No. A18-0090

STATE OF MINNESOTA
IN SUPREME COURT

MINNESOTA SANDS, LLC,

Petitioner,

v.

COUNTY OF WINONA, MINNESOTA,

Respondent.

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST AND IDENTITY OF PLF

Pacific Legal Foundation (PLF) is the oldest and largest nonprofit public interest law firm dedicated to defending individual rights in state and federal courts throughout the nation. Founded in 1973, PLF litigates in defense of constitutionally protected civil rights, limited government, and private property rights. PLF is a donor-supported, nonprofit, tax-exempt 501(c)(3) organization. PLF has participated as counsel and as amicus curiae in numerous private property rights cases before the United States Supreme Court. *See, e.g.*, *Knick v. Township of Scott*, 862 F.3d 310 (3d Cir. 2017), *cert. granted*, 86 U.S.L.W. 3438 (U.S. Mar. 5, 2018) (No. 17-647); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). PLF has also participated before this Court as amicus curiae. *See* Brief for Pacific Legal Foundation as Amicus Curiae Supporting Respondent (Aug. 31, 2016), *filed in Montemayor v. Sebright Products, Inc.*, 898 N.W.2d 623 (Minn. 2017).

STANDARD OF REVIEW

Whether government action constitutes a regulatory taking is a question of law that this Court reviews de novo. *DeCook v. Rochester Int'l Airport Joint Zoning Bd.*, 796 N.W.2d 299, 305 (Minn. 2011).

STATEMENT OF THE CASE

Minnesota Sands owns interests in six leases with various Winona County landowners giving it the exclusive right to mine silica sand on the leased properties. Pet. Add. 94–96. At the time the leases were entered, in 2011 and 2012, such mining activities were permitted in the county on the grant of a conditional use permit (CUP). On November 22, 2016, however, the county adopted an amendment to the zoning ordinance prohibiting the mining of silica sand, thereby rendering Minnesota Sands' leasehold interests worthless.

Minnesota Sands brought this action alleging, among other things, that the ordinance violated the Takings Clauses of the Minnesota and United States Constitutions. The district court granted summary judgment to the County. The Court of Appeals affirmed, holding that Minnesota Sands' leases did not qualify as a property interest protected by the Takings Clauses of the U.S. and Minnesota Constitutions. *Minnesota Sands, LLC v. Cty. of Winona*, 917 N.W.2d 775, 784 (Minn. Ct. App. 2018). It reasoned that the leases were unprotected because Minnesota Sands had not quickly obtained a conditional use permit allowing for the exercise of its intended mining activities before the County enacted a zoning law banning those activities outright. *Id.* Having found no compensable property interest, the court refused to decide whether the mining ban effected a regulatory taking of Minnesota Sands' leases.

SUMMARY OF ARGUMENT

Between 2011 and 2012, Minnesota Sands entered into six leases with a private property owner which gave it the exclusive and valuable right to mine silica sand. These leasehold interests are a recognized property interest under both state law and federal constitutional law. *See Lynch v. United States*, 292 U.S. 571, 579 (1934) (valid contracts are property under the Fifth Amendment); *Naegele Outdoor Advertising Co. of Minn. v. Village of Minnetonka*, 281 Minn. 492, 502 (1968) (discussing just compensation for the "taking of a leasehold interest"). As such, Minnesota Sands' leases are subject to the protection of the Takings Clause and cannot be taken for public use without just compensation. When the county passed a zoning ordinance amendment prohibiting silica sand mining activities, it rendered Minnesota Sands' interests in the leases worthless, or at least severely diminished.

Minnesota Sands properly challenged the mining ban and its effect on the leases as an unconstitutional taking of its property and its claim should be analyzed as such on the merits, under the regulatory takings tests in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Yet the court below refused to proceed with this analysis because it found that Minnesota Sands' leases did not constitute protectable property interests under the Takings

Clause. 917 N.W.2d at 784. It reasoned that the company had lost its interest when the county banned silica sand mining because Minnesota Sands did not acquire a conditional use permit before that time. *Id.*

This reasoning is flawed. The ban on silica sand mining is the very government action alleged to be a taking. It cannot be held to preclude a takings claim on the theory that it eliminated Minnesota Sands' underlying property interests; the inability to get a CUP is properly analyzed as a taking of property, not a flaw in the property interest. Moreover, a property owner does not lose its rights merely by delaying. No provision of the leases or principle of property law required Minnesota Sands to obtain the permit within some specified period. And now, Minnesota Sands cannot acquire the permit because it is no longer available—the county banned silica sand mining outright.

This Court should therefore reverse the decision of the Court of Appeals and hold that Petitioner's leases are compensable property interests within the protection of the Takings Clause.

ARGUMENT

I.

Minnesota Sands' Leases Are Compensable Property Interests Within the Protection of the Takings Clause

A. Various tests exist to analyze the merits of a regulatory takings claim

The Fifth Amendment to the United States Constitution guarantees that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. Government regulation of private property can constitute a "taking" under this clause, even where the government has not directly appropriated nor physically invaded the property. *DeCook v. Rochester Intern. Airport Joint Zoning Bd.*, 796 N.W.2d 299, 305 (Minn. 2011). Similarly, the Minnesota Constitution provides that "[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation." Minn. Const. art. I, § 13. Though it is broader than its federal counterpart, Minnesota Courts have relied on cases interpreting the Federal Constitution's Takings Clause in analyzing the provision. *See Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 631, 632 n.5 (Minn. 2007).

Federal takings analysis has yielded three different tests to determine the merits of a takings claim. Two are categorical—government action constitutes a per se taking where it deprives the property of all economically

viable use, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), or where it results in a permanent physical occupation of the property, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). For a takings claim that does not fall into either of those categories, courts must apply a three-factor balancing test first outlined in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). That test requires courts to weigh (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation interferes with the claimant's investment-backed expectations, and (3) the character of the government action. *Penn Central*, 438 U.S. at 124.

The "economic impact" factor requires courts to assess the extent of the interference with property interests. *Wensmann Realty*, 734 N.W.2d at 634 (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005)). This may typically be measured by comparing the "market value of the property immediately before the governmental action with the market value of that same property immediately after the action." *Cane Tennessee, Inc. v. United States*, 71 Fed. Cl. 432, 437 (2005), *aff'd*, 214 Fed. Appx. 978 (Fed. Cir. 2007) (quoting *Cane Tennessee, Inc. v. United State*s, 57 Fed. Cl. 115, 123 (2003)). The "character of the government action" factor calls for broad set of considerations. Courts should determine whether the action forces some people alone to bear public burdens which in fairness and justice should be borne by

the public at large, *see Armstrong v. United States*, 364 U.S. 40, 49 (1960), and whether the regulation is designed to mitigate a traditional and known public nuisance, *Lucas*, 505 U.S. at 1029.

Finally, courts applying the *Penn Central* test must determine the extent to which a challenged action interferes with the claimant's reasonable, investment-backed expectations. Multiple considerations play into the reasonable expectations inquiry. Some courts have concluded that a property owners' expectations are strengthened by the absence of a restrictive regulatory regime. *See, e.g., Parkridge Investors Ltd. Partnership by Mortimer v. Farmers Home Admin.*, 13 F.3d 1192, 1199 (8th Cir. 1994) (claimant's expectations not reasonable where governmental impairment of its interests is foreseeable). The nature of surrounding property uses can also affect the reasonableness of a takings claimant's expectations. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 634 (2001) (O'Connor, J., concurring). Finally, a few courts have held that delay in the use or development of private property can reduce the reasonableness of one's expectations. *See W.R. Grace & Co.-Conn. v. Cambridge City Council*, 779 N.E.2d 141, 155 (Mass. App. Ct. 2002) ("[A]

developer with designs on improving its property consistent with an existing zoning framework had best get its shovel into the ground.").[1]

B. Land leases are an established form of constitutionally protected property

Of course, before a court analyzes a regulatory takings claim on its merits, it must first determine whether the property interest at issue is protected by the Fifth Amendment. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000 (1984). The Supreme Court has explained that "property" is far more than simply title to an object or land. Rather, it "denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *United States v. General Motors Corporation*, 323 U.S. 373, 377-78 (1945). The Takings Clause "is addressed to every sort of interest the citizen may possess." *Id.* at 378. In considering whether specific interests qualify as constitutionally protected property rights, courts look to the

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[1] Unlike economic impact—which if severe enough may lead to a finding of a *per se* taking under *Lucas*—or the character of the government action—which if constituting permanent physical occupation may lead to a finding of a *per se* taking under *Loretto*—there is no categorical rule relating to a claimant's expectations. Thus, while the existence of a restrictive regulatory regime or a delay in development may diminish a property owner's reasonable expectations, it does not by itself bar a takings claim. *See Palazzolo*, 533 U.S. at 634 (O'Connor, J., concurring) (lack of reasonable investment-backed expectations is not dispositive); *see also Wensmann Realty*, 734 N.W.2d at 638, 638 n.11 (property owner's awareness of city's comprehensive plan, which did not permit his intended use, does not automatically preclude a takings claim).

"existing rules and understandings that stem from an independent source such as state law." *See Ruckelshaus*, 467 U.S. at 1001 (citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). Under this general framework, courts have identified numerous property interests protected by the Takings Clause, including most interests in land. *See General Motors*, 323 U.S. at 382 (leaseholds); *United States v. Welch*, 217 U.S. 333, 338 (1910) (easements); *United States v. 403.15 Acres of Land*, 316 F. Supp. 655, 656–57 (M.D. Tenn. 1970) (life estates). Valid contracts also qualify as constitutionally protected property. *Lynch v. United States*, 292 U.S. 571, 579 (1934).

Under Minnesota law, leasehold interests are compensable property rights. *See Naegele Outdoor Advertising Co.*, 281 Minn. at 502 (discussing just compensation for the "taking of a leasehold interest"); *State by Lord v. La Barre*, 255 Minn. 309, 315 (1959) (same); *In re Widening Third St. in St. Paul*, 176 Minn. 389, 390 (1929) (same); *Kafka v. Davidson*, 135 Minn. 389, 394 (1917) (same); *State by Spannaus v. Belmont, Holmberg*, 384 N.W.2d 214, 216 (Minn. Ct. App. 1986) (same). *See also Siggelkow v. Arnold*, 187 Minn. 395, 397 (1932) (A leasehold is "an interest in realty."); *Lease*, Black's Law Dictionary (10th ed. 2014) (A lease is a "contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration . . . ."). Indeed, the Court of Appeals recognized in its decision

below that "[l]ease rights are compensable property rights to which the Takings Clause applies." 917 N.W.2d at 783 (citing *Lynch*, 292 U.S. at 579). And Minnesota's Eminent Domain statute defines a property "owner" to include "all persons with any interest in the property subject to a taking, whether as proprietors, *tenants*, life estate holders, encumbrances, beneficial interest holders, or otherwise." Minn. Stat. Ann. § 117.025 (West 2018) (emphasis added).

C. Minnesota Sands owns a compensable property interest in its leases

Minnesota Sands' leases gave it the exclusive right to mine silica sand on the respective lands, and County law conditionally allowed that activity at the time the parties entered the leases. This is a compensable property interest. *See Naegele*, 281 Minn. 492 (1968) (discussing just compensation for the "taking of a leasehold interest"); *Hubbard Broadcasting, Inc. v. City of Afton*, 323 N.W.2d 757, 766 (Minn. 1982) (analyzing takings claim even though claimant's intended use required a CUP). That should have ended the threshold "protected property interests" inquiry, and the Court of Appeals should have proceeded to analyze Minnesota Sands' takings claim under *Lucas* and *Penn Central*. *See Hall v. State*, 908 N.W.2d 345, 352 (Minn. 2018). Yet the court below held that Minnesota Sands lost its property interest because it had

failed to seek and obtain a CUP at the time the county banned silica sand mining. 917 N.W.2d at 784. It further cited *United States v. Locke*, 471 U.S. 84, 107 (1985), *Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1982), and *Hawkins v. Barney's Lessee*, 30 U.S. 457, 465 (1831), for the proposition that there can be no taking when a property owner unreasonably delays the use or development of its property. *Id.* Finding no compensable property interest, the Court of Appeals declined to assess Minnesota Sands' takings claim on its merits. *Id.*

This holding is flawed for at least two reasons: First, it is circular, essentially holding that a property owner cannot challenge a government action as a taking because the government action in question eliminated their property interests. Second, while a property owner's delay in use or development might affect the merits of a takings claim, it does not eliminate property interests.

1. Property rights cannot be defined by the very government action alleged to be a taking

At bottom, the court below held that Minnesota Sands lost its property interests, and therefore cannot maintain a takings claim, because the county eliminated the permit required to exercise its rights in the leases. 917 N.W.2d at 784. This reasoning is circular—and wrong—as it amounts to the proposition that a property owner may not challenge a regulation as a taking

if that regulation made it impossible for it to exercise its property interests. But the very nature of a takings claim is that the government's regulation diminished or eliminated a property interest or right. *See Wensmann Realty*, 734 N.W.2d at 632. Minnesota Sands had a property interest in its leases consisting of the exclusive right to mine silica sands on the property. *See* Pet. Add. at 94–96. That the ultimate exercise of the right was contingent to some degree on a county CUP does not destroy its property interest. If denied, that permit itself could be subject to a takings challenge, *see Hubbard Broadcasting*, 323 N.W.2d at 766, and thus, a total ban on CUPs similarly raises takings concerns. *See Palazzolo*, 533 U.S. at 626–27 (takings claim available despite restrictive regulatory regime). Minnesota Sands' leasehold interests are now useless—not because the leases are an invalid form of property, but because the county's zoning ordinance amendment made it impossible to exercise them.

The Court of Appeals cited *United States v. Locke*, *Texaco, Inc. v. Short*, and *Hawkins v. Barney's Lessee* in support of its conclusion that the county mining ban exposed a lack of a property interest, but those cases are inapposite. 917 N.W.2d at 784. Those cases hold that a property owner cannot complain when it could have realized its expectations through compliance with existing statutory requirements. But that is not the case here: Minnesota Sands cannot realize its expectations because silica sand mining is no longer a

permitted use. All of the cited cases involved some pre-existing statutory time limit that gave the property owner ample notice that their interests would expire if not pursued. *Hawkins* concerned Kentucky's seven-year statute of limitations on actions to recover lands held by adverse possession. 30 U.S. at 464. *Locke* involved an annual filing requirement to preserve mining claims under the Federal Land Policy and Management Act of 1976. 471 U.S. at 87–89. And *Short* related to an automatic lapse in mineral rights following a twenty-year statutory period of disuse under Indiana's Mineral Lapse Act. 454 U.S. at 518.

In each of these cases, the claimants had statutory notice that their rights would be imperiled by failure to comply with the restrictions within a specified time period. If they had so complied, their rights would not have been injured in the first place. In contrast, here, Petitioner's rights were not divested by the running of some statutory period—they were stripped by the passage of a new ordinance. In the period between Petitioner's entry into its leases and the passage of the amendment, there was no statutory requirement that Petitioner apply for a conditional use permit within some limited period of time. And now that the amendment is in effect, there are still no regulatory restrictions with which Petitioner could comply in order to realize its interests.

2. A claimant's delay in utilizing its property does not eliminate its property interests

More fundamentally, reliance on these cases is misplaced because a delay in use or development does not go to the existence of a property interest. For example, the owner of a fee simple title does not lose its right of use and enjoyment merely because it does not quickly build a home in the face of increasing land use controls. *See Denman v. Gans*, 607 N.W.2d 788, 795 (Minn. Ct. App. 2000) ("legal title to real property cannot be lost by abandonment"). Similarly, the owner of an easement does not lose its property interests through mere non-use. *Richards Asphalt Co. v. Bunge Corp.*, 399 N.W.2d 188, 192 (Minn. Ct. App. 1987) (abandonment of easement requires manifestation of clear intent). Title to property—and its attendant rights—are protected, even if there are certain rules with which an owner must comply to fully utilize its interests. *See Palazzolo*, 533 U.S. at 621–22 (takings claim available despite failure to seek special permission for the intended use); *Lucas*, 505 U.S. at 1012 (same). While delay might affect a claimant's reasonable, investment-backed expectations, *Parkridge Investors Ltd. Partnership by Mortimer*, 13 F.3d at 1199, such expectations do not weigh on the existence of a compensable property interest and cannot be held to preclude a takings claim at the outset. *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring).

Minnesota Sands had compensable property interests in its leases. The fact that it did not obtain a CUP permit for five years after entry of the leases is irrelevant at this preliminary stage of the analysis. And the fact that it can no longer obtain a CUP because the county has banned silica sand mining cannot defeat its claim, for that ban is the very basis of its claim. This court should reverse the holding below and should proceed to assess the merits of Minnesota Sands' claim under *Lucas* and *Penn Central*.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be reversed.

DATED: December 12, 2018.

Respectfully submitted,

s/ Harry N. Niska

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DATED: December 12, 2018.

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