



WALSH, KNIPPEN, POLLOCK & CETINA, *CHTD.*  
TRIAL LAWYERS  
2150 Manchester Road · Suite 200 · Wheaton, Illinois 60187  
Telephone 630-462-1980 · Facsimile 630-462-1984  
www.wkpc-law.com

EDWARD J. WALSH  
JAMES H. KNIPPEN, II  
BRADLEY N. POLLOCK  
MICHAEL S. CETINA  
ADAM C. KRUSE

FEBRUARY 27, 2015

Samuel Jandt, ESQ.  
306 South Marshall Street  
Caledonia, MN 55921

Dr. Mr. Jandt:

I am directing this letter opinion to you because I believe those people who wish to allow frac sand mining in Houston County may be directing unfounded and meritless threats of litigation against the County and its elected Commissioners. Additionally, I believe the same pro frac sand mining special interests may be inappropriately suggesting the County's insurer may not defend and indemnify the County and its Commissioners in the event of litigation following the County's adoption of an ordinance prohibiting frac sand mining in Houston County.

**Prefatory Note:**

It is my opinion a Houston County Ordinance prohibiting frac sand mining would be a proper exercise of the County's governmental power. It is also my opinion that an Ordinance prohibiting frac sand mining would *not* constitute a regulatory taking. Additionally, it is my opinion the County's insurance arrangement would provide liability coverage for the County and its Commissioners in the *unlikely* event a lawsuit were filed by the pro frac sand mining interests.<sup>1</sup>

I have discussed both of these issues with the Executive Director and counsel for the Minnesota Center for Environmental Advocacy (MCEA), Minneapolis, MN, Scott Strand. Mr. Strand agrees with my opinions on both of these issues. I have requested Scott Strand contact you direct to share his knowledge and experience with you.

**Opinion**

---

<sup>1</sup> I have not read the Intergovernmental Agreement or insurance policy which provides insurance for the County and its Commissioners. However, I am extremely experienced in insurance coverage and municipal litigation issues. I am certain the County's insurance arrangement will provide appropriate coverage and defense of any ordinance appropriately drafted, adopted and enacted.

## I. Regulatory Taking

Because oil and gas interests throughout the United States have finally reluctantly accepted the legality of a municipal corporation's right and power to regulate land uses, they are now fashioning and asserting arguments based upon the protections afforded private parties under the Fifth Amendment to the U.S. Constitution. As you know, the Fifth Amendment prohibits governmental bodies from "taking" private property without "just compensation."<sup>2</sup>

Constitutional "takings" come in two basic forms: *physical* and *regulatory*. As you know, the simplest form of a taking is through permanent physical occupation of private property by the state, known as a "physical taking." See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). This form of taking is more commonly referred to as *eminent domain*. In these cases, the state or local government takes title to any ownership of the property. The property owner is compensated for the "fair market value" of the real property.

A more subtle form of a "taking" is known as a "regulatory taking." The regulatory taking concept was first recognized by the Supreme Court in *Penn Coal Co. v. Mahon*, 260 U.S. 393, 413 (1945). A regulatory taking occurs where the local, state or federal government deprives an owner of the use of his or her property *through regulation*, rather than taking ownership. I believe this is the type of "taking" referenced by you at the last County Board meeting.

The seminal "regulatory" taking case is *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). In *Lucas*, South Carolina's Coastal Zone Management Act (1977) required owners of coast land in "critical areas" near beaches to obtain permits from the South Carolina Coastal Council before committing the land to new uses. The United States Supreme Court found the regulation deprived Lucas of value which then had to be returned to the property owner in the form of public compensation. The *Lucas* Court held a regulatory taking only occurs if the regulation deprives the property holder of **all economically beneficial use of his or her property**, or satisfies a three-part balancing test set out by the Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) ("economic injuries caused by public action [should] be compensated by the government, rather than remain disproportionately concentrated on a few persons.")

Under the *Lucas* rule, a taking only occurs when a regulation destroys **all economically beneficial use of an owner's private property**. Locally, in Houston County, MN, within the context of a fracking ban, the private property in question is frac sand which would be transported out of state and used elsewhere in the fracking process. Those who own the rights to frac sand under their land apparently contend a ban or prohibition on frac sand mining destroys the economic value of their land. The argument suggests that their inability to mine the sand prevents their economic recovery of the natural resources.

The proposed Houston County Ordinance prohibiting the mining of frac sand would *not* destroy all economically beneficial use of any owner's property. Land that may be the target of frac sand mining in Houston County is otherwise rich in value for agricultural, recreational, residential and other worthwhile purposes. Under the *Lucas* rule, there would be *no regulatory taking* of any land in Houston

---

<sup>2</sup> Minnesota Constitution Article I Section 13 is also applicable.

County if the County Commissioners appropriately adopt an Ordinance prohibiting frac sand mining.

It is fundamental and undeniable that a county government may use its police and zoning/land use power to restrict and prohibit uses it considers to be detrimental to the community. The exercise of these powers does not necessarily constitute a “taking.” See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (Moratorium not a regulatory taking); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (Property retained some value, therefore not a total taking); *Lingle v. Chevron U.S.A.*, 125 S. Ct. 2655 (2005) (Touchstone is whether the regulation is “so onerous its effect is tantamount to a direct appropriation or ouster”).

An important and likely critical legal precept in determining whether a regulatory prohibition rises to the level of a regulatory taking was set forth by the U.S. Supreme Court in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). In *Palazzolo* the Court found “The regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those [investment-backed] expectations.” Frac sand mining has never been permitted in Houston County and no property owner or mining corporation in Houston County could ever convincingly argue he, she or it had any reasonable mining “investment backed expectation” at the time of property acquisition.

In the context of a fracking prohibition, “distinct investment-backed expectations”, as recited by the Court in *Palazzolo*, basically means the mining companies will have to demonstrate when they entered into a lease within Houston county they had a “reasonable expectation” they would be allowed to drill and use “enhanced recovery” techniques to recover the frac sand. Similarly, a Houston County property owner would have to convincingly persuade a court she or he expected or intended to mine for frac sand when she/he purchased the property. This would be extremely difficult, if not impossible, to do in the case of all Houston County property.

While property may be appropriately governmentally regulated to a certain extent, if a regulation goes too far it will be deemed a taking. There is no precise rule as to when property has been taken by government regulatory action. In *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987), the United States Supreme Court confirmed the two-part rule for when a regulatory taking occurs: (1) when a governmental regulation does not substantially advance legitimate state interests, or (2) when a governmental regulation denies an owner of ***substantially all economically viable use of the owner’s land***.

Significantly, it is my opinion neither Houston County property owners nor mining entities could ever successfully meet the United States Supreme Court’s requirements established in the *First English* case. Accordingly, an appropriately drafted and adopted Ordinance prohibiting frac sand mining in Houston County would be upheld by the courts and not constitute a regulatory taking.

## **II. Public Nuisance Exception to Regulatory Taking**

A property owner does not by virtue of land ownership have the right to create and maintain a common law nuisance. Government actions which abate common law nuisances are *per se* not takings. Courts have acknowledged there are inherent limits on landowner rights, imposed by common law nuisance and property statutes. Thus the state and county governments can prohibit deleterious uses

even to the point of total takings. The Findings of Fact so well prepared by you clearly recite the numerous deleterious insidious nuisance effects of frac sand mining.

The “public nuisance” exception to regulatory takings has been reaffirmed by the U.S. Supreme Court on numerous occasions. “[C]ourts have consistently held a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance.” *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 492 (1987). Your Findings of Fact readily illustrate the nuisance characteristics of frac sand mining. An Ordinance specifically prohibiting frac sand mining would serve to prevent and abate the devastating public nuisance consequences of frac sand mining in Houston County.

Prohibitions upon the use of property for purposes which are deemed to be injurious to the health, morals, or safety of the public do not constitute a taking or an appropriation of property for the public benefit. This type of legislation does not prevent the owner in the control or use of his or her property for *lawful* purposes, nor restrict his or her right to dispose of it. Government land use prohibitions are simply a declaration by the state or county that land use by anyone, for certain forbidden purposes, is prejudicial to the public interests. *Goldblatt v. Hempstead*, 369 U.S. 590, 593 (1962).

Again, the Findings of Fact prepared by you clearly recite frac sand mining is injurious to the health, safety and welfare of Houston County and its residents. Accordingly, for the reasons recited by the Supreme Court in *Goldblatt*, an appropriately drafted Ordinance prohibiting frac sand mining in Houston County would be upheld in the courts and not constitute a regulatory taking.

### **Conclusion Regarding Regulatory Taking Issue**

In conclusion on this regulatory taking issue, it is noteworthy to discuss the opinion of the Minnesota Supreme Court in *McShane vs. City of Faribault*, 292 N.W. 2<sup>nd</sup> 253 (Minn. 1980). *McShane* involved the relationship of a landowner and the regulations imposed by a municipal airport authority. The court cogently and properly recognized the decision of the United States Supreme Court in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). *Euclid*, as you know, established that the right to use property as one wishes *is subject to and limited by* the proper exercise of the police power in the regulation of land use. The Minnesota Supreme Court in *McShane* acknowledged such regulation does *not constitute a compensable taking* unless it deprives the property of *all* reasonable use.

The Minnesota Supreme Court in *McShane* emphasized it has **repeatedly upheld zoning ordinances and other land use restrictions against allegations of unconstitutional taking, even where the value of the property declined significantly as a result of the restrictions**, citing *State, by Powderly, v. Erickson*, 285 N.W.2d 84 (Minn.1979); *Holaway v. City of Pipestone*, 269 N.W.2d 28 (Minn.1978); *Beck v. City of St. Paul*, 304 Minn. 438, 231 N.W.2d 919 (1975); *Connor v. Township of Chanhassen*, 249 Minn. 205, 81 N.W.2d 789 (1957) and *Alexander Co. v. City of Owatonna*, 222 Minn. 312, 24 N.W.2d 244 (1946).

Based on the foregoing case law and analysis, it is my opinion any appropriately drafted Houston County Ordinance prohibiting frac sand mining will be *upheld* in the judicial system as a

proper exercise of the County's police power and zoning authority. It is further my opinion such an Ordinance would be judicially determined *not* to be a regulatory taking.

### **III. Insurance Coverage for the County**

In the event the County Commissioners listen to the will and opinion of the overwhelming number of their constituents, the Commissioners will adopt an Ordinance prohibiting frac sand mining in Houston County. Undeniably, the Commissioners have the legal authority to adopt such an Ordinance which would contain the Findings of Fact prepared by you.

It would be disingenuous for any land owner or mining special interest to suggest to the County Commissioners they would not be insured for properly carrying out their fiduciary and legislative duties. I am reasonably certain the insurance intergovernmental agreement/agency which provides liability coverage for the Commissioners of Houston County has most likely been confronted with issues similar to those currently at issue before the Board.

I am certain the agency which provides liability coverage for the Commissioners and the County would advise you the County and its elected Commissioners *would be* defended, insured and indemnified if anyone sued them as a result of carrying out their constitutional duties and powers by adopting an Ordinance prohibiting frac sand mining in Houston County.

In the event you or the Commissioners would like to discuss these issues with me further, I would enjoy the opportunity to do so.

Very truly yours,



Edward J. Walsh