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October 11, 2016

RULE 408 SETTLEMENT COMMUNICATION

VIA E-mail and U.S. Mail

Steven R. Peloquin
Peloquin Law Office, P.A.
432 3rd Avenue SE
Perham, MN 56573
Steve@peloquinlawoffice.com

**Re: City of Vergas // Mark Sand & Gravel Co.
Ordinance No. 2016-002
Our File No.: 037697-006**

Dear Steve:

I represent Mark Sand & Gravel Co. ("Mark Sand & Gravel"). As you know, your client, the City of Vergas (the "City"), recently adopted Ordinance No. 2016-002 to amend its city code to regulate Excavation, Mining and Gravel Pits (the "Ordinance"). The Ordinance only affects my client, and if it is enforced as enacted, it will effectively prevent them from continuing to use their gravel mine.

Mark Sand & Gravel has been willing, and continues to be willing, to work with the City. Mark Sand & Gravel has taken steps to lessen any issues that have arisen from operation of its gravel mine, such as dust. Mark Sand & Gravel also offered feedback regarding proposed language for the Ordinance. Unfortunately, the City did not recognize Mark Sand & Gravel's proactive approach, and enacted the Ordinance without addressing Mark Sand & Gravel's concerns.

Mark Sand & Gravel cannot comply with the Ordinance as written and still operate the gravel mine. In order to avoid litigation and expense on both sides, I hope that the City will work with us to find a solution and agree to change the most challenging parts of the Ordinance.

As a first step, please provide me with all documents demonstrating that the City complied with its notice and hearing obligations under Minn. Stat. § 462.357 and City Code § 151.51. I can send a formal Data Practices Act request if necessary, but I would prefer communicating directly with you.

Second, Mark Sand & Gravel has identified particular parts of the Ordinance that are unworkable:

1. The Ordinance limits Mark Sand & Gravel to hauling only four trucks per hour. This will limit their production to 90 tons per hour. In the past Mark Sand & Gravel removed approximately 500 tons per hour. When and how much gravel Mark Sand & Gravel removes from the mine is driven by when it needs to deliver

gravel to particular jobs. When Mark Sand & Gravel needs to remove gravel for a job, it needs to do so quickly which requires moving much more than 90 tons per hour. If Mark Sand & Gravel cannot do this, it will not be able to secure contracts to provide gravel from the mine, and the mine will, in effect, be worthless.

2. The Ordinance prohibits more than five areas from being actively mined at one time. The Ordinance also requires that for each additional three acres mined, Mark Sand & Gravel must reclaim three previously mined acres. However, Mark Sand & Gravel needs significantly more area open to operate the mine. It currently has 40 acres on the property open so that it can operate its hot mix (15 acres), have a stockpile (5-10 acres), and perform active mining (25-30 acres). It is simply not possible to compress all of these operations into five acres, and to reclaim the mined areas in three acre segments. It is also not practical to cover up parts of the mine that have already been opened and are not completely mined out.
3. The Ordinance requires a 4:1 slope when the mining is completed, and it requires 6" of black dirt placed on the slope. This slope is outside of the industry standard. Moreover, the industry standard is only to place material that is available on site on areas where the mining is complete. The City has not provided a reason that these abnormal and costly requirements are necessary.

In addition to the provisions, there are other unusual requirements of the Ordinance, such as requiring the permit applicant to reimburse the City for engineering and legal services if those costs exceed the permit fee. This requirement leaves permit applicants with virtually unlimited liability for simply submitting an application. The only reason for such a provision, as opposed to simply a fixed permit fee, is to deter filing of applications.

As you are undoubtedly aware, Minnesota law requires the City to allow nonconforming uses that existed at the time of an amendment to the City's zoning ordinance. Minn. Stat. § 462.357, subdivision 1e. Mark Sand & Gravel, and its predecessor, have been operating the mine in the same way for decades. Therefore, Mark Sand & Gravel is entitled to continue using its mine as it has in the past.

If the City does not agree to amend the Ordinance, it will result in a compensable taking. It is well settled that even if the City does not formally exercise its power of eminent domain, it can in fact do so through regulation. As described above, the Ordinance will in effect prevent Mark Sand & Gravel from using its mine in an economically viable manner which is a per se taking. *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 2893, 120 L. Ed. 2d 798 (1992) (categorical taking when "regulation denies all economically beneficial or productive use of land"). Even if the Ordinance did not deny Mark Sand & Gravel all economically beneficial use of the mine, it is still a taking because (1) it significantly impacts the value of the property; (2) Mark Sand & Gravel purchased the mine with the expectation that it would continue in operation; and (3) Mark Sand & Gravel's mine is the only property impacted. *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 632 (Minn. 2007).

Therefore, Mark Sand & Gravel will be entitled to seek to enjoin enforcement of the Ordinance and seek compensation for the inverse condemnation by initiating a mandamus

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action to compel the City to initiate condemnation proceedings. If Mark Sand & Gravel is required to take these actions, the City will be liable not only for the value of the gravel mine lost because of the Ordinance, but also Mark Sand & Gravel's attorneys' fees. See *DeCook v. Rochester Int'l Airport Joint Zoning Bd.*, 811 N.W.2d 610, 613 (Minn. 2012).

Please let me know how you would like to proceed. Again, Mark Sand & Gravel is willing to work with the City within reason, but the City will need to make changes to the Ordinance.

Very truly yours,

A handwritten signature in green ink, appearing to be 'KH', with a stylized flourish extending to the right.

Kyle E. Hart

KEH/

cc: Client
Peter K. Doely