SUPREME COURT, STATE OF COLORADO Court Address: 2 East 14th Ave., 4th Floor Denver, Colorado 80203	
Petitioner/Cross-Respondent: ANIMAS VALLEY SAND AND GRAVEL, INC., a Colorado corporation. Respondent/Cross-Petitioner: THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LA PLATA	⬆ COURT USE ONLY ⬆
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COMBINED AMICUS CURIAE BRIEF OF THE COLORADO MUNICIPAL LEAGUE AND COLORADO COUNTIES, INC.

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STATEMENT OF THE ISSUES

The League and Colorado Counties adopt and incorporate by reference the statement of the issues as stated in the Answer Brief of the Board.

STATEMENT OF THE CASE

The League and Colorado Counties adopt and incorporate by reference the statement of the case as stated in the Answer Brief of the Board.

SUMMARY OF THE ARGUMENT

AVSG urges this Court to make two dramatic departures from established takings law in Colorado. First, it asks the Court to find that a regulation can create a compensable taking even when a property owner is left with reasonable uses of its property. Second, it asks the Court to allow property owners to manipulate the takings analysis by splitting the bundle of sticks that comprises their property rights into whatever configuration is most advantageous to their takings claims. In both cases, the result would be to greatly expand the financial liability of local governments to compensate private property owners for impacts on their property from typical land use regulation. Under this result, local government would lose the ability to regulate land use for the health, safety and welfare of the public.

If the Supreme Court accepts the expansion of Colorado takings law urged by the Petitioner/Cross-Respondent, Animas Valley Sand & Gravel (AVSG), the impact on municipalities and county government would be disastrous. On the one hand, pressure on local governments – both municipalities and counties – to regulate land use has increased in recent years. Citizens expect – and federal and state law mandates – local governments to regulate

everything from storm and floodwater runoff (C.R.S. §§ 31-23-301 (3), 30-28-133(3)(c)(viii)), wetlands and riparian habitat (C.R.S. §31-23-207(2)(k)), to comprehensive growth management and planning (C.R.S. § 30-28-106), to details like steep slopes and geological hazards (C.R.S. §§ 31-23-207, 30-28-133(5)(c)), building setbacks and heights (C.R.S. § 31-23-301), and location of group homes (Fair Housing Act, 42 U.S.C. §§ 3601-3619 (1968); Colorado Fair Housing Act, C.R.S. § 24-34-502.2 (1999)). Local governments have had to grapple with Colorado's growth pressures while attempting to responsibly plan their communities in an era of tax and spending initiatives.

On the other hand, property owners have increasingly sought – and received – increased legislative protection against such regulation in the form of vested rights (C.R.S. §ə24-68-103). Property owners across the nation have also filed suits such as this one, in an attempt to expand takings law to require compensation when their development plans are restricted or rejected by local government. Traditional takings jurisprudence has resulted in a balance between the interests of local governments in enacting reasonable land use regulation and the interests of property owners.

However, local government cannot adequately perform its duties to regulate land use for the public health, safety and welfare if takings jurisprudence is expanded in the manner suggested by AVSG. If the current demarcation between an unconstitutional taking and permissible police power regulation is changed, local government would shy away from regulating because it would be forced to compensate every disappointed property owner.

The Colorado Municipal League and Colorado Counties, Inc. ask this Court to decline both of AVSG's invitations and affirm the Court of Appeals' ruling in part and reverse it in part.

The Court should uphold the determination of the Court of Appeals that a regulation cannot create a compensable taking when the property owner has viable economic uses for his property, and that a mineral right cannot be severed from the rest of the property for the purpose of finding a taking of the mineral right. However, the Court should overrule the Court of Appeals' determination that it may consider anything less than the property as a whole to determine that a taking has occurred. This result would be consistent with Colorado law and would maintain the balance between landowners' rights and local governments' needs for reasonable land use regulations.

ARGUMENT

I. THIS COURT SHOULD DECLINE AVSG'S INVITATION TO EXPAND THE DEFINITION OF A TAKING TO INCLUDE A REGULATION THAT MERELY "SUBSTANTIALLY DIMINISHES" THE VALUE OF THE PROPERTY.

The central issue of this appeal is whether the Board's regulation of AVSG's property, which prevented AVSG from operating a sand and gravel quarry on a portion of its property but that allowed it to operate other commercial uses on its property, resulted in a taking within the meaning of Art. II, § 15 of the Colorado Constitution. AVSG argues that this Court should find a regulatory taking occurred here even though reasonable, economically viable uses of its property remain after the regulation. Specifically, AVSG argues that this Court should find that a taking exists because its property value was substantially diminished. However, the adoption of AVSG's position would drastically rewrite Colorado takings law and would be inconsistent with federal law as well. Further, the practical and policy implications of such a redefinition of takings jurisprudence are far-reaching and would substantially disrupt municipal and county land use regulations.

A. Colorado law on takings.

The Colorado Constitution provides, "Private property shall not be taken or damaged, for public or private use, without just compensation." Colo. Const. art. II, § 15. Historically, the Court has utilized a disjunctive test for determining when governmental regulation constitutes a taking of private property that warrants the payment of just compensation to the private landowner. "A land-use regulation when applied to a particular property constitutes a taking if it does not advance legitimate state interests or if it prevents all economically viable use of the property." Van Sickle v. Boyes, 797 P.2d 1267, 1271 (Colo. 1990) (refusing to find that a fire code restriction that hindered commercial use of a piece of property resulted in a compensable taking where the property could be used as a residence); Cottonwood Farms v. Board of County Comm'rs, 763 P.2d 551, 554 (Colo. 1988) (declining to find a compensable taking where a landowner's rezoning application was denied because the property could be used for the construction of residences even though it could not be used for aggregate mining); Sellon v. City of Manitou Springs, 745 P.2d 229, 234 (Colo. 1987) (rejecting a takings claim where an ordinance did not preclude landowners from building residences on their property). Thus, a regulation does not result in a taking if reasonable uses of the property remain. As the Court of Appeals explained, "Although a governmental regulation prohibiting *all* reasonable use of private property constitutes a taking, property owners are not entitled to receive just compensation when an ordinance reasonably restricts, but does not prohibit, all reasonable use of their property." National Advertising Co. v. Board of Adjustment (Zoning) of City and County of Denver, 800 P.2d 1349, 1351 (Colo. App. 1990).

Colorado courts have borrowed from federal takings jurisprudence in defining what is a taking under Art. II, § 15 of the Colorado Constitution. The United States Supreme Court has been reluctant to adopt a singular formula for determining when a governmental regulation results in a taking of property. See Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). The Supreme Court in Agins v. Tiburon, 447 U.S. 255 (1980), described the takings analysis as a disjunctive test as to whether the application of a general zoning law to particular property "does not substantially advance legitimate state interests or denies an owner economically viable use of his land." Id. at 260 (citations omitted). Secondarily, the Supreme Court has discussed, but has not necessarily applied, an ad hoc, multi-factoral inquiry to determine whether a regulation goes "too far." See Penn Central, 438 U.S. at 123. The factors utilized for this inquiry are the character and purpose of the governmental action, the regulation's economic impact, and its interference with the property owner's investment-backed expectations. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 484 (1987).

Although Colorado courts have cited with approval the Supreme Court's three ad hoc factors for determining a taking, Colorado, like the Supreme Court, continues to focus on whether the regulation in question prohibits all reasonable uses of the property in question. For instance, in Van Sickle v. Boyes, 797 P.2d 1267, 1271 (Colo. 1990), this Court said:

> [A] landowner is not constitutionally entitled to use his property in a manner that results in the maximum attainable profit. The Supreme Court has noted:
>
> > The economic impact of the regulations on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.

Id. (quoting Penn Central Transp. Co. v. New York City, 438 U.S. 104, 138 (1978)); Sellon, 745 P.2d at 234)). That is, while a landowner may be entitled to some uses of his property, a landowner is not entitled to use his property in a manner to result in the maximum achievable profit, and the burden of proving that no reasonable use for the property remains is on the landowner. Jafay v. Board of County Comm'rs of Boulder County, 848 P.2d 892, 901 (Colo. 1993); Nopro Co. v. Town of Cherry Hills Village, 504 P.2d 344, 350 (Colo. 1972) ("[T]here is simply no constitutionally protected right under the federal or state constitutions to gain the maximum profit from the use of property.").

In the large majority of cases, this Court has not engaged in the three-factor analysis spelled out by the United States Supreme Court, finding instead that the traditional question of any economically viable use resolves the takings inquiry. However, in the unique context of highly regulated activities, this Court has elected to apply the "investment-backed expectations" factor in the three-factor analysis because this factor easily disposed of the takings inquiry. For example, in State Department of Health v. The Mill, 887 P.2d 993 (Colo. 1994), after noting that the test in Colorado is whether a regulation prohibits all reasonable economically viable use of the property, this went on to say that the reasonable investment-backed expectations of the landowner may be dispositive of the takings question in certain cases such as The Mill. See id. at 999-1000. This analysis must be viewed, however, within the context of the case. In The Mill, the issue was whether a governmental regulation of a highly contaminated, highly regulated former uranium milling site constituted a taking of the property within the meaning of the Colorado Constitution. This Court found that when a buyer purchases property that is highly contaminated and highly regulated, the buyer is on notice that the reasonable uses of the property

are severely limited. Thus, this Court said it was not appropriate to allow the buyer/landowner to recover on a takings theory because the buyer did not have a reasonable investment-backed expectation that the site would be free from regulation or that it could be used as a public nuisance. See id. This Court concluded, "Because we find The Mill's expectations to have been highly unreasonable, this factor is 'so overwhelming' as to dispose of the taking issue ..." Id. at 1002. See also U.S. West Communications, Inc. v. City of Longmont, 948 P.2d 509, 522 (Colo. 1997) (applying a similar analysis and reaching a similar conclusion in the highly regulated arena of public utilities).

Despite the rare application of the three-factor analysis to highly regulated activities, the Colorado courts have continued to endorse and apply the economically viable use analysis in the majority of takings challenges. See U.S. West, 948 P.2d at 522 (explaining that a taking occurs when "an entity with the power of eminent domain substantially deprives a property owner of the use and enjoyment of that property."); Central Colorado Water Conservancy Dist. v. Simpson, 877 P.2d 335, 346 (Colo. 1994) (stating that "a taking within the meaning of [Art. II, § 15 of the Colorado Constitution] occurs when a governmental entity 'substantially deprives a property owner of the use and enjoyment of that property.'" (citing City of Northglenn v. Grynberg, 846 P.2d 175, 178 (Colo. 1993), cert. denied, 510 U.S. 815)). As a result, the fundamental principle remains that a regulatory taking occurs when the regulation prohibits reasonable uses of the property, and that a taking does not occur when reasonable, economically viable uses remain. For example, when this Court dealt with a comprehensive rezoning challenge in Jafay, this Court utilized the traditional standard in enunciating a taking. This Court said, "[W]e have repeatedly stated that '[a] governmental regulation that prohibits *all reasonable use[s]* of property

constitutes a taking within the meaning of . . . article II, section 15.'" Jafay, 848 P.2d at 900-901, citing Van Sickle v. Boyes, 797 P.2d 1267, 1271 (Colo. 1990) (emphasis added by Jafay court). To the same effect, in Sellon v. City of Manitou Springs, 745 P.2d 229, 234 (Colo. 1987), this Court said, "[S]o long as [a] zoning ordinance leaves some reasonable use for the property, the ordinance does not violate state constitutional standards." Thus, the central issue when a landowner challenges the application of zoning or land use regulations is whether the governmental regulation as applied to the aggrieved landowner's property forecloses all reasonable use of the property. Jafay, 848 P.2d at 901.

B. Colorado does not recognize a taking even when economically viable uses of property remain.

AVSG argues that Colorado courts apply a three-factor test separately from the economically viable use test, and that this separate analysis may result in a finding of a compensable taking even when a government regulation does not prohibit all reasonable use of a landowner's property. Based on this misreading of Colorado law, AVSG argues that the Board's actions resulted in a compensable taking of its property because their actions diminished the value of his property even though the Board's actions left other economically viable uses of the property. However, no court in Colorado has held that, as AVSG argues, a property owner who retains a reasonable, economically viable use of his property can still prove a taking by engaging in an additional, three-factor analysis. Rather, the three-factor analysis is part of the inquiry into whether a reasonable, economically viable use of the property remains. Because these tests are not exclusive, but are rather intermingled, the adoption of AVSG's argument would upset the status of Colorado takings law.

AVSG cites two cases to support its argument that this Court should allow a taking to be found whenever the value of property is substantially diminished. First, AVSG cites Central Colorado Water Conservancy District v. Simpson, 877 P.2d 335 (Colo. 1994), to support its argument that a reasonable investment-backed expectations inquiry is dispositive of a taking, even when a beneficial use remains. Second, AVSG cites State v. The Mill, 887 P.2d 993 (Colo. 1994), in an attempt to argue that a taking still may be found when a beneficial use remains. In neither of these cases, however, did this Court find a taking. To the contrary, both of these cases found that the regulations at issue there did not result in compensable takings. Further, when put into the appropriate context, the statements AVSG extracts from these cases fail to support the conclusion that Colorado recognizes a compensable regulatory taking even when a regulation leaves property with economically viable uses.

First, no aspect of Simpson indicates Colorado recognizes a compensable taking where a regulation does not eliminate all economically viable use of a landowner's property. AVSG argues that Simpson held that the pre-regulatory value of property may determine whether a taking occurred. Simpson stands for no such proposition. In Simpson, this Court held that a regulation requiring sand and gravel pit operators to provide augmentation plans for water diverted in mining operations did not effect a taking of those operators' junior water rights, though it may have rendered them somewhat more junior. See Simpson, 877 P.2d at 346-48. The court found that the junior water right holders had no property interest in the water in the stream. Still, the court observed that the Colorado Constitution prohibits governmental conduct that might not be deemed a taking under the federal Constitution, based on the additional language requiring compensation not only for takings, but for the government's substantial

damaging of property. See id. at 347.[1] The court began its analysis with a summary of Colorado's takings law, which parallels federal law, as follows: "We have determined that a taking within the meaning of this constitutional provision occurs when a governmental entity substantially deprives a property owner of the use and enjoyment of that property." Id. at 347.

In analyzing the "damaging" claims, the court found the owners of the junior water rights could not show any damage to their particular water rights, only a more general impact on the water in the river overall, to which individual owners of water rights have no title. See id. at 347. See also Thompson v. City and County of Denver, 958 P.2d 525, 528 (Colo. App. 1998) ("To recover in a 'damaging' case, the owner must show a unique or special injury that is different in kind from, or not common to, the general public." (quoting Northglenn v. Grynberg, 846 P.2d 175, 179 (Colo. 1993)). The court's discussion of pre-regulation value versus post-regulation value of the water rights is in the context of determining whether a constitutional damaging had occurred under the Colorado Constitution's unique language. See id. at 347-348. Simpson's focus on the damaging claim distinguishes it from the typical takings analysis, and from this case, where plaintiffs are alleging a taking of property they actually own. Unlike the case at bar, Simpson turned on a finding that the junior water rights owners' rights were not damaged any differently than the public could claim damage to their water values in general. In addition, Simpson did not purport to overturn this Court's previous ruling in City of Northglenn

[1] The only significant difference between the Colorado Constitution's takings provision and the United States Constitution's takings clause is that Colorado provides more protection to landowners by allowing compensation when property is not just taken, but when it is damaged. A claim of "damaged property" occurs when governmental action has a significant detrimental impact on adjoining or nearby property. La Plata Elec. Ass'n, Inc. v. Cummins, 728 P.2d 696, 698-99 (Colo. 1986). This matter is not at issue here.

v. Grynberg, 846 P.2d 175, 179 (Colo. 1993), which said, "In no case has mere depreciation in value been grounds to award just compensation for a damaging of property." For all these reasons, Simpson does not support AVSG's contention that Colorado recognizes a compensable taking when a regulation simply reduces the value of a landowner's property without prohibiting all economically viable use of the property.

Second, the language AVSG relies on in The Mill does not support its contention that two separable tests exist for a regulatory taking in Colorado, and that one of these tests allows courts to find a compensable taking even when economically viable uses of property remain. As discussed above in Argument I.A., The Mill inquired into whether the property owner's expectation of developing his radioactive property was reasonable only as it relates to the ultimate question of whether all *reasonable* use of the land is foreclosed. In The Mill, this Court found that expectations of unregulated use are unreasonable when an extensive regulatory scheme is in place at the time of investment. The Mill, 887 P.2d at 1000. Because the expectations for unregulated use of the contaminated property were unreasonable, this Court rejected the argument that the landowner could pursue a takings claim based on an argument that the *regulation* caused the property to lose its reasonable uses. That is, the landowner was precluded from complaining about the lack of reasonable uses on a parcel of property that the landowner knew was highly contaminated and highly regulated because the uses were severely limited even when the landowner bought the property.

The use of the three-factor analysis in The Mill does not cast doubt on the legitimacy of the economically viable use test. Rather, in the unique circumstances of The Mill, the application of the economically viable use test was not appropriate because it could have resulted

in a finding of a taking since the contaminated property had no economically viable use. Such a result would have been inappropriate given the history of contamination and governmental regulation of the property involved in The Mill. For this reason, examination of the reasonable investment-backed expectations in The Mill was more appropriate than examining the economically viable uses of the property. Because the unique circumstances of The Mill do not apply here, The Mill does not provide any support for AVSG's argument that this Court should apply the three-factor analysis even when beneficial uses of its property remain.

Further, even the application of the three-factor test here does not lead to the conclusion advocated by AVSG. AVSG asks this Court to find that the three-factor test shows that the diminution in value of property alone is sufficient to find a compensable taking. However, no court in Colorado has reached this conclusion. As this Court has repeatedly noted, the appropriate test is whether any reasonable use remains after application of the challenged regulation. If so, no taking has occurred. Jafay, 848 P.2d 892; Sellon, 745 P.2d 229. For these reasons, the Court of Appeals in the case at bar was correct when it declined to read The Mill as "changing prior law that all reasonable use must be foreclosed." [See Animas Valley Sand & Gravel, Inc., v. Board of County Comm'rs of County of La Plata, No. 98CA1474, slip. op. at 9, (Feb. 3, 2000)]. As a result, this Court should affirm the Court of Appeals and reject AVSG's request to redefine takings law in Colorado.

C. AVSG argues for the exception, not the rule.

For its contention that a diminution in value alone results in a taking, AVSG relies on Florida Rock v. United States, 45 Fed. Cl. 21 (1999), the dissent in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), and a phrase from Penn Central. AVSG argues that,

even when a property owner has failed the appropriate test, and still retains a beneficial and economically viable use for his property, he is nonetheless entitled to another bite at the apple using the three factors articulated in Penn Central. None of these three authorities, however, warrants this Court to redefine the standard for determining a regulatory taking in Colorado and to allow landowners to be compensated for every decrease in their property value. First, Florida Rock is neither well-reasoned nor commonly accepted. In Florida Rock, the U.S. Court of Federal Claims held that a property owner who had purchased a 1560-acre wetland parcel had suffered a compensable taking when an Army Corps of Engineers denial of its permit application under the Clean Water Act prohibited Florida Rock from mining limestone on 98 acres of the property. Florida Rock, 45 Fed. Cl. at 38. The court found that approximately three-quarters of the property was rendered unusable by the regulation, and held this was sufficient to constitute a taking because Florida Rock suffered an absolute frustration of its reasonable investment-backed expectations to mine limestone. See id. at 41.

As the Court of Appeals noted here, however, the views on partial takings theory espoused in Florida Rock are "not universally accepted." Indeed, as the Court of Appeals noted, the Tenth Circuit expressly rejected the Florida Rock approach in Clajon Production Corp v. Petera, 70 F.3d 1566 (10th Cir. 1995). [See Slip. op. at 12]. Also, even Florida Rock recognizes that destruction of the majority of a parcel's value does not always amount to a compensable taking. Florida Rock, 45 Fed. Cl.Ct. at 41. See also, e.g., Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (no taking despite 75 percent diminution); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (no taking despite 87 ½ percent diminution).

Second, language from the dissent in Lucas cannot support a reversal of the Court of Appeals because it is merely dissent, and not the holding of the case. Citing the dissent in Lucas, AVSG claims that the result of focusing solely on whether any reasonable use remains is arbitrary. [See Opening Br. at 26]. This argument was considered and addressed by the majority in Lucas, which recognized that it was drawing an arbitrary line between complete loss of economic value and something less. See Lucas, 505 U.S. at 1019 n. 8. Still, this consideration did not change the Court's analysis, and an observance in the dissent does not provide any basis for this Court to reject Colorado traditional takings doctrine.

Third, AVSG's reliance on the "goes too far" language in Penn Central is misplaced. While it is true, as AVSG alleges, that the Superme Court in Penn Central articulated three factors to involve in takings analysis (the regulation's economic impact on the claimant, the regulation's interference with the claimant's reasonable investment-backed expectations, and the character of the government action), these factors do not constitute a separate test that allows a property owner to recover for the mere diminution in value of property. Penn Central, 438 U.S. at 124. In Penn Central, after examining the various factors, the Court ultimately concluded that no taking had occurred, because the owner retained an economically viable use of the property. Penn Central, 438 U.S. at 138. The Court's holding supports the conclusion that the factors are part of the general inquiry in determining whether an economically viable use remains, and whether a taking has occurred. Contrary to the approach urged by AVSG, consideration of the three factors is *not* a separate inquiry, to be engaged in *after* a property owner failed the general test because he retains some economically viable use of his property.

Two Supreme Court cases decided since Penn Central confirm this view. First, in Agins v. Tiburon, 447 U.S. 255, 260 (1980), the issue was whether the landowner was denied all use of his property. Second, in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 312 (1987), the inquiry again focused on whether the government action denied "all economically beneficial or productive use" of property. Most recently, in Del Monte Dunes v. City of Monterrey, 526 U.S. 687, 700 (1999), the Supreme Court affirmed a finding of a regulatory taking where the trial court instructed the jury that "For the purpose of a taking claim, you will find that the plaintiff has been denied all economically viable use of the property if, as a result of the city's regulatory decision, there remains no permissible or beneficial use for that property."

Penn Central's three factors cannot be considered a separate test to be used after the property owner has failed to demonstrate a deprivation of all economically beneficial use of his property. Rather, they are part of the inquiry in determining whether a beneficial use remains for the property. The factor involving reasonable investment-backed expectations is shorthand for the concept that property owners who purchased their property after restrictions were in place are estopped from challenging the restrictions as a taking. Similarly, the question of economic impact of the challenged regulation on the property owner is not a separate test, but a part of the question of whether the challenged regulation has taken all economic value from the property. Mere diminution in value, no matter how severe, cannot effect a taking. Euclid, 272 U.S. at 384; Hadacheck, 239 U.S. at 405; Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 508 U.S. 602, 645 (1993). Even in Penn Central, the source of the "goes too far" phrasing, the Supreme Court emphasized that the taking issue is resolved by focusing on the uses the

regulations permit, not by the diminution of property value, standing alone. See Penn Central, 438 U.S. at 131. Economic impact is only relevant to the takings question insofar as it relates to the question of whether all or essentially all economically beneficial use of the property has been prohibited. For all these reasons, this Court should reject AVSG's argument for revising takings law in Colorado to create a separate, new test for a taking.

D. Expanding takings analysis as AVSG requests would thwart the legitimate exercise of local government police powers to protect the public health, safety and welfare.

Adopting the broad definition of a taking advocated by AVSG would not only impact the outcome in this case, but would have broad-ranging impacts on land use regulation throughout Colorado. The challenged regulation in this case is the River Corridor designation in the County Master plan. [See Opening Br. at p.1, ¶ 2]. This designation is akin to a zoning ordinance, and is well within the traditional land use powers of cities and counties. To provide for the health, safety and welfare of its citizens and the general public, a city has the power to classify land within its boundaries for specified uses. Bird v. City of Colorado Springs, 176 Colo. 32, 489 P.2d 324, 325 (1971); City of Colorado Springs v. Miller, 95 Colo. 337, 36 P.2d 161 (1934). County commissioners, too, have the authority to adopt zoning regulations to guide the use and development of land within the unincorporated territory of the county. Applebaugh v. Board of County Com'rs, 837 P.2d 304 (Colo. App. 1992).

It is axiomatic that the purpose of zoning is to provide for orderly growth of a community and to structure that growth in such a way that it will conform to the desires of the citizens of the community and produce a well ordered and designed result in the end. Bird, 489 P.2d at 326. Courts' review of zoning decision has been restricted. See id. at 325; Orth v. Board of County

Comm'rs for Boulder County, 158 Colo. 540, 408 P.2d 974; Huneke v. Glaspy, 155 Colo. 593, 396 P.2d 453 (1964). The public policy reason behind judicial reticence to second guess zoning decisions is that local governments, by necessity, must regulate land use. As the Court of Appeals noted, zoning regulations necessarily deprive property owners of some uses of their property, but such deprivation is constitutional so long as it is reasonable. [See Slip op., at 8]. Because zoning restricts an owner's right to use his property, it constitutes a partial taking, which is constitutionally permissible so long as it is reasonable. Service Oil Co. v. Rhodus, 179 Colo. 335, 500 P.2d 807 (1972). AVSG's contention runs headlong into the well-established proposition that the just compensation clause of the Colorado and Federal Constitutions does not require that zoning ordinances permit a landowner to make the most profitable use of his or her property. Bird, 489 P.2d at 326.

From a public policy standpoint, land use regulation in Colorado would be severely hampered if the court were to adopt AVSG's attempted expansion of takings law. Liberalizing the standard for a regulatory taking to allow for compensation based on mere diminution in value would alter the existing balance, which allows local government to regulate numerous aspects of land use, from wetlands and riparian habitat, to setbacks and plumbing code requirements without compensation. Local government land use regulations, by their nature, restrict allowable uses on land and impact property value. Following AVSG's argument, these regulations could be considered a compensable taking, thereby thwarting the public health, safety and welfare protections of such regulations. As the Supreme Court noted years ago, "Government could hardly go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law." Lucas, 505 U.S. at 1018 (citing Pennyslvania

Coal, 260 U.S. 393, 413 (1922). As local governments have little excess funds due to taxing and spending limitations under Art. XX of the Colorado Constitution, local governments would be forced to back away from enforcing these police powers if diminution in value would be sufficient to create a taking.

Moreover, AVSG's taking standard serves as a terrible guidepost for defining a recognizable boundary between legitimate regulation and constitutional violation for local government. The current "no reasonable economical viable use" test is easily understood and applied by government planners and decisionmakers. A landowner's available uses of his or her property is fairly ascertainable by local officials. On the other hand, diminution of property value is not easily determined for purposes of evaluating whether a taking has occurred. Moreover, the effect of a particular land use regulation or decision on a property's value is not an evaluative factor for government decisionmaking. For example, in evaluating the propriety of a planned unit development or a subdivision, the diminution in value is not something that is evaluated or assessed by planning staff or decisionmakers. Therefore, the diminution in value standard provides local government with a standard that does not allow governments to assess and anticipate a taking. To the contrary, determining whether government land use regulation has gone "too far" in the sense advocated by AVSG would be nothing less than guesswork for local government and could paralyze these entities from pursuing the legitimate police power objectives of zoning and land use planning. If this court were to extend the interpretation of takings law as AVSG suggests, categorical takings would certainly not be the "rare" or "extraordinary" circumstances envisioned by the United States Supreme Court in United States

v. Riverside Bayview Homes, Inc. 474 U.S. 121, 126 (1985) (stating that regulatory takings occur only in "extreme circumstances").

II. THIS COURT SHOULD DECLINE TO FIND A TAKING HERE BECAUSE THE BOARD'S LAND USE REGULATION DID NOT INTERFERE WITH AVSG'S REASONABLE INVESTMENT-BACKED EXPECTATIONS.

Following the appropriate analysis for a takings claim, AVSG cannot show that it is deprived of all reasonable economic use of its property, or that a taking has occurred. In the alternative, if this Court decides to reach the three-part analysis utilized in The Mill, AVSG still failed to demonstrate a taking because it does not have reasonable, investment-backed expectations in the unregulated mining of its property.

As this Court noted in The Mill, 887 P.2d at 1000, expectations of unregulated use are unreasonable when an extensive regulatory scheme is in place at the time of investment. It is undisputed that a mining permit is required for mining of sand and gravel, and that AVSG was aware of this fact. While the River Corridor designation – the challenged regulatory regime in this case – was implemented after AVSG bought the property, AVSG cannot reasonably have expected that sand and gravel mining would not be regulated, because a permit for such operation has been required by the Division of Mined Land Reclamation since the mid-1980's. [See Opening Br. at ¶ 6]. Businesses that operate in an industry with a history of regulation have no reasonable expectation that regulation will not be strengthened to achieve established legislative ends. See Concrete Pipe & Prods., 508 U.S. at 645.

A landowner is not constitutionally entitled to use his property in a manner that results in the maximum attainable profit. See Van Sickle, 797 P.2d 1267 (citing Penn Central, 438 U.S. at

125); Sellon, 745 P.2d at 234. Nor is a landowner entitled to obtain maximum profits from the use of property. Sellon, 745 P.2d at 234 (citing Nopro Co. v. Town of Cherry Hills Village, 180 Colo. 217, 504 P.2d 344). A reasonable investment-backed expectation must be more than a unilateral expectation or an abstract need. Ruckelshaus v. Monsanto, 467 U.S. 986, 1004-1006 (1984). Claimants cannot establish a takings claim "simply by showing that they have been denied the ability to exploit a property interest that they heretofore believed was available for development." Penn Central, 438 U.S. at 130.

In its brief, AVSG goes to great lengths to describe the history and plans of its owners for gravel mining. These facts are irrelevant, however, to the question of whether gravel mining is the only reasonable use of the property such that its prohibition would constitute a taking. As the record shows, other reasonable uses still exist for the property, and therefore no taking has occurred.

III. THE APPROPRIATE INQUIRY FOR A TAKINGS ANALYSIS INVOLVES A CONSIDERATION OF THE PARCEL AS A WHOLE, RATHER THAN A PIECEMEAL ANALYSIS OF SELECTED ACREAGE OR SUBSURFACE ESTATES OF THE PARCEL.

The Court of Appeals' ruling that only part of AVSG's property could be considered in analyzing AVSG's takings claim is contrary to the law of Colorado and to the overwhelming weight of authority in the federal courts. The second and third issues presented for review concern whether the takings analysis may focus on one small portion of a larger parcel to determine whether a taking occurred. Specifically, the second issue for which this Court granted certiorari concerns whether a regulation that prohibits the mining of property constitutes a compensable taking of the property owner's mineral rights under Colo. Const. Art. II, sec. 15. The third issue, raised by the Board, is whether the Court must consider the impact of the

challenged regulation on the property as a whole, or can consider, as the Court of Appeals in this case did, a sub-section of the property affected by the regulation. The answer to both of these questions is no. The doctrine of the parcel as a whole requires the consideration of the regulation's effect on the entire parcel, rather than on the discrete components of a parcel.

A. Colorado law requires consideration of the parcel as a whole.

Colorado courts have consistently followed the property as a whole rule, meaning that the courts examine the impact of the challenged regulation in the context of the property of the whole. The parcel as a whole rule derives from federal law, and Colorado has followed the lead of the Supreme Court and the overwhelming majority of federal courts in adopting the parcel as a whole rule.

The Supreme Court defined the problem raised by the case at bar as follows: "Because our test for regulatory takings requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'" Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987) (quoting Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1192 (1967)). The United States Supreme Court has held that the appropriate inquiry as to whether a taking has occurred is to consider the "parcel as a whole." As the Supreme Court noted in 1979, there is no taking where only one stick in the claimant's bundle of rights is adversely affected by the regulatory action because the aggregate must be viewed in its entirety. Andrus v. Allard, 444 U.S. 51, 66 (1979).

In Keystone, the Court specifically rejected the contention that a regulation entirely destroyed a landowner's interest in a unique support estate. Id. at 499-501. The issue facing the Keystone Court was whether the "support estate," a legal right cognizable and transferable under Pennsylvania law, was taken by a regulation requiring coal mining companies to leave certain coal deposits underground to support the surface estate. Id. The Court held that the value of this right is "merely a part of the entire bundle of rights possessed by the owner of either the coal or the surface." Id. at 501. The Court said, "It is clear ... that our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights." Id. at 500. Similarly, in Penn Central, the Court found it was appropriate to consider the entire property. In response to the argument that New York City's landmarks ordinance took property rights to the superadjacent air space above Grand Central Station, the Court opined:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and the nature and extent of the interference with the rights in the parcel as a whole, here the city tax block designated as the "landmark site."

Penn Central, 438 U.S. at 130-131. See also Lucas, 505 U.S. at 1018, n.7 (identifying the denominator problem for takings analysis in dicta).

More recently, in 1993, a unanimous U.S. Supreme Court once again rejected the idea that a taking claim should be analyzed by focusing on the restricted portion of the property rather than the property as a whole. Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602 (1993).

> We rejected [this proposed] analysis years ago in Penn Central . . ., where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be

> complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question.

Id. at 644. In determining the boundaries of the relevant parcel, courts consider factors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the restricted lots benefit the unregulated lot. See Ciampitti v. United States, 22 Cl. Ct. 310, 318-19 (1991) (stating that a parcel should be defined as accurately as possible because "the effect of a taking can obviously be disguised if the property at issue is too broadly defined" or "a taking can appear to emerge if the property is viewed too narrowly"). Factors such as the development of a portion of the property, however, do not define the parcel as a whole. For example, in Penn Central, the Supreme Court considered the relevant parcel to include not only the airspace above the station where construction was proposed, but also the station itself, constructed several years earlier. Penn Central, 438 U.S. 104, 124 (1978).

Lower federal courts have followed the Supreme Court's reasoning. See, e.g., Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 802 (Fed. Cir. 1993) ("Clearly, the quantum of land to be considered is not each individual lot containing wetlands or even the combined area of wetlands. If that were true, the Corps' protection of wetlands via a permit system would, ipso facto, constitute a taking in every case where it exercises its statutory authority."); Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172, 176 (4th Cir. 1988) ("Guided by these precepts [from Keystone and Penn Central] the district court, on remand, must determine the appropriate unit of Naegele's property after holding an evidentiary hearing on this issue."); Mountain States Legal Foundation v. Hodel, 799 F.2d 1423, 1430 (10th Cir. 1986) (en banc) ("In

determining whether a particular land-use regulation deprives a property owner of the 'economically viable use' of his land, the court must examine the impact of the regulation on the property as a whole."), cert. denied, 480 U.S. 951 (1987); MacLeod v. County of Santa Clara, 749 F.2d 541, 547 (9th Cir. 1984) ("[I]t is well settled that taking jurisprudence does not divide a single parcel into discrete segments or attempt to determine whether rights in a particular segment of a larger parcel have been entirely abrogated."), cert. denied, 472 U.S. 1009 (1985).

Colorado courts have adopted federal law in applying the parcel as a whole rule to takings claims. In Simpson, this Court, citing Penn Central and Keystone, concluded, "to determine whether a taking has occurred for purposes of federal takings analysis, the impact on the challenged action on the property as a whole must be considered." Simpson, 877 P.2d at 347. Immediately after laying out the federal takings framework, the court described takings analysis under Colorado law as employing a similar analytical structure. Id. Similarly, the Colorado Court of Appeals in Williams, described its takings analysis as follows:

> Generally, to determine whether there has been a denial of all use of a landowner's property, a court must compare the value that has been taken from the property to that which remains; the interference with rights in the discrete segment of the property affected is measured ***against the value of the property as a whole.***

907 P.2d at 704. Simpson and Williams demonstrate how the Colorado courts have specifically adopted the Supreme Court's analysis. No other Colorado cases are to the contrary. Accordingly, under Colorado law, as under federal law, the proper analysis should focus on the parcel of property as a whole.

B. This Court should reject AVSG's invitation to follow the Court of Appeals' aberration from the parcel of the whole doctrine because it runs counter to the weight of authority and Colorado precedent.

The Court of Appeals' express rejection of the parcel of the whole doctrine runs counter to Colorado law and the overwhelming weight of authority on this issue. In its opinion, the Court of Appeals said, "We do, however, reject the County's assertion that we must consider AVSG's property as a whole rather than only the approximately 33 acres affected by the Plan." [Slip op. at 5]. The Court of Appeals reasoned, "We do so because the 33 acres were the subject of AVSG's petition, they were the only portion affected by the Plan, and, as noted by the trial court, 'it is this 33-acre portion of the Tract that is the subject matter of this action.'" [Id.]. In refusing to consider AVSG's property as a whole, and in considering only the portion of the property subject to the regulation, the Court of Appeals erred and created a new doctrine of law that has serious implications for the implementation of land use regulations throughout the state.

Although AVSG attempts to bolster the Court of Appeals' ruling with citations to federal cases, those cases are aberrations that directly contradict Supreme Court precedent and the overwhelming weight of authority. The parcel as whole issue here has two facets. First, AVSG argues that it the relevant parcel for the takings analysis should include only thirty-three of its acreage in Tract B. Second, AVSG contends that the mineral estate should be viewed separately from the surface estate. To further its argument relating to the mineral estate, AVSG attempts to define the relevant parcel exclusively as the mineral right. AVSG principally relies on a Federal Circuit Court of Appeals case in support of its argument the mineral right is a separate property interest that can be taken under federal law. Whitney Benefits, Inc. v. United States, 926 F.2d 1169, 1174 (Fed. Cir.), cert. denied, 502 U.S. 952 (1991).

Indeed, that case concludes, "mineral rights are clearly property subject to the taking clause of the Fifth Amendment." Whitney Benefits, 926 F.2d at 1174. However, the strength of

this holding is in doubt given that it directly conflicts with the Supreme Court's analysis in Keystone. In Keystone, the petitioners argued the Subsistence Act completely destroyed their rights in the support estate, uniquely recognized under Pennsylvania property law as a separate and distinct property interest. Keystone, 480 U.S. at 499-501. After declaring, "our takings jurisprudence forecloses reliance on such legalistic distinctions within the bundle of property rights," the Court continued, "the support estate has value only insofar as it protects or enhances the value of the estate with which it is associated. Its value is merely a part of the entire bundle of rights possessed by the owner of either the coal or the surface." Id. at 501.

In the instant case, only AVSG's right to mine sand and gravel on a *portion* of its property has been disrupted by the Board's actions. As the district court found, AVSG still maintains the ability to make other uses of the thirty-three acres it cannot use for mining. The Board's action is similar to the one in Keystone; the Board has only prevented AVSG from exercising part of one of its many available sticks in its bundle of rights. Even the complete destruction of one strand in that bundle is insufficient to constitute a taking. See Andrus v. Allard, 444 U.S. 51, 65-66 (1979).

C. Allowing property owners to define the relevant parcel for a taking allows them to manipulate takings law to their advantage, resulting in a potential takings victory for virtually any governmental land use regulation.

The Court of Appeals' rejection of the parcel of the whole doctrine has the practical effect of allowing landowners raising a takings claim to define the boundaries of a piece of property into whatever fragmented configuration that best serves the landowners' purposes, raising disturbing implications for land use regulation. Virtually every land use regulation, no matter how *de minimis*, would constitute a taking if this approach were allowed. Such a result

would thwart local governments' ability to engage in land use planning and management and would force local governments to open their checkbooks for even reasonable land use regulations that allow for certain uses, but not others.

In a regulatory takings claim, the very issue confronting the court is whether the regulation in question leaves any reasonable, economically beneficial use of the property. At the heart of this analysis is an examination of the effect of the regulation on the property, and the designation of which property to analyze is critical. The facts of recent cases in other jurisdictions upholding the parcel as a whole analysis are instructive on the problems inherent in analytically segmenting parcels of property in takings challenges. For example, in K&K Construction, Inc. v. Department of Natural Resources, 575 N.W.2d 531 (Mich. 1998), the state department of natural resources denied the application of an owner of four parcels of property to fill in portions of wetlands on ***one*** of the four parcels. The landowner challenged the action as an unconstitutional taking, arguing that the one parcel in question was the only parcel relevant to the takings analysis. The district court agreed with the landowner and therefore found that the denial of the permit prevented all economically viable use of the wetlands on the one parcel. See id. at 534-35. The trial court awarded $3.5 million plus interest to the landowner. See id. The Michigan Supreme Court reversed, finding that the effect of the department's action on all four parcels of property should be weighed in the takings analysis. The court said, "It would be inappropriate to allow plaintiffs to sever [the connection of the parcels] now that it makes their legal argument stronger." Id. at 537.

Likewise, in Zealy v. City of Waukesha, 548 N.W.2d 528 (Wis. 1996), a landowner's 10.4-acre parcel was zoned into three zoning classifications as follows: 8.2 acres were zoned as

part of a conservancy district, and 2.1 acres were zoned for residential and business uses. The Wisconsin Court of Appeals determined that the parcel should be considered as discrete segments for purposes of a takings analysis. However, the Wisconsin Supreme Court reversed, finding that the 10.4-acre parcel must be considered as one unit in determining whether the designation of the conservancy district on 8.4 acres constituted a compensable taking. See id. at 533. When considering the whole parcel, the court found the conservancy district zoning designation did not constitute a taking because economically viable uses of the remaining 2.1 acres. See id. This example illustrates that typical land use regulation such as zoning and land use planning could be halted in its tracks if requiring compensation to be paid for regulations that effect only a portion of a landowner's property. See also City of Annapolis v. Waterman, 745 A.2d 1000 (2000).

Indeed, taken to its logical extreme, the Court of Appeals' and AVSG's rationale could allow a landowner to recover on a takings theory when only one acre out of a 1000-acre planned unit development is designated as an open space district. Yet another example would be a typical lot coverage restriction, which limits a building to occupy no more than a specified percentage of the lot on which it is located. Under AVSG's analysis, such a restriction could be characterized as a "taking" of the vacant area. Moreover, one could always argue that a setback regulation requiring that no structure be built within a certain distance from the property line constitutes a "taking" of that area of property that is unbuildable. See Keystone, 480 U.S. at 498.

These few examples illustrate the absurdity of rejecting the parcel as a whole doctrine because it would stop in its tracks virtually all legitimate government regulation of land use. Virtually all government regulation of land use places limits on a property owners right to use

property that are necessary for the health, safety and general welfare of citizens. Considering the effect of these regulations on the parcel as a whole, rather than on select portions of the parcel, has achieved a workable balance between the interests of landowners and the needs of local governmental entities. This Court should elect to maintain that balance by continuing to follow the parcel as a whole doctrine in Colorado and by reversing the Court of Appeals to the extent it rejected the parcel as a whole doctrine.

CONCLUSION

This Court should reject AVSG's expansive definition of a taking and its effort to redefine a takings claim by eliminating the parcel as a whole requirement. Under the parcel as a whole rule, it is inappropriate to consider, as AVSG urges, either its mineral right, or its 33 acres, separately from its ownership of the whole 46 acres comprised by parcels A and B. The entire property includes both parcels, as well as any mineral rights associated with both parcels. AVSG has not been deprived of the right to mine sand and gravel on ten of its 46 acres, because those ten acres have been "grandfathered" by virtue of the mining permit AVSG already holds, and under which AVSG has been mining for several years. Without considering any other possible uses for the property, at a minimum, AVSG retains the beneficial and economically viable use to continue mining sand and gravel on those ten acres. Additionally, AVSG has, on 33 acres, the other uses permitted in the River Corridor district. Despite AVSG's dismissal of these uses, the mere fact that AVSG is not interested in exploiting them does not mean they don't exist. The bottom line is that AVSG has retained a beneficial use of its property. Accordingly, under the well-established principles of Colorado and federal takings law, no taking has occurred because AVSG retains several uses of its property that are both beneficial and economically viable.

WHEREFORE, *amicus curiae* the Colorado Municipal League and Colorado Counties, Inc. respectfully request this Honorable Court affirm in part the decision of the Court of Appeals, and hold that a governmental regulation that leaves reasonable economically viable uses of property does not effect a taking and that the mineral rights may not be severed from the parcel as a whole; and to reverse in part the decision of the Court of Appeals, and hold that the 33 acres may not be severed from the parcel as a whole.

Dated this 1st day of December, 2000.

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I HEREBY CERTIFY that on the 15th day of December 2000, I mailed a true and correct copy of the foregoing **COMBINED AMICUS CURIAE BRIEF OF THE COLORADO MUNICIPAL LEAGUE AND COLORADO COUNTIES, INC.**, correctly addressed, postage prepaid, in the U.S. Mail to the following:

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