

KTJ

KLEIN, THORPE & JENKINS, LTD.
Attorneys at Law

20 N. Wacker Drive, Ste 1660
Chicago, Illinois 60606-2903
T 312 984 6400 F 312 984 6444

15010 S. Ravinia Avenue, Ste 10
Orland Park, Illinois 60462-5353
T 708 349 3888 F 708 349 1506

www.ktjlaw.com

November 3, 2012

Via Email and U.S. Mail

President and Board of Trustees
Paul Hendren, Village Attorney
Village of Homer
500 E. Second Street
Homer, Illinois 61849

Re: Request of Sunrise Coal, LLC for water supply

Gentlemen:

Sunrise Coal, LLC of Terre Haute, Indiana, (Sunrise) has submitted a written request to the Village of Homer proposing that the Village supply non-potable water for underground mining and coal processing and potable water for its planned coal mine to be located in unincorporated Champaign and Vermilion Counties. The President and Board of Trustees, through the Village Attorney Paul Hendren, have provided us with a series of issues with respect to Sunrise's request and asked that we provide our legal opinions regarding those issues. Mr. Hendren has provided us with a series of documents setting forth certain facts and assumptions with respect to the Sunrise request. We have based our opinions and have relied upon the facts, assumptions and other information contained in documents provided to us by Mr. Hendren. Should any of these facts or information change, or should the assumptions be changed, the opinions expressed herein could be affected. The information provided to us is set forth in the following documents.

1. Request of Sunrise Coal, LLC dated June 29, 2012.
2. Correspondence from John Rowe, Rowe Law Firm, LLC dated August 9, 2012.
3. Correspondence from John Rowe, Rowe Law Firm, LLC dated September 6, 2012.
4. Memorandum of Paul Hendren, Village Attorney, dated September 10, 2012.
5. Memorandum of Sorling Northrup Attorneys, dated September 21, 2012.
6. Memorandum of Chad S. Becket, Beckett & Webber, PC, dated September 24, 2012.
7. Memorandum of Sorling Northrup Attorneys, dated September 26, 2012.
8. Memorandum of Paul Hendren, Village Attorney dated October 5, 2012.

In responding to the issues presented to us, we have placed those issues and our responses in the order we believe is the most logical sequence.

1. **If use of [the Village's] eminent domain was necessary, would the Village have such authority, considering the arguments of Attorney Beckett that the use of eminent domain to acquire property to provide water to this non-resident commercial business would not be for a "public purpose," etc.?**

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In order for water to be provided to the Sunrise, pipes for water and sewer must be installed to and from the coal mine, and second, additional wells must be drilled to generate an adequate amount of additional water to serve the coal mine. The Village currently has adequate water provisions for its residents through its existing wells, and any additional wells would be constructed solely to provide water to the coal mine.

The Village may use its eminent domain authority to take property, as allowed, and limited, by the Illinois Constitution and State statutes. The Illinois Constitution provides, in Article I, Section 15:

Private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law.

There are three jurisdictional preconditions to the exercise of eminent domain authority by the Village set forth in the Illinois Constitution. First, there must be statutory authority. *Department of Transportation v. First Galesburg National Bank & Trust Company*, 141 Ill. 2d 462 (1990). Second, the taking must be for a public purpose. *Southwestern Illinois Development Authority v. National City Environmental*, 199 Ill.2d 225 (2002). Third, the taking must be necessary, and take no more property than is required to achieve the public purpose underlying the taking. *People ex rel. Director of Finance v. YWCA of Springfield*, 86 Ill. 2d 219 (1981).

Statutory Authority

The Village has statutory authority for both categories of takings pursuant to the Illinois Municipal Code. Section 11-125-2 of the Illinois Municipal Code provides, in relevant part:

For the purpose of establishing or supplying waterworks and to [...] extend [...] waterworks, each city or village may go beyond its corporate limits and acquire and hold property by purchase or otherwise, and also may take and condemn all necessary property therefor, in the manner provided for the taking or damaging of private property for public uses including [...] for water supply purposes [...] 65 ILCS 5/11-125-2.

Section 11-129-1 of the Illinois Municipal Code sets forth certain authority to finance a waterworks system and provides:

Any municipality with a population of less than 500,000 is authorized, as provided in this Division 129, to build, or purchase, and to operate a waterworks system or water supply system either within or without the corporate limits thereof, and also to improve or extend that system. 65 ILCS 5/11-129-1.

Section 11-149-1 of the Illinois Municipal Code provides:

The corporate authorities of a municipality may provide by ordinance for the extension and maintenance of municipal sewers and water mains, or both, in specified areas outside the corporate limits. Such service shall not be extended,

however, unless a majority of the owners of record of the real property in the specified area petition the corporate authorities for the service. In a non-home rule municipality, if such service has been provided to another unit of local government, the municipality cannot thereafter require the annexation of the property owned by the unit of local government to the municipality as a prerequisite to the continuation and maintenance of such service.

These sections of the Illinois Municipal Code provide the Village with statutory authority for the takings necessary for the request of Sunrise.

Public Use

"Before the right of eminent domain may be exercised, the law requires that the use for which the land is taken shall be public as distinguished from a private use." *Tuohy v. City of Chicago*, 394 Ill. 477, 481 (1946). The Eminent Domain Act does not define "public use." Instead, the Illinois Supreme Court, the Illinois Appellate Courts, and the Illinois Circuit Courts determine on a case by case basis whether the result of an eminent domain action is for a valid public use or an invalid private use.

"Courts all agree that the determination of whether a given use is a public use is a judicial function." *Tuohy*, 394 Ill. at 481. The Court in *Tuohy* provided the following standard regarding public versus private uses:

Under the constitution property cannot be condemned for a private use. While, from time to time, the courts have attempted to define public use, there is much disagreement as to its meaning. [...] Any attempt to grant the right to take private property for private use is void. *Town of Kingston v. Anderson*, 300 Ill. 577, 133 N.E. 347; *Litchfield & Madison R. Co. v. Alton & Southern R.*, 305 Ill. 388, 137 N.E. 248.

However, when the question arises judicially, the use may be one where it is difficult to apply any given test. The purpose may be highly beneficial to the public as well as to private interests; and, on the other hand, the use put to land acquired by private interests by eminent domain may be highly beneficial to the public, without giving the latter any control over the property taken.

The problem is rendered more complex by development arising since the adoption of the constitution, such as needs for acquiring property for social, medical or health purposes, as well as for the application of new inventions which may be adapted to public use. Uses for purposes not contemplated at the time may be, and frequently are, declared by the legislature to be public uses for which the power of eminent domain may be property used.

The question of what constitutes a public use has been before this court on several occasions, when general principles were applied to special conditions. The language used in those decisions must be read in connection with the facts

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involved, and is authority only for what is decided on such facts. *City of Geneseo v. Illinois Northern Utilities Co.*, 378 Ill. 506, 39 N.E.2d 26 (9142).

The Illinois Supreme Court further defined a public use as one that serves a public purpose. *Southwestern Illinois Development Authority v. National City Environmental*, 199 Ill.2d 225 (2002). A public use is not defeated merely because title to property taken pursuant to eminent domain is transferred to a private person or entity. "Clearly, private persons may ultimately acquire ownership of property arising out of a taking and the subsequent transfer to private ownership does not by itself defeat the public purpose." *Id.* Instead, the proper analysis is whether the government "exceeded the boundaries of constitutional principles and its authority by transferring the property to a private party for a profit when the property is not put to a public use." *Id.* at 236.

In the *Southwestern Illinois Development Authority* case, the Illinois Supreme Court focused on the interests of the public in the property after its taking, and the nature of the person or entity who would take title after the eminent domain action concluded. The Court looked at the profit motive of the subsequent title holder, and whether the public would be free to use the property at all, as a matter of right. (emphasis added)

The Court noted that the property sought to be taken for a parking lot to be owned by a private raceway:

is a private venture designed to result not in a public use, but in private profits. If this taking were permitted, lines to enter parking lots might be shortened and pedestrians might be able to cross from parking areas to event areas in a safer manner. However, we are unpersuaded that these facts alone are sufficient to satisfy the public use requirement, especially in light of evidence that the [private owner] could have built a parking garage structure on its existing property.

The Court continued to reason that:

While the activities here were undertaken in the guise of carrying out its legislated mission [to improve the economic situation in southwestern Illinois, the government's], true intentions were not clothed in an independent, legitimate governmental decision to further a planned public use. SWIDA did not conduct or commission a thorough study of the parking situation at Gateway. Nor did it formulate any economic plan requiring additional parking at the racetrack.

The Court concluded that:

the foundation of this taking is rooted not in the economic and planning process with which SWIDA has been charged. Rather, this action was undertaken solely in response to Gateway's expansion goals and its failure to accomplish those goals through purchasing NCE's land at an acceptable negotiated price. It appears SWIDA's true intentions were to act as a default broker of land for Gateway's proposed parking plan.

Thus, the Court held that if the purpose of a taking makes the government a mere broker of land for a private person or entity, with no resulting public benefit or use, such a taking is not permitted. However, a valid public use under the Constitution and Act may include the eventual transfer of title to private persons or entities for: takings of slums and blighted areas for clearance and redevelopment (*Village of Wheeling v. Exchange National Bank of Chicago*, 213 Ill. App. 3d 325 (1st Dist. 1991)), takings to increase public safety (*Illinois State Toll Highway Commission v. Eden Cemetery Association*, 16 Ill. 2d 539 (1959)), and takings for economic development purposes (*People ex rel. City of Canton v. Crouch*, 79 Ill. 2d 356 (1980)), so long as there is some continuing public use.

In a series of cases, the Illinois Supreme Court has held that where the taking will benefit only a private party with no attendant public benefit, acquisition through the use of eminent domain is prohibited by the Illinois Constitution. The Illinois Supreme Court has held that eminent domain may not be used: to provide a private switch from a business to a railroad (*Sholl v. German Coal Company*, 118 Ill. 427 (1887)), for taking water rights to facilitate a private milling business (*Gaylord v. Sanitary District*, 204 Ill. 576 (1903)), to construct a private road for the sole purpose and benefit of a private individual or entity (*Town of Kingston v. Anderson*, 300 Ill. 577 (1921)). In each case, the Illinois Supreme Court noted that after the taking the use of the property so taken would rest exclusively with a private person or entity. The Court held that where there is no right of the public to use the property post-taking, the taking fails to establish a qualifying public use, and eminent domain authority may not be used in such a case.

Southwestern Illinois Development Authority examined certain the facts underling the proposed taking. Facts the court found relevant to the public use determination in the Village's situation include:

1. Ownership. Who will own the property after the taking?

The information provided to us indicates that Sunrise will own the water and sewer pipes, and the Village will own the well. The well will only service the coal mine to be operated by Sunrise. Because the coal mine will be the owner of the sole water and sewer pipes from the new well, it is likely that a court would find no public use for that taking, under the same rationale used in the *Southwestern Illinois Development Authority* case.

2. Use of Improvements. Who will use the improvements constructed in the property?

The coal mine will be the only user of the improvements, the wells, water pipes and sewer pipes, constructed on the property proposed to be taken through eminent domain. Because there will be no public use, this factor suggests that eminent domain may not be used for the acquisition of the property in question.

3. Rationale for Acquisition. Is there a reason to acquire the property besides for improving the coal mine's profits, and if so does the reason relate to a benefit to the Village or its residents?

The rationale for the acquisition of the property for the wells, water pipes and sewer lines is the coal mine's request, and not due to any need by the Village or its residents. Revenue to be received by the Village is insufficient, by itself, to establish, a public use. As a result, there is no public use for the taking because the rationale for it is purely private.

4. Who Served. Whose goals would be primarily served by the taking?

The sole purpose of constructing the new water improvements is to allow Sunrise to operate its coal mining plant. The coal mine's goals would be served by the taking, not the Village's. Because there is no public benefit that flows from the proposed taking, only the coal mine's interests would be served. No public use for the taking exists where the only benefit is to a private entity.

We believe it would be difficult for the Village and/or coal mine will to provide the rationale required to satisfy the four factors for public use used by the Illinois Supreme Court in the *Southwestern Illinois Development Authority* case. The following facts suggest that a public use will not be served:

1. Distance. The coal mine is outside of the Village's jurisdiction and its planning area by a significant distance, six miles.
2. Expansion of Village Territory. The Village does not appear to have plans to annex the coal mine property, and other properties between it and the Village, into the Village's jurisdiction. Thus, the extension of Village infrastructure will not serve the Village's long-range expansion goals.
3. Well Capacity. The Village currently has enough capacity in its water wells to supply the Village into the foreseeable future. Without the coal mine, the Village would not have to obtain, operate, maintain, and repair additional wells. Thus, the costs associated with such new wells would be associated directly, and only, to the coal mine.
4. Public Benefit. We are unaware of a public benefit to the Village and its residents that would be served by the extension of water and sewer lines to the coal plant. The only user of the additional well, water lines and sewer lines would be the coal mine. Such an arrangement would not meet the public use test set forth above.

Admittedly, the residents of the Village would benefit from supplying water to Sunrise by the increased revenue generated by the Village selling the water to Sunrise. This revenue, in turn, could be used to defray the cost to taxpayers of maintenance of the Village's waterworks system. However, as the Illinois Supreme Court held in *Southwestern Illinois Development Authority*, "revenue expansion alone does not justify an improper and unacceptable expansion of the eminent domain power of the government." 199 Ill.2d at 241.

Finally, we note that there is an Illinois statute which on its face provides Sunrise with eminent domain authority applicable to this situation. The Mining Act of 1874 provides in relevant part:

Whenever any mine or mining place shall be so situated that it cannot be conveniently worked without a road or railroad thereto, or ditch to drain the same or to convey water thereto, and such road, railroad or ditch shall necessarily pass over, through or under other land owned or occupied by others, the owner or operator of any such mine or mining place may enter upon such lands, and construct such road, railroad or ditch, upon complying with the law in relation to the exercise of the right of eminent domain.

765 ILCS 505/1 (emphasis added). However, any use of eminent domain authority under the Mining Act must meet the public use test set forth above, as if the Village were exercising its eminent domain authority. See e.g., *Litchfield & M. Railway Company v. Alton & S. Railroad*, 305 Ill. 388 (1922); *Sholl v. German Coal Company*, 118 Ill. 427 (1887).

Necessity

The Village may only take property to the extent necessary to serve the public purpose underlying the taking. Necessity, in the eminent domain context, means "expedient, reasonably convenient, or useful to the public," and physically necessary. *City of Chicago v. Midland Smelting Company*, 384 Ill. App. 3d 945, 967 (1st Dist. 2008). Necessity does not mean indispensable or absolute necessity. *Id.* The Village may not take more property than is necessary to achieve its goals. Therefore, the scope of any taking by the Village must be limited in size to a proportion that would be found to be required for the two categories of takings contemplated by the coal mine.

In our opinion it would be difficult for the Village to convince a court that use of its eminent domain authority to acquire land for construction of waterworks for the sole benefit of Sunrise qualifies as an appropriate public use.

2. Does it matter whether the potable water, not-potable water and/or return gray water are delivered to/from the Sunrise Coal Company to the Village at a location within the Village, rather than delivered to (and taken from) the coal mine site by Village owned water/sewer lines?

As indicated above, the Illinois Municipal Code authorizes municipalities to operate water systems, to drill wells both within and outside the corporate limits, and to extend water services outside the jurisdictional limits of the municipality. This authorization includes the installation of water/sewer lines to service any properties out of the corporate limits. The Illinois Municipal Code contains no requirement that the delivery point be located within the corporate limits and it is our opinion that whether the well, connection, or transmission lines are located within Village limits has no effect upon the authority of the Village to provide water to Sunrise.

With respect to the use of eminent domain to acquire property for the well or to install water and sewer lines, the applicable case law would appear to limit the Village's eminent domain power if the well and water and sewer lines were solely for the use of Sunrise. If the Village were to decide to own the transmission lines, the Village would be required to negotiate easements with any private land owners and /or land rights with any public bodies controlling rights of way.

Ownership of the water/sewer lines by the Village rather than by Sunrise will require the Village to assume maintenance and repair responsibilities of those lines and any potential liability in connection with the construction, maintenance and repair any corresponding liability.

3. Several comments were made at the 9/26/2012 public hearing that the requested non-potable water service to Sunrise Coal Company would require the Village to take water from the underground aquifers in the region and thus compromise the water supply of properties in the region. Some of these owners threatened to sue if the Village proceeded and their water supplies were adversely affected. Under what circumstances could the Village be liable for any such result?

Mr. Hendren notes in his October 5, 2012 letter that several opponents of Sunrise's request to the Village to supply water for its coal mining operations have threatened to sue the Village if doing so would adversely affect their water supply. However, if the Village follows the procedures and substantive requirements of the Illinois Water Use Act of 1983, it is our opinion that the Village's exposure to any such liability could be limited. If the procedures of the Illinois Water Use Act of 1983 are followed, and it is determined that the Village's supply of water to Sunrise satisfies the "reasonable use" requirements of Illinois law, the Village would be well positioned to defend a cause of action alleging illegal interference with water rights. Further, before starting coal mining operations, Sunrise would be required to obtain a mining permit from the Illinois Department of Natural Resources (IDNR), which would presumably authorize its use of groundwater for its mining operations. The issuance of a mining permit by IDNR, as explained below, would further insulate the Village from liability. If, however, through these processes it is determined that the Village supplying water to Sunrise would adversely impact the water use rights of other landowners, there may be a risk of liability to the adversely impacted landowners.

Illinois Water Use Act of 1983

By enacting the Illinois Water Use Act of 1983 ("Act"), "[t]he General Assembly declared it to be in the public interest to better manage and conserve water, to establish a mechanism for restricting withdrawals of groundwater in emergencies, and to provide for public notice of planned substantial withdrawals of water after the effective date of this Act from new points of withdrawal before water is withdrawn." 525 ILCS 45/2.

The purpose of the Act is to "establish a means of reviewing potential water conflicts before damage to any person is incurred and to establish a rule for mitigating water shortage conflicts..." 525 ILCS 45/3. The purpose of the Act is accomplished in the following ways:

- (a) Providing authority for County Soil and Water Conservation Districts to receive notice of incoming substantial water users.
- (b) Authorizing County Soil and Water Conservation Districts to recommend restrictions on withdrawals of groundwater in emergencies.
- (c) Establishing a "reasonable use" of groundwater withdrawals. *Id.*

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Section 5 of the Act, which provides a mechanism for addressing potential water conflict resolution, provides that:

In the event that a land occupier or person proposes to develop a new point of withdrawal and the new point is a high-capacity well, the land occupier or person shall notify the District before construction of the well begins. The District shall in turn notify other local units of government with water systems who may be impacted by the proposed withdrawal. The District shall then review with the assistance of the Illinois State Water Survey and the State Geological Survey the proposed point of withdrawal's effect upon other users of the water. The review shall be completed within 30 days of receipt of the notice. The findings of such reviews shall be made public. 525 ILCS 45/5.

A "district" is defined by the Act as "a public body, corporate and political, organized under the "Soil and Water Conservation Districts Act." 525 ILCS 45/4. A "person" under the Act includes municipalities, such as the Village. *Id.*

A "point of withdrawal" is defined as "that point at which underground water is diverted by a person from its natural state." *Id.* And "high-capacity well" is defined as "a well located on a parcel of property where the rate or capacity of water withdrawal of all intakes on the property is equal to or in excess of 100,000 gallons during any 24-hour period." *Id.*

Based on the information provided to us, the Village's current wells do not have the capacity to provide Sunrise's needs and new wells would need to be constructed. These wells would be considered "high-capacity wells" under the Act. As such, the Village would be required under the Act to contact the Champaign County Soil and Water Conservation District ("SWCD") before construction of the new well(s) began, thereby triggering the water conflict resolution provisions of the Act. 525 ILCS 45/5. The SWCD would then notify other units of local government that could be impacted by the new wells, and the SWCD would consult the State Water Survey and Geological Survey to determine the impact of the new wells on other users of the water. *Id.* The determination would then be made public by the SWCD.

The Illinois Department of Agriculture has implemented detailed administrative rules regulating the reporting and public notice requirements leading up to the construction of new high-capacity wells. See 8 Ill. Admin. Code 675.10, *et seq.* We have enclosed a copy of the administrative rules for your ease of reference.

Upon receipt of the SWCD's determination on this issue, we would recommend that the Village and/or Sunrise retain their own hydrologists to review the results. Sunrise would need to have its own hydrological studies done regardless in connection with the IDNR's permitting process for coal mining operations. Based on the results of the SWCD's determination and those of the Village/Sunrise's experts, the Village Board would make a determination as to whether to proceed with construction of the new wells to supply water to Sunrise. In the event that the SWCD and the independent experts determined that construction of the new wells and related use complied with the reasonable use requirements of the Act, the Village would be in a very

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strong position to defend any type of suit claiming an unreasonable depletion of groundwater under the Act.

The Illinois Supreme Court's recent decision in *Citizens Opposing Pollution v. ExxonMobil Coal U.S.A, et al.*, 357 Ill.Dec. 55 (2012), may provide the Village with additional protection against suit under the Act. In *Citizens*, the Court addressed the issue of whether "the Water Use Act of 1983...allows a private right of action to challenge activity permitted by a mining permit." *Id.* at 57. The Illinois Supreme Court held that there "is no statutory basis to conclude that the Water Use Act allows a private right of action to challenge conduct that is specifically mandated by the terms of a permit authorized by the IDNR." *Id.* at 68.

Admittedly, the mining permit at issue in *Citizens* was a reclamation permit requiring corrective action by ExxonMobil, which is different from the type of mining permit that Sunrise would need to obtain for its mining operations. Nonetheless, to the extent that the permit obtained by Sunrise, as it relates to required water use in its mining operations, is analogous to the permit at issue in *Citizens*, the *Citizens* decision could be used as persuasive, if not controlling authority to defend the Village against an action under the Act. We would be happy to look more closely at the permitting requirements that Sunrise is subjected to if so directed.

Also, the Village has certain immunities under the Local Government and Governmental Employees Tort Immunity Act ("Tort Immunity Act") that can be used to further shield it from liability. Sections 2-109 and 2-201 of the Tort Immunity Act immunize public officials and public bodies from liability for injuries to property involving the determination of policy or the exercise of discretion. 745 ILCS 10/2-109 & 2-201.

Moreover, §3-103(a) of the Tort Immunity Act provides that:

A local public entity is not liable under this Article for an injury caused by the adoption of a plan or design of a construction of, or an improvement to public property where the plan or design has been approved in advance of the construction or improvement by the legislative body of such entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved. The local public entity is liable, however, if after the execution of such plan or design it appears from its use that it has created a condition that it is not reasonably safe. 745 ILCS 10/3-103(a).

The decision of a municipality to extend its municipal waterworks system outside of its corporate boundaries involved the exercise of discretion. See, *Continental Illinois National Bank and Trust Company of Chicago v. Village of Park Forest*, 4 Ill.App.3d 811 (3rd Dist. 1972) and *Exchange national bank of Chicago v. Behrel*, 9 Ill.App.3d 338 (1st Dist., 1972). It is our belief that the above referenced provisions of the Tort Immunity Act could be used to further protect the Village from liability in connection with drilling new wells to supply water to Sunrise, assuming that it is determined that such use is consistent with the Water Use Act.

Takings Claims under the Illinois and United States Constitutions for Depletion of Groundwater

Another area of concern for the Village in this matter is potential "takings" claims under the Illinois and U.S. Constitutions. Article 1, §15 of the Illinois Constitution prohibits units of government, including municipalities, from taking private property without just compensation. Similarly, the Takings Clause of the Fifth Amendment to the United States Constitution, made applicable to the states and units of local government through the Fourteenth Amendment, provides that private property shall not be taken for public use without just compensation. *Lingle v. Chevron U.S.A Inc.*, 544 U.S. 528, 536 (2005).

The fundamental issue here is whether landowners have a protected property interest in the use of groundwater. If landowner's do possess such a property right, the government cannot interfere with this right without providing the property owner just compensation. *Id.* While there are no Illinois cases that have addressed this issue, several cases from other jurisdictions have found a protected property right in the reasonable use of groundwater.

The Ohio Supreme Court in *McNamara v. City of Rittman*, 107 Ohio St.3d 243 (2005), held that landowners possess a protected property right in the reasonable use of ground water servicing their properties under state and federal law, and that interference with this right required just compensation by the government. Further, the Supreme Courts of Washington State, Nevada and North Dakota have also recognized these rights.¹ Additionally, appellate courts in Indiana and Florida have recognized this right.²

If the Illinois Courts determined that landowners in Illinois possess a protected property right in the reasonable use of groundwater, a claim for just compensation by the government under the takings clauses of the Illinois and U.S. Constitutions might be found to exist. This argument to this effect would be bolstered by the fact that the Illinois General Assembly arguably identified the right to reasonable use of groundwater in the Illinois Water Use Act of 1983.

It is important to note that the cases from other jurisdictions dealing with protected property rights in groundwater focus on the right to "reasonable" use of the groundwater. Thus, assuming that the Village follows the procedures outlined above in the Illinois Water Use Act of 1983, and an accurate determination is made that the drilling of new wells to provide water to Sunrise is consistent with other landowners' reasonable use of the groundwater, the Village would be well positioned to defend a State or federal takings claim.

- 4. If the Village would furnish non-potable water to the mine for coal washing and fire protection, and if the water supply was interrupted so the coal mine could not operate, or available water was insufficient for fire protection, could the Village be liable for mine down time or fire damages? Would any immunities apply to such incidents?**

¹ See *State by State Hwy. Comm. V. Ponten*, 77 Wash.2d 463 (1969); *Dermody v. Reno*, 113 Nev. 207 (1997); *Volkman v. Crosby*, 120 N.W.2d 18 (1963).

² *Center Townhouse Corp. v. City of Mishawaka*, 882 N.E.2d 762, 768 (Ind.App. Mar 20, 2008); *Schick v. Florida Dept. of Agriculture*, 504 So.2d 1318 (Fla.App. 1987).

Economic Losses for Mine Down Time

Economic losses cannot be recovered under a theory of negligence. *Moorman Manufacturing Co. v. National Tank C.*, 91 Ill.2d 69 (1982). The Court noted that contract law, which protects expectation interests, provides the proper remedy when a qualitative defect is involved. *Moorman*, 91 Ill.2d at 81. Economic losses consist of damages for inadequate value, costs of repair and replacement, or consequential loss of profits – without a claim of personal injury or damage to other property. *Moorman*, 91 Ill.2d at 82. A loss sustained due to repair costs, decreased value, and lost profits has been determined to be essentially the failure of the purchaser to receive the benefit of its bargain, traditionally the core concern of contract law. *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295 (1986).

The economic loss rule applies even to individuals who have incurred physical damage to their property, if that damage is caused by disappointed commercial expectations, gradual deterioration, breakage, or other nonaccidental causes, rather than by a dangerous event. *In re Chicago Flood Litigation*, 176 Ill.2d 179 (1997). In *Anderson Electric, Inc. v. Ledbetter Erection Corp.*, 115 Ill.2d 146 (1986), the Illinois Supreme Court extended the economic loss rule enunciated in *Moorman* to claims that services were performed negligently.

Lost profits from mine down time are economic losses which are not recoverable by a negligence action. Damages to property or persons may be actionable if those damages are found to be outside the expectation interests of the party. It is only through the terms and conditions of the contract for the supply of water that Sunrise could seek compensation for lost profits. Therefore, if any contract were to be negotiated with Sunrise, provisions limiting Village liability would be essential.

Damages of fire due to insufficient water supply

As a general rule, the Tort Immunity Act does not grant general immunity to municipal water suppliers. Municipal Water Suppliers are liable for personal or property damages caused by their negligent conduct, unless that specific conduct is encompassed within a specific section of the Tort Immunity Act. *Independent Trust Corporation v. City of Chicago Department of Water*, 295 Ill.App.3d 811 (1st Dist., 1998).

Section 3-103(a) of the Tort Immunity Act provides:

A local public entity is not liable under this Article for an injury caused by the adoption of a plan or design of a construction of, or an improvement to public property where the plan or design has been approved in advance of the construction or improvement by the legislative body of such entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved.

To the extent that an inadequate supply of water was the result of a defective plan or design of construction approved by the Village Board, Section 3-103(a) would provide immunity from liability.

Three cases have discussed the application of various sections of Article V of the Tort Immunity Act to fire damage allegedly caused by a lack of water supply. The decisions in each of these cases rested largely upon the facts of each case.

In *Independent Trust Corporation, supra*, the owners of a building damaged by flooding which resulted from a leak in a dedicated fire hydrant water pipe sued the City alleging that the City negligently maintained, inspected or repaired the water pipe. The City filed a motion to dismiss raising Section 5-103(a) of the Tort Immunity Act which provides in pertinent part:

Neither a local public entity, nor a public employee acting in the scope of his employment, is liable for injury resulting from the condition of fire protection or firefighting equipment or facilities.

The court rejected this contention holding that a pipe that carries water from a water main to a fire hydrant is not fire equipment or facilities. *Independent Trust Corporation*, 295 Ill.App.3d at 816. The court noted that "a pipe is a pipe and the sole function of a pipe is to carry water. The particular end use of that water does not miraculously transform the pipe into firefighting equipment." *Independent Trust Corporation*, 295 Ill.App.3d at 817.

In contrast to *Independent Trust Corporation*, in *Jones v. Village of Willow Springs*, 240 Ill.App.3d 235, 608 N.E.2d 298 (1st Dist, 1992), the court upheld the trial court's determination that Sections 5-101 and 5-102 and 5-103 of the Tort Immunity Act would insulate a village and a water commission from fire damage alleged to be caused by an inadequate water supply. Section 5-101 of the Tort Immunity Act provides that "neither a public entity nor a public employee is liable for failure to establish a fire department or otherwise provide fire protection. Section 5-102 provides that where a public entity does undertake to provide fire protection services, neither it nor its employees is liable for an injury resulting from the failure to suppress or contain a fire or from the failure to provide or maintain sufficient personnel, equipment or other fire protection. Unfortunately, the Appellate Court in *Jones* does not *directly* address the applicability of Article V of the Tort immunity Act to any Village alleged negligence in failing to provide an adequate water supply. Rather the issue on appeal was whether the special-duty doctrine and allegations of willful and wanton conduct would provide an exception to tort immunity under the Tort Immunity Act.

In *Consolidated Biscuit Co. v. Illinois Iowa Power Co.*, 303 Ill.App.80, 24 N.E.2d 582 (4th Dist., 1937) the court found that where a city contracts with a private water supply company to furnish water to city residents, the property owner could not hold the water company liable for loss by fire, caused by the failure to furnish an adequate water supply because there was no privity of contract between the water company and the city. Because there was no contract between the plaintiff and the defendant Water Company the court found that no duty to any resident exists to provide adequate water supply for fire suppression. Since the Village would directly contract with Sunrise, the Village and Sunrise would be in privity and the finding in *Consolidated Biscuit* would not apply.

Unfortunately, these cases while informative provide no clear case precedent that would determine whether the Village might be liable to Sunrise for fire damage based upon the inability

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to supply water. However, it is important to note that the Village can limit any potential liability through well crafted indemnification and release provisions within any water supply agreement.

5. Financial and other risks to the Village from undertaking this requested service.

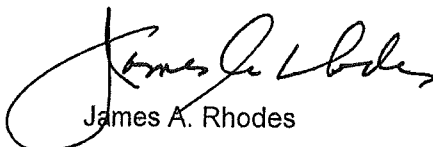
The information provided to us does not discuss any financing mechanisms for providing the requested water service to Sunrise. Village financing through the issuance of general obligation bonds would involve risk to the Village where the actual source of repayment is solely the water revenue paid by Sunrise. Any failure by Sunrise to continue to operate the coal mine would cause the Village to pay the bond indebtedness from general revenue or to default on its obligations. It is our recommendation that the Village speak to municipal financial experts who can advise the Village whether revenue bonds paid solely from water revenue is a viable option to finance those portions of a water supply system to be owned by the Village.

In addition, if the Village determines that Sunrise should acquire and maintain ownership of the water transmission lines, it would be our recommendation that the Village require Sunrise to obtain all property rights necessary for the installation prior to the Village expending any money to acquire land or construct any new wells.

Should you have any questions with respect to opinions and comments expressed in this correspondence or need any additional information, please let us know.

Very truly yours,

KLEIN, THORPE & JENKINS, LTD.


James A. Rhodes

Joint Committee on Administrative Rules
ADMINISTRATIVE CODE

TITLE 8: AGRICULTURE AND ANIMALS
CHAPTER I: DEPARTMENT OF AGRICULTURE
SUBCHAPTER q: SOIL AND WATER CONSERVATION
PART 675 GROUNDWATER USE GUIDELINES
SECTION 675.10 DEFINITIONS

Section 675.10 Definitions

"Act" means the Water Use Act of 1983 (Ill. Rev. Stat. 1985, ch. 5, par. 1601 et seq., as amended by P.A. 85-905, effective November 18, 1987, and P.A. 85-483, effective September 17, 1987).

"Aquifer" means a water-bearing geologic formation, group of geologic formations, or part of a geologic formation that has the characteristics to receive, store, and transmit groundwater.

"Artesian aquifer" or "confined aquifer" means an aquifer confined from the top and bottom at a particular location such that the groundwater in the aquifer is under pressure greater than the atmosphere. As a result, the water level in a well tapping an artesian aquifer rises above the top of the aquifer. A flowing artesian well results when pressure in the artesian aquifer is sufficient to cause the water level in the well to rise above the land surface.

"Artificial wants" means a use of water that may increase comfort, aesthetic, and propriety, but is not essential for existence. Artificial wants include, but are not limited to, street cleaning, washing vehicles, and watering lawns.

"Consolidated aquifer" means an aquifer formed in hard bedrock materials, such as limestone, dolomite, and sandstone.

"Critical water level" means the elevation or depth of the water level for an aquifer below which suggests that the aquifer resource is being depleted on a long-term basis based upon monitoring of well water levels.

"Drawdown" means the difference between the static and pumping water level in a well.

"High capacity well" means a well capable of producing more than 100,000 gallons of groundwater a day.

"Natural wants" means the use of water that is necessary for existence of man or beast. Natural wants include, but are not limited to, quenching thirst; household uses of cooking, washing, bathing, and sanitation purposes; watering animals or

livestock; and fire protection.

"Public water supply well" means a water distribution system relying on a well or wells and servicing at least 25 people for 60 or more days a year.

"Pumping water level" means the resulting water level in a well following a period of use.

"Static water level" or "nonpumping water level" means the water level in a well which occurs during a period when the well is not being used.

"Unconfined aquifer" or "water table aquifer" means an aquifer that is exposed to the atmosphere through openings in the overlying materials which extend to the land surface. Groundwater in an unconfined aquifer is not under any additional pressure; therefore, the water level in a well tapping an unconfined aquifer reflects the true top of an unconfined aquifer.

"Unconsolidated aquifer" means an aquifer formed in loose or uncemented materials, such as soil, sand, and gravel.

"Units of local government" mean villages, municipalities, townships, counties, and water districts.

"Water table" means that surface of an unconfined groundwater body which is under atmospheric pressure. The water table marks the top of an unconfined aquifer.

"Well" is used synonymously with point of withdrawal and is meant to include any continuous structure, such as a shaft or hole or a series of connected shafts or holes in the earth, which is used for withdrawing groundwater.

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PART 675 GROUNDWATER USE GUIDELINES
SECTION 675.20 NOTIFYING THE DISTRICT OF INCOMING SUBSTANTIAL USERS
OF GROUNDWATER

Section 675.20 Notifying the District of Incoming Substantial Users of Groundwater

- a) Any land occupier or person who is planning to develop a new high capacity well for the purpose of withdrawing groundwater shall provide written notification to the county soil and water conservation district in which the proposed well is to be located, before water is withdrawn. The notification requirement applies to all counties in Illinois, except those counties (i.e., Lake, McHenry, Cook, DuPage, Will and Kane Counties) governed by the provisions of "AN ACT in relation to the regulation and maintenance of the levels in Lake Michigan and to the diversion and apportionment of water from the Lake Michigan Watershed" (Ill. Rev. Stat. 1985, ch. 19, par. 119 et seq.). Written notification given to the Soil and Water Conservation District of a permit application, which is made in accordance with The Surface-Mined Land Conservation and Reclamation Act (Ill. Rev. Stat. 1985, ch. 96½, par. 4501 et seq.), shall be considered as meeting the notification requirements of this Section.
- b) The land occupier or person planning to develop a high capacity well shall provide written notification to the District. The notification shall require the following information:
- 1) Name, address, and phone number of proposed well owner;
 - 2) Date of notification;
 - 3) Legal description of the proposed well location, including county, township, range, and section (quarter/quarter);
 - 4) General location description (e.g., nearby buildings or landmarks);
 - 5) Proposed well identification (i.e., name or number if assigned);
 - 6) Proposed well depth in feet;
 - 7) Proposed well casing diameter (inches), depth to bottom (feet), weight and thickness;

- 8) Proposed well screen length (feet), diameter (inches), and depth to bottom (feet);
- 9) Proposed well pump type, gallons per minute capacity, head rating, motor horse power, and power source;
- 10) Type of aquifer (e.g., consolidated, unconsolidated, water table, or artesian);
- 11) Predicted static water level;
- 12) Anticipated maximum daily withdrawal and total annual withdrawal anticipated;
- 13) Planned use of well:
 - A) If for agricultural use, the number of people and farm animals served. If used for irrigation, the total acres, crop rotation, acres to be irrigated, type of irrigation equipment, travel speed, maximum capacity in gallons per minute, and total number of additional wells in use;
 - B) If for domestic use, the number of people served and total number of additional wells in use;
 - C) If for municipal or non-community (e.g., seasonal resort) use, the total population, average daily withdrawal, the total number of additional wells in use; or
 - D) If for industrial use, purpose for which water is used, average daily withdrawal, and total number of additional wells in use.
- 14) Name, address, and phone number of drilling contractor;
- 15) Names of landowners or occupiers within a one mile radius, except in villages or municipalities in which case only the total number of residents within a one mile radius; and
- 16) Names of local units of government with public water supply systems within a one mile radius.

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SECTION 675.30 NOTIFICATION TO UNITS OF LOCAL GOVERNMENT

Section 675.30 Notification to Units of Local Government

- a) Upon receipt of notification of a planned high capacity well, the District shall provide written notification to local units of government with a public water supply well located within one mile of the proposed high capacity well. A list of local units of government with public water supply wells in a county shall be supplied to each District by the Illinois State Water Survey.

- b) A written notification to the local unit of government with a public water supply well located within one mile of a proposed high capacity well shall be made to the chief executive officer of the local unit of government. The notification shall be mailed within five (5) working days of having received written notification of the proposed high capacity well by the land occupier or owner. The letter of notification to the local unit of government shall contain the following information:
 - 1) The statutory authority under which the notification is being made;
 - 2) The name and address of the soil and water conservation district making the notification;
 - 3) The distance the proposed high capacity well is from the well or wells of the local unit of government;
 - 4) Planned use of the proposed high capacity well;
 - 5) The steps the District shall take to review the possible impacts of the planned groundwater withdrawal; and
 - 6) A statement that the findings of such review will be sent to the local unit of government.

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SECTION 675.40 REVIEW OF WATER WITHDRAWAL IMPACTS ON OTHER USERS
OF GROUNDWATER

Section 675.40 Review of Water Withdrawal Impacts on Other Users of Groundwater

- a) When a District receives written notification by a land occupier or person that a high capacity well is planned, it shall within five (5) working days request the assistance of the Illinois State Water Survey and the Illinois State Geological Survey in reviewing the proposed withdrawal's effect upon other users of water. The review of the proposed withdrawal's effect shall consist of an examination of the information submitted to the District under Section 675.20 and may also include a study of geological data, groundwater aquifer maps, test well data, and the relationship to the location of the proposed well, if such information is available.
- b) The request for the assistance of the Illinois State Water Survey and the Illinois State Geological Survey shall be in writing and shall include a copy of the notification information collected by the District from the land occupier or person proposing the high capacity well.

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SECTION 675.50 MAKING PUBLIC THE REVIEW FINDINGS

Section 675.50 Making Public the Review Findings

- a) Upon the completion of a review of the proposed withdrawal's impacts on other users of water by the District, the Illinois State Water Survey, and the Illinois State Geological Survey, the findings of the review shall be made public in an informational announcement.
- b) The District shall publish an informational announcement in any newspaper with a circulation covering an area of at least twenty-five miles in radius from the proposed point of withdrawal within ten (10) days following the completion of the review.
- c) The informational announcement shall include the following:
 - 1) The statutory authority under which the informational announcement is published;
 - 2) The name of the soil and water conservation district;
 - 3) The purpose of the announcement;
 - 4) The location of the proposed high capacity well, including county, township, range, and section; and
 - 5) The location and hours during which the report containing the review findings may be examined.
- d) If the completed review indicates that the proposed high capacity well may affect the groundwater supplies of a local unit of government, the District shall notify that local unit of government in writing within ten (10) days. The possible effects shall be described, and a copy of the completed review shall be attached.
- e) The District shall notify in writing within ten (10) days the land occupier or person who is proposing the high capacity well when the completed review indicates that the proposed new well may affect the groundwater supplies of a local unit of government or a private well owner. The possible effects to the well of the local unit of government or private well owner shall be described, and a copy of the completed review shall be attached.