Handout for LSOHC meeting, December 12, 2017
LSOHC Inquiry of NGOs Regarding County Board Notification
(Sent only to NGOs with FY2019 "fee-title acquisition" proposals)

Request of NGO:	**1. Please provide a description of how you have been notifying county boards of fee-title acquisitions and include an example of correspondence between you and the county board (ex. Notification letter, email, etc).** **2. If the LSOHC was to require mandatory notification to county boards of all fee-title acquisitions prior to closing, how would this affect your program? Would this change be acceptable to your program?**
Name of NGO	**Current Process for notifying a County of Proposed Fee-title acquisition.**
The Nature Conservancy	**1.** Send a signed notification letter to the county administrator approximately 30 days before closing. The document includes both a TNC, and depending on the program, either a DNR or USFWS logo. Letter describes the project location, future plan for property, likely public users, and an offer to make ourselves available for questions. **2.** To date, most of TNC's projects have not had any concerns raised and where questions have come up, TNC has resolved them with the person inquiring.
Pheasants Forever	**1.** Once PF has executed a purchase agreement and verified that there are no insurmountable title clouds, we notify the county commissioners by sending a letter and map (generally by email) of our intentions to protect said property. We discuss our proposed plans for the parcel, outline tax/PILT information and offer to discuss any concerns they may have which could include attending an upcoming commissioner meeting should they choose to invite us. We strive to send these notification letters out at least 30-60 days prior to us closing to allow for sufficient time for discussion if the commissioners feel it necessary. I would note in most cases there is no response from commissioners. If there is a response, it is generally positive and that they support the project. Occasionally, there are tax related or other concerns that are brought up, but so far all easily worked out. **2.** This would not change or affect our program. It would be viewed as additional positive communication/coordination with the local stakeholders and would be acceptable to PF and our programs.
The Conservation Fund	**1.** The Conservation Fund has worked in many counties in Minnesota to acquire lands using OHF and other sources of funding. We communicate with county boards in a number of ways, depending on the level of involvement they tell us they prefer. These have included formal presentations, separate planning meetings with county lands departments and commissioners present, securing resolutions in support of projects, individual letters of support from commissioners, as well as in-person meetings with specific commissioners. These communications are done by phone or in-person, which we find is highly effective in planning the project details to coincide with local goals. **2**. We would welcome a formal notification process and are willing to provide documentation to DNR contract management staff. This would not affect how we do conservation projects.

Ducks Unlimited	**1.** Ducks Unlimited provides a letter of notification to county boards with a description and map of the parcel to be acquired, and an explanation of why we are purchasing the property, what we will do with the property in terms of restoration and disposition, and what the estimated PILT payments will be in comparison to tax payments. We currently strive to do this prior to closing whenever possible. When requested, we attend county board meetings in person to present the letter and allow for discussion. Attached is an example letter and map pertaining to a recent land acquisition in Murray County in SW Minnesota. **2.**This change would be acceptable to Ducks Unlimited's prairie and wetland land acquisition and restoration program in Minnesota. Ducks Unlimited will adapt our program to accommodate mandatory notification prior to closing, which we currently strive to do. We continue to appreciate the strong OHF funding support recommended by LSOHC for our strategic and science-based wetland conservation work, of which land acquisition and restoration in the Prairie Pothole Region of southern and western Minnesota is a crucial and high-priority component.
Trust For Public Lands	**1.** Signed notification letter sent to county commissioner, commisioners, and/or administrator in advance of acquisition. Letter indicates intent by TPL and DNR for purchase, use, future plan for property, likely public users, and an offer to be available for questions. **2.** If the LSOHC were to require mandatory notification to county boards of all fee-title acquisitions prior to closing this should not affect our program as we already provide notice to County Boards in which we are working. This change would be acceptable, as long as there are not burdensome content or timing requirements for the notice.
MN Valley Trust	**1.** The OHF grants MVT has received to-date have been only for fee acquisition of lands to expand the Minnesota Valley National Wildlife Refuge (MVNWR). Those lands were identified by the USFWS through a public planning process that resulted in the publication of the Comprehensive Conservation Plan (CCP) for the Refuge. The CCP process was open to and involved all local units of government, partner organizations and the general public. Accordingly, all local units of government, including counties, are aware of our delineated search areas and the properties within them. For that reason, we have not to-date taken the extra step of notifying county boards or seeking their approval of land acquisitions we are pursuing. **2.** Requiring mandatory notification of county boards would not change the work we are doing to expand the MVNWR. It adds an administrative step to the process.

From: Janelle Taylor [mailto:Janelle.Taylor@house.mn]
Sent: Thursday, December 07, 2017 2:44 PM
To: Mark Johnson <mark.johnson@lsohc.leg.mn>
Subject: Fwd: LSOHC - county board approval

Hi Mark,

This is what Larie in our office came up with. It looks like both House and Senate staff agree that requiring county board approval is constitutional.

Thank you!
Janelle

>>> Larie Pampuch 12/7/2017 11:33 AM >>>
Janelle,

The issue at hand, as I understand it, is whether the addition of a requirement that the county board approve the sale of private land to non-profit corporations funded by the Lessard-Sams Outdoor Heritage Council under Minnesota Statutes, section 97A.056, would violate the land owner's rights. Based on the Minnesota Supreme Court's 1980 opinion regarding county board approval as applied to the purchase of wetlands by the DNR under Minnesota Statutes, section 97A.145 (at that time, Minnesota Statutes, section 97A.481) and the Court's history of requiring a strict standard be met in order for a "regulatory taking" to occur, the addition of this requirement to Minnesota Statutes, section 97A.056 is permissible under state and federal law.

In the 1980 case, the plaintiff questioned the constitutionality of the county board's review of the purchase of private land by the DNR. However, the Minnesota Supreme Court found that they did not need to reach this argument to resolve the dispute, that the statute on its face should be reviewed to determine the parties' rights. Note that the Minnesota Supreme Court focused on the question of how the board should function to further the state's policy and interest in preserving wetlands and wildlife lands. If a provision requiring county board approval for sales under section 97A.056 is added, what criteria the board should consider in determining whether to approve the sale may be helpful.

Additionally, the Minnesota Supreme Court has historically required that in order for a regulatory taking to occur the owner "must demonstrate that he has been deprived ... of all reasonable uses of his land." The addition of county board approval of a sale under section 97A.056 puts the onus on the buyer, not the seller, and it is unlikely that the Court would find that the seller had been deprived of any reasonable use, much less all of them.

I have attached the referenced case and I hope this information is helpful. Please let me know if I can provide anything further.

Best,

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Senate

State of Minnesota

TO: Members of the Lessard-Sams Outdoor Heritage Council

FROM: Ben Stanley, Senate Counsel (651/296-4793)

DATE: November 28, 2017

RE: Legality of Statutory Requirement That County Approval Be Obtained for Certain Real Property Purchases

The purpose of this memorandum is to address a question that arose at the November 16, 2017, meeting of the Lessard-Sams Outdoor Heritage Council regarding the constitutionality of Minnesota Statutes § 97A.145. That statute requires proposed sales of land to the state for wildlife development purposes to be approved by the board of commissioners of the county where the land resides. It explicitly prohibits the state from purchasing the land if the county board disapproves the proposed acquisition. The Council requested a legal opinion on whether this statutory restriction violates the seller's constitutionally protected property rights. For the reasons set forth below, in my opinion the statute in question is constitutional.

The Statute Is a Restriction on the State, Not on Private Property Owners

As an initial matter, it is worth noting that § 97A.145 does not purport to govern what a seller can and cannot do. Instead, it governs what the state can do by establishing a mechanism for determining when the commissioner of natural resources has the legal authority to purchase land. In this sense it is no different than any of the other limitations the legislature places on state agencies' ability to contract through, for example, procurement statutes.

This reason alone is sufficient for me to conclude that the statute is constitutional, but for the sake of completeness the remainder of this memorandum will address the constitutionality of the statute as though it were a prohibition on private conduct rather than state conduct.

Private Property Rights Must Yield to Duly Enacted Laws

Private property owners have a constitutional right to use their property as they wish,[1] and the Minnesota Supreme Court has said that this right includes the power to decide with whom one contracts:

[1] See e.g., 73 C.J.S. Property § 4 ("Limitation of Property Rights").

> As a constitutional principle, it is well established that the freedom to contract with respect to one's property and in the conduct of a lawful business to select the party with whom one chooses to do so is a part of the liberty protected by the due process clauses of the State and Federal Constitutions.[2]

These rights are not absolute, however, and they must yield to duly enacted laws.[3] The state, in other words, has what the court has referred to as "inherent supremacy over private property rights"[4] and has the power to regulate the use of private property:

> The police power[5] of the state is very broad…. Under it the legislative power may impose any reasonable restrictions and may make any reasonable regulations, in respect to the use which the owner may make of his property, which tend to promote the general well-being or to secure to others that use and enjoyment of their own property to which they are lawfully entitled….[6]

§ 97A.145 "tends to promote the general well-being" by ensuring that counties are not subject to a sudden loss of tax revenue, which could directly affect their operations. It therefore appears to be a valid exercise of the state's police power, to which private property rights must yield.

The Statute Does Not Constitute a Regulatory Taking

Just because the legislature has the authority to enact § 97A.145, however, does not answer the separate question of whether the law creates a taking for which just compensation must be provided.

The takings clause of the Minnesota Constitution provides that "[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured."[7] Similar language in the federal constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law."[8] Although these clauses are not worded identically, Minnesota courts routinely use cases interpreting the federal takings clause to interpret its Minnesota counterpart[9] and so this memorandum refers to the two interchangeably.

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[2] Federal Distillers, Inc. v. State, 304 Minn. 28, 45 (1975) (internal citations omitted).
[3] 73 C.J.S. Property § 4 ("Limitation of Property Rights").
[4] Johnson v. City of Plymouth, 263 N.W.2d 603, 605 (Minn. 1978).
[5] The police power is a legislative body's general power to legislate for the health, safety, morals, and welfare of the people. See e.g., State ex rel. Lachtman v. Houghton, 134 Minn. 226, 229 (1916) ("'The term "police power," as understood in American constitutional law, means simply the power to impose such restrictions upon private rights as are practically necessary for the general welfare of all.")).
[6] City of Plymouth, 263 N.W.2d at 606-607 (quoting State ex rel. Lachtman v. Houghton, 134 Minn. 226, 237 (1916)).
[7] Minnesota Constitution, article I, section XIII.
[8] United States Constitution, amend. V.
[9] See e.g., Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623, 631-632 (Minn. 2007)("The language of the Takings Clause in the Minnesota Constitution is similar to the Takings Clause in the U.S. Constitution. We have therefore relied on cases interpreting the U.S. Constitution's Takings Clause in interpreting this clause in the Minnesota Constitution."). Since the two are interpreted similarly, this memorandum uses the singular "takings clause."

The takings clause applies not only to the actual, physical damaging or taking of private property but also in certain situations to interference by the state with the ownership, possession, enjoyment, or value of private property through regulation.[10] This latter form of taking is known as a regulatory taking. §97A.145 does not create a physical taking because it does not physically damage or take property. The question is whether it creates a regulatory taking by interfering with the ownership, possession, enjoyment, or value of private property.

The starting point for a regulatory takings analysis is to ask whether particular state action has the effect of permanently denying a property owner of *all* economically beneficial uses of the affected property.[11] If it does, then the inquiry is over, the state action constitutes a taking, and the state is unequivocally required to pay just compensation. If it does not, then courts apply the balancing test first set forth in the United States Supreme Court case of Penn Cent. Transp. Co. v. City of New York:[12]

> Anything less than a complete taking of property requires the balancing test set forth in *Penn Central*.…This test requires the court to consider: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government regulation.[13]

Prohibiting a property owner from selling to one particular buyer does not deprive the owner of all economically beneficial uses of the property. §97A.145 does not, therefore, appear to be a regulatory taking under the first test.

Whether or not the statute constitutes a taking, therefore, likely turns on the application of the *Penn Central* balancing test. It seems unlikely that reducing the number of potential buyers by one would have a large economic impact on a property owner because the property could still be sold to other parties. It also seems unlikely that removing the state as a potential buyer would have a serious impact on investment-backed expectations because investing in land in the hopes of eventually selling that land to the state for profit seems like an unlikely investment. Regarding the third prong of the test, as noted above, the regulation appears to be designed to prevent counties from suffering sudden losses to their tax base. It seems likely to achieve that end by giving counties veto authority over sales. It therefore appears to be a regulation designed to promote the general well-being. For these reasons, it seems likely that a court applying the *Penn Central* test would rather easily conclude that §97A.145 does not create a taking under the that test.

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[10] See e.g., Johnson v. City of Plymouth, 263 N.W.2d 603, 605 (Minn. 1978) ("To be constitutionally compensable, the taking or damage need not occur in a strictly physical sense and can arise out of any interference by the state with the ownership, possession, enjoyment, or value of private property.").

[11] Johnson v. City of Minneapolis, 667 N.W.2d 109 (Minn. 2003) (internal punctuation omitted)(this test is often referred to as the "Lucas test" after the United States Supreme Court case in which it was first set forth).

[12] 438 U.S. 104 (1978).

[13] Johnson v. City of Minneapolis, 667 N.W.2d at 114. A slightly altered version of the *Penn Central* test applies in certain cases but that version is not discussed in this memorandum because it does not seem to apply in this context. Those who are interested can see e.g., Zeman v. City of Minneapolis, 552 N.W.2d 548 (Minn. 1996).