

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

On Appeal From The Court Of Appeals
The Hon. William C. Whitbeck, P.J., the Hon. Kathleen Jansen, and the Hon. Alton T. Davis

EDITH KYSER,

Plaintiff/Appellee,

v

KASSON TOWNSHIP, a Michigan
General Law Township,

Defendant/Appellant.

Supreme Court Case No. 136680

Court of Appeals Docket No. 272516

Trial Court Case No. 04-6531-DZ

DEFENDANT-APPELLANT KASSON TOWNSHIP'S REPLY BRIEF

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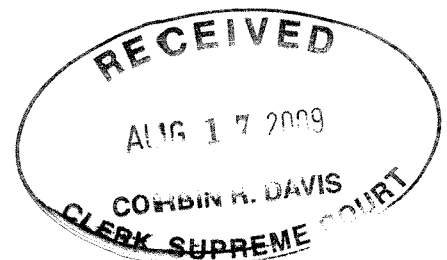


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1. **DETERMINING THE INAPPLICABILITY OF THE “NO VERY SERIOUS CONSEQUENCES” RULE IS PROPERLY PRESENTED TO THIS COURT, AND ONLY TO THIS COURT.**

The issues raised on this appeal are properly before the Court under MCR 7.316(A)(3) and (A)(7). These rules expressly authorize the Court to, “at any time, in addition to its general powers, . . . (3) permit the reasons or grounds of appeal to be amended or new grounds to be added [or] (7) enter any judgment or order that ought to have been entered, and enter other and further orders and grant relief as the case may require.” Under this court rule authority, along with the case authority discussed below, the Court properly granted leave to appeal to consider issues important to Michigan’s zoning jurisprudence.

Felcoskie v. Lakey Foundry Corp, clarified that the general rule prohibiting the assertion of a question for the first time on appeal “is not inflexible,” and when “consideration of a claim sought to be raised is necessary to a proper determination of a case, such rule will not be applied.”¹

The majority opinion in *Booth Newspapers, Inc. v. University of Michigan Bd. of Regents*,² citing *Perin v Peuler*,³ held that examining an issue for the first time on appeal has been found to be proper in instances in which “issue resolution was necessary to quell confusion generated by the Court's earlier opinions.” In the present case, the trial court’s actions and statements more than adequately demonstrate that any attempt to administer the “no very serious consequences” rule is steeped in confusion.

2. **THE *SILVA* RULE WAS SUPERSEDED BY STATUTE**

¹ 382 Mich 438, 442, 170 N.W.2d 129 (1969).

² 444 Mich. 211, 251, 507 N.W.2d 422 (1993), fn. 23.

³ 373 Mich 531, 534, 130 N.W.2d 4 (1964).

a. **The Exclusionary Zoning Statute Did Not Reserve Special Treatment for Resource Extraction Use.**

Plaintiff argues that *Silva* was not superseded by the exclusionary zoning statute because that 1979 statute “does not say it replaces the [1982] VSC test.”⁴ Indeed, particularly as read together with case law, the statute effectively *does say* that it replaces the *Silva* rule.

The *Silva* majority addressed only a single use, to which it afforded special treatment, establishing a *particularized exclusionary zoning rule*. The legislature enacted the exclusionary zoning statute,⁵ providing a broad, rather than particularized, policy for the state, specifying that “[a] zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of *a land use* within a local government . . .” In other words, the statute addresses the exclusion of *all land uses*, residential as well as industrial.⁶ *No reservation is made* in this sweeping policy statement for natural resource extraction use.⁷ In making such a broad statement on exclusionary zoning for all land uses, did the legislature have an unspoken intent to single out resource extraction use for special treatment?

A general rule on this subject is instructive: “it is a well-settled principle that, when a specific privilege or exemption is claimed under a statute, . . . it is to be construed strictly against the property owner and in favor of the public.”⁸ With regard to the

⁴ Plaintiff’s Brief, p 36 (Emphasis supplied).

⁵ MCL 125.297a, now codified as MCL 125.3207 (emphasis supplied).

⁶ Specific cases in this regard are referenced in the Township’s principal brief, p 31.

⁷ An express statutory reservation is made in the act for oil and gas well uses. MCL 125.3205(2).

⁸ *City of Detroit v Detroit Commercial College*, 322 Mich 142, 149, 33 NW2d 737 (1948).

specific subject of exclusionary zoning, footnote 8 of the *Silva* majority opinion recounts that the Court of Appeals had established an exclusionary zoning scheme that granted “favored” status for certain uses – the “preferred use” doctrine – and that such doctrine was ultimately *rejected* by the Court in *Kropf*. In other words, within this exclusionary zoning context, this Court rejected a reservation of special treatment for any particular use. Thus, in the absence of an express statutory exception, and given the rule of construction applicable to a party seeking to establish an exception, and also respecting the *Kropf* rejection of preferred uses,⁹ it is clearly Plaintiff’s burden to come forward with solid evidence to prove that the legislature intended to carve out an exception from the statute’s broad treatment for exclusionary zoning. Plaintiff has not done so.

This Court’s recent unanimous opinion in *Hoerstman General Contracting, Inc. v Hahn* clarified the rule for ascertaining whether a statutory scheme preempts the common law, holding that it is a *question of legislative intent*.¹⁰ In the face of this holding, Plaintiff makes the surprising argument that “statutes cannot derogate the common law by implication; they must say so explicitly.”¹¹ It is a fundamental rule of statutory construction that, “[t]he determinative factor is whether the Legislature’s intent is clear from the statute as a whole, not whether any particular words are present within the statute.”¹² The Township’s principal brief sets forth a detailed analysis clarifying the

⁹ This rejection is particularly relevant in view of the fact that the 1975 report entitled *Michigan’s Zoning Enabling Acts – Recommendations for Revision*, that served as a model for the statute, expressly referred to the *Kropf* case in explaining its recommendation on exclusionary zoning. (see, Township’s principal brief, Attachment 2, pp 39, 85-86, footnotes 12 and 18).

¹⁰ 474 Mich 66, 74, 711 N.W.2d 340 (2006).

¹¹ Plaintiff’s Brief, p 38.

¹² *Burt Township v Dept. of Natural Resources*, 459 Mich 659, 676, 593 NW 2d 534 (1999).

consistency of the exclusionary zoning statute with legislative intent as stated in the Zoning Enabling Act as a whole,¹³ particularly as distinguished from the inconsistency of the *Silva* rule with that intent.¹⁴ Clearly, the statute intends to set state policy for *all uses*.

b. Defining “Exclusion” within the Context of Resource Extraction is a Matter of Legislative Policy

The *Silva* rule defined exclusion for purposes of resource extraction, and also authorized a remedy for such exclusion. Plaintiff urges that this rule amounts to an interpretation of substantive due process, and that the legislature had no authority to diminish it.¹⁵ To the contrary, the Michigan Constitution and case law pronounce with clarity that prescribing state zoning policy, including policy for the preservation and development of natural resources, is an appropriate, perhaps exclusive, legislative function. In terms of case law, this Court has explained that, “[t]he exercise of the inherent police power of the State is vested in the *legislative* department, . . . [and] the burden rests on the [party] pointing out the limitations on the power of the legislature that have been exceeded.”¹⁶

Specifically addressing natural resource conservation and development, the Michigan Constitution could not be clearer in its terms. First of all, it is extremely revealing that the entire subject of natural resource conservation and development is established under Article 4, which empowers the *legislative branch* of this state’s government. In Art 4, §52, it is expressly provided that:

“The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of

¹³ MCL 125.3101 *et seq.*

¹⁴ Township’s Brief, pp 30-34.

¹⁵ Plaintiff’s Brief, p 40.

¹⁶ *Peo v Piasecki*, 333 Mich 122, 143, 52 NW2d 626 (1952) (Emphasis supplied).

the health, safety and general welfare of the people. The *legislature* shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.” (Emphasis supplied)

Discussing this constitutional mandate, the Court has expressly approved the use of the zoning authority for its implementation.¹⁷ Thus, the specific subject of *natural resource conservation and development* is declared by the Michigan Constitution to be *a matter of police power interest within the regulatory control of the legislative branch of government, and the Court has clarified that zoning is a proper means by which the legislature may achieve such conservation and development*. This constitutional declaration, as interpreted by the Court, raises the serious question whether there was judicial authority to establish a state policy on this subject. Nonetheless, the *Silva* majority expressed a *policy* that the exclusion of resource extraction should mean the prohibition of such use on *any property* within the entire state.

The Michigan Legislature did not remain silent on exclusionary zoning policy. In addressing this subject, the legislature did not carve out special treatment for one or more uses, but as a matter of state-wide policy, defined “exclusion” to mean, in part, a total prohibition of a use within a local government. This established overarching policy for Michigan.¹⁸ The delegation in Art 4, §52, coupled with this Court’s approval of its implementation by way of zoning, evince the decisive conclusion that applying the exclusionary zoning statute to resource extraction is authorized. Nothing could be clearer.

¹⁷ *Hess v West Bloomfield Township*, 439 Mich 550, 564-565; 486 NW2d 628 (1992).

¹⁸ “As we said in *Brae Burn*, and quoted again in *Kropf*, ‘The people of the community, through their appropriate legislative body, and not the courts, govern its growth and its life.’” *Kirk v Tyrone Township*, 398 Mich 429, 441, 247 NW2d 848 (1976).

3. **SYLVA VIOLATES THE SEPARATION OF POWERS DOCTRINE.**

There are two points to address on this issue. First, Plaintiff argues that decisions on the scope of the police power exercises for natural resource preservation and development are within the exclusive province of the judiciary. Consistent with the immediately preceding discussion, Plaintiff misses the point that Const 1963, Art 4, §52 expressly delegates this police power charge to the legislature.

The second point in need of clarification is found in the opinion in *Schwartz v City of Flint*,¹⁹ which recognizes that **zoning litigation has two distinct phases**: the **adjudicatory phase** in which the court determines the validity of legislatively established zoning; and the **remedy phase** in which the court considers the grant of a land use authorization to a plaintiff that has been successful in the adjudicatory phase. Plaintiff in the present case appears to disavow that the remedy phase ever occurs under the *Silva* rule. The Township will first identify the remedy phase under *Silva*, and then explain why the *Silva* remedy fails to meet the constraints of separation of powers, as pronounced in *Schwartz*.

a. **The Remedy Phase Under Silva.**

The Township has detailed in its principal brief the implicit holding in *Schwartz*²⁰ that the judicial rezoning of property authorized in *Silva* transgresses the separation of powers doctrine. In its response to this point, Plaintiff spends a good part of its brief pontificating that it is within the exclusive authority of the judiciary to adjudicate substantive due process. For purposes of separation of powers, Plaintiff's extensive discussion in this regard amounts to an irrelevant exhibition of words because it focuses

¹⁹ 426 Mich. 295, 395 N.W.2d 678 (1986).

²⁰ Township's Brief, pp 35-38.

only upon the *adjudicatory phase* of the zoning case. *Plaintiff entirely ignores* (perhaps for strategic reasons) the *remedy* authorized in *Silva*. In such a vacuum, Plaintiff has no compass to find the separation of powers violation. It does not require an extensive expedition of thought to expose the remedy phase in *Silva*.

Tracing the basics of a *Silva* trial, the scenario begins with the *adjudicatory phase* of a case: a plaintiff attacks a zoning ordinance that has been established in accordance with the legislatively mandated process. If the court concludes that resource extraction has been excluded on plaintiff's property, and that there are "no very serious consequences," the court adjudicates the invalidity of the ordinance. This sets the stage for the *remedy phase*. In this phase of a *Silva* trial, *the court is authorized to grant a land use remedy in the form of a resource extraction land use, which the court substitutes for the legislatively established zoning classification on plaintiff's property.*

This remedy phase of the case is distinct from the reasonableness or due process adjudication with regard to the legislatively established ordinance. As recognized in *Schwartz*, the grant of remedy is a separate phase of the proceedings, and the *Silva* remedy is precisely the type of judicial action held by *Schwartz* to impermissibly tread upon the legislative function.

b. The *Silva* Remedy is Neither Reasonable Nor Equitable.

The separate remedy phase of a zoning case was analyzed at length in *Schwartz*. The Court found a very narrow window within the constraints of the separation of powers for a court to fashion *equitable relief* for a successful plaintiff in an as-applied zoning challenge, permissible only if the plaintiff is able to meet an "appropriately high" burden of proving that a proposed specific use is "*reasonable*." Specifically, the conclusion in

Schwartz permits “courts to exercise their *equitable powers* in order to fashion sufficient remedies for successful plaintiffs, while doing so expediently and *within the constraints of the separation of powers*,”²¹ and to “grant relief *tailored to the equities of the situation*.”²² However, such relief is permitted only where a plaintiff, successful in the adjudicatory phase, *separately demonstrates* in the remedy phase of the case the *reasonableness* of a specific proposed use, with the “*reasonableness burden [being] appropriately high*, so that a plaintiff who has successfully challenged an unconstitutional ordinance [in the adjudicatory phase] will not automatically be free to proceed with its proposed use.”²³

The *Silva* remedy fails for two important reasons to qualify as equitable relief permitted in *Schwartz*: (i) the extractive use remedy authorized in *Silva* may be granted regardless of whether it is a “*reasonable*” use; and (ii) The extractive use remedy permitted under *Silva* may be granted even if the result is not “*equitable*.”

(i) The *Silva* Remedy is Not Required to be “Reasonable.”

The *Silva* formulation does not require an extractive use granted in the remedy phase to be a *reasonable use*, especially with “reasonableness” being determined under the scrutiny of an *appropriately high standard*.

Demonstrating a “reasonable use” under a “high” standard would, at a minimum, require a court proceeding under *Silva* to consider whether a plaintiff has demonstrated that the proposed extractive use would meet the fundamental intent of the Zoning Enabling Statute, including whether such use would: have an *appropriate relationship*

²¹ *Schwartz*, p 308.

²² *Id*, p 322 (Emphasis supplied).

²³ *Id*, p 328 (Emphasis and parenthetical clarification supplied).

with surrounding land uses and zoning [MCL 125.3201(1)]; and be *in accordance with the comprehensive planning* of the community [MCL 125.3203(1)]. While there is no clarity whatsoever in the meaning of “no very serious consequences,” one thing is unquestionable: it does not require a proposed extractive use to have an appropriate relationship with surrounding land uses and zoning, or to be in accordance with the comprehensive planning of the community. Granting the *Silva* remedy requires no such evaluation. Thus, granting the *Silva* remedy totally ignores the fundamental basis determining land use “reasonableness,” as recognized from the very outset of zoning.²⁴

The trial court’s determination in the present case offers unmistakable evidence that the “no very serious consequences” test fails to require the interjected extractive use to be in accordance with the comprehensive planning of the community [MCL 125.3203(1)]. Indeed, the fundamental purpose of the Kasson Master Planned Gravel District – to resolve the 1988-1994 Township-destroying chaos and turmoil – was totally undermined by the remedy granted by the trial court.²⁵ The imposition of the *Silva* remedy renders the traditional statutory rezoning procedures ineffectual and makes a farce out of the legislatively mandated rezoning hearing.²⁶

(ii) The *Silva* Remedy Need Not be Equitable.

²⁴ *Village of Euclid v Ambler Realty*, 272 U.S. 365, 386-392; 47 S.Ct. 114; 71 L.Ed. 303 (1926). Shortly following *Euclid*, the Standard State Zoning Enabling Act was modified with direction that the regulations of the zoning ordinance “shall be made in accordance with a comprehensive plan,” clarifying by footnote that such a plan “will prevent haphazard or piecemeal zoning. No zoning should be done without such a comprehensive study.” See, <http://www.planning.org/growingsmart/enablingacts.htm>.

²⁵ The Township Board has been consistent in its adherence to the Master Plan, rejecting alteration of the Gravel District for Plaintiff or an existing operator. App 121a-125a.

²⁶ *Schwartz*, p 311 (explaining the shortcomings in the overruled *Zaagman* process).

The purpose of equity is to promote and *achieve justice* in the reconciliation of competing claims.²⁷ Critical to this process is that *justice must be complete*.²⁸ The remedy granted by a court under *Silva* – the plaintiff’s pre-determined extractive use – fails to afford the equity and complete justice required in *Schwartz*.

Under *Silva*, the judicial substitution of an extractive land use authorization for that which had been legislatively established *fails to afford equity to the community and to its citizens*. The extractive use remedy is imposed without planning or public hearing at the heavy cost of predictability and stability for property owners and developers, effectively driving a knife into the very essence of zoning as a police power exercise.²⁹ Its lack of standards permits the meaning of “no very serious consequences” to be newly determined in every case. This is judicial legislating and rough arbitrariness, not equity.

The remedy granted under *Silva* violates the separation of powers doctrine and fails to qualify as a specific reasonable use under *Schwartz*.

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²⁷ 27A Am. Jur. 2d Equity § 2, Nature, purpose, and distinguishing features.

²⁸ *Henry v Dow Chemical Co.*, 473 Mich 63, 112-113, 701 NW 2d 684 (2005) (Cavanagh, J., *dissenting*), *Department of Civil Rights ex rel. Cornell v Edward W. Sparrow Hosp. Assn.*, 423 Mich 548, 564, 377 NW2d 755 (1985).

²⁹ *Village of Euclid v Ambler Realty*, 272 U.S. 365, 386-392; 47 S.Ct. 114; 71 L.Ed. 303 (1926).