

STATE OF MICHIGA
IN THE MICHIGAN SUPREME COURT

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

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BRIEF OF AMICUS CURIAE MICHIGAN TOWNSHIP ASSOCIATION
IN SUPPORT OF DEFENDANT-APPELLANT

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STATEMENT OF QUESTIONS INVOLVED

1. Does former MCL 125.297a of 1978, recodified as MCL 125.3207 in 2006, supersede and modify the Michigan Supreme Court's decision in *Silva v Ada Township*, 416 Michigan 153 (1982) which initiated the standard of "very serious consequences" necessary to prohibit mining through zoning within a township?

The Trial Court did not directly address this question but effectively answered it "No".

Plaintiff-Appellee answered this question "No".

Defendant-Appellant answers this question "Yes"

Amicus Curiae Michigan Townships Association answers this question "Yes"

2. Did the Michigan Supreme Court in *Silva v Ada Township, supra* and its companion decisions violate the separation of powers constitutional mandate by adopting the "very serious consequences" standard for deciding the validity of local zoning legislation prohibiting mining activity in an area of the Township?

The Trial Court answered this question "No".

Plaintiff-Appellee answers this question "No".

Defendant-Appellant answers this question "Yes"

Amicus Curiae Michigan Townships Association answers this question "Yes"

3. Does the requirement of proof by the Township of "very serious consequences" to sustain its Zoning Ordinance prohibiting mining in an area of the Township impermissibly shift the burden of proof of the presumptive validity of its ordinance onto the Township?

The Trial Court answered this question "No".

Plaintiff-Appellee answers this question "No".

Defendant-Appellant answers this question "Yes"

Amicus Curiae Michigan Townships Association answers this question "Yes"

4. Is the *Silva, supra*, standard of "no very serious consequences" (required by the court to uphold a proposed gravel mining operation which is prohibited under a zoning ordinance), applicable to a mining's adverse consequences on a local government's continuance as a viable, stable and attractive municipality for essential development necessary for municipal survival?

The Trial Court answered this question "No".

Plaintiff-Appellee answers this question "No".

Defendant-Appellant answers this question "Yes"

Amicus Curiae Michigan Townships Association answers this question "Yes"

STATEMENT OF FACTS

Amicus Curiae Michigan Townships Association hereby incorporates Defendant-Appellant Kasson Township's Statement of Facts in its brief in the within cause involving pages 1 through 23 which this Amicus Curiae submits is a comprehensive and accurate recitation of the factual events, testimony and judicial proceedings of record in the within cause to the date of this Honorable Court's granting of leave to appeal on April 29, 2009. To revisit this recorded previous history of the case would only exacerbate the length of this Amicus Curia's brief and the reading time for appellate review. Suffice it to say, the Township's planning commission, planning and zoning experts, the Township's geological experts, the consideration of the public and their pertinent interests, along with the Township Board's participation was exhaustive, exemplary and thorough and a sound basis for the enactment of the mining zoning ordinance and the advancement and regulation of the mining industry.

ARGUMENT I

FORMER MCL 125.297a OF 1978, RECODIFIED AS MCL 125.3207 IN 2006, SUPERCEDES AND MODIFIES THE MICHIGAN SUPREME COURT'S DECISION IN SILVA V ADA TOWNSHIP, 416 MICHIGAN 153 (1982) WHICH INITIATED THE STANDARD OF "VERY SERIOUS CONSEQUENCES" TO PROHIBIT MINING THROUGH ZONING WITHIN A TOWNSHIP.

A. Chronology of *Silva v Ada Township*, 416 Michigan 153 (1982) decision and the Exclusionary Zoning Act.

Although *Silva Township v Ada Township*, *supra*, was decided by the Supreme Court in a split decision in 1982, its reference to the standard of "very serious consequence" was based on obiter dictum in the previous cases of *Certain-Teed Products Corp v Paris Township*, 351 Mich 434 (1958) and *City of North Muskegon v Miller*, 249 Mich 52 (1929) as indicated in Justice Ryan's dissent on page 165. These

two previous cases were decided before the exclusionary statute enacted first in 1978. Furthermore, the *Silva, supra*, case did not refer to the statute. The state legislature in enacting the exclusionary statute emphasized the requirement of proof of “the presence of a demonstrated need” of the proposed prohibited use in order to overturn the zoning ordinance prohibition.

For reference to the foregoing, MCL 125.3207 provides, in full, as follows:

“Sec. 207. A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a local unit of government in the presence of a demonstrated need for that land use within either that local unit of government or the surrounding area within the state, unless a location within the local unit of government does not exist where the use may be appropriately located or the use is unlawful.” (Emphasis added.)

Although the statute prohibits a zoning ordinance or decision which has “the effect of totally prohibiting the establishment of a land use”, the use of the article “a” in the phrase “a land use” in conjunction with the statutory requirement of “a demonstrated need for that land use” emphasizes intent to refer to a particular use on a particular parcel of land, such as mining on the plaintiff Kyser’s parcel; which, per statute, could not be prohibited in the face of a “demonstrated need”, which need was totally lacking in evidence in the case at bar.

In support of the foregoing interpretation, it is submitted, that *Webster’s II, New College Dictionary*, copyrighted in 1999, defines critical words “a” and “that” as follows:

“a” as in the phrase “a land use” in the foregoing statute: “used before nouns and noun phrases that denotes a single, but unspecified person or thing. (a mountain.) (a woman.)”

“That” as in the phrase in the foregoing statute: “that land use” is defined under (1): “Being the one singled out implied or understood. (that book.) (those clothes.)”

The *Silva* case, *supra*, totally ignored the essential statutory standard “of a demonstrated need for that land use” in order for a court to overrule a duly adopted zoning ordinance provision which prohibited the proposed mining on a described parcel of land.

Contrary to the foregoing statute, the *Silva* court substituted its non-statutory basis for invalidating the zoning ordinance mining prohibition on the site that “very serious consequences” were not shown to result from the proposed mining.

When the foregoing statutory standards for overruling a prohibited use in a zoning ordinance are considered in conjunction with the plenary authority the legislature has granted to townships and other municipalities to control development within their boundaries, it becomes clear that the “very serious consequences” standard of *Silva, supra*, necessary to support a mining prohibition in a zoning ordinance is no longer viable.

MCL 125.3203 provides in pertinent part,

“The zoning ordinance shall be based upon a plan designed to promote the public health, safety, and general welfare, to encourage the use of lands in accordance with their character and adaptability, to limit the improper use of land...to meet the needs of the state’s residents for food, fiber, and other natural resources,...and other uses of land...”, etc., etc. (emphasis added.)

Similar zoning authority was delegated to the township zoning board under the previous township zoning act enacted in 1943 and found at MCL 125.271 through MCL 125.310 which predated the Michigan Zoning Enabling Act enacted in 2006.

In remanding the case to the Court of Appeals, the *Silva, supra*, court based its remand on the basis “the Court of Appeals failed to apply the ‘very serious consequences’ standard in determining the validity of the zoning in the instant cases.” (P 162.) Although it hypothesized that the public interest might be harmed by the

prohibition of mining of the silica sand from the plaintiff's property, there was no evidence "of a demonstrated need for that land use within either that local unit of government or the surrounding area in the state" as required by the exclusionary use statute. The *Silva, supra*, decision has, accordingly, been superseded by the enactment of the exclusionary zoning statute at MCL 125.3207 and its forerunner at MCL 125.297a.

B. Further support for overruling the *Silva* decision.

Although the Michigan Court of Appeals in the case of *American Aggregates Corporation v Highland Township*, 151 Mich App 37 (1986), did not refer to MCL 125.297a in supporting the Township's zoning prohibition of sand and gravel mining on plaintiff's property, it supported the requirement of a "demonstrated need" as a qualification for overturning the mining prohibition of the zoning ordinance. It stated at pages 42 & 43:

"Prior to reaching his conclusion..., the trial judge made several findings indicating that plaintiff had failed to establish that southeastern Michigan needed another sand and gravel extraction operation. Plaintiff argues that the evidence admitted on this issue, and the trial judge's conclusion, are irrelevant in assessing whether 'very serious consequences' would result from plaintiff's mining operations under the *Silva* analysis. We disagree. In *Silva*, the Supreme Court did not specifically address whether the need for sand and gravel on plaintiff landowner's land was a relevant factor in the analysis. However, the entire foundation of the stricter test of reasonableness referred to in *Silva* rests on the important public interest involved in extracting and using natural resources. Therefore, the degree and extent of public interest in the extraction of the specific natural resources located on the landowner's land is a relevant factor in reviewing the reasonableness of the zoning regulation."

"This factor is relevant because the degree of public interest in natural resources varies greatly depending on the type of resource involved and on the market demand and supply conditions that exists as to the resource sought to be extracted. We do not believe that the *Silva* analysis requires us to blindly assume that all 'valuable' natural resources involve a constant high degree of public interest." (Emphasis added.)

Continuing at pages 44 and 45,

“This type of sliding-scale approach based on the public interest in the landowner’s specific resource results in an appropriate cost/benefit analysis in applying the Silva standard for determining the reasonableness of zoning regulations preventing the extraction of natural resources. The ‘very serious consequences’ test is not viable unless it is applied in this way, since it essentially involves an internalizing of costs imposed on the public by the extraction operation that the landowner is not aware of in making his private decision to extract the resources (externalities). For such an internalizing of public costs to make any sense, these costs must be compared to the benefits of the extraction operation as measured by the degree of public interest in the specific resources.” (Emphasis added.)

MCL 125.3207, as part of the Michigan Zoning Enabling Act, recognized the importance of the “degree of public interest” in the sand and gravel supply and availability, and specifically included as a standard and qualification for a court to void zoning legislation prohibiting mining on a particular site that “the presence of a demonstrated need for that land use” (e.g., public interest in the resource) be clearly proven.

In Kasson Township the trial court acknowledged the proofs disclosed that there were 130 million tons of gravel for subsequent mining in the six square miles zoned for that purpose which resource “is going to last into the latter part of the 21st century. (Lines 16 through 22, p16 of the Court’s bench decision.)

The court further noted on lines 16 through 19 on page 17 of the court’s decision:

“So, from that I conclude that the public interest in Ms. Kyser’s gravel is not high. There is plenty of other gravel around. And if this gravel weren’t ever mined, we would survive just fine.”

The presence of a demonstrated need for that land use as required in MCL 125.3207 is obviously sorely lacking in the Kasson Township case.

ARGUMENT II

THE MICHIGAN SUPREME COURT IN *SILVA v ADA TOWNSHIP, SUPRA*, AND ITS COMPANION DECISIONS, VIOLATED THE SEPARATION OF POWERS CONSTITUTIONAL MANDATE BY ADOPTING THE “VERY SERIOUS CONSEQUENCES” STANDARD FOR DECIDING THE VALIDITY OF LOCAL ZONING LEGISLATION PROHIBITING MINING ACTIVITY IN AN AREA OF THE TOWNSHIP.

A. Article 3, §2 of the 1963 Michigan Constitution provides as follows:

“The powers of the government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.”

As stated by the court in *Schwartz v City of Flint*, 426 Mich 295 (1986) at 305 and 306,

“Our state system is modeled after the federal system. The United States Supreme Court described the separation of powers as follows:

“‘The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other.’

The distinction between judicial and legislative authority is succinctly and clearly stated in the following often-quoted language of this Honorable Court in the case of *Brae Burn, Inc v City of Bloomfield Hills*, 350 Mich 425 (1957) at 430, 431 and 432:

“We are brought, then, to the merits of the zoning scheme itself. In view of the frequency with which zoning cases are now appearing before this Court, we deem it expedient to point out again, in terms not susceptible of misconstruction, a fundamental principle: this Court does not sit as a super-zoning commission. Our laws have wisely committed to the people of a community themselves the determination of their municipal destiny, the degree to which the industrial may have precedence over the residential, and the areas carved out of each to be devoted to commercial pursuits. With the wisdom or lack of wisdom of the determination we are

not concerned. The people of the community, through their appropriate legislative body, and not the courts, govern its growth and its life. Let us state the proposition as clearly as may be: It is not our function to approve the ordinance before us as to wisdom or desirability. For alleged abuses involving such factors the remedy is the ballot box, not the courts. We do not substitute our judgment for that of the legislative body charged with the duty and responsibility in the premises. As Willoughby phrased it in his treatise, *Constitution of the United States* (2nd ed. 1929, p. 321): 'The Constitutional power of a law-making body to legislate in the premises being granted, the wisdom or expediency of the manner in which that power is exercised is not properly subject to judicial criticism or control.' We held similarly in *Tel-Craft Civic Association v. City of Detroit*, 337 Mich. 326, 60 N.W.2d 294, 297:

"Unless it can be shown that the council acted arbitrarily or unreasonably, their determination is final and conclusive and no court may alter or modify the ordinance as adopted.'

"While it is within the province of the courts to pass upon the validity of statutes and ordinances, courts may not legislate nor undertake to compel legislative bodies to do so one way or another. (Citing cases.) The court erred in seeking to compel the defendant mayor and city commission members to amend the ordinance.' *Northwood Properties Co. v. Royal Oak City Inspector*, 325 Mich. 419, 423, 39 N.W.2d 25, 27.

"The ultimate power is vested in the council, and its good faith in acting for the public welfare cannot be questioned by the judicial branch of government.' *Gratton v. Conte*, 364 Pa. 578, 73 A.2d 381, 384.'

"It is a necessary corollary of the above that the ordinance comes to us clothed with every presumption of validity, *Hammond v. Bloomfield Hills Building Inspector*, 331 Mich. 551, 50 N.W.2d 155, and it is the burden of the party attacking to prove affirmatively that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of his property. *Janesick v. City of Detroit*, 337 Mich. 549, 60 N.W.2d 452. This is not to say, of course, that a local body may with impunity abrogate constitutional restraints. The point is that we require more than a debatable question. We require more than a fair difference of opinion. It must appear that the clause attacked is an arbitrary fiat, a whimsical ipse dixit, and that there is no room for a legitimate difference of opinion concerning its reasonableness. Such cases have in fact occurred (e. g., *Bassey v. City of Huntington Woods*, 344 Mich. 701, 705, 74 N.W.2d 897, where a lot zoned 'residential' was subject as such to side-line restrictions leaving only a 4-foot width to accommodate a 2-family dwelling) but they must in their very nature be extreme and the rule thus stated cannot justify the great numbers of cases reaching this court.

“We have stressed, heretofore, in these zoning cases, the principle that each case must be judged on its own facts. Some confusion may have arisen from its frequent repetition. The statement is merely a truism in the law, applicable to all cases, from arbitration to zoning. It solves nothing. Most assuredly it does not imply that each zoning case stands alone, unrelated to and untouched by the others. To put it in another way, we have no ‘Woodward avenue rule,’ no ‘traffic’ rule as such, no ‘diminution in value’ rule. All these are merely factors to be considered, pieces of the mosaic. The question always remains: As to this property, in this city, under this particular plan (wise or unwise though it may be), can it fairly be said there is not even a debatable question? If there is, we will not disturb.”

* * * * *

“Somewhere one zone must end and another start. There will always be peripheral problems. But as the Supreme Court of Illinois expressed it in a recent ‘across-the-street’ case (*Wesemann v. Village of La Grange Park*, 407 Ill. 81, 87, 88, 94 N.E.2d 904, 908) stated:

‘It is practically a suburb of Chicago and is about fifteen miles to the west of the Loop district. The village authorities have been diligent in attempting to enforce its zoning regulations. It is the province of the municipal body to draw the line of demarcation as to the use and purpose to which property shall be assigned or placed, and it is neither the province nor duty of courts to interfere with the discretion with which such bodies are invested, except where there is a clear showing of an abuse of that discretion, which is not the case where the question is merely debatable.

“The fixing of zoning lines is a matter of legislative discretion and necessarily results in a different classification of uses on either side of the line. This does not render limitations on use of property near the boundary line in a more restricted district unreasonable or invalid.”

This separation of authority is further explained and identified in Section 62:36 of Rathkopf’s, *The law of Zoning and Planning*, under the heading *Presumption in Favor of “Board-Role of Court”*:

“Where the issues are such that the minds of reasonable persons could differ, the judiciary must defer to the discretionary judgment of local officials because of their familiarity with the Community and the wants and needs of the people they represent. “

“In the absence of proof of arbitrariness, a reviewing court is constrained to uphold the local determination regardless of its independent view of the wisdom of the decision to grant or deny the variance.

“By statute or ordinance, depending upon the decision to be reviewed, the power of decision is legislatively conferred upon a board of appeals or planning board or is reserved by the legislative body to itself. A court will not substitute its own judgment for that of a board unless it is demonstrated that the latter’s decision is arbitrary, contrary to law, or not supported by substantial evidence. To do otherwise would be to usurp powers delegated elsewhere: It would violate the doctrine of separation of powers.” (Citations omitted.)

Section 40:6 of *Rathkopf’s, supra*, further states in pertinent part:

“In most states, both the denial or grant of a rezoning application are considered legislative acts. As a consequence of this legislative characterization, courts, acting on the basis of historically evolved principals of the separation of powers of the branches of government, apply highly differential standards in reviewing the validity of rezonings, overturning grants or denials of rezoning only in cases where the action is clearly arbitrary and capricious.” (Citations omitted.)

B. Kasson Township’s Extensive Study and Resulting Legislative Action.

In the case at bar, Kasson Township planning commission, with assistance from experts in the fields of planning, geology, appraisals, mining contractors and general government, engaged in a comprehensive review and study of gravel deposits existing in the township, of the needs of the public and contractors for such gravel, of the disruption of the township through constant and multiple litigation and referendum elections on mining issues, of the desires and complaints of the citizens and property owners of the Township concerning the desired and undesired development of the Township, and of providing an appropriate and long-term supply of such anticipated gravel needs; and, as a result, with the approval of the county planning commission recommended the rezoning of approximately six square miles of Township territory for such mining purposes. This recommendation was adopted by the Kasson Township Board of Trustees and, contrary to previous history, was not followed by any

referendum election proceedings from its citizens who obviously accepted the ordinance.

Certainly, such extensive efforts and zoning legislation results could not be considered an arbitrary fiat, a whimsical ipse dixit, beyond any reasonable governmental purpose, and undebatably wrong or without reason. The reasonableness of the Township's zoning efforts is acclaimed by the thoroughness of the study upon which it was based. Kasson Township's zoning legislation was clearly within its legislative authority and cannot be infringed upon by the judiciary under the constitutional separation of powers doctrine.

As stated in *Rathkopf's, supra*, at Section 62:36, found at pages 62-82:

"If the formal requirements of the statute or ordinance have been met, the board's decision cannot be disturbed unless it is based on a legally untenable ground or is unreasonable, whimsical, capacious, or arbitrary." (Citations omitted.)

The limitations on judicial intrusion into the zoning legislative authority of municipalities is further succinctly explained in the Section 25.278, *Limitations on Courts*, found in McQuillin's *Municipal Corporations*, 3d Edition revised, with a cite to *Tel-Craft Civic Ass'n v City of Detroit*, 237 Mich 326 at 330 & 331 as follows:

"Judicial power to inquire into, review and set aside municipal zoning laws is subject to definite limitations arising from the governmental and legislative nature of zoning as well as from the separation of the judiciary from the legislative branch of government. This limited scope of judicial review must be kept in mind with respect to contentions that an ordinance adopted pursuant to a zoning statute is arbitrary, unreasonable and unconstitutional. Zoning is a legislative function and, as a result, under the limitation arising from the constitutional separation of powers, it is not subject to judicial interference except for abuse of discretion, excessive use of power or error of law."

C. The *Silva, supra* decision's violation of the constitutional separation of powers doctrine.

The *Silva, supra* decision and its progeny established a new non-statutory requirement to overturn a zoning ordinance which prohibited mining in a given area of the township unless the township proved the existence of "very serious consequences" which would occur if the mining were allowed to proceed. Such a standard is contrary to law in many respects:

(1) It establishes a preferred status for mining which does not exist in the zoning and planning acts of Michigan. The Zoning Enabling Act does provide for special zoning treatment for "state licensed residential facilities" for "family child care homes", for "group child care homes" (see MCL 125.3206); and for a home occupation to give instruction in a craft or fine art within a residence under MCL 125.3204); and finally, for drilling, completion or operation of oil or gas wells under MCL 125.3205.

Under the well known and accepted doctrine of "inclusio unius est exclusio alterius" (inclusion of one thing is the exclusion of another), the express inclusion of some preferred uses, excludes any other preferred uses.

Furthermore, in the case of *Kropf v City of Sterling Heights*, 391 Mich 139 (1974) at 156, this court overruled the preferred use concept in the following language:

"Insofar as decisions of the Court of Appeals are based solely on the concept of 'favored or preferred use' and the attended shifting of burden of proof, they are hereby overruled. Plaintiffs must bear the burden of proof in attacking the constitutionality of the ordinance in question.

"Our laws have wisely committed to the people of a community themselves the determination of their municipal destiny, the degree to which the industrial may have precedence over the residential, and the areas carved out of each to be devoted to commercial pursuits. With the wisdom or lack of wisdom of the determination, we are not concerned. The people of the community, through

their appropriate legislative body, and not the courts, govern its growth and its life.”

(2). In *Brae Burn, Inc. v City of Bloomfield Hills, supra*, the court stated at 430 the axiom many times since repeated, “This court does not sit as a super-zoning commission.”

The *Silva, supra*, decision, has on the basis of the foregoing violated the separation of powers doctrine in the Michigan Constitution by creating a new required standard of “very serious consequences” and accordingly, a preferred use for mining which constitutes improper legislation outside the bounds of judicial authority.

ARGUMENT III

THE REQUIREMENT OF PROOF BY THE TOWNSHIP OF “VERY SERIOUS CONSEQUENCES” TO SUSTAIN ITS ZONING ORDINANCE PROHIBITING MINING IN AN AREA OF THE TOWNSHIP IMPERMISSIBLY SHIFTS THE BURDEN OF PROOF OF THE PRESUMPTIVE VALIDITY OF ITS ORDINANCE ONTO THE TOWNSHIP.

A. Unique Facts Can Influence an Improper Decision

The *Silva, case, supra*, was consolidated with *Ottawa Silica Company v Township of Brownstown* wherein the trial court found that:

“The resource to be mined is a unique type of silica sand, which, because of its qualities of being both round and white, is particularly valuable for foundry use and the manufacturing of fine crystal. There is no other deposit of such sand in this country at this relatively shallow level underground, which means that it can be mined more economically than if it were deeper under the ground, and hence can be sold at a most competitive price”. (Emphasis added.)

Furthermore, 49% of the parcel was within a floodplain which could not be built upon.

In the case at bar, contrary to this unique situation, the plaintiff’s land was developable for residence purposes or for agriculture (paragraph 3, Stipulated Order for Trial), the gravel deposits therein were in no manner unique; and, in fact, were in

minimal amount compared with the gravel in the six square miles adjacent to the plaintiff's property. There was no evidence of any pressing need for plaintiff's gravel, no existing offer to purchase her gravel, and plaintiff only hoped to sell the property for mining purposes. (Paragraph 34 , Stipulated Order for Trial.)

Furthermore, since Plaintiff requested and obtained an order in limine preventing Defendant Township from submitting evidence of other permissible and proper uses of her property under the Township Zoning Ordinance, it must be assumed the ordinance did not render her property useless for other purposes.

Amicus Curiae Michigan Townships Association submits that given the facts of the case at bar with no unique gravel supply nor lack of other permissible uses under current zoning, the *Silva* case decision would have been in favor of the Township upholding its zoning ordinance mining prohibition in favor of residential or rural development.

B. The Presumption of Validity of Kasson Township's Zoning Ordinance Must Prevail.

Even the Supreme Court decision in the *Silva* case *supra* at 158 states:

"Zoning ordinances are presumed to be reasonable, and a person challenging the ordinance has the burden of proving otherwise."

The Supreme Court then proceeded to distinguish the *Silva* case, *supra* at 158 by the following:

"These appeals concern the standard to be employed in determining reasonableness where the zoning would prevent the extraction of natural resources." (Emphasis added.)

Amicus Curiae submits this distinction is improper in that it is creating a classification and a new standard for that classification, respectively: A "classification"

of extraction of a natural gravel resource; and a “standard” for prohibiting that classification of proof of “very serious consequences”.

The *Silva* decision proceeds to elaborate on the standard to be applied to this new classification of extraction of natural resources at 159:

“If the gain to the public by the ordinance is small when compared with the hardship imposed upon the individual property owner by the restrictions of zoning ordinance, no valid basis for the exercise of police power exists.”

In reverse, if the gain to the public is large (the preservation of its zoning ordinance and protection of health, safety and general welfare without loss of any needed gravel supply for the public) in comparison with the minimal hardship to the property owners (the inability to compete against a major six square miles of good gravel supply accompanied by the right to use the property as zoned) affords “no valid basis for the exercise of police power” and the mining prohibition prevails. All of the foregoing supports the presumption of validity of the zoning ordinance and the acknowledged burden of proof upon the plaintiff to convince the court of its invalidity. See *Kirk v Township of Tyrone*, 398 Mich 429 (1976) where at page 441 the court states:

“Therefore, unless the Legislature speaks otherwise, the appropriate standard by which the validity of a zoning ordinance may be challenged is that, to overcome the presumption of validity with which a zoning ordinance, as all legislation is clothed, the party attacking the ordinance bears the burden of proving that the ordinance is an arbitrary and unreasonable restriction upon the owner’s use of his or her property.”

Further cases of this nature are as follows:

In *White Lake Township v Amos*, 371 Mich 693 (1963), the court states at: 698:

“The zoning ordinance is presumed to be valid and the burden is upon the party attacking to prove the ordinance is arbitrary and unreasonable restriction on the owner’s use of his property.”

In *Kropf v City of Sterling Heights*, 391 Mich 139 (1974) the court stated at page 162:

“It is a necessary corollary of the above that the ordinance comes to us clothed with every presumption of validity, ...and it is the burden of the party attacking to approve affirmatively that the ordinance is an arbitrary and unreasonable restriction upon the owner’s use of his property.... This is not to say, of course, that a local body may with impunity abrogate constitutional restraints. The point is that we require more than a debatable question. We require more than a fair difference of opinion. It must appear that the clause attacked is an arbitrary fiat, a whimsical ipse dixit, and that there is no room for a legitimate difference of opinion concerning its reasonableness.” (Citations omitted.)

At page 156, the *Kropf, supra*, court also invalidated the concept of favored or preferred use in the following language:

“Insofar as decisions of the Court of Appeals are based solely on the concept of ‘favored or preferred use’ and the attendant shifting of the burden of proof, they are hereby overruled. Plaintiffs must bear the burden of proof in attacking the constitutionality of the ordinance in question. It is up to them to present sufficient proofs to the court showing that the defendant city by its action violated one of their aforesaid constitutional rights and thus acted ‘unreasonably’. They must show that the city, via its ordinance denied them substantive or procedural due process, equal protection of the laws, or deprived them of their property without just compensation. To each of these claims the court will apply their proofs presented and determine if they have met their burden in showing the ordinance in question to be ‘unreasonable’, for as we have said, reasonableness is the test of its validity.”

The plaintiff’s meager proofs of some comparatively minimal supply of gravel on plaintiff’s property, of plaintiff’s property’s proximity to the Township’s gravel mining district, the lack of evidence of a “need” for plaintiff’s gravel, the plaintiff’s initial disinterest in being included in the Township’s gravel mining district and the plaintiff’s alleged but unproven lack of very serious consequences to defendants and others occurring from plaintiff’s speculative mining activities; when compared with Kasson Township’s thorough and well-identified history and study of the township, its past mining issues and six square mile gravel mining approval for meeting all gravel needs

for the foreseeable future, conclusively supports the validity of Kasson Township's zoning ordinance, the failure of plaintiffs to meet their burden of proof, and the foregoing weakness of the *Silva, supra* decision upon which the lower courts exclusively based their overruling of the Township's reasonable and protective zoning ordinance.

ARGUMENT IV

THE *SILVA, SUPRA*, STANDARD OF "NO VERY SERIOUS CONSEQUENCES" REQUIRED BY THE COURT TO UPHOLD A PROPOSED GRAVEL MINING OPERATION PROHIBITED UNDER A ZONING ORDINANCE, IS APPLICABLE TO A MINING'S ADVERSE CONSEQUENCES ON A LOCAL GOVERNMENT'S CONTINUANCE AS A VIABLE, STABLE AND ATTRACTIVE MUNICIPALITY FOR ESSENTIAL DEVELOPMENT NECESSARY FOR MUNICIPAL SURVIVAL.

A. Pertinent provisions of the Michigan Zoning Enabling Act.

MCL 125.3203 (successor to MCL 125.273) again provides in pertinent part:

"The zoning ordinance shall be based upon a plan designed to promote the public health, safety, and general welfare, to encourage the use of lands in accordance with their character and adaptability, to limit the improper use of land, to conserve natural resources and energy, to meet the needs of the state's residents for food, fiber and other natural resources, places of residents, recreation, industry, trade, service, and other uses of land, to ensure that uses of the land shall be situated in appropriate locations and relationships, to avoid the overcrowding of population, to provide adequate light and air, to lessen congestion on the public roads and streets, to reduce hazards to life and property, to facilitate adequate provision for a system of transportation, sewage disposal, safe and adequate water supply, education, recreation, and other public requirements, and to conserve the expenditure of funds for public improvements and services to conform with the most advantageous uses of land, resources, and properties. The zoning ordinance shall be made with reasonable consideration to the character of each district, its peculiar suitability for particular uses, the conservation of property values and natural resources, and the general and appropriate trend and character of land, building, and population development." (Emphasis added.)

The foregoing provision identifies the elements necessary to provide, protect, and to ensure the successful future of a municipality and to accommodate and satisfy the public's needs and interest. To ignore the same would create "very serious consequences" to the detriment of the public and the proper development of the

municipality. The previous aggravated and unsettling history of Kasson Township involving multiple lawsuits against the Township as well as referendums on gravel mining issues were disruptive of township government and the stability of development within the Township which created both a township financial burden and a feeling of lack of security for future property development within the Township.

To curtail the proliferation of these “very serious consequences” caused by continued additional encroachment into otherwise developable areas of the Township by new and aggressive gravel mining requests which discouraged and prohibited other desirable and beneficial developments, the Township, with the aid of experts, comprehensive studies and public hearings created a six square mile valuable gravel area to accommodate the gravel needs within the Township and surrounding communities for the foreseeable future. Rather than constantly being on the defensive to protect and preserve the proper development of the Township, the Township planning commission and board of trustees engaged in a proactive solution to the dilemma by the foregoing zoning ordinance approach which more than met the foreseeable needs of the mining industry and the public for such minerals and at the same time, preserved the municipal integrity of the township to control its development for the health, safety and welfare of its citizens and property owners. The mining ordinance’s provisions were not contested in court nor by petition for referendum and were accordingly fully accepted by the general public and the mining industry.

As it might be said in the vernacular, “it was necessary to stop the bleeding before the patient died”, which the gravel mining ordinance accomplished.

Again, as so apply stated by this Honorable Court in *Brae Burn, Inc., v City of Bloomfield Hills, supra*, at 431:

“Our laws have wisely committed to the people of the community themselves the determination of their municipal destiny, the degree to which the industrial may have precedence over the residential, and the area carved out of each to be devoted to commercial pursuits. With the wisdom or lack of wisdom of the determination we are not concerned. The people of the community, through their appropriate legislative body, and not the courts, govern its growth and its life. Let us state the proposition as clearly as may be: It is not our function to approve the ordinance before us as to wisdom or desirability. For alleged abuses involving such factors, the remedy is the ballot box and not the courts. We do not substitute our judgment for that of the legislative body charged with the duty and responsibility in the premises.”

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Amicus Curiae, Michigan Townships Association, respectfully requests that this Honorable Court enter an order:

A. Reversing the lower court’s decisions which invalidated Kasson Township’s denial of Plaintiff’s requested rezoning of her property for gravel mining on the following basis:

- (1) MCL 125.297a, recodified as MCL 125.3207 requires proof of a demonstrated need for gravel to void a zoning ordinance prohibition as distinguished from proof of “very serious consequences” enunciated as such basis in *Silva, supra* and which was totally lacking in evidence.
- (2) *Silva, supra*, in initiating the rule of “very serious consequences” to validate a zoning ordinance mining prohibition constitutes judicial legislation in violation of the constitutional “separation of powers” doctrine.
- (3) *Silva, supra*, decision that “very serious consequences” must be proven to support a zoning ordinance mining prohibition violates the presumption of validity of a zoning ordinance, impermissibly shifts

the burden of proof of the validity of the ordinance onto the municipality, and impermissibly grants a preferred use status to gravel mining not provided by statute.

- (4) The rule of “very serious consequences” to sustain a mining prohibition in a township zoning ordinance, if valid, is not limited to proof of a nuisance but extends to serious impediments to normal governmental functions, purposes and development as exhibited in the within case.

Respectfully submitted.

Dated: August 7, 2009

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