


MEMORANDUM

TO: Emmet County Planning Commission

FROM: Robert J. Engel, Civil Counsel 

DATE: August 23, 2017

RE: Mineral Extraction Request - Elmers - Pickerel Lake Road

The Planning Commission has asked assistance from civil counsel regarding Elmers' request for a mineral extraction special use permit off of Pickerel Lake Road. It is my understanding that the Bear Creek Township Planning Commission recommended denial of the special use permit. At the subsequent Emmet County Planning Commission meeting, more details were brought forth by Elmers. At that meeting, the Planning Commission asked Ms. Doernenburg to consult with the county's civil counsel.

Issues involving mineral extraction under a zoning ordinance are often different than other applications of the ordinance. The State of Michigan has spoken clearly, through its appellate courts and legislature, that mineral extraction is treated differently from most issues coming before a planning commission.

The following information provides some historical background and is taken from the book, *Michigan Zoning, Planning, and Land Use*, published through the Institute of Continuing Legal Education (ICLE):

Michigan courts had created a special rule for judicial review of cases in which a proposed mineral extraction operation has been denied zoning approval. The essence of this special rule was as follows:

- Zoning ordinances are presumed to be reasonable and valid.
- The person challenging a zoning regulation that prevents mineral mining has the burden of overcoming the presumption of reasonableness by showing that:
 - the property at issue contains valuable natural mineral deposits,
 - there is a public need for such minerals, and
 - no "very serious consequences" would result from the proposed mineral extraction operation.

The supreme court in [*Kyser v Kasson Township*, 278 Mich App 743, 755 NW2d 190 (2008), rev'd, 486 Mich 514, 786 NW2d 543 (2010)] held that the "no very serious consequence rule" was not a constitutional requirement and violated the constitutional separation of powers. The supreme court also held that this special rule was superseded by the ZEA's exclusionary zoning provision, MCL 125.3207. The legislature clearly intended for localities to regulate land uses, including the extraction of natural resources other than oil and gas. The constitution only requires that a zoning ordinance be reasonable, regardless of whether the ordinance does or does not regulate the extraction of

natural resources. Moreover, an ordinance is presumed to be reasonable, and the burden is on the party challenging the ordinance to overcome this presumption by demonstrating that there is no reasonable governmental interest being advanced.

In response to *Kyser*, the legislature amended MCL 125.3205 in 2011 PA 113. This enactment embodies the most unusual approach of effectively reversing the portion of *Kyser* that had overruled the *Silva* decision discussed above by reinstating the standards set forth in *Silva* by express reference to the case name. Thus, 2011 PA 113 returns to Michigan the *Silva* test for determining the validity of zoning that prohibits natural resource extraction, namely the so-called “no very serious consequences” test. However, the statute has provided additional details on the application of this test. First, in MCL 125.3205(3) and (4), an initial threshold is established for property owners who seek the benefit of the statute. In MCL 125.3205(3), a property owner must show that the natural resources proposed to be extracted are “valuable,” i.e., that the extraction operation will “receive revenue and reasonably expect to operate at a profit.” An interpretation of this statutory language clarifies that the “no very serious consequences” rule is intended to apply only to a “commercial” operation. MCL 125.3205(4) goes on to impose the very significant requirement that the property owner show a “need” for the resources, that is “that there is a need for the natural resources by the person or in the market served by the person.” Taking these in reverse order of appearance in the statute, a showing of need “in the market served by the person” would involve a demonstration that the resources would be sold in the marketplace and that there is an insufficient supply of resources to satisfactorily meet the prevailing demand. What must be shown to demonstrate “a need for the natural resources by the person” apart from a need in the market is slightly less clear. It would appear that this “need” refers to a person who operates a business that requires the natural resources in question as a raw material for producing a final product such as cement or asphalt and that there is an absence of a reasonable supply of such resource, thus giving rise to a need by this person to extract the resource for the person’s own use.

The statute, MCL 125.3205, is printed below with several areas of concern highlighted:

- (1) A zoning ordinance is subject to all of the following:
 - (a) The electric transmission line certification act, 1995 PA 30, MCL 460.561 to 460.575.
 - (b) The regional transit authority act.
- (2) A county or township shall not regulate or control the drilling, completion, or operation of oil or gas wells or other wells drilled for oil or gas exploration purposes and shall not have jurisdiction with reference to the issuance of permits for the location, drilling, completion, operation, or abandonment of such wells.

(3) *An ordinance shall not prevent the extraction, by mining, of valuable natural resources from any property unless very serious consequences would result from the extraction of those natural resources.* Natural resources shall be considered valuable for the purposes of this section if a person, by extracting the natural resources, can receive revenue and reasonably expect to operate at a profit.

(4) A person challenging a zoning decision under subsection (3) has the initial burden of showing that there are valuable natural resources located on the relevant property, that there is a need for the natural resources by the person or in the market served by the person, and that no very serious consequences would result from the extraction, by mining, of the natural resources.

(5) *In determining under this section whether very serious consequences would result from the extraction, by mining, of natural resources, the standards set forth in *Silva v Ada Township*, 416 Mich 153 (1982), shall be applied and all of the following factors may be considered, if applicable:*

(a) The relationship of extraction and associated activities with existing land uses.

(b) The impact on existing land uses in the vicinity of the property.

(c) The impact on property values in the vicinity of the property and along the proposed hauling route serving the property, based on credible evidence.

(d) The impact on pedestrian and traffic safety in the vicinity of the property and along the proposed hauling route serving the property.

(e) The impact on other identifiable health, safety, and welfare interests in the local unit of government.

(f) The overall public interest in the extraction of the specific natural resources on the property.

(6) Subsections (3) to (5) do not limit a local unit of government's reasonable regulation of hours of operation, blasting hours, noise levels, dust control measures, and traffic, not preempted by part 632 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.63201 to 324.63223. However, such regulation shall be reasonable in accommodating customary mining operations.

(7) This act does not limit state regulatory authority under other statutes or rules.

As noted, the above statute provides that standards referred to as “very serious consequences” need to be applied in mineral extraction matters, including the standards set forth in *Silva v Ada Township*, 416 Mich 153 (1982). Quite frankly, when I read the *Silva* case, its predecessors and

subsequent cases, including the case that overruled the *Silva* decision, and the Legislature's response to adopt *Silva* over the supreme court's decision, it is difficult to state exactly what is meant by "very serious consequences" other than what the statute reads in subparagraph 5.

In my opinion, the only definite conclusion that I have from the courts and legislature is that mineral extraction is treated differently than other zoning decisions, placing the initial burden on the person requesting the permit to set forth reasons for the need, and, if met by the person, then are there "very serious consequences" if the permit was not to be granted. At that point, if the Planning Commission believed that denial of the permit was appropriate, the commission would have to state the "very serious consequences" that it finds to deny the permit. The general rule would be for a court to uphold the decision made by the Planning Commission if the decision is supported by the evidence under the heightened "reasonableness" standards of the statute.

To summarize, MCL 125.3205 specifically addresses mineral extraction. The statute provides that a local zoning ordinance cannot prevent the extraction, by mining, of valuable natural resources from any property unless very serious consequences would result from the extraction of those natural resources. MCL 125.3205(3). Valuable natural resources is defined in the same subsection as ". . . if a person, by extracting the natural resources can receive revenue and reasonably expect to operate at a profit." The applicant also has to show that there is a need for the natural resources by the person or in the market served by the person. MCL 125.3205(4).

Based on the factual information available to me, it appears that there is a valuable natural resource at the applicant's location. The next question is whether Elmers can show that there is a need to extract the sand and gravel. Elmers would likely receive revenue and expect a profit from extracting sand and gravel. Elmers would still have to show there is an actual need. The last question then becomes whether there is sufficient evidence to show the planning commission can prevent the extraction based on the provision of the statute that reads: "unless very serious consequences would result from the extraction . . ."

Between the provisions of Zoning Ordinance Section 26.10.4 and Zoning Ordinance Section 21.02, the County's Zoning Ordinance appears to comply with the statute. In addition, the County of Emmet has provisions in its Zoning Ordinance in relationship to mineral extraction activities. Resource mining and extraction is considered subject to a Special Use Permit under Zoning Ordinance Section (hereafter "ZO Section") 26.10 et seq. Some of the factors suggested above are considered in ZO Section 26.10.1 and 26.10.4. Further consideration is found in ZO Section 21.01 regarding Special Land Use Review.

Now, directing to the question being asked by the Planning Commission, four additional studies and/or requests are being sought in this case. These include a traffic impact study, environmental impact study, water impact study, and evaluation of property values if the extraction operation was approved. Answers to these questions would aid the Planning Commission in making a determination of whether very serious consequences exist and the extent to which those consequences affect the decision to either grant or deny the request.

Generally, the first three studies/requests fall within ZO Section 21.02 and ZO Section 26.10.4. A traffic impact study is specifically stated as something that can be required. Also a road agency (i.e., road commission) review is required under certain circumstances. Under the

ordinance, it would be further reasonable to require the applicant to provide an environmental impact and water impact study. It is my understanding that there may be a claim that part of the property is wetlands, which require special protection.

The Planning Commission can require Elmers to provide the first three studies/requests. Of course, the County could acquire its own studies if felt necessary to either confirm or question the applicant's studies.

As to the fourth request/study, the evaluation of property values, it is not addressed in the Zoning Ordinance, but is one of the factors in MCL 125.3205(5). The County could request Elmers to provide the evaluation of property values, but I do not see how the County could make it mandatory for Elmers to do so. On the other hand, Elmers should be strongly encouraged to present such a study to be considered as part of the application process.

I understand that several of the neighboring property owners have stated that the extraction operation would diminish their property value, but no numbers have been provided. If the neighbors provided appropriate documentation to that effect through a licensed appraiser, the County would not have to have a separate study to meet the standard. But, as noted in the statute, the evaluation of property values must be based on credible evidence. Therefore, something more than a statement that "my property value will go down" would be necessary for this standard to be met. Similar to Elmers, the neighboring property owners may want to present their own study regarding an evaluation of property values.

If the County decided to retain a third party to look at the effect on property values, the Planning Commission will have to determine which properties are affected. The statute refers to "impact on property values *in the vicinity of the property and along the proposed hauling route* serving the property." The statute does not provide a distance for what is "in the vicinity." Based on topography and other land uses in the area, "vicinity" for one case may be different in another case.

The below excerpt is from a Court of Appeals case about the time that the *Silva* decision came from the Michigan Supreme Court. The case addresses many of the factors of "very serious consequences," but of particular importance is the portion dealing with noise levels as well as property values. The case is very fact-specific, so it is clear that the more information available for a decision by the Planning Commission, the better to support its decision:

Second, the trial judge found that the truck traffic generated by plaintiff's operation would result in a serious increase in traffic noise along the three-mile haul route. Expert testimony revealed that each gravel truck that passed by would result in a noise level of eighty-four to one hundred four decibels. A noise level of sixty decibels has been determined to be "very noisy urban" and "not well suited to detached residential houses". A noise level of sixty-five decibels has been determined to be "intolerable" to fifty percent of the general population. Defendant township's expert testified that if the noise level of a gravel truck reached eighty-nine decibels, a sixty-decibel noise level would exist 1400 feet on either side of the county road and a sixty-five-decibel noise level would exist seven hundred feet on either side of the road. If the truck noise level reached one hundred four decibels, a sixty-decibel noise level would exist 5600 feet on either side of

the road and a sixty-five-decibel noise level would exist 2800 feet on either side of the road. For reference purposes, a sixty- to seventy-decibel noise level is equivalent to the noise of a dishwasher or vacuum cleaner, a ninety-decibel noise level is equivalent to a motorcycle twenty-five feet away, and ninety-five- to one hundred five-decibel noise level is equivalent to a jackhammer.

Based on this evidence, the trial judge did not err in finding that plaintiff had failed to prove that its extraction operations would not have a significant effect on the noise level along the haul route. Contrary to plaintiff's argument on appeal, the fact that federal law may exclusively regulate truck noise levels and thus may preempt state and local regulation does not preclude the trial judge from considering the gravel truck noise level. Neither defendant township nor the trial judge were attempting to directly regulate the noise level of plaintiff's trucks, but were merely considering the truck noise level to determine whether it would constitute a "very serious consequence" to the community for purposes of assessing the reasonableness of a zoning regulation. Thus, whether or not federal regulations preempt the field and control noise levels on federal highways does not prevent consideration of the noise factor for purposes of litigating the validity of a zoning ordinance.

Third, the trial judge found that plaintiff's extraction operations would result in a serious decrease in the value of property near plaintiff's land and proposed haul route. Defendant township's expert witness on real estate values rebutted the evidence presented by plaintiff's experts, which indicated that a decrease in property values near sand and gravel mining operations should not be expected. Based on a comparative analysis of assessed property values for property near gravel operations, defendant's expert witness concluded that values of properties adjacent to plaintiff's gravel operations would decrease from five to twenty percent. The trial judge was entitled to weigh the experts' credibility and to sift their opinions as to value. In doing so, there was testimony to support his conclusion that plaintiff had failed to prove that its gravel operations would not result in a serious decrease in the values of surrounding properties.

American Aggregates Corp. v. Highland Township, 151 Mich. App. 37, 48-50 (1986)

In summary of this factor of evaluation of property values, it is my opinion that the Planning Commission needs credible evidence of any effect to property values. This credible evidence can be produced by the applicant, by neighboring property owners in the vicinity of the proposed extraction site, or by the Planning Commission retaining a third party.

It is possible that the Planning Commission could state that the property value factor does not carry great weight in its decision when compared to the other factors. However, it is my opinion that would open the door to an action in the Circuit Court.

Finally, MCL 125.3205(6) clarifies that the provisions of subsections (3) through (5) do not limit a municipality's ability to reasonably regulate hours of operation, blasting hours, noise levels, dust control measures, and traffic as long as the regulation is reasonable in accommodating customary mining operations.