Michigan Loves Mining . . . Again

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In July 2011, the Michigan legislature invalidated a Michigan Supreme Court ruling that found gravel mining not to be a preferred land use. Just one year before, the Michigan Supreme Court issued its opinion in *Kyser v. Kasson Township*, 786 N.W.2d 543 (Mich. 2010). In *Kyser*, the court held that a judicially created law for gravel mining was invalid.

In Michigan, most zoning ordinances are reviewed under the traditional reasonableness standard. However, since 1982, the court had held that this standard was not appropriate for the special problem of natural resource extraction. Instead, the court announced a new test in *Silva v. Ada Township* 330 N.W.2d 663 (Mich. 1982). This new test held that a more rigorous standard of reasonableness was necessary. This test was used for a landowner who challenged a zoning ordinance that prevented him from extracting natural resources through mining. Under this test, the landowner bore the burden of proof, and the ordinance was still presumed reasonable. The landowner also must show that there is a valuable natural resource on his property. And the landowner must demonstrate that no "very serious consequences" would result from extracting those resources. This test came to be known as the "very serious consequences" or *Silva* test.

This test was later developed through lower court opinions into two prongs. The first prong was a subjective test where the landowner must show that by extracting the resource he or she can reasonably hope to operate at a personal profit. The second prong is a balancing test. The factors include the impact from increased truck traffic, the effect on the community's residential development and tax base, and the degree of public interest in the resource. The level of public interest in the resource impacts the landowner's burden. Essentially, it creates a sliding scale. Where the interest is low, the landowner must make a strong showing that no "very serious consequences" will result.

In *Kyser*, the Michigan Supreme Court found that the *Silva* test inverted the presumed reasonableness of a zoning ordinance. This resulted in the municipality being forced to prove that the "very serious consequences" would occur. The court also held that Michigan's Zoning Enabling Act superseded *Silva*. Because the legislature had given the power to regulate land uses to municipalities, the power to regulate natural resource extraction was included. The court found that the legislature did not intend that mining hold status as a high-priority land use as *Silva* had made it. The court also found that *Silva* violated the separation of powers principles. The court held that *Silva* made the judiciary a policy-making body.

A year after *Kyser*, Michigan enacted Public Act 113 of 2011 (Act 113). Act 113 legislatively overturned *Kyser*. Representative Matt Huuki, the legislation's sponsor, issued a statement, saying that "[t]he necessity of the new law became apparent following a court decision that led local municipalities to begin halting aggregate mining operations through zoning regulations, putting Michigan's struggling economy and desperately needed jobs for area families at further risk." In a joint statement by Michael Newman, Executive Director of the Michigan Aggregates Association (MAA), and Kenneth Vermeulen, MAA's general counsel, they announced that "[t]he purpose and intention of [Act] 113 was to simply return the state to the pre-*Kyser* state of the law." The MAA supported the legislation and helped draft the initial language. The enacted law was written with input from local government groups.

Act 113 sought to codify the *Silva* test. The act goes as far as stating, "[i]n 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 (Mich. 1982), shall be applied." However, Andy Schor, Assistant Director of the Michigan Municipal League (MML), argues that Act 113 changes the "very serious consequences" test from how it was applied in *Kyser* and *Silva*. Indeed, Act 113 changes the *Silva* test in a few ways. These changes provide uncertainty as to how *Silva* could be applied and whether any earlier case law now applies.

First, Act 113 states that municipalities "shall not prevent the extraction, by mining, of valuable natural resources . . . unless very serious consequences would result." The act states that natural resources are valuable "if a person, by extracting the natural resources, can receive revenue and reasonably expect to operate at a profit." This is a small change from *American Aggregates Corp. v. Highland Township*, 151 Mich. App. 37, 41; 390 NW2d 192 (1986), where the court held that a landowner must prove that by extracting the resource he "can raise revenues and reasonably hope to operate at a personal profit." The changed language is subject to differing interpretations. According to the MAA, it was not its "intention to change the elements of the *Silva* test, as applied by the courts for the past 30 years." On the other hand, Gerald Fisher, appellate counsel for Kasson Township in *Kyser*, argues that whether "resources may be sold is quite different from the operation being commercially profitable." This distinction will likely require court interpretation.

Second, *Silva* had two-prong test: "The party challenging the zoning has the burden of showing that there are valuable natural resources and that no 'very serious consequences' would result from the extraction of those resources." *Silva v Ada Township*, 416 Mich. 153, 162; 330 N.W.2d 663 (Mich. 1982). Under Act 113, the landowner "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." However, under Act 113, the landowner must satisfy the two *Silva* prongs and an additional "need" requirement. This language, too, has sparked disagreement. According to the MAA, it was not intended that Act 113 "adds any additional burden or 'prong' to the test." However, Fisher disagrees, arguing that "[t]his language . . . creates a new threshold that a property owner must meet in order to be entitled to consideration under the 'no very serious consequences' rule. "

The "need" requirement likely presents a new element to the analysis. The legislature left open the question of how a landowner demonstrates the need either by the landowner or the landowner's market. Is it sufficient for the landowner to need the resource for its own purposes? What if the resource is readily available in its market? Is it still sufficient for the landowner to extract its own resource? Does the landowner's ability to sell the resource and operate at a profit satisfy the requirement that the landowner's market needs such resources? Does the marketplace's overall competitiveness or saturation for such resources matter? All these questions are opened by the need requirement

and are currently unanswered. Fisher predicts that the "need" requirement will be addressed on a case-by-case basis.

The third way that Act 113 changes the *Silva* test is that Act 113 states that determining whether very serious consequences would result must be done under the *Silva* standard and a reviewing court must use the *Silva* standard as well as consider all of the following factors: the impact on existing land uses; the relationship with those uses; the impact on property values near the extraction site and along the hauling route; the impact on pedestrian and traffic safety; the impact on the local government's other identifiable health, safety, and welfare interests; and the overall public interest in the extraction.

In *American Aggregates Corp. v. Highland Township*, 151 Mich. App 37, 42; 390 NW2d 192 (1986), the Court of Appeals, in determining if "very serious consequences" existed, reviewed several factors which largely mirror Act 113. However, Act 113 includes language making the local government's traditional police power to regulate impacts on its health, safety, and welfare interests a consideration. According to Fisher, including the health, safety, and welfare interests "means that the community would have the right to present evidence concerning the impact of the proposed mining on its Master Plan and Comprehensive Zoning Ordinance." However, given the discretionary language regarding the factors, it is unclear if a municipality must be invited by a reviewing court to provide evidence relevant to the factors. Is a court required to consider these factors if a municipality has done so as part of its legislative determination? Act 113's discretionary language is an open question that will likely be resolved on a case-by-case basis.

Act 113 has several issues that will likely be resolved in court. The MAA argues that Act 113 will not have a noticeable long-term impact. However, it acknowledges that the courts will determine whether Act 113 accomplished its purpose to return the law to that of pre-*Kyser*. The MML sees the future differently. Schor argues that Act 113 "muddies the waters" by creating new standards that will likely lead to increased litigation. Fisher anticipates that future litigation will center on the new "need" requirement and how to apply the factors. Given the significant changes in the past two years, how Act 113 will be interpreted and applied remains to be seen.

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