STATE OF MICHIGAN

COURT OF APPEALS

EDITH KYSER,

Plaintiff/Appellee,

v

KASSON TOWNSHIP, a Michigan General Law Township,

Defendant/Appellant.

Court of Appeals Consolidated Docket Nos. 272516 & 273964

Lower Case No. 04-6531-DZ

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BRIEF AMICUS CURIAE OF AMERICAN PLANNING ASSOCIATION AND MICHIGAN ASSOCIATION OF PLANNING IN SUPPORT OF DEFENDANT-APPELLANT, KASSON TOWNSHIP

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STATEMENT OF BASIS OF JURISDICTION

Amici accept and adopt the position of Defendant, Kasson Township with regard to the basis for jurisdiction.

STATEMENT OF QUESTION PRESENTED

WHETHER THE DECISION OF THE CIRCUIT COURT IS REPUGNANT TO THE PUBLIC INTEREST AND CONTRARY TO FUNDAMENTAL MICHIGAN ZONING JURISPRUDENCE, REPRESENTING AN UNNECESSARY SECOND-GUESSING OF RESPONSIBLY-ESTABLISHED TOWNSHIP-WIDE POLICY, A RE-DRAWING OF THE BOUNDARIES OF THE TOWNSHIP'S GRAVEL ZONING DISTRICT THAT HAD BEEN REASONABLY ESTABLISHED TO RESOLVE A PATTERN OF SERIOUS DISPUTES AND LITIGATION, AND AN EMASCULATION OF THE RELIANCE OF TOWNSHIP CITIZENS ON DULY ESTABLISHED ZONING DISTRICT LINES, AND, ACCORDINGLY, SUCH DECISION MUST BE REVERSED.

Plaintiff/Appellee would say:	NO
Defendant/Appellant says:	YES
Trial Court answered:	NO
Amici say:	YES

STATEMENT OF INTEREST

The American Planning Association ("APA") is a nonprofit public interest and research organization founded in 1978 exclusively for charitable, educational, literary and scientific research purposes to advance the art and science of planning – including physical, economic, and social planning – at the local, regional, state and national levels. The APA's mission is to encourage planning that will contribute to the well-being of people today as well as future generations by developing sustainable and healthy communities and environments.

The APA resulted from a merger between the American Institute of Planners, founded in 1917, and the American Society of Planning Officials, established in 1934. The organization has 46 regional chapters and 21 divisions devoted to specialized planning interests. The APA represents more than 42,000 professional planners, planning commissioners, and citizens involved with urban and rural planning issues. The Michigan Association of Planning ("MAP") is a chapter of APA representing a membership of some 3,700 planning commissioners and professional planners throughout Michigan. Members of APA and MAP are involved, on a day-to-day basis, in formulating and implementing planning policies and land-use regulations.

The present case has great significance to the future of land use and community planning in the state of Michigan. As explained in greater detail in this Brief, the circuit court's holding in this matter calls into question the ability and authority of townships and other local governments in Michigan to successfully implement well-conceived and thoughtful plans for the future of their communities. Kasson Township officials acted responsibly in anticipating the future need for mineral resources and accommodated this long-term need by proactively planning and zoning for an entire 3,000 acre zoning district in which gravel mining is permitted. The circuit court ignored the public interest associated with such planning and zoning that *permits* gravel mining, and focused its analysis as if the Township had *prevented* gravel mining.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a factual and legal context not previously examined by the Michigan appellate courts in connection with cases in which zoning jurisprudence intersects with gravel mining regulation.

The factual circumstances examined in previous mining regulation cases have been fairly consistent: they have involved zoning decisions that *prevented* gravel mining on single, isolated parcels of land. Michigan law, as announced in *Silva v Ada Township*, 416 Mich. 153, 330 N.W. 2d 663 (1982),[1] and further reviewed and explained in *American Aggregates Corp v Highland Township*, 151 Mich.App. 37, 390 N.W.2d 192 (1986), has embraced a special rule for judicial review in such cases. The essence of this special rule may be summarized as follows:

- Zoning ordinances are *presumed to be reasonable*. *Silva* at 162.
- A person challenging a zoning regulation that prevents gravel mining has the *burden of showing* that there are valuable natural resources to be extracted and that '*no very serious consequences*' would result from the extraction of those resources. *Silva* at 162.
- The 'no very serious consequences' formulation applies where an *important public interest* would be served. *American Aggregates* at 43.

This three-part test is referred to in this Brief as the "No Very Serious Consequences/Public Interest Rule."

The present case presents a factual circumstance distinct from *Silva* and *American Aggregates* in that the broad context in which this case is presented involves a municipality that has not *prevented* gravel mining. Rather, Kasson Township has *proactively permitted* gravel mining. Through the use of sound planning and zoning measures, the Township has formally

established a legislative policy that provides all gravel resources needed in the region into the latter part of the Century. Thus, in applying the No Very Serious Consequences/Public Interest Rule in this case, the public interest flowing from the Township's proactive action must be factored into the overall public interest equation.

Background of the No Very Serious Consequences/Public Interest Rule

To place this matter in proper context, it is appropriate to examine why the No Very Serious Consequences/Public Interest Rule – a rule that is most unusual in zoning jurisprudence -- was even considered by the Court relative to gravel extraction cases. The reality is that officials in some communities come under pressure from neighbors of properties proposed for gravel mining. The thrust of this pressure essentially amounts to a strong urging to deflect such gravel mining proposals to alternative locations – generally, as far away as possible from the site being proposed. This type of position by neighboring property owners has been characterized as the "not in my backyard," or "NIMBY" response to applications for zoning approval to conduct unwanted uses.

Of course, it should not be ignored that gravel mining operations represent a natural target for opposition by would-be neighbors during the planning and zoning process. The anticipation of external impacts unique to gravel mining operations has drawn large crowds at public hearings – and not entirely without an understandable basis. The large pieces of equipment utilized for extracting and then crushing and moving rocks and stones on a mining site produce significant noise and vibrations. When such heavy equipment is routinely joined by earth movers and large tandem trucks and trailers on the site, even greater noise and vibration occurs. Along with such noise and vibrations, there can be considerable dust produced on and off the site. By the very nature of the gravel business – requiring deliveries of very heavily-mined

[1] The majority opinion refers to the Court's holding as a "reaffirmance," however, Justice Ryan (concurring in part

and processed gravel throughout the region – numerous tandem trucks and trailers must travel over various "haul routes" to and from the operation site. All of us who are typical automobile drivers can identify with the experience of encountering one of these large gravel trucks, and especially following one for some distance, not a longed-for occurrence. For those who are not yet neighboring property owners, considering all of the impacts recited above, prospective buyers of residential and other types of property naturally tend to give low priority to land within reasonable proximity of mining operations, as well as properties along haul routes.

Thus, the "not in my backyard" incantation expressed in response to a proposed zoning approval for gravel mining is not unusual, nor even unexpected. Bearing this in mind, coupled with the consideration that gravel is a natural resource deposited in limited locations, the judicial creation of the relatively extreme No Very Serious Consequences/Public Interest Rule was judicially formulated by the Michigan Supreme Court in the 1992 *Silva* decision.

As advanced by Defendant Township, and discussed further by Amici below, the circuit court misconstrued and misapplied the No Very Serious Consequences/Public Interest Rule in this case. Of equal or greater importance, however, a new and important context for the examination of the No Very Serious Consequences/Public Interest Rule is presented in this case. Specifically, long before the complaint in this matter was even contemplated, the officials in Kasson Township had on a succession of occasions faced the NIMBY outcry, and, as part of the planning and zoning process, had, in effect, legislatively applied the No Very Serious Consequences/Public Interest Rule.

While the No Very Serious Consequences/Public Interest Rule had been created to address cases in which gravel mining was being *prevented,* Kasson Township deliberated on where gravel mining could be *permitted* in the Township in order to serve the regional market. In

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and dissenting in part) pointed out that prior decisions on the subject were "merely obiter dictum."

other words, in a very responsible measure taken to avoid future NIMBY confrontations, Kasson Township officials deliberated on the very serious consequences and public interest considerations relating to proactively locating properties on which gravel mining could be permitted, rather than facing ongoing *ad hoc* battles involving referenda and litigation on whether piecemeal gravel mining proposals should be approved. This was no small accomplishment, and must be recognized by the Court to be exemplary planning and zoning stewardship.

The Public Interest Context of this Case

This case goes well beyond the context of merely examining whether a municipality has legitimately prevented gravel mining on a single, isolated parcel of property. Kasson Township officials embraced the responsibility implicit in the No Very Serious Consequences/Public Interest Rule and, in a manner consistent with Michigan law and the public interest, effectively altered the playing field on which the rule had been conceived. Unlike a single parcel rezoning, this case must be examined within the context that, after due deliberation and public hearings intended by the Michigan Legislature, Township officials adopted a comprehensive land use plan for the community, and zoning in accordance with such plan, establishing *an entire zoning district for gravel mining*. Thus, the Township established a permissive – rather than preventive – Township-wide gravel policy. The decision of the lower court entirely neglected this material distinction from prior cases, and has the effect of undermining Township legislative policy which had already taken into consideration the essence of the No Very Serious Consequences/Public Interest Rule.

The major consequence of Kasson Township's initiative *permitting* all needed gravel mining for the region within a proactively established Gravel Zoning District is that the very context in which the No Very Serious Consequences/Public Interest Rule was conceived, i.e., the

context of reviewing the effect on the public interest resulting from municipal action *preventing* gravel mining on a single property, requires a fresh judicial analysis in this case. Three primary points, directly bearing upon the issue of *public interest*, are extremely relevant:

- ► First, in terms of the *need* for the gravel on Plaintiff's land, the circuit court found that the regional demand for gravel was satisfied based upon the resources available in the established Gravel Zoning District. Thus, there is little, if any, public interest in the gravel on Plaintiff's land.
- ► Second, unlike prior cases, the municipality here proactively *permitted* gravel mining based upon a Township-wide policy embodied in legislatively-drawn boundaries of an entire Gravel Zoning District. *This factor is relevant to the public interest for two reasons.*
    a) Establishment of the Gravel Zoning District has resolved disputes that threatened the peace and quality of life in the Township, and this threat is almost certain to return if *ad hoc* gravel zoning decisions are invited by a judicial alteration of the District in this case; and,
    b) The planning and zoning stewardship represented by the Gravel Zoning District should be a central focus of this case in that it *permits,* rather than *prevents***,** the mining of gravel. This proactive establishment of an entire gravel zoning district of substantial size totally negates the foundation and rationale under which the No Very Serious Consequences/Public Interest Rule had been established, i.e., the Rule seeks to assure that adequate gravel mining will be permitted somewhere, an assurance that doesn't

begin to find relevance in a municipality that has formulated a community-wide policy to permit adequate gravel mining.

- Third, the establishment of the Gravel Zoning District created a legitimate and important basis on which the citizens of the Township could rely in terms of a fixed location of the boundary lines for gravel mining. This, in turn, provided citizens with long-term stability unavailable during the prior volatile regime of *ad hoc* zoning battles. As detailed in this Brief, the Michigan Supreme Court has recognized this right of reliance upon established zoning boundaries, and has accordingly held that changes that would undermine reasonable expectations arising out of zoning district boundaries should be made very sparingly, and should occur only in the event of a change in circumstances.

Each of these three points is of significance on its own. *Taken together, they establish a paramount and overriding public interest.* Bearing these three points in mind, the question presented is whether there is sufficient public interest in gravel mining on the subject property to justify a judicial redrawing of the Township-wide policy embodied in the legislatively-drawn lines of the Gravel Zoning District. An analysis of the circumstances in this case requires the conclusion that the public interest in preserving the Gravel Zoning District far outweighs the public interest, if any, in altering the District to permit mining on Plaintiff's property. A decision to allow gravel mining on Plaintiff's property would not serve what *American Aggregates* at 43, found to be the underlying basis for the No Very Serious Consequences/Public Interest Rule:

> ". . . 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." (Emphasis supplied).

When a community has responsibly undertaken planning and zoning so as to proactively

establish township-wide policy that makes reasonable provision for gravel resources for the foreseeable future, and has legislatively drawn the lines of an entire gravel zoning district that may be relied upon by private property owners in the community, Amici urge this Court to recognize such action as an important advancement of the public interest, both in terms of gravel mining and overall land use stewardship.

Application of the No Very Serious Consequences/Public Interest Rule

The Court is not called upon to ignore Michigan precedent in gravel mining cases. Rather, it simply must be recognized that the exercise of planning and zoning, as undertaken by Kasson Township in proactively establishing its Gravel Zoning District, represents responsible land use stewardship that should not be judicially second-guessed. It may not be ignored that,

> "even in the context of limits on the extraction of mineral resources, zoning ordinances are presumed to be reasonable under the requirements of substantive due process. A person challenging the ordinance has the burden of proving otherwise." *American Aggregates* at 41 (citing *Silva*).

Thus, the Court is implored to conclude that the Township's responsible enactment of legislative policy to *permit* gravel mining may not be mechanically trampled by a rule formulated to counter efforts to *prevent* it. Application of the No Very Serious Consequences/Public Interest Rule to this case in the same manner as it has been applied to *ad hoc* zoning decisions rings hollow, indeed, and would amount to a very serious and insidious consequence in terms of this case and for Michigan's zoning jurisprudence.

The circuit court decision that second-guessed Township-wide policy, re-drawing the boundaries of the Township's Gravel Zoning District, and undermined the reliance of property owners on established zoning district lines, must be deemed repugnant to the public interest and contrary to fundamental Michigan zoning precedent. Accordingly, the circuit court decision should be reversed.

STATEMENT OF FACTS

Amici, American Planning Association and Michigan Association of Planning ("Amici"), adopt the Statement of Facts presented in Appellant Township's Brief on Appeal but wish to highlight and supplement facts particularly relevant to Amici's argument.

1. ***The Township as a repository of gravel resources***. There is no dispute, and the circuit court found, that Kasson Township is the repository of substantial gravel resources. As the circuit court characterized it, ". . . Kasson Township . . . is both blessed and cursed with a large deposit of what apparently is very good quality gravel, and has spawned a number of gravel operations both before zoning regulations and since then." (Transcript of circuit court's May 4, 2006 Opinion, p 3). The Township's Master Plan of 1995 (Exhibit 5a, p 2) notes the "purpose of the plan – to address the combination of the splendid natural beauty and the abundant usable natural resources of Kasson Township …"

2. ***Ad hoc rezoning applications and resulting instability***. Appellant's Brief, pp 3-5, provides the details and citations to the record with regard to the instability that reigned in the Township during the period of March 1988 through October 1994. In this period, there was a succession of *ad hoc* rezoning applications by property owners seeking authorization to conduct gravel mining operations. During this six and one-half year period, seven *ad hoc* applications were filed. When the township board granted some of these applications, referendum petitions were filed by citizens overturning Board action. Lawsuits, including a case raising claims between private interests, were filed. Generally, the period was marked by great uncertainty in the Township with regard to if, when and where the next gravel mining application would be filed. Due to the significant deposits of gravel in the Township, how could anyone predict with certainty where the next gravel operation would be proposed? Consequently, there was an

inability on the part of citizens, as well as the Township itself to undertake reliable planning for other land uses within the Township. These conditions are **serious, divisive, inefficient and destabilizing as applied in any municipality**. This state of affairs led the Leelanau County Planning Department to report that, "if the township is going to get control of these rezonings, they need to do it quickly and have a plan that would support their actions." (No. 6 on JEx, 23).

3. ***Establishment of Township-wide policy to bring peace, stability and quality of life to the Community*****.** In response to this six and one-half year reign of turmoil, the Kasson Township Board, the legislative body of the municipality, established a Township-wide gravel mining policy. The essence of this policy was embodied in a plan to set aside some six square miles, or 3,100 acres, for gravel mining. The intent of this plan was to put an end to the *ad hoc* gravel rezoning battles that had ripped and torn at the fabric of the Township's peace, stability and quality of life. This policy was implemented by the 1995 adoption of a new Master Plan, and 1997 enactment of legislation in the form of Zoning Ordinance amendments in accordance with the Master Plan to establish a Gravel Zoning District. As intended by the Michigan Legislature, this policy implementation was undertaken in a public process, replete with public hearings at the Master Plan and Zoning Ordinance amendment stages, taking into consideration a survey of soils, the location of then existing gravel operations, and other factors. (Appellant's Brief, pp 5-6) It is certainly noteworthy that, at the time the 1995 Township Master Plan was being publicly debated and prepared, the growth pressures being experienced in the Township were extraordinary. The Master Plan recites (Exhibit 5a, p. 45) that Leelanau County was then one of the fastest growing counties in Michigan, with growth during the 1980s of some 18%, and during the 1990s approximately 24%. Consistent with this factual analysis undertaken by the Township

in determining how to plan for the "serious consequences" of locating gravel mining, the 1995 Master Plan further expressly recognizes that

> Growth places a premium on the assets of Kasson Township. The focus of Township leadership must shift from maintaining the status quo (politically desirable, in most areas, but impossible given the growth explosion in the region) to how to monitor, orchestrate, and benefit from those identified and valued assets already in place and the changes that are forthcoming. (Exhibit 5a, p.50)

The Township engaged in serious planning before drawing the legislative boundary lines of the Gravel Zoning District.

4. ***The record does not reflect an objection by Plaintiff to the boundaries of the 3,000 acre gravel zoning district***. The record does not reflect that Plaintiff ever objected to the establishment of the boundaries for the six square mile (3,000 acre) Gravel Zoning District in 1995/1997. In fact, the record reflects that, in 1989, during the chaotic period leading to the establishment of the District, Plaintiff and others had signed a petition opposing one of the seven *ad hoc* rezonings. (Defendant's Exhibit 3B). Plaintiff stated in the petition, among other things, that the approval of the particular *ad hoc* rezoning would have the following impacts:

- ". . . violate the reason and concept of zoning by moving mining operations into the . . . residential . . . area."
- "The destructive effects of dust, smoke and other contaminates (sic) from mining . . ."
- "Approximately 1,000 acres of land has been zoned . . . Therefore, there is a very adequate supply of land available for extraction well into the future."
- "The load heavy around-the-clock noise destroying the tranquility of our living area."

- "The hazards of entering and exiting of double-bottom rigs and attendant machinery on the highway."
- "All of the above reasons which will lower the cash and aesthetic value of homes and farms in this area."

5. ***The 3,000 acres in the Gravel Zoning District will provide for regional gravel demand into the latter part of the century***. There was conflicting testimony on the precise duration of the gravel supply for the regional market based upon the existing and authorized gravel mining in the Gravel Zoning District. However, the circuit found that currently authorized gravel resources are "going to last into the latter part of the 21st Century," and that, "[t]here's plenty of other gravel around, and if this [Plaintiff's] gravel weren't ever mined we would survive just fine." (Transcript of circuit court's May 4, 2006 Opinion, pp.16-17) The Township Clerk presented the view that planning and zoning embodied in the Gravel Zoning District had worked well, and that a ruling for Plaintiff in this case would reopen the problems prior to its establishment. (Transcript, Vol. II, pp.146-147, 155) The Township Zoning Administrator echoed the view that the Gravel Zoning District had worked well, pointing out that it provided ***notice*** to property owners where gravel mining would occur; in other words, the Gravel Zoning District brought stability to the Township. (Transcript, Vol. III, pp. 4, 8-9, 13)

6. ***Consequence of a judicial modification of the Gravel Zoning District boundaries***. The testimony of the Clerk and Zoning Administrator reflected the view that authorizing gravel mining on the subject property would re-open the zoning instability and divisiveness of the past. It would re-open the field to new and additional proposed *ad hoc* rezonings. Such testimony merely expresses opinion. However, the testimony of neighboring property owners moved this point from opinion to reality. Clifford Boomer, speaking for some

200 acres of neighboring property, and Hazel Wistrand, speaking for 120 additional acres to the south, both testified that, if Plaintiff's land is authorized for gravel mining, they too would want this right. *See,* Appellant's Brief, pp.16-17, 34-35. Moreover, the Boomer and Wistrand properties would not represent all of the subjects of future *ad hoc* rezoning requests. In this regard, the circuit court surveyed the prospect of future zoning battles, and its resulting analysis on this subject reflects that further *ad hoc* authorization for gravel mining may be "by force of arms." Distilling the circuit court's analysis to its essence reveals an acknowledgement of the serious consequences of opening this Pandora's box, but also reveals the court's desire to be shielded from the onslaught, as reflected in the statement that, ". . . I don't know where the future goes, but I don't look forward to being the zoning person to decide it." (Transcript of circuit court's May 4, 2006 Opinion, pp. 44-45)

7. *Lack of legitimate basis for circuit court second-guessing the Township's legislative policy embodied in the Gravel Zoning District*. In the course of its opinion, the circuit court recited the long history of controversy within the community regarding mining, referred to various requested rezonings, discussed the extensive efforts undertaken by the Township to address these issues through a careful planning process, and pointed out the detailed implementation of its planning efforts through the enactment of an explicit zoning district (Transcript of circuit court's May 4, 2006 Opinion, pp. 2-5) The court also found that the quantities of gravel encompassed by this mining district were sufficient to accommodate the regional need for this mineral through most of this century, and that, accordingly, the public interest in plaintiff's proposed mining activities was correspondingly low (Transcript of circuit court's May 4, 2006 Opinion, pp.12-18) With these facts placing the proper compass in the court's hand to finalize its conclusions, the path then followed by the circuit court suggests that

the compass was discarded. Without proper factual bearings, and misinterpreting the law, the court fully inserted itself into the community planning and zoning process, concluding that *Silva* and *American Aggregates* authorized it to take off its judicial hat, and replace it with a hat worn by the entire legislative body of the Township, as characterized by the statement that: "*I'm here pretending to be a zoning person.*" (Transcript of circuit court's May 4, 2006 Opinion, pp. 44-45, Emphasis supplied) Rather than determining whether the board's own analysis and conclusions were rational, the circuit court noted variously, for example, that "it is not at all clear that [the Township's Gravel Zoning District] is necessarily the ideal district" (Transcript of circuit court's May 4, 2006 Opinion, p. 42); that "some thought about 'where does this [i.e., the District boundary] end' probably would be a good idea. At the risk of sort of *speculating* about that" (Transcript of circuit court's May 4, 2006 Opinion, p. 43, Emphasis supplied) "maybe the line could be drawn there, but, you know, it's a beautiful woods, but who knows" (Transcript of circuit court's May 4, 2006 Opinion, p. 45); and, that "[a]ll that's somewhat speculative. I don't know where the future goes, but I don't look forward to being the zoning person to decide it" (Transcript of circuit court's May 4, 2006 Opinion, p. 46).

ARGUMENT

As authorized and intended by State law, the Township publicly deliberated and prepared a community-wide policy for the resolution of disputes and litigation over the proper location of gravel mining operations in the Township. The policy forged by such public deliberation was embodied in the Township's 1995 Master Plan, and in 1997 legislatively enacted as part of the Zoning Ordinance, resulting in the planning and zoning for the boundaries of a 3,000 acre zoning district dedicated to gravel mining. The establishment of this district was intended to be the permanent means of bringing peace, stability and quality of life to the Township, in place of an untenable and chaotic consequence of successive *ad hoc* applications seeking authorization to undertake gravel mining. This gravel policy adopted by the Township will accommodate the regional need for gravel resources into the latter part of the century. Plaintiff now seeks to undermine the Township-wide legislative policy embodied in the Gravel Zoning District, and has asked the Court to return the Township to the turmoil of disputes and litigation implicit in *ad hoc* decision-making on gravel mining authorization. The public interest outweighs any interest in permitting gravel mining on Plaintiff's property: (1) in terms of the *need for the gravel* on Plaintiff's land, the circuit court found that the regional demand for gravel was satisfied based upon the resources available in the established Gravel Zoning District; (2) unlike prior cases in Michigan on this subject, the municipality here *proactively permitted* gravel mining based upon the legislatively-drawn Gravel Zoning District, action that resolved disputes that threatened the peace and quality of life in the Township, and represents important planning and zoning stewardship; and (3) the establishment of the Gravel Zoning District created a legitimate basis for the citizens of the Township to rely upon a stable location of the boundary lines for gravel mining. The circuit court misconstrued case precedent applicable to gravel mining, and failed to take into consideration the relevant public interest analysis. The circuit court's opinion amounts to a second-guessing of the duly established Township-wide legislative policy, a re-drawing of the boundaries of the gravel zoning district, and an emasculation of the reasonable reliance the citizens of the Township were entitled to place on the gravel zoning district. The lower court's action in this regard is contrary to fundamental Michigan zoning jurisprudence, and must be reversed.

Standard of Review

Legal questions presented on this appeal are reviewed *de novo* as questions of law. *Kropf v. Sterling Heights*, 391 Mich. 139, 152, 163; 215 N.W.2d 179 (1974); *Jude v. Heselschwerdt*, 228 Mich.App. 667, 670; 578 N.W.2d 704 (1998). The Court should give considerable weight to the findings of fact by the trial judge, reviewing such findings for clear error. See *Kropf*, *supra* at 163; *Hecht v. Niles Twp*, 173 Mich.App 453, 458-459; 434 N.W.2d 156 (1988).

Analysis

A. ***Consistent with the intent of the Michigan Legislature for the establishment of zoning districts, the Township held public hearings and adopted a major planning and zoning policy to resolve the tumultuous conditions that had arisen from the numerous ad hoc zoning petitions for gravel mining*.**

Receding glaciers endowed several communities in Michigan with substantial deposits of gravel resources. A large portion of Kasson Township is such a repository, which in the past resulted in tumultuous disputes and litigation relating to the right of property owners to conduct gravel mining operations on their land. This turmoil was seriously divisive and scarring to the Township. The situation had apparently sunk to a sufficiently low depth that it motivated the County Planning Agency to announce that, "if the township is going to get control of these rezonings, they need to do it quickly and have a plan that would support their actions." (No. 6 on JEx, 23)

Fortunately, the Township Planning Act and the Township Zoning Act, applicable through 2005, MCL 125.231 *et seq.* and MCL 125.271 *et seq.*, respectively, set forth in great detail the intent of the Michigan Legislature for resolving such disputes by developing a master land use plan, and then zoning in accordance with such plan.[2] The clear import of these Acts mandates a detailed analysis by public officials intimately familiar with the facts and circumstances in the community, and ensures the opportunity for public input at both the planning and zoning stages.

Consistent with this legislative delegation, *Schwartz v. City of Flint*, 426 Mich. 295, 313; 395 N.W.2d 678 (1986), recognized that:

> Zoning, by its nature, is most uniquely suited to the exercise of the police power because of the value judgments that must be made regarding aesthetics,

[2] The section of the Zoning Act was re-codified following the actions giving rise to this case by Act 110 of the Public Acts of 2006, effective July 1, 2006, as part of a combined act regulating cities, villages, townships, and counties.

> economics, transportation, health, safety, and a community's aspirations and values in general.

It was with these complex considerations in mind that Kasson Township officials carried out the intent of the Michigan Legislature in terms of planning and zoning the Township. The 1995 Township Master Plan (Exhibit 5a, p 18) reflects the weighing and balancing undertaken prior to drawing boundaries of the Gravel Zoning District:

> "The bounty of the natural resources in Kasson Township is also found in the rich deposits of gravel which underlie a good portion of the Township … This Plan recognizes the value of these assets, but declares the community's interests, and proposes measures to assert them, in having the development of these assets performed in ways beneficial to all of the Township's residents and in no way harmful to them."

The power of local legislative bodies to exercise the value judgments referenced in *Schwartz v City of Flint,* and debated during the long and public process of master planning and zoning to establish the Gravel Zoning District, is at the very heart of a municipality's general policy-making efforts to protect the quality of life for its residents. In *Village of Belle Terre v Boraas***,** 416 U.S. 1, 13; 94 S.Ct. 1536; 39 L.Ed.2d 797 (1974), Justice Marshall, even while dissenting with regard to the effect of a particular single-family zoning regulation in the village ordinance, made the following oft-cited observation with regard to the zoning power:

> It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life. I therefore continue to adhere to the principle of *Village of Euclid v Ambler Realty Co,* 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed.303 (1926), that deference should be given to governmental judgments concerning proper land-use allocation.

See also, *Brae Burn, Inc v Bloomfield Hills,* 350 Mich. 425; 86 N.W.2d 166 (1957).

The Michigan Supreme Court has specifically recognized that, given the inter-relationship between and among uses of land, weakening the right of a municipality to regulate a particular type of land use within its borders erodes the efficacy of zoning in the balance of the

community. *Hess v. West Bloomfield Township*, 439 Mich. 550; 486 N.W.2d 628 (1992).

Likewise, the process of enacting and implementing zoning regulations by locally-elected officials—with extensive planning study and review, and public hearings to ensure citizen oversight and input—has long and consistently been recognized in the United States to be a proper function, as initially approved in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365; 47 S.Ct. 114; 71 L.Ed. 303 (1926), and as consistently upheld since. *See also, Solid Waste Agency of N. Cook County v. United States Army Corp of Engineers*, 531 U.S. 159; 121 S.Ct. 675; 148 L. Ed.2d 576 (2001) (regulation of land use is a function traditionally performed by local government). Such local regulation is appropriate for achieving, among other important objectives, a preservation of community character. *See,* Anderson, *American Law of Zoning*, (4th ed.) §7.26. Moreover, zoning restrictions which "protect residential landowners from noise, dirt, smoke, machinery, and other annoyances of city life" have been upheld. *Id.*, citing *West Bloomfield Twp. v Chapman*, 351 Mich. 606, 88 N.W.2d 377 (1958).[3]

An examination of the Michigan zoning enabling act applicable to townships at the time this case was litigated below confirms that the authorized method of exercising the zoning power involves a plan for *dividing the community into use districts*.[4]

Only a local legislative body, after recommendation from the planning commission, has the authority to draw the lines of use districts. *Schwartz v City of Flint*, 426 Mich. 295; 395 N.W.2d 678 (1986). "[I]t is settled law in Michigan that zoning and rezoning of property are *legislative functions*." *Arthur Land Co, LLC v Otsego County*, 249 Mich.App. 650; 645 N.W.2d

[3] Even prior to the adoption of the first zoning ordinance in this country in New York City in 1916, the U.S. Supreme Court examined a regulation enacted by the City of Los Angeles which prohibited a property owner from using the clay beneath his property for a brick kiln located in the middle of a residential neighborhood. In this seminal case, the regulation was sustained as a reasonable exercise of the police power. *Hadacheck v. Sebastian*, 239 U.S. 394, 60 L. Ed. 348, 36 S. Ct. 143 (1915).

50 (2002) (emphasis added). In reversing a circuit court's conclusion that a rezoning denial should be treated as an "appeal" from an "administrative decision" under the constitutional "competent, material, and substantial evidence" standard, the Court of Appeals in *Arthur*, 249 Mich App at 664, emphasized the legislative nature of the action:

> Because in denying plaintiff's request to rezone, the county board of commissioners acted as a legislative, as opposed to administrative, body, the trial court's decision in this regard was error. Were this an appeal from an administrative body, the trial court would have been limited to a determination whether the decision was authorized by law and supported by competent, material, and substantial evidence on the record. *However, because rezoning is a legislative act, its validity and the validity of a refusal to rezone are governed by the tests which we ordinarily apply to legislation.* [*Emphasis supplied*]

In the establishment of zoning districts, and the refusal to modify those districts upon a private petition for rezoning, a municipality in Michigan is exercising local *legislative* authority.[5] The Michigan Supreme Court very recently explained, in part, the reasoning for this important point in *Greater Bible Way Temple of Jackson v City of Jackson*, 478 Mich. 373; 733 N.W.2d 734 (June 27, 2007):

> In the instant case, the city adopted a zoning ordinance that applied to the entire community, not just to plaintiff. See *West v. City of Portage*, 392 Mich. 458, 469, 221 N.W.2d 303 (1974) (" '[Z]oning ordinances ... are classified as general policy decisions which apply to the entire community.' ")(Citation omitted.) Concomitantly, if the city had granted plaintiff's request to rezone the property, such rezoning would also have applied to the entire community, not just plaintiff. A decision whether to rezone property does not involve consideration of only a particular or specific user or only a particular or specific project; rather, it involves the enactment of a new rule of general applicability, a new rule that governs all persons and all projects. See *Sherrill v. Town of Wrightsville Beach*, 81 N.C.App. 369, 373, 344 S.E.2d 357 (1986) ("it is the duty of the zoning authority to consider the needs of the entire community when voting on a rezoning, and not just the needs of the individual petitioner").

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[4] MCL 125.271. This section of the Zoning Act was re-codified following the actions giving rise to this case by Act 110 of the Public Acts of 2006, effective July 1, 2006, as part of a combined act regulating cities, villages, townships, and counties.

[5] This rule is in accord with the majority holding in the United States. *See*, Mandelker, *Land Use Law* (5th Ed), §§ 6.24, 6.26 ("The adoption and rejection of amendments to the zoning map is held to be a legislative act in the majority of states.").

In the present case, the extent and significance of the Kasson Township's *policy decision* to permit gravel mining throughout a large district is heightened in view of the nature and purpose of the Gravel Zoning District. Specifically, the Gravel Zoning District represented a Township-wide legislative policy to resolve the chaos that had gripped the community as it faced a succession of *ad hoc* rezoning petitions seeking authorization to undertake gravel mining. With the objective of putting an end to this chaos, and improving the stability and quality of life in the community, the Township carefully deliberated as part of a publicly-open process, with the view of securing a long-term solution. Based upon this deliberative process, the township planning commission and township board established probably the most important legislative policy in the Township's recent history.

Consistent with the Planning and Zoning Acts, the Township's deliberations required a weighing and balancing of the purposes for drawing the particular boundary lines of a new and comprehensive zoning district that would make provision for the regional need for gravel resources for the foreseeable future – a district intended to end the *ad hoc* zoning instability regarding gravel mining. With the adoption of new Master Plan and Zoning Ordinance provisions in 1995 and 1997, respectively, the Township effectively considered and resolved the "very serious consequences" of drawing the boundary lines in alternative locations within the Township. Amici are not aware of any evidence in the record reflecting assertions presented in 1995 and 1997 by or on behalf of Plaintiff that the major Township-wide policy embodied in the boundary lines ultimately selected by the Township were anything but reasonable. Indeed, as it relates to Plaintiff's view of gravel mining, immediately preceding this policy-making process, Plaintiff had joined others in filing a petition reciting the ills of authorizing gravel mining in a

particular instance.[6] In the end, the Township proactively amended the Zoning Map so as to establish the vast six square mile (3,000 acre) Gravel Zoning District.

B. ***Kasson Township's comprehensive zoning ordinance and Gravel Mining District, rather than merely the rezoning of a single parcel of land, is at the heart of this appeal.***

The language quoted above, from the very recent *Greater Bible Way* decision clarifies that a community-wide legislative policy is at stake in the establishment of a zoning district, as well as in the review of a proposed rezoning. In the typical case in which an *ad hoc* approval for gravel mining is sought, a single parcel is the focus of gravel mining authorization. Indeed, nearly all cases involving the review of a rezoning decision denying gravel mining have involved the issue whether to allow mining on a single property which is located in the midst of a zoning district intended for some other use, such as residential or office. The issue not faced in these prior cases is whether the court should order an alteration of a large proactively-established gravel zoning district.

In the process of enacting a comprehensive master plan and zoning ordinance for the community as a whole, almost without exception, the practice in most communities is to include *text* in the zoning ordinance specifying the regulations for gravel mining. However, the establishment of a *zoning map designation* for gravel mining typically awaits an *ad hoc* petition from a property owner, i.e., a petition from a person who has undertaken the necessary analysis, and has determined to request a rezoning to create the zoning map designation for gravel mining. There was a succession of such *ad hoc* petitions filed in Kasson Township until the 1995/1997 proactive planning and zoning action resulted in local legislation mapping the Gravel Zoning District.

[6] *See*, Part B, below.

Silva v Ada Township, 416 Mich. 153, 330 N.W.2d 663 (1982), and *American Aggregates Corp v Highland Township*, 151 Mich.App. 37, 390 N.W.2d 192 (1986), were decided *in the context of such ad hoc gravel rezoning proposals, where no proactively established gravel zoning district had been provided to satisfy the public interest in this natural resource.* Thus, in these lead cases, making provision for the public interest in gravel resources involved only a single parcel rezoning consideration.

Due to the relatively severe impacts of gravel mining, and the transportation of extracted gravel, neighbors of properties proposed for mining, and owners of properties along proposed haul routes for gravel distribution, have frequently taken positions parallel to the petition signed in 1989 by the Plaintiff in this case (Exhibit 3B), which stated, among other things, that approval of the individual rezoning then at issue would have the following impacts:

- ". . . violate the reason and concept of zoning by moving mining operations into the . . . residential . . . area."
- "The destructive effects of dust, smoke and other contaminates (sic) from mining . . ."
- "Approximately 1,000 acres of land has been zoned . . . Therefore, there is a very adequate supply of land available for extraction well into the future."
- "The load heavy around-the-clock noise destroying the tranquility of our living area."
- "The hazards of entering and exiting of double-bottom rigs and attendant machinery on the highway."

- "All of the above reasons which will lower the cash and aesthetic value of homes and farms in this area."

Within this confrontational framework, *Silva* pronounced a very imperfect rule to make provision for gravel mining *somewhere* in order to satisfy the need for this mineral resource. The *Silva* Court held that the balance to be struck in such *ad hoc* cases should be in favor of satisfying the public interest in providing gravel as long as the proponent property owner could prove that "no serious consequence" would result.[7] Of critical importance, the fundamental "preventive" context in which this rule was established is not present in Kasson Township. While the holdings in *Silva* and *American Aggregates* grew out of circumstances in which mining was *prevented*, the context in which this case is presented is not one in which the public interest in gravel resources has gone unmet, and is not one in which the Township's actions have simply been to prevent such public interest from being fulfilled.

Rather than providing the regulatory framework for gravel mining only in the *text* of the Zoning Ordinance, and awaiting a petition to establish a designation on the zoning map for this use, the Township took a proactive legislative approach in determining where the district lines should be drawn for the purpose of avoiding a "very serious consequence." The Township labored for several years in the process of attempting to achieve the appropriate balance in the community, consistent with strong planning principles which support sustainability. POLICY GUIDE ON PLANNING FOR SUSTAINABILITY, Ratified by APA Board of Directors, April 17, 2000, available at http://www.planning.org/policyguides/sustainability.htm

Very early on in this process, in 1992, the Township Master Plan points out (Exhibit 5a, p. 6) that the general public was brought directly into the discussion by way of a public opinion

[7] To this rule, *American Aggregates* added further guidance to be discussed in this Brief, below. Due to its glaring ambiguity, a reconsideration of "no serious consequence rule" would certainly be appropriate.

survey. Among the results of this survey, the Master Plan reports that "the responding residents of the township voted emphatically for more controls on development to protect the community's character and natural resources."

The end result of this lengthy deliberation was a very responsible and proactive establishment of the vast 3,000 acre Gravel Zoning District. The Township made the "value judgments that must be made regarding aesthetics, economics, transportation, health, safety, and a community's aspirations and values in general," *Schwartz v City of Flint*, 426 Mich. 295; 395 N.W.2d 678 (1986), and drew the boundaries of a district that would provide sufficient gravel resources for the better part of a century into the future.

Unlike the factual underpinning in *Silva,* Kasson Township adopted a policy, legislatively-embodied in the Gravel Zoning District, *permitting,* rather than preventing, gravel mining. In addition to achieving this public interest, the drawing of gravel district boundary lines that would remain fixed for the long-term ended the destabilizing succession of *ad hoc* applications to undertake mining. Due to the extensive gravel deposits in the Township, prior to the establishment of the Gravel Zoning District, citizens had no ability to predict where future mining sites would be sought and established. The Gravel Zoning District now provides the stability that allows citizens in the community to make informed decisions on locating their homes and businesses away from areas that will be adversely impacted by gravel mining sites or haul roads, i.e., citizens have *advance notice that can be relied upon* in making life-changing investments of money and family commitments in relation to the fixed locations of the gravel zoning boundaries in the Township. All of this, according to the Township Clerk and Zoning Administrator, was working well. Peace, stability and quality of life had been re-established in

the Township. (Transcript, Vol III, pp. 4, 8-9, 13) The public interest was served by this legislative policy in important respects.

Now comes Plaintiff with a proposal that, as effectively acknowledged by the circuit court,[8] would wreck havoc on the very peace and stability the Gravel Zoning District had secured. In Plaintiff's proposal, the Township was, and now the Court is, faced with the obvious probability that, *in the single stroke of approving relief for Plaintiff, the carefully established Township-wide policy of historic proportion -- a legislative policy that had brought an end to the serious and divisive ad hoc zoning battles, and secured peace, stability and quality of life to the Township -- would be utterly obliterated.* The lower court decision ignored the critical building blocks of public interest constructed by the Township in the action of creating the Gravel Zoning District. Directly in the face of the proactive planning and zoning established by the Township, the essence of the circuit court's decision in this case was a judicial interjection that lays open and restructures a township-wide legislative policy embodied in the Gravel Zoning District.

As identified in the Statement of Facts, above, there are neighboring property owners literally waiting in the wings to resume the *ad hoc* gravel zoning war. This will, in turn, re-ignite the citizen petitions, referenda and litigation that had divided and strained the Township prior to the establishment of the Gravel Zoning District. Numerous properties will be brought into these new battles, and the impacts will be felt in the character, tax base and quality of life in the Township as a whole. At issue in this case is a major planning and zoning policy that has not previously been considered in connection with zoning cases involving gravel mining.

Therefore, because the Township has enacted a comprehensive zoning plan reflecting the exercise of responsible and proactive planning and zoning applicable to mineral extraction, the

Court should take into consideration that holding the zoning ordinance invalid in this case amounts to an overruling of not merely a municipal decision made with regard to a single property, but an overruling of a municipality-wide legislative policy. This factor should, in turn, be heavily weighed in evaluating the reasonableness of the zoning ordinance. In this case, a ruling for plaintiff would be *contrary to the public interest* in that it would amount to an overruling of a most responsible and critical Township-wide legislative policy, proactively established to end major divisiveness, and bring peace, stability and quality of life to the Township as a whole.

C. ***The circuit court sat as a superzoning commission and usurped the Township's land use stewardship by misreading* Silva *and* American Aggregates**.

The decisions in *Silva v. Ada Township* and *American Aggregates Corp v. Highland Township* make it sufficiently clear that, if it would be contrary to the pubic interest, a municipality cannot limit mineral extraction in location or scope merely as it finds convenient. However, "even in the context of limits on the extraction of mineral resources, zoning ordinances are presumed to be reasonable under the requirements of substantive due process. A person challenging the ordinance has the burden of proving otherwise." *American Aggregates*, at 41 (citing *Silva*).

Silva and *American Aggregates* also make it abundantly clear that interjecting the element of gravel extraction into a case does not entirely transform the function of the court sitting in review of local legislative action within the zoning context. Thus, Michigan case law provides no basis whatsoever for the circuit court (Transcript of circuit court's May 4, 2006 Opinion, pp 44-45) to have concluded that,

[8] Although conceding the coming onslaught of battles, the circuit court seeks refuge in the point that, ". . . I don't know where the future goes, but I don't look forward to being the zoning person to decide it." (Transcript of circuit court's May 4, 2006 Opinion, pp 44-45).

> The Supreme Court has given special status in zoning disputes to mineral extraction operations, and that's *the only reason I'm here pretending to be a zoning person*"(Emphasis supplied)

The circuit court read *Silva* and *American Aggregates* to authorize a material judicial usurpation of the Township's land use stewardship. While *Silva* and *American Aggregates* contemplate a special scrutiny, and thus create a somewhat different review, they in no respect direct a judicial second-guessing of broad legislatively-enacted policy. Rather, as in cases of challenges to the validity of zoning ordinances generally, the test applied in gravel zoning cases is whether the zoning ordinance is *reasonable*. *Silva,* at 157-158; *Kirk v Tyrone Township*, 398 Mich. 429; 247 N.W. 2d 848 (1976). *Silva* further directs that, "[z]oning regulations seek to achieve a land use which serves the interests of the community as a whole." *Silva*, at 158. Stated in the words of the *American Aggregates* opinion, zoning should serve the *public interest.* In probing to determine the reasonableness of zoning in relation to the interests of the community as a whole, *Silva* and *American Aggregates* have established the No Very Serious Consequences/Public Interest Rule, requiring consideration of the consequences of permitting gravel mining, and probing for the appropriate public interest outcome.

Bearing in mind that Kasson Township officials established and implemented a Township-wide policy *permitting* gravel mining for the benefit of the entire region, the No Very Serious Consequences/Public Interest Rule simply cannot be applied with "blinders" that foreclose a broader public interest analysis. To restrict the review in this way would be tantamount to ignoring the overarching rationale for and benefits of planning and zoning altogether. In *Cady v City of Detroit,* 289 Mich. 499, 509, 286 N.W. 805 (1939), the Court quoted with approval the following benefits of zoning:

> It cannot be denied that a city systematically developed offers greater attractiveness to the home seeker than a city that is developed in a haphazard way.

> The one compares to the other about as a well ordered department store compares to a junk-shop. If such regulations stabilize the value of property, promote the permanency of desirable home surroundings, and if they add to the happiness and comfort of the citizens, they thereby promote the general welfare.

Master planning a community has also been recognized as being important in *Raabe v City of Walker*, 383 Mich. 165, 178; 174 N.W.2d 789 (1970):

> The absence of a formally adopted municipal plan, whether mandated by statute or not, does not of course invalidate municipal zoning or rezoning. But it does, as in Biske, *supra*, weaken substantially the well known presumption which, ordinarily, attends any regular-on-its-face municipal zoning ordinance or amendment thereof. This is particularly true of an ordinance purposed toward contradictory rezoning, after years of original zoning upon which concerned persons have come to depend. To paraphrase a widely known phrase of Euclid, Ohio v. Ambler Realty Co. (1926), 272 U.S. 365, 388, 47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016, the entire or partial intrusion by means of rezoning, of an industrial district upon an established residence district, amounts more and more in these days of constantly increased irritation caused by highway traffic, the noise that annoys, and the industrial fouling of nearby atmosphere, to that which merely is a right thing in or too near the wrong place-'like a pig in the parlor instead of the barnyard.'

Within the context of gravel mining, the task of the legislative body is to consider all of the implications and balance the interests of individual property owners with the larger public need for gravel, factoring into the equation the near- and long-term consequences of allowing mining both on neighboring properties and community-wide. Striking the appropriate balance between the interests of the larger community and the interests of individual property owners begins with a strong public planning process. The record below indicates Kasson Township engaged in such a process.

A reading of the Kasson Township Master Plan (Exhibit 5a) reveals the challenges and competing interests that confronted the Township's officials. The Master Plan's Mission Statement indicates that these officials wanted "to create a master plan that comprehensively addresses the community's needs" (Kasson Township Master Plan at p. v). The planning process

involved a public survey and public participation in meetings and hearings. *Id.* at p.3 Results from the 1992 public opinion survey (pp.6-7) indicate what respondents considered important to the public interest. Planning officials extensively mapped the existing land uses.

In making the ultimate zoning district determinations, the local legislative body must necessarily draw boundaries somewhere. Thus, some properties that may have reasonable—even good—mineral deposits could have been left out of the Gravel Zoning District as part of the process of balancing all of the rational and competing interests of the community as a whole. The kind of analysis involved and the nature of this line-drawing exercise are as old as the law itself, and in the case of zoning, the Michigan Supreme Court has repeatedly stressed that this is within the purview of the legislature answerable to the people at the ballot box, and not within the purview of the court. Even under the special scrutiny afforded to a zoning regulation that prohibits the extraction of minerals, the legislative decision-making on where to draw the broad zoning district boundary lines should thus be left to the legislative body, and the task of the court should be to determine whether those decisions were reasonable, not to redraw boundary lines on its own accord. This deferential judicial analysis is particularly applicable in the present case, where the careful deliberations of the legislative body resulted in drawing zoning district boundary lines to *permit* the mining of sufficient gravel to meet regional needs for the long term.

Despite the consistent directives of Michigan case precedent, the circuit court in this case committed reversible error by engaging headlong in a line of analysis that exactly mimicked, and then supplanted, the duly established authority of the Kasson Township Board, rather than determining whether the Board's own analysis and conclusions were unreasonable. In no respect does *Silva*, or any other case for that matter, alter the long and consistent dictate – violated in the extreme by the circuit court in this case – that *a court is not to second guess a municipality in its*

zoning decisions and sit as a superzoning commission. This rule for judicial review of zoning cases is as strong and well-established as any other. In 1960, in *Dequinder Development Co v. Charter Township of Warren* (now City of Warren), 359 Mich. 634, 647-648; 103 N.W.2d 600 (1960), the Court pronounced the following:

> Such are the issues we are bound to get into when we abandon the judicial role and take on the habiliments of a superzoning commission. Is the parcel better used for parking or for building? For trailers or for homes? Should the line be here or there? As long as these questions are debatable they are not for us. Our cities must be allowed to chart their own futures without hindrance by us unless there is constitutional impairment and such I cannot find where the use of land is merely, to employ plaintiff's words, a matter of opinion. We have neither the wisdom nor the constitutional right to usurp the legislative function. I am constrained to observe that we should be slow to equate a public official's sharp retort to fraud, lest we impeach the whole process of government, legislative, executive, and even, some may add, judicial.

The venerable case of *Kropt v. City of Sterling Heights*, 391 Mich. 139, 161; 215 N.W.2d 179 (1974) provides further important policy reasons for the rule, all of which are applicable to the present case:

> It is not for this Court to second guess the local governing bodies in the absence of a showing that that body was arbitrary or capricious in its exclusion of other uses from a single family residential district. Justice Smith aptly pointed this out in Brae Burn, Inc., v. Bloomfield Hills, Supra, pp. 430, 431, 432, 86 N.W.2d p. 169, 170.
>
> '* * * this Court does not sit as a superzoning 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 widow 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 (2d ed., 1929), Vol. 1, s 21, p. 32: '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.'

More recently, in 2003, *City of Essexville v Carrollton Concrete,* 259 Mich.App. 257, 265-267; 673 N.W.2d 815 (2003) reaffirmed these rules and policies:

> [W]e deem it expedient to point out again, in terms not susceptible of misconstruction, a fundamental principle: this Court does not sit as a superzoning 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.

See also, Cady v Detroit, 289 Mich. 499, 509; 286 N.W. 805 (1939) ("Courts cannot substitute their opinions for that of the legislative body on questions of policy").

These steady and important rules and policies announced and reiterated in cases over the years represent an integral part of Michigan zoning jurisprudence. Yet, these very rules were violated in the first magnitude by the circuit court in this case. As noted above, the circuit court acknowledged that it was "pretending to be a zoning person." (Transcript of circuit court's May 4, 2006 Opinion, pp. 44-45) The circuit court proceeded on a foray into speculation and guesswork that was, in turn, used as the basis for judicially-altering the carefully master-planned and zoned boundaries of the Gravel Zoning District. This second-guessing by the lower court is evidenced in several comments made in rendering its opinion in the case, and include the following: rather than determining whether the Board's own analysis and conclusions were rational, the circuit court noted that "it is not at all clear that [the Township's Gravel Zoning District] is necessarily the ideal district" (Transcript of circuit court's May 4, 2006 Opinion, p.

42); that "some thought about 'where does this [i.e., the District boundary] end' probably would be a good idea. At the risk of sort of *speculating* about that" (Transcript of circuit court's May 4, 2006 Opinion, p. 43, Emphasis supplied); that "maybe the line could be drawn there, but, you know, it's a beautiful woods, but who knows" (Transcript of circuit court's May 4, 2006 Opinion, p. 45); and, that "[a]ll that's somewhat speculative. I don't know where the future goes, but I don't look forward to being the zoning person to decide it" (Transcript of circuit court's May 4, 2006 Opinion, p. 46).

In effectively trampling the Township's legislative policy embodied in the Gravel Zoning District, the circuit court's decision was made in violation of consistent Michigan case law forbidding the court to sit as a superzoning commission. Likewise, the circuit court's decision violated the spirit of state law that directs the establishment of planning and zoning policy applicable to the community-at-large only after a careful and public deliberative process.

The circuit court made a finding that currently authorized gravel resources are "going to last into the latter part of the 21st Century," and that, "[t]here's plenty of other gravel around, and if this [Plaintiff's] gravel weren't ever mined we would survive just fine." (Transcript of circuit court's May 4, 2006 Opinion, pp. 16-17) These findings reflecting the lack of public need for gravel mining on Plaintiff's property, a fact that, in and of itself, is sufficient to trigger the holding in *American Aggregates* at 43, where the Court held that,

> ". . . 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." (Emphasis supplied)

Given the lack of public interest in mining gravel on Plaintiff's property, and the exceptional and responsible Township action of proactively establishing reasonable zoning to *permit* gravel mining in the Township, and also recognizing that the circuit court sat as a

"superzoning commission" and merely second-guessed the important Township-wide legislative policy providing for gravel mining, the record in this case urges reversal of the decision below.

D. ***In addition to the lack of public interest in gravel mining on Plaintiff's property, and the distinct reasonableness of the Township's policy and legislative action to permit gravel mining in six sections of the Township, the residents of Kasson Township have a right to rely on the unaltered boundaries of the Gravel Zoning District***

If the residents of the community perceive that the boundaries of the Gravel Zoning District will be subject to successive change in undetermined locations, *stability and investment in land use will be discouraged*. Prior to the introduction and judicial approval of zoning in the early 1900s, there was no assurance in terms of land use control. There was a lack of regulation to prevent industrial uses from inappropriately locating in close proximity to other uses. In such cases, property owners were forced to resort to the law of nuisance, and seek after-the-fact solutions to these land use conflicts. Zoning was the tool approved by the United States Supreme Court in *Village of Euclid v Amber Realty*, 272 U.S. 365; 47 S.Ct. 114; 71 L.Ed. 303 (1926) to bring stability to land use coordination by providing a *proactive method of avoiding land use conflicts*.

Put simply, the legislative enactment of zoning or rezoning in accordance with a plan *creates a policy for the "system*" of regulation; once rationally created, stability and efficiency are set into motion. It is thus critical that, once zoning policy is legislatively-fixed in terms of a particular district, those within its boundaries *come to rely upon it*. In *Raabe v City of Walker*, 383 Mich. 165, 177-178; 174 N.W.2d 789 (1970), quoting from McQuillin, *The Law of Municipal Corporations* (3rd ed.) §§25.06, 25.68, the Court clarified an extremely important proposition with regard to this relevant point:

> Since the purpose of zoning is *stabilization of existing conditions* subject to an orderly development and improvement of a zoned area and since *property may be purchased and uses undertaken in reliance on an existing zoning ordinance*, an

> amendatory, subsequent or repealing zoning ordinance must clearly be related to the accomplishment of a proper purpose within the police power. Amendments should be made with utmost *caution and only when required by changing conditions; otherwise, the very purpose of zoning will be destroyed*. (Emphasis supplied)

In *Greater Bible Way Temple of Jackson v City of Jackson*, 478 Mich. 373, 733 N.W.2d 734 (June 27, 2007), the Court concluded in that case that protection of the stability of a residential zoning district amounted to a *compelling governmental interest*. Amici submit that, particularly in view of the gravel mining bedlam that had befallen Kasson Township prior to the establishment of the Gravel Zoning District, there is likewise a compelling public interest to maintain the stability of the boundaries drawn for the Gravel Zoning District. Such a conclusion is particularly apt considering the chaos that is certain to revisit Kasson Township if the District boundaries are put on the block for further dispute.

In *Silva,* the Court established a rule, albeit ambiguous in nature, to protect mineral extraction in view of the public interest to be served in many instances. However, in determining the "public interest," keeping an eye on the underlying purposes of zoning simply cannot be forgotten. Quite clearly, very fundamental zoning objectives include the stabilization of property values within the community, the promotion of land use efficiency, and encouragement of desirable home surroundings. It was toward this end that the Kasson Township Master Plan of 1995 (Exhibit 5a, p 23) sought to promote the public health, safety and welfare of the community, as evidenced in the following language of the Plan itself:

> ". . . a gravel district is proposed in order to confine gravel mining to the areas already being mined and to those areas identified as having the best deposits for mining. It is the Commission's position that sufficient deposits will exist within this designated area for the foreseeable future and that no other area in the township shall be developed for this purpose."

The zoning administrator of Kasson Township made the insightful point that the Gravel Zoning District, established in accordance with the Master Plan, *provides notice to citizens in terms of where gravel mining will occur*. (Transcript, Vol III, pp. 4, 8-9, 13) Citizens may, in turn, make reliable decisions based upon this notice and knowledge, including decisions relating to where to do business, buy homes and make family commitments. Meaningful decisions of this type may be made only if they are associated with the *ability to rely upon the fact that established zoning districts will not be successively altered absent a change of circumstances***.** The bottom line is that the Gravel Zoning District brings critical stability and quality of life to the Township.

The Michigan law expressed in *Silva* and *American Aggregates* dictates that, *where the public interest requires*, special consideration applies in cases in which gravel mining is being *prevented*. In the present case, the lack of need for mining gravel on Plaintiff's property, and the reasonableness of the Township's planning and zoning policy *permitting* adequate gravel mining within fixed boundaries, establish important and heavily-weighted public interest factors that cut sharply against affording special consideration to allowing gravel mining on Plaintiff's property. In addition to these two points, there is the third material point for concluding a lack of public interest exists in mining gravel on Plaintiff's property. Namely, under Michigan law, given the establishment of the Gravel Zoning District, the citizens of Kasson Township have every right to believe and expect that the *ad hoc* zoning battles of the past have ended. *Raabe v City of Walker*, 383 Mich. 165; 174 N.W.2d 789 (1970). Therefore, altering the boundaries of the Gravel Zoning District so to allow mining on Plaintiff's property, in the absence of a material change of relevant circumstances, would effectively amount to a breach of the public's right of reliance, with corresponding diminution in stability and quality of life in the municipality. Consequently, the

circuit court's determination to permit mining on Plaintiff's property is contrary to the public interest.

E. *Summary of Argument and Conclusion*

In cases involving zoning decisions that prevent gravel mining, as announced in *Silva v. Ada Township***,** 416 Mich. 153; 330 N.W.2d 663 (1982), and further reviewed and explained in *American Aggregates Corp v. Highland Township,* 151 Mich. App 37; 390 N.W.2d 192 (1986), Michigan law makes provision for a special judicial review that has been referred to in this brief as the No Very Serious Consequences/Public Interest Rule.

In this case, there is a new element, not present in the *Silva* and *American Aggregates*. Whereas in *Silva* and *American Aggregates*, the municipalities were *preventing* gravel mining, Kasson Township officials proceeded proactively through the use of planning and zoning to *permit* gravel mining. The Township formally established a legislative policy that provided all gravel resources needed in the region into the latter part of the Century.

In *American Aggregates*, the Court aptly concluded, 151 Mich.App. at 43, that,

> ". . . 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." (Emphasis supplied)

Thus, if the No Very Serious Consequences/Public Interest Rule is to be applied in this case, the overarching public interest flowing from the Township's proactive gravel policy must be recognized as an important factor.

In determining the outcome of this case, it is of central importance to weigh the public interest considerations, placing on one side of the public interest scale the interests served by allowing gravel mining on Plaintiff's property, and placing on the other side of the public interest

scale the interests served by upholding the finality and integrity of the Township's 3,000 acre Gravel Zoning District. Following is an analysis of this process.

- **Public Interest Served by Allowing Gravel Mining on Plaintiff's Property**

  The underlying basis for affording any heightened rights in favor of an applicant for gravel mining must ultimately be traced to the public need for the gravel to be mined on the applicant's property. In the present case, the circuit court found that, considering the existing and future potential for mining in the Gravel Zoning District, currently authorized gravel resources are "going to last into the latter part of the 21st Century," and that, "[t]here's plenty of other gravel around, and if this [Plaintiff's] gravel weren't ever mined we would survive just fine." (Transcript of circuit court's May 4, 2006 Opinion, pp 16-17).

  Therefore, in terms of the *public need* for the gravel on Plaintiff's land, it was the finding of the circuit court that the regional demand for gravel is satisfied based upon the resources available in the established Gravel Zoning District. Thus, there is little, if any, public interest in the gravel on Plaintiff's land.

- **Public Interest Served by Upholding the Finality and Integrity of Gravel Zoning District**

  The municipality in this case proactively *permitted* gravel mining based upon a Township-wide policy of legislatively-drawn boundaries of an entire Gravel Zoning District. This factor is relevant to the public interest for two reasons. First, establishment of the Gravel Zoning District has resolved disputes that had threatened the peace and quality of life in the Township, a threat almost certain to return if future *ad hoc* gravel zoning decisions are invited by a judicial alteration of the District in this case. Second, the planning and zoning stewardship

represented by the Gravel Zoning District should be the central focus of this case in that it *permits,* rather than *prevents,* the mining of gravel.

In addition, the establishment of the Gravel Zoning District has created a legitimate and important basis for the citizens of the Township to rely upon a stable location of the boundary lines of gravel mining. This, in turn, has provided citizens with land use stability, and the basis for promoting efficiency and investment unavailable during the pre-Gravel Zoning District regime of *ad hoc* zoning battles. It is this stability and efficiency that citizens have a right to rely upon. *Raabe v City of Walker*, 383 Mich. 165, 177-178; 174 N.W.2d 789 (1970).

Weighing the public interest on each side of the scale produces a clear conclusion for this case: Plaintiff failed to sustain the burden of proving unreasonableness under the No Very Serious Consequences/Public Interest Rule. Specifically, the record in this case reveals a scale decisively tipped by the recognition that there is material public interest in upholding the finality and integrity of the Gravel Zoning District, and substantially no public interest in allowing gravel mining on plaintiff's property. Thus, the public cost (consequence) of judicially-altering the Gravel Zoning District would be extensive and inequitable.

The circuit court's ruling for Plaintiff on this record amounted to a second-guessing of a significant legislatively-established policy of Township-wide importance, i.e., the circuit court sat as a "superzoning commission" contrary to the long and consistent admonition of the Supreme Court. In reaching its decision, the circuit court noted that, "I don't know where the future goes, but I don't look forward to being the zoning person to decide it" (Transcript of circuit court's May 4, 2006 Opinion, p. 46). The main thrust of this position is an

acknowledgement that a modification of the Gravel Zoning District for Plaintiff undermines the long-term stability provided by such District, and will re-open the serious divisiveness, litigation and inefficiency implicit in *ad hoc* rezoning battles over gravel mining. However, the circuit court was apparently prepared to leave this problem to be resolved "by force of arms" in the future (Transcript of circuit court's May 4, 2006 Opinion, p 44). In exercising responsible land use stewardship, the public interest supports Kasson Township's approach of proactively addressing this problem consistent with the fundamental purpose of zoning as envisioned in the United States Supreme Court's preeminent zoning case, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926), and as consistently upheld since. Moreover, it is clear that proactively addressing the gravel mining issue through the use of careful land use planning and legislative action, with public notice and hearings at critical stages, is precisely what the legislature intended in the planning and zoning enabling acts.

A judicial modification of the Gravel Zoning District by allowing mining on plaintiff's property would result in a very serious and insidious adverse consequence.

RELIEF REQUESTED

Amici respectfully request this Court to uphold the public interest and preserve the integrity of Michigan zoning jurisprudence by reversing the decision and judgment of the circuit court, and directing entry of an order upholding the unaltered Gravel Zoning District.

Respectfully submitted,

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