STATE OF MICHIGAN

IN THE SUPREME COURT

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

EDITH KYSER,

Plaintiff/Appellee,

Supreme Court Case No. 136680
Court of Appeals Docket No. 272516

v

KASSON TOWNSHIP, a Michigan General Law Township,

Defendant/Appellant.

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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 OF THE SUPREME COURT

American Planning Association and Michigan Association of Planning ("Amici"), adopt the position of Defendant, Kasson Township with regard to the basis for jurisdiction.

STATEMENT OF THE QUESTIONS PRESENTED

I. **Should the Defendant, Kasson Township's claim, that the "no very serious consequences" rule should be overruled, be dismissed because the township failed to raise this claim before the trial court or the court of appeals?**

Plaintiff/Appellee says: YES

Defendant/Appellant would say: NO

The lower courts did not address this question.

Amicus Curiae answers: NO

II. **Should the "no very serious consequences" rule be overruled by the Michigan Supreme Court for creating an unwarranted special exception to the standard test for adjudicating the reasonableness of a local zoning ordinance with regard to the regulation of land uses involving the extraction of mineral resources?**

Plaintiff/Appellee says: NO

Defendant/Appellant says: YES

The lower courts did not address this question.

Amicus Curiae answers: 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 nationally. The Michigan Association of Planning (MAP) is a chapter of APA representing 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. The lower courts relied upon an improper test—the "no very serious consequences" rule—for adjudicating the reasonableness of a Michigan locality's zoning ordinance, one that has no reasonable basis in either constitutional or statutory law. As well-illustrated by this case, that rule compels courts in Michigan to become superlegislatures when adjudicating disputes related to the local regulation of mineral extraction, and as such it 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.

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Amici adopt the Statement of Facts and the discussion of Material Proceedings presented by Appellant Township's Brief on Application for Leave to Appeal.

SUMMARY OF ARGUMENT

The Supreme Court should hear and decide Defendant, Appellant Township's claim that the "no very serious consequences" (NVSC) rule should be overruled, even though that claim was not specifically raised before the courts below. This claim speaks to the validity of a constitutional principle of major significance that was established by the Supreme Court and that only the Court itself can change. Dismissal of the claim would result in a manifest injustice to the Defendant and would leave unresolved the question of the validity of NVSC rule.

The Supreme Court should overrule the NVSC rule, currently applied under substantive due process adjudication to zoning ordinances that regulate mineral extraction, and it should reaffirm the same "rational basis" standard of review it applied prior to 1982 and that it prudently applies to all other types of local zoning claims. Consistent with the U.S. Supreme Court's refusal to engage in expansive substantive due process adjudication since the early 20th century, the Michigan Supreme Court has clearly and consistently held that legislative decisions made by local governments through their zoning ordinances should be given "rational basis" (or "fairly debatable" or "rational relationship") review. Under that standard, a court must be deferential to the local legislative decision and uphold it if it can discern any reasonable relationship between the legislative decision and a legitimate governmental interest. Since 1982, however, the Court has applied a different standard of review—the NVSC rule—when assessing the constitutionality of local zoning ordinances that regulate the extraction of minerals. There are several compelling reasons for overruling the NVSC rule.

First, the key sources of authority for the NVSC rule, which was established for the first time by the Court in 1982, were two statements of *dicta* drawn from two earlier Michigan Supreme Court decisions, the earliest of which was based in turn on a statement of *dicta* drawn

from a Sixth Circuit Court of Appeals decision construing the constitutionality of a local zoning ordinance in Ohio under the Ohio constitution, which itself was based on yet another statement of *dicta* drawn from an early U.S. Supreme Court decision. Moreover, both of the federal cases and all of the early Michigan Supreme Court cases cited as providing authority for the NVSC rule were decided before the deferential "rational basis" standard of review became well settled under both federal and Michigan law. In sum, rather than resting on solid doctrinal authority, the NVSC rule ultimately rests inaptly on a series of statements of *dicta* made by earlier and now out-dated Michigan and federal court decisions.

Second, as well illustrated by this case, the NVSC rule compels lower courts in Michigan to engage in expansive substantive due process review. As a result, it compels the trial court to act as a "superzoning" commission, substituting its opinion regarding the appropriateness of a given legislative decision for that of the legislature rather than assessing the reasonableness of the legislature's decision. In fact, this standard of review actually amounts to a strict scrutiny level of judicial review because it effectively compels the *government* to convince the trial court (because the plaintiff will surely not be motivated to do so) that its zoning decision is *necessary* (because the anticipated consequences from allowing mining to occur cannot be mitigated) to advance a *compelling* interest (because, absent regulation, those consequences will be "very serious"). Aside from the inapt authorities noted above, nothing in the Court's decisions regarding the adjudication of substantive due process claims against local zoning ordinances can be construed to warrant this outcome. Moreover, because the reasons stated by the courts in those inapt decisions were based on the economic and political concerns of the judges, and because the rule itself operates to make mineral extraction a preferred land use, the NVSC rule

improperly establishes state natural resource management policy by judicial decree alone with no basis in Michigan constitutional or statutory law.

Third, the Supreme Court and lower courts in explaining the need for the NVSC rule have offered two primary justifications, both of which are faulty. The first is based on the argument that, unlike other land uses that can be engaged in a variety of locations, the mining of gravel and other minerals can be conducted only where minerals are found. This reasoning represents a form of the broader concept of "land suitability," whereby localities should engage in planning and zoning decision-making recognizing the important constraints and opportunities that are created by the physical- and built-environment conditions present on the land. The reasoning is also certainly true so far as it goes. It is faulty as the basis for the NVSC rule, however, because it goes too far. Local governments necessarily regulate land uses through zoning in ways that often limit (if not prohibit altogether) uses of land that are generally reasonable in the abstract—including uses that take advantage of the unique physical attributes of the land itself—but that are potentially harmful given the specifics of a particular case. There is nothing especially unique about having minerals on one's land in that sense, and there was no valid reason for the Court to take this one particular aspect of land suitability and elevate it to the status of a doctrinal constitutional rule.

Fourth, the second justification routinely offered by the courts for the NVSC rule is that the regional need for gravel creates a larger public interest in promoting gravel mining operations to serve the economic interests of the state. The problem with this argument is that it is a wholly judicially-created policy statement, again drawn from the same inapt prior decisions noted above, that has no basis in Michigan constitutional or statutory law. The proper forum for establishing state-wide natural resource management and economic development policies is the state

legislature, not the state courts. Careful review of the state's relevant constitutional and legislative provisions makes clear that not only has the state legislature remained silent regarding the potential effects of local zoning on mineral extraction, it is reasonable and appropriate to conclude that the legislature contemplated a policy of establishing a preferred status for minerals extraction and declined to do so. No public policy establishing mining as a preferred land use has ever been appropriately adopted under Michigan law, and the Supreme Court erred when it pronounced such a policy in the form of heightened judicial review for minerals extraction zoning cases through judicial decree alone.

Finally, Amici argue that engaging in good master planning is an appropriate means for ensuring that local zoning decisions are reasonable and that the careful and consistent use of a local plan to inform local zoning decisions should be accepted as convincing evidence of reasonableness. Amici do not argue that simply having a plan and citing to it as a justification by itself should be taken as dispositive evidence of reasonableness. Consistent with well-settled Michigan law, the courts in Michigan should not engage in heightened judicial review and thereby necessarily become superzoning commissions when reviewing local zoning ordinances that regulate minerals extraction, or any other type of land use. Rather, consistent with state statutory requirements and good planning practice, the proper approach for the courts should be to focus especially on the clarity, rigor, and coherence of the analysis and deliberations engaged by the local government through its planning efforts to support the legislative zoning decision it reached, as appropriately tailored to the issues and landscape conditions at hand. If under such review the reasoning offered by the local government for making its decision was in any way reasonable or "fairly debatable," then the court should defer, even for cases involving the local regulation of mineral extraction.

ARGUMENT

I. The Defendant, Kasson Township's claim, that the "no very serious consequences" rule should be overruled, should not be dismissed even though it was not raised before the trial court or the court of appeals because raising that claim before the lower courts would have been futile and refusing to address it by the Supreme Court—the only court capable of addressing such a claim—would result in a manifest injustice.

A. Standard of Review

"Issues raised for the first time on appeal are not ordinarily subject to review,"[1] including issues related to constitutional claims,[2] except in exceptional circumstances.[3] More specifically, the Supreme Court has stated that it will not hear on appeal "objections *which could have been raised* in the court below but were not there raised."[4] Moreover, "[t]he general rule that a question may not be raised for the first time on appeal to this court is not inflexible. When consideration of a claim sought to be raised is necessary to a proper determination of a case, such rule will not be applied."[5]

B. Analysis

Plaintiff, Edith Kyser properly asserts in her response to Defendant, Kasson Township's Leave for Appeal that the Supreme Court has ruled that it normally will not hear issues on appeal that were not raised below, including constitutional issues.[6] Nonetheless, the Court has made clear that this general rule is not inflexible, and that the Court will hear issues on appeal when

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[1] *Booth Newspapers Inc v University of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).
[2] *See, e.g., Butcher v Special Machine & Engineering Inc*, 418 Mich 520; 345 NW2d 164 (1984).
[3] *See, e.g., Perin v Peuler*, 373 Mich 531, 534; 130 NW2d 4 (1964).
[4] *Krause v Faulkner*, 318 Mich 422, 425; 28 NW2d 232 (1947), emphasis added.
[5] *Dation v Ford Motor Co*, 314 Mich 152, 160-61; 22 NW2d 252 (1946).
[6] Plaintiff's Response to Defendant's Leave to Appeal, pp. 18-22.

justice requires. While this rule applies to constitutional as well as other claims, it is important to distinguish claims alleging some violation of a constitutional rule or principle, which lower courts are capable of addressing and to which the cases cited as authority by Plaintiff speak, from a claim that the constitutional rule or principle itself should be reversed, a claim upon which a lower court cannot act. Only the Supreme Court can fundamentally reinterpret or overrule a constitutional rule or principle, including one established by the Supreme Court itself. In other words, such claims cannot be realistically raised below because attempting to do so would be futile. Defendant reasonably argued its case below given the applicability of the "no very serious consequences" rule, a rule first articulated by this Court. Defendant now properly seeks to raise the issue of the fundamental validity of that rule itself before this Court, the only court capable of acting upon such a claim. Moreover, because Defendant and Plaintiff in their briefs for this appeal, as well as Amici in this brief, have addressed this claim in detail, nothing is missing from the record below that would prevent the court from acting on this claim competently. Refusing to hear the claim now because it was not raised below would result in a manifest injustice, and it would leave unresolved the question of the validity of the NVSC rule.

II. The Michigan Supreme Court should overrule the "no very serious consequences" rule because it creates an unwarranted special exception to the standard test for adjudicating the reasonableness of a local zoning ordinance with regard to the regulation of land uses involving the extraction of mineral resources.

A. Standard of Review

A claim that the lower courts' legal analysis was flawed presents a question of law to which the de novo standard of review is applied.[7] "We review de novo the interpretation and application of a statute as a question of law."[8]

B. Analysis

1. Both the U.S. Supreme Court and the Michigan Supreme Court have long held that courts should not employ heightened judicial scrutiny when adjudicating substantive due process claims regarding local zoning ordinances.

In 1926, the United States Supreme Court considered for the first time, in the case of *Euclid v Amber Realty, Co,*[9] whether a local zoning regulation, on its face, represents a constitutionally valid exercise of state and local police power authority. Recognizing the legislative nature of zoning regulation, the Court held that if the purpose behind the regulatory action and the reasonableness of its execution is "fairly debatable," then a court should defer and uphold that decision, rather than supplanting the legislature's prerogative to make legislative decisions through the political process with the court's own view of the appropriate outcome through judicial fiat.[10] In the 1928 decision of *Nectow v Cambridge,*[11] the court held further that while zoning is constitutionally valid on its face, it may nonetheless be found by a court to have

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[7] *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561, 569; 592 NW2d 360 (1999).
[8] *Eggelston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).
[9] 272 US 365; 47 S Ct 114 (1926).
[10] *Euclid*, 272 US at 388.
[11] 277 US 183; 48 S Ct 447 (1928).

violated due process guarantees in application, *if* the decision made by the locality bears *no* reasonable relationship to a legitimate public interest. Over time, the formulation of this standard of review has evolved with the US Supreme Court's evolving substantive due process adjudication, so that land use regulations, along with other social and economic regulations, are today viewed by the Court as constitutionally valid using the deferential "rational relationship" or "rational basis" standard of review, unless some question of race, national origin, gender, alienage, or fundamental constitutional right is implicated, in which case the courts employ greater judicial scrutiny.[12]

Importantly, private property rights already enjoy a heightened degree of federal and state constitutional protection because federal, state, and local regulations affecting the use of property are subject to judicial review under both the due process and the regulatory takings constitutional doctrines. It is also important to recognize that what precisely constitutes a fundamental constitutional right under the federal substantive due process doctrine is not entirely clear. Even so, while the US Supreme Court has recognized a number of fundamental rights warranting greater judicial protection,[13] it has never identified the right to use private property as a fundamental right warranting heightened judicial scrutiny for substantive due process adjudication. Rather, it continues to apply rational relationship review to laws restricting the use of property.[14] The Michigan Supreme Court has similarly held that "[w]hen First Amendment

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[12] Technically, if questions of race, origin, gender, or alienage are implicated, then the US Supreme Court applies equal protection review rather than substantive due process. Nonetheless, the tests the Court applies are essentially the same under both doctrines. *See generally*, Nowack and Rotunda, *Constitutional Law* (1995, 5th ed.).

[13] These include most of the guarantees of the Bill of Rights, the right to fairness in criminal proceedings, the right to privacy, the right to travel, the right to vote, the freedom of association, and "some aspects of fairness in the adjudication of individual claims against the government." Nowack and Rotunda, *supra*, p. 390.

[14] *Id.* at 392, citing *Hodel v Indiana*, 452 US 314; 101 S Ct 2376 (1981).

rights are being restricted we require the state to justify its legislation by a 'compelling' state interest[, but with] regard to zoning ordinances, we only ask that they be 'reasonable.'"[15] Thus, the law under the federal and Michigan constitutions, as well as that of all of the other several states, is historically consistent and well-settled in holding that state and local regulations implicating the use of private property, when challenged on substantive due process grounds, are to be evaluated using rational relationship review, not heightened judicial scrutiny.[16]

The federal *Euclid* and *Nectow* local zoning cases were decided at the height of the US Supreme Court's infamous *Lochner* era,[17] when the Court invalidated a host of social and economic regulations based on notions of substantive due process. The problem with the Court's adjudication during the *Lochner* era was that it proceeded down not just a slippery slope but an icy plummet. As explained by constitutional law professors John Nowack and Ronald Rotunda, the Supreme Court's rulings during this era:

> …could not even be termed an economically consistent defense of laissez faire theories of economics. Instead, the Justices upheld laws which they personally agreed would be necessary to protect important social goals even though the legislation involved some restraint on commerce, while they struck down as arbitrary legislation laws they considered to tamper unnecessarily with the free market system. Thus, the independent review of legislation during this period resulted in an unprincipled control of social and economic legislation. [The due process clause of the Fifth and Fourteenth Amendments especially] provided the Court with the most useful and flexible concepts *to promote and protect the economic scheme that the Justices believed was best for the country*.[18]

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[15] *Kropf v Sterling Heights*, 391 Mich 139, 157; 215 NW2d 179 (1974).

[16] Indeed, establishing private property use as a fundamental right warranting heightened judicial scrutiny under substantive due process review would represent a substantial departure from historically consistent and well-settled precedent under the due process doctrines as established uniformly by the federal courts and the courts of the several states. *See generally*, Nowack and Rotunda, *Constitutional Law* (1995, 5th ed.); Jurgensmeyer and Roberts, *Land Use Planning and Development Regulation Law* (2003); Mandelker, *Land Use Law* (1997, 4th ed. with 2007 supp.); Crawford, *Michigan Zoning and Planning* (1998, 3rd ed., with 2007 supp.).

[17] *Lochner v New York*, 198 US 45, S Ct 539 (1905).

[18] Nowak and Rotunda, *supra*, pp. 384-85, citations omitted, emphasis added.

Remarkably, even though *Euclid* and *Nectow* were decided during the *Lochner* era, they in fact embodied the principle of deferential judicial review. They also foreshadowed the Court's eventual retreat from expansive substantive due process adjudication by the mid 1930s.[19] The Court ultimately abandoned its substantive due process doctrine with regard to social and economic regulation generally, and it apparently determined to not adopt such heightened review for local zoning cases in the first place, because it recognized the imprudence of compelling the judiciary, in the words of Justice Black, to "sit as a superlegislature to weigh the wisdom of legislation.'"[20] The legislature is the branch of government most directly accountable to the people politically, and it is best positioned to analyze, contemplate, deliberate, and draw lines through policies and regulations that affect individuals for the sake of safeguarding the public health, safety, and general welfare—including regulations that affect individuals' use of property. Accordingly, the judiciary should give substantial deference to legislative decisions under due process adjudication when neither fundamental rights nor suspect classifications are implicated and when the underlying basis of the legislation is in any way rational or "fairly debatable."

While this federal adjudicatory history and precedent applies—strictly speaking—only to the federal courts and to state courts when adjudicating federal constitutional claims, it provides a compelling illustration of the dangerous seas into which courts sail when they begin to second guess legislatures on substantive due process grounds generally, or to carve out exceptions to

[19] *West Coast Hotel v Parrish,* 300 US 379; 57 S Ct 578 (1937); *US v Carolene Products,* 304 US 144; 58 S Ct 778 (1938); *Williamson v Lee Optical Co,* 348 US 483; 69 S Ct 257 (1955). *See* Nowack and Rotunda, *supra*, pp. 384-88.
[20] *Fergusun v Skrupa,* 372 US 726, 731-32; 83 S Ct 1028 (1963). See also Nowak and Rotunda, *supra*, pg. 388.

deferential substantive due process review for anything other than fundamental and clearly articulated constitutional guarantees.

Indeed, the Michigan courts have long recognized the wisdom of engaging in deferential review both generally and specifically with regard to local zoning regulations. The Michigan Supreme Court has clearly and consistently held that the kind of line-drawing policy decision embodied by a local zoning adoption or amendment is fundamentally within the domain of the legislature rather than the judiciary[21] and that, accordingly, local decisions to both adopt and amend local zoning ordinances are fundamentally legislative actions.[22] Moreover, courts should not "substitute their opinions for that of the legislative body on questions of policy."[23] Specifically with regard to local zoning, a Michigan court should most emphatically "not sit as a superzoning commission" in order to second guess a municipality in its zoning decisions.[24] The Court has also consistently held that "reasonableness is the test of [a local zoning code's] validity,"[25] that the ordinance is presumed to be valid, and that a property owner faces a heavy burden in proving that a zoning action violates substantive due process.[26]

That is, the Michigan courts have maintained a deferential stance for judicial review of local legislative zoning decisions except for a relatively recent judicial foray into cases involving

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[21] *Brae Burn, Inc v Bloomfield Hills*, 350 Mich 425, 86 NW2d 166 (1957).
[22] *Swartz v City of Flint*, 426 Mich 295, 395 NW2d 678 (1986); *Greater Bible Way Temple of Jackson v City of Jackson*, 478 Mich 373, 733 NW2d 734 (2007). 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.").
[23] *Cady v Detroit*, 289 Mich 499, 509, 286 NW 805 (1939).
[24] *Dequinder Development Co v Charter Township of Warren*, 359 Mich 634, 64-48; 103 NW2d 600 (1960). Both the Supreme Court and Court of Appeals have repeatedly stated the admonition to lower courts to not sit as superlegislatures or superzoning commissions, *see, e.g., Kropf v City of Sterling Heights*, 391 Mich 139, 161; 215 NW2d 179 (1974); *Essexville v Carrollton Concrete*, 259 Mich App. 257, 256-67; 673 NW2d 815 (2003), *app den*, 470 Mich 864 (2004).
[25] *Kropf v Sterling Heights*, 391 Mich 139, 157; 215 NW2d 179 (1974).
[26] *Id. See also, Robinson v Bloomfield Hills*, 350 Mich 425, 86 NW2d 166 (1957).

the regulation of mineral extraction. That foray was initiated most directly by virtue of the Court-established "no very serious consequences" (NVSC) rule, which was first clearly articulated as such by Justice Levin of the Michigan Supreme Court in 1982. Despites its now almost 30-year tenure, however, this rule is inapt for several reasons: its key source of authority was premised on *dicta* from a 1929 Michigan Supreme Court decision which was itself premised on *dicta* from a dated and inapt federal circuit court decision; it was and remains based on a flawed and inappropriate standard of review for the adjudication of substantive due process claims; it properly invokes but improperly over-applies the important concept of land suitability for land use decision-making purposes; and it ignores sound principles of statutory construction in construing the state's zoning enabling laws.

2. The authority underlying the "no very serious consequences" rule is inapt and not compelling.

The Michigan courts, as well as the courts of other states and federal courts construing state law, have long struggled with the difficulty of determining the reasonableness of local ordinances that regulate mineral extraction, recognizing the larger public interest in allowing access to needed mineral resources and given concerns about allowing property owners to extract value from their property—both in tension with the public health, safety, and welfare concerns associated with the mineral removal process.[27] Michigan's current foray into treating mineral extraction as a preferred land use, and thus to adjudicating such cases using heightened judicial scrutiny, was established in 1982 in *Silva v Ada Twp*,[28] where Justice Levin writing for the Court

[27] See *Certain-Teed Products v Paris Twp.*, 351 Mich 434, 457; 88 NW2d 705 (1958) citing to a variety of federal and state cases.
[28] *Silva v Ada Twp.*, 416 Mich 153; 330 NW2d 663 (1982).

quoted from a 1929 Michigan Supreme Court decision, *North Muskegon v Miller*,[29] and cited to the 1971 Michigan Supreme Court decision, *Certain-Teed Products*, in order to "*reaffirm* the [no] 'very serious consequences' rule."[30]

The problem with this formulation is that Justice Levin elevated to doctrine language that had been provided through *dicta* in both of the earlier cases cited, as recognized by Justice Ryan in his dissent to the *Silva* decision.[31] Indeed, the "no very serious consequences" language that the *Silva* decision cites from the 1971 *Certain-Teed* decision was actually penned by Justice Black writing in *dissent*, where he attempted to elevate to the status of a rule the "no very serious consequences" language from the 1929 *Miller* decision, a formulation which the majority of the Court in *Certain-Teed* had clearly rejected.[32] In fact, the opinion of the majority in *Certain-Teed* reaffirmed prior decisions that had held "that the test of constitutionality of a zoning ordinance is its reasonable relationship to the good and welfare of the general public."[33]

Beyond that, the status of the "no very serious consequences" language in the *Miller* decision—the Michigan Supreme Court decision upon which the NVSC rule ultimately rests—is tenuous at best for two reasons. First, as noted, that language was drawn from *dicta* in the *Miller* decision, which was actually decided by the Court based on its conclusion that the zoning ordinance in question was "unreasonable and confiscatory,"[34] based in turn on its conclusions of

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[29] *North Muskegon v Miller*, 249 Mich 52; 227 NW 743 (1929).
[30] *Silva*, 416 Mich at 159, 330 NW2d at 666, emphasis added. Note that in quoting *Miller*, Justice Levin provided emphasis to the phrase "very serious consequences" that was not provided in the original.
[31] *Silva*, 416 Mich at 164-65, Ryan, J., dissenting.
[32] *Certain-Teed Products*, 351 Mich at 466-67, Black, J., concurring in part and dissenting in part. Justice Levin, in citing to this language in *Silva* (416 Mich at 159), failed to note that it was actually taken from Justice Black's dissent in *Certain-Teed*.
[33] *Certain-Teed*, 351 Mich at 459, citing earlier in the opinion to the US Supreme Court's *Euclid* decision, at 457.
[34] *Miller*, 249 Mich at 59, 227 at 745.

fact that the land in question was unsuited for the uses for which it was zoned and that the ordinance therefore had the effect of making the plaintiff's property "almost worthless."[35] Contrary to the assertion made by Justice Levin in *Silva* and repeated continuously by Plaintiff here, neither the *Miller* nor the *Certain-Teed* decisions established the so-called NVSC rule; it was established by the *Silva* decision.

Second, in commenting tangentially that "courts have particularly stressed the importance of not destroying or withholding the right to secure oil, gravel, or mineral from one's property, through zoning ordinances, unless some very serious consequences will follow therefrom,"[36] the Supreme Court in *Miller* cited to a single case as the source of authority for its assertion—*Village of Terrace Park v Errett*[37]—a federal Sixth Circuit Court of Appeals decision construing the constitutionality of a local zoning ordinance in Ohio under the Ohio constitution. The authority provided by *Terrace Park* for the "no very serious consequences" assertion in *Miller* is, in turn, itself quite tenuous. The *Terrace Park* court engaged in an ad hoc analysis of the likely consequences of a proposed surface gravel mine vis-à-vis local concerns about the potential impacts from that mining, although the decision itself nowhere includes the phrase or clearly articulates a "no very serious consequences" rule for adjudicating mineral extraction cases. Nonetheless, the *Terrace Park* court clearly based the authority for its analysis primarily on the US Supreme Court Decision in *Pennsylvania Coal v Mahon,*[38] the case that established the federal regulatory takings doctrine. Moreover, specifically with regard to the assertion that mineral extraction cases warrant heightened scrutiny, the *Terrace Park* court again cited

[35] *Id.*, 249 Mich at 57, 227 at 744. See also Davis, J., dissenting.
[36] *Id.*, 249 Mich at 57, 227 at 744.
[37] 12 F.2d 240 (1926).
[38] 260 US 393, 43 S Ct 158 (1922).

primarily to *dicta*, in this case a tangential observation made by the US Supreme Court decision in *Hadacheck v Los Angeles*.[39]

The Sixth Circuit *Terrace Park* decision, published in April of 1926, did not cite to either the *Euclid* or *Nectow* decisions (discussed *supra*) because both came later—*Euclid* in November of 1926 and *Nectow* in 1928. Yet in terms of federal constitutional case law, both of those latter decisions today provide more clear authority and guidance for the proper adjudication of local zoning ordinances with regard to substantive due process than does *Pennsylvania Coal*. Similarly, neither *Terrace Park*, nor by extension the Michigan Supreme Court's early 20th-century decision in *Miller*, reflect the evolution that has occurred in the past 80 years with regard to the adjudication of state and local laws under the federal substantive due process doctrine or the mainstream of the Michigan Supreme Court's doctrine with regard to state substantive due process adjudication, even as it applies to local zoning regulations. In sum, rather than resting on solid doctrinal authority, the Michigan Supreme Court's NVSC rule ultimately rests inaptly on a single tangential observation that was made by an earlier and now dated Michigan Supreme Court decision that was itself based inaptly on a now-dated federal circuit court decision construing Ohio constitutional law.

3. The "no very serious consequences" rule compels courts to engage in improper substantive due process adjudication.

Beyond the fragile doctrinal pedestal upon which the NVSC rule stands, both the formulation of that rule and its application through the case at hand illustrate precisely the

[39] 239 US 394, 36 S Ct 143 (1917). The *Hadacheck* Court upheld a Los Angeles zoning ordinance prohibiting the manufacturing of bricks within city limits even though it had the effect of outlawing plaintiff's existing brickyard, although it noted in passing that it might have decided differently had the land use in question involved mineral extraction rather than brick making.

impropriety of the Supreme Court establishing public policy regarding local zoning cases through judicial decree: it compels the lower courts to engage in expansive substantive due process adjudication that in turn compels them to act as superzoning commissions rather than courts.

The doctrinal pedigree underlying the NVSC rule just described, in addition to be being based primarily on several statements of *dicta*, was also based substantively on a judicially established public policy of promoting mineral extraction. Aside from repeatedly stating something like "courts have particularly stressed the importance of not destroying the right to secure oil, grave, or minerals from one's property" (typically citing to the *Terrace Park*, *Miller*, *Certain-Teed*, and now *Silva* cases for authority), this judicial pronouncement was stated most prominently in *Certain-Teed*. Using language strikingly reminiscent of the justifications employed by the US Supreme Court at the height of its *Lochner* era, the Michigan Supreme Court in *Certain-Teed* declared, "*We believe* the public policy of the State is calculated to encourage both manufacturing and mining. In the administration of our zoning laws, while we seek to protect our homes, we must likewise take into account the public interest in the encouragement of full employment and vigorous industry."[40]

Aside from running counter to the lessons that should have been learned from the US Supreme Court's unhappy foray into expansive substantive due process adjudication during the *Lochner* era, this statement in *Certain-Teed*—and its subsequent restatement in part with

[40] *Certain-Teed*, 351 Mich at 464-65, emphasis added. Somewhat ironically, even though the Court articulated this expansive state-level natural resource management policy, it also declined to establish a heightened standard of review for mineral extraction cases generally as argued for by Justice Black in dissent (discussed *supra*); that came later with Justice Levin's opinion in *Silva*.

approval by Justice Levin in *Silva*[41]—was fundamentally flawed, certainly by the time *Silva* was decided if not earlier. As noted by Justice Ryan in his dissent in *Silva*, the Court had "long since abandoned the illusion that our scarce natural resources are infinite and renewable and therefore should be quickly exploited to the fullest extent."[42] More importantly, Justice Ryan also recognized that the newly-crafted NVSC rule reversed the burden of proof and turned mining into a preferred land use, a doctrine which had been expressly overruled by the Court a few years earlier in *Kropf*[43] based especially on reasoning articulated almost two decades earlier by the Court in *Brae Burn, Inc v Bloomfield Hills*.[44]

Kropf and *Brae Burn* are pivotal sources of authority for the case at hand because the Court stated in those decisions, in words that could hardly be more explicit and direct, that it is not the role of the court to pass judgment on the desirability of the substantive policy decisions embodied within a local zoning ordinance:

> [T]his 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

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[41] *Silva*, 416 Mich at 159, n5.
[42] *Id.* at 164, Ryan, J., dissenting.
[43] Justice Levin's opinion, responding to Justice Ryan's dissent, countered that because *Kropf* had not addressed specifically the "'[no] very serious consequences' rule of *Miller* and *Certain-teed*" (*Silva*, 416 Mich at 161), it did not overrule the special standard of review created by those cases. But since neither of those cases had actually established the NVSC rule (see discussion *supra*), one would not have expected the *Kropf* Court to address such a rule. Beyond that, *Kropf* was intentionally broad in its statement overruling the doctrine of preferred land uses, and it runs counter to logic and a straightforward reading of that case on its face to conclude that only those preferred uses specifically identified in *Kropf* were overruled by it (*Kropf*, 391 Mich at 156).
[44] 350 Mich 425; 86 NW2d 166 (1957).

> 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, § 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 the subject to judicial criticism or control."[45]

This mandate to not make substantive policy through judicial decree is based fundamentally on the separation of powers doctrine, and it applies in terms of making both state-wide public policy and local public policy. The proper authority for making substantive public policy for the state is the state legislature. Similarly, beyond constraints or obligations imposed by the state legislature, the proper authority for making substantive policy decisions for any given locality is the local legislature. Contrary to this fundamental doctrine, the Court through its decisions in *Certain-Teed* and *Silva* established a state-wide natural resource management policy that treats mineral extraction as a preferred land use, a policy that has no basis in state statutory law or constitutional provision (this assertion is discussed in more detail below, pp. 35-39). Moreover, as well-illustrated by this case, that policy has now evolved into an adjudication rule that—except under the most extreme circumstances—is virtually dispositive: if a landowner has minerals on his or her property, the locality must allow it to be mined. As stated by the trial court in this case, Judge Power, from the bench:

> Now, the law is kind of odd in this case. In most cases in which there's an appeal of a denial of a Township or a city of a rezoning, the question is whether the zoning scheme is quote "reasonable." And there is a strong presumption that a Township or a city zoning scheme is reasonable and it's that strong presumption the owner must rebut. There is however for mineral extraction a different rule that is far more favorable to the owner. I was a little surprised actually, because I hadn't thought that would be the case, but it is. And the … Supreme Court last addressed this issue in 1982 in the case of *Silva v Ada Township*…. And for mineral extraction it clarified that there was a … "very serious consequences

[45] *Kropf*, 391 Mich at 161, quoting *Brae Burn*, 350 Mich at 430-32.

> test"…. And that is a more rigorous standard of reasonableness that the zoning ordinance has to meet in order to be upheld.[46]

Having acknowledged this new rule, the trial court then stepped through every potential "very serious consequence" contested by the parties and concluded, almost inevitably, that none of the consequences—in the opinion of the court—were either very serious or beyond being cured through mitigation. The effect of *Silva* has been a complete reversal of the deferential stance courts are to take toward local zoning ordinances under substantive due process review.[47]

Beyond clearly illustrating that the NVSC rule has indeed established state resource management policy through a dispositive adjudication rule, this case also clearly demonstrates that it necessarily compels a trial court to become a superzoning commission when hearing minerals extraction cases. That is, review of the trial court transcript for this case clearly demonstrates that that is exactly what happened here. Having discussed the *Silva* rule for mineral extraction cases, in combination with the Michigan Court of Appeals decision in *American Aggregates v Highland Twp*,[48] the bulk of the trial court's decision consisted of the court stepping through every potential "very serious consequence," along with potential configurations of the Township's gravel mining district, and engaging in exactly the same kind of analysis and pro-and-con deliberation that is the essence of legislative decision-making. The trial court struggled especially with the question of determining the most appropriate boundaries for the gravel mining district:

> And it … is not at all clear that that district is necessarily the ideal district. And … maybe [addition] to it from time to time is not necessarily a bad idea. The question is, how do we prevent the whole of Kasson Township to the west to Empire from becoming a gravel pit? And particularly with the residential

[46] Trial court transcript pp. 7-8.
[47] In fact, as demonstrated below, pp. 30-32, the NVSC amounts more to a strict scrutiny rather than rational basis standard of review.
[48] 151 Mich App 37; 390 NW2d 192 (1986).

> development that is now occurring on the western edge of the Township. And so I think … some thought about "where does this end" probably would be a good idea. At the risk of sort of speculating about that.[49]

This, again, is exactly the kind of deliberative reasoning and line-drawing policy-making that is fundamentally the province of a legislature, not a court. Yet because the NVSC rule effectively reverses the burden of proof and compels the local government to convince a court that the consequences of allowing mining will be "very serious," the rule effectively compels the trial court to itself become the local "superzoning commission." Indeed, Judge Power himself recognized this, noting that 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."[50]

As Judge Davis noted in his dissent,[51] the Supreme Court foresaw this very outcome from elevating mineral extraction to a preferred status in its 1957 gravel mining decision of *Bloomfield Twp v Beardslee*.[52] In that case, the Court contemplated the argument that mineral extraction should be granted a preferred use status, and it appropriately rejected it. Justice Levin cited to this case without comment in *Silva*,[53] but apparently ignored it in reaching his decision, laying the ground for Michigan's improvident foray into expansive, *Lochner*esque substantive due process review when it comes to gravel mining cases. The Court now has the opportunity to

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[49] Trial court transcript pp. 42-43.
[50] *Id.*, pp. 44. Ironically, the *Silva* rule would do this while at the same time prohibiting the court from also fully contemplating another fundamental concern inherent to local legislative decision-making on land use regulation—that is, the public interest that is served by maintaining the integrity and coherence of the locality's planning and zoning system—if the decisions by the trial court and court of appeals in this case are upheld.
[51] *Kyser v Kasson Twp*, Mich App slip op, Davis, J., dissenting, pg. 3.
[52] 349 Mich 296; 84 NW2d 537 (1957). As Judge Davis noted, "The Court explained that '[a]ttractive though the argument may seem upon its first reading, it must be obvious that a logical application of its principle would be destructive of all zoning….'" (*Kyser*, Mich App slip op, Davis J., dissenting, pg. 3, quoting *Bloomfield Twp*, 349 Mich at 303.)
[53] 416 Mich at 159, n6.

correct course and return to the same standard of review it prudently applies to every other kind of local zoning case.

Consideration of three assertions made by Plaintiff regarding this larger substantive due process issue, in response to Defendant's Application for Leave to Apply, helps to further clarify the arguments being made here.

i. Judge-made law establishing rules for proper adjudication are legitimate, but judge-made law establishing state-wide public policy are not.

Plaintiff asserts that Defendant's (and Amici's) claim that the NVSC rule amounts to inappropriate judge-made law is irrelevant because judges legitimately make laws such as the rule that governmental action be reasonable under substantive due process adjudication.[54] Courts surely make law when establishing rules that provide guidance for the appropriate adjudication of constitutional principles, such as the rule of reasonableness under due process review, or that ensure the economical and fair administration of justice, such as rules regarding standing. Courts do not appropriately make law through judicial decree, however, when those laws effectively establish state-wide (or local) substantive public policy. The Court's NVSC rule is not illegitimate judge-made law simply because it was judge made but rather because it establishes state-wide natural resource management policy solely by judicial decree.

ii. Kropf *does not establish, nor does it support, the proposition that local zoning ordinances affecting mining should receive heightened judicial scrutiny.*

Both Defendant in its Motion for Leave to Appeal and Plaintiff in her Response quote extensively from *Kropf*, an important Supreme Court decision regarding substantive due process

[54] Plaintiff's Response, pp. 24-25.

challenges to local zoning ordinances. Plaintiff essentially misconstrues a key aspect of the *Kropf* decision, however, by quoting a statement from it—but doing so only in part. Specifically, Plaintiff provides an extensive quote from *Kropf* that ends with the statement "'Different degrees of State interest are required by the courts, depending upon the type of private interest which is being curtailed.'"[55] Plaintiff then uses that statement to assert that *Kropf* "says that different degrees of public health, safety and welfare interest may be required to comply with substantive due process, depending on the type of activity being restricted," and that the NVSC rule simply represents a different degree of interest—and hence a different degree of the same level of judicial scrutiny—for zoning cases in terms of substantive due process review. The quote provided by Plaintiff is incomplete, however, because the paragraph from which it was extracted concludes with the following three sentences:

> When First Amendment rights are being restricted we require the state to justify its legislation by a "compelling" state interest. With regard to zoning ordinances, we only ask that they be "reasonable." And, as we have stated, they are presumed to be so until the plaintiff shows differently.[56]

In other words, this quote speaks to the higher level of judicial scrutiny implicated when a local regulation implicates a fundamental constitutional right such as a First Amendment guarantee, as discussed earlier in this brief (see pp. 15-16 *supra*). Rather than supporting Plaintiff's assertion that the authority provided by *Kropf* supports the notion that mineral extraction cases deserve heightened judicial scrutiny, that authority in fact stands for just the opposite. As the full quotation from that decision explains, heightened judicial scrutiny is appropriate only when some fundamental right has been implicated; it does not extend to local zoning cases as a general rule, including cases involving the extraction of mineral resources.

[55] Plaintiff's Response, pg. 26, quoting *Kropf*, 391 Mich at 157-58.
[56] *Kropf*, 391 Mich at 157-58.

Because neither the federal courts nor the Supreme Court of Michigan have ever recognized property ownership as a fundamental guarantee warranting heightened judicial review, and because the preferred use status of mineral extraction was established inappropriately by judicial decree in a single decision (i.e., *Silva*) that misconstrued and ignored prior Michigan Supreme Court precedent (i.e., *Miller, Certain-Teed, Bloomfield Twp, Brae Burn, Kropf*), the foundation for Plaintiff's argument that Michigan precedent justifies a "different degree" of judicial scrutiny for mineral extraction cases under substantive due process review washes away.

iii. The "no very serious consequences" rule does not represent merely a variant of the general reasonableness test, but a heightened standard of judicial review that reverses the burden of proof and negates the presumption of a local ordinance's validity.

Building off of the assertion that the NVSC rule is merely a variant of the general test of reasonableness under substantive due process review, Plaintiff argues further that it does not amount to a heightened level of judicial scrutiny, that it does not shift the burden of proof to the locality, and that it does not establish mineral extraction as a preferred land use.[57] These arguments are premised essentially on the assertion made by Justice Levin early in his opinion in *Silva* that "[z]oning ordinances are presumed to be reasonable, and a person challenging the ordinance has the burden of providing otherwise" before he pronounced the NVSC rule itself.[58] The assertion that even under the NVSC rule the plaintiff has the burden of showing that there will be no "very serious consequences" seems to parallel the standard formulation for substantive due process review, under which a plaintiff bears the burden of showing that there is no "rational relationship" between a regulation and the corresponding harm to be avoided. To that extent, it

[57] Plaintiff's Response, pp. 26-31.
[58] *Silva*, 416 Mich at 157.

seems plausible on its face. Further reflection, however, reveals that the assertion that the NVSC rule does not, in fact, amount to a different standard of judicial scrutiny is fundamentally nonsensical. It also runs counter to the rule's actual effect as demonstrated by this very case.

Under the standard reasonableness test, the defending locality effectively has to offer but a single putatively valid justification for its regulation, and that justification is deemed sufficient unless the *plaintiff* can demonstrate that the justification is wholly irrational or bears absolutely no legitimate relationship to a valid public interest. As stated clearly by the Court in the 1957 gravel mining case of *Bloomfield Twp*, prior to both the 1958 *Certain-Teed* and 1982 *Silva* decisions, "[i]n each case the question is whether, on the peculiar facts before us, the ordinance is a reasonable regulation in the interest of the public good, or whether it is an *arbitrary and whimsical* prohibition of a property owner's enjoyment of all of the benefits of his title."[59]

Under the NVSC rule, in contrast, the defendant locality is in effect compelled to present *every* plausible injurious consequence from mining, and further the *defendant* must effectively demonstrate to the satisfaction of a court (because a plaintiff will surely not be much motivated to do so) that at least one of the consequences identified will be "very serious." This standard of review clearly reverses the burden of proof, and it clearly negates the presumption of a regulation's validity, because it actually compels the local *legislature* to demonstrate unequivocally that at least one unmitigable "very serious consequences" will surely arise from the locality's *failure* to regulate. In other words, this standard requires that the local *government* demonstrate that its regulation is *necessary* (because the anticipated injurious consequence from failure to regulate will be unmitagable) to advance a *compelling* governmental interest (because

[59] 349 Mich at 303, emphasis added. As noted by Judge Davis, while this opinion was denominated the "concurring" opinion, it was actually the majority opinion. *Kyser*, Mich App slip op, Davis J., dissenting, pg. 3

those injurious consequences will be "very serious"). Yet more precisely, it must satisfy the "strict scrutiny" standard of review reserved under both federal and Michigan law for alleged violations of fundamental constitutional guarantees under substantive due process and equal protection adjudication.[60]

To merely recite the language of the standard test for reasonableness under due process review before deploying the NVSC rule in the case of mineral extraction does not obviate the rule's actual effect. Indeed, Plaintiff protests in her reply that, if both parties had not agreed that the NVSC test controlled, she could have amended her complaint to offer a variety of alternative due process and equal protection claims.[61] She did not need to do so, however, and the Defendant lost its case below, because the NVSC rule is in fact a standard of due process review that amounts virtually to strict scrutiny. Under such a standard of review, a plaintiff need not bother to make any other claims because the defendant government, bearing the burden of proof to overcome a substantial presumption of invalidity, will very likely lose. Moreover, because this species of local zoning ordinance is the only type of zoning ordinance that is given such heightened judicial scrutiny, it does in effect amount to a judicially established preferred land use doctrine, in contravention of the Court's holding in *Kropf* that clearly overruled such doctrines prior to *Silva*.

4. The Silva decision properly cites but improperly over-applies the important concept of land suitability for local land use decision making.

The *Silva* decision along with the other decisions to which it cited have offered two key justifications for providing heightened judicial review of local zoning ordinances that regulate (if

[60] *Kropf*, 391 Mich at 157-58; see generally Nowack and Rotunda, *supra*, pp. 391-93.
[61] Plaintiff's Response, pg. 21.

not prohibit altogether) minerals extraction. The first is the argument that, unlike other land uses that can be engaged in a variety of locations, the mining of gravel and other minerals can be conducted only where minerals are actually found. As Justice Levin explained in *Silva*:

> Natural resources can only be extracted from the place where they are located and found. Preventing the mining of natural resources located at a particular site prevents all use of those natural resources. As the United States Court of Appeals for the Sixth Circuit said in *Village of Terrace Park v Errett*, 12 F2d 240, 243 (CA 6, 1926): "There is * * * a substantial difference between an ordinance prohibiting manufacturing or commercial business in a residential district that may be conducted in another locality with equal profit and advantage, and an ordinance that wholly deprives the owner of land of its valuable mineral content."[62]

This reasoning is faulty for several reasons. First, it is not at all clear that preventing the mining of mineral resources at a given site necessarily prevents access to all such mineral resources entirely (i.e., the implication of the statement above). Second, it is not at all clear that there is in fact any substantial difference between being prevented from making a profit in one's land by extracting minerals than being prevented from making a profit through any other potential use of the land; a wide array of land uses that are considered reasonable in general—including uses stemming from unique physical attributes of the property—are often curtailed if not prohibited outright on individual properties because of the socially harmful consequences those uses could yield. Moreover, expressing concern about wholly depriving a landowner of the land's valuable mineral content (i.e., akin to depriving all economic value) is an assertion more properly made in the context of a regulatory takings adjudication, not a due process adjudication.[63] Finally, while this reasoning about the location of minerals and the corresponding suitability of land for mining purposes does in fact raise the important issue of land suitability, a

[62] *Silva*, 416 Mich at 159-60.
[63] This distinction was drawn most clearly with regard to federal constitutional adjudication by the US Supreme Court's recent decision in *Lingle v Chevron USA Inc*, 544 U.S. 528; 125 S Ct 2074 (2005).

fundamentally important concept in local land use planning and development management more broadly,[64] it improperly extends that concept too far.

Many uses of land are appropriate or inappropriate for a host of reasons, including conditions related to both the natural and the built environment (or to "land suitability"). Some conditions of the landscape, both natural and built, speak strongly toward the need to allow a land use to take place. The presence of prime agricultural lands, for example, works strongly in favor of zoning for farming, the presence of a river or lake-front works strongly in favor of zoning for water dependent uses, and the presence of water and sewer infrastructure works strongly in favor of zoning for new residential development, just as the presence of subterraneous minerals works strongly in favor of zoning for mining. Similarly, the combination of both built and natural conditions sometimes constrains the suitability of that landscape for one or another potential use. Attempting to permit through a zoning ordinance a chemical refining operation—a land use which presumably could be engaged anywhere—in the middle of an established residential district, for example, would be just as implausible in reality as attempting to encourage (or permit by right) mining in an area of town that has no underground minerals.

The concept of land suitability is thus an important part of planning and development management, and localities in applying that concept are faced with the daunting challenge of designating zoning districts to accommodate a variety of competing land uses in such a way that those uses comport with both the physical features and the built conditions of the landscape itself. Recognizing the reality that minerals can be mined only where found is an important aspect of land suitability, and it is one that a locality encompassing mineral resources can ill-afford to ignore through its local planning and zoning efforts.

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[64] *See, e.g.*, Berke, Godschalk, Kaiser, and Rodriguez, *Urban Land Use Planning* (2006, 5th ed.); Randolph, *Environmental Land Use Planning and Management* (2004).

While the observation that minerals can be mined only where they are found is, of course, true, it is important as a guiding principle related to land suitability only so far as it goes. Most importantly, the holding that having minerals on one's land must therefore presumptively compel local governments to allow them to be mined simply goes too far. It takes a complex and nuanced consideration (i.e., an aspect of land suitability) that should be used carefully by a legislature like a scalpel through appropriate analysis and deliberation, and uses it instead as the basis for announcing through judicial decree a rule that amounts to a sledge hammer. Surely the judiciary should recognize the importance of land suitability—including the absence or presence of minerals—when assessing whether a locality's legislative zoning decisions were reasonable (considering specifically the extent to which the locality *itself* used that concept in making its zoning decisions—as discussed in more detail below, pp. 39-44), but it should not take, on its own accord, one particular aspect of land suitability and elevate it to the status of a doctrinal constitutional rule.

5. The proper place for establishing state natural resource management policy is through state legislation, and the legislature has clearly decided not to establish mineral extraction as a preferred use.

The second key justification for the NVSC rule offered by the *Silva* decision was that courts should look carefully at local zoning regulations constraining (or prohibiting altogether) minerals extraction because of the typically extra-local or regional need for those minerals and thus the larger public interest in allowing minerals extraction to occur. Again as stated by Justice Levin in *Silva*:

> Preventing the extraction of natural resources harms the interests of the public as well as those of the property owner by making natural resources more expensive. Because the cost of transporting some natural resources (*e.g.*, gravel) may be a significant factor, locally obtained resources may be less expensive than those

> which must be transported long distances…. The public interest of the citizens of this state who do not reside in the community where natural resources are located in the development and use of natural resources requires closer scrutiny of local zoning regulations which prevent development.[65]

This statement is not part of an analysis regarding the reasonableness of a given locality's regulation of gravel mining (i.e., the actual question at issue in the *Silva* case), but rather a justification premised on economic considerations for establishing a new substantive state-wide natural resource management policy in the form of a new heightened standard of review, which is what the Court then did through the *Silva* decision. Again, this amounts to exactly the same kind of legislative policy-making through judicial decree—premised on exactly the same kinds of economic and policy concerns of individual judges—that the US Supreme Court's experience through the *Lochner* era cautions against and that the Michigan Supreme Court has repeatedly exhorted the Michigan courts not to do (see discussion *supra*).

Rather than establishing state wide public policy through judicial rule, the proper forum for doing so is either through the state constitution itself or through state legislation. Only three provisions of the Michigan Constitution[66] are pertinent here. Section 17 provides, in part, "[n]o person . . . shall be deprived of life, liberty or property, without due process of law." In addition, Section 52 provides:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

Finally, Section 34 provides, in part, "[t]he provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor."

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[65] *Silva*, 416 Mich at 160.
[66] Constitution of the State of Michigan of 1963.

The first of these is the due process clause, which parallels the federal due process clause both in form and judicial doctrine, as discussed above. Nothing in this clause in particular can be construed to imply a heightened level of judicial scrutiny when localities regulate the extraction of minerals through their zoning ordinances. The second clause speaks directly to the public interest in the conservation and development of the state's natural resources. While it emphasizes the importance of this public interest, it can hardly be construed to somehow compel the rule that landowners should presumptively be allowed to excavate minerals underlying their land. More importantly, the second phrase of this clause clearly directs the *legislature*, not the judiciary, to provide for the protection and management of the state's natural resources as it deems most appropriate. Finally, the third clause makes clear that the constitution and laws regarding local government are to be construed liberally. Again, nothing in this clause can be construed to imply a heightened level of judicial scrutiny when localities regulate the extraction of minerals. In fact, all of these clauses taken together counsel the judiciary *against* the adoption of special rules of adjudication, by judicial decree alone, promoting a particular aspect of natural resource management policy contrary to the deferential stance due toward validly enacted state and local legislation.

Given these constitutional provisions, the ultimate place to look for state-wide policy regarding local zoning and minerals extraction is in state legislation. As an initial matter, Section 210 of the Michigan Zoning Enabling Act (ZEA) provides that, "[e]xcept as otherwise provided under this act, an ordinance adopted under this act shall be controlling in the case of any inconsistencies between the ordinance and an ordinance adopted under any other law."[67] In other

[67] MCL 125.3210. The Michigan Zoning Enabling Act, adopted by 2006 PA 110 (as amended), repealed and replaced in July of 2006 the Township Zoning Act (*see* MCL 125.3702(1)(c)),

words, the place to look for the applicable statutory authorities and policies with regard to the local regulation of minerals extraction through zoning is the ZEA.

Looking to the ZEA, several provisions make clear that the state legislature has explicitly considered issues of regional or statewide concern potentially harmed by local regulation and has taken steps to address those concerns. Specifically, Section 205(2) of the ZEA provides that "[a] county or township shall not regulate or control [through its zoning ordinance] the drilling, completion, or operation of oil or gas wells or other wells drilled for oil or gas exploration…."[68] Moreover, Section 207 provides that a zoning ordinance "shall not have the effect of totally prohibiting the establishment of a land use within a local unit of government in the presence of a demonstrated need for that land use…."[69] Applying the statutory construction rule of *inclusio unius est exclusio alterius*, when a statute includes provisions speaking to particular issues but excludes others, it is reasonable to conclude that the legislature contemplated and specifically intended to exclude those others. Here the state legislature clearly contemplated natural resource management issues and determined that only two of those implicated issues of regional or state-wide concern—oil and gas development. It is reasonable to conclude, especially considering the propinquity of mining to oil and gas conceptually (*see, e.g.*, the language used by the Court in *Miller*),[70] that the legislature intended to *not* extend such preferred status to mining.

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which was the applicable statute at the time this case was initially filed. The ZEA passage cited here, along with the several passages cited below, were all included essentially verbatim in the Township Zoning Act (*see* MCL 125.298, repealed); no substantive change in the law was made with regard to the issues discussed here.

[68] MCL 125.3205(2).

[69] MCL 125.3207.

[70] "[C]ourts have particularly stressed the importance of not destroying or withholding the right to secure oil, gravel, or mineral from one's property, through zoning ordinances, unless some very serious consequences will follow therefrom." (*Miller*, 249 Mich at 57.)

Similarly, the state legislature clearly contemplated the problem of local governments excluding through their zoning ordinances affordable housing, among other important land uses, despite the larger or regional public interest in providing adequate affordable housing for the state's citizens,[71] and it took legislative action to address that larger public interest accordingly. The legislature has clearly not adopted a similar policy granting heightened protection for mineral extraction given the public interest in natural resource conservation and development.

In sum, careful review of the state's relevant constitutional and legislative provisions makes clear that not only have the constitution and state legislature remained silent regarding the potential effects of local zoning on mineral extraction, it is reasonable and appropriate to conclude that the legislature contemplated a policy establishing a preferred status for minerals extraction and declined to do so. Thus no public policy establishing mining as a preferred land use has ever been appropriately adopted under Michigan law, and the *Silva* Court erred when it pronounced such a policy in the form of a heightened standard of review for minerals extraction zoning cases through judicial decree alone.

6. Proper substantive due process adjudication requires assessing the clarity, rigor, and coherence of the analysis and deliberation used to inform the zoning decision, not substituting the court's own decision for that of the legislature.

Amici have argued here that the presence of minerals on a property should not categorically make a local government's zoning ordinance that regulates (or even prohibits altogether) the extraction of those minerals "unreasonable" under substantive due process adjudication. Similarly, nothing presented here should be taken as an argument for the

[71] See *Kropf*, 391 Mich 139; 215 NW2d 179 (1974); Defendant, Kasson Township's Application for Leave to Appeal, pp. 37-38; Crawford, *Michigan Zoning and Planning* (1998, 3rd ed., with 2007 supp.), §§ 1.07, 14.01.

proposition that merely because a locality has adopted a local master plan and now points to it, a court should categorically conclude that the zoning action was reasonable under substantive due process review. Rather, the argument presented here is that the Michigan courts should treat the provisions of a local zoning ordinance affecting mineral extraction just as it treats every other provision of that zoning ordinance, asking whether that ordinance is unreasonable, arbitrary or capricious, and presuming that it is not unless a plaintiff can clearly demonstrate otherwise.

In terms of procedural due process, a court must determine whether a petitioner was given adequate notice and opportunity for comment and whether the government's proceedings were conducted fairly and impartially.[72] In terms of substantive due process, a court must evaluate whether the governmental decision itself was reasonable. Thus by extension, when adjudicating substantive due process claims using the deferential rational basis or "fairly debatable" standard of review,[73] the task of the court should be to evaluate whether the locality's assessment and deliberations underlying its legislative decision were reasonably calculated to support the decision it actually reached. It is appropriate for a court when doing so to be more or less demanding in contemplating the adequacy of the locality's decision-making process given the particular issues and landscape characteristics at hand.[74] It is also appropriate for the court, again when evaluating the reasonableness of the locality's deliberations, to consider not just the needs and interests of the locality itself but of the larger public welfare and the larger region

[72] *See generally* Fisher et al., *Michigan Zoning, Planning, and Land Use* (2008), § 8.14.
[73] That is, absent evidence of corruption, racial bias, capriciousness, or other illicit animus against a particular petitioner or an alleged violation of a fundamental constitutional right, which might require heightened procedural due process review or heightened substantive due process review, or both.
[74] *See generally* Fisher et al., *supra*, § 9.4.

within which the locality is situated.[75] It is *not* appropriate for a court when adjudicating a substantive due process claim, however, to evaluate the substance of the decision reached in terms of what the *court* thinks should have been the most appropriate outcome.

Michigan statutory and case law provides guidance for assessing the reasonableness of the analysis and deliberations used by a locality to reach its legislative zoning decisions. The Michigan Zoning Enabling Act, like the zoning enabling laws of all the other states, directs local governments to base their zoning ordinances "upon a plan designed to promote the public health, safety, and general welfare…."[76] In addition, under the recently adopted Michigan Planning Enabling Act (PEA), if the community has created a planning commission and prepared a master plan, then by operation of the PEA and ZEA together the longer-term master plan and a detailed zoning plan prepared in conjunction with that master plan should become the basis for the zoning ordinance.[77] Engaging in good local master planning is thus both statutorily required and a fundamentally important means to ensure that the regulatory decisions made by local

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[75] The US Supreme Court in its pivotal *Euclid* decision (272 US at 390), for example, stated after upholding the validity of the city's zoning ordinance that "[i]t is not mean by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."

[76] MCL 125.3203(1). Similarly, the ZEA requires that administrative zoning decisions also be consistent with the plan. MCL 125.3501(5) states: "A decision rejecting, approving, or conditionally approving a site plan shall be based upon requirements and standards contained in the zoning ordinance, other statutorily authorized and properly adopted local unit of government *planning documents*, other applicable ordinances, and state and federal statutes" (emphasis added).

[77] The Michigan Planning Enabling Act, 2008 PA 33, (MCL 125.3801 *et seq*.) becomes effective September 1, 2008. It consolidated and replaced the three prior local planning enabling acts, including the Township Planning Act, which was applicable when Kasson Township made the rezoning decision under review. This specific language regarding the development of a zoning plan, found at MCL 125.3833(2)(d), was not included in the Township Planning Act, although the same general relationship between planning and zoning was contemplated by the prior planning and zoning acts, and the zoning plan language noted will apply as of September 1. *See also*, *Inverness Mobile Home Community v Bedford Twp*., 263 Mich App 241, 249; 687 NW2d 869 (2004) (A "zoning ordinance must be based on the applicable master plan . . . .").

governments through their zoning codes are appropriate and reasonable. The Michigan courts have long recognized this important role and have found that by adopting and following a plan, updating it periodically, and making zoning decisions consistent with it, a locality provides convincing evidence supporting the presumption of validity and reasonableness of its zoning decisions, particularly for purposes of assessing due process claims.[78] Conversely, a locality that has not done all of those things, while not losing its presumption of validity and reasonableness, has nonetheless diminished its ability to defend its decision-making against due process claims.[79]

In sum, while local governments in Michigan should be able to use good master planning as a means of demonstrating the reasonableness of their zoning decisions, they should not be able to hide behind inappropriate, deficient, or inconsistent planning to do so. And while a court in Michigan should not substitute its judgment of what would be an appropriate legislative zoning decision for that of the local legislature, it should consider carefully the reasonableness of that local decision in light of the particular facts of the case. With regard to the role played by planning in particular, the courts under substantive due process review should focus especially on the clarity, rigor, and coherence of the analysis and deliberations engaged by the local government through its local planning efforts to support the legislative zoning decision it reached—as appropriately tailored given the various public interest considerations, landscape characteristics, and land development issues at hand—as well as the consistency with which the locality uses its plan to make its zoning decisions. If under such review the reasoning offered by

[78] *Bell River Assoc v China Charter Twp*, 223 Mich App 124; 565 NW2d 695 (1997). *See also Cohen v. Canton Twp*, 38 Mich. App. 680; 197 NW2d 101 (1972); *Essexville v Carrollton Concrete Mix, Inc*, 259 Mich App 257; 673 NW2d 815, (2003), *appeal den*, 470 Mich 864; 680 NW2d 894 (2004); *Conlin v. Scio Twp*, 262 Mich App 279; 686 NW2d 16 (2004).
[79] *Raabe v. City of Walker*, 383 Mich 165; 174 NW2d 307 (1970).

the local government for making its decision is reasonable or *fairly* debatable, then the court should defer.

This standard of review should apply even for cases involving the local regulation of mineral extraction. Under such cases, the court might ask a range of questions to probe the reasonableness of the locality's decision in light of the presence of minerals on a landowner's property and the public interest in accessing those resources. For example, did the locality engage in appropriate study of the location, quantity, and quality of mineral deposits within its jurisdiction? Did it clearly contemplate the regional demand for minerals within the region? Did it clearly contemplate the competing interests implicated in permitting reasonable uses of property, the need for mineral extraction, and the effects of mining operations on neighboring properties and the larger community? In contemplating these questions, a court should assess whether the analyses and deliberations conducted by the locality were adequate and reasonable, not determine what the court itself thinks should have been the appropriate decision in light of those analyses and deliberations.

Considerable evidence and argument has been made below suggesting that the planning and zoning decision-making process employed by the Defendant, Kasson Township was reasonable, thus warranting deference by the courts. The township hired a professional consultant to document the mineral resources present within its jurisdiction; it adopted a master plan that recommended the creation of a zoning district consistent with that study; it established a gravel mining district in the zoning ordinance consistent with the master plan, one that will provide adequate mineral resources for the larger region for at least decades to come; it appropriately delineated the boundaries of that district given the variety of other public interest concerns at hand; and it now seeks to maintain the integrity of its planning and zoning efforts by

not allowing the ad hoc modification of that boundary (and thereby forestall a new rash of litigation that will almost certainly come otherwise). In so doing, the township followed the required statutory scheme of basing zoning on a master plan that attempts to balance the myriad public interests involved. The various experts who testified at trial disagreed on some of the particulars, but it is clear that the reasonableness of the township's analysis, deliberations, and justifications offered in making its decision were all—at the very least—*fairly* debatable. On that basis, Defendant's decision to not rezone the property in question should not have been overturned on substantive due process grounds for being unreasonable.

Plaintiff made no allegations apparent from the transcript of the trial court decision below that the township's actions were motivated by illicit personal animus or corruption, suggesting again that there are no reasons to conclude that the Defendant's refusal to rezone was suspect on due process grounds. Plaintiff suggests in her Response that there may in fact have been other suspect justifications at play behind the Township's actions,[80] suggesting that the decision was suspect for those reasons. If so, those allegations may warrant remanding this case back to the trial court for additional consideration under the appropriate standard of review under both procedural and substantive due process claims—that is, deferential review—but those assertions should not be used to justify maintaining the heightened level of judicial scrutiny that was established improvidently by the Court under *Silva*.

CONCLUSION

On the basis of the foregoing, Amicus Curiae American Planning Association and Michigan Association of Planning submit that the "no very serious consequences" rule has no

[80] Plaintiff's Response, pp. 9, 23-24.

basis in Michigan constitutional and statutory law and that it should be overruled. The rulings of the Court of Appeals and the Circuit Court should accordingly be reversed and the plaintiff's claim either dismissed or remanded back to the trial court for further proceedings consistent with the proper, deferential standard of review for adjudicating due process claims under Michigan law. If remanded, the trial court should be directed to consider the reasonableness of Defendant-Kasson Township's denial of Plaintiff's rezoning request specifically in light of the reasonableness of the township's master planning efforts and the degree of consistency between those efforts and its zoning ordinance, and the trial court should defer to the township's legislative decision if the reasonableness of the decision-making process was, at the very least, fairly debatable.

Respectfully submitted,

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