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,

v

KASSON TOWNSHIP, a Michigan General Law Township,

Defendant/Appellant.

Supreme Court Case No. 136680
Court of Appeals Docket No. 272516
Trial Court Case No. 04-6531-DZ

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

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August 14, 2009

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases:

Michigan

Federal

Constitution:

Statutes:

Treatises:

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 *Silva v Ada Twp* "no very serious consequences" rule be overruled because it violates the separation of powers doctrine?**

Plaintiff/Appellee says:	NO
Defendant/Appellant says:	YES
The lower courts did not address this question.	
Amicus Curiae answers:	YES

II. **Did Defendant Kasson Township engage in adequate and appropriate study and master planning to justify the reasonableness of its decision not to rezone Plaintiff's property?**

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, a rule that has no valid legal 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 discussion of material and judicial proceedings below presented by Appellant/Defendant Kasson Township's Brief for Oral Arguments.

SUMMARY OF ARGUMENT

The Supreme Court should overrule the "no very serious consequences" (NVSC) rule, currently applied by Michigan courts under substantive due process adjudication to zoning ordinances that regulate mining, and it should reaffirm the deferential standard of review it applied prior to 1982 and that it prudently applies to all other types of local legislative zoning cases. Moreover, applying that deferential standard in light of the studies and master planning engaged by the Defendant Kasson Township, the Court should uphold Defendant's decision not to rezone Plaintiff's property.

As an initial matter, the Court should not invoke the doctrine of *stare decisis* to save the NVSC rule because *Silva* was wrongly decided, having no valid legal basis in US or Michigan law, and because the NVSC rule violates the separation of powers doctrine, as well illustrated by the case at bar.

The Michigan Supreme Court has clearly and consistently held that legislative decisions made by local governments through their zoning ordinances should be given deferential "fairly debatable" (or "rational basis" or "rational relationship") review. The need for deferential judicial review of both state and local legislative decisions derives from the separation of powers doctrine. It ensures that the judiciary, while appropriately checking abusive legislative action, does not encroach too far into the legislative function of making discretionary public policy decisions. Thus under the fairly debatable standard of review, a court must presume that the local

legislative zoning action is valid and defer to it if the court can discern a reasonable relationship between the legislative decision and a legitimate governmental interest.

It follows, then, that an appellate court can violate the separation of powers doctrine if it improperly invades the legislative function. In 1982 the Michigan Supreme Court did just that when it adopted the special NVSC rule for the adjudication of local legislative zoning actions affecting mineral extraction in its *Silva v Ada Twp* decision. That decision violates the separation of powers doctrine in at least five different ways, each of which by itself warrants reversal.

First, on its face, the NVSC rule negates the presumption that a local regulation is constitutionally valid and must be *upheld* unless proven to be unreasonable. Second, rather than employing the fairly debatable standard of review, courts employing the NVSC rule must apply instead the heightened "strict scrutiny" standard of review, the standard properly used only for alleged violations of fundamental constitutional rights. This is because the rule compels a showing that the local zoning action is *necessary* (because the anticipated consequences from allowing mining to occur cannot be mitigated) to advance a *compelling* governmental interest (because, absent regulation, those consequences will be "very serious").

Third, the NVSC rule effectively shifts the burden of proof from the plaintiff squarely onto the defendant locality because it requires that a plaintiff show only that her proposed mining would be a reasonable use of her land, not that the regulation is unreasonable. This requirement, coupled with the heightened standard of review, compels the defendant government to prove that its regulation is absolutely necessary, and the presumption against the regulation's validity means that the defendant will almost certainly fail to meet that burden of proof.

Fourth, in addition to shifting the burden of proof, the NVSC rule implicitly equates proof that mining on a particular property would be a reasonable land use with proof that a

regulation prohibiting that mining is necessarily unreasonable. That assumption, in addition to being a logical fallacy, also flips well-settled US and Michigan constitutional law on its head; a landowner is guaranteed *some* reasonable use of her property, not necessarily her *preferred* land use. Moreover, that assumption coupled with all of the other attributes of the NVSC rule just described together compel a trial court to effectively sit as a super zoning commission, despite repeated admonitions by the Supreme Court that that is something a court is not supposed to do. As well-illustrated by the case at bar, the rule necessarily compels a court to engage in exactly the kinds of pro and con analyses and line-drawing deliberations that are the very essence of the legislative function, rather than assessing deferentially whether the local zoning response was a reasonable means to achieve a legitimate governmental purpose, the essence of the judicial function.

Fifth, because of the virtually insurmountable burden that it places on local legislatures to defend their zoning actions, the NVSC rule effectively establishes statewide natural resource management policy by elevating mineral extraction as a preferred land use over all other land uses through judicial decree alone. Indeed, a straightforward reading of the *Silva* decision itself reveals that that was precisely the intent of the court. Yet there was and remains no constitutional or statutory basis under US or Michigan law for the court to have reached this conclusion. To the contrary, there is good reason to conclude that the Michigan Legislature contemplated elevating mineral extraction to a preferred land use but declined to do so.

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 credible 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. Rather, consistent with well-settled Michigan law and good planning practice, courts reviewing local zoning ordinances that regulate minerals extraction, or any other type of land use, should 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 conditions at hand*. If under such review the reasoning offered by the local government for making its decision is "fairly debatable" or otherwise reasonable, then the court should defer, even for cases involving the local regulation of mining.

Applying that standard of review to the case at hand, Defendant Kasson Township's decision not to rezone Plaintiff's property should be upheld.

ARGUMENT

The parties have addressed a number of claims related to this case, including those identified specifically by the Court in its order granting leave for appeal as well as additional claims raised by Plaintiff. *Amici* American Planning Association and Michigan Association of Planning (APA/MAP) concur with and adopt the analyses and conclusions reached by Defendant Kasson Township's and the *Amicus Curiae* Public Corporation Law Section's (PCLS) that the "no very serious consequences" (NVSC) rule enunciated in *Silva v Ada Township* was superseded by the enactment of 1978 PA 737, MCL 125.297a (now MCL 125.3207). *Amici* APA/MAP also concur with and adopt the analysis and conclusions reached by *Amicus Curiae* PCLS that Defendant Kasson Township could not have waived the claim that the NVSC rule should be overruled because that claim speaks to a fundamental question of constitutional adjudication, only this Court can address the claim, and sufficient facts and arguments were presented below to allow this Court to do so competently.

In this brief, *Amici* APA/MAP address directly the argument made by Plaintiff that the doctrine of *stare decisis* precludes overruling the *Silva* NVSC rule and the issues identified specifically by the Court regarding the separation of powers doctrine and a plaintiff's burden of proof under that doctrine. Finally, *Amici* address the question of what the proper role should be for local master planning in justifying the reasonableness of a local zoning regulation, and we argue that the planning studies, analyses, deliberation, and policy-making engaged by Defendant Kasson Township here were more than sufficient to justify the reasonableness of its decision not to rezone Plaintiff's property as requested.

I. The *Silva v Ada Twp* "no very serious consequences" rule should be overruled because it violates the separation of powers doctrine.

In essence, three different substantive arguments have been put forward to justify upholding the *Silva v Ada Twp* "no very serious consequences" (NVSC) rule that a local legislative zoning action prohibiting the extraction of minerals must be struck down unless the proposed mining operation would yield "very serious consequences:" first, that the principle of *stare decisis* should be invoked, despite the origins of the rule and its effect; second, that the NVSC rule does not amount to a different standard of review for adjudicating substantive due process claims but rather a variation or "species" of rational relationship review; and third, that there should exist under Michigan constitutional law a judicially-established preferred land use doctrine favoring mineral extraction.

The doctrine of *stare decisis* should not be invoked to save the *Silva* NVSC rule because *Silva* was wrongly decided in the first place and because it has the effect of violating the separation of powers doctrine. The NVSC rule violates the separation of powers doctrine because it is not merely a variation of rational relationship review but rather an adjudication rule that negates the presumption that a local legislative zoning decision is constitutionally valid, effectively creates a heightened "strict scrutiny" adjudication test, and shifts the burden of proof onto the defendant-locality, all of which flip well-settled US and Michigan constitutional law on its head and compel a trial court to become a "super zoning commission" by making local legislative zoning decisions in place of the local legislature. Finally, the NVSC rule similarly violates the separation of powers doctrine because the rule itself improperly usurps the state legislative function by establishing state natural resource management policy through judicial decree alone, with no basis in Michigan constitutional or statutory law. All of these effects are well-illustrated by the case at hand, and each of them warrants overruling the *Silva* NVSC rule.

1. The doctrine of stare decisis *should not be invoked to save the "no very serious consequences" rule because* Silva v Ada Twp *was wrongly decided and because the rule violates the separation of powers doctrine.*

This Court ruled in its 1982 decision of *Silva v Ada Twp*[1] that, when adjudicating a substantive due process claim against a local legislative zoning decision that prohibits the extraction of mineral resources, the "zoning [can] not be sustained unless very serious consequences would result from the mining operation." Justice Levin, writing for the majority, incorrectly characterized this decision as reaffirming a rule established by the Court in earlier decisions. In doing so, he relied primarily on two earlier Michigan Supreme Court decisions, *Certain-teed Products Corp v Paris Twp*[2] and *North Muskegon v Miller*,[3] as well as a US Sixth Circuit decision construing the Ohio Constitution, *Village of Terrace Park v Errett*,[4] to assert that the NVSC was already well established.

But as Justice Ryan noted in his partial concurrence and dissent in *Silva*, "the supposed 'rule' favoring the removal of natural resources unless 'very serious consequences' would result was merely obiter dictum" in both the *Certain-teed* and *North Muskegon* decisions.[5] Indeed, as further explained by Judge Davis in his dissent to the Court of Appeals decision below,[6] the "no very serious consequences" language from *North Muskegon* was a tangential observation made before the court ultimately concluded that, "The legality of a zoning ordinance, when reasonable,

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[1] 416 Mich 153, 159, 330 NW2d 663 (1982).

[2] 351 Mich 434, 88 NW2d 705 (1958).

[3] 249 Mich 52, 227 NW 743 (1929).

[4] 12 F2d 240 (1926).

[5] 416 Mich at 165 (Ryan, J., dissenting). Moreover, the *Certain-teed* decision itself was inapt because it addressed the reasonableness of the quasi-administrative action of issuing a special-use permit, not a legislative rezoning action.

[6] *Kyser v Kasson Twp*, ___ Mich App ___ (2008) (Davis, J., concurring in part and dissenting in part), slip op. p. 2.

has long been recognized by our courts…. It is, however, necessary that a zoning ordinance be reasonable, and the reasonableness becomes the test of its legality."[7] And again as explained by Judge Davis, prior to its subtle transformation in subsequent cases, *North Muskegon* for many years stood for the proposition "'that a zoning ordinance that renders property almost worthless is unreasonable and confiscatory, and therefore illegal,'" not for the proposition that a different rule somehow applied to mineral extraction cases.[8]

The primary transformation of the supposed NVSC rule came in the dissenting opinion written by Justice Black in *Certain-teed*, where he recharacterized the "warning rule" of *North Muskegon* as the proposition that,

> To sustain the ordinance in such a case there must be some dire need which, if denied the ordained protection, with [sic] result in "very serious consequences." So, and if the ordinance in its proposed application to mining fails to meet the test quoted in the footnote, the result must be a judicial determination of constitutional unreasonableness.[9]

The reporting of the *Certain-teed* decision was muddled, and it is not clear whether Justice Black was writing for the majority or writing a dissent.[10] In either case, his recitation of the *North Muskegon* "warning rule" was clearly dicta that both misconstrued *North Muskegon* and—more importantly—improperly relied upon a test supposedly established by the US 6th Circuit in its *Terrace Park* decision (i.e., the "test quoted in the footnote" noted above) as its ultimate source of authority.

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[7] *North Muskegon*, 249 Mich at 57.

[8] *Kyser* (Davis, J., dissenting), slip op. p. 3, citations omitted.

[9] *Certain-teed*, 351 Mich at 466-467 (Black, J., concurring in part and dissenting in part).

[10] Justice Black's opinion was denominated a concurrence in part and a dissent in part, although it was joined by three of the other justices and so appears to have been a majority opinion. Even so, it was not presented as the opinion of the court, it was not written by Justice Black himself as such, it is not clear which part of his opinion was the "concurring" part and which was the "dissenting" part, and it is not clear to which part (or both) the other justices joined.

This characterization of the *Terrace Park* "test" was improper, first, because the 6th Circuit based its decision in that case on the fact that the ordinance in question amounted to a complete confiscation of the landowner's property, not because of the "very serious consequences" language noted, which itself was dicta.[11] Second, and equally important, to the extent that the *Terrace Park* decision suggested that a heightened standard of review should be applied to ordinances affecting mining, careful review of that *Terrace Park* decision shows that the 6th Circuit got it wrong.

This point is equally important because language from *Terrace Park*, purportedly citing to an early US Supreme Court case as authority, has been repeatedly quoted by courts and litigants as justification for the purpose behind and the supposedly well-established pedigree of the NVSC rule:[12]

> There is also 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. The difference was recognized by the Supreme Court in *Hadacheck v Los Angeles* [citation omitted], in which case it was held that, "while an ordinance prohibiting the manufacturing of bricks within a specified section of a municipality may be a constitutional exercise of the police power, *quaere* whether prohibiting of digging the clay and moving it from that section would not amount to an unconstitutional deprivation of property without due process of law."[13]

The US Supreme Court's decision in *Hadacheck v Sebastion*[14] upheld a Los Angeles ordinance that had the effect of prohibiting plaintiff's continued operation of his brick-making factory, and this language is repeatedly offered to suggest that the outcome might have been different had the ordinance completely prohibited mining instead. In fact, the language

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[11] *Terrace Park*, 12 F2d at 243.

[12] See Plaintiff's Response Brief, pp. 30-31.

[13] *Terrace Park*, 12 F2d at 243.

[14] 239 US 394, 36 SCt 143 (1915).

supposedly quoted in the *Terrace Park* decision from the *Hadacheck* decision was actually drawn from the court reporter's syllabus for *Hadacheck,* not from the opinion itself. Moreover, the *Terrace Park* Court further mischaracterized the ruling actually made by the *Hadacheck* Court by asserting that that decision had somehow cited with approval other decisions finding that prohibitions of mining violated due process. Rather, the *Hadacheck* Court stated clearly:

> In the present case there is no prohibition of the removal of the brick clay, only a prohibition within the designated locality of its manufacture into bricks. And to this feature of the ordinance our opinion is addressed. Whether other questions would arise if the ordinance were broader, and opinions on such questions, we reserve.[15]

Indeed, rather than granting some type of special preferred use treatment to mineral extraction, the *Hadacheck* decision actually held:

> …we cannot declare invalid the exertion of a power which the city undoubtedly has [i.e,. the police power] because of a charge that it does not exactly accommodate the conditions [i.e., of the area encompassing the brickyard in question] or that some other exercise would have been better or less harsh. We must accord good faith to the city in the absence of a clear showing to the contrary and an honest exercise of judgment upon the circumstances which induced its action.[16]

The purported *Hadacheck* language cited as authority in the *Terrace Park* decision was not even dicta, it was language crafted by a court reporter, and the *Hadacheck* Court ultimately upheld the local ordinance in question as reasonable even though it had the effect of making the brick-making operation worthless and even though the Court recognized that brick-making operations were necessarily limited to locations were brick-making clays were physically found. Moreover, even if the *Terrace Park* decision ever had any persuasive authority, it was decided before the US Supreme Court and the Michigan Supreme Court handed down their seminal decisions establishing the appropriate standard of review for adjudicating substantive due

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[15] *Hadacheck,* 239 US at 412.

[16] *Id.* at 413-414.

process claims against zoning ordinances, as discussed in more detail below, and as such that persuasive authority has long since been negated.

In sum, the supposed authority upon which the *Silva* decision relied did not exist, either in US law or Michigan law; it was a mischaracterization of dicta built upon earlier mischaracterizations and dicta. Rather, this Court first established the NVSC rule some 20 years ago in *Silva*, not 80 years ago by *North Muskegon* or even 50 years ago by *Certain-teed*, and it was wrongly decided by *Silva* because there was in fact no valid legal basis for it. Thus Plaintiff's assertion that *Silva* was correctly decided (premised on her citation to the cases just discussed) is incorrect. Moreover, as detailed next, the *Silva* NVSC rule clearly violates the separation of powers doctrine. Her argument that the doctrine of *stare decisis* should be invoked to uphold that rule, therefore, should be rejected.

2. The Michigan Supreme Court has long and properly held that courts should employ deferential judicial review when adjudicating claims regarding local legislative zoning decisions.

This case is remarkable not because it threatens a significant departure from well-settled constitutional law, but because it presents an opportunity to correct an imprudent departure from well-settled law effected by this Court some two decades ago. The Michigan courts have long recognized that the branch of government that is best able institutionally, and most legitimate politically, to make the difficult policy decisions required when balancing a landowner's rights of private property ownership, on the one hand, with the state's duties to protect public health, safety, and welfare, on the other, is the legislative branch. In words that could hardly be more explicit and direct, this Court more than 30 years ago in *Kropf v Sterling Heights*[17] quoted from

[17] 391 Mich 139, 215 NW2d 179 (1974).

and reaffirmed its ruling from some 20 years earlier in *Brae Burn, Inc v Bloomfield Hills*,[18] to explain that it is not the role of a 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 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."[19]

This mandate to not make substantive policy through judicial decree is based fundamentally on the separation of powers doctrine,[20] 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.[21] Similarly, beyond complying with constraints and obligations imposed by the state legislature, the proper authority for making substantive policy decisions for any given locality—including zoning-related decisions—is the local legislature.[22] Again, as the Michigan Supreme Court has stated clearly, "The people of the

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[18] 350 Mich 425, 86 NW2d 166 (1957).

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

[20] Art. 3, Sec. 2 of the Michigan Constitution states: "The powers of government are divided into three branches: legislative, executive, and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as provided in this Constitution."

[21] *Scwartz v City of Flint*, 426 Mich 295, 395 NW2d 678 (1986).

[22] *Hess v West Bloomfield Twp*, 439 Mich 550, 486 NW2d 628 (1992).

community, through their appropriate legislative body, and not the courts, govern its growth and its life."[23]

Given this unique role for the legislature, the judiciary plays an equally important role as a check against the legislature. But that role is properly limited to checking the *abuse* of the legislative function, not second guessing the legislature's discretionary policy-making decisions. In the case of a local zoning dispute, the function of a court is to ensure that the local government acted within its state-enabled authority, to ensure that its action comported with constitutional and statutory due process requirements, and to resolve disputes when the precise meaning of an applicable law is contested.[24] With regard to substantive due process claims in particular—the type of claim alleged by plaintiff here—the function of the court is to determine whether the local zoning decision was clearly and wholly unreasonable, not whether it was correct.

Of course, a court necessarily confronts the substance of a legislative policy decision when passing judgment on the reasonableness of that decision. To that extent some overlap between the legislative and judicial functions is unavoidable. Nonetheless, in order to avoid straying too far into the legislative realm, the separation of powers doctrine compels the judiciary to take a highly deferential posture through its adjudication rules when reviewing a legislative decision, setting aside that decision only when the legislature clearly violated a constitutional protection or abused its policy-making discretion.

Both the US Supreme Court and the Michigan Supreme Court have long recognized the need to adopt a deferential posture when adjudicating the reasonableness of a state zoning

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[23] *Robinson v Bloomfield Hills*, 350 Mich 425, 430-431, 86 NW2d 166 (1957).

[24] *See generally* Fisher, Galvin, Green, Need, and Rosati, *Michigan Zoning, Planning, and Land Use* (2008); Crawford, *Michigan Zoning and Planning* (1998, 3rd ed., with 2007 supp.); Mandelker, *Land Use Law* (1997, 4th ed. with 2007 supp.); Jurgensmeyer and Roberts, *Land Use Planning and Development Regulation Law* (2003).

enabling law or a local zoning decision. In the first impression case of *Euclid v Amber Realty, Co,*[25] decided in 1926 and adopted by the Michigan Supreme Court in 1938,[26] the US Supreme Court upheld the validity of zoning generally as an exercise of the state's police powers. That decision established the so-called "fairly debatable" test for adjudicating substantive due process claims against local zoning actions, under which a court should defer to the local legislature on its zoning actions if the purpose of the zoning action and the means used to advance that purpose are at all reasonable (or fairly debatable).[27] This formulation was, in effect, an early version of the US Supreme Court's now well-settled "rational relationship" or "rational basis" test used for adjudicating due process and equal protection claims in general.[28] Under the separation of powers doctrine, the Court applies heightened judicial scrutiny in adjudicating such claims only when unlawful discrimination based on race, origin, gender, or alienage has been implicated, or when some violation of a fundamental constitutional right has been alleged.[29]

Similarly, 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

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[25] 272 US 365, 47 SCt 114 (1926) (upholding zoning as a constitutionally valid exercise of the state's police power).

[26] *Austin v Older*, 283 Mich 667, 278 NW 727 (1938).

[27] The United States Supreme Court ruled two years later in *Nectow v City of Cambridge*, 277 US 183, 48 SCt 447 (1928), that while zoning in general was constitutionally valid on its face, a given zoning ordinance could nonetheless be found to be constitutionally invalid as applied. That case opened the door to subsequent "as applied" constitutional litigation of local zoning ordinances, such as the case at bar, but it did not change the deferential standard of review for adjudicating such claims.

[28] *See generally* Nowack and Rotunda, *Constitutional Law* (1995, 5th ed.).

[29] *Id*. It is important to note that neither the federal courts nor any of the supreme courts of the several states has ever held that private property ownership in-and-of itself constitutes a fundamental constitutional right, the regulation of which warrants heightened judicial scrutiny. *See generally* Nowack and Rotunda, *supra*; Jurgensmeyer and Roberts, *supra*; Mandelker, *supra*. Nothing in the case at bar suggests that some type of unlawful discrimination or some violation of a fundamental constitutional right was implicated in Kasson Township's decision to deny Plaintiff-Kyser's rezoning request, and Plaintiff made no such allegations in any of her pleadings or arguments below.

fundamentally within the domain of the legislature rather than the judiciary[30] and that, accordingly, local decisions to both adopt and amend local zoning ordinances are fundamentally legislative actions.[31] As noted above and reaffirmed repeatedly by the Court, trial courts should not "substitute their opinions for that of the legislative body on questions of policy"[32] and, specifically with regard to local zoning decisions, a trial court should most emphatically "not sit as a superzoning commission" in order to second guess a municipality in its zoning decisions.[33] The Court has also consistently held that "reasonableness is the test of [a local zoning code's] validity,"[34] 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.[35] It had done so, prior to *Silva*, even with regard to the local regulation of mining: "In each case the question is whether, on the peculiar facts before us, the ordinance is a reasonable regulation in the interest of the

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[30] *Brae Burn*, 350 Mich 425 (1957). As explained further by the Court in a subsequent decision, in typical zoning disputes, "such as between single dwelling and multiple dwelling uses or between residential and commercial uses…. we are dealing with a local government's line drawing between such uses. While the decision to zone a community is a reasonable exercise of the police power, it is recognized that the actual line drawn between uses is often, by its nature, arbitrary." The appropriate standard of review, therefore, "is weighted to recognize and defer to the planning expertise in the difficult task of zoning." *Delta Charter Twp v Dinolfo*, 419 Mich 253, 268-269, 351 NW2d 831 (1984).

[31] *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.").

[32] *Cady v Detroit*, 289 Mich 499, 509, 286 NW 805 (1939).

[33] *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*, 391 Mich at 161; *Essexville v Carrollton Concrete*, 259 Mich App 257, 256-67, 673 NW2d 815 (2003), *app den*, 470 Mich 864 (2004).

[34] "When First Amendment 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.'" *Kropf*, 391 Mich at 157.

[35] *Id. See also*, *Robinson*, 350 Mich 425 (1957).

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."[36]

In sum, it is well-settled under both US and Michigan law that the separation of powers doctrine requires deferential rather than enhanced judicial review when a court adjudicates claims against local legislative zoning actions. It follows, then, that an appellate court can violate the separation of powers doctrine if it improperly invades the legislative function by adopting an adjudication rule that destroys the presumption that a local regulation is constitutionally valid, a rule that creates a heightened rather than a deferential standard of review, a rule that shifts the burden of proof from the plaintiff-landowner to the defendant-locality, a rule that forces a trial court to usurp local legislative prerogative by sitting as a local legislative policy-maker rather than a judge, or a rule that itself usurps state legislative prerogative by establishing state-wide legislative policy through judicial decree alone. The *Silva* decision erred in all of these ways when it adopted the NVSC rule.

3. The Silva *"no very serious consequences" rule violates the separation of powers doctrine by negating the presumption that a local zoning regulation is constitutionally valid.*

As noted above, the *Silva* decision held that, when adjudicating a claim against a local legislative zoning decision that prohibits the extraction of mineral resources, the "zoning [can] not be sustained unless very serious consequences would result from the mining operation."[37] This formulation, in a strikingly straightforward way and despite any assertions to the contrary,

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[36] *Bloomfield Twp v Beardslee,* 349 Mich 206, 303, 84 NW2d 537 (1957), emphasis added. As noted by Judge Davis in his dissent to the Court of Appeals decision on this case, while this opinion was denominated the "concurring" opinion, it was actually the majority opinion. *Kyser*, Mich App slip op, Davis J., dissenting, pg. 3

[37] *Silva*, 416 Mich at 159.

clearly negates the required presumption that a local zoning regulation is to be deemed constitutionally valid unless a plaintiff proves otherwise. That is, the NVSC rule on its face clearly specifies that the zoning ordinance is presumed to be *un*constitutional, and that it must accordingly be struck down, *unless* it can clearly be shown that the regulation is absolutely necessary to prevent the mining from yielding very serious and unmitigable public harm. This negation of the presumption of validity goes hand-in-hand with the heightened standard of judicial scrutiny and the shift in the burden of proof effected by the rule, discussed next, and it clearly violates the separation of powers doctrine.

4. The "no very serious consequences" rule violates the separation of powers doctrine because it requires strict judicial scrutiny of a local zoning regulation of mining activities.

Deferential judicial review of the reasonableness of a local legislative zoning decision consists of two elements: the actual standard of review applied and the burden of proof. As noted by the Michigan Supreme Court in *Kropf*, plaintiff has the burden of proving, "first, that there is no reasonable governmental interest being advanced by the present zoning classification itself … or secondly, that an ordinance may be unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area in question."[38] Justice Levin acknowledged this general and well-settled rule by noting 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 proving otherwise."[39] Having restated existing law, however, he

[38] *Kropf*, 391 Mich at 158.

[39] *Silva*, 416 Mich at 157.

nonetheless articulated a new rule to be used specifically in mining cases—the NVSC rule—which has the effect of both elevating the standard of review and shifting the burden of proof.[40]

In terms of the standard of review, it is important to consider not Justice Levin's perfunctory characterization of the NVSC rule, but the way it actually functions. The assertion that, even under the NVSC rule, a court should view deferentially the required showing that there would be "no very serious consequences" from a proposed mining operation seems to parallel the standard formulation for reviewing claims against zoning decisions generally, and to that extent it seems plausible on its face. Further reflection, however, reveals that the assertion is nonsensical.

Under the standard reasonableness test, the plaintiff must clearly demonstrate either that the purpose of the regulation is wholly unreasonable or that the means used to achieve that purpose is wholly unreasonable. In practical terms, the defending locality has to offer but a single valid justification for its regulation in order to prevail. More importantly, the defending locality does not have to demonstrate that its regulation was in fact the *best* means to achieve the public purpose in question, or that it was the *only* way to achieve it, or that it was somehow the *correct* policy decision otherwise; it only has to show that its regulation was a reasonable way (perhaps one among many) to reach a reasonable end (also one among many).

Under the NVSC rule, in contrast, the defendant locality is in effect compelled to present *every* plausible injurious consequence from mining, and it must demonstrate to the satisfaction of a court both that at least one of the consequences identified will be "very serious" and that the zoning regulation is the only way to avoid that consequence. In addition to improperly negating

[40] The effect of the NVSC rule regarding the burden proof is addressed directly in the following section.

the presumption that the regulation is constitutionally valid, as discussed above, this formulation effectively creates a heightened standard of review.

That is, rather than deferring to the local legislature's discretion to regulate mining in order to advance a reasonable governmental interest, a court can uphold the regulation only when there is some compelling governmental interest at stake—some "*very* serious consequence" that will surely arise from the proposed mining operation. Moreover, rather than deferring to the local legislature's discretion to prohibit mining on a given property as a reasonable means to address the harms that that mining operation would engender, a court can uphold the regulation only when such a prohibition is absolutely necessary to advance the compelling governmental interest—that is, *only* when the government's *failure* to regulate would yield some very serious consequences that could not be otherwise mitigated.

Stated more succinctly, because it compels a showing that the local legislative zoning action is *necessary* to advance a *compelling* governmental interest, the NVSC rule amounts to the "strict scrutiny" standard of review, the standard to be employed under both federal and Michigan law only for alleged violations of fundamental constitutional guarantees under due process and equal protection adjudication.[41] 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.

Plaintiff asserts that the NVSC rule is not a heightened standard of review but merely a variation or "species" of rational relationship review, and she cites to *Kropf* as a key source of authority for that assertion. Specifically, Plaintiff provides an extensive quote from *Kropf* that ends with the statement, "'Different degrees of State interest are required by the courts,

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[41] *Kropf*, 391 Mich at 157-58; see generally Nowack and Rotunda, *supra*, pp. 391-93.

depending upon the type of private interest which is being curtailed,'"[42] to assert 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. 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.[43]

In other words, this quote in its entirety speaks to the higher level of judicial scrutiny implicated when a local regulation implicates a fundamental constitutional right such as a First Amendment guarantee. 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.

Because the actual effect of the *Silva* NVSC rule goes well beyond deferential adjudication, as demonstrated above, and because neither the federal courts nor the Supreme Court of Michigan have ever recognized property ownership as a fundamental guarantee warranting heightened judicial review, Plaintiff's argument that the NVSC merely represents a "species" of rational relationship judicial scrutiny for mineral extraction cases and that prior case law supports that interpretation washes away. Rather, the *Silva* NVSC rule creates an

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[42] Plaintiff's Response Brief, p. 29, quoting *Kropf*, 391 Mich at 157-58.

[43] *Kropf*, 391 Mich at 157-58.

unprecedented and unwarranted "strict scrutiny" standard of review for mining cases and as such it violates the separation of powers doctrine.

5. The "no very serious consequences" rule violates the separation of powers doctrine because it impermissibly shifts the burden of proof from the plaintiff to the defendant locality.

Prior to *Silva* the Michigan Supreme Court made clear repeatedly, even with regard to the local regulation of mining, that when adjudicating a claim against a local legislative zoning action, "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."[44] Moreover, under this standard of review, the plaintiff has the burden of proving, "first, that there is no reasonable governmental interest being advanced by the present zoning classification itself … or secondly, that an ordinance may be unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area in question."[45]

Under this deferential standard of review, the focus of the judicial inquiry is on the reasonableness of the regulation, not on the reasonableness of a landowner's preferred land use. Moreover, the default assumption to be made by a court is that the regulation is valid, and the court will strike the regulation down only if the plaintiff can demonstrate clearly that it is not. The plaintiff thus has the burden of showing that the *regulation* is in every way defective (not that her preferred land use is or could be made reasonable); she must prove that there is absolutely no reasonable purpose served by the regulation or that the means employed to advance that purpose is wholly unreasonable. This burden of proof also means that in practical

[44] *Beardslee*, 349 Mich at 303, emphasis added.

[45] *Kropf*, 391 Mich at 158.

terms the plaintiff has the clear incentive to dispute as vigorously as possible every conceivable argument the government might put forward for justifying its regulation. The plaintiff has every incentive to do this because the only way she can prevail is by doing so; if she *fails* to do so, the regulation will be upheld.

Also as noted above, Justice Levin acknowledged this general and well-settled rule by stating 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 proving otherwise,"[46] even under the newly crafted NVSC rule. Yet just as the assertion that the NVSC rule does not create a heightened standard of review is nonsensical, the corresponding assertion that it also does not shift the burden of proof to the defendant locality is similarly nonsensical.

The statement that a local zoning ordinance regulating mineral extraction "[will] not be sustained unless very serious consequences would result from the mining operation,"[47] or conversely that the ordinance will be struck down if there would be "no very serious consequences" from the mining operation, in conjunction with the assertion that plaintiff still bears the burden of proof for making such a showing, can only be interpreted logically in one of two ways. First, it could equate to asserting that the plaintiff's real burden of proof is to show that her proposed mining operations would be reasonable, rather than that the local regulation affecting those operations are wholly unreasonable (i.e., she must prove only that her mining would yield *no* very serious consequences).

Aside from completely flipping well settled US and Michigan constitutional law on its head, and despite Plaintiff's puzzling assertion that this burden of proof is somehow higher than

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[46] *Silva*, 416 Mich at 157.

[47] *Silva*, 416 Mich at 159, citing *Certain-teed Products*, 351 Mich at 467 (Black, J., dissenting).

the adjudication rule appropriately applied under substantive due process review,[48] this burden of proof is in fact little burden at all. It is much easier to assert (especially with the presumption running in favor of the assertion) that an isolated use of property is somehow reasonable, than it is to prove (with the presumption running against) that the local regulation of that use is wholly unreasonable. This is true particularly when the very serious precedent-setting, disruptive, cumulative, and long-term consequences of judicially voiding the local regulation in order to allow the landowner's preferred use to occur are explicitly dismissed—as happened in this very case.[49] In fact, the landowner in such a case has no real need to argue that the regulation is unreasonable at all because even if she fails to do so (and indeed, even if the regulation is in fact reasonable, just not compelling and necessary) her mining operation will still very likely be upheld by the court.

Thus under this interpretation of the *Silva* burden of proof requirement, the burden has shifted to the defendant locality, which must prove *not* that its regulation is somehow reasonable, but that the landowner's proposed mining operation is wholly unreasonable. This shift is well illustrated by the case at bar. Plaintiff never proved that the Township's regulation was wholly unreasonable, and the trial court never considered that standard of proof, focusing instead entirely on whether her proposed mining operations were reasonable and deciding that they were by concluding that the Defendant Township had failed to prove that they were not.

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[48] See, e.g., Plaintiff's assertion that, "Requiring a landowner to prove that no very serious consequences will result from extraction is functionally no different from requiring a landowner to prove that an ordinance is not reasonably necessary to serve any public health, safety, or welfare interest." (Plaintiff's Response Brief, second par., p. 2.) The first requirement is another way of saying that plaintiff must prove that her proposed mining would somehow be a "reasonable" land use while the second is another way of saying that she must prove that the regulation would be wholly unreasonable—two entirely distinct concepts both theoretically and functionally.

[49] See Justice Davis' well-crafted argument on this point in his dissent below, *Kyser*, (Davis, J., dissenting), slip op. pp. 6-7.

The only other logical way to interpret the *Silva* burden of proof requirement is to equate it to this putative requirement: In order for a regulation prohibiting mining on a particular property to be *upheld*, the *plaintiff* must show that her proposed mining operation would surely yield at least one unmitigable very serious consequence and that the only way to avoid that consequence is by prohibiting the proposed mining activities through regulation. Theoretically, if the plaintiff "fails" to meet this "burden of proof" (by "failing" to show that any consequences are very serious) then the regulation prohibiting her proposed mining operation must be struck down, and if she "succeeds" (by showing that at least one consequence will be very serious and unmitigable) the regulation will be upheld and her proposed mining operation will be prohibited.

Thus, because of a rhetorical sleight of hand, the NVSC standard of review completely reverses the incentive structure faced by a plaintiff. Under this standard of review the plaintiff has little incentive to "succeed" in carrying the burden of proof by showing that her mining activities will yield unmitigable very serious consequences, and in fact every reason to "fail" in carrying the burden of proof by showing otherwise; if she succeeds, she will have provided the justification required by the government to have its regulation upheld and if she fails she will be allowed to proceed with the proposed mining.

Under either of these interpretations, a plaintiff's burden of proof under the NVSC rule is thus no burden at all. Rather, in practical terms, and again as illustrated well by the case at bar, this special rule of adjudication requires only that the plaintiff persuade a trial court judge that the worst consequences of her proposed mining can be mitigated—that there will be *no very serious consequences*—and it gives her the benefit of the doubt.[50] That deference to the plaintiff

[50] Justice Levin referred to this rule as the "very serious consequences" rule and asserted that the plaintiff still bears the burden of proof, but because the plaintiff's task is really to support the presumption that her

in turn builds upon the impermissible presumption that the local zoning ordinance is invalid on its face, and it shifts the burden to the *defendant* local government to overcome that presumption by proving otherwise—a burden of proof that, rather than being deferential to the local government, is virtually insurmountable. Indeed, Plaintiff's assertion now on appeal that she would have alleged other claims when filing suit if she had known that the NVSC rule itself was subject to challenge[51] speaks volumes about just how favorable for a plaintiff landowner, and how virtually dispositive against a defendant locality, that rule actually is.

In sum, in addition to clearly negating the presumption that a local zoning regulation of mining is constitutionally valid and creating an enhanced standard of review, the *Silva* NVSC rule clearly shifts the burden of proof from the plaintiff squarely onto the defendant locality, violating the separation of powers doctrinal requirement for deferential judicial review of such cases.

6. The "no very serious consequences" rule violates the separation of powers doctrine because it compels a trial court to usurp local legislative prerogative by sitting as a local legislative policy-maker rather than a judge.

As alluded to above, a fundamental confusion at the heart of this case stems largely from a conceptual sleight of hand that the Court in its *Silva* decision elevated to constitutional doctrine and that Plaintiff perpetuates here. That sleight of hand is the assumption embodied within the NVSC rule that proving that a landowner's preferred use of her property for mining would be reasonable (i.e., that it would not yield any very serious and unmitigable public harms) equates to proving that a regulation prohibiting that use of her property is, necessarily, wholly

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mining operations would not yield very serious consequences, it is more properly referred to as the "no very serious consequences" rule.

[51] Plaintiff's Response Brief, p. 23.

unreasonable. Aside from the fact that this formulation is a logical fallacy, the difficulty it confronts is that neither the US Constitution nor the Michigan Constitution guarantees a private property owner that she can engage in *any* "reasonable" use of her property as she prefers, but rather that she has a right to engage in some kind of reasonable use and that the government cannot be wholly unreasonable in regulating that use.[52]

Of course, in assessing whether a local regulation is unreasonable, it is necessary to consider what the various reasonable uses of the property might be. But in making such an initial determination, the only point at which the reasonableness of a plaintiff's proposed land use becomes dispositive is when she can present compelling evidence that the regulation prevents *all* reasonable use of her land, and even then the proper form of the complaint is a regulatory taking, not a substantive due process violation.[53]

The Michigan Supreme Court has long recognized this distinction, and it clearly eschewed equating the reasonableness of a landowner's preferred land use with the unreasonableness of the zoning regulation in *Schwartz v City of Flint*,[54] where it held that the reasonableness of a petitioners' preferred land use becomes a deciding factor only *after* a court has determined that the zoning regulation is constitutionally invalid for being wholly unreasonable, and it is considered only then for the sake of fashioning an equitable remedy.

Despite all of this well settled law, the conceptual sleight of hand of equating "reasonable mining" to "unreasonable regulation" embodied within the NVSC rule, coupled with the fact that it negates the presumption of constitutional validity, heightens the standard of review, and shifts

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[52] *Kropf, supra*; *Triomphe Investors v City of Northwood*, 49 F3d 198 (6th Cir. 1995).

[53] *Hecht v Niles Twp*, 173 Mich App 453, 434 NW2d 156 (1988); *Lingle v Chevron USA Inc*, 544 US 528, 125 S Ct 2074 (2005).

[54] 426 Mich 295, 395 NW2d 678 (1986).

the burden of proof, altogether necessarily thrusts a court into the position *not* of contemplating whether there is any conceivable reasonable justification for the local regulation (and deferring to the locality if there is), but rather contemplating whether mining would be a reasonable use of the land and then balancing that consideration against all of its other various reasonable uses and all of the locality's various concerns regarding all of those potential uses. In other words, the rule necessarily has the effect of forcing a trial court judge to take on the role of a local legislative policy-maker, or in the words of the Supreme Court in prior rulings, a "super zoning commission," despite repeated admonitions by the Court that that is something a trial court is not supposed to do.

The trial court judge in the case at bar, Judge Power, recognized this distorting effect of the NVSC rule and struggled with it on 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 test"…. And that is a more rigorous standard of reasonableness that the zoning ordinance has to meet in order to be upheld.[55]

After acknowledging the heightened standard of review created by the NVSC rule and discussing that rule in combination with the Michigan Court of Appeals decision in *American Aggregates v Highland Twp*,[56] a substantial portion of the trial court's decision consisted of the court stepping through every potential "very serious consequence" contested by the parties and concluding, almost inevitably, that none of the consequences—in the opinion of the court—were

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[55] Trial court transcript pp. 7-8.

[56] 151 Mich App 37, 390 NW2d 192 (1986).

either very serious or beyond being cured through mitigation. The court similarly stepped through a range of potential configurations of the Township's gravel mining district, engaging in exactly the same kind of pro-and-con analyses and line-drawing deliberations that is the essence of legislative decision-making. Indeed, the 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 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.[57]

This, again, is exactly the kind of deliberative reasoning and policy-making that is fundamentally the province of a legislature, not a court. Yet because the NVSC rule effectively compels a trial court judge to strike down the local regulation *unless* the judge is convinced that plaintiff has failed to prove that there would be no very serious consequences from her mining operation (i.e., she has failed prove that her preferred land use would be reasonable) and that the *only* possible way to address those consequences would be to prohibit that mining through zoning (i.e., instead of determining whether the zoning regulation is at least one reasonable means to achieve a reasonable end), the rule effectively compels the trial court to itself become the local "super zoning commission," thereby violating the separation of powers doctrine. Indeed, Judge Power himself recognized this, noting that the "Supreme Court has given special

[57] Trial court transcript pp. 42-43. Plaintiff summarizes this legislative, discretionary policy deliberation on the part of the trial court thoroughly in her Response Brief at pp. 7-14.

status in zoning disputes to mineral extraction operations, and that's the only reason I'm here pretending to be a zoning person."[58]

7. The "no very serious consequences" rule violates the separation of powers doctrine because it impermissibly creates statewide natural resource management policy through judicial decree alone.

Not only does the NVSC rule violate the separation of powers doctrine by usurping local legislative prerogative, it also usurps state legislative prerogative by establishing statewide natural resource management policy through judicial decree. In fact, a straightforward reading of the *Silva* decision reveals that that was precisely the intent of the court.

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 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."[59]

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[58] Trial Court Transcript, p. 44. Ironically, the *Silva* rule would compel trial courts to function as superzoning commissions while at the same time prohibiting them 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.

[59] *Silva*, 416 Mich at 159-60.

While it is true that minerals can be mined only where found, 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. Even given the fundamental axiom of property law that every piece of real property is unique, 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 or environmentally harmful consequences those uses could yield. There is nothing so valuable or unique about the presence of minerals when compared to any other unique and potentially valuable attribute of a given piece of property to justify elevating mineral extraction as a specially protected land use through judicial decree.

Justice Ryan in his dissent in *Silva* made this very point, noting 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."[60] He also recognized that the newly-crafted NVSC rule effectively turned mining into a preferred land use, a doctrine which had been expressly overruled by the Court a few years earlier in *Kropf*[61] based especially on reasoning articulated almost two decades earlier by the Court in *Brae Burn*.[62]

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[60] *Id.* at 164 (Ryan, J., concurring in part and dissenting in part).

[61] 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

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.[63]

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 statewide natural resource management policy in the form of a new heightened standard of review, which is what the Court did through the *Silva* decision. This amounts to exactly the same kind of legislative policy-making through judicial decree at the state level that the Michigan Supreme Court has repeatedly exhorted the lower Michigan courts not to engage in at the local level.

Rather than establishing statewide 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[64] are pertinent here. Section 17 provides, in part, "[n]o

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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).

[62] 350 Mich 425, 86 NW2d 166 (1957).

[63] *Silva*, 416 Mich at 160.

[64] Constitution of the State of Michigan of 1963.

person . . . shall be deprived of life, liberty or property, without due process of law."[65] 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."

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,

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[65] Plaintiff creatively argues that because the NVSC rule was established prior to the ratification of the Constitution of 1963, it was incorporated into the meaning of the due process clause by implication (Plaintiff's Response Brief, pp. 45-47). But, again, since the NVSC rule was not in fact the law of the land in 1963, having been mentioned only as obiter dicta in several cases prior to *Silva*, this argument has no merit.

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. There are no state laws that specifically identify the extraction of minerals as a preferred land use not subject to local regulation. Beyond that, 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."[66] In other words, under current law, 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…."[67] Moreover, Section 207 provides that a zoning ordinance "shall not have the effect of totally

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[66] 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)), 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.

[67] MCL 125.3205(2).

prohibiting the establishment of a land use within a local unit of government in the presence of a demonstrated need for that land use…."[68] 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 *North Muskegon*[69]), that the legislature intended to *not* extend such preferred status to mining.

Similarly, the state legislature clearly contemplated the problem of local governments excluding affordable housing, among other important land uses, through their zoning ordinances despite the larger or regional public interest in providing adequate affordable housing for the state's citizens,[70] 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

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[68] MCL 125.3207.

[69] "[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." (*North Muskegon,* 249 Mich at 57.)

[70] See *Kropf*, 391 Mich at 139; Defendant, Kasson Township's Brief for Oral Argument, pp. 28-29; Crawford, *Michigan Zoning and Planning* (1998, 3rd ed., with 2007 supp.), §§ 1.07, 14.01.

use has ever been appropriately adopted under Michigan law, and the *Silva* decision violated the separation of powers doctrine when it pronounced such a policy in the form of a heightened standard of review for minerals extraction zoning cases through judicial decree alone.

II. Defendant Kasson Township engaged in adequate and appropriate study and master planning to justify the reasonableness of its decision not to rezone Plaintiff's property.

1. The proper standard of review for adjudicating claims against local legislative zoning actions, including those actions affecting mineral extraction, is the "fairly debatable" standard of review.

Rather than treating mineral extraction as a preferred land use, the Michigan courts should treat the provisions of a local zoning ordinance affecting mineral extraction just as they treat 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.[71] 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,[72] 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.

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[71] *See generally* Fisher et al., *Michigan Zoning, Planning, and Land Use* (2008), § 8.14.

[72] 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.

Amici concur with Plaintiff that it is entirely 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.[73] 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 within which the locality is situated.[74] It is also appropriate for the court to consider whether the regulation arbitrarily and capriciously precludes all reasonable uses of the private property in question. It is *not* appropriate, however, for a court to evaluate the substance of the decision reached in terms of what the *court* thinks should have been the "correct" or the most appropriate outcome.

2. The preparation of an appropriately detailed master plan and consistent use of that plan to inform zoning decisions provides compelling evidence of the reasonableness of a zoning decision made consistent with the plan, including zoning decisions that constrain mining.

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…."[75] In addition, under the recently adopted Michigan Planning Enabling Act (PEA), if the community has created a planning commission and prepared a master

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[73] *See generally* Fisher et al., *supra*, § 9.4.

[74] 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, "It is not meant 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."

[75] MCL 125.3203(1).

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.[76] 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 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 the reasonableness of its zoning decisions, particularly for purposes of assessing due process claims.[77] 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.[78]

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. The arguments presented here should not be read in any way to suggest that just because a locality has a master plan and

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[76] The Michigan Planning Enabling Act, 2008 PA 33, (MCL 125.3801 *et seq*.) became 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 has applied since September 1, 2008. *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 . . . .").

[77] *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).

[78] *Raabe v. City of Walker*, 383 Mich 165, 174 NW2d 307 (1970).

points to it to justify its zoning decision a court should accept that claim as definitive proof of the reasonableness of the local action and thereby abdicate its judicial responsibility. At the same time, a court must not completely dismiss the important role played by planning in informing and justifying the reasonableness of its zoning decision, substituting its judgment of what would be an appropriate legislative zoning decision for that of the local legislature, as the trial court judge felt compelled to do in the case at bar because of the NVSC rule.

Rather, a court should consider carefully the reasonableness of that local decision in light of the particular facts of the case. And with regard to the role played by planning in particular, the courts 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 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 the local government for making its decision is reasonable or *fairly* debatable, then the court should defer.[79]

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

[79] The Court has employed this terminology in the past to the extent that it has ruled that a plaintiff must establish *more* than that there is a "debatable question" on whether a regulation is reasonable. *Robinson v Bloomfield Hills*, 350 Mich 425, 432, 86 NW2d 166 (1957). In other words, if the question is "fairly debatable," then the court must defer to the local government.

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.

3. Applying the judicially deferential fairly debatable standard of review, Defendant Kasson Township's legislative decision to not rezone Mrs. Kyser's property was reasonable.

Considerable evidence and argument has been made before the courts 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 the new 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 for being unreasonable.

CONCLUSION

In explaining the basis of the NVSC rule, Justice Levin characterized that rule as merely a variation on the generally applicable, judicially deferential rule for adjudicating zoning claims:

> Zoning regulations seek to achieve a land use which serves the interests of the community as a whole. Because of the important public interest in extracting and using natural resources, this Court has applied a *more rigorous standard of reasonableness* when the zoning would prevent the extraction of mineral resources.[80]

Yet as straightforward analysis demonstrates, and as the facts and the deliberations of the lower courts in the case at bar clearly illustrate, the NVSC rule is in fact a rule of enhanced judicial review, one that improperly negates the presumption that a regulation is constitutional valid, shifts the focus of judicial inquiry, and compels a local government to bear the burden of proving that its zoning regulation is necessary to advance a compelling governmental interest. And again as the case at bar clearly illustrates, because of this enhanced standard of review, the NVSC rule is also virtually dispositive: if a landowner has minerals on her property—including even gravel, perhaps the most ubiquitous mineral in the State of Michigan—then the local government must allow it to be mined. Finally, the very nature of applying the NVSC rule in litigation effectively compels a trial court to become a local legislative decision-maker rather than judge, while the virtually insurmountable burden that it places on local legislatures effectively establishes state-wide natural resource management policy favoring mineral extraction above all other land use

[80] *Silva*, 416 Mich at 158-159, citations omitted, emphasis added.

considerations, all by judicial decree alone. For all of these reasons, the NVSC rule violates the separation of powers doctrine, and it should be overruled.

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 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 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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August 14, 2009