

STATE OF MICHIGAN  
IN THE COURT OF APPEALS

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EDITH KYSER,

Plaintiff/Appellee,

v

KASSON TOWNSHIP,

Defendant/Appellant.

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Court of Appeals Case No. 272516

Leelanau County Circuit Court  
Case No.04-006531-CZ

Hon. Thomas G. Power

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**BRIEF OF AMICUS CURIAE MICHIGAN AGGREGATES ASSOCIATION**

**TABLE OF CONTENTS**

	<u>Page</u>
INDEX OF AUTHORITIES.....	ii
BASIS OF JURISDICTION.....	iii
STATEMENT OF QUESTIONS PRESENTED FOR REVIEW .....	iv
INTRODUCTION .....	1
STATEMENT OF PROCEEDINGS AND FACTS.....	2
<u><i>The Michigan Aggregates Association</i></u> .....	2
<u><i>The Impact of Aggregates on Michigan’s Economy</i></u> .....	2
<u><i>Relevant Facts and Proceedings Below</i></u> .....	3
STANDARD OF REVIEW .....	4
ARGUMENT .....	4
I.    THE “VERY SERIOUS CONSEQUENCES” TEST IS BASED ON THE IMPORTANCE OF PRESERVING THE RIGHT TO EXTRACT NATURAL RESOURCES WHERE THEY ARE FOUND.....	4
II.   THIS COURT SHOULD NOT ALTER (AND THEREFORE UNDERMINE) THE “VERY SERIOUS CONSEQUENCES” TEST BY APPLYING THAT TEST TO INCLUDE CONSIDERATION OF PLANNING AND ZONING CONCERNS.....	5
III.  INCORPORATING CONSIDERATION OF LOCAL PLANNING AND ZONING CONCERNS INTO THE “VERY SERIOUS CONSEQUENCES” TEST WILL ENABLE THE VERY MISCHIEF THE TEST IS DESIGNED TO AVOID .....	8
CONCLUSION.....	10

## INDEX OF AUTHORITIES

Page

### Federal Cases

<i>Village of Terrace Park v Errett</i> , 12 F2d 240 (CA 6, 1926) .....	4
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### State Cases

<i>American Aggregates Corp v Highland Twp</i> , 151 Mich App 37; 390 NW2d 192 (1986).....	5, 6, 7
<i>Bloomfield Twp v Beardslee</i> , 349 Mich 296; 84 NW2d 537 (1957).....	7
<i>Certain-teed Products Corp v Paris Twp</i> , 351 Mich 434; 88 NW2d 705 (1958).....	5
<i>City of North Muskegon v Miller</i> , 249 Mich 52; 227 NW 743 (1929).....	4
<i>Silva v Township of Ada</i> , 416 Mich 153; 330 NW2d 663 (1982).....	4, 5
<i>The Detroit News, Inc v Policemen &amp; Firemen Ret Sys of Detroit</i> , 252 Mich App 59; 651 NW2d 127 (2002).....	4

### Other Authorities

<a href="http://www.miagg.org/facts/index.htm">http://www.miagg.org/facts/index.htm</a> .....	2
<a href="http://www.nma.org/pdf/states_04/mi2004.pdf">http://www.nma.org/pdf/states_04/mi2004.pdf</a> .....	3

## **BASIS OF JURISDICTION**

The MAA agrees with the parties' statements of the basis of jurisdiction.

## STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Should this Court alter the “very serious consequences” test to include consideration of planning and zoning concerns, where such an alteration conflicts with Michigan Supreme Court precedent and would virtually eliminate a property owner’s ability to challenge a zoning decision that prevents the extraction of natural resources?

The trial court did not directly address this question, though it did analyze whether the proposed Kyser mine would have very serious consequences for the Kasson Township zoning plan.

*Amicus Curiae* MAA answers: No.

## INTRODUCTION

The Michigan Aggregates Association (“MAA”) files this *amicus curiae* brief to focus the Court’s attention on a critical legal issue that this appeal presents—the continuing viability of the “very serious consequences” or “VSC” test that courts use when analyzing the validity of a zoning ordinance that prevents the extraction of natural resources.

In its opinion, the trial court considered whether the proposed Kyser gravel mine would have very serious consequences not only on traditional factors, such as traffic, noise, property values, and nearby residential use, but also on the Kasson Township zoning plan itself. (5/4/06 Trial Ct Tr at 39 (analyzing “the domino effect”).) The Township presses this point on appeal, arguing that “Planning and Zoning Concerns Fall Within the Very Serious Consequences Test.” (Kasson Twp Appeal Br at 25.) As will be explained below, neither this Court nor the Michigan Supreme Court has ever included consideration of “planning and zoning concerns” as part of a VSC analysis. That is because such consideration would undermine the more rigorous standard of reasonableness that applies when reviewing zoning regulations in this context. By definition, judicial override of any zoning decision will have a negative impact on the underlying planning and zoning concerns that resulted in the decision. A reformation of the VSC test that includes an analysis of such concerns would therefore severely weaken a property owner’s ability to challenge a zoning decision that prohibits the extraction of natural resources, contrary to the important public interest that gave rise to the VSC test in the first place. Accordingly, while the MAA takes no position regarding the underlying merits of the trial court’s decision, it respectfully requests that this Court decline the invitation to expand—and therefore undermine—the VSC test by considering very serious consequences to planning and zoning concerns.

## STATEMENT OF PROCEEDINGS AND FACTS

### The Michigan Aggregates Association

The Michigan Aggregates Association (MAA) is a non-profit trade association founded in 1960 by a group of conscientious and environmentally concerned aggregate producers. The Association's goal is to protect and promote the interest, growth, and welfare of the Michigan aggregates industry. MAA membership has grown to include not only crushed stone and sand and gravel products, but many industrial and recycled material producers, as well as suppliers of equipment and other goods needed to produce mineral products required by every citizen of Michigan.

### The Impact of Aggregates on Michigan's Economy

One hundred fifteen million tons of mineral aggregates were sold from Michigan sources in 2006, produced from about 325 surface mines located throughout the State. Aggregate mining takes place in every single county in Michigan, and the industry employs over 8,000 people in Michigan, at an average yearly wage some 25% higher than the average wage for all industries. (<http://www.miagg.org/facts/index.htm>.) Thousands more Michigan citizens are indirectly employed to service the industry, including equipment repair contractors, trucking companies, longshoremen and boat crews, and the like.

Aggregate makes up approximately 95% of every ton of asphaltic concrete placed on Michigan roads, and 80% of each cubic yard of Portland cement concrete used. *Id.* Some of the largest aggregate users are therefore the State, Counties, Townships, and Municipalities in their road and infrastructure programs. *Id.* An average of 11 tons of aggregate is required annually for each and every resident in the State of Michigan. *Id.* Overall, Michigan's direct

and indirect annual economic impact from the entire mining industry (in 2005 figures) is approximately \$25.8 billion. ([http://www.nma.org/pdf/states\\_04/mi2004.pdf](http://www.nma.org/pdf/states_04/mi2004.pdf).)

*Relevant Facts and Proceedings Below*

Appellee Edith Kyser sued Kasson Township after the Township refused to rezone 115 acres of her property to allow gravel mining. The Township opposed the rezoning primarily because it had already created a “Gravel District” in its Master Plan, and it did not want to amend that plan to include Kyser’s property, which is immediately adjacent to the Gravel District.

Following a bench trial, the trial court ruled in Kyser’s favor, finding that Kyser’s property contains valuable gravel deposits, and that the proposed use would cause no very serious consequences for local traffic, noise, property values, residential use, or the integrity of the Township’s land use plan.

The MAA takes no issue with the trial court’s evidentiary rulings or with its factual findings. But the MAA takes great issue with the trial court’s decision to consider the Township’s zoning plan when conducting a VSC analysis. That decision conflicts with a long line of Michigan Supreme Court and Court of Appeals cases, and, if adopted by this Court, sets a dangerous precedent for all future challenges to zoning decisions involving the extraction of natural resources. The MAA respectfully requests that this Court decline the Township’s invitation to alter the VSC test.

## STANDARD OF REVIEW

The MAA agrees that this Court reviews the trial court’s fact findings under the clear error standard. (Kasson Twp Appeal Br at 23.) The trial court’s legal conclusions are reviewed *de novo*. *The Detroit News, Inc v Policemen & Firemen Ret Sys of Detroit*, 252 Mich App 59, 67; 651 NW2d 127 (2002).

## ARGUMENT

### I. THE “VERY SERIOUS CONSEQUENCES” TEST IS BASED ON THE IMPORTANCE OF PRESERVING THE RIGHT TO EXTRACT NATURAL RESOURCES WHERE THEY ARE FOUND.

For more than 75 years, Michigan courts have “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.” *City of North Muskegon v Miller*, 249 Mich 52, 57; 227 NW 743 (1929). That is because 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.” *Silva v Township of Ada*, 416 Mich 153, 159-160; 330 NW2d 663 (1982). As the United States Court of Appeals for the Sixth Circuit has explained:

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.

*Village of Terrace Park v Errett*, 12 F2d 240, 243 (CA 6, 1926). (*Accord* Townships Assoc *Amicus Curiae* Br at 4 (“Under Michigan law, the mining of minerals has been granted preferred status. Minerals are not artificial goods and therefore must be extracted from where they naturally exist.”).)

Preserving the right to extract natural resources protects a number of interests. For example, “[p]reventing 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.” *Silva*, 416 Mich at 160; 330 NW2d 663. The extraction of natural resources also advances “the public interest in the encouragement of full employment and vigorous industry.” *Id.* at 159 n 5, quoting *Certain-teed Products Corp v Paris Twp*, 351 Mich 434, 465; 88 NW2d 705 (1958) (separate opinion of Edwards, J). In addition, once natural resources are extracted, property can often be restored and put to other uses. *Silva*, 416 Mich at 160-161; 330 NW2d 663 (“we note that extraction of natural resources is frequently a temporary use of the land and that the land can often be restored for other uses and appropriate assurances with adequate security can properly be demanded as a precondition to the commencement of extraction operations”).

Acknowledging these important interests, Michigan courts have rejected the usual test for challenging a zoning decision that would prevent the extraction of natural resources, applying instead “a more rigorous standard of reasonableness.” *American Aggregates Corp v Highland Twp*, 151 Mich App 37, 40; 390 NW2d 192 (1986). Specifically, a person challenging such a zoning decision need only show that “there are valuable resources located on the land and that no ‘very serious consequences’ would result from the extraction of the resources.” *Id.* at 41; 390 NW2d 192, citing *Silva*, 416 Mich at 162; 330 NW2d 663.

**II. THIS COURT SHOULD NOT ALTER (AND THEREFORE UNDERMINE) THE “VERY SERIOUS CONSEQUENCES” TEST BY APPLYING THAT TEST TO INCLUDE CONSIDERATION OF PLANNING AND ZONING CONCERNS.**

In *American Aggregates*, this Court considered four likely consequences of a proposed gravel mine: (1) truck traffic, (2) traffic noise, (3) a predicted decrease in property values, and (4) the impact the operation would have on the contemplated residential development and tax base of the township where the mine was to be located. 151 Mich App at 42; 390 NW2d

192. The Court did not consider whether the proposed mine would have very serious consequences for local planning and zoning, and potential consequences to planning and zoning concerns should not be added to the test.

Whenever a property owner challenges a zoning decision that prohibits the extraction of natural resources, success necessarily means a court has overridden the zoning decision. Because zoning decisions, by nature, involve local planning decisions, success must also almost always mean that the new use had consequences for local planning and zoning—after all, the zoning decision was reversed. If courts must consider the very serious consequences to zoning decisions, the end result will be a prohibition on the extraction of natural resources in far more instances than is presently the case.

For example, imagine a rural township that bans the extraction of all natural resources within the township and dedicates all lands solely to residential development. A proposed mine in the township would undeniably have very serious consequences on the zoning plan and therefore bar the mine. That would be the result even if mining was to take place in a remote area that would have no other consequences on the community, and with a plan for residential development on the site after 20 years, long before the rest of the township can reasonably expect to be developed. The public interest in extraction of natural resources counsels strongly in favor of allowing such a mine to proceed, yet it would be virtually impossible under the test Kasson Township proposes. The local planning and zoning concerns would trump the public's interest in the extraction of natural resources.

In its appeal brief, Kasson Township confuses consideration of “planning and zoning concerns” with the *American Aggregates* court's consideration of potential consequences on “residential development and [the] tax base.” (See Kasson Twp Appeal Br at 25.) These are

two separate matters. A proposed gravel mine may have no serious consequences on residential development and the tax base but still significantly impact local planning and zoning, as the Township alleges here. Conversely, a trial court is free to consider the consequences on residential development and the tax base even when a proposed mine is wholly consistent with a general zoning plan. The two considerations are not congruent. The *American Aggregates* court appropriately looked at effect on development and taxes revenue; it also correctly declined to consider the consequences to the local zoning plan. This Court should do the same.

Kasson Township's reliance on *Bloomfield Twp v Beardslee*, 349 Mich 296; 84 NW2d 537 (1957), is also misplaced. (Kasson Twp Appeal Br at 25-26.) Just like *American Aggregates*, the *Beardslee* court looked at the potential effect a proposed gravel mine would have on residential development. *Id.* at 302; 84 NW2d 537. That is not the same thing as analyzing the potential effect on local planning and zoning. Here, for example, the trial court could have concluded that the proposed Kyser mine would have very serious consequences for residential development in Kasson Township without reference to the Township's zoning plan or even the Gravel District. The VSC test must reflect an analysis of the consequences to the community and the natural environment, not the potential consequences to a theoretical plan that a township has adopted which may be changed at any time and was made without having to consider the broader public interest.

Kasson Township argues that allowing gravel mining on the Kyser property will "unleash" zoning and planning chaos as other owners of property currently outside the Gravel District try to enter the gravel business. (Kasson Twp Br at 27-28.) That policy argument ignores the VSC test's purpose, which is to vest in the courts the power to determine whether a proposed extraction of natural resources will have very serious consequences on a neighborhood.

The Township’s argument also rings hollow. If gravel supply in Kasson Township is as inflated as the Township argues throughout its appeal brief, the market will discourage additional owners from entering the business, and there will be no further expansion. And if Kyser is right that there is still a need for more gravel mines, then new mines will be fulfilling an important public function by supplying the material needed to construct roads, bridges, and other public structures. Either way, the propriety of allowing additional mining should be controlled by the VSC test the State has followed for more than 75 years, not by the planning decision of local officials who have no obligation to consider the greater public good or the public’s need for aggregates.<sup>1</sup>

**III. INCORPORATING CONSIDERATION OF LOCAL PLANNING AND ZONING CONCERNS INTO THE “VERY SERIOUS CONSEQUENCES” TEST WILL ENABLE THE VERY MISCHIEF THE TEST IS DESIGNED TO AVOID.**

*Amicus curiae* American Planning Association (“APA”) and Michigan Association of Planning (“MAP”) laud Kasson Township for its zoning plan and dare this Court to interfere with such “community-wide legislative policy.” As discussed above, there is no local policy—regardless of its merit—that can be placed above the interest of the broader public in the extraction of minerals, an interest that the VSC was created to protect. In addition, the APA and MAP fail to consider that local zoning decisions are frequently made with much less deliberation and good intentions than Kasson Township allegedly exercised in establishing the Gravel Zoning District.

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<sup>1</sup> The Townships Association predictably requests that this Court allow local officials to substitute their own analysis for that of the courts. (Townships Association *Amicus Curiae* Br at 8 (“In effect, the Township in this case has already conducted a ‘very serious consequences’ analysis and determined that there would be ‘very serious consequences’ to the community at large if gravel mining was not confined to the specified gravel district.”); *id.* at 10 (“the [trial court] judge did not give deference to the Township’s exhaustive and comprehensive plan to provide for adequate gravel production while also planning for the normal and successful development of the Township.”).) That approach stands the VSC test on its head and should be rejected.

Local zoning and township officials are predictably beholden to their constituents' concerns that an aggregate mine not be located in their backyard, the so-called "NIMBY" problem. This is not a criticism of public officials; rather, it is the natural consequence of facing regular, public election. As a result, the dockets of Michigan Circuit courts are littered with cases where an aggregates company delivered a mining application to a township only to have the township pass a total moratorium on mining only a short time later—sometimes the very next day—while the township amends their ordinance to make obtaining a mining permit more difficult. When challenged, these bad-faith moratoriums and ordinance amendments inevitably succumb to the VSC test in litigation, as they should.

The reality is that it is not difficult to proffer a "planning" justification for nearly any anti-mining decision. And in the face of a near or total moratorium, it is almost impossible to say that a proposed mine will not have very serious consequences to such contrived planning considerations. Rather than protect the public's interests in the extraction of minerals, then, consideration of these planning interests will imbue local zoning decisions with the same type of protection they enjoyed before the VSC test was created to protect the greater public interest.

In deciding whether to alter the VSC test, then, this Court must consider not only the "laudable" circumstances purportedly surrounding Kasson Township's zoning decision, but the more common situation involving a zoning decision that represents nothing more than a naked attempt to prohibit mining. To the extent a Township has a legitimate concern about residential development, traffic, the environment, or some other local interest, the VSC test already accounts for that concern; to the extent a Township has an illegitimate motive to stop mining altogether, the VSC test should be maintained in its present form, giving the courts the power to place the greater public good over local self-interest.

## CONCLUSION

If this Court alters the VSC test to include consideration of planning and zoning concerns, we will have returned to the long-ago era when local zoning decisions could trump the public interest in natural resource extraction. This case does not raise the specter of the judiciary acting in a legislative capacity. (*Contra* Townships Assoc *Amicus Curiae* Appeal Br at 13.) Rather, this case presents the question of whether the VSC test should be applied by the courts, or by a local zoning board. (Townships Association *Amicus Curiae* Br at 8, 10.) Because the Michigan Supreme Court and this Court have always (and correctly) left VSC analysis to the courts, the MAA respectfully requests that this Court decline Kasson Township's request to alter the VSC test, and that it instead reaffirm both the validity of the VSC test in its current form and the public's interest in extracting valuable natural resources.

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