

## MSC Opinion: Kyser v. Kasson Township

16. July 2010 By Gaëtan Gerville-Réache

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On July 15, 2010, the Michigan Supreme Court issued a landmark opinion in *Kyser v. Kasson Township*, No. 136680, with dramatic economic implications for Michigan's mining and construction industries. Justice Markman, joined by Justices Corrigan, Hathaway, and Young, delivered the opinion of the Court, overturning its 1982-decision in *Silva v. Ada Township*, 416 Mich 153; 330 NW2d 663 (1982). In *Silva*, the Court had recognized a long-standing rule that zoning ordinances that prevent mining are unreasonable unless "very serious consequences" would otherwise result. In *Kyser*, the majority holds that this rule was not a constitutional requirement and was, in fact, unconstitutional as it violated separation of powers. Moreover, the Court holds that this rule had been superseded by the exclusionary zoning provision in MCL 125.297a of the Township Zoning Act of 1979, now the Zoning Enabling Act. Chief Justice Kelly, joined by Justice Cavanagh, dissented. Justice Weaver recused herself due to her longstanding relationship with Kasson Township's supervisor.

After experiencing a boom in sand and gravel mining in the late '80s and early '90s, Kasson Township tried to stem the tide of gravel mining within the Township by establishing a gravel mining district and barring mining outside of that district. Plaintiff Edith Kyser owns property adjacent to the district, containing a rich deposit of commercially valuable gravel. She filed an application to rezone her property so that it could be mined, but her application was denied on the basis that it would open the door for other similarly situated property owners to do the same, thereby undermining the Township's comprehensive zoning and land-use plan. Ms. Kyser filed a complaint, contending that her due-process rights had been violated because the gravel mining on her property would cause no very serious consequences. The trial court and the court of appeals agreed and invalidated the zoning ordinance as applied to her property in accordance with *Silva v. Ada Township*.

After a substantial discussion of the "no very serious consequences" (NVSC) rule's evolution starting in 1929, the Court proceeded to analyze the grounds for the rule as explained in *Silva* and found its reasoning to be flawed. According to *Silva*, the rule was premised upon the logic that a zoning ordinance that prevents the extraction of mineral resources forever locks them away. As a result, such a zoning ordinance "wholly deprives the owner of land of its valuable mineral content" and harms the public interest in accessing those mineral resources. Interestingly, in this case, the trial court determined that the public interest in the particular gravel resources on the plaintiff's property was not high, but felt compelled under *Silva* to enjoin enforcement of the ordinance anyway.

The majority disagreed with this reasoning in *Silva*. Citing extensively to *Brae Burn, Inc v Bloomfield Hills*, 350 Mich 425, 430-431; 86 NW2d 166 (1957), the Court held that an ordinance is not invalid just because it bars the

most profitable land use. The Court also saw no constitutional basis for elevating the public interest in accessing those minerals over other public-interest considerations. It felt the weighing of these public considerations was better left to the Legislature and local communities rather than the judiciary. Essentially, the rule arrogated to the judiciary the role of conducting an expansive and detailed analysis of land-use considerations that local governments were better suited to handle, as they, unlike the judiciary, could take into account the long-term concerns inherent in land-use planning. For this reason, the Court held that the rule violated the principle of separation of powers. The Court also noted that Article 4, § 52 of the Michigan Constitution grants to the legislature, not the judiciary, responsibility for protection and management of natural resources. The legislature apparently assigned this responsibility to local governments through the Zoning Enabling Act. Because it viewed the ZEA as a comprehensive statement of legislative policy in this area, and because the NVSC rule was inconsistent with that policy, the Court held that the NVSC rule was not only unconstitutional but also superseded by the ZEA.

Chief Justice Kelly, in dissent, contended that the majority had casually jettisoned 80 years of constitutional precedent by ignoring the constitutional underpinnings of the rule that were clearly stated in earlier decisions and by failing to support its decision to part with prior precedent. Chief Justice Kelly states, "If the majority is intent on sending *Miller* and its progeny to the grave, it should give them a proper burial." Essentially, the proper justifications for parting with precedent—e.g., considerations of how it defies practical workability and whether overturning it will cause real-world dislocations—were missing. Because the rule, in her view, was constitutional and there was no basis for overturning it, she disagreed with the majority's conclusions that such a constitutional rule could violate separation of powers or could be superseded by statute. And even if it was not constitutional, she disagreed with the court's conclusion that the legislature superseded it through the ZEA.

In sum, the Michigan Supreme Court in this opinion has eliminated the NVSC rule and replaced with the traditional reasonableness test that applies to all other types of land-use restrictions.

Disclaimer: WNJ submitted an *amicus curiae* brief in this matter.