The siting of mining and extraction operations, such as gravel pits, can often be the source of great controversy. Although many residents view the proliferation of these land uses as damaging to adjacent properties, mining operations are considered valuable to state infrastructure and the economy according to certain interest groups. Due to this value and the premise that gravel pits cannot exist anywhere because of reliance on specific types of soil and minerals, gravel pits are afforded special protections under Michigan law, which can limit townships’ ability to regulate these uses. Accordingly, special care should be used when crafting regulations that place limits or restrictions on such activities. This E-Letter explores the special protections provided to mining operations under Michigan law.

I. Protections under the MZEA

The municipal regulation mining operations is afforded special protections under Section 205 of the Michigan Zoning Enabling Act (the “MZEA”), which instructs that a township cannot prevent the extraction of valuable natural resources unless “very serious consequences” would result.

A township’s initial determination of whether a mining operation should or should not be sited is afforded some weight under the MZEA. To challenge a zoning decision pertaining to a mining operation, the MZEA places the burden of proof on the challenger, who must prove that: (1) there are valuable resources located on the site; (2) there is a need for the resources by that person or the market served by that person; and (3) no “very serious consequences” would result from the extraction of these resources. MCL 125.3205(4).

If the proponent of the mining operation carries their burden and makes such a showing, the burden then shifts to the township to prove that the resources were not valuable or not needed, or that “very serious consequences” would result. The issues of whether a resource is “valuable” and whether a mining operation would result in “very serious consequences” are thus critical in determining whether a site is appropriate.
a. Valuable Resources and Very Serious Consequences

Under the MZEA, a natural resource is deemed “valuable” if its extraction could result in revenue and is reasonably expected to be profitable. MCL 125.3205(2). Determining if a mining operation would cause “very serious consequences” is less straightforward.

The MZEA’s test for whether “very serious consequences” would result from a mining operation incorporates the standards used in *Silva v Ada Township*, a 1982 Michigan Supreme Court case. MCL 125.3205(5). Interestingly, *Silva v Ada Township* was reversed by the Supreme Court in 2010 in *Kyser v Township*, with the Kyser Court holding that the “very serious consequences” rule established in *Silva v Ada Township* “violate[d] the constitutional separation of powers” and “usurp[ed] the responsibilities belonging to both the Legislature and to self-governing local communities.” In response to this ruling, the legislature amended the MZEA in 2011 to reinstate the *Silva v Ada Township* “very serious consequences” test when evaluating a request to site a mining operation. This test requires consideration of the following:

- The relationship of the mining operation with existing land uses;
- The impact on existing land uses in vicinity;
- The impact on property values in vicinity and along the proposed hauling route, based on credible evidence;
- The impact on pedestrian safety and traffic safety in vicinity and along hauling route;
- The impact on other identifiable health, safety and welfare interests; and
- The overall public interest in the extraction of the specific natural resources from the site.

Within this framework, there is still room for local regulation of mining operations, but the special protections afforded by the MZEA to these types of operations must be kept in mind. If your township already regulates mining operations, it may be worthwhile to review your regulations to ensure compliance with these provisions, as a failure to do so could result in a challenge from a developer seeking to site a mining operation in your township.

II. Practical Ordinance Drafting Tips

The following are aspects of mining operations that may still be regulated under the MZEA. If your Township is revising its current controls on mining operations, or considering drafting a new ordinance, these suggested tips will help your township exercise local control without running afoul of state law.

a. Fees and Escrow Deposits

Section 406 of the MZEA allows townships to charge reasonable fees for zoning permits including special use permits. The Michigan Court of Appeals recently held that a township board can adopt a fee schedule that includes an “escrow deposit” provision allowing a township to request funds from a developer to reimburse fees associated with reviewing a proposed land use. *Forner v Allendale Charter Township Supervisor*, unpublished per curiam opinion of the Court of Appeals, issued March 21, 2019 (Docket No. 339072).
Townships should consider granting their planning commissions and zoning administrators the ability to request escrow deposits from developers so they can pay for any necessary engineering, legal, or other professional reviews of an application for a mining and extraction operation. The sophisticated nature of mining operations may require engineering review to determine potential impacts on the environment and may require legal and planning review to determine compliance with a zoning ordinance and the MZEA. Escrow deposit provisions ensure that townships do not bear all the costs associated with reviewing a proposed mining operation.

**b. Traffic Safety Impacts**

A zoning ordinance may also want to require a developer to provide some sort of traffic information or data related to a proposed mining and extraction operation's haul route. MCL 125.3205(5)(d) enumerates that townships must consider the impact on pedestrian and traffic safety along a mining operation's haul route. Because a mining operation will often create truck traffic, townships should create standards to ensure that a proposed development's haul route can adequately handle the traffic.

**c. Hydrogeological Impacts**

Depending on the extraction technique, a mining operation may impact the water table/ground water. Townships can write standards into the zoning ordinance requiring a developer to provide reports or guarantees addressing impacts on the water table (if any) and wells to ensure that an operation does not negatively impact neighboring properties.

**d. Land Reclamation**

Unlike many land uses, mining operations only last for a finite amount of time (until the valuable natural resources are gone). These land uses also often require operators to dig into the earth for material extraction. Townships may want to specify how long a mining operation can operate before needing to renew a permit to ensure compliance. Townships will also want to develop clear standards on how a mining operator must repair the land used for a mining operation so it can be used in the future.

**e. MZEA Express Authority**

The MZEA gives townships the express authority to reasonably regulate a mining operation’s: (1) hours of operation; (2) blasting hours; (3) dust control measures; and (4) traffic. MCL 125.3205(6). Townships should be careful to not to construe this grant of authority too liberally—a regulation that restricts hours of operation to thirty minutes a day or restricts traffic to one truck a week will almost certainly be challenged by a potential developer. To avoid such a challenge, a township siting a mining operation should give considerable thought to balancing the needs of adjacent landowners against what is practically necessary to conduct the mining operation.
III. Pending Legislation

Given the controversy that often surrounds gravel pits and similar developments, it should come as little surprise that voices on both sides of issue have gained traction. Presently, two very different bills regarding the municipal regulation of mining and extraction operations are pending in the House and the Senate.

a. Senate Bill 431

Senate Bill 431 ("SB 431") was introduced to Michigan’s Senate on August 20, 2019 by Senator Hollier and seeks to amend Section 205 of the MZEA to modify zoning requirements for mining operations. If passed, SB 431 would significantly hamper the ability of local governments to regulate mining operations in a number of ways.

SB 431 seeks to impose a much higher standard for the “very serious consequences” test and would require any consideration of whether “very serious consequences” would result from a mining operation to be considered in light of the state’s “paramount public interest in the conservation and development” of natural resources. SB 431 would further allow a finding of “very serious consequences” only if the impact in question “substantially exceeds the ordinary impacts of customary mining operations and poses an actual and unnecessary risk to public health, safety, or welfare that cannot be avoided or ameliorated through the imposition of reasonable controls or conditions on the mining operations” (emphasis added). This goes well beyond the current restrictions set forth in the MZEA.

SB 431 would also completely excuse the requirement for a developer to prove that resources are valuable and that no “very serious consequences” would result if the developer submits an application showing that the operation will meet certain parameters. Some notable requirements of the application (which in turn will function as minimum requirements for a mining operation) include:

- Setbacks limited to a 50-foot setback from the mining area to the nearest roadway or property line, a 200-foot setback from screening and crushing equipment to the nearest roadway or property, and a 300-foot setback from screening and crushing equipment to the nearest occupied residential dwelling.

- Proposed stockpiles of materials may be up to 70 feet above surface level or 40 feet higher than the elevation of adjacent property at the property line.

- Berming and screening, which may be accomplished using overburden, is required only between the mining area and an adjacent occupied dwelling and only to the extent that it is “reasonably practicable” for the developer.

- Financial assurance for reclamation of the mining area is only required in the amount of $1,500 per acre disturbed by the mining operation (not including roadways, plant sites and open water areas), and no bond, surety, escrow or cash certificate of deposit if the developer “demonstrates that it has sufficient financial resources” to pay this amount.
These submittal requirements are very favorable to the developer and offer little to no protection of adjacent land uses.

SB 431 further establishes a “shot clock,” which would require townships to evaluate an application for a mining operation for administrative completeness with 30 days, and to approve or deny the application within 180 days. If a township fails to approve or deny an application in 180 days, it is considered approved. SB 431 also provides that a permit issued to a mining operation remains effective until the mining operation is complete, so mining permits would not require renewal.

Finally, SB 431 would impose additional restrictions to the “reasonable regulations” allowed under Section 205(6) of the MZEA concerning, hours of operation, noise, dust and traffic. SB 431 establishes maximum controls on acceptable dust, noise and vibration levels and proscribes hours of operation for truck loading (5 a.m. to 7 p.m., Monday through Saturday).

b. House Bill 5305

House Bill 5305 (“HB 5305”) was introduced to Michigan’s House of Representatives by Representatives Warren and Alexander on December 19, 2019. In contrast to SB 431, HB 5305 swings strongly in favor of local control.

While the current language of the MZEA and SB 431 have a presumption in favor of the siting of mining operations (SB 431 much more so than the MZEA), HB 5305 is structured so that a permit for a mining operation cannot be issued unless the applicant submits a permit application to the local unit of government. The permit application is required to contain the following:

- A phase I environmental assessment.

- An alternatives analysis that evaluates the need for the resources, alternative sites, alternatives for project scope, and whether the proposed project is superior to each alternative in terms of cost, feasibility, logistics, public health, community impact and environmental impact.

- A financial guarantee in a form approved by the local government to ensure the rehabilitation and reclamation of the mining site.

HB 5305 would also modify requirements of the “very serious consequences” test, requiring consideration of environmental impacts, including impacts on wetlands, conservation areas and areas of contamination. The following conditions would be deemed “very serious consequences” under HB 5305:

- If the site of the mining operation is an area of known contamination.

- If a proposed haul route runs through a historic district.

- If there are already three or more mining operations within the local unit of government.
HB5305 would additionally expand the conditions that may be imposed by local governments on mining operations, including mandatory setbacks and berming, environmental testing and remedial activity, and the submission of reclamation plans. Compared to the current language of the MZEA, and certainly to the proposed amendments under SB 431, HB 5305 would greatly enhance the ability of local municipalities to exercise control over the siting of mining operations.

IV. Conclusion

Mining operations are afforded special protections under the MZEA, so care should be taken when crafting or revising regulations that address these uses. Although municipal regulatory authority is somewhat hampered by the MZEA, there are still a number of ways to protect your township against the adverse impacts of mining operations. Finally, pending legislation could result in considerable changes to the protections afforded to mining operations.

If you are currently reviewing a proposed gravel mine or drafting new zoning regulations, you can reach out to one of the attorneys at Fahey Schultz Burzych Rhodes, PLC for further assistance.

Jacob Witte & Kyle O’Meara

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