STATE OF MICHIGAN

COURT OF APPEALS

EDITH KYSER, Plaintiff-Appellee, v KASSON TOWNSHIP, Defendant-Appellant.	FOR PUBLICATION May 6, 2008 No. 272516 Leelanau Circuit Court LC No. 04-006531-CZ Advance Sheets Version

EDITH KYSER, Plaintiff-Appellant, v KASSON TOWNSHIP, Defendant-Appellee.	 No. 273964 Leelanau Circuit Court LC No. 04-006531-CZ

Before: Whitbeck, P.J., and Jansen and Davis, JJ.

DAVIS, J. (*concurring in part and dissenting in part*).

I concur in the majority's decision to affirm the trial court's denial of sanctions, but I respectfully dissent from the majority's decision to affirm the trial court's order permitting plaintiff's gravel mining notwithstanding defendant's zoning ordinance and the unique history of gravel mining in Kasson Township.

As the majority states, the salient facts of this case are not seriously disputed. Defendant Kasson Township is significantly underlain with gravel deposits. Between 1988 and 1994, the township as a whole experienced considerable internal strife brought about because of zoning and other legal battles waged by various entities concerning gravel mining, which included a public referendum on the subject. The township eventually resolved the problems by forming a gravel district after this lengthy and public planning process. Plaintiff's property lies outside of, but adjacent to, the gravel district.

Plaintiff desires to have a portion of her property rezoned for gravel mining. The trial court found plaintiff entitled to mine gravel because the unique law that governs zoning as applied to the exploitation of natural resources requires that the exploitation be permitted unless "very serious consequences" will ensue. "We review the trial court's findings of fact in a bench trial for clear error and conduct a review de novo of the court's conclusions of law." *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). We review a trial court's decision whether to grant injunctive relief for an abuse of discretion. *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 105-106; 662 NW2d 387 (2003).

The law applicable to this question has its origins in a case that is almost 80 years old. In *North Muskegon v Miller*, 249 Mich 52; 227 NW 743 (1929), the city of North Muskegon discovered that there was oil within its limits and passed an ordinance forbidding oil drilling within its limits without a permit. The defendant owned a parcel of property that was zoned residential and applied for a permit, was repeatedly denied, and eventually commenced drilling anyway, whereupon the city commenced suit. It was significant to the discussion in the case that the defendant's property was a swampy wasteland that had been abandoned by the logging industry, and it was bordered on one side by the city's odiferous refuse dump and on another side by a primary water well for the city. It was undisputed too that the property was unsuitable for the residential purposes for which it was zoned. Therefore, the Court opined:

> It will be readily seen that the property in question is almost worthless if its use is to be restricted as provided in the zoning ordinance. The courts have particularly stressed the importance of not destroying or withholding the right to secure oil, gravel, or mineral from one's property, through zoning ordinances, unless some very serious consequences will follow therefrom. *Village of Terrace Park v. Errett* [12 F2d 240 (CA 6, 1926), cert den 273 US 710 (1926)]. The effect of the zoning ordinance in the cause at issue amounts almost to a confiscation of the property. The legality of a zoning ordinance, when reasonable, has been long recognized by our courts. . . . It is, however, necessary that a zoning ordinance be reasonable, and the reasonableness becomes the test of its legality. [*North Muskegon*, *supra* at 57.]

Given the worthlessness of the property for any other purpose and the "lack of regard for the property" shown by the city itself, "the zoning ordinance as applied to the property in this case is unreasonable and confiscatory, and therefore illegal." *Id*. at 59. The drilling-permit ordinance, however, was upheld as reasonable given the proximity of the oil well to the city's water supply. *Id*. at 61-63.

The *Terrace Park* case, cited by our Supreme Court in *North Muskegon*, entailed property that could conceivably be used for residential purposes, and was only zoned for that purpose, but was vastly more suited to gravel extraction. *Terrace Park*, *supra* at 242-243. Although it was undisputed that gravel mining would devalue the surrounding properties somewhat, the *Terrace Park* court stressed that the specter of a constitutional "taking" loomed more ominously where a zoning ordinance precluded something that was fundamentally inherent in the land itself, as opposed to an ordinance precluding something that could be done elsewhere. *Id*. at 243. An example of the former was a rock quarry, and the latter a horse livery. *Id*. The court concluded that the zoning ordinance at issue in that case was an unreasonable confiscation

of the plaintiff's property because the area was already afflicted by unpleasant industry, so a gravel operation would not likely cause much additional bother. *Id*.

For many years, *North Muskegon* was cited as standing for the proposition "that a zoning ordinance that renders property almost worthless is unreasonable and confiscatory, and therefore illegal." *Ervin Acceptance Co v City of Ann Arbor*, 322 Mich 404, 408; 34 NW2d 11 (1948); see also, e.g., *Pleasant Ridge v Cooper*, 267 Mich 603, 606; 255 NW 371 (1934), *Hammond v Bloomfield Hills Bldg Inspector*, 331 Mich 551, 556; 50 NW2d 155 (1951), and *Bowman v Southfield*, 377 Mich 237, 248; 140 NW2d 504 (1966).

It was, however, cited for a different point by Justice Black in his "concurring" (but actually the majority) opinion in *Bloomfield Twp v Beardslee*, 349 Mich 296; 84 NW2d 537 (1957). That case again involved an allegedly confiscatory zoning ordinance that prevented the defendants from mining gravel on their property. *Id*. at 301-306. The defendants asserted that they had suffered a taking because they had a legal right to exploit natural resources, which must be performed where the resources are. *Id*. at 303. The Court explained in the "lead" opinion by Justice Smith that

> [a]ttractive though the argument may seem upon its first reading, it must be obvious that a logical application of its principle would be destructive of all zoning. . . . [J]ust as the surface user desired by the owner must give way, at times, to the public good, as must the subsurface exploitation. In each case the question is whether, on the peculiar facts before us, the ordinance is a reasonable regulation in the interests 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. [*Id*. at 303.]

The "lead" opinion explained that the proper analysis was only one of reasonableness, citing *North Muskegon*, among other cases, for the proposition that there was no absolute bar in the law to prohibiting the exploitation of a valuable natural resource. It concluded that the overwhelmingly residential nature of the area, the deleterious effect thereon of gravel mining, and the remaining valuable use to which the defendants could put the property, made the zoning reasonable. *Bloomfield Twp, supra* at 304-305, 309-310.

Justice Black's majority "concurrence," however, agreed that the proposed mining was an enjoinable nuisance, but expressed "concern over the implications of zoning the depths distinguished from zoning the surface," and cited in support of that concern *Terrace Park* and *North Muskegon* for the different proposition that the right to exploit natural resources should not be zoned away in the absence of "'very serious consequences'" should the zoning not be in place. *Id*. at 310-311. Subsequently, Justice Black again wrote a majority opinion concurring in part and dissenting in part with the "lead" opinion citing *North Muskegon*, and the citation therein to *Terrace Park*, as setting forth a "warning rule" of law that if a zoning ordinance that prohibits exploitation of a natural resource fails to meet the "test" that very serious consequences would ensue in the absence of the zoning, the courts "must" find the ordinance constitutionally unreasonable. *Certain-teed Products Corp v Paris Twp*, 351 Mich 434, 467; 88 NW2d 705 (1958).

Almost a quarter of a century later, in *Silva v Ada Twp*, 416 Mich 153; 330 NW2d 663 (1982), our Supreme Court returned to the issue of the standard for determining the constitutionality of zoning regulations that impede exploitation of natural resources. In *Silva*, our Supreme Court "again reaffirm[ed] the 'very serious consequences' rule of [*North Muskegon*] and *Certain-teed*." *Id*. at 159. The Court explained that the reason zoning ordinances precluding natural-resource exploitation required greater justification than other zoning ordinances was because of the important public need for those resources and because resources can only be exploited where they actually exist. *Id*. at 159-160. The Court further noted that resource-bearing land could usually be put to some other purpose, resource extraction is usually temporary, and extraction can usually be regulated to minimize harm. *Id*. at 160-161. However, even zoning ordinances that preclude resource extraction remain presumptively reasonable, notwithstanding the higher standard; any individual challenging such an ordinance still bears the burden of rebutting that presumption. *Id*. at 162.

It is worth a brief digression to discuss zoning in general. Nine years before *North Muskegon* was decided, cities—and by implication in our Supreme Court's analysis, townships[1]—had no "inherent zoning power." *Clements v McCabe*, 210 Mich 207, 216; 177 NW 722 (1920). This conclusion was viewed with dismay by the Legislature, resulting in, among other reactions, the passage of 1921 PA 207, a zoning enabling act codified at 1929 CL 2633. See *Korash v Livonia*, 388 Mich 737, 741-742; 202 NW2d 803 (1972). A year before *North Muskegon*, our Supreme Court had acknowledged that the legislative and executive branches of Michigan's government had recognized that zoning laws served an important public policy, albeit one that required just compensation if property was taken as a consequence. *Johnstone v Detroit, G H & M R Co*, 245 Mich 65, 74-75; 222 NW 325 (1928). As discussed, *North Muskegon*, decided the next year, was at the time viewed as merely setting forth a rule of reasonableness, and was cited as such in an official note accompanying 1929 CL 2633.

Our Supreme Court endeavored to explain in unambiguous terms that "[o]ur 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." *Brae Burn, Inc v Bloomfield Hills*, 350 Mich 425, 431; 86 NW2d 166 (1957). In the absence of an affirmative showing of unreasonableness or arbitrariness sufficient to rebut "every presumption of validity" with which zoning ordinances are clothed, the courts do "not sit as a superzoning commission." *Id*. at 430-432. "We do not see the land, we do not see the community, we do not grapple with its day-to-day problems," and as such, short of a taking of constitutional magnitude or "the most extreme instances, involving clearly whimsical action," the courts are not in a position to adjudicate the wisdom of a community's efforts to address its own unique problems. *Id*. at 436-437. This was not a new pronouncement: again citing *North Muskegon* as setting forth reasonableness as the touchstone of a zoning ordinance's legality, our Supreme Court had emphasized 16 years before the *Brae Burn, Inc*, decision that "the court should not interfere with the judgment of a zoning

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[1] *North Muskegon* involved zoning by a city, but *Bloomfield Twp*, *Certain-teed Products*, and *Silva*, wherein our Supreme Court relied on *North Muskegon*, involved zoning by townships.

board if there is a reasonable basis for its ruling." *Pere Marquette R Co v Muskegon Twp Bd*, 298 Mich 31, 36; 298 NW 393 (1941).

The "very serious consequences" rule applicable to zoning ordinances that affect natural resource extraction is, still, a matter of zoning, and it must be viewed in that context. When its history is considered, and when the public policy in this state of deference to zoning in general is also considered, it becomes apparent that defendant's gravel district is presumptively valid, that plaintiff has the burden of proving otherwise, and that the test is still fundamentally whether the zoning ordinance is confiscatory or arbitrary. The fact that a natural resource will be "locked up" in the ground if the gravel district is found valid is an important consideration in this analysis, but it is nevertheless only a part of that analysis. Put another way, the distinction between an "ordinary" zoning ordinance and a zoning ordinance that affects natural-resource exploitation is that the latter requires consideration of wider-scale social ramifications. In effect, the courts must determine whether the challenged zoning ordinance is confiscatory with regard to not only the landowner's desire to exploit the resources on his or her land, but also with regard to the community's need to have those resources exploited. It rationally follows that our analysis must also consider the negative implications to the community of exploitation, if contrary to the duly enacted zoning regulation.

In *American Aggregates Corp v Highland Twp*, 151 Mich App 37; 390 NW2d 192 (1986), this Court observed that our Supreme Court had not provided any firm guidelines for determining the existence of "very serious consequences," although it had made clear that "the degree and extent of public interest in the extraction of the specific natural resources located on the landowner's land is a relevant factor in reviewing the reasonableness of the zoning regulation." *Id*. at 43. Therefore, a "sliding scale approach" was necessary, because natural resources do not all "involve a constant high degree of public interest," and the only rational way to determine the seriousness of a consequence was by comparing it to the benefits to be derived. *Id*. at 43-44. The lower the degree of public interest in the particular natural resource on the particular property at issue, the stronger a showing the landowner must make that no "very serious consequences" will ensue from the desired exploitation. *Id*. at 45-47. This Court then analyzed a variety of alleged harms that would occur in that particular case—also a gravel mining case—to surrounding properties, including noise from trucks, traffic-safety issues, decreased property values, and stunted residential development along the truck route because of the noise; this Court found the low public interest in the resource and the plaintiff's failure to prove no "very serious consequences" warranted upholding the zoning ordinance at issue. *Id*. at 47-51.

The *American Aggregates Corp* Court therefore properly recognized that the "very serious consequences" rule remains, consistent with any other zoning analysis, a test of reasonableness, albeit one that takes into account more factors than would ordinarily warrant consideration. Critically, however, this Court in *American Aggregates Corp* did not consider the kind of "very serious consequence" that is primarily at issue here: not merely the effect gravel mining will have on the immediately surrounding properties, but the effective dissolution of an entire community's legal framework specifically created to prevent itself from self-destructing. More particularly, the trial court's findings of fact included a discussion of the resulting expansion of gravel mining in the township if gravel mining was permitted on plaintiff's property. The trial court opined that the answer to "where does this end?" was that gravel

mining would probably expand to natural boundaries: two national parks, another gravel-mining operation, a property owner who expressed no interest in gravel mining, and areas that simply could not be mined profitably. In other words, the only effective limitations on transforming the entirety of Kasson Township into a gravel mine would be the existence of gravel on a given parcel of property and the property owner's own interest in mining.

Despite the trial court's factual findings above, the trial court found no "very serious consequences" because it believed *Silva* and *American Aggregates Corp* required it to make that finding. I believe that the trial court erred in relying too narrowly on these cases instead of fully considering the underlying legal principles involved. See *People v Stafford*, 434 Mich 125, 133-135; 450 NW2d 559 (1990). I believe that the majority likewise errs in ignoring or misconstruing the actual ramifications of the trial court's findings, particularly given defendant's history.

As the trial court recognized, the gravel district is the result of intensive planning efforts by defendant, with widespread community participation,[2] to arrest and avert its own destruction. The evidence showed considerable strife, animosity, and uncertainty brought about by both gravel mining per se and lawsuits brought seeking to permit or prevent mining, among other issues. In other words, the gravel district was formed to prevent precisely what the trial court found would occur—uncontrolled intrusion of mining into any part of the township that would support it, irrespective of the consequences to the community. The trial court also determined that the gravel on plaintiff's property, if mined, would only "add modestly" to an existing gravel reserve that at worst would last "not much less" than "into the latter part of the 21st Century," and that "if this gravel wasn't ever mined we would survive just fine." The need for this particular gravel is therefore low, and the township has already gone to great lengths, with the involvement of its citizens, to *permit* gravel mining within its boundary in a managed and controlled manner. Under these circumstances, destruction or extensive disruption of the community itself—beyond harm to any particular parcel or parcels of property near the proposed mining—certainly constitutes a "very serious consequence." I, like the majority, find no clear error in the trial court's individual findings of *fact*. But the trial court and the majority fail to recognize that those facts constituted "very serious consequences."

Each and every zoning case must be analyzed on its own unique facts, so I would not hold anything more than that on the facts of *this* case, plaintiff *here* has failed to make the requisite showing that there are no very serious consequences attendant to conducting gravel mining on her property contrary to the township's zoning plan. I am definitely and firmly convinced that the trial court made a mistake in determining that plaintiff had shown that no very serious consequences would ensue from her proposed gravel mining. MCR 2.613(C); *Dep't of*

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[2] Plaintiff and her now-late husband owned the property at issue in the township during this time and apparently did not seek to have it included in the gravel district until approximately eight years after the district's adoption. While not strictly relevant to the existence of "very serious consequences," this is illustrative of some of the ongoing uncertainty the gravel district was intended to prevent.

Civil Rights ex rel Johnson v Silver Dollar Cafe, 441 Mich 110, 117; 490 NW2d 337 (1992). I would therefore reverse the trial court's order in plaintiff's favor. In view of the result I would reach, this Court would not need to determine whether plaintiff was entitled to costs as a prevailing party.

I agree with the majority that the trial court's refusal to impose sanctions should be affirmed. I would reverse the trial court's order permitting plaintiff to conduct gravel mining in disregard of the zoning ordinance that the citizens of Kasson Township enacted to preserve their community from what will, as the trial court found, now occur.

/s/ Alton T. Davis