STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF L E E L A N A U

RUSSELL L. BROAD,
Plaintiff,

File No. 90-2765-CE

RAYMOND J. HULBERT, Sr., and
DELA E. HULBERT,
Plaintiffs

File No. 90-2772-CD

EDWARD PEPLINSKI, et al,
Plaintiffs,

File No. 90-2773-NZ
HON. PHILIP E. RODGERS
CONSOLIDATED CASE

vs .

KASSON TOWNSHIP,
Defendant.

Robert A. Steadman (P20925)
Attorney for Plaintiffs Broad
and Hulbert

Louis A. Smith (P20687)
Michael J. Corcoran (P41254)
Attorneys for Plaintiffs Peplinski

Richard W. Ford (P13569)
Attornev for Defendant

DECISION AND ORDER

These three cases come before the Court on complaints consolidated for trial, seeking both injunctive and declaratory relief. The Plaintiffs are owners of real estate in Kasson Township. On May 7, 1990, the Kasson Township Board passed an amendment to its zoning ordinance which changed the classification of the Plaintiffs' parcels from agricultural to earth removal, quarrying, gravel processing, mining and related mineral extraction businesses. The Plaintiffs' parcels and their relationship to other gravel mining operations and county roads are depicted on Plaintiffs' Exhibit 6.

On June 2, 1990, and June 20, 1990, petitions were filed with the Kasson Township Clerk pursuant to MCL 125.282 requesting the submission of the ordinance amendments to the electors of the

township for their approval. Subsequent to the filing of these petitions, the Township Planning Commission met on August 13, 1990, and Plaintiff Broad's site plan was approved and a special use permit authorized to commence gravel extraction. Shortly thereafter, and pursuant to the provisions of the special use permit, gravel extraction operations were commenced on the Broad property.

Then, on November 6, 1990, a referendum election was held on the Township Board's adoption of the rezoning amendments, and a majority of the electors voting rejected the amendments to the zoning ordinance. In a related action filed in the summer of 1990, Plaintiffs Hulbert and Broad challenged the referendum petitions and sought injunctive and declaratory relief that such petitions were invalid because they did not comply with the provisions of the Rural Zoning Act. The trial court refused to grant Plaintiffs' Motion for Summary Disposition for the reason that the substance of the petitions substantially complied with the statutory provisions authorizing a referendum. The decision of the trial court was affirmed by the Michigan Court of Appeals on April 9, 1992. (Case No. 136140).

Following the referendum election, Plaintiffs Broad and Hulbert filed their suits seeking to enjoin the Defendant Township from preventing gravel extraction on their property and Plaintiff Peplinski filed a complaint challenging the decision resulting from the referendum election. On November 20, 1990, this Court entered a Temporary Restraining Order which enjoined the Township from preventing gravel extraction and processing operations which were currently underway on Plaintiff Broad's land.

Each of these cases, then, arises out of rezonings approved by the Kasson Township Board after a petition for a zoning change had been brought by each Plaintiff and after the Township authorities had completed the statutory zoning review process which included preliminary approval of the proposed gravel zoning by the Township's Planning Commission and, later, by the Township Board after conducting extensive public hearings. Although approved by the Township Board and the Township Planning Commission, these amendments to the zoning ordinance were rejected by the Kasson Township electorate in the referendum election previously discussed. As noted, these suits followed and were consolidated for trial. A two-day bench trial was commenced on May 14, 1991, and counsel presented oral arguments on June 26, 1991. The Court took the matter under advisement.

The Court will now provide its findings of fact and conclusions of law. MCR 2.517.

An integral aspect of this case is the relationship between the proposed zoning and special use permit necessary to commence mining operations. Rezoning land from an agricultural to a gravel mining use does not ipso facto grant authorization for gravel mining. To the contrary, after an extraordinary expenditure of effort, this rural township developed an elaborate special use permit process, the satisfaction of which is a condition precedent to the commencement of mining operations.

The decision for this Court, then, is whether Plaintiffs have been impermissibly denied rezoning of land from an agricultural to a gravel mining use through the township referendum. The Court of Appeals has found the petitions valid and the subject matter appropriate for a referendum election. The Court of Appeals was not asked to--and did not comment upon--the substantive questions raised by these cases. The law by which a rezoning denial is tested is no different if the source of the denial is a Township Board or a voter-approved referendum. The analysis involves a consideration of serious consequences, reasonable alternative uses of the land, and the public's interest in a potentially valuable mineral resource.

There is limited appellate authority to assist the Court, and all parties rely upon Silva v Twp of Ada, 416 Mich 153 (1982) and American Aggregates Corp v Highland TwP, 151 Mich App 37 (1986) to support their respective positions. In Silva, the Supreme Court addressed the burden of proof applicable in a gravel extraction case when it held:

"Zoning regulations are presumed to be reasonable and a person challenging zoning has the burden of proving otherwise. The party challenging the zoning has the burden of showing that there are valuable natural resources and that no 'very serious consequences' would result from the extraction of those resources". Id., at p 162.

The Court of Appeals expanded upon the concepts addressed in Silva and developed a cost/benefit approach to the determination of very serious consequences. The Court's discussion of this approach is as follows:

"This type of sliding scale approach based on the public interest and the landowner's specific resource results in an appropriate cost/benefit analysis in applying the Silva standard for determining the reasonableness of zoning regulations preventing the extraction of natural resources. The 'very serious consequences' test is not viable unless it is applied in this way, since it essentially involves an internalizing of costs imposed on the public by the extraction operation that the landowner is not aware of in making his private decision to extract the resources (externalities). For such an internalizing of public costs to make any sense, these costs must be compared to the benefits of the extraction operation as measured by the degree of public interest in the specific resources. As stated above, if the benefits (public interest in the resources) are low, less public costs (consequences) are necessary to outweigh those benefits and lead to a conclusion that the zoning regulation preventing extraction is reasonable. Therefore, if public interest in Plaintiff landowner's resources is relatively low, Plaintiff must make a very strong showing that no 'very serious consequences' will result from the extraction of the resources. American Aggregates, supra, at p 44.

An important aspect of the zoning question at issue here is the special use permit process which overlays it. In both the American Aggregates and Silva cases, rezoning alone was the only significant event prior to the legal extraction of minerals. In Kasson Township, minerals may not be extracted until first, the land has an appropriate zoning classification and, second, a special use permit is obtained. As will be commented upon further ahead, the special use permit process is designed to minimize the "externalities" of extraction identified as public costs in the American Aggregates analysis.

The Court's factual conclusions are best viewed in light of the testimony which will now be summarized.

Plaintiff Ed Peplinski testified that he has owned his parcel for approximately 40 years. It is 160 to 170-acres in size and during these years he has worked as a part-time farmer and school bus driver. He testified that he always needed to work to support the farm; specific farm losses were attributable to mechanical breakdowns and the accelerated depreciation of equipment due to the rocks which are found throughout the property. Mr. Peplinski stated that he had received no profits on the farm for the three to four years prior to the rezoning. He said that he had attempted to rent the land to others and such parties would either break the lease or refuse to renew it because the land was not profitable and there was too much lost time due to equipment breakdowns.

Mr. Peplinski also described his efforts to sell the Property. He noted that he had listed the property for sale several years ago and had received no offers during the six months the property was listed. Mr. Peplinski described his desire to sell his property for gravel purposes and stated that he had an offer which would significantly add to the land's value.

As to the disruption caused by gravel trucks, Mr. Peplinski said that his property borders on County Road 669 and that sand and gravel trucks currently go north and south past his house. They use a number of existing and approved gravel pits and do not disrupt his peaceable use of his home. Mr. Peplinski expressed his desire to remain in his home after the land is sold for gravel mining.

As a part-time farmer and school bus driver, Mr. Peplinski was also familiar with the school bus route in the area. He described how the school bus goes by every operating gravel excavation site except that of Leelanau Excavating. He noted that children were picked up within 200 feet of the Kasson Sand and Gravel scales and that there are currently four bus stops which pick up 13 children within the gravel area identified on Plaintiffs' Exhibit 6. Mr. Peplinski opined that there was no problem with the truck traffic on County Road 669 and that if there was any traffic problem it was with the drivers of

automobiles.

When questioned regarding dust and noise, Mr. Peplinski stated that he had observed the Broad pit since it had begun

operation and that he could discern no meaningful increase in noise or dust problems. Mr. Peplinski described the Broad gravel operation as one that took place below ground level. He could not see the equipment and could not hear the trucks. He also noted that the Broad pit is operated pursuant to the terms of a special use permit which limits its hours of operation, requires that the site be bermed and trees be planted. Finally, Mr. Peplinski opined that he was confident that the special use permit process, as an aspect of the new zoning ordinance relating to gravel, would deal with any deleterious impact that gravel mining might have on his continued residential use of a portion of his property.1

Footnote 1:Towards this end, the Court did view the gravel mining operations currently approved in Kasson Township and specifically
(Footnote Continued)
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With regard to proposed alternative uses of his land, Mr. Peplinski said that he had never been approached by any builder for a possible residential subdivision of his property; that there were no residential subdivisions within the area; and that he was not aware of any plans for the construction of residential subdivisions in the foreseeable future.

Bea Peplinski also testified. Together with her husband, she has had an ownership interest in the land for forty years. Ms. Peplinski described the land as potholes and woods, a "good share" of which was not tillable and had never been farmed. She raised seven children and also worked at factory jobs to provide the extra income needed to support the family. Ms. Peplinski agreed that the farm was never operated at a profit and that expenses exceeded income largely due to mechanical breakdowns associated with a large amount of gravel and rocks in the soil. She described the property as her only asset and her desire to sell was predicated on her age (61) and a carpal-tunnel condition which makes her job painful and from which she would like to retire.

Like the other witnesses, Bea Peplinski agreed that there was no significant increase in traffic from the recent operations at the Broad pit and no increase in noise or dust. Ms. Peplinski described the Broad operation and its owner as a "good, clean operator." She also plans to continue to live on her property and stated her opinion that she is protected by the new gravel

(Footnote Continued)
noted the distinction between those operating with special use permits such as the Broad pit and that operated by Traverse Asphalt Paving and the pre-existing operation at Kasson Sand and Gravel. The distinction is stark. Those sites regulated by a special use permit show significant diminuition of the deleterious impacts on adjoining land uses otherwise associated with gravel mining while providing the owners of the minerals with the opportunity to extract them profitably.

ordinance and has lived by gravel pits her entire life and does not find them to be a problem.

The Plaintiff Raymond Hulbert, Sr. offered testimony similar to the Peplinskis'. He has owned his 120 acres since 1944, 111 of which would be subject to the rezoning and nine of which the family proposes to live on. He described it as rolling property which was rocky and gravelly. Like the Peplinskis, he could not make a living farming the land and worked for 31 years at the State Hospital in Traverse City. He was never able to farm the land for a profit and tried various crops, including potatoes and corn, as well as raising cattle. Also like the Peplinskis, he experienced numerous mechanical breakdowns and accelerated depreciation of equipment due to the amount of rock in the soil. Mr. Hulbert attempted to lease his land to others, but no one would keep the lease and he never was able to receive more in lease payments than his taxes on the property. The land was last farmed four years ago and has been abandoned simply because it was "too rough and stony."

Mr. Hulbert also discounted any increased traffic associated with gravel mining on the Plaintiffs' parcels. He described the location of his home on Kasson Center Road near the main entrance to the existing Kasson Sand and Gravel operation. The existing operation can be noisy depending on the wind direction, but he has not noticed any problem with dust. Gravel has been removed from the Kasson pit for as long as he has lived in Kasson Township.

Mr. Hulbert testified that Eastwood Excavating was interested in leasing his property for gravel mining purposes and that he would derive substantial revenues from this lease. In Mr. Hulbert's opinion, there would be limited consequences from

Footnote 2: Plaintiff Peplinski's son, Don Peplinski, testified that two-thirds of the land was not tillable and that it could not be operated profitably as a farm despite his efforts to do so. Like Bea Peplinski, Don Peplinski agreed that the new gravel ordinance will protect his investment and that he foresees no adverse consequences so long as the site plan review process is followed.

additional gravel mining within the area. He also testified that agricultural zoning on his land is unreasonable as he cannot farm the land for a profit, cannot sell the land as a farm, and has never been able to make a living as a farmer on the land. Despite the significant number of gravel trucks already operating within the area, his children and his grandchildren have still been able to take the bus to and from school and he does not find I the current conditions or the addition of trucks to be unsafe or to add any significant danger.

Again, on cross-examination, the issue of reasonable alternatives are explored. Mr. Hulbert noted that a plan to use his land for a recreation area for motorcycles had been explored but had not proven to be feasible. The group promoting this idea simply gave up. Other uses such as riding stables, greenhouses, or a nursery have not been explored, nor has Mr. Hulbert explored residential uses of his property. Mr. Hulbert did note that there were five residences along the road in the area of his home and that the land drops off sharply at the rear. He also noted that no interest in such alternative uses has been expressed to him by others.

Thomas L. Shimek also testified.3 A member of the Kasson Township Planning Commission since 1977, Mr. Shimek was involved in the discussions which led to the passing of the zoning ordinance and special land use permit process. Mr. Shimek described the Planning Commission's goals as being the the protection of the environment, shielding neighbors from the negative impacts

Footnote 3: Mr. Shimek's testimony was supported by Tim Dolehenty, Leelanau County Planning Director. Mr. Dolehenty's staff report was received as Plaintiffs' Exhibit 11 and identified the Peplinski parcel as a good prospect for sand and gray, Mr. Dolehenty further found the 1989 amendments to l\the Kasson Township zoning ordinance to be excellent site plan review

criteria and he found the objective standards within the ordinance sufficient to deal with any potential adverse consequences. Mr. Dolehenty further agreed that residential development should not be encouraged in an area of known gravel extraction.

of gravel operations, and to meet general public concerns regarding gravel operations. Mr. Shimek discussed at length the extensive public process through which the zoning ordinance was developed, including the very specific standards which must be satisfied to generate a special use permit.

Mr. Shimek testified that site plan review was designed to minimize any adverse impact on the adjoining area. His testimony was illustrated by a review of the site plan map for the Broad parcel. (Plaintiffs' Exhibit 1). This site plan required berms, a 90-foot setback, planting of trees for a visual screen, an asphalt access road to reduce dust, a gate to restrict access and restriction on the hours of operation. Mr. Shimek also testified that the Township's master plan projected residential development substantially to the north and east of any proposed gravel uses proposed by Plaintiffs. See, Plaintiffs' Exhibit 4. Mr. Shimek did not feel there was significant potential for residential development, noted that all current residents bought with full knowledge of the existing gravel operations, a number of which are not subject to the protections implicit within the special use permit process, and offered his opinion that the rezoning proposed by Plaintiffs would not generate "very serious consequences."

Mr. Shimek lives within this residential district at the intersection of County Roads 669 and M-72 near the Traverse Asphalt operation, a gravel mining operation which is being conducted pursuant to the special land use permit process. With regard to the Traverse Asphalt operation, Mr. Shimek stated that he has noticed additional trucks and sees some dust on the roadway where they leave the site. He has heard the crusher but has no complaints.

Mr. Shimek described his own land as abrasive and rough to farm and stated that it inhibited crop growth. He also testified that he had attempted to farm the Broad and Peplinski parcels but that they were, with the exception of one marginal field, rocky and unproductive

Mr. Shimek's opinions were largely shared by Fred Lanham, the Kasson Township Supervisor. A Township Board member for nine years, Mr. Lanham was on the Planning Commission when the gravel ordinance was adopted. Mr. Lanham supported the rezoning of each parcel and opined that the special permit process will prevent any serious consequences. Mr. Lanham described the Township's Master Plan as consistent with rezoning, given its intent to encourage residential development to the east and north of this gravel area.

On the issue of traffic, James Gilbo testified. Mr. Gilbo is the engineer in charge of the Leelanau County Road Commission. With respect to the two principal north-south roads at issue, Newman Road and County Road 669, Mr. Gilbo testified that they were essentially comparable. Mr. Gilbo was familiar with the gravel haul routes and with the loads carried by double-bottom gravel trains. Despite this punishment, Mr. Gilbo noted that the roads have stood up "amazingly well" given their light construction, "due to natural aggregate-base construction." He testified that despite repeated use by gravel trains over a period of years, that this natural aggregate-base construction has limited maintenance on County Road 669 to a single seal-coat in 1990 and some edge-wedging on Newman Road. 4

As to the value of the mineral resource, its public need, and its relationship to public consequences, the Plaintiffs first called William Cuther to testify as an expert witness. Mr. Cuther is a trained geologist who evaluated the Peplinski property for a potential purchaser. His geological report was introduced into evidence as Plaintiffs' Exhibit 10. Mr. Cuther described the great glacial deposits of gravel within Kasson Township as part of the Port Huron moraine. He opined that at various locations the gravel accumulations were 200 feet deep.

Footnote 4: Mr. Lanham concurred with Mr. Gilbo in the assessment that County Road 669 was a superior road and that the additional truck traffic would not itself pose any serious consequence to the Township.

Mr. Cuther described the gravel on the Peplinski property as high quality, construction-grade gravel found in large quantity.

Russell Butch Broad, a Plaintiff herein, also testified regarding available gravel resources and demand in Northwestern

Michgian. Mr. Broad is the current operator of the Broad pit and is the president of an excavation and asphalt business.

It was Mr. Broad's opinion that the greater Traverse City area's gravel supplies are depleted. While Mr. Broad conceded that road gravel was readily available, he stated that dense-graded aggregates and road gravel that satisfied Michigan Department of Transportation specifications was not readily available. Further, competition was limited by the fact that Kasson Sand and Gravel operated the only washed gravel plant. In Mr. Broad's opinion, Kasson Sand and Gravel could not keep up with demand and was not satisfyinq his needs for specific sand and stone. Mr. Broad discussed at length these various aggregates and their use and the difficulty he had meeting his needs through Kasson Sand and Gravel. He also described alternative suppliers such as the Hersey pit just north of Baldwin in Lake County and deliveries by a barge out of Cedarville in Michigan's Upper Peninsula. He noted that prices from these alternative suppliers were not competitive due to the additional transportation costs.

Mr. Broad testified that his operation was not producing a washed product as he would have to sink an eight to twelve-inch well for that purpose. He believed that such an investment would be justified if his use of the property was affirmed. Mr. Broad noted that the expected life of his pit was 30 years, that the berm surrounding it is six feet high, and that he expects the trees he has planted to be eight to ten feet high before he moves to the east where the operation might otherwise be visible.

Mr. Broad was asked his opinion regarding the gravel potential of the Hulbert parcel. The Hulbert parcel is characterized by larger stones of volleyball size. They are used as decorative stones in landscaping and for rip-rap. These stones are a valuable commodity of limited availability. Mr. Broad noted that the colored stones are required by fireplace masons and that the Hulbert parcel offers a supply of more decorative stones. Mr. Broad described the current producers of such stones as Onaway Stone and Alpers Excavating. In Mr. Broad's opinion, Kasson Sand and Gravel could not supply the current demand and that such decorative stone is not currently available at Kasson Sand and Gravel in the predictable quantities necessary to make customers happy. For that reason, the stone has not been offered.

While Mr. Broad was thoroughly cross-examined regarding the

location of existing active pits and their size, Mr. Broad continued to make the clear distinction between the availability of low-quality road gravel and that dramatic shortage of other sands and stones which Plaintiffs' parcels could supply. He also described his own significant investment in this operation which, with the addition of wells for washed gravel, will approach $1.3 million dollars. Mr. Broad was emphatic when he testified that he would not make such an investment if the materials which are essential to his business were readily available at competitive prices. Mr. Broad also testified regarding the significant cost savings generated by having additional gravel supplies available and of the stark contrast between the conditions under which his operation must be run compared with those applicable to existing operators.

The testimony offered by the Defendant came from interested neighbors, a realtor and a competitor. The neighbors who testified in opposition to the Plaintiffs' proposed mining operations were uniformly concerned with additional dust, increased truck traffic, and the possible diminution in value of their residential real estate. However, these individuals admitted, on cross examination, that gravel mining was not new to the area. Each of them lived in close proximity to an existing sand and gravel operation which had none of the protections associated with it that the special use permit process would provide to persons residing near the Plaintiffs' property. In fact, despite the relatively unregulated nature of existing operations, the neighbors acknowledged that their property values had increased.

The residential home owners who testified also acknowledged that despite their proximity to existing unregulated gravel operations, they enjoy the rural character of the area, intend to remain in their homes, and do not wish to move. To the extent that any of them had attempted farming, they acknowledged that it could not be done profitably.

A number of the witnesses who testified had not read the 1989 amendments to the zoning ordinance and were not aware of the special use permit restrictions and their application to the Plaintiffs' parcels should mining operations be approved. Several witnesses expressed concerns regarding a potential asphalt plant and were unaware that such a plant could not be operated without a special use permit and then only in compliance with the conditions associated with the permit's issuance.

Robert W. Noonan, manager of Kasson Sand and Gravel, testified that his operation produces all types of sand and gravel and that supplies are available to meet 99 percent of all available demand. His gravel operation is 400 acres in size, of which 320 acres is zoned for gravel, the balance having been depleted over the last 30 years. Mr. Noonan stated that his gravel pit has "tested" reserves on 200 acres of this land, comprised of 3.5 to 4 million tons of sand and stone. Mined at an average yearly rate of 375,000 tons a year, he opined that his pit would last ten years. Mr. Noonan denied that he had failed to meet any contractual obligations and stated that he had adequate resources to meet all demand. He did acknowledge that Kasson Sand and Gravel has occasionally run out of product if demand exceeds his projections.

The Township also called John Martin, a realtor, to testify regarding the impact of gravel development on residential market values. Mr. Martin acknowledged that he is not an appraiser and makes determinations of value as a real estate agent by looking at comparable property. He did not complete a market survey and did not engage in alternative valuations by the use of replacement cost or income approaches. It was Mr. Martin's opinion that the new zoning ordinance was "great" but he was concerned with future enforcement and truck traffic. While the pits themselves may not be visible, Mr. Martin feared that adjacent residential uses would be severely effected by gravel train traffic. He felt that noise would be limited by the topography and that the main impact on the quality of life for a residential homeowner, and on value, would be the increased truck traffic.

On cross-examination, Mr. Martin did acknowledge that existing gravel mining is already a fact of life within the area described by the proposed rezonings and that he could not quantify any percentage difference in market price attributable to marginal rezonings requested by the Plaintiffs as opposed to existing lawful gravel operations.

Karen Nielson was the Defendant's final witness. Ms. Nielson lives on County Road 669 in Kasson Township and served as the chairman of the Kasson Township Planning Commission during the period when the 1989 ordinance amendment was developed. She described the gravel ordinance as the only significant issue before the Board during that two and one-half year period. Ms. Nielson is a very intelligent and articulate individual who donated significant amounts of time to gathering data, collecting

public input, reviewing the proposed ordinance with experts around the country, and participating in the drafting and redrafting process.

Ms. Nielson testified that she supported the ordinance that was adopted but recognized that it was an attempt to limit the public "spillovers" from gravel operations. She described these as increased traffic, noise, and an impact on residential market values. Ms. Nielson offered no opinion as to any increased noise or traffic associated with the Plaintiffs' parcels, but did believe that the addition of mining operations would have a negative impact on neighboring property values. Ms. Nielson predicated her opinion on both the significant quantities of gravel found within the Township and the gravel area's proximity to a national park.

Ms. Nielson admitted that agricultural zoning was not proper for the Plaintiffs' parcels. However, she felt that other alternative land uses should be considered before gravel mining was approved. On cross-examination, Ms. Nielson agreed that the residential development envisioned by the Township's master plan was north and east of the proposed gravel operation and that the gravel trains did not go north or northeast very often. Ms. Nielson also acknowledged that the ordinance does internalize a number of the public costs associated with gravel development. Her concern with serious consequences was driven, she said, by the extraordinary amount of gravel within the Township, the length of time that gravel mining would be projected as a use, and the close proximity of the gravel deposits to the national park. Ms. Nielson was specifically concerned with a reservation of a 500-foot barrier as a condition of site plan approval to provide for public safety where gravel operations adjoined land used for public gathering places.

Based upon a review of this testimony and the applicable law, the Court is convinced that the current zoning on the Plaintiffs' parcels is unreasonable. Each parcel is located within a gravel district created by a glacial moraine. No profitable agricultural use may be made of the land and residential development is minimal throughout the gravel district. The Township Master Plan appropriately envisions residential development east and north of this concentration of valuable mineral resources.

Unlike the situations presented in Silva and American Aggregates, supra, the act of rezoning Plaintiffs' parcels cannot itself generate "very serious consequences." Such consequences,

if any, may only occur if a special use permit is granted to allow mining operations. However, a review of the 1989 amendments to the zoning ordinance that describe the special permit conditions reveals a systematic and thorough attempt by the Township to eliminate the possibility of any serious consequences and to internalize any potential public costs within the mining operation. This is done by sweeping conditions which, among others, restrict hours of operation, require berms and visual screens composed of trees, and limit dust and noise.

Based upon the Court's view of the Broad pit, the Leelanau Excavating pit and that run by Traverse Asphalt, the special use permit process works well. The Court observed gravel trains loading at the Broad pit and saw no noticeable dust at the site or on the access road as the trucks left. Noise was minimal and traffic in this rural area is quite limited.5

Recognizing that the great weight of the evidence demonstrated that the current zoning on the Plaintiffs' property is unreasonable, the effect of the 1990 referendum was to impose a zoning classification on the Plaintiffs which cannot be legally justified.

Here, the Court has been shown that significant deposits of high-grade gravel are located within Kasson Township. Although road gravel is generally available throughout the area, there is only one available supplier of washed gravel products. Despite significant efforts to meet market demand, supplies of needed materials are not always available at competitive prices. The Plaintiffs' parcels contain gravel deposits that may satisfy the demand for gravel products ranging from decorative stone to washed gravel products. The special use permit procedure, as implemented in Kasson Township, allows minerals to be extracted profitably without very serious consequences so long as the terms and conditions of the ordinance and its related permit are enforced.

An application of the costs/benefit analysis, discussed in American Aggregates, further supports the Plaintiffs' position in this case. There is a public need for the minerals and they may

5Peak traffic counts in August, 1990, on County Road 669 at Shimek's Corners showed average daily traffic of 1496 vehicles over a three-day period. This compares to a count in August, 1986 of 1228 vehicles.

only be extracted pursuant to ordinance requirements intended to eliminate any serious consequences and to impose what might otherwise be public costs on the private entity that seeks to remove the minerals. The internalization of costs envisioned by the Kasson Township ordinance is quite consistent with the American Aggregates analysis. The Court finds nothing unreasonable in the terms and conditions imposed by the special use permit process and further finds that Plaintiffs have demonstrated that no very serious consequences will flow either from the act of rezoning or from the extraction of minerals pursuant to such a permit so long as its conditions are vigorously enforced.

In view of these findings, the denial of appropriate zoning for the Plaintiffs' land is unreasonable. Continued implementation of a zoning classification that deprives Plaintiffs of their property rights cannot be allowed, lest Plaintiffs' land be condemned without the payment of appropriate compensation and in the absence of due process of law.

For all the foregoing reasons, these consolidated cases are remanded to the Kasson Township Board for rezoning in a manner consistent with this Decision. In accordance with the procedures set forth in MCR 2.602, a Judgment which comports with the terms of this Decision should be presented to the Court for signature no later than fourteen days from this date.

IT IS SO ORDERED.

HON. PHILIP E. RODGERS, Jr.
Circuit Court Judge

Dated: 7/17/92