

METAMORA TOWNSHIP

**PROPOSED ZONING ORDINANCE AMENDMENT REGARDING GRAVEL MINING**

[PART ONE OF TWO ZONING ORDINANCE AMENDMENTS. IT IS INTENDED THAT THIS PART ONE WOULD BE COMBINED WITH PART TWO AS ONE AMENDED SECTION OF THE ZONING ORDINANCE. PART TWO OF THE AMENDMENT WILL BE PRESENTED IN THE IMMEDIATE FUTURE FOR CONSIDERATION]

**SECTION \_\_\_\_\_. PROCEDURE FOR APPLICATIONS TO PERMIT THE EXTRACTION OF NATURAL RESOURCES**

**A. INTRODUCTION**

This Section is intended to provide the authorization and procedure for applications seeking permission to permit the extraction of natural resources in Metamora Township in accordance with MCL 125.3205(3), et seq. enacted by Gravel Statute, PA 2011 ("Gravel Statute").

In conformance with Gravel Statute, an application under this Section shall be divided into two parts.

Part I addresses whether the applicant has demonstrated a sufficient property interest in the natural resource, whether valuable natural resources are located on the applicant's property, and whether there is a need for the natural resource sought to be extracted. The Part I shall consist of an administrative proceeding. The Planning Commission shall conduct an initial public hearing and make findings and a recommendation to the Township Board.

Part II addresses the decision on whether the applicant has demonstrated that the proposed extractive operation would result in no very serious consequences based on the standards specified in the Gravel Statute. Part II shall only be necessary if the applicant has satisfied the requirements of Part I.

**B. LEGISLATIVE FINDINGS BY TOWNSHIP BOARD**

The Michigan Supreme Court observed the following points in *Kyser v Kasson Township*, 486 Mich 514, 518 (2010) ("Kyser"):

Referring to MCL 125.3201, the Zoning Enabling Act ("ZEA") directs that the power of local government units to regulate the use of land is to be exercised by dividing the community into uniform zoning districts:

- (1) A local unit of government may provide by zoning ordinance for the regulation of land development and the **establishment of 1 or more**

**districts within its zoning jurisdiction** which regulate the use of land and structures to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, . . . to ensure that use of the land is situated in appropriate locations and relationships, . . . to facilitate adequate and efficient provision for transportation systems, . . . and to promote public health, safety, and welfare.

- (2) Except as otherwise provided under this act, the **regulations shall be uniform** for each class of land or buildings, dwellings, and structures **within a district**.
- (3) A local unit of government may provide under the zoning ordinance for the regulation of land development **and the establishment of districts** which apply only to land areas and activities involved in a special program . . . and the **establishment of districts** in areas subject to damage from flooding or beach erosion.  
(Emphasis supplied)

The exercise of the zoning authority under MCL 125.3201(1) and (3) (quoted above) is an empowerment of *local legislative bodies* (e.g., township boards) to plan and zone for a broad range of purposes. These provisions reveal the comprehensive nature of the ZEA. It defines the fundamental structure of a zoning ordinance by requiring a zoning plan to take into account the interests of the entire community and to ensure that a broad range of land uses is permitted within that community. These provisions empower localities to plan for, and regulate, a broad array of land uses, taking into consideration the full range of planning concerns that affect the public health, safety, and welfare of the community.

The provisions of Gravel Statute read in light of the ZEA as a whole create an exception to the general rule of intended authority and discretion of municipalities clarified in *Kyser*. Thus, under the customary rules of statutory construction, an exception to a general rule of zoning and planning as contained in the Gravel Statute must be construed narrowly, and the applicant must satisfy a heavy burden to prove each of the required showings under this Section, including:

- The burden to prove the three elements identified in the Preliminary Administrative Procedure subsection of this Section; and if it is found that the applicant has met this burden;
- The burden to prove that no very serious consequences would result from the proposed natural resource extraction on the property, i.e., the change in the land use authorization on the subject property established by the Township that prohibits such use, a prohibition relied upon by Township property owners in zoning districts throughout the Township consistent with the doctrine of average reciprocity of advantage (see *Penn Central Transportation Co. v City of New York*, 438 US 104,139-140 (1978)).

The Gravel Statute specifies that the standards in *Silva v Ada Township*, 416 Mich. 153 (1982) (“*Silva*”) shall be applied in reviewing an application to permit the extraction of natural resources. As dictated by Michigan Supreme Court, the existing zoning ordinance shall be presumed to be reasonable for purposes of substantive due process.

By reference to *Silva*, the Gravel Statute directs an alternative due process analysis exclusively for natural resource extraction use. However, the Gravel Statute remains within the context of land use decision-making established in the ZEA as a whole. Accordingly, reading the ZEA as a whole in the manner directed in *Kyser*, any decision to approve natural resource extraction under this ordinance must consider the decision’s effect not only on a specific project or property, but also upon the impact upon the surrounding area, future planning and all land use in the Township.

Based on the history, tradition, and underlying basis for the authorization of zoning by the Supreme Court of the United States in *Village of Euclid v Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 54 A.L.R. 1016, 71 L.Ed. 303 (1926), the Planning Commission and Township Board make the legislative finding that the single most important purpose of zoning in Metamora Township is to protect the public health and safety, and promote the public welfare, of families and children by the separation and organization of districts zoned to permit residential use and other uses predominantly for families and children. It is the further legislative finding that zoning in Metamora Township is intended to serve as the basis for carrying out the functions and purposes clarified in the Michigan Supreme Court’s *Kyser* case, including the authorization for the exercise of the police power to achieve the value judgments that must be made regarding aesthetics, economics, transportation, health, safety, and a community’s aspirations, and values in general.

### C. **DEFINITIONS**

There are certain terms stated in the Gravel Statute that require interpretation. There has been insufficient litigation and decision making that might otherwise provide a meaningful understanding of these terms. In order to provide guidance for purposes of proceedings conducted at the Township, the following definitions are provided.

- (1) As used in this Section, “*Need for the Natural Resources*,” is intended to refer to the phrase in MCL 125.3205(4): “Need for the Natural Resources by the person or in the market served by the person,” and shall include a demonstrable need for a commercially meaningful quantity of the natural resources proposed to be excavated on the applicant’s property. To the extent included in the applicant’s application, demonstrating such a need shall require the applicant to show the following in relation to the natural resources on applicant’s property: a commercial need for the natural resources to satisfy a present and ongoing requirement by an active business operated principally by the applicant using the natural resources in the production of a new and different product for sale; or a

present and ongoing commercial need by purchasers of such natural resources from the applicant's property within the market described in the application.

For purposes of this definition of Need for the Natural Resources:

- (a) "commercial need" in relation to applicant's property will only be deemed to exist if and to the extent the need for the natural resources cannot otherwise be met from other viable sources within the commercial market.
  - (b) "commercially meaningful quantity" shall mean that quantity, taking into consideration the quality and type of natural resources, that a person who is experienced and knowledgeable in the industry would require as a condition to investing the time and money necessary to commence and operate a mining enterprise that is expected to be profitable for a sustained period of time.
  - (c) "commercial market" means that geographic area within which there would be a commercial demand for the natural resources from the applicant's property, considering factors including, but not limited to: the transportation expenses and other factors relevant to cost; and the actual or available alternative supply of the natural resources from active mining sites and vacant land classified to permit mining within the market area, i.e., the supply from all other active mines, quarries, and vacant land classified for such purpose that could provide an alternative supply to meet such demand in whole or part within the market area.
- (2) As used in this Section, the phrase "*sufficiency of applicant's property interest*" shall mean a requirement that, with regard to the land which is the subject of the application, applicant has, as a matter of substance, a "possessory property interest" in the land, as that term is understood in Michigan real property law, including all interests in the land that must be joined in the application in order to avoid disputes of relevant rights.

D. **PART I OF REVIEW PROCESS: THREE FACTOR PRELIMINARY ADMINISTRATIVE DETERMINATION.**

- (1) Review of an application to permit the extraction of natural resources shall be commenced by filing an application for an administrative determination with regard to the following, consistent with the terms defined above: the sufficiency of the applicant's property interest; a determination as to whether there are "valuable" natural resources on the applicant's property, that is, whether the applicant can receive revenue and reasonably expects to operate at a profit if the natural resources are extracted; and the Need for the Natural Resources, including a determination on the duration of the need.

The application shall provide written documentation and evidence describing in detail and making the requisite demonstration with regard to each of the three determinations. The specific application form shall be developed by Township representatives and presented to the Township Board for approval by Resolution.

For purposes of this part one preliminary review process, the Planning Commission shall conduct an administrative hearing on the application, which shall be a public hearing. Prior to the hearing, the Township shall review the application and documentation submitted in support of the application, and report any deficiencies to the applicant and the Planning Commission within a reasonable time. The hearing shall not be noticed until the applicant has cured the deficiencies found to exist in accordance with this procedure. Public notice of the hearing shall be provided in the manner specified in the ZEA for public hearings for the review of a special land use.

- (2) At the hearing the applicant shall have the initial burden of showing:
  - (a) The sufficiency of the applicant's property interest; and
  - (b) The natural resources are "valuable," that is, the applicant can receive revenue and reasonably expects to operate at a profit if the natural resources are extracted; and
  - (c) The Need for the Natural Resources. This determination shall include the duration of the need, which should correspond with the duration of the disruption of the Township authorized only as a result of applying the special treatment specified in the Gravel Statute.
- (3) The public hearing shall begin with an introduction by the person designated by the Planning Commission chairperson. The applicant shall then be given the opportunity to make the three proofs required in paragraph (2), above. At the completion of the applicant's presentation the Township, through its representatives may address and offer evidence or argument on these issues. Members of the public shall then have the opportunity to address and offer evidence or argument on these issues. If requested, the applicant shall be provided with an opportunity to rebut evidence and argument presented, but for efficiency purposes shall not be permitted to duplicate evidence on matters included in applicant's earlier presentation. Likewise, any new matters addressed by the applicant may be rebutted by representatives of the Township and members of the public. The public hearing shall then be closed.
- (4) Following completion of the public hearing, either at the same meeting at which the public hearing was held, or at some later meeting, the Planning Commission shall, based on the record made, adopt findings and recommendations on whether the applicant has made a sufficient showing on each of the determinations in

subparagraphs (a) through (c), above. Township representatives may assist the Planning Commission with such findings and recommendations.

- (5) The Planning Commission shall forward its findings and recommendation to the Township Board which shall, taking into consideration the evidence from the public hearing the Planning Commission's recommendation, then make its own findings and conclusions on each of the three determinations in subparagraphs (a) through (c) in paragraph (2), above. The Township Board may conduct an additional public hearing at its discretion. If the Township Board does schedule an additional public hearing, the notice requirement and proceedings conducted shall conform to the procedure set forth above for the Planning Commission public hearing.
- (6) Appeal. With regard to all findings and conclusions made by the Township Board, an aggrieved applicant or other interested party may appeal to the circuit court.