

Chairman Nash called the Metamora Township Planning Commission Public Hearing to order at 7:02 p.m. at the Metamora Township Hall, 730 W. Dryden Road, Metamora, Michigan.

Members Present: George Nash, Phil Bellinger, Ann Derderian, Kevin Knisely, Roger Hamilton, Dan Miller and Lance Gould

Members Absent: None

Also Present: Township Planner Doug Piggott, Township Attorneys Michael Nolan and Gerry Fisher, and those persons listed on the attached sign-in sheets.

The pledge of allegiance was recited.

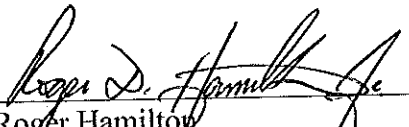
Chairman Nash announced that this is a public hearing on the application of Daniel Agnew, d/b/a Victory Custom Trailers, for special land use approval under Section 1102 Special Land Use, H Outdoor Sales Lot Section 1431. The property in question is located at 3549 S. Lapeer Road (the former Gilling's Roadside Attractions Property), and is zoned B2. A review of the site plan was presented by Planner Piggott. Board discussion with planner. The applicant, Daniel Agnew, was present and responded to questions from the Board. He stated with regard to salvage vehicles there would be no dismantling of the vehicles. He would buy the salvage vehicle for his customer and hold it approximately 2 days until the buyer shows up. The applicant stated he would replant trees adjacent to the residential district. The applicant stated he was not proposing to change the structure of the existing sign but just the panel in the middle to name his company.

No written communication was received in response to the Notice of Public Hearing regarding this matter and no one from the public had any comment on this issue at the public hearing.

At 7:24 p.m., Motion by Member Derderian, support by Member Bellinger, to close the public hearing. All ayes, no absent. Motion carried.

Respectfully submitted,
Darlene Wise, Recording Secretary

cc: All Board Members
Persons Requesting Same


Roger Hamilton
Planning Commission Secretary

MINUTES OF Planning Commission Public Hearing-Z.O. Amendment

HELD April 13, 2016

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Township of

Metamora

Jennie Dagher

Clerk

Form M-1-PT

The Regle Press, Inc., Flint, Michigan

Chairman Nash called the Metamora Township Planning Commission Public Hearing to order at 7:24 p.m. at the Metamora Township Hall, 730 W. Dryden Road, Metamora, Michigan.

Members Present: George Nash, Phil Bellinger, Ann Derderian, Kevin Knisely, Roger Hamilton, Dan Miller and Lance Gould

Members Absent: None

Also Present: Township Planner Doug Piggott, Township Attorneys Michael Nolan and Gerry Fisher, and those persons listed on the attached sign-in sheets.

Chairman Nash announced that this is a public hearing on proposed text amendments to the Zoning Ordinance to require applications for permits to extract natural resources to submit proof of adequate property interest, of the value of the natural resource and the need for the natural resource and provide for a review and approval of this information. Township Attorney Mike Nolan reiterated for the public in attendance that tonight's public hearing is with respect to Part I of the proposed amendment to the ordinance only. Mr. Nolan stated to the Board his recommendation that they consider recommending to the Township Board the proposed text amendment.

Chairman Nash asked if anyone in the audience had any comment on this matter. Jocelyn Schofield of 2890 Wilder Road, Metamora, asked for an explanation of the amendment. Attorney Gerry Fisher stated that the proposed ordinance is not a response to any particular application and then explained the draft text amendment which is Part I of a two-part step. Part I represents the administrative steps an applicant must follow and meet in order to be entitled to go the next stage and claim they are entitled to gravel mining and that it would not result in any serious consequences. Dave Hoisington of 2145 Hendrie Road spoke in favor of the proposed amendment. Cindy Flidner of 3120 Thornville Road spoke in favor of the proposed amendment. Ms. Garre Croswell of 3786 Winding Pine asked about the suggested revisions to the zoning ordinance presented 3 years ago and when the last time was that the ordinance was updated and Mr. Nolan responded. Rick Young of 3706 Washington Drive in Elba Township spoke in favor of the taking action now. Larry Roesner of 1830 Cobblestone in Oxford spoke in favor of the zoning ordinance amendment. Greg Boudreau of 3630 Thornville Road asked who would determine if an applicant met the criteria and Mr. Fisher responded. Bruce Meyers of 3100 Delano Road commented on having proper enforcement of regulations for future mining. Frank Porretta of 365 Stock Road questioned whether the complete text had been drafted, whether it applies to an application that has already been submitted, and the definition of "value" of the natural resources and Mr. Fisher responded. Sean Fitzsimmons of 146 E. Davison Lake Road, Metamora spoke in opposition of Levy's position. Susan Kutzman of 5622 Eastview Lane asked questions about abandoned mines and Mr. Fisher responded. Rob Champion of 2250 Dryden Road suggested the meeting on Part II of the proposed text amendments be moved to a larger venue. Attorney Patrick Lennon of the Honigman Law Firm representing the Levy Company spoke in opposition to the proposed zoning amendments and referred to his letter to the Township dated April 12, 2016 explaining the objection, which letter is attached and included in the record as a part of these minutes. Also attached and included in the record as part of these minutes is the Memorandum dated April 13, 2016 from

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Township of

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Jennie Dagher

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The Rieg's Press, Inc., Flint, Michigan

Township Attorneys Michael Nolan and Gerald Fisher in response to the Levy letter of April 12, 2016. Eli Barlia of 2634 Rock Valley Road spoke in opposition to gravel mining. Attorney Christopher Bzdok of 420 E. Front Street, Traverse City, Michigan stated he represents the Metamora Land Preservation Alliance which is an organization of residences and businesses within this community who are concerned about the impacts of graveling mining and that the MLPA is in support of the Township's zoning amendment process and has submitted a letter to the Township dated April 13, 2016 which is attached and included in the record as a part of these minutes. No other written communication was received in response to the Notice of Public Hearing regarding this matter.

There being no further comments, **at 8:06 p.m., Motion by Member Derderian, support by Member Bellinger, to close the public hearing. All ayes, no absent. Motion carried.**

Respectfully submitted,
Darlene Wise, Recording Secretary

cc: All Board Members
Persons Requesting Same


Roger Hamilton
Planning Commission Secretary

METAMORA TOWNSHIP
PLANNING COMMISSION AGENDA
13 APRIL 2016 7:00 PM
METAMORA TOWNSHIP HALL

Pledge of Allegiance

Roll Call

Hearings:

A: Public Hearing on proposed special land use approval submitted by Daniel D. Agnew, dba Victory Custom Trailers or Victory Property Mgt. for a Special Land Use under Section 1102 Special Land Use, H Outdoor Sales Lot Section 1431.

B: Public Hearing on proposed text amendments to the Metamora Township Zoning Ordinance No. 23 to require applications for permits to extract natural resources to submit proof of adequate property interest, of the value of the natural resource and the need for the natural resource and provide for a review and approval of this information.

Approval of Agenda

Approval of Minutes

Public Comments (on items not scheduled on this agenda)

New Business:

A: Decision of Public Hearing on proposed special land use approval submitted by Daniel D. Agnew, dba Victory Custom Trailers or Victory Property Mgt. for a Special Land Use under Section 1102 Special Land Use, H Outdoor Sales Lot Section 1431.

B: Decision of Public Hearing on proposed text amendments to the Metamora Township Zoning Ordinance No. 23 to require applications for permits to extract natural resources to submit proof of adequate property interest, of the value of the natural resource and the need for the natural resource and provide for a review and approval of this information.

Unfinished Business:

Communications and / or committee report

Matters for discussion from the commission members

Township Planners Report – Doug Piggott/Rowe Professional Services

Township Planning Coordinator Report -

Adjournment

MINUTES OF Planning Commission MeetingHELD April 13, 201620
Jennie Dagher

Township of

Metamora

Clerk

Form M-1-PJ

The Regis Press, Inc., Flint, Michigan

Chairman Nash called the Metamora Township Planning Commission regular meeting to order at 8:07 p.m. at the Metamora Township Hall, 730 W. Dryden Road, Metamora, Michigan.

Members Present: George Nash, Phil Bellinger, Ann Derderian, Kevin Knisely, Roger Hamilton, Dan Miller and Lance Gould

Members Absent: None

Also Present: Township Planner Doug Piggott, Township Attorneys Michael Nolan and Gerry Fisher, and those persons listed on the attached sign-in sheets.

Approval of Agenda

Motion by Member Derderian, support by Member Hamilton, to approve the agenda as presented. Motion carried, all ayes.

(At this time a brief recess was taken while several members of the audience exited the building. Meeting reconvened at 8:09 p.m.)

Approval of Meeting Minutes

Chairman Nash noted there were meeting minutes for approval from the March 9, 2016 regular meeting. **Motion by Member Derderian, support by Member Bellinger, to approve the minutes of the March 9, 2016 regular meeting as presented. All ayes, no absent. Motion carried.**

Public Comments (on items not on this Agenda)

None.

New Business

A. Decision of Public Hearing on proposed special land use approval submitted by Daniel D. Agnew, d/b/a Victory Custom Trailers or Victory Property Management for a Special Land Use under Section 1102 Special Land Use, H Outdoor Sales Lot Section 1431. Planner Piggott summarized the consensus of the Board's concerns regarding this proposal. Board discussion. **Motion by Member Derderian, support by Member Knisely, to approve the special land use requested by Daniel D. Agnew, d/b/a Victory Custom Trailers or Victory Property Management for a Special Land Use under Section 1102 Special Land Use, H Outdoor Sales Lot Section 1431 with the following conditions:**

1. That the applicant replace trees along the rear lot line required in the 2001 site plan that are missing.
2. A replacement sign is approved provided the only change is to the existing sign face, and the replacement sign face shall be no larger than the existing one.
3. The site plan be revised to note that the proposed security fence will be chain link and no taller than 6 feet.
4. The site plan be revised to note the 25 foot easement along M-24,

Township of

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Clerk

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The Regle Press, Inc., Etnah, Michigan

5. That the applicant will provide address numbers on the building at least 6 inches high.
6. The site plan be revised to eliminate spaces 10 and 11 along the service drive as display areas.
7. The site plan be revised to verify location of the loading and unloading area in the rear.
8. The site plan be revised to verify location of the dumpster enclosure in the same area as before.
9. That salvage vehicles are limited to a maximum of two (2).

ROLL CALL VOTE: Bellinger, aye; Derderian, aye; Gould, aye; Hamilton, aye; Nash, aye; Knisely, aye; Miller, aye. Motion carried 7 ayes, 0 nays, no absent.

B. Decision of Public Hearing on proposed text amendments to the Metamora Township Zoning Ordinance No. 23.

Brief discussion. Motion by Member Derderian, support by Member Hamilton, to recommend to the Township Board to approve the proposed text amendments to the Metamora Township Zoning Ordinance No. 23 to require applications for permits to extract natural resources to submit proof of adequate property interest, of the value of the natural resource and the need for the natural resource and provide for a review and approval of this information.

ROLL CALL VOTE: Bellinger, aye; Derderian, aye; Gould, aye; Hamilton, aye; Nash, aye; Knisely, aye; Miller, aye. Motion carried 7 ayes, 0 nays, no absent.

Planner Piggott suggested a special meeting be scheduled prior to the May 11th regular Planning Commission meeting to have information presented regarding Part II of the proposed amendment to the Zoning Ordinance which has not yet been drafted. This would be an informational meeting/study session only prior to the public hearing which could then be scheduled for May 11th. The Board decided to set an informational meeting for **Wednesday, May 4, 2016 at 7:00 p.m.** at the Township Hall (*location later changed to Metamora Lions Hall*).

Motion by Member Derderian, support by Member Miller to set a public hearing on Part II of the proposed text amendments to the Metamora Township Zoning Ordinance for 7:00 p.m. on Wednesday, May 11, 2016, at the Metamora Lions Hall. All ayes, no absent. Motion carried.

Motion by Member Knisely, support by Member Derderian to enter into these minutes the three items of correspondence received for tonight's meeting: Letter of April 12, 2016 from Attorney J. Patrick Lennon; Letter of April 13, 2016 from Attorney Christopher M. Bzdok; Memorandum dated April 13, 2016 from Township Attorneys Michael J. Nolan

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and Gerald A. Fisher. All ayes, no absent. Motion carried.

Communications and/or Committee Report

Nothing at this time.

Matters for Discussion from the Commission Members

Nothing at this time.

Township Planner Report - ROWE Professional Services Company

Nothing further.

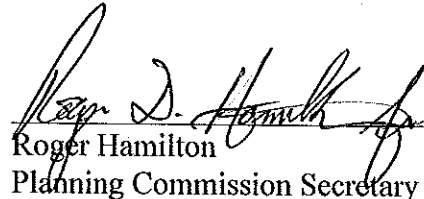
Township Planning Coordinator Report

None.

At 8:31 p.m., a Motion was made by Member Derderian, support by Member Miller, to adjourn. Motion carried, all voting aye.

Respectfully submitted,
Darlene Wise, Recording Secretary

cc: All Board Members
Persons requesting same


Roger Hamilton
Planning Commission Secretary

April 12, 2016

Via Pdf E-mail – Clerk@metamoratownship.com

Mr. David Best, Township Supervisor
Ms. Jennie Dagher, Township Clerk

Re: Objections to Proposed Amendments to Metamora Township Gravel Mining Ordinance

Mr. Best and Ms. Dagher:

As you know, this Firm represents Edw. C. Levy Co. and its related affiliates and divisions, including American Aggregates of Michigan, Inc. (together, "Levy"). We are writing to formally notify Metamora Township (the "Township") of Levy's objections to the proposed amendments to the Township gravel mining ordinances (the "Proposed Amendments") and to urge the Township to reject them. This objection letter is to be included as part of the record of the Township Planning Commission and Township Board meetings that may occur in connection with the Proposed Amendments.

As discussed below, the Proposed Amendments should be rejected. Despite their purported purpose, they are intended to evade—not align with—Public Act 113 of 2011 ("PA 113"). The Proposed Amendments emanate from an improper moratorium that was part of the Township's reaction to Levy's application to mine the D-bar-A property. Levy has filed a separate petition/appeal seeking annulment of the moratorium. Unfortunately, the moratorium and the Proposed Amendments stem from the long history of intense public opposition to mining at the D-bar-A property and represent the latest efforts to prevent mining.

Background

The Proposed Amendments are a reaction to Levy's application seeking approval to mine the D-bar-A property which it submitted on November 10, 2015 (the "Application"). Efforts to obtain approval to mine the D-bar-A property date back to at least the 1980s. All of the efforts have been met by intense and sustained opposition, particularly from the Metamora Land Preservation Alliance ("MLPA"). This opposition has resulted in extensive and costly litigation on multiple occasions, and appears poised to do so once more.

Unfortunately, rather than review the Application and provide comments and input as it has for other applicants, the Township instead immediately halted the process,

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passed a new resolution, and imposed a moratorium. Levy promptly challenged the moratorium and filed, under protest and with reservation of rights, a petition with the Township invoking the so-called administrative remedy contained in the resolution that established the moratorium. Since that time, the Township has essentially ignored Levy's petition and only recently asked Levy if it wants to proceed with a public hearing.

Concurrently with imposing the moratorium, the Township hired Gerald Fisher as its outside counsel. Mr. Fisher has represented numerous municipalities and established himself as an opponent to sand and gravel mining efforts in Michigan. Through Mr. Fisher's guidance, he and the Township have developed and put forth the Proposed Amendments. Although explained as an attempt to address the "complexities" created by PA 113 and to "clarify" the process; the Proposed Amendments are in fact a new framework that expands the scope of the Township's authority and involvement beyond the limits imposed by state law. They also erect new obstacles to sand and gravel mining and amount to *changing the rules* after submission of, and as a reaction to, the Application. As discussed herein, the Proposed Amendments violate PA 113 and should be rejected.

The Proposed Amendments are Based on a False Premise

Township attorneys contend that PA 113 made the analysis of mining rights and the Township's role "overly complicated" and "created confusion." As a result, they argue that the Township "needs" to amend its mining ordinances to "align" with PA 113.

In reality, PA 113 is simple and clear and had just two principal effects. First, it restored, after a brief interruption, the standard that had applied for the prior thirty years to zoning decisions involving sand and gravel. There is no basis to contend that a new process suddenly is needed. Second, PA 113 clarified that municipalities do not, in the guise of exercising their zoning authority, have the power to prevent mining when that standard is not met. However, rather than "aligning" the Township with PA 113, the Proposed Amendments are designed to undermine and evade PA 113, and ultimately give the Township license to disregard it—all under a thin veneer of purported compliance.

This latter point cannot be overstated. PA 113 is a restriction of power, not a grant. It states that an ordinance "shall not prevent" mining "unless very serious consequences would result." The Proposed Amendments are not authorized by any reading of the relevant zoning enabling legislation and constitute a clear abuse of the Township's legislative power that will not survive judicial review. First, the Proposed Amendments are ultra vires in their attempt to impose a "heavy burden" on applicants to

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overcome a presumption of denial. They do so by ignoring the limits of the Township's zoning authority through the creation of new definitions and standards, and setting artificially and baselessly high thresholds to meet them. Second, they attempt to construct a bifurcated process for the review of mining applications which is intended only to delay and impose greater costs by forcing a multiplicity of actions challenging the inevitable denials. The Township's poorly hidden intent is to prevent mining through an unauthorized process meant solely to manipulate the applicable standards of review by recasting legislative actions as administrative. The Township apparently believes that by such manipulation it can insulate its decision making from the level of judicial review that PA 113 requires in order to combat the prevention of mining on arbitrary and illusory grounds.

In short, the unauthorized Proposed Amendments are transparently designed to make it easier for the Township to deny applications and to wear down applicants by delaying the process and stringing out subsequent legal challenges.

The Definitions Contained in the Proposed Amendments Violate PA 113

The Proposed Amendments purport to expand and redefine terms in PA 113 relating to "need" and "valuable natural resources." The new proposed definitions are styled as "need for natural resources," "commercial need," "commercially meaningful quantity," "commercial market," "sufficiency of applicant's property interest" and other terms. All of them are accompanied by heightened standards, elements, requirements and criteria, all designed to tilt the scale and increase the baseless "heavy burden" on the applicant. This, despite that these terms as used in PA 113 have well-established meanings set forth and applied in dozens of judicial decisions following *Silva*.

The Township obviously lacks authority to impose definitions that differ from those used in PA 113, or to impose additional restrictions and burdens. This is particularly so where, as here, the terms arise in a part of the statute that indisputably imposes substantial limitations on the Township's authority.

The Legal Support for the Proposed Amendments is also Flawed

Ironically, much of the supposed support for the Proposed Amendments is based on the nullified decision in *Kyser v Kasson Township*, 486 Mich 514 (2010) ("Kyser"). Kyser is not relevant here. At bottom, it is a case addressing the "separation of powers" between the State's legislative and judicial branch. The Supreme Court there held that the legislature, not the judiciary, was responsible for establishing zoning policy. As all are aware - - the legislature did precisely that - - by enacting PA 113 and adopting the

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standards set forth in *Silva v Ada Township*, 416 Mich 153 (1982) (“*Silva*”). Any further focus on Kyser is simply an invitation for the Township to ignore the actual limits on its zoning authority under PA 113.

Indeed, the Proposed Amendments actually commit the same type of error that Kyser forbade, only in the reverse. PA 113 sets forth initial burdens—not “heavy burdens”—that an applicant must meet when “challenging a zoning decision” by a municipality. MCL 125.3205(4). This explains what a court is to look at when faced with a petition from an aggrieved applicant, after a “zoning decision” has been made. The Proposed Amendments purport to create a framework in which the Township can make itself the almost unchallengeable sole fact-finder about “need” and “value” in a two-step process designed to avoid ever getting to “very serious consequences.”

Moreover, PA 113 and the *Silva* standards it adopts recognize that mining is an activity that has tremendous public value, but is a regular target for influential local opposition. Municipalities have a long history of attempting to use zoning as a way to preclude mining. The notion that a municipality has the power to expand its fact-finding role into areas in which it has no inherent competence—such as questions of regional need, supply and demand, and commercial alternatives—and simultaneously insulate itself from judicial review, is nonsense. This is particularly so when it attempts to do so under the guise of “aligning” its ordinances with a statute that actually imposes a restriction on municipal power.

The Attempt to Amend the Ordinance in Two Parts Further Violates PA 113

Even if the Township had the authority under the zoning enabling act to enact the Proposed Amendments, they would still be an abuse of any legitimate power based upon their substantive and procedural deficiencies. In addition to being deficient in their substance, the Proposed Amendments are also procedurally deficient in that they are being offered piecemeal, in what can only be explained as an effort to stall and obfuscate. There is no legitimate reason for amending the zoning ordinance in stages, first with a “Part I” that has been submitted for public hearing, and then again shortly with a “Part II” that has not yet been proposed. Certainly the delay cannot be explained by the need to draft each part in turn. We understand that Kasson Township, which we are informed was also guided by Mr. Fisher, adopted an ordinance that is substantially similar to the Proposed Amendments. Even in that case, we understand there was no bifurcation into two separate and distinct “Parts”.

In any event, the Township has now extended its moratorium, to enable approval of the Proposed Amendments, and for consideration of a “Part II”. Presumably, Part Two

HONIGMAN

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will also have to wind its way through the process for eventual adoption; all of which will have to happen before Levy's nearly six-month old Application can even begin going through the extended process of consideration under a new standard patently designed to lead to denial under Part I.

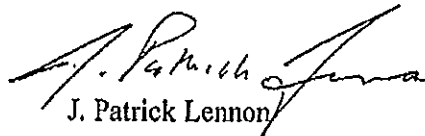
Conclusion

There is no substance to the argument that PA113 created an "overly-complicated regulatory scheme". PA 113 is simple and clear and represents more than 30 years of a stable legal framework. As discussed above, the Proposed Amendments violate PA 113 in numerous ways and on multiple levels. Given the long history of litigation and intense public opposition to mining the D-bar-A property, we contend the Proposed Amendments represent a reaction to Levy's Application and an effort to establish a more protective vehicle to deny it. If adopted, they will simply move the Township farther down the path it appears to have already chosen and would likely lead to more time consuming and expensive litigation.

As discussed above, we urge the Township to reject the Proposed Amendments. We look forward to supplementing the record and our submission as part of the public hearing process involving the Proposed Amendments and the disputed moratorium.

Sincerely,

HONIGMAN MILLER SCHWARTZ AND COHN LLP



J. Patrick Lennon

cc: Michael Nolan Esq. (via e-mail)
Gerald Fisher, Esq. (via e-mail)
L. Steven Weiner
Richard Zanotti
Bob Doyle

OLSON, BZDOK & HOWARD

April 13, 2016

Members of the Planning Commission
Metamora Township
730 W Dryden Rd
Metamora, MI 48455

Via email:
c/o Township Clerk Jennie Dagher
clerk@metamoratownship.com

ATTORNEYS

RE: Public Hearing on Part I of Gravel Zoning Amendments

PARTNERS:

James M. Olson
Christopher M. Bzdok
Scott W. Howard
Jeffrey L. Jocks
Ross A. Hammersley
Kate Redman

OF COUNSEL:

William Rastetter
Michael H. Dettmer
Lawrence I. McKay III
Joan S. McKay

TRAVERSE CITY:

420 E. Front Street
Traverse City
Michigan 49686
231.946.0044
cnvlaw.com

FRANKFORT:

427 Main Street
PO Box 1782
Frankfort
Michigan 49635
231.352.4412

Dear Members of the Township Planning Commission:

I write to you on behalf of the Metamora Land Preservation Alliance (MLPA), regarding the draft Part I amendment to the Metamora Township Zoning Ordinance. Please include this letter in the record of the public hearing.

MLPA generally supports the proposed Part I amendment. We understand that the Part I amendment is focused solely on the need for the gravel resource that the applicant asserts a proposed mining project would serve. We understand that Public Act 113 of 2011 requires that this question be answered before the local unit of government is required to permit mining.

MLPA also recognizes that the "need" issue is only one of the matters that the Township will amend its zoning ordinance to address. We understand that questions related to the harm a project will cause to the community will be addressed by the Township in Part II of the zoning amendments. MLPA believes that questions of harm – so-called "very serious consequences" – are of paramount importance when it comes to the Levy project proposed in Metamora; and we are confident the Township will address those issues in due time.

Until then, MLPA supports taking a careful look at need for the gravel resource in question. We support the effort to interpret Public Act 113 in a common sense manner; and to define terms in the ordinance that Public Act 113 has left ambiguous or open to interpretation. MLPA believes that the local unit of government, supported by its professional experts, is in the best position to weigh and measure the true need for any more gravel mining in Metamora Township.

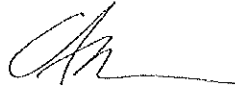
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MLPA also believes any such consideration of “need” must ultimately give way to the unavoidable negative impacts that significant mining projects will force the community to endure. We understand that once any zoning amendments are enacted, the impacted public, including the MLPA, will have ample opportunity to provide facts and evidence relevant to the devastating environmental, nuisance, and property value impacts of the pending Levy/Boy Scout D Bar A proposal.

In light of the potentially dire consequences to Metamora and surrounding communities, MLPA appreciates the Township’s careful consideration of its zoning ordinance in light of new law and – at the appropriate time – all relevant facts and circumstances concerning any mining proposal. We look forward to continuing to engage in the process, and bringing further facts to light.

Thank you for this opportunity to provide MLPA’s position for the record. I look forward to seeing you Wednesday night.

Sincerely,



Christopher M. Bzdok

CMB:knf

xc via email: Doug Piggott
Mike Nolan
Gerald Fisher
MLPA

**MEMORANDUM PROVIDING PARTIAL
RESPONSE TO LEVY LETTER OF APRIL 12, 2016
OBJECTING TO PART I OF ZONING ORDINANCE AMENDMENT**

TO: METAMORA TOWNSHIP BOARD & PLANNING COMMISSION

**FROM : MICHAEL J. NOLAN, TOWNSHIP ATTORNEY
GERALD A. FISHER, TOWNSHIP SPECIAL LEGAL COUNSEL**

DATED : APRIL 13, 2016

This memorandum is intended to provide a partial response on one day's notice to the letter of the Edward C. Levy Co dated April 12, 2016, objecting to the proposed terms of Part I of a proposed zoning ordinance amendment to align the Township's ordinance with MCL 125.3205 (the Gravel Statute").

For purposes of this Memorandum the relevant language of the Gravel Statute reads as follows:

(3) An ordinance shall not prevent the extraction, by mining, of valuable natural resources from any property unless very serious consequences would result from the extraction of those natural resources. Natural resources shall be considered valuable for the purposes of this section **if a person, by extracting the natural resources, can receive revenue and reasonably expect to operate at a profit.**

(4) A person challenging a zoning decision under subsection (3) has the initial burden of showing that there are valuable natural resources located on the relevant property, that **there is a need for the natural resources by the person or in the market served by the person**, and that no very serious consequences would result from the extraction, by mining, of the natural resources. (Emphasis supplied)

It was deemed necessary to respond to at least certain portions of the Levy letter, recognizing that the Township reserves all rights to respond further in the fullness of time. A limited response to the Levy letter follows:

Attack on Special Legal Counsel

When an advocate does not have a strong argument on the merits, he or she often reverts to attacking messengers. The Levy letter incorrectly states that Gerald Fisher, retained as special legal counsel for the Township based on his knowledge of this particular subject matter, is an opponent to sand and gravel mining efforts in Michigan. In fact, Mr. Fisher has successfully negotiated approvals of mining applications on behalf of municipalities, e.g., Independence Township and Oakland Township (involving a Levy Company). Certainly, assisting the Michigan Supreme Court in *Kyser v Kasson Township* in its analysis leading to the conclusion

that a prior decision of the Supreme Court violated the Michigan Constitution cannot serve as evidence of being an opponent to gravel mining. The Township has certainly not suggested that the actions of Levy should be viewed with suspicion because its legal counsel has a long and successful history and reputation for representing developers.

Separating Ordinance Amendment into Two Phases

An attempt is being made by the Township to expedite the amendment of its zoning ordinance to align with the Gravel Statute. In spite of statements to the contrary in the Levy letter, this subject matter is complex. It involves constitutional direction being given to the courts by the legislature, a mandate that appears to obliterate master planning, and the use of a phrase (“no very serious consequences”) that is foreign to what planning commissioners and township board members see as a general matter in deliberations on the enactment and administration of planning and zoning in the Township. Making an attempt to expedite the process, and to present materials that the Gravel Statute itself allocates separate treatment, is viewed as rational and in the interest of achieving understanding of this subject matter.

The Terms of the Gravel Statute Are Not ‘Simple and Clear’

The Levy letter suggests that the proposed ordinance expands and redefines terms in the Gravel Statute, claiming that the terms of the statute are simple and clear. While the terms of the statute might be simple and clear to Levy’s highly skilled legal counsel, the letter completely ignores the point that the terms used in the statute must be administered in the first instance by officials who were not appointed and elected in the community based on their skills to act as lawyers. Thus, the language of the proposed ordinance is not intended to “redefine” terms, but rather to provide meaning for the officials charged with administration. For example, standing alone, what is the meaning of the language of the Gravel Statute referring to “need for the natural resources by the person or in the market served by the person?” It can hardly be said that such meaning is “simple and clear.” While the Levy letter apparently assumes that officials will read, analyze, and understand the *Sylva* decision, as well as later decisions following *Sylva*, in the interpretation of the Township zoning ordinance, such an assumption is unrealistic and unreasonable. Therefore, some effort to assist officials as they attempt to do the right thing is appropriate – and needed (excuse the pun). It is quite customary to provide clarification by ordinance for statutory terms that have not been otherwise defined. Thus, attempting to assist Township officials address the issues of “need,” and “market,” are sensible. A comparison can be made to the section of the zoning enabling act that governs the grant and denial of a “variance” by the zoning board of appeals. Routinely, zoning ordinances in Michigan provide supplemental explanations of the requirements an applicant must demonstrate in order to be entitled to the grant of variance relief.

Should an Applicant Have a Heavy Burden

Issue is taken with the burden of proof the ordinance describes. However, this burden is consistent with zoning law, and of equal importance is very commensurate with the concept of requiring an applicant to demonstrate why it should be granted the right to establish a nuisance-type heavy industrial use in residential and other zoning districts, contrary to the very essence of the purpose and intent of zoning.

The *Sylva* opinion, relied on by the Gravel Statute, specifies that “Our reaffirmance of the “very serious consequences” rule does not imply that zoning which prevents the extraction of natural resources is unreasonable. **Zoning regulations are presumed to be reasonable and a person challenging zoning has the burden of proving otherwise.**” Overcoming this presumption so as to allow a proposed use has been characterized by the courts as a ‘heavy burden.’ *Tandy Corp. v. City of Livonia*, 81 F.Supp.2d 800, fn 6 (1999). And rightly so. The purport of the Gravel Statute is to allow this one specific type of use – and a nuisance-type heavy industrial use at that – to be established anywhere in the Township. This contradicts the foundations of zoning that calls for uses to be assigned to uniform districts based on a comprehensive plan. Zoning law has not been approved to destroy harmony and compatibility. Allowing this nuisance-type intrusion must require a strong showing of a need to do so.

The Kyser Case Has Not Been “Nullified”

It is cavalierly stated in the Levy letter that the decision in *Kyser* has been “nullified.” For this statement to be true, it would mean that the Gravel Statute has the effect of ‘nullifying’ the full course of zoning history in Michigan and elsewhere.

The simple point is that, building on the pronouncements of the Court dating back more than a half-century, the *Kyser* case explains very clearly that the Zoning Enabling Act charges local officials with the authority and responsibility of governing the growth and life of a community. Indeed, we were reminded of the **key attribute of zoning** by U.S. Supreme Court Justice Marshall in a 1970s dissenting opinion, as follows:

It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life. I therefore continue to adhere to the principle of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed.303 (1926), that deference should be given to governmental judgments concerning proper land-use allocation.

CONCLUSION

The provisions of the Township’s proposed zoning ordinance amendment are designed to provide clarity and context for words of the Gravel Statute that were cobbled together by the Michigan legislature in 16 days and enacted with almost no debate by stakeholders.

The ordinance is needed for the purpose of allowing meaningful review under the terms dictated by one difficult-to-understand section of the Zoning Enabling Act.

Metamora Township Planning Commission
Sign In Sheet

Please Print

Date: 4/13/16

Name	Company	Address
Bob Doyle	Smith Group LLC	201 Depot Ave Arbor, MI 48104
SHARON JONES	CITIZEN	
JILL GENE KRAJNIAK		1140 Hendrie Metamora 48455
David & Alice Holsington		Metamora
Susan Johnson	Butzel	41000 Woodward Rd, MI
Carolyn Powrozek	Goldr	27200 Haggerty Rd S.L.B-12
Vicki Garon	Goldr	27200 Haggerty Rd S.L.B-12
CINDY FLIEDNER	CITIZEN	3120 THORNVILLE
Debra Welby	Resident	2941 Caley Rd
JILL BRISTOW	DRYDEN TWP.	
Mar Van Slenbroek		
Wes Wickham		
Richard Zanolini		Wixom, MI
Susan Kuntzman	CITIZEN	5622 EASTVIEW LN
GARY KUNTZMAN	"	"
L S Ullman	ECLERY	8800 DIX 48209
CRISTINA BENTON	Anderson Economic Group	East Lansing MI
Sara Bowers	Anderson Economic Group	East Lansing, MI
Rob & SARAH Champion	22 S Dryden Rd.	Metamora
Lucy Clark Dougherty		Metamora

Metamora Township Planning Commission

Sign In Sheet

Date: 4/13/16

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Name	Company	Address
		1087 Morris Rd.
Kelly Marble	Citizen/Resident	Lapeer, MI 48446
Roger & Leslie Kirkpatrick	Resident	3995 Bluebird Ln METAMORA
Roy J. Holden	RJH Assoc.	16 E. High St. METAMORA
Lynn Knisely	Resident	429 Hawk High Hill Rd.
HAROLD CROSWELL	RESIDENT	3786 WINDING PINE DR.
STARRS CROSWELL	RESIDENT	3786 " " "
Joseph Maday	"	2851 Casey Rd.
GREG BOUDREAN	"	3630 Thornville Rd.
Bruce Meyers	Res	3100 DELAND
LARRY ROBSNER	RB	1830 COBBLESTONE
Kallie Meyers	Citizen / Res	3100 Deland
Peter Culler	"	2851 Casey Rd.
Judy Addis	J+B Motors	3131 E Dryden Rd
Hugh Burton	Resident	3970 Hosner Rd
Tom Stanko	Resident	3939 Hosner Rd
Edward Yack	Resident	4267 Gardner Rd
Eric & Melanie Bassons	Resident	446 Hawk High Hill Metamora
Sarah Marshall	"	4360 Crawford Dryden.
KAROL LAVERDIERE	"	3352 Hopcroft Rd
MICHELLE KOTHE	"	112 FOX HOLLOW DR

Metamora Township Planning Commission

Sign In Sheet

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Name	Company	Address
MARIBETH REIGLE	RESIDENT	3512 DRYDEN RD METAMORA
FRANK PORRETTA		365 STOCK
ERIKA STIMAC	RESIDENT	3063 DRYDEN RD.
Olivia Holaski	Resident	3068 E. Dryden
DAVID STIMAC	RESIDENT	3063 E. DRYDEN
CHAROLE PORRETTA	Resident	365 Stock Rd.
SWITCH J. HOLASKI	RESIDENT	3068 E. DRYDEN
SEAN FITZSIMMONS	RESIDENT	Box 436 / 146 E. DAVISON (KR)
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JOCELYN SPOFIELD	"	2890 WILDER
ROGER & PAT AFFELDT	"	3123 Rock Valley
Jane B. Schade	resident	1466 W. Sutton
Wayne Inman	"	3398 Thornville Rd.
RICHARD CASSABEN	RESIDENT	3107 HOSNER DR.
Garen Gaunt	resident	4210 Barber Rd
Aarick Welby	Resident	3049 Doreland
Keith Kanasty	"	500 Hawk High Hill
Randy Malove	"	3103 E. Dryden rd.
Isabella Kanasty	"	500 Hawk High Hill Rd.
PATRICK BOTCHER	DRYDEN	Box 101

Metamora Township Planning Commission
Sign In Sheet

Please Print

Date:

Name

Company

Address

Dan Agnew

Victory Trailers

Metamora

Metamora Township Planning Commission

Sign In Sheet

Please Print

Date:

4/13/16

Name

Company

Address

Dawn Kanasty

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Ralph Romanowski

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