

METAMORA TOWNSHIP

**PROPOSED ZONING ORDINANCE AMENDMENT FOR
NATURAL RESOURCE EXTRACTION PLANNED UNIT DEVELOPMENT**

THE TOWNSHIP OF METAMORA ORDAINS AS FOLLOWS:

Section 1 of Ordinance

A new Article 12A shall be added to the Township Zoning Ordinance reading as follows, recognizing that the number "12A" may be changed to a different numerical designation when inserted into the Ordinance:

**ARTICLE 12A. PLANNED UNIT DEVELOPMENT CLASSIFICATION FOR
TRANSITORY EXTRACTION OF NATURAL RESOURCES**

PART I

INTRODUCTION

A. GENERAL INTENT

This Article 12A of the Zoning Ordinance is intended to provide the procedure and standards for review and approval of applications seeking permission to conduct the land use of extracting natural resources in Metamora Township ("Transitory Extraction of Natural Resources Use") in accordance with MCL 125.3205(3), et seq. enacted by Act 113, PA 2011 ("Gravel Statute"). As described and explained in this Article 12 A, Transitory Extraction of Natural Resources Use in Metamora Township shall require legislative approval of a planned unit development ("Transitory Extraction Use Planned Unit Development") under Part III of this Article. As a condition to being entitled to file an application under Part III, an applicant must first seek and obtain administrative approval under Part II, which imposes the requirements specified in subsections (3) and (4) of the Gravel Statute, MCL 125.3205(3) and (4), and requires an applicant to demonstrate such pre-conditions in order to be entitled to apply for the extraordinary zoning treatment provided under the Gravel Statute.

In conformance with Gravel Statute, the application and approval process under this Article 12A shall be divided into two parts.

Part II provides an administrative review process to determine whether the applicant has demonstrated a sufficient property interest in the natural resource,

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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. Part II 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, and the Township Board shall make the final Part II administrative determination.

Once an applicant has received approval under Part II, a legislative review and approval process is provided in Part III for an application for classification of the applicant's property to Transitory Extraction Use Planned Unit Development. This process is intended to determine whether the applicant has demonstrated that the applicant's proposed extractive use would result in "no very serious consequences" as determined under the Michigan Zoning Enabling Act.

B. LEGISLATIVE FINDINGS BY TOWNSHIP BOARD FOR THIS ARTICLE 12A

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

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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 the burden to prove each of the required showings under this Article, including:

- The burden to prove the three elements identified in the Preliminary Administrative Procedure subsection of this Article; 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.

PART II

ADMINISTRATIVE DETERMINATION OF ENTITLEMENT TO APPLY FOR PLANNED UNIT DEVELOPMENT CLASSIFICATION FOR TRANSITORY EXTRACTION OF NATURAL RESOURCES

A. 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 Article, "*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.

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- (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 Article, 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, all persons who (a) file as applicant, and (b) consent in writing to the application, together are vested with all possessory property rights in the land, as understood in Michigan real property law, including all interests in the land that must be joined in the application in order to avoid a dispute with regard to whether the applicant is authorized to make application and conduct an extraction operation if approved under this Article 12A.

B. **PART II REVIEW PROCESS: THREE FACTOR PRELIMINARY ADMINISTRATIVE DETERMINATION.**

- (1) Review of an application to permit a Transitory Extraction Use Planned Unit Development shall begin with a preliminary administrative proceeding in which the applicant must demonstrate qualification to seek rezoning approval. This preliminary administrative proceeding 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

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officials and representatives and presented to the Township Board for approval by Resolution.

For purposes of this preliminary administrative 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 for the Natural Resources, 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) of paragraph (2), above. Township representatives may assist the Planning Commission with the articulation of its 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.

PART III

LEGISLATIVE DETERMINATION OF APPLICATION FOR REZONING TO PLANNED UNIT DEVELOPMENT CLASSIFICATION FOR TRANSITORY EXTRACTION OF NATURAL RESOURCES

An applicant for a transitory extraction of natural resources use as addressed in MCL 125.3205 may apply for legislative approval of a rezoning of its property to Transitory Extraction Use Planned Unit Development classification under this Part III of this Article 12A only if the Township Board first makes the administrative determination that the applicant has demonstrated the administrative requirements specified in Part II of this Article.

A. RECONCILIATION OF THE GRAVEL STATUTE WITH THE ZONING ENABLING ACT AS A WHOLE; CREATION OF PLANNED UNIT DEVELOPMENT CLASSIFICATION FOR EXTRACTION USE

The Gravel Statute (MCL 125.3205) directs that the Township shall not prevent the extraction, by mining, of valuable natural resources from any property in the entire Township if it is demonstrated that no very serious consequences would result from the extraction of those natural resources, referring to the standards in *Silva v Ada Township*, 416 Mich 153 (1982) ("the Silva Standard"). There are fundamental issues pertaining to the Silva Standard that require attention in this ordinance in order to reconcile the Silva Standard with the Zoning Enabling Act, MCL 125.3201, *et seq.*, as a whole ("ZEA"), and with the exercise of the zoning authority as approved by the courts:

- (1) Whether there are "very serious consequences" is a question ambiguous on its face. Although some attempt is made in the Gravel Statute to provide examples of more specific standards to determine very serious consequences, the Gravel

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Statute specifies that these more specific examples are *in addition* to the Silva Standard, and thus do not provide the needed clarification. Determining whether there are very serious consequences requires additional standards, and must consider local conditions and circumstances.

- (2) Implicit in the Silva Standard adopted by the Gravel Statute are important characteristics of Transitory Extraction Use, matters of both fact and law, that require clarification in order to reconcile the Gravel Statute with the ZEA as a whole, including (but not limited to):
 - (a) Unlike most land uses, a Transitory Extraction Use amounts to a transitory use that will have a duration based on various circumstances such as the quantity and quality of resources to be extracted in a particular location, the extent and duration of ‘need’ for the resources from such location, and other factors. “Extraction of natural resources is frequently a temporary use of the land and that the land can often be restored for other uses and appropriate assurances with adequate security can properly be demanded as a precondition to the commencement of extraction operations.” *Silva v Ada Township*, 416 Mich. 153, 160-161 (1982).
 - (b) The Gravel Statute, read in isolation, i.e., absent additional standards, purports to allow for Transitory Extraction Use in a manner entirely distinct from the *planning and use district allocation* specified in the ZEA as a whole, with the Legislature in the Gravel Statute directing the Courts to apply a specific Due Process standard to scrutinize a denial of a proposed use. Such mandated Due Process standard has not been adjudicated by the Courts; rather, the legislatively mandated standard is distinct from and foreign to the Due Process standard established by the Courts and applied in all other zoning considerations.
 - (c) The Gravel Statute, read literally, i.e., absent additional standards, authorizes approval for Transitory Extraction Use within any zoning district, even though the general rule applicable to the exercise of zoning authority is to *separate* uses based on use district classifications. This literal reading of the Gravel Statute creates particular issues in cases in which a heavy industrial use (such as Transitory Extraction Use) would be approved within a residential or other district, due to the direct conflict with achieving the objectives specified in the ZEA that provides that “[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*, . . . to facilitate adequate and efficient provision for transportation systems, . . . and to promote public health, safety, and welfare.” As this zoning authority has been interpreted, the “scope of the power to protect the public health, safety, and welfare within the zoning context is not confined to elimination of filth, stench, and unhealthy places, but includes the

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authority to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.” *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). In addition, a community is authorized to enact land-use regulations to enhance quality of life by preserving the character and desirable aesthetic features of a city. *Penn Central Transportation Co. v New York City*, 438 US 104 (1978).

- (d) Authorization and operation of a heavy industrial Transitory Extraction Use operation in residential or other zoning districts creates a significant regulatory challenge for the Township, particularly in comparison with the authorization of nearly any other use considering the distinct impacts of the Transitory Extraction Use on the immediate surrounding area, as well as the area along the haul route utilized by the Transitory Extraction Use. The need for additional standards is manifest.
- (e) Approval of a heavy industrial Transitory Extraction Use operation in residential or other zoning districts is directed by a literal reading of the Gravel Statute without expressly stated regard for, and in conflict with, a community’s Master Plan in accordance with which zoning is to be established. The ZEA, MCL 125.3203, provides that “[a] zoning ordinance shall be based upon a plan designed to promote the public health, safety, and general welfare, . . . to conserve *natural resources* and energy, to *meet the needs of the state's residents for . . . other natural resources*, . . . industry, . . . and other uses of land, to ensure that uses of the land shall be situated in appropriate locations and relationships, . . .to reduce hazards to life and property, to facilitate adequate provision for a system of transportation . . .A zoning ordinance shall be made with reasonable consideration of the character of each district, its peculiar suitability for particular uses, the conservation of property values and *natural resources*, and the general and appropriate trend and character of land, building, and population development.” Accordingly, recognizing how each local government has formulated its master plan and system of zoning districts is an analysis that is inseparable from the authorized exercise of the zoning authority. There is a need for additional standards for decision making in order to achieve the necessary reconciliation among all sections of the ZEA.

In light of the fundamental issues described above relating to a literal reading of the Silva Standard, the courts may ultimately find the Gravel Statute invalid and unauthorized. In the meantime, the Township must attempt to exercise its zoning authority in the manner provided by existing law. In this regard, the Township has concluded that the only permissible exercise of zoning authority that could provide a reconciliation of a literal reading of the Gravel Statute with the ZEA as a whole, and with the common law of zoning, is an invocation of the planned unit development authorization in MCL 125.3503 for approving uses in residential and other zoning districts. This invocation would require classification of Transitory Extraction Uses as “planned unit developments.” For the reasons spelled out in paragraphs A(1) and A(2) of this Part III, above, the Gravel Statute

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standing alone fails to provide an express reconciliation with the ZEA as a whole, or with the common law of zoning under the judicially established standard of Due Process. The utilization of the planned unit development authorization is within the intent of the ZEA as a whole for providing a permissible means of achieving such reconciliation. The ZEA, in MCL 125.35033(3), provides that “[t]he planned unit development regulations need not be uniform with regard to each type of land use if equitable procedures recognizing due process principles and avoiding arbitrary decisions are followed in making regulatory decisions,” thus affording the means of reconciliation. The standards in this Part III are intended to provide the needed equitable procedures recognizing due process principles and avoiding arbitrary decisions.

Accordingly, a Transitory Extraction Use Planned Unit Development zoning classification (“Transitory Extraction Use PUD”) is hereby established, and an applicant for a Transitory Extraction Use must meet all of the requirements contained in this Part III, which are deemed to be within the authorization provided by MCL 125.3205 and MCL 125.3503. A property for which a Transitory Extraction Use PUD is approved shall be classified on the Zoning Map as “Transitory Extraction Use PUD.”

Approval of a Transitory Extraction Use PUD shall require amendment of the zoning ordinance in accordance with this Part III, and shall not be deemed to be the subject of administrative approval.

B. APPLICATION FOR TRANSITORY EXTRACTION USE PUD; STANDARDS FOR REVIEW

- (1) The application form for Part III of this Article 12A shall be approved by resolution of the township board, and shall require the submission of sufficient information for use by the Township in reviewing the relevant issues, including:
 - (a) The issues required to be considered based on the Silva Standard in the Gravel Statute; and
 - (b) The more specific standards in the Gravel Statute specified in subparagraphs MCL 125.3205(5) (a) – (f)).

As explained above, reconciliation of the Gravel Statute and the ZEA as a whole requires application of all standards contained in this Part III. The standards in this Part III provide necessary clarification for considering the Silva Standard and specific standards in the Gravel Statute. All of the standards in this Part III shall therefore be deemed to guide and reconcile the statutory standards of the Gravel Statute with the implicitly authorized authority contained in the Zoning Enabling Act as a whole and MCL 125.3503 in particular.

An application for Transitory Extraction Use, including haul route, shall include a Transitory Extraction Use Plan, which shall provide a detailed plan for the property which is the subject of the rezoning, and show the property along all haul

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routes within the Township (including the Village of Metamora). The Transitory Extraction Use Plan shall be prepared by a licensed professional civil engineer, or comparable professional, and shall show the location, size, height, design, architecture or other measure and feature for and of buildings, structures, improvements, operational plan, and other features on the subject property. The details offered by the applicant for inclusion within the Transitory Extraction Use Plan may be required to be modified if relevant for decision making by the Planning Commission or Township Board based on facts that have come to light during the course of the process of consideration, including preliminary review of the application.

- (2) The standards of this Article 12A that shall guide and reconcile the statutory standards of the Gravel Statute with the authority contained in the Zoning Enabling Act as a whole shall be applied to both the Silva Standard and the more specific standards in the Gravel Statute referenced above. These standards shall not be deemed to be exclusive considerations, and the Silva Standards may be interpreted as being clarified based on the application of sound planning principles.
- (3) The Silva Standard of Review for Legislative Consideration
 - (a) The Gravel Statute specifies that the Township 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. The applicant must demonstrate that no very serious consequences would result from the extraction, by mining, of the natural resources. In determining under this Article whether very serious consequences would result from the extraction, by mining, of natural resources, the standards set forth in *Silva v Ada Township*, 416 Mich 153 (1982), shall be applied, as directed by the Gravel Statute.
 - (b) *Silva v Ada Township* directs that the “no very serious consequences” test is a part of the Due Process “reasonableness” test, a constitutional test applied to determine whether a zoning regulation meets the demands of Due Process. The *Silva* opinion directs that the courts are to apply this different, and more rigorous Due Process standard for “reasonableness” only when the zoning would prevent the extraction of natural resources. The *Silva* opinion has been overruled, and thus has application only by reference by the Michigan legislature in the Gravel Statute. Accordingly, in the Gravel Statute, the Michigan legislative branch directs the Michigan judicial branch to apply a separate and different interpretation of the Due Process clause only for Transitory Extraction Use.
 - (c) The Silva Standard that an applicant must meet for amendment of the zoning ordinance under this Part III requires an applicant to overcome the

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presumption of validity of existing zoning regulations, and imposes on such applicant the burden of demonstrating that the proposed Transitory Extraction Use, and all associated activities and haul route, would have “no very serious consequences” as provided in *Silva v Ada Township*, presumably including the holdings in cases interpreting *Silva v Ada Township*, e.g., *American Aggregates Corp. v. Highland Township*, 151 Mich App. 37 (1986). Application of this general standard shall be interpreted by the Planning Commission and Township Board on a case by case basis considering all relevant facts and circumstances.

- (d) While the Gravel Statute specifically addresses natural resource use, other sections of the Zoning Enabling Act do as well. MCL 125.3201 directs that municipalities are to exercise zoning authority by *dividing the community into districts* to achieve the purposes of zoning, including the objectives of meeting “the needs of the state's citizens for . . . *natural resources*, . . . to facilitate adequate and efficient provision for transportation systems, . . . and to promote public health, safety, and welfare.” MCL 125.3203 directs that a “zoning ordinance shall be *based upon a plan* designed to promote the public health, safety, and general welfare, . . . to conserve *natural resources* and energy, to *meet the needs of the state's residents for . . . other natural resources*, . . . industry, . . . and other uses of land, to ensure that uses of the land shall be situated in appropriate locations and relationships, . . .to reduce hazards to life and property, to facilitate adequate provision for a system of transportation . . . *A zoning ordinance shall be made with reasonable consideration of the character of each district, its peculiar suitability for particular uses, the conservation of property values and natural resources*, and the general and appropriate trend and character of land, building, and population development.” These provisions of the ZEA may not be ignored in light of a single section of many sections of the ZEA. Unless and until the Gravel Statute is invalidated, the Gravel Statute must be reconciled with the Zoning Enabling Act as a whole.
- (e) Standards are provided in this Part III to reconcile the Gravel Statute with the Zoning Enabling Act as a whole, and shall be deemed implicit requirements of the Gravel Statute to be read into, and guide interpretation and decision making under, the Silva Standard that must be met by an applicant for amendment of the zoning ordinance to permit a Transitory Extraction Use. This Part III minimizes the ambiguity of the “no very serious consequences” rule by establishing more specific standards to facilitate understanding of the meaning of the Silva Standard within the context of the ZEA as a whole, applying the master planning component and other considerations compelled in order to place parties and review bodies on notice of the proofs needed in order to secure Transitory Extraction Use PUD approval. The Silva Standard of the Gravel Statute implicitly requires and directs clarification and interpretation based on recognized land use and zoning principles that are relevant to determining whether the applicant has proven that “no very serious

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consequences” would result from the applicant’s proposed Transitory Extraction Use.

(4) Specific Standards of Review for Township Legislative Consideration

The following specific standards are provided. These standards are presented within the framework provided in MCL 125.3205(5) (a) – (f) for the purpose of determining whether the applicant has proven that “no very serious consequences” would result from the applicant’s proposed Transitory Extraction Use and associated activities and haul route. These standards are intended to assist the Township in reviewing an application in relation to both the general Silva Standard and the specific standards in MCL 125.3205(5). All of the standards in this ordinance Article shall be considered by the Planning Commission and Township Board in deliberating on the application, and shall guide decision making on the Township Board’s ultimate legislative decision on whether the applicant has proven that “no very serious consequences” would result from the applicant’s proposed Transitory Extraction Use and associated activities and haul route.

(a) Existing Land Uses

1. The relationship of applicant’s proposed Transitory Extraction Use and associated activities with existing land uses anticipated to be impacted shall not produce unreasonable or inequitable results;
2. The impact of applicant’s proposed Transitory Extraction Use and associated activities on existing land uses in the vicinity of the property shall not produce unreasonable or inequitable results;
3. The proposed Transitory Extraction Use, including haul route, shall be capable of being designed, located, planned and operated so that that the public health, safety and welfare shall be protected in relation to existing land uses, and that the proposal will achieve such results.

(b) Property Values

1. The impact of applicant’s proposed Transitory Extraction Use and associated activities on property values in the vicinity of the property and along the proposed hauling route serving the property shall not produce unreasonable or inequitable results;
2. The proposed Transitory Extraction Use, including use of the haul route, shall not cause injury to the value of other property in the neighborhood in which it is to be located, or along the haul route.

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3. The proposed Transitory Extraction Use, including use of the haul route, shall not unreasonably or inequitably affect the value of properties in the Township, including the Village of Metamora, which is part of the Township.
4. The proposed Transitory Extraction Use, including use of the haul route, shall be such that the proposed vehicles (including number and type); machines and equipment used in the operation, location and height of buildings or structures; location, nature and height of walls, fences and landscaping; and all other aspects of the proposed use will not unreasonably or inequitably affect the value of other uses and properties.

(c) Pedestrian and Traffic Safety

1. The impact of the proposed Transitory Extraction Use and associated activities on pedestrian and traffic safety in the vicinity of the property and along the proposed hauling route serving the property shall not be unreasonable or inequitable.
2. The proposed Transitory Extraction Use and haul route shall be consistent with and permissible under state, county, and/or local regulations that have been established for roadways, including regulations applicable to the use of roads for proposed haul routes.
3. The proposed Transitory Extraction Use, including haul route, shall be of a nature that will make vehicular and pedestrian traffic no more hazardous than is normal for the district(s) impacted, taking into consideration the number, size, weight, noise, and fumes of vehicles, vehicular control, braking, and vehicular movements in relation to routes of traffic flow, proximity and relationship to intersections, adequacy of sight distances, location and access of off-street parking and provisions for pedestrian traffic, with particular attention to minimizing the interaction of heavy vehicles used for the Transitory Extraction Use with children, the elderly or the handicapped.
4. The proposed Transitory Extraction Use, including haul route, shall be of a nature that will make vehicular and pedestrian traffic no more hazardous to children attending schools or other activities within the Township, including the Village of Metamora, which is part of the Township.
5. Overall, the proposed Transitory Extraction Use, including haul route, shall not result in children, older persons, or handicapped persons, including those who use the downtown Village of Metamora, which is

part of the Township, being effectively required to forego or alter their activities.

(d) Identifiable Health, Safety, and Welfare Interests

1. If the property has been designated in the Master Plan as an appropriate site for heavy industrial use, this shall weigh in favor of the applicant under this provision, subject to consideration of the specific scope and impact of the operation and associated activities. Similarly, if the property has been designated in the Master Plan for non-industrial use, this shall weigh in favor of determining that the proposed Transitory Extraction Use would result in a very serious adverse consequence.
2. The impact of applicant's proposed Transitory Extraction Use and associated activities on identifiable health, safety, and welfare interests in the Township shall not be unreasonable or inequitable. For purposes of this ordinance, "health, safety, and welfare" shall have the meaning attributed to such terms by the courts, e.g., *Berman v Parker*, 348 U.S. 26 (1954); *Village of Belle Terre v Boraas*, 416 US 1 (1974), *Kyser* (majority opinion), *Cady v City of Detroit*, 289 Mich. 499 (1939), and *Hess v Charter Township of West Bloomfield*, 439 Mich. 550 (1992), including the manner in which such meaning has been reasonably determined by the Planning Commission and Township Board in the Master Plan and Zoning Ordinance, read as a whole, including the crucial and material stability and quality of life (see, e.g. dissenting opinion of Judge (later Justice) Davis in the Court of Appeals opinion in *Kyser v Kasson Township*, 278 Mich.App. 743, 773 [referenced with approval by the Michigan Supreme Court in *Kyser*, 486 Mich. 514, 519 (2010)]).
3. The proposed Transitory Extraction Use, including haul route, shall not unreasonably or inequitably impact upon surrounding property in terms of noise, dust, fumes, smoke, air, water, odor, light, and/or vibration. In determining whether a proposed Transitory Extraction Use amounts to a very serious consequence, the standards for the stated impacts contained within the Township's regulatory ordinance, as the same may be amended, will apply. In addition, considering that a proposed Transitory Extraction Use may include one or a combination of components that have unique qualities relating to these impacts (e.g., crusher noise and vibration), compliance with the regulatory ordinance standards would not necessarily mean that the use would not amount to a very serious consequence with regard to these impacts (see paragraph 11, below).

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4. The proposed Transitory Extraction Use, including haul route, shall not have an adverse impact on economic development and ‘placemking’ in the Township, historic Village of Metamora, which is a part of the Township, or in other units of government that will be impacted by the Use, including haul route.
5. The proposed Transitory Extraction Use, including haul route, shall not be permitted to have impacts, or create a character, likely to render the applicable limitations of Township zoning on other property in the area and haul route unreasonable in terms of the limitations imposed by existing zoning regulations. For example, the heavy industrial nature of the proposed Transitory Extraction Use shall not be permitted to undermine reciprocity of advantage by creating impacts and character that would raise a reasonable question whether residential zoning restrictions on area property would represent arbitrary limitations on the use and enjoyment of such area property.
6. The proposed Transitory Extraction Use operation, including the haul route, shall be such that the proposed location and height of buildings or structures and location, nature and height of walls, fences and landscaping, and all other proposed aspects of the overall use, will not interfere with or discourage the appropriate development and use of adjacent land and buildings.
7. The proposed Transitory Extraction Use, including haul route, shall not cause unreasonable or inequitable limitations on the use and enjoyment of other property in the vicinity (zoning district or districts, as impacted) in which it is to be located and along the haul route, and will not be detrimental to existing and/or other permitted land uses in the zoning districts impacted or unreasonably impact on future re-development in the manner specified in the Master Plan.
8. The proposed Transitory Extraction Use, including haul route, shall not be detrimental to the development of new land uses in the zoning districts impacted.
9. The proposed Transitory Extraction Use, including haul route, shall not unreasonably or inequitably burden the capacity of public services, infrastructure or facilities.
10. The proposed Transitory Extraction Use, including haul route, shall not unreasonably or inequitably burden retail uses, arts and culture, equestrian activities, non-motorized vehicle travel or recreation, school use, parks, playgrounds, residential uses, or result in the physical vulnerability or degradation of historic uses and resources, including

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the creation of the need for added public or private expenditures for maintenance of buildings, structures, and infrastructure.

11. The proposed Transitory Extraction Use, including haul route, shall not cause unreasonable diesel fumes, dust, truck noise or physical/mental health issues, including along the haul route, and including within the historic downtown of Metamora Village, which is a part of the Township.
12. The proposed Transitory Extraction Use, including haul route, shall not cause unreasonable impacts in relation to environmental resources in the Township, including air, ground water, surface water, soils, and wetlands. In determining whether impacts are unreasonable, the cumulative effect upon all environmental resources shall be evaluated.

(e) Overall Public Interest in the Proposed Extraction

1. The overall public interest in the extraction of the specific natural resources on the property both in absolute terms and in relative terms shall be weighed in relation to the adverse consequences likely to occur, and unreasonable or inequitable consequences shall not be permitted.
2. Public interest in the proposed Transitory Extraction Use shall be measured against any inconsistencies with the interests of the public as are proposed to be protected in Master Plan for the area to be impacted by the Transitory Extraction Use and haul route.
3. Public interest in the proposed extraction shall be measured against any inconsistencies with regard to physical, historic, and economic interests in relation to the Transitory Extraction Use and haul route.
4. Public interest in the proposed extraction shall be measured against any likely creation of valid environmental concerns, including without limitation impairment, pollution and/or destruction of the air, water, natural resources and/or public trust therein.
5. Public interest in the proposed extraction shall be measured against public costs likely to be caused by the proposed Transitory Extraction Use, including haul route, considering alternative supplies of gravel.

**C. DETERMINATION OF A TRANSITORY EXTRACTION USE APPLICATION
TO REZONE THE APPLICANT'S PROPERTY TO PLANNED UNIT
DEVELOPMENT**

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- (1) The determination of a Transitory Extraction Use Application may consist of an approval of rezoning to Transitory Extraction Use Planned Unit Development, or an approval of such rezoning with conditions, or a denial of rezoning.
- (2) An approval of rezoning, with or without conditions, shall include and incorporate a Transitory Extraction Use Plan as approved by the Township, and a Transitory Extraction Use Agreement, all as described below. Any conditions, if any, that may be required with the approval shall also be specified in such an approval.
- (3) An approval of rezoning shall include:
 - (a) A specification of the duration of the rezoning, which will state a termination date for the effect of the approval. This specification shall be based on findings that balance the public interest in providing the natural resources to be extracted against the public interest of freeing the area of the Township and residents that will be adversely impacted by the Transitory Extraction Use, including use of the haul route, from the burdens and costs allowed under the Gravel Statute due to the finding that the resources to be extracted and transported are needed to a sufficient degree.
 - (b) Approval of a Transitory Extraction Use Agreement, which shall clarify for all interested persons, including the public, the rights and obligations of the Township and the applicant and owner(s) of the property.
 - (c) Other conditions that conform to the requirements of applicable law.
- (4) A denial of rezoning shall include a statement of reasons why the applicant has failed to satisfy its burden of proof that approval of the application would result in “no very serious consequences.”

D. TRANSITORY EXTRACTION USE AGREEMENT

A Transitory Extraction Use Agreement shall mean a written agreement approved and executed by the Township, the applicant, and all owners of the property to be rezoned, incorporating all relevant terms of the approval, the approved Transitory Extraction Use Plan, any and all Transitory Extraction Use Conditions, and any other terms relevant to the land and operation to which the rezoning will apply. A Transitory Extraction Use Agreement shall include the following as applicable to the facts and circumstances:

1. Acknowledgment that the Rezoning to Transitory Extraction Use PUD classification is based on the application submitted and Transitory Extraction Use Plan, and that the duration of a Transitory Extraction Use will be temporary in nature, i.e., “extraction of natural resources is frequently a temporary use of the land and that the land can often be restored for other uses

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and appropriate assurances with adequate security can properly be demanded as a precondition to the commencement of extraction operations.” *Silva v Ada Township*, 416 Mich. 153, 160-161 (1982). Thus the Agreement shall specify the duration of the rezoning and the termination date, as found and determined by the Township Board based on its deliberations and balancing of public interests.

2. Acknowledgment that the conditions and Transitory Extraction Use Agreement are authorized by all applicable state and federal law and constitution, and that the Agreement is valid and entered into on a voluntary basis and represents a permissible exercise of authority by the Township.
3. Acknowledgment that the property in question shall not be developed or used in a manner inconsistent with the Transitory Extraction Use Agreement, including Transitory Extraction Use Plan, and that any material deviations in development and use from such Plan shall constitute a nuisance per se under MCL125.3407.
4. Acknowledgment that the approval and Transitory Extraction Use Agreement shall be binding on and inure to the benefit of the applicant, the property owner(s) and Township, and their respective heirs, successors, assigns, and transferees.
5. Acknowledgment that, when the Transitory Extraction Use zoning authorization terminates, no development or use shall be undertaken or permits for development issued until a new zoning district classification of the property has been established, and that the Township will not unreasonably delay in acting on the establishment of a new zoning district classification.
6. Acknowledgment that each of the requirements and conditions in the Transitory Extraction Use Agreement represents a necessary and reasonable measure which, when considered with all other conditions and requirements, is roughly proportional to the increased impact created by the use represented in the approved Transitory Extraction Use Rezoning, taking into consideration the changed zoning district classification and the specific use authorization granted.
7. Affidavit in recordable form, signed by the applicant and all owners of the property to be rezoned, to be recorded for the purpose of providing notice of the approval as well as the restrictions and conditions to the approval. The rezoning to Transitory Extraction Use shall not be effective unless and until the affidavit is recorded with the office of the Lapeer County Register of Deeds.

E. REVIEW PROCESS – PLANNING COMMISSION

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- (1) To seek an amendment of the zoning classification applicable to the property to Transitory Extraction Use PUD classification, the applicant shall submit an application in the form approved by resolution of the Township Board.
- (2) The application shall provide written documentation and evidence describing in detail and making the requisite demonstration with regard to each of the criteria on the issue of whether “no very serious consequences” shall result in relation to the property and haul route, and in the community, as described in detail in this Part III. Prior to conducting a public 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 public hearing on the application to amend the zoning classification shall not be noticed until the applicant has cured the deficiencies found to exist in accordance with this procedure. The Planning Commission may require the applicant to make a preliminary presentation for informational purposes prior to conducting a public hearing.
- (3) After providing the notice required for changing the zoning classification of a property, the Planning Commission shall conduct a public hearing on the application to determine whether the applicant can and does satisfy the applicant’s burden of proof that “no very serious consequences” shall result from applicant’s use of the property and haul route, as described in detail in this Part III. The hearing shall begin with an introduction by the Planning Commission chairperson, or a person designated by the chairperson. The applicant shall then be given the opportunity to make the showings required in this ordinance. At the completion of the applicant's presentation, either at the same meeting or at a subsequent meeting if additional time is needed in order to thoroughly address the subject matter, the Township, through its representatives, may address and offer evidence or argument on the issues. Members of the public shall then have the opportunity to address and offer evidence or argument on the 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) After the public hearing has been closed, either at the same meeting at which the public hearing was completed, or at a later meeting held within a reasonable time, the Planning Commission shall, based on the evidence presented, adopt findings and recommendations on whether the applicant has made a sufficient showing on whether there would be “no very serious consequences” as a result of the proposed Transitory Extraction Use including haul route, applying the standards contained in this Part III and all other applicable principles and law. Township representatives may assist the Planning Commission with the articulation of such findings and recommendations.

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- (5) Following all of the hearing procedures and requirements specified above, the Planning Commission shall forward to the County (if required) its findings and recommendations on whether to amend the zoning ordinance map to approve a rezoning of the property to the Transitory Extraction Use PUD classification, along with the Transitory Extraction Use Plan and Agreement.

F. REVIEW PROCESS – COUNTY AND TOWNSHIP BOARD

- (1) After any required action is taken by the County, the Planning Commission shall forward a summary of public hearing comments, along with its findings and recommendation, to the Township Board. The Planning Commission shall also forward to the Township Board the proposed Transitory Extraction Use Plan and Agreement.
- (2) The Township Board shall, taking into consideration the evidence from the public hearing, the Planning Commission’s recommendation, and any additional evidence presented to the Township Board, act on the application for a rezoning of the property to Transitory Extraction Use PUD classification. The Township Board shall conduct a public hearing on whether the property should be rezoned and classified for Transitory Extraction Use Planned Unit Development, and may direct changes in the Plan and Agreement (including a direction for representatives of the applicant and Township to negotiate proposed changes and present them to the Board). The Board’s action may then consist of approval of rezoning, approval of rezoning with conditions, or denial of rezoning.
- (3) If the Board acts to approve the rezoning to Transitory Extraction Use Planned Unit Development, or approve with conditions, the approval shall also include the Transitory Extraction Use Plan, Transitory Extraction Use Agreement, and a determination of the permitted duration of the rezoning, considering that that the duration of a Transitory Extraction Use will be temporary in nature, i.e., “extraction of natural resources is frequently a temporary use of the land and that the land can often be restored for other uses and appropriate assurances with adequate security can properly be demanded as a precondition to the commencement of extraction operations.” *Silva v Ada Township*, 416 Mich. 153, 160-161 (1982).

G. EFFECT OF APPROVAL

- (1) Approval of a rezoning of property to Transitory Extraction Use PUD classification shall authorize the owner of the property to apply for permits for construction and operation of a Transitory Extraction Use, including permits required under a separate Township Ordinance established for the regulation of extraction use operations. The approval shall become effective in the manner and on the date provided by law and after recordation of the Affidavit that is part of the Transitory Extraction Use Agreement, whichever is later (see Section D, above).

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- (2) The Transitory Extraction Use PUD classification shall expire following a period of two (2) years from the effective date of the rezoning unless:
 - (a) The period for securing permits and commencing bona fide construction is extended by the Township Board for good cause within the effective period; or
 - (b) Approved bona fide development of the property pursuant to building and other required permits issued by the Township commences within such two (2) year period and proceeds diligently and in good faith as required by ordinance to completion.
- (3) In the event that bona fide development has not commenced within the permissible period of time calculated under sub-paragraph (2) above, the Transitory Extraction Use classification shall be void and of no effect.
- (4) If development and/or actions are undertaken on or with respect to the property in material violation of the Transitory Extraction Use classification approved by the Township Board, including Transitory Extraction Use Plan, Transitory Extraction Use Agreement, and all conditions established with the approval, such development and/or actions shall constitute a nuisance *per se*. MCL 125.3407. In such case, the Township may issue a stop work order relative to the property and seek any other lawful remedies. Until curative action is taken to bring the property into compliance with the Transitory Extraction Use approval, Plan, Agreement and conditions, the Township may withhold or, following notice and an opportunity to be heard, revoke permits and certificates, in addition to or in lieu of other lawful action to achieve compliance.
- (5) At the end of the authorized duration of the Transitory Extraction Use, either or both of the following actions may be taken:
 - (a) The property owner, at any time before or after the end of the authorized duration, may seek a new Rezoning of the property, including a new application for rezoning to Transitory Extraction Use classification, in which case the property owner shall have the obligation to newly demonstrate a “Need for the Natural Resources,” taking into account the adverse impacts of the terminated Transitory Extraction Use endured already; and/or
 - (b) The Township may initiate a new Rezoning of the property to a reasonable district classification in accordance with the procedure provided by law for rezonings in townships.

Until such time as a new zoning district classification of the property has become effective, no development or operations shall be undertaken or permits for development issued. The Township will not unreasonably delay in acting on the establishment of a new zoning district classification

H. FEE

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The applicant for a rezoning Transitory Extraction Use classification under this Article shall pay as a fee the Township's costs and expenses incurred in the review and evaluation of the application and preparation of documents for approval. An escrow shall be established in an amount specified by Township Board resolution, and additional reasonable amounts shall be contributed as required in order to complete the process of review and approval. Any unexpended amounts from such escrow shall be returned to the applicant.

PART IV

ADMINISTRATION AND ENFORCEMENT

A. OPERATIONAL REGULATIONS

- (1) Approval of rezoning under this Article of the zoning ordinance shall be subject to separate Township ordinance established for the regulation of extraction use operations. Commencement of work for the operation, and any and all other operation activities, shall require permits for construction and operation of a Transitory Extraction Use, as specified in applicable Township ordinances.
- (2) Exemption: Usual and customary land balancing by cutting and filling in preparation for immediately planned and approved development in accordance with other applicable ordinance and law, not involving the extraction of natural resources for sale or use as contemplated under MCL 125.3205, shall be exempted from the provisions of this Article.

B. OTHER ZONING ORDINANCE SECTIONS SUPERSEDED AND REPEALED

Subject to the effect on prior permits and savings clause stated below, this amendment of the zoning ordinance shall supersede all other provisions in the Zoning Ordinance addressing the authorization of Transitory Extraction Use, including all uses intended to be addressed in MCL 125.3205. Consequently, the following provisions of the Zoning Ordinance applicable prior to the effectiveness of the ordinance embodying this amendment, shall be and are hereby repealed:

- (1) Subsection P of Section 402. Special Land Uses is repealed in its entirety, with the following to be inserted as subsection P: “(Reserved for future use).”
- (2) Section 1429. Mining of Earth Materials is repealed in its entirety, with the following to be inserted as Section 1429: “(Reserved for future use).”
- (3) Section 1531. Excavations or Holes, shall be amended by inserting the language appearing below in italics:

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“The construction . . . prohibited; provided however, this section shall not prevent any excavation under a permit issued pursuant to this ordinance (*e.g., for an approved Transitory Extraction Use Planned Unit Development in accordance with approved Plan and Agreement*), where such excavation . . .”

C. EFFECT OF PRIOR PERMITS

As of the date this Ordinance becomes effective, existing natural resource extraction uses for which Township permits have been issued under provisions repealed by this Ordinance amendment shall be permitted to be continued in accordance with the terms, provisions, and conditions of the respective permits issued, but shall not be permitted to expand the operation or impact of the operation without complying with this Article 12A.

D. SAVINGS CLAUSE

All rights or remedies of the Township of Metamora are expressly saved as to any and all violations of ordinance provisions repealed by the ordinance amendment, and all violations of relating to uses for which prior permits were issued under provisions repealed by this ordinance amendment. As to all such violations, courts of competent jurisdiction shall have all the powers that existed prior to the effective date of this ordinance. All violations which may otherwise become nonconforming uses under this ordinance, shall not become legal nonconforming uses, but shall be considered as violations of this ordinance in the same manner that they were violations of a repealed ordinance.

Section 2 of Ordinance

Except as expressly set forth above, the Metamora Township Zoning Ordinance shall remain in full force and effect.

Section 3 of Ordinance

This ordinance amendment shall be effective on the date provided by law following publication, subject to the provisions of the Michigan Zoning Enabling Act.

CERTIFICATION

It is hereby certified that the foregoing Ordinance was adopted by the Township Board of the Township of Metamora, Lapeer County, Michigan, at a meeting of the Board duly called held on ____ day of _____, 2016.

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TOWNSHIP OF METAMORA

BY: _____
JENNIE DAGHER, CLERK

ADOPTED:
PUBLISHED:
EFFECTIVE: