PROPERTY LAW

FRANK C. AIELLO†

Michigan's appellate courts delivered important holdings during this *Survey* period with respect to foreclosure, condemnation, the scope of easements, zoning, and riparian rights.

I. FORECLOSURE

A. Foreclosure by Advertisement is Not Available to a Third Party Mortgagee

In *Residential Funding Co, LLC v. Saurman*,[1] the court of appeals determined that a third-party mortgagee that does not hold an interest in the debt secured by the mortgage may not foreclose by advertisement.

---

† Associate Professor, Thomas M. Cooley Law School. B.A., 1998, Michigan State University; J.D., 2001, Wayne State University Law School. The author teaches Property Law, Secured Transactions, and Land Use Planning and Zoning Law. He sits on the Planning Commission of Springfield Township and serves as the editor of the Michigan Model Conservation Easement, a project hosted by the Heart of Lakes Center for Land Conservation Policy.

Residential Funding consolidated two cases. In both cases the Mortgage Electronic Registration System (MERS) was a mortgagee.[2] As explained by the court of appeals:

> In 1993, the MERS system was created by several large participants in the real estate mortgage industry to track ownership interests in residential mortgages. Mortgage lenders and other entities, known as MERS members, subscribe to the MERS system and pay annual fees for the electronic processing and tracking of ownership and transfers of mortgages. Members contractually agree to appoint MERS to act as their common agent on all mortgages they register in the MERS system.
>
> The initial MERS mortgage is recorded in the County Clerk's office with "Mortgage Electronic Registration Systems, Inc." named as the lender's nominee or mortgagee of record on the instrument. During the lifetime of the mortgage, the beneficial ownership interest or servicing rights may be transferred among MERS members (MERS assignments), but these assignments are not publicly recorded; instead they are tracked electronically in MERS's private system. In the MERS system, the mortgagor is notified of transfers of servicing rights pursuant to the Truth in Lending Act, but not necessarily of assignments of the beneficial interest in the mortgage.[3]

Foreclosure by advertisement is available only to a party that is either the "owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage."[4] In each transaction involving MERS, a lender was named in the promissory note, but MERS was named as the mortgagee in a "security instrument."[5] The parties agreed that "MERS was neither the owner of the indebtedness nor the servicing agent of the mortgage."[6] It was left for the court of appeals to then determine if MERS owned an "interest in the indebtedness" sufficient enough to allow MERS to foreclose by advertisement.[7]

---

1. 292 Mich. App. 321, 807 N.W.2d 412 (2011); *rev'd*, 490 Mich. 909, 805 N.W.2d 183 (2011).
2. *Id.* at 325.
3. *Id.* at 329.
4. *Id.* at 330 (quoting MICH. COMP. LAWS ANN. § 600.3204(1)(d) (West 2000)).
5. *Id.* at 326.
6. *Id.* at 330.
7. *Saurman*, 292 Mich. App. at 331.

The court of appeals interpreted the term "ownership" in the statute to exclude the interest of MERS in the note created by the agreement.[8] The court turned to *Black's Law Dictionary*'s definitions of "own," "interest," and "indebtedness."[9] Given this background, the court of appeals found that the interest granted to MERS in the transactions does not qualify as ownership sufficient to permit foreclosure by advertisement.[10] The security instrument provided that:

> . . . Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.[11]

According to the court of appeals:

> The contention that the contract between MERS and Homecomings provided MERS with an ownership interest in the notes stretches the concept of legal ownership past the breaking point . . . . We are confident that such a loose and uncertain meaning is not what the Legislature intended. Rather, the Legislature used the word "owner" because it meant to invoke a legal or equitable right of ownership. Viewed in that context, although MERS owns the mortgages, it owns neither the related debt nor an interest in any portion of the debt, and is not a secondary beneficiary of the payment of the debt.[12]

The Michigan Supreme Court granted leave to appeal this decision and required that briefs be submitted no later than October 21, 2011.[13]

---

8. *Id.* at 330-31.
9. *Id.* at 333.
10. *Id.* at 330; *see also* BLACK'S LAW DICTIONARY 1105 (6th ed. 1994).
11. *Saurman*, 292 Mich. App. at 326 (alteration in original).
12. *Id.* at 334-35.
13. Residential Funding Co., L.L.C. v. Saurman, 490 Mich. 877, 805 N.W.2d 183 (2011) (holding that MERS owned a security lien on the property, "contingent on the satisfaction of indebtedness," that authorized them to foreclose by advertisement).

B. Foreclosure Sale Purchaser is Responsible for Receivership Expenses if the Purchaser Benefits from the Receivership

In *In re Estate of Price*,[14] the court of appeals held that a foreclosure sale purchaser that did not consent to, or have notice of, the property's receivership is responsible for receivership expenses if the purchaser benefits from the receivership. The receivership order in *Price* authorized the receiver to make any expenditure necessary for the upkeep and repair of the property; the receiver spent approximately $20,000 for that purpose.[15] Any party with actual notice of the order was prohibited from interfering with the receiver's possession and management of the property.[16] The foreclosing bank was not aware of the receivership order when it began foreclosure of the property, but it did have notice of the order before the foreclosure sale.[17] The receiver filed a motion to void the foreclosure and hold the foreclosing bank in contempt for the Bank's violation of the receivership order.[18]

The trial court denied the motion to void the foreclosure, but did extend the redemption period to allow the receiver to sell the property at a better price than that received at the foreclosure sale.[19] The foreclosure sale yielded only sixty-nine percent of the appraised value.[20] With the receiver unable to sell the property at a greater price than at foreclosure, the trial court then granted the receiver's motion to dissolve the receivership and ordered the foreclosing bank to pay the costs of the receiver, with those costs secured by a lien against the property.[21]

Before the court of appeals, the foreclosing bank attempted to align its facts with *Attica Hydraulic Exchange v. Seslara* where the Michigan Department of Environmental Quality (DEQ) was not held liable for receivership expenses as a foreclosure purchaser.[22] The court of appeals distinguished *Attica* from this foreclosing bank's circumstances. In *Attica*, the DEQ would hold the property in a regulatory capacity only

14. 292 Mich. App. 294, 298, 806 N.W.2d 750 (2011).
15. *Id.* at 295.
16. *Id.*
17. *Id.* at 296.
18. *Id.*
19. *Id.*
20. *Price*, 292 Mich. App. at 298. The foreclosing bank purchased the property for $169,312.50, but had subsequently received an appraisal of $245,000. *Id.*
21. *Id.* at 296.
22. *Id.* at 299 (citing Attica Hydraulic Exchange v. Seslara, 264 Mich. App. 577, 691 N.W.2d 802 (2004)).

and never take possession.[23] Here, the foreclosing bank was liable as it benefitted both from the receivership and from taking possession.[24]

C. Tax Foreclosing Governmental Units, Such As a County Treasurer, May Not Refuse a Municipal Purchase Request

In *City of Bay City v. Bay County Treasurer*,[25] the court of appeals held that (i) a tax-foreclosure government purchaser is not required to show that the public purpose for the purchase be accomplished "efficiently and expeditiously" and (ii) the determination of the appropriate public purpose is a legislative function to be made by the governing body of the government purchaser, not the foreclosing governmental unit.[26]

This case arose out of a conflict between Bay City and the Bay County Treasurer.[27] The State of Michigan has the right of first refusal to purchase any tax-foreclosed properties in the state.[28] If the state declines to purchase property, the municipality where the property is located may purchase it "for a public purpose."[29] A county has the option to either allow the state to administer such foreclosures or to appoint "a foreclosing governmental unit" within its county government.[30] Bay County elected to appoint its Treasurer as its foreclosing governmental unit.[31]

Bay City identified four tax-foreclosed properties for purchase under this statutory scheme.[32] The Bay County Treasurer determined that he was not required to sell the properties to Bay City because he had determined that the purchased property would not generate tax revenue.[33] The conflict resulted in cross-claims of mandamus and a petition for declaratory relief.[34]

Although the public purpose of all four properties was contested at trial, only one property (the "Wilson Property") remained at issue on appeal.[35] The Wilson property was vacant and the city planned to convey

23. *Id.* at 296.
24. *Id.*
25. 292 Mich. App. 156, 807 N.W.2d 892 (2011).
26. *Id.* at 167, 171.
27. *Id.* at 158.
28. MICH. COMP. LAWS ANN. § 211.78m(1) (West 2005).
29. *Id.*
30. *Bay City*, 292 Mich. App. at 158.
31. *Id.*
32. *Id.*
33. *Id.* at 158-59.
34. *Id.* at 159.
35. *Id.* at 160.

it to Habitat for Humanity after purchase for construction of a new home.[36]

The Bay County Treasurer attempted to read into the tax-foreclosure statute a requirement that the public purpose for the purchase must be capable of efficient and expeditious accomplishment.[37] The court of appeals noted that legislative findings in the statute do state that "[t]he legislature finds that there exists in this state a continuing need to strengthen and revitalize the economy . . . by encouraging the efficient and expeditious return to productive use of property returned for delinquent taxes."[38] The court of appeals, however, read this language to be simply a finding and not a constraint on the type of public purpose allowed for purchase under the statute.[39] The court of appeals also made it clear that determining what constitutes a public purpose is a legislative function and, under the separation of powers, left it to the Bay City Council to decide, not the Bay County Treasurer.[40]

II. CONDEMNATION

The court of appeals declined to create a condemnation award for "loss of competitive advantage" in *Charter Township of Lyon v. McDonald's USA, LLC.*[41]

Lyon Township enabled use of an undeveloped parcel by condemning an easement through a pre-existing development that had been developed by Milford Road East Development Associates, L.L.C. ("Development Associates").[42] Development Associates claimed a condemnation award using the creative argument that Lyon Township had "out positioned" Development Associates by enabling a new, competing development.[43]

The issue arose when Lyon Township initiated an eminent domain action against a McDonald's condominium unit for placement of water and sewer facilities to support development of a parcel on the other side of I-96, a major highway.[44] Development Associates filed a motion to intervene in the condemnation action, claiming an interest in the

36. *Bay City*, 292 Mich. App. at 160.
37. *Id.*
38. *Id.* at 167 (quoting MICH. COMP. LAWS ANN. 211.78(m)(1) (West 2005)).
39. *Id.* at 167.
40. *Id.* at 171-72.
41. 292 Mich. App. 660, 809 N.W.2d 167 (2011), *appeal granted*, 491 Mich. 874, 809 N.W.2d 571 (2012).
42. *Id.* at 663-64.
43. *Id.* at 666.
44. *Id.* at 665.

McDonald's property by way of its rights under the Master Deed and Bylaws of the condominium development.[45] It appeared that the Township's enabling development of this new parcel on the other side of I-96 decreased the marketability of Development Associates' project.[46] In response, Development Associates sought compensation for its loss in competitive position now that the competing property was open for development.[47]

The court of appeals concluded that by granting Development Associates' approval of the location of utilities, the Master Deed and Bylaws provisions provided a compensable interest.[48] The court then turned to the thornier issue of the appropriate award of damages to Development Associates.[49]

The parcel that was physically affected by the condemnation, already occupied by McDonalds, did not face competition from the parcel newly enabled for development by Lyon Township.[50] To capture the economic damage to Development Associates from the new competition, it needed to connect the physically impacted parcel with an economically impacted parcel.[51] Development Associates attempted to do this by tracing the entities that held the two parcels back to their common ownership.[52] The court of appeals responded that two parcels of land, while owned by companies that have common beneficial ownership and both sustaining damage from the taking of an easement, do not constitute one parcel for purposes of the Uniform Condemnation Procedures Act.[53]

The court of appeals also clarified *Board of County Road Commissioners v. Bald Mountain West.*[54] While the lower court read the case to require an award for loss in competitive advantage, the court of appeals clarified that the only issue before the *Bald Mountain* court was the allowance of an appraiser's testimony on such an issue.[55]

To allow an award for lost competitive advantage would be to allow the first developer in a geographic area to monopolize real estate by placing unreasonably high cost barriers for competitors to tap into public

---

45. *Id.*
46. *Id.* at 666.
47. *Charter Twp. of Lyon*, 292 Mich. App. at 666.
48. *Id.* at 668.
49. *Id.* at 671-72.
50. *Id.* at 669-71.
51. *Id.* at 669.
52. *Id.* at 667-71.
53. *Charter Twp. of Lyon*, 292 Mich. App. at 667-70 (citing MICH. COMP. LAWS ANN. § 213.51 (West 2005)).
54. No. 275230, 2008 WL 400681 (Mich. Ct. App. Feb. 14, 2008) (per curiam).
55. *Charter Twp. of Lyon*, 292 Mich. App. at 672-73.

utility lines. One would not expect every person that legally accesses existing sewer lines to reimburse the original developer of the lines for the construction cost of the lines, or to pay the developer for every reduction in the developer's competitive position. Here, similarly, it was incorrect to require that the defendant be compensated for a change in the real estate market.[56]

III. SCOPE OF EASEMENTS

A. Land Division Act Does Not Limit Scope of Utility Easements

The court of appeals held that the Land Division Act[57] does not determine the scope of a utility easement for purposes of trespass in *D'Andrea v. AT&T Michigan*.[58] The owners of property subject to a utility easement argued that the installation of new equipment "overburdened the easement and thus committed a trespass on their private property."[59]

The court of appeals recognized that activities by the owner of the dominant estate are a trespass to the servient estate if they "go beyond the reasonable exercise of the use granted by the easement."[60] However, the court of appeals rejected the argument that the Land Division Act determined the rights and limitations of AT&T with respect to its easement.[61] While the Land Division Act does provide for certain size and location requirements for utilities within a subdivision, the court of appeals held that the Land Division Act was not intended to proscribe the limitations of a utility easement generally.[62]

B. Drainage Equipment, Installed by a Municipality, Directing Water Flow to a Servient Storm Water Easement Parcel May Constitute a Trespass by the Dominant Estate Holder

The court of appeals held that drainage equipment, installed by a municipality and directing water flow to a servient storm water easement parcel, may constitute a trespass by the dominant estate holder in *Wiggins v. City of Burton*.[63]

---

56. *Id.* at 674.
57. MICH. COMP. LAWS ANN. § 560.101-.293 (West 2006).
58. 289 Mich. App. 70, 795 N.W.2d 620 (2010).
59. *Id.* at 72-73.
60. *Id.* at 73.
61. *Id.* at 74.
62. *Id.* at 74-75.
63. 291 Mich. App. 532, 805 N.W.2d 517 (2011).

The Wigginses owned a parcel that was part of a subdivision developed in the mid-1990s.[64] The Wigginses' parcel abutted two pre-existing homes owned by the Heckmans and Mahlers.[65] The Wigginses' parcel was burdened by a private easement for storm detention.[66] Storm water flowed onto the Heckmans' and Mahlers' parcels after development of the Wigginses' parcel.[67] In response to the request from the Mahlers and Heckmans, the City of Burton installed drainage pipelines directing the flow of water back to the Wigginses' parcel.[68] These drainage pipelines resulted in a retention pond in the Wigginses' backyard.[69] The Wigginses claimed that the drainage equipment constituted a compensable trespass and nuisance.[70]

The court of appeals held that the Wigginses' claim could lie in trespass but not in nuisance because the intrusion onto their property was tangible.[71] The Wigginses have a claim for trespass only if the use by the Heckmans and Mahlers exceeded the scope of the easement burdening the Wigginses' property.[72] Noting the plain language of the easement and the court's charge to honor such language,[73] the court of appeals determined that the installation of the drainpipe exceeded the retention of waters that naturally flow as the result of storms.[74] Because the physical drainage ditch exceeded the scope of the easement, the court of appeals found that the Wigginses did have a trespass action that entitled them to at least nominal damages and injunctive relief.[75]

While the drainage pipe was installed by the city and only at the request of the Mahlers and Heckmans, the court of appeals still held that the Mahlers and Heckmans were liable in trespass.[76] The court of appeals found that instigation of the trespass was enough to create joint tortious liability.[77] Also significant to the court of appeals, but ignored by the lower court, was that ownership of the drainage pipe was transferred to

64. *Id.* at 536.
65. *Id.*
66. *Id.*
67. *Id.* at 537-38.
68. *Id.*
69. *Wiggins*, 291 Mich. App. at 537-38.
70. *Id.* at 538.
71. *Id.* at 574.
72. *Id.* at 556.
73. *Id.* at 554.
74. *Id.*
75. *Wiggins*, 291 Mich. App. at 556.
76. *Id.* at 557.
77. *Id.* at 557-58 (citing Kratze v. Ind. Order of Oddfellows, 190 Mich. App. 38, 43, 475 N.W.2d 405 (1991)).

the Mahlers and Heckmans after installation by the city.[78] The court found that the drainage ditch constituted a trespass of a permanent and continuing nature and entitled the Wigginses to injunctive relief (the removal of the drainpipe) and at least nominal damages.[79]

Additionally, the Wigginses claimed that the water flowing through the drainage pipe constituted a separate actionable trespass apart from the drainage ditch.[80] The court of appeals noted the "natural servitude" that benefits an upper, dominant estate for the natural flow of water to the lower, servient estate,[81] but reasoned that anything greater than such natural flow will constitute a trespass.[82] The court of appeals stated, given a "commonsense reading [of] the language of the storm-detention easement at issue in this case . . . it is apparent that the easement requires only that the servient estate detain or retain those surface waters that naturally flow to it from the dominant estate."[83] Such a conclusion is curious to this Author however. Why would it be common sense to create an easement for a right that is already implied as a "natural servitude" under the law? Nonetheless, the court of appeals instructed the lower court to find an independent trespass from the water flow if it determined on remand that the flow of surface water is "materially increased beyond that which has historically and naturally flowed to it from the dominant estates."[84]

The court of appeals also determined that there was a genuine issue of material fact concerning whether the city's installation of the drain constituted a taking.[85] The court of appeals held, however, that any flooding that may have resulted from the drain did not constitute a taking, as the city no longer had ownership of the drain.[86]

IV. ZONING

The Michigan Supreme Court held that a claimant must receive judicial review of its original zoning variance denial before bringing an exclusionary zoning claim for a higher-density, differently-zoned development in *Hendee v. Putnam Township*.[87]

---

78. *Id.* at 558.
79. *Id.* at 558-59.
80. *Id.* at 561.
81. *Wiggins*, 291 Mich. App. at 563.
82. *Id.* at 563-64.
83. *Id.* at 565.
84. *Id.* at 566-67.
85. *Id.* at 570.
86. *Id.* at 571-72.
87. 486 Mich. 556, 786 N.W.2d 521 (2010).

Hendee was denied rezoning and a subsequent variance to allow development of his property into a ninety-five unit planned unit development.[88] "At that point, plaintiffs had exhausted their administrative review obligations and could have sought judicial relief under the ripeness rule of Paragon Prop[erties] Co. v. City of Novi[89] as no other means of administrative appeal or review was available to plaintiffs to permit development of a ninety-five unit PUD."[90] Instead, Hendee brought an exclusionary zoning claim because the Township was not allowing Hendee to develop his property into a 498-unit mobile home community.[91]

The Michigan Supreme Court previously held that judicial review in zoning cases is not available until the zoning authority has rendered a final decision.[92] Here, the supreme court found that Hendee had not yet received a final decision on the 495-unit mobile home community development.[93] Putnam Township allowed for mobile home community development in its master plan, but had not yet provided zoning for a mobile home community.[94] Because Putnam Township had not yet reviewed Hendee's rezoning request for a mobile home community development, the issue was not yet ripe for judicial review on exclusionary zoning grounds.[95]

Hendee countered that exhausting his remedies for the 495-unit mobile home community was not necessary under the "futility doctrine," it being futile for him to pursue a higher density development because the result would have been the same.[96] The supreme court quoted *Bannum, Inc. v. City of Louisville*:[97] "the landowner must have submitted at least one 'meaningful application' for a variance from the challenged zoning regulations."[98] Without much explanation, the court of appeals determined that Hendee had not made a "meaningful application."[99] The supreme court also recounted that a zoning ordinance cannot be facially attacked as exclusionary simply for failure to include a particular type of land use:

---

88. *Id.* at 559.
89. 452 Mich. 568, 550 N.W.2d 772 (1996).
90. *Hendee*, 486 Mich. at 567.
91. *Id.* at 568.
92. *Id.* at 572 (citing *Paragon*, 452 Mich. at 576-77).
93. *Id.* at 572.
94. *Id.* at 573.
95. *Id.*
96. *Hendee*, 486 Mich. at 574.
97. 958 F.2d 1354 (6th Cir. 1992).
98. *Hendee*, 486 Mich. at 575 (quoting *Bannum*, 958 F.2d at 1362-63).
99. *Id.*

> [T]he zoning authority must first be afforded the opportunities (1) to determine the effect of its ordinance in light of evidence demonstrating a need for the proposed land use and (2) to render a zoning decision based on that evidence before a facial exclusionary zoning claim can become ripe for judicial review."[100]

In *Kyser v. Kasson Township*, the Michigan Supreme Court overturned the curious Michigan requirement that a zoning ordinance was unreasonable if it restricted the extraction of natural resources when "no very serious consequence" would result from extracting the resource.[101] Instead the court made clear that a zoning challenge, whether involving extracted natural resources or not, requires that the regulation bear no rational relationship to the public welfare.[102] Even so, the legislature quickly responded to the *Kyser* decision by making the "no serious consequence rule" a statutory standard.[103]

The Michigan Supreme Court traced the "no serious consequences" rule back to *City of North Muskegon v. Miller*,[104] characterizing the appearance of the language not as an additional requirement, but rather as one factor to be considered when determining a regulation's reasonableness.[105] The supreme court then traced the history of later references to the rule holding "the 'no very serious consequences' rule of *Miller* was not a rule, but a definition of one factor to consider when assessing whether a zoning ordinance was reasonable."[106]

The court identified two premises upon which it found the "no serious consequence" test to be based. The first presumption is that extraction of natural resources is the preferred or more valuable land use.[107] The supreme court noted, however, that a zoning ordinance is not unreasonable simply because it prohibits the most profitable use of property.[108] The second presumption is that the extraction of the natural resources is valuable to the public.[109] However, considering the use

---

100. *Id.*

101. Kyser v. Kasson Twp., 486 Mich. 514, 786 N.W.2d 543 (2010). The "no serious consequence" requirement originated in *Silva v. Ada Twp.*, 416 Mich. 153, 330 N.W.2d 663 (1982).

102. *Kyser*, 486 Mich. at 531-32.

103. MICH. COMP. LAWS ANN. § 125.3205 (West Supp. 2011).

104. 249 Mich. 52, 227 N.W. 743 (1929).

105. *Kyser*, 486 Mich. at 523-25.

106. *Id.* at 530.

107. *Id.* at 531.

108. *Id.* at 530-31.

109. *Id.* at 530.

before the Michigan Supreme Court here, the trial court concluded that the public interest in gravel as a natural resource was not high because the supply available under current zoning would last well into the twenty-first century.[110] Dispensing with these premises for the case before it, the supreme court found that the "no very serious consequences" rule was not a constitutional requirement for zoning validity.[111]

The supreme court also held the "no very serious consequences" requirement invalid as a violation of the separation of powers.[112] Such determinations are within the proper role of legislative bodies and not courts, which are ill-equipped to engage in such a function.[113]

Finally, the supreme court determined that the Zoning Enabling Act superseded the "no very serious consequences rule," as it did not allow a locality to make the exclusionary zoning analysis or comprehensive plan as required by the Zoning Enabling Act.[114]

The dissenting justices argued that the "no very serious consequences" test should stand. In their view, it reflects a valid substantive due process concern under the Michigan Constitution that the supreme court was bound to uphold under *stare decisis*,[115] it did not violate the separation of powers because of its constitutional origins, and was not superseded by the Zoning Enabling Act because the legislature did not directly address the doctrine when the legislature was presumed to have knowledge of it.[116]

The Michigan legislature quickly responded to the *Kyser* decision by statutorily requiring the "no very serious consequences" requirement.[117]

---

110. *Id.* at 531-32.
111. *Kyser*, 486 Mich. at 534.
112. *Id.* at 539.
113. *Id.*
114. *Id.*
115. *Id.* at 548 (Kelly, C.J., dissenting).
116. *Id.* at 551-52 (Kelly, C.J., dissenting).
117. MICH. COMP. LAWS ANN. § 125.3205 (West Supp. 2011):

> (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 . . . .
>
> . . . .
>
> (5) In determining under this section 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 and all of the following factors may be considered, if applicable:
>
> (a) The relationship of extraction and associated activities with existing land uses.
>
> (b) The impact on existing land uses in the vicinity of the property.

While the legislature's intent appears to have been the reversal of *Kyser*, it may have left municipalities room to wiggle out of the "no very serious consequences" test. The statute allows the local unit of government to consider "[t]he impact on other identifiable health, safety, and welfare interests, in the local unit of government."[118] As was argued by the majority in *Kyser*:

> Ironically, the "no very serious consequences" rule itself potentially creates "very serious consequences" because the rule effectively compels that mineral extraction zoning decisions be made on a case-by-case basis, without methodical consideration being given to other long-term concerns inherent in land-use planning. This ad hoc and piecemeal approach to rezoning undermines the efforts of local governments to provide stable land-use development.[119]

Townships are busily at work drafting ordinance revisions to restrict gravel mining while still complying with the statutory requirements. This Author predicts the "no very serious consequences" test will once again find itself before the Michigan Supreme Court.

V. RIPARIAN RIGHTS

The supreme court held that property owners fronting a lake but separated from the water by a public road possess the riparian rights to the lake in *2000 Baum Family Trust v. Babel*.[120]

This case involved a platted subdivision on the northern shore of Lake Charlevoix.[121] The plat created lots that were separated from the lake only by Beach Drive, and the lot owners utilized the shoreline across the drive as if it was their own.[122] Controversy arose when other

---

(c) The impact on property values in the vicinity of the property and along the proposed hauling route serving the property, based on credible evidence.
(d) The impact on pedestrian and traffic safety in the vicinity of the property and along the proposed hauling route serving the property.
(e) The impact on other identifiable health, safety, and welfare interests in the local unit of government.
(f) The overall public interest in the extraction of the specific natural resources on the property.

Id.

118. *Id.* § 125.3205(5)(e).
119. *Kyser*, 486 Mich. at 538 (citations omitted).
120. 488 Mich. 136, 793 N.W.2d 633 (2010).
121. *Id.* at 140.
122. *Id.* at 140-41.

property owners in the neighborhood, who did not own property on Beach Drive, also began to erect docks and use the shoreline.[123] Those directly along the drive brought trespass claims against these back-lot users.[124] In turn, the Charlevoix County Road Commission counterclaimed, claiming exclusive right to the shoreline and maintaining that it was the Beach Drive property owners who in fact were in trespass.[125]

The supreme court provided an exhaustive history of Michigan cases on the issue of riparian rights along a public road, concluding that "the interposition of a fee title between upland and water . . . transfers them to the interposing owner."[126] But the conveyance of a parcel of land bordering on a public road contiguous to water also conveys the associated riparian rights unless the conveyance provides otherwise.[127]

The Charlevoix County Road Commission and the lower courts distinguished this case's facts because the plat act governing at the time utilized the word "fee" to describe the interest transferred to the county at the time of a plat, but the supreme court was not persuaded:[128]

> We know that the "fee" conveyed by the statute is held "in trust to and for the uses and purposes therein designated, and for no other use or purpose whatever" . . . . We know this fee conveys only "nominal title" . . . . We know that the statute does not convey 'title in the nature of a private ownership . . . . We know that the [Charlevoix County Road Commission] was not conveyed any rights that were not necessary to the use and purpose for which the street was dedicated . . . . And we know that the nomenclature to describe this interest is a "base fee."[129]

Tracing through prior iterations and interpretations of the plat act, the supreme court determined that what is granted to the public as a road under a plat is only a "base fee" and not fee simple absolute:[130]

> We find these interpretations of the property interest at issue to be faithful to the text of the 1887 plat act. As discussed, the text

123. *Id.* at 141.
124. *Id.*
125. *Id.* at 141-42.
126. *2000 Baum Family Trust*, 488 Mich. at 167 (quoting Hilt v. Weber, 252 Mich. 198, 218, 233 N.W. 159 (1930)).
127. *Id.* (citing Croucher v. Wooster, 271 Mich. 337, 344, 260 N.W. 739 (1935)).
128. *Id.* at 172-73.
129. *Id.* at 173 (citations omitted).
130. *Id.* at 164.

> of the statute limits the interest conveyed in both scope and duration: the "fee . . . [is conveyed] in trust to and for the uses and purposes therein designated, and for no other use or purpose whatever."[131]

Of note from the case is the Michigan Supreme Court's rejection of the tax categorization of the properties as significant to the characterization of the property. The parcels were assessed as "water view," but not "waterfront." The court stated, "[w]e do not think that plaintiffs' property tax assessment rate lends support, one way or the other, for the conclusion that they do not hold riparian rights."[132]

The supreme court was also clear to reject the lower court's view that the county "owned" the roadway.[133] Instead, the supreme court clarified that it was the scope of the road's original dedication that controlled the interest of the public entity,[134] here it being solely for the purpose of a public road and nothing greater.[135]

131. *Id.* at 182 (alteration in original) (citations omitted). The dissent disagreed with this characterization, finding that a roadway conveyed through a plat did convey a fee capable of severing the abutting property owners' riparian rights, as distinct from a common law right of way where such rights would presumably not be severed. *Id.* at 189 (Davis, J., dissenting).

132. *2000 Baum Family Trust*, 488 Mich. at 183.

133. *Id.* at 183.

134. *Id.*

135. *Id.* at 184.