

Marty Fittante

From: Steve Pence <Steve@pencenuminen.com>
Sent: Wednesday, June 22, 2011 1:34 PM
To: Marty Fittante
Subject: sb470

Marty,

Thank you for being a good listener. At some point I thought I was overloading you and yet you were patient. Needless to say, in representing working people in Houghton County, who for years put up with deceit from at least one of their Township officials and half - truths from a quarry owner, it was stunning for Mr. and Mrs. Betterly to think their hard won battle in the Circuit Court could be taken away by the same arguments which were rejected in their hometown.

By the time we learned of Senate Bill 470 it seemed as if it was too late to have a voice. Since it was clear the impetus for this legislation came out of a court case it was hard to understand why our elected legislators did not want to hear the other side of the story.

Mr. Betterly will appear tomorrow and testify if he is allowed before Sen. Casperson's Committee on Natural Resources. He is not a trained speaker and this will be hard for him. So, if I may be so bold, I would like to give a brief recounting of the history of the struggle of my clients, who also include Kevin Grzelak.

These three citizens are landowners in Portage Township in an area designated as rural residential. Gravel pits and quarries are forbidden in this zoning classification but are allowed in other portions of the Township. For many years my client enjoyed the peace and quiet of their modest home and their several acres of land. .

Then, noise intruded with what sounded like someone developing an industrial usage in their backyard, but behind a tree line.

On December 11, 2006 my clients attended the regular monthly meeting of the Charter Township of Portage. When they inquired regarding the noise, suggesting that Moyle might be creating a gravel pit, the supervisor claimed no knowledge and said he would check on it.

The supervisor did not speak the truth. Once litigation ensued a letter emerged dated January 17, 2005 from Moyle to supervisor Bill Bingham. This letter proved that Mr. Bingham knew full well what was going on in the Betterlys' back yard.

As it turned out Mr. Aho, the signer of the January 17, 2005, letter testified that the wording used in his letter was that which was suggested by Supervisor Bingham .

After years of ignoring his duty and suggesting that Moyle had removed gravel from this area , and thus could continue to do so as a grandfathered nonconforming use, Mr. Bingham was forced to do his job and on June 12, 2009, he wrote a letter to Gary Moyle telling him the Township records show no history of gravel operations in section 15, which is zoned rural residential. So, the quarry use was illegal.

At trial, the senior Mr. Moyle testified that when he paid over half a million dollars for the property and its development costs, he had no knowledge of the existing zoning at the site. The court found this testimony to not be credible.

At a time when public pressure was mounting , the Township Supervisor resigned his position and ran for the Houghton County Board of commissioners. The public was not enthused about his candidacy and he presently serves no public office.

It took years for Mr. Bingham to admit that his son works for Moyle. In a half-truth, he said that did not matter since he was only one vote on the Township Board. He failed to disclose that as the sole Portage Township zoning officer he had failed to execute the oath of office as it concerns Moyle due to a clear conflict of interest.

Given this sordid record, why Mr. Bingham would appear in Lansing as he did last week to testify in favor of this bill and as a representative of Moyle, is mostly a testament to extreme and permanent bad judgment.

When Mr. Bingham left office and the citizens finally hired private counsel to assist them in having the town ship ordinance enforced, the Township was persuaded to do the right thing and join the citizens suit against Moyle. At great cost, financial and emotional, the citizens and Portage Township succeeded. This was a victory for local control of zoning and development in the Township and, for the rule of law, not the whim of man, which is always exercised, it seems, in favor the powerful. Now, this hard won victory against those who would use influence to secure what an average man could not possibly secure, are at risk of having their victory taken away by those who have enough money, time and influence to lobby their legislature while the average man is happy just to get a good night's rest. And, for the chairman of the portage Township planning commission, Mr. Wilmers to be labeled as a representative of the Township, is also appalling, since the Township unanimously voted to instigate this suit and their lawyer instructed all Township officials to stay out of the fray. Mr. Wilmers admittedly has close ties to Moyle and is a no regulation ideologue.

What the Senate proposes to do is egregiously wrong on two levels: first, Senate Bill 470 will have the effect of thwarting local government and the rule of law in this particular case. Secondly, by saying municipalities can only regulate quarry operations and gravel pits in cases where those uses would cause serious consequences, would be to give those uses an exemption allowed no other business or industry in Michigan. And , all across the state of Michigan , well thought out zoning plans would be rendered irrelevant. Does Sen. Casperson and Representative Huuki believe central government -Lansing- knows better than local citizens and their elected representatives?

It has often been said about Moyle that they find it easier to ask forgiveness than permission. Why? Because anyone who opposes them will be accused of being a "job killer"

As I publicly told Moyle employees, you should look to Mr. Moyle and no one else as the cause of your problems because he should have checked the zoning and he would have known you could not quarry there. And, if he had checked the law before the Kyser decision was handed down, he would have known that you could sue under the old standard and if you could prove no serious consequences, you would be grandfathered in, forever.

That, Mr. Fittante, is my understanding of the law. If you are nonconforming use you can remain in business forever but you cannot expand that usage. Caveat: I am a trial lawyer , more so than a real estate lawyer, but I believe this is the test and in fact it was the initial argument which Mr. Bingham suggested Moyle make: you may remove gravel from this area because you have always done so. This, of course, turned out to be absolutely untrue and Mr. Bingham admitted so under oath and in writing in his June 12, 2009 letter to Gary Moyle.

I expect my client will arrive at the hearing with exhibits which will prove that the above stated matters are factual and not mere opinion. Respectfully I would ask that no decision be made in committee until such time as I have an opportunity to testify in person and all interested parties statewide have an opportunity to weigh in on this matter which will affect the entire state of Michigan.

Thank you for your consideration. I ask that these written remarks be part of the record in this matter.

Steve Pence

PLEASE NOTE NEW ADDRESS

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