# Legislative Analysis

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**LOCAL REGULATION OF SAND AND GRAVEL MINING**

**Senate Bill 431 (proposed substitute H-2)**
**Sponsor: Sen. Jim Ananich**
**House Committee: Local Government and Municipal Finance**
**Senate Committee: Transportation and Infrastructure**
**Complete to 6-21-22**

**SUMMARY:**

Senate Bill 431 would amend the Michigan Zoning Enabling Act to provide that a local unit of government does not have authority to prohibit or regulate sand and gravel mining except in specified circumstances. In addition, the bill would prohibit the adoption of a zoning ordinance that prevents mining, regardless of whether very serious consequences as described in the act would result, except with regard to specified kinds of sand and gravel mining.

The bill would provide that a local unit of government or other governmental authority created by statute does not have jurisdiction or authority to prohibit or regulate sand and gravel mining by ordinance, regulation, policy, or practice, including the permitting, location, development, operation, abandonment, reclamation and processing and trucking activities of sand and gravel mining or that are related to sand and gravel mining.

However, a local unit of government could regulate sand and gravel mining if less than 1.0 million tons of sand and gravel will be mined over the life of the mine and the mining operator has not elected to apply for a permit under Part 639 of the Natural Resources and Environmental Protection Act (NREPA). [Senate Bill 429 would add Part 639 (Sand and Gravel Mining) to NREPA.] Unless regulated by a local unit of government under the above exception, sand and gravel mining would be subject to Part 639 of NREPA.

In addition, the act now prohibits the adoption of a zoning ordinance that prevents the extraction by mining of natural resources from any property, if the natural resources are valuable and no very serious consequences (as described in the act) would result from their extraction. (See "Background," below.) The act says that natural resources are considered "valuable" if a person, by extracting them, can receive revenue and reasonably expect to operate at a profit. The bill would amend this provision to instead allow a local ordinance that prevents the sand and gravel mining described in the exception above (as long as the natural resources are valuable and no very serious consequences as described in the act would result) and to provide that natural resources are considered "valuable" if a person, by extracting them, expects to operate at a profit.

Finally, the act now provides that the provisions described above do not prohibit reasonable local regulation not preempted by Part 632 (Nonferrous Metallic Mineral Mining) of NREPA concerning hours of operation, blasting hours, noise levels, dust control measures, and traffic. The bill would retain this provision.

MCL 125.3205

**BACKGROUND:**

The general test for whether a zoning ordinance is valid and constitutionally sound (e.g., that it does not violate due process rights) is whether or not it is reasonable. In *Silva v Ada Township*, 416 Mich 153 (1982), the Michigan Supreme Court held that zoning ordinances prohibiting the extraction of natural resources from property (e.g., oil wells or mining) must be held to a higher standard. The court noted that, since natural resources "can only be extracted from the place where they are located and found," zoning ordinances that prevent a property owner's access to natural resources differ from those that, say, prohibit building a factory in a residential district: unlike the natural resources, the factory could be located elsewhere. The court wrote:

> Unless a higher standard is required, natural resources could be extracted only with the consent of local authorities or in the rare case where the land cannot be reasonably used in some other manner. The public interest of the citizens of this state who do not reside in the community where natural resources are located in the development and use of natural resources requires closer scrutiny of local zoning regulations which prevent development.

The higher standard upheld by the court in *Silva* was the "no very serious consequences" test described above as current law, which holds a zoning ordinance to be invalid if the person challenging it can show that there are valuable natural resources on a property and that no very serious consequences would result from their extraction.

Nearly 30 years later, in *Kyser v Kasson Township*, 486 Mich 514 (2010),[1] the Michigan Supreme Court reversed its decision in *Silva*, finding among other things that the "no very serious consequences" rule violates the separation of powers and "usurps the responsibilities belonging to both the Legislature and to self-governing local communities" in privileging the extraction of natural resources over other public interests and policies.

The court in *Kyser* traced the judicial history of the "no very serious consequences" test, from its appearance in a 1929 decision[2] as one factor to consider when judging the reasonableness of a zoning ordinance to its assertion in *Silva* as the sole and sufficient rule for cases involving the extraction of natural resources. The court found that the rule was neither constitutionally nor statutorily required. As to whether the extraction of natural resources is a special land use requiring special scrutiny, the court wrote:

> With regard to the value or profitability of land, there is no obvious difference in kind between being prevented from extracting resources and being prevented from using the land in any other way. [...] When compared with any other unique, and potentially valuable, attributes of a particular property—its location, its view, its size or configuration, its terrain, its lakes and ponds and wildlife—minerals on a property do not render it any more unique or valuable in a way that would justify elevating mineral extraction to a specially protected land use by judicial decree.

[1] See http://publicdocs.courts.mi.gov/OPINIONS/FINAL/SCT/20100715_S136680_114_kyser-op.pdf

[2] *City of North Muskegon v Miller*, 249 Mich 52 (1929). See https://casetext.com/case/city-of-north-muskegon-v-miller

The court in *Kyser* thus eliminated the "no very serious consequences" rule and replaced it with the traditional reasonableness test that applies to all other types of land use restrictions.

In 2011, in response to the *Kyser* ruling, the legislature amended the Michigan Zoning Enabling Act to incorporate the "no very serious consequences" test of the *Silva* decision.[3] It is current law, as described above. Under the bill, local governments could adopt an ordinance that prevents mining only with regard to the sand and gravel mines described in the exception above (less than 1.0 million tons and not operating under a permit under Part 639 of NREPA). The ordinance could be challenged using the *Silva* test, i.e., by showing that the natural resources are valuable and that no very serious consequences will result from their extraction. The bill would appear to remove the authority to adopt an ordinance preventing other mining, regardless of whether very serious consequences would result, under these provisions.

**FISCAL IMPACT:**

The bill would have an indeterminate, but likely negligible, fiscal impact on local unit of government regulatory costs associated with mining operations. Any fiscal impact from regulation or zoning challenges would be unique to the local unit of government and issue scope. Other potential fiscal implications directly related to the zoning of mining operations would be difficult to quantify and would be considered or addressed when considering zoning approval of mining under the provisions of the bill. These include real estate prices, property taxes, and other tax and fiscal matters related to mining operations. Net fiscal impacts would vary by local unit.

The bill's provisions would not have any significant fiscal impact on the state of Michigan.

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[3] 2011 PA 131 (HB 4746): http://legislature.mi.gov/doc.aspx?2011-HB-4746