Legislative Analysis

ZONING OF MINING

Phone: (517) 373-8080
http://www.house.mi.gov/hfa

Analysis available at
http://www.legislature.mi.gov

House Bill 4875 (proposed substitute H-2)
Sponsor: Rep. Julie Alexander
Committee: Local Government and Municipal Finance
Complete to 6-21-22

SUMMARY:

House Bill 4875 would amend the Michigan Zoning Enabling Act to provide procedures and parameters for zoning approval of mining and conditions under which a mining operation may be regulated, limited, or prohibited.

The act currently 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*** would result from their extraction. (See "Background," below.) Natural resources are considered "valuable" under the act if a person, by extracting them, can receive revenue and reasonably expect to operate at a profit.

If such an ordinance is adopted and challenged, the ordinance must be found to be invalid if the person challenging it can show that there are valuable natural resources on the property, that the person or the market the person serves has a need for those resources, and that no ***very serious consequences*** would result from their extraction by mining. In determining whether very serious consequences would result, the standards in *Silva v Ada Township*, 416 Mich 153 (1982),[1] must be applied, and all of the following factors may be considered, if applicable:

- The relationship of extraction and associated activities with existing land uses.
- The impact on existing land uses near the property.
- Based on credible evidence, the impact on property values near the property and along the proposed hauling route serving the property.
- The impact on pedestrian and traffic safety near the property and along the proposed hauling route.
- The impact on other identifiable health, safety, and welfare interests in the ***local unit of government***.
- The overall public interest in the specific extraction.

Local unit of government means a city, township, village, or county.

These provisions do not limit a local unit of government's reasonable regulation of hours of operation, blasting hours, noise levels, dust control measures, and traffic as long as the regulations are not preempted by Part 632 of the Natural Resources and Environmental Protection Act (NREPA) and are reasonable in accommodating customary mining operations.

The bill would additionally provide that, notwithstanding anything to the contrary in the act or other law, a local unit of government may by ordinance or permit action prevent a mining operation if the property on which the mining will occur is a ***facility*** or is located within one

[1] See https://casetext.com/case/silva-v-ada-twp/ for the text of the decision. See **Background**, below, for further discussion of the *Silva* decision.

mile of a facility, regardless of whether or not corrective action or response activities have been completed at the facility.

> ***Facility*** would mean, as defined in Part 201 of NREPA, any area, place, parcel or parcels of property, or portion of a parcel of property where a hazardous substance in excess of the concentrations that satisfy the cleanup criteria for unrestricted residential use has been released, deposited, disposed of, or otherwise comes to be located. ***Facility*** would not include any area, place, parcel or parcels of property, or portion of a parcel of property where any of the following conditions are satisfied:
>
> - Site-specific criteria that have been approved by the Department of Environment, Great Lakes, and Energy for application at the area, place, parcel of property, or portion of a parcel of property are met or satisfied, and hazardous substances at the area, place, or property that are not addressed by site-specific criteria satisfy the cleanup criteria for unrestricted residential use.
> - Hazardous substances in concentrations above unrestricted residential cleanup criteria are present due only to the placement, storage, or use of beneficial use by-products or inert materials at the area, place, or property in compliance with Part 115 of NREPA.
> - The property has been lawfully split, subdivided, or divided from a facility and does not contain hazardous substances in excess of concentrations that satisfy the cleanup criteria for unrestricted residential use.
> - Natural attenuation or other natural processes have reduced concentrations of hazardous substances to levels at or below the cleanup criteria for unrestricted residential use.
> - Response activities have been completed under the federal Comprehensive Environmental Response, Compensation, and Liability Act or Part 201 of NREPA that satisfy the cleanup criteria for unrestricted residential use. [**Note**: While this exception is part of the definition of the term "facility" in Part 201 of NREPA, House Bill 4875 appears to eliminate it for purposes of that bill.]
> - Corrective action has been completed under the federal Resource Conservation and Recovery Act or Part 111 or 213 of NREPA that satisfies the cleanup criteria for unrestricted residential use. [**Note**: While this exception is part of the definition of the term "facility" in NREPA, House Bill 4875 appears to eliminate it for purposes of that bill.]

Where the law currently provides that these provisions do not limit a local unit of government's reasonable regulation of hours of operation, blasting hours, noise levels, dust control measures, and traffic, the bill would add that they also do not limit a local unit of government's reasonable regulation of vibration levels, postextraction reclamation (including security for completion of reclamation), or other local matters. The requirements that such local regulations be reasonable in accommodating customary mining operations and not be preempted by Part 632 of NREPA would still apply.

Zoning approvals

The bill would require a local unit of government to make a final decision on an application for zoning approval for a mining operation by not more than one year after receiving a complete application. An application would be considered complete if it contains all of the materials specified in the local government's ordinance governing the application. An application would also be considered complete if the local unit of government does not notify the applicant in

writing of any deficiencies in the application within 90 days after receiving it. The time periods specified above (one year for the final decision, 90 days to notify an applicant of application deficiencies) could be extended by written agreement.

For an existing mining operation that has received zoning approval, the local unit of government would have to make a final decision on an application for expansion of the mining operation within 90 days within receiving a complete application as long as all of the following conditions were met:

- The property is not in a residential zoning district.
- The application does not propose a new haul route.
- The property is not a facility and is not located within one mile of a facility, as described above.

A zoning approval for a mining operation would be valid for the life of the mine as specified in the zoning approval as long as the mine operator complies with the conditions of approval imposed by the local unit of government and applicable state and federal laws and rules.

After approval of an application, the local unit of government could conduct a periodic compliance review of the mining operations and related operations. If authorized by ordinance, this review could include site inspections, inspection of documents, and requirements for the mining operator to submit information to the local unit of government. A mining operator's response to a compliance review would not be considered to be an application for a new approval to operate.

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),[2] 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[3] 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.

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.[4] It is current law, as described above.

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.

Legislative Analyst: Holly Kuhn
Fiscal Analyst: Ben Gielczyk

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.

[2] See http://publicdocs.courts.mi.gov/OPINIONS/FINAL/SCT/20100715_S136680_114_kyser-op.pdf
[3] *City of North Muskegon v Miller*, 249 Mich 52 (1929). See https://casetext.com/case/city-of-north-muskegon-v-miller
[4] 2011 PA 113 (HB 4746): http://legislature.mi.gov/doc.aspx?2011-HB-4746