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**32<sup>nd</sup> Judicial Circuit  
Court**

# Fax

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**Phone:** **Date:** April 7, 2011

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**Re:** (Houghton Cases)  
Charter Twp. of Portage v VVQ Land, et al  
File No. 10-14647 CH and  
  
Grzelak & Betterly, v VVQ Land, et al  
File No. 10-14635 CE

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**CC:**

The Opinion of the Court Regarding "Exclusionary Zoning" is being sent via fax and first class mail.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF HOUGHTON

THE CHARTER TOWNSHIP OF  
PORTAGE, a Michigan Municipal  
Corporation,

Plaintiff,

v

File No. 10-14647 CII

VVQ LAND HOLDINGS, LLC,  
a Michigan limited liability company, and  
THOMAS J. MOYLE, JR., INCORPORATED,  
d/b/a VALLEY VIEW QUARRY, a Michigan  
Corporation,

OPINION OF THE COURT REGARDING  
"EXCLUSIONARY ZONING"

Defendants.

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KEVIN GRZELAK, EMILY BETTERLY,  
And VICTOR BETTERLY,

Plaintiffs,

File No. 10-14635 CE

v

VVQ LAND HOLDINGS, LLC, a Michigan  
limited liability company, and THOMAS J.  
MOYLE, JR., INCORPORATED, d/b/a  
VALLEY VIEW QUARRY, a Michigan  
Corporation,

Defendants.

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On February 14 this court heard oral argument and rendered a bench opinion regarding most of the issues raised about the propriety of Defendant Moyle's (VVQ Land Holdings,

Opinion  
Page 2

LLC) operation of Valley View Quarry in Section 15 of Portage Township in violation of the Portage Township Zoning Ordinance. (Plaintiffs Betterly and Grzolak have collectively been referred to as "Resident Plaintiffs". Plaintiff Portage Township has been referred to as such, or as "The Township".)

Defendant Moyle contends, however, that even if the quarry is a zoning violation it must still be allowed because Portage Township has engaged in "Exclusionary Zoning" prohibited by law. The court held open this issue for further discovery and briefing. The parties' briefs have ultimately been received last Wednesday, March 30, 2011.

Michigan Law (formerly MCL 125.297a, now 125.3207) states:

"A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a local unit of government in the presence of a demonstrated need for that land use within either that local unit of government or the surrounding area within the state, unless a location within the local unit of government does not exist where the use may be appropriately located or the use is unlawful."

Of course, all parties recognize that the Portage Township Zoning Ordinance allows for gravel extraction in the Farm-Forestry District by special use permit. The majority of the acreage of Portage Township is in the Farm-Forestry District. Therefore, the ordinance is not facially exclusionary in violation of law.

However, courts have recognized that ordinances which in literal terms do not violate this statute may nonetheless be exclusionary in effect. This might well occur in circumstances where

Opinion  
Page 3

a land use which appears to be available by special use permit in a given area cannot possibly be developed in that area of the municipality for reasons of topography or otherwise. If a facially permitted use is a practical impossibility in the areas chosen for it, the permission of that land use is little more than a ruse and the ordinance is considered to violate the statute. Landon Holdings, Inc. v Grattan Twp., 257 Mich App 154,168; 667 NW2d 93 (2003).

However, the prohibition of exclusionary zoning by a municipality remains a very tightly interpreted law. If it were otherwise, courts would be constrained to become “superzoning commissions”, effectively substituting the judgment of a trial judge in place of the elected representatives of the municipality who are properly charged with performing this legislative function. Our Supreme Court has long admonished judges to resist the invitation of disgruntled developers to engage in the weighing of alternative land use values or other such discretionary functions of the municipality in the zoning field. Brae Burn, Inc. v Bloomfield Hills, 350 Mich 425, 430, 86 NW2d 166 (1957); Kropf v Sterling Heights, 391 Mich 139, 161, 215 NW2d 179 (1974); Kyser v Kasson Twp., 486 Mich 514, 786 NW2d 543 (2010).

In order to avoid such a judicial invasion of the legislative function, the Michigan Supreme Court has devised an analytical approach which requires the developer prove four things:

- (1) That the challenged ordinance has the effect of totally prohibiting the establishment of the land use sought within the [township];
- (2) There is a demonstrated need for the particular land use within either that municipality or the surrounding area;
- (3) A location exists within the municipality where the use would be appropriate;

Opinion  
Page 4

(4) The use would otherwise be lawful.

Adams Outdoor Advertising, Inc. v City of Holland, 463 Mich 675, 684, 625 NW2d 377 (2001). See also Houdek v Centerville Twp., 276 Mich App 568, 575, 741 NW2d 587 (2007).

#### Total Exclusion of Land Use

Regarding the first element, it must be proven that exclusion of the land use within the township is “total” and absolute. Kropf, supra at 155.

According to witnesses there are apparently three principal sources of gravel or aggregate: gravelly soils with sufficient concentration of rock at or near the surface, “poor rock” piles which are the leftovers from copper mining days, and quarrying igneous rock from basalt outcroppings or otherwise accessible strata.

With regard to gravel availability, the Township’s expert, Bruce Peterson, a soil scientist by training and experience as well as the current township supervisor, testified that there is a high probability of quality gravel sources in several sections of Portage Township which are not within the Copper Country State Forest yet are properly zoned for gravel extraction, at least some of which would appear to be reasonably accessible. (Peterson Dep pp 37-43) All parties’ witnesses acknowledge that there seems to be no dearth of gravelly soils in Portage Township and adjacent areas. The question is quality for economic production of aggregate. Moyle’s expert, Dr. Stan Vitton, in a report dated March 17, 2011 indicates that “the potential for economically

Opinion  
Page 5

viable sand and gravel potential for Portage Township is limited.” (Vitton report pp 16, though a good glacial outwash deposit can produce good quality aggregates, Id. p 14). Bruce Peterson, however, on deposition testifies that even the most conservative predictions show good availability of gravel and aggregate sources. As the Township points out in its brief, there are at least three sand and gravel pits now operating within five miles of Portage Township (Twp. Brief pp 4-5), implying that the ample gravelly soils within the Township may likewise be productive.

Again, defendant Moyle, through its expert, Dr. Stan Vitton, maintains that what Moyle is doing in Section 15 in violation of the ordinance is qualitatively different, an entirely different order of magnitude, from operation of a simple gravel pit. Of course, Moyle is quarrying igneous rock from a surface rock face. This involves blasting and, of course crushing, to develop a high quality aggregate. Dr. Vitton maintains that this is the only available location in Portage Township, and also maintains that the other commonly used source, poor rock, is practically exhausted in the Township. (Vitton Report p 16)

His point, however, underscores the real issue involving the question of a total exclusion of a land use through zoning. Does every municipality have a legal obligation to zone for not just gravel, but a particularly beneficial source of gravel, within its boundaries? Is every township required to allow a basalt quarry operation if there is such an outcropping of igneous rock at a location in the township? One would think not, but the question implicates the second element of the legal analysis; that is, a demonstrated public need.

Opinion  
Page 6

Demonstrated Need

Appellate decisions provide guidance in the interpretation of the statutory requirement of a ....“demonstrated need for that land use within either that local unit of government or the surrounding area.....” MCL 125.3207.

The need for a resource or particular land use must relate to the public need of the residents of the area, not simply to the developers’ private economic self-interest. Adams Outdoor Advertising, Inc. v City of Holland, supra; DF Land Development v Twp. of Ann Arbor, supra. Further, the public need is not equivalent to economic demand, in the sense that the public “needs” cheaper imported goods from China when American manufacturers could supply the same goods, if not fulfill the same economic demand. Houdek v Centerville Twp., supra.

Also, need is interpreted not as a local or township matter, but on a regional basis. Thus, if needs are otherwise served or can be served by such land uses in close geographical proximity to the township, this element of the statutory prohibition is not met and the ordinance is not considered exclusionary even if a particular land use is not extant in the particular township. Freemont Twp. v Greenfield, 132 Mich App 199, 347 NW2d 204 (1984), (other junk yards within 17 miles); DF Land Development, Supra.

Clearly, there are gravel pit operations within five miles of Portage Township (some perhaps even in the township, referred to as Harris and DP) that are keeping up with demand. Poor rock piles abound in adjacent Adams Township, which according to testimony is not zoned, and

Opinion  
Page 7

many other areas within close proximity to Portage Township in what we know as the Copper Country. (Peterson Dep p 33,51,76,79) (Vitton Dep p 92)

Of course, Dr. Vitton asserts that aggregate from such sources as gravel (unless it is outwash) and poor rock do not meet the quality standards of quarried igneous aggregate. He maintains that such higher quality material will be necessary if the state imposes, as anticipated, higher standards in MDOT specifications for road base materials, or concrete or even asphalt production, in future years. He says there are no other locations currently supplying that quality aggregate in Houghton County. (Vitton Dep p 18).

There is currently no legal requirement, however, that each individual township legislate its land use by perceiving future regional and state needs for natural resources. The statute in question here certainly does not do so. Furthermore, Dr. Vitton acknowledges that there are basalt outcroppings along the entire basalt corridor running along the spine of the Keweenaw Peninsula at various locations, some as far as twenty miles south in the Twin Lakes area of Elm River Township and according to witness Dennis Jouppe, some ten miles north of Portage Township in the vicinity of the Houghton County Airport. (See Vitton Depp pp 106-108; Jouppe Dep pp 18-20). Although not all basalt is created equal for purposes of high quality aggregate according to Dr. Vitton, he has no reason to think other such outcroppings would produce lower quality aggregate. (Vitton Dep p 108)

According to the 2010 Census data just released, Houghton County is one of only



Opinion  
Page 8

three counties in the Upper Peninsula (with Baraga and Marquette) to have gained population in the past decade, although just by 1.7%. Still, the Plaintiff Residents present a number of witnesses who are in or knowledgeable about the industry to support Plaintiff's contention that the market in Houghton County is and has always been stable, almost all aggregate types are produced or could be produced, and no shortages are anticipated in the foreseeable future. (Plaintiff's Brief p 9). Defendant Moyle's expert, Dr. Vitton, really does not contradict this point. (Vitton Dep p 100).

Defendant Moyle has not demonstrated that the public need supports allowing its quarry operation in the area zoned Rural-Residential by Portage Township.

#### Appropriate Use

In addition to total exclusion on a de facto basis, and demonstrated regional unmet need, it also must be shown that the use is appropriate for the particular location and is otherwise lawful. Houdek, supra, at 574-575.

In this regard, Defendant Moyle has quite clearly shown that its quarry operation in Section 15 of the Township is appropriate to that particular parcel of land. It features a basalt outcropping of igneous rock particularly valuable for crushing to aggregate for high quality road building as well as rip-rap for shoreline erosion protection, according to Dr. Vitton.

This quarrying may well be the highest and best use of that particular parcel. Unfortunately for Moyle, this court does not serve on either the Portage Township Board or its Planning Commission, and thus has no role to play or thing to say about the highest and

Opinion  
Page 9

best use of the property. Indeed, the Township Board has zoned the area Rural-Residential, prohibiting such activities as defendant's quarry in this transitional area between more intensely developed residential areas and the undeveloped Farm-Forest District. In other words, given the fact that the Ordinance does not totally exclude aggregate production in the Township, and public unmet need does not require production of aggregate in Section 15, this Court may not nonetheless engage in the legislative function of dictating that the quarry operation must be allowed simply because the particular parcel is suitable for it.

#### Lawfulness

The fourth element required to be considered is whether the use is lawful, but for the zoning prohibition. This issue is not hotly contested in this case since the quarrying operations have existed and have apparently been properly permitted by the State.

#### Summary Conclusions

- A. The Portage Township Zoning Ordinance neither excludes aggregate production (gravel pit) on its face nor does it exclude it in practical effect, since gravelly soils exist in zones allowing for gravel production and not restricted by state-protected ownership.
- B. The public need for aggregate is currently met in Portage Township and its environs,
- C. The potential future public need for yet higher quality aggregate (such as

Opinion  
Page 10

now produced at Valley View Quarry) may potentially be met by tapping other basalt outcroppings in the Copper Country. Portage Township is not legally required to anticipate and fulfill future possible needs in Section 15, a Rural-Residential area.

D. But for current zoning, and importantly, nearby residents' peace and quiet, the Valley View Quarry operation is an appropriate use in Section 15, but this Court may not delve into the qualitative analysis of highest and best use or propriety of allowing it in spite of the general neighborhood. That is a legislative function of the Township Board.

Therefore, the Defendant Moyle has not met its burden of proof and on the evidence presented there is no genuine issue: The Portage Township Zoning Ordinance does not violate MCL 125.3207.

Fundamentally, Moyle developed and operated a quarry and crushing business in an area where that activity was prohibited by zoning. It apparently did so in reliance upon the heritage of this area where extracting resources has been encouraged for both public and private good, and as a result of a former township supervisor who, in the public interest tried to mediate difficult tensions between the township's largest private employer and the complaints of neighborhood residents. Although there was no evidence that former Supervisor Bingham ever gave Moyle formal approval, in the sense of issuing a zoning permit, his efforts to ameliorate problems may have given the impression, at least, of condoning Moyle's industrial quarry in violation of zoning.

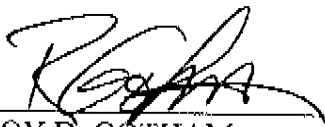
Opinion  
Page 11

Moyle has now defended its operation by attacking the zoning ordinance and process in every conceivable legal way, with literally thousands of pages of briefs and witness deposition transcripts.

But Moyle's valiant effort fails, because it appears that the ordinance is the law and is indeed valid, both on its face and as applied in this case. This Court cannot condone its violation.

The Court thus confirms the conclusions reached in the bench decision in the Houghton County Circuit Court on February 14, 2011. Summary disposition is granted in favor of the Plaintiff Residents and The Township against Defendant Moyle. Defendant Moyle will be enjoined to cease and desist its operation of Valley View Quarry in Section 15, (and other areas zoned Rural-Residential) of Portage Township.

DATED: April 6, 2011

  
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HON. ROY D. GOTHAM  
Circuit Judge – 32<sup>nd</sup> Circuit