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**32nd Judicial Circuit
Court**

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Pages: 5 , including this cover sheet

Phone: **Date:** April 8, 2011

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

CC:

The Addendum to 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,

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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Today (April 7) this Court belatedly received Defendant Moyle's reply brief. This brief apparently was delivered to the Houghton County Circuit Court last Monday, April 4, the deadline imposed by the Court for filing such briefs. Unfortunately, that courthouse is over one

ADDENDUM
TO THE OPINION OF THE COURT
REGARDING "EXCLUSIONARY
ZONING"

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hundred miles away and Defendant's attorney apparently failed to deliver a copy to the undersigned judge, as was required, until Thursday April 7th after the Court's opinion had already been issued.

Review of this new brief and attached exhibits, including a new Affidavit by the Defendant's expert, Dr. Vitton, necessitates this Addendum to the original opinion of the Court.

Peterson Testimony

The Defendant is tardy in only now making a Rule of Evidence (MRE 702) objection to the testimony of Bruce Peterson, the township's witness. Defendant may well have done so in its original brief, since both the Peterson deposition and the deposition of Defendant's witness (Dr. Vitton) were taken the same day, March 19.

Mr. Peterson has career-long experience as a soil scientist, particularly in the actual interpretation and use of soil surveys. (Peterson Dep p 15). Soil types in Portage Township and adjacent areas, particularly down to a depth of five feet, are relevant to this case.

The geology of Houghton County is obviously also relevant to this case. Mr. Peterson is not a geologist, did not pretend to be, and quite assiduously shield away from giving any opinions as a geologist. Indeed, Peterson was even reluctant to extrapolate from the soil surveys, recognizing their limited utility.

The belated "objection" to admissibility of Mr. Peterson's testimony is overruled. This Court can and must evaluate the relevance and significance of Peterson's testimony, both in terms of his experience and possible bias as current supervisor of Portage Township.

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Vitton Testimony, Report and New Affidavit

In his new Affidavit dated April 4, 2011, Defendant Moyle's expert, Dr. Vitton, speaks quite forcefully of the limited availability of high quality quarried aggregate and the stricter requirements (or testing) of road-building aggregates expected to be imposed in 2014.

In his new Affidavit Dr. Vitton strongly rejects the utility of most other basalt outcroppings in Houghton County for aggregate production. (Vitton Affidavit pp 6-8), despite the fact that he was reticent to offer such strong opinions on related issues in his deposition. (Vitton Depp p 26-27, 108).

Dr. Vitton powerfully shows that rock quarries producing high quality aggregate are important to all of us, including the people of Portage Township. He further demonstrates that Defendant's Valley View Quarry is the only place in Portage Township and likely one of the few places (but not the only place) in Houghton County where aggregate of that high quality can be economically produced, given existing residential and commercial development. He also indicates by this Affidavit, much more strongly than he did in deposition, that the anticipated requirement of such high quality aggregate is a mandate, not open to speculation.

These arguments are directed to the wrong tribunal. As stated in this Court's original Opinion of April 6, there is no statute which insists, nor any case law which authorizes a Court to impose, that a township zone in such a way as to anticipate a future state or federal requirement for natural resources. It may be a very good idea to do so, but that is a local legislative function, not a judicial function.

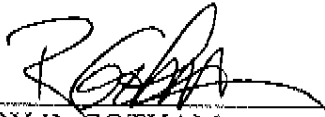
Nor is there an absolute legal requirement that a township zone for a specific type of gravel or quarry operation, producing a specific type of aggregate, even if that may be required some two years hence. If the statute in question (MCL 125.3207) regarding exclusionary zoning

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were to be interpreted so broadly, then taken to its logical conclusion no zoning ordinance would be safe unless it created a zone where “anything goes”, and everything was “doable” as a matter of practicality by virtue of favorable topography and geology.

Therefore, despite Dr. Vitton’s persuasive contentions that Portage Township should with an eye to the future allow a quarry in Section 15, this Court may not order Portage Township to do so.

DATED: April 8, 2011



HON. ROY D. GOTHAM
Circuit Judge – 32nd Circuit