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ZONING LAW AND EXTRACTIVE INDUSTRY—THE MICHIGAN EXPERIENCE

CLAN CRAWFORD, JR.*

I. INTRODUCTION

Apart from the need to recognize most existing land uses as legitimate, those who prepare zoning maps have considerable discretion in drawing district boundary lines to regulate growth and land development in the manner that they regard as appropriate. Most land uses are not so exacting in their physical location requirements as to prevent their being incorporated into a well thought out zoning plan with reasonable comfort. A troublesome exception is removal of minerals from the ground. Where the materials are known to exist, the zoning authorities must either permit extraction or attempt to prohibit it, thus shutting off a source of supply that is presumably valuable to the community. Miners do not dig for fun; they perform a necessary service. The problem is further complicated by the fact that mineral removal operations are, at least aesthetically, incompatible with many other kinds of land uses. It is primarily for these reasons that the drilling for oil, the extraction of sand and gravel, and the mining of other minerals have produced so much zoning controversy and litigation.

This article will describe the various statutes that have dealt with this problem in the State of Michigan, set forth the questions which have been settled and those which remain unresolved, and offer this author's critique of the present situation and suggestions for the future.

II. MICHIGAN APPELLATE DECISIONS AND STATUTORY PROVISIONS

In 1929, during the earliest era of zoning, the Michigan Supreme Court decided *City of North Muskegon v. Miller*.[1] The city of North Muskegon had adopted an ordinance regulating the drilling of oil wells and a zoning ordinance. It asserted both ordinances against an effort to drill an oil well on the property in question. The regula-

* Private practice, Ann Arbor, Mich., J.D., 1952, University of Michigan.

1. 249 Mich. 52, 227 N.W. 743 (1929).

tory ordinance was upheld.[2] The court stated that it applied to the property in question because of the proximity of a well producing about half the city's water supply.[3] The zoning ordinance was held void on the ground that it was confiscatory.[4] The court stated:

> The courts have particularly stressed the importance of not destroying or withholding the right to secure oil, gravel, or mineral (sic) from one's property, through zoning ordinances, unless some very serious consequences will follow therefrom.[5]

Technically the invalidation of the zoning ordinance and the foregoing comment were dictum. Nonetheless, *Miller* has become Michigan's landmark zoning case involving the extractive industries.

Certain-Teed Products Corp. v. Paris Township[6] involved a gypsum mine and plant located on a large tract of land, part of which was zoned for industrial use and the rest for agricultural use. The pertinent ordinance provided that some of the agricultural land could be used for industrial purposes if a conditional use permit was obtained. The manufacture of gypsum was one of numerous kinds of industry which required a special use permit in either district. The issues, arising from the refusal of the township to grant a conditional use permit, were many and varied.[7] The township and some of its residents were concerned about dust and vibration from the underground blasting involved, surface subsidence and truck traffic. The gypsum company pointed out that this was one of only three commercial deposits of gypsum discovered within the state of Michigan. The company also stressed that its operations would create 250 new jobs, and insisted that cost factors required

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2. *Id.* at 60, 227 N.W. at 745.
3. *Id.* at 62, 227 N.W. at 746.
4. *Id.* at 59, 227 N.W. at 745.
5. *Id.* at 57, 227 N.W. at 744.
6. 351 Mich. 434, 88 N.W.2d 705 (1958). The Michigan Court consolidated two cases involving the same parties, Certain-Teed Products Corporation, a Maryland corporation; and Paris Township, a Michigan political subdivision. In the first action, plaintiff Certain-Teed was appealing the Township Board's decision to deny Certain-Teed's application for an extension of the current industrial zone to permit the construction of a gypsum manufacturing plant and to allow the mining of gypsum as a permitted use under current zoning regulations. In the second action, Certain-Teed sought a declaratory decree permitting the company to proceed with its plant construction and a declaratory decree that the county was without authority to prevent the mining of gypsum. The company had promised to carry out its mining operations using modern procedures which would prevent injury to surface owners. The circuit court held the Township's denial of the application a legitimate exercise of the zoning authority and that the action of the Township Board was not arbitrary or capricious. The circuit court also denied the request for declaratory decree stating that the present zoning ordinance was neither unreasonable nor unconstitutional as violative of due process.
7. Seven members of the eight man court took part in this decision which consists of two opinions. The first opinion, written by Edwards, J., and concurred in by Carr, J., held: (1) that the Township Board's actions in denying the zoning application were arbitrary and capricious and the implementation of the ordinance unreasonable as the Board applied it, and (2) that declaratory relief should be granted authorizing Certain-Teed to proceed with the mining and manufacturing of gypsum under restrictions included in the

processing the gypsum at the mine head. The township involved was located several miles from the city of Grand Rapids and was just beginning to feel the pressure of suburban housing development.[8]

The opinion of Justice Edwards, upheld the requirement of a conditional use permit for gypsum manufacture and found the numerous standards for administrative decision, which were set forth in the ordinance to be adequate.[9] It also upheld, in principle, an ordinance provision permitting the extension of industrial use for a distance of 1000 feet into an agricultural zone upon special approval.[10] On the facts however, the opinion reversed the lower court saying that it appeared that township officials had buckled under political pressure and unreasonably refused the requested permit.[11] The opinion describes the hearing given the petitioner as cursory.[12]

The gypsum company had agreed to use a blasting technique to minimize shock and vibrations, to take precautions to assure that soil subsidence would not follow the mining, to install modern air pollution control devices and to protect and save harmless the water supply of neighboring property owners from either diminution or pollution.[13] It was held that the circuit court could exercise jurisdiction to assure compliance with these representations.[14]

It was further held that on the facts, the plaintiff had not established his right to extend the industrial area.[15] The court was influenced on this aspect by the admission of plaintiff that it could locate its plant and mine head entirely inside the existing industrial zone. The court left the question of extension of the industrial zoning area to determination after a reapplication and presentation of the matter on the merits.[16]

The court then addressed itself to the question of whether the zoning enabling act[17] authorized prohibition of deep mining in township zoning ordinances.[18] The trial court had ruled that the act did

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opinion. Kelly, J., concurred in the result of this opinion. The second opinion, written by Black, J., and concurred in by Dethmers, C. J., Smith and Voelker, J. J., concurred with the first holding of the first opinion. On the issue of declaratory relief, these judges denied it as improvident.

8. Certain-Teed Products Corp. v. Paris Township, 351 Mich. 434, 443, 88 N.W.2d 705, 710 (1958).

9. *Id.* at 465, 88 N.W.2d at 721.

10. *Id.*

11. *Id.* at 448, 88 N.W.2d at 712.

12. *Id.*

13. *Id.* at 442, 88 N.W.2d at 709.

14. *Id.* at 465, 88 N.W.2d at 721.

15. *Id.* at 455, 88 N.W.2d at 716.

16. *Id.*

17. MICH. COMP. LAWS ANN. § 125.271 (1967).

18. Certain-Teed Products Corp. v. Paris Township, 351 Mich. 434, 459, 88 N.W.2d 705, 718 (1958).

privide such authority.[19] Some courts have held that this activity could be restrained by zoning ordinances and others have held to the contrary,[20] but it was noted that the facts in the various situations differed with respect to the character of the area involved and the impact that the particular operation would have.[21] The court concluded that with respect to surface mining, the test is the relationship of the ordinance, under the circumstances, to the public welfare.[22] With respect to deep mining, the court held that to the extent that plaintiff could effectively mine without any interference with normal surface uses and living, a zoning prohibition would be clearly unconstitutional as not related to any public need.[23] This of course led the court to consider the prospective surface manifestations of the operation involved. On the record presented, it was determined that the claims of possible surface subsidence, threatened damage to homes through blasting and interference with wells were not valid reasons for preventing the mining, because of the ability of the court to regulate the operation to assure the plaintiff paid for any damage and to prevent activities that would amount to a nuisance.[24]

The court had more difficulty with the fact that three small buildings would be erected. They concluded however, that this was a minor variation not inconsistent with agricultural zoning.[25]

The court made the following observation:

> It is apparent that this is an industry which, if it is to exist anywhere, must exist here. We believe the public policy of the State is calculated to encourage both manufacturing and mining. . . . In the administration of our zoning laws, while we seek to protect our homes, we must likewise take into account the public interest in the encouragement of full employment and vigorous industry.[26]

This was followed by a direction instructing the trial court to reverse its decision and enter a decree conditioning plaintiff's right to mine upon performance of the representations made.[27] The trial court was also directed to retain jurisdiction and the plaintiff was warned it might lose its right to operate if its representations were not performed.[28]

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19. *Id.*
20. *Id.* at 460-61, 88 N.W.2d at 719.
21. *Id.* at 461, 88 N.W.2d at 719.
22. *Id.* at 462, 88 N.W.2d at 719.
23. *Id.*
24. *Id.* at 463, 88 N.W.2d at 720.
25. *Id.* at 464, 88 N.W.2d at 720.
26. *Id.* at 464, 88 N.W.2d at 721.
27. *Id.* at 465, 88 N.W.2d at 721.
28. *Id.*

The majority opinion agreed that the record failed to show any dire community need which would result in some very serious consequence unless the ordinance were enforced against plaintiff.[29] However, the opinion indicated that the case was not yet ready for the declaratory relief proposed by Justice Edwards.[30] The opinion made a frequently quoted statement:

> Here we have no mere zoning case. Its impact without doubt will be felt for years to come in great areas of Michigan where zoning is as yet unknown.[31]

The majority thought the case should be decided upon nuisance grounds and that more pleadings and proofs were necessary.[32] It was noted that the courts were being asked to approve an experiment with new techniques and methods.

In result, the difference between the justices revolved around whether or not a decree attempting to permit the operation while, at the same time, imposing necessary regulation, should be drafted immediately or after further testimony.

It is clear that all felt that it was not appropriate to prevent the mining and manufacturing operations as long as the representations with respect to nuisance and other aspects were performed.

Shortly before *Paris*, the Michigan Supreme Court had decided *Bloomfield Township v. Beardslee.*[33] In that case the operator of a gravel pit, anticipating the exhaustion of the deposit he was working, bought some land nearby and attempted to expand operations into it. Up to the time of trial, only 1000 yards of gravel had been removed from the property in question and all crushing, screening and stockpiling for sale had been conducted on the site of the old pit. The area was one which was in the process of development as expensive single family homes. The old pit had been operated as a nonconforming use and there was no question as to the right of the owner to continue there. Three of the members held that the zoning ordinance was valid as to the property because of the character of the neighborhood and the fact that the land had substantial value for residential uses.[34] They also held that because of the small scale of the operations, no lawful nonconfroming use had been established prior to adoption of the zoning ordinance.[35]

However, four other justices disagreed. Citing to *Miller*,[36] they

29. *Id.* at 467, 88 N.W.2d at 722.
30. *Id.*
31. *Id.*
32. *Id.* at 468-69, 88 N.W.2d at 723.
33. 349 Mich. 296, 84 N.W.2d 537 (1957).
34. *Id.* at 301, 84 N.W.2d at 539.
35. *Id.* at 309, 84 N.W.2d at 543.
36. City of North Muskegon v. Miller, 249 Mich. 52, 227 N.W. 743 (1929).

expressed their concern over the use of zoning ordinances to prevent mineral removal.[37] They held that the operation should be enjoined purely on public nuisance grounds in view of the character of the neighborhood.[38]

In *Beardslee* there was no clear majority, but it does appear that as a result of Michigan's first three cases the "very serious consequence" doctrine became well established. There is, however, little guidance in these decisions as to what constitutes a "very serious consequence".

The city of Bloomfield Hills is one of America's most famous suburbs. Most of it is occupied by the large and expensive homes of "captains of the automobile" and other industries on very large lots fronting on quiet residential streets. The rolling, partly wooded countryside is in marked contrast with the flat lands which comprise so much of the Detroit suburban fringe. In this setting arose the case of *Buckley v. Bloomfield Hills,*[39] where the city attempted to prevent the removal of sand and dirt to lower a hill to a level of 2 feet above the adjacent road. A suit by the owner and the sand company was dismissed by the trial court.[41] The city maintained that the plaintiffs were carrying on a commercial sand and gravel business in a residential zone.[42] The Michigan Supreme Court agreed that if such were the primary object, the purpose and effect of this activity would violate the zoning ordinance.[43] However, the plaintiffs asserted that the changing of the contour of the soil was necessary to make the land suitable for the construction of dwellings.[44] They insisted that they were doing nothing more than preparing the land for uses allowed by the ordinance.[45] On the record, the court agreed.[46] It held that the transformation of a Bloomfield hill to a Bloomfield flat did not violate the ordinance and then went on to say that:

> No possible relationship to public health, safety, morals or the general welfare can be conceived for a regulation under the police power that the land zoned for residential purposes shall be kept hilly rather than made flat. In the absence of testimony establishing the relationship an ordinance so requiring would necessarily be held unreasonable and invalid.[47]

37. Bloomfield Township v. Beardslee, 349 Mich. 296, 310, 84 N.W.2d 537, 544 (Black, J., Concurring).
38. *Id.* at 310, 311, 84 N.W.2d at 544.
39. 343 Mich. 83, 72 N.W.2d 210 (1955).
40. *Id.* at 84-85, 72 N.W.2d at 211.
41. *Id.* at 85, 72 N.W.2d at 211.
42. *Id.* at 85, 72 N.W.2d at 212.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 86, 72 N.W.2d at 212.
47. *Id.*

Recognizing that any other construction would render the ordinance invalid, the court held that the ordinance did not prevent removal.[48] It also said that an unduly protracted operation, with removal geared to market demand, would constitute a gravel business.[49] The court remanded the matter to the trial court with directions to enter a decree fixing a reasonable time limit and restricting the area of removal operations to avoid any dangerous condition. This decision was unanimous.[50]

The foregoing cases constitute the total message from the Supreme Court of Michigan with respect to the application of zoning laws to mineral removal operations. However, Michigan's intermediate court, the Court of Appeals, was established in 1964 and has dealt with the problem on several occasions.

In *Bristow v. Woodhaven*,[51] the Court of Appeals established Michigan's celebrated "preferred use" doctrine under which the presumption of validity of a zoning ordinance was held to disappear when the complaining property owner established that the zoning ordinance excluded from the community his proposed use of the property in question and that use was regarded by the courts as a preferred use.[52] Preferred uses were rather vaguely defined as certain uses generally recognized by constitution, statute, or court decision as being valuable and necessary to the general welfare.[53] *Bristow* involved a mobile home park. An interesting aspect of this decision is that *Miller*[54] and *Paris*[55] were among the decisions most heavily relied upon to establish the doctrine.

A number of cases were decided by the court of appeals on the basis of the "preferred use" doctrine announced in *Bristow*. The only one that bears on our subject is *Jamens v. Shelby Township*.[56] That case involved a township zoning ordinance and a landfill regulation ordinance which were upheld to prevent the plaintiffs from using their land for the removal of fill sand on the theory that the record did not show evidence to overturn the presumption of validity of a municipal ordinance.[57] The facts indicated that, although there were some uses nearby that were not conducive to the single family residential use for which the property was zoned, there was a new residential area immediately to the south of the site. Two judges signed the majority opinion, which did not refer to the "preferred use" doc-

48. *Id.*
49. *Id.*
50. *Id.* at 87, 72 N.W.2d at 212.
51. 35 Mich. App. 205, 192 N.W.2d 322, *denying appeal to*, 386 Mich. 764 (1971).
52. *Id.* at ——, 192 N.W.2d at 328.
53. *Id.* at ——, 192 N.W.2d at 325.
54. 249 Mich. 52, 227 N.W. 743 (1929).
55. Certain-Teed Products Corp. v. Paris Township, 351 Mich. 434, 88 N.W.2d 705 (1958).
56. 41 Mich. App. 461, 200 N.W.2d 479 (1972).
57. *Id.* at ——, 200 N.W.2d at 485.

trine. However, a concurring opinion, did discuss *Bristow*,[58] *Miller*,[59] and *Paris*,[60] and pointed out that the record did not show how much sand existed on the property, what need there was for the sand, how it would be removed so as not to injure nearby property, or how long the mining would continue, and that, therefore, the existence of a preferred use had not been established.[61]

The "preferred use" doctrine, born in the *Bristow*[62] decision of July, 1971, passed away suddenly in February, 1974 when the Michigan Supreme Court decided *Kropf v. Sterling Heights*.[63] That decision, which did not involve mineral removal, held that the "preferred use" doctrine was an incorrect view of the law. However, the court did not criticize *Paris*[64] or *Miller*[65] and it should be kept in mind that the "preferred use" doctrine involved questions of burden of proof and the nature of a presumption, rather than sustantive law.

Michigan,[66] like many other states,[67] permits by statute the continuation, but not the expansion of nonconforming uses lawfully begun prior to the adoption of the zoning ordinance. In the eyes of many people, open pit mining operations frustrate these rules because as the operation continues, the hole gets bigger, and it is easy to regard this as expansion. The Michigan Court of Appeals tackled this problem in *Fredal v. Forster*.[68] The case involved approximately 160 acres of land that had been used for the mining of sand and gravel. While parts of the property had been worked rather extensively and continuously for a number of years, other portions of the land had been worked only sporadically, and approximately a quarter of the property had not been used at all.[69] Although earlier zoning had permitted mining on this property, after the construction of a subdivision nearby the zoning had been changed.[70] The case involved the extent of the right to continue the mining operation.

The trial court found abandonment of the nonconforming use as to most of the property and that continued operation constituted

58. 35 Mich. App. 205, 192 N.W.2d 322 (1971).
59. 249 Mich. 52, 227 N.W. 743 (1929).
60. 351 Mich. 434, 88 N.W.2d 705 (1958).
61. Jamens v. Shelby Township, 41 Mich. App. 461, 200 N.W.2d 479, 487 (1972).
62. 35 Mich. App. 205, 192 N.W.2d 322 (1971).
63. 391 Mich. 139, 215 N.W.2d 179 (1974).
64. 351 Mich. 434, 88 N.W.2d 705 (1958).
65. 249 Mich. 52, 227 N.W. 743 (1929).
66. MICH. COMP. LAWS ANN. §§ 125.216, 125.286, 125.583(a) (1967). *See generally* 1 ANDERSON, AMERICAN LAW OF ZONING §§ 6.01-6.71 (1968).
67. *E.g.*, N.D. CENT. CODE § 11-33-13 (1960) (authorizing as lawful the continuing use of land existing at the time of adoption of an ordinance), and §§ 40-05-01(34), 40-05-02(24) (dealing with the public welfare power of cities which authorizes them to remove hazardous structures. *See also* City of Minot v. Fisher, 212 N.W.2d 837 (1973).
68. 9 Mich. App. 215, 156 N.W.2d 606 (1968).
69. *Id.* at ——, 156 N.W.2d at 609.
70. *Id.* at ——, 156 N.W.2d at 610.

a public nuisance because of noise, dust and smell.[71] With respect to the southern part of the property, it found that a lawful nonconforming use existed.[72]

The court of appeals first determined that the removal of 50,000 cubic yards of material over a 3 year period was a "substantial" operation establishing a vested interest in the continuation of a nonconforming use.[73] It went on to hold that a nonconforming use, once established, is not lost merely by nonuse.[74]

The Court then faced the problem of the extent of the right of nonconforming use,[75] citing earlier Michigan cases[76] holding that an entire parcel may not be reserved for a nonconforming use by beginning such a use on merely a portion thereof, and that municipalities have no power to limit the time of duration of a nonconforming use. It also threw in the complication of the rule of *Miller* that mineral removal should not be prohibited except where some very serious consequence will result.[77]

In order to resolve the controversy, it was ruled that the right to continue a nonconforming use in this kind of case entitles the owner to continue working existing holes no matter how large they get, and that the prohibition against expansion prevents the digging of any new holes in areas not previously excavated.[78] Thus, the value of the right depends upon the geology of the area. If there are continuous deposits of valuable material, work may go on until the entire property is used. However, if the materials turn out to be scattered, operations must cease when existing holes are fully worked out.

The court tempered its decision with a ruling that a nonconforming use of this type is terminable when, because of development of the surrounding area, it becomes an unreasonable interference with the rights of others and, hence, a nuisance.[79]

Early in 1970, mainly through the efforts of young people in colleges and universities around the country, America suddenly made an amazing discovery—the environment. As a result, new considerations have been added to the decision making process in most land use matters. The Michigan legislature adopted an environmental protection act,[80] which gave virtually everyone standing to sue virtually everyone else to prevent pollution, destruction or impairment of natural resources.[81] It also directed all administrative agencies to

71. *Id.*
72. *Id.*
73. *Id.* at ——, 156 N.W.2d at 613-14.
74. *Id.* at ——, 156 N.W.2d at 614.
75. *Id.*
76. *Id.*
77. *Id.* at ——, 156 N.W.2d at 616.
78. *Id.*
79. *Id.*
80. MICH. COMP. LAWS ANN. § 691.1201 (Supp. 1974).
81. *Id.* § 691.1202.

consider the environmental aspects in matters pending before them.[82]

The only two zoning cases involving mineral removal decided since the great discovery are *Jamens*,[83] and *Lyon Sand and Gravel Co. v. Oakland Township*.[84] In the latter, plaintiff was prohibited by both a zoning ordinance and a mineral removal ordinance from extracting sand and gravel from the property involved. Plaintiff attacked both ordinances in the trial court and won. Plaintiff established that the township had a population of 2500 which was expected to grow to 5400 by 1980; that the area in which the land is located is used for farms, residences, and other gravel pits; that there were about 5 million tons of gravel on the property involved which was required for road construction and building; that limitation on the availability thereof would hamper commercial and residential development; that it would take 10 years to remove the gravel; that plaintiff would use modern methods to substantially eliminate noise and dust and would create an artificial berm to visually screen the excavation; that after the mining was completed a sizable lake, protecting the surrounding water table, would result; and that homes would be built.[85] The court cited *Miller*[86] and *Paris*[87] and declared the zoning ordinance to be "'unreasonable and confiscatory as applied."[88] The regulatory ordinance had been set aside by the trial court for lack of administrative standards necessary to determine whether to grant or deny a permit. The court of appeals concurred and also took exception to a depth limit provision which, it said, would prevent the removal of any substantial amount of gravel. It also found that performance standards regarding noise would have prevented mining and could not be sustained.

Lyon is disappointing in that the decision rests entirely upon traditional grounds and arguments and the court does not discuss the environmental aspects of mineral removal operations, although it might well have done so because of the fact that the environment was so commonly in the news and talked about at that time. However, after reiterating that public policy favors permitting the taking of minerals from the ground it stated: ". . .outright prohibition of the taking is in fact confiscation rather than conservation."[89]

The foregoing are all of the zoning cases involving mineral removal which have been decided by Michigan's Appellate Courts. Before analyzing the state of the law, it should be noted that in addition

82. *Id.* § 691.1205(2).
83. 41 Mich. App. 461, 200 N.W.2d 479.
84. 33 Mich. App. 614, 190 N.W.2d 354 (1971).
85. *Id.* at ——, 190 N.W.2d at 355-56.
86. 249 Mich. 52, 227 N.W. 743 (1929).
87. 351 Mich. 434, 88 N.W.2d 705 (1958).
88. *Id.* at 617, 190 N.W.2d at 356.
89. 33 Mich. App. 614, 616, 190 N.W.2d 354, 356 (1971).

to the environmental protection act[90] previously mentioned, zoning enabling acts specifically prohibit counties and townships from regulating the location of oil or gas wells, leaving this to a state official.[91] Cities and villages are not so restricted.[92]

III. SUMMARY OF ESTABLISHED LAW

From *Miller*,[93] *Paris*[94] and *Lyon*[95] it appears established that zoning cases involving mineral removal will be treated in a slightly different manner than the ordinary zoning case with respect to the question of what the record must show to sustain or invalidate a restriction on removal. In view of the recent rise and fall of the preferred use doctrine, it is a bit dangerous to speak broadly in terms of presumption or burden of proof. However, *Miller* and *Paris* were decided long before the preferred use doctrine was formulated and *Lyon* was decided a few weeks before the doctrine was announced in *Bristow* and by a different panel of judges. It seems clear that if the record shows a public need for the minerals sought to be removed, it must also show some serious consequence if a restriction on removal is to be sustained.

In *Miller*, a potential hazard to an established municipal water supply was held to justify refusal to permit an oil well.[96] In *Paris*, the trial court was directed to permit mining only under such terms as would assure that the miner made good on promises to avoid significant dust problems and undue vibration from blasting and to mine in such a manner as to prevent later surface subsidence.[97] The miner was also required to protect and save harmless the water supply of neighboring owners from either diminution or pollution.

Buckley[98] permitted removal on he ground that a property owner has a right to contour his land to make it more desirable, in his own eyes, for uses permitted under the zoning ordinance, thus creating a new and separate theory under which a miner may sustain his operations where the mere leveling of hills or creation of lakes and ponds is involved.[99] Although the court did not rule out the possibility of preventing a lowering of the grade if it could be established that the maintenance of the existing grade had some substantial relationship to the public health, safety and welfare, the justices, apparently in recognition of the fact that land grades are often changed very substantially without any great harm resulting, said that they

90. MICH. COMP. LAWS ANN. § 691.1201 (Supp. 1974).
91. *Id.* §§ 125.201, 125.271.
92. *See id.* § 125.31 *et seq.*
93. 249 Mich. 52, 227 N.W. 743 (1929).
94. 351 Mich. 434, 88 N.W.2d 705 (1958).
95. 33 Mich. App. 614, 190 N.W.2d 354 (1971).
96. 249 Mich. 52, 62, 227 N.W. 743, 746 (1929).
97. 351 Mich. 434, 465, 88 N.W.2d 705, 721.
98. 343 Mich. 83, 72 N.W.2d 210 (1955).
99. *See id.*

could not conceive of any such relationship without proof.[100] *Buckley* also ruled that removal operations to change grade may be regulated to prevent leaving the property in a dangerous condition and to keep a purported land balancing act from becoming a mere guise for a commercial gravel pit in a residential zone.[101]

With respect to the right to continue lawful nonconforming uses, most of the law centers around requirements for establishing the right. *Beardslee*[102] holds that the sporadic removal of 1,000 yards of gravel is not enough.[103] *Fredal*[104] holds that 50,000 yards is enough.[105] Presumably the boundary lies somewhere in between. Perhaps it also depends upon the other circumstances of the case.

With respect to the question of what constitutes expansion and what amounts to mere continuation of a lawful non-conforming use, we have only the *Fredal* decision to guide us. The notion that the right to go on and on depends upon the quirks of glacial geology seems a crude basis for a rule of law. Certainly, such a rule would tempt the operator to dig through unusable materials in the hopes of reaching valuable minerals farther on, thus wasting substantial quantities of energy and creating the kinds of nuisances that lead to regulation of open pit mininig in the first place.

IV. THE UNDECIDED QUESTIONS—SOME SUGGESTIONS FOR RESOLUTION

The frontier between continuing nonconforming use and unlawful expansion might be resolved by either the legislature or the courts by setting an area or volume limit to continued operation, based on the extent of the previous operation, once a zoning ordinance forbidding mining takes effect. Possibly, if a municipality incorporated such a rule in its zoning ordinance, the courts would uphold it. However, it may be a waste of effort to attempt to establish any limit of this sort, because when the limit is reached, if valuable deposits remain, the owner will probably attack the reasonableness of the zoning ordinance either on the *Buckley* plan, where he maintains that he is merely preparing the land for uses permitted under the ordinance, or under the *Miller-Paris* doctrine where he will show a need for the minerals and claim that no serious consequence will result from removal.

Cases arising under the *Buckley* doctrine may present a question of what constitutes mere mineral removal and what constitutes a

100. *Id.* at 86, 72 N.W.2d at 212.
101. *Id.* at 85-86, 72 N.W.2d at 212.
102. 349 Mich. 296, 84 N.W.2d 537 (1957).
103. *Id.* at 306-09, 84 N.W.2d at 542-43.
104. 9 Mich. App. 215, 156 N.W.2d 606 (1968).
105. *Id.* at ——, 156 N.W.2d at 613-14.

commercial mining operation. The *Buckley* opinion suggested that it might be a matter of intent.[106] Often the question of processing comes up in sand and gravel operations. Ordinarily, it is much cheaper for the gravel miner to crush, sort, mix and perform various other processing operations at the site of gravel removal. While these activities can be done elsewhere, the added cost may make the operation noncompetitive. On the other hand, processing operations, and particularly the operation of a rock crusher, are extremely noisy and sometimes result in significant dust nuisances. Although there are no actual decisions in point, it would seem fairly evident that the operator who conducts processing operations is likely to be held to be running a commercial mine rather than merely lowering the contour of land for uses permitted under the zoning ordinance. It is not realistic to apply a simple test of whether or not the minerals are being sold, since that fact, in itself, has no bearing on the annoyance caused to neighbors or the potential disfigurement of the landscape. Likewise, it would seem that some minor processing operations, not involving excessive or different kinds of noise or dust, should not be determinative. Among other things, performing some of these operations at the site undoubtedly saves a certain amount of trucking which, in itself, may be one of the nuisance aspects of the operation and, in any event, consumes considerable energy. Trucking is reduced because useless materials are separated and not hauled away from the site.

In *Buckley* apart from the processing aspects, commercial operations were distinguished from mere lowering of the land contour by sporadic operations tailored to the demands of the marketplace from time to time. While this decision seems perfectly reasonable in the context in which made, a rather small gravel removal operation in a residential area, it might be questionable on environmental grounds if applied to a substantial project. If material is removed faster than it can be absorbed by the market, it must be taken somewhere and stored. This means extra loading, unloading and hauling, all of which consumes substantial energy. Furthermore, it means that the total operation will intrude on not one but two neighborhoods. Altogether, the total environmental impact is increased, and in many situations this should be regarded as unsatisfactory.

Perhaps it is not too radical to suggest that whether or not the operation is commercial in nature is a poor test. A better one would be whether or not the land is being lowered in a manner which strikes the most reasonable balance between the interests of the neighbors in not being annoyed, the interests of the community in making the best use of land and materials with the least environ-

106. *See* 349 Mich. 296, 84 N.W.2d 537 (1957).

mental impact, and the interest of the landowner and miner in attempting, like everyone else, to do as well for themselves as possible. Such a rule would enable the courts to decide each case on its merits, rather than on a lot of fine points of precedent, and provides a sound basis for imposing restrictions on operations which are permitted to proceed.

When we come to cases where the landowner and miner rely upon the serious consequences rule, we can easily get into some rather wide differences of opinion as to what kind of consequence is serious. To a member of the Sierra Club, the leveling of a lakeside sand dune to provide the very special kind of sand needed by foundries is clearly a very serious consequence. However, to the mother who must frequently climb it, carrying a picnic basket while leading her children to and from the beach, removal of the dune may seem like a very good idea. Perhaps the resolution of this particular conflict depends upon the number of lakeside sand dunes in the region and whether or not a substantial number are guaranteed preservation by being held by the public for parks or otherwise made unavailable to sand mining.

In certain situations a miner might be inclined to seek judicial approval of his activity by pointing out that it is a temporary use only and the annoyance to neighbors will not be of long duration. The argument is especially persuasive where the vicinity is beginning to change from rural to urban or suburban in character, because prompt removal, before the area builds up, means annoyance to less people. The cases cited above do not discuss this kind of argument directly, but the *Paris* decision, requiring regulation of nuisance aspects, suggest that it would be effective in appropriate circumstances.[107]

In *Miller,* Michigan adopted the popular rule that a zoning ordinance which, because of its restrictions on use and development, renders valuable property substantially worthless, is invalid.[108] However, the Michigan courts have often held that a zoning ordinance does not have to permit the highest and best economic use of land and that an ordinance which causes some reduction in the value of a parcel is not necessarily invalid where the property has substantial value for permitted uses.[109] The Michigan courts have never addressed themselves to application of these rules to the situation where a party who is blocked by a zoning ordinance from removing minerals does not actually own the land but only the mineral rights therein. Very likely this question will arise at

107. *See* 351 Mich. 434, 88 N.W.2d 705 (1958).
108. 249 Mich. 59, 227 N.W. 745 (1929).
109. *See* Reibel v. Birmingham, 23 Mich. App. 732, 177 N.W.2d 243 (1970).

some time, because it is extremely common for companies involved in mineral removal operations to purchase only mineral rights entitling them to enter the property and remove the minerals, without actually buying the land. Very frequently these purchases are made many years in advance of projected operation to assure reserve supplies, and it is not uncommon for substantial sums of money to change hands at the time the mineral rights are sold. In view of the rapid spread of zoning controls in recent years over lands formerly unzoned, it seems certain that conflicts will result. The peculiar problem, of course, is whether if a zoning ordinance prevents the removal of minerals which have been bought by a mining or other extractive company, the mineral rights are thereby rendered substantially worthless unless oil or other minerals can be extracted by operations conducted on nearby property which is zoned for this use. Nonetheless, even though the mineral interests may be rendered worthless, the land may retain substantial value for permitted uses. The courts are going to have to decide whether or not to hold zoning ordinances void in such situations.

The problem may be even more complicated, as distinctions may be made as to whether or not the mineral interest was separated from the fee prior to the intervention of the zoning ordinance. If it is held that a zoning ordinance may not destroy the value of previously acquired mineral rights, the courts may consider it necessary to refuse to apply the same rule where the rights are acquired after the ordinance is adopted to avoid making zoning a virtually useless tool for restricting mineral removal.

Additional complications may arise out of sales of mineral interests where the purchaser is entitled to a refund or cancelation if prevented from removing the minerals by public regulation. Very probably the rather celebrated decision of the U.S. Supreme Court in *Pennsylvania Coal Company v. Mahon*,[110] will receive considerable attention. It was there held that the police power of the state could not be used to prevent coal mining in order to protect surface owners from soil subsidence so as to defeat the rights of a miner who had previously acquired the mineral rights.[111]

The Michigan Environmental Protection Act gives virtually anyone or anybody standing to maintain an action against anyone else for "the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction."[112] Where the plaintiff makes a prima facie showing that defendant has or is likely to pollute, impair or destroy, the defendant

110. 260 U.S. 393 (1922).
111. *Id.* at 414.
112. MICH. COMP. LAWS ANN. § 691.1202(1) (Supp. 1974).

may show, as an affirmative defense, that there is no feasible and prudent alternative to his conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources.[113] This statute has been hung from a provision of Michigan's 1963 constitution which reads as follows:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.[114]

Although the Supreme Court has not yet passed on the constitutionality of the statute, it is widely regarded as being valid, at least as a general proposition.[115] Presumably there may be attempted applications of it that violate due process, equal protection, or other constitutional rights. The Supreme Court has recently ruled that the constitutional provision was mandatory upon the legislature and that the environmental protection act was an appropriate response, but the constitutionality of the act was not in question.[116]

Because the act requires that environmental impact be considered in all administrative or other proceedings and that pollution, impairment or destruction shall not be authorized so long as there is a feasible and prudent alternative, the statute directly affects any zoning action involving mineral removal.

The language of the act is extremely broad, so broad, in fact, that if literally interpreted, it could be applied to prevent anybody from ever doing anything. For example, farm land can certainly be regarded as a natural resource which would be destroyed by using it for a gravel pit. Nonetheless, it seems improbable that the courts will flatly rule that no farm land may be used for gravel extraction. Presumably, in such situations, the courts will apply the "no feasible and prudent alternative" language, at least in some circumstances, to hold that the act does not prevent removal.

Perhaps the statute will have its major impact on cases patterned after *Buckley*.[117] Since vegetation and scenic resources may well be regarded as natural resources, their potential destruction by the removal of a hill or the digging of a pond may provide the relationship to the public health, safety and welfare that the

113. *Id.* § 691.1203(1) (Supp. 1974).
114. MICH. CONST. art. 4, § 52 (1963).
115. 1969-70 MICH. ATT'Y GEN. BIENNIAL REP. 17, 19-31.
116. State Highway Comm'n v. Vanderkloot, 392 Mich. 159, 220 N.W.2d 416 (1974).
117. 343 Mich. 83, 72 N.W.2d 210 (1955).

justices could not perceive in *Buckley*. However, in some cases there may be complicating factors. For example, it is rather generally recognized that the quantity of our land resource is finite and land should be put to good use and not wasted. Very often, the existence of a hill or dune drastically reduces the usability of land for other purposes. For example, when urban planners are computing land capability for housing units, they customarily assign much higher densities to flat lands than to rugged or hilly property. As a result, the removal of a hill or dune may not be actually destructive of natural resources but may simply make them available for full use in addition to making the minerals removed available for various human needs. It should be remembered that the constitutional provision upon which the act is based speaks not of preservation but of "conservation and development."[118] Therefore, in deciding a *Buckley* type case,[119] the court may, on the particular facts, conclude that there is no pollution, impairment or destruction, when looking at the picture as a whole and balancing scenic loss against land usability gain, and never get to the question of alternatives.

Alternatives will undoubtedly play an important part in cases where the miner's claims are based on *Miller*[120] and *Paris*[121] and he insists that there is an important need for the minerals and that no serious consequence will be shown to follow from removal. Here, the alternative may well be either taking the material from some other place which will also have adverse environmental consequences, or shutting down the industries which require the materials. In cases of this kind there will also be arguments about whether the impairment or destruction of natural resources as a result of mining operations constitutes a serious consequence. In this respect, the Act no doubt increases the burden on the miner, unless, as pointed out above, he can show a net environmental benefit by making the land resource more usable.

Before concluding, it is necessary to make some comment upon what is probably the most important problem in connection with the use of zoning laws to control mineral removal. The majority brought it to public attention in *Paris*, but the courts have made little mention of it since. Although a gravel pit may provide materials for road building and construction only within or close to the community exercising zoning control, most other mineral removal operations affect the economic well being of an area far

118. MICH. CONST. art. 4, § 52 (1963).
119. 343 Mich. 83, 72 N.W.2d 210 (1955).
120. 249 Mich. 52, 227 N.W. 743 (1929).
121. 349 Mich. 296, 84 N.W.2d 537 (1957).

beyond and of people whose numbers vastly exceed the population of the jurisdiction where the minerals are found. Local officials frequently have little perception of the impact of their decisions and, in any event, are not motivated to consider consequences of their actions upon persons other than their local constituents. It seems clear that zoning laws are not really appropriate means for determining which mineral deposits are to be extracted and which left in place as long as Michigan, like most other states, continues bowing to the sacred cow of home rule and leaves zoning entirely to local authorities. It is clear that planning and regulations on a much broader geographic scale are necessary to the achievement of rational results. Unfortunately, the courts have only limited leverage here. Judges can complain about the lack of regional and statewide planning and decision making process and can refuse to enforce zoning laws which fail to adequately consider interests beyond those of the municipality, but until state legislatures recognize the importance of the problem and take action, nothing much will happen. Unless, of course, Congress uses, in recognition of the important obstructions to interstate commerce which local officials can create, state inaction to justify imposing federal planning and control.