

THE RISK JOURNAL

A PUBLICATION FOR MMRMA MEMBERS

JUNE 2011

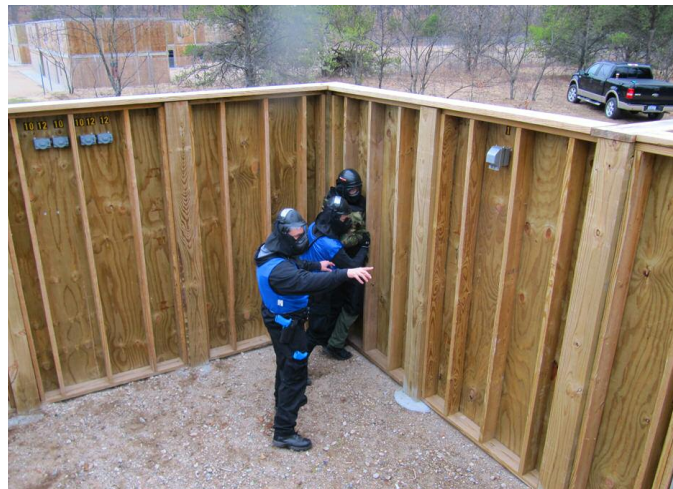
MMRMA Sponsors High-Risk Tactical Encounters Training

by Michael Rhyner
MMRMA Executive Director

IN MAY, I observed MMRMA-sponsored Tactical Encounters Training for Law Enforcement Personnel, by the Northern Michigan Law Enforcement Training Group (NMLETG). MMRMA is represented by Bill Page, who serves on the NMLETG board of directors. NMLETG includes 124 law enforcement agencies representing city, county, state, and tribal police agencies.

The course focuses on tactically demanding situations such as traffic stops, arrest situations, building entries and searches, low-light tactics, and high-risk calls, all of which challenge officers' decision-making.

Training emphasizes a positive mental mindset, paramount to officer survival. The event also includes a full day of firearms training, from basic fundamentals to advanced combat, based on actual officer encounters. Trainees are debriefed after each session about what went right and how their responses to high-risk encounters could be improved.



MMRMA Puts Safety First

Safety was paramount during the training. Officers used simulated firearms that discharge plastic training rounds but function identically in operation, loading/unloading, weight, feel and appearance to an officer's service weapon.

The officers' firearms and protective head gear were provided through an MMRMA Risk Avoidance Program (RAP) grant.

The training gave me an even greater appreciation of the skills and techniques required for safe and effective law enforcement. It is by no means an easy job. We believe well-trained officers versed in policies and proce-



The three-day event was held at the Northern Michigan Law Enforcement Training Center in Camp Grayling.

dures can reduce the risks that could result in liability claims against municipalities and their officers.

This program is also extremely important in our current economic environment, in which

An MMRMA RAP grant supplied the headgear and weaponry for the training exercise. The deadline for the next submissions of RAP grants is July 29, 2011.

law enforcement agencies are being downsized and funding for training is being curtailed.

Continued Support for Cost-effective Training

Using the Camp Grayling facility makes NMLETG training very cost-effective. In addition, MMRMA will continue our commitment to law enforcement training through our risk control professionals and financial support through RAP grants.

For more information on future law enforcement training, please contact MMRMA Risk Control Consultant Mike Berthā at mbertha@mmrma.org or call 734 513-0300.

Mining No Longer Given Special Treatment Under Zoning Laws

by Carol Rosati,
Johnson, Rosati, LaBarge,
Aseltyne & Field, PC

THE MICHIGAN Supreme Court issued a significant land use decision in *Kyser v Kasson Township*. Kasson Township is a rural community in central Leelanau County in Northern Michigan. The soils beneath the township contain significant deposits of sand and gravel.

From 1988–1994, the township received seven rezoning applications, all of which were eventually approved as a result of litigation. Of note is the fact that the plaintiff, Mrs. Kyser, a private landholder, had objected to at least one of these rezoning requests. By 1998, seven active gravel mines were in operation.

Faced with the chaos created by the approval of mining operations for land neither zoned nor planned for that purpose, the county planning director warned the township that it would lose control over the direction of development unless it took action to address the situation head-on.

Heeding this warning, the township adopted new gravel mining regulations in 1989. However, they fell short of addressing the core problem: the random interjection of heavy mining in locations not planned for that use.

In 1995, to maximize public input, the township began an



The *Kyser* decision confirms the basic principles of land use law: that municipalities have broad powers to regulate and control land use.

extensive study that created detailed Master Plan provisions and established a 3,100-acre Gravel Zoning District. Mrs. Kyser's property is adjacent to the western boundary of the district, but she did not object to its specific boundaries.

Rezoning Request Filed

In 2003, Mrs. Kyser filed a petition to amend the boundaries of the Gravel Zoning District to include her property. Her request would redraw the legislatively established lines of the district to create an irregular western boundary. She did not plan to mine the land herself, but to sell the property to a gravel operator.

Mrs. Kyser's application for rezoning was recommended for denial by Leelanau County planners, who opined that there was no demonstrated shortage of gravel, and that the Master Plan was very explicit that extractive operations should be confined to the designated area. There was legitimate concern that allowing the rezoning would put the township in the same place it had been before.

Consistent with these recommendations as well as the Master Plan and recently created Gravel Zoning District, the township board denied the request, and Mrs. Kyser filed suit.

At trial, Mrs. Kyser claimed that the township's refusal to amend the Gravel Zoning District's boundaries violated her substantive due process rights. She did not allege that the property could not be used as zoned, that there were not legitimate governmental interests that supported the existing zoning, or that applying the existing zoning to the property amounted to a taking without just compensation.

Instead, she argued that "no very serious consequences" would result from the mining operation based on the rule that had been formulated in *Silva v Township of Ada*, 416 Mich 153; 330 NW2d 663 (1982), and later expanded in *American Aggregates v Highland Township*, 151 Mich App 37; 390 NW2d 192 (1986).

Put simply, the judicially created "no very serious consequences" rule gave

natural resource extraction a "preferred use" in zoning. While a zoning ordinance would typically be presumed to be constitutional, an extraction use was evaluated differently, with the focus being limited to whether the mining would result in "no very serious consequences."

Trial Court Rules for Kyser

The trial court concluded that "no very serious consequences" would result from the use of Mrs. Kyser's property for gravel mining. In doing so, the trial court acknowledged that unrest and litigation could follow from the approval of mining/redrawing of the established mining boundaries.

However, the trial court felt its hands were tied because the Supreme Court had previously given special status to mineral extraction operations. The trial court discussed the confusion and uncertainty that could arise in the future, including a barrage of additional requests to alter the mining district boundaries, but elected to allow this problem to be resolved "by force of arms" in the future.

No Preferred Zoning, continued from page 2

The township filed an appeal, and Mrs. Kyser filed a cross-appeal. In a 2-1 decision, the Court of Appeals affirmed the trial court (*Kyser*, 278 Mich App 743; 755 NW2d 190 (2008)).

With respect to the Gravel Zoning District, the majority concluded that it was not clear that the district established by the township was the "ideal district." The opinion emphasized the trial court's findings to support the conclusion that Mrs. Kyser had satisfied her burden of showing that there would be "no very serious consequences."

A dissenting opinion, filed by Justice Davis, argued that the Gravel District was the result of intensive planning efforts and widespread community participation. Recognizing that the township had gone to great lengths to provide for mining uses in a managed and controlled way, he felt that extending the district beyond that designated by the township *would* result in very serious consequences.

The township filed an appeal with the Michigan Supreme Court and *Kyser* responded. The Supreme Court accepted the case on three issues:

1. Is the "no very serious consequences" rule constitutionally required?
2. Does the rule violate the constitutional separation of powers?
3. Was the rule superseded by amendments to the Zoning Enabling Acts?

Issue 1: Rule Not Constitutionally Required

The Supreme Court held that the "no very serious consequences" rule was not constitutionally required. Municipalities had been given broad power to regulate land through the adoption of zoning ordinances and those ordinances were presumed to be constitutional.

Generally, if a landowner challenged the zoning under one of the provisions of the constitution, the landowner would be required to prove the invalidity of the zoning by showing that it failed to advance any reasonable governmental interests, or was exclusionary, or that it resulted in a taking without just compensation.

However, *Silva* created an exception to that rule, even though the Supreme Court had previously ruled that there should be no preferred land uses in zoning. The court found that *Silva* elevated one of the factors that might be considered by a reviewing court in viewing constitutional challenges—whether a mining operation might be a reasonable land use—and created a presumption that an ordinance was invalid unless there were "very serious consequences."

The Supreme Court found no constitutional support for this presumption and felt that the consideration of competing public interests was best left to local government and the Michigan Legislature.



The Michigan Supreme Court ruled that no land use should be given a preferred zoning status over another.

Issue 2: Rule Violates Separation of Powers

The Supreme Court found that the "no very serious consequences" rule violated the constitutional separation of powers. The court felt the judicially created preference for extraction of natural resources usurped a local government's right to consider competing public policies, and resulted in the court becoming a "super-zoning commission" contrary to the right of local government to plan and regulate land use in their boundaries.

Issue 3: Zoning Act Supersedes Rule

As to issue 3, the majority concluded that the "no very serious consequences" rule was superseded by the exclusionary zoning provision of the Zoning Enabling Act.

The court felt the Act was very comprehensive, allowing municipalities to weigh the need and potential location of all land uses, including mining operations. If the Legislature had intended to prohibit local government from regulating the extraction of natural resources, the court reasoned, it would have done so in the Zoning Enabling Act.

The Supreme Court reversed and remanded the case to the trial court for further proceedings not inconsistent with the opinion.

The *Kyser* decision confirms the basic principles of land use law:

- Municipalities have broad powers to regulate and control land use.
- A zoning ordinance is presumed to be constitutional, and it is the burden of the person attacking it to prove otherwise.
- No land use should be given a "preferred use" status or treated more preferentially than others.

In *Kyser*, the Michigan Supreme Court affirmed the broad prerogative given to municipalities to control local land use, and the right of local government to move forward with its vision for its community.

Carol Rosati is managing shareholder of Johnson, Rosati, LaBarge, Aseltyn & Field, PC, a principal defense firm for MMRMA. Recognized in the area of land use law, she is the recipient of the Distinguished Municipal Attorney Award from the Michigan Association of Municipal Attorneys.

Profile: Fire and EMS Advisory Committee



The Port Huron to Mackinac Boat Race, starting July 23 in 2011, is the world's longest consecutively run freshwater sailing race.

Michael Rhyner
Executive Director
mrhyner@mmrma.org

Michael Ellis
Director of Claims
mellis@mmrma.org

Chuck Schwab
Director of Risk
Management
cschwab@mmrma.org

Bryan J. Anderson, CPA
Finance Director
banderson@mmrma.org

The *Risk Journal* is published six times a year for members of the Michigan Municipal Risk Management Authority. We welcome your feedback. To comment or suggest story ideas, please contact Tamara Christie, communications specialist, at 734 513-0300, 800 243-1324, or tchristie@mmrma.org.

by Al Smolen
Risk Control Consultant

THE FIRE AND EMS Advisory Committee's 12 members represent municipal Fire and EMS departments, small and large, across Michigan. Although each organization is different, their missions are consistent: to provide quality public services through proven best practices and empathy with citizens seeking their aid.

The committee is comprised of professional leaders and administrators who share a collective base of knowledge and experience with the entire MMRMA membership. The committee meets eight times per year to identify operational issues and create practical solutions based on policies, procedures, and training programs.

24/7 Response Requires a Solid Organization

From the public's perspective, Fire and EMS departments answer 911 calls and respond to extinguish fires and provide emergency life support. What is less obvious are the many behind-the-scenes functions that are essential to operating 24/7 services.

For example, Fire and EMS departments require workforces to staff three shifts as well as fleets of specialized vehicles, unique equipment, and strategically placed buildings to house all of the above. Members of the Fire and EMS Advisory Committee recognize these challenges and have assisted in developing



A solid behind-the-scenes support team is vital to a community's fire and emergency response effort.

and implementing projects that promote professional service, customer care, and effective risk control.

Over the years, the committee has developed the following model policies and procedures, which can be modified and adapted for local needs:

- Emergency driving safety
- Mutual aid agreements
- Agency ride-along policy
- Do-Not-Resuscitate procedures (per Michigan law)
- Automated external defibrillator use and care
- Water and ice rescue
- Safe delivery of infants
- Emergency scene traffic management safety
- Two-in, two-out compliance
- Hybrid vehicle crash and extrication procedures.

The committee also promotes the use of policies and procedures developed by MMRMA's other advisory committees.

Among the committee's many training programs, funded by MMRMA's Risk Avoidance Program (RAP) grants, are:

- Driver training for emergency vehicle operators via DVDs, classroom, and realistic simulator courses

This is the third in a series of profiles of MMRMA's Risk Control Advisory Committees.

Read past articles in the *Risk Journal* archives at www.mmrma.org.

- Hybrid vehicle characteristics and safety precautions
- Online training for medical licenses and CME credits
- Advanced management courses from local colleges and universities.

The committee has also supported members' RAP grant requests for programs and equipment that promote safety and risk control practices and improved service.

Your Invitation to Join

Many members of the Fire and EMS Advisory Committee are longtime participants, and new members can benefit by being a part of this visionary group. We welcome your interest in joining this committee: please contact Al Smolen at 734 513-0300 or email asmolen@mmrma.org.