

STATE OF MICHIGAN  
IN THE SUPREME COURT

JEFFREY HENDEE, an individual,  
MICHAEL HENDEE, an individual,  
LOUANN DEMOREST HENEE, an individual,  
and VILLAGE POINT DEVELOPMENT, LLC,  
a Michigan limited liability company,

SUPREME COURT NO. 137447

COURT OF APPEALS NO. 270594

Plaintiffs-Appellees,  
V

Livingston Co. Circuit Court  
Case No. 04-20676-CZ

TOWNSHIP OF PUTNAM, a political  
Subdivision of the State of Michigan

Defendant-Appellant.

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**AMICUS CURIAE MICHIGAN TOWNSHIPS ASSOCIATION BRIEF**  
**IN SUPPORT OF THE POSITION OF DEFENDANT-APPELLANT**  
**PUTNAM TOWNSHIP**

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**STATEMENT OF QUESTIONS PRESENTED**

1. Did the Court of Appeals and Circuit Court Error in Granting Specific Relief to a Facial Exclusionary Zoning Claim without Applying the Rule of Finality or Ripeness?

Plaintiffs-Appellees answered: "No".  
Defendant-Appellant answered: "Yes".  
Trial Court answered "No"  
Court of Appeals' majority answered: "No".  
Amicus Curiat MTA answers : "Yes".

2. Did the Court of Appeals Error in Holding that the Futility Doctrine Excuses the Finality Requirement?

Plaintiffs-Appellees answered: "No".  
Defendant-Appellant answered: "Yes".  
Trial Court answered "No"  
Court of Appeals' majority answered: "No".  
Amicus Curiat MTA answers : "Yes".

3. Did the Trial Court Error in Permitting the Plaintiffs' Proposed Use of a Manufactured Housing Community When the Use Had Never Been Proposed and Presented Before the Township?

Plaintiffs-Appellees answered: "No".  
Defendant-Appellant answered: "Yes".  
Trial Court answered "No"  
Court of Appeals' majority answered: "No".  
Amicus Curiat MTA answers : "Yes".

4. Did the Court of Appeals Error in Holding that a Zoning Ordinance is Unconstitutional Without Considering a "Demonstrated Need Pursuant to Statute Which Preempts the Kropf Analysis?

Plaintiffs-Appellees answered: "No".  
Defendant-Appellant answered: "Yes".  
Trial Court answered "No"  
Court of Appeals' majority answered: "No".  
Amicus Curiat MTA answers : "Yes".

5. Did the Circuit Court Abused its Discretion in Awarding Plaintiff's their Costs and Experts' Fees?

Plaintiffs-Appellees answered: "No".  
Defendant-Appellant answered: "Yes".  
Trial Court answered "No"  
Court of Appeals' majority answered: "No".  
Amicus Curiat MTA answers : "Yes".

**INTRODUCTION**

**STATEMENT OF FACTS**

**STANDARD OF REVIEW**

Amicus Curiae Michigan Townships Association accepts the Introduction, the Statement of Facts and the Standard of Review as set forth in Defendant/Appellant's Brief pages i through ix.

## **ARGUMENT I**

### **THE COURT OF APPEALS AND CIRCUIT COURT ERRED IN GRANTING SPECIFIC RELIEF TO A FACIAL EXCLUSIONARY ZONING CLAIM WITHOUT APPLYING THE RULE OF FINALITY OR RIPENESS**

#### **FACIAL CHALLENGE**

Upon reviewing the Appellee's brief to this Honorable Court, the Appellee spends over two-thirds of the brief in argument on "exclusionary zoning". In fact, from pages 14 to 45, the word exclusionary or exclusion is used on 20 of the 31 pages of the brief. The problem with the Plaintiffs-Appellees position and the Circuit Court and the Court of Appeals decision is that it mixes "facial" and "as applied" throughout the arguments and decisions. Using Judge Donofrio's example in his dissent, if a person was to go to Mackinac Island and discovered that there is no provision for an industrial zone, this on its face is exclusionary. A person then can go to circuit court and file an action alleging exclusionary zoning as a "facial challenge" and that court can render an opinion that it finds on its face that Mackinac Island is guilty of exclusionary zoning for failure to provide for an industrial zone in their ordinance. However, if the person also wants the court to consider a particular parcel and whether or not this parcel should be allowed to conduct industrial uses, then that becomes an "as applied" issue and based on statutory and case law, that person must follow the zoning procedures of the ordinance to see if it can convince the municipality to grant an industrial use zone. It is this author's opinion that this is the nexus for the entire law suit. The circuit court from Mackinac Island would have no basis upon which to sit as a "superzoning" board and hear testimony as to whether or not the parcel is suitable for industrial use. The circuit court would have no right to decide that a parcel that lies between the Mackinac fort and the downtown

area should be industrial simply on the basis that Mackinac does not have a provision in its zoning ordinance.

As to the question in a facial challenge, does one have to institute the rule of finality? On the surface, the answer by examining case law would be “no”. But, if the property owner is requesting relief from the court, i.e., that they want a particular parcel to have this use, then finality is required. I believe this is best outlined in the unpublished decision of *DF Land Development LLC v Charter Township of Ann Arbor*, Docket No. 275859 (October 23, 2008) (attached in the appendix as Exhibit A). Particularly, the last three pages of the decision (pp 8-10) in which exclusionary zoning is discussed.

Unlike the Plaintiffs-Appellees at bar, the plaintiff in the *DF Land Development, supra*, case, did submit an application for rezoning and for a variance for multiple family residential in agriculturally zoned property. However, in the complaint it also alleged a “facial challenge” to the Zoning Ordinance because the zone they sought did not exist within the Township. That court found that because the plaintiff had filed a rezoning petition and applied for a use variance, that these constituted an “as applied” claim which were ripe for review and had met the finality test.

However, when the court reviewed the Count for “exclusionary zoning”, the court referred to MCL 125.297(a) and recognized that the plaintiff only had to show the “effect of totally prohibiting the establishment of a land use within the township or surrounding area within the state”. (Id. at p 8.) The court then concluded that the “ripeness” test in the *Braun v Ann Arbor Township*, 262 Mich App 154; 683 NW2d 755 (2004) did not apply to statutory exclusionary challenges but went on to opine:

“Nonetheless, even though the Braun finality test does not apply to claims brought under [MCL 125.297a](#), a plaintiff remains obligated to first submit a rezoning request or request for a variance to the appropriate legislative body before seeking relief from

the court system. Whether a municipality will allow a particular requested use in the township must be decided with reference to what the municipality has authorized and will authorize in its comprehensive zoning map of the township. While a plaintiff need not satisfy the stringent requirements of the Braun test, a plaintiff seeking relief under the statute must seek and receive an administrative determination on a request regarding a particular parcel of land because a use is not necessarily excluded simply because it does not yet exist in the zoning map. See [Landon Holdings, Inc. v. Grattan Twp., 257 Mich.App. 154, 168-169, 667 N.W.2d 93 \(2003\)](#). (Id. at p 8.)

Thus, the Court of Appeals in *DF, supra*, recognized that a plaintiff still must “seek and receive” an administrative determination to satisfy a successful exclusionary challenge. This, the plaintiff in the case at bar did not do. The court went on to review *Landon* and emphasized the importance of making a proper request.

“In *Landon*, the plaintiffs did not apply for rezoning or for a special land use permit for the particular use of manufactured housing before filing suit. The *Landon* Court found that while the zoning plan allowed for the use, and regardless of the fact that the municipality had not yet designated land for that use because it had not yet been requested, there could be no exclusionary zoning violation. [Landon, supra at 157-158, 160, 667 N.W.2d 93](#). *Landon* means that exclusionary zoning exists only after a request has been submitted to the proper administrative body, considered by that body, and ultimately denied. A plaintiff’s request before the proper administrative body provides the township the opportunity to revisit its zoning plan and make an administrative determination on a plaintiff’s particular request. It is in this exercise that the township, in its legislative function, is provided with public comment, expert analysis, use analysis, community analysis, needs analysis, and other expert opinions relative to its proper legislative role in zoning to ensure that it does not violate the prohibition against exclusionary zoning. Thus, failing to make the initial zoning request before the township administrative body denies a township the opportunity to consider designating land for the requested land use. Denying the municipality the opportunity to make the initial determination improperly usurps decision-making authority from the municipality and inappropriately transforms the judiciary into a kind of “superzoning” authority making zoning decisions for particular communities.

“In sum, while “finality” in the Braun context is not required to establish ripeness in exclusionary zoning claims, at a minimum, a plaintiff must submit a zoning request for consideration before the proper administrative body for a suitability and needs determination in that particular community for the claim to be ripe and judicial review appropriate. Because plaintiff submitted its request for rezoning to the township zoning commission, and also sought a variance before the ZBA, plaintiff’s statutory claim for exclusionary zoning is ripe for judicial review. (Id at p 8-9.)

The court concluded that “finality is not required for facial challenges because such challenge attacks the very existence or enactment of an ordinance.” (Citing

*Paragon Properties, City of Novi*, 452 Mich 568, 576 (1996) at p9.) However a person must still submit a zoning request:

“Like statutory exclusionary zoning challenges, in constitutional exclusionary zoning claims, a plaintiff must submit a zoning request for consideration before the proper administrative body for a suitability and needs determination for the claim to be ripe for judicial review. This is because whether a plaintiff’s exclusionary zoning challenge is brought pursuant to the statute or under the constitution, the zoning map underlying the challenge is part of the zoning ordinance. See [MCL 125.271](#); [MCL 125.280](#); see also [Paragon, supra at 573-574, 550 N.W.2d 772](#). And a use not yet present in the zoning map is not necessarily excluded simply because it does not yet exist in the zoning map. See [Landon, supra at 168-169, 667 N.W.2d 93](#). Landon also applies in exclusionary zoning claims brought under the constitution .<sup>FN4</sup> Thus, like statutory exclusionary zoning claims, while a plaintiff need not satisfy the stringent requirements of the Braun finality test, a plaintiff seeking constitutional redress must first seek and receive an administrative determination on a request regarding a particular parcel of land. Because plaintiff here submitted a request for rezoning to the township zoning commission, as well as a request for a variance before the ZBA, plaintiff’s constitutional claim for exclusionary zoning is ripe for judicial review. The trial court erred by finding that plaintiff’s exclusionary zoning claims are not ripe for judicial review. (Id at p.9-10)

Finally, in footnote 4 of the decision, the court noted the following:

“[FN4](#). Just because a community has not designated a certain land use within its borders that exclusionary zoning exists on its face. For example, merely because the administrative body responsible for zoning in Mackinac Island has not zoned land for industrial purposes does not mean that exclusionary zoning exists on its face. There must be a request and an appropriate determination for that community by the administrative body responsible for zoning. In other words, a community cannot engage in exclusionary zoning if there is no “demonstrated need” for the zoning requested in that community. See [Landon, supra at 168-169, 667 N.W.2d 93](#).” (Id at p10.)

If you are going to allege a facial challenge and you are not going to go through the steps for rezoning and/or a variance, then it is not ripe for review and the court, at a minimum, can only admit that there has been a facial violation but cannot and may not prescribe a remedy because that would undermine the legislative authority which has been granted by our statutes. How would this work? It would be similar to a plaintiff which alleges a zoning violation as in the case at bar, but also alleges an Open Meetings Act violation. If the court finds that there has been an open meetings

violation, it remands the case back to the municipality to conduct a meeting that is in compliance with the act. The court does not find there is a violation of the Open Meetings Act and then award zoning relief. This is akin to what the Court of Appeals did with the case at bar. It said, and we believe incorrectly, that the ordinance on its face is exclusionary and then proceeded to fashion a remedy. This does not make sense. If a person can attack an ordinance on its face, then the court should be forced to direct the municipality to address the constitutional violation and the ordinance. After that is done, the property owner begins the process of applying for whatever zoning situation he wants. On the other hand, if the property owner applies for a rezoning and/or a variance and is denied, then their challenge is an “as applied” challenge and the court can review the legislative actions of the municipality and decide whether or not they followed the statute and the ordinances and find whether the property owner gets an “as applied” resolution.

In conclusion, it does not serve any purpose for a plaintiff to bring a lawsuit to simply get the court’s pronouncement on a facial challenge for alleged exclusionary zoning unless they are seeking specific release for a parcel. If they are, it seems that the court cases of *Braun, supra, Landon Holdings, Inc. v Grattan Township*, 257 Mich App 154; 667 NW2d 93 (2003) and *Smookler v Wheatfield Township*, 394 Mich 574, 588; 232 NW2d 616 (1975) are clear. If you want the court to rule on your specific parcel, then you must follow the statutory procedures, make the appropriate request, have the property properly reviewed by the planning commission and/or other bodies and address that part of the statute that shows there is a “demonstrated need” for the property within the community. Failure to do that corrupts the whole zoning process and fails to follow the statute in all of the zoning cases over these many decades that have established the importance of following the process in achieving the rule of finality.

So, the real answer to the question that this court has posed is, “Does a rule of finality or ripeness apply to an exclusionary zoning claim?” The answer is “yes”, if the property owner is looking for specific relief that deals with a specific parcel. If, however, hypothetically, the person is simply trying to get the court to declare that because there is no property zoned for specific use, that there is exclusionary zoning on its face, then that could be a different matter and perhaps the court could find that there is exclusionary zoning on its face but it cannot offer relief. Instead, it must remand the issue back to the local municipality and to the property owner to go through the proper process. In the case at bar, Plaintiffs-Appellees did not take the mobile home park zoning issue to the local authorities for consideration or follow any of the zoning procedures. As a result, the circuit court and the Court of Appeals were in error when they granted an “as applied” remedy to a facial challenge. Maybe the court recognized their error, because when the *DF Land*, *supra*, case was released several months after *Hendee*, *DF*, does not follow the *Hendee* decision on this issue. Since *DF* is the most recent decision, this Honorable Court should follow its legal reasoning as set forth above and require that an application and decision by a municipality shall be made before bringing an exclusionary zoning challenge.

### **SUPERZONING COMMISSIONS**

What is also disturbing about the *Hendee* ruling is by ignoring the statute and the case law that a property owner must submit an application and receive a decision regarding zoning, that the *Hendee* court acted as a “superzoning commission”. In the famous case of *Brae Burn Inc. v Bloomfield Hills*, 350 Mich 425, 430-431; 86 NW2d 166 (1957), rendered 52 years ago, the Supreme Court stated the following:

“(T)his Court does not sit as a superzoning commission. Our laws have wisely committed to the people of a community themselves the determination of their municipal destiny, the degree to which the industrial may have precedence over

the residential, and the areas carved out of each to be devoted to commercial pursuits. With the wisdom or lack of wisdom of the determination we are not concerned. The people of the community, through their appropriate legislative body, and not the courts, govern its growth and its life. Let us state the proposition as clearly as may be: It is not our function to approve the ordinance before us as to wisdom or desirability. For alleged abuses involving such factors the remedy is the ballot box, not the courts. We do not substitute our judgment for that of the legislative body charged with the duty and responsibility in the premises.”

The Hendee decision reverses some of the most significant cases the Supreme Court and Court of Appeals have rendered regarding the courts not becoming superzoning commissions. Some of the cases are as follows:

*Kropf v City of Sterlings Heights*, 391 Mich 139, 161; 250 NW2d 179 (1974)

*Smookler v Wheatfield Township*, 394 Mich 574, 588; 232 NW2d 616 (1975)

*Schwartz v City of Flint*, 426 Mich 295, 395; 308 NW2d 678 (1986)

*Lepior v Venus Township*, 437 Mich 955, 961; 467 NW2d 811, 814 (1991)

*Newman Equities v Meridian Township*, 264 Mich App 215, 219; 690 NW2d 466 (2004)

As a result, It is clear from the Hendee decision, that the court acted as a superzoning commission, taking testimony and evidence, and deciding by itself whether or not a particular parcel was suitable for a mobile home park. All of this without any municipal involvement, without the right of any public hearings, without the right of the people and surrounding property owners to voice any concerns, support or otherwise. This is exhibit 1 in terms of what the courts were **not** designed to do in zoning matters and this Supreme Court should reverse the Court of Appeals’ decision in allowing the circuit court to sit as the superzoning commission.

## **AS APPLIED**

Since the Plaintiffs-Appellees devoted so much time to exclusionary zoning and the relationship between “facial” and “as applied”, it is once again worth reviewing the case law for the relationship between “facial” and “as applied” especially since all the parties seem to be citing the same cases.

In *Paragon Properties, supra*, this Supreme Court made a distinction between “facial” and “as applied” challenges”. When there is a challenge to the validity of a zoning ordinance and allegations of denial of equal protection, due process or a taking claim then it was subject to the rule of finality. (Id. at 577), citing the *Williamson Co Planning Commission v Hamilton Bank of Johnson City*, 473 US 172, 186; 105 SCt 3108; 87 LED2d 126 (1985): “The finality requirement is concerned with whether the initial decision maker has arrived at a definite position on the issue that inflicts an actual, concrete injury...” (Citing *Wilamson* at 193.) (Id. at p 577.) This rule of finality applies to an “as applied” challenge which “alleges a present infringement or denial of a specific right or of a particular injury and process of actual execution.” (Id. at 567.)

Further, in the case of *Jacob & Sons v Saginaw County Department of Public Health*, 284 F. Supp. 2d 711 also discusses the difference between a “facial challenge” and an “as applied” challenge and the importance of a “final decision”. The court stated,

“...a facial challenge alleges that the mere existence and threatened enforcement of the land use rule materially and adversely affects land values and curtails opportunities of all property regulated in the market.” (Id at 718.) (Citation omitted.)

\* \* \* \* \*

“An ‘as applied’ challenge alleges a present infringement or denial of a specific right or of a particular injury in process of actual application of the rule to a particular parcel of land or landowner. (Citations omitted.) A challenge to the validity of an ordinance “as applied” whether analyzed under 42 U.S.C. 1983 as a denial of equal protection as a deprivation of due process under the fourteenth

amendment or as a taking under the Just Compensation Clause of the Fifth Amendment, is subject to the rule of finality which is concerned with whether the government entity charged with implementing the ordinance has reached a final decision regarding the application of the ordinance to the property at issue.” See *Williamson*, 473 U.S. at 186; 105 S Ct 3108; *Paragon Properties Co v City of Novi*, 452 Mich 568, 576-577; 550 N.W.2d 772, 775 (1996). ((Id at 718.)

In the case of *English v Augusta Twp*, 204 Mich App 33; 514 NW2d 172 (1994), cited by Plaintiffs-Appellees, action was brought after the township had denied a zoning request. However, the court noted that the property owners were not exempt from the site plan review process (Id at 41.) In *Eveline Township v H&D Trucking Co*, 181 MA 25 (1989), also cited by Plaintiffs-Appellees, a township filed an action against the defendants from violating the zoning ordinance and a trial court found that it was exclusionary zoning and the ordinance was “void and unenforceable, as applied to the defendants parcel.” (Id at 29.) A facial challenge may be made because an ordinance does not provide for a use that a property owner wishes to implement or can apply to an existing condition in an ordinance which seems to be unconstitutional. Neither is the situation in the case at bar and therefore the court erred in determining that the Plaintiffs-Appellees had a facial challenge since it really was an “as applied” challenge because it related to a specific parcel and the failure to properly request rezoning means that the parties should have been directed to go to the Township first before the court considered whether or not there was a due process claim applicable to the plaintiff’s property. The court’s order specifically states that the A-O zoning designation is unconstitutional as applied to the subject property.

“IT IS HEREBY ORDERED AND ADJUDGED, for the reasons set forth in the court’s findings of fact and conclusions of law, that Defendant Putnam Township’s Agricultural/Open Space (AO) zoning district is unconstitutional as applied to Plaintiffs’ property.” (See amended Judgment of May 23, 2006, p. 2)

Plaintiffs-Appellees also make an issue about the importance of a facial challenge citing *Landon Holdings, supra*. Their rendition of this case is that a facial due

process challenge can be brought without having to exhaust any administrative remedies. Therefore, they do not have to apply for a rezoning for a mobile home park in the case at bar. However, they fail to discuss *Landon Holdings*' sufficiently. First of all, the plaintiffs in the *Landon* case did apply for rezoning although no decision was rendered. (Id at 160.) In a facial challenge, it is the party challenging the ordinance which has the burden to show total exclusion or can demonstrate no reasonable relationship to a legitimate governmental interest. (Id at 176-177.) The *Landon* court found that the township ordinance did not totally prohibit manufactured housing. The court recognized that a township can regulate the location of manufactured housing communities and further stated: "Plaintiffs have not shown why it is unreasonable for defendant to wait to rezone certain areas for manufactured housing rather than either permitting them by right in existing districts or specifically designate certain areas as manufactured housing districts before owners even apply for rezoning." (Id at 187.) (The court went on to state that the plaintiffs in *Landon* failed to establish a violation of due process or equal protection and summary disposition was appropriate on both the statutory and constitutional claims.)

Following the example of *Landon*, likewise, it is one thing to raise a facial challenge but it is another to prevail and this court should follow the holding of *Landon* and find that the Plaintiffs-Appellees in this case have failed to meet the burden challenging the constitutionality of the township's ordinance. But, finding that the ordinances are not enforceable does not immediately mean that a proposed use should be implemented. In the case at bar, the circuit court not only found for the Plaintiff on the facial challenge, but also found that the proposed use, which was not properly brought before the Township, was reasonable and this violates the principle set forth in *Brae Burn* which states that a court is not to function as a "super zoning board". If the

trial court's decision stands, then why should any property owner bother to comply with the procedure set forth in the zoning and planning acts but just immediately go into circuit court and present evidence as to reasonable use and completely bypass the whole legislative function of the statute and local ordinances? That is, in essence, the position that the Plaintiffs-Appellees have taken in regards to this case. This would also guarantee that every lawsuit filed would allege facial challenges and maybe for property owners, it would be quicker and less expensive to go immediately to court rather than spend time and money attending planning commission meetings and township board meetings. The new Zoning Enabling Act went into effect in July 2006. Following the ruling of the court, perhaps it should be amended to include that for those developers who do not want to go through the rezoning process they can immediately go to circuit court because that is, in essence, what the circuit court's ruling accomplished.

## ARGUMENT II

### THE COURT OF APPEALS ERRED IN HOLDING THAT THE FUTILITY DOCTRINE EXCUSES THE FINALITY REQUIREMENT

After discussing the rule of finality, the Hendee, *supra*, court stated: “Plaintiff’s constitutional cause of action that challenged the application of the A-O zoning classification to their property were subject to the rule of finality”. (See p5 of decision.) However, the Court went on to discuss the futility argument citing Paragon, *supra*, at pp581-583. The Court of Appeals noted that Paragon had suggested that a futility exception to the rule of finality could exist but under the right circumstances. (Decision at p6.) However, the Court of Appeals failed to adequately explain why futility existed in this case at bar and improperly concludes “...the township clearly has no intent to allow MHC’s within its boundaries, it would have been futile for plaintiffs to submit any application or request for a 498 unit MHC to the township.” (Decision at p7.) However, the court acknowledged *Sequin v Sterling Heights*, 698 F2d 584, 589 (CA 6, 1992) that “at least one meaningful application must be submitted as a prerequisite to a plaintiff’s attempt to benefit from the futility exception”. And then admits that, “...Plaintiffs here did not present an MHC application to the Township for resolution...” (Decision at p7.) But, nevertheless found a “futility exception under the factual circumstances presented.” (Decision at p7.) Once again, after citing several cases that hold you must make some attempt to obtain a local decision, the **court ignores the cases** and concludes that the developer is excused from an application and obtaining a decision. This is in conflict with what *Paragon, supra*, holds and the federal case cited. The court, however, even admits “...even though we found some of plaintiff’s constitutional claims to be as applied, challenges subject to the rule of finality...”, (Id at p. 7), it nevertheless strangely concludes: “Given that the futility exception to the rule of finality operates as if the

municipality had expressly come to a definitive position on an MHC, we find that the action was ripe for suit.” (Emphasis added.) (Decision at pp7-8.)

But how can the court ignore the foundation case of *Paragon, supra*? In that case, the court established the landmark decision on the rule of finality. As this Supreme Court has stated, the rule of finality is “concerned with whether the initial decision maker arrived at a definitive position on the issue that inflicts an actual, concrete injury”. (Id, at 577.) This rule of finality applies to an “as applied” challenge which “alleges a present infringement or denial of a specific right or of a particular injury and process of actual execution.” (Id at 576.)

### **FULE OF FINALITY**

Judge Donofrio, in his dissent, addressed this situation and particularly called attention not only to *Paragon* but to the *Braun* case. That court also emphasized the “rule of finality” which was required for all “as applied” constitutional claims. The *Braun, supra*, court cited *MacDonald Sommer and Frates v Yolo Co*, 477 US 340; 106 SCT 2561; 91 LEd2d 285 (1986) where the Supreme Court held that until a property owner obtains a final decision regarding his zoning application, “It is impossible to tell whether the land retains any reasonable beneficial use or whether existing expectation, interests have been destroyed.” (*Braun, supra* at 158.) The *Braun, supra*, court went on to cite *Paragon* stating, “Our Supreme Court held that a judicial challenge to the constitutionality of a zoning ordinance, as applied to a particular parcel of land, is not ripe for judicial review until the plaintiff has obtained a final, non-judicial determination regarding the permitted use of the land.” (*Braun, supra*, at 160-161.)

The court went on to state that a challenge to the validity of a Zoning Ordinance applied whether or not charges were brought under 42 USC 1983 as a denial of equal protection, deprivation of due process under the 14<sup>th</sup> Amendment or a taking under the

just compensation clause of the 5<sup>th</sup> Amendment. As a result, the *Braun*, court dismissed the plaintiff's "as applied constitutional" challenge because they had not met the requirement of finality in regards to their "taking" claims and "as applied" constitutional claims.

The Court of Appeals begins by examining the rule of finality as it affects ripeness. Were the Plaintiffs/Appellees' claim ripe for litigation? It then examines a host of cases that represents the now-well accepted law that in order for a case to be litigated, it must be ripe for litigation and that is tied to the rules of finality (Hendee, *supra*, p4.) The court then lists and summarizes the following cases:

*Sun Communities v Leroy Twp*, 241 Mich App 665, 669; 617 NW2d 42 (2000)

*Arthur Land Co, LLC v Otsego Twp*, 249 Mich App 650, 662; 645 NW2d 50 (2002)

*Paragon Properties Co v Novi*, 452 Mich 568, 577; 550 NW2d 772 (1996)

*Bevan v Brandon Twp*, 438 Mich 385, 392 n 8; 475 NW2d 37 (1991)

*Electro-Tech, Inc v HF Campbell Co*, 433 Mich 57, 74; 445 NW2d 61 (1989)

*Conlin v Scio Twp*, 262 Mich App 379, 382; 686 NW2d 16 (2004)

*Braun v Ann Arbor Charter Twp*, 262 Mich App 154,158-159; 683 NW2d 755 (2004)

Although the Court of Appeals cites all of the above cases that apply to the rule of finality, they then turn and argue **that they don't apply**. Invoking the *Paragon* court, they claim that that court recognized an "acceptance of a futility exception to the rule of finality" (Hendee, *supra*, p7). But they also recognized that *Paragon* did not find a circumstance that merited that exception and certainly not to that case. What is the point of having the rule of finality if one can then assert an exception? The court's conclusion is very confusing in that the "as applied" counts of due process, equal

protection, and a taking were subject to the rule of finality but this is now modified by the “futility exception”.

The test cited by the Court of Appeals seems to address a “facial challenge” when a court looks at “advancing a legitimate governmental interest, not acting “arbitrarily or capriciously”. Then the court, looking at a “constitutional exclusionary zoning claim” states that a “facial challenge” is not subject to the rule of finality but, “It is unnecessary to reach the issue because, assuming the contrary, the futility exception applied”. (See conclusion at p23 of Decision.) The court held that the exclusion of the MHCs in the township did not have a reasonable relationship to health, safety or general welfare and thus violated plaintiff’s due process and equal protection. How can the court allege that it violated due process when the process was never initiated? Likewise, it would be true for equal protection that the court recognized is an “as applied” challenge. There is still a question as to how, on a facial challenge, the court can find that a proposed use of property that was never before the municipality can constitute a “reasonable use of property”? If the court finds that a proposed use is a reasonable use, then that goes to “as applied”. If the court is applying the use to the property, it seems that it should have been before the legislative body first to have an opportunity to address what was a reasonable use of the property to begin with. If finality is needed in regards to determine due process and equal protection on the one hand, how can the court conclude finality is not needed to determine equal protection and due process on the other? Why would any property owner want to assert an “as applied” challenge when they can simply allege a “facial challenge” and a new and untried concept of “futility” and simply attack any ordinance on its face as being unconstitutional? After all, the courts have recognized that an ordinance does not have to totally exclude a use in order to allege exclusionary zoning. The circuit court and the

Court of Appeals are in error to hold that the rule of finality does not apply and substitute “futility” as the way to arrive the issue.

The futility exception is not something where our courts have made very definitive statements but following *Kinzli v City of Santa Cruz*, 818 F2d 1449 (9<sup>th</sup> Circuit) (1987), held that a plaintiff needed to make “at least one meaningful application” (*supra* at 1454-5) then the court should follow that principle especially in the light of *Paragon*, *supra* and the rule of finality. In the case at bar, the applicant wasn’t asking just for another residential density that may have been slightly greater than 95, i.e., requesting for a density of say 150. Instead, he was asking for the most intense dense classification that a person could request and an entirely different type of housing, in part, dictated by a whole separate statute being the mobile home statute. Even the courts recognize that mobile home parks are developed in a different way including having to get approval through the mobile home commission. Nevertheless, going from one request of 40 and now wanting a density that is 12 times greater certainly should have had an application put forward before the Township, if nothing else to alert the surrounding property owners and Township of a desire to build that kind of density. The radicalness of the request going from a single-family residential to a full scale 498 unit mobile home park should certainly follow basic procedures according to the statute and Zoning Ordinance for the sake of the entire public. To be able to sidestep that and go only in court based on a so called “futility” exception is extraordinary to say the least, but if this ruling of the Court of Appeals remains, this will have major implications for municipalities and will lead to even more gamesmanship. (I.e., ask for a use you know you will not get, get it rejected and then go for the real use you want and claim a futility exception citing the *Hendee*, *supra*, case.)

This Honorable Court should review once again the importance of finality principles that have been laid out in key cases that have been rendered by this Supreme Court and reject the “futility” principles as set forth in the Hendee, *supra*, decision.

### ARGUMENT III

#### THE TRIAL COURT ERRED IN PERMITTING THE PLAINTIFFS' PROPOSED USE OF A MANUFACTURED HOUSING COMMUNITY WHEN THE USE HAD NEVER BEEN PROPOSED AND PRESENTED BEFORE THE TOWNSHIP

If the court follows the arguments presented by Amicus Curiae Michigan Townships Association in the first two arguments, (i.e., the need for the Rule of Finality in an exclusionary zoning claim and that the futility doctrine was misapplied and in this case), then a finality requirement is necessary and it makes sense that the circuit court had no right to sit as a superzoning commission and order that the "498 unit manufactured housing community constitutes a reasonable use of the property". (See amended Judgment May 23, 2006 at p 2.)

The mobile home park community is a very special zoning use and is even further regulated by the Mobile Home Commission Act of PA 96 of 1987 (MCL 125.2301 et seq.) MCL 125.2311(1) recognizes the fact that one must apply to the local municipality:

"A person who desires to develop a mobile home park or seasonal mobile home park shall submit a preliminary plan to the appropriate municipality, local health department, county road commission and county drain commission for preliminary approval."

It goes on to say:

(2) A municipality may grant preliminary approval if a proposed mobile home park or a seasonal mobile home park conforms to applicable laws of local ordinances not in conflict with this act and laws and ordinances relative to:

- (a) land use and zoning;
- (b) municipal water supply, sewage service and drainage;
- (c) compliance with local fire ordinances and state laws...."

Even this statute recognizes the importance of going through the local municipality and submitting a site plan for approval before a park can be established.

Instead, the circuit court completely ignored this process and acted in place of the authority recognized by the Zoning Enabling Act and the Mobile Home Commission Act.

Landon, *supra*, held, that zoning is not necessarily “exclusionary” if the zoning has never been requested. (At 168-169.) Why didn’t the plaintiff first make a request to have the property zoned for a mobile home park before alleging exclusionary zoning? The Township had no opportunity to consider designating any land for the land use unless it was first requested. As the dissent in *Hendee, supra*, points out, “Denying the municipality the opportunity to make the initial determination improperly usurps decision making authority from the municipality and inappropriately transforms the judiciary into a kind of “superzoning” authority making zoning decisions for particular communities.” (P8 of the Dissent.)

How does a court conclude that a use is reasonable without reviewing the township process, e.g., reasons for or against a rezoning that would be contained in minutes or in any decision made by a municipality? What if the plaintiff wants to locate a mobile home park in a floodplain area? Wetland? Near a major landfill, gravel pit or Industrial Park? How does the court conduct their own fact finding and make decisions that the plaintiff’s property is suitable for the use that they desire when there has been no opportunity for the municipality to conduct any fact finding? Does the court have to recognize the municipal land use plan? Is the court free to ignore the master plan and the current zoning and on what basis does it get to make the determination that there is a proper “facial challenge”? What happens if the court allows the use the plaintiff desires under a facial challenge and it turns out that the property they want to develop has numerous problems and an adverse impact on the whole area? Can aggrieved parties then bring an action against the court for a poor decision? How does a “demonstrated need” get met on a facial challenge?

In conclusion, given the seriousness of a circuit court ordering 498 unit mobile home park in a township with that density, which was 12 times the 40 that the township had considered for residential, and the serious impact that a mobile home park will have on sewer, water, traffic, and roads, it is simply incredible that the Township had absolutely no input on whether or not this was the appropriate location or zone for that type of density. Given the number of cases that the courts have litigated regarding mobile home parks, it would seem to this author that to avoid the entire process that developers have to go through at the local unit, they would certainly pay very good attention to *Hendee* which would encourage a developer to allege a facial challenge to the ordinance, not submit any request for a zoning or site plan or anything to the township and go directly into court. This Supreme Court must review the *Hendee* decision and look at the implications that this decision will have on the whole zoning process in the State of Michigan.

## ARGUMENT IV

### THE COURT OF APPEALS ERRED IN HOLDING THAT A ZONING ORDINANCE IS UNCONSTITUTIONAL WITHOUT CONSIDERING A “DEMONSTRATED NEED PURSUANT TO STATUTE WHICH PREEMPTS THE KROPF ANALYSIS

In 1978, by Public Act 637, effective March 1979, the Michigan legislature adopted MCL 125.297(a) (now a similar version is found in 125.3207 which specifically states:

“A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a township in the presence of a demonstrated need for that land use within either the township or surrounding area within the state unless there is no location within the township where the use may be appropriately located or the use is unlawful.”

The state legislature deliberately clarified the responsibility of the statute and any zoning decision as it relates to a land use within the township. “Exclusionary zoning” must, in fact, have a context. The fact that Mackinac Island may not have a zone for industrial use does not mean they are in violation of a constitutional right or a statutory requirement. This particular statute states if there is no location where the use can be appropriately located, or the use may be unlawful, then one is not violating the statute by not providing an industrial use on Mackinac Island. Likewise, the statute sets forth the test on what may constitute a violation but it has to be within a context and in this context the township can consider “a demonstrated need for that land use within either the township or the surrounding area”. Thus, if a township is surrounded by mobile home parks, it may not necessarily be responsible for providing that use since it could be concluded there was a sufficient use of mobile home parks within the “area”. Unfortunately, the Court of Appeals characterized this qualification as something that may be “limited by the whims of a legislative body through the enactment of a statute”. (See footnote 16 on page 15 of the *Hendee, supra*, opinion.) Characterizations that “demonstrated need” may be a whim? What the statute does is just clarify which could

be considered prohibiting a land use. Characterization by the court that the “statute cannot contravene the dictates of our state or federal constitution” is not appropriate. The statute does not contravene the constitution. Look at the analysis that all the parties have done in terms of “facial challenge” and “as applied challenge”. The statutes and case law have always helped define what is meant by a particular term and what constitutes some type of constitutional violation. (Statutes have helped define what a constitutional right violation is, (e.g., Voting Rights Act, Religious Land Use and Institutionalized Person Act, Civil Rights Act, etc.) The court in *Hendee, supra*, held that a constitutional violation can still arise “despite the absence of a demonstrated need for the use at issue.” (Id. at p 15.) Even though the court points out that the exclusionary violation has to be in a context as to the “health, safety or general welfare of the community”. These functions could certainly be incorporated in a “demonstrated need”. That is, if there was someone who could testify before the Township, that for the general welfare of the community, mobile home-type housing was necessary because there wasn’t sufficient housing available would certainly go to a demonstrated need and address the health, safety and welfare of the community standard. In fact, on that question, if one were to show that a mobile home park of 500 bore a reasonable relationship to the health, safety or general welfare of the community, that in itself, could constitute a “demonstrated need”. Even that text cannot exist in a vacuum. For instance, if the surrounding townships had mobile home parks that were only at 50% occupancy, one certainly would have a hard time arguing that for the general welfare of the community, that additional housing was needed when it has not been satisfied within or without the community at large. It also could be in a very awkward situation in which a court could find a violation of the constitutional issue of exclusionary zoning but find that the township did not violate the statutory provision because a demonstrated

need was never proven. The Court of Appeals' position is that a count of exclusionary zoning can be totally different from a statutory count. However, if that is the case, we are still led back to the question of remedy.

In reviewing *Schwartz v Flint*, 426 Mich 295; 295 NW2d 698 (1986), this Honorable Court held that if a court declared a zoning ordinance unconstitutional, it can declare a proposed land use reasonable and enjoin the municipality from interfering with the use but that becomes an "as applied" solution. Interestingly, the *Hendee* court stated: "Again, the analysis is confined to situations in which the court has found a particular ordinance to be unconstitutionally applied." (Id. at p 17.) (Emphasis added in decision.) So, even *Hendee* admits the ordinance is evaluated as it applies to a particular property.

What is even more ironic in this question about whether the Court of Appeals could hold that the ordinance is unconstitutional without considering a demonstrated need is the circuit court order itself. The amended judgment signed on May 23, 2006 on page 2 states in the second paragraph:

IT IS FURTHER HEREBY ORDERED AND ADJUDGED, for the reasons set forth in the Court's findings of fact and conclusions of law, that the total exclusion of manufactured housing communities by Defendant Putnam Township constitutes exclusionary zoning in violation of MCR 125.297a and a violation of Plaintiffs' constitutional rights to substantive due process and equal protection, and is therefore facially invalid and unenforceable to the extent that the ordinance excludes such legitimate land use:"

Thus, even the circuit court defined exclusionary zoning as it relates to "violation of MCR 125.297a". (The court really meant "MCL".) Thus, apparently the Court of Appeals did not realize that the holding of the circuit court recognized the statute and even defined the exclusion by using the statutory which requires a demonstrated need.

Once again, we are back to that conundrum that the Court of Appeals has established, i.e., making a decision on a facial challenge as opposed to an applied

challenge. Trying to follow the Court of Appeals' logic, the court could find a township guilty of a facial challenge to exclusionary zoning but they would not be in a position to address a specific land use or a special parcel without that issue being properly brought before the Township. Once they decide to get into the "as applied" then the statute (125.297a, now 125.3207) would also apply and they would have to present evidence of a "demonstrated need" in order to address the statutory qualifications. What the Court of Appeals, it seems to us, cannot do, is to declare a facial challenge and then remedy it by deciding that a particular parcel, therefore, can be used for a mobile home park without any other statutory or administrative process. Even the Court of Appeals recognizes that in *Schwartz*, the trial court went too far when it actually ordered to change the zoning classification of the plaintiff's property. The Court of Appeals concluded that "under the test for exclusionary zoning", the plaintiff's proposal in the case at bar was a "specific reasonable use" referring to the *Schwartz* standard (Id at p 17). However, in almost all the cases prior to *Hendee, supra*, the applicant had submitted a proposed use or proposed zoning classification to the municipality first, not going to the court for first impression. Under what authority does the circuit court have a right to examine and find that a use is reasonable and order it without going through the statutory legislative process? Somehow the *Hendee, supra*, court has decided that if there is a constitutional issue, it preempts any statutory process whatsoever. A person does not have to submit any requested zoning or plan to the township before going into court. It does not have to show any demonstrated need to the municipality before going into court. The court under *Hendee, supra*, can act as a superzoning commission and ignore any other standards that have been legislated.

The test that was set forth in *Kropf, supra & Kirk v Tyrone Township, 398 Mich 429; 247 NW2d 848 (1975)*, was established by the courts, not legislation. The fact that

after these cases were rendered that the legislature decided to clarify what constitutes prohibiting a land use is in their right as the legislative function. Historically, it is not uncommon after a court decision is made for the legislature to address certain deficiencies within the law and amend, modify or abolish certain statutes. What the Court of Appeals has done by their decision in *Hendee, supra*, is basically make the zoning statute, which addresses a demonstrated need, a nullity. They, in essence have declared that this section is unconstitutional. The basis of that decision appears to be simply because they prefer a different test than the one than the legislature has articulated.

However, *Bell River Associates v Charter Township of China*, 223 Mich App 124, 135; 565 NW2d 695 (1997) analyzes the validity of exclusionary zoning claim under statutory standards. Also, see *Houdek v Centerville Township*, 276 Mich App 568; 741 NW2d 587 (2007), *Anspaugh v Imlay Township*, 273 Mich App 122; 729 NW2d 251 (2007). It was also interesting to note that the Court of Appeals did not site a specific provision of the Michigan Constitution which establishes “exclusionary zoning claims”.

Municipalities cannot be in a situation in which, hypothetically, they can be found not to be in violation with the statutory provision regarding zoning exclusion but then be charged with violating a “constitutional right” and be subject to the trial courts acting as a superzoning commissions and also establishing what constitutes a constitutional violation.

Under *Hendee, supra*, the cards are all held in one hand by the courts and the legislative powers of the municipalities have been trimmed down to next to nothing. Neither the public nor the elected representatives and their appointees have any input in the process of zoning according to *Hendee, supra*. In fact, a landowner does not even have to bring a proposal to the respective municipality whatsoever and rely totally on

the circuit court to make all the decisions including determining what constitutes exclusionary zoning, what zone is appropriate for a particular parcel and approval of a site plan.

And finally, as it is pointed out by the defendants and later addressed in the dissent, the so-called “expert” that the court allowed to testify over the objections of the township had no specialty to qualify as one to who could analyze the issue of manufactured housing by way of the market’s need, etc. Not only were his qualifications suspect, but the limited analysis he did, did not encompass the township or surrounding areas pursuant to the statute but only a very small six mile area. The circuit court and the Court of Appeals erred by accepting the person’s testimony and report when he did not meet the qualifications “as an expert”.

For a more complete analysis, the court should reference the dissent’s opinion about Mr. Brian Frantz. Mr. Frantz did not prepare a “demonstrated needs analysis” but a “demand analysis” which is not in keeping with what the statute, MCL 125.297a, requires. No countywide data for current and proposed mobile home communities in the county was consulted. Most of his data was collected from “friends and family”, not even in the area to form a proper opinion. The dissent concluded, “...Frantz’s methods for arriving at his demand analysis are irrational and fundamentally unsound.” (Dissent at p12.) Mr. Frantz did not meet the test of an expert in regards to knowledge, skill, experience, training or education in order to qualify as an expert and certainly his opinion did not meet the standards that one would need to prepare the analysis needed to satisfy the requirement for “demonstrated need”. In that sense, since the trial court relied on that testimony to form the basis to determine exclusionary zoning, the finding that there was exclusionary zoning was improper because Mr. Frantz was not an expert and failed to lay the proper foundation to determine exclusionary zoning.

After all of the work in legislation that has been done in Michigan regarding what some consider some of the best zoning laws in our United States, it is a shame that all that could be put aside because of the *Hendee* decision.

We submit that the statutory enactment of PA 637 of 1978 must be given effect and that when a court looks to an allegation of exclusionary zoning, it must also consult with the statutory provision and be taken into consideration before rendering a judgment on whether a municipality is guilty of exclusionary zoning.

## ARGUMENT V

### THE CIRCUIT COURT ABUSED ITS DISCRETION IN AWARDING PLAINTIFF'S THEIR COSTS AND EXPERTS' FEES

Amicus curiae supports the Township's assertion that the Circuit Court abused its discretion when granting, in part, Plaintiff's motion for costs. The Circuit Court awarded the Plaintiff its costs, including its expert witness fees, despite the Township's objection that the fees were unreasonable and had not been properly established. Subsequently, the Court of Appeals upheld the Circuit Court's awarding Plaintiff its costs.

In cases involving a public question or an issue that would affect the public welfare, courts have generally refrained from awarding costs to the prevailing party. *American Aggregates Corp v Highland Township*, 151 Mich App 37, 52-54; 390 NW2d 192 (1986). Specifically, Michigan courts have held that cases of a property owner challenging the constitutionality of zoning as applied to its property involve a public question. *Id.* at 54 (citing *Ettinger v Avon Twp*, 64 Mich App 529; 236 NW2d 129 (1975); *Turkish v City of Warren*, 61 Mich App 435; 232 NW2d 732 (1975), modified on other grounds 406 Mich 137 (1979)). In *Kyser v Kasson Township*, 278 Mich App 743, 761-763; 755 NW2d 190 (2008), appeal granted 483 Mich 982 (2009), a property owner successfully challenged the application of the Township's zoning ordinance as applied to its property. The *Kyser* court held that

“ ‘Michigan courts frequently refuse to award costs in cases involving public questions,’ and “this Court has specifically refused to award costs in landowners’ suits challenging the constitutionality of zoning ordinances as applied to their property, since such cases involve public questions.” *Id.*, citing *American Aggregates*, supra at 54, 390 NW2d 192. Because this case directly involved a ‘public question,’ *id.*, the circuit court did not abuse its discretion by denying plaintiff’s request to tax costs.”

As in *Kyser*, the property owner herein challenged the applicability of the Putnam Township zoning ordinance as applied to its property. A public question was undoubtedly involved. As such, plaintiff should not have been awarded costs, including expert witness fees. Notably, the validity of the Township's zoning ordinance, as well as the Township's authority to develop and administer such ordinance, were under review.

In addition, the Plaintiffs-Appellees never applied to the Township for a mobile home park zone or presented evidence at a zoning hearing to show a demonstrated need as required by statute. Having bypassed the zoning process the Township should not now be penalized for the Plaintiff's use and expense for experts at trial.

Further, the Township should not now be penalized for defending the zoning ordinance that had been duly developed and adopted by its elected and appointed officials. Such effort clearly involved a public question of great importance to township governments throughout the state.

## CONCLUSION

If the *Hendee* decision is left to stand, it will then undercut decade-old rules of law that our courts are not to become superzoning commissions. If the *Hendee* decision is left to stand, it will contradict *Paragon Properties, City of Novi*, 452 Mich 568, 576 (1996) decision and do away with the “finality rule” which will no longer be necessary for filing a lawsuit. The *Hendee* decision changes the test for whether or not a municipality is involved in exclusionary zoning by ignoring not only the case law but also the statutory law enacted in 1978. It further creates confusion between the difference between a “facial challenge” and “as applied” challenge. Under *Hendee*, once a facial challenge is alleged, the courts can then use a “as applied” remedy even though a plaintiff has never complied with any statutory or local ordinance procedure regarding zoning. The *Hendee* decision is even at odds with the *DF Land Development, supra*, decision.

We submit to this Honorable Court that upon review of the *Hendee* decision, it should restore the developed case law in regards to the importance of finality in zoning matters before litigation can commence and that the principles that have developed over the decades including the statutory requirement of “demonstrated need” be reaffirmed by reversing the *Hendee* decision and remanding the Plaintiffs-Appellees to return to following the zoning procedures that this court has affirmed in the past.

Dated: September 29, 2009

BAUCKHAM, SPARKS, LOHRSTORFER,  
THALL & SEEBER, P.C.

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John K. Lohrstorfer (P39071)