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STATE OF MICHIGAN

IN MICHIGAN SUPREME COURT

On Appeal From The Court Of Appeals
The Hon. Pat M. Donofrio, the Hon. David H. Sawyer, and the Hon. William B. Murphy

JEFFREY HENDEE, MICHAEL HENDEE, LOUANN DEMOREST HENDEE, and VILLAGE POINT DEVELOPMENT LLC,

Plaintiffs/Appellees,

v

TOWNSHIP OF PUTNAM,

Defendant/Appellant.

/

Supreme Court Case No.

COA Docket No. 270594

Trial Court Case No. 04-020676-CZ

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AMICI CURIAE MICHIGAN MUNICIPAL LEAGUE, MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY, AND MICHIGAN MUNICIPAL LEAGUE LIABILITY AND PROPERTY POOL'S BRIEF IN SUPPORT OF THE POSITION OF DEFENDANT/APPELLANT

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Defendant/Appellant, Township of Putnam ("Township") seeks leave to appeal from the Court of Appeals' August 26, 2008 unpublished opinion affirming in part and reversing in part the trial court's judgment entered after a bench trial. MCR 7.302 governs applications for leave to appeal to this Court. The Application for Leave to Appeal was filed within forty-two (42) days of the Court of Appeals' August 26, 2008 unpublished opinion. *Amici Curiae,* the Michigan Municipal League, the Michigan Municipal Risk Management Authority, and the Michigan Municipal League Liability and Property Pool, support Defendant/Appellant's Application for Leave to Appeal for the reasons contained in this Brief.

STATEMENT OF QUESTIONS INVOLVED

Defendant/Appellant, Putnam Township, has addressed four issues in the Application for Leave to Appeal to this Court. *Amici Curiae*, the Michigan Municipal League ("MML"), the Michigan Municipal Risk Management Authority ("MMRMA"), and the Michigan Municipal League Liability and Property Pool ("Pool") address two (2) issues which relate to the ripeness of the challenge to the Zoning Ordinance, and whether there is a "constitutional" exclusionary zoning claim.

I. WERE THE PLAINTIFFS' CLAIMS RIPE FOR ADJUDICATION WHERE PLAINTIFFS NEVER MADE APPLICATION TO THE TOWNSHIP TO DEVELOP THE SUBJECT PROPERTY FOR A MOBILE HOME PARK?

Plaintiffs/Appellees Answered:	Yes
Defendant/Appellant Answered:	No
Trial Court Answered:	Yes
The Court of Appeals Answered:	Yes
Amici Curiae Answers:	No

II. WHETHER THE LEGISLATURE'S AMENDMENTS TO THE ZONING ENABLING ACTS IN 1979[1] REPLACED THE COMMON LAW HOLDING RELATED TO EXCLUSIONARY ZONING AS DISCUSSED IN *KROPF V CITY OF STERLING HEIGHTS*[2], LATER REITERATED IN *KIRK V TYRONE TOWNSHIP*[3]?

Plaintiff/Appellee Answered:	No
Defendant/Appellant Answered:	Yes
Trial Court Answered:	Did Not Answer
Court of Appeals Answered:	No
Amici Curiae Answers:	Yes

[1] PA 1978, No. 638, effective March 1, 1979.
[2] 391 Mich 139; 215 NW2d 179 (1974).
[3] 398 Mich 429; 247 NW2d 848 (1976).

ARGUMENT

I. INTRODUCTION AND STATEMENT OF INTEREST.

The Plaintiffs/Appellees, Jeffrey Hendee, Michael Hendee, Louann Demorest Hendee, and Village Point Development, LLC (collectively the "Plaintiffs") own approximately 144 acres of land which the family has farmed through the years. Plaintiffs requested that Defendant/Appellant, Putnam Township (the "Township") rezone the property from AO (Agricultural/Open Space) to R1B (Residential; one house per acre), and also sought corresponding approval of a Planned Unit Development ("PUD") consisting of 95 single-family homes on one acre lots.

On May 28, 2003, the Township Planning Commission recommended denial of the rezoning requests. On June 18, 2003, the Livingston County Planning Commission recommended denial of Plaintiffs' requests in accordance with the County Planning Department Staff's recommendation. On December 10, 2003, the Township Planning Commission, on remand from the Township Board, provided specific findings of fact in support of its recommended denial of Plaintiffs' rezoning requests. The Township's Community Planner wrote to the Township on December 17, 2003 recommending denial of Plaintiffs' requests. On that same date, the Township Board denied Plaintiffs' requests for specific reasons contained in the Minutes and Resolution.

On December 23, 2003, Plaintiffs applied for a use variance from the Township Zoning Board of Appeals ("ZBA") "to develop the property for one acre residential lots." The ZBA conducted hearings on February 23rd and March 22nd, 2004, at which time the ZBA denied Plaintiffs' request for a use variance.

On April 12, 2004, Plaintiffs filed a Complaint challenging the AO zoning classification on several grounds. Count I alleged that the Township had violated Plaintiffs' equal protection

rights by depriving Plaintiffs of "their rights to own and to make lawful, reasonable use of their real estate, their right to engage in a lawful business, and their right to be free from unlawful interference in the development of the property". Plaintiffs also asserted that the equal protection claim existed by virtue of the Township's "discriminatory actions". Count II claimed that the Township's refusal to rezone the property was "wholly arbitrary, capricious and unreasonable," and failed to "promote the public health, safety and general welfare," resulting in a violation of substantive due process. Count III asserted that the Zoning Ordinance precluded the use of Plaintiffs' property for any economically-viable use, deprived them of reasonable investment-backed expectations, and was confiscatory. The first three counts alleged that the claims were both "facial" and "as applied" challenges to the Zoning Ordinance. Lastly, Count IV alleged that the Township Zoning Ordinance was exclusionary under the Township Rural Zoning Act, MCL 125.297a[4] (the "exclusionary zoning statute") because it prohibited the development of "affordable housing consisting of density equal to or greater than one acre lots, including manufactured housing communities". This count sought the invalidation of the ordinance, both facially and as applied, and a declaration that a proposed mobile home park would be a reasonable use for the subject property.

By Stipulated Order to Waive Claim for Damages and for Dismissal of Jury Demand dated June 21, 2005, Plaintiffs waived all damage claims and sought only injunctive relief. Thereafter, both the Plaintiffs and the Township moved for Summary Disposition. On June 30, 2004, the Circuit Court entered an Order regarding Cross-Motions for Summary Disposition denying both sides' Motions.

A Bench Trial was held on January 31, 2006, February 1-2, 6-7, 24 and 28, 2006, and March 1, 3 and 13, 2006. On May 5, 2006, the Circuit Court issued an Opinion from the bench.

[4]The Township Zoning Act was repealed with the adoption of the Michigan Zoning Enabling Act, MCL 125.3101 *et seq.* The new section governing exclusionary zoning is contained in MCL 125.3207, and is virtually identical to the former statute.

A Judgment was entered on May 5, 2006, and an Amended Judgment on May 23, 2006. The Township filed a timely Claim of Appeal to the Court of Appeals.

Specifically, the Trial Court ruled that the Township's AO, Agricultural/Open Space, zoning classification was unconstitutional "as applied" to Plaintiffs' property. The Trial Court further found, based upon the Court's findings of fact and conclusions of law, that the total exclusion of manufactured housing communities by the Township constituted exclusionary zoning in violation of the Zoning Enabling Act, resulted in a violation of substantive due process and equal protection, and rendered the zoning "facially" invalid. The Trial Court then found Plaintiffs' proposed development and use of the subject property as a 498 unit mobile home park to be reasonable, and entered an injunction permanently enjoining the Township from enforcing the AO zoning classification against the subject property, and permanently enjoining the Township from interfering with Plaintiffs' use of the property as a 498 unit mobile home park. The Judgment did not exempt Plaintiffs from complying with all applicable federal, state and local regulations governing manufactured housing communities.

The Township timely filed an appeal. In the Court of Appeals, *Amicus Curiae* Briefs were filed by the Real Property Law Section of the State Bar of Michigan in favor of the Plaintiffs, and by both the Michigan Township Association and the Michigan Municipal League supporting the Township's position. On August 26, 2008, the Court of Appeals issued its unpublished opinion (docket Nos. 270595, 275469), attached as **Exhibit A**. In a 2-1 decision, the Court of Appeals reversed in part and affirmed in part.

First, the Court of Appeals unanimously reversed the lower court on the due process, equal protection and takings claims. The majority found the claims ripe for review, but held these claims failed on the merits. Contrary to the majority, the dissent found that the claims were not ripe, but agreed that Plaintiffs had failed to prove any of these claims. With respect to

the exclusionary zoning claim, the majority did not address whether the claim would be ripe, sidestepping the issue based on the "futility exception."

Secondly, despite the fact that Plaintiffs had based their claims for exclusionary zoning on the statute, MCL 125.297a, the majority of the Court of Appeals panel determined that it was unnecessary to review the standards contained in the statute because the Plaintiffs had stated a "constitutional" exclusionary zoning claim which did not require a showing of demonstrated need or lack of the use in the Township or the surrounding area. The dissent found that the exclusionary zoning claim was not ripe. The dissent determined, however, that even if the exclusionary zoning claim was ripe, the Plaintiffs had failed to show the demonstrated need required.

It is the position of the MML, the MMRMA, and the Pool that the decision of the lower courts eviscerates the ripeness doctrine first established by the United State Supreme Court in the seminal case of *Williamson County Regional Planning Commission v Hamilton Bank of Johnson City,* 473 US 172, 105 S Ct 3108, 87 L Ed 2d 126 (1985), and confirmed by the Michigan Supreme Court in *Paragon v City of Novi*, 452 Mich 568; 550 NW2d 773 (1996). Without a clear understanding of the law as it applies to the issues in this case, there is a danger that the ripeness doctrine will be turned on its head. In addition, the Court of Appeals found the existence of a "constitutional" exclusionary zoning claim, even though Plaintiff's complaint alleged a violation of the exclusionary zoning statute, and in the absence of any reference to "exclusionary zoning" in either the United States of Michigan Constitutions. The MML, the MMRMA, and the Pool believe that it is therefore important to clarify and provide its input on these issues for the Supreme Court.

This lawsuit involves the fundamental question of what constitutes a "final decision" for purposes of the ripeness doctrine. There is no dispute in this case that Plaintiffs never applied

for a rezoning of their property for a mobile home park, and instead asked the Court to approve that use in the first instance. Indeed, Plaintiffs only requested that the Township render a decision on its request to rezone the property to permit the development of 95 single-family homes, a request that Plaintiffs then admitted at trial was not reasonable. Once that rezoning was denied, and Plaintiffs request for a use variance to permit a similar single-family development was likewise denied, Plaintiffs ran to Court requesting that the Court approve a development proposal that had never been submitted or considered by the Township, never been reviewed by appropriate consultants, and never noticed for public hearing or public comment. Moreover, the Trial Court simply accepted Plaintiffs' allegations that the claims being raised were both "facial" and "as applied" without analyzing the validity of those allegations with respect to existing law. This resulted in the Trial Court ignoring the ripeness doctrine, both on the facts and based upon a mislabeling or wrongful analysis of the Plaintiffs' claims.

Plaintiffs alleged in their complaint that the Township's Zoning Ordinance was exclusionary in violation of MCL 125.297a. The Court of Appeals disregarded the statutory language, and instead determined that the trial court should be affirmed on the basis that Plaintiffs had established a "constitutional" exclusionary zoning claim under language in *Kropf* v *City of Sterling Heights,* 391 Mich 139; 215 NW2d 179 (1974) and *Kirk v Tyrone Township*, 398 Mich 429; 247 NW2d 848 (1976). In so holding, the Court of Appeals failed to recognize that the Michigan Supreme Court decisions in *Kropf* and *Kirk* had been superseded by the Michigan Legislature when it adopted amendments to the Zoning Enabling Act in 1979.

The Michigan Municipal League ("MML") is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 516 Michigan local governments of which 425 are also members of the Michigan Municipal League Legal Defense Fund. The MML operates the Legal

Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance. This brief *Amicus Curiae* is authorized by the legal Defense Fund's board of directors whose membership includes: the president and executive director of the MML, and the officers and directors of the Michigan Association of Municipal Attorneys: Debra A. Walling, corporation counsel, Dearborn; Andrew J. Mulder, city attorney, Holland; William B. Beach, city attorney, Rockwood; Randall L. Brown, city attorney, Portage; W. Peter Doren, city attorney, Traverse City; Clyde Robinson, city attorney, Battle Creek; Eric D. Williams, city attorney, Big Rapids; Lori Grigg Bluhm, city attorney, Troy; Stephen K. Postema, city attorney, Ann Arbor; John E. Johnson, Jr. corporation counsel, Detroit; and William C. Mathewson, general counsel, Michigan Municipal League.

The Michigan Municipal Risk Management Authority ("MMRMA"), is a pool of 338 self-insured municipalities and governmental agencies throughout the State of Michigan. More specifically, the MMRMA consists of 67 cities, 60 counties, 38 townships, 10 villages, and 163 other governmental entities. The MMRMA is governed by a Board of Directors, whose members are James Kohmescher, City of Wyoming; James Scharret, City of Southfield; Michael Welsch, Iosco County; Richard Burke, City of Ishpeming; Cindy King, Charter Township of Van Buren; Leonard Peters, Eaton County; Michal Dornan, City of Wixom; Robert Seeterlin, Charter Township of Waterford; Michael Bosanac, Monroe County; and Thomas Yack, Charter Township of Canton. This Brief has been authorized by the MMRMA, including Michael L. Rhyner, its Executive Director, and Michael Ellis, the Director of Claims.

The Michigan Municipal League Liability and Property Pool ("Pool") is sponsored by the Michigan Municipal League. Only those municipalities that are members of the League may purchase this pool insurance. The Pool exists to serve municipalities only, pursuant to a

statutorily authorized intergovernmental contract for a municipal group self-insurance pool. MCL 124.5.

The issues involved in this appeal are of significance to the members of the MML, the MMRMA, and the Pool. *Amici Curiae* intend to address the following issues: (1) Whether Plaintiffs' claims were ripe for adjudication; and (2) Whether the Legislature's Amendments to the Zoning Enabling Acts in 1979 replaced the common law holding related to exclusionary zoning as discussed in *Kropf*, later reiterated in *Kirk*.

The MML, the MMRMA, and the Pool believe the Court of Appeals incorrectly analyzed the issues, and that this case has created further confusion and chaos in zoning litigation. Plaintiffs have taken a position with this Court that would result in a property owner totally bypassing the processes required at the local governmental unit for obtaining development approval. Plaintiffs also want this Court to acknowledge the existence of a "constitutional" exclusionary zoning claim, when no such claim exist under either the United States or Michigan Constitutions, and when the Michigan Legislature clearly superseded prior Supreme Court precedent in 1979 with the amendments to the Zoning Enabling Act. Plaintiffs want this Court to create a "constitutional" exclusionary claim that would not require the Plaintiffs to establish the factors contained in the exclusionary zoning statute. These positions are contrary to law and public policy.

II. STATEMENT OF FACTS.

Amici Curiae accept and adopt the Statement of Facts in the Township's Brief on Appeal. *Amici Curiae* take exception to two "facts" which had been argued below. First, it was claimed that Plaintiffs attempted to file an application to rezone the property for a mobile home park, but that the Township refused to accept the application. This statement is expressly contrary to the specific findings of the trial court:

> I further find that Plaintiffs never pursued with the Township any request or petition to have their property rezoned for manufacturing home use...
>
> I further find that at no time did the - any of the Plaintiffs present to the Township a request for a review or approval of any mobile home park development, including a 536 unit mobile home park development that is identified as Exhibit B in the Complaint. (Defendant/Appellant's Brief on Appeal, Opinion from the Bench, 5/05/06. Trial pp. 56-57, attached as Appendix 1; see, also, Stipulated Facts).

In addition, there were assertions in the Court of Appeals that the ZBA rejected a request for a use variance which would have permitted the development of 40 lots on the property. This is again contrary to the record, as Plaintiffs never submitted any application to the ZBA for 40 lots. (See Stipulated Findings of Fact, ¶¶ 19, 20.) The trial court confirmed that the Township ZBA denied Plaintiffs' requested use variance for development up to 95 lots on the property. (Defendant/Appellant's Brief on Appeal in Court of Appeals, Opinion from the Bench, 5/05/06, Trial p. 56, attached as Appendix 1.)

III. LEGAL FRAMEWORK.

A. General Background on Land Use.

At issue is the critical interplay of the relationship between the Courts and the legislative power of municipalities pursuant to the Michigan Zoning Enabling Act and Michigan Planning Act to review and decide land use issues. Also at issue is the ability of a property owner to sidestep long-standing municipal processes and legal precedent by mislabeling the claimed constitutional attacks on zoning regulations. Should the Court permit a property owner to challenge zoning regulations and grant relief to a property owner when that property owner has never requested the municipality to render a decision on the proposed use? Does the property owner have an obligation to make application before the local municipality and proceed through the public hearing process before he or she requests that a Court approve such a use? Does a property owner who ignores the approval process have standing to assert constitutional or other challenges to the zoning regulations? The Plaintiffs assert a position that would permit a

property owner to entirely bypass required decision-making procedures - a position that is not only contrary to the law, but would violate public policy.

B. Legislative and Judicial Roles in Zoning.

The Township Planning Act,[5] and the Township Zoning Act[6] set forth in great detail the intent of the Michigan Legislature for resolving problems like those faced by the Township. Specifically, the Legislature prescribed the development of appropriate master land use plan provisions, followed by the enactment of zoning ordinance amendments in accordance with the master plan, in order to bring land use order and balance to the community.[7] This prescription by the Michigan Legislature is not new or unique. Indeed, the notion of separating land uses in order to advance the public health, safety, and welfare has been the keystone of zoning ordinance viability and validity from the very outset of the exercise of this police power authority. *Village of Euclid, Ohio v Ambler Realty Co*, 272 US 365; 47 SCt 114; 71 LEd 303 (1926).

Consistent with this legislative delegation, the Court in *Schwartz v City of Flint,* 426 Mich. 295, 313; 395 NW2d 678 (1986) reLgnized that:

> Zoning, by its nature, is most uniquely suited to the exercise of the police power because of the value judgments that must be made regarding aesthetics, economics, transportation, health, safety, and a community's aspirations and values in general.

In *Village of Belle Terre v Boraas*, 416 US 1, 13; 94 SCt 1536; 39 LEd2d 797 (1974), Justice Marshall, even while dissenting with regard to the effect of a particular single-family zoning regulation in that case, made the following oft-cited observation with regard to the zoning power:

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[5] MCL 125.231 *et seq,* to be superseded upon the effectiveness of the Michigan Planning Enabling Act on September 1, 2008, MCL 125.3801, *et seq.*

[6] MCL 125.271 *et seq,* superseded effective July 1, 2006 by the uniform Michigan Zoning Enabling Act, MCL 125.3101, *et seq.* applicable to cities, villages, townships, and counties.

[7] MCL 125.273 (The zoning ordinance shall be based upon a plan . . .). Now, see, MCL 125.3203.

> It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life. I therefore continue to adhere to the principle of *Village of Euclid v Ambler Realty Co*, 272 US 365, 47 SCT 114, 71 Led 303 (1926), that deference should be given to governmental judgments concerning proper land-use allocation.

Courts have long appreciated that zoning is a legislative act. *Paragon Properties Co v City of Novi,* 452 Mich 568, 574, 550 NW2d 773 (1996); *Albright v City of Portage*, 188 Mich App 342, 470 NW2d 657 (1991). Zoning ordinances enable government to manage land within its jurisdictions, and carry out the community's goals for development within its geographical boundaries. Where property is subject to an existing zoning ordinance, a landowner may use it as regulated, or request that the regulations be changed. The request can take the form of a rezoning application, a conditional rezoning application, a use variance, or other creative land use tools. Regardless of how the development is approached, processes are in place before the local municipality to insure that local government has the opportunity to review the proposal in light of surrounding land uses, the master plan setting the goals for community development, and any proposed development's impact on infrastructure, roadways, utilities, police and fire services, and so on. The local municipality provides the venue for public comment on the development proposal. The local municipality is in the best position to evaluate and dictate its development goals, desires, and needs, and the Court has long-recognized the legislative discretion involved in these matters.

As far back as 1957, the Michigan Supreme Court recognized that it was not the function of the Court to serve as a "super zoning commission". As stated in *Daraban v Redford Twp*, 383 Mich 497, 501-506, 176 NW2d 598 (1970):

> The role of the Court is not to control the direction of zoning. It is not to determine what is the best use of the land. Our role is to prevent the abuse of the zoning power - as when the ordinance in question so restricts the use of the land that it amounts to confiscation by the local government.

In *Kropf, supra,* 391 Mich at 161, quoting *Brae Burn Inc v City of Bloomfield Hills,* 350 Mich 425, 430-431, 86 NW2d 166 (1957), the Supreme Court again reiterated:

> This Court does not sit as a super zoning commission. Our laws have wisely committed to the people of a community themselves the determination of the 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...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.

The Court has consistently noticed that for alleged abuses involving zoning, the remedy is the ballot box, and not the Court. See, also, *Parkview Homes, Inc. v City of Rockwood,* 2006 WL 508647 (ED Mich, 2006). As zoning is a legislative function, a Court's role is to determine whether the legislative power has been "abused" when weighed against a constitutional attack.

Zoning involves the exercise of value judgments on the part of local legislative bodies. Zoning is put into place after debate through the public process involved. The authority to zone includes the power to draw lines between zoning use districts and to determine what uses are appropriate or "needed" in the municipality. The power of local legislative bodies to exercise the value judgments referenced in the quoted excerpt from *Schwartz v City of Flint,* above, is at the very core of a municipality's general policy-making efforts to protect the quality of life for its residents. The Court, in *Greater Bible Way Temple of Jackson v City of Jackson,* 478 Mich 373, 389; 733 NW2d 734 (2007), recently explained a facet of zoning ordinance enactment that applies with significant force within the present context:

> In the instant case, the city adopted a zoning ordinance that applied to the entire community, not just to plaintiff. See West v City of Portage, 392 Mich 458, 469, 221 NW2d 303 (1974) (" '[Z]oning ordinances ... are classified as general policy decisions which apply to the entire community.' ")(Citation omitted.) Concomitantly, if the city had granted plaintiff's request to rezone the property, such rezoning would also have applied to the entire community, not just plaintiff. A decision whether to rezone property does not involve consideration of only a particular or specific user or only a particular or specific project; rather, it involves the enactment of a new rule of general applicability, a new rule that

> governs all persons and all projects. See Sherrill v Town of Wrightsville Beach, 81 NCApp 369, 373, 344 SE2d 357 (1986) ("it is the duty of the zoning authority to consider the needs of the entire community when voting on a rezoning, and not just the needs of the individual petitioner").

This longstanding, underlying foundation of the separation between the role of local government (the legislators) and the role of the Court (the judiciary) is in jeopardy of being implicitly overruled through a decision in this case. Based upon the law, it is a total leap in logic for Plaintiffs to suggest that a court should assume the role, in the first instance, of determining the appropriateness of a proposed development. In this case, Plaintiffs made application for a 95 single-family unit development on the property. That was the only proposal that proceeded through the required steps at the local municipality, and the only proposal that the Township had the opportunity to evaluate and decide. Moreover, the public has a right to participate through public hearings in the rezoning process, and the public never received notice or any opportunity to comment on the use Plaintiffs requested through the lawsuit. Bypassing the system entirely, Plaintiffs filed suit after receiving a decision on the R1B single-family proposal (which would not have permitted the development of a mobile home park), specifically attacked the R1B that they had specifically requested on the basis that it was unreasonable (thereby confirming the Township correctly denied that rezoning), and for the first time requested permission to develop a mobile home park. In using this tactic, which was allowed by the trial court and the Court of Appeals, Plaintiffs managed to, thus far, fly under the ripeness radar. The failure of Plaintiffs to file a true and meaningful application, as detailed below, compromised this record.

A further attack on the separation of powers took place when the majority of the Court of Appeals declared that Plaintiffs were not required to meet the standards of MCL 125.294a to establish an exclusionary claim. In doing so, the Court of Appeals ignored the holding of the United States Supreme Court in *Village of Euclid v Ambler Realty Co, supra*, 272 US at 395, that

zoning power is derived from the legislature. The Court of Appeals also failed to recognize that the Michigan Legislature acted in 1979 to define the parameters of an exclusionary claim, and that the amendments to the Zoning Enabling Act superseded former case law.

IV. PLAINTIFFS' CLAIMS WERE NOT RIPE FOR ADJUDICATION.

A. The Ripeness Doctrine.

The United States Supreme Court first defined the ripeness doctrine in the landmark case of *Williamson County Regional Planning Commission v Hamilton Bank of Johnson City, supra.* In 1973, the County had adopted a zoning ordinance that allowed, among other things, "cluster" development of residential areas. The then owner of the property submitted a preliminary plat for cluster development. The preliminary plat was approved for the 676 units. In 1977, the County changed its zoning ordinance which reduced the density permitted under the cluster development. The County continued to apply 1973 regulations to the subject property. However, in 1979, the Planning Commission "changed its mind" and applied the new ordinance regulations to the developer's request for renewal, and ultimately disapproved the preliminary plat for several reasons.

Hamilton Bank thereafter acquired through foreclosure the portion of the property that had not yet been developed. The bank then submitted two preliminary plats to the Planning Commission, which were denied. The Planning Commission declined to follow the decision rendered by the County Zoning Board of Appeals. Hamilton Bank sued, alleging the County had taken its property without just compensation. After a three week trial, the jury awarded the bank $350,000.00 for the temporary taking of property. The lower Court granted judgment notwithstanding the verdict. A divided panel of the Sixth Circuit reversed, finding a temporary taking was compensable, and holding that the jury had found a vested right to develop under the former regulations.

Although the United States Supreme Court granted certiorari to address the question of whether damages must be paid for a temporary taking, the Court instead *sua sponte* raised and disposed of the case on the issue of ripeness, finding that because the claims were not ripe, the Court lacked jurisdiction. In discussing the first prong of the ripeness doctrine, the Court wrote:

> As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. *Id.* at 186.

The Court noted that the bank had failed to apply for available variances and waivers from the commission that may have provided the desired result.

The Court also explained the need to focus on the elements of causes of action which would have to be proven for a property owner to invalidate a land use decision or regulation on constitutional grounds. Courts had consistently indicated that among the factors of particular significance in any inquiry would be the economic impact of the challenged action and/or regulation, and the extent to which it would interfere with reasonable investment-backed expectations. The United States Supreme Court then stated:

> **Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.** Here, for example, the jury's verdict indicates only that it found the respondent would be denied the economically feasible use of its property if it were forced to develop the subdivision in a manner that would meet each of the commission's eight objections. It is not clear whether the jury would have found that the respondent had been denied all reasonable beneficial use of the property had any of the eight objections been met through the grant of a variance. Indeed, the expert witness who testified regarding the economic impact of the commission's actions did not itemize the effect of each of the eight objections, so the jury would have been unable to discern how a grant of a variance from any one of the regulations at issue would have affected the profitability of the development. Accordingly, until the commission determines that no variances will be granted, it is impossible for the jury to find, on this record, whether a respondent 'will be unable to derive economic benefit' from the land. *Id.* at 473 US 191. (Emphasis added).

Hamilton Bank had claimed that there was no requirement to "exhaust administrative remedies" before asserting the constitutional claims. The Court clarified its position as follows:

> The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable.... While the policies underlying the two concepts often overlap, the finality requirement is concerned with **whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual concrete injury**; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate... *Id.* at 193. (Emphasis added.)

The Court required a property owner resort to the procedures available to obtain a "conclusive determination" as to whether the property could be developed "in the manner respondents proposed". Id. at 193. The Supreme Court has also confirmed this first prong of the ripeness doctrine in subsequent opinions. See, *Palazzolo v Rhode Island,* 533 US 606, 620; 121 S Ct 2448; 150 L Ed 2d 592 (2001) (landowner must first follow the "reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property"); *Suitum v Tahoe Regional Planning Agency,* 520 US 725, 117 S Ct 1659, 137 L Ed 2d 980 (1997); *Tahoe-Sierra Preservation Council v Tahoe Regional Planning Agency*, 535 US 302, 122 S Ct 1465, 152 L Ed 2d 517 (2002).

Hamilton Bank had further raised a substantive due process claim which was rejected by the Supreme Court as premature:

> In sum, respondent's claim is premature, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the just compensation clause of the Fifth Amendment. *Id.* at 200.

Since *Williamson County*, federal courts throughout the nation have applied the final decision requirement, and found claims unripe for failure to obtain a final decision. The ripeness doctrine has been applied to takings claims, substantive due process claims, and equal protection claims. See, for example, the numerous cases in the Sixth Circuit Court of Appeals.

Bigelow v Michigan Dept' of Natural Resources, 970 F2d 154, 158-159, (CA 6, 1992) (ripeness applies to equal protection claim); *Warren v City of Athens, Ohio, supra* at 708 (ripeness requirements apply to claims that are ancillary to takings claims – based on the same set of facts); *Peters v Fair,* 427 F3d 1035, 1037 (CA 6, 2005) and *Arnett v Nyer,* 281 F3d 552, 556 (CA 6, 2002) (substantive due process and equal protection claims that are ancillary to a takings claim are subject to ripeness); *J-II Enterprises LLC v Board of Commissioners of Warren County,* 135 Fed Appx 804, 807 (CA 6, 2005) (equal protection claim not ripe if takings claims is not ripe for review).

Michigan Courts have followed the final decision requirement. In the case of *Paragon Properties Co v City of Novi, supra,* plaintiff bought certain property located in the City of Novi which was zoned for single-family residential use. Approximately four years later, Paragon requested that the City of Novi rezone the land for a mobile home park, which rezoning request was denied. Litigation subsequently ensued. The City moved for summary disposition on the basis that Paragon's claims were not ripe for adjudication because no final decision had been made because Paragon had not sought a variance from the Zoning Board of Appeals, which motion was denied by the Court. After trial, the Court found that the zoning of the property amounted to a taking of property without just compensation. Judgment was entered enjoining the City from enforcing the single-family residential classification, approving Paragon's proposed mobile home park, and awarding damages and attorney fees of approximately $500,000. The City's Motion for a New Trial or Judgment Notwithstanding the Verdict was denied, and an appeal was taken.

The central issue on appeal was whether the City's denial of Paragon's rezoning application constituted a "final decision" from which Paragon could seek redress in the Circuit Court. The City argued that Paragon had not received a final decision as it had failed to seek a

variance from the Zoning Board of Appeals. The Court of Appeals[8] agreed with the City that plaintiff had an obligation to seek a variance, even after the denial of rezoning, and reversed the Trial Court.

The Michigan Supreme Court, in *Paragon*, 452 Mich at 578-579, affirmed and applied the same reasoning:

> The finality requirement aids in the determination of whether a taking has occurred by addressing the actual economic effect of a regulation on the property owner's investment-backed expectations. As noted in Williamson, factors affecting a property owner's investment expectation 'simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question. Investment-backed expectations are distinguishable from mere financial speculation.'

See, also, *Electro Tech Inc v HF Campbell Co,* 433 Mich 57, 445 NW2d 61 (1989), cert den 493 US 1021 (1990); *Lake Angelo Associates v White Lake Township*, 198 Mich App 65; 498 NW2d 1 (1993).

Considerable guidance for the present case is also provided by *Braun v Ann Arbor Twp,* 262 Mich App 154, 683 NW2d 755 (2004). There, the landowner filed an application to rezone property from A-1 (Agricultural) and R-2 (Single-Family Suburban), to R-3 (Single-Family Urban) and R-6 (Mobile Home Park Residential). The Township Board denied the request. The landowner filed a complaint asserting counts that were essentially identical to Plaintiffs' claims in this matter: (1) substantive due process; (2) equal protection; (3) inverse condemnation; and (4) exclusionary zoning. 262 Mich App at 156. The Circuit Court ruled that plaintiff's claims were not ripe and dismissed the complaint. The Court of Appeals affirmed because the possible development of the land had not been established, explaining:

> The [United States] Supreme Court...observed...that its 'cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it'.

[8] 206 Mich App 74; 520 NW2d 34 (1994).

* * *

> The Supreme Court has stated that '[until] a property owner has obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property it is impossible to tell whether the land retains any reasonable beneficial use or whether existing expectation interests have been destroyed'. 262 Mich App at 158.

The *Braun* Court emphasized that controlling United States Supreme Court authority, explained above, requires property owners to show that they sought and were denied alternative uses of the property, thus leaving the landowner with no economically feasible use of the property. The ripeness doctrine specifically requires that a landowner actually obtain a final decision - not play procedural games to bypass the local municipality in a hope to obtain alternative relief through the Court. *Conlin v Scio Twp*, 262 Mich App 379, 686 NW2d 16 (2004).

Contrary to the dictates of *Paragon* and *Braun*, Plaintiffs never received a final decision on the alleged "issue that inflicts an actual concrete injury". *Williamson County, supra* at 193. The ripeness doctrine required Plaintiffs to obtain a "final, authoritative decision" as to the type and intensity of development that would be permitted on the property, and required them to obtain a final decision on the specific issue that Plaintiffs would request the court to address. If Plaintiffs had wanted a decision on a mobile home park, they should have filed the appropriate application to obtain that decision.[9] Instead, Plaintiffs sought that relief for the first time from the Court. Plaintiffs are in the same position as a property owner that has not made any application for a proposed use, as Plaintiffs never requested the specific use sought through

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[9] The Court of Appeals majority side-stepped the issue of whether the claims were ripe by holding that application for approval of a mobile home park by Plaintiffs would have been "futile". The majority's logic was that because the Township denied Plaintiffs' request for a 95 unit single-family development, it necessarily followed (without explanation) that the Township would likewise deny an application for a mobile home park, although no one, including the Plaintiffs, had ever made such a request. As shown by the law cited in the Township's Application for Leave to Appeal, "the mere possibility, or even probability, that the responsible agency may deny the permit should not be enough to trigger the excuse [that a party can bypass a procedure]". *Gilbert v City of Cambridge*, 932 F2d 51, 61 (CA 1, 1991). The Court should not condone Plaintiffs' "bait and switch".

Court; there is not yet a "concrete controversy regarding the application of the specific zoning regulations". See, *Agins v City of Tiburon*, 447 US at 260. The Court is entitled to congruity between the issue presented on the merits and the issue presented for a ripeness determination to the Township. Plaintiffs' actions fly in the face of existing law, and are a clear end run around the ripeness doctrine.

Moreover, Plaintiffs actions are contrary to public policy. The Township was never given the opportunity to have its staff, consultants or legal counsel provide any recommendation on a proposed mobile home park use. Further, the purpose of the Zoning Enabling Act "would be defeated if a township board could not consider public opposition to a proposed rezoning application..... The act requires a public hearing and notice to affected and neighboring property owners on any proposal for rezoning...". *A B Enterprises v Madison Township*, 197 Mich App 160, 163; 494 NW2d 761 (1993). No notice or public hearing took place here, as required by the Zoning Enabling Act, because Plaintiffs never made application to rezone the subject property for a proposed mobile home park. The fundamental underpinning of the ripeness doctrine is the requirement that a landowner obtain a final decision, and that the municipality be able to render a final decision on a particular request, prior to Court intervention. The Township is advocating a position that is based on existing law and policy. The parties should be able to play on an even field. The Trial Court should have dismissed this case on the basis that Plaintiffs claims were not ripe for adjudication, and the Court of Appeals should have reversed the decision of the Trial Court finding that the claims were not ripe.

B. Plaintiffs failed to make a meaningful application, and did not receive a final decision from Putnam Township as to the use of the subject property for a mobile home park.

Plaintiffs' claims are not ripe because Plaintiffs failed to file a true and "meaningful application" for Township review. It is that failure that has created confusion in this case.

Specifically, Plaintiffs did not ask for permission to build the project which they sought through litigation. Plaintiffs failed to ripen their claims by deliberately obscuring the development sought. The seminal ripeness cases establish the necessity to satisfy the final decision requirement concerning a desired use before running to court. Ripeness is evaluated by reference to the requests and applications actually made to the municipality, including the analysis of whether those applications were "meaningful". In the absence of a meaningful application, there can be no final decision and the case is not ripe.

In *Penn Centrall, supra,* the City's Landmark Preservation Commission refused to approve plans for construction of a 50-story office building over Grand Central Terminal, which had been designated a landmark. The terminal owner sued alleging a taking of property and violation of substantive due process. In rejecting the terminal owner's claims, the Court held:

> First, it simply cannot be maintained, on this record, that appellants have been prohibited from occupying *any* portion of the air space above the Terminal. While the Commission's actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit *any* construction above the terminal. The Commission's report emphasized that whether any construction would be allowed depended upon whether the proposed addition 'would harmonize in scale, material and character with [the terminal]'... Since appellants have not sought approval for the construction of a smaller structure, we did not know that appellants will be denied any use of any portion of the airspace above the Terminal. *Id.* at 136-137. (Emphasis added.)

In *MacDonald, Sommers & Frates v Yolo County*, 477 US 340, 106 S Ct 2561 (1986), the property owner submitted a proposal to subdivide certain property into 159 single-family and multi-family residential lots. The application was denied by the Planning Commission, and the County Board of Supervisors affirmed the denial. The property owners then sued alleging that the denial amounted to a taking and a violation of substantive due process rights. In rejecting the property owner's claims, the United States Supreme Court stated:

> Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it. Thus, in Agins v City of Tyberon, 447 US 255, 100 S Ct 2138, 65 L Ed 2d 106 (1980), we held that zoning ordinances which authorize the development of between one and five single-family residences on appellant's five acre tract did not effect a taking of their property on their face, and, because appellants had not made application for any improvements to their property, the constitutionality of any particular application of the ordinances was not properly before us. *Id.*, 477 US at 352-353. Emphasis added.)

Moreover, the United States Supreme Court stated that: "The implication is not that future applications would be futile, but that a **meaningful** application has not yet been made". Id., 477 US 353, N. 8. (Emphasis added.)

In *Agins, supra,* the plaintiff acquired five acres of vacant land for residential development. The zoning ordinance would have permitted the property owner to build between one and five single-family residences on the property. The owner sued alleging that the property had been taken without just compensation. As the owner had failed to make application to the City for development, the United States Supreme Court rejected the case stating:

> Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is yet no concrete controversy regarding the application of these specific zoning provisions. *Id.* at 260.

More recently, in *Palazzolo v Rhode Island, supra*, the Coastal Resources Council denied the landowners' request to fill 18 acres of coastal wetlands to construct a beach club. The United States Supreme Court found the landowner's claims to be ripe as there was no question that a final decision had been rendered as to whether any fill would be permitted in the wetlands. However, the Court again confirmed the final decision requirement, noting that it "responds to the high degree of discretion characteristically possessed by land use boards in softening the strictures of the general regulations they administer". *Id.* at 533 US 620. The Court noted:

> **These cases stand for the important principle that a landowner may not establish a taking before a land use authority has the opportunity, using its own reasonable procedures to decide and explain the reach of a challenged regulation.** Under our ripeness rules, a takings claim based on a law or regulation which is alleged to go too far in burdening property depends on the landowners first having found reasonable necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed, the extent of the restriction on property is not known and a regulatory taking has not been established... *Id.* at 620-621. (Emphasis added).

The Court reconfirmed that a landowner must submit a meaningful application which allows the governmental agency to make clear the extent of development that will be permitted. *Palazzolo* recognized that a property owner has an obligation to submit alternative plans, and request available variances, waivers and special uses to receive a final decision. 533 US at 620-621.

Historical review of the cases shows that the Court has required that a landowner submit a meaningful application to receive a final decision. Certainly, at a minimum, a meaningful application would include an application for the use that the property owner intends to seek through the Court system. The Court has also made clear that the submission of more than one development plan may be required. The minimum requirement for a constitutional claim is a meaningful application that provides a municipality with a record for determining both the extent to which development is permitted and the site specific reasons why any further development should be barred. To be "meaningful", an application "must be essentially complete, and realistically describe the **desired use**, and must be reasonably current". *Gilbert v City of Cambridge,* 932 F2d 51, 63 (CA 1, 1991)(Emphasis added). See, also, *South Pacific Transportation Co v City of Los Angeles*, 932 F2d 498, 509 (CA 9, 1990) - a property owner must give "indication...of how [it] might intend to develop the property if permitted to do so"; *Unity Ventures v County of Lake*, 841 F2d 770, 776 (CA 7, 1988) - "formal application...with adequate documentation about the density of the proposed development"; *MacDonald*

Sommers and Frates v Yolo County, 477 US at 352-358 (1986) - "the implication is not that future applications would be futile, but that a meaningful application has not yet been made"; *Southview Associates, Ltd v Bongartz,* 980 F2d 98-99 (CA 2, 1991) – the plaintiff did not satisfy the rule of finality because it only submitted one development proposal, and the board's rejection of that proposal in no way precluded the plaintiff from submitting another proposal.

Michigan Courts have yet to address this issue in a published opinion. However, in *TG Development v Mt. Morris,* 2004 WL 594950 (unpublished Mich App 2004), (attached as **Exhibit B**), the Court found it insufficient when plaintiff submitted "some photographs, floor plans and a development plan" in addition to discussing the features of the proposed development. In *Fieleck v Brighton Twp,* 1998 WL 1991262 (unpublished Mich App 1998) (attached as **Exhibit C**), the Court noted that until plaintiffs formally presented their development plan, it was impossible to determine the actual economic effect of the ordinance on the property. In both cases, the Court found the litigation to not be ripe. See, also, *Conlin v Scio Twp, supra* (claims were not ripe because plaintiffs never applied for rezoning of their land to a classification that would allow development at the density they desired, i.e., they never applied for the use they were requesting the court to approve).

C. An exclusionary zoning claim also requires a prior meaningful application before litigation can be instituted.

The fact that an exclusionary zoning claim was pled under the state statute does not relieve Plaintiffs of the obligation to submit a meaningful application before bringing suit. The dissent in *Hendee* agreed with this requirement, as did the panel of the Court of Appeals in the recent case of *DF Land Development, LLC v Charter Township of Ann Arbor,* 2008 WL 4684083 (unpublished Mich App 2008), (attached as **Exhibit D**).

Some courts have previously held that exclusionary zoning claims are facial challenges not subject to ripeness. See, e.g., *Countrywalk Condominiums,* 221 Mich App 19; 561 NW2d

405 (1997). Whether an exclusionary zoning claim is "as applied" or "facial" is an issue that can be left for another day. However, previous courts have addressed an exclusionary zoning challenge only after the landowner had applied to the local municipality and received a final decision on the proposed land use which the landowner alleges is being excluded. See, *Countrywalk Condominiums, supra,* (plaintiff applied to develop multiple-family housing prior to alleging that the zoning ordinance was exclusionary for prohibiting multiple-family); *English v Augusta Twp*, 204 Mich App 33, 514 NW2d 172 (1994), (plaintiff applied to rezone property for mobile home use prior to challenging the ordinance as exclusionary); *Anspaugh v Imlay Twp,* 273 Mich App 122, 729 NW2d 251 (2007), (plaintiff applied for industrial zoning prior to alleging exclusionary zoning claim); *Braun v Ann Arbor Charter Twp, supra*, (application for rezoning to mobile home park prior to filing suit asserting exclusionary zoning claim); *ACC Industries, Inc v Charter Township of Mundy*, 2004 WL 345419 (Mich App) (plaintiff filed two separate applications seeking rezoning to a mobile home park before filing suit); *Schwartz v City of Flint*, 426 Mich 295, 395 NW2d 678 (1986), (rezoning requested for garden apartment use prior to lawsuit); *Guy v Brandon Township,* 181 Mich App 775; 450 NW2d 279 (1989) (application for rezoning for mobile home park prior to filing suit). Conspicuously absent from both Plaintiffs and the Real Property Law Section's Brief filed in the Court of Appeals was citation to any case where an exclusionary zoning claim was allowed prior to an application for Plaintiffs' proposed use being made to the local municipality. The lesson from the case law is clear: an exclusionary zoning claim, whether considered a facial challenge or not, cannot be reviewed where - as here - the use allegedly excluded was not first requested. Once again, it is essential that this Court overlook the form and view the actual substance of the claims involved in this case so that long-standing and bedrock zoning law is not ignored.

This fundamental concept that an application for a use must first be made before an exclusionary zoning challenge can be property evaluated was recently addressed by the Court of Appeals. In *DF Land Development, LLC, supra,* plaintiff owned 54 acres of land adjacent to Domino Farms. The property contained wetlands and steep slopes. Plaintiff petitioned to rezone the property from general agricultural (A-1) to multiple-family residential (R-7). When the rezoning was denied, plaintiff requested and was denied variances by the Zoning Board of Appeals based on a lack of jurisdiction. After the lawsuit was filed, both sides filed motions for summary disposition. The lower court granted the Township's motion on the basis that plaintiff's constitutional and exclusionary zoning claims were not ripe because plaintiff had not applied for a planned unit development, another land use option that might have afforded some relief to the plaintiff. The Court of Appeals reversed, finding that the denial of the rezoning and the variance relief were sufficient applications to provide a definitive answer as to the type and intensity of development that would be permitted so as to ripen plaintiff's claims.

In *DF Land Development, LLC, supra,* plaintiff's complaint alleged a violation of the state exclusionary zoning statute, yet the Court of Appeals analyzed both the statutory claim, and the alleged "constitutional" exclusionary zoning claim. Unlike the majority of the Court of Appeals in *Hendee,* however, the panel of the Court of Appeals in *DF Land Development, LLC* concluded (like the dissent in *Hendee*) that before a plaintiff could assert an exclusionary zoning claim, plaintiff was "obligated to first submit a rezoning request or request for a variance to the appropriate legislative body before seeking relief from the court system". **Exhibit D**, pp. 8, 9, and 10. The Court of Appeals commented as follows:

> 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 no exclusionary zoning violation. *Landon, supra* at 157-158, 160. *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 usurps decision making authority from the municipality and inappropriately transforms the judiciary into a kind of 'super-zoning' authority making zoning decisions for particular communities.**" (Emphasis added).

Here, Plaintiffs never submitted a meaningful application - much less any application - to the Township prior to filing suit. Plaintiffs only applied for R1B zoning to permit the construction of 95 single-family homes, and then argued to the Trial Court that the R1B proposal was not reasonable. Because Plaintiffs never made an application for a mobile home park, the Township never had the opportunity to "exercise its full discretion in considering development plans" of the Plaintiffs for the mobile home park, so necessarily the Trial Court did not know the "nature and extent" of development that the Township would permit on the land. The issue that the Court addressed – whether a mobile home park was a reasonable use for the property in light of such factors as surrounding land uses and infrastructure – was never answered, much less considered, by the Township. Because no application was made, the Township did not have the opportunity to have any mobile home proposal reviewed by its staff, consultants, or legal counsel. Further, a proposed rezoning for a mobile home park use was never noticed and no public hearing was conducted as required by law (Michigan Zoning Enabling Act, MCL 125.3101, MCL 125.3502, MCL 125.3306, MCL 125.3401). The public, who has a particular interest in land use, was denied any opportunity to comment on the proposed

development. Plaintiffs' claims were not ripe for failure to make meaningful application, much less any application, for the proposed mobile home park.

V. THE LEGISLATURE'S AMENDMENTS TO THE ZONING ENABLING ACTS IN 1979 REPLACED THE COMMON LAW HOLDING RELATED TO EXCLUSIONARY ZONING AS DISCUSSED IN *KROPF V CITY OF STERLING HEIGHTS*, LATER REITERATED IN *KIRK V TYRONE TOWNSHIP*.

The United States Supreme first recognized the right of local government to zone for the protection of the public health, safety and welfare in *Village of Euclid Ohio v Ambler Realty Co, supra.*[10] Following this pronouncement, the Michigan Legislature adopted the Zoning Enabling Acts conferring this authority. See, City or Village Zoning Act, MCL 125.581 *et.seq.*; Township Rural Zoning Act, MCL 125.271 *et. seq.*; County Rural Zoning Enabling Act, MCL 125.201 *et. seq.*[11] It has been consistently held by the Michigan courts that the local legislators are uniquely situated to determine the land development goals and rules within their local boundaries, and that these legislative decisions are presumed to be constitutional. *Kropf*, 391 Mich at 161; *Brae Burn Inc v City of Bloomfield Hills*, 350 Mich 425, 430-431, 86 NW2d 166 (1957). The Michigan Legislature, recognizing the problems faced by communities like the Township in this case, passed legislation permitting the adoption of master land use plan policies, followed by the enactment of zoning ordinance regulations in accordance with the master plan, to permit a community to provide for land use order and balance.

A. The initial concept of "exclusion" in the zoning context.

The 1970's witnessed an exclusionary zoning movement aimed primarily at making provision for low and moderate income housing facilities for those situated in metropolitan areas. The initial Zoning Enabling Acts adopted by the Michigan Legislature did not contain

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[10] The Michigan Supreme Court firmly validated this exercise of police power in *Pleasant Ridge v Cooper*, 267 Mich 603, 605-606; 255 NW 371 (1934).

[11] These three statutes were repealed in 2006 and replaced by the Michigan Zoning Enabling Act, MCL 125.3201, which is applicable to all forms of government.

specific regulations related to "exclusionary zoning". The use of the term "exclusion" in the context of zoning and land use regulations instead found its origin in case law.

In *Kropf*, the plaintiff challenged the constitutionality of the single-family zoning of his property. Plaintiff filed a petition to rezone the property to permit multiple family dwellings, which was denied by the City. The Trial Court upheld the zoning. However, the Court of Appeals reversed on the basis that the Zoning Ordinance was not presumed constitutional, and that multiple dwellings were a "preferred use" of land, resulting in the shifting of the burden of proof as to the validity of the zoning to the City. The Supreme Court focused on the issue of which side had the burden of proof and noted:

> This concept of 'favored or preferred use' and the attendant shifting of the burden of proof when such use is present in a case, finds its origins in Bristow v City of Woodhaven, 35 Mich App 205, 192 NW2d 322 (1971) and is applied to multiple dwellings in Simmons v Royal Oak, 38 Mich App 496, 196 NW2d 811 (1972).
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> Rejecting the notion of a "favored or preferred use", the Supreme Court stated:
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> A review of the authorities cited in support of the aforesaid proposition reveals that this 'favored use' concept and the attendant shifting of the burden of proof as to the constitutionality of an ordinance upon the municipality rests upon no statutory or case law foundation in this State. *Id.* at 154.

The Supreme Court overruled the concept of "favored or preferred use" and the attendant shifting of the burden of proof. *Id.* at 156.

Reviewing earlier cases involving the validity of zoning regulations which were challenged as applied to excluded uses, the Supreme Court opined:

> ...On its face, an ordinance which Totally excludes from a municipality a use recognized by the Constitution or other laws of this State as legitimate also carries with it a strong taint of unlawful discrimination and denial of equal protection of the law as to the excluded use... *Id.* at 155.

Moreover, the Supreme Court held that, in order to overcome the presumption of validity of a zoning regulation, the landowner would be required to submit sufficient proofs

showing a violation of one of the established constitutional rights - procedural or substantive due process, equal protection, or a takings. If, and only if, the landowner proved the elements to sustain one of those constitutional challenges would the Court determine that the ordinance was "unreasonable". *Id.* at 156-157. Thus, as used in the *Kropf* opinion, the determination of "reasonableness" revolved around proofs on one of these specific constitutional challenges. No "constitutional" exclusionary zoning claim was discussed because no such "exclusionary zoning" reference exists in either the Michigan or United States Constitution. Further, there were no statutory provisions related to exclusionary zoning at that time.

The Supreme Court established a two-prong test for "reasonableness" as follows:

> In looking at this 'reasonableness' requirement for a zoning ordinance, this Court will bear in mind that a challenge on due process grounds contains a two-fold argument; first, that there is no reasonable governmental interest being advanced by the present zoning classification itself, here a single family classification, or secondly, that an ordinance may be unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area in question. Though each of those arguments are founded upon due process, in reality they are distinct arguments, each requiring different proofs. *Id.* at 158.

Although this test seems to contain two separate standards, in reality the second prong is merely another way of viewing the "reasonableness" or constitutionality of the zoning classification in recognition of the different constitutional grounds upon which zoning can be challenged and the different elements that would have to be shown to assert the separate and distinct claims.[12]

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[12] For example, The Court might consider such questions as: Are there reasonable governmental interests to support the zoning classification? Do the regulations violate due process or equal protection rights or result in a taking without just compensation? Was it reasonable, under all the facts present in a case, including the master plan goals, the zoning in the community, and the surrounding land uses, to "exclude" a use from the specific property? Was it reasonable, under all the facts present in a case, to conclude that specific uses can be permitted and others excluded from a particular zoning district? Are there such issues as traffic, infrastructure, surrounding land uses, planned uses, etc., which would sustain the municipality's interest in allowing some land uses in an area and excluding others?

Following *Kropf*, the plaintiff in *Kirk* sued when his application to rezone his property from agricultural-residential to a designation that would have permitted the development of a mobile home park was denied. The Court of Appeals ruled in favor of the plaintiff under the "preferred use" doctrine, and the Supreme Court remanded the case based upon its overruling of this doctrine in *Kropf*. Plaintiff argued that the Township Zoning Ordinance excluded mobile home parks. The Master Plan designated two areas for use as a mobile home park, one of which had been rezoned to that classification by the court, although it was never developed. Plaintiff was the only landowner that had applied for a rezoning to permit a mobile home park. The Supreme Court confirmed the ruling in favor of the Township, reiterating the two-prong test for "reasonableness" set forth in *Kropf*. The Court, however, clarified the four rules to be applied to a constitutional attack on a zoning ordinance, as follows:

> 1. The ordinance comes to us clothed with every presumption of validity.
>
> 2. (I)t is the burden of the party attacking to prove affirmatively that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of his property...It must appear that the clause attacked is an arbitrary fiat, a *whimsical ipse dixit*, and that there is no room for a legitimate difference of opinion concerning its reasonableness.
>
> 3. Michigan has adopted the view that to sustain an attack on a zoning ordinance, an aggrieved property owner must show that if the ordinance is enforced the consequent restrictions on his property preclude its use for any purpose to which it is reasonably adapted.
>
> 4. This Court, however, is inclined to give considerable weight to the findings of the trial judge in equity cases. *Id.* at 439-440, citations omitted.[13]

These rules again confirm that the idea of a "favored" or "preferred use" is not a viable concept under Michigan law.

Of significance are the following observations of the Supreme Court in *Kirk*:

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[13]In *Hecht v Township of Niles,* 173 Mich App 453, 459-460; 434 NW2d 156 (1988), the court noted that prior courts had mistakenly intertwined the standards applicable to the different theories of relief, and clarified that standard number 1 applied to all challenges, standard number 2 applied to a due process and equal protection claims, and standard number 3 applied to a takings claim.

> Upon reflection, it does not seem wise as Sabo[14] did to attempt to engraft upon the established legislative scheme of zoning and re-zoning, a new system which admittedly requires new legislative action to operate optimally. **Should the Legislature choose to revise the approach to zoning amendments in our state, this Court would, of course, view matters differently**....
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> * * * * * * * *
>
> Therefore, **unless the Legislature speaks otherwise**, the appropriate standard by which the validity of a zoning ordinance may be challenged is that, to overcome the presumption of validity with which a zoning ordinance, as all legislation is clothed, the party attacking the ordinance bears the burden of proving that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of his or her property. *Id.* at 441, emphasis added.

The Supreme Court acknowledged that the Legislature could act to alter the law contained in its rulings, and that it would recognize any changes so made.

B. The Legislature acted in 1979 superseding prior case law.

A significant state of ambiguity exists in Michigan zoning jurisprudence on whether there are multiple exclusionary zoning rules: one common law/constitutional rule and another statutory rule. This conflict provides a compelling reason for this Court to accept the Application for Leave to Appeal. Moreover, the problems that arise from the confusion are not perceived or speculative, but have become reality based on the *Hendee* decision, and the more recent *DF Land Development, LLC* opinion which also discussed the purported multiple exclusionary zoning claims.[15] Put simply, the Court of Appeals confused the fact that an analysis of the factors under the exclusionary zoning statute may be similar to an evaluation of the factors required to prove a recognized constitutional claim, and erroneously jumped to the conclusion that some free-standing, "constitutional" exclusionary zoning claim exists.

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[14] *Sabo v Township of Monroe*, 394 Mich 531; 232 NW2D 584 (1974). The Supreme Court confirmed that a landowner must show more than a debatable question, more than a legitimate difference of opinion. *Id.* at 162.

[15] See, also, Application for Leave to Appeal filed by Kasson Township in *Edith Kyser v Kasson Township,* Michigan Supreme Court Case No. 136680, which raises some of the same issues as this Application.

The Michigan Legislature quickly responded to the exclusionary zoning issue raised in *Kropf* and *Kirk* by establishing statutory policy that became effective in 1979.[16] Consistent with the broader statements in *Kropf* and *Kirk,* the exclusionary zoning statutes did not restrict themselves to the issue of low and moderate income housing, but more generally addressed zoning that totally prohibited the establishment of *lawful land uses in the presence of a demonstrated need.*

There is no question that the State Legislature, which conferred the authority to zone in the first instance on governmental entities through the adoption of the Zoning Enabling Acts, has the authority to amend those acts, and to expand, limit, or further define the zoning powers. It is the position of *Amici Curiae* that the rule relating to "exclusion" of a land use set forth in *Kropf* and *Kirk* was superseded by the enactment of that statute. The statute in question now appears in a nearly identical form in the Michigan Zoning Enabling Act, MCL 125.3207, as follows:

> A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a local unit of government in the presence of a demonstrated need for that land use within either that local unit of government or the surrounding area within the state, unless a location within the local unit of government does not exist where the use may be appropriately located or the use is unlawful.[17]

Issues of statutory construction present questions of law that are reviewed *de novo. Rowland v Washtenaw County Road Commission,* 477 Mich 197, 731 NW2d 41 (2007); *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594, 648 NW2d 591 (2002); *Eggleson v Bio-Medical Applications of Detroit Inc*, 468 Mich 29,32,658 NW2d 139 (2003). The primary goal of statutory interpretation is "to discern and give effect to the legislature's intent as expressed in the words of the statute." *Neal v Wilkes*, 470 Mich 661, 665, 648 NW2d 648 (2004);

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[16] Now, MCL 125.3207. *See,* Ternan, Amendments to the Zoning Enabling Acts: New Concepts and Procedures, 59 Mich B. J. 100 (February, 1980).

[17] See, also, discussion of exclusionary zoning in *Michigan Zoning, Planning, and Land Use*, ICLE 2008, Section 1.40, pp. 35-36; Section 3.19, pp. 97-98, Section 9.6, p. 273.

DiBenedetto v West Shore Hospital, 461 Mich 394, 402, 605 NW2d 300 (2000). Words of a statute are accorded their plain and ordinary meaning, and the courts look outside the statute to ascertain legislative intent *only if* the statutory language is ambiguous. *Rowland v Washtenaw County Road Commission*, 477 Mich at 202; *Pohutski v City of Allen Park*, 465 Mich 675, 683, 641 NW2d 219 (2002). If the language is clear and unambiguous, it is presumed that the legislature intended the meaning expressed. *Id.*; *DiBenedetto* at 402. "[N]o further judicial construction is required or permitted, and the statute must be enforced as written." Id.

It is fundamental that "courts may not rewrite the plain language of [a] statute and substitute their own policy decisions for those already made by the legislature." *DiBenedetto*, at 405. Nor may courts speculate about an unstated purpose or the probable intent of the legislature beyond the language used in the statute. *Pohutski* at 683; *Cherry Growers Inc v Agricultural Marketing & Bargaining Board*, 240 Mich App 153, 173, 610 NW2d 613 (2000). Language omitted from a statute is presumed to have been done so intentionally. *People v Wilson*, 257 Mich App 337, 345, 668 NW2d 371 (2003), vacated in part on other grounds 469 Mich 1018 (2004). It is not within the province of our courts to rewrite the plain language of the statute and substitute the court's own policy decisions for those of the Legislature. *DiBenedetto,* at 405. The statute must be interpreted and enforced as written. No further judicial construction is required or permitted. See, *Rowland v Washtenaw County Road Commission*, supra at 202.

There is no question that the Legislature has the power to change or modify the common law by statute. Const. 1963, Art. 3, Sec. 7; *Wold Architects & Engineers v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006); *Spires v Bergman*, 276 Mich App 432, 438; 741 NW2d 523 (2007). The Legislature is presumed to know the existence of the common law when it acts, **and statutes must be interpreted in conformance with their express terms even**

if they conflict with common law. *Spires, supra* at 438; *Walters v Leech*, 279 Mich App 707; ___ NW2d ___ (2008 WL 2811499) (attached as **Exhibit E**); *Glancy v City of Roseville*, 216 Mich App 390, 394; 549 NW2d 78 (1996); *Nummer v Treasury Dep't*, 448 Mich 534, 544; 533 NW2d 250 (1995); *Ambs v Kalamazoo County Road Com'n*, 255 Mich App 637; 662 NW2d 424 (2003). The cardinal rule of statutory construction is to give effect to the intent of the Legislature. *Gage v Ford Motor Co*, 423 Mich 250, 260; 377 NW2d 709 1985). When the statute is comprehensive and describes in detail a course of conduct to pursue and the parties and things affected, the Legislature will generally "be found to have intended that the statute supersede and replace the common law dealing with the subject matter. *Walters, supra* at ____; *Wold Architects & Engineers, supra* at 233. And, when the Legislature uses a word or phrase that has acquired a unique meaning under common law, it is interpreted to have the same meaning when used in a statute dealing with the same subject matter. *Lewis v LeGrow*, 258 Mich App 175; 670 NW2d 675 (2003).

Numerous cases have recognized the Legislature's right to react to court decisions and adopt Legislation overruling, amending, modifying, or clarifying the case law. See, e.g., *Byrne v State of Michigan*, 463 Mich App 652, 657-658; 624 NW2d 906 (2001) (court observed that 1996 PA 538 was a legislative override of *Addison Twp v State Police (On Remand)*, 220 Mich App 550; 560 NW2d 67 (1996)); *New Dimension Development v Orchard, Hiltz & McCliment Inc*, unpublished opinion of the Court of Appeals, decided October 27, 2005, (Docket No. 262565) (attached as **Exhibit F**) (Legislature amended the Governmental Immunity Statute, MCL 691.1401, in response to *Ross v Consumers Power Co*, 420 Mich 567; 363 NW2d 641 (1984)); *Pohutski, supra* at 683 (*Ross* noted that the Legislature enacted the governmental tort liability act in 1964 in reaction to *Williams v Detroit*, 364 Mich 231; 111 NW2d 1 (1961) abolition of common-law immunity for municipalities); *People v Perkins*, 473 Mich 626; 703 NW2d 448

(2005) (Legislature enacted MCL 776.20 related to firearms rights in response to *People v Schrader*, 10 Mich App 211; 159 NW2d 147 (1968); *Spires, supra* at 438 (Legislature amended MCL 722.31 to modify the factors for child custody that had been set forth in *D'Onofrio v D'Onofrio*, 144 NJ Super 200; 365 A2d 27 (1976)).

The House Legislative Analysis Section prepared a Synopsis of House Bill 4593, which included the following note:

> A municipality would be required to permit all lawful uses for which there was a demonstrated need, but would have the power to establish standards for the location of uses to ensure that adequate public services were available, that the use was compatible with the natural characteristics of an area and its environment, that sanitary living conditions be ensured, and that a high degree of air and water quality be maintained. An ordinance could not prohibit a lawful land use for which need had been demonstrated unless the public health, safety, and welfare was endangered, and standards for location were not complied with. See **Exhibit G.**

In this case, the statutory language at issue is clear and unambiguous. Presumptively aware of the law that had been created in *Kropf* and *Kirk* related to the exclusion of land uses, the Legislature adopted 78 PA 637, effective March 1, 1979. The Legislature could have easily adopted the language expressed in *Kropf* and K*irk* had it intended to do so when the Zoning Enabling Act was originally enacted. The Legislature could have incorporated the "test" in *Kropf* and *Kirk* when it adopted the exclusionary zoning statute in 1979, but chose not to do so.[18] Instead, the Legislature, in recognition of the broad zoning powers of municipalities and legislative judgment involved in formulating zoning ordinances, set a standard to be utilized to determine if exclusionary zoning existed. The standard required, at a minimum, a finding of a demonstrated need for the land use considering, among other things, community infrastructure and characteristics.

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[18] Further, when the Legislature abolished the prior zoning enabling acts, and adopted the Michigan Zoning Enabling Act, effective July 1, 2006, the Legislature again confirmed the manner in which an exclusionary zoning claim was to be considered and examined by the courts.

Contrary to the rulings in *Kropf* and *Kirk,* the Legislature required a landowner to prove the following standards to prove an exclusionary zoning claim:

1. The land use must be lawful;

2. The zoning must totally prohibit the establishment of that lawful land use;

3. There must be a demonstrated need for that land use within the local unit of government that is not being met in the locality or in the surrounding area within the state;

4. If there is no location within the unit of government where the use can be appropriately located, an exclusionary zoning claim will fail.

See, MCL 125.3207.

It is important that the Legislature chose not to limit the analysis to the test of the mere existence or prohibition of a use as would seem to follow from the language in *Kropf* and *Kirk.* Undoubtedly, the Legislature was cognizant of the fact that every municipality does not, and cannot realistically, provide for every land use within its geographical boundaries. For example, the City of Detroit has no land zoned for agricultural use. The City of Orchard Lake Village is zoned almost exclusively for single-family residential use, and contains no mobile home parks or multiple-family units in any form. *Countrywalk Condominiums v City of Orchard Lake Village, supra.* The City of Bloomfield Hills does not have industrial land uses or any land dedicated for mobile home use. As noted by the dissent, "...merely because the ... body responsible for zoning in Mackinac Island has not zoned land for industrial purposes does not mean that exclusionary zoning exists on its face." *Hendee,* dissent [FN3].

Thus, the analysis in an exclusionary zoning case revolves around the specific public need for a particular land use in a particular area, a determination of whether the use can be found in the "surrounding area" (not merely within the Township), and the suitability of that land use for the proposed property. As held in *Adams Advertising v Holland,* 234 Mich App 681, 689 (1999), aff'd on other grounds 463 Mich 576 (2000), the issue of need is not related to a

landowner's desire for a particular use, but instead is based upon a "public need". See, also, *Outdoor Advertising v City of Clawson*, 273 Mich App 204; 729 NW2d 893 (2006); *Gustafson v City of Lake Angeles*, 76 F3d 778 (CA 6, 1996).

The Legislature's adoption of the exclusionary zoning statute was intended to specify the requirements for such a claim, and the specific language superseded the vague references to "exclusion" in *Kropf* and *Kirk*. See, *English v Augusta Township*, 204 Mich App 33, 37; 514 NW2d 172 (1994) ("The Legislature addressed the problem of exclusionary zoning with the enactment of §27a of the Township Rural Zoning Act, MCL 125.297a."); also, cases decided subsequent to the statute which applied the statutory amendment, *Houdek v Centerville Township*, 276 Mich App 568; 741 NW2d 587 (2007); *Anspaugh v Imlay Twp*, 273 Mich App 122, 729 NW2d 251 (2007). The exclusionary zoning statute sets forth the legislative determination of public policy for the State with respect to zoning and the exclusion of uses from an area.

Despite the fact that the Plaintiffs had alleged a violation of the exclusionary zoning statute, MCL 125.297a, the majority of the Court of Appeals believed that there was no obligation to review and determine the various standards contained in that statute because "... **we conclude that the township engaged in exclusionary zoning in violation of the constitution**...." *Id.* at 8.[19] The Court of Appeals discussed and acknowledged that four standards would have to be proven by the plaintiffs to prevail under the exclusionary zoning statute. Noting that the Township had argued that it did not exclude mobile homes, that there was no total prohibition in the surrounding area as there were existing mobile home parks in the surrounding area (including 6 ½ miles from plaintiff's property), and that there was no

[19] Interestingly, the circuit court dismissed and the Court of Appeals affirmed dismissal of the specific constitutional challenges to the zoning - equal protection, substantive due process, and a regulatory taking - on the grounds that the claims were not ripe, and alternatively, on the basis that plaintiff failed to prove the elements to show a violation of those constitutional rights. The Court of Appeals affirmed the decision in favor of the plaintiff based only on the purported constitutional exclusionary zoning claim.

demonstrated public need for a mobile home park, the majority tossed those arguments to the side "**[b]ecause the issue of 'demonstrated need' relates to MCL 125.297a [the exclusionary zoning statute] and is not a required part of the constitutional analysis**..." *Id.* at 8. Notably, the majority failed to cite to the specific provisions of the Michigan Constitution which establishes the purported constitutional exclusionary zoning claim.

It appears that the Court of Appeals believed that some constitutional exclusionary zoning claim existed based on language in *Landon Holdings v Gratton Township*, 257 Mich App 154; 667 NW2d 93 (2003) and *Countrywalk Condominiums v City of Orchard Lake Village*, *supra*. The Court of Appeals erroneously concluded that the discussion of "exclusion" in the context of the evaluation of the due process and equal protection claims created a constitutional exclusionary zoning claim. It is important to note that in both *Landon Holdings* and *Countrywalk*, the plaintiffs had asserted a specific count in their complaints asserting a violation of the exclusionary zoning statute! The Court of Appeals had a leap in logic when it blurred the facts that might be considered to determine whether a due process or equal protection claim has been shown (including the fact that the use is not permitted and the municipality's reasons for that exclusion), and jumped to the conclusion that a "constitutional exclusionary zoning claim" existed. Justification for this conclusion was purportedly the quote contained in *Kropf* related to the exclusion of uses, as well as other cases decided prior to the adoption of the exclusionary zoning statute.[20] The fact that the factors considered under the exclusionary zoning statute may be the same or similar to an evaluation of the factors required to prove a recognized constitutional claim, does not result in the conclusion reached by the majority of the Court of Appeals that some free-standing, "constitutional" exclusionary zoning

[20] For example, *Kirk, supra*; *Sabo v Monroe Twp*, 394 Mich 531; 232 NW2d 584 (1975); *Nickola v Grand Blanc Twp*, 394 Mich 589; 232 NW2d 604 (1975); *Smookler v Wheatfield Twp*, 394 Mich 574; 232 NW2d 616 (1975).

claim must exist. A simple review of the language contained in the Michigan Constitution shows that there is no such animal.

The dissenting opinion in *Hendee* authored by Judge Donofrio also demonstrates the quandary in the law. In his analysis, Judge Donofrio noted that the issue of exclusionary zoning was "complicated and requires a multi-tiered analysis" stating:

> In order to properly address this complex issue, I must break it down into its component parts and determine on what basis in law plaintiffs assert their exclusionary zoning claim: statutory, constitutional, or some combination of both. *Id.* at 25.

Judge Donofrio did not agree with the majority regarding the analysis of the "constitutional" exclusionary zoning claim:

> ... While our Supreme Court [in *Anspaugh v Imlay Twp,* 480 Mich 964; 741 NW2d 518 (2007)] did not explicitly state that it was remanding the plaintiff's constitutional exclusionary zoning claim to the circuit court for analysis in accordance with the exclusionary zoning statute, MCL 125.297a, that is exactly what it did when it remanded for a 'demonstrated needs' determination. For these reasons, while I would not review plaintiffs' exclusionary zoning claims for the reason that they are not ripe for judicial review, I must review their substance because my opinion differs from the majority's view. I will review plaintiffs' exclusionary zoning claims - statutory or constitutional - in accordance with the mechanism provided by the legislature, MCL 125.597a, and tacitly approved by our Supreme Court in *Anspaugh, supra* at 480 Mich 964. *Id.* at 28.

The grave significance of the issue present in this appeal is demonstrated by the outcome in *Hendee.* The majority, relying on an imaginary "constitutional" exclusionary zoning claim, found that the Township had engaged in exclusionary zoning simply because no land was zoned for mobile home use in the community. On the other hand, the dissent found that no exclusionary zoning claim had been proven when it reviewed evidence presented against the criteria contained in the exclusionary zoning statute because, among other reasons, the plaintiffs had failed to show a demonstrated need for a mobile home park in the Township.[21]

[21] The confusion which exists in the area is again shown by the recent Court of Appeals decision in *DF Land Development, LLC v Charter Township of Ann Arbor,* which discussed both the statutory exclusionary claim, and the "constitutional" exclusionary zoning challenge.

Local government has considerable authority and discretion to enact zoning regulations, which are a specialized exercise of police power. These zoning regulations are adopted in conjunction with a master plan setting forth the goals and objectives for development of the community. The Master Plan and Zoning Ordinance are only adopted after public hearing during which the residents of the community can weigh in on their dreams for their community.

The Township Rural Zoning Act, MCL 125.271, (which existed at the time Plaintiff here applied for rezoning) provides in pertinent part:

> Sec. 1(1) The township board of an organized township in this state may provide by zoning ordinance for the regulation of land development and the establishment of districts in the portions of the township outside the limits of cities and villages which regulate the use of land and structures; to meet the needs of the state's citizens for food, fiber, energy and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land; to insure that uses of the land shall be situated in appropriate locations and relationships; to limit the inappropriate overcrowding of land and congestion of population and transportation systems and other public facilities; to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility needs; and to promote public health, safety, and welfare. For these purposes, the township board may divide the township into districts of such number, shape, and area it considers best suited to carry out this act....

The objectives sought to be accomplished under the Zoning Enabling Act are broad, and involve complex considerations and balancing in order to make provision for and maintain harmony between and among the various land uses and activities. The statutory design reflects the legislative recognition that the entire municipality is an interrelated and dynamic set of people, public and private properties, resources, systems, institutions, facilities, uses and activities. The statute recognizes that the authorization or provision of particular uses and activities in one area of the community does have a realistic, and possibly substantial, impact upon persons and properties in other areas of the community. Thus, the Zoning Enabling Act authorizes regulation to ensure that development is permitted in appropriate locations and

relationships, and that limits are placed upon inappropriate overcrowding or use of land. Regulation of the community at large is required as a condition to feasibly plan for and provide a coordination of transportation, drainage, sewage, water and other public services and facilities.

Clearly, effective regulation depends upon the ability of the local government to control the important and interrelated variables and activities within the community. Obviously, all of the activities and uses which are part of the interactive scheme of community affairs must be weighed and balanced. As the ability to control is encumbered, for example, by a court's invalidation of a zoning regulation with respect to a particular piece of property, the process of "comprehensive" planning and zoning is weakened. At some point, where sufficient variables are not subject to regulation, the regulatory process becomes useless and ineffective. Indisputably, land within in a community must be regulated as a cohesive whole.

Again, the realities of zoning cannot be stressed enough to this Court. There is no legal or constitutional obligation on the part of a municipality to provide for every conceivable land use within its boundaries. As aptly noted by Judge Donofrio in his dissenting opinion in *Hendee*:

> FN3. I am simply unwilling to accept the bald proposition that if 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 for 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. *Id.* at 27; See also, *DF Land Development, LLC,* **Exhibit D**, pg. 10

Unfortunately, the decision in *Hendee*, which ignores the Legislature's adoption of the exclusionary zoning statute that superseded the "exclusionary" analysis of *Kropf* and *Kirk*, is the perfect example of the current confusion now outstanding in Michigan, and how this confusion

is turning zoning on its head. Under *Hendee*, the mere exclusion of a use results in a violation of "constitutional" exclusionary zoning without any further showing whatsoever, and without any proof of the elements established by the legislature. *Amici Curiae* asserts to this Court that, if this analysis is permitted to stand, every municipality in the State of Michigan must question whether its zoning ordinance will survive this challenge.

VI. RELIEF.

In this situation, the Township was not given the opportunity prior to litigation to evaluate any proposed mobile home use for the subject property, or any need for such a use in the community. Because no application was made, the Township was never able to have such an application reviewed by its consultants or legal counsel. Further, the general public was not provided notice of a proposed rezoning for such a use or given an opportunity to speak at a public hearing as required by the Zoning Enabling Act. This Court must make it clear that a landowner may not bring such a claim until he has first given the local municipality the ability to evaluate an application requesting the use, and the public has been given the opportunity to address such a proposal. An exclusionary zoning claim should not be asserted until such time as an application for the alleged excluded use is made to the municipality, and a final decision rendered.

The law in the area of land use regulation has been constantly evolving since this Court's decisions in *Kropf* and *Kirk.* The differences between the various attacks and constitutional challenges that can be made, and the elements to prove those claims, have been refined and clarified over time so that there is no longer a blurring of the causes of action. Although *Kropf* and *Kirk* are still important cases, reliance on the language in these cases to differentiate what must be shown between a due process, equal protection, or exclusionary zoning claim, is no longer viable. Specific definitions and standards are applicable to the

various claims, and the importance of the differences should not be lost on this Court. Zoning regulations should not be invalidated without a thorough analysis of the appropriate legal standard.

In summary, the Trial Court and the Court of Appeals failed to apply clear and longstanding federal and Michigan precedent. Plaintiffs' contention that they can proceed to Court without ever asking the Township for a decision on their proposed use of the property would turn zoning law on its head. Such a proposition would create uncertainty, result in the Court usurping the legislative prerogative of the local municipality, and undermine the statutory requirements for notice and public comment on any rezoning request. This Court should decline to do so. Moreover, the Court of Appeals attempt to create a "constitutional" exclusionary zoning claim should be rejected, and *Amici Curiae* asks this Court to clarify that the Legislature superseded *Kropf* and *Kirk* with the adoption of the exclusionary zoning statute.

Amici Curiae respectfully requests that this Honorable Court reverse the decision of the Court of Appeals.

Respectfully submitted,

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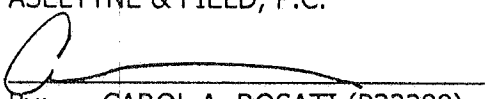

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