

STATE OF MICHIGAN
IN THE SUPREME COURT

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

Plaintiffs/Appellees,

V

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

Defendant/Appellant.

Supreme Court
Case No. 137446-7

Court of Appeals Case Nos.
270594 and 275469

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

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DEFENDANT/APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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INTRODUCTION

This Reply Brief, in addition to reaffirming the policy support for the Township's position, highlights errors of fact, law, and logic presented by Plaintiffs' Brief. Nothing in Plaintiffs' Brief overcomes the legal and policy support for reversal of the decisions of the courts below.

I. THE RECORD NEEDS CLARIFICATION.¹

The representations that the Township "refused" to "approve rezoning" other than the one acre (R-1B) and 95 unit PUD request (Brief, pp. 9 and 28) are mistaken. Plaintiffs made only one application, which they chose to abandon. (Appellant's Brief, pp. 21-23). Plaintiffs' corresponding suggestion of a good faith effort to pursue a mobile home community (MHC) application (Brief, p. 7) is also mistaken. Marcus Yono, Plaintiff VPD's principal, testified that while the R-1B/95 unit application was pending, he submitted a MHC request to the Township as a "peace offering." Yono, of course, promptly and voluntarily withdrew the MHC request. (Supp. App. 211a-212a). That request was a farce, as the trial court made clear: "He [Yono] described the manufactured housing proposal as a peace offering to the Township, which the Court finds ludicrous." (App. 77a-78a). Notwithstanding Plaintiffs' effort to manipulate the process, Plaintiffs in their Brief in this Court **now – finally – concede** that although he hid this from the Township, a "**Manufactured Housing Community**" was "**Yono's preferred use from the beginning.**" (Brief, p. 7). Had he applied for his preferred use at the beginning, we would not be here.

Plaintiffs' suggestion that the Township seeks by this case to impose "finality/ripeness doctrine [on] all facial constitutional challenges to zoning ordinances" (Brief, p. 48) is also

¹ As an initial matter, attached as Supplemental Appendix 208a is an index of transcript pages included here that were cited in Appellant's Brief on Appeal but mistakenly not made part of the original Appendix.

mistaken. (See Appellant's Brief, pp. 19-20) (explaining that immediate review may be appropriate in given cases, whether they are labeled "facial" or not). Plaintiffs' suggestion that the Township has no entitlement to present the issue of Plaintiffs' failure to prove the merits of its exclusionary zoning claim under MCL 125.297a, since the Court's order granting leave to appeal did not expressly refer to that issue (Brief, p. 45), is, once again, mistaken. The Court's order advises that "the parties shall include **among the issues to be briefed . . .**" certain issues. (App. 69a). The Township submits that because this case should have been decided based on the statutory exclusionary zoning claim, it necessarily follows that the merits of that claim should be addressed, just as the dissent in the Court of Appeals addressed them. This issue is properly before the Court.

Clarification of an error in the Township's (Appellant's) Brief is also required. The Township mistakenly advocated that case law reviewing exclusionary zoning claims did so only after the Plaintiffs had applied for "and received a final decision on the proposed land use which the landowner claimed was being excluded." (Appellant's Brief, p. 19). That statement is correct to the extent that in every case, before filing suit, the plaintiff had at a minimum submitted an application for the requested use. But the statement incorrectly suggests that in every case a final decision had been reached by the municipality before a lawsuit was filed.

II. REZONING REQUESTS ARE REGULARLY SUBJECT TO A NEEDS ANALYSIS. UNDERSTANDING THIS PROVES THE FUTILITY ARGUMENT WRONG.

Whether there is a need for a requested land use is a factor Township decision-makers consider when someone seeks rezoning. In this case, when Plaintiffs applied for the R1-B/95 unit PUD, the Township thoroughly studied that request. The Planning Commission did not

simply recommend "no" and the Board did not simply say "no." To the contrary, they relied on many factors from several sources.²

Of most significance here are the specific findings of the Planning Commission, Township Board, County Planning Department, and community planner Paul LeBlanc that one reason the R-1B/95 unit use Plaintiffs did apply for should be denied was **there was no need for the use**. (See LeBlanc recommendation to the Board, App. 142a: "many other R-1B zoned properties are available throughout the Township and the applicant has not demonstrated a need for additional such property to be rezoned at this time."). See also App. 139a (Planning Commission Minutes, 12-10-03, finding that Plaintiffs never showed a "need in the area for additional small lots"); App. 151a (Twp. Board Resolution, 12-12-03, indicating that "ample property" is already zoned in the Township to accommodate "the type of development and density proposed by the applicant. No need has been demonstrated for additional such land"). Consequently, precisely as the *DF Land* court (App. 199a-207a) and the *Hendee* dissent (App. 63a-65a) advised, a needs analysis is fundamental to the municipal decision-making process. Knowing that the requested one acre use was being served in zoning districts elsewhere in the Township and thus not needed, the Township also knew that a decision denying Plaintiffs' R-1B rezoning and 95 unit PUD application was both appropriate *and defensible*.

The fact that County Planning would also have reviewed any MHC request submitted is particularly of note since Plaintiffs have consistently argued the County Planning Dept. regularly advised the Township that the areas master planned for MHCs in the Township were inadequate.

² The many detailed reasons supporting the Planning Commission's recommendation are found at App. 139a-140a; those supporting the Board's decision to deny that application are found at App. 149a-150a. The Township relied on its consultants in this regard, including community planner Paul LeBlanc (App. 141a-142a) and the engineering firm of Ayres, Lewis, Norris & May, Inc. (App. 143a-144a). Additionally, the Township relied on the Livingston County Department of Planning (App. 127a-136a) and Planning Commission. (App. 122a-124a).

(Brief, pp. 9-11). Had Plaintiffs filed an application with the Township to review a mobile home rezoning request, both the Township and the County would have reviewed the application and addressed whether there was any need for a MHC that is not being fulfilled. Plaintiffs' issues regarding the availability of land for mobile home parks somewhere in the Township would have been expressly analyzed. With the results of that analysis in hand, the Township would consider whether a denial of the application would be both appropriate *and* **defensible**. In all of the circumstances, the Township might have approved the request for a mobile home park or, for example, otherwise negotiated a compromise development plan, as so very often is the case.³ But since Plaintiffs filed no application, no needs or other analysis was conducted and no decision made.

This absolutely refutes Plaintiffs' futility argument. At bottom, the argument, as concerns Plaintiffs' parcel, is that "density is futility": if they won't allow 95 units, it would be futile to ask for 498. And the argument Township-wide is that the 80 acres master planned, as well as all acres previously master planned, could not support a MHC so rezoning in those areas would also be futile. Plaintiffs misunderstand the "meaningful application" requirement and ask too much of the futility exception. A meaningful application for a MHC would have put to the Township the task of review, inclusive of a needs inquiry. Ultimately, the question of whether the denial of the application would be defensible would influence the decision. The outcome here is unknown due to circumstances of Plaintiffs' creating.

³ See *McDonald, Sommer & Frates v Yolo County*, 477 US 340, 350; 106 SCt 2561; 91 L Ed 2d 285 (1986) (explaining that "local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand, they may give back with the other").

III. PLAINTIFFS' ANALYSIS OF *LANDON*, *COUNTRYWALK*, AND *SCHWARTZ* IS INCORRECT.

A. *Landon Holdings, Inc v Grattan Twp.*

Plaintiffs concede the *Landon* court concluded plaintiffs there had no duty to "exhaust any administrative remedies." (Brief, p. 19)⁴ (Citing *Landon* at 177). But as has been made clear elsewhere,⁵ exhaustion of administrative remedies and ripeness are distinct concepts, and when the Court of Appeals has revisited *Landon* in the specific context of ripeness, it has made clear that in the absence of a needs analysis – which cannot take place if a rezoning petition is not filed – an exclusionary zoning case is not ripe. *DF Land v Ann Arbor Twp* (App. 206a). There has been no needs analysis in this case. The claims are not ripe.

Plaintiffs concede that here, as in *Landon*, the claims are due process, equal protection, and statutory exclusionary zoning. Additionally, here, as in *Landon*, the Township Ordinance provides for a MHC district and land is planned for, although not yet zoned MHC. The *Landon* court found that in those circumstances, the trial court properly ruled that the ordinance – which allowed for manufactured housing use only upon an application for rezoning or a special use permit – "does not totally exclude manufactured housing communities, either effectively or on its face. Therefore, the ordinance in question does not violate MCL § 125.297a." 257 Mich App at 171-173.

Stating its conclusion, the *Landon* court established that although the defendant submitted no evidence regarding the reasons supporting its zoning ordinance as concerns MHC use:

Plaintiffs have not shown why it is unreasonable for defendant to wait to rezone certain areas for manufactured housing rather than either permitting them by right in existing districts or specifically designating certain areas as manufactured housing districts before owners even apply for rezoning.

⁴ Plaintiffs later mistakenly write that the *Landon* court found the exclusionary zoning claims to be ripe (Brief, p. 24). The court did not make that finding.

⁵ Appellant's Brief, p. 14.

(*Id.* at 178). That analysis is directly on point as a matter of fact, law, and policy and should apply here.

B. Countrywalk Condominium, Inc v City of Orchard Lake Village.

Plaintiffs cite *Countrywalk* for propositions not found in the case; and in any event, the case favors the Township not Plaintiffs. Plaintiffs assert that plaintiffs in *Countrywalk* "never sought a rezoning or variance before filing suit . . ." (Brief, pp. 19 and 20). *Countrywalk*, however, addresses the question of whether a plaintiff alleging due process, equal protection, and taking challenges to an ordinance must seek a variance. Nowhere in the *Countrywalk* case is it suggested plaintiff did not apply for rezoning.⁶

Countrywalk favors the Township on its merits as well. Plaintiffs believe it important that *Countrywalk* references *Kropf* as requiring a burden-shifting analysis. (Brief, pp. 41-43). Yet, Plaintiffs concede the claims in *Countrywalk* are due process and equal protection claims only; there is no suggestion anywhere of an exclusionary zoning claim. For example, at p. 20 of their Brief, Plaintiffs quote *Countrywalk's* description of counts I and II of plaintiff's complaint that indisputably sets forth due process and equal protection claims and nothing else. It is beyond dispute that the claims at issue in *Countrywalk* were due process and equal protection claims,⁷ and it is beyond dispute that those claims are **not** at issue here.

C. Schwartz v City of Flint.

Plaintiffs' discussion of *Schwartz* is also off point. *Schwartz* is of significance here on the issue of remedy alone. The *Schwartz* court found the City of Flint's regulations effected a taking of plaintiff's property only; not of all property township-wide. Fashioning a remedy unique to

⁶ Additionally, the most direct discussion of ripeness doctrine confirms the fact that Plaintiffs' taking claim was not ripe because Plaintiffs failed to seek a variance. (*Id.* at 22-23). Of course, as was the case in *Paragon Properties v Novi*, 452 Mich 568, 550 NW2d 772 (1996) and here as well concerning the R-1B rezoning actually requested, variances are sought after petitions for rezoning are first denied.

⁷ And, initially, a takings claim.

plaintiff's property in *Schwartz* made sense in those facts. Plaintiff wanted and applied for zoning to develop garden apartments on his property. After receiving a final decision from the township denying that request, followed by a liability finding from the court, the court agreed that injunctive relief prohibiting the city from interfering with plaintiff's use of his property as originally requested by way of an application to the city would be an appropriate remedy. Plaintiffs' case here, of course, is very different.

Plaintiffs challenge the ordinance in its entirety and argue that (1) public review is not required in order to get into court; and (2) public review is not required of any land use a court might ultimately approve and impose upon the community. In short, contrary to the facts in *Schwartz*, Plaintiffs here argue the public should play no role. Plaintiffs rely on footnote 24 of *Schwartz* that indicates "potentially broader relief" might be appropriate in an exclusionary zoning case. (Brief, p. 32). Plaintiffs acknowledge what they must: What this Court meant by "potentially broader relief" is not clear. The Township submits the *Schwartz* Court decidedly did not envision parcel-specific injunctive relief in a case like this – since that would be the exact relief awarded to the plaintiff in *Schwartz*, a takings case.

IV. MCL 125.297a CONTROLS THIS CASE, NOT THE COMMON LAW CLAIM THAT EMANATES FROM *KROPF*.

The Township has established that the Legislature can supersede the common law through properly enacted legislation. (Appellant's Brief on Appeal, pp. 28-31; see also Brief of Amici Michigan Municipal League, et al. at pp. 31-47). Plaintiffs offer no rebuttal to this point. Instead, Plaintiffs argue that the exclusionary zoning statute is inapplicable because it would limit Plaintiffs' constitutional rights: a reference to Plaintiffs' dismissed due process rights. (Brief, p. 39) ("Protection from exclusionary zoning is deeply rooted in the state Constitution when such zoning is arbitrary, unreasonable or capricious"). Plaintiffs go so far as to wrongly

suggest that the Township "argues that the discriminatory or arbitrary exclusion of a land use is not constitutionally prohibited . . . as a violation of substantive due process or equal protection." (*Id.*). Plaintiffs continue to miss the point. There is textual support in the Constitution for substantive due process and equal protection claims. Arbitrary governmental conduct can support such a claim. Plaintiffs' due process and equal protection claims, however, were dismissed, not cross-appealed, and are no longer at issue.⁸ The exclusionary zoning statute does not limit any due process rights. It does not limit equal protection rights. Those claims stand or fall on their own merits, independent of MCL 125.297a. That was the case here and ultimately the Court of Appeals unanimously rejected those claims.

Plaintiffs separately suggest the burden-shifting standard from *Kropf* "enjoys the same constitutional protections as the strict scrutiny standard," arguing, apparently, that standards of review are protected by the Constitution and any statute that "limits" the standard of review necessarily contravenes the Constitution. That, of course, is incorrect.

MCL 125.297a, far from contravening or limiting constitutional principles in any fashion, does this: It codifies a cause of action that did not exist before enactment of the statute. *Kropf*⁹ did not adopt, create, or find somewhere in the Constitution an exclusionary zoning claim that never existed before the Legislature enacted MCL 125.297a. *Kropf's* dicta referencing total

⁸ In this regard, it is important for the Court to reject Plaintiffs' effort to resurrect those substantive due process and equal protection claims as Plaintiffs do throughout their brief. See, for example, brief p. 18, headnote II(B): "Plaintiffs' substantive due process, equal protection, and statutory exclusionary zoning claims are facial claims that were ripe for adjudication as a matter of law"; p. 30: "The finality rule is inapplicable to facial constitutional challenges such as Plaintiffs' substantive due process and equal protection claims in the case at bar"; p. 46, arguing that the Township should not be allowed to address the statutory exclusionary zoning claim because it was rendered moot in light of the Court of Appeals' "conclusion that the Township violated Plaintiffs' substantive due process and equal protection rights"; p. 47, arguing that the Township should pay expert witness fees as a result of its "blatantly discriminatory conduct . . . in violation of Plaintiffs' constitutional rights to equal protection and substantive due process."

⁹ *Kropf v City of Sterling Heights*, 391 Mich 139, 215 NW2d 179 (1974).

exclusion is born of the common law and nothing more.¹⁰ The legislation that controls here does not contravene any provision of the Constitution and certainly has no impact on a nonexistent constitutional exclusionary zoning claim. The statutory exclusionary zoning claim, instead, is a feature of a larger body of time-tested municipal legislation. The statute, not *Kropf*, controls.

V. A TRIAL IS NOT THE PLACE TO CONDUCT PUBLIC MUNICIPAL REVIEWS.

In response to the Township's irrefutable point that it is impossible to perform a needs or any other reasoned analysis if a rezoning request is not submitted, Plaintiffs' argue that the Township had "every opportunity to present at trial" all the proofs it saw fit. (Brief, p. 23). Where, however, the policy question before us is how should the rezoning review process begin and end, presenting proofs in court is the wrong answer.

Our work should be to help people resolve disputes without going to court. The municipal process takes place at the township hall with all interested voices heard. For example, when, as the law requires, notice of a rezoning petition is mailed to all land and homeowners within 300 feet of plaintiff's property and posted in the local newspaper (MCL 125.284(2)),¹¹ members of the community appear at the township hall to join the debate.¹² When a lawsuit is filed without any municipal action first requested, they do not.

¹⁰ The fact that the "totally excludes/strong taint of unlawful discrimination" language from *Kropf* is dicta is easily proven by the sentence that follows: "Such a taint can hardly be presumed to be present in cases such as that presently before us when the general use is reasonably permitted in the community and the only issue is whether it was arbitrarily or capriciously denied as to this particular piece of land." *Kropf*, 391 Mich at 155-156.

¹¹ These provisions now appear as part of MCL 125.3103.

¹² See App. 108a-109a, 123a, and 140a-146a (Township Planning Commission, County Planning Commission, and Township Board meetings at which a total of no less than 40 members of the public spoke. These are only members of the public who spoke, not the total number of persons who attended the meetings at which the Hendee rezoning/PUD request was discussed).

CONCLUSION

In briefs filed in support of the Township, Amici point out, as has the Township, that should *Hendee* stand, there will be no reason for a developer to ever go to the township requesting any use in the first instance. This is not a "parade of horrors" argument. A case now pending in the Court of Appeals involves exactly those facts.¹³ That case, filed before this Court granted leave to appeal here, is a potent indication of how far and how fast developers will take the *Hendee* decision should this Court allow *Hendee* to stand. And the case at bar makes clear the bait-and-switch strategy that developers are willing to employ in order to avoid public review of proposals the developer truly wants, but believes only a court will approve.

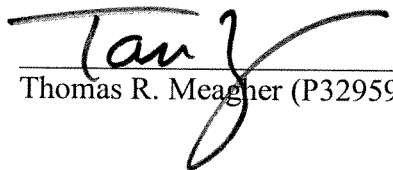
The Court of Appeals majority erred on many fronts. Doing so it provides this Court the opportunity to clarify for citizens, their municipalities, the bar, and the judiciary the importance of maintaining the integrity of the protections afforded the public by local review of land use applications before court involvement. Protecting the public in that fashion supports reversal of the decisions below.

Respectfully submitted,

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Attorneys for Defendant/Appellant

Dated: October 8, 2009

By:



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¹³ *DF Land v Ann Arbor Twp*, Court of Appeals No. 291362. This Court of Appeals case, although between the same parties as the case attached here as App. 199a-207a, is completely unrelated to that case.