

**STATE OF MICHIGAN
IN THE SUPREME COURT**

Appeal from the Court of Appeals

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.

SC #: 137446-7
COA #: 270594
LC#: 04-020676 CZ

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STATEMENT OF QUESTIONS INVOLVED

The Real Property Law Section addresses four of the issues posed by the Court in its Order Granting the Application for Leave to Appeal the August 26, 2008 Judgment of the Court of Appeals:

1. WHETHER A RULE OF FINALITY OR RIPENESS APPLIES TO THE PLAINTIFFS' EXCLUSIONARY ZONING CLAIM?

Plaintiffs Answer: No
Defendant Answers: Yes
The Circuit Court Answered: No
The Court of Appeals Did not answer this question
Amicus Curiae Answers: No

2. IF A RULE OF FINALITY OR RIPENESS APPLIES TO THE EXCLUSIONARY ZONING CLAIM, WHETHER THE COURT OF APPEALS MAJORITY PROPERLY HELD THAT THE DEFENDANT'S PREVIOUS DENIALS OF THE PLAINTIFFS' APPLICATION TO REZONE THEIR PROPERTY FOR LESS INTENSIVE USES EXCUSED THE FINALITY REQUIREMENT UNDER THE FUTILITY DOCTRINE?

Plaintiffs Answer: Yes
Defendant Answers: No
The Circuit Court Answered: Yes
The Court of Appeals Answered: Yes
Amicus Curiae Answers: Yes

3. **WHETHER THE TRIAL COURT ERRED IN GRANTING INJUNCTIVE RELIEF PROHIBITING THE DEFENDANT TOWNSHIP FROM INTERFERING WITH THE PLAINTIFFS' PROPOSED USE OF THEIR PROPERTY FOR A MANUFACTURED HOUSING COMMUNITY WHEN THE PLAINTIFFS HAD NEVER PROPOSED THAT USE TO THE TOWNSHIP?**

Plaintiffs Answer: No
Defendant Answers: Yes
The Circuit Court Answered: No
The Court of Appeals Answered: No
Amicus Curiae Answers: No

4. **WHETHER A CLAIM THAT A ZONING ORDINANCE UNCONSTITUTIONALLY EXCLUDES A LAWFUL USE IS PROPERLY ANALYZED WITHOUT REGARD TO WHETHER A DEMONSTRATED NEED FOR THE USE EXISTS, AS SUGGESTED BY THE COURT OF APPEALS' RELIANCE ON *KROPF V CITY OF STERLING HEIGHTS*, 391 MICH 139, 155-156 (1974), OR WHETHER THE ENACTMENT OF 1978 PA 637, MCL 125.297a (NOW RECODIFIED IN NEARLY IDENTICAL LANGUAGE AS MCL 125.3207) SUPERSEDED THE ANALYSIS OF *KROPF* ON WHICH THE MAJORITY RELIED?**

Plaintiffs answer that the statute did not supersede *Kropf* and that a showing of demonstrated need is not required.

Defendant answers that the statute supersedes the *Kropf* analysis and that a showing of demonstrated need is required.

The Circuit Court did not answer these questions.

The Court of Appeals answered that the statute did not supersede *Kropf* and that a showing of demonstrated need is not required.

Amicus Curiae answers that the statute did not supersede *Kropf* and that a showing of demonstrated need is not required.

I. INTRODUCTION AND STATEMENT OF INTEREST

The Plaintiffs/Appellees (the "Hendees") own approximately 144 acres of land the family had farmed and now seeks to develop. The Hendees filed suit in Livingston County Circuit Court, claiming that Putnam Township's Agricultural-Open Space (A-O) zoning of their property violated their rights to equal protection and substantive due process and constituted a taking of their property. Prior to trial, the Hendees waived their damage claim against the Township and sought only declaratory and injunctive relief. Following a bench trial, the trial court held that the existing zoning of the property constituted a violation of the Hendees' constitutional rights to substantive due process and equal protection and further held that the Putnam Township zoning ordinance unreasonably excluded mobile home parks.

The trial court, in the remedy phase of the trial, held that the Hendees' proposed 498-unit mobile home park was a reasonable use and therefore enjoined Putnam Township (the "Township") from interfering with development in accordance with that plan. The Township asserted seven issues in the Court of Appeals. In doing so, the Township misconstrued the relationship between finality to meet the requirements of ripeness to file a constitutional challenge to the ordinance and the remedy a court may order; the trial court declined to follow the Township's contention and kept those issues separate as did the Court of Appeals.

Unfortunately, the facts and the mix of claims presented by the case invite an attempt to confuse these issues and dramatically change the requirements for zoning litigation and the remedy a court may order. The Township claims "bait and switch": the Hendees asked the Township for a 95-lot subdivision but asked the court for a 498-unit mobile home development. The Township says that ripeness rules require that the Hendees ask the Township first whether it would accept the mobile home park. The Hendees say they did raise a mobile

park with the Township and that, in any event, asking the Township for zoning for a 498-unit mobile home park would be futile after rejection of a 95-lot single-family subdivision. The trial court and Court of Appeals agreed. The Township's claim that it should have had the chance to finish review of the request for a 498-unit mobile home park, when it had already rejected a 95-lot single-family subdivision, struck the Hendees, the trial court, and the Court of Appeals as a futile gesture.

From the perspective of the Real Property Law Section, that demand from the Township illustrates the practical effect of the ripeness rule in most cases: The property owner is required to pursue a meaningless process which does not serve to narrow or define the issues for the courts, but rather only to delay.¹ The purpose of the ripeness rule is to finally determine for the court what use the challenged zoning ordinance will permit on the property. As the circumstances of this case do make clear, requiring the Hendees now to return to the Township to apply for a 498-unit mobile home park after denial of a single-family subdivision does not answer that question or in any way advance the inquiry.²

The Hendees also brought exclusionary zoning claims on the basis of MCL 125.297a³ and on constitutional grounds. Both the trial court and the Court of Appeals agreed that the Township zoning ordinance excludes mobile home parks. The Township now asks this Court to apply ripeness rules to bar this claim as well.

¹ In their dissenting opinions in *Paragon Properties Co v City of Novi*, 452 Mich 568, 583; 550 NW2d 772, 778 (1996) and *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 106; 445 NW2d 61, 83 (1989), Justices Cavanaugh and Brickley, respectively, characterized the finality requirements similarly as a "pointless waste of time and resources" and "an exercise in futility."

² In fact, in a prior suit, the Hendees first went to court just to obtain an order to the Township to decide their request for a 95-lot single-family subdivision. Livingston County Circuit Court, Case No. 03-201191-AW (1/31/06 Tr 108-111).

³ MCL 125.297a of the Township Zoning Act is now codified in nearly identical language as MCL 125.3207 of the consolidated Michigan Zoning Enabling Act.

The Court of Appeals rejected all of the Township's ripeness claims, holding that further township proceedings would have been futile. Even though it found some of the Hendees' constitutional claims to be "as applied" challenges subject to the rule of finality, they too must be considered ripe under the futility exception, the Court of Appeals held:

Given that the futility exception to the rule of finality operates as if the municipality had expressly come to a definitive position on [a manufactured housing community], we find that the action was ripe for suit.

Slip Opinion at 7-8. The Court of Appeals found that the trial court had erred in finding that the township A-O zoning of the property violated the Hendees' rights to substantive due process and established a regulatory taking. Slip Opinion at 8-9. It affirmed, however, the trial court's finding that the Township's zoning categorically excluded mobile home development. Slip Opinion at 9 - 18. As a remedy, the Court of Appeals affirmed the trial court's injunction preventing the Township from interfering with the development of the Hendees' property as a mobile home park.

The determination made by a court to address whether the zoning of property unconstitutionally deprives the owner of property of its rights turns on whether the existing zoning unreasonably restricts the use of the property, fails to reasonably advance a legitimate governmental objective or excludes a legitimate use.⁴ Once the court has made that determination and found that the existing zoning is unconstitutional, the court fashions a remedy. Under Michigan precedent, the property owner presents a proposed plan of development, and if the court finds it reasonable, the court will enjoin the local government from interfering with the

⁴There are other grounds for invalidating a zoning ordinance, such as unconstitutional taking, violation of the zoning act, and denial of equal protection. If a zoning regulation applicable to a property is invalidated for any reason, the court would then proceed to the remedy phase of the case.

development of the property in accordance with that reasonable plan of development. *Schwartz v Flint*, 426 Mich 295; 395 NW2d 678 (1986).

No Michigan case requires that the proposed plan of development necessarily be the one that the property owner originally proposed to the local government. In fact, under *Schwartz, supra*, it is the trial court's function to determine whether the proposed use is reasonable. See pp 22-26, below.

The same standard of reasonableness applies to the property owner as to the municipality. In determining whether a zoning ordinance is reasonable, the court does not search for the best of all possible uses; its role is limited to determining whether the use chosen by the municipality falls within the range of reasonable alternatives. Just so, it is not within the court's judicial role to search for or sift among the range of conceivable alternatives to see if some other use is more reasonable or to find a midsatisfactory or less intense use. That role was expressly rejected by our Supreme Court in *Schwartz, supra*.

As a practical matter, a property owner will first ask the local government to rezone the property for the desired use. In this case, the owner proposed zoning to R1B to allow a 95-unit development. The Township would not allow rezoning to permit that use or the lower density zone recommended by the Township planning expert. The Zoning Board of Appeals rejected a variance to allow either 95 or 40 homes. The Township rested upon its assertion that Agricultural-Open Space zoning for the property, permitting only agricultural use or 13 homes on 10-acre lots, was reasonable.⁵ At some point, during the course of these 14-month zoning proceedings, the Hendees, concluding that their requests would not be granted, applied to rezone

⁵ The Township's planning expert agreed that agricultural use is not appropriate or economically feasible. (2/26/09 Tr 8-9).

the property for manufactured housing to provide affordable housing. The Township refused to process the application.⁶

At trial, the Hendees proved to the circuit court that the existing zoning was unreasonable and unconstitutional. At that point, the existing zoning had been invalidated, and the case proceeded to the second stage - the remedy stage. The Hendees offered proofs and asked the court to declare that a plan for development of the property for a 498-unit mobile home park was a reasonable use. On the proofs presented by the Hendees and the Township, the trial court found that proposed plan of development for the Hendee property reasonable and ordered the Township not to interfere with development for that use. The Township claims that a court may not order that remedy.

The Township conflates the issues of ripeness and remedy. In the trial court and on appeal, the Township contends that an owner can only get its claim before a court after first requesting a rezoning for, and then specifically anticipating and requesting a variance for, and obtaining a decision on, one of the possible uses that the court might then order after trial as a remedy. Without a decision on that specific use, the Township contends, the case is not ripe, and the owner may not seek, and the Court may not order, that use as a remedy. That is, the owner must propose a specific use, allow the Township to weigh that use – using its broad legislative prerogative, not an administrative standard – after which the owner may challenge the ordinance's constitutionality, against all of the presumptions in favor of legislative action.

In so doing, the Township would have this Court dramatically change the requirements for ripeness in bringing a taking challenge, apply that ripeness standard to a facial and exclusionary zoning claim in the face of a well-grounded finding of futility, and change the

⁶ (1/31/06 Tr 107).

remedies permitted in an equity court in Michigan. Ripeness serves a far more limited, prudential purpose,⁷ and in this case, the exclusionary zoning of the Township helps to make that clear. The Township invites this Court to use ripeness to overturn *Schwartz*. The Court should decline.

By tying the ripeness requirement to the exact remedy a court may order, the ripeness rule would swallow the remedy and require the property owner to engage in an endless shell game, seeking to discover what the municipality might allow. When this Court decided *Schwartz*, it declared an end to an earlier version of that shell game with respect to the remedy. In ~~*Palazzolo v Rhode Island*, 533 US 606 (2001)~~, the United States Supreme Court rejected manipulation of the ripeness requirement to the same end.

The equitable remedy adopted by the Court in *Schwartz* was a culmination of years of turmoil, experimentation, and reexamination by this Court of the nature of zoning and the remedy a Michigan court may order when zoning is found to be unconstitutional.⁸ In *Ed Zaagman, Inc v City of Kentwood*, 406 Mich 137; 277 NW2d 475 (1979), the court ordered that subsequent to a judicial finding of the invalidity of the zoning classification, the court should remand to the city council to adopt a "mid-satisfactory use"; if the property owner rejected that use, the owner could submit a proposed mid-satisfactory use, and if the local government did not agree, the trial court would choose and implement its own mid-satisfactory use. 406 Mich at

⁷ As the United States Supreme Court has pointed out, ripeness is prudential. *Suitum v Tahoe Regional Planning Agency*, 520 US 725, 733-34 (1987).

⁸ See, e.g. *Sabo v Monroe Twp*, 394 Mich 531, 536-537; 232 NW2d 584 (1975) (plurality opinion held that proofs should be presented administratively and judicial review restricted to whether record evidence supported the administrative finding of whether the proposed use is reasonable; even if the present zoning were not unreasonable or confiscatory, a proposed use would be permitted if reasonable under all of the circumstances).

166-167. In other words, even though the ordinance has been found unconstitutional after the local government has declined to change it, and the owner has expended the time and resources to go to court for an uncertain result, the local government would again have the opportunity to enact its preferred alternative.⁹

⁹In its amicus brief submitted to this Court in *Schwartz*, the Real Property Law Section said:

The fear that municipalities might unreasonably use *Zaagman* to block development of land was not imaginary, but was based on experience. The attitude of many municipalities toward the zoning process was candidly expressed by a California city attorney in 1974. Justice Brennan in his dissent in *San Diego Gas & Electric Co v San Diego*, 450 US 621, 636; 67 LED2d 551, 563 (1981) stated:

Invalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity. At the 1974 annual conference, the National Institute of Municipal Law Officers in California, a California city attorney gave fellow city attorneys the following advice:

IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN!

'If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent [California] Supreme Court case of *Selby v City of Buenaventura*, 10 C3d 110, appears to allow the City to change the regulation in question, even after trial and judgment. To make it more reasonable, more restrictive, or whatever, and everybody starts over again . . .

'See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck' [citation omitted] (emphasis in original).

450 US at 655; 67 LED2d at 575, fn 22.

(continued . . .)

What the Court decided in *Schwartz*, in large measure, was that once the local government had enacted its ordinance and declined to change it, leaving the owner to seek a remedy in court, and the court has finally determined that the ordinance is unconstitutional, the local government may not demand another try.

Under the rule of finality adopted in *Paragon*, only after the local government has adopted the ordinance, declined to change it, and declined to vary it in a separate proceeding, may the property owner ask the aid of the courts. The rule urged by the Township would not simply allow the local government another opportunity to try another position, but require the owner to repeatedly ask what the local government might allow, even where its decisions logically preclude those uses. The local government, having declined to consider far less intense uses on the property than a mobile home park, chose to limit the land to houses on 10-acre lots.

In *Palazzolo*, as discussed in greater detail below, the Rhode Island Coastal Resources Management Council, denied an application to fill wetlands and construct a beach club, first on all of the wetlands and then on 11 of the wetland acres, but suggested, as the Court described, "perhaps an application to fill (for instance) 5 acres would have been approved. Thus, the reasoning goes, we cannot know for sure the extent of permitted development on petitioner's wetlands." 533 US at 619. That contention was belied by the Council's finding that the proposed activity did not satisfy the standard of a "compelling public purpose" to fill wetlands, allowing

(... continued)

Justice Brennan was condemning rules of law which left open the possibility of the abuses suggested by the California attorney. Yet, the effect of *Zaagman* is not merely to tolerate, but to mandate under sanction of a court decision, the practices which Justice Brennan indicted in *San Diego*.

no fill, and thus, no structures and no development. Further permit applications were not necessary to establish this point. 533 US at 621.

The issue to be determined for purposes of ripeness is how the regulation applies to the land and what uses it permits. In this case, likewise, there can be no doubt that the Township would have denied a mobile home park.

The Real Property Law Section proposes to address four of the issues posed by this Court in its Order granting leave to appeal. The Section takes them in a different sequence, however, to provide the foundation for responding to those questions: first, the question of when a matter is ripe, and the subquestion, whether ripeness requires that the most minimal variance be sought. The second is how the court provides a remedy after determining that the existing zoning is unconstitutional. Third, how the rule of finality for ripeness applies, if at all, to an exclusionary zoning claim, and in this case, whether the finding of futility by the lower courts would excuse any finality requirement, in any event. Finally, in light of the statutory provision prohibiting exclusionary zoning in Michigan, does exclusionary zoning still offend the Constitution?

The Real Property Law Section believes that the Court of Appeals correctly analyzed these issues, correctly applying both Michigan precedent and practical sense, and avoiding the confusion often found in zoning litigation. The courts examine existing ordinances as they regulate land uses and property rights to determine whether they unreasonably restrict the use of property. In this case, the Township government legislated an extremely restrictive regime, limiting the use of the Hendee property and outlawing mobile home communities in the entire township. Now, faced with a remedy it believes more unpalatable than the form of development originally proposed by the Hendees, which the Township rejected, the Township

suggests far-reaching changes to Michigan law to avoid that result. The Court of Appeals also correctly analyzed the application of rules of finality or ripeness to the exclusionary zoning claim in this case: No such procedural requirement does apply or should apply to the exclusionary zoning claim brought by the Hendees. An exclusionary zoning claim is fully ripe upon adoption of the exclusionary ordinance. The rule of finality deals with the impact of the ordinance on a particular property in question -- how it applies to that particular property. An exclusionary ordinance, by its terms, excludes a legitimate use from the community.

Without a clear understanding of these issues, the role of the courts could be returned to that of a mediator between the local government and the property owner, reviving what was once known as the "mid-satisfactory use" - rejected by this Court - and the courts again placed in the role of "super zoning commissions." The Real Property Section believes that it is therefore important to clarify those issues. The Real Property Law Section is a voluntary membership society of the State Bar of Michigan. Membership in the Real Property Law Section is open to all members of the State Bar of Michigan, but generally comprises attorneys who practice and are interested in real property law. One mission of the Real Property Law Section is to provide information about current issues in real property law.

The Real Property Law Section possesses the ability to provide unique information and perspective on the issues in this case. Its membership includes attorneys who focus their practices in zoning and land use actions, offering a depth of experience and familiarity with the issues before the Court. In the past, the Michigan Supreme Court has recognized the Real Property Law Section's expertise in past cases involving real property issues, inviting the Real Property Law Section to file amicus briefs in such cases. See, e.g., *Schwartz v Flint*, 426 Mich 295; 395 NW2d 678 (1986).

The Real Property Law Section Council authorized preparation of an amicus curiae brief by the Real Property Law Section's Zoning & Land Use Committee at its meeting in July 2009, as required by the bylaws of the State Bar of Michigan. The State Bar of Michigan has no position on this matter; the positions expressed are those of the Real Property Law Section only.

II. STATEMENT OF FACTS

Amicus Curiae, Real Property Law Section, accepts and adopts the Counterstatement of Facts in the Hendees' Brief on Appeal.

III. ARGUMENT

The zoning process in local government differs in kind from the examination of zoning in the courts. The rules proposed by the Township and the Michigan Townships Association for the basic gate-keeping functions in bringing a zoning challenge to the courts and in limiting the remedies a court may order would recreate in the courts the same process as in local government, tasks to which the courts are ill-suited. By dramatically raising the stakes in this case, refusing any development greater than open space or 13 single-family homes on 144 acres, on property which the proofs showed -- to the satisfaction of the circuit court -- that a 498-unit manufactured housing community is reasonable, the Township essentially invites the Court to intervene as a mediator, and not as a court.

A. Background - The Legislative, Administrative and Judicial Roles in Zoning

1. The Local Government - Legislative and Administrative

The interest and focus of the proceedings before the local government are on the classification or permissible uses sought in the rezoning or variance. Where property, as in this case, is subject to an existing zoning ordinance, the owner may use it as zoned or request an

amendment to the zoning ordinance to permit other uses. The owner need not propose a specific use. The change from a residential to a commercial zone, for example, typically opens a range of business uses; a rezoning from one residential zone to another changes the permissible density. In this case, the Agricultural-Open Space (A-O) zoning of the property under the township ordinance permitted agricultural uses and single-family development on ten-acre lots. Testimony of one of the owners and the Township's planning expert at trial established that an agricultural use of the property is neither appropriate nor economically feasible. The property is the remainder of a larger dairy farming operation discontinued when it became no longer viable in the 1970s. By the same token, as the trial court found, no builder or developer expressed interest in the property under the A-O zoning district, and a market analysis of its development for 13 lots showed that even if all 13 lots were immediately sold upon development at full market value, the cost of development would still exceed the total sales price and render use of the property economically infeasible, even assuming no cost to purchase the property and no profit to a developer.

If a city council or township board will not amend the ordinance, the property owner's only practical alternative is usually in the circuit court. While, as a theoretical matter, the zoning board of appeals has the authority, in limited circumstances, to grant a variance, a variance requires the owner to choose and propose a specific use for which the owner may not

have a tenant, buyer, or market. Moreover, after denial of a rezoning by a city council, few zoning boards of appeal would consider, much less allow, a use variance.¹⁰

2. The Court - The Judicial Role in Zoning

In court, the focus shifts to the effect of the existing ordinance, not the ordinance as possibly amended or possibly varied. A challenge to the zoning ordinance can include a claim that as applied to its property, the zoning ordinance violates the owner's right to substantive due process by unreasonably restricting the use of the property, or a facial challenge to the ordinance itself, as for example, a claim that the ordinance by its terms is exclusionary and will not allow the use or uses desired by the property owners. More rarely, the owner claims that as applied, the ordinance constitutes a taking of its property without compensation.

In every such challenge, the court addresses the ordinance, either on its face or as applied to the property. For substantive due process, the issue is whether the present zoning classification fails to advance, or to reasonably advance a legitimate governmental interest; arbitrarily and capriciously excludes other types of legitimate land use; or is confiscatory, measured in light of the existing circumstances of the property. See *e.g.*, *Kropf v Sterling Heights*, 391 Mich 139, 151; 250 NW2d 179, 186-189 (1974).

With respect to a taking claim, as stated in *K&K Construction, Inc v Dep't of Natural Resources*, 456 Mich 570, 576-577; 575 NW2d 531 (1998):

[C]ourts have found that land use regulations effectuate taking in two general situations: (1) where the regulation does not

¹⁰Moreover, the township and county zoning enabling acts, unlike the city and village act, did not by their terms expressly authorize use variances. Compare, former MCL 125.293 and MCL 125.585. The consolidated Michigan Zoning Enabling Act expressly permits use variance only by boards of appeal in cities, villages, and those few townships that, after *Paragon Properties Co v Novi*, 452 Mich 568; 550 NW2d 772 (1996), expressly authorized or had granted a use variance. MCL 125.3604(a).

substantially advance a legitimate state interest, or (2) where the regulation denies an owner economically viable use of his land.

An exclusionary zoning claim challenges a zoning ordinance that totally excludes an otherwise lawful use. *Kropf, supra*, at 156; *Smookler v Wheatfield Twp*, 394 Mich 574; 232 NW2d 616 (1975).

If the existing ordinance is declared unconstitutional, the Michigan courts possess equitable power to order a remedy. *Schwartz v Flint*, 426 Mich 295; 395 NW2d 678 (1986). As discussed in greater detail, below, in *Schwartz*, the Michigan Supreme Court determined that beyond enjoining the local government from enforcing the ordinance found to be invalid, the court may not order the local government to rezone the property, as doing so would invade the legislative province and violate the constitutional separation of powers. Rather than leave the local government free to rezone the property to any other category of uses, the court may craft a remedy that directly addresses the use of the property. The owner may propose a use and offer proofs to show that it is reasonable. The court's role is not to determine whether that use is the most reasonable among the range of theoretically possible uses; that would invade the legislative province and would make the court a superzoning commission. Rather, if the court finds it to be reasonable, the court may enjoin the local government from interfering with that reasonable use. *Schwartz, supra*.

3. Narrowing the Taking Issue by Requiring Ripeness

Against this backdrop, in *Paragon Properties Co v Novi*, 452 Mich 568; 550 NW2d 772 (1996), the Supreme Court held that when an owner claimed that the ordinance as applied to the particular parcel amounted to a taking of the property, the owner's taking claim, after requesting rezoning, was not ripe: Although the city council had denied its request to rezone, the owner also could have sought administrative relief by a variance from the zoning

board of appeals under the zoning ordinance, allowing a different use of the property than that permitted under the existing zoning of the property.

As discussed above, the two types of relief are distinct, both practically and legally. As pointed out in Justice Cavanaugh's dissent in *Paragon, supra*, an amendment to rezone the property legislatively allows a different, but broad range of uses permitted by right or by special use permit in the district to which the property is rezoned; a variance allows a specific use, subject to conditions, different from and not otherwise permitted in the zoning district for the property. It is, in effect, a license to use property in a way that otherwise violates the zoning ordinance. *Heritage Hills Ass'n, Inc v Grand Rapids*, 48 Mich App 765; 211 NW2d 77 (1973).

B. The Putnam Township Legislative and Administrative Proceedings

As first requested by the Hendees, rezoning to the R-1B district under the Putnam Township zoning ordinance would have allowed a limited range of uses, including single-family homes on 1-acre lots; rezoning to R-1A would have allowed a limited range of uses including single-family homes on 2-acre parcels. Failing these, the Hendees suggested a rezoning for manufactured housing. The Township Board did not rezone the property to any other classification but left the legislated A-O district in place. The Hendees had thus played out the legislative string.

In accordance with *Paragon, supra*, the Hendees applied to the zoning board of appeals for a variance. The zoning board of appeals considered, and rejected, both a 95-unit single-family development originally proposed by the Hendees, and a 40-home development suggested as a compromise by the Township's planning expert. The Hendees had thus played out the administrative string. Having met the threshold laid down by *Paragon*, and lacking any

other means to change the ordinance and its effect on their property, the Hendees filed their action in the circuit court.

C. Mixing Ripeness and Remedy - the Township's Claims

The Township would have this Court extend the requirement of a variance request to obtain relief on any constitutional claim. Then, even more broadly, under the rubric of ripeness, the Township treats all constitutional claims as one for review of the legislative and administrative actions by the Township Board and Township Zoning Board of Appeals. Thus, the Township says in its brief in the Court of Appeals, at 6:

[T]he Circuit Court might have been able to review Plaintiffs' requests for R-1B zoning and their corresponding 95-unit proposal.

But, the court could not, the Township says, consider a manufactured housing use as a remedy. In other words, the court's action is limited to an "appeal" of whatever proposal is put before the Township. Indeed, the Township appears to go even further and suggest that a challenge to a zoning ordinance is not ripe unless the property owner guesses which specific use would be determined by a court to be the most minimal use variance, thus subjecting the property owner to a judicial shell game.¹¹ This broad brush sweeps aside the clear legal distinctions between different claims, between the right and the remedy, and the judicial role in limiting local government regulation to constitutional bounds. Only the court, not a local government board or commission, may determine whether an ordinance is unconstitutional. It is settled law that a zoning board of appeals has no judicial power and lacks the authority to invalidate an ordinance. *Long v City of Highland Park*, 329 Mich 146, 149; 45 NW2d 10, 11 (1950), Ziegler, et al, *Rathkopf's The Law of Zoning and Planning*, § 57:22.

¹¹The U.S. Supreme Court has rejected the notion that the property owner must participate in a shell game before gaining entry to the courts and obtaining a meaningful remedy. See, *Palazzolo v Rhode Island*, 533 US 606, 619; 121 S Ct 2448, 2458; 150 L Ed2d 595 (2001), as discussed *infra*, at 24.

As described in *Kropf, supra*, and its progeny, the court examines the application of the existing ordinance to the property at issue; it does not review the decision of the legislative body to determine whether its legislative action rested upon sufficient evidence or whether it was done for proper or improper motives. Both are irrelevant. See, e.g., *Pythagorean, Inc v Grand Rapids Township*, 253 Mich App 525, 528; 656 NW2d 212 (2002) (“the validity of a law has nothing to do with the motivation of the legislators who enact it”). *Arthur Land Co v Otsego Co*, 249 Mich App 650; 645 NW2d 50 (2002) (overturning trial court’s appellate review of county rezoning action on the record).

The court’s jurisdiction in a constitutional challenge to an ordinance is original, it is not appellate. *Arthur Land Co, LLC v Otsego County*, 249 Mich App 650, 657; 645 NW2d 50 (2002) (the trial court had agreed with defendant county that “plaintiff’s claims were in essence an appeal from the final decision of the county board and that, therefore, the trial court was required to limit its review to the record created during the proceedings below”). That the ordinance, as it exists, is reviewed, and not the legislative decision on a request to amend, is a distinction that is sometimes lost. See, e.g., *Kernen v City of Walled Lake* (unpublished decision of Court of Appeals, No. 229465, February 24, 2003) (“because zoning is a legislative act, the validity of a decision to rezone or to refuse to rezone is determined under the tests normally applicable to legislation”); *TG Development, LLC v Mt Morris Township* (unpublished decision of Court of Appeals, No. 243019, March 25, 2004) (trial court found that township’s rejection of the rezoning application was supported by competent, material and substantial evidence).

The court determines whether the zoning ordinance, as it exists, not as it might be, violates the Constitution. As stated in the oft-quoted *Kropf v Sterling Heights*, 391 Mich 139, 151; 215 NW2d 179 (1974):

The rule of law governing such problems is well settled: Zoning, to be valid, must be reasonable, and its reasonableness must be measured by present conditions. The rule was expressly stated in *Gust v Twp of Canton*, 342 Mich 436, 442; 70 NW2d 772, 774 (1955):

‘The test of validity is not whether the prohibition may at some time in the future bear a real and substantial relationship to the public health, safety, morals or general welfare, whether it does so now.’

* * *

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 residential 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 these arguments are founded upon due process, in reality, they are distinct arguments, each requiring different proofs. [*Id.* at 186-187].

In short, the Hendees challenged the ordinance as it existed. The Township instead argues that because the Township did not make a decision on a proposed mobile home park, the Hendees “failed to explore with the Township any less dense residential development or any alternative use of the property,” and the Hendees then sought a remedy allowing a mobile home park [*Id.* at 6, 7], the circuit court had nothing to review, and therefore lacked jurisdiction even to consider the Hendees’ constitutional challenges, much less to order a remedy for any constitutional violation. The Township’s mistake is fundamental: The court does not review what the local legislative body might do. It reviews what the legislative body actually did: It reviews the existing local ordinance; the court must take the ordinance as it exists, not as it might be, and measures its effect against existing circumstances, not in the future. *Gust v Twp of*

Canton, 342 Mich 436, 442; 70 NW2d 772, 774 (1955), *Kropf, supra*, at 151. To do otherwise would require the court to intrude into the legislative power and violate the separation of powers.

D. Ripeness

1. Origin in the Federal Courts

Federal courts will not consider a taking claim for damages until the property owner pursues a remedy under state law or unless the property owner has no remedy under state law. A claim is not ripe until a state fails “to provide adequate compensation for the taking.” *Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 US 172; 105 S Ct 3108; 87 L Ed2d 126 (1985). The ripeness rule is prudential, not jurisdictional. *Suitum v Tahoe Regional Planning Agency*, 520 US 725, 733-34; 117 S Ct 1659; 137 L Ed2d 988 (1987). See also, *San Remo Hotel, LP v San Francisco*, 545 US 323; 125 S Ct 2491; 162 L Ed2d 315 (2005) (Rehnquist, J. concurring); *Lucas v South Carolina Coastal Council*, 505 US 1003, at 1012-1013; 112 S Ct 2886; 120 L Ed2d 798 (1992).

The ripeness rule does not apply to facial challenges to the validity of a zoning ordinance. See, *San Remo Hotel, supra*, 545 US at 340, n 23, and 345-346, *Neuenfeldt v Williams Twp*, 356 F Supp 2d 770, 775-776 (ED Mich 2005).

2. Michigan

In *Paragon Properties v Novi*, 452 Mich 568; 550 NW2d 772 (1996), the Michigan Supreme Court held that a takings claim challenging a city zoning ordinance as applied

to property is not ripe until the property owner has applied for use variance and been denied.¹² As in federal court, that ripeness rule does not apply to a facial challenge to the ordinance. *Id.* at 577. *Sun Communities v LeRoy Twp*, 241 Mich App 665; 617 NW2d 42 (2000); see also, *Wolters Realty Ltd v Saugatuck Twp*, Court of Appeals No. 247228, October 25, 2005 (unpublished) Donofrio, J. concurring.

The *Paragon* holding, by its terms, required that the property owner seek relief from the zoning board of appeals, as an alternative means to obtain relief under the zoning ordinance:

The decision of the city council on the rezoning request in no way diminished the zoning board of appeal's authority to grant a variance had *Paragon* pursued that alternative form of relief. Were the Zoning Board of Appeals to deny *Paragon's* request, relief in the form of an appeal to the circuit court is authorized by statute. MCL § 125.585(11); MSA § 5.2935(11). [*Id.* at 777].

The Court emphasized this in its reasoning on finality and rejected the land owner's contention that a variance in place of a rezoning should not be granted. *Id.* at 777.

The Township suggests, citing *Braun v Ann Arbor Township*, 262 Mich App 154, 156; 683 NW2d 755 (2004), that the Hendees, rather than submitting a plan to the Zoning Board of Appeals as an alternative means to obtain relief, must submit various applications for unknown or unnamed uses. The U.S. Supreme Court has rejected such a shell game, making clear that finality for ripeness purposes requires no such thing. *Palazzolo v Rhode Island*, 533

¹² Can this requirement of *Paragon* apply to township or county zoning ordinances? As discussed at page 14, note 2, above, as compared to the former city and village zoning act, the township and county zoning enabling acts did not, by their terms, expressly authorize use variances. Compare, former MCL 125.293 and MCL 125.585, both repealed in this consolidated Michigan Zoning Enabling Act, MCL 125.3604, which specifically authorizes use variances in cities and villages, and those townships which, before the effective date of the new statute (February 15, 2006) expressly authorized them either by having granted one, or employing the phrase "use variance" or "variances from uses of land." This Court has not ruled on the question of whether townships may grant use variances.

US 606, 619; 121 S Ct 2448, 2458; 150 L Ed2d 595 (2001). There, where the defendant suggested that

while the Council rejected petitioner's effort to fill all of the wetlands, and then rejected his proposal to fill 11 of the wetland acres, perhaps an application to fill (for instance), 5 acres would have been approved. Thus, the reasoning goes, we cannot know for sure the extent of permitted development on petitioner's wetlands.

As the United States Supreme Court pointed out, factually, this contention was belied by the unequivocal nature of the wetlands at issue, allowing an exception only where a "compelling public purpose" is served. The Council determined that the proposed activity did not satisfy the "compelling public purpose" standard of the ordinance, not that the Council could have accepted the activity on a smaller surface area. *Id.* at 629-30; 2458-59.

In assessing the significance of petitioner's failure to submit applications to develop the upland area, it is important to bear in mind the purpose that the final decision requirement serves. A ripeness jurisprudence imposes obligations on land owners because "[a] court cannot determine whether a regulation goes 'too far' unless it knows how far the regulation goes." *McDonald*, 477 US at 348; 106 S Ct at 2561. Ripeness doctrine does not require a land owner to submit applications for their own sake. Petitioner is required to explore development opportunities on its upland parcel only if there is uncertainty as to the land's permitted use.

Id. at 619-622.¹³ The issue to be explored, as the *Palazzolo* decision makes clear, is how the regulation applies to the land and what uses it permits, not whether the regulation might be repealed or changed.

The legislative body, the Township Board in this case, legislatively zoned the property to A-O Open Space with a limited range of uses; it declined to amend its ordinance. The Zoning Board of Appeals denied a request for a variance, necessarily finding that the Hendees had not established “unnecessary hardship,” the standard required in Michigan law for approval of a use variance. Moreover, even had it found that the Hendees established that their property met the standard of unnecessary hardship, the Zoning Board of Appeals rejected developments of either 95 units or 40 units. The outcome with respect to higher density cannot be in doubt, either legally, because of the lack of a finding of unnecessary hardship, or practically, because it supposes that the board would reject 40 units of favor of 498.

The ripeness threshold imposed by *Paragon* demands that the owner go to the zoning board of appeals to seek alternative relief in order to determine how the property may be used under the municipality's application of its own zoning ordinance, at it exists. Failing that relief, the owner may then bring its constitutional challenge in court. The owner need not appeal the denial of the variance itself. *Sun Communities v Leroy Twp*, 241 Mich App 665; 617 NW 2d

¹³ The direction in *Paragon* has been carried to lengths and applied to cases that strain credulity. The Court of Appeals affirmed the dismissal of the plaintiffs' constitutional claims in *Braun v Ann Arbor Township*, 262 Mich App 154, 156; 683 NW2d 755 (2004), because the plaintiffs failed, after seeking rezoning, to file a petition for review of the township board's resolution, a review not permitted by Michigan law, or seek a variance before the zoning board of appeals, even though the township attorney informed the plaintiffs that the zoning board of appeals lacked jurisdiction. Under Michigan law, prior to 2005, the township and county zoning enabling acts lacked the authorizing language found in the city and village zoning act permitting use variances. MCL 125.253; MCL 125.293; MCL 125.585. In the wake of *Paragon*, property owners were nonetheless required to request such a variance from the township zoning board of appeals or, as in *Braun*, face dismissal for failing to do so.

42 (2000), *First Rural Housing, LLP v Howell*, unpublished, Court of Appeals No. 241192, February 5, 2004. The ripeness rule does not turn the court action into a review of the local government's legislative denial of rezoning or the Zoning Board of Appeals' administrative denial of a variance. All that it requires is that there be sufficient proceedings by the Township to determine how the zoning ordinance, as it exists, applies to the parcel.

E. Remedy

The Township argues that because the Township did not make a decision on a proposed mobile home park, the court lacks jurisdiction of a challenge to the ordinance, and thereby lacks jurisdiction and authority to even reach the remedial stage that would consider that use as a remedy. The Township's misstatement of the role of the local government and the courts is driven home by the claim that the ripeness doctrine prevents the circuit court from "acting in a legislative capacity by ordering, in the first instance, how the Township must allow Plaintiffs' property to be developed." Township Court of Appeals Brief at 7. So far from acting in a legislative capacity, the court's role in a constitutional challenge to a zoning ordinance expressly disavows an appellate review of the township legislative actions; the Court does not review the action on the request to rezone or for a variance, and it cannot order a remedy that would invade the legislative province of the township board by ordering it to amend the ordinance.

The Township's contention would require that the court apply an entirely different test to a challenge to the constitutionality of a zoning ordinance, and reinstate a form of remedy briefly used in the Michigan courts before being overruled and repudiated in *Schwartz v Flint, supra*.

In *Schwartz v Flint*, the Michigan Supreme Court held that after the existing ordinance has been declared unconstitutional by the court, the owner may propose a use and offer proofs to show that it is reasonable. If the court finds it to be reasonable, the court may enjoin the local government from interfering with that reasonable development. *Id.* at 328. The holding does not require that the use be one which the owner had previously proposed to the local government. As the *Schwartz* court explained:

The rule prevents the plaintiff from 'shooting the moon' with its proposed use, because if the plaintiff does not demonstrate reasonableness, the municipality's further zoning will be limited only by the court's declaration of unconstitutionality.

* * *

. . . if the plaintiff does not show reasonableness by a preponderance of the evidence, the zoning authority is free to rezone the property, unrestrained by a use that has been declared reasonable. The court generally looks to the existing uses and zoning of nearby properties in determining reasonableness. Presumably, the defendant and any intervening parties will submit evidence on this point.

The reasonableness burden should, in our view, be appropriately high, so that a plaintiff who has successfully challenged an unconstitutional ordinance will not automatically be free to proceed with its proposed use.

Id. at 328, 329.

Thus, if the court does not find the proposed use reasonable, the owner is left with only a declaration that the current zoning, and the local government is free to rezone the property to another district without restraint. That has occurred in more than one case. See, e.g., *Guy v Brandon Twp*, 181 Mich App 775, 784; 450 NW2d 279 (1988) (affirming both finding of invalidity and finding that proposed use was unreasonable because it would have resulted in an excessive level of mobile homes in the township, leaving township free to rezone the property), *Drogos v Bensenville*, 100 Ill App 3d 48, 56; 426 NE2d 1276 (1981) (affirming finding of

invalidity but finding plaintiff's proposed gas station to be an unreasonable use); *English v Augusta Twp*, 204 Mich App 33; 514 NW2d 172 (1994) (invalidating trial court order to rezone property from agricultural/residential to manufactured housing park; substituting remedy of injunction prohibiting defendant from interfering with plaintiffs' reasonable, proposed use of their property as a mobile home park, but still subject to site plan review and other regulation).

In *Schwartz*, the court repudiated its earlier adoption of a form of remedy adopted and described in detail in *Ed Zaagman, Inc v City of Kentwood*, 406 Mich 137; 277 NW2d 475 (1979), and adopted a remedy, "essentially hearkening back to earlier pre-Zaagman precedent." *Id.* at 325.

Under the procedure set forth in *Zaagman*, enforcement of the disputed ordinance was enjoined and the matter remanded to the city council to present, within 60 days, an adopted amendatory ordinance; if the parties found the amendment acceptable, that "mid-satisfactory" ordinance would be ordered implemented; if the amendment were unacceptable to the plaintiff, the judge could order the amended ordinance implemented or implement the court's own "mid-satisfactory" use after the parties had the benefit of a hearing. The *Schwartz* court found the *Zaagman* procedures to be an improper usurpation by the judiciary of a legislative function, as well as not satisfactory to parties in zoning cases, as represented by the parties in *Schwartz* and a broad range of *amici curiae*. *Id.* at 681-82.

The implication of the Township's contention is that the Court must engage in a comparison of the various uses which the property owner would be required to offer as varying alternatives and the use or uses permitted by the Township, find the least offensive, but still feasible alternative, and order that use as a remedy. That role would engage the Court, not only in effectively legislating land use but engage it as a kind of mediator, roles that this Court in

Schwartz rejected as not only improper, as an invasion of the legislative power, but not within the court's capabilities, as well.

The *Schwartz* court considered and rejected the alternative of leaving the property unzoned and either permitting the property owner to implement any use at all, or allowing the local government simply to rezone the property to another designation, without concern for the owner, and, likely, starting the dispute anew.

The *Schwartz* court found the approach it adopted to be practical because, as the Illinois Supreme Court had observed:

Normally the land owner is interested particularly in a specific use which he proposes, and so it is natural that he will try the case and the judge will reach his decision in terms of the reasonableness of excluding that specific use.

Sinclair Pipe Line Co v Village of Richton Park, 19 Ill2d 370, 378; 167 NE2d 406 (1960) (*Id.* at 329).

Nothing in the *Schwartz* holding, or the reasoning that led the court to adopt the remedy it did, requires the property owner to seek a remedy only for a specific use previously presented to the municipality and for which the municipality has made a determination. Rezoning, by its nature, divides the municipality into districts, each of which permits a range of uses. The requirement that the owner prove to the court that the use is reasonable under the current circumstances of the property and the community checks any tendency of the owner to overreach. As noted above, more than one court has rejected the owner's proposed use.

The rule urged by the Township as both a ripeness threshold and remedy limitation amounts to a requirement of exhaustion of legislative and administrative remedies before review of those actions by the courts. As explained by the court in *Bruley v Birmingham*, 259 Mich App 619; 675 NW2d 910 (2003), finality for ripeness purposes and exhaustion of

administrative remedies are not the same. As the court reiterated, citing *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 177; 667 NW2d 93 (2003), a plaintiff can bring a facial due process challenge that claims arbitrariness or capriciousness and need not exhaust any administrative remedies. The court's role in a constitutional challenge is not simply a further appeal.

Similarly, in the *Paragon* decision itself, this Court was very careful to make clear that the zoning board of appeals, in considering a variance, had no authority to review or reverse the legislative decision of the township board or city council to amend or refuse to amend the zoning ordinance; in deciding on a variance, the zoning board of appeals exercises a different, administrative function. That distinction is sometimes lost in the description of zoning proceedings. Thus, in *Braun v Ann Arbor Township, supra*, the court upheld dismissal where the township board of trustees denied a request to amend the zoning ordinance, and “[p]laintiffs did not file a petition for review of the board’s resolution or seek a variance before the zoning board of appeals.” Plainly, there is no authority for a zoning board of appeals to review the denial of a request to rezone, and the court itself does not exercise its power in that fashion. Accordingly, the remedy that a court may order is also not limited to affirming or reversing a request to the Township for a particular use.

F. Exclusionary Zoning Claims are Not Subject to the Rule of Finality

The rule of finality or ripeness from *Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 US 172 (1985), adopted by this Court in *Paragon Properties Co v Novi*, 452 Mich 568; 550 NW2d 772 (1996), requires a property owner to first obtain a final or definitive position from the local government on the application of the ordinance to its property. That rule has no application in the context of an exclusionary zoning claim. The

Court should reject an extension of the *Paragon* rule where it would serve no purpose in establishing the procedural ripeness for consideration of the claim by Michigan courts.

An exclusionary zoning claim is fully ripe upon adoption of the exclusionary ordinance; by its terms, as applied throughout the community, it excludes the use. The rationale for the *Paragon* ripeness rule -- determining whether the municipality's application of its ordinance has an adverse economic effect on the property owner by destroying his or her investment-backed expectations -- has nothing to do with exclusionary claims. Exclusionary zoning violates the equal protection and due process rights of the owner, as well as the exclusionary zoning statute, because a municipality is abusing its police power by keeping legitimate land uses out of the community. The administrative procedures available to the township planners or zoning administrator, township planning commission, or the township board will not change that fact. Reviewing a meaningful application is not to the point. The defect lies in the ordinance itself.

The *Paragon* opinion expressly recognizes that distinction:

The City of Novi's denial of Paragon's rezoning request is not a final decision because, absent a request for a variance, there is no information regarding the potential uses of the property that might have been permitted, nor, therefore, is there information regarding the extent of the injury Paragon may have suffered as a result of the ordinance.^{FN14} While, the city council's denial of rezoning is certainly a decision, it is not a final decision under *Electro-Tech* because had Paragon petitioned for a land use variance, Paragon might have been eligible for alternative relief from the provisions of the ordinance.^{FN15}

FN14. This is not a case in which all development of the land was physically impossible by application of the ordinance. *See, e.g., Robyns v. City of Dearborn*, 341 Mich. 495, 67 N.W.2d 718 (1954). Nor is this a case involving exclusionary zoning. *See, e.g., English v. Augusta Twp.*, 204 Mich.App. 33, 514 N.W.2d 172 (1994), and M.C.L. § 125.592; M.S.A. § 5.2942.

Paragon Properties, supra, at 776.

The Court of Appeals applied that understanding to an exclusionary zoning challenge to an ordinance in *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 177, 667 NW2d 93, 106 (2003), relying also on *Countrywalk Condominiums, Inc v Orchard Lake Village*, 221 Mich App 19, 23, 561 NW2d 405 (1997):

Defendant [township] in the present case also argues that plaintiffs could not bring a due process claim based on the lack of reasonable relationship to a legitimate governmental interest without first exhausting their administrative remedies. Plaintiffs never sought a special use permit, nor did they wait for a response to their rezoning request. Defendant cites *Paragon Properties Co. v Novi*, 452 Mich. 568, 577, 550 N.W.2d 772 (1996), which held that 'as applied' challenges require exhaustion of administrative remedies, but facial challenges do not. Plaintiffs in the present case raise facial challenges. This Court clarified in *Countrywalk, supra* at 23, 561 N.W.2d 405, that a plaintiff can bring a facial due process challenge that claims arbitrariness or capriciousness and need not exhaust any administrative remedies. Therefore, plaintiffs were not required to exhaust administrative remedies before filing suit.

The flaw in the Township's reasoning is a misapprehension of what the zoning power is all about: It is the power to regulate. Exclusionary zoning does not regulate uses; it eliminates them. Municipalities cannot and ought not be allowed to do that, as this Court has said on more than one occasion. *Kropf, supra*, *Gust v Canton Twp*, 337 Mich 137; 59 NW2d 122 (1953), *Gust v Canton Twp*, 342 Mich 436; 70 NW2d 772 (1955), *Dequindre Development Co v Warren Twp*, 359 Mich 634; 103 NW2d 600 (1960); *Smith v Plymouth Twp Building Inspector*, 346 Mich 57; 77 NW2d 332 (1956); *Knibbe v City of Warren*, 363 Mich 283; 109 NW2d 766 (1961); *Smookler v Wheatfield Twp*, 394 Mich 574; 232 NW2d 616 (1975). The exclusionary claim is a facial constitutional and statutory claim by its nature; it is not an as-applied claim. The Township ordinance precludes the use of this or any property in the township for that use.

As a practical and logical matter, the Township's argument that the Hendees somehow sought to fool the township by asking for the modest development of less than one

house per acre does not make sense because the township denied it.¹⁴ Logically, the terms of the township's denial mean that its zoning will not admit the far more intensive use of a 498-unit mobile home community. *Cf Palazzolo v Rhode Island*, 533 US 606, 624 (2001) ("Petitioner is accused of employing a hide the ball strategy of submitting applications for more modest uses to the Council, only to assert later a takings action predicated on the inability to build a much larger project. . . . It is difficult to see how this concern is relevant to the [ripeness] issue here. Petitioner was informed by the Council that he could not fill the wetlands; it follows of necessity that he could not fill and then build 74 single-family dwellings upon it.") Submission of the proposal to build a much larger mobile home community does nothing to clarify the extent of development permitted by the Township zoning ordinance on the Hendees property, which is the relevant inquiry under this Court's ripeness decisions.

When the rule in *Paragon* has been applied in other contexts, including substantive due process and equal protection, local governments in Michigan rarely, if ever, change their view of how land could be developed. Instead, time was lost, money was spent, and the parties were back in court two to five years later. Extending this doctrine and war of attrition to exclusionary zoning cases where it serves no purpose does not make sense. The constitutional and statutory policies embodied in exclusionary claims are not met by sending them back for consideration by the Township, as it requests. The zoning board of appeals does not have the authority, *see, Long v City of Highland Park*, 329 Mich 146, 149; 45 NW2d 10, 11 (1950), Ziegler, et al, *Rathkopf's The Law of Zoning and Planning*, § 57:22, to determine whether the ordinance violates the enabling act or the Constitution by its exclusion of the use. The finality or

¹⁴ The argument also overlooked the fact that the Hendees hid nothing. They sought rezoning for a mobile home use, and the Township Board declined the application.

ripeness doctrine of *Williamson Co, Paragon, and Hamilton Bank* should not be applied in exclusionary zoning cases.

G. The Amendments to the Zoning Enabling Acts in 1978 Do Not Supersede the Constitutional Prohibition of Exclusionary Zoning

The complete exclusion of a land use violates equal protection and due process. *Kropf* at 155. As constitutional claims, these limits on government cannot be superseded or limited by legislation. They can be supplemented by legislation which creates additional claims or limits in the enabling statute. The exclusionary zoning provision of the zoning enabling act statute does just that. It creates a statutory exclusionary zoning claim in Michigan which supplements the pre-existing constitutional claims.

That the prohibition of exclusionary zoning is constitutional is made clear both by the analysis of the court in *Kropf, supra*, and this Court's application of it in *Smookler v Wheatfield Twp*, 394 Mich 574; 232 NW2d 616 (1975),

In *Kropf v Sterling Heights*, 391 Mich 139; 215 NW2d 179 (1974), we stated that although, 'the ordinance come to us clothed with every presumption of validity' [quoting from *Brae Burn, Inc v Bloomfield Hills*, 350 Mich 425; 86 NW2d 166 (1957)] 'that . . . [a] reasonable governmental interest [is] being advanced by the present zoning classification . . .' [391 Mich at 158], 'an ordinance which *totally* excludes from the 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 the denial of equal protection of the law as to the excluded use.' 391 Mich 139, 156; 215 NW2d 179, 185. Therefore, when confronted with a regulation invalid on its face, it is not necessary for this Court to examine the reasonableness of the ordinance as applied to plaintiffs' land. [Emphasis in original.]

Noting that the *Kropf* court "disposed of the notion of a favored or preferred use as it affected the shifting of the burden of proof," the *Smookler* court said that, nonetheless,

The zoning ordinance is, however, invalid because it fails to pass the test outlawing total exclusion of an otherwise permissible use.

Plaintiffs have properly borne the burden of proof in demonstrating that the Wheatfield Township Zoning Ordinance Amendment No. 2, purporting to permit mobile-home parks in the township is, in fact, exclusionary on its face.

Critical is the fact that there is no reference to any actual territory to which this zoning applies. The net result is that there is no land in the township zoned for mobile-home parks and consequently they are excluded.

The fact situation presented by the instant court does not vary substantially from those this Court examined in the past . . . Similar ordinances were expressly disapproved by this Court in cases including *Gust v Canton Twp*, 337 Mich 137; 59 NW2d 122 (1953), *Gust v Canton Twp*, 342 Mich 436; 70 NW2d 772 (1955), *Dequindre Development Co v Warren Twp*, 359 Mich 634; 103 NW2d 600 (1960), *Smith v Plymouth Twp Building Inspector*, 346 Mich 57; 77 NW2d 332 (1956), and *Knibbe v City of Warren*, 363 Mich 283; 109 NW2d 766 (1961).

394 Mich at 582-583.

The *Smookler* court neither required nor considered evidence of a "demonstrated need" for the use. Rather, the Court declared at the outset of its opinion:

This zoning appeal invites this Court to once again confront a facet of exclusionary zoning, this time the creation of a zoning classification without attaching it to any specific land. Such a zoning ordinance is, of course, invalid on its face, and this causes us to invalidate the zoning ordinance of the defendant township as exclusionary.

394 Mich at 577.

That holding does not rest, as the Township suggests, upon a requirement that the use be a school or church. Rather, as early as *Gust v Canton Twp*, 342 Mich 436 at 438 (1955), this Court made clear that "trailer camps may lawfully be operated in Michigan," setting them on the same standing as a legally recognized use as the case to which it cited for the more general rule concerning exclusion, *Roman Catholic Archbishop of Detroit v Village of Orchard Lake*, 333 Mich 389; 53 NW2d 308 (1952).

Although *Smookler* later was grouped with *Sabo v Monroe Twp*, 394 Mich 531; 232 NW2d 584 (1974), and *Nicola v Grand Blanc Twp*, 394 Mich 589; 232 NW2d 604 (1975), in what became known as the Court's "zoning trilogy" in *Kirk v Tyrone Twp*, 398 Mich 429; 247 NW2d 848 (1976), the Court, while repudiating the administrative zoning adopted by a plurality in *Sabo*, 398 Mich 441, and reiterating the standards set forth by the court's opinion in *Kropf*, also reiterated its holding concerning a total exclusion. 398 Mich at 442. The Court agreed with the trial court, however, that the plaintiff had not demonstrated that Tyrone Township was excluding mobile home parks, one 80-acre parcel in the township having already been rezoned for that use:

Thus, the facts before us differ from other cases in which exclusion was present. For example, in *Gust v Canton Twp*, 342 Mich 436, 438; 70 NW2d 772 (1955), the ordinance and record disclose the exclusion of mobile homes from the entire township. In *Roman Catholic Archbishop of Detroit v Village of Orchard Lake*, 333 Mich 389, 391; 53 NW2d 308 (1952), we found that although the ordinance, on its face, permitted churches and schools in about 10% of the village's area, in effect they were excluded by ordinance from the entire village. In *Dequindre Development Co v Charter Twp of Warren*, 339 Mich 634, 638; 103 NW2d 600, 602 (1960), although the Township already contained one mobile home park, we held that exclusion was established with the zoning ordinance 'in effect, prohibited trailer parks by making no provision therefor.'

398 Mich at 443.

That rule was recently reiterated by the Court of Appeals in *Anspaugh v Imlay Twp*, 273 Mich App 122; 729 NW2d 251 (2006):

A zoning ordinance that creates a classification but does not apply that classification to any land is exclusionary on its face. *Smookler v Wheatfield Twp*, 394 Mich 574, 577; 232 NW2d 616 (1975).

Id. at 128-129. This Court, however, vacated the judgment of the Court of Appeals because that court had engaged in appellate fact-finding when it concluded that land that had subsequently

been zoned to the excluded district was nonetheless exclusionary because of the lack of a direct route of travel to the property was therefore unsuitable for the use. *Anspaugh v Imlay Twp*, 480 Mich 964; 741 NW2d 518 (2007), vacating *Anspaugh*, 273 Mich App 122.

In sum, the rule that exclusionary zoning offends the Constitution has a long and continuing history, apart from the statutory prohibition adopted in 1978.

H. The 1978 Amendments to the Zoning Enabling Acts Cannot Supplant the Limits of the Constitution

The Legislature, local governments, and the courts lack the authority to substitute a statutory claim for a constitutional limitation on their power. Neither the terms of the 1978 zoning amendments nor the background to their adoption suggest that they should be taken to do so. As this Court noted in the *Kropf* opinion itself, decided in 1974, before the adoption of the amendments to the zoning enabling acts,

A plaintiff citizen may be denied substantive due process by the City or municipality by the enactment of legislation, in this case a zoning ordinance, which has, in the final analysis, no reasonable basis for its very existence. The power of the city to enact ordinances is not absolute. It has been given power by the State of Michigan to zone and regulate land use within its boundaries so that the inherent police powers of the State may be more effectively implemented on the local level. But the State cannot confer upon the local unit of government that which it does not have. For the State itself to legislate in a manner that affects the individual right of its citizens, the State must show that it has a sufficient interest in protecting or implementing the common good, via its police powers, that such private interests must give way to this higher interest. Different degrees of State interest are required by the courts, depending upon the type of private interest which is being curtailed. When First Amendment rights are being restricted we require the State to justify its legislation by a 'compelling' State interest. With regard to zoning ordinances, we only ask that they be 'reasonable.' And, as we have stated, they are presumed to be so until the plaintiff shows differently.

Kropf v City of Sterling Heights, 391 Mich 139, 157-158; 215 NW2d 179, 186 (1974).

Nothing in the legislation itself or its history suggest that the statutory prohibition of exclusionary zoning was intended to be anything but a supplement to the protection of the Constitution. Contemporary accounts confirm that.

The text of the provision itself does not suggest that the Legislature intended to supplant the Constitution as applied by the courts. In its current form, MCL 125.3207, differs from the terms used by Michigan courts to describe the constitutional limit:

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.

Where the courts examine the ordinance, the statute says "ordinance or zoning decision." Where the courts prohibit exclusion of a use that is variously described as "otherwise permissible," *Smookler, supra*, at 582, or "lawful," *Gust v Canton Twp, supra*, at 438, among other descriptions, the statute speaks of a "demonstrated need." As the terms differ, there is no reason to suppose that the Legislature intended the same thing.

In the Michigan Bar Journal, February 1980, at 100, *et seq.*, Lawrence R. Ternan, who served on the Zoning Advisory Committee which recommended the changes to the zoning enabling act, and assisted in writing its report entitled "Michigan Zoning Enabling Acts -- Recommendations for Revision" and transmitted to the Governor, addressed a number of the changes which were enacted into law. As to exclusionary zoning, at 102, he explained

For the first time, the zoning enabling acts include a prohibition against exclusionary zoning . . .

In the bills first introduced, this provision included detailed statements of what would be unlawful exclusionary zoning along with circumstances under which exclusionary ordinance provisions would be allowed. [footnote omitted] It was particularly difficult

to frame standards balancing the competing interests. The more detailed standards become, the more amenable they are to abuse and exclusionary practices.

It was clear that the Legislature was intent on including at least a general declaration against exclusionary zoning. Therefore the drafter substituted the provision enacted as that declaration. It is general in nature, and is based primarily on (but may be broader than) the case law on the subject. [*Sabo v Monroe Twp*, 394 Mich 531, 539 (1975); *Kropf v Sterling Heights*, 391 Mich 134, 155-6 (1974); *Kirk v Tyrone Twp*, 398 Mich 429, 442-4 (1976)]

* * *

As an exception, a municipality may prohibit a land use if there is no location appropriate for the use. For all practical purposes, we must assume the proofs will be limited to the feasibility of using the land under consideration for the prohibited use. If other land is zoned for the use, and that land is adequate for the demonstrated need, this exception will not be in issue. If no other land is so zoned, or other land so zoned is inadequate, a municipality would not be allowed to cite other land suitable for the use unless it is fairly certain that the other land *will* be zoned to allow the use.

A close reading of the new provision suggests that the burden of proving this would be on the municipality. This appears to be consistent with case law, where there is a showing of total exclusion and the presence of a demonstrated need for the use. [citing *Kropf, supra*, and *Ferndale v Ealand*, 92 Mich App 88; 286 NW2d 688 (1979)] [emphasis in original].

The courts have applied the rules with the same understanding. Although finding against the plaintiffs' claim of exclusion, the *Landon Holdings* court analyzed those claims first under the statute, and then as a constitutional claim, *Id.* at 173-177, relying on *Kropf*. The *Countrywalk* court likewise analyzed the plaintiff's constitutional exclusionary zoning claims.

Michigan municipalities have historically attempted to use their police power to exclude manufactured housing, subsidized apartments, high density single-family developments, and other forms of low income or "affordable" housing. *Bristow v City of Woodhaven*, 35 Mich App 205; 192 NW2d 322 (1971) and *Simmons v Royal Oak*, 38 Mich App 496; 196 NW2d 811

(1972) attacked those abuses by creating the preferred use doctrine which shifted the burden of proof from the land owner to the municipality where mobile home or apartment uses (the preferred uses) were proposed. *Kropf* rejected shifting the burden of proof as a mechanism for correcting the problem. Instead, the *Kropf* court recognized that municipalities which exclude the uses violate the equal protection and due process clauses. The claims recognized in *Kropf* in 1974 are constitutional claims which the Legislature has no power to abrogate or limit.

The policy underlying *Kropf*, curbing municipal abuse of its police power, applies to the Putnam Township zoning ordinance at issue here. Local governments exclude land uses either because of opposition to the particular land use (*e.g.*, waste facilities, truck and bus garages, fast food restaurants, cell towers), or to the type of people believed to operate or use the particular land use (*e.g.*, drug rehabilitation facilities, mega-churches, sex-related businesses). In either case, the municipal police power is abused. Land use is not regulated; it is eliminated. When that occurs, the *Kropf* court found, the equal protection and due process clauses are violated. Both the constitutional and statutory exclusionary zoning claims should continue to exist.

IV. CONCLUSION AND RELIEF REQUESTED

The Township's essential contention is that the Court can only review and allow the exact use that the property owner has proposed to the Township. That claim should not be accepted.

It would change the nature of the constitutional challenge – the courts review the existing ordinance as legislatively adopted by the city council or the township board to determine whether its limits on the property are unconstitutional. It would change the nature of the remedy finally adopted in *Schwartz*. The courts do not review whether a proposed use is better than the

uses that the ordinance permits, acting as a mediator. They do not act as a superzoning commission, weighing a form of appeal from the local legislative body.

Neither the nature of a challenge to a zoning ordinance, nor ripeness requires accepting the Township's claim. Ripeness only requires a reasonable effort to determine how the existing local law – the zoning ordinance -- applies to the property, and what use *the ordinance* will permit on the property. If the township board insists upon the limits of the existing ordinance, and the zoning board of appeals will not allow another use under the ordinance, the owners are not required to ask repeatedly whether any other use – especially those which the decisions of the township board and the zoning board of appeals make clear would be out of bounds – might be acceptable. If, after a trial, the court finds the ordinance unconstitutionally restricts the use of the property, the property can seek to prove that a proposed plan of development is reasonable, and ask the court to order that the township be enjoined from interfering with that use, as its remedy. Those rules were developed in Michigan over years, taking account of both the legal and practical limits on how a court can and should intervene to limit municipal regulation and provide a remedy to the property owner.

Where the ordinance precludes the use altogether – as Putnam Township's ordinance excludes mobile home parks -- the application of the ordinance is clear, and there is no reason – for purposes of ripeness and finality to ask how it might apply to any particular property where the exclusion is township-wide. Before the Legislature enacted its own limits in 1978, this Court made clear that exclusionary zoning offends our Constitution.

In this case, the Township insisted upon the strictest limits, rejecting 95 or even 40 single family homes in favor of homes on 10-acre lots. It declined to consider the application for rezoning for a mobile home park and excluded mobile home parks from its zoning map

altogether. It now asks for the broadest possible relief – that this Court change the basic rules for both ripeness and remedies in zoning cases.

In this case, the strength of the finding of futility alone – on the facts found by the trial court – also argue that this is also a case in which this Court should decline to offer the Township the drastic relief it requests. There could be no real doubt that by saying that the Hendees must first go back and ask the Township to allow a mobile home park, the Livingston County Circuit Court would have done no more than delay.

This Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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