STATE OF MICHIGAN

COURT OF APPEALS

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

Plaintiffs-Appellees,

v

TOWNSHIP OF PUTNAM,

Defendant-Appellant.

UNPUBLISHED
August 26, 2008

No. 270594
Livingston Circuit Court
LC No. 04-020676-CZ

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

Plaintiffs-Appellants-Cross-Appellees,

v

TOWNSHIP OF PUTNAM,

Defendant-Appellee-Cross-Appellant.

No. 275469
Livingston Circuit Court
LC No. 04-020676-CZ

Before: Donofrio, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

In these consolidated appeals arising out of litigation concerning the zoning of property, we affirm in part and reverse in part the trial court's judgment, entered after a bench trial, in

Docket No. 270594,[1] and we affirm the trial court's order on the issues of taxation of costs and attorney fees in Docket No. 275469.

I. Overview

This case concerns a vacant 144-acre tract of land (the property or subject property) owned by the Hendee plaintiffs[2] that is located in Livingston County and within the boundaries of defendant Putnam Township (the township). The property is comprised of some flat areas, steep rolling and sloping hills, wetlands, woodlands, and streams. The property is zoned as an agricultural-open space (A-O) district, which allows on the property, among other uses, farming and the development and construction of single-family residential dwellings on, minimally, ten-acre lots. After the Hendee plaintiffs put the property up for sale in 2001, they found that builders and developers might be interested in purchasing the property, but not if the property remained designated as an A-O zone. Plaintiffs first attempted to have it rezoned to R-1-B, which would have allowed construction of single-family residential dwellings on one-acre lots, in an effort to pursue a development encompassing 95 residences. On recommendation of the county planning commission, plaintiffs' rezoning plan later sought consideration of a planned unit development (PUD) overlay, and we shall refer to the overall rezoning request as one for a 95-lot PUD. The rezoning application was eventually denied by the township board, and a subsequent request to the zoning board of appeals (ZBA) for a use variance to permit a density of up to 95 residential lots on the property was also rejected. In the midst of these proceedings, plaintiffs began contemplating and planning, in the alternative to the 95-lot PUD, the development of a manufactured housing community (MHC) on the property, which ultimately envisioned 498 units, and which plaintiffs contended constituted a reasonable use of the property. But plaintiffs never fully pursued a request to the township for permission or rezoning to develop a 498-unit MHC, instead opting to continue the doomed rezoning application for the 95-lot PUD.

After the 95-lot PUD was rejected, and without any decision by the township on the 498-unit MHC plan given the lack of any rezoning application on the matter, plaintiffs filed suit, alleging that the A-O zoning classification and the township's refusal to allow rezoning resulted in an equal protection infringement, a violation of substantive due process, and a regulatory taking without just compensation, and that, with respect to an MHC, the township violated MCL 125.297a, which prohibits exclusionary zoning, by not designating any township property for MHCs. In the context of the exclusionary zoning claim, plaintiffs also sought a declaration that the township's actions were unconstitutional. The thrust of plaintiffs' allegations was that any development or use of the property under the A-O zoning classification was not economically

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[1] While the trial court erred in ruling in plaintiffs' favor on some of the causes of action, we ultimately uphold the sole remedy ordered by the court.

[2] Plaintiff Village Point Development, LLC (Village Point) entered into a contingent purchase agreement with the Hendees for the property that is subject to the condition that rezoning occurs such that residential development will be permitted at a much greater density than that allowed under the current zoning classification.

feasible, that an MHC, for which there was a demonstrated need, constituted a reasonable use of the property, and that the township could not lawfully prohibit MHCs from being located in the township. Cross-motions for summary disposition were denied, as was the township's motion seeking to preclude the testimony of one of plaintiffs' experts, Brian Frantz. Before trial, plaintiffs stipulated to waive any claim for money damages, reserving their right to pursue equitable and declaratory relief, plus costs and fees, and the township dropped its demand for a jury trial. Following a bench trial, and based on the evidence presented, including some stipulated facts, the court ruled that the A-O zoning classification was unconstitutional as applied to plaintiffs' property, that the total exclusion of MHCs in the township constituted illegal exclusionary zoning and violated plaintiffs' substantive due process and equal protection rights, that the development of a 498-unit MHC on plaintiffs' property reflected a reasonable use of the property, and that the township was enjoined from enforcing the A-O zoning classification and from interfering with plaintiffs' development of an MHC. The township appeals that judgment in Docket No. 270594. Subsequently, the trial court awarded plaintiffs $43,177 in taxable costs for expert witness fees, but denied plaintiffs' request, made pursuant to 42 USC 1983 and 1988, for $123,871 in attorney fees. In Docket No. 275469, plaintiffs appeal the denial of attorney fees, and the township cross appeals, arguing that the court erred in awarding plaintiffs taxable costs for expert witness fees.

II. Standards of Review

This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003), citing MCR 2.613(C) and *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). Similarly, when reviewing a trial court's rulings on matters of equity, this Court reviews the trial court's conclusions de novo, but the court's underlying findings of fact are reviewed for clear error. *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 67; 577 NW2d 150 (1998). Constitutional issues and other questions of law are reviewed de novo on appeal. *Wayne Co v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004); *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). Finally, considering that the township argues that the trial court should have dismissed the case at summary disposition on the basis of ripeness, rulings on motions for summary disposition are reviewed de novo on appeal. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004).

III. Analysis – Docket No. 270594

A. Doctrine of Ripeness – Rule of Finality

The township argues that plaintiffs' constitutional claims were not ripe for litigation and should have been dismissed and that, assuming in the alternative that the claims were ripe, they fail on the merits.

We begin by framing and properly characterizing the claims brought by plaintiffs. On review of the complaint and lower court proceedings, we conclude that plaintiffs pursued three constitutional challenges (substantive due process, equal protection, and a regulatory taking) on the basis that the A-O zoning classification, as applied to plaintiffs' property, and the failure to allow rezoning of the property left the property in an undevelopable state, as costs would exceed the income generated by sales if the property was developed under the A-O zoning designation

or even as a 95-lot PUD. These particular constitutional claims were not predicated on exclusionary zoning principles. Next, plaintiffs pursued an exclusionary zoning claim on the basis of MCL 125.297a and the township's failure to zone land for MHCs, and they also requested a declaration that the township's exclusionary zoning practice relative to MHCs is unconstitutional. In other words, there were constitutional claims that simply challenged the application of an A-O zoning classification to the property and constitutional challenges that arose out of the exclusionary zoning allegations. Exclusionary zoning can not only violate MCL 125.297a, it can offend due process and equal protection rights. *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 173-176; 667 NW2d 93 (2003).

"[I]t is settled law in Michigan that the zoning and rezoning of property are legislative functions." *Sun Communities v Leroy Twp*, 241 Mich App 665, 669; 617 NW2d 42 (2000); see also *Arthur Land Co, LLC v Otsego Twp*, 249 Mich App 650, 662; 645 NW2d 50 (2002). In the context of zoning cases, the doctrine of ripeness is tied to the rule of finality, which is concerned with whether the initial decisionmaker has arrived at a definitive position on an issue that inflicts an actual and concrete injury. *Paragon Properties Co v Novi*, 452 Mich 568, 577; 550 NW2d 772 (1996)(constitutional claim is not ripe for review without a final decision from which an actual or concrete injury can be determined); *Bevan v Brandon Twp*, 438 Mich 385, 392 n 8; 475 NW2d 37 (1991)(addressing "finality (ripeness) requirements"); *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 74; 445 NW2d 61 (1989)(action not ripe because the plaintiff failed to satisfy the rule of finality where the "plaintiff had not yet completed the available procedures which might have enabled it to build"); *Conlin v Scio Twp*, 262 Mich App 379, 382; 686 NW2d 16 (2004); *Braun v Ann Arbor Charter Twp*, 262 Mich App 154, 158-159; 683 NW2d 755 (2004).[3] In *Paragon Properties, supra* at 576-577, our Supreme Court explained the differences between "facial" challenges to an ordinance and "as applied" challenges for purposes of determining whether the rule of finality is applicable, stating:

> A challenge to the validity of a zoning ordinance "as applied," whether analyzed under 42 USC 1983 as a denial of equal protection, as a deprivation of

[3] Both the state and federal constitutions confer only "judicial power" on the courts, US Const, art III, § 2; Const 1963, art 3, § 2, and US Const, art III, § 2 limits that judicial power to cases and controversies. *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 475 Mich 363, 369; 716 NW2d 561 (2006). In order to prevent the judiciary from usurping the power of coordinate branches of government, our Supreme Court and the federal courts have developed justiciability doctrines to ensure that cases brought to the courts are appropriate for judicial action, and these doctrines include, along with standing and mootness, the doctrine of ripeness. *Id.* at 370-371. In general, the doctrine of ripeness precludes the adjudication of hypothetical or contingent claims before an actual injury has been sustained, and an action is not ripe if it rests on contingent future events that may not occur as anticipated or may not occur at all. *Id.* at 371 n 14. These doctrines are constitutionally derived, and "[w]here a lower court has erroneously exercised its judicial power, an appellate court has 'jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.'" *Id.* at 371, 374 (citation omitted).

> due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment, *is subject to the rule of finality.*
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> * * *
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> Finality is not required for facial challenges because such challenges attack the very existence or enactment of an ordinance. [Citations and footnotes omitted; emphasis added; see also *Conlin, supra* at 383 and *Frericks v Highland Twp*, 228 Mich App 575, 595; 579 NW2d 441 (1998).][4]

Here, the only rezoning request presented by plaintiffs to the township pertained to the planned 95-lot PUD, which was rejected, as was the request for a variance relative to a 95-lot development. However, as noted above, plaintiffs ultimately did not challenge these decisions, nor do they want to develop a 95-lot PUD. Rather, plaintiffs wish to develop a 498-unit MHC, but that request was never presented to any township body or official for a decision, either in the form of a rezoning application or a variance request. Thus, the township did not arrive at any position, let alone a definitive position, on the issue of a 498-unit MHC.

This case presents, in part, an "as applied" constitutional challenge to the A-O zoning district, where there was no assertion at trial that the ordinance governing A-O districts was generally unconstitutional regardless of its application to and effect on particular property. It was the actual execution of the A-O zoning ordinance through designation of plaintiffs' particular piece of property as an A-O zone that gave rise to the constitutional claims that plaintiffs' property could not be used in an economically viable manner. Plaintiffs' constitutional causes of action that challenged the application of the A-O zoning classification to their property were subject to the rule of finality.

With respect to the exclusionary zoning claim, the caselaw suggests that it would constitute a facial challenge that is not subject to the rule of finality.[5] We find it unnecessary,

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[4] As stated in *Jott, Inc v Clinton Charter Twp*, 224 Mich App 513, 525; 569 NW2d 841 (1997), "[a] facial challenge is one that attacks the very existence or enactment of the ordinance; it alleges that the mere existence and threatened enforcement of the ordinance adversely affects all property regulated in the market as opposed to a particular parcel." "An 'as applied' challenge alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution." *Paragon Properties, supra* at 576.

[5] In *Landon Holdings, supra*, this Court addressed a complaint that alleged exclusionary zoning in violation of MCL 125.297a and the constitutional guarantees of due process and equal protection. The defendant argued that, because the plaintiffs had never sought a special use permit, nor waited for a response to their rezoning request, the action should have been dismissed for failure to exhaust administrative remedies. This Court, citing *Paragon Properties, supra* at 577, and *Countrywalk Condominiums, Inc v City of Orchard Lake Village*, 221 Mich App 19, 23; 561 NW2d 405 (1997), rejected the argument, finding that the "[p]laintiffs in the present case raise facial challenges." *Landon Holdings, supra* at 177. In *Countrywalk*, the plaintiff argued that the zoning ordinance violated equal protection and due process rights, where it totally excluded multiple family dwellings from the city. The defendant contended that the

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however, to determine whether plaintiffs' exclusionary zoning claim constituted a facial challenge and whether it was subject to the rule of finality, holding that further township proceedings would have been futile assuming application of the rule. The record is a bit unclear whether the township had ordinance language in place that generally recognized, outside of the master plan for future land use, an MHC district or zone that would allow MHCs as a permissible use for consideration relative to rezoning applications, and the parties presented conflicting oral arguments on the matter. It does appear from the record, however, that an R-6 district for MHCs had been created by the township, and we shall proceed on that basis, although it is agreed that no particular land had actually been designated as an MHC district (again, outside the master plan). Accordingly, we are faced with a case in which an MHC exclusionary zoning claim is made in the context of a situation where the township could conceivably have approved rezoning or a variance allowing the use claimed to have been excluded, i.e., MHCs as created in the ordinance scheme, and where plaintiffs failed to submit an application or request to use their property for an MHC. Under these circumstances, it would seem problematic to conclude that, for purposes of the rule of finality, ripeness, and simply establishing that the township was truly engaged in exclusionary zoning, plaintiffs had no obligation to first present an MHC application to the township, regardless of whether an exclusionary zoning claim is generally deemed a facial challenge under the caselaw.[6]

In *Paragon, supra* at 581-583, our Supreme Court addressed the plaintiff's argument that seeking a use variance, which was not done, would have been futile; therefore, the Court should not apply the rule of finality. The futility argument was premised on the claim that a hardship, as a grounds for a potential variance request, must be unique or peculiar to the property for which the variance is sought, and the plaintiff's claimed hardship affected multiple properties, making a variance request futile. *Id.* at 581-582. The Court rejected the futility argument, finding that a hardship variance may have been granted if sought because a hardship variance is not limited to situations in which a single ownership parcel of land is negatively affected. *Id.* at 582-583. *Paragon* does suggest, therefore, that a futility exception to the rule of finality exists, but a legally sound argument invoking the exception under the right circumstances must be presented.[7]

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claims should have been dismissed because the plaintiff did not obtain a final decision from the defendant regarding the use of the plaintiff's property. This argument effectively invoked the doctrine of ripeness or rule of finality and parallels the township's argument here. The *Countrywalk* panel rejected the argument and, citing *Paragon, supra* at 577, held that the plaintiff had made a facial challenge to the ordinance and thus the rule of finality was inapplicable. *Countrywalk, supra* at 22.

[6] With regard to exclusionary zoning, this lawsuit does not present a case in which the municipality enacted ordinance language expressly prohibiting a particular use, which most certainly would give rise to a facial challenge without implicating the rule of finality. It could be said that the case at bar reflects a facial challenge with "as applied" attributes or features, considering that execution of the ordinance scheme with respect to a recognized yet unapplied MHC district can go to the issue of whether the township engaged in exclusionary zoning . Later in this opinion, we shall discuss the effect of plaintiffs' failure to present an MHC application to the township on the question of whether the township effectively excluded or prohibited MHCs within its borders.

[7] Discussing the futility exception in the context of exhaustion of administrative remedies, this

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The *Paragon* Court's acceptance of a futility exception to the rule of finality, despite a finding that the circumstances did not merit invocation of the exception, is consistent with *Electro-Tech, supra* at 87, in which the Court stated:

> In light of the record in the instant case as well as the purpose underlying the . . . finality requirement, we reject the plaintiff's assertion that it would have been futile to submit an amended site plan to the building department.

In light of the facts and record here, it is abundantly clear that presenting an MHC application to the township would have been an exercise in futility and nothing more than a formal step to the courthouse. Plaintiffs had already endured a lengthy process relative to the 95-lot PUD rezoning application, which ultimately required plaintiffs to commence litigation against the township in order to simply procure a final decision on the application. Given that plaintiffs did in fact engage in township proceedings, that a lower density 95-lot PUD was soundly rejected as a rezoning and variance request, that the parties are embroiled in litigation, with the township aggressively fighting plaintiffs' attempt to develop an MHC, and that, for reasons stated later in this opinion, the township clearly has no intent to allow MHCs within its boundaries, it would have been futile for plaintiffs to submit any application or request for a 498-unit MHC to the township. We acknowledge *Seguin v Sterling Heights*, 968 F2d 584, 589 (CA 6, 1992), wherein the Sixth Circuit for the United States Court of Appeals stated that "[w]e agree with the Seventh and Ninth Circuits that at least one meaningful application must be submitted as a prerequisite to a plaintiff's attempt to benefit from the futility exception." Although plaintiffs here did not present an MHC application to the township for resolution, they did indeed initially pursue efforts through the township to obtain rezoning and a variance with respect to their property. This is not a case in which plaintiffs contemptuously ignored the township, and we find it appropriate to allow plaintiffs to benefit from the futility exception under the factual circumstances presented.[8]

In light of our ruling invoking the futility exception, even though we found some of plaintiffs' constitutional claims to be "as applied" challenges subject to the rule of finality, dismissal of those claims under the doctrine is not appropriate, and, again, it is unnecessary to categorize the exclusionary zoning claim as either an "as applied" or "facial" challenge and to determine whether the rule of finality is applicable. Given that the futility exception to the rule

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Court has stated that it will not require parties to undertake vain and useless acts, and where it is clear that further administrative proceedings would be an exercise in futility and nothing more than a formal step on the way to the courthouse, resort to the administrative body is not mandated. *L & L Wine & Liquor Corp v Liquor Control Comm*, 274 Mich App 354, 358; 733 NW2d 107 (2007); *Turner v Lansing Twp*, 108 Mich App 103, 108; 310 NW2d 287 (1981). However, "[f]utility will not be presumed," and a mere expectation that an agency will decide or act in a certain way is insufficient to satisfy the futility exception. *L & L Wine, supra* at 358-359.

[8] We note that there was evidence that plaintiffs had initiated the process of preparing and submitting an MHC rezoning application to the township, but they were informed that, because the 95-lot PUD rezoning application was still pending at the time, they could only pursue one application at a time and had to make a choice between the two. Plaintiffs chose to continue seeking the 95-lot PUD, given the significant amount of time already devoted to that application.

of finality operates as if the municipality had expressly come to a definitive position on an MHC, we find that the action was ripe for suit.

In sum, the threshold issue of ripeness did not bar plaintiffs' action against the township. We now turn to the merits of the causes of action.

B. Merits of the "As Applied" Constitutional Claims

Plaintiffs' substantive due process and equal protection "as applied" claims ultimately boil down to whether plaintiffs established that application of the A-O zoning classification to their property did not advance, nor was rationally related to, a legitimate governmental interest or whether plaintiffs established that application of the A-O zoning classification to their property was unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of legitimate land use from the area in question. *Houdek v Centerville Twp*, 276 Mich App 568, 582-586; 741 NW2d 587 (2007).

The rational basis analysis does not test the wisdom, need, or appropriateness of the ordinance, or whether any classification is made with "mathematical nicety," or even whether it results in some inequity; rather, the analysis entails only whether the ordinance is reasonably related to a legitimate governmental purposes. *Muskegon Area Rental Ass'n v City of Muskegon*, 465 Mich 456, 464; 636 NW2d 751 (2001). The ordinance will be constitutional if the municipality's judgment is supported by any set of facts, either known or which could reasonably be assumed, even if those facts are debatable. *Id.* The challenging party needs to show that the ordinance is solely based on reasons unrelated to the pursuit of the municipality's goals. *Id.*

Under these principles, and outside the context of the exclusionary zoning claim, we cannot conclude that plaintiffs' substantive due process and equal protection rights were violated through application of the A-O zoning district to their property. The township's purposes in zoning land under the A-O designation are to protect the local agricultural economy from premature disinvestment, discourage urban sprawl and untimely and unplanned growth, reduce conflicts between neighbors, and to retain critical natural features and wildlife habitats. These goals and interests, as considered relative to plaintiffs' property, are reasonable governmental interests, given the nature, character, and topography of the township, the surrounding land, and the property itself, as well as the bordering zoning classifications. And the governmental interests are being advanced by the A-O zoning classification. This conclusion is supported by MCL 125.3203(1), and "it is clear that avoiding overcrowding and preserving open space are 'legitimate governmental interests.'" *Conlin, supra* at 394.

Additionally, excluding MHCs from this rural, open-space area (plaintiffs' property), which consists of wetlands, streams, woodlands, and rolling and sloping hills, does not reach the level of constituting arbitrary, capricious, and unfounded action by the township, considering the location and character of the area, including surrounding properties, the demographics of the township, and the population centers.

With respect to a regulatory taking, plaintiffs' case was even weaker. Given all of the enumerated permitted uses in an A-O zoning district and uses that could be pursued on obtaining a special use permit, which were not explored or developed at trial, and considering the historical

use and zoning of the property and that nearly half the acreage could be used for farming crops as evidenced by testimony regarding the leasing of the property for such a purpose, there was simply a failure to establish a regulatory taking. See *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 576-577; 575 NW2d 531 (1998).

Accordingly, the trial court erred in finding that the "as applied" constitutional claims relative to the A-O zoning district and plaintiffs' property merited relief.

C. Exclusionary Zoning

With respect to the exclusionary zoning claim, the township argues that it does not totally exclude mobile homes, that there was no total prohibition in a geographic area close to the township, that there is no demonstrated need for manufactured housing, and that the trial court erred in not excluding the testimony of plaintiffs' expert Brian Frantz in regard to "needs" analysis. Additionally, the township contends that reversal is warranted because plaintiffs never proposed a 498-unit MHC to the township and because the use of the property for a 498-unit MHC is unreasonable.

We have already addressed the issue of ripeness relative to the exclusionary zoning claim, and we find it unnecessary to examine the issue of whether the township engaged in exclusionary zoning in violation of MCL 125.297a because we conclude that the township engaged in exclusionary zoning in violation of the constitution; the remedies for either type of violation are the same. We shall, however, briefly address the statute, but only for the purposes of explaining why it is unnecessary to address some of the issues raised by the township on appeal. MCL 125.297a[9] provided:

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

To establish a claim of exclusionary zoning under the statute, a party must show (1) that the challenged ordinance has the effect of totally excluding the land use within the township, (2) there is a demonstrated need for the excluded land use in the township or surrounding area, (3) a location exists within the township where the use would be appropriate, and (4) the use is lawful. *Houdek, supra* at 575; see also *Adams Outdoor Advertising, Inc v City of Holland*, 463 Mich 675, 684; 625 NW2d 377 (2001). As indicated above, the township presents arguments on the

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[9] Although repealed by 2006 PA 110, effective July 1, 2006, which enacted the Michigan Zoning Enabling Act, MCL 125.3101 *et seq.*, the Township Zoning Act (TZA) still controls this case. MCL 125.3702(2). We note that the prohibition against exclusionary zoning formerly found in MCL 125.297a was recodified with nearly identical language in MCL 125.3207.

issue of demonstrated need, including the claims that Frantz was not qualified to testify on the issue, that his analysis of the issue was based on insufficient and biased data, and that Frantz utilized an unreliable methodology. The township also maintains that, even if Frantz's testimony is not excluded, plaintiffs failed to establish demonstrated need. Because the issue of "demonstrated need" relates to MCL 125.297a and is not a required part of the constitutional analysis, as will be seen below, we decline to address the issues associated with demonstrated need.

The trial court ruled that the total exclusion of MHCs in the township constitutes unlawful exclusionary zoning under MCL 125.297a and violates plaintiffs' rights to substantive due process and equal protection. In *Kropf v Sterling Heights*, 391 Mich 139, 155-156; 215 NW2d 179 (1974), our Supreme Court explained:

> On its face, an ordinance which *totally* excludes from a municipality a use recognized by the Constitution or other laws of this State as legitimate also carries with it a strong taint of unlawful discrimination and a denial of equal protection of the law as to the excluded use. 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 parcel of land. [Emphasis in original.]

In *Landon Holdings, supra* at 176, this Court held that if a plaintiff asserting equal protection and substantive due process violations regarding a zoning ordinance establishes that a use is totally excluded, the burden shifts to the defendant to justify the exclusionary ordinance.

In *Countrywalk, supra*, this Court addressed an exclusionary zoning claim made solely pursuant to equal protection and substantive due process rights. The Court stated that the plaintiff had established a prima facie case when it presented evidence that the defendant's ordinance excluded multiple dwellings. *Id.* at 23. The *Countrywalk* panel then set forth the applicable analytical framework:

> Although not presumed valid, because it totally excludes multiple dwellings, the ordinance will be declared valid if the exclusion has a reasonable relationship to the health, safety, or general welfare of the community. Upon a showing by the challenging party that an ordinance totally excludes a legitimate use, the zoning authority has the burden of going forward with such evidence. If the defendant provides it, the burden of proof falls upon the challenging party to show that the ordinance does not bear a real and substantial relationship to the safety or welfare of the public. [*Id.* at 24 (citations omitted).]

We must first address whether there was a total prohibition or exclusion of MHCs in the township.

As of the date of trial, no land in the township was presently designated for use as an MHC, nor were any MHCs in existence. While the township's master plan for future land use designated 80 acres near the village of Pinckney for an MHC, the evidence strongly supports, and we find no error with, the trial court's conclusion that this land is unsuitable for an MHC.

The township contends that there is no exclusionary zoning because there are some mobile or manufactured homes in the township.[10] However, the use at issue here is not individual manufactured or mobile homes; rather, the relevant use is MHCs. There is a difference between placing an individual home on a site and developing an entire community of manufactured homes on a site.

The township relies on the following passages from *Landon Holdings, supra* at 168-169, 172:[11]

> [A] use is not necessarily excluded simply because it does not yet exist, particularly when the defendant asserts that it has received no requests for that use.
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> The failure to designate specific property as zoned for manufactured housing does not indicate that the ordinance amendment is illusory and that defendant has no intention of allowing manufactured housing. Rather, it was logical for defendant to wait for rezoning requests rather than rezone property to manufactured housing absent the owners' request.

In *Landon Holdings,* the trial court invalidated the defendant's zoning ordinance that required a special use permit for manufactured housing, and, while the litigation proceeded, the defendant amended the ordinance, adding MHCs to the list of zoning districts recognized by the defendant. No land had yet been designated for MHCs; rather, property owners needed to apply for rezoning to an MHC district. The landowner plaintiffs applied for rezoning, but this Court noted that the record did not indicate the status of that rezoning application. The trial court found that the new ordinance did not violate MCL 125.297a, and this Court agreed. *Id.* at 156-160. On appeal, the plaintiffs had claimed that the new ordinance was illusory because it did not actually rezone any property and because the defendant's land use map did not identify any property suitable for a manufactured housing district. This Court concluded that the defendant's "amended ordinance does not totally exclude manufactured housing communities, either effectively or on its face[;] [t]herefore, the ordinance in question does not violate MCL 125.297a." *Id.* at 172-173.

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[10] Frantz testified that 4% of the single-family homes in the township in 2000 were mobile homes (78 homes).

[11] Although much of the opinion in *Landon Holdings* focused on whether there was an exclusion or prohibition of manufactured housing relative to MCL 125.297a, the panel also carried that analysis over when discussing exclusionary zoning under the constitutional claims. Therefore, and because a constitutional exclusionary zoning claim also requires exclusion of a use, *Landon Holdings* is relevant as are other cases that touch on the exclusion or prohibition aspect, despite addressing the issue in relation to the statute.

Landon Holdings appears to indicate that the mere fact that a township has an ordinance recognizing MHCs as a zoning classification and permissible use, it is sufficient to preclude a finding of exclusionary zoning, even if no land is specifically designated for MHCs.[12] Here, we are proceeding on the basis that the township created and recognized an MHC zoning district, although no land is designated as such. There currently is no land zoned in the township that provides for the possibility of an MHC as a "special use." It is noted that "[t]he possibility of a variance alone would likely be insufficient to prevent an ordinance from being exclusionary." *Id.* at 170. In the vein of variances, special use permits, and rezoning applications, the *Landon Holdings* panel stated:

> However, the special permit procedure in defendant's ordinance is not an authorization to engage in *prohibited* uses, like variances, rather it creates conditions to ensure that the particular use and location are appropriate. Landowners must meet much lower standards than for variances. Further, the amended ordinance allows manufactured housing not only by special use permit but also by rezoning to a manufactured housing district, which is clearly distinguishable from a variance. The use is permitted as of right in that district; the township has just not yet decided where it is appropriate. [*Id.* at 170-171 (footnote omitted; emphasis in original).]

Again, the township has no land zoned that provides for MHCs as a special use. On the other hand, the township recognizes an MHC zoning classification as a potential permissible use subject to a rezoning request.

In *Countrywalk, supra* at 23, the panel stated:

> In the instant case, defendant admitted in its answer that its zoning ordinance did not set aside any area within the city for multiple family dwellings. The fact that plaintiff could apply for a variance or a special permit does not cure the defect in the zoning ordinance. *Eveline Twp v H & D Trucking Co*, 181 Mich App 25, 34; 448 NW2d 727 (1989). Therefore, plaintiff has established a prima facie case by presenting evidence that defendant's ordinance excludes multiple dwellings.[13]

Countrywalk suggests that the availability of a special use permit relative to the use at issue is insufficient to prevent a finding of exclusionary zoning. That proposition would reasonably extend to a situation where a municipality recognizes a zoning classification and

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[12] The panel stated that the "amended ordinance included a district allowing [MHCs] as a permitted use. This indicates that defendant did not intend to exclude [MHCs]." *Landon Holdings, supra* at 171.

[13] In *Landon Holdings, supra* at 170, the panel attempted to negate the language in *Countrywalk* by asserting that the *Countrywalk* panel "did not clarify its reference to a 'special use permit' and the facts indicated the desired use was permitted in the township only as a nonconforming use, not as a use requiring a special use permit."

conceptually would permit a certain use on a rezoning request but has not actually designated any land under the zoning classification. As in *Countrywalk*, defendant township's ordinance scheme does not currently set aside any area within the township for MHCs. We again note that *Countrywalk* did not address exclusionary zoning in the context of the statute; it analyzed the issue purely under equal protection and due process principles. *Countrywalk, supra* at 23.[14]

In *English v Augusta Twp*, 204 Mich App 33, 38; 514 NW2d 172 (1994), this Court found that the defendant engaged in exclusionary zoning even where some land was actually zoned for a mobile home park, stating:

> Defendant argues that the existence of the site presently zoned MHP requires a finding that mobile-home parks are not totally excluded from the township. However, there was ample evidence that the zoning of that parcel for mobile homes was nothing less than a subterfuge for the township's unwritten policy of excluding mobile-home parks altogether. As noted above, the township board chose the site because they believed that it would never be developed. The township supervisor owned the vast majority of the site, fully intending to continue to operate the property as a family farm. In addition, the site was inappropriate for its zoned use because of the unavailability of water and sewer service and its proximity to a toxic-waste landfill and a federal prison. Thus, in effect, the township has designated no appropriate site for a mobile-home park.

Finally, in *Anspaugh v Imlay Twp*, 273 Mich App 122, 127-128; 729 NW2d 251 (2006), vacated 480 Mich 964 (2007), this Court stated that "[a] zoning ordinance that creates a classification but does not apply that classification to any land is exclusionary on its face." While *Anspaugh* was vacated, on unrelated grounds, and the quoted proposition constituted dicta, the Court cited *Smookler v Wheatfield Twp*, 394 Mich 574, 577; 232 NW2d 616 (1975), in support of the proposition. Justice Williams, in a separate opinion in *Smookler*, stated:

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[14] The township also quotes the following statement from *Guy v Brandon Twp*, 181 Mich App 775, 785-786; 450 NW2d 279 (1989): "The total-prohibition requirement of this statute [MCL 125.297a] is not satisfied if the use sought by the landowner otherwise occurs within township boundaries *or* within close geographical proximity." (Emphasis added.) The township correctly points out that there was evidence of numerous MHCs in Livingston County, including one within a 6.1 mile radius of the subject property, yet outside the township. Assuming *Guy* is relevant outside of the statutory context, the quoted statement is inconsistent with the statutory language and inconsistent with post-1990 decisions, which are binding on this Court, as opposed to *Guy*, and which speak only of total exclusions within the township or relevant municipality, not surrounding areas. MCR 7.215(J)(1); *Adams Outdoor Advertising, supra* at 684; *Houdek, supra* at 575. Accordingly, we decline to give any weight to the statement in *Guy* that is cited by the township.

> 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. [*Id.*]

Smookler, *Sabo v Monroe Twp*, 394 Mich 531; 232 NW2d 584 (1975), overruled in part on other grounds *Kirk v Tyrone Twp*, 398 Mich 429; 247 NW2d 848 (1976), and *Nickola v Grand Blanc Twp*, 394 Mich 589; 232 NW2d 604 (1975), formed a trilogy of cases that were separately submitted but decided at the same time, although in three separate opinions, and the cases involved actions by the plaintiffs to use land, zoned for either family residential or agricultural use, for development of mobile-home parks. Although somewhat difficult to ascertain because the opinions are splintered and cross-reference each other, we conclude that a majority of the Justices deciding *Smookler* found that exclusionary zoning had occurred. And while Justice Williams was the only one who expressly stated that a zoning ordinance that creates a classification but does not apply that classification to any land is exclusionary on its face, the majority was necessarily in agreement.

Keeping in mind the cited caselaw, we hold that the township effectively and totally prohibited MHC land use because (1) there is no land presently designated for MHCs, (2) the land designated in the master plan (80 acres near Pinckney) for an MHC is not actually suitable for an MHC, thereby reflecting an intent to exclude any and all MHCs in the township, (3) the township has a problematic history of designating land for MHCs in master plans and then removing the land in subsequent plans, again reflecting an exclusionary intent, (4) there is no land allowing for an MHC pursuant to a special use permit, and (5) although the current ordinance scheme recognizes an MHC classification zone as a possible permissible use for purposes of a rezoning request, it is evident that the township will not grant any such rezoning requests for anyone and is effectively prohibiting MHCs.[15] Moreover, on the last point in the preceding sentence, *Smookler* would dictate that regardless of whether the ordinance scheme created and recognizes an MHC classification, the township is engaged in exclusionary zoning because the classification has not been applied to any land in the township so as to allow for present day development.

We also distinguish the present case from *Kirk*, *supra*, in which the plaintiffs argued that the township zoning ordinance excluded mobile home parks and our Supreme Court ruled that

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[15] We reach this conclusion because of the evident game playing with respect to designating MHC land and then removing the land in master plans and because of the clear unsuitability of the Pinckney 80 acres. Although the owner(s) of the 80 acres near Pinckney (currently zoned A-O) might conceivably be granted a rezoning request for an MHC in light of the master plan, it is highly doubtful that any such request would ever be submitted, given the unsuitability of the land for an MHC. The evidence supports a conclusion that the unsuitability of the Pinckney 80 acres was and is known by the township, and it is reasonable to infer that, knowing this, the township was hopeful and confident that no one would ever attempt to develop that land for an MHC. There is no evidence that any such attempt has been made.

the plaintiffs failed to demonstrate that the township excluded such parks. *Kirk* brings us back to our earlier discussion on ripeness regarding whether plaintiffs' failure to seek permission from the township to develop an MHC essentially negates a conclusion that the township effectively excluded MHCs. The *Kirk* Court, conducting its analysis of the issue presented, stated:

> The proposed Master Plan for Future Land Use indicates two areas earmarked for mobile home parks, one of 80 acres and the other of 600-800 acres. There was some question as to whether the Master Plan was ever adopted. However, such a plan does exist, and the fact of its adoption goes only to the evidentiary weight of its reasonableness, and not to its admissibility.
>
> There has been no request made by the owners of the larger parcel for rezoning. Of greater significance is the status of the 80 acre property rezoned to mobile home park use by the same court which denied plaintiffs' request. Despite the rezoning gained through successful court action, as of oral argument, there had been no request made for a building permit, and no progress made on actually building a mobile home park.
>
> 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 disclosed 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 Warren Twp*, 359 Mich 634, 638; 103 NW2d 600 (1960), although the township already contained one mobile home park, we held that exclusion was established where the zoning ordinance "in effect, prohibited trailer parks by making no provision therefor."
>
> Plaintiffs attempt to demonstrate that by zoning land for mobile home parks which is unsuitable for that purpose, the township is, as a practical matter, following a policy of exclusion. As to the 80 acres judicially rezoned, it was apparently not the judgment of either the trial court or the plaintiff requesting the rezoning that the land was unsuitable for mobile home parks. As to the 600-800 acres, there has been no such record developed before this Court.
>
> At the present time there is no evidence, in view of the apparent dearth of requests, that the township precludes the possibility of rezoning other suitable land for this purpose if needed.
>
> Under the facts before us today, a case of exclusion of mobile home parks from the township has not been established. [*Kirk, supra* at 442-444 (citation and footnote omitted; emphasis in original).]

Here, no land is being used for an MHC and the land designated in the master plan for an MHC is, contrary to the situation in *Kirk*, unsuitable for an MHC. While we too have an apparent dearth of requests for MHC development, and thus no rejections, and while rezoning or

a variance allowing an MHC is conceptually conceivable given the creation and recognition of an MHC district, it is beyond rationale argument that the township is against plaintiffs using their land for an MHC. And the designation of unsuitable land in the master plans and the accompanying gamesmanship relative to designating and undesignating land for MHCs in the master plans reflect an intent to exclude MHCs, supporting a conclusion that a rezoning or variance request for an MHC by landowners other than plaintiffs would also be rejected.

Having found that MHCs are effectively and totally excluded from the township, we must next ascertain whether the township is justified in excluding MHCs, i.e., whether it established that the exclusion has a reasonable relationship to the health, safety, or general welfare of the community. *Landon Holdings, supra* at 176; *Countrywalk, supra* at 24. While the township has successfully argued to us that excluding an MHC from plaintiffs' property served a legitimate governmental interest, asserting that a township-wide exclusion of MHCs has a reasonable relationship to the health, safety, or general welfare of the township's citizens is a strained and losing argument on the record presented. Claiming that there is no demonstrated need does not suffice under the constitutional analysis as a lack of need is not related to the health, safety, and welfare of the community.[16] But claiming that there is no appropriate location for an MHC and

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[16] We respectfully disagree with our dissenting colleague's opinion that a showing of "demonstrated need," which is language found in the exclusionary zoning statute, comprises part of the analysis for purposes of a constitutionally-based exclusionary zoning claim. First, a fundamental and indisputable tenet of law is that a constitutional mandate cannot be restricted or limited by the whims of a legislative body through the enactment of a statute. *Stanhope v Village of Hart*, 233 Mich 206, 209; 206 NW 346 (1925)("The provisions of the Constitution clearly point decision herein, and we find no occasion to go to statutory provisions on the same subject[;] [t]he Constitution controls."); see also *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 710; 614 NW2d 607 (2000)(statute cannot contravene "the dictates of our state or federal constitution"). Thus, if a constitutional violation arises from the practice of exclusionary zoning despite the absence of a demonstrated need for the use at issue, the constitutional cause of action cannot be limited by requiring a showing of demonstrated need merely because a statute includes such a requirement. The Michigan cases that have specifically addressed the required analysis relative to a constitutionally-based exclusionary zoning claim do not make any reference whatsoever to a demonstrated-need element; rather, the question is simply whether the total exclusion of a lawful use has a reasonable relationship to the health, safety, or general welfare of the community. *Bzovi v Livonia*, 350 Mich 489, 492; 87 NW2d 110 (1957)(outdoor theater); *Gust v Twp of Canton*, 342 Mich 436, 438; 70 NW2d 772 (1955)(trailer camp); *Roman Catholic Archbishop of Detroit v Village of Orchard Lake*, 333 Mich 389, 392-393; 53 NW2d 308 (1952)(church and school); *Landon Holdings, supra* at 176; *Countrywalk, supra* at 24; *Ottawa Co Farms, Inc v Polkton Twp*, 131 Mich App 222, 225-226; 345 NW2d 672 (1983)(sanitary landfill); *Binkowski v Shelby Twp*, 46 Mich App 451, 460; 208 NW2d 243 (1973)(mobile home park); *Sisters of Bon Secours Hosp v Grosse Pointe*, 8 Mich App 342, 349-350; 154 NW2d 644 (1967)(hospital). Finally, with respect to the dissent's reliance on this Court's opinion in *Anspaugh, supra*, and our Supreme Court's order vacating that opinion, we cannot agree that the order reflects the Supreme Court's determination or acceptance, implicit or otherwise, that

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"demonstrated need" forms part of the analysis relative to a constitutionally-based exclusionary zoning claim. In *Anspaugh*, the plaintiffs unsuccessfully sought to have property rezoned from R-1 (residential) and I-1 (light industrial) to I-2 (heavy industrial), where the I-2 district had been created by Imlay Township but not applied to any particular land at the time of the rezoning requests and the initiation of the lawsuit. With regard to the nature of the suit, this Court observed, "[P]laintiffs filed the instant suit for declaratory and injunctive relief, alleging that the township's zoning scheme was violative of substantive due process and wholly exclusionary, both as applied and on its face, because it 'prohibits . . . even the possibility of I-2 uses.' An amended complaint, adding allegations that the township's actions and ordinance denied plaintiffs equal protection, was [later] filed[.]" *Id.* at 124-125 (omission in original). The trial court dismissed the exclusionary zoning action, finding that exclusionary zoning was not being practiced in light of the fact that the township had recently amended its zoning ordinance that actually designated land for I-2 uses. *Id.* at 127. This Court reversed, noting that exclusionary zoning can effectively occur even where land has been designated for the use ostensibly excluded. *Id.* at 128. The panel found that the township had engaged in exclusionary zoning regardless of the I-2 designated land, where there was a demonstrated need for the uses allowed in an I-2 district and the I-2 usage of the land was not appropriate for the designated location. *Id.* at 129-130. Any I-2 use of the land was not possible or appropriate because, according to this Court, there was no direct route of travel to the I-2 designated location. *Id.* at 130.

Contrary to the dissent's interpretation of *Anspaugh* here, it is not clear that the case only addressed a constitutionally-based exclusionary zoning claim. Indeed, it appears that the *Anspaugh* panel was addressing a statutory exclusionary zoning claim, despite the initial, cursory reference to the causes of action in the complaint, where the panel proceeded to analyze cases dealing with MCL 125.297a, to quote MCL 125.297a, to recognize that MCL 125.297a was recodified with nearly identical language in MCL 125.3207, to acknowledge the test to establish exclusionary zoning under MCL 125.297a, and to apply the test. *Anspaugh*, *supra* at 128-130. There is no reference to *any* constitutional analysis as set forth in the case law. Moreover, the issue of demonstrated need was not the focus of the Supreme Court's subsequent order, wherein the Court, finding improper fact-finding by this Court in relation to property access and suitability, stated:

> Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals, and we remand this case to the Lapeer Circuit Court for further hearing, if necessary, and further findings of fact. The Court of Appeals engaged in appellate fact-finding when it concluded that "we too find that the I-2 zoning provided for by defendants is exclusionary," because "there is no direct route of travel" to the property zoned for I-2 use, and consequently "the I-2 land use siting provided by the township is not appropriate to foster the commercial uses to which land designated for I-2 uses must be put." On remand, the Lapeer Circuit Court shall determine whether, as the Court of Appeals held, "the township's zoning ordinance effectively excludes lawful and otherwise appropriate I-2 uses for which there is a demonstrated need," owing to the unsuitability for I-2 uses of the available routes of access to the I-2 zoned property within the township. In making this determination, the Lapeer Circuit

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that allowing a development in such a situation might endanger the health, safety, and welfare of the citizenry could be an acceptable argument. However, the township argued that the Pinckney 80 acres would be an appropriate location for an MHC, but, aside from designating that area, still zoned A-O, in the master plan for future purposes, the township has not currently designated any land for MHCs. There was some testimony that there is no ideal land anywhere in the township for an MHC. However, even ruling out the Pinckney 80 acres on the basis of unsuitability, the township never truly presented evidence and an argument that there was no land anywhere in the township appropriate for an MHC. The township did not satisfy its burden to show that the exclusion of MHCs has a reasonable relationship to the health, safety, or general welfare of the community. Thus, we hold that the trial court properly found that the township engaged in exclusionary zoning in violation of equal protection and due process guarantees. The next step is to determine the appropriate remedy.

The seminal Michigan case on zoning remedies where the municipality engaged in unlawful zoning practices is *Schwartz v Flint*, 426 Mich 295; 395 NW2d 678 (1986). The Supreme Court held that if a court declares that a zoning ordinance is unconstitutional, it may additionally declare that the plaintiff's proposed land use is reasonable and enjoin the municipality from interfering with the use, where the plaintiff has established, by a preponderance of the evidence, that the use is indeed reasonable. *Id.* at 329. "The defendant is always free to rezone consistent with the limiting conditions of plaintiff's proposed use, or not so limited, where plaintiff's use has not been declared reasonable." *Id.* The *Schwartz* Court was not addressing a claim of exclusionary zoning, but the Court referenced the theory in two footnotes, stating:

> Like the New York Court and others, we would be inclined to distinguish situations involving discriminatory or exclusionary zoning. We do not consider here the proper role of the court in such cases.
>
> Again, the analysis is confined to situations in which the court has found a particular ordinance to be unconstitutionally *applied*. Exclusionary zoning is an entirely different type of determination, necessitating potentially broader relief. [*Id.* at 309 n 11, 325-326 n 24, respectively (emphasis in original).]

(…continued)

> Court shall consider whether there are available indirect routes that provide reasonably suitable access to the I-2 zoned property. . . . [*Anspaugh v Imlay Twp*, 480 Mich 964; 741 NW2d 518 (2007) (citations omitted).]

To extrapolate from this order, when read in conjunction with this Court's vacated opinion in *Anspaugh*, that our Supreme Court supports the proposition that the statutorily-based "demonstrated need" element is also part of the constitutional analysis defies sound reasoning. While we acknowledge that it appears easier to pursue an exclusionary zoning claim under the state and federal constitutions rather than the statute, leaving one to question the thought processes of the Legislature, we are not at liberty to ignore the constitutional dictates, as developed and analyzed under the cited case law, relative to exclusionary zoning.

In *English, supra* at 39-41, this Court, picking up where *Schwartz* left off and addressing the appropriate remedy where the municipality engaged in exclusionary zoning, held:

> Having determined that defendant has improperly engaged in exclusionary zoning, the question of plaintiffs' remedy remains. The trial court ordered defendant to rezone plaintiffs' property from AR to MHP [manufactured housing park]. However, we believe that the trial court went too far in fashioning a remedy.
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> * * *
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> We recognize that the *Schwartz* decision was limited to cases involving an unconstitutional application of a zoning ordinance to a particular parcel. The Supreme Court noted that cases of exclusionary zoning involved "an entirely different type of determination, necessitating potentially broader relief." *Id.* at 325-326, n 24. However, the Supreme Court did not explain what that "potentially broader relief" might be.
>
> Accordingly, in light of the strong language in *Schwartz, supra* at 319-321, prohibiting any form of judicial zoning, we conclude that the trial court went too far when it ordered defendant to change the zoning classification of plaintiffs' property. Thus, we vacate the trial court's order requiring defendant to rezone plaintiffs' property from AR to MHP.
>
> However, while we vacate the trial court's order, we do not leave plaintiffs without any relief. Instead, we fashion a remedy in accordance with *Schwartz, supra.* The abundant record in this case not only supports the trial court's finding that plaintiffs' property was suitable for the proposed use under the test for exclusionary zoning, . . . but also that plaintiffs' proposal was a "specific reasonable use" under the standard adopted in *Schwartz, supra* at 327-328. Stated differently, while the trial court did not specifically analyze the present case in light of *Schwartz*, the trial court's findings nevertheless make it clear that plaintiffs have satisfied the burden of demonstrating that the mobile-home park was a "specific reasonable use." Notably, while a proposed use must be specific, "it need not amount to a 'plan.'" *Id.* at 328.
>
> Thus, we remand this matter to the trial court with instructions to enter an injunction prohibiting defendant from interfering with plaintiffs' reasonable, proposed use of their property as a mobile-home park. *Schwartz, supra* at 329. However, we note that our decision does not exempt plaintiffs from complying with all applicable federal, state, and local regulations governing mobile-home parks. In particular, plaintiffs are not exempt from the site-plan review process. Further, plaintiffs may be required to contribute to certain costs for the construction and maintenance of the development's infrastructure. We express no opinion regarding such details, which may necessitate additional public hearings in the township and in the trial court.

> The decision of the trial court that defendant engaged in exclusionary zoning is affirmed. The trial court's order of rezoning is vacated, with instructions to enter an injunction preventing defendant from interfering with plaintiffs' specific reasonable use of their property as a mobile-home park.

Accordingly, because constitutionally offensive exclusionary zoning was established by plaintiffs, they are entitled to develop an MHC on their property, without interference from the township, if they showed that using the property for an MHC constituted a specific reasonable use.

The township argues that developing a 498-unit MHC on plaintiffs' property is not reasonable because (1) it would conflict with surrounding land uses, (2) it would be inconsistent with the master plan, (3) it would equate to spot zoning, (4) it would create traffic hazards, and (5) it would have a negative environmental impact on the area. The township complains that a 498-unit MHC would constitute a density use that would be five times more intense than the 95-lot PUD.[17]

The evidence supports the trial court's ruling that developing an MHC on plaintiffs' property would be a reasonable use of the property. There might be some inconsistencies with surrounding uses and the master plan, but there are existing residential developments already in some areas around the property and they are growing, albeit with lower density housing, and a conflict with surrounding uses would also exist if an MHC were developed on the Pinckney 80 acres. Any potential traffic hazards could be lessened by the township dictating that plaintiffs construct or pay for the construction of turn and deceleration lanes, and there was evidence that the roadways had the capacity to handle the volume of traffic that would be generated by a 498-unit MHC. Further, the property's location on D-19 was viewed as a plus by everyone. There was not any specific evidence showing that harmful environmental effects would be created by a 498-unit MHC as planned by plaintiffs. The property had a smaller percentage of wetlands than the Pinckney 80 acres. Engineer David Call testified that the plan envisioned construction of a community well for water and a waste-water/sewage treatment plant. He found that on consideration of such matters as roads, storm water drainage, detention basins, and other features of the property, it would be suitable for a 498-unit MHC. There was also evidence that the soils on the subject property were well-suited for an MHC, and they were of much better quality than the soils on the Pinckney 80 acres. While the property was hilly in locations, grading could take care of that matter. Brian Frantz opined that the development of a 498-unit MHC on the property constituted a reasonable use of the property considering the totality of the circumstances. The planned development also complied with the MHCA according to Charles Patterson, who

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[17] A preliminary matter that must be addressed, which harkens back to the township's ripeness arguments, is the township's claim that *Schwartz* limited its "reasonable use" analysis to situations where the use was first sought at the municipal level. We see no language in *Schwartz* suggesting that, before a party is entitled to a reasonable use analysis in regard to fashioning a remedy on a finding of unlawful zoning activity, the party must have initially proposed the use to the municipality. *Schwartz* simply did not address the issue of ripeness and the rule of finality, and the proposition proffered by the township supposedly based on *Schwartz* lacks merit.

assisted in drafting the act. Further, the planned development would have fewer units per acre than a development on the Pinckney 80 acres. While the township's expert, Paul LeBlanc, testified that development of a 498-unit MHC on the property would not be reasonable, he never even walked the property, and there is sufficient evidence to support our finding that developing an MHC constitutes a reasonable use of plaintiffs' property. Accordingly, the trial court did not err in enjoining the township from interfering with plaintiffs' use of the property for an MHC. We wish to emphasize, however, consistent with *English*, *supra* at 41, that our decision does not exempt plaintiffs from complying with all applicable federal, state, and local regulations governing MHCs, they are not exempt from any site-plan review process, and plaintiffs may be required to contribute to the costs of any construction and maintenance of the development's infrastructure. As stated by the *English* panel, we too "express no opinion regarding such details, which may necessitate additional public hearings in the township and in the trial court." *Id.*

IV. Analysis – Docket No. 275469

Plaintiffs argue that the trial court erroneously denied their motion for attorney fees under 42 USC 1988, where plaintiffs prevailed on all of the constitutional claims advanced against the township under 42 USC 1983, and where there existed no special circumstances that would justify denial of fees. The township argues that the court did not abuse its discretion in denying the motion for attorney fees, where plaintiffs never pled an action under 42 USC 1983, there was no discovery taken regarding a § 1983 claim, and where there were no proofs or arguments concerning a § 1983 claim. The trial court denied the motion, declining an award on the basis of its right to exercise its discretion on the matter.

In *Outdoor Sys, Inc v City of Clawson*, 273 Mich App 204, 209-210; 729 NW2d 893 (2006), this Court, addressing awards of attorney fees under 42 USC 1988, stated:

> The Civil Rights Attorney's Fees Awards Act, 42 USC 1988, governs the award of attorney fees in actions to enforce various federal civil rights and antidiscrimination statutes. Section 1988 provides in pertinent part, "In any action or proceeding to enforce a provision of [42 USC 1983], . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . . " 42 USC 1988(b). Although the phrase "may allow" might appear to be permissive, the United States Supreme Court has interpreted the phrase as mandating attorney fees when the plaintiff prevails and certain special circumstances are not present. *Independent Federation of Flight Attendants v Zipes*, 491 US 754, 761; 109 S Ct 2732; 105 L Ed 2d 639 (1989).

The Court noted that 42 USC 1988 does not contain any public-interest exception when it rejected the city's claim that attorney fees should not be allowed because the litigation involved a question of public interest. *Clawson, supra* at 212 n 4.

The purpose of 42 USC 1988 is to ensure effective access to the judicial process for individuals who have civil rights grievances, and a prevailing party should ordinarily recover an attorney's fee unless special circumstances exist that would render such an award unjust. *Hensley v Eckerhart*, 461 US 424, 429; 103 S Ct 1933; 76 L Ed 2d 40 (1983).

Equal protection, due process, and a takings claims would generally fall under the umbrella of 42 USC 1983.[18] But, as argued by the township, plaintiffs never framed their constitutional claims or desired remedies under § 1983 at any time. In fact, the complaint merely references equal protection, due process, and a regulatory taking without any express citation or reference whatsoever to the relevant federal and state constitutional provisions. Michigan of course has similar constitutional protections; therefore, it cannot necessarily be concluded that plaintiffs were seeking to enforce their federal civil rights. See *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 30; 703 NW2d 822 (2005). Reversal is unwarranted.[19]

Next, the township argues in its cross-appeal that the trial court erred by granting taxable costs to plaintiffs because the award was contrary to public policy and plaintiffs did not establish an entitlement to all of the claimed expert witness fees. In support of this argument, the township maintains that this case presented issues of first impression that are significant and important to the public policy of this state. Further, the township contends that any of the expert witness fees associated with consulting and strategic planning services are not recoverable pursuant to *Detroit v Lufran Co*, 159 Mich App 62, 64; 406 NW2d 235 (1987). The township proceeds to dissect and attack some of the entries on the invoices relative to plaintiffs' experts.

First, in responding to plaintiffs' motion for taxable costs, the township never argued that some of the expert witness fees could not be recovered because they related to consulting and strategic planning services. The township only presented the public policy argument. Not until its motion for reconsideration did the township first assert that some of the expert witness fees were not recoverable as they related to consulting and strategic planning services. In the order on the motion for reconsideration, the court found that the township had never claimed that the expert witness fees were unreasonable, and the court determined that the fees were normal, usual, and customary. An argument is not properly preserved for appeal when a party raises an

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[18] 42 USC 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

[19] We also note that plaintiffs were not successful on all of their constitutional claims, given our ruling.

issue for the first time in a motion for reconsideration; however, we may address the issue if it involves a question of law and the parties have presented all of the facts necessary for its resolution. *Farmers Ins Exch v Farm Bureau Gen Ins Co of Michigan*, 272 Mich App 106, 117-118; 724 NW2d 485 (2006). We decline to address the issue because it was forfeited and because all of the facts necessary to resolve the issue were not presented, considering that there was no detailed review of each component of the requested fees.

Moving to the issue of taxable costs and the public policy argument, this Court reviews a trial court's decision to award expert witness fees for an abuse of discretion. *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 466; 633 NW2d 418 (2001). MCR 2.625 provides that "[c]osts will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action." "MCL 600.2164 authorizes a trial court to award expert witness fees as an element of taxable costs." *Rickwalt, supra* at 466.

In *American Aggregates Corp v Highland Twp*, 151 Mich App 37, 54; 390 NW2d 192 (1986), this Court observed that "Michigan courts frequently refuse to award costs in cases involving public questions. In addition, we note that this Court has specifically refused to award costs in landowners' suits challenging the constitutionality of zoning ordinances as applied to their property, since such cases involve public questions." (Citations omitted.) Here, the underlying basis for the township's public question or policy argument is that this case presented an issue of first impression, where plaintiffs were granted equitable relief that allowed for the development of an MHC despite the fact that they never made a request for an MHC to the township before filing suit. We observe that if you narrowly tailor any description of a case, you could argue that it presents an issue of first impression. As evident from this opinion, there are plenty of cases on the issue of ripeness and the rule of finality in which zoning matters were not fully explored in municipality proceedings. Under all of the circumstances in this case, we cannot find that the trial court abused its discretion in awarding costs.

V. Conclusion

The constitutional "as applied" counts (substantive due process, equal protection, and regulatory taking) challenging the A-O zoning classification and the failure to rezone were subject to the rule of finality; however, the futility exception to the rule was applicable. Regardless, these claims fail on the merits because the township was advancing a legitimate governmental interest in maintaining the A-O classification with regard to the property, it was not acting arbitrarily or capriciously, and because all avenues of use, and thus economic feasibility, were not explored and negated.

The constitutional exclusionary zoning claim appears to be a "facial" challenge under the caselaw and thus not subject to the rule of finality, but it is unnecessary to reach the issue because, assuming the contrary, the futility exception applied; the claim was ripe for suit. Further, we hold that there was, effectively, a total exclusion of MHCs in the township and that the township, on the matter of justification, failed to show that the exclusion had a reasonable relationship to the health, safety, or general welfare of the citizenry, thereby violating plaintiffs' constitutional rights to due process and equal protection. With respect to the appropriate remedy, the trial court properly found that developing a 498-unit MHC on plaintiffs' property constituted a reasonable use of the property. Accordingly, the trial court did not err in enjoining the

township from interfering with plaintiffs' use of the property for an MHC. In light of these conclusions, it is unnecessary to address the statutory exclusionary zoning claim.

Finally, the trial court did not err in declining to award attorney fees to plaintiffs, given that a claim or remedy under 42 USC 1983 was not expressly alleged. And the court did not abuse its discretion in awarding plaintiffs expert witness fees, considering that a public question of first impression was not litigated and because the township forfeited any claim that some of the expert witness fees were not recoverable.

Affirmed in part, and reversed in part.

/s/ David H. Sawyer
/s/ William B. Murphy