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UNPUBLISHED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.

DONOFRIO, J. (*dissenting*)

I concur in part and respectfully dissent in part. I also write separately to clarify the application of the rule set forth in *Braun v Ann Arbor Charter Twp*, 262 Mich App 154; 683 NW2d 755 (2004). I would vacate the trial court's ruling that the zoning classification was unconstitutional as applied to plaintiffs' property because the takings claim as well as the attendant as applied constitutional claims were unripe for judicial review. I would further vacate the trial court's holdings that the exclusion of MHCs in the township constituted exclusionary zoning for the reasons that they were unripe for judicial review and furthermore that plaintiffs did not meet their burden of establishing demonstrated need.

I

Plaintiffs' complaint alleges the following claims: violation of plaintiffs' constitutional right to equal protection (count I); violation of plaintiffs' constitutional right to substantive due process (count II); unconstitutional taking of plaintiffs' property without just compensation (count III); and, exclusionary zoning claim on the basis of MCL 125.297a (count IV). All of plaintiffs' counts went to trial, but plaintiffs stipulated to waive any and all claims for money damages but reserved their right to seek equitable and declaratory relief, plus allowable costs and fees. As summarized by the majority, "[f]ollowing 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." Defendant appeals as of right.

II

Defendant argues that all of plaintiffs' constitutional claims are not ripe for review and should be dismissed. Plaintiffs' complaint alleges that defendant's refusal to rezone their property constituted both "as applied" due process and equal protection violations as well as facial due process and equal protection violations. "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 Co v Novi*, 452 Mich 568, 576; 550 NW2d 772 (1996). In order to be ripe for judicial review, plaintiffs "as applied" constitutional challenges must satisfy the rule of finality. The rule of finality is "'concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.'" *Id*. at 577 quoting *Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 US 172, 186; 105 S Ct 3108; 87 L Ed 2d 126 (1985). "In other words, where the possibility exists that a municipality may have granted a variance—or some other form of relief—from the challenged provision of the ordinance, the extent of the alleged injury is unascertainable unless these alternative forms of potential relief are pursued to a final conclusion." *Conlin v Scio Twp*, 262 Mich App 379, 382; 686 NW2d 16 (2004). To the contrary, "[f]inality is not required for facial challenges because such challenges attack the very existence or enactment of an ordinance." *Paragon Properties*, *supra* at 577.

This case is similar to *Braun v Ann Arbor Charter Twp*, 262 Mich App 154, 158-159; 683 NW2d 755 (2004), a zoning case, wherein the plaintiffs alleged very similar violations to the instant case. Specifically, in *Braun*, the plaintiffs asserted that the defendant's denial of their rezoning petition violated substantive due process, equal protection, exclusionary zoning-substantive due process, and constituted an unconstitutional taking of property without just compensation. *Braun*, *supra* at 156. The *Braun* Court properly observed the rule that finality is required for all "as applied" constitutional claims. However, I find *Braun* particularly useful in the analysis of whether the present case is ripe for judicial review because *Braun* expressly addressed cases like this one, where the plaintiffs assert a takings claim in addition to any "as applied" constitutional claims.

Addressing the plaintiffs' argument that the trial court erred in dismissing their claims on the basis of ripeness, the *Braun* Court quoted *MacDonald, Sommer & Frates v Yolo Co*, 477 US 340, 349; 106 S Ct 2561; 91 L Ed 2d 285 (1986), a takings (only) case, where the United States Supreme Court stated that, "[u]ntil a property owner has obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests ha[ve] been destroyed." *Braun*, *supra* at 158. The *Braun* Court also acknowledged that in *MacDonald*, *supra* at 351, the Supreme Court stated that "[o]ur cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *Braun*, *supra* at 158.

The *Braun* Court then quoted *Palazzolo v Rhode Island*, 533 US 606, 620-621; 121 S Ct 2448; 150 L Ed 2d 592 (2001), an inverse condemnation action, where the United States Supreme Court similarly stated:

> Under our ripeness rules *a takings claim* based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established. [*Braun*, *supra* at 159, quoting *Palazzolo*, *supra* at 620-621.]

The *Braun* Court also recognized that

> [b]oth *Palazzolo* and *MacDonald* counsel that a determination of alternative uses of property as zoned is a condition precedent to a valid takings claim. In other words, the landowner must show that he sought alternative uses of the property as zoned and was denied, thus leaving the property owner with land having no economically productive or reasonably beneficial use. [*Id*.]

Based on *Palazzolo* and *MacDonald*, the *Braun* Court concluded that because the plaintiffs had not applied for a variance, or sought review of the board of trustees' decision before the ZBA, there was "no way to discern whether the land as zoned has any reasonable beneficial use, or whether plaintiff's expectation interests have been destroyed." *Id*. The *Braun* Court concluded that the trial court had correctly found that the plaintiff's inverse condemnation claim was not ripe for judicial review. *Id*. at 160.

The *Braun* Court also found that the plaintiffs' "as applied" constitutional claims were also not ripe for judicial review because the plaintiffs had not satisfied the rule of finality, stating:

> The Supreme Court decision in *MacDonald* dealt with claims arising under the takings clause of the Fifth Amendment. Unlike the case at bar, *MacDonald* did not involve any other constitutional claims. In *Paragon Properties* . . . our Supreme Court held that a judicial challenge to the constitutionality of a zoning ordinance, as applied to a particular parcel of land, is not ripe for judicial review until the plaintiff has obtained a final, nonjudicial

> determination regarding the permitted use of the land. The Court stated specifically that, "[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 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." The purpose of this requirement is to ensure that the plaintiff has suffered an "actual, concrete injury."
>
> As we stated above, we are not satisfied plaintiffs established that a final decision was made regarding the permitted uses of the property. For this reason, in accordance with *Paragon*, we find that plaintiffs' remaining constitutional claims are likewise not ripe for judicial review. Summary disposition of plaintiffs' remaining constitutional claims pursuant to MCR 2.116(C)(4) was appropriate. [*Id*. at 160-161 (internal quotations and citations omitted).]

The *Braun* Court dismissed the plaintiffs' remaining "as applied" constitutional challenges to the zoning decision because the plaintiffs had not met the requirement of finality in regard to their takings claim and thus the takings claim as well as the attendant "as applied" constitutional claims were not ripe for judicial review.[1]

The holding in *Braun* stands for the proposition that in zoning cases where the plaintiffs assert a takings claim as well as one or more "as applied" constitutional claims, the plaintiffs must establish finality with regard to the takings claim before the entire matter is ripe for judicial review. *Braun* articulates its ripeness test as follows, whether plaintiffs "sought alternative uses of the property as zoned and was denied," or applied for the "the minimum variance that is necessary to place the land in productive economic use within the zoning classification." But *Braun* only applies to those claims that combine a takings claim with one or more "as applied" constitutional challenges.

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[1] After this Court's decision on appeal, the *Braun* plaintiffs sought and were denied a use variance and sued in federal court, asserting violations of procedural due process, substantive due process, equal protection, an unconstitutional taking, and a violation of 42 USC 1983. *Braun v Ann Arbor Twp*, ___ F3d ___; 2008 WL 656630 (CA 6, 2008), slip op at *4. The federal district court granted summary judgment to the defendant, finding that the takings claim was not ripe because the plaintiffs had failed to seek just compensation in state court after the application for a variance was denied. *Id*. at *4-5. Seemingly piggybacking this Court's holding that ripeness and finality are required for all "as applied" constitutional claims in cases where the plaintiffs also assert a takings claim, the federal district court then specifically held that the plaintiffs' remaining constitutional claims were also unripe for review because they were "ancillary" to the takings claim. *Id*. at *5, 7. The district court stated, "resolution of the takings claim was necessary in order to address the attendant process-related issues." *Id*. at *7. The district court also stated that if the plaintiffs prevailed on the takings claim, no other constitutional injury would likely exist. *Id*. at *8. On appeal, the federal appellate court recognized the doctrine and accepted that the plaintiffs' claims may be ancillary and therefore unripe. *Id*. at *7-10. However, the federal appellate court held that, even assuming that the claims *were not ancillary*, they would not be ripe for review. *Id*.

Some practitioners may read *Braun* to mean that all plaintiffs in all zoning cases must meet the *Braun* ripeness test in order for "as applied" constitutional challenges to be ripe for judicial review. This is simply not the case. A careful reading of *Braun* and *Paragon* shows that only those plaintiffs who asserts a takings claims with attendant "as applied" constitutional challenges in their complaint are subject to the *Braun* minimum land use determination to establish finality in order for their "as applied" constitutional claims to be ripe for judicial review. In other words, the *Braun* ripeness test—i.e., whether plaintiff "sought alternative uses of the property as zoned and was denied," or applied for the "the minimum variance that is necessary to place the land in productive economic use within the zoning classification"—does not apply to cases where the plaintiffs brought "as applied" constitutional claims without a takings claims. This distinction makes sense because in a takings claim the court's goal is to ascertain the limits of the development that would be permitted on the property, if any, in order to determine any diminution in value that results from the alleged taking so the plaintiff can be provided "just compensation." *Lingle v Chevron USA, Inc*, 544 US 528, 536-540; 125 S Ct 2074; 161 L Ed 2d 876 (2005). Conversely, issues such as the remaining value of the land or what productive uses might be allowed by the municipality are not relevant in cases where the plaintiff does not raise a takings claim and does not make a demand for damages based on diminution in value or otherwise. In cases where the plaintiff simply claims that, "as applied," a zoning ordinance does not substantially advance a legitimate government interest, and is arbitrary and capricious the *Braun* test does not apply. The United States Supreme Court has recognized that the substantially advances test "prescribes an inquiry in the nature of due process, not a takings test." *Lingle, supra* at 540-541. It is a test for ascertaining the validity of the underlying regulation. *Id*. at 542-543. If an action is so arbitrary as to violate due process, that is the end of the inquiry, and "[n]o amount of compensation can authorize such action." *Id*. at 543. The *Lingle* Court recognized that commingling the two tests is understandable, but concluded that doing so is invalid, inappropriate, and imprecise. *Id*. at 541-542, 545, 548.

Like the plaintiffs in *Braun*, plaintiffs here assert a takings claim in their complaint as well as other "as applied" constitutional challenges. Thus, *Braun* applies and plaintiffs must establish finality before the matter—the takings claim as well as the "as applied" constitutional challenges—is ripe for judicial review. Again, plaintiffs must show that they "sought alternative uses of the property as zoned and was denied," or that they applied for the "the minimum variance that is necessary to place the land in productive economic use within the zoning classification." The record reflects that plaintiffs submitted only one rezoning request to the Putnam Township Board pertaining to the planned 95-lot PUD. The Putnam Township Board rejected plaintiffs' rezoning request and also rejected plaintiffs' requests for variances relative to a 95-lot development and, apparently, a 40-lot development. The record also reflects that plaintiffs ultimately did not challenge these decisions, and in fact, they no longer seek to develop a 95-lot PUD. Instead, plaintiffs now seek to develop a 498-unit MHC. But plaintiffs never submitted a request for a 498-unit MHC to Putnam Township Board for a decision either as a rezoning application or a variance request.

After reviewing the record, I conclude that plaintiffs cannot show that they sought alternative uses of the property and were denied, or that they applied for the minimum variance necessary to place the land in productive economic use within the zoning classification. Plaintiffs did not seek a decision from the appropriate administrative body regarding either a rezoning application or a variance request regarding a 498-unit MHC and instead sought

premature relief from the judiciary by filing the instant lawsuit. In my view, plaintiffs have not established finality as required by *Braun* and thus plaintiffs' takings claim nor their "as applied" constitutional challenges are ripe for judicial review.

While I find the majority's discussion and application of the futility exception to finality interesting, I am not of the view that it can be employed on the first request for a zoning use never before applied for and absent an application for such land use. Plaintiffs did not make even a minimal showing under the *Braun* rule of finality and by their action—or inaction—has in effect denied Putnam Township the opportunity to grant a request for the contemplated zoning use within their township. Plaintiffs should not benefit from a situation of their own making. In sum, I would conclude that plaintiffs have not established finality as required by *Braun* and thus neither plaintiffs' takings claim nor their "as applied" constitutional challenges are ripe for judicial review.

III

Defendant also argues that plaintiffs' facial constitutional claims fail on the merits. Specifically, defendants contend plaintiffs' equal protection claims (Count I) and substantive due process claims (Count II) fail on the merits because the zoning ordinance rationally serves government interests. In their complaint, plaintiffs pleaded their equal protection claim (Count I) and substantive due process claim (Count II) as both "as applied" and facial challenges. Because of my previous analysis regarding the "as applied" constitutional challenge, the substance of that claim is not ripe for judicial review. However, constitutional claims that are classified as facial are not subject to the same finality/ripeness rules and must be analyzed as part of this appeal. I agree with the majority's conclusion that plaintiffs' substantive due process and equal protection claims fail, though, I disagree with the majority's labeling of these claims as "as applied" constitutional challenges. Like the majority, I would analyze the substance of plaintiffs' facial due process and equal protection claims under the rational basis test.

The rational basis analysis tests only whether the ordinance is reasonably related to a legitimate governmental purpose. *Muskegon Area Rental Ass'n v City of Muskegon*, 465 Mich 456, 464; 636 NW2d 751 (2001). The majority has included a lengthy and comprehensive list of legitimate governmental purposes advanced by the A-O zoning classification, some of which are as follows: "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." While for purposes of this substantive analysis I would characterize the constitutional challenges as facial, I wholly concur with the majority's rational basis analysis and would similarly conclude that the trial court erred when it found that plaintiffs' substantive due process and equal protection claims relative to the A-O zoning classification merited relief because the ordinance is reasonably related to legitimate governmental purposes. *Id*.

IV

Finally, I address plaintiffs' exclusionary zoning claim (Count IV). As evidenced by the majority opinion, this issue is complicated and requires a multi-tiered analysis. In order to properly address this complex issue, I must break it down into its component parts and determine on what basis in law plaintiffs assert their exclusionary zoning claim: statutory, constitutional, or some combination of both. I first consult plaintiffs' complaint. Plaintiffs' complaint narrowly

alleged that Putnam Township engaged in exclusionary zoning in violation of former MCL 125.297a,[2] a statutory violation. In my view, the language in the complaint at Count IV asserting a claim of exclusionary zoning does not contain allegations of exclusionary zoning relying on protections afforded in either the United States or Michigan Constitution and does not discuss its exclusionary zoning claim in any terms clearly implicating other constitutional violations. Thus, I would analyze the issue solely on the basis of the alleged statutory violation. But, I do not have the luxury of reviewing this issue in a vacuum. Clearly, in the trial court, the parties litigated plaintiffs' exclusionary zoning claim as a mixed issue of law grounded in both statutory and constitutional violations. Though, in my view, it does not appear that plaintiffs properly pled a count for constitutional exclusionary zoning, whether plaintiffs properly pled it or not, it was litigated and decided. Thus, I will analyze plaintiffs' exclusionary zoning claim based on both statutory and constitutional violations separately addressing ripeness and any affect it may have on either basis.

A. MCL 125.297a - Ripeness

MCL 125.297a provides that:

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

The language of the statute does not address the application of an ordinance to a particular plaintiff's individual parcel of land. Rather, to establish an exclusionary zoning claim, the statute requires a showing that the ordinance has "the effect of totally prohibiting the establishment of a land use within a township or surrounding area within the state." In light of the plain language of the statute, the *Braun* ripeness test—i.e., whether plaintiff "sought alternative uses of the property as zoned and was denied," or applied for the "the minimum variance that is necessary to place the land in productive economic use within the zoning classification"—can not apply to statutory exclusionary zoning challenges.

When considering the specific language of the statute, in the context of a ripeness analysis, if finality in the *Braun* sense were required, it would be an insurmountable requirement for plaintiffs and the statute would be rendered nugatory for all reasonable intents and purposes. This is because the holding in *Braun* requires that plaintiffs must establish finality with regard to a takings claim before the entire matter is ripe for judicial review by requiring that plaintiffs "sought alternative uses of the property as zoned and was denied," or applied for the "the minimum variance that is necessary to place the land in productive economic use within the

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[2] Although repealed by 2006 PA 110, effective July 1, 2006, which enacted the Michigan Zoning Enabling Act, MCL 125.3101 *et seq*., the 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 § 207 of the Michigan Zoning Enabling Act. MCL 125.3207.

zoning classification." In exclusionary zoning claims brought under MCL 125.297a, making this showing would be impossible. Pursuant to MCL 125.297a, the denial of a petition to rezone one's singular parcel of property within a township cannot show that the municipality has reached a final decision on whether to totally prohibit a particular use within an entire township, but only that parcel of land on which the request has been submitted. In other words, a *Braun*-type finality test is inappropriate for exclusionary zoning cases because requiring a plaintiff to petition to rezone someone else's property or to rezone the entire township to test the outside limits of the rezoning denial would be inapposite to the plain language of the statute.

But, my conclusion that the *Braun* finality test does not apply to claims brought under MCL 125.297a in no way exempts plaintiffs from first submitting their rezoning request or request for a variance to the appropriate legislative body before seeking relief from the court system. Whether a municipality will allow a particular requested use in the township must be decided with reference to what the municipality has authorized and will authorize in its comprehensive zoning map of the township. While plaintiffs need not satisfy the stringent requirements of the *Braun* test, plaintiffs seeking relief under the statute must seek and receive an administrative determination on a request regarding a particular parcel of land because a use is not necessarily excluded simply because it does not yet exist in the zoning map. See *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 168-169; 667 NW2d 93 (2003).

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

In sum, I conclude that while "finality" in the *Braun* context is not required to establish ripeness in exclusionary zoning claims, at a minimum, plaintiffs must submit their zoning request for consideration before the proper administrative body for a suitability and needs determination in that particular community for the claim to be ripe and judicial review appropriate. Because plaintiffs here never submitted their request for an MHC to the township zoning commission, plaintiff's statutory claim for exclusionary zoning is not ripe for judicial review and I would decline to review its merits.

B. Constitutional Exclusionary Zoning Claim - Ripeness

Ordinances are usually presumed to be valid. *Smookler v Wheatfield Twp*, 394 Mich 574, 581; 232 NW2d 616 (1975). However, "an ordinance which totally excludes from a municipality a use recognized by the constitution and 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." *Id*., quoting *Kropf v City of Sterling Hts*, 391 Mich 139, 156; 215 NW2d 179 (1974). Like the statutory exclusionary zoning challenge under MCL 125.297a, a constitutional exclusionary zoning challenge requires a proponent to establish that the use is excluded in the municipality. See *id*. As the Court in *Smookler* observed, "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 plaintiff's land." *Smookler*, *supra* at 581 (emphasis added). For this reason, plaintiffs' constitutional exclusionary zoning claim whether labeled as an "as applied" claim or a facial claim, as a matter of law can in substance only be a facial claim. *Id*. And "[f]inality is not required for facial challenges because such challenges attack the very existence or enactment of an ordinance." *Paragon Properties*, *supra* at 577. The analysis does not stop there, however. While in this facial challenge "it is not necessary for this Court to examine the reasonableness of the ordinance as applied to plaintiff's land," *Smookler*, *supra* at 581, still, the trial court must have some manner available to it to determine whether the zoning ordinance at issue indeed is "invalid on its face."

Like statutory exclusionary zoning challenges, I conclude that in constitutional exclusionary zoning claims, plaintiffs must submit their zoning request for consideration before the proper administrative body for a suitability and needs determination for the claim to be ripe for judicial review. This is because whether a plaintiff's exclusionary zoning challenge is brought pursuant to the statute or under the constitution, the zoning map underlying the challenge is part of the zoning ordinance. See MCL 125.271; MCL 125.280; see also *Paragon*, *supra* at 573-574. And a use not yet present in the zoning map is not necessarily excluded simply because it does not yet exist in the zoning map. See *Landon, supra* at 168-169. I conclude that *Landon* also applies in exclusionary zoning claims brought under the constitution.[3] Thus, like statutory exclusionary zoning claims, while plaintiffs need not satisfy the stringent requirements of the *Braun* finality test, plaintiffs seeking constitutional redress must first seek and receive an administrative determination on a request regarding a particular parcel of land. Because plaintiffs here never submitted their request for an MHC to the township zoning commission, plaintiff's constitutional claim for exclusionary zoning is not ripe for judicial review and I would decline to review its merits.

C. Substance of the Exclusionary Zoning Claims

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[3] I am simply unwilling to accept the bald proposition that if a community has not designated a certain land use within its borders that exclusionary zoning exists on its face. For example, merely because the administrative body responsible for zoning in Mackinac Island has not zoned land for industrial purposes does not mean that exclusionary zoning exists on its face. There must be a request and an appropriate determination for that community by the administrative body responsible for zoning. In other words, a community cannot engage in exclusionary zoning if there is no "demonstrated need" for the zoning requested in that community. See *Landon, supra* at 168-169.

While I would not review the substance of the exclusionary zoning claims because I believe they are not ripe for judicial review, I must address the majority's substantive analysis of the exclusionary zoning claims. Whether brought solely under MCL 125.297a or solely under the constitution, I would analyze the claims in the same manner. I would utilize the mechanism prescribed by the legislature, namely MCL 125.297a. "[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). Zoning is a recognized legislative function that is provided for by statute. Thus, zoning is a legislative action and the legislature can properly define its terms, requirements, and review mechanisms. In the enactment of MCL 125.297a our legislature weighed in on exclusionary zoning and explicitly prescribed how to demonstrate exclusionary zoning in the absence of a suspect class.

Further support that a statutory analysis should be employed in deciding whether zoning is exclusionary in either constitutional or statutory claims is found in our Supreme Court's order in *Anspaugh v Imlay Twp*, 480 Mich 964; 741 NW2d 518 (2007). In *Anspaugh*, our Supreme Court issued an order vacating this Court's determination on the plaintiffs' claim for constitutional exclusionary zoning in *Anspaugh v Imlay Twp*, 273 Mich App 122; 729 NW2d 251 (2006). In *Anspaugh*, the plaintiffs sought to rezone property from residential to heavy industrial and the defendant township denied their request. The plaintiffs brought suit alleging purely constitutional exclusionary zoning, specifically "that the township's zoning scheme was violative of substantive due process and wholly exclusionary, both as applied and on its face, because it 'prohibit[ed] . . . even the possibility of I-2 uses.' An amended complaint, add[ed] allegations that the township's actions and ordinance denied plaintiffs equal protection." *Anspaugh, supra* at 273 Mich App 124-125. This Court found in favor of the plaintiffs and held that township's zoning scheme was exclusionary. *Id*. at 129-130. On appeal, our Supreme Court vacated this Court's opinion and sent it back to the circuit court for a factual determination of whether there was a "demonstrated need" for the zoning classification in the township. *Anspaugh, supra* at 480 Mich 964. While our Supreme Court did not explicitly state that it was remanding the plaintiff's constitutional exclusionary zoning claim to the circuit court for analysis in accordance with the exclusionary zoning statute, MCL 125.297a, that is exactly what it did when it remanded for a "demonstrated needs" determination. For these reasons, while I would not review plaintiffs' exclusionary zoning claims for the reason that they are not ripe for judicial review, I must review their substance because my opinion differs with the majority's view. I will review plaintiffs' exclusionary zoning claims—statutory or constitutional—in accordance with the mechanism provided by the legislature, MCL 125.297a, and tacitly approved by our Supreme Court in *Anspaugh, supra* at 480 Mich 964.

Moving on to the substance of plaintiffs' exclusionary zoning allegations, defendant argues that plaintiffs' exclusionary zoning claim fails because: Putnam Township does not totally exclude mobile homes; there is no demonstrated need for manufactured housing; and, the trial court should have excluded evidence from plaintiffs' expert witness. Former MCL 125.297a, 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.

Interpreting this provision, this Court has stated that "[t]o establish a violation of MCL 125.297a, plaintiffs 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) the use is appropriate for the location, and (4) the use is lawful." *Houdek v Centerville Twp*, 276 Mich App 568, 575; 741 NW2d 587 (2007).

On appeal, amongst other arguments, Putnam Township presents several arguments focused on the issue of demonstrated need. The majority affirmatively declined to address the issue of "demonstrated need" stating that it relates only to a statutory analysis pursuant to MCL 125.297a and is not required as part of the constitutional exclusionary zoning analysis it found to be applicable. As I explained above, I believe that this analysis is appropriate as part of a statutory or constitutional exclusionary zoning claim, therefore I respectfully disagree with the majority's conclusion that an analysis of "demonstrated need" is not required in this case.

In the instant case, in regard to demonstrated need, the township claims that plaintiffs' expert, Brian Frantz, was not qualified to testify regarding demonstrated need and that his testimony should have been excluded on that basis. Further, the township claims that the substance of Frantz's testimony should be excluded from consideration because Frantz's analysis of demonstrated need was based on insufficient and biased data and that he used an unreliable methodology in his calculations. The township brought a motion before the trial court to strike Frantz as an expert and exclude his testimony. The trial court denied the motion stating as follows:

> The Court will first address that as to strike Mr. Frantz as an expert. I do believe that the – I'm not going to strike Mr. Frantz as a witness, I believe he would be able to testify at the time of trial. I think the argument that counsel's making goes to his credibility and to the weight that would be given to his testimony and not necessarily to the admissibility, I so make that finding.

The party proffering the expert bears the burden of persuading the trial court that the expert is qualified to testify. *Siirila v Barrios*, 398 Mich 576, 591; 248 NW2d 171 (1976). A witness may be qualified as an expert by knowledge, skill, experience, training or education. MRE 702; *Mulholland v DEC Int'l Corp*, 432 Mich 395, 403; 443 NW2d 340 (1989). MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion . . . .

The trial court's role as gatekeeper does not require it to search for absolute truth, to admit only uncontested evidence, or to resolve genuine scientific disputes; rather, it is to preclude evidence that is unreliable. *Chapin v A & L Parts, Inc*, 274 Mich App 122, 127; 732 NW2d 578 (2007). The inquiry is whether an expert's opinion is rationally derived from a sound foundation. *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485, 491-492; 566 NW2d 671 (1997). The standard focuses on the scientific validity of the expert's methods rather than on the

correctness or soundness of the expert's particular proposed testimony. *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 589-590; 113 S Ct 2786; 125 L Ed 2d 469 (1993). An expert's opinion is admissible if it is based on the "methods and procedures of science," as opposed to "subjective belief or unsupported speculation." *Id*. at 590.

Frantz had an undergraduate degree in geography and earth science. Although Frantz had taken a course in technical writing, one marketing course, and other various research courses he had no specialized education qualifying him to prepare a demand—let alone a needs—analysis regarding manufactured housing. While he had been employed as a planner, he had no professional experience or training that would otherwise qualify him to prepare statistical analyses concerning aspects of the marketing, demand, or need for manufactured housing in a particular area.

Pursuant to MCL 125.297a, plaintiffs must show a "demonstrated need" for the excluded land use within "the township or surrounding area." In my view, plaintiffs failed on both counts. First, the record is very clear that the Frantz prepared only "demand analysis" as opposed to a "demonstrated need analysis." Next, Frantz's demand analysis only accounted for a small portion of the township, namely a six-mile radius of plaintiffs' property and ignored the remainder of the township and the surrounding area. The record reflects that choosing a six mile radius had the effect of not considering the existence of a mobile home park just 6.1 miles from plaintiffs' property. Thus, the demand analysis offered by Frantz only considered a six-mile radius surrounding plaintiffs' property and plainly failed to consider "the township or surrounding area" as required by the statute.

Moreover, the record displays that Frantz also did not consider any readily available and seemingly relevant county-wide data regarding the existence of current and proposed mobile home communities in the county. Frantz admitted that he did not consider data important if it "didn't fall within the geographic area I was looking at . . . ." I also find Frantz's analysis—biased at best, suspect at worst—for the fact that he collected and used data from friends and family not in the area to form the basis of some of his demand analysis. For these reasons, I conclude that Frantz's methods for arriving at his demand analysis are irrational and fundamentally unsound. *Nelson, supra* at 491-492. Frantz's conclusions regarding the demand for manufactured housing was therefore not "rationally derived from a sound foundation," nor was Frantz "qualified as an expert by knowledge, skill, experience, training, or education" to give any conclusions.

Ultimately, given Frantz's lack of knowledge, experience, and training in preparing need analyses in the manufactured housing industry coupled with the lack of objective, supportive evidence to bolster his opinions, the trial court erred finding that any concerns went to weight and credibility. The trial court abused its discretion by failing to exclude his proposed expert testimony as unreliable. Plaintiffs provided no other evidence regarding demonstrated need at trial. Because plaintiffs failed to establish that there is a demonstrated need for the excluded land use in the township or surrounding area in accordance with MCL 125.297a, I would hold that their exclusionary zoning claim fails and I need not discuss the remaining requirements of an exclusionary zoning claim. See *Houdek, supra* at 578.

While I concur in part, I would vacate the judgment for the reasons stated, and remand for entry of dismissal consistent with this dissenting opinion.

/s/ Pat M. Donofrio