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Exclusionary Zoning as Analyzed in Recent Decisions of the Court of Appeals: Are Such Claims Effectively Excluded from the Developer's Lawyer's Repertoire?

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contents

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Introduction

Some municipal land use attorneys have noticed an increase in exclusionary zoning claims in recent months. This is somewhat surprising since the Michigan Supreme Court's most recent discussion of the subject, in *Adams Outdoor v City of Holland*,[1] indicated that such claims are difficult to support; courts since *Adams* have often rejected exclusionary zoning claims on the grounds that either the "total exclusion" and/or "demonstrated need" elements could not be satisfied.[2] The burden of proving such claims seemed, to many land use attorneys, to be so great that many plaintiffs simply stopped pursuing them, choosing instead to focus upon more common theories such as takings and substantive due process.[3] However, more recent Court of Appeals opinions suggest that exclusionary zoning claims may be asserted under a constitutional (rather than statutory) analysis, and that such claims may not be subject to the same finality requirement that stands as a bar to many other land use challenges.[4] This article will focus upon two such decisions—*D.F. Land Development, L.L.C. v Charter Township of Ann Arbor* and *Hendee v Township of Putnam*—in considering whether the concept of exclusionary zoning may warrant renewed attention from both sides of the land use bar.

Exclusionary Zoning Jurisprudence in Michigan

The principle that local units of government cannot totally prohibit certain land uses was initially articulated in decisions from various northeastern states in the early 1970s.[5] These decisions focused upon concerns that newly developing communities would exclude low and moderate income families while pursuing goals such as achieving a higher tax base or aesthetically pleasing development.[6] In Michigan, the rule was first articulated in *Kropf v City of Sterling Heights*, where the Court stated that "[o]n 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

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Chairperson's Corner

By William B. Beach, Miller Canfield

Mary Fales (Ann Arbor) and Marcia Howe (Johnson, Rosati) have put together a great program, "Thriving on a Dime: Practical Advice for Public Agency Attorneys in Financing and Contracting Services in a Tight Economy," for the Public Corporation Law Section's winter program at St. John's Conference Center in Plymouth. It will look at the issue through the eyes of the public accountants (Plante & Moran), lead us through AIA contracts from the owner's perspective of cost savings, discuss how to save on retirement and pension costs, and avoid exposure to ADA. If you have never been to St. John's, a visit to the facility alone is worth the time and money—especially if you stick around for the reception. The lamb chops and crab cakes are superb.

The food is almost as good as that found at the Grand Hotel, which will be the next venue of the Public Corporation Law Section. The summer seminar will be held June 26, 27, and 28 on Mackinac Island. We are just beginning to line up speakers for this event and are open to any suggestions for topics and volunteers. If you have had to deal with an issue of statewide impact or simply experienced something that would share a laugh, let us know. Or if there is something that you see coming on the horizon that all of us should become prepared to meet, raise the issue now and we can have the experts lined up to teach us what to do. Sometimes the best part of the event comes during the cracker-barrel session when issues are just thrown out and chewed on by everyone in the audience. Chicken ordinances got everyone's attention at Drummond Island.

I am looking forward to seeing all of you at both of these events and hope that, if you cannot attend, you will e-mail your suggestions, questions, issues, or whatever. If you can think of ways we can better serve you, lay it out. The Board is always looking for new ways to serve your best interests.

Call for Articles

We need articles. While the winter edition of the *Quarterly* is usually pretty thin anyway, we were lucky to get a good long lead article for it. Everyone is busy, and we understand that it is not easy to find even a few hours to put together a piece that you want to see in print. But this section is full of talented and knowledgeable attorneys who are generous with their time and who have a lot to say about issues that matter to the rest of us. The *Quarterly* is open to publishing articles of pretty much any length, on any subect relavant to the practice of municipal law. And there are plenty of timely and hot topics waiting to be written about—the preemptive nature of bankruptcy sale orders (seeing a lot of those); incorporating green standards (e.g., LEED, stormwater BMPs) into ordinances; rules, standards, and good forms for public contracts; shared services and interlocal agreements; financial incentives/tax abatements (MEDC, IFEs, MEGA); property tax assessment challenges. Of course, there's always something new on even the usual topics of FOIA, OMA, takings/due process, etc.

Contact either *tschultz@secrestwardle.com* or *sjoppich@secrestwardle.com* with an idea or a proposed article. We need articles.

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strong taint of unlawful discrimination and the denial of equal protection of the law as to the excluded use."[7] In so holding, the Court in *Kropf* rejected the "favored use" analysis which the Court of Appeals had set forth in *Bristow v City of Woodhaven*[8] and *Simmons v Royal Oak*.[9] According to the "favored use" theory, certain land uses were recognized as bearing such a "real, substantial, and beneficial relationship to the public health, safety, and welfare" that any ordinance which was "at odds" with such uses should lose its presumption of validity.[10] The Court in *Kropf* rejected this reasoning, finding that the concept of "favored or preferred use" had "no statutory or case law foundation in this state."[11] The Court made clear that, in order to strip a zoning ordinance of its presumption of validity, one must show that the ordinance *totally* excluded a particular use.[12] Although *Kropf* is generally recognized as one of the first Michigan decisions to acknowledge the rule against exclusionary zoning,[13] the plaintiff in *Kropf* was unable to take advantage of it; the Court found that in the case "presently before us … 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."[14]

Shortly after *Kropf*, the rule against exclusionary zoning was codified in Michigan's zoning enabling statutes, formerly MCL 125.227a (counties), 125.297a (townships), and 125.592 (cities and villages).[15] These statutes expanded the concept beyond the context of housing.[16] Since 2006, the rule has been codified in the current Zoning Enabling Act, MCL 125.3207, as follows: "A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a local unit of government in the presence of a demonstrated need for that land use within either that local unit of government or the surrounding area within the state, unless a location within the local unit of government does not exist where the use may be appropriately located or the use is unlawful." This language is "nearly identical" to that of the earlier zoning enabling statutes.[17]

Courts interpreting these provisions have found that, in order to establish a violation of the statute, "plaintiffs must show (1) that the challenged ordinance has the effect of totally excluding the land use within the [municipality], (2) there is a demonstrated need for the excluded land use in the [municipality] or surrounding area, (3) the use is appropriate for the location, and (4) the use is lawful."[18] Regarding the first element, courts have held that "[t]he total-prohibition requirement of this statute is not satisfied if the use sought by the landowner otherwise occurs within township boundaries or within close geographical proximity."[19] Thus, an ordinance can arguably survive an exclusionary zoning challenge, even when it undeniably prohibits a use, if the use exists in nearby municipalities. Similarly, an exclusionary zoning claim may fail even if the use is not permitted in any district if, for example, the use may be allowed by a special use permit[20]; "a use is not necessarily excluded simply because it does not yet exist in the zoning map."[21] On the other hand, an exclusionary zoning claim may survive summary disposition even when an ordinance specifically provides a zoning district for a certain use; "[a] zoning ordinance that creates a classification but does not apply that classification to any land is exclusionary on its face."[22] Likewise, even where a municipality had created a classification that permitted mobile home parks *and* allocated 96 acres of land to that classification, a plaintiff could satisfy the total prohibition requirement where there was evidence that the only land selected was clearly not desirable for residential use.[23]

Regarding the second element, courts have found that a "demonstrated need" is not established by showing a "self-serving demand."[24] Rather, the need must be public in nature. Moreover, the need may be satisfied by the availability of similar uses outside of the municipality in question.[25] Thus, "every municipality is not required to provide land for every conceivable land use within its geographical boundaries."[26] It has not been uncommon for courts to avoid addressing the demonstrated need element altogether, where they have found that the plaintiff has failed to satisfy the first element (i.e., where no total prohibition of the use has been found).[27]

One important threshold question remains unanswered by the statutes: what constitutes a use for the purposes of exclusionary zoning?[28] The statutes and subsequent case law also left open the question of whether a distinct cause of action for exclusionary zoning may continue to exist under the Michigan Constitution and if so, what the elements of such a claim would be.[29] Notwithstanding these ambiguities, the case law seemed to establish by the early part of this decade that exclusionary zoning claims, in general, would be difficult to advance beyond the summary disposition phase, with courts frequently dismissing such claims under MCR 2.116(C)(10) on the grounds that the use in question had not been "totally excluded."[30] This trend did not appear to be affected by the 2006 amendments to the Zoning Enabling Act.[31]

Hendee v Township of Putnam

One recent opinion which defies this apparent trend is *Hendee v Township of Putnam*.[32] In *Hendee*, the plaintiffs brought several claims based upon Hendee Township's decision not to allow a manufactured housing community

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(MHC) on a 144-acre tract which plaintiffs owned within the township. The tract was zoned agricultural-open space (A-O) district, which allowed, among other uses, farming and the development and construction of single-family residential dwellings on, minimally, ten-acre lots. After various rezoning proposals were unsuccessful, plaintiffs filed suit, alleging that the Township had excluded manufactured housing in violation of MCL 125.3207 and the Michigan Constitution.[33] Following a bench trial, the trial 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 appealed, and the Court of Appeals, in a lengthy but unpublished decision, affirmed in relevant part. As it pertained to exclusionary zoning, the opinion first addressed the question of whether the claims were ripe. This required a discussion of the rule of finality. "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."[34] The Court explained that whether a land use claim is subject to finality turns, in part, upon whether the claim is pled as a "facial" or "as applied" challenge. A challenge to the validity of a zoning ordinance "as applied" is subject to the rule of finality, but finality is not required for facial challenges because such challenges attack the very existence or enactment of an ordinance.[35] However, the Court stopped short of finding that an exclusionary zoning claim would "constitute a facial challenge that is not subject to the rule of finality."[36] Although the Court found "caselaw [which] suggest[ed]" that exclusionary zoning claims would *not* be subject to finality,[37] the Court instead found that the claims were ripe because any further proceedings would have been futile.[38]

Having determined that the exclusionary zoning claims were ripe, the Court began its substantive analysis, finding "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."[39] The Court did, however, proceed to "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."[40] After discussing the four elements of an exclusionary zoning claim under the statute, the Court noted that "demonstrated need" element is based only upon the language of the statute, and is not a required part of the constitutional analysis. The Court, therefore, declined to address the issues associated with demonstrated need.[41] Then, analyzing the total prohibition element, the Court found that "[a]s 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."[42] Although the Township contended that there was no exclusionary zoning because there were some mobile or manufactured homes in the township, the Court of Appeals rejected this argument; the Court found that "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."[43] The Court found that MHC's were totally prohibited despite the fact that the Township's ordinance recognized an MHC zoning classification as a potential permissible use subject to a rezoning request.[44]

The Court of Appeals summarized its holding with respect to the exclusionary zoning claim as follows:

> [W]e 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. … [R]egardless 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 the plaintiffs failed to demonstrate that the township excluded such parks. ... 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.[45]

It is important to note that under the constitutional analysis, the finding of total prohibition does not establish the cause of action. Rather, it merely shifts the burden to the municipality to show the exclusion is justified.[46] Having found that MHCs were effectively and totally excluded from the township, the court in *Hendee* next sought to 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."[47] While the Township persuaded the Court of Appeals that excluding an MHC from plaintiffs' property served a legitimate governmental interest, the Court did not accept the argument that *a township-wide* exclusion of MHCs had a reasonable relationship to the health, safety, or general welfare of the township's citizens. The absence of a demonstrated need was found to be irrelevant to this analysis, not only for the reasons discussed above, but also because "a lack of need is not related to the health, safety, and welfare of the community."[48] Although "claiming that there was no appropriate location for an MHC and that allowing a development in such a situation might endanger the health, safety, and welfare of the citizenry" might have been "an acceptable argument" in the Court's view, this was not the Township's position.[49] The Court found that the "township never truly presented evidence [or] an argument that there was no land anywhere in the township appropriate for an MHC."[50] Therefore, "[t]he 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."[51]

Hon. Pat M. Donofrio authored a detailed dissenting opinion, expressing his disagreement with several aspects of the majority's holding. With respect to exclusionary zoning, Judge Donofrio would have vacated "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."[52] As to the statutory claim, Judge Donofrio agreed with the majority's suggestion that finality is not required to establish ripeness.[53] However, "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."[54] Because the plaintiffs in *Hendee* never submitted their request for an MHC to the Township zoning commission, their statutory claim for exclusionary zoning was not ripe for judicial review in Judge Donofrio's opinion. Judge Donofrio would have found that the constitutional claim was unripe for similar reasons:

> [I]n 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. 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.[55]

Although Judge Donofrio would not have reached the merits of either the constitutional or statutory exclusionary zoning claims, his dissenting opinion addressed the majority's substantive exclusionary zoning analysis. He appears to have done so primarily for the purpose of expressing his opinion that, whether brought solely under the statute or solely under the Constitution, he would analyze the claims in the same manner, utilizing the statutory approach.[56] Judge Donofrio would do so because, in his view, this analysis has been "prescribed by the legislature" and "[i]t is settled law in Michigan that the zoning and rezoning of property are legislative functions."[57] Zoning is a recognized legislative function that is provided for by statute and therefore, the legislature should properly be allowed to define its terms, requirements, and review mechanisms. It did so, in Judge Donofrio's opinion, by codifying the concept of exclusionary zoning.

Having opined that plaintiffs should only be able to

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prove an exclusionary zoning claim by satisfying the statutory elements, Judge Donofrio went on to opine that the plaintiffs in this case failed to do so because they did not show a demonstrated need for an MHC in the township. As noted above, the majority affirmatively declined to address the issue of "demonstrated need," stating that it relates only to a statutory analysis and is not required as part of the constitutional exclusionary zoning analysis it found to be applicable. However, because Judge Donofrio felt that all exclusionary zoning claims should be subject to the statutory analysis, he would have reached the issue of "demonstrated need." With respect to the issue of demonstrated need, plaintiffs offered expert testimony, over the Township's objection, from Brian Franz. In Judge Donofrio's view, Mr. Franz's testimony was inadequate to establish demonstrated need because he "prepared only 'demand analysis' as opposed to a 'demonstrated need analysis.'"[58] This "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 Franz only considered a six-mile radius surrounding plaintiffs' property and plainly failed to consider 'the township or surrounding area' as required by the statute."[59] The record further displayed that Franz 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. For these and other reasons detailed in Judge Donofrio's dissenting opinion, he would have excluded Franz's "proposed expert testimony as unreliable," and because "Plaintiffs provided no other evidence regarding demonstrated need at trial[,] … [they] failed to establish that there is a demonstrated need for the excluded land use in the township or surrounding area…."[60]

D.F. Land Development, L.L.C. v Charter Township of Ann Arbor

In a more recent opinion, another Court of Appeals panel (which, interestingly, included Judge Donofrio along with two judges who were not involved in *Hendee*) explored some of the same exclusionary zoning issues addressed in *Hendee*: namely, ripeness and the dichotomy between statutory and constitutional exclusionary zoning claims. In *D.F. Land Development, L.L.C. v Charter Township of Ann Arbor,*[61] plaintiff owned a 54-acre tract of land located off US-23 in Ann Arbor Township, between Ford Road and Earhart Road, which plaintiff sought to have rezoned from general agricultural (A-1) to low density, multiple-family residential (R-7). After plaintiff's request for rezoning was denied, plaintiff sought multiple use variances, all of which the Township also denied. Plaintiff then filed its complaint. Count II of that complaint alleged "exclusionary zoning—denial of equal protection and substantive due process."[62] The parties filed cross-motions for summary disposition, with the Township asserting that plaintiff's claims were not ripe for judicial review because plaintiff did not pursue alternative forms of relief such as a planned unit development (PUD)[63] or a conditional zoning agreement under MCL 125.3405. At the hearing on the motion, plaintiff asserted that its count II constituted a 'facial challenge" to the zoning ordinance because although R-7 zoning is permitted, no land in the township has ever been zoned R-7. In response to the Township's ripeness argument relative to the PUD, plaintiff replied that it was not eligible for a PUD under the ordinance because the density plaintiff was asking for was inconsistent with the Township's master plan and because the ordinance states that a PUD cannot be granted where multi-family housing is proposed. Plaintiff maintained that finality had been achieved because plaintiff applied for a variance after being denied rezoning. Defendant denied that the PUD option was unavailable to plaintiff because "if the PUD process that exists does not satisfy their requests, then the Township Board through appropriate processes can change these PUD requirements." Defendant contended that plaintiff's claims were not ripe because it could have asked for a change to the PUD ordinance. Defendant also argued that the fact that plaintiff sought a variance is not dispositive because "what they sought was a variance that would allow the development that had already been denied." Defendant argued that plaintiff was bound to seek the minimum variance that would put its property to productive use.[64]

The trial court, relying upon *Braun v Ann Arbor Twp*,[65] found that plaintiff was required to seek the minimum variance. The court held that the claims were not ripe because PUD classification was a possibility. Specifically with respect to count II, the court dismissed same because it "is one of exclusionary zoning and as such it is not merely a facial challenge."[66]

The Court of Appeals reversed and remanded. With respect to the exclusionary zoning claim, the Court held that, in light of the plain language of the statute, the *Braun* ripeness test cannot apply to statutory exclusionary zoning challenges. The Court reasoned that, "[w]hen 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."[67] This is because the holding in *Braun* requires plaintiffs to establish finality with regard to a takings claim before the entire matter is ripe for judicial review, by requiring that plaintiffs seek "alternative uses of the property as zoned and was denied," or apply for the "the minimum variance that is necessary to place the land in productive economic use within the zoning classification." The court in *D.F. Land Dev*. found that, in exclusionary zoning claims brought under the statute, making this showing would be impossible.[68] Under the statutory analysis, the denial of a petition to rezone a single parcel does not show that the municipality has reached a final decision on whether to totally prohibit a particular use within an entire township, but only as to that parcel of land for which the request had been submitted. In other words, the Court held, 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."[69]

Even though the Court did not require "*Braun*-type" finality for exclusionary zoning claims, the Court added that a plaintiff nonetheless "remains obligated to first submit a 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 a plaintiff need not satisfy the stringent requirements of the *Braun* test, a plaintiff 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."[70] Because the plaintiff here submitted its request for rezoning to the Township zoning commission, and also sought a variance before the ZBA, plaintiff's statutory claim for exclusionary zoning was ripe for judicial review.

The *D.F. Land Dev*. panel went on to acknowledge that plaintiff had pled a separate exclusionary zoning claim under the Michigan Constitution. The Court found that this claim was also ripe for nearly the same reasons as the statutory claim:

> 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. 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."[71] 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. And "[f]inality is not required for facial challenges because such challenges attack the very existence or enactment of an ordinance."[72]

Although the Court held that "*Braun*-type" finality did not apply to constitutional exclusionary zoning claims either, the Court again held that trial courts "must have some manner available to [them] to determine whether the zoning ordinance at issue indeed is 'invalid on its face.'"[73] Thus, in constitutional exclusionary zoning claims, a plaintiff must submit a zoning request for consideration before the proper administrative body for a suitability and needs determination for the claim to be ripe for judicial review. In so holding, the panel echoed (without citing) Judge Donofrio's dissenting opinion in *Hendee*:

> [W]hether 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. *Landon* also applies in exclusionary zoning claims brought under the constitution. Thus, like statutory exclusionary zoning claims, while a plaintiff need not satisfy the stringent requirements of the *Braun* finality test, a plaintiff seeking constitutional redress must first seek and receive an administrative determination on a request regarding a particular parcel of land.[74]

Again, because the plaintiff here submitted a request for rezoning to the Township zoning commission, as well as a request for a variance before the ZBA, its constitutional claim for exclusionary zoning was ripe for judicial review.

Because the case was dismissed by the trial court exclusively on ripeness grounds, the Court of Appeals was not called upon to decide, and did not discuss, what the substantive elements of a constitutional, as opposed to a statutory, exclusionary zoning claim would be. However, in addressing ripeness, the Court did analyze the two theories separately, suggesting that there might be some substantive difference as the majority found in *Hendee*.

Conclusion

For many years, exclusionary zoning claims seemed to be viable only in the most extreme cases, with such claims most commonly being raised ancillary to other land use challenges. Often, the theory was either dismissed on summary disposi-

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tion, abandoned by the plaintiff, or some combination of the two.[75] Two recent unpublished opinions from the Court of Appeals, however, suggest that at least one common defense to such claims, "*Braun*-type" finality, may no longer be available. Moreover, the opinion in *Hendee* suggests, for the first time, that plaintiffs may not have to show a demonstrated need for their proposed land use when pleading a constitutional, rather than statutory, exclusionary zoning claim. However, neither *D.F. Land Dev.* nor *Hendee* carry any precedential weight, and a closer look at the two opinions, as well as the fundamental elements of the claim under either a statutory or constitutional theory, reveals that exclusionary zoning claims remain very defensible. Under either theory, the plaintiff must still show a total exclusion of the land use in question, which has proven to be an onerous task.[76] Even if a showing of "demonstrated need" is not required to support constitutional exclusionary zoning claims, the advantage this may provide to plaintiffs could be illusory, as a showing of total prohibition under such a theory merely shifts the burden. In those limited cases where a total prohibition is proven under a constitutional theory, the municipality will still have the opportunity to demonstrate that the total prohibition of the use in question is justified. On the other hand, in those limited cases where a total prohibition is proven under a statutory theory, the municipality is still free to argue that a "demonstrated need" has not been shown. In addition, the holding of *D.F. Land Dev.* that "*Braun*-type" finality does not apply to such claims has yet to be adopted in a published opinion.[77] Even if "*Braun*-type" finality is rejected in the exclusionary zoning context, it appears that there would still be a watered-down ripeness defense available, as *D.F.* Land Dev., as well as Judge Donofrio's dissent in Hendee, suggest that plaintiffs would likely be required to at least seek and receive an administrative determination regarding their proposed use for a particular parcel prior to filing suit.[78]

About the Author

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Endnotes

1 463 Mich 675, 684 (2001).

2 See, e.g., *Houdek v Centerville Twp*, 276 Mich App 568, 575 (2007).

3 See, e.g., *Grand Blanc Venture L.L.C. v Charter Township of Grand Blanc*, unpublished per curiam opinion of the Court of Appeals, decided June 10, 2008 (No. 276311), at 6 n.14 (plaintiff pled an exclusionary zoning in its complaint but abandoned the theory on appeal); *JGA Development v Charter Township of Fenton*, unpublished per curiam opinion of the Court of Appeals, decided August 21, 2008 (No. 277243), at 2 (plaintiff pled an exclusionary zoning claim, but stipulated to dismissal of the claim prior to the adjudication of plaintiff's other zoning claims).

4 See, e.g., *D.F. Land Development, L.L.C. v Charter Township of Ann Arbor*, unpublished per curiam opinion of the Court of Appeals, decided October 23, 2008 (No 275859); *Hendee v Township of Putnam*, unpublished per curiam opinion of the Court of Appeals, decided August 26, 2008 (No 270594).

5 Fisher, et al., *Michigan Zoning, Planning, and Land Use* (Ann Arbor: Institute of Continuing Legal Education, 2008), § 1.40, p. 35.

6 *Id.*, citing *Southern Burlington County NAACP v Mount Laurel*, 67 NJ 151; 336 A2d 713 (1975) and *Appeal of Girsh*, 437 PA 237; 263 A2d 395 (1970).

7 391 Mich 139, 155-156 (1974) (emphasis in original).

8 35 Mich App 205 (1971).

9 38 Mich App 496 (1972).

10 *Bristow, supra* at 210-211. It has long been the rule under Michigan law that a zoning ordinance comes to the court "clothed with every presumption of validity." *Brae Burn, Inc. v City of Bloomfield Hills*, 350 Mich 425, 432 (1957). See also *Newman Equities v Meridian Township*, 264 Mich App 215 (2004).

11 *Kropf, supra* at 155-156.

12 Id.

13 See Fisher, et al., *supra* at § 1.40, p. 35; Crawford, *Michigan Zoning and Planning* (3rd Ed) (Ann Arbor: Institute of Continuing Legal Education, 1988), § 1.07, p. 42-43.

14 *Id.* at 156.

15 Fisher, et al., *supra* at § 1.40, p. 35; Crawford, *supra* at § 1.07, p. 42-43.

16 Fisher, et al., *supra* at § 1.40, p. 35.

17 See, e.g.,, *Houdek, supra* at 574 n.1.

18 *Id.*, citing *Adams Outdoor, supra* at 684 (cities). See also *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154 (2003) (townships).

19 *Guy v Brandon Twp*, 181 Mich App 775, 785-786 (1989).

20 *Taylor v City of Westland*, unpublished per curiam opinion of the Court of Appeals, decided September 20, 2007 (No. 269454), leave denied **480 Mich 1033 (2008).** The plaintiff in *Taylor* operated two businesses at the same location, a towing service for stranded vehicles, and a vehicle storage and refurbishing service. The City took the position that the applicable zoning classification did not permit plaintiff's businesses, and that special land use approval was required. Plaintiff filed suit, arguing, among other things, that the City's zoning ordinance totally prohibited these land uses because "no district within the city allow[ed] their proposed uses without a special land use permit." *Id.* at 5. The Court of Appeals rejected this argument, finding that "[e]ven if plaintiffs are correct that the city allows for their proposed uses only by special land use permit, this Court has held that a zoning ordinance permitting a use only by a special use permit does not violate [exclusionary zoning]…. Accordingly, plaintiffs cannot establish that the City's zoning decisions had the effect of totally prohibiting their proposed land uses…." *Id.*, citing *Landon, supra* at 172-173.

21 *D.F. Land Development, supra* at 8, citing *Landon, supra* at 168-169.

22 *Anspaugh v Imlay Twp*, 273 Mich App 122, 127-128 (2006), vacated 480 Mich 964 (2007). While *Anspaugh* was vacated, on unrelated grounds, the relevant portion of the Court of Appeals' opinion in *Anspaugh* relied upon *Smookler v Wheatfield Twp*, 394 Mich 574, 577 (1975) where Justice Williams, writing a concurring opinion (which happened to be the only opinion), stated: "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*.

23 *English v August Township*, 204 Mich App 33 (1994). See also Fisher, et al., *supra* at § 9.6, p. 273 (discussing *English*).

24 *Outdoor Systems, Inc v City of Clawson*, 262 Mich App 716, 721 (2004). See also *Houdek, supra*.

25 See, e.g., *ACC Industries v Charter Township of Mundy*, unpublished per curiam opinion of the Court of Appeals, decided February 24, 2004 (No. 242392): "The trial record…included the testimony of the township's expert planner that there was no 'great demand' for [mobile homes] … when the housing market was evaluated by looking beyond the township boundaries, there was insufficient demand for plaintiff's proposed housing development to require a zoning classification change. The trial court properly weighed evidence regarding the appropriate housing market, data regarding absorption rates, and the need for additional mobile home parks in the area. Plaintiff's own proofs showed that Genesee County has the largest percentage of persons living in mobile home parks anywhere in the state, and that the percentage of persons living in mobile home parks in Mundy Township is higher than the state average. Such testimony undercuts plaintiff's exclusionary zoning claim." See also *Houdek, supra* (holding that the ability of the Grand Traverse Septage Treatment Plant ("GTSTP") to receive and treat Centerville Township's septic waste, along with the existence of another available facility in Benzie County, defeated plaintiff's assertion of a demonstrated need for additional septage disposal sites in Centerville Township).

26 Fisher, et al., *supra* at § 9.6, p. 273, citing *Countrywalk Condos v City of Orchard Lake Village*, 221 Mich App 19 (1997). In *Countrywalk*, the City of Orchard Lake was zoned almost exclusively for single-family use and contained no mobile home parks or multi-family units. However, Countrywalk's due process and equal protection challenge to the ordinance failed, as the City was able to support its exclusion of multi-family uses with legitimate governmental concerns regarding traffic congestion and safety. *Countrywalk, supra* at 24-25. However, it should be noted that because the ordinance did exclude multi-family dwellings, the ordinance was not *presumed* valid. *Id*. at 23. Rather, the City had to (and did) satisfy its burden of showing that "the exclusion has a reasonable relationship to the health, safety, or general welfare of the community." Id. at 24.

27 *Adams Outdoor, supra* at 685-686; *Landon, supra* at 167 ("In the present case, the trial court did not reach the issues regarding whether there was a demonstrated need and appropriate location for the use, ruling instead that there was no total exclusion. The statute's language clearly precludes only total exclusion."); *Bell River Assoc v China Charter Twp*, 223 Mich App 124, 136 (1997). See also *Johnecheck v. Bay Township*, 119 Fed Appx 707, 708 (6th Cir 2004) (applying Michigan law and finding that defendant's ordinance did not totally prohibit wind turbine generators; question of demonstrated need therefore did not need to be addressed).

28 Fisher, et al., *supra* at § 1.40, p. 35. See also *Adams Outdoor, supra* at 684 n.10: "Defendant contends that billboards in general do not constitute a 'use' within the zoning context. Because of our resolution in this case, we can assume without deciding that billboards constitute such a 'use.'"). See also *Johnecheck, supra* (assuming, without deciding, that wind turbine generators are a "use" within the zoning context).

29 *Hendee, supra* at 10 (Donofrio, J., dissenting). See also *Johnecheck, supra* (acknowledging that plaintiffs had also pled an exclusionary zoning claim under the state constitution, but dismissing that claim with little analysis, finding that plaintiff could not "meet the difficult burden of demonstrating no reasonable relationship to a legitimate governmental interest," citing *Landon, supra*).

30 See, e.g., *Landon, supra* at 173, 178; *Schoolcraft Egg, Inc. v Schoolcraft Twp*., unpublished per curiam opinion of the Court of Appeals, decided August 11, 2000 (No. 216268), at 8 (holding that plaintiff's exclusionary zoning claim was properly dismissed because the ordinance "restricted" but did not "exclude" intensive livestock operations). Interestingly, the Court of Appeals affirmed the dismissal of plaintiff's exclusionary zoning claim in *Schoolcraft Egg* while at the same time finding that plaintiff had presented triable due process and equal protection claims. *Id.*

31 See, e.g., *Houdek, supra* at 574 n.1.

32 Unpublished per curiam opinion of the Court of Appeals, decided August 26, 2008 (No 270594).

33 Plaintiffs also brought other constitutional claims which, other than the constitutional exclusionary zoning claim, are beyond the scope of this article.

34 *Id*. at 4, citing, among other cases, *Paragon Properties Co v Novi*, 452 Mich 568, 577 (1996) and *Braun v Ann Arbor Charter Twp*, 262 Mich App 154, 158-159 (2004).

35 *Hendee, supra* at 4-5 (citations omitted).

36 *Id*. at 5.

37 The cases cited by the Court included *Landon, supra* at 177 and *Countrywalk, supra* at 22.

38 *Id*. For the proposition that futility represents an exception to the rule of finality, the Court cited *L & L Wine & Liquor Corp v Liquor Control Comm*, 274 Mich App 354, 358 (2007) and *Turner v Lansing Twp*, 108 Mich App 103, 108 (1981).

39 *Hendee, supra* at 9.

40 *Id.*

41 *Id*. at 10.

42 *Id.*

43 *Id.*

44 *Id*. at 12.

45 *Id*. at 14-15, discussing *Kirk v Tyrone Twp*, 398 Mich 429 (1976).

46 *Hendee, supra* at 16-18.

47 *Id*. at 16, citing *Landon Holdings, supra* at 176 and *Countrywalk, supra* at 24.

48 *Hendee, supra* at 16.

49 *Id*. at 18.

50 *Id.*

51 *Id.*

52 *Hendee, supra* at 10 (Donofrio, J., dissenting). As discussed above, the majority held that "established need" is only a required element of a statutory exclusionary claim. However, as will be discussed below, Judge Donofrio would have *only* applied the statutory analysis and therefore, plaintiffs' inability to satisfy this element would have been fatal to their exclusionary zoning claims, in his view.

Continued on next page

Exclusionary Zoning . . .
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53 *Id.* at 8.

54 *Id.*

55 *Id.* at 9.

56 *Id.* at 10.

57 *Id.*, citing *Sun Communities v Leroy Twp*, 241 Mich App 665, 669 (2000) and *Arthur Land Co, LLC v Otsego Twp*, 249 Mich App 650, 662 (2002).

58 *Hendee, supra* at 11 (Donofrio, J., dissenting).

59 *Id.*

60 *Id.*

61 Unpublished per curiam opinion of the Court of Appeals, decided October 23, 2008 (No 275859).

62 *Id.* at 2.

63 See MCL 125.3503.

64 *D.F. Land Dev., supra* at 2.

65 262 Mich App 154 (2004).

66 *D.F. Land Dev., supra* at 3.

67 *Id.* at 8.

68 The statute at issue in *D.F. Land Dev.* was former MCL 125.297a. However, the Court noted that the current statute "recodified" the "prohibition against exclusionary zoning" with "nearly identical language." *D.F. Land Dev., supra* at 7 n.3.

69 *Id.* at 8.

70 *Id.*, citing *Landon, supra* at 168-169.

71 *D.F. Land Dev., supra* at 9, citing *Smookler, supra* at 581.

72 *D.F. Land Dev., supra* at 9, citing *Paragon, supra* at 577.

73 *D.F. Land Dev., supra* at 9.

74 *Id.* at 9-10. Compare *Hendee, supra* at 10 (Donofrio, J., dissenting).

75 See, e.g., *Grand Blanc Venture, supra* at 6 n.14 (plaintiff pled exclusionary zoning in its compliant but abandoned the theory on appeal); *JGA Development, supra* at 2 (plaintiff pled an exclusionary zoning claim, but stipulated to dismissal of the claim prior to the adjudication of plaintiff's other zoning claims).

76 *Adams Outdoor, supra* at 685-686; *Landon, supra* at 167. ("In the present case, the trial court did not reach the issues regarding whether there was a demonstrated need and appropriate location for the use, ruling instead that there was no total exclusion. The statute's language clearly precludes only total exclusion."). *Bell River Assoc v China Charter Twp*, 223 Mich App 124, 136 (1997). See also *Johnecheck, supra* (applying Michigan law and finding that defendant's ordinance did not totally prohibit wind turbine generators; question of demonstrated need did not need to be addressed).

See, e.g., *Adams Outdoor, supra* at 684; *Landon, supra* at 173, 178; *Schoolcraft Egg, supra* at 8 (holding that plaintiff's exclusionary zoning claim was properly dismissed because the ordinance "restricted" but did not "exclude" intensive livestock operations). See also *Johnecheck, supra.*

77 See *Hendee, supra* at 5-6.

78 *D.F. Land Dev., supra* at 9-10; *Hendee, supra* at 8-9 (Donofrio, J., dissenting).

State Law Update

By Ronald D. Richards Jr. and Josh Richardson, Foster, Swift, Collins & Smith, PC

Court Strikes Down Township Ordinance Regulating Sale of Pesticides

War-Ag Farms, LLC v Franklin Township, unpublished opinion per curiam of the Court of Appeals (Docket No. 270242, dec'd 10/7/08)

Franklin Township denied a conditional use permit (CUP) that the plaintiffs sought to sell and distribute seed, pesticides, and fertilizers from a 20-acre parcel of agriculturally-zoned property as part of their 1,500-acre farming operation. The Township's denial was based on its ordinance allowing sales and distribution only on an operating farm when the sales are secondary and incidental to the principal farming operation. Because the Michigan Department of Agriculture (Department) already issued the plaintiffs the requisite licenses to sell seed, pesticide, and fertilizer from the same location as involved in the CUP request, the plaintiffs sued the Township. The Court of Appeals held that this ordinance was preempted by NREPA.

As with all preemption issues, the Court relied heavily on the language in the underlying statute, the NREPA. Applying that statutory language, the Court held that the NREPA does allow some regulation of farm chemicals but that the Township's ordinance was not acceptable. Specifically, it found that the Township's ordinance conflicted with the Department's decision to grant to the plaintiffs a license to sell and distribute pesticides and fertilizers at the very location at issue in the CUP. It also found the ordinance invalid because it set standards above and beyond that which the NREPA set and was not approved by the Commission on Agriculture.

Court Upholds Township's Denial of Variance to Build a Church

Great Lakes Society v Georgetown Charter Twp, (Docket Nos. 270031/280574, dec'd 10/3/08)

Great Lakes Society (GLS), a religious organization, sought a special use permit (SUP) to construct a two-story

building for worship services and other activities. The building was to consist of a sanctuary for worship services, a ministry area, a tape or publication ministry area with recording studio, a training ministry area, an administration area, health area, youth center, and a garage. While GLS's SUP request was pending, the Township amended its zoning ordinance to require that a church built in a residential district must have 200 feet of frontage on a major street. The zoning board of appeals denied GLS's subsequent variance request from the frontage requirement. GLS's SUP request was also denied. GLS then sued the Township, raising various claims.

The Michigan Court of Appeals sided with the Township, holding that the Township's amended ordinance, which included the new 200-foot frontage requirement, was valid. The Township did not adopt the amendment to merely concoct a defense. Instead, the Township adopted the amendment to merely clarify the Township's longstanding intent to always require 200 feet of street frontage.

The Court also held that the Township zoning board of appeals' denial of GLS's variance request was proper. Indeed, the Court noted that the Township's decision was competently made because (1) the purpose of the 200-foot requirement was to ensure adequate sight distance for traffic entering and exiting the site; (2) GLS's application could present traffic and public safety issues; and (3) GLS did not meet all requirement in the ordinance to get a variance.

Finally, the Court held that the variance denial did not violate the Religious Land Use and Institutionalized Persons Act. The denial did not substantially burden GLS's religious exercise since GLS could establish a church on another location so long as it follows the 200-foot frontage requirement and otherwise complies with the ordinance.

Challenge to Validity of Special Assessments Is Within Tax Tribunal's Exclusive Jurisdiction

Walton v Whitewater Township, unpublished opinion per curiam of the Court of Appeals (Docket No. 274969, dec'd 10/16/08)

After receiving two separate petitions, one to pave four roads and the other to pave five roads, Whitewater Township adopted a resolution to create a special assessment district to pave five roads within the township. The estimated cost of the project was $2,500,000.00. In adopting the resolution, the Township determined that the petitions were properly signed by property owners whose frontage constituted more than 50 percent of the improvement's total frontage, as required by MCL 41.723(3)(b). Additionally, the Township allowed certain owners of larger parcels of land within the special assessment district to reduce their share of the special assessment by granting the Township recordable covenants waiving development rights on their property for a 15-year period.

The plaintiffs, property owners affected by the special assessment, sued for injunctive relief after the Township adopted the resolution establishing the assessment roll and duration of the special assessment. The plaintiffs argued that the special assessment was invalid because a majority of the petitioners signed the petition to pave only four roads, rather than five. The plaintiffs also challenged the Township's decision to allow certain property owners to reduce their share of the special assessment by waiving their development rights, because this increased the remaining property owners' shares of the assessment.

The Township sought summary disposition, arguing that the trial court lacked subject matter jurisdiction over the plaintiffs' action. The trial court agreed that the Tax Tribunal had exclusive jurisdiction under MCL 205.731(a), and granted the Township's motion.

The Court of Appeals upheld the trial court's decision. It held that under MCL 205.701 *et seq.*, the Tax Tribunal "generally has exclusive jurisdiction over a challenge to a governmental unit's decision concerning a special assessment for a public improvement, even when the challenge is couched in constitutional terms…." It further held that, despite the labels used by the plaintiffs, their claims ultimately challenged whether the Township's decisions concerning the special assessment were authorized by statute. As such, the Tax Tribunal had exclusive jurisdiction, and the trial court properly granted summary disposition in the Township's favor.

Court Finds No Constitutional Taking Where Alleged Diminution of Property Value Is Caused by Fluctuating Market Values During Government Decision-Making Process

Doorenbos v Alpine Township, unpublished opinion per curiam of the Court of Appeals (Docket No. 279998, dec'd 10/16/08).

In 1987, the plaintiff bought about 168 acres of agriculturally zoned farmland in Alpine Township. The property was actively farmed until 2002, when the plaintiff sold a 45-acre parcel of his land to a development company. The plaintiff and the development company then applied to the Township to rezone the property to low-density residential. The Township granted the rezoning request in August 2002. But in October of 2002, township citizens petitioned for a referendum election, through which the rezoning request was ultimately rejected. Before the referendum election, the development company deeded the property back to the plaintiff. In December of 2004, the plaintiff sued the Township and argued that the ordinance as applied violated his substantive due process and equal protection rights, and was an unlawful taking. After filing suit, the plaintiff reapplied with the Township to rezone the parcel to low-density residential. This request was ultimately approved in 2006. No petitions for referendum election were

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State Law Update

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filed. The Township then sought summary disposition, arguing that no unconstitutional taking had occurred. The trial court granted the Township's motion, and the plaintiff appealed.

On appeal, the plaintiff argued that he was entitled to just compensation for the temporary taking of the 45-acre parcel from the time of the township citizens' petitions for referendum election to the time the rezoning request was actually approved in 2006, because he was "deprived of economically viable use of the property" during that time. The Court of Appeals disagreed, however.

The Court held that summary disposition was properly granted in the Township's favor. In applying the balancing test of *Penn Central Transportation Co v New York City*, 438 US 104 (1978), the Court held that the plaintiff failed to establish a constitutional taking of property. It further held that the zoning ordinance applied equally to all similarly situated property owners and, because the Township did not unreasonably delay in processing the plaintiff's rezoning application, no temporary taking of the plaintiff's property occurred for which just compensation was required. The Court clarified that "[m]ere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership,'" and do not constitute a constitutional taking.

February 6, 2009 Public Corporation Section's Winter Conference at St. John's Conference Center, Plymouth, Michigan

"Thriving on a Dime: Practical Advice for Public Agency Attorneys in Financing and Contracting Services in a Tight Economy"

8:30 a.m. to 9:00 a.m. Check in and Continental Breakfast serving chilled juices, fresh fruit, assorted yogurts, a variety of bagels and house-baked pastries.

9:00 a.m. - 10:00 a.m. ***Helping Local Government in Today's Environment....Perspectives from the Finance Community***

Presenter: Frank W. Audia, CPA, Partner, Plante & Moran, PLLC

Frank Audia specializes in auditing and consulting for governmental entities and related organizations. He is the leader of the Plante & Moran's Governmental Group which provides service to over 200 governmental units and related entities in Michigan. Frank has completed a number of special projects for governmental entities in the areas of utility rates, internal control systems, multi-year planning, right-of-way issues and municipal finance matters. Frank also serves as an expert witness on behalf of governmental units on a variety of subjects. Frank has completed several studies of the fiscal health of Michigan local governments for the Michigan Municipal League, and has participated in various legislative initiatives. Frank is also active in the Michigan Governmental Finance Officers Association and serves on their Legislative Committee. Frank has a Bachelor of Business Administration from the University of Michigan (Dearborn campus) and has been with Plante & Moran for more than 20 years working with local government.

BREAK

10:30 a.m.- 12:00 p.m. ***Design and Construction Contracts – Strategies for Controlling Costs While Protecting the Public Agency.***

Presenters: Don M. Schmidt, Miller, Canfield, Paddock and Stone, P.L.C.
John Sier, Kitch Drutchas Wagner Valitutti & Sherbrook
CDPA Architects, Inc.

Don M. Schmidt, a Principal with the firm, specializes in government and nonprofit representation. His areas of expertise include intergovernmental agreements, economic development projects, PA 425 conditional land transfers, municipal utility matters, annexation, Freedom of Information Act and Open Meetings Act issues, elections, construction contracts and bidding and contracting matters. Mr. Schmidt has been a featured speaker at numerous seminars and conferences.

John Sier, a Principal with the firm, and head of the firm's commercial litigation practice. concentrates his practice in dispute avoidance and resolution of commercial, health care and construction contract issues as the head of the firm's commercial litigation group. In the construction industry, Mr. Sier has experience in analyzing legal aspects of various project delivery methods including drafting construction contracts as well as assisting in dispute

resolution and project completion. In health care, Mr. Sier has handled matters involving staff privileges, Medicare and third-party payer reimbursement issues as well as HIPAA compliance issues. He received his Juris Doctor and Master of Arts in Mass Communication and Journalism from Drake University Law School and Graduate School in 1986. He has published articles and presented seminars on construction, health care and commercial issues.

CDPA Architects, Inc. A national architecture/egineering firm with a diverse and wide range of capable in-house staff. CPDA has managed and directed numerous public agency construction projects of varying size and scope bringing together architects, designers, technician and specialized consultant to provide its clients with expert design, technical engineering and responsible management.

LUNCH

Continue collegial discussions of morning topics over a taste of New Orleans of creole catfish, vegetable etoufee, smoked pork loin and pecan pie.

1:00 p.m. - 2:30 p.m. ***Retirement Benefits and Funding Options***
Presenter: Amy Christen, Dykema

Amy Christen practices in all areas of employee benefits law. Her experiences involve compliance and design of qualified retirement plans (including governmental and private sector defined benefit plans and profit sharing and 401(k) plans), sections 457 or 403(b) plans, SEP or other nonqualified plans, and health and other welfare plans (including VEBAs, health reimbursement arrangements, health savings accounts, flexible spending accounts, cafeteria plans, severance plans, COBRA and HIPAA issues); advising clients on employee benefit concerns in mergers and acquisitions; and ERISA litigation.

BREAK

2:45p.m. - 3:30 p.m. ***Title II of the ADA: Constructing Accessible Public Rights-of-Way and Reducing Exposure for Plaintiffs' Attorney Fees in the Process***
Presenter: **Abigail Elias**, City of Ann Arbor

Abigail Elias is Chief Assistant City Attorney for the City of Ann Arbor, Michigan. Since getting her J.D. from Harvard Law School, her law career has included work in the Civil Rights Division of the U.S. Justice Department, the City of Detroit Law Department, including six years as Deputy Corporation Counsel, and a private firm in Detroit doing commercial litigation.

3:30 p.m. –4:00 p.m. *ADA Roundtable*

- Abigail Elias, Chief Assistant City Attorney, City of Ann Arbor
- Susan Fitzmaurice, ADA Coordinator, City of Dearborn
- Cathy McAdams, Chair, City of Dearborn Commission on Disability Concerns

Susan Fitzmaurice has been a board member of numberous disability organizations, including the Washtenaw Association for Community Advocacy and United Cerebral Palsy-Detroit. She is also an active member of Not Dead Yet and a prolific author on disability concerns. Ms. Fitzmaurice has made numerous presentations to regional, state and international conferences around issues of disability.

Registration

Winter Conference, February 6, 2009

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Address:_____
City:_____ State: _____Zip: _____
Telephone: (_____) _____
Enclosed is check # _____ for $_____
Please make check payable to: State Bar of Michigan

Please bill my: ❑ Visa ❑ MasterCard

Card #:_____
Expiration Date:_____
Please print name as it appears on credit card:

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Authorized Signature: _____

Cost:

- ❑ $75 for government employees
- ❑ $125 for Public Corporation Law Section members
- ❑ $150 for non-section members
  - ❑ Join the Public Corporation Law Section and get a $35 discount on the seminar.

Mail your check and completed registration form to:
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(ONLY if paying by credit card) the completed form and credit card information to:
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For a refund, cancellations must be received in writing at least 72 hours in advance of the event.

Opinions of Attorney General Mike Cox

By George M. Elworth, Assistant Attorney General

Editor's note: Assistant Attorney General George M. Elworth of the Finance Division and a member of the Publications Committee furnished the text of the headnotes of these opinions. The full text of these opinions may be accessed at www.mi.gov/ag.

Mental Health Code

Procedure for admission of a minor court ward to a hospital for psychiatric treatment

In the case of a minor who is a temporary ward of the court under MCL 712A.2 et seq, a child care facility serving as the designee of the Michigan Department of Human Services and providing placement, care, and supervision for the court ward as a person in loco parentis is not required to obtain a court order before requesting emergency admission of the ward to a hospital for psychiatric treatment if the child care facility has reason to believe the child is a "minor requiring treatment" as defined in section 498b(b)(i) and (ii) of the Mental Health Code, MCL 330.1498b(b)(i) and (ii) and that the minor presents a serious danger to self or others. Nor is a court order required to admit the minor ward to the hospital if the appropriate health professionals determine that emergency admission is necessary under section 498h of the Mental Health Code, MCL 330.1498h. If it is determined by the appropriate health professionals that emergency admission of the minor ward for psychiatric treatment is not necessary, the child care facility, as the Department's designee and person in loco parentis, must obtain a court order empowering the facility to request admission of the minor to a hospital in accordance with section 498d(3)(a) of the Mental Health Code, MCL 330.1498d(3)(a).

Opinion No. 7220
October 20, 2008

Prosecuting Attorneys

Process for appointing special prosecuting attorney based on disqualifying conflict of interest or other inability to serve

If a county prosecuting attorney determines that he or she is disqualified by reason of a conflict of interest or is otherwise unable to perform his or her duties, the prosecuting attorney has a duty to file a petition with the attorney general requesting the appointment of a special prosecuting attorney under MCL 49.160(1).

Regardless of whether a petition is filed under MCL 49.160(1), the attorney general has authority under MCL 49.160(2), other statutes including MCL 14.28, MCL 14.30, and MCL 14.101, and the common law, to make an independent determination regarding whether a prosecuting attorney is disqualified or otherwise unable to serve in a matter. If the attorney general determines that a prosecuting attorney is disqualified or is otherwise unable to serve, the attorney general may elect to proceed in the matter or may appoint a special prosecuting attorney to perform the duties of the prosecuting attorney in the matter.

Opinion No. 7221
November 7, 2008

Urban High School Academies

Application of the exceptions to the single-site requirement in MCL 380.524(1) to urban high school academies

An urban high school academy duly chartered under Part 6C of the Revised School Code, 1976 PA 451, MCL 380.1 et seq, that operates a middle school and a high school at two

different locations with different configurations of grades at the two schools is not subject to the 125-pupil-per-grade restriction or the one-mile-radius limitation contained in section 524(1) of the Code, MCL 380.524(1). The 125-pupil and one-mile-radius conditions only apply under circumstances where the same configuration of grades is operated at more than one site. The academy may operate at multiple sites with different configurations of grades under a single contract if authorized to do so by its authorizing body.

An urban high school academy duly chartered under Part 6C of the Revised School Code, 1976 PA 451, MCL 380.1 et seq, that operates two elementary schools (both offering kindergarten through grade 5), one middle school, and one high school, each at separate locations, may operate under a single authorizing contract provided that the two elementary schools offering the same configuration of grades have a combined total enrollment not exceeding 125 pupils per grade and are both located within a one-mile radius of the academy's central administrative office. The 125-pupil-per-grade restriction and the one-mile-radius limitation contained in section 524(1) of the Revised School Code, MCL 380.524(1), do not apply to either the high school or the middle school because they operate different configurations of grades.

An urban high school academy duly chartered under Part 6C of the Revised School Code, 1976 PA 451, MCL 380.1 et seq, that operates grades 6 through 12 (including a middle school and a high school) at a single location where its central administrative office is also located is not subject to the 125-pupil-per-grade restriction or the one-mile-radius limitation of MCL 380.524(1) because these conditions apply solely to circumstances where the same configuration of grades is offered at multiple locations under a single contract.

Opinion No. 7219
August 27, 2008

Legislative Update

By Kester K. So and Christina Pina, Dickinson Wright PLLC

Over the course of the last several months, the Michigan Senate and House of Representatives have considered numerous bills of municipal interest. The following are summaries of some of those bills:

Laws Enacted

- Hospital Finance. **SB 1304** would amend the Hospital Finance Authority Act to include public entities in the definition of "hospital," and to exclude certain facilities from the definition. Amends 1969 PA 38, MCL 331.33.
- Municipal Investments. **SB 1517** would amend provisions regulating investments to allow the investment officer of a municipality, if authorized by the public corporation, to invest funds in CDs in insured depository institutions in accordance with specified conditions. Amends 1943 PA 20, MCL 129.91.
- School District Investments. **HB 6297** would amend the Revised School Code to allow the treasurer of a school district, if authorized by the school board, to invest funds in CDs in insured depository institutions in accordance with specified conditions. Amends 1976 PA 451, MCL 380.622 and 1223.

Bills Passed by the Senate

- Special Assessments: Police and Fire. **SB 1286** would amend the statute related to police and fire protection, and exclude certain land and premises from special assessments which are exempt from general ad valorem property taxes under the General Property Tax Act and not subject to a specific tax. Amends 1951 PA 33, MCL 41.801.
- New Charter Adoption Periods. **SB 1345, 1346 and 1347** would amend the Home Rule Village Act, statutes relating to the State Boundary Commission, and the Home Rule Cities Act to extend to three years from two during which a new charter must be adopted following an election on the incorporation of a village or of a proposed city, or following the State Boundary Commission's order to approve the proposed consolidation of municipalities. Amends 1909 PA 278, MCL 78.12, 1968 PA 191, MCL 123.1017, and 1909 PA 279, MCL 117.16.
- Township Park Commissions. **SB 1487** would amend a statute relating to township parks and places of recreation by authorizing the dissolution of a township park commission. Amends 1905 PA 157, MCL 41.426g and 426h.
- Regional Convention Facilities. **SB 1630, 1631 and 1632** would create and provide for the incorporation of certain regional convention facility authorities to allow for the acquisition, construction and improvement of certain facilities, would amend the distribution of certain taxes collected as described in the State Convention Facility Development Act, and would

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Legislative Update

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further amend the Liquor Control Code of 1998 to extend the levy of certain taxes until January 1, 2016. Creates new legislation and amends 1985 PA 106, MCL 207.620 and 640 and 1998 PA 58, MCL 436.2207.

Bills Passed by the House of Representatives

- Regional Convention Facilities. **HB 5690**, **5691, 6405** would create and provide for the incorporation of certain regional convention facility authorities to allow for the acquisition, construction, and improvement of certain facilities, would amend the distribution of certain taxes collected as described in the State Convention Facility Development Act, and would amend the Health and Safety Fund Act to provide for certain transfers to the convention facility development fund set forth in the State Convention Facility Development Act for fiscal years ended 2009-2039. Creates new legislation and amends 1985 PA 106, MCL 207.623, 628, 629, 630, 632, and 640 and 1987 PA 264, MCL 141.475.
- Stadia and Convention Facilities. **HB 6515** would amend existing legislation to allow additional counties or municipalities within counties to levy with voter approval an excise tax of up to one percent on restaurants and bars, of up to one percent on hotel and motel rooms, and of up to two percent on rental cars. Amends 1991 PA 180, MCL 207.751.
- Local Building Authority. **HB 6619** amends the Building Authority Act to authorize the refunding of certain bonds, if issued before January 1, 2011. Amends 1948 PA 31, MCL 123.961.
- Tax Increment Finance. **HB 6620** amends the Tax Increment Finance Authority Act to expand the definition of "other protected obligation" and "qualified refunding obligation." Amends 1980 PA 450, MCL 125.1801.
- Refunding Securities. **HB 6736-6740** would amend the Revised Municipal Act to authorize the refunding of certain securities if issued before December 31, 2012, and if such securities are not secured by the unlimited full faith and credit pledge of the municipality without meeting any net present value savings requirement, and amends the Downtown Development Authority Act, the Tax Increment Finance Authority Act, and the Local Development Authority Act to expand the definition of "qualified refunding obligation." Amends 2001 PA 34, MCL 141.2305, 1975 PA 197, MCL 125.1651, 1980 PA 450, 125.1801, and 1986 PA 281, MCL 125.2152.
- Large Project MEGA Credit. **HB 6748** amends the Michigan Business Tax Act to authorize the Michigan Economic Growth Authority (MEGA) to award tax credits to 20 projects that individually cost over $10 million. Up to three of these projects can be outside of a core community. The bill expands the core community criteria to include obsolete or blighted property in a brownfield plan, which is in a city with a population of at least 70,000, and within 10 miles of another Michigan city with a population of at least 500,000. MEGA must give preference to mixed-use projects that satisfy certain criteria. Amends 2007 PA 36, MCL 208.1437.

Bills Introduced in the Senate

- Adult Entertainment. **SB 1612 and SB 1613** would authorize a municipality to enact an ordinance requiring any person employed at an adult entertainment business to obtain a work permit and levy an excise tax from persons engaged in the business of operating an adult entertainment facility.

Bills Introduced in the House of Representatives

- Local Option Transportation Taxes. **HB 6322-6326, House Joint Resolution HHH and HB 5059.** These six bills and one joint resolution would amend the Motor Fuel Tax Act and the Motor Vehicle Code and authorize counties to impose a specific tax on motor fuels, additional taxes on operators' or chauffeurs' licenses, additional real estate transfer taxes, and additional vehicle registration taxes, and amend the Michigan Constitution to allow a county to impose a sales tax on retailers. Amends 2000 PA 403, MCL 207.1022, 1966 PA 134, MCL 207.504 and 207.509, 1949 PA 300, MCl 257.1 to 257.923, creates new acts, and amends the Michigan Constitution.
- Aerotropolis Development. **HB 6502-6511** amend the Michigan Renaissance Zone Act, the Local Development Financing Act, the Plant Rehabilitation and Industrial Development Act, the General Property Tax Act, and the Michigan Economic Growth Authority Act to authorize certain local units of government located adjacent to or within three miles of a qualified airport to form an aerotropolis development corporation in order to attract aerotropolis businesses to the area, authorizes aerotropolis

development zones (like a renaissance zone) and makes them eligible for certain tax increment financing, eligible to receive property tax abatements, permits qualified businesses to receive property tax exemptions for new personal property owned or leased by the business and allows such businesses to be eligible for certain Michigan business tax credits. Amends 1996 PA 376, MCL 125.2681 et seq, 1986 PA 281, 125.2152, 2153, 2154, 2154 and 2162, 1974 PA 198, MCL 207.552 and 554, 1893 PA 206, MCL 211.9f, and 1996 PA 376, MCL 125.2690.

- Confidential Information. **HB 6729** would amend the Confidential Research and Investment Information Act limiting the exemption from disclosure from the Freedom of Information Act of certain intellectual property created by a person employed by a public university or college. Amends 1994 PA 55, MCL 390.1554.

I'll Bet You Didn't Know (or maybe you forgot):

Counting Bowser and Capital Punishment for Fido

A regular feature submitted by Richard J. Figura, Simen, Figura & Parker, P.L.C., Flint and Empire, Michigan

I'll bet you didn't know (or maybe you forgot) that, along with their property tax assessment duties, township supervisors and local assessors are authorized to count the number of dogs in their assessing district. Section 16 of the Dog Law of 1919, 1919 PA 339 [MCL 287.276] provides, in relevant part:

> *The supervisor of each township and the assessor of every city, annually, on taking his assessment of property as required by law, may make diligent inquiry as to the number of dogs owned, harbored or kept by all persons in his assessing district;…*

Why does the assessor have this authority? Clearly, it is to make sure that no dog goes unlicensed. MCL 287.276 goes on to say that the assessor is to make *"a complete report to the county treasurer… on a blank form furnished by the director of agriculture, setting forth the name of every owner, or keeper, of any dog, subject to license under this act, how many of each sex are owned by him, and if a kennel license is maintained such fact shall be also stated."* That report is to be filed with the county treasurer "*on or before June 1."*

Since this service is provided by the assessor for the benefit of the county, the county is responsible for paying a fee to the supervisor or assessor for making the dog count and owner identification. The fee to be paid shall be "*at a rate determined by the board of supervisors for each dog so listed, which sums shall be paid out of the general fund of the county."*

Then, using the list provided by the assessor as to the identity of all dogs in the assessing district, the county treasurer can compare that list with the list of licensed dogs and determine which dogs are unlicensed. MCL 287.277 provides that "*The county treasurer may, based on records of the dogs actually licensed in each city or township of the county and any report under section 16, identify and locate all unlicensed dogs."* What may be more important (to the dog, at least) is that MCL 287.277 also provides that any dog not licensed under the Dog Law *"is a public nuisance."*

Okay. So you neglected to get a license for your dog, and you got caught through the cooperative investigative efforts of the assessor and the county treasurer. So what? Well, you, as the owner of the unlicensed dog, can be prosecuted for violating the Dog Law by the county prosecutor, who, upon receiving your name from the county treasurer *"shall at once commence the necessary proceedings against the owner of the dog, as required by this act."*

Your dog, however (and here's why the license is important to your dog), is in real deep doo-doo, because MCL 287.277 also provides that *"The sheriff shall locate and kill, or cause to be killed, all such unlicensed dogs. Failure, refusal, or neglect on the part of a sheriff to carry out the provisions of this section constitutes nonfeasance in office."* Now, tell me honestly, is there any sheriff out there today who isn't *"non-feasing"* in office? How many unlicensed dogs has your sheriff killed this year? I suspect that most sheriffs, if they are aware of their duties under the Dog Law, are choosing to risk removal from office by the governor for non-feasance, as opposed to recall by the voters for killing all the unlicensed dogs out there.

So capital punishment is Fido's penalty for being a public nuisance, but Fido has some other capital punishment risks under the Dog Law. The law provides that a dog may be killed by a law enforcement officer for *"molesting wildlife"* unless the dog is hunting [MCL 287.278]. Likewise, pursuant to MCL 287.279, any dog who is seen *"in the act of pursuing, worrying,*

I'll Bet You Didn't Know . . .

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or wounding any livestock or poultry or attacking persons" may be killed by *"any person including a law enforcement officer."* While MCL 278.279 also makes it unlawful "*to kill or injure a dog which bears a license tag for the current year,"* even having a license doesn't protect the dog from being killed if it is *"pursuing, worrying or wounding"* any livestock.

Although some rabid dog lovers might want it otherwise, a dog is still not a "person" for purposes of constitutional provisions prohibiting cruel and unusual punishment. Nevertheless, the Michigan legislature has prohibited some inhumane methods of executing an unlicensed dog. MCL 287.279a provides that *"An animal control officer or other person killing a dog or other animal pursuant to the laws of this state shall not use a high altitude decompression chamber or electrocution for that killing."*

We all know what electrocution is, but what is a "high altitude decompression chamber?" A *Google* search of the term showed most states have banned its use in killing dogs, but the search offered very little information to describe it. The website of the Humane Society of the United States included its 2002 annual report[2] which did, however, describe such a device as *"a horrible contraption that forced animals to reach simulated altitudes of 60,000 feet in 60 seconds."* Ugh! Run, Spot, run!

All of this is very interesting, but what I really want to know is how do we tell if livestock is "*worried*" and not just scared? And if we are sure the livestock is worried, how do we know the worry was caused by a dog and not something else—like maybe a pending foreclosure on the barn?

Endnotes

1 Perhaps those persons whose dogs are lost should consider notifying the county treasurer and ask that the treasurer use his or her statutory authority to locate their dog.

2 *http://files.hsus.org/web-files/PDF/PUBS_2002_Annual_Report.pdf*

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