STATE OF MICHIGAN

IN THE SUPREME COURT

ADAMS OUTDOOR ADVERTISING, INC.,

Appellant,

v.

CITY OF HOLLAND,

Appellee.
_____/

Supreme Court No. 114919

Court of Appeals No. 208543

Lower Court No. 95-18250-CE

BRIEF OF AMICI CURIAE MICHIGAN MUNICIPAL LEAGUE AND MICHIGAN TOWNSHIPS' ASSOCIATION IN SUPPORT OF DEFENDANT/APPELLANT CITY OF HOLLAND

Respectfully submitted,

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These *amici curiae* accept the Statement of Judgment Appealed From by Appellee City.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

The Home Rule Cities Act (HRCA) permits cities to adopt general police power ordinances that regulate, restrict, and limit the number and location of off-premises advertising billboards. The City and Village Zoning Act (CVZA) provides separate legislative authority under which a city may adopt zoning ordinance provisions regulating the use of property. The City of Holland adopted a zoning ordinance provision restricting the placement of billboards but not totally prohibiting their existence within the City. Did the Court of Appeals err when it found that the City's zoning Ordinance does not violate the HRCA?

The Court of Appeals says "No."

Appellant Adams says "Yes."

Appellee City of Holland says "No."

Amici Curiae for Michigan Municipal League and Michigan Township Association say "No."

This Court should say "no."

II.

Under the "Exclusionary Zoning" section of the City and Village Zoning Act (CVZA), a zoning ordinance or provision may not have the effect of totally prohibiting a land use in the presence of a demonstrated need for that use within the municipality or surrounding area. An off-premises advertising billboard is not a "land use" within the meaning of the section, but even if it were, Adams failed to establish either that Holland's ordinance constituted a total prohibition on billboards or that there was a demonstrated need for more billboards within the City. Did the Court of Appeals err in concluding that the Holland ordinances does not violate the CVZA?

The Court of Appeals says "No."

Appellant Adams says "Yes."

Appellee City of Holland says "No."

Amici Curiae for Michigan Municipal League and Michigan Township Association say "No."

This Court should say "no."

INTRODUCTION

The Court of Appeals addressed two narrow issues in its opinion below: (1) whether certain provisions in the City of Holland's zoning ordinance governing off-premises advertising billboards are authorized under the Home Rule Cities Act (HRCA); and (2) whether the same zoning ordinance provisions are unlawfully exclusionary in violation of the City and Village Zoning Act (CVZA). The Court of Appeals correctly answered both questions "no." This Court should affirm the Court of Appeals' decision, which relies on well-established law favoring local self-government and confirms the historically broad power of local governments to regulate for the public welfare -- a power that necessarily extends to regulations addressing peculiarly local concerns like community character and aesthetics.

One of the keystones of this state's land use tradition is the long-standing and closely-guarded ability of cities to control their own unique destinies. Our national historical model has been to provide broad discretion and flexibility for local governments to plan and maintain their character and goals:

> Since our country was conceived in the theory of local self-government, political power has, from the beginning, been exercised by citizens of the various local communities. Having been so dedicated by long practice, local self-government has come to be regarded as the most important feature in our system. The American people have always acted upon the deep-seated conviction that local matters can be better regulated by the people of the locality than by the state or central authority. One controlling idea of local self-government is to bring the officials nearer to the people whose interests are immediately affected by official conduct, ... Local self government is, thus, a guaranty of individual liberty. Further, local self-government better insures that the public will not lose interest in their government. When the public does lose interest in the government, they run the risk of having their government

> lose interest in them. Thus, local self-government is a way of insuring individual liberty through an alert citizenry.
>
> * * *
>
> The popular character of local administration, all-pervading in its scope, exerts a dominating influence upon the life of United States citizens. Local self-government draws the citizen close to government, makes him feel that he is a living part of it and responsible for its actions; it stimulates public confidence, teaches the necessity for legal restraints on individual and property rights, and motivates respect for the will of the people as expressed in the law; it promotes the habit of cooperation, inspires citizens to be devoted to duty to the community, and instills confidence in the authority of the representatives and servants of the people; it leads to reasonableness in discussion and consideration of proposed community action, promotes moderation and harmony of opinion and results in sensible public regulation and administration; and finally it engenders pride in the conduct of common affairs.

McQuillin, Municipal Corporations, 3rd Ed, Rev, Section 1.37, pp 44-46.

This notion of strong local control has been jealously guarded in Michigan, as, for example, in the early case of Attorney General v Detroit Common Council, 58 Mich 213; 24 NW 887 (1885), in which our Supreme Court underscored the importance of local self-regulation:

> It is also well settled that our State polity recognizes and perpetuates local government through various classes of municipal bodies whose essential character must be respected, as fixed by usage and recognition when the Constitution was adopted. And any legislation, for any purpose, which disregards any of the fundamental and essential requisites of such bodies, has always been regarded as invalid and unconstitutional.

The Court of Appeals below relied on substantial precedent from this Court to conclude that Holland has the right to adopt the billboard limitations under the HRCA. The Court's conclusion is correct, although the Court need not actually have reached the issue. The Court of Appeals *should have* found that Adams' challenge to certain provisions of

Holland's *zoning* ordinance by reference to the *HRCA* fails because the validity of a zoning ordinance cannot be tested by reference to the HRCA. The CVZA, not the HRCA, governs validity of a zoning ordinance provision. And when properly analyzed under the CVZA, the Court of Appeal's conclusion that billboards may be regulated because of their potential impact on the character and aesthetics of community is unmistakably correct.

The Court of Appeals' additional determination that the billboard ordinance is not exclusionary in violation of the CVZA is also firmly grounded in appellate precedent. Adams fails to establish either of the two basic elements of an exclusionary zoning claim: (1) a total prohibition of a "use"; and (2) a demonstrated need for that use. Adams' inability to prove either factor is understandable, though, since the concept of exclusionary zoning was never intended to apply to things like billboards, which do not fall within the purpose of the rule in any event.

Adams goes to great lengths to disguise the glaring absence of any constitutional issues among its arsenal of arguments. Although the Holland ordinance regulates billboards, even Adams concedes (by default) that the ordinance implicates neither First Amendment free speech rights nor Fifth Amendment takings law. Adams acknowledges that the real heart of this case is Holland's right to legislate on the issue of billboard placement. In reviewing Adams' challenges to the Court of Appeals' reasonable analysis of that issue, some insight can be gleaned from Mr. Justice Holmes in his oft-quoted dissent in Tyson & Bros. v Banton, 273 US 418, 445-446; 47 S Ct 426 (1927), on the subject of the New York Legislature's right to regulate ticket "scalping":

> We fear to grant power and are unwilling to recognize it when it exists. * * * [W]hen Legislatures are held to be authorized to do anything considerably affecting public welfare it is covered by

> apologetic phrases like the police power, or the statement that the business concerned has been dedicated to a public use.
>
> * * *
>
> I do not believe in such apologies. I think the proper course is to recognize that a . . . Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.

This Court should uphold the Court of Appeals' determination that the billboard provisions of Holland's zoning ordinance are authorized by statute, are reasonably related to legitimate governmental interests, and are not unlawfully exclusionary.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT HOLLAND'S ORDINANCE DOES NOT VIOLATE THE HOME RULE CITIES ACT (HRCA).

The Court of Appeals found that the Holland ordinance did not violate the Home Rule Cities Act (HRCA), MCL 117.1 et seq.; MSA 3.2071 et seq, because Holland is expressly authorized to regulate billboards under the HRCA and because the Holland ordinance does not exceed that authority by attempting to totally prohibit billboards within the City. The Court of Appeals' analysis of the HRCA is correct, and would constitute an appropriate basis for reviewing a billboard ordinance enacted pursuant to the statutory authority conferred on Holland by the HRCA. The Court of Appeals could have disposed of Adams' challenge under the HRCA much more easily, though, by pointing out that the Holland ordinance, as a zoning ordinance, was enacted under the different enabling authority of the City and Village Zoning Act (CVZA), MCL 125.271 et seq.; MSA 5.2963(1)

et seq, and that Adams' challenge to the Holland ordinance by reference to the HRCA is therefore inapt.

A. ***Holland's Zoning Ordinance is Enabled Exclusively by the CVZA. Its Validity Cannot be Determined by Reference to the HRCA.***

The "police power" is one of the State's fundamental tools of governance. It is a power exercised for the purpose of promoting and protecting the public health, safety, and welfare. In Cady v City of Detroit, 289 Mich 499; 286 NW 805 (1939), the Michigan Supreme Court discussed the broad authority contained within the ambit of the police power. The opinion clarified that there is authority under the police power for local legislation designed to regulate municipal development, provide a secure home life, preserve a favorable environment in which to rear children, safeguard the local economic structure, stabilize the use and value of property, and foster a permanency of citizens.

The Court has employed the following sweeping language to describe the encompassing breadth of this governmental authority:

> The term "police power" is said to be a power or organization of a system of regulations tending to the health, order, convenience, and comfort of the people. . . . It is the expression of an instinct of self-preservation and characteristic of every living creature, an inherent faculty and function of life, attributed to all self-governing bodies as indispensable to their healthy existence and to the public welfare. . . . It embraces all rules and regulations for the protection of life and the security of property. . . . It has for its object the improvement of social and economic conditions affecting the community at large. . . . Courts have consistently and wisely declined to set any fixed limitations upon subjects calling for the exercise of this power. It is elastic and is exercised from time to time as varying social conditions demand correction.

People v Brazee, 183 Mich 259, 262; 149 NW 1053 (1914), aff'd 241 US 340 (1915), cited with approval in Square Lake Hills v Bloomfield Township, 437 Mich 310; 471 NW2d 321

(1991). See, *also,* McQuillin, Municipal Corporations, 3rd Ed Rev, Vol 6A, Sections 24.02 through 24.10.

Within this broad police power, the legislatures of nearly all states in the country have established a distinct sub-category of authority known as "zoning." It is under this special type of police power that local municipalities are granted the right to restrict the use of properties based upon the creation of geographic districts within the community. Within each district, specified uses are permitted. The location and boundaries of these "zoning districts" are designed to accomplish such objectives as insuring that uses of land are situated in appropriate locations and relationships, and facilitating adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility needs. *See*, MCL 125.581; MSA 5.2931.

The exercise of zoning is undertaken pursuant to a plan drawn so that both people and property -- primarily within residential neighborhoods -- are protected from the undesirable and potentially dangerous impacts of inconsistent uses. It is significant that, along with these critical benefits derived from zoning, there is substantial potential for impact upon property values. Given these unique aspects associated with the exercise of this special type of police power, the Legislature and the courts in this State have established and required adherence to very detailed procedural requirements as a condition to establishing zoning regulations. Krajenke Buick Sales v Hamtramck City Engineer, 322 Mich 250; 33 NW2d 781 (1948). Attempts to exercise zoning authority without strictly complying with these detailed requirements are invalid. Bane v City of Pontiac, 343 Mich 481; 72 NW2d 134 (1955).

Zoning jurisprudence in Michigan has developed with other very unique rules which are not applicable to general police power enactments -- including those enabled under the HRCA. For example, there is a special rule that prohibits a plaintiff from challenging the validity of a zoning ordinance in the courts without first seeking a "final decision" at the zoning board of appeals. Paragon Properties v City of Novi, 452 .Mich 568; 550 NW2d 772 (1996). There are also rules for scrutinizing the validity of zoning ordinances if a dispute reaches the court. Kirk v Tyrone Township, 398 Mich 429; 247 NW2d 848 (1976). There are still other specific rules governing remedies for successful plaintiffs challenging the validity of zoning ordinances as applied to their properties. Schwartz v City of Flint, 426 Mich 295; 395 NW2d 678 (1986). In Korash v Livonia, 388 Mich 737; 202 NW2d 803 (1972), the Court held that, due to the unique process of zoning, the generally applicable authority for promulgating local legislation by initiative, as generally authorized in the HRCA, simply could not apply to zoning.

Consistent with this understanding of "zoning" as a very special type of police power, Michigan has long held that ***the exercise of the zoning power is not founded upon a city's general regulatory authority enabled by the HRCA***. Rather, the power of a city to restrict the use of property by way of zoning is premised ***exclusively*** upon CVZA.

> "Before the enactment of zoning enabling acts delegating zoning power to local units of government, the Legislature had delegated to local units of government other components of the police power under general enabling acts such as the Township Ordinance Act [a counterpart of the HRCA]. The question arose whether local units of government could zone in the exercise of such a general grant of police power. This Court, and other courts, ruled they could not."

Square Lake Hills v Bloomfield Township, supra, (Levin, J., dissenting), at 343. See also, Clements v McCabe, 210 Mich 207, 215; 177 NW 722 (1920).

Notwithstanding this extensive Michigan zoning jurisprudence, in its analysis of the City of Holland's zoning ordinance, the trial court's Opinion and Judgment, at p 4, holds that, "The ordinance does violate the Home Rule Cities Act," and the Court of Appeals took up that issue as well (albeit with a different result).

The context of Michigan zoning law dictates the conclusion that Holland's zoning ordinance is not enabled by the HRCA, but rather under the CVZA. For that simple reason, Holland's prohibition upon the establishment of new billboards within the city is in no respect prevented by, governed by, or at all affected by, any provision of the HRCA. Determination of the validity of the Holland zoning ordinance thus should be measured not under the HRCA, but *exclusively* under the CVZA and the case law decided under that act.

Ironically, the trial court, after focusing its analysis on the Michigan Supreme Court's decision in Adams Advertising v East Lansing, 439 Mich 209; 483 NW2d 38 (1992), expressly recognized that "Unlike Holland Ordinance 1100, the East Lansing ordinance was not a zoning ordinance." (Opinion and Judgment, p 5.) The trial court then entirely neglected the significant distinction in Adams between the authority to regulate billboards under the HRCA and the authority to regulate under the CVZA. As addressed below, and consistent with the "cardinal rules" of statutory construction, it is critical to ascertain the purpose and intent of legislation, by examining, among other things, legislative history and the events at the time of adoption of legislation as they relate to the purpose of the law. Empire Iron Mining Partnership v Asmund, 211 Mich App 118; 535 NW2d 223 (1995).

There are cases, decided by reference to the HRCA, that appear to hold that a city may not, under the authority of that Act, enact legislation that completely prohibits outdoor billboard advertising signs. See, e.g. Central Advertising Co. v City of Novi, 91 Mich App

303; 283 NW2d 730 (1979), citing Central Advertising Co. v Ann Arbor, 391 Mich 533; 218 NW2d 27 (1974), aff'd 294 Mich 943 (1975). None of the cases cited by either the trial court in its opinion or Adams on appeal addresses the specific fact situation that this Court now faces: an ordinance that permits billboards currently existing in the City to remain, but prohibits erection of new billboards.

Put simply, this Court need not address these cases, which interpret and rely solely upon the language and intent of the HRCA. Holland's ordinance is a zoning ordinance, not a general police powers ordinance enacted under the HRCA. The trial court clearly and undeniably erred -- dramatically -- when it invalidated a provision in Holland's zoning ordinance, enacted under the CVZA, by concluding that the provision was impermissible under the HRCA. There is no provision in the HRCA that establishes its superiority to the CVZA. Nor may the Court read into a statute a provision which was not included by the Legislature. Sanders v Delton Kellogg Schools, 453 Mich 483; 556 NW2d 467 (1996); Empire Iron Mining Partnership v Orhanen, 455 Mich 410; 565 NW2d 844 (1997).

The necessary conclusion is that the validity of the Holland zoning ordinance in this case cannot be judged by reference to the HRCA, and the Court of Appeals correctly held that no cause of action against the City exists under that Act. The proper measuring stick of validity is the CVZA, addressed in Argument II below.

B. *Even When Analyzed Under the HRCA, the Court of Appeals Correctly Concluded that the Holland Ordinance Does Not Amount to a Total Prohibition of Billboards, and Thus Does Not Exceed the Authority Granted by the HRCA.*

MCL 117.4i(f)(5); MSA 5.2082(5) provides that a city may provide in its charter "for licensing, *regulating*, *restricting* and *limiting* the number and location of billboards within the city." (Emphasis added.) The Court of Appeals correctly held that this regulatory

authorization is to be read broadly. The Court relied in reaching that conclusion on the express language of our state constitution, providing that the constitution and laws of the state "shall be liberally construed" in favor of municipalities. Const 1963, Art 7, § 34. The Court of Appeals also relied on recent authority from this Court stating that home rule cities like Holland "enjoy not only those powers specifically granted, but they may also exercise *all powers not expressly denied.*" Detroit v Walker, 445 Mich 682, 689-690; 520 NW2d 135 (1994) (emphasis added).

The Court of Appeals then held that the Holland regulations at issue, §39-348(g) and §39-350(6), fell within the concept of "regulating, restricting, and limiting the number and location of billboards within the city," but did not by their terms, and as a matter of law, amount to a total prohibition of billboards within the City. Because the prohibition was not total, the Court of Appeals determined that this Court's opinion in Central Advertising v Ann Arbor, 391 Mich 533; 218 NW2d 27 (1974), which involved a total prohibition on billboards, was not implicated.

While Adams takes the Court of Appeals to task for theorizing that Central Advertising in any event had been limited -- and possibly even superseded -- by more recent cases from this Court, the fact remains that the Court of Appeals distinguished the case thoroughly in any event. On this issue, it also bears noting that Central Advertising predates the U.S. Supreme Court's opinion in Metromedia, Inc. v City of San Diego, 453 US 490; 101 S Ct 2882; 69 L Ed 2d 800 (1981), which confirms that, at least for First Amendment purposes, the U.S. Constitution accords less protection to commercial speech than to other constitutionally-guaranteed expression, citing Central Hudson, Gas and Electric Corp. v Public Service Commission, 447 US 557; 100 S Ct 2343; 65 L Ed 2d 341

(1980). A majority in Metromedia specifically recognized that *a permanent ban on the construction of new off-premises advertising billboards would be permissible with respect to commercial speech.* Id. at 506. The standards under the First Amendment for reviewing the reasonableness of an ordinance restricting speech, outlined in detail in Metromedia, are far more restrictive than the constitutional standards under the Fourth and Fifth Amendments for reviewing land use regulations.

If this Court decides that it is appropriate to analyze the HRCA in order to determine whether the Holland's zoning limitations on off-premises billboards are authorized, the Court cannot reach any conclusion but that express authorization for such ordinance exists under the HRCA.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE HOLLAND ORDINANCE DOES NOT VIOLATE THE CITY AND VILLAGE ZONING ACT (CVZA).

The Court of Appeals held that the Holland ordinance does not violate the CVZA, because the ordinance furthers legitimate governmental interests. The Court also found that the ordinance did not specifically violate the exclusionary zoning provisions of the CVZA, because Adams had not established a "demonstrated need" for its proposed billboard use. The Court of Appeals' conclusions are correct and should be upheld for several reasons.

As relates to Adams' *general* challenge to the ordinance, it cannot conceivably be said that the ordinance does not further legitimate governmental interests; Adams' reliance on the Highway Advertising Act to reach the opposite conclusion is badly misplaced. As relates to Adams' *specific* challenge to the ordinance as violating the exclusionary zoning provisions of the CVZA, the claim falls far wide of the mark. First, the exclusionary zoning

provision has no application to secondary or accessory uses of land like billboards. Second, even if the exclusionary zoning concept did apply to billboards, it cannot be relied upon here, because Adams has made a "facial" attack to the ordinance, rather than an "as applied" challenge, and on its face the ordinance does not prohibit billboard uses. Finally, even if Adams' challenge is construed to be "as applied," it fails to meet the criteria for establishing an exclusionary zoning claim.

A. The Ordinance Furthers Legitimate Governmental Interests.

There can be no doubt that *general* authority to enact regulations regarding the size, number, and location of billboards exists under the CVZA, which grants broad regulatory authority:

> The legislative body of a city or village may regulate and restrict the use of land and structures; to meet the needs of the state's residents for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land; to insure that uses of the land shall be situated in appropriate locations and relationship; * * * and to promote public health, safety, and welfare, and for those purposes may divide a city or village into districts of the number, shape, and area considered best suited to carry out this section. For each of those districts regulations may be imposed designating the uses for which buildings or structures shall or shall not be erected or altered, and designating the trades, industries, and other land uses or activities that shall be permitted or excluded or subjected to special regulations.

MCL 125.581(1); MSA 5.2931.

The U.S. Supreme Court in Metromedia, supra, at 507-511, held that regulations limiting and restricting billboards further legitimate governmental interests relating to both traffic control and aesthetics. The Court said so again in City Council v Taxpayers for Vincent, 466 US 789, 807; 104 S Ct 2118 (1984):

> We reaffirm the conclusion of the majority in Metromedia. The problem addressed by this ordinance -- the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property -- constitutes a significant substantive evil within the City's power to prohibit. "[T]he city's interest in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect." Young v American Mini Theatres, Inc. 427 US at 71; 96 S Ct, at 2453 (plurality opinion).

In reaching its conclusion, Vincent relied on a number of prior Supreme Court cases in which the issues of regulating for aesthetic purposes was discussed:

> It is well settled that the state may legitimately exercise its police powers to advance esthetic values. Thus, in Berman v Parker, 348 US 26, 32-33; 75 S Ct 98, 102-103; 99 L Ed 27 (1954), in referring to the power of the legislature to remove blighted housing, this Court observed that such housing may be "an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn." Ibid. We concluded: "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary." Id., at 33; 75 S Ct, at 102 (citation omitted). See also Penn Central Transportation Co. v New York City, 438 US 104, 129; 98 S Ct 2646, 2661; 57 L Ed 2d 631 (1978); Village of Belle Terre v Boraas, 416 US 1, 9; 94 S Ct 1536, 1541; 39 L Ed 2d 797 (1974); Euclid v Ambler Co., 272 US 365, 387-388; 47 S Ct 114, 118; 71 L Ed 303 (1926); Welch v Swasey, 214 US 91, 108; 29 S Ct 567, 571; 53 L Ed 923 (1909).

Id. at 805. The Court of Appeals' conclusion that the Holland ordinance furthers governmental interests related to aesthetics and community character is thus supported by well-established law from the highest courts in the land.

Adams invokes the Highway Advertising Act (HAA), MCL 252.301 et seq.; MSA 9.391(101) et seq, claiming that by adopting that act the state legislature, at least, has determined that billboards are a "legitimate" use of land. Adams attempts a "separation of

powers" argument, contending that the legislature's statements prevent any efforts at local regulation. Adams' arguments are unavailing.

Adams made the same argument in the circuit court, which dismissed the claim. Failing to appeal the question to the Court of Appeals, Adams must be found to have abandoned it. The argument never had any merit in any event, though. The HAA by its terms governs only signs adjacent to interstate highways, freeways, and highways that are part of the federal primary highway system. MCL 252.303; MSA 9.391(103). Moreover, the act by its terms permits local regulations as to "size, lighting, and spacing" of signs. MCL 252.304(a); MSA 9.391(104)(a). See generally, Central Advertising v St. Joseph Township, 125 Mich app 548; 337 NW2d 15 (1983).

The Court of Appeals also correctly held that the burden of proof when challenging the validity of an ordinance lies with the plaintiff. Kropf v Sterling Heights, 391 Mich 139; 215 NW2d 179 (1974). See also Bell River Assoc. v China Township, 223 Mich app 124; 565 NW2d 695 (1997); Gora v City of Ferndale, 456 Mich 704; 576 NW2d 141 (1998). Adams' attempt to avoid that burden by asserting that an ordinance that "totally prohibits" a land use is not accorded such deference is inapt. At best, the cases upon which Adams relies acknowledge (on the fact patterns there at issue) that a plaintiff may be able to meet its prima facie burden of proving unreasonableness by proving total prohibition of the use sought. See, e.g., Country Walk v City of Orchard Lake Village, 221 Mich App 19; 561 NW2d 405 (1997). However, those cases have no application here, because Adams cannot in this case prove that a total prohibition is accomplished by the ordinance. Moreover, even if this Court were to find that, as in Country Walk, Adams established a prima facie case of unconstitutionality by virtue of a total prohibition, that would merely shift

the burden to Holland to show that the ordinance does bear a reasonable relationship to the public health, safety, and welfare. Holland meets that burden under the analysis of Metromedia and Vincent *as a matter of law*. Thus, Holland's ordinance passes constitutional scrutiny regardless of who bears the burden of proof.

B. ***The Exclusionary Zoning Provisions of the CVZA Do Not Apply to Regulation of Billboard Signs.***

1. The Basic Thrust and Meaning of "Exclusionary" Zoning.

It is difficult, if not impossible, to apply either the language or the intent of the Michigan "exclusionary zoning" statute in the context of sign regulation. The statute, MCL 125.592; MSA 5.2942, was adopted in 1978 amidst a growing national debate over the perceived problem of developing suburban (and even rural) communities adopting zoning ordinances and land use controls that effectively closed off their housing and land markets to low- and moderate-income families. While these ordinances and controls (e.g., large minimum lot sizes, limitations on multiple-family development) can admittedly accomplish legitimate social and land use planning objectives, many argue that they can also have the effect of limiting community access to certain classes of individuals. It is this latter effect that statutory provisions such as MCL 125.592; MSA 5.2942, and the judicial decisions that preceded them, are aimed. See generally, Rohan, Zoning and Land Use Controls, §2.01[1], pp 2-6; McQuillin, Municipal Corporations, §25.120.05, p 471. (Exhibit C).

The concept of "exclusionary zoning" includes two distinct but related theories: (1) the alleged use of the zoning power by municipalities to maintain themselves as bastions of social homogeneity, and (2) the alleged use of the zoning power by municipalities to reap the benefits of regional development without having to bear the burdens of such development. Rohan, pp 2-10, n. 10. Thus, the term "exclusionary zoning" is intended to

address the situation in which the zoning power is used not as a land use planning technique, but as a device by which certain types of "undesirable" uses are excluded from the community.

Before enactment of MCL 125.592; MSA 5.2942, and the companion provision relating to zoning within townships, MCL 125.297(a); MSA 5.2963(27a), Michigan courts over the years issued a number of opinions in which exclusionary zoning was addressed. A review of those cases discloses that the primary focus was upon housing, with a particular eye toward the exclusion of mobile homes and mobile home parks, an often-suggested means of providing low- and moderate-income housing. See, e.g., Cady v Detroit, 289 Mich 499; 286 NW 805 (1939); Gust v Canton Township, 342 Mich 436; 70 NW2d 772 (1955); Dequindre Development Company v Warren Charter Township, 359 Mich 634; 103 NW2d 600 (1961); Knibbe v Warren, 363 Mich 283; 109 NW2d 766 (1961); Bristow v Woodhaven, 35 Mich App 205; 192 NW2d 322 (1971); Green v Lima Township, 40 Mich App 655; 199 NW2d 243 (1972). A few non-housing cases were also decided under the same label, including cases related to churches and schools (Roman Catholic Archbishop of Detroit v Village of Orchard Lake, 333 Mich 389; 53 NW2d 308 (1952)) and business or commercial uses (Lincolnhol v Shoreham Village, 368 Mich 225; 118 NW2d 689 (1962)).

The rationale behind these exclusionary zoning cases has been described or characterized in many different ways. However, a case released just prior to the legislative introduction of the exclusionary zoning statute, and relied upon by the trial court in this case, Kropf v City of Sterling Heights, supra, sums it up pretty simply:

> On its face, an ordinance which *totally* excludes from a municipality a use recognized by the constitution or other laws

> of this state as legitimate also carries with it a strong taint of unlawful discrimination and a denial of equal protection of the law as to the excluded use. (Emphasis added.)

Id. at 155-156. Thus, the exclusionary zoning concept embodied in MCL 125.592; MSA 5.2942 rests squarely on the constitutional prohibition against unlawful discrimination; it also, however, embodies the constitutional due process requirement that zoning regulations must be "reasonably related" to legitimate governmental interests and must not be arbitrary or capricious. Kropf, supra, at 162.

2. *A Billboard is Not In and Of Itself a "Use" with the Context of Zoning.*

The purpose of the exclusionary zoning statute is not to require that every type of structure appear in every community. Rather, what is prohibited is precluding a particular use within a community and the surrounding area in the face of a demonstrated need for such use. Stated otherwise, what is required under the statute, consistent with the constitutional concepts that underlie it, is that every community must, by its land use regulations, avoid the exclusion of needed legitimate uses that would not be unreasonably detrimental within the community.

This concept of exclusion in the face of a demonstrated need for a use is easy to apply in the context of those kinds of land uses and users that occasionally suffer regulatory prohibition -- mobile home parks (Gust, supra; Green, supra); multiple-family dwellings (Kropf, supra); junkyards (Fremont Township v Greenfield, 132 Mich App 199; 347 NW2d 204 (1984)); landfills (Ottawa County Farms, Inc. v Polkton Township, 131 Mich App 222; 345 NW2d 672 (1983)). Not only are these kinds of uses and users often discriminated against, they clearly fall within the intent of the statute relating to "land use."

The root of the problem behind applying the exclusionary zoning analysis to a billboard is that it simply is not a "land use" within the meaning of the statute. Although erection of a billboard sign, or a sign of any kind, may technically be called "use" of the land on which it is established, a sign is not a "land use" in the traditional zoning and planning sense of that term. Residential homes (mobile or otherwise), apartments, offices, businesses, junkyards, gravel pits, landfills -- these are "primary" uses of property. The City of Holland's zoning ordinance, like that of most other communities in the state, zones property on the basis of these primary land uses, dividing the community into districts that relate to residential, commercial, industrial, or agricultural uses.

Signs and billboards are not, under this traditional zoning scheme, a "primary" use of land. There is no "billboard" zoning district in the City of Holland's ordinance -- or in any other ordinance with which *Amici* are familiar. Signs are generally permitted both in the City of Holland and elsewhere *incidental or ancillary to the underlying primary land use*. A sign may certainly be regulated under a local zoning ordinance as a structure and as an ancillary or sometimes accessory use of the property, but it simply makes no sense for a court to consider a sign to be a "land use," within the context of the exclusionary zoning consideration.

The traditional analysis of billboards, based upon the classification that truly fits the subject, is a form of speech, usually commercial. Thus, in reviewing the reasonableness of municipal regulations affecting billboards and signs generally, the applicable constitutional concept is and ought to be that of free speech -- the First Amendment, not the Fourth (due process) or the Fifth (taking) Amendments -- rather than the concepts of equal protection and due process typically applied in the zoning context.

Why would Adams pursue this as an exclusionary zoning case rather than a First Amendment case, despite the jealous protection of the right to free speech confirmed by seemingly limitless U.S. Supreme Court precedent? See, e.g., Ladue v Gilleo, 512 US 43; 114 S Ct 2038; 129 L Ed 2d 36 (1994). Put simply, the ordinance at issue, which only precludes the establishment of any new billboards within the City, and which permits the maintenance and repair of existing billboards, on its face does not violate the First Amendment, and would be upheld against a traditional First Amendment challenge. In the absence of a constitutional claim, Adams tries desperately to find a state law basis for its challenge, trying to drive a square peg (a billboard) into a round hole (the exclusionary zoning rule). The peg doesn't fit.

C. ***Even When Analyzed Under the Exclusionary Zoning Law, Adams' Facial Challenge to the Holland Ordinance Fails Because The Ordinance Does Not Totally Exclude Billboards.***

The CVZA states that a zoning ordinance may not have the effect of "totally prohibiting" a land use within a city if a "demonstrated need" exists for that use within the city or the surrounding area. Holland's zoning ordinance prohibits the placement of new billboard signs in the City, but expressly permits existing billboard signs to remain where located, and further permits the maintenance and repair of such billboard signs. Because the ordinance by its terms does not "totally prohibit" billboard signs, the trial court erred in finding that the ordinance violated the statute.

MCL 125.592; MSA 5.2942 provides as follows:

> A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a city or village in the presence of a demonstrated need for that land use within either the city or village or the surrounding area within the state, unless a location within the city or village does not

> exist where the use may be appropriately located or is unlawful. (Emphasis added.)

Adams claims in this case that the City's zoning ordinance "totally prohibits" billboards within the boundaries of the City. This is simply untrue.

The ordinance defines a "billboard or advertising sign" as follows:

> A sign which contains a message or advertises an establishment, product, service, space or activity not available on the lot on which the sign is located (Section 39-346).

Under Section 39-348, entitled "Sign Prohibitions," subsection (g) states that "billboards and advertising signs are not permitted." However, Section 39-350 governs non-conforming signs, billboards, or advertising signs and provides in relevant part as follows:

* * *

> (b) Non-conforming signs, billboards or advertising signs may not be expanded, enlarged, or extended; however, said signs may be maintained and repaired ***so as to continue the useful life of the sign***.
>
> * * *
>
> (e) When a non-conforming sign, billboard, advertising sign or portion thereof, is removed, it shall be replaced only with a sign that conforms with all requirements of the zoning district within which the property is located. A sign which may be removed for maintenance or repair purposes in accordance with Section 39-157(b) following a permit from the Building and Zoning Inspector or authorized representative that the sign would be reinstalled within 90 days of removal or the right of non-conforming use shall be deemed abandoned. (Emphasis added.)

By its terms, the ordinance does not have the effect of "totally prohibiting" billboards within the City. Existing billboards are not only allowed to continue, they may be maintained and repaired so as to continue their useful life. Significantly, such maintenance

and repair, under §39-350(e), may even include ***removal and reinstallation*** of the structure "for maintenance and repair purposes." Under this kind of regulation, the "useful" life of the existing billboards within the City of Holland can be extended indefinitely – the useful life of a metal structure that can be removed and reinstalled is effectively indefinite. What the trial court had before it, then, was an ordinance that effectively "permits" the use (billboards) but limits the extent of such use within the City's boundaries. On these facts, the Holland ordinance cannot possibly be seen as a "total prohibition" of billboards; at most it is a "cap" on the number of billboards permitted to exist in the City.

Under established case law developed in the Court of Appeals, when the use alleged to be excluded in fact already exists within the municipality, the "total prohibition" requirement of MCL 125.592; MSA 5.2942 cannot be met. Guy v Brandon Township, 181 Mich App 275; 415 NW2d 279 (1989). Guy involved the exact statutory provision set forth above. This Court found the existence of other mobile home park units within the township to be a factor that completely refuted the argument that the zoning scheme effectively served as a "total" prohibition of mobile home park use. In so ruling, this Court underscored the requirement that the use alleged to be excluded must in fact be completely precluded:

> The total prohibition requirement of the statute is not satisfied if the use sought by the landowner otherwise occurs within the township boundaries or within close geographical proximity. See Fremont Township v Greenfield, 132 Mich App 199, 203-205; 347 NW2d 204 (1984); Lerner v Bloomfield Township, 106 Mich App 809, 814; 308 NW2d 701 (1981), lv den, 414 Mich 871 (1982).

Guy is a reasonable reading of the plain language of the statute, which expressly refers to a total prohibition of the use and which expressly recognizes that the existence of the use

in the area surrounding the municipality may affect the need for such use within the municipality itself. This Court should affirm the reasoning and the result in this line of appellate cases.

In this case, the evidence at trial established that there are currently at least 20 billboard "faces" existing within the boundaries of the City of Holland, owned or controlled by Adams in this case (McBeth Tr. at 67.) In addition, Adams owns or controls another ***78*** billboard faces in what was termed at trial as the Holland/Zeeland market area. There are others in the Holland/Zeeland area that are not owned or controlled by Adams, including other sign faces in the City. Given the fact that these billboards exist both within the City and in close geographical proximity to the City, the rationale in Guy and Fremont precludes the trial court's finding of a "total prohibition" in violation of the statute.

The trial court made no real findings of fact as to the effect of the ordinance. Its opinion reads more like an order granting summary disposition than an opinion following trial. The trial court cited only one case in support of its determination that the ordinance was exclusionary by virtue of its failure to permit the erection of new billboards. In Eveline Township v H&D Trucking Company, 181 Mich App 25; 448 NW2d 727 (1989), the township brought suit to enjoin the defendant from operating a commercial deep water port within the township in violation of the township ordinance. While the defendant's property was zoned for commercial use, the ordinance did not list "ports" as a permitted use in that district. The township contended that the use was not permitted and sought injunctive relief. The trial court denied the requested relief, and also found that the ordinance as interpreted by the township was exclusionary, because it had the effect of totally prohibiting commercial ports.

Both the trial court and the Court of Appeals in Eveline rejected the township's argument that the port was a prior non-conforming use, and therefore could be continued, and therefore was not "totally prohibited." The township relied upon the "non-conforming use" provision of the Township Rural Zoning Act (TRZA), which provides that a use that exists prior to the passage of a zoning ordinance may be continued even if it does not conform to the ordinance. MCL 125.286(1); MSA 5.2963(16)(1). The Court of Appeals determined that the mere fact that the township was required to suffer the continuance of a non-conforming use because of a state statute did not mean that the use was sanctioned under the zoning ordinance; rather, the use must merely be "tolerated until it is possible to replace [it] with [a] use which conform[s] to the local zoning ordinance." Id. at 29.

This case bears no similarities to the Eveline case. The City in this case did not file an action for injunctive relief to remove the existing billboards; the action was filed by the Plaintiff. The City has not undertaken any affirmative action to secure the removal of the existing billboards. Nor, for that matter, can it be said that the City in this case is merely "tolerating" the existing billboards; Holland's ordinance expressly concedes to their indefinite continuance – far more than it is required to do under the state law nonconforming use provisions. See, e.g., Cole v Battle Creek, 298 Mich 98; 298 NW 466 (1941); Paye v Grosse Pointe, 279 Mich 254; 271 NW 826 (1937). Holland's ordinance expressly permits not just maintenance and repair of the existing billboard facilities, but removal and replacement of the billboards for such purposes. The ordinance at issue thus has the effect of continuing indefinitely the "useful life" of the existing billboards. This case is not Eveline.

The trial transcript reflects that the trial court may have been concerned by the fact that many of the existing billboard sites were leased, not owned, and that there was the possibility that the sites might be lost and not replaced. This cannot be a basis for finding that billboards are prohibited. The trial court must make its decision on the basis of the facts that exist at the time of its decision. To do otherwise is pure speculation. In fact, the testimony at trial established that, with only one exception, all of Adams' billboard "faces" had been held long term, and there was no immediate concern that they would be lost. (Trial TR. McBeth, pp 67-69.) In fact, the testimony at trial established that, with only one exception, all of Adams' billboard "faces" had been held long term, and there was no immediate concern that they would be lost. (Trial TR. McBeth, pp 67-69.) The same possibility of loss through casualty, bankruptcy, attrition, etc., exists with any kind of use. Any contention by Adams that this kind of use is "different" than others serves only to prove that billboards are not the kind of "land use" intended to be addressed in MCL 125.592; MSA 5.2942.

In addition to Eveline, Adams cites Roman Catholic Archbishop of Detroit v Village of Orchard Lake, supra. Like Eveline, Archbishop of Detroit is both factually and legally distinguishable from this case. The opinion is very short, and the only statement regarding exclusionary zoning is contained at the beginning of the opinion, where the Court indicates that the ordinance, which on its face permitted schools and churches in about 10% of the village, had the "practical effect" -- i.e., "as applied" effect -- of excluding churches and schools from the entire village. The Court does not elaborate on any of the reasons for reaching its conclusion and as such the opinion is of no real use to this Court in evaluating

the claim now before it. The "practical effect" of the City of Holland ordinance is to permit more than 20 billboard faces within the City limits.

Adams asks this Court to ignore the plainly stated requirement that the alleged prohibition be "total" in order to constitute a violation of the law. Retreating from First Amendment protection (which is apparently of no use to it), Adams relies on the constitutional concepts embodied in the exclusionary zoning statute. In doing so, Adams is bound by the rationale the courts have found to apply under the statute. If the issue in this case were not billboards, but, say, mobile home parks, and if the defendant City were able to establish the existence of ten mobile home parks within its boundaries, and 79 others in the area, all owned or controlled by Adams, surely this Court would not conclude that by enacting a zoning ordinance that did not permit the establishment of any new mobile home parks in the City, the City had "totally prohibited" mobile home parks. The same rationale would apply if the City had chosen instead to create a "billboard" zoning district, and to include the existing billboard locations in such a district. Under that scenario, a court could not find that the use permitted and existing was "totally prohibited."

If this Court determines to view billboards as a "land use" for purposes of MCL 125.592; MSA 5.2942, then it must acknowledge that such land use "otherwise occurs within the [City] boundaries or within close geographical proximity," Guy, supra, not just once or twice, but in dozens of locations, including more than 20 instances of that land use within the City. Under the circumstances, the trial court's determination that the City's ordinance "totally prohibits" billboards was clearly in error and the Court of Appeals' recognition to the contrary should be upheld.

D. ***Even if the Court Were to Find that the Ordinance "Totally Prohibits" Billboards, Plaintiff Failed to Establish a "Demonstrated Need" for Additional Billboards.***

The other, and equally fundamental, flaw in Adams' exclusionary zoning claim is its inability to show any "demonstrated need" for additional billboard signs in the City, as required under MCL 125.592; MSA 5.2942. The trial court does not bother to address this issue at all. The court states only (and without factual basis) that the ordinance will result in the "gradual elimination of all billboards within Holland city limits." (Trial Court Opinion, p 6.) Adams during trial presented only the barest testimony of a single salesperson to the effect that Adams would be "able to" sell advertising space on the proposed new billboard faces. (Trial TR., Newsted, pp 28-29.) However, the individual who testified on behalf of Adams with respect to the acquisition of the new billboard sites at issue testified that she had not been instructed or requested by any sales person to obtain new billboard sites for specific customers. (Trial TR., McBeth, p 72.)

Adams' own counsel may have put it best in his closing argument at trial, when he acknowledged, effectively, that the concept of "exclusion in the face of need" really does not fit billboard "use":

> Demonstrated need is a tough question I think in this instance. It's not like low-income housing where you can go to the statistics from the census data and figure out how many people have low income in a community and then survey the housing stock to see if you can meet that need.

(Trial TR, p 191.)

A trial court or appellate court can adequately address, in the context of the exclusionary zoning statute, whether a "demonstrated need" exists for low-income or affordable housing, or for a landfill. Neither a trial court nor an appellate court can

determine at what point a "need" for commercial speech through the particular medium of billboards has been demonstrated. Counsel for Adams in his closing argument stated that "I don't think anyone can say we don't need speech. . . ." (Trial TR at 191.) But how much speech and by what means is a subject of *First Amendment* discussion, by reference well-established constitutional principles guaranteeing the right to free speech.

Adams faults the Court of Appeals for concluding that "need" is not the same as "demand," and for including in its decision the concept that the need should be a "public" one. Adams says that there is "no authority" for such conclusions.

To some extent, Adams is correct -- there is precious little case law interpreting the language in the Michigan statute, and none focusing in particular on the "demonstrated need" leg of the test. Nor does it appear that the language is derived from a model statute with significant case law development; the language, at least, seems to be specific to Michigan law.

Left to an application of common sense to the term, the Court of Appeals reasonably interpreted the concept to refer to a public need for the community as a whole. Housing, commercial shopping opportunities, landfills -- the historical contexts of appellate discussion of exclusionary zoning -- all of these uses have an undeniable *public* element to them that is simply absent in the case of off-premises advertising. By contrast, Adams' own narrow reading, which equates "need" with a private "desire," fails to take into consideration the context of either the zoning enabling act generally or the exclusionary zoning section of the act.

The inclusion of the requirement in MCL 125.592; MSA 5.2942 that the need for the use be "demonstrated" is tacit (if not express) acknowledgement that the purpose of the

statute is not to require that every use must appear in every community. It has long been recognized that "the lack of need for the proposed use or the overabundance of similar existing uses" are matters that must be considered when evaluating a claim that such use is improperly restricted or excluded. See, e.g., Bristow v City of Woodhaven, supra. While it is true that billboards are a viable medium to publish both commercial and non-commercial messages and information, it is also true, as the U.S. Supreme Court found in Metromedia v City of San Diego, supra, that the regulation of billboards as a medium of free speech is permissible; indeed, the complete prohibition of billboards as a medium for commercial and non-commercial speech is also permissible.

CONCLUSION

The Court of Appeals' opinion reaches the unremarkable conclusion that local governments may adopt and enforce ordinances regulating off-premises advertising billboards for purposes that are largely, though not entirely, aesthetic. The U.S. Supreme Court had already reached that conclusion as a matter of First Amendment law in Metromedia. Adams asked the Court of Appeals, and now it asks this Court, to find that certain state laws preclude the exercise of such authority despite the lack of constitutional implications. Adams' arguments reflect a misunderstanding of the scope of Michigan's exclusionary zoning statute and ignore the broad authority of local governments to legislate in the public interest.

The exclusionary zoning concept has no real application to a secondary or ancillary use of property for off-premises advertising. And even if it did, Adams' challenge to Holland's ordinance is puzzling, because the ordinance does not totally prohibit billboards, it merely "caps" the number and location at their historical status.

Holland's billboard regulations are generally authorized whether analyzed under the HRCA or the CVZA, and the particular regulations further real governmental interests even though Adams obviously fails to appreciate the point of the regulations:

> [T]o many people the superfluous is the necessary, and it seems to me that Government does not go beyond its sphere in attempting to make life livable for them. I am far from saying that I think this particular law a wise and rational provision. That is not my affair. But if the people * * * speaking by their authorized voice say that they want it, I see nothing in the Constitution of the United States to prevent their having their will.

Tyson & Brothers v Banton, supra, at 447 (Holmes, J., dissenting).

The people of Holland, speaking through their elected local officials, have determined that they want protection from the visual pollution created by an excessive number of off-premises advertising billboards. Adams cannot identify any constitutional or statutory prohibition against the local self-regulation imposed by the Holland City Council, and the regulation must therefore stand.

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