2001-12

STATE OF MICHIGAN

IN THE COURT OF APPEALS

OUTDOOR SYSTEMS, INC.,
d/b/a INFINITY OUTDOOR,

Appellant-Plaintiff,

v.

CITY OF CLAWSON,

Appellee-Defendant.

Court of Appeals No. 245069

Oakland County Circuit Court Case No. 00-022427-CZ

James J. Walsh (P27454)
Thomas G. Cecil (P56552)
Luttrell D. Livingston (P64674)
BODMAN, LONGLEY, & DAHLING, LLP
Attorneys for Appellant-Plaintiff
110 Miller Avenue
Suite 300
Ann Arbor, MI 48104
(734) 761-3780

Carol A. Rosati (P32288)
JOHNSON, ROSATI, LABARGE, ASELTYNE & FIELD, P.C.
Co-Counsel for Appellee-Defendant
34405 W. 12 Mile Road, Suite 200
Farmington Hills, MI 48331-5627
(248) 489-4100

John H. Kingsepp (P15982)
Brad A. Rayle (P28898)
James H. Geary (P13892)
HOWARD & HOWARD ATTORNEYS,P.C.
Attorneys for Appellee-Defendant
39400 Woodward Avenue, Suite 101
Bloomfield Hills, MI 48304-5151
(248) 645-1483

Andrew J. Mulder (P26280)
P. Haans Mulder (P61842)
CUNNINGHAM DALMAN, P.C.
Attorneys for the Michigan Municipal League Amicus Curiae
321 Settlers Road, P.O. Box 1767
Holland, MI 49422-1767
(616) 392-1821

<u>THE MICHIGAN MUNICIPAL LEAGUE'S AMICUS CURIAE BRIEF</u>

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES ii

STATEMENT OF BASIS OF JURISDICTION vii

COUNTER-STATEMENT OF QUESTIONS INVOLVED viii

COUNTER-STATEMENT OF FACTS 1

LAW AND ARGUMENT 2

I. THE CITY OF CLAWSON HAS TWO SEPARATE AND INDEPENDENT SOURCES OF AUTHORITY TO REGULATE BILLBOARDS 2

II. MCL 125.592 OF THE CITY AND VILLAGE ZONING ACT PROHIBITING EXCLUSIONARY ZONING WAS NOT INTENDED TO APPLY TO BILLBOARDS. 8

III. VIACOM HAS FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES UNDER PARAGON PROPERTIES. 12

IV. THE CITY OF CLAWSON'S SIGN ORDINANCE IS CONTENT-NEUTRAL AND A VALID REGULATION OF SPEECH 15

V. THE CITY OF CLAWSON'S SIGN ORDINANCE IS TAILORED TO SERVE SIGNIFICANT GOVERNMENTAL INTERESTS AND THERE ARE ALTERNATE CHANNELS OF COMMUNICATION 20

RELIEF REQUESTED 22

INDEX OF AUTHORITIES

Page

Cases

Ackerley Communications of Northwest, Inc. v. R.F. Krochalis,
108 F3d 1095 (9th Cir 1997) 17

Adams Outdoor Advertising, Inc. v. City of Holland,
234 Mich App 681, 600 NW2d 339 (1999) . . . . *passim*

Adams Outdoor Advertising, Inc. v. City of Holland,
463 Mich 675, 625 NW2d 377 (2001) 4, 9

Adams Outdoor Advertising, Inc. v. East Lansing,
439 Mich 209, 483 NW2d 38 (1992) 5

Adderley v. Florida, 385 US 39, 87 S Ct 242, 17 L Ed2d 149 (1966) 15

Beckis v. Planning and Zoning Commission, 162 Conn 11, 291 A 2d 208 (1971) 7

Bristow v. Woodhaven, 35 Mich App 205, 192 NW2d 322 (1971) 10

Cady v. Detroit, 289 Mich 499, 286 NW 805 (1939) 9, 10

Central Advertising Co. v. Ann Arbor, 391 Mich 533, 218 NW2d 27 (1974) 6

City of Detroit v. Walker, 445 Mich 682, 690, 520 NW2d 135 (1994) 4, 6, 8

Clark v. Community for Creative Non-Violence,
468 US 288, 104 S Ct 3065, 83 L Ed2d 221 (1984) 17

Consolidated Edison Co. v. Public Service Commission,
447 US 530, 100 S Ct 2326, 65 L Ed2d 319 (1980) 15, 20

Cox v. Louisiana, 379 US 536, 85 S Ct 453, 13 L Ed2d 471 (1965) 15

Davenport v. Grosse Pointe Farms, 210 Mich App 400, 534 NW2d 143 (1995) 13

De Mull v. City of Lowell, 368 Mich 242, 118 NW2d 232 (1960) 5

Dequindre Development Company v. Warren Charter Township,
359 Mich 634, 103 NW2d 600 (1961) 10

Eveline Township v. H&D Trucking Company, 181 Mich App 25,
448 NW2d 727 (1989) 12

Gallup v. Saginaw, 170 Mich 195, 135 NW 1060 (1912) 5

Gannett Outdoor Company of Michigan v. City of Troy,
156 Mich App 126, 409 NW2d 335 (1986) 17, 19, 20

Green v. Lima Township, 40 Mich App 655, 199 NW2d 243 (1972) 10

Heffron v. International Society for Krishna Consciousness, Inc.,
452 US 640, 101 S Ct 2559, 69 L Ed2d 298 (1981) 15, 17

International Business Machines Corp. v. Dept. of Treas., 75 Mich App 604,
255 NW2d 702 (1977) 12

John Donley & Sons, Inc. v. Outdoor Advertising Board, 369 Mass 206,
399 NE2d 709 (1975) 7

Judges of the 74th Judicial Dist. v. Bay County, 385 Mich 710,
190 NW2d 219 (1971) 12

Knibbe v. Warren, 363 Mich 283, 109 NW2d 766 (1961) 10

Kovacs v. Cooper, 336 US 77, 69 S Ct 448, 93 L Ed 513 (1949) 7

Krohn v. Saginaw County, 175 Mich App 193, 437 NW2d 260 (1988) 13

Kropf v. City of Sterling Heights, 391 Mich 139, 215 NW2d 179 (1974) 10

Lamar-Orlando Outdoor Advertising v. City of Ormond Beach,
415 So 2d 1312 (Fla App 1982) 7, 8

Lincolnhol v. Shoreham Village, 368 Mich 225, 118 NW2d 289 (1962) 10

Linmark Associates v. Willingboro, 431 US 85, 97 S Ct 1614, 52 L Ed2d 155 (1977) 15

Major Media of the Southeast, Inc. v. City of Raleigh, 792 F2d 1269 (4th Cir 1986),
cert denied 479 US 1102, 107 S Ct 1332, 94 L Ed2d 185 (1987) 17

Martin v. Millcreek, 413 A2d 764 (Pa 1980) 9

Members of the City Council of Los Angeles v. Taxpayers for Vincent,
466 US 789, 104 S Ct 2118, 80 L Ed2d 772 (1984) . . . . *passim*

Messer v. City of Douglasville, 975 F2d 1505 (11th Cir 1992),
cert denied 508 US 930, 113 S Ct 2395, 124 L Ed2d 296 (1993) 17, 19, 20

Metromedia, Inc., et al v. City of San Diego, et al,
483 US 490, 101 S Ct 2882, 69 L Ed2d 800 (1981) . . . . *passim*

Ottawa County Farms, Inc. v. Polkton Township, 131 Mich App 222,
345 NW2d 672 (1983) 10

Outdoor Systems, Inc. v. City of Mesa, 169 Ariz 301, 819 P2d 44 (1991) 6, 7, 8

Packer Corp. v. Utah, 285 US 105 (1932) 11

Papish v. University of Missouri Curators, 410 US 667, 93 S Ct 1197,
35 L Ed2d 618 (1973) 15

Paragon Properties v. City of Novi, 452 Mich 568, 550 NW2d 772 (1996) . . . . *passim*

People v. Sell, 310 Mich 305, 17 NW2d 193 (1945) 5

Police Department of Chicago v. Mosely, 408 US 92, 92 S Ct 2286,
53 L Ed2d 212 (1972) 16

Poulous v. New Hampshire, 345 US 395, 73 S Ct 760, 97 L Ed2d 1105 (1953) 15

Real Property Owners Association v. City of Grand Rapids,
455 Mich 246, 254, 566 NW2d 514 (1997) 4, 8

Roman Catholic Archbishop of Detroit v. Village of Orchard Lake,
333 Mich 389, 53 NW2d 308 (1952) 10

Rzadkowlski v. Village of Lake Orion, 845 F2d 653 (6th Cir 1988) . . . . *passim*

St. Louis Poster Advertising Co. v. St. Louis, 249 US 269 (1919) 11

Southlake Property Associates, Ltd. v. City of Morrow, 112 F3d 1114 (11th Cir 1997),
cert denied 525 US 820, 119 S Ct 60, 142 L Ed2d 47 (1998) 17, 20

Thomas Cusack Co. v. City of Chicago, 242 US 526 (1917) 11

Village of Euclid v. Ambler Realty, 272 US 365, 47 S Ct 114, 71 L Ed 303 (1926) 13

Virginia Pharmacy Board v. Virginia Citizens Consumer Council,
425 US 748, 96 S Ct 1817, 48 L Ed2d 346 (1976) 15, 20

Wheeler v. Commissioner of Highways, 822 F2d 586 (6th Cir 1987),
cert denied 484 US 1007, 108 S Ct 702, 98 L Ed2d 653 (1988) 17, 18, 20

Statutes

Home Rule Cities Act, MCL 117.1, et. seq. 2

MCL 117.4i 4, 6

MCL 125.585(11) 13

MCL 125.585 13

MCL 125.592 . . . . *passim*

MSA 5.2082 5

Public Act No. 215 of 1895 (MCL 81.1, et. seq.) 2

Public Act No. 279 of 1909 (MCL 117.1, et. seq.) 2

Other Authorities

83 Am Jur 2d 100 9

Convention Comment, Art. VII, Section 22 4

Mich Const 1835 2

Mich Const. 1850 3

Mich Const 1908 3

Mich Const 1963 3

Rae, Local Government Law and Practice in Michigan 3, 4

Rathkopf, The Law of Zoning and Planning, 17.01 (4th Ed.) 9

Urban Environment Management Act 6

STATEMENT OF BASIS OF JURISDICTION

The Michigan Municipal League adopts the Statement of Basis of Jurisdiction of Outdoor Systems, Inc.[1]

---

[1]Upon search of the corporate records, Outdoor Systems, Inc. is known as Viacom Outdoor Inc. Also, upon review of Outdoor System, Inc.'s brief and other pleadings in this case and for the sake of consistency, Outdoor Systems, Inc. will be referred to as "Viacom."

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. Does the Home Rule Cities Act provide separate and independent authority to the City of Clawson to regulate billboards?

II. Is MCL 125.592 of the City and Village Zoning Act prohibiting exclusionary zoning intended to apply to billboards?

III. Does the City of Clawson's Sign Ordinance violate MCL 125.592?

IV. Is the City of Clawson's Sign Ordinance a content-neutral regulation?

V. Does the City of Clawson's Sign Ordinance violate the First Amendment of the US Constitution?

COUNTER-STATEMENT OF FACTS

The Michigan Municipal League adopts the Counter-Statement of Facts of the City of Clawson.

LAW AND ARGUMENT

I. THE CITY OF CLAWSON HAS TWO SEPARATE AND INDEPENDENT SOURCES OF AUTHORITY TO REGULATE BILLBOARDS.

The City of Clawson is a home rule city under the Home Rule Cities Act, MCL 117.1, et. seq. (the "Act"). The City of Clawson's home rule status dates back to 1928 when it was incorporated from a village. See Charter Section 3.01. Charter Section 3.01 sets forth the powers of the City of Clawson and provides as follows:

> "All of the powers, not inconsistent with the provisions of this Charter, possessed by the Village of Clawson by virtue of its incorporation as such and enumerated in the Village Charter of said Village adopted by the people of said Village at an election held February 6, 1928, which Charter is hereby superceded, are expressly retained by the City of Clawson under this Charter. Further, unless otherwise provided in this Charter, ***said City and its officers shall be vested with any and all powers expressed and implied, which cities and their officers are, or hereinafter may be, permitted to exercise or provide for their charters under the Constitution and laws of the State of Michigan, including all of the powers granted the cities and officers of cities of the fourth class by Public Act No. 215 of 1895 (MCL 81.1, et. seq.) and permitted to cities by Public Act No. 279 of 1909 (MCL 117.1, et. seq.), as fully and completely as if those powers were specifically incorporated into and provided for in this Charter, and in no case shall any enumeration of particular powers in the Charter be held to be exclusive.***"

The City of Clawson's home rule authority cannot be understood without a summary of the evolutionary revisions to the Michigan Constitution and the fundamental shift in the relationship between municipalities (in particular home rule cities) and state government. Throughout the 1800's and the early 1900's, the relationship between municipalities and the state government was somewhat unclear. The Michigan Constitution of 1835 made no references to municipal corporations and only few references to entities which became recognized as municipal corporations (i.e. townships, counties, and corporate towns or cities). See Rae, Local Government Law and Practice in Michigan, 1.3 (1999). In contrast,

the 1850 Constitution recognized a city or village as a "municipal corporation." See Id. citing Mich Const. 1850, Art XV, Section 13, 1, 10. The 1908 Constitution provided for significant revisions to local government. See Id. citing Article VII, Section 20, of Mich Const 1908. However, the relationship between municipalities and state government remained open. This changed with the adoption of the 1963 Constitution. Specifically, Article IX, Section 6, replaced the phrase "municipal corporation" with the phrase "city, village, charter or county, charter township, charter authority, or other authority, the tax limitations of which are provided by general law." More importantly, the 1963 Constitution provided two separate provisions regarding the relationship between municipalities and state government:

> Mich. Const 1963, Art. VII, Section 22.
>
> "Under general laws the electors of each city and village shall have the power and authority to frame, adopt, and amend its charter, and to amend an existing charter that the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have the power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the Constitution and law. ***No enumeration of powers granted to cities and villages under this Constitution shall limit or restrict the general grant of authority conferred by this section.***
>
> Mich Const 1963, Art. VII, Section 34.
>
> "The provisions of this Constitution and law concerning counties, townships, cities, and villages shall be liberally construed in their favor. ***Powers granted to counties and township by this Constitution or by law shall include this fairly implied and not prohibited by this Constitution.***"

The framers of the 1963 Constitution explained the revision in stating they wanted to "reflect Michigan's successful experience with home rule" by providing "a more positive statement and municipal powers, giving home rule cities and villages full power over their property and government subject to this Constitution and law." See Rae, Local Government Law and Practice in Michigan at 1-9, citing

Convention Comment, Art. VII, Section 22. In addition, the framers described Article VII, Section 34, as "a new section intended to direct courts to give liberal or broad construction to statutes and constitutional provisions concerning all local governments." In other words "home rule cities and villages already enjoy a broad construction of their powers and it is the intention here to extend to counties and townships within the powers granted to them equivalently to the interpretation of the Constitution and statutes." See Id. citing Convention Comment, Art. VII, Section 34.

Based upon these constitutional provisions, Michigan courts have recognized the following principle with regard to the relationship between municipalities and state government:

> "***Our municipal governance system has matured to one of general grant of rights and powers, subject only to certain enumerated restrictions instead of the earlier method granting enumerated rights and powers definitely specified.***"

City of Detroit v. Walker, 445 Mich 682, 690, 520 NW2d 135 (1994). See also Real Property Owners Association v. City of Grand Rapids, 455 Mich 246, 254, 566 NW2d 514 (1997); Adams Outdoor Advertising, Inc. v. City of Holland, 234 Mich App 681, 687, 600 NW2d 339 (1999), affirmed on other grounds 463 Mich 675, 625 NW2d 377 (2001).

Recognizing home rule cities' general grant of authority, MCL 117.4i of the Act sets forth the permissible charter provisions and provides in part:

> "Each city may provide in its charter for 1 or more of the following:
>
> (f) Licensing, regulating, restricting, and limiting the number of locations of billboards within the city."

This statutory section specifically grants a city the authority to license, regulate, restrict, and limit billboards. It is noteworthy that this specific and express grant of authority relates to one type of sign: billboards. No other provision of the Act is so direct and specific in its delineation. More importantly,

it does not explicitly, nor even implicitly, ***prohibit*** cities from banning billboards.

The Michigan Supreme Court has stated on a number of occasions that home rule cities have broad powers with respect to billboards. Adams, 234 Mich App at 688; See also Adams Outdoor Advertising, Inc. v. East Lansing, 439 Mich 209, 483 NW2d 38 (1992). In fact, the Michigan Supreme Court stated in East Lansing:

> "The reading of De Mull [v. City of Lowell, 368 Mich 242, 118 NW2d 232 (1960)] has not restricted a city's authority to regulate billboards under the home rule act, is also consistent with this court's long-standing liberal interpretation of that act. We noted in Gallup v. Saginaw, 170 Mich 195, 200, 135 NW 1060 (1912) that the home rule act is one of general grant of rights and powers, subject only to the certain enumerated restrictions, instead of the former method of only granted enumerated rights and powers definitely specified."

Id. at 218. The court stated further:

> "The zoning authority under the home rule act is clearly subject to many restrictions, enumerated by the Legislature in the zoning enabling act. ***The separate power to regulate billboards is not so restricted.*** Further, in construing the same section of the home rule act at issue here, MCL 117.4i; MSA 5.2082, we have said that the act is comprehensive, 'but it leaves many things to be implied from the power conferred .' People v. Sell, 310 Mich 305, 312; 17 NW2d 193 (1945) (citation omitted). 'Considering it purpose, [the act] should be construed liberally in a home-rule spirit.'"

See Id.

In Adams, the Michigan Court of Appeals specifically rejected the argument that MCL 117.4i(f) was not an express general grant of authority and precluded home rule cities from banning new billboards. Adams, 234 Mich App at 688. After summarizing the evolution of authority afforded to home rule cities, the court restated the established principle regarding the relationship between home rule cities and the state government in stating:

"As indicated in both Detroit v. Walker, Supra, and Adams Outdoor Advertising,

supra, unless a power or right is specifically proscribed by law, a home rule city has broad authority to enact ordinances for the benefit of the health, safety, and welfare of its residents. Home rule cities are not limited to those powers expressly enumerated."

See Id. The court proceeded to state that even though MCL 117.4i does not grant a home rule city the authority to ban new billboards, "unless a power or right is specifically proscribed by law, a home rule city has broad authority to enact ordinances for the benefit of the health safety, and welfare of its residents." Id. at 689. The court stated further that "home rule city are not limited to only those powers expressly enumerated." Id. It is also important to note that the court rejected the argument that Central Advertising Co. v. Ann Arbor, 391 Mich 533, 218 NW2d 27 (1974) precluded its holding.[2] The court stated that more recent Supreme Court jurisprudence in Detroit v. Walker and Adams Outdoor Advertising has "superseded" Central Advertising Co. and denies such narrow reading of a home rule cities powers. Id. at 689-690. On this basis, it upheld the ban on new billboards.

The Supreme Court of Arizona addressed whether a city exceeded its authority under the Urban Environment Management Act ("UEMA"), Arizona's zoning enabling act, in prohibiting off-site billboards. Outdoor Systems, Inc. v. City of Mesa, 169 Ariz 301, 819 P2d 44 (1991). In this case, City of Mesa passed an ordinance prohibiting all "off-site" signs or billboards. Various billboard companies challenged the ordinance on the grounds that it violated UEMA. The relevant provisions of UEMA as provided as follows:

"The legislative body of any municipality by ordinance may in order to protect and promote the public health, safety and general welfare:

2. ***Regulate signs and billboards.***

3. Regulate location, height, bulk, number of stories and sizes of buildings and

---

[2]Central Advertising Co. had held that the banning of billboard violated the Act.

> structures, the size and use of lots, courts and other open spaces, the percentage of a lot which may be occupied by a building or structure, access to incident solar energy and the intensity of land use."

Id. at 305. The billboard companies argued that Mesa's power to "regulate" under UEMA did not encompass the power to ***prohibit*** "off-site" billboards. The court refused to recognize the regulation-prohibition distinction and upheld the prohibition on "off-site" billboards. The court stated:

> "We believe that Mesa's ordinance prohibiting off-premises signage is a valid exercise of the city's power to regulate signs and billboards. Although they fail to use the term 'prohibited' along side the word 'regulate,' Section 9-462.01(A) vests Mesa with 'broad authority' to regulate land uses." See Circle K, 166 Ariz. at 467, 803 P.2d at 460. This authority includes the power to regulate location and specification of sign billboards. Mesa ordinance does not breach that power by restricting the location of a detached sign to the site of the activity or enterprise which it advertises. Nor does it eliminate the existence of the very thing or act to be regulated. Mesa's sign code does not prohibit all signs and billboards, but only those classified as off-site."

Id. at 305. The court further stated that:

> "Contrary to the fear voiced by Outdoor, our decision does not sanction the wholesale prohibition of any activity that a municipality or government agency may regulate pursuant to the enabling act. We hold only that, by virtue of the broad zoning power conferred by the UEMA, Mesa is authorized to prohibit off-premises signs. It does not follow that a city or regulatory board may use the same or another grant of enabling power to obtain extreme results, such as a ban of on-premises identification signs or the prohibition of all new entrants into a business or profession."

Id. at 305-306.[3]

Mesa is clearly on point with respect to the Clawson ordinance. Similar to UEMA, MCL

---

[3]The court also noted that the majority of cases have upheld the ban of off-site billboards regardless of the language of the enabling statute and, in doing so, have rejected the distinction between the power to regulate and the power to prohibit. See Kovacs v. Cooper, 336 US 77, 69 S Ct 448, 93 L Ed 513 (1949); Metromedia, Inc. v. City of San Diego, 453 US 490, 101 S Ct 2882, 69 L Ed2d 800 (1981); Beckis v. Planning and Zoning Commission, 162 Conn 11, 291 A 2d 208 (1971); Lamar-Orlando Outdoor Advertising v. City of Ormond Beach, 415 So 2d 1312 (Fla App 1982); John Donley & Sons, Inc. v. Outdoor Advertising Board, 369 Mass 206, 399 NE2d 709 (1975).

117.4i grants home rule cities the authority to "regulate" billboards. As indicated by Mesa, "regulate" encompass the power to "prohibit." The only difference between Mesa and this case is that the Arizona Supreme Court was interpreting Arizona's zoning enabling act whereas this Court is analyzing the Act. However, that is a further reason to uphold the City of Clawson Sign Ordinance. As indicated by Walker, Real Property Owners Association v. City of Grand Rapids, and Adams Outdoor Advertising, Inc., the authority of home rule cities is ***not limited*** to its enumerated powers. As a result, the City of Clawson should not be precluded from banning off-premises billboards under the Act.

II. MCL 125.592 OF THE CITY AND VILLAGE ZONING ACT PROHIBITING EXCLUSIONARY ZONING WAS NOT INTENDED TO APPLY TO BILLBOARDS.

Viacom's claim that the City of Clawson's Sign Ordinance violates MCL 125.592 ***erroneously presumes*** that the statutory section applies to billboards. MCL 125.592 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 use is unlawful."

MCL 125.592 does not define what constitutes a ***"land use."*** In addition, the remaining provisions of the City and Village Zoning Enabling Act, MCL 125.581 et. seq. (the "CVZA"), do not define "land use" under MCL 125.592.

The Michigan Supreme Court recently addressed this section of the CVZA in Adams Outdoor Advertising, Inc. v. City of Holland, 463 Mich 675, 625 NW2d 377 (2001). However, in a footnote, the Court specifically declined to address the issue in stating:

> "Defendant contends that billboards in general do not constitute a 'use' within the

> zoning context. Because of our resolution of this case, we can assume without deciding that billboards constitute such a 'use.'" Id. at 684.

This case presents an opportunity for this Court to definitively decide this issue and correctly interpret the CVZA to exclude billboards as "land uses."

The fundamental theory of exclusionary zoning stems from equal protection and constitutional law. In this vein, it has been traditionally applied to the "exclusion of particular classes of persons from a community because of their race or social or economic status." See Rathkopf, The Law of Zoning and Planning, 17.01 (4th Ed.); See also 83 Am Jur 2d 100; Martin v. Millcreek, 413 A2d 764 (Pa 1980).

In 1978, the Michigan Legislature adopted MCL 125.592 as part of substantial revisions to the CZVA. At the time, there was a great deal of concern with developing suburban communities shutting out land and housing markets to low and moderate income families. Over the years, suburban communities employed many tools to accomplish land use planning objectives (such as larger minimum lot sizes, and limitations on multiple-family development). See 83 Am Jur 2d 109-115. However, these controls also impacted low and moderate income families by excluding them from residing in certain suburban communities. As a result of this challenge, statutes across the country, such as MCL 125.592, were enacted to deal with this problem.

There have been a number of cases in Michigan which have dealt with the application of exclusionary zoning to housing arrangements such as mobile homes and mobile home parks. See Cady v. Detroit, 289 Mich 499, 286 NW 805 (1939); 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). The exclusionary zoning doctrine has also been applied to other cases involving churches, schools, junkyards, and landfills. See Roman Catholic Archbishop of Detroit v. Village of Orchard Lake, 333 Mich 389, 53 NW2d 308 (1952); Lincolnhol v. Shoreham Village, 368 Mich 225, 118 NW2d 289 (1962); Kropf v. City of Sterling Heights, 391 Mich 139, 215 NW2d 179 (1974), Ottawa County Farms, Inc. v. Polkton Township, 131 Mich App 222, 345 NW2d 672 (1983).

Despite more than eighty years of jurisprudence, a Michigan court has never applied the concept of exclusionary zoning or MCL 125.592 to billboards.[4] There is a logical reason for this. As indicated previously, exclusionary zoning was intended to protect such fundamental uses as housing and discrimination based upon race. Michigan case law has extended the doctrine to other uses (i.e. churches, schools, junkyards, and landfills). However, the underlying thread among all of these uses is that there is some ***necessity*** to their location within a municipality. The language of MCL 125.592 further supports the notion that exclusionary zoning in only designed to protect ***necessary uses*** within a municipality. The language explicitly states that it applies to land uses where there is a "demonstrated need." While MCL 125.592 does not define "demonstrated need," the emphasis clearly is on "need." This implies that not all uses are to be protected within the ambit of exclusionary zoning. The intent and the language of MCL 125.592 does not contemplate billboards being protected under exclusionary zoning.[5]

---

[4]The Supreme Court's decision in Adams Outdoor Advertising, Inc. is the only case where the MCL 125.592 has even arguably been applied to billboards. However, as noted above, the court refused to reach this issue.

[5]Viacom has employed the same arguments that were rejected in the early 1900's. As noted in the U.S. Supreme Court's decision in Metromedia, Inc., et al v. City of San Diego, et al, 483 US 490,

This interpretation of MCL 125.592 is also consistent with United States Supreme Court jurisprudence. See Metromedia, Inc. v. City of San Diego, 453 US 490, 101 S Ct 2882, 69 L Ed2d 800 (1981). Metromedia is discussed more comprehensively later in this brief, but in short, it upheld a complete ban on off-site commercial billboards. In doing so, the court stated:

> "As is true of billboards, the esthetic interests that are implicated by temporary signs are presumptively at work in all parts of the city...These interests are both psychological and economic. The character of the environment affects the quality of life and value of the property in both residential and commercial areas."

Id. at 498. The U.S. Supreme Court has further solidified its ruling in Metromedia with its decision in Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 US 789, 104 S Ct 2118, 80 L Ed2d 772 (1984). In Members of the City Council, the Court stated:

> "We affirm the conclusion of the majority in Metromedia. The problem addressed by this ordinance - the visual assault on the citizens of Los Angeles presented by the accumulation of signs posted on public property - cuts to a significant substantive evil within the City's power to prohibit." 466 US at 806-807.

According to U.S. Supreme Court case law, billboards pose unique problems that are not

---

101 S Ct 2882, 69 L Ed2d 800 (1981), the Court provided a brief history of the challenges billboard companies have made to regulations. It stated:

> "Early cases in this Court sustaining regulation of and prohibitions aimed at billboards did not involve First Amendment considerations. See Packer Corp. v. Utah, 285 US 105 (1932); St. Louis Poster Advertising Co. v. St. Louis, 249 US 269 (1919); Thomas Cusack Co. v. City of Chicago, 242 US 526 (1917). n7
>
> n7 These cases primarily involved due process and equal protection challenges to municipal regulations directed at billboards. The plaintiffs claimed that their method of advertising was improperly distinguished from other methods that were not similarly regulated and that the ordinances resulted in takings of property without due process. The Court rejected these claims, holding that the regulation of billboards fell within the legitimate police powers of local government." Id. at 498.

similar to other uses of land. This judicial determination is consistent with a legislative interpretation of MCL 125.592 to not include billboards within the definition of a "land use" for exclusionary zoning. As a result, MCL 125.592 should not extend to this type of unnecessary land use.

III. VIACOM HAS FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES UNDER PARAGON PROPERTIES.

The Michigan Supreme Court has made it clear that in order to challenge a zoning ordinance "as applied" to a particular property, a party must obtain a "final decision" from the municipality. See Paragon Properties v. City of Novi, 452 Mich 568, 550 NW2d 772 (1996).[6] The underlying policy considerations of Paragon Properties are clear. Michigan courts have stated:

> "Exhaustion of administrative remedies serves several policies: (1) an untimely resort to the courts may result in delay and disruption of an otherwise cohesive administrative scheme; (2) judicial review is best made upon a full factual record developed before the agencies; (3) resolution of the issues may require the accumulated technical competence of the agency or may have been entrusted by the legislature to the agency's discretion; and (4) a successful agency settlement of the dispute may render a judicial resolution unnecessary."

Judges of the 74th Judicial Dist. v. Bay County, 385 Mich 710, 727-728, 190 NW2d 219 (1971); see also International Business Machines Corp. v. Dept. of Treas., 75 Mich App 604, 255 NW2d 702 (1977). With regard to an exclusionary zoning claim, a plaintiff's challenge is particular to the facts and decided on a case-by-case basis. See Eveline Township v. H&D Trucking Company, 181 Mich App 25, 448 NW2d 727 (1989). See also Paragon Properties, 452 Mich 568 (1996) ; Village of Euclid v. Ambler Realty, 272 US 365, 47 S Ct 114, 71 L Ed 303 (1926). In Village of Euclid, the United States Supreme Court stated:

---

[6] To date, no court in Michigan has addressed whether the exhaustion of administrative remedies doctrine applies to the exclusionary zoning claims. In Adams, the Michigan Court of Appeals specifically the declined to address this issue. 234 Mich App at 699-700.

"A facial challenge alleges that the mere existence and threatened enforcement materially and adversely effects value and curtails opportunities of all property regulated in the market. An 'as applied' challenge alleges a present infringement or denial of a specific right or of a particular injury and process of actual execution." See Id.

The issues involved with an exclusionary zoning claim are analogous to a challenge to a zoning ordinance as applied and therefore, a plaintiff should follow Paragon Properties before commencing litigation.

Under the CVZA, the exhaustion of administrative remedies entails a party applying for variance relief from the appropriate zoning board of appeals. See MCL 125.585. MCL 125.5(8)(5)(11) provides that a decision of the zoning board of appeals is final and may be appealed to the circuit court. In addition, a party seeking to appeal a zoning board of appeals decision has 21 days to file an appeal. See Davenport v. Grosse Pointe Farms, 210 Mich App 400, 534 NW2d 143 (1995). The failure to file a timely appeal from a determination of the zoning board of appeals waives any constitutionally related claims arising out of the same facts. See Krohn v. Saginaw County, 175 Mich App 193, 437 NW2d 260 (1988).

Viacom has clearly failed to satisfy the requirements of Paragon Properties. As stated by the City of Clawson in its Counter-Statement of Facts, Viacom applied for a building permit to install one 12' x 24' billboard on a 30' pole on Fourteen Mile Road. The City of Clawson Building Department denied the request and the Viacom filed a notice of appeal with the City of Clawson Zoning Board of Appeals (the "ZBA"). Following established procedure, the City Manager for the City of Clawson distributed copies of the ZBA Bylaws for use variances to Viacom. The bylaws require a pre-hearing conference with a building official to develop a plan presentation and for the property owner to show specific reasons why the use variance should be granted. To facilitate this conference, the ZBA tabled

the matter until its April 19, 2000 meeting.

Notwithstanding, Viacom failed to meet with a building official or the ZBA and instead, filed the lawsuit underlying in this case. Surprisingly, Viacom filed its complaint requesting the Oakland County Circuit Court to order the City of Clawson to permit the construction of three billboards (not just the one initially requested). The additional requests in Viacom's complaint included two 14' x 48" dual face billboards on 70 foot steel poles.

At the preliminary injunction hearing, the Oakland County Circuit Court ordered Viacom to make an administrative request before the ZBA under Paragon Properties. Pursuant to the court's order, Viacom applied to the ZBA for a use variance. On June 15, 2000, the ZBA denied the request, but more importantly, the ZBA stated that it did not meet the height, set-back, or square footage requirements for signs under the Sign Ordinance. After the ZBA decision, Viacom failed amend its complaint. In addition, Viacom subsequently entered into another lease and on February 1, 2002 applied for an additional building permit for a 14' x 40' dual-face sign by a 70 foot pole. The request was denied and Viacom never applied for a use variance.

The mandates of Paragon Properties are clear and reasonable. Viacom must exhaust its administrative remedies prior to filing suit. In this case, Viacom had already been ordered to file an appeal with the ZBA for failing to exhaust its administrative remedies. However, in doing so, Viacom did not complete its burden. The ZBA decision clearly left open the issues of height, set-back, and square footage. In addition, Viacom has added a fourth billboard to its request, which did not proceed through an administrative appeal process. Viacom must believe there is an exception to the exhaustion of administrative remedies under Paragon Properties and clearly, there is no such exception.

IV. THE CITY OF CLAWSON'S SIGN ORDINANCE IS CONTENT-NEUTRAL AND A VALID REGULATION OF SPEECH.

Viacom's First Amendment challenge can be confined to the issue of whether a distinction between an off-site sign and on-site sign is content-neutral. It is well established that the First Amendment does not guarantee the right to communicate one's views at all times and places or that may be desired. Adderley v. Florida, 385 US 39, 47. 87 S Ct 242, 17 L Ed2d 149 (1966); Poulous v. New Hampshire, 345 US 395, 405, 73 S Ct 760, 97 L Ed2d 1105 (1953); Cox v. Louisiana, 379 US 536, 85 S Ct 453, 13 L Ed2d 471 (1965); Heffron v. International Society for Krishna Consciousness, Inc., 452 US 640, 101 S Ct 2559, 69 L Ed2d 298 (1981). The US Supreme Court has stated:

> "...restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that do so the leave open all ample alternative channels for communication of the information."

Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 US 748, 771, 96 S Ct 1817, 48 L Ed2d 346 (1976); Consolidated Edison Co. v. Public Service Commission, 447 US 530, 535, 100 S Ct 2326, 65 L Ed2d 319 (1980); Members of City Council v. Taxpayers for Vincent, 466 US 789, 807, 104 S Ct 2118, 80 L Ed2d 772 (1984). A major criterion for a valid time, place, and manner restriction is that the restriction "may not be based upon either the content or subject matter of the speech." Consolidated Edison Co., 447 US 530, 100 S Ct 2326, 65 L Ed2d 319 (1980); Linmark Associates v. Willingboro, 431 US 85, 97 S Ct 1614, 52 L Ed2d 155 (1977); Police Department of Chicago v. Mosely, 408 US 92, 92 S Ct 2286, 53 L Ed2d 212 (1972); Papish v. University of Missouri Curators, 410 US 667, 670, 93 S Ct 1197, 35 L Ed2d 618 (1973).

The landmark case in the area of billboard regulation is Metromedia, 453 US 490 (1981). In

this case, the City of San Diego passed an ordinance permitting on-site commercial advertising. However, the ordinance prohibited commercial advertising and noncommercial communication unless the speech fit within one of twelve exemptions. The exceptions included signs identifying premises on which the sign was located or signs advertising goods produced or services rendered on the premises ("on-site premises signs"). The exceptions also included religious symbols, commemorative plaques of recognized historical societies, signs carrying news items or telling the time or temperature, signs erected in the discharge of any governmental function, or temporary political campaign signs. The US Supreme Court upheld the ordinance with respect to its regulation of commercial speech on the basis that the goals of improving traffic safety and the appearance of the city were substantial; that the ordinance directly served these goals; and that they were no broader than necessary to accomplish the ends. However, the US Supreme Court found a constitutional defect in the ordinance's treatment of commercial and non-commercial speech. It was particularly concerned with the ordinance elevating commercial speech above non-commercial speech and the way the challenged ordinance distinguished among different noncommercial messages. Id. at 513-514. In so doing, it stated:

> "There is a broad exception for on-site commercial advertisements, but there is no similar exception for commercial speech. The use of on-site billboards to carry commercial messages related to the commercial use of the premises is freely permitted, but the use of otherwise identical billboards to carry non-commercial messages is generally prohibited...insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of non-commercial messages."

Id. 453 US at 513.

The plurality opinion in Metromedia made a distinction which is critical to this case. It found

that a municipality could legitimately distinguish between on-site and off-site advertising.[7] Id. at 512. Based on Metromedia, numerous other courts have upheld that the distinction between an on-site and off-site regulation as a valid content-neutral or time, place, and manner regulation.[8] Rzadkowlski v. Village of Lake Orion, 845 F2d 653 (6th Cir 1988); Wheeler v. Commissioner of Highways, 822 F2d 586 (6th Cir 1987), cert denied 484 US 1007, 108 S Ct 702, 98 L Ed2d 653 (1988); Gannett Outdoor Company of Michigan v. City of Troy, 156 Mich App 126, 409 NW2d 335 (1986); Messer v. City of Douglasville, 975 F2d 1505 (11th Cir 1992), cert denied 508 US 930, 113 S Ct 2395, 124 L Ed2d 296 (1993); Southlake Property Associates, Ltd. v. City of Morrow, 112 F3d 1114 (11th Cir 1997), cert denied 525 US 820, 119 S Ct 60, 142 L Ed2d 47 (1998); see also Ackerley Communications of Northwest, Inc. v. R.F. Krochalis, 108 F3d 1095 (9th Cir 1997); Major Media of the Southeast, Inc. v. City of Raleigh, 792 F2d 1269 (4th Cir 1986), cert denied 479 U S 1102, 107 S Ct 1334, 94 L Ed2d 185 (1987).

In Wheeler, a billboard statute was challenged under the First and Fourteenth Amendments of the US Constitution. 822 F2d 586. The statute prohibited the erection of any billboard within 660 feet

---

[7]Viacom attempts to mis-characterize the holding in Metromedia on page 21 and 22 of its brief in claiming that a limitation of commercial messages to the principal use of the premises is content-based. Viacom fails to recognize that Metromedia was only concerned with elevating commercial speech over non-commercial speech and controlling the content of non-commercial speech. Neither of these concerns are present in the City of Clawson's Sign Ordinance. Contrary to Viacom's arguments, it does not "pick and chose" among messages. The Sign Ordinance prohibits commercial and non-commercial speech on nonaccessory or off-premises signs while allowing them on accessory or on-premises signs.

[8]The US Supreme Court has upheld content-neutral regulations in similar cases. Members of City Council, 466 US 789 (1984) (upheld ban on signs in public parks); Clark v. Community for Creative Non-Violence, 468 US 288, 104 S Ct 3065, 83 L Ed2d 221 (1984) (general ban on camping in park upheld); Krishna Consciousness, Inc., 452 US 640 (regulation requiring all dissemination of ideas to be made from fixed locations within state fair upheld).

of any interstate highway or federal-aid primary highway. In contrast, the statute permitted on-premises signs or signs that "contain a message relating to an activity or the sale of a product on the property on which they are located." Id. at 588. The Sixth Circuit upheld the statute on the basis that it was a valid, time, place, and manner regulation. It reasoned that the statute prohibited all off-premises signs containing "any message" in the protected areas. Id. at 590. The court further stated that the "on-premises/off-premises distinction does not constitute an impermissible regulation of content just because the determination of whether a sign is permitted in a given location is a function of the sign's message." Id. at 591. The court distinguished Metromedia in reasoning that the on-premises exception is not limited to commercial speech. Moreover, the statute does not limit non-commercial speech to political advertisements, commemorative plaques, or religious symbols. Id. at 593.

In Rzadkowlski, a sign company applied for six permits to erect freestanding billboards and the Village of Orion denied four of the six applications on the grounds that its zoning ordinance did not permit the structures in the particular zoning district. 845 F2d 653. The zoning district only permitted on-premises signs with either commercial or non-commercial message that related to the activities conducted on the premises. The sign company challenged the zoning ordinance on the basis that it was a content-based regulation and was unconstitutional. The Sixth Circuit rejected the claim that it was a content-based regulation and upheld the constitutionality of the ordinance. The court reasoned that the "ordinance does not regulate content or make any distinction between commercial and noncommercial speech." Id. at 655. The court continued in stating that "...the Village's ordinance here is content neutral because it permits on-premise signs depicting both commercial and noncommercial speech in the business districts." Id. at 655.

In Gannett Outdoor Company of Michigan, a sign company challenged the denial of buildings permits for billboards. 156 Mich App 126. The City of Troy's sign ordinance permitted accessory signs in all zoning districts and non-accessory signs in the industrial zoning district. Accessory signs included signs relating to a business conducted on-premises while nonaccessory signs included those in which the sign message was unrelated to the business conducted on the premises. Id. at 129. Both commercial and non-commercial messages could be displayed on accessory signs. The sign company claimed that the sign ordinance violated the First Amendment of the US Constitution and Art 1, Section 5 of the Michigan Constitution. The Michigan Court of Appeals upheld the constitutionality of the sign ordinance. After reviewing US Supreme Court jurisprudence, it determined that the sign ordinance was content-neutral because the regulation is not based on the "city's assessment of the desirability of the idea expressed on proposed signs." Id. at 136. As in Wheeler, the Court of Appeals distinguished Metromedia in stating that the City of Troy's sign ordinance regulates non-accessory signs without regard to commercial or non-commercial content. In addition, the sign ordinance did not distinguish among noncommercial messages by reference to the content of their message.

In Messer, the municipality prohibited off-premises signs in its historic district. 975 F2d 1505. Various sign companies filed suit against the municipality claiming the complete ban on off-premises signs violated the First Amendment of the US Constitution. The Eleventh Circuit rejected the constitutional challenge. It reasoned that the sign regulation was content-neutral in that "it regulates signs not based on the viewpoint of the speaker, but based on the location of the signs." Id. at 1509. Moreover, the ordinance did not favor commercial speech over non-commercial speech as in Metromedia.

Similar to Messer, a sign company challenged an ordinance on the basis that it violated the First and Fourteen Amendments of the US Constitution. Southlake Property Associates, Ltd., 112 F3d 1114. The municipality's sign ordinance prohibited billboards. Billboards were defined as signs which advertise an activity which is not located on-premises. Id. at 1115. The Eleven Circuit upheld the validity of the sign ordinance. It reasoned that the ordinance was content-neutral in that it did not distinguish between commercial and non-commercial speech for on-premise signs. Id. at 1117.

As in Rzadkowlski, Wheeler, Gannett Outdoor Company of Michigan, Messer, and Southlake Property Associates, Ltd., the City of Clawson's Sign Ordinance does not distinguish between commercial and non-commercial speech. It merely prohibits all off-premises or nonaccessory signs. In doing so, this clearly distinguishes it from the constitutional impairment recognized in Metromedia.

V. THE CITY OF CLAWSON'S SIGN ORDINANCE IS TAILORED TO SERVE SIGNIFICANT GOVERNMENTAL INTERESTS AND THERE ARE ALTERNATE CHANNELS OF COMMUNICATION.

A time, place, and manner regulation must also serve a significant governmental interest and leave open ample alternative channels for communication of information. See Virginia Pharmacy Board, 425 US 748 (1976); Consolidated Edison Co., 447 US 530 (1980); Members of City Council, 466 US 789 (1984).

Since Metromedia, it is well established that the interests of safety and esthetic considerations are sufficient to justify a content-neutral ban on billboards. Metromedia, 453 US at 508-511. In writing for the plurality, Justice White stated:

> "We are likewise hesitant to disagree with the accumulated, commonsense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety."

Id. at 509. With regard to aesthetics, Justice White wrote:

> "it is not speculative to recognize that billboards are by their very nature, wherever located and however constructed, can be perceived as an "esthetic harm.'"

Id. at 510. The US Supreme Court later stated in Members of the City Council:

> "We affirm 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."

466 US 789 (1984). In both Metromedia and Members of the City Council, the US Supreme Court did not impose a burden of proof on the municipalities to show by virtue of studies or investigations that their interests in traffic safety and aesthetic were valid.[9] For this reason, City of Clawson is not required to evidence its intent through a study or investigations. The nuisance of billboards is recognized by established judicial authority.

There are also alternate channels for communication for Viacom in the City of Clawson. The US Supreme Court has recognized that billboards are unique advertising devices. Metromedia, 453 US at 525. However, the plurality in Metromedia still construed the ordinance as a total ban on billboard advertising. The City of Clawon's sign ordinance is not a ban on all advertising signs. It permits accessory signs or ones that relate to the use of the property. Both commercial and non-commercial messages are allowed on these signs. The Sign Ordinance merely prohibits nonaccessory or off-premises signs.

In a very factually similar case, the Sixth Circuit held that the due to the size of the Village of

---

[9]In Metromedia, Justice White expressed some concern with the aesthetic judgments of municipalities in that they may only be "public rationalization of an impermissible purpose." 453 US 510. However, there is no evidence to suggest such a purpose in this case.

Lake Orion, there was no suggestion that alternative channels were not available nearby. Rzadkowloski, 845 F2d at 655. In this case, the Village of Lake Orion was approximately two square miles and most of the area was zoned for residential use. Id.

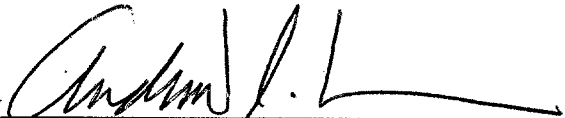
Similarly, the City of Clawson is a unique municipality in that approximately eighty percent of it is residential. Like the Village of Lake Orion, it has an area of 2.4 square miles and according to the 2000 census has 12,732 people. Lastly, Viacom's own research shows there is no shortage of billboards in the Oakland County. For these reasons, there are clearly alternate channels of communication for Viacom.

RELIEF REQUESTED

The Michigan Municipal League respectfully requests that this Court uphold the decision of the Oakland County Circuit Court.

Respectfully submitted,

CUNNINGHAM DALMAN, P.C.
Attorneys for the Michigan Municipal League
Amicus Curiae



Dated: May 28, 2003

By ______________________

Andrew J. Mulder (P26280)
P. Haans Mulder (P61842)
321 Settlers Road, P.O. Box 1767
Holland, MI 49422-1767
(616) 392-1821

G:\Haans\Michigan Municipal League\MML.B-Mot4Lv.CoA.wpd phm-5/28/03