STATE OF MICHIGAN
IN THE COURT OF APPEALS

INTERNATIONAL OUTDOOR, INC.,

Plaintiff/Appellant,

v

CITY OF LIVONIA,

Defendant/Appellee.

Court of Appeals No. 325243

Lower Court Case No. 14-008996-CZ
Hon. Kathleen Macdonald

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***AMICUS CURIAE* BRIEF OF**

MICHIGAN MUNICIPAL LEAGUE; MICHIGAN TOWNSHIPS ASSOCIATION PUBLIC CORPORATION LAW SECTION OF THE STATE BAR OF MICHIGAN; AND SCENIC AMERICA AND SCENIC MICHIGAN

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE CITY OF LIVONIA HAS AUTHORITY TO REGULATE OFF-PREMISE BILLBOARDS UNDER THE HOME RULE CITIES ACT AND ORDINANCES AUTHORIZED THEREUNDER?

THE CIRCUIT COURT SAID	"YES."
APPELLANT SAYS	"NO."
APPELLEE SAYS	"YES."
AMICI SAY	"YES."

II. WHETHER THE CITY OF LIVONIA HAS AUTHORITY TO REGULATE OFF-PREMISE BILLBOARDS, INDEPENDENT OF EXCLUSIONARY ZONING PROTECTIONS PROVIDED FOR IN MCL 125.3207 OF THE MICHIGAN ZONING AND ENABLING ACT?

THE CIRCUIT COURT SAID	"NOT ANSWERED."
APPELLANT SAYS	"NOT ANSWERED."
APPELLEE SAYS	"NOT ANSWERED."
AMICI SAY	"YES."

III. IS THE CITY OF LIVONIA'S BILLBOARD REGULATION ENFORCEABLE AS TO APPELLANT, WHETHER VIEWED UNDER MICHIGAN COMMON LAW OR STATUTORY EXCLUSIONARY ZONING PROTECTIONS?

THE CIRCUIT COURT SAID	"YES."
APPELLANT SAYS	"NO."
APPELLEE SAYS	"YES."
AMICI SAY	"YES."

COUNTERSTATMENT OF STANDARD OF REVIEW

Amici accept Appellee's counterstatement of the standard of review applicable to this proceeding.

INTRODUCTION

By this appeal, Appellant seeks to resurrect that which has become extinct – billboards in the City of Livonia. Appellant is not, however, an owner of land, claiming that aggressive regulation has made it impossible to continue keeping or maintaining billboards. Nor is Appellant a lessor of land, complaining that a city's regulations make it untenable to rent property of others for purposes of keeping billboards in any particular location. Rather, Appellant is an entrepreneur of new business. Appellant is seeking to plow the protected billboard free landscape within the City of Livonia with new billboard devices; contending only now that regulations which have stood the test of time and repeated court challenges should be disregarded for *its* sole commercial interests and at the expense of a community's interest in protecting its natural landscape.

However, not only is Appellant too late to assert any claimed injury with the application of the City of Livonia's regulations, the record upon which Appellant relies for its appeal simply fails to offer Appellant a basis upon which its challenge could be sustained. This is because Appellant asserts that its challenge is a *facial challenge* to the City of Livonia ordinance.

> * * * So currently **on its face** there is a total prohibition of billboards in the City of Livonia

Nov. 20, 2014 Hrg. Transcript of Proceedings before Trial Court, p. 12. (Appellant's trial counsel)(emphasis added).

> After the denial of the use variance, International Outdoor sued, challenging Section 18.50C(2) of the zoning ordinance **as invalid on its face**.

Appellant's Brief, p. 4 (emphasis added).

> Thus, unlike *Adams*, Livonia completely prohibits billboards. And the prohibition **is on the face of the ordinance**.

Appellant's Brief, p. 20 (emphasis added).

If we are to take Appellant at its word, and view its challenge as a *facial* challenge, this appeal must fail when considering the clear language of the City of Livonia ordinances which, contrary to Appellant's argument, do not and never did "completely prohibit[] billboards."

Billboards are specifically defined by the Livonia Ordinances as follows:

> 4. Billboard. A ground sign advertising a product, event, person, business or subject **not related to the premises on which the sign is located**.

(See, Appellant's Brief, App. 3, Section 18.50A of Livonia Ordinances)(emphasis added). Accordingly, by this definition, the types of billboards at issue in this proceeding are those *off-premises* billboards that are "not related to the premises on which the sign is located." *Id*.

The Livonia Ordinances further provide as follows:

> Section 18.16 Billboards and Signs. The erection and maintenance of billboards and outdoor advertising signs on any parcel of land within the City of Livonia, or the use of any such parcel for said purpose, are hereby prohibited; provided, however, that **this section shall not apply to billboards or outdoor advertising signs lawfully in existence at the time this ordinance becomes effective**, nor to those specific signs which are expressly allowed by the district regulations contained in this ordinance.

(See, Appellee's Brief, Exhibit C, Section 18.16 Livonia Ordinances)(emphasis added). Appellant completely ignores the express provision of the Livonia ordinances granting nonconforming use status and instead focuses its attention on Livonia's supplementary ordinance at Section 18.50C which merely recognizes that new billboards, beyond those which were presently existing in 1952 when Ordinance Section 18.16 was enacted, are obviously prohibited. The challenged ordinance states as follows:

> Section 18.50C Prohibited Signs. * * * A sign **not expressly permitted** in a zoning district is prohibited. The following signs as defined in Section 18.50A of this ordinance shall not be permitted and are expressly prohibited in any zoning district:
>
> * * *
>
> 2. "Billboards"

Livonia Ordinance Section 18.50C(2) (emphasis added). Clearly, Section 18.16 of the Livonia Ordinances "expressly permit[s]" billboards which were "lawfully in existence" in 1952. As such, Appellant's claim that the Livonia Ordinances, on their face, prohibit all billboards is simply a false premise which should not be entertained by this Court. Livonia ordinances to not prohibit "on premise" billboards and further do not prohibit "off premise" billboards which have been grandfathered under express terms of the ordinances.

Notwithstanding Appellant's contentions otherwise, it is not surprising that the trial court chose to view Appellant's complaint as an *as applied* challenge.

> And looking at everything; your complaint and your argument, it is certainly as applied challenge which is one in which the complainant alleges that the individual landowners suffers from a specific and identifiable injury as a result of the township's ordinance or decision.

Nov. 20, 2014 Hrg. Transcript. p. 15 (Trial Judge statements). As will be explained further, however, even an as applied challenge fails on this record.

In the context of billboard regulation, our Supreme Court has observed,

> * * * with the passage of time, the ordinance might effectively eliminate all billboards. If that eventuality arises, our opinion should not be construed as foreclosing an "as applied" challenge to the ordinance. However, we need not address that contention because the present case involves a facial challenge to the validity of the ordinance sections under consideration.

Adams Outdoor Adver., Inc. v. City of Holland, 463 Mich. 675, 685, 625 N.W.2d 377, 383 (2001)(FN 11). The obvious question is whether Appellant, intentionally or not, has properly presented the "eventuality" question, *ie*. does an ordinance which allows existing billboards to stay, but precludes new billboards, pass legal muster when, "with the passage of time," previously existing billboards fade out of existence? However, before this "eventuality"

question can be addressed, more foundational questions unanswered by *Adams Outdoor Adver., Inc. v. City of Holland, supra* should first be answered.

In *Adams Outdoor*, plaintiffs argued that the City of Holland's billboard regulations violated MCL 117.4i of the Home Rule Cities Act (HRCA). MCL 117.4i provides:

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

MCL 117.4i (emphasis added). Plaintiffs argued that, in their view, the challenged ordinances "completely prohibit[ed] billboards." *Adams Outdoor Adver., Inc. v. City of Holland*, 463 Mich. 675, 682, 625 N.W.2d 377, 381 (2001). The Michigan Supreme Court disagreed and concluded that the charter authorizations provided for in the HRCA, when read in conjunction with the then applicable City and Village Zoning Act (CVZA), authorized cities to regulate billboards within the context of a zoning code. *Id*. at 684. When considering the challenged Holland regulations in light of the exclusionary zoning rules then applicable under the CVZA, the Supreme Court concluded, "we hold that, although the ordinance sections do limit the number of billboards within the city, they do not constitute an impermissible total prohibition of billboards. *Id*. at 685. Unanswered, however, was whether subsection 4i(f) of the HRCA "authorizes cities to regulate billboards in their charters" independent of a city's zoning authority. The Supreme Court simply noted, "subsection 4i(f) of the HRCA, the provision authorizing cities to regulate billboards in their charters need not be considered." *Id.* at 682.

For reasons more fully explained by Appellee's Brief, it is clear the challenged Livonia ordinances survive an as applied exclusionary zoning challenge under MCL 125.3207 of the Michigan Zoning and Enabling Act (MZEA). However, a more fundamental question relating to

a city's power to regulate billboards as authorized by the Michigan Constitution and the HRCA is presented by the relentless efforts of billboard entrepreneurs.

COUNTERSTATEMENT OF FACTS

Amici accept Appellee's counter-statement of facts and summary of proceedings below.

LAW AND ARGUMENT

I. THE CITY OF LIVONIA HAS AUTHORITY TO REGULATE BILLBOARDS UNDER THE HOME RULE CITIES ACT.

The City of Livonia is a home rule city under the Home Rule Cities Act, MCL 117.1, *et. seq*. (the "Act"). The City of Livonia's home rule status dates back to its incorporation. See Livonia Charter, Chpt. 2, Section 1. Livonia's charter sets forth the powers of the City of Livonia and provides as follows:

> **Section 1. General Powers.** The City of Livonia is hereby vested with any and all powers, privileges and immunities, expressed and implied, which cities and their officers are, or hereafter may be, permitted to exercise or provide for in their charters under the Constitution and Laws of the State of Michigan, including all the powers, privileges and immunities which cities are permitted to or may provide in their charters by Act. No. 279 of the Public Acts of 1909, as amended, as fully and completely as though those powers, privileges and immunities were specifically enumerated in and provided for in this Charter, and in no case shall any enumeration of particular powers, privileges or immunities in this Charter be held to be exclusive. The City and its officers shall have power to exercise all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; to do any act to advance the interests and welfare of the City, the good government and prosperity of the municipality and its inhabitants, and through its regularly constituted authority, to pass, adopt, enact, enforce and execute all laws, ordinances and resolutions relating to its municipal concerns, subject to the Constitution and General Laws of the State and the provisions of this Charter.

Livonia Charter, Chpt. 2, Section 1.

The City of Livonia'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 those 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 do four separately enumerated actions relative to billboards, 1) license, 2) regulate, 3) restrict, and 4) limit billboards. It is further 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.

In fact, the HRCA speaks more directly to a city's otherwise specifically authorized power to zone.

> Each city may provide in its charter for 1 or more of the following:
>
> * * *
>
> (c) The establishment of districts or zones within which the use of land and structures, the height, area, size, and location of buildings, the required open spaces for light and ventilation of buildings, and the density of population may be regulated by ordinance. The zoning ordinance provisions applicable to 1 or more districts may differ from those applicable to other districts. If a city is incorporated, or if territory is annexed to a city incorporated under this act, the zoning ordinance provisions applicable to the territory within the newly incorporated city or the annexed territory shall remain in effect for 2 years after the incorporation or annexation unless the legislative body of the city lawfully adopts other zoning ordinance provisions.

MCL 117.4i(c). Accordingly, despite this clear pronouncement of authority for cities to provide for zoning rules concerning the use of land and structures within their communities, the legislature nonetheless made a point to specifically enumerate an additional power beyond those powers enumerated in subsection (c) of Section 4i of the HRCA. See, MCL 117.4i(f).

Rules of statutory construction require all language used by the legislature to be given operative effect. Superfluous language is not used.

> It is also an established rule of statutory construction that legislative enactments must be considered in their entirety, and no statutory expression may be treated as superfluous or without meaning. As stated in *Potter v. Safford*, 50 Mich. 46, 48, 14 N.W. 694, 695: '**We must suppose every word employed in a statute has some force and meaning, and was made use of for some purpose**.' *See also, Chamski v. Wayne County Board of Auditors*, 288 Mich. 238, 257, 258, 284 N.W. 711; *Chicago, Detroit & Canada Grand Trunk Junction R. Co. v. Simons*, 210 Mich. 418, 423, 178 N.W. 12; *Lovalo v. Michigan Stamping Co*., 202 Mich. 85, 90, 167 N.W. 904.

In re Perry, 157 F. Supp. 910, 914 (W.D. Mich. 1958)(emphasis added). Here, the HRCA's separate pronouncement in subsection (f) of Section 4i which specifically authorizes cities to enact ordinances that "limit[] the number of . . . billboards within the city" must have

application, even outside a zoning context. MCL 117.4i(f). The express legislative pronouncement in MCL 117.4i(f), empowering municipalities to take *four separate and distinct actions* relative to billboards, fully embraces the legislative action taken by the City of Livonia, which limits billboards within its city and, through inaction of the billboard industry itself, has produced a landscape void of billboards. To any extent such void landscape is viewed as presenting the "eventuality question" forecasted by the Supreme Court in *Adams Outdoor, supra,* it cannot be answered without first considering and applying the very specific municipal authorizations enumerated in MCL 117.4i(f) as relating to the regulation *and limitation* of a very specific device – "billboards."

The Michigan courts have stated on a number of occasions that home rule cities have broad powers with respect to billboards. *Adams*, 234 Mich App at 688, affirmed on other grounds 463 Mich 675, 625 NW2d 377 (2001); 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* (emphasis added).

In *Adams*, the Michigan Court of Appeals specifically rejected the argument that MCL 117.4i(f) was not an express general grant of authority which 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*. at 689. 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*. 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.[1] 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

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

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 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' alongside 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's 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[2]

Mesa is clearly on point with respect to the challenged Livonia ordinance. Similar to UEMA, MCL 117.4i grants home rule cities the authority to not only "regulate" billboards, but to also "limit[]" 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 HRCA. However, that is a further reason to uphold the City of Livonia 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 Livonia should not be precluded from banning off-premises billboards under the Act – by virtue of the Michigan Constitution and the express authority granted to cities to "limit[] the number of . . . billboards within the city" under the HRCA. MCL 117.4i(f).

II. MCL 125.3207 OF THE MICHIGAN ZONING AND ENABLING ACT PROHIBITING EXCLUSIONARY ZONING WAS NOT INTENDED TO APPLY TO BILLBOARDS.

International Outdoor, Inc.'s claim that the City of Livonia's Billboard and Sign Ordinance violates MCL 125.3207 ***erroneously presumes*** that this statutory section applies to billboards. MCL 125.3207 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 local unit of government in the presence of a demonstrated need for that land use within either that local unit of government or the surrounding area within the state, unless a location within

[2] 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 *Kovoacs 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).

> the local unit of government does not exist where the use may be appropriately located or the use is unlawful.

MCL 125.3207 does not define what constitutes a ***"land use."*** In addition, the remaining provisions of the Michigan Zoning and Enabling Act (MZEA), MCL 125.3101 *et. seq*. do not define "land use" under MCL 125.3207.

The Michigan Supreme Court acknowledged this nearly identical section of MZEA within its predecessor CVZA[3] 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 MZEA 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 former MCL 125.592[4] as part of substantial revisions to the CVZA. 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

[3] Until 2006, there were three separate zoning enabling acts in Michigan: one for city and village zoning, one for township zoning, and one for county zoning. In 2006, the Legislature enacted the ZEA, 2006 PA 110, effective July 1, 2006, which consolidated the zoning enabling authority for all local governments." MCL 125.3101 *et seq. Kyser v. Twp.*, 486 Mich. 514, 540, 786 N.W.2d 543, 558 (2010), FN 19.

[4] Now codified at MCL 125.3207.

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 former 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 125.3207 (or its predecessor MCL 125.592) to billboards.[5] 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.

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

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 present statutory exclusionary zoning provision in MCL 125.3207 further supports the notion that exclusionary zoning is 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." MCL 125.3207. While MCL 125.3207 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 125.3207 simply does not contemplate billboards being protected under exclusionary zoning.[6]

This interpretation of MCL 125.3207 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* 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

[6] International Outdoor, Inc. 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, 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 regulations 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

> n 7 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.

> 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 similar to other uses of 1and. This judicial determination is consistent with a legislative interpretation of former MCL 125.592 and current MCL 125.3207 to not include billboards within the definition of a "land use" for exclusionary zoning. As a result, MCL 125.3207 should not extend to this type of *unnecessary* land use.

III. EVEN IF VIEWED AS A ZONING CHALLENGE, INTERNATIONAL OUTDOOR, INC. HAS FAILED TO ESTABLISH EXCLUSIONARY ZONING, WHETHER UNDER PRINCIPLES OF ZONING COMMON LAW OR STATUTORY LAW.

Even if the Livonia billboard ordinance were to be viewed as “zoning” land use ordinance, International Outdoor, Inc. cannot establish, on this record, a violation of exclusionary zoning protections. International Outdoor, Inc. has argued that prohibited exclusionary zoning is presented under principles of both common law and statutory law. (Appellant’s Brief, pp. 8 and 19).

A. Any common law protections applicable to exclusionary zoning claims have been absorbed by statutory provisions of the MZEA.

In *Kyser v. Twp.*, 486 Mich. 514; 786 N.W.2d 543 (2010), a property owner challenged a township's zoning rule which excluded gravel mining at her property because such land use was outside of the area designated for gravel mining within the township. The Michigan Supreme Court reviewed whether the *common law* "no very serious consequences" rule, as pronounced in *Silva v Ada Twp.*, 416 Mich 153, 330 N.W.2d 663 (1982), was still applicable considering later revisions to the Township Zoning Act, formerly MCL 125.297a and the MZEA[7] when a township zoning rule is challenged as exclusionary in nature and in violation of due process protections. *Kyser, supra* at 539 – 543. After *Silva*, Michigan's zoning enabling laws were amended to provide protection to property owners from exclusionary zoning. As observed in *Kyser*,

> * * * the Legislature itself superseded the rule of *Silva* by enacting the exclusionary zoning provision, MCL 125.297a.[8]
>
> * * *
>
> MCL 125.297a is now recodified in nearly identical form as MCL 125.3207 under the ZEA, which provides:
>
> A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a local unit of government <u>in the presence of a demonstrated need for that land use within either that local unit of government or the surrounding area within the state</u>, unless a location within the local unit of government does not exist where the use may be appropriately located or the use is unlawful.
>
> MCL 125.3207 prohibits municipalities from enacting any zoning ordinance "totally prohibiting" a given land use if a "demonstrated need" exists for that use,

[7] See FN 3, infra.

[8] This specific holding in *Kyser v. Twp.*, 486 Mich. 514, 786 N.W.2d 543, itself appears to be superseded by recent revisions to MZEA at MCL 125.3205(3) which reincorporates *Silva's* "very serious consequences" test for zoning relating to mining operations. The subsequent amendment provides, in part, that "the standards set forth in *Silva v Ada Township*, 416 Mich 153 (1982), shall be applied." See, Public Act 113 of 2011, effective July 20, 2011. This subsequent amendment did not otherwise modify the rules relating to analysis necessary on exclusionary zoning claims under MCL 125.297a.

> unless there is no location where the use may be "appropriately located," the use is "unlawful."

Kyser v. Twp., 486 Mich. at 539 - 540, 786 N.W.2d at 558 (2010)(emphasis added).

In concluding that subsequent legislative amendments superseded the common law previously applicable to an exclusionary zoning challenge to zoning rules prohibiting the extraction of natural resources, this Court stated as follows:

> Fundamental to determining whether the exclusionary zoning provision supersedes the "no very serious consequences" rule is assessing the provision in the context of the whole ZEA. The ZEA establishes the framework for a local government to create a comprehensive zoning plan to promote the public health, safety, and welfare of the community. MCL 125.3201(1) empowers local legislative bodies to zone for a broad range of purposes and addresses the establishment of land-use districts.

Kyser v. Twp., 486 Mich. at 540, 786 N.W.2d at 558-59 (emphasis added). Here, Appellant's contention that superseded principles of zoning common law should somehow govern this Court's review of its exclusionary zoning claim is clearly without merit.

B. Properly applied, the MZEA makes clear that no exclusionary zoning as defined by this Act is presented by International Outdoor, Inc.'s claim.

The Michigan Supreme Court has observed the following regarding a local unit of government's authority to zone and control for its local concerns:

> Zoning constitutes a legislative function. *Schwartz v. City of Flint*, 426 Mich. 295, 309, 395 N.W.2d 678 (1986). The Legislature has empowered local governments to zone for the broad purposes identified in MCL 125.3201(1). This Court has recognized zoning as a reasonable exercise of the police power that not only protects the integrity of a community's current structure, but also plans and controls a community's future development. *Austin v. Older*, 283 Mich. 667, 674–675, 278 N.W. 727 (1938). Because local governments have been invested with a broad grant of power to zone, "it should not be artificially limited." *Delta Charter Twp. v. Dinolfo*, 419 Mich. 253, 260 n. 2, 351 N.W.2d 831 (1984). Recognizing that zoning is a legislative function, this Court has repeatedly stated that it " 'does not sit as a superzoning commission.' " *Macenas v. Village of Michiana*, 433 Mich. 380, 392, 446 N.W.2d 102 (1989) (citation and emphasis omitted); *Brae*

> *Burn, Inc. v. Bloomfield Hills*, 350 Mich. 425, 430–431, 86 N.W.2d 166 (1957). Instead, **"[t]he people of the community, through their appropriate legislative body, and not the courts, govern its growth and its life**." *Brae Burn*, 350 Mich. at 431, 86 N.W.2d 166. We reaffirm these propositions.

Kyser v. Twp., 486 Mich. 514, 520-21, 786 N.W.2d 543, 547-48 (2010)(emphasis added). The "people of the community" of the City of Livonia have considered and adopted appropriate rules governing its community growth and its life – among them are restrictions relating to new off-premises billboards. See, Sections 18.16 and 18.50C.

As previously noted, the MZEA provides as follows with respect to a municipalities' ability to regulate a land use in an exclusionary fashion:

> A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a local unit of government in the presence of a demonstrated need for that land use **within either that local unit of government** or **the surrounding area within the state**, unless a location within the local unit of government does not exist where the use may be appropriately located or the use is unlawful.

MCL 125.3207. Applying this language, *Adams Outdoor Adver., Inc. v. City of Holland*, 463 Mich. 675, 684, 625 N.W.2d 377, 382, observed:

> * * * to sustain a claim that a city engaged in unlawful exclusionary zoning . . . , one must show that: (1) the challenged ordinance section has the effect of totally prohibiting the establishment of the land use sought within the city or village, (2) there is a demonstrated need for the land use within either the city or village or the surrounding area, (3) a location exists within the city or village where the use would be appropriate, and (4) the use would be lawful, otherwise.

1. <u>No language within the challenged Livonia Ordinances has the effect of totally prohibiting billboards.</u>

As discussed above, the plain language of the *challenged ordinances* simply do not have the "effect of totally prohibiting the establishment of the land use sought within the city." *Id*. To the contrary, not unlike the ordinances challenged in *Adams Outdoor Adver., Inc. v. City of Holland*, *supra*, the challenged ordinances here do allow billboards in the City of Livonia,

provided they were in existence at the time the restriction was enacted or on-site signs. See, Livonia Ordinance, Section 18.16.

In *Adams Outdoor, supra.* the Supreme Court held:

> * * * on its face, the challenged ordinance sections do not currently completely prohibit billboards in Holland. While new billboards are banned, current billboards may remain. Section 39-350(b) specifically permits a billboard owner to maintain and repair existing signs so as to continue their useful life. Also, § 39-350(e) authorizes a billboard owner to remove a sign from its location for repair and maintenance and then to replace it.

Id. at 685. Section 18.17 of the City of Livonia ordinances similarly allows for "Continuance" of non-conforming uses, and permits "Restoration" (Livonia Ord. Section 18.19); and "Repair" (Livonia Ord. Sec. 18.20). Simply because owners of the previously existing billboards have apparently chosen not to avail themselves of such rights does not mean that the challenged Livonia ordinances themselves have had the effect of totally prohibiting a new desired use. MCL 125.3207. There is simply no evidence in this record that Livonia has sought to eliminate billboards through condemnation or other means.

2. <u>International Outdoor, Inc. has failed to demonstrate that there is a demonstrated need for the reintroduction of billboards within the City of Livonia or the surrounding area.</u>

The second factor required to challenge a zoning regulation as improperly exclusionary in nature is whether there exists "demonstrated need for the land use within either the city . . . or the surrounding area." MCL 125.3207. As noted above, the concept of "demonstrated need" has its origins in protecting fundamental human needs such as housing and a right to be free from discrimination. See e.g., *Cady v. City of Detroit*, 289 Mich. at 514, 286 N.W. at 810, quoting *Noble State Bank v. Haskell*, 219 U.S., 104, 31 S.Ct. 186, 188, 55 L.Ed. 112, (1911) (observing, "It may be said in a general way that the police power extends to all **the great public needs.** * *

* It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion **to be greatly and immediately necessary to the public welfare**.")

Appellant has cited no authority intimating that Livonia has a great public need for billboards within its boundaries, especially when considering that this particular community is surrounded by more than 50 billboards along the highways leading to and from the City of Livonia. (Appellee Brief, Ex. N – depicting the location of 54 billboards within a 2 mile radius of the City of Livonia). Moreover, the limited record generated by the Appellant before the Zoning Board of Appeals on its failed variance application demonstrates only further that Appellant has no evidence to proffer relating to a claimed "demonstrated need."

> ZBA Member Sills: "**But I stated that we had not needed one [a billboard] in 52 years, why would [we] need one now?**"
>
> Appellant's representative: "**I don't know how I can answer that. <u>I'm not sure if you do</u> - - you - - you haven't had them but there's - - I don't think there is any proof that you haven't needed them.**"

(Appellee Brief, Ex. B, p.5)(emphasis added). At best, Appellant can only proffer the lack of evidence against its entrepreneurial thirst as somehow establishing a "demonstrated need." Appellant has turned the applicable standard on its head. A "demonstrated need" is not presented by simply contending that municipality must show that it does not need the desired use. This approach has been resoundingly rejected by this Court in *Outdoor Sys., Inc. v. City of Clawson*, 262 Mich. App. 716, 721, 686 N.W.2d 815, 819 (2004) which held:

> * * * we are bound under MCR 7.215(J)(1) by the holding in *Adams Outdoor Advertising, Inc. v. Holland*, 234 Mich. App. 681, 698, 600 N.W.2d 339 (1999) (*Adams I*), aff'd on other grounds in *Adams Outdoor Advertising*, 463 Mich. at 677-678, 625 N.W.2d 377 that, "**while the desire by national, state, and local advertisers for billboards may well demonstrate a *demand* for the billboards, such proofs are not sufficient to demonstrate the requisite public *need* for new billboards.**" Further, we agree with this reasoning. It extended the analysis

> of precedents extending back to *Fremont Twp. v. Greenfield*, 132 Mich. App. 199, 204-205, 347 N.W.2d 204 (1984) (holding that the CVZA was not violated in the absence of evidence that there was need for additional junkyards within a township). See *Adams I, supra* at 694, 600 N.W.2d 339. Presumably any entrepreneur seeking to use land for a particular purpose does so because of its perception that a demand exists for that use. To equate such a self-serving demand analysis with the "demonstrated need" required by the statute would render that language mere surplusage or nugatory, in contravention of usual principles of construction. *Wickens v. Oakwood Healthcare Sys.*, 465 Mich. 53, 60, 631 N.W.2d 686 (2001). We conclude that the *Adams I* Court correctly determined that the statute **requires a showing of public need for new billboards rather than a demand for those billboards by advertisers**.

Outdoor Sys., Inc. v. City of Clawson, 262 Mich. App. 716, 721, 686 N.W.2d 815, 819 (2004)(emphasis added). On this record, Appellant cannot establish a demonstrated need either within the City of Livonia or it is surrounding area for placement of its billboard devices. Accordingly, Appellant's claim of improper exclusionary zoning must also fail for these reasons.

IV. CONCLUSION

Appellant's challenge to the City of Livonia billboard regulations clearly fails if considered an *as applied* challenge. The challenged ordinances, not unlike the City of Holland ordinances at issue in *Adams Outdoor, supra*, by their plain language permit billboards, provided they were lawfully in existence at the time the restrictive regulation was enacted. Moreover, even if Appellant could be viewed as having mounted as "as applied" challenge to the billboard regulations, because the challenged regulations are specifically authorized by direct language within the HRCA, issues relative to exclusionary zoning are not even presented. Finally, to any extent the regulations must be viewed in the context of zoning law, the statutory rules applicable to exclusionary zoning offer Appellant no assistance on this record - which simply fails to demonstrate its desired use is neither totally prohibited nor a use demonstrably needed by this particular community.

Appellant must simply come forth with more than its own needs to demonstrate wrongful governmental impediments to its desired entrepreneurial pursuit. The right of the community of Livonia to "govern its growth and its life," by relying upon statutory authorizations and judicial construction of the laws of self-governance, is too important to cast aside to serve the claimed need by Appellant to resurrect a lawfully restricted activity, long since played out within City of Livonia. *Kyser v. Twp.*, 486 Mich. at 520-21, 786 N.W.2d at 547-48. For these reasons, *Amici* respectfully request the judgment of the Wayne County Circuit Court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2015, I electronically filed the **Motion for Leave Pursuant to MCR 7.212(H) to File Amicus Curiae Brief** and the **Amicus Curiae Brief** with the Clerk of the Court of Appeals and electronically served same upon:

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