

MSC Opinion: Hendee v. Putnam Township

16. July 2010 By Nicole Mazzocco

On July 15, 2010, the Michigan Supreme Court published its opinion in *Hendee v. Putnam Township*, Nos. 137446 and 137447. The plaintiffs wished to develop a large parcel of land zoned for agricultural use into a manufactured-housing development. The plaintiffs had previously requested the local government to rezone the parcel or to grant a variance to allow the plaintiffs to build a 95-unit subdivision. The local government denied this request and while this request was pending had refused to consider a second request to permit the manufactured-housing development. Following the denial of the 95-unit-subdivision request, the plaintiffs did not resubmit the manufactured-housing request. Instead, the plaintiffs filed a complaint asserting that the local government's zoning scheme was invalid because it would not allow the manufactured-housing development. The complaint included equal-protection, substantive-due-process, and takings claims, as well a claim for exclusionary zoning in violation of MCL § 125.97a. Without issuing a majority opinion, the Court unanimously held that the plaintiffs' claims were not ripe because the plaintiffs had failed to seek permission to build the manufactured-housing development.

Justice Weaver, joined by Justice Hathaway, authored the lead opinion. Justice Weaver viewed the plaintiffs' complaint as presenting both facial and as-applied challenges to the local government's zoning scheme. She rejected both as unripe and in violation of the finality rule because the plaintiffs had failed to request permission for their manufactured-housing development and had no evidence that the local government would refuse all manufactured-housing applications. That the local government did not have an area currently zoned for manufactured housing was insufficient, as was the prior refusal to allow the 95-unit subdivision.

Justice Cavanagh concurred, joined by Chief Justice Kelly. Justice Cavanagh wrote separately to emphasize his continued adherence to his dissenting positions in *Paragon Properties Co. v. City of Novi*, 550 N.W.2d 772 (Mich. 1996), and *Electro-Tech, Inc. v. H.F. Campbell Co.*, 445 N.W.2d 61 (Mich. 1989). Justice Cavanagh rejects the current approach to ripeness and the finality rule, believing it too mechanical. He would use the purposes beyond the doctrines to govern their application and so adopt an approach similar to that of the federal courts.

Justice Corrigan also concurred, joined by Justices Young and Markman. Justice Corrigan focused on the need to determine whether the plaintiffs' claims were facial or as-applied challenges to the zoning scheme. To her, this determination governs the analysis. A facial challenge need not meet the finality requirement or the same strict ripeness standards. In her view, the plaintiffs' claims (despite their labels) alleged only an as-applied challenge. Consequently, Justice Corrigan applied the finality requirement, holding the plaintiffs had failed to meet this requirement because they did not file a request to build the manufactured-housing development and the finality

exception did not apply because there was no evidence that it was certain the local government would deny the request. The prior 95-unit application was insufficient to demonstrate futility. Justice Corrigan also held that the case was not ripe for the same reasons.