



## Report on Public Policy Position

**Name of Section:**

Real Property Law Section

**Contact Person:**

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**RE:**

Amicus brief on DF Land Development, LLC v Charter Township of Ann Arbor Court of Appeals No. 275859

**Date position was adopted:**

July 21, 2007

**Process used to take the ideological position:**

Discussion and vote of the Council of the Section

**Number of members in the decision-making body:**

17

**Number who voted in favor and opposed to the position:**

12 voted in favor; none were opposed.

**Position:**

Please see attached statement.

**The text (may be provided by hyperlink) of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report:**

Not applicable.

*DF Land Development, LLC v Charter Twp of Ann Arbor, Court of Appeals*, docket no. 275859.

In *Paragon Properties Co. v City of Novi*, 452 Mich 568; 550 NW2d 772 (2006), the court held that a claim that a zoning ordinance as applied to a particular property amounts to a taking without compensation is not ripe for consideration by the courts until the property owner has first requested a variance to use the property. In this Washtenaw County case, the trial court misapplied that rule and added additional requirements not supported by *Paragon* or its progeny. If sustained, the trial court ruling would dramatically change the rules on constitutional challenges to local land use regulations. The Real Property Law Section, by vote of the Section Council, authorized the filing of an *amicus* brief in support of the property owner's appeal.

DF Land owns 54 acres in Ann Arbor Township zoned A-1 (for agriculture and 10-acre single-family homes) and requested rezoning to R-7 (0.2-acre multi-family zoning). The Township has an R-7 zoning district in its ordinance but has never zoned any property R-7. After four hearings before the Planning Commission, the Township Board denied the rezoning, voting to leave the property zoned A-1. To meet the ripeness requirement to bring a taking claim under *Paragon*, the property owner then requested variances to use the property according to its plan of development. The zoning board of appeals, on advice of its counsel, determined that as a township board of appeals it lacked the authority to approve use variances.

In its complaint in the circuit court, the owner did not include any taking or economic deprivation claim. Instead, it brought a substantive due process claim, alleging that the zoning ordinance, as applied to its property, is arbitrary and fails to advance a legitimate governmental interest. The plaintiff also brought an exclusionary zoning claim.

The court dismissed the complaint, concluding that the property owner was first required to take various actions to make its substantive due process claim ripe. The owner, the court held, must first seek relief in the form of a PUD and must also seek the minimum variance necessary to allow productive economic use of the property. Without separate analysis, the court also dismissed the exclusionary zoning claims on the basis of ripeness.

As pointed out in the Real Property Law Section's *amicus* brief filed in *Hendee v Putnam Twp*, Michigan law does not require that a substantive due process claim meet the ripeness requirements of *Paragon*. That holding by the trial court, as well as the requirement of other actions the plaintiff must take to make its claim ripe, appear to be based on a misapplication of *dicta* in *Braun v Ann Arbor Twp*, 262 Mich App 154 (2004). The requirement that the plaintiff first request the minimum variance necessary for some productive use, rather than a use the plaintiff might actually want to make of its land, is new and particularly troubling.

The issues raised by the plaintiff on appeal are as follows: 1. Under *Paragon* and its progeny, is a landowner in a zoning case required to seek the minimum necessary relief (whether by variance, PUD, or otherwise) in order to place the land into minimal economic production to ripen an as-applied substantive due process claim? 2. Beyond seeking variances from the ZBA is a landowner required to exhaust legislative alternatives that do not fit the landowners proposed development (e.g., rezoning to alternative zoning districts, PUD, or conditional rezoning)? 3. Does the doctrine of ripeness apply to a claim that zoning ordinance, on its face, excludes a lawful land use in violation of the Constitution and zoning enabling act?

The Section's *amicus brief* is not written to support the specific use sought by the plaintiff. The Real Property Law Section supports the position that none of these requirements apply to either the substantive due process and exclusionary zoning claims brought by a property owner like the plaintiff, and the trial court's dramatic expansion of ripeness requirements is not supported by Michigan law.