

Report on Public Policy Position

Name of section:

Real Property Law Section

Contact person:

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Regarding:

Hendee v Putnam Township, Michigan Supreme Court Case No. 137446-7

Date position was adopted:

July 18, 2009

Process used to take the ideological position:

Position adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body:

18

Number who voted in favor and opposed to the position:

15 Voted for position

0 Voted against position

0 Abstained from vote

3 Did not vote

Position:

Oppose

Explanation of the position, including any recommended amendments:

The Court of Appeals ruled that ripeness requirements apply to all as-applied constitutional challenges to a zoning ordinance but found that further zoning applications by the Hendees would have been futile under the circumstances. The Court of Appeals reversed the trial court's findings on both substantive due process and equal protection, but sustained its finding of exclusionary zoning.

The Supreme Court now asks the parties and amici to address whether ripeness rules apply to an exclusionary zoning claim; whether the futility exception should apply in this case; whether the language of the zoning enabling act changes the standard for a constitutional zoning claim; and whether the Township is right that ripeness and remedy are joined, and a court cannot allow as a remedy a use that was not specifically proposed to and rejected by the Township.

The Real Property Law Section, supports the plaintiffs' position that ripeness and remedy are not the same, and a court may order, as a remedy, a use that was not specifically proposed and rejected, but that it finds is a reasonable use of the property. Further, ripeness rules, properly read as a measure of finality for prudential reasons, not as a constitutional threshold, should not apply outside the context of takings. Finally, the facts in this case demonstrate, as both the trial court and the Court of Appeals found, the futility of further applications to build a 498-unit development where the township refuses to permit any use for more than 12 to 14 units.