

STATE OF MICHIGAN
IN THE SUPREME COURT

HOUDINI PROPERTIES, LLC,
a Michigan limited liability company,

Plaintiff-Appellant

v

CITY OF ROMULUS, a Michigan
municipal corporation,

Defendant-Appellee.

Docket No. _____

Court of Appeals No. 266338

Wayne County Circuit Court No.
05-504139-CZ

Open 6/13/06
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PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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- Exhibit A: June 13, 2006 Order of the Court of Appeals
- Exhibit B: July 27, 2006 Order of the Court of Appeals
- Exhibit C: *Sammut v City of Birmingham*, 2005 WL 17844 (Mich App)
- Exhibit D: Real Estate Summary Sheet of Subject Property from Defendant's Assessor
- Exhibit E: Plat Map
- Exhibit F: November 18, 2004 Report from Langworthy, Strader, LeBlanc & Associates
- Exhibit G: September 7, 2005 Circuit Court Motion Hearing Transcript
- Exhibit H: Illustrative Photographs
- Exhibit I: Select Portions of the Romulus Zoning Ordinance
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- Exhibit K: November 2, 2005 letter from Defendant's Department of Building, Safety and Engineering
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- Exhibit N: Claim of Appeal
- Exhibit O: Statement of the Order Appealed From and Jurisdictional Basis from Plaintiff's Brief on Appeal
- Exhibit P: Complaint and Jury Demand
- Exhibit Q: Defendant's Motion for Summary Disposition
- Exhibit R: Plaintiff's Response to Defendant's Motion for Summary Disposition
- Exhibit S: Plaintiff's Restated Motion for Leave to File First Amended Complaint
- Exhibit T: Plaintiff's Proposed First Amended Complaint and Jury Demand
- Exhibit U: March 22, 2006 Order of the Court of Appeals

- Exhibit V: Defendant's Supplemental Brief Re Defendant's Motion for Summary Disposition
- Exhibit W: Plaintiff's Supplemental Brief Re Defendant's Motion for Summary Disposition
- Exhibit X: October 3, 2005 Circuit Court Motion Hearing Transcript
- Exhibit Y: *1st Rural Housing Partnership, LLP v City of Howell*, 2004 WL 226168
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- Exhibit Z: August 26, 2005 Order of the Circuit Court

ORDERS APPEALED AND RELIEF SOUGHT

Plaintiff-Appellant Houdini Properties, LLC ("Houdini") seeks leave to appeal from the Court of Appeals' June 13, 2006 order affirming the decision of the Wayne County Circuit Court (the "Circuit Court") to grant summary disposition in favor of Defendant-Appellee City of Romulus ("Defendant") and its concurrent denial of Houdini's motion to file an amended complaint (the "Order"). (Exhibit A) This Application for Leave to Appeal is timely because it has been filed within 42 days of the Court of Appeals' July 27, 2006 order denying Houdini's timely Motion for Reconsideration. (Exhibit B) *See* MCR 7.302(C).

Substantively, this case involves both zoning and constitutional law. Defendant has overstepped its police powers by using its Zoning Ordinance to regulate a small parcel of property Houdini owns to the point where Houdini literally cannot develop it in any way. Defendant has also taken this same property without just compensation in a variety of ways, including, but not limited to, by excessive regulation and by destroying all vehicular access to the property, which, in turn, destroys its value. Defendant has also wrongfully discriminated against Houdini as compared to other similarly situated property owners. However, this application for leave is largely about procedural issues. The Court of Appeals dismissed this case (hereinafter, the "Civil Action") not on its merits but simply because Houdini did not join it to Houdini's administrative appeal of Defendant's Board of Zoning Appeals' (the "BZA") decision to deny Houdini a variance to allow the development of the property at issue, which Houdini also brought in the Circuit Court as required by law (the "Appeal"). The Court of Appeals also refused to allow Houdini an opportunity to amend, which was warranted in light of the circumstances.

As will be discussed herein, the Civil Action, which has substantial merit, has been derailed by the Court of Appeals' failure to respect the distinction between the Circuit Court's original jurisdiction over the Civil Action, as governed by the 200 series of the Michigan Court Rules (the "Court Rules"), and the Circuit Court's limited appellate jurisdiction over the Appeal, as governed by the 700 series of the Court Rules. The Order obliterates this critical distinction and mashes, without any basis, these proceedings together to create a hybrid original/appellate proceeding that is neither contemplated by or allowed under the Court Rules. The effect of the Order is to leave Houdini without the ability to pursue the Civil Action and thus maintaining, and paying taxes to Defendant on, a property that it cannot use and cannot sell because the Defendant won't allow development on it.

Review is warranted for at least three reasons. First, if allowed to stand, the Order will cause a material injustice to Houdini in that it prevents Houdini, who acted at all times reasonably and in accordance with proper procedure, from obtaining any relief. *See* MCR 7.302(B)(5). Second, the Court of Appeals' erroneous construction of the Court Rules presents a jurisprudentially significant issue that needs to be addressed by this Court in that the Order creates a new hybrid original/appellate proceeding that is neither contemplated by or allowed under the Court Rules. *See* MCR 7.302(B)(3). Finally, the issues addressed herein have significant public interest in that Michigan landowners have a desire to be secure in their property rights and the action is one against a subdivision of the State. *See* MCR 7.302(B)(2).

Houdini respectfully requests that the Court grant its Application for Leave to Appeal, reverse the Order in its entirety and remand the Civil Action to the Circuit Court.

STATEMENT OF QUESTIONS PRESENTED

I. Did the Court of Appeals err in holding that the qualified compulsory joinder rule of MCR 2.203(A), which requires the joinder of certain "pleadings", could apply to the Appeal and the Civil Action when these proceedings were not simultaneously pending?

II. Did the Court of Appeals err in holding that the qualified compulsory joinder rule of MCR 2.203(A), which requires the joinder of certain "pleadings", required Houdini to join the Civil Action to the Appeal when the Court of Appeals went beyond the plain language of MCR 2.203(A) and read the term "claim of appeal" into the definition of "pleading" that is set forth in MCR 2.110(A)?

III. Did the Court of Appeals err in granting Defendant's Motion For Summary Disposition pursuant to MCR 2.116(C)(6) because Houdini did not join, via MCR 2.203(A), the Civil Action to the Appeal even though Houdini could not have joined these matters or, at a minimum, was not required to because they did not arise out of the same transaction or occurrence?

IV. Did the Court of Appeals err in granting Defendant's Motion For Summary Disposition pursuant to MCR 2.116(C)(7) and the doctrine of res judicata where the first proceeding, the Appeal, was an administrative appeal of limited review brought subject to the Circuit Court's limited appellate jurisdiction in which the Circuit Court could not have resolved the claims presented in the second proceeding, the Civil Action, which was brought subject to the Circuit Court's original jurisdiction?

V. Did the Court of Appeals err Court err by affirming the Circuit Court's decision to deny Houdini's Motion For Leave To File An Amended Complaint where the Circuit Court abused its discretion by merely stating that the motion was "futile", failed to consider the claims involved in the proposed amended complaint and jury demand and failed to explain how justice would not be served by granting the motion?

I. INTRODUCTION

Houdini owns a small, irregularly shaped vacant parcel located immediately adjacent to the north side of Interstate-94 in Romulus (the "Property"). The Property is located in a largely undeveloped area, much of which was once a residential subdivision. The Property is located directly across Interstate-94 from the Detroit Metropolitan Airport. Nearly all of the parcels surrounding the Property are also vacant and many of them have been used for years by government agencies as sound mitigation for the aircraft that fly directly over the area at low altitudes.

Defendant has, through the guise of zoning regulation, altogether prevented Houdini from developing the Property since at least 2001. Among other things that will be addressed herein, Defendant's Zoning Ordinance requires a minimum lot size of 1 acre and the Property is barely a third of an acre. This means that the Zoning Ordinance wholly prohibits development of the Property. Application of these regulations to the Property is patently unconstitutional under longstanding decisions of this Court. *See Bassey v City of Huntington Woods*, 344 Mich 701, 705-06, 74 NW2d 897 (1974) (holding that application of a zoning ordinance that rendered a residential property impossible to develop was "unreasonable on its face"). In fact, this Court has repeatedly and clearly instructed municipalities not to zone in such a manner. *See e.g. Robinson v City of Bloomfield Hills*, 350 Mich 425, 432, 86 NW2d 166 (1957) (holding that the application of the ordinance at issue in *Bassey* (which, as will be discussed herein, is materially identical to the application of Defendant's regulations to the Property) was "an arbitrary fiat, a whimsical *ipse dixit* and that there is no room for a legitimate difference of opinion regarding its reasonableness").

Defendant admits that it has regulated Houdini's Property as it has and it admits that it is doing so in order to "consolidate" it and numerous other properties in the vicinity into some

hoped-for commercial development. Defendant, in apparent furtherance of these plans, has destroyed all access to Houdini's property and others nearby by abandoning or vacating all of the roads that previously accessed it and has thereby destroyed the value thereof. But Houdini does not have to consolidate its Property into Defendant's hoped-for development. Houdini is entitled to a variance that allows for the productive economic use of the Property. *See e.g. Braun v Ann Arbor Charter Twp*, 262 Mich App 154, 160, 683 NW2d 755 (2004). Moreover, as this Court recently held, consolidation efforts being undertaken by government actors for the benefit of private parties based upon generalized economic benefits are unconstitutional. *See Wayne County v Hathcock*, 471 Mich 445, 480, 684 NW2d 765 (2004) (overruling *Poletown Neighborhood Council v City of Detroit*, 410 Mich 616, 304 NW2d 455 (1981)).

Given the nature of the Property and the surrounding area, its proximity to Interstate-94 and the fact that it is landlocked, the Property is an ideal location for a small scale passive land use such as a billboard. Given that there are numerous advertising signs in the area and the fact that Interstate-94 is visible from the Property, there is also a ready market for it. Houdini applied with Defendant for a building permit to construct a billboard on the Property. Defendant denied the same and Houdini appealed to the BZA. The BZA, despite being advised of the unconstitutionality of the application of its Zoning Ordinance to the Property and the fact that the Property cannot be developed in any other economically feasible way, denied the same.

Because Houdini is legally entitled to an economically productive use of the Property and because Defendant has no right to deprive it of one, as its BZA did, Houdini hurried to file the Appeal, which is an *administrative appeal* in the form of a claim of appeal, of the BZA's decision. The Appeal was filed, in accordance with the law, and the then-existing twenty-one

day jurisdictional time limit with the Circuit Court.¹ Houdini, knowing that it could not obtain discovery, a jury trial or damages in the administrative review procedures of the Appeal, then filed the Civil Action, which is an original *cause of action* in the form of a complaint and jury demand, with the Circuit Court in order to recover its money damages. Houdini lost its Appeal, which is not entirely surprising given the deferential standard of review the Defendant is afforded in such matters. However, the Court of Appeals denied Houdini's application for leave to appeal the same in a 2-1 vote.

Defendant has avoided having to answer for itself in the Civil Action because it managed to persuade the Circuit Court to dismiss the same: (a) pursuant to MCR 2.116(C)(6) because Houdini did not join it to the Appeal via MCR 2.203(A) even though this rule should not have been applied and despite the fact that Houdini was not required to join these proceedings even if it could have; and (b) pursuant to MCR 2.116(C)(7) because the resolution of the Appeal allegedly acted to bar the Civil Action pursuant to res judicata, even though the Civil Action involved numerous issues that had nothing to do with the matters addressed in the Appeal, was to be heard before a jury, required discovery and fact finding that is not allowed in the circuit court appellate procedure and sought relief that could not be obtained in the Appeal. Prior to the summary disposition hearings, Houdini moved to amend its complaint and jury demand to add additional claims and allegations of fact that, among other things, had absolutely nothing to do with the issues addressed in the Appeal. Nevertheless, concurrently with its summary disposition ruling, the Circuit Court refused to grant Houdini leave to amend.

¹ At the time Houdini filed the Appeal, the governing statute of the same was a portion of the City and Village Zoning Act, MCL 125.581, et seq. The City and Village Zoning Act was recently repealed and superseded by the Michigan Zoning Enabling Act, MCL 125.3101, et seq.

The Court of Appeals erroneously affirmed the Circuit Court on all issues. *See* Exhibit A. The Court of Appeals held that that the joinder rule of MCR 2.203(A) applied here because Houdini's complaint and its claim of appeal, the operative filings that instigated the Appeal and the Civil Action each constitute a "pleading" within the ambit of MCR 2.203(A). *Id.* at 1-2. This was error because the joinder rule cannot apply where two actions are not proceeding concurrently. *See Fast Air Inc v Knight*, 235 Mich App 541, 545-546, 599 NW2d 489 (1999). In this case, the Appeal had been finally resolved before summary disposition was granted and therefore, application of the rule was an error. Second, the Court of Appeals improperly interpreted MCR 2.203(A) when it held that a "claim of appeal" is a "pleading", which MCR 2.203(A) is strictly limited to on its plain terms. The definition of "pleading", which is expressly limited to only those documents articulated, is set forth in MCR 2.110(A) and it does not include a claim of appeal. Therefore, the joinder rule cannot apply. Finally, the Court of Appeals erred here because, even if the Appeal and the Claim of appeal could have been joined, they did not have to be as they did not "arise" from the same transaction or occurrence. *See* MCR 2.203(A).

The Court of Appeals' holding that res judicata operated to bar the Civil Action was in error because the matters addressed in the Civil Action could not, as a matter of law, have been resolved, or even considered, in the Appeal. As such, res judicata, under Michigan law, cannot apply as one of the threshold standards of the doctrine is that the matter contested in the second action must have either actually been resolved or have been able to have been resolved in the first. *See e.g. Dart v Dart*, 460 Mich 573, 586, 597 NW2d 82 (1999).

Finally, the Order affirms the Circuit Court's decision to deny Houdini leave to file an amended complaint because doing so would allegedly be futile. *See* Exhibit A at 3-4. For some reason that is not fully articulated, the Court of Appeals thought that the resolution of the Appeal

barred it from pursuing the Civil Action. *Id.* This is demonstratively untrue as these are clearly separate proceedings under Michigan law. *See e.g. Paragon Properties Co v Novi*, 452 Mich 568, 580, n 15, 550 NW2d 772 (1996) (holding that "neither a city council's decision to rezone land nor a zoning board of appeal's decision to grant a variance is relevant to the constitutionality or unconstitutionality of an ordinance's provisions"). Houdini's proposed amendment also contained wholly new factual allegations and demonstratively viable causes of action that had nothing to do with the matters addressed in the Appeal. Given this Court's instruction that "futile" means "legally insufficient on its face", *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 656, 213 NW2d 134 (1973), the Court of Appeals' holding on this issue is illogical.

These holdings were in error, constitute material injustice to Houdini, present jurisprudentially significant issues in that they, in effect, create a new hybrid original/appellate proceeding that is neither contemplated by or allowed under the Court Rules and have significant precedential effect that will be detrimental to Michigan landowners. These errors effect more than Houdini. The Order will confuse both future property owners as they try to square it to the plain language of the Court Rules and circuit courts that are forced to sit simultaneously as an appellate and trial court over one proceeding. It also works to create an inherent bias in the circuit court and prejudices future claimants in that the circuit court's administration and disposition of the appeal is likely to influence its decision in the civil action. As will be discussed herein, Houdini fell victim to that very bias itself. That the Order is unpublished is even more troublesome as future litigants may not even realize it exists.

In short, the Order has summarily stripped Houdini of its day in court based upon a most unjust ruling and left it with a useless property. No doubt the Order has also provided Defendant an emboldened view of its ability to treat other of its taxpayers that own real property in the city

in a similar fashion. The Court of Appeals manifestly erred in misconstruing the jurisdictional issues presented in this case and, at a minimum, abused its discretion by not overruling the Circuit Court and granting Houdini leave to file an amended complaint and jury demand. This Court should, respectfully, reverse as to all of the matters addressed herein.

It should be noted that the Court's recent 4-3 decision to deny leave to appeal in *Sammut v City of Birmingham*, 2004 WL 17844 (Mich App) (Exhibit C), *leave denied* 474 Mich 877, 704 NW2d 77 (2005), may have influenced the Court of Appeals' error here as the Circuit Court relied heavily on the same. *Sammut* is a two page unpublished decision of the Court of Appeals that was issued on January 4, 2005, which was *after* the Appeal was filed. It is the first and only Michigan case that Houdini could locate in which the procedural requirements and boundaries between Michigan circuit courts' original and appellate jurisdiction vis-à-vis administrative appeals from decisions of local zoning boards was addressed in a manner even somewhat supporting the Defendant's unorthodox joinder and res judicata arguments. It is also materially distinguishable from the instant case and it was wrong for the Circuit Court to apply it to this case and wrong for the Court of Appeals to condone its use. As it was issued after the Appeal was filed, Houdini could not have possibly had notice of the same prior to instigating its legal proceedings. The *Sammut* case will be addressed herein and its role in this case reinforces the point that the Order constitutes a dangerous precedent for Michigan landowners.

II. MATERIAL FACTS

A. Houdini's Property and the Surrounding Area

The Property is located in a largely undeveloped area, much of which was once a residential subdivision. A copy of the Property's "Real Estate Summary Sheet" from Defendant's Department of Assessment that roughly illustrates the Property is attached as Exhibit D and a portion of one of Defendant's plat maps illustrating what was once the local street network is

attached as Exhibit E.² The Property is located directly across Interstate-94 from the Detroit Metropolitan Airport and the Wayne County Road Commission's enormous garage. Nearly all of the parcels surrounding the Property are also vacant and many of them have been used for years by government agencies as sound mitigation for the aircraft that fly directly over the area at low altitudes. *See* Exhibit F at 3, "Report" from Defendant's planning consultant, Langworthy, Strader, LeBlanc & Associates ("Planning Consultant"). Defendant admits that it is working to "consolidate" the properties in the vicinity, including the Property, for future commercial development. *See id.*³

Dimensionally, the Property is a mere 0.337 of an acre and has a perimeter of 493 feet. Measuring clockwise starting from the northeast corner, it has 90.24 ft. of frontage on Kenwood Ave., then 140.66 ft. of frontage on Interstate 94, then 127.23 ft. to the northwest corner and finally 135 ft. measuring back to Kenwood Avenue. *See* Exhibit D.⁴

B. Defendant's Consolidation Activities and Zoning Laws have Rendered the Property Undevelopable Since at Least 2001.

Defendant has rendered the Property landlocked and inaccessible to vehicular traffic. Defendant, at its own initiative, has: (a) vacated Mary Avenue, which previously provided access from the south; (b) barricaded Kenwood Avenue at its intersection with Garner Avenue, which prevents access, including police and emergency response units; and (c) generally abandoned

² All of the Exhibits attached hereto are part of the record below.

³ Consolidation efforts by government actors for the benefit of private parties based upon generalized economic benefits have been ruled unconstitutional and Defendant should be ignored if it attempts to rely upon this "consolidation" as justification for any of its actions or regulations. *See Wayne County v Hathcock*, 471 Mich 445, 684 NW2d 765 (2004) (overruling *Poletown Neighborhood Council v City of Detroit*, 410 Mich 616, 304 NW2d 455 (1981)).

⁴ All measurements appear to be approximate, but are believed to be reliable.

and/or failed to maintain Kenwood Avenue and much of the rest of the surrounding street network so that regular vehicular access to the Property is impractical if not impossible. *See* Exhibits E and F. Defendant's counsel admitted that these road closures have occurred during proceedings before the Circuit Court.

There's no roads in this district, your Honor. The roads have all been abandoned. The subdivision has been completely obliterated.

Exhibit G, Sept. 7, 2005 Circuit Court hearing transcript, at 11:25 to 12:2. Illustrative photographs of the area and the Property, including some that reveal the state of Kenwood Avenue, are attached as Exhibit H.⁵

In 2004 and in apparent accord with its "consolidation" efforts, Defendant zoned the Property, and others in the area, for uses that they could not possibly accommodate. Defendant, at its own initiative, zoned them as a "RC (Regional Center)" district, which district "is intended to promote large scale commercial and office developments which can take advantage of the potential trade of passengers, visitors and employments at the Metro Airport". *See* Exhibit I, Romulus Zoning Ordinance, §11.01. Permitted uses in the RC District are limited to large commercial and business facilities and the ancillary uses thereto (e.g. hotels, theatres, restaurants, convention centers, colleges, et cetera). *See id.* at §§11.02(A)-(K).

The Property (and many of the surrounding properties) cannot possibly accommodate these uses because the RC District requires a minimum lot area of 43,560 sq. ft. (1 acre) and a minimum lot width of 150 ft. in order to be developed. *See id.* at §11.06. According to Defendant's own records, the Property is barely more than a third of an acre and only 135 ft. and 140 ft. wide. *See* Exhibit D (Real Estate Summary). In short, the Property cannot be developed

⁵ The arrow on the last photograph approximates the location of the Property and the dots represent other advertising signs (both on-site and off-site).

under the Zoning Ordinance in any way because it is simply too small. In addition, the RC District also requires a front development setback of 50 feet, a rear development setback of 35 feet, and two side development setbacks of 20 feet each. *See* Exhibit I at §11.06. Development is not allowed in the setback areas. *Id.* Therefore, application of the setback requirements to the Property limits the Property's developable footprint to a tiny space that, as discussed above, cannot be accessed by the public. No use allowed in the RC District can possibly, physically or economically, be developed in that space.

Prior to Defendant's decision to rezone the Property to RC and at the time Houdini purchased it, the Property was zoned "BT (Business Transitional)". *See* Exhibit F at 1. It is undisputed that the Property could have been developed under the BT zoning. However, Defendant eliminated the BT district from the Zoning Ordinance in 2001. *See id.* and Exhibit J, January 5, 2004 report from Defendant's Planning Consultant to Cynthia Lyon, Defendant's Planning Official. Thus, the Property was in zoning limbo between 2001 and 2004 (when it was zoned RC) as the Zoning Ordinance did not permit any uses for it.

C. Defendant Denied the Only Variance that Would have Allowed for the Reasonable, Economically Viable Use of the Property.

Given the nature of the Property and the surrounding area, its proximity to Interstate-94 and the fact that it is landlocked, the Property is an ideal location for a small scale passive land use such as a billboard. Given that there are numerous advertising signs in the area (*See* Exhibit H), there is also a ready market for it. Therefore, on or about October 29, 2004, Houdini applied for a building permit to construct a billboard on the Property. The application was proper and included a preliminary site plan, a set of blueprints showing the proposed construction and other related materials. The Property can be developed with a billboard in accordance with State law and without deviation from Defendant's applicable billboard regulations, save the fact that

billboards are not allowed in the RC District. This prohibition on billboards is curious because Defendant typically allows large signs in commercial and industrial districts, such as billboards, as being consistent with such land uses, but for some reason they are not allowed in the commercial RC District. *See* Exhibit I, Zoning Ordinance at § 4.25(E) (allowing billboards in the Defendant's general business and industrial districts). In any event, Defendant's Department of Building, Safety and Engineering denied the application on November 2, 2005 solely because billboards are not a permitted land use in the RC District. *See* Exhibit K.

On or about November 4, 2004, Houdini applied to the BZA for a use variance that would allow Houdini to develop the billboard on the Property. Houdini submitted a proper application and detailed memorandum to the BZA that explained how the Property could not be developed, why this was unconstitutional (this will be addressed below) and how Houdini met all of the criteria for approval of the requested use variance. A copy of Houdini's application, with the accompanying brief in support, is attached as Exhibit L.

On December 1, 2004 the BZA held a hearing on Houdini's application. Houdini's counsel, Timothy A. Stoepker, explained to the BZA how the Property could not be developed and explained the facts and circumstances that illustrated why granting the variance was appropriate. The BZA briefly deliberated and denied Houdini's Application in a motion "consistent with the recommendation of [Defendant's Planning Consultant]". *See* Exhibit M ("Minutes"). Although Defendant failed to record it in the Minutes, one member of the BZA told Mr. Stoepker that Houdini's solution was to sell the Property rather than try to develop it.

That the billboard is the only economically viable use for the Property cannot be contested. Defendant has argued before that a parking lot could be built on the Property, but that is not true because the Zoning Ordinance requires that parking lots be developed with access to

major roads at least 120 feet in width and that every parking spot has to be 400 feet from the right-of-way. *See* Exhibit I, Zoning Ordinance at §4.36. It is undisputed that there is no access to the Property or what was once Kenwood Ave., which is not a major road at least 120 feet in width, and that the 400 foot required setback would consume the entirety of the Property. *Id.* Similarly, without any basis in fact, Defendant has argued that the Property could be developed for a retail use. Given that there is no access because Defendant closed and barricaded all of the roads, this, even more so than a parking lot, is an absurd notion (not to mention physically impossible for any RC District use). Other than the foregoing, Defendant has never articulated what Houdini can do with the Property and has not offered any solution to the problem it has created.

III. PROCEDURAL HISTORY

A. Houdini Files an Administrative Appeal to the Circuit Court in Order to Obtain an Order of Reversal of the BZA's Denial of Houdini's Variance Application.

Houdini appealed the BZA's decision by filing the Appeal. (Exhibit N) The Appeal was an administrative appeal of right that Houdini brought to the Circuit Court pursuant to the Michigan Constitution of 1963, Article 6, Section 28, MCR 7.101(A)(2) and a provision in the then current and applicable zoning enabling act, MCL 125.585(11).

The Michigan Constitution of 1963, Article 6, Section 28, provides, in part:

All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

In accord, MCR 7.101(A)(2) provides that: "[a]n order or judgment of a trial court [which includes administrative agencies by reference to MCR 7.101(A)(1)] reviewable in the circuit court may be reviewed **only by an appeal**". (Emphasis added.)

MCL 125.585(11), from the recently repealed and superseded City and Village Zoning Act, provided:

The decision of the board of appeals is final. However, a person having an interest affected by the zoning ordinance may appeal to the circuit court. Upon appeal, the circuit court shall review the record and decision of the board of appeals to ensure that the decision meets all of the following requirements:

- (a) Complies with the constitution and laws of this state.
- (b) Is based upon proper procedure.
- (c) Is supported by competent, material, and substantial evidence on the record.
- (d) Represents the reasonable exercise of discretion granted by law to the board of appeals.

The scope and nature of this statutory review has been retained in large part in the newly enacted Zoning Enabling Act. *See* MCL 125.3605 and 125.3606. Damages, according to the then current and applicable zoning enabling act, were clearly not recoverable in the Appeal. *See* MCL 125.585(13): "As a result of the review required by this section, the court may affirm, reverse, or modify the decision of the board of appeals". This limitation has also been retained in the newly enacted Zoning Enabling Act. *See* MCL 125.3606(2).

The Circuit Court designated the Appeal as an administrative appeal and assigned it Case No. 04-438291-AA. Shortly thereafter, Houdini filed its attendant brief on appeal in which it stated: "[Houdini] reserves its damage claims for the taking of its property without just compensation, and its challenge to the Zoning Ordinance, as such claims are subject to the original jurisdiction of this Court in the form of a complaint". *See* Exhibit O, Statement of the Order Appealed From and Jurisdictional Basis from Houdini's brief on appeal.

B. Houdini Files a Civil Action in Order to Recover its Money Damages in the Form of a Jury Verdict.

As Houdini indicated would be forthcoming, it filed the Civil Action on February 11, 2005, while the Appeal was still pending, in order to recover its money damages, which were not recoverable as a matter of law in the Appeal. Houdini also demanded a jury trial for these claims, which was not available by operation of law in the Appeal. *See* MCR 7.100, *et seq.* Houdini's Complaint and Jury Demand asserted three counts: (1) that Defendant committed an unconstitutional taking of the Property under Michigan law by applying its RC Zoning regulation to the Property and by refusing to grant the Use Variance Request; (2) that Defendant violated Houdini's substantive due process under Michigan law by depriving it of the use and enjoyment of the Property via the above described unreasonable and arbitrary zoning restrictions, which advance no governmental interest directly related to public, health, safety and welfare; and (3) a 42 USC § 1983 claim to the effect that Defendant deprived Houdini of its federal constitutional rights under the color of state law. A copy of the Complaint and Jury Demand is attached as Exhibit P.

The Circuit Court designated the Civil Action as a general civil litigation matter and assigned it Case No. 05-504139-CZ.

C. Defendant Files a Motion for Summary Disposition as to the Civil Action and Houdini Files a Motion for Leave to File a First Amended Complaint.

In lieu of filing an answer, Defendant filed its Motion for Summary Disposition on March 10, 2005, a copy of which, without exhibits, is attached as Exhibit Q ("Defendant's Motion"). As detailed in Houdini's response (Exhibit R, without exhibits) Defendant's Motion took a shotgun, logically inconsistent and obfuscating approach, arguing that summary disposition of the Civil Action was proper under MCR 2.116(C)(4), (6), (7) and (8) for numerous

unfounded and contradictory reasons. Defendant's main argument was that summary disposition of the Civil Action was proper under MCR 2.116(C)(6) for failure to join because Houdini did not join the Civil Action to the Appeal under MCR 2.203(A) as it was, according to Romulus, required to because the Civil Action and the Appeal involved the same transaction and occurrence - the denial of the variance application.

In support of this unorthodox joinder argument, Defendant could only point to and relied solely upon *Sammut v City of Birmingham*, an unpublished decision of the Court of Appeals that was issued on January 4, 2005. (Exhibit C). *Sammut* was about res judicata and supported Defendant's argument regarding joinder, if at all, only by implication.⁶ However, Defendant's Motion also implied that resolution of the Appeal would act to bar Houdini's Civil Action by the doctrine of res judicata were Defendant's joinder argument correct. *See* Exhibit Q at 8.

Houdini realized that its fundamental constitutional rights were at risk of being lost without even so much as a hearing on the merits or a trial thereof were Defendant to succeed in its unorthodox joinder argument and that Houdini was without a way to prevent the same and continue to preserve its right to pursue the Appeal, which is another of Houdini's constitutional rights. Therefore, Houdini requested the Circuit Court to consolidate the Appeal and the Civil Action pursuant to MCR 2.505 if it found the joinder argument persuasive so that Houdini's fundamental constitutional rights could be protected. *See* Exhibit R at 8-9.

Houdini then filed Plaintiff's Restated Motion for Leave to File First Amended Complaint and Jury Demand on August 16, 2005, a copy of which and the accompanying brief in support, without exhibits, is attached as Exhibit S ("Houdini's Motion"). Houdini's Motion sought leave

⁶ *Sammut* is fully addressed herein in the Argument section.

to file the "First Amended Complaint and Jury Demand" which sought to add numerous additional allegations of fact and the following counts: (1) equal protection violations by Defendant in that Defendant allowed other similarly situated landowners to develop their properties for uses similar to that which Houdini sought in the use variance application; and (2) that Defendant had de facto taken the Property by destroying all vehicular access to it. As addressed in the brief in support of Houdini's Motion, these are both viable theories. *See id.* A copy of the proposed First Amended Complaint and Jury Demand is attached as Exhibit T.

D. Houdini Loses the Appeal and Defendant Seizes the Opportunity to Further Confuse the Circuit Court By Adding a Res Judicata Argument.

On August 26, 2005, the Circuit Court resolved the Appeal by affirming the BZA. Houdini sought leave to appeal that decision, but the Court of Appeals denied the same by a 2-1 vote. (Exhibit U)

Defendant then filed Defendant's Supplemental Brief in Support of Motion for Summary Disposition ("Romulus' Supplement"), a copy of which is attached as Exhibit V. Defendant now argued, as it had earlier alluded, that the disposition of the Appeal acted to bar the Civil Action per res judicata. *See id.* Again, its argument relied heavily upon the holding in *Sammut*. Houdini's response is attached as Exhibit W.

E. The Civil Court Conducts Motion Hearings in Which it Completely Reverses Itself.

The Circuit Court held a hearing on Defendant's Motion and Houdini's Motion on September 7, 2005. *See* Exhibit G (Transcript). At this hearing, Defendant's counsel relied heavily upon the joinder argument. *Id.* at 4-6. However, he continued to cause confusion because he combined this argument with the later-filed res judicata argument:

This is a mandatory joinder situation under MCR 2.203. They failed to join these claims. And to Plaintiff's detriment, this Court found in favor of the city,

and found that the decision of the Zoning Board of Appeals was reasonable. As such, your Honor, this claim is barred by the doctrine of res judicata.

Id. at 5:19-24. The Circuit Court at first recognized that Romulus' joinder argument was incorrect and denied Romulus' Motion as to the same.

THE COURT: And I guess I have to tell you that **my gut reaction on that issue is that I'm not convinced that mandatory joinder applies.** And the Sammut case is really - - it doesn't have any binding authority. And **I'm going to ... deny the motion for summary disposition on that issue.**

Id. at 8:13-20 (emphasis added).

The Circuit Court then, at its own initiative, addressed the takings issues at which point Romulus' counsel admitted the operative facts establishing the facto taking claim that Houdini sought leave to bring:

There's no roads in this district, your Honor. The roads have all been abandoned. The subdivision has been completely obliterated.

Id. at 11:25 to 12:2.

When speaking to Houdini's Motion, Defendant's counsel also incorrectly and misleadingly asserted, several times, that "[t]he only issue they claim now is, they want to file an equal protection argument". *See e.g. id.* at 6:11-12. This ignored that the First Amended Complaint and Jury Demand sought to add a claim of de facto taking as Defendant had abandoned, vacated or destroyed all of the roads accessing the Property and that it sought to add numerous factual allegations. *See Exhibit T generally.* Houdini's counsel explained that there were numerous issues of fact in the Civil Action that could not be addressed in the Appeal because the Circuit Court can only consider the Record on Appeal in the Appeal:

Economic viability. His statement raises a question of fact. Is it economically viable or not? When our client bought the property, it was zoned "BT"; business transitional. It wasn't zoned "RC" zoning. There were roads going to the property. This is no different than some of the cases like In re Virginia Park and the City of Detroit where the city turned off utilities and light

and then maintained the basic city services that they required, and then said, Well, you know, we're now going to come in and take your property and consolidate it. The defendant in it's [sic] memo states that there is no use for the property. That the only thing we can go is hold it to be sold. To whom? **We're entitled to a viable use of land. The question he raises is, is it economically viable? That is to be developed based upon the proofs before this Court. And we think that once discovery is completed in this matter, the evidence will come out that the property is currently zoned, and cannot be built upon.**

Exhibit G at 15:24 to 17:13. (Emphasis added.)

They have not identified one use. In fact, counsel says, Well, but the hotel would have to be part of another piece of property. And then, you can't even get to it. So, why are they complaining? **I mean, we're complaining because, number one, it's stated in the Amended Complaint we can't get there. Second, that the application of the "RC" zoning which was adopted after we bought the property, and the dimensional requirements placed upon that, and the uses that are intended under the "RC zoning prevent any economical, viable use of the property."** That is a question of fact for a jury to decide. **And that's what we're asking for in this case. Under the Bevan Township v Brandon case, the Court recognized those are separate and distinct arguments. The government is not allowed to take property to regulation which denies you the use of your land.** The defendant today has not identified one use that can go on that property. And even if it could go there, under its current conditions, which defendant admits and doesn't even deny in reference to the First Amended Complaint, they denied access to the property.

Id. at 17:24 to 19:1. (Emphasis Added.)

Houdini's counsel also reiterated the clear differences in the claims at issue in the Appeal and the proposed First Amended Complaint and Jury Demand.

So, the complaint, as stated to this Court in **the First Amended Complaint clearly states viable causes of action. It states a taking action based upon the regulatory taking applied by the zoning ordinance, and what I would call a "reasonable return on investment,"** which is the standard under the Penn Central case **And Count-II then alleges the taking of the property by reason of the closure of the road. None of those issues were before the Zoning Board of Appeals, and certainly not before the circuit court before. Those are issues of fact for a jury to decide. And we should be permitted to complete our discovery on this.** And if at the end of that discovery, the defendant doesn't believe that we have some economical, viable use of the property, then let them demonstrate it to the Court.

Id. at 20:7 to 21:1. (Emphasis added.) The Circuit Court did not rule further and took the balance of the motions under advisement.

The Circuit Court reconvened on October 3, 2005 at which point it altogether reversed its earlier ruling regarding the joinder issue and announced its decision as follows:

I didn't want to have you all reargue the matter again. I've re-read the pleadings, and I'm prepared to make a decision on the Summary Judgment Motion and the Motion to Amend. I looked at the court rule on the compulsory joinder matter, 2.203A, and I also looked at that *Sammon (ph.) v City of Birmingham*, and read that over. And, you know, as reluctantly as I initially was to find that joinder was required, or res judicata applied, I think in reviewing the facts and the arguments in the case, and looking at the court rule, and again, that *Sammon* case, even though it's unpublished, I think it is applicable. Because, essentially, you have the same parties, you have the same transaction arising out of the same set of facts. The issues are not identical, but they're pretty similar, or substantially similar, and for that reason, I think that, you know, the compulsory joinder rule applies, or res judicata applies. And so the Court, accordingly, is going to grant the Defendant's Motion for Summary Judgment.

Now, I also looked at the Motion to Amend and, really, the issue there is futility. And I know that the court rules say that amendments should be granted liberally and those kind of things. But again, given my ruling on the Summary Disposition Motion, and my ruling on the appeal, I really think it's a futile effort to allow an amendment raising an equal protection argument, which really arises out of the same set of facts, same transaction, same circumstances. So, the Court is also, accordingly, going to deny the Motion to Amend.

See Exhibit X (Transcript) at 3:13 to 4:22.

Houdini's counsel advised the Circuit Court that its ruling did not account for the inverse condemnation count that Houdini requested leave to bring and which had *nothing* to do with any of the rezoning or variance issues and reminded the Circuit Court that "the Court can't hear a damage claim in an appeal". *Id.* at 4:25 to 5:15. The Circuit Court's only response was "Well, I still think it's [sic] futile. And I still think it surrounds the same issues." *Id.* at 5:25 to 6:1. Houdini's counsel once more pressed for some semblance of an explanation for the basis of the ruling and the Circuit Court's refused stating: "I'm not going to argue with you. I've made my call. I'm going to stick by it, and that's my decision." *Id.* at 6:4-6.

F. The Court of Appeals Affirms the Circuit Court and Denies Houdini's Motion for Reconsideration.

On June 13, 2006, the Court of Appeals affirmed the Circuit Court by issuing the Order. *See* Exhibit A. In so doing, the Court of Appeals made numerous errors requiring reversal, which will be addressed in more detail below. Houdini's Motion for Reconsideration was denied on July 27, 2006. *See* Exhibit B.

IV. ARGUMENT

A. Standards of Review

The Court of Appeals' decision to grant Defendant's Motion (for Summary Disposition) is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118, 597 NW2d 817 (1999).

The Court of Appeals' decision to affirm the Circuit Court's decision to deny Houdini's Motion (for Leave to File an Amended Complaint) is reviewed for an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 469, 502 NW2d 337 (1993). A decision to refuse to allow an amendment that results in injustice should be reversed. *Id.*

To the extent the Court's review involves the interpretation of a Rule, the issue is a question of law that is also to be reviewed de novo. *Dessart v Burak*, 252 Mich App 490, 494, 652 NW2d 669 (2002).

When reviewing a motion brought under MCR 2.116(C)(7), the Court must consider the pleadings and affidavits or documentary evidence submitted by the parties and determine whether the moving party is entitled to judgment as a matter of law. *Sewell v Southfield Public Schools*, 456 Mich 670, 674, 576 NW2d 153 (1998). "The contents of the complaint must be accepted as true unless specifically contradicted by the affidavits or other appropriate documentation submitted by the movant." *Id.* (quotation omitted). Summary disposition under MCR 2.116(C)(6) is only properly granted where "resolution of either action will require

examination of the same operative facts." *JD Candler Roofing Co, Inc v Dickson*, 149 Mich App 593, 600-601, 386 NW2d 605 (1986). The applicability of res judicata is a question of law, which is to be reviewed de novo. *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 216, 561 NW2d 854 (1997).

B. The Zoning Ordinance, as Applied to the Property, is Undeniably Unconstitutional.

It is important to understand from the outset that Defendant's application of the RC district to the Property is patently unconstitutional under longstanding decisions of this Court.

As the Court has repeatedly instructed municipalities, zoning ordinances must be reasonable in their application. See e.g. *Kropf v City of Sterling Heights*, 391 Mich 139, 157-158, 215 NW2d 179 (1974). A zoning ordinance that wholly prevents a property from being developed is unreasonable on its face and unconstitutional. *Bassey v City of Huntington Woods*, supra, 344 Mich at 705-706. In considering such an issue, this Court has instructed that the "reasonableness of a zoning restriction must be tested according to existing facts and conditions and not some condition which might exist in the future." *Christine Building Co v City of Troy*, 367 Mich 508, 516, 116 NW2d 816 (1962).

In *Bassey*, this Court held that the application of a residential zoning ordinance that rendered the property at issue impossible to develop was "unreasonable on its face". *Id.* at 344. The parcel at issue in *Bassey* was a 20 foot wide residentially zoned lot and the applicable zoning ordinance required two 8 foot side setbacks. Therefore, when the ordinance was applied, only 4 feet of the parcel could be developed. This Court struck the ordinance as applied without hesitation. See *id* generally. So clear and forceful was the Court's ruling that, shortly thereafter, the Court cited *Bassey* as a case where the ordinance at issue was "an arbitrary fiat, a whimsical

ipse dixit and that there [was] no room for a legitimate difference of opinion concerning its reasonableness". *Robinson v City of Bloomfield Hills*, supra, 350 Mich at 432.

In the instant case and as the facts of this matter know stand, application of the Zoning Ordinance to the Property renders it as equally unreasonable because the Property is undisputedly too small to meet the minimum lot size requirements of its designated RC District zoning and so it cannot be developed. *See* Exhibit I, Zoning Ordinance, §11.06. Likewise, even if it could be developed, the application of the setback requirements leaves a tiny developable space that is unsuitable for the RC uses. *Id.* As such, it is unreasonable and unconstitutional under the controlling law.

C. Houdini Acted Properly in Concurrently Proceeding Under the Circuit Court's Limited Appellate Jurisdiction and General Original Jurisdiction.

The essence of the Order is that the Civil Action and the Appeal had to be brought together in one proceeding. *See* Exhibit A. This is an error because it misses or ignores the fact that the Appeal only invoked the Circuit Court's limited appellate jurisdiction whereas the Civil Action invoked the Circuit Court's broader original jurisdiction. In other words, these proceedings are separate and distinct – regardless of the fact that they both are conducted in a circuit court. The Order is also largely the product of the unpublished decision in *Sammut*, which was decided only *after* the Appeal was filed and thus wholly unknown to Houdini and everyone else.

Michigan's circuit courts have at least two distinct forms of jurisdiction – original and appellate. The Michigan Constitution of 1963, Article 6, Section 13, provides:

The circuit court shall have original jurisdiction in all matters not prohibited by law; appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law; power to issue, hear and determine prerogative and remedial writs; supervisory and general control over inferior courts and tribunals within their respective jurisdictions in accordance with rules of the supreme court;

and jurisdiction of other cases and matters as provided by rules of the supreme court.

In this case, the *limited appellate* jurisdiction for the Appeal was derived from the then current City and Village Zoning Act and the Appeal had to be filed within twenty-one days and heard before a Circuit Court Judge. *See* MCL 125.585(11)⁷ and MCR 7.101. On the other hand, the three claims set forth in the Civil Action and the two that Houdini sought to add by amendment were governed by their own statute of limitations and could be heard before a jury, which Houdini demanded. *See* Exhibits P and T.

There can be no question that the Appeal and the Civil Action are materially different proceedings and that the Circuit Court was to act as a true appellate court in administering and adjudicating the Appeal. In *Lorland Civic Ass'n v DiMatteo*, 10 Mich App 129, 157 NW2d 1 (1968), the Court of Appeals addressed the procedure for circuit court review of an administrative zoning appeal and explained that it requires the circuit court to sit as a true appellate court:

The legislature and common council have confided to the zoning appeals board the power to allow a variance, subject to limited appellate review. Courts review the appeals board's exercise of that power. The appellate court's task is to determine whether the order on appeal has been entered according to law. An appellate court exceeds its function when it measures a zoning appeals board order against evidence the board did not consider. [*Lorland, supra* at 138.]

Likewise, in *Abrahamson v Wendell*, 76 Mich App 278, 256 NW2d 613 (1977), the Court of Appeals explained that during an administrative review:

The trial court on review is not to consider evidence not heard by the township zoning board of appeals nor is it to supplement the record with something not considered by the board **or with something that changes the nature of the inquiry**. [*Abrahamson, supra* at 282 (emphasis added).]

⁷ The new Zoning Enabling Act provides for thirty days. *See* MCL 125.3606(3).

Also See Macenas v Michiana, 433 Mich 380, 387, 446 NW2d 102 (1989) ("Once pleadings are filed in the circuit court, which constitute a claim of appeal from a decision by a zoning board of appeals, as in the instant case, the circuit court acts as an appellate court.")

Again, the essence of the Order is that the Civil Action and the Appeal had to be brought together in one action. Clearly, this was not proper procedure because it would have required the Circuit Court to investigate matters it could not legally do and, at a minimum, changed the nature of the inquiry in the Appeal. Michigan's appellate courts have recognized the import of the jurisdictional distinction created by the Constitution and have reversed circuit courts that have mistakenly deprived plaintiffs of their day in court, as the Circuit Court and Court of Appeals did here to Houdini.

For example, in *Sun Communities v Leroy Twp*, 241 Mich App 665, 617 NW2d 42 (2000), defendant township denied plaintiff's rezoning request and plaintiff filed an original eight-count cause of action in the circuit court. Defendant moved for summary disposition under MCR 2.116(C)(4) arguing that the circuit court lacked subject matter jurisdiction because plaintiff had failed to file an administrative appeal to the circuit court within the requisite time limit and the circuit court granted the motion as to numerous of plaintiff's counts. *See id.* at 666-68. In reversing the circuit court on appeal, the court explained that "[p]laintiff argues on appeal that that the complaint ... invoked the original, rather than the appellate, jurisdiction of the court" and, after some discussion, then correctly ruled that "***plaintiff was not required to pursue an appeal of the township's decision to deny plaintiff's request for rezoning in order to challenge the constitutionality of the zoning ordinance***". *Id.* at 668 and 672 (emphasis added). In so ruling, the Court quoted the seminal case of *Paragon Properties Co v Novi*, supra, 452 Mich at 580 for its holding that "neither a city council's decision to rezone land nor a zoning board of

appeal's decision to grant a variance is relevant to the constitutionality or unconstitutionality of an ordinance's provisions". *Id.* at 672.⁸

The above precedent is correct because it is consistent with other Michigan precedent. *See e.g. Bevan v Township of Brandon*, 176 Mich App 452, 456, 440 NW2d 31 (1989), *reversed on another issue* 439 Mich 1202, 475 NW2d 37 (1991), (holding that "Plaintiffs' taking challenge is separate and distinct from their seeking of a variance") and *1st Rural Housing Partnership, LLP v City of Howell*, 2004 WL 226168 at 2 (Mich App) (reversing a circuit court's decision to dismiss a plaintiff's civil action challenging the constitutionality of a zoning ordinance as unripe because the plaintiff chose not to file an administrative appeal under MCL 125.585(11) as to a denied variance request and specifically noting that the plaintiff filed "an original action alleging a confiscatory taking rather than by appealing from the adverse decision of the ZBA on the variance request").⁹ The holding from *1st Rural Housing Partnership* succinctly summed up a landowner's options:

Therefore, we conclude that **plaintiff had the option in this case to either pursue the variance issue by appealing the adverse decision to the circuit court, or to abandon the variance issue and merely bring an original action in the circuit challenging the zoning ordinance itself, or both.** While it may be that plaintiff limited its options by abandoning the variance issue and only challenging the rezoning issue, that is plaintiff's choice to make.

Id. at 2. (Emphasis added.)

⁸ *Sun Communities* involved the since repealed and superseded Township Zoning Act which was, in relevant part, substantially identical to the similar portions of the since superseded City and Village Zoning Act and the new Zoning Enabling Act discussed above. As such, the decision is still valuable as precedent.

⁹ *1st Rural Housing Partnership* is unpublished and a copy of the opinion is attached as Exhibit Y. However, leave for appeal of the same was denied by this Court in a written opinion. *See* 471 Mich 886 (2004).

This is exactly what Houdini did in bringing the Appeal and the Civil Action; it pursued all of its remedies concurrently and, as will be addressed below, in accord with the Court Rules. As noted in the language of the above quote, the "variance issue", in that case and in this, is a wholly separate issue from original jurisdiction claims.

Houdini's reliance on this critical distinction, which was been badly misunderstood by both the Circuit Court and the Court of Appeals, makes sense and is correct because it jibes with the other procedural and substantive differences as between appeals and original causes of action. For example, when a circuit court sits in its appellate jurisdiction, it is restricted to a review of the record below rather than considering all evidence allowed under the Michigan Rules of Evidence, which it can do while sitting in its original jurisdiction. *See Coburn v Coburn*, 230 Mich App 118, 121-123, 583 NW2d 490 (1998) (recognizing that facts and documents not part of the Record on Appeal cannot be considered on appeal even if their entry is stipulated to) *reversed aft'r remand on another issue* 459 Mich 875 (1998). Parties also have different tools available to them depending on how the circuit court is sitting. For example, discovery is not allowed when a circuit court sits in its appellate jurisdiction. *See* MCR 7.101(F) and (I) (establishing procedure whereby the record on appeal is furnished to the circuit court and the appellant and appellee must brief only the same). Motion practice differs as well. This Court has ruled that MCR 2.116(C)(8) motions, which test only *pleadings*, cannot be considered when a circuit court is sitting in its appellate jurisdiction on zoning matters because MCL 125.585 requires the circuit court to review only the record and decision of the board of appeals. *See Macenas*, *supra*, 433 Mich at 387. A circuit court cannot consider MCR 2.116(C)(10) motions when sitting in its appellate jurisdiction for the same reason. *Carleton Sportsman's Club v Exeter Twp*, 217 Mich App 195, 202-03, 550 NW2d 867 (1996).

As one noted scholar succinctly stated regarding common-law adjudicatory principles, “[t]here are significant differences in objectives, procedures and dynamics between trial court proceedings and the process of appellate review.” Stephen J. Markman, *CIVIL APPEALS*, § 1:12, pp. 1-2–1-3.

Houdini proceeded properly by filing the Appeal separately from the Civil Action. The Circuit Court and the Court of Appeals apparently failed to understand this and all of the decisions at issue here revolve around this fundamental error. This error stems in large part from the decision in *Sammut* and the application of the same, which is materially distinguishable, to this case.

1. **The *Sammut* Case**

"It is undisputed that an unpublished opinion of the Court of Appeals has no precedential value and that trial courts and administrative tribunals are not 'bound' by decisions without precedential value." *Forgach v George Koch & Sons Co*, 167 Mich App 50, 56, 421 NW2d 568 (1988) (citations omitted). *Also see* MCR 7.215(C)(1). The Circuit Court first recognized this and the fact that the case was not applicable. *See* Exhibit G at 8:13-20 (stating that "gut reaction" is that the case is not applicable). Notwithstanding, the Circuit Court then relied heavily upon *Sammut* and the Court of Appeals condoned its use here. *See* Exhibit A at 2. Furthermore, *Sammut* was issued on January 4, 2005, which was *after* the Appeal was filed so Houdini could not have possibly had notice of its holding prior to filing the Appeal. The Circuit Court clearly expressed its heavy reliance upon the legal holding in *Sammut*:

I looked at the court rule on the compulsory joinder matter, 2.203A, and I also looked at that *Sammon (ph.) v City of Birmingham*, and read that over. And, you know, as reluctantly as I initially was to find that joinder was required, or res judicata applied, I think in reviewing the facts and the arguments in the case, and looking at the court rule, and again, that *Sammon* case, even though it's unpublished, I think it is applicable.

Exhibit X at 3:18 to 4:1. (October 3, 2005 transcript). The Circuit Court was wrong to do this. *Sammut* did not involve a joinder issue and was incorrectly decided. Tellingly, *Sammut* cites no precedent for its legal holding in either of its two pages and ignores substantial existing precedent. It was plain error for the Circuit Court to so heavily rely upon *Sammut* and for the Court of Appeals to condone its use.

In *Sammut*, plaintiffs filed and successfully prevailed upon an administrative appeal of an adverse ruling on a variance request issued by defendant's board of zoning appeals. After this appeal was resolved, plaintiffs filed a civil action alleging that the *defendant's conduct in the earlier administrative hearings* violated the Michigan Constitution's guarantee of fair and just treatment in the course of the same. *See id.* at 1. The trial court granted defendant summary disposition under MCR 2.116(C)(7) as it claimed the civil action was barred by res judicata. *See Id.* On review, the Court of Appeals found that plaintiffs' civil action arose from the same transaction as its appeal because "[a]ll of plaintiffs' allegations in the second case ... arose from the same transaction of the prior case". *Id.* The court then, without citing any precedent, held that because plaintiffs' appeal arose from MCL 125.585(11), which requires that the circuit court ensures that the lower decision complies with the constitution and laws, that "the constitutionality of defendant's decision could have been raised in the prior action". *Id.* The plaintiffs properly argued that their appeal was brought and governed under the limited appellate jurisdiction and that the court could not have granted money damages, but the court erroneously stated, again without any authority other than a general cite to the Constitution, that "Plaintiffs' reasoning is predicated on the erroneous assumption that MCL 125.585 restricts a circuit court's jurisdiction" and held that "Plaintiffs therefore could have joined their constitutional claim and their BZA appeal pursuant to MCR 2.203; indeed, MCR 2.203 requires [joinder]". *Id.*

The res judicata holding in *Sammut* was incorrect because it failed to recognize the jurisdictional distinction between original and limited appellate jurisdiction addressed in the preceding section and because it destroys the statute of limitations and rights to jury trials on constitutional issues as administrative appeals must be filed within thirty days and must be heard before a circuit court judge. *See* MCR 7.100, *et seq.*

Moreover, as will be addressed in the next brief section, *Sammut's* implications about Michigan's *qualified* joinder rule are patently incorrect as they fly in the face of the plain terms of the Court Rules. This inconsistency further buttresses the fact that *Sammut's* holding is directly contrary to the spirit, intent and plain text of all applicable legal authorities. The bottom line is that *Sammut* must be wrong because its practical effect is that it forces parties to forgo their constitutional claims against municipalities, like what happened to Houdini, if they chose to timely file an administrative appeal. This is not, and cannot be, the law.

Even if *Sammut* was correctly decided, its facts and procedural posture render it materially distinguishable from and not applicable to the instant case. In *Sammut*, the claims in the civil action (violation of the Michigan Constitution's guarantee of fair and just treatment in the course of administrative appeals) did in fact did "arise from" the board of zoning appeals' decision; but here, the Civil Action pertains to claims that deal with far more than the BZA proceedings (e.g. road closures and consolidation activity). Also, the plaintiffs in *Sammut* waited until after the Appeal had been resolved. Houdini pursued the Appeal and the Civil Action concurrently.

D. The Court of Appeals Erred in Holding that Houdini was Required to Join its Original Jurisdiction Based Civil Complaint to Its Appellate Jurisdiction Based Claim of Appeal.

MCR 2.203(A), the qualified compulsory joinder rule, provides that:

In a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction and occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

The Court of Appeals invoked the joinder rule of MCR 2.203(A) and held that it applied here because Houdini's claim of appeal and its complaint, the operative filings that instigated the Appeal and the Civil Action, respectively, each constitute a "pleading" within the ambit of MCR 2.203(A). *See* Exhibit A at 1-2. The Court relied on *Macenas*, *supra*, to establish that Houdini's claim of appeal constituted a pleading subject to MCR 2.203(A). *Id.* The Court also found that "[b]ecause Houdini's constitutional claims arise directly from defendant's denial of the use variance, the actions filed by plaintiff were required to be joined in accordance with MCR 2.203(A). *Id.* at 1. All of these interpretations and holdings were error and reversal is warranted.

1. The Court of Appeals erred in applying the joinder rule because only one proceeding was pending between the parties at the time of the ruling.

Interpretation of a court rule presents a question of law that is reviewed de novo on appeal. *Dessart v Burak*, *supra*, 252 Mich App at 494. The Court of Appeals was wrong to grant Defendant summary disposition under MCR 2.116(C)(6) because this rule "does not operate where another suit between the same parties involving the same claims is no longer pending at the time the motion is decided". *See Fast Air Inc v Knight*, *supra*, 235 Mich App at 545-546.

Here, as the court of Appeals recognized, the Appeal was decided by the Circuit Court on August 26, 2005. *See* Exhibit A at 2. *Also see* Exhibit Z, Order Affirming Romulus Board of

Zoning Appeals. By its own terms and operation of law, this constituted a "final order" that closed the Appeal. *See id.* and MCR 7.101(M). The Circuit Court granted summary disposition in the Civil Case orally on October 3, 2005, *See Exhibit X (Transcript)* and issued its written order on October 19, 2005. *See Exhibit A at 2.* As the Appeal was not pending at the time Defendant's Motion was granted, the Circuit Court erred in granting Defendant's Motion on the issue of joinder and the Court of Appeals erred in affirming it. The fact that Houdini had filed an application for leave to appeal the Appeal to the Court of Appeals that was pending at the time the Circuit Court ruled on Defendant's Motion is not relevant because the Court of Appeals does not have jurisdiction over a matter absent an order granting leave to appeal. *Rossow v Brentwood Farms Development, Inc*, 251 Mich App 652, 654, 651 NW2d 458 (2002). As the Court of Appeals did not have jurisdiction over the Appeal, no other case was pending and MCR 2.116(C)(6) could not apply. Therefore, the Court of Appeals erred in even applying the rule.

2. The Court improperly interpreted the applicable Court Rules when it held that MCR 2.203(A) could apply to a "complaint" and a "claim of appeal".

Rules for statutory construction also apply to the construction of the Court Rules. *Goodwin v Schulte*, 115 Mich App 402, 407, 320 NW2d 391 (1982). The Court Rules are to be interpreted in accordance with the intent and purpose behind them. *McCroskey, Feldman, Cochrane & Brock, PC v Waters*, 197 Mich App 282, 286, 494 NW2d 826 (1992). The Court Rules should also be construed in accordance with the ordinary and approved usage of the language used therein. *St. George Greek Orthodox Church of Southgate, Michigan v Laupmanis Assoc, P.C.*, 204 Mich App 278, 282, 514 NW2d 516 (1994). The primary source for the meaning of a statute (and a Court Rule) is its plain language. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720, 691 NW2d 1 (2005). As this Court has repeatedly instructed, strict and narrow interpretations are the only permissible interpretations and nothing

may be read into a statute (or Court Rule) as courts may not speculate as to legislative intent beyond the words expressed. *See e.g. Lansing v Lansing Twp*, 356 Mich 641, 649, 97 NW2d 804 (1959).

The Court of Appeals' interpretation of MCR 2.203(A) and MCR 2.110(A) totally contravenes these bedrock principles of statutory construction to which it is bound to follow. The Court improperly read provisions into MCR 2.110(A) by the use of dicta and/or imprecise language from the *Macenas* opinion; which case had nothing to do with either MCR 2.203(A) or MCR 2.110(A). *See* Exhibit A at 1-2.

On its face, MCR 2.203(A) only applies to a "pleading"; a term that is specifically defined under MCR 2.110(A) to mean *only* a complaint, a cross-claim, a counter-claim, a third-party complaint, an answer to the same and a reply to an answer. *See* MCR 2.110(A) ("No other form of pleading is allowed.") Contrary to the Court of Appeals' reading, it does not include a claim of appeal. The only issue reviewed in *Macenas* was whether this Court applied the proper standard of review in considering a claim of appeal proceeding under MCL 125.585(11). *See Macenas*, *supra*, 433 Mich at 382. Neither MCR 2.203(A) nor MCR 2.110(A) is cited anywhere in the *Macenas* holding. Nevertheless, the Court of Appeals read it to mean that a "claim of appeal" filed under MCL 125.585(11) and MCR 7.101(B)(1) constituted a "pleading" for purposes of MCR 2.203(A) notwithstanding the definition set forth in MCR 2.110(A). *See* Exhibit A at 2.

The Court of Appeals relied upon the following excerpts: "[o]nce pleadings are filed in the circuit court which constitute a claim of appeal from a decision by a zoning board of appeals ...the circuit court acts as an appellate court" and "[i]f a proper appeal to the circuit court is filed, a 'cause of action' is stated ..." *See id.* at 2. These quotes do reference that the plaintiff in

Macenas properly asserted a legal action, but the Order withholds a critical piece of the latter statement, which reads: "...a 'cause of action' is stated, at least for the purpose of obtaining *appellate review* of the board's decision in accordance with the statute." *Macenas*, supra, at 388 (emphasis added). What the Order does not take into account and is reflected in this statement is the fact that the plaintiff in *Macenas* filed a "complaint which, according to an order entered by [the trial judge], was to be treated as a claim of appeal ...". *Id.* at 385. This document is what these statements are referring to. Given that a complaint was filed, it is not surprising that the Court referred to it here as a "pleading", but the Court did not hold in *Macenas* that a claim of appeal under MCL 125.585(11) is a "pleading" under MCR 2.110(A) or MCR 2.203(A). The Court of Appeals erred in reading that into the *Macenas* holding. *See e.g. Lansing*, supra, 356 Mich at 649.¹⁰

That the definition of "pleading" found in MCR 2.110(A) is meant to be static cannot be doubted as there are numerous published cases expressly refusing to extend its scope beyond that which is explicitly set forth. *See e.g. Village of Diamondale v Grable*, 240 Mich App 553, 565, 618 NW2d 23 (2000) (motion for summary disposition is not a pleading under the Court Rules) and *Decker v Flood* 248 Mich App 75, 80, fn4, 638 NW2d 163 (2001) (affidavit attached to a complaint is not a pleading under the Court Rules).

¹⁰ It is also likely that the Court used the term "pleading" in its most general sense. *See* BLACK'S LAW DICTIONARY, abridged sixth ed., pg 798 (1991) (defining "pleading" as "[t]he formal allegations by the parties to a lawsuit of their respective claims and defenses, with the intended purpose of being to provide notice of what is to be expected at trial"). In any event, the Court of Appeals clearly improperly took the Court's words out of context.

3. Joinder, even if allowed, was not required because the Appeal and the Civil Action do not involve matters that arise from the same transaction and occurrence.

Houdini's civil action, as alleged in the Complaint and Jury Demand, asserts claims of unconstitutional taking by regulation, violation of substantive due process and violations of Houdini's similar federal civil rights pursuant to 42 USC § 1983. *See* Exhibit P. Houdini's taking claim alleges that the Defendant's application of its zoning ordinance to Houdini's property constitutes a taking. *Id.*, ¶¶ 30-31. Simply stated, when Defendant rezoned the property it rendered the entire parcel non-conforming. Additionally, no structure can be erected on the parcel that satisfies the use and dimensional criteria of the RC zoning district, which governs Houdini's property. Such a taking is separate and distinct from Houdini's application to erect a sign and Defendant's denial of the same. Houdini's substantive due process claim alleges that the Defendant's application of the zoning ordinance to Houdini's property is an arbitrary and unreasonable restriction that advances no governmental interest directly related to public health, safety and welfare. *See id.*, ¶¶ 37-38. Specifically, the substantive due process questions are: (1) Do the limitations on parcel size in the RC district advance reasonable governmental interests?; (2) Do the limitations on land uses in the RC district as applied to Houdini's property advance reasonable governmental interests?; and (3) Do the dimensional limitations in the RC district as applied to Houdini's property advance reasonable governmental interests? Equally separate and distinct are Houdini's de facto taking (based upon, among other things, road closures) and equal protection claims that were presented in its proposed amended complaint. *See* Exhibit T.

None of these claims, contrary to Court's Order, "arise directly from defendant's denial of the use variance". *See Bevan, supra*, 176 Mich App at 456 ("Plaintiffs' taking challenge is

separate and distinct from their seeking of a variance.") These claims are based upon the totality of Defendant's outlandish regulation of and actions and omissions as to Houdini's property and did not "arise" from the ultimate issue in the Appeal, which proceeding was strictly limited to the circuit court's review of Defendant's decision to deny Houdini a specific use variance. Furthermore, the denial of Houdini's variance request was not the "transaction or occurrence that precipitated plaintiff's civil action". Exhibit A at 1. Houdini pursued the variance because it needed it and because it was required under Michigan law to seek either a variance or a rezoning before its takings claims would ripen. *See Arthur Land Company, LLC v Ostego County*, 249 Mich App 650, 665, fn. 20, 465 NW2d 50 (2002) (to meet the ripeness requirement in a takings action plaintiff must obtain a "final, non-judicial determination regarding the permitted use of the land"). *Also see Segun v City of Sterling Heights*, 968 F2d 584, 587 (6th Cir 1992) ("[A] zoning determination, under Michigan law, cannot be deemed final until the plaintiffs have applied for, and been denied, a variance.")

What the Court's Order fundamentally fails to take into account by claiming that joinder is required is that the Circuit Court is so strictly limited in its review of Houdini's claim of appeal that joinder would be impossible in this case. The then applicable MCL 125.585(13) provided that the review afforded by the circuit court is to "ensure that the [BZA's] *decision* meets with the following requirements ... complies with the constitution and laws of *this* state". (Emphasis added.)¹¹ In adjudicating the Appeal, the Circuit Court was not entitled to conduct a review of the Defendant's general constitutional compliance and was certainly not entitled to adjudicate federal constitutional claims, like those asserted by Houdini in the Civil Action. It was only to

¹¹ This type of review has been retained, with slightly differing language, in the new Zoning Enabling Act. *See* MCL 125.3606.

consider the zoning decision at issue. *Id.* Just because Houdini's variance application "included arguments pertaining to the constitutional issues raised by plaintiff in its subsequent lawsuit", Exhibit A at 3, does not mean that these issues could be resolved in the Appeal. In fact, they could not have been because, consistent with the limited nature of this review, the Circuit Court was not equipped to award Houdini the damages it sought. The then applicable MCL 125.585(13) strictly prohibited the Circuit Court from granting damages as it states that the court may only: "... affirm, reverse, or modify the decision of the board of appeals."¹²

This review is also strictly limited to the record below as this procedure is governed by the appellate rules of procedure. *See e.g. Macenas*, *supra*, at 388. As aptly set forth in *Coburn*, *supra*, 230 Mich App at 121-123: "Neither affidavits nor depositions may be presented in this fashion as a means of enlarging the appellate record."; "Even by stipulation, in the absence of a motion to enlarge the record and the granting of such motion by this Court, MCR 7.216(A)(4), the parties cannot add to the record on appeal anything not considered by the court below in rendering the decision that is the subject of appeal."; "Exhibits offered on appeal that were either not offered to the court below or that were excluded by the lower court from the settled record on appeal are not properly part of the record on appeal."; "Facts not appearing from the record *cannot* be considered on appeal." and "Nothing arising after the order from which appeal has been taken can be considered on appeal". (Citations and quotations omitted). Houdini was entitled to discovery on its constitutional claims. *See* MCR 2.203(A) and (B). Even if these claims could have been joined to the claim of appeal, the Court's Order on this issue would force Houdini to rely solely upon the administrative record below. This is clearly incorrect and

¹² This limitation has also been retained in the new Zoning Enabling Act. *See* MCL 125.3606.

materially prejudicial to Houdini's ability to prosecute its claims. Houdini's claims are entitled to adjudication based upon a preponderance of evidence standard and Houdini's takings, at least, claims are to be determined by a jury. The Court of Appeals' Order means the loss of fundamental rights.

In short, even if joinder were possible, it is not required because the issues in the Appeal and the Civil Action do not arise from the same transaction and occurrence.

E. The Court of Appeals Erred in Holding that Houdini's Civil Action was Barred by Res Judicata.

"The doctrine of res judicata operates to prevent the relitigation of facts and law between the same parties or their privies." *Hackley v Hackley*, 426 Mich 582, 584, 395 NW2d 906 (1986) (citation omitted). For the doctrine of res judicata to apply, the following elements must be established: (1) the first action was decided on the merits; (2) the matter contested in the second action was or could have been resolved in the first; and (3) both actions involve the same parties or their privies. *Dart v Dart*, supra, 460 Mich at 586. In other words, res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to the facts or evidence in a prior action. *Id.* at 586. In determining whether two actions are sufficiently related so as to give res judicata effect to the first, the Restatement of Judgments sets forth the following pertinent factors to be considered:

Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes. Though no single factor is determinative, the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first. If there is a substantial overlap, the second action should ordinarily be held precluded. But the opposite does not hold true; even when there is not a substantial overlap, the second action may be precluded if it stems from the same transaction or series.

¹ Restatement Judgments, 2d, § 24, comment b, p 199 (Emphasis added).

The Court of Appeals ruled that Houdini's "subsequent civil action here was barred by the trial court's prior affirmation of the decision of defendant's zoning board of appeals". Exhibit A at 3. This was based upon the Court's findings that "...the same evidence involved in the appeal would be used to prove allegations contained in the subsequent lawsuit", that "[Houdini's] application for the zoning variance included arguments pertaining to the constitutional issues raised by plaintiff in its subsequent lawsuit, arguments the circuit court on appeal from the zoning decision was statutorily authorized to consider, MCL 125.585(11)(a) and that "...the matters raised in this subsequent civil action could have been resolved in the initial appeal". *Id.*

As discussed above, Houdini's civil claims could not have been resolved in the Appeal and they would not have been based upon the same evidence. The Appeal involved, and could only involve, one limited issue – whether the BZA properly exercised its discretion in ruling on the variance request and the Civil Action involved numerous other issues that were far in excess of those regarding the variance request (e.g. Defendant's closing of roads, its "consolidation" efforts, its treatment of other similarly situated property owners, etc.) and *required* discovery that is not allowed in administrative appeal proceedings. Also, the Court of Appeals' ruling that trial court's prior affirmation of the decision of Defendant's BZA acted to bar Houdini's civil action does not account for the fact that these are wholly separate issues. *See Sun Communities*, supra, 241 Mich App at 665; and *Paragon Properties Co*, supra, 452 Mich at 568. It also does not logically comport with the Court's ruling that these proceedings could have been joined. As with the joinder issue, the Court of Appeals erred here and reversal is required.

F. The Court of Appeals Erred in Holding that Houdini's Proposed Amended Complaint was Futile.

Leave to amend pleadings under MCR 2.118(A)(2) should be freely given when justice so requires. *Weymers v Khera*, 454 Mich 639, 658, 563 NW2d 647 (1997). Leave to amend

should be denied only in the face of undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility. *Id.* (Citation omitted). Further, MCL 600.2301 provides that:

The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

A circuit court's failure to set forth specific findings as to why justice would not be served by requested amendment of pleadings constitutes reversible error. *Ray v Taft*, 125 Mich App 314, 323-24, 336 NW2d 469 (1983). When denying a motion to file an amended complaint, a circuit court must make findings that justice would not be served by granting the motion. *Hanon v Barber*, 99 Mich App 851, 857-58, 298 NW2d 866 (1980).

Here, the *entirety* of the Circuit Court's ruling on Houdini's Motion was that:

Now, I also looked at the Motion to Amend and, really, the issue there is futility. And I know that the court rules say that amendments should be granted liberally and those kind of things. But again, given my ruling on the Summary Disposition Motion, and my ruling on the appeal, I really think it's a futile effort to allow an amendment raising an equal protection argument, which really arises out of the same set of facts, same transaction, same circumstances. So, the Court is also, accordingly, going to deny the Motion to Amend.

Exhibit X (October 3 transcript) at 3:13 to 4:22. Houdini's counsel tried to explain to the Circuit Court that its ruling did not account for the inverse condemnation/de facto taking count (based upon the removal of streets and access to the Property and the like) that Houdini requested leave to bring and which had *nothing* to do with any of the rezoning or variance issues and reminded the Circuit Court that "the Court can't hear a damage claim in an appeal", which applied to all of Houdini's civil claims. *Id.* at 4:25 to 5:15. Contrary to its duty to do so, the Circuit Court refused to actually consider the issue and only provided the following illogical response: "Well, I

still think it's [sic] futile. And I still think it surrounds the same issues." *Id.* at 5:25 to 6:1. In addition, there was no evidence of undue delay and hardly any discovery had taken place (Defendant had only served a set of preliminary interrogatories, which Houdini timely answered). Just stating that Houdini's proposed amended complaint was "futile" without explanation and without making a finding that justice would not be served by granting Houdini's Motion, was an abuse of discretion and constitutes reversible error. It was also wrong for the Circuit Court to rely upon its holding in the Appeal, as the above quote clearly establishes that it did, in determining that granting leave was futile because the Circuit Court's decision in the Appeal involved substantially different issues, burdens, evidentiary rights and procedural rights.

The Court of Appeals affirmed the Circuit Court's decision to deny Houdini's motion to amend for three reasons. First, the Order holds, without any citation to authority, that "[b]ecause the trial court's grant of summary disposition in favor of defendant was based on the failure to join the actions and the doctrine of res judicata, amendment of the complaint was futile". *See* Exhibit A at 3. Second, the Order holds that the proposed amended complaint does not vary substantially from the original complaint, that it "comprises the same allegations and issues" and does not assert a new issue or legal theory. *Id.* Finally, the Order holds that the Circuit Court's holding that the requested amendment was "futile" was sufficiently particularized under Michigan law. *Id.* at 4. Houdini respectfully argues that this holding, on all three counts, is error.

First, as discussed, the Court of Appeals erred in its rulings on the issues of joinder and res judicata and Houdini's loss on its very limited Appeal does not act to bar it from recovering damages for Defendant's constitutional violations, which claims involve a much broader inquiry. *See e.g. Paragon Properties, supra*, 452 Mich at 580 (holding that "neither a city council's

decision to rezone land nor a zoning board of appeal's decision to grant a variance is relevant to the constitutionality or unconstitutionality of an ordinance's provisions".

Second, the proposed amended complaint includes *two* new legal theories, de facto taking and equal protection, and it involves factual issues that were not addressed before the BZA. *See* Exhibit T. The proposed amended complaint does address the destruction of the roads and public services more fully, but it also presents new allegations of fact against the Defendant. For limited example, it contains the following regarding de facto taking:

23. Defendant also zoned many other parcels in the vicinity of the Property in the RC District that cannot be developed under these regulations. Like the Property, Defendant knew that these properties could not be developed under the RC District regulations, but zoned them that way nonetheless. This rezoning has stymied development and the possibility of development in the vicinity.

24. Defendant intended to reduce the value of the Property so that it, or unspecified others, could acquire the same at a discounted rate for use in a large scale commercial or office development consistent with the RC District regulations. This consolidation was part of Defendant's community development goals and objectives.

Id. It also contains the following, among other things, about equal protection:

26. Defendant has permitted the erection of huge signs advertising the hotels that are located nearly adjacent to this property.

Id.

Houdini's de facto taking claim is, in essence, that Defendant, a state actor, took the Property without just compensation not by denying the variance request and imposing a zoning ordinance that prevents development alone, but also by using its governmental regulatory powers and/or other official action in such a way so as to prevent the use of the Property for any profitable purpose (i.e. Defendant took the Property by significantly damaging its value). Such a

claim has long been recognized in Michigan law and was recently discussed at length as a viable theory of recovery in *Peterman v State Dept of Natural Resources*, 446 Mich 177, 189-90, 521 NW2d 499 (1994). Houdini's equal protection claim centers around the Defendant's regulation of Houdini as compared to other similarly situated property owners. This is a viable claim because when any legislation or legislative act, including zoning ordinances, creates a classification that distinguishes among persons and subjects them to different treatment, it implicates constitutional principles of equal protection and substantive due process. *See e.g. Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 173-174, 667 NW2d 93 (2003).

Finally, the Order completely ignores the rule of law that a circuit court's failure to set forth specific findings as to why justice would not be served by requested amendment of pleadings constitutes reversible error. *See Ray*, supra, 125 Mich App at 323-24; and *Hanon*, supra, 99 Mich App at 857-58. Instead, the Order states that "...Michigan courts have held that a determination of 'futility' is a sufficiently particularized basis to deny amendment". *See Exhibit A at pg 4*. In support, the Court of Appeals cites *Ben P Fyke & Sons, Inc v Gunter Co*, supra, 390 Mich 649 and *Amburgey v Saunder*, 238 Mich App 228, 247, 605 NW2d 84 (1999). However, *Ben P Fyke & Sons* is in accord with Houdini's because it holds that: "[t]o safeguard and implement the policy favoring amendment, this Court has directed that upon denial of a motion to amend such exercise of discretion should be supported by *specific findings as to reasons* for the same". *Id.* at 656-57 (citations and quotations omitted, emphasis added). Also, *Ben P Fyke & Sons* explained that "futile" means "legally insufficient on its face". *Id.* at 660. Houdini's proposed amended complaint asserted real, already recognized and viable theories. It was not insufficient on its face.

Furthermore, justice would have been served by granting Houdini's Motion. As detailed herein, Houdini at all times proceeded in accordance with existing precedent and in a good faith effort to protect its rights. The *Sammut* case leapt out of nowhere and only after the *Appeal* had been filed and worked, at least in very large part if not wholly, to strip Houdini of its rights. Justice requires that Houdini be granted leave to file its proposed amended complaint. The Circuit Court's decision and the Court of Appeals' affirmation of the same was tantamount to depriving Houdini of all claims it had against Defendant simply because they were not joined in an administrative appeal, regardless of the fact that such joinder is not required or likely even permissible under the Court Rules and, again, there was absolutely no reason Houdini should have expected the same to occur.

Finally, it is important to recognize that Houdini requested consolidation of these proceedings pursuant to MCR 2.505. *See* Exhibit R at 8-9. The Circuit Court never considered the same and Houdini has been stripped of all of its property rights.

V. CONCLUSION AND RELIEF REQUESTED

For all of the reasons stated, Houdini respectfully requests that the Court grant its application for leave to appeal, reverse the decision of the Court of Appeals in all regards and remand this matter back to the Circuit Court for appropriate proceedings.

Respectfully Submitted:

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