

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. 132018

Court of Appeals No. 266338

Wayne County Circuit Court No.
05-504139-CZ

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PLAINTIFF-APPELLANT'S REPLY BRIEF

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I. CLARIFICATION OF MATERIAL FACTS

Romulus'¹ "Response" contains several inaccurate or misleading statements of material fact that require clarification.

First, this case is not about billboards. It is about, at its core, whether Houdini is entitled to a lawful and economically viable use of its Property. Romulus argues that billboards were not allowed at the Property under the prior BT Zoning. *See* Response at 5. This is true but irrelevant because the BT Zoning allowed for some uses of the Property and it is clear that the RC Zoning does not. Romulus claims that the RC district allows numerous land uses. *See* Response at 5-6. This is an illusory (and unconstitutional), however, as it is undisputed that the RC District requires a minimum lot size and of one acre and the Property is about one-third that size. Therefore, Houdini literally cannot develop anything on its Property without a variance, which must issue to avoid a taking. *See e.g. Braun v Ann Arbor Charter Township*, 262 Mich App 154, 160; 683 NW2d 755 (2004) (holding that landowner is entitled to minimum variance that will allow for productive economic use of their property).

Romulus repeatedly, and erroneously, asserts that Houdini argued a regulatory taking in its administrative Appeal. *See e.g.* Response at 8. As evidenced by the *Appellant's Brief on Appeal*, Houdini's arguments in the Appeal were that: (1) the zoning ordinance, as applied, was an unconstitutional use of police power in that it was unreasonable; (2) Houdini had met the required criteria for the issuance of a variance; and (3) the ZBA's decision was arbitrary and capricious as it did not bear a real and substantial relationship to the public health, safety and welfare and/or it was not based upon the substantial, material and competent evidence on the

¹ All capitalized terms herein have the meaning set forth in Houdini's Application for Leave unless otherwise stated.

record. *See* Exhibit A, Table of Contents. Each of these arguments tracks the review standards of MCL 125.585(11). Houdini did not argue in a regulatory taking the Appeal. In fact, the Statement of the Order Appealed From specifically states: “Appellant reserves its damage claims for the taking of its property without just compensation, and its challenge to the Appellee's Zoning Ordinance, as such claims are subject to the original jurisdiction of this Court in the form of a complaint.” *Id.* The regulatory takings claim and a substantive due process claim were addressed in Houdini’s two-count Civil Action. *See* Exhibit B, Complaint and Jury Demand.²

Romulus also argues that Houdini “requested that the trial court consolidate the actions” in an apparent attempt to prove that Houdini realized joining them was proper procedure. *See* Response at 18. This is not true either. As stated in Houdini’s *Brief in Response and Opposition to Defendant's Motion for Summary Disposition*, Houdini only requested the circuit court to consolidate the matters pursuant to MCR 2.505 if it found Romulus’ “unorthodox and unsupported” joinder argument persuasive so that Houdini's fundamental constitutional rights could be preserved. *See* Exhibit C at 8-9.

Finally, Romulus argues that “MCR 2.116(C)(6) only requires that another action has been initiated between the parties in order to apply the rule [and] [t]here is no question Houdini filled two actions.” Response at 25. (Emphasis in original.) This is, again, wrong and highlights Romulus’ efforts to mash the Court Rules together in order to suit its own purposes. The Civil

² The Response is replete with vague references to “constitutionality” or “constitutional issues”. Each aspect of the Michigan Constitution is unique and subject to specialized consideration under the attendant caselaw. For example, takings issues are materially distinguishable from substantive due process issues, but Romulus describes them as involving “the same issues”. *See* Response at 20. Romulus’ repeated simplification is an unmistakable attempt at obfuscation.

Action is a “civil action”. *See* MCR 2.101(A). The Appeal is a “claim of appeal”. *See* MCR 7.101(C).³ These proceedings are not both “actions”, only the Civil Action is.

II. CLARIFICATION OF MCL 125.585(11) AND HOUDINI’S PROCEDURE

MCL 125.585(11) does not provide an “original cause to action” as claimed by Romulus. *See* Response at 8. It codifies the constitutional right to an administrative appeal of a zoning board’s decision in accord with The Michigan Constitution of 1963, Article 6, Section 28. This right of appeal is a true appellate action in that it is limited to a review of the Record on Appeal and the issues below, *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 after remand on another issue* 459 Mich 875 (1998), and the circuit court does not act as a true finder of fact as this Court has instructed that they must defer to a zoning board's determinations of fact as long as they " are supported by competent, material, and substantial evidence on the record." *Macenas*, *supra*, 433 Mich at 395.⁴

Romulus argues that “[a]pparently, Plaintiff’s argument is that the circuit court is not permitted to entertain [the Appeal and Civil Action] concurrently.” Response at 15. This is wrong and Romulus is again trying to shoehorn Houdini into positions it has not taken. Houdini did file the claims concurrently, just not in the same document. It is undisputed that Houdini filed the Appeal on December 16, 2004 and the Civil Action on February 2, 2005 and that the

³ This is a distinction with a difference. For example, it has already been established that a circuit court considering an administrative claim of appeal cannot decide a MCR 2.116(C)(8) or (10) motion due to the nature of the proceedings. *See Macenas v Michiana*, 433 Mich 380, 387; 446 NW2d 102 (1989) and *Carlton Sportsman’s Club v Exeter Township*, 217 Mich App 195, 202-203; 550 NW2d 867 (1996).

⁴ Note too that Romulus’ position would deny landowners of their due process of law by subjecting all of their constitutional claims to this deferential standard of review.

Appeal was not finally decided until August 23, 2005. Filing these separately as a claim of appeal and a complaint was proper procedure. *See* MCR 7.101 and 2.101. *Also see* MCR 1.103. The matters proceeded concurrently, just on different dockets – the AA appellate docket and the CZ civil docket. Houdini proceeded properly and respected the Court Rules’ distinctions here, which, as discussed in the Application for Leave, provide that an appellate jurisdiction based claim of appeal cannot be, or at a minimum does not have to be, joined to an original cause of action.

III. REVIEW IS NECESSARY TO RESOLVE A SPLIT OF AUTHORITY

Sammut v City of Birmingham, 2005 WL 17844 (Mich App) (Exhibit D) is a drastic departure from existing law and has created a split in authority involving issues that have significant public interest. *Sammut* interprets MCL 125.585(11) in such a way so that it creates a hybrid type of appellate/original proceeding in which the circuit court is required to resolve any “constitutional” issues that relate to the same transaction or occurrence as the subject of the claim of appeal under MCL 125.585(11). The existing case law, as discussed below, does not interpret MCL 125.585(11) this way. *Also see* Application for Leave at 24-31. The Court should resolve this split by granting Houdini leave to appeal. *See* MCL 7.302(B)(2) and (3).

Appellate opinions have long established that the circuit courts are to sit as true appellate courts when reviewing a zoning board’s decision. *See e.g. Lorland Civic Ass’n v DiMatteo*, 10 Mich App 129, 138; 157 NW2d 1 (1968). As Romulus acknowledges at page 16 of the Response, established caselaw holds that a landowner faced with an adverse decision of a zoning board, which decision is administrative action, does not have to appeal the same in order to challenge the constitutionality of the zoning ordinance as applied, which is a legislative action. *See Sun Communities v Leroy Twp*, 241 Mich App 665, 672; 617 NW2d 42 (2000) *citing*

Paragon Properties Co. v Novi, 452 Mich 568; 550 NW2d 772 (1996). *Sun Communities* is right because, as this Court has clearly held, the right to appeal an adverse variance decision afforded by MCL 125.585(11) is not relevant to “the constitutionality or unconstitutionality of an ordinance’s provisions”. *Paragon Properties.*, supra, 452 Mich at 580.

The Court of Appeals addressed this interplay in *1st Rural Housing Partnership, LLP v City of Howell*, 2004 WL 226168 (Mich App). (Exhibit E) The plaintiff in *1st Rural* had been denied a variance by Howell’s zoning board. Plaintiff filed an original cause of action challenging the application of the ordinance and did not file a MCL 125.585(11) claim of appeal. *See id.* at 1. Howell argued that the civil action was not ripe because plaintiff was required to file a MCL 125.585(11) appeal before or contemporaneously with the civil action. *Id.* The court clarified:

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.

Id. at 2. (Emphasis added.)

1st Rural, in accord with, and citation to, all of the other major precedent regarding these matters clearly held that an aggrieved party could file a claim of appeal or a civil action or both. *1st Rural* did not hold that these had to be joined in the same document. In fact, its decision acknowledges that they do not as it cites *Paragon* for the well-reasoned point that a variance denial is not relevant to the constitutionality challenge. *See id.* at 2. Defendant Howell apparently even recognized the appeal could be resolved before the civil action was filed. *See id.* at 1 (arguing that the civil action was not ripe because plaintiff was required to file a MCL 125.585(11) appeal before or contemporaneously with the civil action).

Then, after Houdini filed its Appeal, *Sammut* was decided. *Sammut* does not cite a single case from the established case law involving these matters. See Exhibit C.⁵ Nevertheless, *Sammut*, upon which the lower courts heavily relied here, establishes for the first time that MCL 125.585(11) creates a hybrid type of appellate/original proceeding in which the circuit court can resolve any other constitutional issue that relates to the same transaction or occurrence as the claim of appeal under MCL 125.585(11). See *id.* at 1. As such, joinder under MCR 2.203(A) is, according to *Sammut*, necessary.⁶ Romulus even agrees that *Sammut* created this new rule. See e.g. Response at 15 (acknowledging that *Sammut* did not “subscribe” to the 1st Rural holding that a plaintiff like Houdini may appeal an 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). Again, no precedent for this ruling was cited in *Sammut* and Romulus has never cited another case holding that such a joinder (administrative appeal and civil action) is required.

The Court Rules provide procedure by which published opinions can be resolved through a panel of the Court of Appeals, but no such procedure exists for unpublished cases. See MCR 7.215(J). Resolution of this split is particularly important here because Michigan’s property owners’ constitutional rights are at stake and the use of *Sammut* against Houdini and in the face of such precedent to the contrary evidences the danger unpublished opinions pose.

IV. ROMULUS HAS FAILED TO EXPLAIN HOW ITS ZONING ORDINANCE IS NOT UNCONSTITUTIONAL.

⁵ The only case cited in *Sammut* is *Adair v State*, 470 Mich 105; 680 NW2d 386 (2004), which involved a res judicata decision in the context of a claim under the Headlee Amendment and had nothing to do with either MCL 125.585(11) or zoning law.

⁶ It is critical to note that the *Sammut* plaintiff requested money damages in its civil action and the court held that this should have been reviewed as part of the newly established hybrid type of appellate/original proceeding even though MCL 125.585(13) clearly prohibits the awarding of such relief in these administrative reviews.

Houdini provided a brief, concise and well-reasoned argument explaining how, as a matter of law, application of the RC District to the Property is an unconstitutional use of Romulus's police power under this Court's precedent in *Bassey v City of Huntington Woods*, 344 Mich 701; 74 NW2d 897 (1974). See Application for Leave at 23-24. Romulus' only response, in a nutshell, was that the zoning is reasonable because Romulus and its consultants say it is. See Response at 13-14. Houdini acknowledges that it has the burden to prove that the ordinance is unreasonable under *Kropf v City of Sterling Heights*, 391 Mich 139; 215 NW2d 179 (1974), but that finding is, as discussed in the Application for Leave, self-evident here. Romulus' assertions that its zoning the Property so that it cannot be used was reasonable are preposterous.⁷

V. ROMULUS HAS FAILED TO REBUT ANY OF HOUDINI'S POINTS REGARDING THE COURT OF APPEALS' ERRONEOUS APPLICATION OF MCR 2.203(A).

A. MCR 2.203(A) cannot apply where only one action is "pending".

Romulus admits, as it must, that the qualified compulsory joinder rule of MCR 2.203(A) only applies where two actions are pending. See Response at 22. It also admits that Houdini's Appeal had been finally decided by the circuit court and that Houdini's *application for leave to appeal* the same to the Court of Appeals had not been granted when summary disposition was awarded in the Civil Action. *Id.* at 23. It also admits that the Court of Appeals acknowledged in *Rossow v Brentwood Farms Development, Inc*, 251 Mich App 652; 651 NW2d 458 (2002) that

⁷ Moreover, rather than addressing the actual issue, Romulus again argues here how Houdini failed to meet its taking burden in the Appeal and argues that billboards are not allowed in the RC District. See Response at 14-15, discussing *Penn Central Transp Co v New York City*, 438 US 104; 98 SCt 2646 (1987) and *K&K Construction Co, Inc v Dep't of Natural Resources*, 456 Mich 570; 575 NW2d 531 (1998). As discussed, Houdini never argued a taking in the Appeal and billboards are not the issue here.

the Court of Appeals lacks jurisdiction where a party does not have an appeal as of right. *Id.*⁸ Romulus tries to distinguish this holding as being in a footnote, being made in other procedural circumstances and by stating that the Court of Appeals had “jurisdiction” to consider the application. *See* Response at 23. These arguments are distinctions, if any, without a difference. The critical un-rebutted point is that Houdini did not have an appeal of right so the Court of Appeals did not have jurisdiction unless and until it granted leave. Therefore, MCR 2.203(A) could not apply because there were not two “pending” actions.

B. MCR 2.203 cannot apply to a claim of appeal at all and, even if it can, it does not apply to this case.

Romulus has more or less merely parroted the Court of Appeals’ holding that *Macenas*, *supra*, held that MCR 2.203(A) and MCR 2.110(A) provide that a “claim of appeal” can constitute a “pleading” under MCR 2.203(A). *See* Response at 22. As discussed in Houdini’s Application for Leave, the Court of Appeals’ interpretation of MCR 2.203(A) and MCR 2.110(A) totally contravenes bedrock principles of statutory construction and reversal is warranted. Romulus has failed to rebut that point and instead relies on generalized policy arguments that, in effect, state that the Court Rules should mean more than they say. *See* Response at 24-28. Just like the Court of Appeals did here, Romulus is reaching and the Court should reject this argument as it has instructed that nothing may be read into a statute (or by extension a Court Rule) beyond the words expressed. *See e.g. Lansing v Lansing Twp*, 356 Mich 641, 649; 97 NW2d 804 (1959). All of the authority Romulus cites and discusses for pages and pages is irrelevant because not one of these cases held that MCR 2.203 requires joinder of a civil action to an administrative appeal. *See* Response at 25-28.

⁸ The specific holding in *Rossov* was “this Court lacks jurisdiction absent an order granting plaintiffs leave to appeal”. *See id.* at 564, n. 1, *citing* MRC 7.212(C)(4) and (D)(2).

Furthermore, Romulus does not even address the specific issues set forth in Section IV (D)(3) of Houdini's Application for Leave which establish that even if joinder were possible, it is not required here because the issues in the Appeal and the Civil Action do not arise from the same transaction and occurrence. *See Id.* at 36-39. Instead, Romulus apparently relies on its argument that the "gist" of the two actions was zoning and constitutional matters and so this is enough to require joinder. *See* Response at 28. Romulus is wrong. *See* Application for Leave at 36-39.

VI. ROMULUS HAS FAILED TO REBUT HOUDINI'S ARGUMENT AS TO RES JUDICATA AND RELIES ON IRRELEVANT AUTHORITY.

Houdini does not assert an overly narrow application of the doctrine of res judicata. As the Court has stated, "[t]he 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, emphasis added.) As Romulus' own authority states "[w]hether a factual grouping constitutes a "transaction" for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in time, space, origin or motivation, whether they form a convenient trial unit" *Adair v State*, 470 Mich 105, 125; 680 NW2d 386 (2004). (Quotation and emphasis omitted.) It is hard to imagine how the same facts or evidence could be used in the Appeal and the Civil Action considering discovery is not allowed in the Appeal and that the circuit court could not consider any issues that were not before the BZA.⁹ Furthermore, Houdini's motivation before the BZA was to obtain a use

⁹ This issue is particularly relevant in that Houdini should have been granted leave to file an amended complaint which would have added three new counts not before the ZBA – equal protection, de facto taking and a 42 USC § 1983 claim, which involved federal claims that could not, under any reasonable reading of MCL 125.585(11) been addressed in the Appeal or reviewed by the ZBA. *See* Application for Leave at 37 to 40.

variance. Its motivation in the Civil Action was to recover relief for Romulus' constitutional violations. At a minimum, the two transactions do not form a convenient trial unit for all of the reasons stated above and in Houdini's Application for Leave and as evidenced by the format, structure and plain terms of the Court Rules. Romulus' heavy reliance on *Peterson Novelties v City of Berkley*, 259 Mich App 1; 672 NW2d 351 (2003) is misplaced because, like every other case cited by Romulus, it involved two civil actions – not a civil action and an administrative appeal. *See id.*

VII. ROMULUS' CIRCULAR ARGUMENT THAT LEAVE TO AMEND WAS PROPERLY DENIED FAILS TO REBUT THE POINTS MADE BY HOUDINI THAT ESTABLISH THAT GRANTING LEAVE IS PROPER.

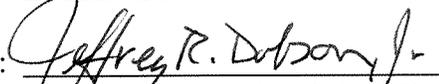
Romulus' circular argument here is that the amendment sought was futile because the lower courts established a new procedural rule that stripped Houdini of the right to pursue the Civil Action (the circuit court even refused to join the matters). As such, Romulus has failed to respond to the issues set forth in Houdini's Application for Leave that demonstrate that the lower courts erred in not granting Houdini leave to amend.

VIII. CONCLUSION

For all of the reasons stated herein and in it Application For Leave to Appeal, Houdini respectfully requests that the Court grant its application for leave to appeal.

Respectfully Submitted:

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