

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 SUPPLEMENTAL BRIEF IN SUPPORT
OF ITS APPLICATION FOR LEAVE TO APPEAL**

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I. INTRODUCTION

In its June 8, 2007 Order directing the Court Clerk to schedule oral argument on Houdini's application for leave to appeal, the Court posed the following questions to be addressed by the parties:

(1) Whether the claim of appeal to the Wayne Circuit Court from the City of Romulus Zoning Board of Appeals' (ZBA) variance denial was a "pleading" to which the compulsory joinder rule of MCR 2.203(A) applies, so as to require the plaintiff to assert and include its taking claim in the same document as its claim of appeal.

(2) Whether when the plaintiff filed its claim of appeal to the Wayne Circuit Court from the ZBA's variance denial, the plaintiff's claim was ripe for review under the rule in *Paragon Properties Co v Novi*, 452 Mich 568, 583; 550 NW2d 772 (1996), which requires a property owner to obtain "a final decision from which an actual or concrete injury can be determined" before asserting a constitutional taking claim.

(3) Whether, once the Wayne Circuit Court affirmed the plaintiff's appeal, pursuant to MCL 125.585(11) (now MCL 125.3606(1)), of the ZBA's variance denial, that determination was res judicata with respect to the plaintiff's constitutional taking claim.

Houdini will address these issues in turn.

Joinder was not required. The Court Rules expressly and unambiguously provide a complete accounting of what documents are "pleadings" to which Michigan's qualified compulsory joinder rule applies and a claim of appeal is not one of them. *See* MCR 2.203(A) and 2.110(A). The Court of Appeals erred when it disregarded the plain language of the Court Rules and improperly read holdings into the Court's decision in *Macenas v Village of Michiana*, 433 Mich 380; 446 NW2d 102 (1989), when it ruled that joinder was required. It is also improper procedure to join a civil action and an appeal because these proceedings are under differing forms of the circuit court's jurisdiction and putting a claim of appeal in a complaint would subject it to strike under MCR 2.115(B). In any event, even if joinder were possible, it

was not necessary in this case because Houdini's two proceedings did not involve matters that arose from the same transaction or occurrence.

As to the Court's second question, Houdini's taking claim was ripe. The Court's decision in *Paragon Properties, Inc. v City of Novi*, 452 Mich, 568, 575; 550 NW2d 772 (1996), established that ripeness for as applied constitutional land use challenges requires "a final, nonjudicial determination regarding the permitted use of the land". *Arthur Land Company, LLC v Ostego County*, 249 Mich App 650, 665; 645 NW2d 50 (2002). (Emphasis added.) This means that "... a determination of alternative uses of a property as zoned is a condition precedent to a valid takings claim". *Braun v Ann Arbor Charter Twp*, 262 Mich App 154, 159-160; 683 NW2d 755 (2004) citing, among other things, *Paragon*, leave to appeal denied 472 Mich 942, 698 NW2d 400 (2005). (Emphasis added.) Thus "the minimum variance that is necessary to place the land in productive economic use within the zoning classification, if disallowed by the zoning board of appeals, meets the finality requirement and allows the maintenance of a takings cause of action, or any other alleged deprivation." *Id.* at 160. Houdini's civil action was ripe when filed because Houdini had been denied the minimum use variance required to make economic use of the Property prior to filing it.

Finally, res judicata, which is more or less the opposite side of the same coin as joinder, does not apply to Houdini's taking claim because, as it is a doctrine applicable to civil actions. *See, e.g., Adair v State*, 470 Mich 105, 121; 680 NW2d 386 (2004) ("The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action.") (Emphasis added.) Neither Romulus nor the Court of Appeals has cited any authority providing that the doctrine of re judicata applies to bar a civil action because of the resolution of an appeal of an administrative decision. Even if res judicata were applicable, it does not apply here because

Houdini's taking claim could not have been resolved in the appeal, which is a necessary element of re judicata. *See Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). This is because the appeal, per MCL 125.585(11), is strictly limited to only a review of the zoning board's decision at issue, which in this case was the ZBA's denial of the use variance request. Moreover, factual allegations needed to establish Houdini's takings claim (i.e. the permitted use of the land) were subject to discovery that is not allowed in the appeal and based upon facts that would not exist until, and only if, its variance request had been decided. *See Paragon, supra*.

In addition, res judicata cannot apply here because doing so would go against the Court's policy directive of *Pike v City of Wyoming*, 431 Mich 589, 598; 433 NW2d 768 (1988) that the doctrine is not meant to create vested rights in decisions where it can cause inequities. Here, the Court of Appeals' decision vested Romulus with the right to assert that its zoning ordinance and actions, as applied to Houdini, were constitutional on every single possible basis, including those clearly beyond the scope of Houdini's administrative appeal. As a result, Houdini has been left with an undevelopable and unserviced Property that Romulus continues to tax, but does not allow Houdini to do anything with. That is hardly the sort of scenario that the res judicata doctrine was intended to create.

II. HOUDINI'S ANSWER TO QUESTION 1: HOUDINI'S CLAIM OF APPEAL WAS NOT A "PLEADING" TO WHICH THE JOINDER RULE OF MCR 2.203(A) APPLIES AND HOUDINI WAS NOT REQUIRED TO ASSERT ITS CIVIL CLAIMS AND CLAIM OF APPEAL IN THE SAME DOCUMENT.

The answer to the Court's first question goes to the heart of the unifying principle in this case, which is that appellate proceedings and civil actions are separated under the Court Rules, and that this separation both establishes and reflects that different rules, such as the joinder rule, apply to different types of procedures. This organizational bifurcation exists under the Court

Rules because, as Romulus admits, appellate claims and civil actions are separate and distinct proceedings even where they are both conducted in a circuit court. If that principle is kept in mind, this issue is rather uncomplicated.

Procedures for civil actions and appellate proceedings are separated under the Court Rules. *See* Chapters 2 (Civil Procedure) and 7 (Appellate Rules). The applicability provisions make the import of this division clear. MCR 1.103, from the General Provisions, provides:

The Michigan Court Rules govern practice and procedure in all courts established by the constitution and laws of the State of Michigan. Rules stated to be applicable only in a specific court or to a specific type of proceeding apply only to that court or type of proceeding and control over the general rules.

(Emphasis added.)

In accord, MCR 2.001 provides:

The rules in this chapter govern procedure in all civil proceedings in all courts established by the constitution and laws of the State of Michigan, except where the limited jurisdiction of a court makes a rule inherently inapplicable or where a rule applicable to a specific court or a specific type of proceeding provides a different procedure.

(Emphasis added.)

In the context of civil proceedings, “[t]here is one form of action known as a ‘civil action’”. MCR 2.101(A). “A civil action is commenced by filing a complaint with a court.” MCR 2.101(B). On the other hand, appeals from zoning boards’ decisions to the circuit courts are, naturally, governed by the appellate rules. *See* MCR 7.104(A) and, in this case, MCL 125.585(11). A claim of appeal is the vehicle by which an appellate action of right is brought. *See* MCR 7.101(C) and MCR 7.101(A)(2) (An order or judgment of a trial court reviewable in the circuit court may be reviewed only by an appeal.) (Emphasis added.)

Michigan’s qualified compulsory joinder rule does not apply to Houdini’s claim of appeal and complaint because the rule, on its express terms, only applies to the joinder of certain

“pleadings”, which is a defined term pertaining to documents only filed in civil actions. *See* MCR 2.203(A) and 2.110(A).

Michigan courts have, until this case, consistently refused to expand the Court Rules’ definition of pleading. *See, e.g., Decker v Flood*, 248 Mich App 75, 80, fn. 4, 638 NW2d 163 (2001) (affidavit attached to a complaint is not a pleading); *Village of Diamondale v Grable*, 240 Mich App 553, 565, 618 NW2d 23 (2000) (motion for summary disposition is not a pleading); *Boodt v Borgess Medical Center*, 272 Mich App 621, fn.2, 728 NW2d 471 (2006) (clarifying that notice of intent is not a pleading); and, most recently, *May v Warren*, unpublished opinion per curiam of the Court of Appeals, issued January 23, 2007 (Docket No. 271627); 2007 WL 171990 (supplementary brief is not a pleading subject to strike under MCR 2.115(B)). **(Exhibit A)** Thus, the holding in the instant case is a true departure from precedent.

Because the Court Rules are to be strictly construed and in accordance with their plain language, the Court of Appeals manifestly erred when it held that it was “convoluted” to respect the limitations of the joinder rule and the Court Rules’ separation of appellate proceedings and civil actions. It compounded that error and created this anomaly of a case when it twisted this Court’s ruling in *Macenas, supra*, to mean that a claim of appeal as to a decision of a board of zoning appeals constitutes a “pleading” under MCR 2.110(A). *See* Opinion of June 13, 2006. (Application For Leave, Exhibit A) The *Macenas* holding did no such thing.

Macenas involved an appeal of a zoning board’s refusal to grant a building permit. The only issue reviewed in *Macenas* was whether the proper standard of review in considering a claim of appeal proceeding under MCL 125.585(11) was applied. *See* 433 Mich at 382. The case did not involve the joinder rule of MCR 2.203(A) or the definition of pleading found in MCR 2.110(A). The Court of Appeals’ error likely stems from the fact that the *Macenas* Court

first noted that some procedurally irregularities had occurred in that the plaintiff 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. The Court then recognized that "the circuit court acts as an appellate court" in such circumstances and held that, as such, it was improper for the circuit court to consider a motion that pertained only to civil actions:

Under such circumstances, and particularly where as in this case no challenge is made to the circuit court's determination that a claim of appeal has been filed, a motion for summary disposition pursuant to MCR 2.116(C)(8), which tests only the pleadings, is not appropriate. If a proper appeal to circuit court is filed, a "cause of action" is stated, at least for purposes of obtaining appellate review of the board's decision in accordance with the statute.

Id. at 387-388. (Emphasis added.) The above quote is the portion of *Macenas* that the Court of Appeals paraphrased and relied upon in deciding that a claim of appeal is a pleading. *See* Opinion of June 13, 2006. (Application For Leave, Exhibit A) However, as is clear from the above, *Macenas* did not state that a civil action had been filed and it did not state that a claim of appeal constitutes a pleading for joinder purposes. Rather, the opinion, regardless of the filing anomalies that apparently occurred in the trial court before the judge corrected them, clearly reflects that the matter should be treated as an appellate proceeding. In addition, in footnote 11, the Court stated: "Where the statute provides no guidance concerning procedure to be followed, court rules which generally govern such matters are applicable. For example, an appeal of right to circuit court must be claimed within twenty-one days after entry of the order or judgment appealed from. MCR 7.101(B)(1)." *Id.* (Citations omitted.) The Court of Appeals wrongly ignored the facts of *Macenas* and took a quote entirely out of context to bolster its novel interpretation of the Court Rules.

Note too that not only is including a claim of appeal and a civil action in the same document not contemplated by or proper because an appeal is not a cause of action, but it would

subject the appellate proceeding to a motion to strike under MCR 2.115(B) as it would constitute “part of a pleading not drawn in conformity with these rules”. The effect of a successful motion to strike would likely be loss of the appeal because an appeal, under the current statute, must be brought within thirty days. *See* MCL 125.3606(3).

Finally, even assuming, *arguendo*, that Houdini’s appeal and civil action could have been joined, Houdini was not required to do so as the matters at issue in the appeal and the civil action did not involve matters that arose from the same transaction or occurrence. Bearing in mind the Court’s instruction to not submit restatements of application papers, Houdini respectfully directs the Court’s attention to pages 36-39 of its Application For Leave wherein this issue is fully briefed. Briefly, however, and for easier reading, the sole issue in the appeal was whether the use variance requested (billboard) should have issued, whereas the civil action involved the following issues: (a) Romulus’ taking of Houdini’s property by regulation and the just compensation that Houdini should receive for the same; (b) whether the limitations on parcel size in the RC district advance reasonable governmental interests; (c) whether the limitations on land uses in the RC district as applied to Houdini’s property advance reasonable governmental interests; and (c) whether the dimensional limitations in the RC district as applied to Houdini’s property advance reasonable governmental interests. *Id.* Equally separate and distinct are the claims Houdini sought to add by amendment: (a) a de facto taking based upon, among other things, road closures that occurred well before the variance at issue was even applied for; and (b) equal protection claims having to do with the stark differences in Romulus’ regulatory action as regards similarly situated landowners. *Id.*

In short, there is no absolutely no basis in the Court Rules or published caselaw to require or even allow a party to join a civil action and a claim of appeal, and Houdini followed proper

procedure in filing them separately. *See, e.g., 1st Rural Housing Partnership, LLP v City of Howell*, unpublished opinion per curiam of the Court of Appeals, issued February 5, 2004 (Docket No. 241192); 2004 WL 226168 at 2 (holding that plaintiff denied variance from defendant's zoning board could appeal, file a civil action or do both). (Application For Leave, Exhibit Y).¹

III. HOUDINI'S ANSWER TO QUESTION 2: HOUDINI'S CONSTITUTIONAL TAKING CLAIM WAS RIPE FOR REVIEW WHEN IT FILED ITS CLAIM OF APPEAL BECAUSE THE ZBA'S DENIAL OF THE USE VARIANCE REQUESTED WAS A FINAL DECISION FROM WHICH AN ACTUAL OR CONCRETE INJURY CAN BE DETERMINED.

When considering the Court's second question, it is important to keep the following principles of zoning law in mind. "A use variance is essentially a license to use property in [one] way not permitted under the zoning ordinance." *Paragon*, *supra*, 452 Mich at 575. Rendering a decision on a specific use variance request is an administrative function. *See, e.g., Sun Communities v Leroy Twp*, 241 Mich App 665; 672, 617 NW2d 41 (2000). On the other hand, a rezoning request changes the zoning classification of the subject property, which means that all of the permitted uses of the subject property are altered. Rezoning is a legislative act in that it is an amendment to the zoning ordinance. *Id.* at 669-671. In this case, Houdini did not request a rezoning. It requested a use variance to allow it to construct a billboard.

It is well-established that a plaintiff does not have to exhaust all possible state administrative remedies before bringing a federal taking or substantive due process claim. *See*

¹ Note that *Sammut v City of Birmingham*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2005 (Docket No. 250322); 2005 WL 17844, which the Wayne Circuit Court relied upon in dismissing Houdini's civil action, was only decided after Houdini had filed both of its proceedings.

Electro-Tech, Inc. v H.F. Campbell Co, 433 Mich 57; 445 NW2d 61 (1989). Rather, "... a determination of alternative uses of a property as zoned is a condition precedent to a valid takings claim". *Braun*, supra, 262 Mich App at 159-160. (Emphasis added.) As such, when a variance is sought and denied, neither a rezoning nor any other administrative or legislative procedure or relief must be sought to establish finality. Houdini's constitutional claims were ripe because it complied with this rule as it sought and was denied a use variance prior to asserting its constitutional claims.

A. The *Paragon* and *Braun* Rulings

In *Paragon*, the plaintiff landowner had purchased an unimproved parcel zoned for large-lot single family residential uses. *Id.* at 571. A few years later, it applied for a rezoning of the property to a mobile home district, which request was denied by the Novi's city council. The plaintiff filed suit and prevailed at trial on an as-applied constitutional taking claim. The Court of Appeals reversed, holding, in part, that the circuit court erred when it denied Novi's motion for summary disposition on the grounds that the plaintiff's claim was unripe because it had not sought a use variance from the zoning board of appeals prior to instigating its lawsuit. *Id.*

On review, this Court first noted that all as applied constitutional claims challenging the validity of a zoning ordinance were subject to the rule of finality. *Id.* at 576. Specifically, the Court held that "[a] challenge to the validity a of a zoning ordinance 'as applied,' whether analyzed under 42 U.S.C. § 1983 as a denial of equal protection, as a deprivation of due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment is subject to the rule of finality." *Id.* The Court then affirmed the Court of Appeals' decision, reasoning that Novi's "denial of [plaintiff's] rezoning request is not a final decision because, absent a request for a variance, there is no information regarding the potential uses of

the property that may have been permitted, nor, therefore, is there any information regarding the extent of the injury [plaintiff] may have suffered as a result of the ordinance.” *Id.* at 581. In doing so, the Court relied upon the similar finality holding in *Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 US 172; 105 SCt 3108 (1985), which was adopted in Michigan in *Electro-Tech*, *supra*. Simply put, *Paragon* established that ripeness for as applied constitutional land use challenges requires “a final, nonjudicial determination regarding the permitted use of the land,” which includes a decision on a use variance. *Arthur Land Company*, *supra*, 249 Mich at 665, citing *Paragon*.

The fact that ripeness does not, however, require a rezoning request (as opposed to a request for a use variance) was made clear in *Braun, supra*, on which this Court denied leave. In *Braun*, the plaintiffs had petitioned Ann Arbor Township for a rezoning of their property to allow for more dense residential development than they could then achieve, which request was denied by the Township Board. *Id.* at 156. The plaintiffs then filed a complaint alleging: (a) violation of substantive due process, (b) “exclusionary zoning-substantive due process”; (c) equal protection violation; and (d) inverse condemnation. The circuit court granted the Township summary disposition on the basis that no final decision regarding the permissible uses of land had been made. *Id.* The Court of Appeals affirmed, holding that “... the landowner must show that he sought alternative uses of the property as zoned and was denied, thus leaving the property owner with land having no economically productive or reasonably beneficial use”. (Emphasis added.) The Court of Appeals made clear that this requirement is not intended to be a merry-go-round of zoning applications and reviews and that the landowner is only required to seek the minimum variance necessary to achieve a productive use:

We stress that resorting to the zoning board of appeals should not be an unending circulation of petitions, constituting numerous proposals and requests before

finality is ultimately established. Rather, the minimum variance that is necessary to place the land in productive economic use within the zoning classification, if disallowed by the zoning board of appeals, meets the finality requirement and allows the maintenance of a takings cause of action, or any other alleged deprivation. Similarly, if the zoning board of appeals dismisses the petition for want of jurisdiction, then finality is also achieved.

Id. at 160. (Emphasis added.) This is consistent with federal law. *See Segun v City of Sterling Heights*, 968 F.2d 584, 587 (CA 6 1992) (“a zoning determination cannot be deemed final until the plaintiffs have applied for, and been denied, a variance”) citing *Williamson*, *supra*.

B. Houdini’s Constitutional Claims Were Ripe

In this case, Houdini sought a use variance to enable it to erect a billboard, which Romulus’ ZBA denied. This was the minimum variance necessary to place the land in productive economic use within its zoning classification because there is no access to the Property as Romulus has vacated or destroyed all of the roads leading to the same in furtherance of its consolidation plans, and the Property is too small to be used for any use allowed in its zoning district. The Property is essentially a land locked parcel that abuts Interstate-94 and has no reasonable public access. It is perfectly, and only, suitable for a passive use such as a billboard. Tellingly, despite its repeated claims that some other use is available, Romulus has never stated what other uses might actually be physically possible and economically feasible.

Because it had received a final decision as to what productive uses Romulus would allow on the Property, namely none, Houdini filed its as-applied challenges of: (a) unconstitutional taking; (b) violation of substantive due process; and (c) 42 U.S.C. § 1983 taking and violation of substantive due process. *See Application For Leave, Exhibit P.* The amended complaint and jury demand Houdini sought leave to file also contained three more as-applied counts: (a) de facto taking by road closure and refusal to provide municipal services; (b) equal protection; and (c) 42 U.S.C. § 1983 equal protection. *See Application For Leave, Exhibit T.* All of these

claims were ripe the minute the requested use variance was denied. *See Paragon and Braun*. There was no need for Houdini to request a rezoning.

That Houdini also had filed its claim of appeal is not relevant to this issue for two reasons. First, and as will be addressed in more detail in the next section of this brief, the claim of appeal proceeding pertained *solely* to the issue of whether Romulus' ZBA erred in denying Houdini's variance request. *See* MCL 125.585(11). Second, Michigan law provides that these proceedings can be maintained concurrently and that the claim of appeal is an optional proceeding. *See, e.g., 1st Rural Housing Partnership, supra*, 2004 WL 226168 at 2 (holding that a plaintiff denied a variance from a zoning board could appeal, file a civil action, or do both). (Application For Leave, Exhibit Y). Had Houdini prevailed on its appeal, the fact that it had later acquired its variance could surely be admitted by one or both of the parties in the civil action. But Houdini could still be awarded damages for the time during which its Property had been taken and for the deprivation of its due process and equal protection rights. *See, e.g., Poirier v Grand Blanc Twp*, 192 Mich App 539; 548, 481 NW2d 762 (1992) (holding that where taking occurred property owner is entitled to compensation for the period in which the taking has occurred and holding that taking did not end until the trial court entered its order to rezone the property at issue). If, on the other hand, Houdini failed on the appeal, the takings claim would proceed as pled because, as discussed below, even if the use variance was properly denied, such a determination would not preclude a takings claim.

IV. HOUDINI'S ANSWER TO QUESTION 3: THE CIRCUIT COURT'S AFFIRMATION OF THE ZBA'S DENIAL OF HOUDINI'S USE VARIANCE REQUEST WAS NOT RES JUDICATA WITH RESPECT TO HOUDINI'S TAKING CLAIM.

The Court's third question again goes to the heart of this matter in that civil actions and appeals are substantively different procedures to which different rules and doctrines apply. "The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action," *Adair*, supra, 470 Mich at 121. (Emphasis added). 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*, supra, 460 Mich at 586. Neither Romulus nor the Court of Appeals has cited any authority providing that the doctrine of re judicata applies to bar an action because of the resolution of an appeal of an administrative decision.

Moreover, even if res judicata is applied, it does not act to bar Houdini's taking claim (nor any of its others) because it could not have been resolved in the administrative appeal from the denial of Houdini's requested use variance.

Michigan uses a transactional approach to the second aspect of res judicata, which means that causes of action are not considered separate merely because they require different evidence to prove them as is the case with jurisdictions that use the "same evidence" approach. *See Adair*, supra, at 124. Rather, the transactional approach is more holistic. "Whether 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*, [and] whether they form a convenient trial unit..." *Id at 125* quoting 46 Am. Jur. 2d, Judgments 533, p. 801. (Italics added by *Adair*, underline by Houdini.) And although it is not dispositive, the fact that

different evidence is needed to prove different claims may still be relevant to a review under the transactional analysis. *Id.* In addition, a second proceeding is not barred if there are changed or new facts, or a change in the law. *See, e.g., In Re Hamlet*, 225 Mich App 505, 519; 571 NW2d 750 (1997), overruled in parts on other grounds, 462 Mich 341 (2000).

Houdini's taking claim could not have been resolved in the first because the Wayne Circuit Court's review of the ZBA's denial of Houdini's use variance request could *only* pertain to whether that particular decision was lawful.

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.

MCL 125.585(11). (Emphasis added.) Because of this limitation, the law does not allow the parties or require the reviewing circuit court to address every possible constitutional issue between the parties in an appeal. This makes sense because, factually, the scope of the appeal is strictly limited to the facts set forth in the record on appeal. *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), remanded on another issue 465 Mich 921 (1998); opinion after remand 459 Mich App 118 (1998), reversed 459 Mich 875 (1998). Thus, on Houdini's appeal regarding whether a variance should have been issued, the Wayne Circuit Court could not delve into determining whether all aspects of Romulus' zoning ordinance comply with all Michigan statutes and the Constitution. Specifically, it could not take evidence on Houdini's takings claim, which requires materially different proofs than whether a variance

should issue, because this was not part of the record below. It could deal only with: (a) whether the variance should have issued under the common law and the applicable zoning ordinance; (b) whether the decision to deny the variance requested was, in and of itself, unconstitutional; and (c) whether the ZBA abused its discretion. This is what Houdini argued. *See Exhibit B*, Brief on Appeal. Moreover, these matters could not possibly have been part of the record before the ZBA because a denial of the variance was required before Houdini's takings claim could even be ripe. *See Paragon*, supra, 452 Mich at 580. Simply put, the takings claim could not be resolved in the appeal because the law does not allow the claim or the facts required to prove it to be considered at the appeal.

To rule that res judicata could apply here would require property owners to build a record before a zoning board on any possible basis for which they have or may have a claim to assert. This cannot be the law as it would: (a) deprive persons of their right to discovery on constitutional claims; (b) deprive persons of their right to jury trials on constitutional claims; (c) alter the burdens at issue in that the circuit court would be required to give deference to the zoning boards' determinations; (d) nullify the applicable statutory limitation periods for constitutional claims and force the filing of a lawsuit within the same thirty-day period applicable to the filing of an appeal from a ZBA decision; (e) bar the introduction of subsequently occurring facts (e.g. if the jurisdiction allows a similar use at another site, one would want to use it to support their case, but could not if the case was limited to the record below); (f) allow zoning boards to consider constitutional questions in violation of the Michigan Constitution; and (g) put persons with takings claims in the position of having to present evidence to the zoning board of a taking that had not occurred yet.

Furthermore, just because the ZBA decided not to grant the variance does not mean that there has not been a taking. It may be that Romulus felt that taking the property by regulation (feeling that it would have to pay just compensation for it) would be worth it not to have Houdini develop it as a billboard. It may be that Houdini simply couldn't meet a requirement for a variance. Whatever the case, the two items are not mutually exclusive. *See Paragon, supra*, p 580, n 15 (“Neither a city council’s decision to rezone nor a zoning board of appeals’ decision to grant a variance is relevant to the constitutionality or unconstitutionality of an ordinance’s provisions.”)

As a matter of policy, this Court has also recognized that “[the] principle [of res judicata or estoppel by judgment] is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities....” *Pike, supra*, 431 Mich at 598, quoting *Comm’r v Sunnen*, 333 US 591, 599; 68 SCt 715 (1948). As such, res judicata also cannot apply here because the Court of Appeals’ decision vested Romulus with certain rights that caused Houdini inequity. Specifically, it vested Romulus with the right to assert that its zoning ordinance and actions, as applied to Houdini, were constitutional on every single possible basis even though Houdini's constitutional claims have never in fact been resolved. As a result, Houdini has been left with an undevelopable and wholly unserved Property that Romulus continues to tax, but does not allow Houdini to do anything with. This is hardly the sort of scenario that the res judicata doctrine was intended to create.

In support of its contrary position, Romulus relies more or less exclusively on the companion cases of *Peterson Novelties v City of Berkley*, 259 Mich App 1; 672 NW2d 351

(2003), and *Peterson Novelties v City of Berkley*, 305 F3d 386, 394 (CA 6 2002). It has aptly explained how both courts ruled that the plaintiff should have brought all of its civil action claims together, even if the first proceeding was a show cause hearing. However, all of the claims at issue in those cases were civil claims. The cases are in no way analogous to the matter at hand because they did not involve the filing of a separate claim of appeal and civil suit.

This matter is much more akin to the Court's holding in *Askew v Ann Arbor Public Schools*, 431 Mich 714; 433 NW2d 800 (1988), where the Court held that a worker who had obtained a worker's compensation award that was pending appeal to the relevant board of appeals did not have to present evidence to that board of a change in his physical condition that the worker claimed supported a further and separate claim of benefits arising from the same injury in order to avoid res judicata. In other words, the Court recognized that evidence does not have to be submitted in a pending appellate action in order for the aggrieved party to bring another separate claim resulting from an injury involved in both proceedings. Although the circumstances are a bit different, the same thing could happen here in that facts could develop that would support Houdini's claims. For example, there are numerous other nearby properties that face the same situation as Houdini because they too were rezoned in a manner in which they can not be used as part of Romulus' consolidation efforts. If one of these properties were granted a variance prior to the civil trial, Houdini would want to admit the same as supporting evidence.

The *Askew* Court also noted that the board, per the relevant statute, was not obliged to hear this evidence and held that "[a]doption of the rule advocated by [the defendant] would not, unless the [board] were to routinely grant petitions to submit additional evidence, result in economies of a single adjudication visualized by [the defendant]". *Id.* at 722. In this case, that

same efficiency that Romulus envisions and argues for is even more far-fetched because MCL 125.585(11) does not allow the consideration of other claims under any circumstances.

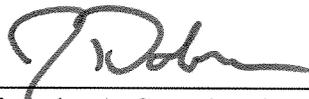
In short, res judicata cannot apply here, but even if it does, it does not bar Houdini's taking claims because they could not have been resolved in the appeal. In addition, the Court of Appeals' ruling that it could is contrary to law and common sense, has caused significant inequities and the benefits Romulus argues affirming the Court of Appeals would produce simply do not exist.

V. CONCLUSION

For the foregoing reasons, as well as those stated in Houdini's Application for Leave to Appeal, Houdini respectfully requests that the Court either grant its application or preemptorily reverse the decision of the Court of Appeals and the Wayne County Circuit Court and remand this matter to the Wayne County Circuit Court for appropriate proceedings.

Respectfully Submitted,

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