

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 OCTOBER 2007 SUPPLEMENTAL BRIEF IN SUPPORT
OF ITS APPLICATION FOR LEAVE TO APPEAL

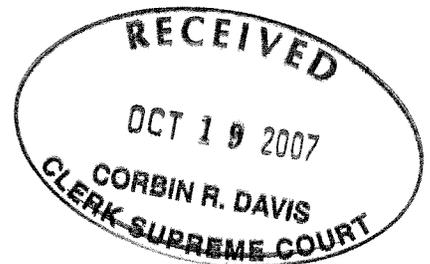


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I. INTRODUCTION

Houdini respectfully submits this Supplemental Brief to provide the Court with compelling authority from the State of Connecticut of which Houdini has only recently become aware and which Houdini believes would assist the Court in its consideration of this matter.

This case presents the Court with many legal issues, but the core one is whether Houdini was *required* to include its constitutional causes of action in its administrative appeal of the BZA's decision to deny Houdini's request for a use variance.¹ While Michigan caselaw includes opinions that are conclusive or instructive on the various legal points this central issue raises, none are as comprehensive or instructive as the Connecticut Supreme Court's companion cases of *Cumberland Farms, Inc. v Town of Groton*, 247 Conn 196; 719 A2d 465 (1998) ("*Cumberland I*") (**Exhibit 1**) and *Cumberland Farms, Inc. v Town of Groton*, 262 Conn 45; 808 A2d 1107 (2002) ("*Cumberland II*") (**Exhibit 2**). The *Cumberland* decisions were both unanimous and they address the same central issue presented by the instant matter (and some of the attendant ones such as ripeness and res judicata) in procedural and factual circumstances that are materially indistinguishable from those before this Court.

In resolving the matter, the Connecticut Supreme Court, Houdini submits, correctly took great pains to consistently and properly frame the situation by emphasizing the many critical differences between an administrative appeal of a zoning board's decision and an original action

¹ Note that Romulus goes so far as to assert that Houdini does not have the right to argue in any context that Romulus' regulations constitute an unconstitutional taking because Houdini was aware of them when it purchased the subject property. *See* Romulus' Supplemental Brief On Appeal at 7. Romulus is wrong because this Court has already reached the sensible conclusion that "one who purchases with knowledge of zoning restrictions may nonetheless be heard to challenge the restrictions' constitutionality" because "[a]n otherwise unconstitutional ordinance, we agree, does not lose this character and immunize itself from attack simply by the transfer of property from one owner to another". *Kropf v City of Sterling Heights*, 391 Mich 139, 152; 215 NW2d 179 (1974).

proceeding on the basis that this same decision would constitute an unconstitutional taking. This approach lead the court to make solid decisions regarding the effect these differences have in regard to various legal issues and astute observations regarding the motivations of parties involved in such proceedings.

This Court has often reviewed, and occasionally adopted, the reasoning and opinions of its sister courts. Houdini respectfully submits that it should do so here.

II. ARGUMENT

A. This Court Should Be Guided By The Reasoning Of The Connecticut Supreme Court, Which Has Recently Addressed Many Of The Issues Presented In This Matter And Found In Favor Of The Positions Asserted By Houdini.

1. Factual Predicate To *Cumberland I and II*

The dispositive facts of *Cumberland I and II* are simple and, from a legal standpoint, materially indistinguishable from those of the instant matter. They are set forth in *Cumberland II* at pages 47 to 55 and can be summarized as follows.

The plaintiff landowner applied with the defendant municipality's zoning board for a use variance to allow it to expand an existing non-conforming gas station that sold snacks to include a full convenience store. The landowner asserted that it needed the additional income that would be generated by the expansion to offset the costs it was going to incur in complying with certain environmental regulations. The zoning board denied the application because it found that the landowner did not sufficiently establish the necessary hardship required by Connecticut law because: (1) the landowner was using the property; (2) the expansion was "financial"; and (3) the property was purchased with knowledge of the scope of the non-conformity. *See id.* at 50.

The landowner filed an administrative appeal of the board's decision to the Connecticut courts pursuant to a state statute that it required the trial court to review the legality of the zoning

board's actions based upon a review of the record below and with deference to the board's factual findings. *See id.* at 51, ft. 8. This review is similar to that afforded by MCL 125.585(11) (now MCL 125.3606(1)). In that proceeding, the landowner argued that it had met the zoning requirements and that the zoning board had failed to consider the fact that the combined effect of the environmental and zoning laws destroyed the value of the property when it decided to deny the variance requested. The trial court denied the landowner's administrative appeal and the landowner appealed the decision to the appellate court.

During the pendency of this appeal, the landowner filed a civil action alleging that the zoning board's denial of its variance application "constituted an inverse condemnation entitling it to compensation under the takings clauses of the federal and state constitutions". The defendant municipality challenged the civil action claiming that it was not ripe and/or was barred by judgment estoppel. *See id.* at 51.

This challenge resulted in the *Cumberland I* and, after remand, *Cumberland II* decisions.

2. *Cumberland I*

Defendant municipality prevailed on a motion to dismiss the civil case on the grounds that the court lacked subject matter jurisdiction because of the landowner's pending appeal of the administrative appeal. It also prevailed on the appeal of the same. Specifically, on a de novo review, the appellate court held that the civil action was premature because there was no finality as to "the type of development legally permitted" and so the action was not ripe as the landowner's damages "cannot be determined until [this] resolution[.]" *Cumberland I*, 247 Conn. at 200-201. It also found that the civil action was barred by a Connecticut estoppel by judgment

doctrine called the “prior action doctrine” because the civil action could have been raised in the appeal of the zoning board’s decision regarding the variance request.²

The Connecticut Supreme Court granted leave and first made it a point to precisely explain the difference in the two proceedings. It correctly explained that the administrative appeal “serves the remedial purpose of reviewing the propriety of the board’s decision” and that it “cannot provide a monetary remedy to the plaintiff”. *Id.* at 207. The Court also held that:

By contrast, in an inverse condemnation action, a plaintiff alleges that a regulatory action constitutes a taking for constitutional purposes and seeks compensation for the alleged taking. An inverse condemnation action does not concern itself with the propriety of the board’s action. The only inquiry is whether a taking has, in fact, occurred. If the board’s action resulted in a taking, the inverse condemnation action will determine the amount of compensation due. Although action by the Superior Court favorable to the plaintiff in the plaintiff’s administrative appeal might eliminate the plaintiff’s claim of compensation for a complete taking, the plaintiff might nonetheless be entitled to compensation for the temporary taking that wrongly denied the plaintiff’s use of its property while the appeal was pending.

Id. at 207-208. This is the exact distinction Houdini has been highlighting in this matter and that Romulus has been trying to obscure. This case is not simply about “zoning” or billboards as Romulus would have it. It is about two wholly separate proceedings that pertain to two wholly separate matters. The Connecticut Supreme Court recognized the critical import of this distinction when addressing the legal issues and so, respectfully, should this Court.

The court, in a lengthy discussion, rejected the municipalities’ arguments about finality and ripeness pursuant primarily to the Connecticut law of administrative finality in zoning cases, which is similar to Michigan law in that it only requires limited review. *See id.* at 206-215. As Houdini has previously addressed, the rule of finality in this matter, and by extension ripeness,

² As will be discussed below, the prior action doctrine is similar to *re judicata*, another estoppel by judgment doctrine, and the considerations made by the *Cumberland I* court as to the prior action doctrine are relevant to this Court’s consideration of both the issue of *res judicata* and joinder.

are already clearly established under Michigan law and in favor of Houdini by, among other things, the cases of *Paragon Properties Co v Novi*, 452 Mich 568; 550 NW2d 772 (1996) and *Braun v Ann Arbor Charter Twp*, 262 Mich App 154; 683 NW2d 755 (2004) leave to appeal denied 472 Mich 942, 698 NW2d 400 (2005). See Houdini's Supplemental Brief of August 9, 2007 at 8-12. Romulus has articulated no justifiable reason for altering the same.

The court's rationale for its holding on ripeness and finality was that "[a]n administrative appeal from that decision may, if favorable to the property owner, render the alleged taking temporary, but it does not eliminate the taking. Nor can the administrative appeal provide the compensation that the inverse condemnation action seeks." *Id.* at 211.

Again, this is exactly what Houdini has been arguing in this matter, which is that its claim of appeal and civil action are wholly separate matters and while the resolution of the claim of appeal may affect the civil action in terms of the damages available, it does not otherwise affect the takings issues. This too is in accord with Michigan law, *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 file an administrative appeal, file a civil action or do both). (Application For Leave, Exhibit Y), and the federal law of takings. *See, e.g., First English Evangelical Christian Church v Los Angeles County*, 482 US 304, 310-11; 107 S Ct 2378 (1987) (establishing that "where finality of the underlying administrative action is established, a plaintiff may bring a claim for a temporary taking"). It is true that Houdini advised the BZA that it felt that denying the variance would constitute a taking, but this was done for persuasive reasons in that, presented with the situation, Houdini did not believe that the

BZA would choose to effectuate a taking. That is not to say that the BZA cannot take the property, it just has to pay just compensation for doing so.

Finally, the *Cumberland I* court considered whether the trial court properly concluded that the plaintiff landowner's case was properly dismissed by judgment estoppel principles known in Connecticut as the prior action doctrine. The court explained the doctrine as follows:

The prior pending action doctrine permits the court to dismiss a second case that raises issues currently pending before the court. The pendency of a prior suit of the same character, between the same parties, brought to obtain the same end or object, is, at common law, good cause for abatement. It is so, because there cannot be any reason or necessity for bringing the second, and, therefore, it must be oppressive and vexatious. This is a rule of justice and equity, generally applicable, and always, where the two suits are virtually alike, and in the same jurisdiction. We must examine the pleadings to ascertain whether the actions are virtually alike and whether they are brought to adjudicate the same underlying rights.

Id. at 216 (citations and quotations omitted). The trial court had concluded that the prior action doctrine was applicable because the plaintiff could have raised its taking claim in its administrative appeal. This too is an argument Romulus vehemently asserts in this matter in support of its positions on the issues of joinder and res judicata. *See City of Romulus'* Supplemental Brief on Appeal (Arguments I and III).

In considering this issue, the Connecticut Supreme Court again carefully considered the circumstances and reiterated the distinct nature of and the distinct relief available in the two proceedings at issue and reversed. The court held:

As indicated above, an administrative appeal pursuant to § 8-8 and an inverse condemnation action are distinct actions that raise distinct claims and seek distinct remedies. At least facially, the plaintiff's purpose here is not to bring vexatious litigation, but to obtain compensation for an alleged unconstitutional taking. The administrative appeal may alleviate the continuation of the alleged taking, but it cannot provide compensation. Consequently, the actions are neither virtually alike nor do they seek to adjudicate the same rights.

* * *

Although the plaintiff could claim in its administrative appeal that the board's denial of its variance was so unreasonable or arbitrary that it was confiscatory the court could do no more than remand the case to the board for reconsideration if it agreed with the plaintiff. It could not award any monetary damages. Connecticut has no statutory vehicle by which to obtain compensation for a regulatory taking and, therefore, a common-law inverse condemnation action is the sole method by which the plaintiff may be compensated if the board's denial of its application for a variance constitutes a taking.

Id. at 216-217 (citations and quotations omitted).

Thus, the court recognized that the landowner's claim could not be barred by the prior action doctrine where the prior action simply could not have resolved the issue due to the nature of the proceedings. The court noted, however, that the tools of consolidation or issue and claim preclusion might apply and remanded the matter for trial proceedings. *Id.*³

Likewise, in this case, Houdini's claim of appeal addressed, and could only address per MCL 125.585(11) (now MCL 125.3606(1)) the very limited issue of the ZBA's decision to deny Houdini's variance request to allow a billboard. *See* Houdini's Supplemental Brief of August 9, 2007 at 13-18. The trial court could not allow discovery, could not conduct the jury trial that Houdini was entitled to under the law, could not award damages for a taking and simply could not review issues that the BZA was not authorized to review such as whether its own application of the Romulus Zoning Ordinance constituted a taking. *See, e.g., Ohio Valley Water Co. v Ben Avon Borough*, 253 US 287; 40 SCt 527 (1920) (where a party alleges that its property has been taken by administrative action, due process requires that "the state must provide a fair

³ This issue is addressed in *Cumberland II*.

opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both facts and law[.]”) (Emphasis added.)⁴

Moreover, the Connecticut prior action doctrine, a judgment estoppel doctrine, is substantially similar to Michigan’ doctrine of res judicata, another judgment estoppel doctrine, as set forth in this Court’s opinions in *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.”) and *Pike v City of Wyoming*, 431 Mich 589, 598; 433 NW2d 768 (1988) (“[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....”) (Quotation omitted.) As such, the same result that the *Cumberland I* court reached about judgment by estoppel should follow in this case – that the pendency of the administrative appeal does not render the civil action unripe or preclude it because the zoning board proceedings and the appeal of the same is not a forum by which the constitutional claims can be addressed or remedied.

3. *Cumberland II*

Cumberland II developed out of the remand of *Cumberland*. Predictably, the defendant municipality filed a motion for summary judgment claiming that no material facts were in dispute because collateral estoppel operated to bar the plaintiff landowner from re-litigating certain factual issues that the zoning board had resolved when it denied the variance request and

⁴ *Ohio Valley* involved a utility provider’s claim that the state’s public service commission had taken its property via regulation, but this same reasoning applies here because a zoning board’s rendering of 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).

that the courts had resolved in the administrative appeal of that decision. *See id.* at 53-54. It prevailed at both the trial and appellate level and the Connecticut Supreme Court again took up the case where it left off.⁵ It ruled that policy reasons applicable to the doctrines of both collateral estoppel and the related doctrine of res judicata precluded the defendant municipality from prevailing on such a motion and that none of the factual issues raised in the civil action were actually litigated and decided in the administrative appeal, so they could not have preclusive effect. *Id.* at 56.

In doing so, the court again emphasized the critical distinction between the administrative appeal and the takings action as it pertained to the instant issues:

Although our statutory scheme affords an aggrieved applicant the right to judicial review of the denial of a variance application, the scope of that review is limited. As we have indicated, when, as in the present case, a zoning board of appeals has articulated its reasons for the action it has taken, the trial court's review of those reasons is limited to determining whether they are supported by the record and, if so, whether, under the applicable zoning regulations, the reasons given provide a legally sufficient basis for the zoning board's action. Thus, the trial court does not find facts, and it may not substitute its judgment or that of the zoning board. Furthermore, no monetary remedy is available in an administrative appeal.

* * *

By contrast, a plaintiff in an inverse condemnation action seeks to demonstrate that the action of a zoning board of appeals resulted in a taking that, in turn, gives rise to a constitutional right to compensation. A plaintiff who brings an inverse condemnation action may vindicate that right in the Superior Court, where the court hears evidence, finds facts and determines whether the action of a zoning board amounts to a practical confiscation. If so, the court also determines what compensation is due. If a plaintiff does not prevail in the Superior Court, he is entitled, as a matter of law, to appellate review.

Id. at 62 (quotations and citations omitted, italics in original, underline added). As addressed in Houdini's previous filings, these very same distinctions exist under Michigan law.

⁵ The *Cumberland II* court also undertook a review of a jury issue that is not addressed because it is not relevant.

The court also addressed the competing policy considerations of doctrines of collateral estoppel (issue preclusion) and the related doctrine of res judicata (claim preclusion) in that they are both favored in the interest of judicial economy and to prevent inconsistent results, but that they should not be used where they would frustrate other policy considerations or result in unfair outcomes. *See id.* at 59-60. Again, this is similar to Michigan law regarding the imposition of res judicata. *See Adair, supra, and Pike, supra.*

The court then addressed the problems with and dangers of the municipality's position:

As we noted previously, the court, *Purtill, J.*, applied a deferential standard of review to the board's factual findings. Therefore, to accord preclusive effect to the board's findings in the context presented would be to vest the board with the responsibility of deciding the facts underlying the plaintiff's constitutional claim and, in effect, would give the board the authority to settle the issue raised by that claim. Under such a regime, local zoning boards would have the power to decide virtually all inverse condemnation actions that are predicated on a claim that the denial of a variance application constitutes a practical confiscation. Such a result would run counter to the well established common-law principle that administrative agencies lack the authority to determine constitutional questions.

* * *

Moreover, we are particularly reluctant to relegate to zoning boards the responsibility for constitutional fact-finding in view of the fact that the citizen volunteers who compose such boards generally are not land use professionals but, rather, laypersons with little or no technical expertise.

* * *

Furthermore, although members of local zoning boards undoubtedly strive to attain a high degree of impartiality, especially when acting in their adjudicative capacity, they nevertheless are governed by rules that, in contrast to those governing court proceedings, encourage input by members of the general public with an interest in the outcome of the board's deliberations.

Id. at 63-64 (quotations and citations omitted, italics in original, underline added). The court also noted the unique circumstance present in that the board's decision itself is the action that gives rise to the constitutional claim and that it is subject to "highly deferential judicial review",

which could impact the incentives a landowner would have to litigate a zoning variance claim. *Id.* at 65-66.

Thus, the court properly recognized that allowing issue preclusion in these circumstances would functionally allow the zoning board to render constitutional decisions, which is not constitutionally permissible, *see, e.g., Ohio Valley Water Co.*, *supra*, and wisely noted that the forum of a zoning appeal hearing and the appeal of the same was, for various well-founded reasons, not appropriate. The court also specifically rejected an argument from defendant municipality that plaintiff landowner could have avoided the imposition of collateral estoppel by consolidating the cases. It recognized that consolidation was not required and that, even if it were, plaintiff would still be entitled to *de novo* review of any facts relevant to the inverse condemnation claim. *See id.* at 69, ft. 27. Likewise, the court held for similar reasons that the lower courts' review of the zoning board's decision could not establish facts either. *See id.* at 67-69.

The court summed up the matter by holding that “the plaintiff is entitled to a *de novo* review of the factual issues underlying its inverse condemnation claim, unfettered by the board's previous resolution of any factual issues ... [and] that the decision of the [court] to deny the plaintiff's administrative appeal does not preclude the plaintiff from litigating any factual issues in the inverse condemnation action.” *Id.* at 69.

As discussed in the preceding section, these same considerations are relevant to the issues of joinder and *res judicata* in this matter. The *Cumberland II* court's reasoning should apply to establish that, even if joinder of an administrative appeal and a civil action were possible, Houdini did not have to join its two proceedings as they did not involve the same matters and

that res judicata cannot bar Houdini's civil action as none of factual issues have been or could have been established in the administrative appeal.

III. CONCLUSION

For the foregoing reasons and those stated in both Houdini's Application for Leave to Appeal and its Supplemental Brief In Support of August 9, 2007, Houdini respectfully requests that the Court either grant its application or peremptorily 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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