

STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT
(On Appeal from Wayne County Circuit Court)

HOUDINI PROPERTIES, LLC,
a Michigan limited liability company,

MSC Docket No.: 132018

Plaintiff/Appellant,

COA Docket No.: 266338

v

CITY OF ROMULUS, a Michigan
municipal corporation,

Lower Court Case No.: 05-504139-CZ

Defendant/Appellee.

DEFENDANT/APPELLEE, CITY OF ROMULUS' SUPPLEMENTAL
BRIEF ON APPEAL

PROOF OF SERVICE

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STATEMENT OF SUPPLEMENTAL QUESTIONS PRESENTED

- I. **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.**

Plaintiff/Appellant would say "no."

Defendant/Appellee submits that Plaintiff was required to assert its taking claim in the appeal based on the legislative scheme embodied in MCL 125.585(11), even though an appeal is not defined as a "pleading" by MCR 2.110(A).

The trial court said "yes."

The Court of Appeals said "yes."

- II. **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 (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.**

Plaintiff/Appellant would presumably say "yes."

Defendant/Appellee says "no."

The trial court did not address this question.

The Court of Appeals did not address this question.

III. 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.

Plaintiff/Appellant would say "no."

Defendant/Appellee says "yes."

The trial court said "yes."

The Court of Appeals said "yes."

STATEMENT OF FACTS

Defendant/Appellant, City of Romulus, incorporates the Statement of Facts set forth in its Response in Opposition to Plaintiff's Application for Leave to Appeal. On June 8, 2007, the Court issued an order indicating that it would entertain oral argument on Plaintiff's Application for Leave. The parties were also requested to submit supplemental briefs on three issues which the Court included in that Order. The City submits this supplemental brief pursuant to the Court's direction.

ARGUMENT

- I. **THE TRIAL COURT'S CONCLUSION THAT PLAINTIFF WAS REQUIRED TO RAISE ITS CONSTITUTIONAL CLAIMS IN THE ZBA APPEAL WAS CORRECT BASED ON THE LEGISLATIVE SCHEME EMBODIED BY MCL 125.585(11) WHICH REQUIRED THE COURT TO REVIEW THE ZBA DECISION TO DETERMINE WHETHER IT COMPLIED WITH THE CONSTITUTION AND LAWS OF THE STATE, EVEN IF AN APPEAL IS NOT DEFINED AS A "PLEADING" SO AS TO REQUIRE JOINDER UNDER MCR 2.203.**

In the trial court, the Defendant argued that the Plaintiff was required to join the claims raised in its complaint with the zoning appeal pursuant to MCR 2.203(A), the compulsory joinder rule:

In a pleading that states a claim against an opposing party, the pleader must join every claim that pleader has against the opposing party at the time of serving the pleading, if it arises out of the transaction or 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.

Defendant's argument that compulsory joinder applied was based on the fact that both actions involved claims regarding the constitutionality of the

Defendant's zoning ordinance. Moreover, Plaintiff admitted that both suits involved the same subject matter. Plaintiff's complaint noted on its face that "[t]here is another civil action pending in circuit court for the County of Wayne involving the parties hereto that relates [to] the subject matter involved in this action." (**Plaintiff's Complaint and Jury Demand, attached as Ex. G to Defendant's Response to Application for Leave to Appeal**). Houdini itself sought to consolidate the actions under MCR 2.505. (**Appellant's Application for Leave to Appeal, p. 17**).¹

Houdini was concerned that resolution of the appeal would act to bar its second suit pursuant to the doctrine of res judicata. (*Id.*). Indeed, that concern was warranted because the appeal and the original action involved the same issue – the effect of the zoning ordinance on Plaintiff's ability to develop its property, and the constitutionality of that ordinance. Plaintiff raised the constitutional issue in its application for a variance, its Circuit Court appeal of the ZBA's denial of its variance request and in its Application for Leave to Appeal the Circuit Court's order affirming the ZBA's decision to the Court of Appeals. The same issues were raised in Houdini's Complaint in Circuit Court, in its appeal to the Court of Appeals and its Application to this Court.

The City's position that compulsory joinder applied because the claims

¹MCR 2.505(A) consolidation, states that "[W]hen actions involving a substantial and controlling common question of law or fact are pending before the court, it may (1) order a joint hearing or trial of any or all of the matters in issue in the action, (2) order the actions consolidated; and (3) enter orders concerning the proceedings to avoid unnecessary costs or delay. MCR 2.505(B) allows the court to order a separate trial of one or more claims "for convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." The trial court therefore was able to accommodate any procedural differences between the appeal and the original action.

arose out of the same transaction or occurrence was reinforced by the Court of Appeals' decision in ***Sammut v. City of Birmingham***, unpublished opinion per curium of the Court of Appeals, decided January 4, 2005 (No. 250322) (attached as Ex. L to Defendant's Response to Application for Leave to Appeal). In ***Sammut***, the Court of Appeals gave res judicata effect to a zoning appeal, finding that "plaintiffs therefore could have joined their constitutional claim and their BZA appeal pursuant to MCR 2.203; indeed, MCR 2.203(A) requires a plaintiff to join claims against a defendant that "arise[] out of the transaction or occurrence that is the subject matter of the action."" (Ex. L, p. 2).

Plaintiff's response was that ***Sammut*** was wrongly decided because MCR 2.203(A) applies only to pleadings, and a zoning appeal is not a "pleading" as defined in the court rules. This argument was rejected by the Court of Appeals, which found ***Macenas v. Village of Michiana***, 433 Mich 380, 387; 446 NW2d 102 (1989) to be persuasive:

Plaintiff presents a convoluted argument that a claim of appeal is not defined within MCR 2.110(A) as a pleading and therefore does not require joinder under MCR 2.203(A). However, our Supreme Court has reasoned that a claim of appeal from a zoning decision is a pleading. *Macenas, supra* at 387 ("[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"). As further noted by our Supreme Court, "[I]f a proper appeal to circuit court is filed, a "cause of action" is stated ..." *Macenas, supra* at 388. Moreover, Plaintiff's argument would defeat the purpose of MCR 2.203, which provides for liberal joinder of actions "to achieve trial convenience and economy in judicial administration ..." *Kubiak v. Hurr*, 143 Mich App 465, 477; 372 NW2d 341 (1985). ***Houdini v City of Romulus***, unpublished opinion per curium of the Court of Appeals, decided June 13, 2006 (No.

266338), at *2 (attached as Ex. A to Defendant's Response to Application for Leave to Appeal).

Houdini has asserted that the "variance issue" is wholly separate from the claims brought under the Circuit Court's original jurisdiction. That argument is simply wrong. Both require the same determination: whether the zoning ordinance, as applied to Plaintiff's property, is constitutional or whether it effects a taking because it fails to advance a legitimate governmental interest or fails to allow Plaintiff economically viable use of its property under the balancing test of *K&K Construction, Inc. v. Department of Treasury*, 456 Mich 570, 576-577; 575 NW2d 531 (1998).²

In assessing whether the ZBA's denial of Plaintiff's variance request should be affirmed, the Circuit Court conducted a similar inquiry. It considered the reasonableness of the ordinance and the interest advanced by the ordinance as well as the character of the governmental action and the economic effect on the Plaintiff's ability to use the property. (Ex. A, August 11, 2005 transcript, pp. 31, 33-34). The takings inquiry and the variance denial inquiries are similar because the "main purpose of allowing variances is to prevent land from being rendered useless..." *Puritan-Greenfield Improvement Association v. Leo*, 7 Mich App 659, 669; 153 NW2d 162 (1967). Pursuant to statute, the standard of review which the circuit court applies requires it to consider whether the board's decision complies with the constitution and laws of this state, whether it is supported by competent, material, and substantial evidence on the record and whether it

²The *K&K* balancing test requires the court to engage in an "ad hoc factual inquiry" considering three factors: (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent to which the regulation has interfered with distinct investment backed expectations.

represents the reasonable exercise of discretion granted by law to the board of appeals (MCL 125.585(11)).

It seems unarguable that when an owner acquires property with restrictions already in effect, it can hardly complain that those restrictions interfered with its investment backed expectations and effected a taking. Clearly, Houdini had no investment backed expectation that it would be allowed to construct a billboard. It admitted its only purpose in acquiring the property – a small parcel with limited development potential in an area in transition to large-scale commercial uses – was to construct a billboard. That use was not permitted by either prior or current zoning. In fact, Plaintiff asserted that the BT zoning district (in effect when Plaintiff purchased the property) did not permit any uses. (**Plaintiff's Circuit Court Appeal Brief, attached as Ex. F to Defendant's Response to Application for Leave to Appeal, at p. 4**).

Against this factual background, and supported by the Court of Appeals' decision in ***Sammut*** under similar circumstances, Defendant asserted that Plaintiff was required to join its two actions – both of which claimed that the zoning ordinance was unconstitutional as applied to Plaintiff's property. The trial court ultimately agreed. Although initially reluctant to find that joinder (or res judicata) applied, after reviewing the facts, court rules and the ***Sammut*** decision, the trial court concluded that joinder was applicable::

Because essentially, you have the same parties, you have the same transaction arising out the same set of facts. The issues are not identical but they're pretty similar, or substantially similar, and for that reason ... the compulsory joinder rule applies or res judicata applies." (**October 3, 2005 transcript, attached as Ex. H to Defendant's Response to Plaintiff's**

Application for Leave to Appeal, at p. 4).

Defendant acknowledges that the term “pleading” as specifically defined in MCR 2.110(A) does not include an administrative appeal as provided for by MCL 125.585(11). Nonetheless, various decisions of the Court of Appeals have required Plaintiffs to include constitutional claims in their ZBA appeals, on the basis that the second suit was not an independent action, but should have been raised in the appeal.

These decisions generally rely on *Krohn v City of Saginaw*, 175 Mich App 193; 437 NW2d 260 (1989). In *Krohn*, the plaintiffs challenged the administrative decision of the Saginaw Planning Commission to grant a special use permit and a variance that would allow the construction of an auto-parts store and gasoline station on a neighboring parcel. The plaintiffs in *Krohn* conceded that, in granting the special use permit and variance request, the planning Commission was exercising the authority of the zoning board of appeals. *Id.* at 195-196. On the basis of this concession, a panel of the Court of Appeals held that the statutory provisions governing the ZBA appeals would apply and that the plaintiffs’ complaint was barred because the plaintiffs failed to file their appeal within twenty one days of the denial. The Court of Appeals further held that the failure to timely file the appeal also barred plaintiff’s request for money damages, which the plaintiff had sought to file as an additional count within the zoning appeal. *Id.* at 197-198. This was because those counts “all raise[d] issues relative to the decision of the planning commission in reaching that decision...they do not establish separate causes of action, but merely address alleged defects in

the methods employed by the planning commission or the result reached....” *Id.*

The Court of Appeals reasoned:

Count III of Plaintiff’s Complaint alleged that their state and federal due process rights were violated and that their property had been taken without just compensation as protected by the state constitution. Count IV alleged that the Planning Commission action allowed an unpermitted illegal use of the subject site and constituted a nuisance per se. Lastly, Count V of the Complaint asked for a declaration of the party’s rights with reference to the intended construction. With respect to each of these counts, we believe that they all raise issues relative to the decision of the Planning Commission in reaching that decision. Thus, they do not establish separate causes of action, but merely address alleged defects in the methods employed by the Planning Commission. Accordingly, those are issues to be raised in an appeal from the Planning Commission. Accordingly, since Plaintiffs were tardy in claiming their appeal, those counts were properly dismissed. ***Krohn, at 198.***

For example, in ***Gillette v. Comstock Township***, unpublished opinion per curium of the Court of Appeals, decided February 3, 2004 (No. 240198 and 240199) (Ex. B), leave denied, 471 Mich 898 (2004) the opinion noted that Plaintiff “filed two new legal actions. The first action ... appealed the....decision of the planning commission granting site plan approval. The second action...sought declaratory judgment, damages, and other equitable relief for various alleged statutory and constitutional violations pertaining to the site plan approval [having been] granted ...”

When the plaintiff in ***Gillette*** voluntarily dismissed the zoning appeal, the trial court also dismissed the damages action, reasoning that the two cases were one and the same. The Court of Appeals affirmed. In ***Sammut, supra***, the Court

of Appeals found the appeal to be the equivalent of a pleading and required joinder, because the constitutional claims arose out of the same transaction or occurrence and were not separate claims. Thus, they were subject to res judicata after the initial action, the appeal, was decided in defendant's favor.

Other Court of Appeals' opinions clearly demonstrate that constitutional claims should be brought in the ZBA proceedings. For example, in ***Allen v Charter Township of Lansing*, unpublished opinion per curiam of the Court of Appeals, no. 263076 (decided December 12, 2005) (Ex. C)**, the court applied *res judicata* to a claim for money damages, where an earlier zoning appeal from the same land use decision had been unsuccessful, without any discussion of whether joinder would have been required under MCR 2.203(A). "Because plaintiff's constitutional claims against defendant were decided by the trial court on their merits in the zoning appeal, and this Court denied plaintiff's application for leave to appeal that decision 'for lack of merit in the grounds presented,' the claims are barred by res judicata." *Id.* In ***Cramer v Detroit Board of Zoning Appeals*, unpublished opinion per curiam of the Court of Appeals, decided April 25, 2006 (no. 258840) (Ex. D)**, the Court of Appeals also held that plaintiff's failure to timely file an appeal to circuit court from a Board of Zoning Appeals' decision barred a claim for money damages based upon the same land use decision. "In this case, plaintiff failed to timely appeal the Board of Zoning Appeals' decision to the circuit court. He argues, however, that he had a right to file an 'original' cause of action related to that decision. We disagree." (Ex. D, p. 2). In ***Shelby Oaks, L.L.C. v. Charter Twp. of Shelby*, unpublished opinion per curiam of the Court of Appeals, decided February 5, 2004 (nos. 241135 &**

241253), (Ex. E), *lv den 471 Mich 886 (2004)*, plaintiff filed an action in circuit court challenging the validity and application of a zoning ordinance amendment and claiming that the zoning classification resulted in a taking. Plaintiff also appealed the decision of the ZBA affirming the ordinances application to its parcel. When the circuit court affirmed the ZBA's decision, it also dismissed plaintiff's taking claim. On appeal, plaintiff claimed that "the trial court erred in *sua sponte* dismissing the constitutional claim regarding the property because it was entitled to a trial on the merits," but the Court of Appeals rejected this argument and held that the taking claim was properly dismissed. (Ex. E, p. 5).

More recently, the Court of Appeals held in *Stops v Watersmeet Twp.*, unpublished opinion per curiam of the Court of Appeals, decided June 14, 2007 (no. 272570) (Ex. F) that a zoning appeal and a constitutional claim for money damages, based upon the same land use decision, "do not establish separate causes of action." In *Stops*, plaintiff applied to defendant's zoning administrator for permission to construct a 45-foot dock. The zoning administrator denied the application on the basis that the proposed dock would violate defendant's zoning ordinance. Plaintiff did not appeal that decision, but more than two years later, plaintiff filed suit, seeking a declaration that defendant's ordinance was invalid as a matter of law and that plaintiff was entitled to issuance of the dock certificate for which he had applied. Plaintiff further alleged a substantive due process violation, challenging the ordinance as unreasonable and asserting that it constitutes an arbitrary and capricious exclusion of a legitimate land use and does not promote the public health, safety, or general welfare. The trial court dismissed the action, treating it as an appeal from the initial denial of the dock

certificate, which was untimely under the statutes and court rules governing zoning appeals. The Court of Appeals affirmed “[b]ecause the allegations of the complaint ... all raise issues regarding the propriety of defendant's denial and the procedures by which it made the decision” and therefore needed to be raised in a timely appeal from the zoning administrator’s decision two years earlier. (**Ex, F, p. 5**).

Although here the circuit court concluded that joinder under the court rule was required, the reasoning underlying the court’s decision was that established statutory review procedures required the trial court to review the denial of the variance for constitutional compliance. The trial court’s decision that joinder was required was, practically speaking, a recognition that Plaintiff’s constitutional claims were not separate causes of action, but had to be included in the appeal. The legislative scheme necessarily implies that a plaintiff must assert the constitutional basis for its challenge to the decision of the ZBA. Plaintiff was required to raise those issues for the Court’s review. The language of the zoning act, MCL 125.585(11) states a specific standard of review to be used by the circuit court. That review includes a determination that the decision of the ZBA complies with the Constitution and laws of the state. Plaintiff was not permitted to reserve its constitutional claims from the trial court’s review and instead file a separate action, where the court was authorized to consider those claims related to the denial of Plaintiff’s use variance. ***Choe v Charter Township of Flint, 240 Mich App 662, 668; 616 NW2d 739 (2000)***. Indeed, Houdini presented evidence regarding the alleged unconstitutionality of the ordinance to the ZBA to support its variance application. Also Houdini’s Application for Leave to appeal to this Court

stated:

Substantively, this case involves both zoning and constitutional law. Defendant has overstepped its police powers by using a 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 the 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.” (**Plaintiff’s Application for Leave to Appeal to the Michigan Supreme Court, p. 1**).

Plaintiff’s Circuit Court Appeal Brief also stated that “[T]he appeal involves a ruling that a provision of the constitution, a statute, a rule or regulation or other state governmental action is invalid.” (**Plaintiff’s Circuit Court Brief on Appeal, attached as Ex. F to Defendant’s Response to Plaintiff’s Application for Leave to Appeal**). Houdini argued further that the “diminution of a property’s value by a government actor may constitute a taking.” (**Id., p. 16**).

Once Houdini obtained judicial review of the ZBA’s denial of its variance request, including constitutional claims, those claims are precluded, because a judicial review of the decision has already occurred. If the Circuit Court could not make a determination on the record before it, as Plaintiff claimed, then the statute permitted it to remand the case for further findings. See MCL 125.585(12) (“If the court finds the record of the Board of Appeals inadequate to make the review required by this section, or that additional evidence exists which is material and with good reason was not presented to the board of appeals, the court shall order further proceedings before the Board of Appeals on conditions which the court considers proper. The Board of Appeals may modify its findings and decision as a

result of the new proceedings, or may affirm the original decision. The supplementary record and decision shall be filed with the court.”).

Finally, even if this Court concludes that joinder of the constitutional claims in the appeal and the subsequently filed lawsuit was not the appropriate mechanism, it should still find that Houdini was required to have raised its constitutional issues in the ZBA appeal. Plaintiff itself acknowledged that the actions involved the same subject matter (**Plaintiff’s Complaint and Jury Demand, attached as Ex. G to Defendant’s Response to Application for Leave to Appeal**). Houdini also sought consolidation under MCR 2.505 – an acknowledgment that the two actions involved a “substantial and controlling common question of law or fact.” Houdini’s Circuit Court Appeal Brief stated that the property could not be developed in any manner, citing the City’s action in vacating and barricading streets in the area. (**Plaintiff’s Circuit Court Brief on Appeal, attached as Ex. F to Defendant’s Response to Plaintiff’s Application for Leave to Appeal**). It also claimed that the zoning ordinance rendered the property without value and was unconstitutional. (*Id.*, pp. 2-3, 7-8). The same constitutional claims of taking of property and substantive due process were raised in Houdini’s Application for Leave to Appeal to the Court of Appeals. (**Ex. G**).

Although Plaintiff’s administrative appeal of the denial of its variance request is not defined as a “pleading” by MCR 2.110(A), the reasoning and purpose underlying the joinder rule favor considering the two actions in one proceeding. More importantly, even if joinder was not required per MCR 2.203(A), Plaintiff was still required to raise its constitutional issues in the ZBA appeal,

based on the language of MCL 125.585(11).

The issues in the appeal and in the current suit are the same, regardless of the labels employed by Plaintiff. The trial court's ultimate decision that Houdini was required to join the two actions was simply a recognition that Plaintiff was required to bring its constitutional claims as part of the ZBA appeal.

II. WHEN THE PLAINTIFF FILED ITS CLAIM OF APPEAL TO THE WAYNE CIRCUIT COURT FROM THE ZBA'S VARIANCE DENIAL, THE PLAINTIFF'S CLAIM WAS NOT RIPE FOR REVIEW UNDER THE RULE IN *PARAGON PROPERTIES CO v NOVI*, 452 MICH 568, 583 (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.

If the Court determines that Plaintiff's current suit states an independent, original cause of action, then the claims asserted therein were not ripe at the time Plaintiff filed the current action.

On November 4, 2004, Plaintiff-Appellant Houdini Properties, LLC filed an application for a zoning variance with the City of Romulus Zoning Board of Appeals. Plaintiffs sought a use variance to allow it to develop a billboard on its property. A billboard was not a permitted use in the RC (regional center) zoning district, nor was it a permitted use in the prior BT district (business transitional). The variance request was denied by the Zoning Board of Appeals on December 1, 2004. Houdini timely filed an appeal of the decision to the Wayne County Circuit Court, as permitted by MCL 125.585(11) (now MCL 125.3606(1)).

While the appeal involving the variance denial was pending, Houdini filed a second action on February 11, 2005, challenging the constitutionality of the City's zoning ordinance. Plaintiff claimed that the denial of Plaintiff's use variance,

which would have allowed Houdini to construct a billboard on its property, constituted a taking of property in contravention of the Michigan Constitution, Article 10, Section 2. (**Plaintiff's Complaint and Jury Demand, attached as Ex. G to Defendant's Response to Application for Leave to Appeal, at ¶33**). Houdini further alleged that applying the RC district to its property constituted a taking of property in contravention of the Michigan Constitution. (**Id. at ¶31**). In Count II, Plaintiff alleged violation of its substantive due process rights, asserting that the RC district was an "arbitrary and unreasonable restriction" on the use of property and advanced no reasonable governmental interest. (**Id. at ¶37-39**). Finally, Count III asserted a 42 USC §1983 claim.

Although Houdini filed its civil suit on February 11, 2005, the Wayne County Circuit Court did not render its decision affirming the denial of Plaintiff's variance request until August 26, 2005. Even then, Houdini continued to pursue appellate relief, filing an Application for Leave to Appeal the decision of the Wayne County Circuit Court. The Court of Appeals denied Plaintiff's Application for Leave to Appeal on March 22, 2006. The application was "denied for lack of merit on the grounds presented." (**Ex. H**).

In *Paragon, supra*, this Court considered whether a plaintiff was required to obtain a final decision regarding the use of property before filing a lawsuit challenging the constitutionality of the city's zoning ordinance. This Court concluded that finality was required and that *Paragon's* constitutional claim was not ripe for review.

In *Paragon*, a landowner purchased a 75-acre vacant parcel in the City of Novi which was zoned for large lot, single-family residential use. The landowner

submitted a request to Novi to re-zone the property from single-family residential to a mobile home district, which was denied. The landowner then filed suit, alleging that the property had no economic value as zoned. Although Novi's zoning ordinance authorized the Zoning Board of Appeals to grant a land use variance, the landowner filed suit without having filed for a use variance. The trial court found that the zoning classification constituted an unconstitutional taking, and the City appealed. *Id* at 573. The Court of Appeals reversed, finding that the owner's failure to apply for a use variance rendered the claim not ripe. *Id*. This Court affirmed, holding that the landowner's failure to file for a use variance barred the action. ***Id. at 583.*** In reaching this conclusion, this Court held:

A challenge to the validity of a zoning ordinance "as applied," whether analyzed under 42 USC 1983 as a denial of equal protection, as a deprivation of due process under the 14th Amendment, or as a taking under the just compensation clause of the 5th Amendment, is subject to the rule of finality.

[T]he finality requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury ... ***Id. at 576-577*** (citations omitted).

The ***Paragon*** court reasoned that until a municipality's objections to a proposed use are addressed and finally resolved, it is impossible to accurately determine the extent to which plaintiff's property retained beneficial use or the extent to which the plaintiff's investment backed expectations had been destroyed. ***Paragon, supra at 578.*** The Court noted that "[a]lthough, the grant of a land use variance cannot change the zoning district classification or amend the zoning ordinance, the effect of a land use variance is similar to rezoning because variances typically run with the land." ***Id at 575.*** (Citations omitted). ***Paragon***

argued that the Novi City Council's decision to deny its rezoning request was a final decision. The Court rejected that argument:

The City of Novi's denial of *Paragon'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 might have been permitted, nor, therefore, is there information regarding the extent of the injury *Paragon* may have suffered as a result of the ordinance. While the City Council's denial of rezoning is certainly a decision, it is not a final decision under *Electro-Tech* because had *Paragon* petitioned for a land use variance, *Paragon* might have been eligible for alternate relief from the provisions of the ordinance. ***Id* at 580.**

Although Novi's rezoning denial was a legislative act rather than an administrative one, that distinction did not resolve the finality issue. Although the zoning board of appeals lacked the statutory authority to amend a zoning ordinance, it was still capable of offering an alternative form of relief to *Paragon*. *Id* at 580-581. The Court reasoned that the denial of *Paragon's* rezoning request did not diminish the authority of the zoning board of appeals to grant a variance if that alternative form of relief was pursued. And even if the zoning board of appeals denied such a request, relief in the form of an appeal to the circuit court was authorized by statute. MCL §125.585(11). ***Id* at 581.** Because *Paragon* had failed to obtain a final decision from which an actual or concrete injury could be determined, the constitutional claim was not ripe for review.

The circumstances of this appeal vary procedurally from those of *Paragon*. Here, *Houdini* never sought rezoning of its property to permit construction of a billboard. Such a use was not permitted when *Houdini* purchased the property in 1998. At that time it was zoned BT (business transitional) and billboards were not permitted. In 2004, the area was rezoned to RC (regional center). Again,

billboards were not a permitted use in that district. Although provided notice of the proposed rezoning by the City, Houdini did not object; indeed according to Plaintiff's counsel, Plaintiff "did not pay attention to the zoning until it was discovered that the site was zoned RC" which was not until 2004. **(December 11, 2004 ZBA minutes, attached as Ex. J to Defendant's Response to Application for Leave to Appeal, at p. 11 of 15).**³

When Houdini bought the property in 1998, the area was no longer a viable, small-lot residential subdivision, but had evolved toward commercial uses as a result of the construction and expansion of nearby Metropolitan Airport. This change was reflected in the BT zoning designation. Even then, permitted uses generally required larger parcel sizes than those acquired by Houdini. Its purpose from the beginning was to erect a billboard; speculative in light of the zoning and the size of the parcel. Plaintiff failed to seek rezoning of the property and failed to object to the City's decision to rezone to Regional Center. Shortly after the property was rezoned, in November 2004, Houdini finally took action, applying for a use variance seeking permission to construct a billboard on the property. That request was denied by the ZBA. Even so, the ZBA's denial was not a final decision which inflicted an "actual concrete injury" under *Paragon* and rendered Plaintiff's claim ripe for review. The issue was not resolved because Houdini elected to appeal the ZBA's decision to circuit court, as provided for by statute.

³That Plaintiff was not interested in the property's zoning classification at the time it purchased the property is further indicated by its answers to interrogatories asking what the zoning classification was at the time of purchase. Plaintiff's answer was "I don't recall. It was some interim zoning." **(Ex. I, August 3, 2005 Answers to Interrogatory No. 12)**. This response demonstrates that, notwithstanding the fact that billboards were not permitted under either current or prior zoning classifications, Plaintiff's only interest was in erecting a billboard on the property.

MCL 125.585(11). Thus, as result of that appeal, the extent of the injury Houdini may have suffered was still unknown. The Circuit Court had the authority to affirm, reverse, or modify the decision of the Board of Appeals. MCL 125.585(13). The possibility still existed that Houdini could have used the property for the purpose it sought until such time as the appeal process was completed. An analysis of *Paragon* compels the conclusion that Plaintiff did not satisfy the rule of finality.⁴

Plaintiff sought a variance and then appealed the ZBA's denial of its request to the Wayne County Circuit Court. Until such time as the Circuit Court issued its opinion on August 26, 2005, affirming the ZBA's decision, Plaintiff's suit was not ripe and should have been dismissed because there remained uncertainty about how the zoning regulations would be applied to the property and thus the extent of the injury, if any, which Houdini may have suffered as a result of the ordinance.

Even after the trial court rendered its opinion, Houdini continued to pursue its appellate remedies from the administrative decision of the ZBA. It filed an Application for Leave to Appeal in the Court of Appeals seeking reversal of the trial court's decision and that of the ZBA and arguing that application of the zoning ordinance to its property was unconstitutional because it advanced no legitimate governmental purpose. Further, it asserted that the ZBA's denial was arbitrary and capricious and that a variance was the only means through which it could use the property. The Court of Appeals denied Houdini's Application for Leave to

⁴Indeed, Defendant moved for summary disposition in the trial court arguing that because Plaintiff failed to seek rezoning for the lawsuit was not ripe pursuant to *Paragon*.

Appeal for “lack of merit on the grounds presented.”

In order to evaluate Houdini’s claim that the zoning ordinance constituted a taking of property, Houdini was required to satisfy the rule of finality. That rule required a showing that “the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.” *Electro-Tech, Inc. v H.F. Campbell Co.*, 433 Mich 57, 82; 445 NW2d 61 (1989) quoting *Williamson County Regional Planning Commission v Hamilton Bank*, 473 U.S. 172, 191; 105 Sup Ct 3108; 87 L. Ed. 2d 126 (1985).

Electro-Tech involved a city council resolution’s subjecting a plaintiff’s site plan to various conditions. *Williamson* involved a zoning ordinance. Both, however, involved the process through which the local government rendered a decision on the use of a particular parcel of property. *Electro-Tech, supra at 73*. *Electro-Tech* counseled property owner to use “the procedures available” which might enable it to use the property according to its plans. That meant, in *Electro-Tech*, that plaintiff should have submitted revised site plans, and in *Williamson* that the respondent should have sought variances. In this case, Houdini used the variance process and then chose to appeal the adverse decision of the ZBA. Therefore, the possibility still remained open that, after judicial review, Houdini would be allowed to use its property for the purpose it sought. Once it chose to appeal the ZBA’s decision, Houdini was required to advance every basis which could support its entitlement to a variance, including the argument that the zoning ordinance was unconstitutional. Until the circuit court affirmed the decision of the ZBA, there was no final decision, as required by *Paragon*.

III. 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, WHERE THE FIRST ACTION WAS DECIDED ON THE MERITS BOTH ACTIONS INVOLVED THE SAME PARTIES, AND PLAINTIFF EXERCISING REASONABLE DILIGENCE, DID, OR COULD HAVE RAISED CONSTITUTIONAL ISSUES IN THE APPEAL.

Houdini argues that the lower courts erroneously applied res judicata because its claims could not have been resolved in the appeal and were not based on the same evidence. In support of that argument, it cites issues which allegedly were not raised or addressed in the variance application, such as closure of the roads and consolidation of property in the areas surrounding Plaintiff's property, as well as the inability to conduct discovery in the appeal proceedings. (**Plaintiff's Application for Leave to Appeal, p. 40**). Notwithstanding Houdini's argument, review of the ZBA and Circuit Court proceedings supports the Court of Appeals' conclusion that these issues were raised by Houdini in the variance proceedings and Circuit Court appeal. Houdini attempted to separate its claims when it filed an appeal to the Circuit Court, but attempted to reserve the constitutional claims for a second proceeding, thus giving it "two bites of the apple." Michigan law does not permit such an attempt. Houdini's argument ignores the broad scope of claim preclusion adopted by this Court in ***Adair v State of Michigan, 470 Mich 105; 680 NW2d 386 (2004)***.

The doctrine of res judicata bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first lawsuit. ***Id. at 121; Sewell v. The Clean Cut Management,***

Inc., 463 Mich 569, 575; 621 NW2d 222 (2001). The doctrine is applied broadly, barring not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. ***Adair, supra at 121.***

The Circuit Court dismissed Houdini's suit, in part, based on MCR 2.116(C)(7), finding that it was barred by the doctrine of res judicata. The Court of Appeals agreed:

Plaintiff's subsequent civil action here was barred by the trial court's prior affirmation of the decision of Defendant's Zoning Board of Appeals. The parties do not dispute that the ruling on the appeal was a determination on the merits or that they were involved in both actions. Moreover, the matters raised in this subsequent civil action could have been resolved in the initial appeal. Notably, although Plaintiff contends that it could have procured new or additional evidence through discovery in the civil action, it does not avoid the fact that the same evidence involved in the appeal would be used to prove allegations contained in the subsequent lawsuit. In addition, Plaintiff'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). Because this subsequent lawsuit relied on the same facts and evidence as the appeal regarding the denial of the zoning variance, the two actions are considered the same for purposes of res judicata and summary disposition in favor of Defendant under MCR 2.116(C)(7) was appropriate. ***Houdini v City of Romulus, unpublished opinion per curium of the Court of Appeals, decided June 13, 2006 (No. 266338), at *3 (attached as Ex. A to Defendant's Response to Application for Leave to Appeal).***

There is no dispute that the prior action was a decision on the merits or that both actions involved the same parties. Disagreement centers around the third requirement – that “the matter in the second case was or could have been resolved in the first.” ***Adair, supra at 121.*** In ***Adair***, this Court stated that the

third prong could be analyzed using either a narrower “same evidence” test or the broader “same transaction” test, and adopted the broader, more inclusive test. *Id.*

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The “same transaction” test and the “same evidence” test were alternative approaches to determine whether res judicata applied. The definition of what would constitute a cause of action was narrower under the same evidence test than under the same transactional test. This Court has clarified that it “has accepted the validity of the broader transactional test in Michigan.” *Adair, supra at 124*. The narrower same evidence test was tied to the theories of relief asserted by the Plaintiff. Under that test, “two claims may be part of the same transaction, yet be considered separate causes of action because the evidence needed to support the theories on which they are based differs.” *Id.* In contrast, the “transactional test” provides that “the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief.” *Id.*, quoting *River Park, Inc. v Highland Park*, 184 Illinois 2nd 290, 307-09; 703 NE2d 883 (1998). Under the transactional approach, “a claim is viewed in ‘factual terms’ and considered ‘coterminous with the transaction, regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff, ...and regardless of variations in the evidence needed to support the theories or rights.” *Adair, supra at 124* (citations omitted).

⁵In *Dart v Dart*, 460 Mich 573; 597 NW2d 82 (1999), the court noted that res judicata would bar a subsequent action between the same parties “when the evidence or essential facts are identical.” *Id. at 586*. That referred generally to the “same evidence” test. In *Adair*, the court clarified the relationship between the “same evidence” test and the “same transaction” test adopting the broader approach. *Adair, supra at 123-124*.

Therefore, Plaintiff's assertions that the evidence needed to prove this lawsuit was different than what was needed in the appeal was not dispositive. **Adair** concluded that although that issue might have some relevance, "the determinative question is whether the claims in the instant case arose as part of the same transaction as did the claims in [the prior case]. 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. 2nd, Judgments, 533, p. 801** (emphasis supplied by the court).

Houdini's argument that the two actions are different because they rely on different evidence is not dispositive (even if it were accurate) in light of **Adair**, which rejected the use of the "same evidence" test.

Applying the transactional test of **Adair**, it is apparent that the two suits were all part of a common transaction for purposes of res judicata and should have been brought in one proceeding. Neither the prior nor current zoning classification permitted Houdini to erect a billboard. Houdini's claim was that if it was denied a use variance which would allow it to construct a billboard on its property, then the City's zoning ordinance was unconstitutional as applied to the property. Houdini asserted that the property was unsuitable for use as zoned and that the zoning prevented it from using the property in a productive manner. It also claimed that the roads had been vacated denying access to the property and that there was no reasonable governmental interest advanced by the zoning. Finally, it argued that the ZBA's decision to deny the variance was arbitrary and was not a reasonable exercise of its discretion.

Houdini's actions provide further evidence that the claims in the appeal and in this lawsuit arose from the same set of facts. Its Circuit Court appeal brief noted that "the appeal involves a ruling that a provision of the constitution, a statute, rule or regulation or other state governmental action is invalid." (**Plaintiff's Circuit Court Appeal Brief, attached as Ex. F to Defendant's Response to Application for Leave to Appeal, at p. 4**). Houdini's complaint and jury demand stated that "there is another civil action pending in the Circuit Court for the County of Wayne involving the parties hereto that relates [to] the subject matter involved in this action ...that action is the Plaintiff's appeal of a decision by the Defendant's Zoning Board of Appeals." (**Plaintiff's Complaint and Jury Demand, attached as Ex. G to Defendant's Response to Application for Leave to Appeal**).

Next, concerned that the second suit could potentially be barred by res judicata, Houdini attempted to consolidate the two actions pursuant to MCR 2.505. That court rule allows consolidation "[w]hen actions involving a substantial and controlling common question of law or fact are pending before the court ..."

This Court has provided several factors for use in determining if claims arise from the same transaction. "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 ...[and] whether they form a convenient trial unit." **Adair, supra at 125** quoting **46 Am. Jur. 2nd, Judgments, 533, p. 801**.

The claims in this case and in the appeal arose from the same factual transaction. The operative facts giving rise to Houdini's variance application and appeal of the denial of that application relate to the zoning of Houdini's property,

which it argues prevents it from developing the property for any productive use consistent with the zoning unless it is allowed to erect a billboard. These are the same operative facts underlying the second action, although Houdini seeks damages, a different form of relief. Houdini's new theory, that the application of the ordinance to its property is an unconstitutional taking, does not create a new claim. "A comparison of the grounds asserted for relief is not a proper test" to determine if claim preclusion bars a second lawsuit. ***Reid v Thetford Township*, 377 F Supp 2nd 621, 627 (ED Mich 2005) quoting *Jones v State Farm Mutual Auto Insurance Co.*, 202 Mich App 393, 401; 509 NW2d 829 (1993).** "[T]he assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief." ***Adair*, supra at 124.**

Plaintiff's claims in the appeal and in the current action are part of the same factual transaction. The two actions, which overlap in time, relate to basically the same facts, which occurred after the property was rezoned in 2004. The facts are related in space because they concern the identical parcel. The facts are also related in origin. The origin of the first action, the variance denial/appeal, was Plaintiff's desire to use the property for a billboard, which was denied by the ZBA. This desire to construct a billboard was also the origin of the second action, because the inability to do so led to Plaintiff's claims that the zoning ordinance was unconstitutional. The alleged unconstitutionality of the ordinance was also argued in the Plaintiff's application for a zoning variance. Accordingly, the origin of both actions was essentially based on the same set of facts, the inability of Plaintiff to use the property to construct a billboard, and its subsequent claim that

the ordinance was unconstitutional as applied to its property.

In *Reid, supra*, the federal court conducted an extensive analysis of the transactional test to determine if plaintiff's first and second suits arose from the same factual transaction. A landowner sued the township alleging that the township's enforcement of its ordinance prohibiting outdoor storage of junk automobiles violated his civil rights. In a prior state court action, the township sought to enforce the ordinance, resulting in an order instructing Reid to remove all but two vehicles from his property. In the second suit, Reid claimed that the township and its supervisor used the enforcement activities to violate his civil rights. The township removed the case to federal court. The federal court concluded that plaintiff was required to bring his civil rights claims in the first action because they arose from the same factual transaction. The "single group of operative facts" which gave rise to the first action was the number of vehicles stored on plaintiff's property and "the interaction between Reid and township officials concerning those vehicles." *Id. at 627.*

The operative facts giving rise to the second action were essentially the same, even though plaintiff used these facts to state a different theory of relief. Consideration of time, place, origin and convenience (*Adair, supra at 125*) likewise indicated that the two lawsuits arose from the same facts. The facts giving rise to the action occurred during the same time period, the facts were related in space (the disputed location was Reid's property), and related in origin as well (the storage of vehicles on the property). *Reid, supra at 628.*

Finally, the federal court noted that the civil rights allegations could have been joined as counter-claims to the ordinance violation to form a "convenient trial

unit” because, despite different questions of law, there was significant overlap in witnesses and evidence. *Id.* The court rejected the argument that two suits were necessary because the federal civil rights claims were legally very different than the ordinance action. Accepting that the claims were legally different did not mean they could not be heard together in one court. “Reid has offered no argument that the county court excluded, or would have excluded consideration of those claims.” *Id.* Once it was established that the civil rights claims in the second suit arose out the same transaction or “single group of operative facts” as those in the ordinance violation, “Michigan’s broad concept of claim preclusion” required the court to apply res judicata to bar the second suit. *Id.*

Houdini could have raised the argument that without action by the ZBA to grant its variance, the city zoning ordinance was unconstitutional as applied to plaintiff’s property on both substantive due process grounds and as a taking. “[Plaintiff] was obligated to advance in a single proceeding every alternative basis which could support this claim [entitlement to a variance]. Failure to do so bars re-litigation of the claim previously resolved against them.” *Reid, supra at 629* quoting *Gose v Monroe Auto*, 409 Mich 147, 166; 294 NW2d 165 (1980). Instead, Houdini attempted to split its cause of action and raise the taking claim and the constitutionality of the ordinance in this lawsuit, the second action. However, it is apparent that Houdini also raised constitutional issues, including its taking claim as part of the variance/appeal proceedings. In support of its variance application, Houdini cited facts and case law regarding the alleged unconstitutionality of the ordinance as applied to its property. By way of example, in the memorandum accompanying the variance application it noted that “[the

property] literally cannot be improved in any way under the City of Romulus zoning ordinance ...under established and controlling Michigan law, the application of the zoning ordinances to the subject property is, on its face, unreasonable, and a variance should issue.” (**Plaintiff’s Use Variance Application, attached as Ex. E to Defendant’s Response to Application for Leave to Appeal**).

Plaintiff further noted in this application that “[t]here is currently no public access to the subject property because Kenwood Avenue, which previously provided access from the west, has been abandoned and/or is unavailable for public use.” (**Id.**, p. 2). Plaintiff further noted, “...application of the zoning ordinance to the subject property is unreasonable on its face and a use variance should issue.” (**Id.**, p. 3). Plaintiff cited ***Bassey v. City of Huntington Woods*, 344 Mich 701, 705-706 (1956)** in support of its argument that application of a zoning ordinance that rendered the property impossible to develop was “unreasonable on its face.” (**Id.**). Plaintiff claimed that any other use than a billboard was “wholly impractical, unreasonable, and in most cases, impossible ...” because of “its location, size and lack of public access.” (**Id.**, p. 4). Again, plaintiff claimed that the property “cannot be developed in any way under the zoning ordinance,” citing ***Bassey, supra***. (**Id.**, p. 7). Houdini argued that “partial destruction or diminution of a property’s value by a governmental agent may constitute a taking,” citing ***Pearsall v. Easton County Board of Supervisors*, 74 Mich 558, 561-562 (1889)**. (**Id.**, p. 8). It continued to argue throughout the variance application that the zoning ordinance prevented the property from being developed in any way and rendered it “both unusable and unmarketable and may

constitute a taking.” (*Id.*, p. 10, 11). Houdini’s circuit court brief continued to raise the same arguments regarding the Plaintiff’s claim and the alleged unconstitutionality of the ordinance. (**Plaintiff’s Circuit Court Brief on Appeal, attached as Ex. F to Defendant’s Response to Plaintiff’s Application for Leave to Appeal, at 1, 3, 4, 5, 6, 7, 8, 11, 15, 16, 19-20, 22, 23 and 26**).

Houdini was required – and did – raise constitutional issues in the appeal, notwithstanding the fact that it also attempted to reserve those issues for its second lawsuit. Once a plaintiff mentions or raises a claim “it must be fully and finally determined.” *Reid, supra at 628* quoting *Ternes Steel Company v Ladney, 364 Mich 614, 619; 111 NW2d 859 (1961)*. The constitutional claims raised by Plaintiff in this lawsuit have already been subject to judicial review during the course of the appeal. After the trial court affirmed the decision of the ZBA, Houdini filed an application for leave seeking review by the Court of Appeals, which denied leave “for lack of merit and the grounds presented.” (Exhibit K to Defendant’s Response to Plaintiff’s Application for Leave to Appeal). The trial court’s determination regarding claims which were actually raised in the appeal proceedings were conclusive. *Sewell v Clean Cut Management, Inc., 463 Mich 569, 576-577; 621 NW2d 222 (2001)*. This is true regardless of whether this Court finds that mandatory joinder applies; while MCR 2.203(A) establishes what claims *must* be brought together, res judicata applies to “every claim arising from the same transaction that the parties, exercising reasonable diligence, *could* have raised but did not.” *Dart, supra at 586* (emphasis added).

The underlying facts constituted a common transaction for purposes of res judicata. All of the elements necessary for application of res judicata are present.

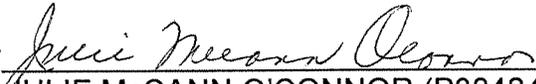
The claims in the appeal and in the second suit arose as part of the same transaction, there was a decision on the merits and both actions involved the same parties. The trial court's decision affirming the ZBA's denial for Plaintiff's variance request was res judicata with respect to Plaintiff's taking claim.

CONCLUSION and RELIEF REQUESTED

For the foregoing reasons, Defendant respectfully requests that this Court deny Plaintiff/Appellant's Application for Leave to Appeal.

Respectfully submitted,

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