2006-25

IN THE SUPREME COURT

Appeal from Michigan the Court of Appeals
Presiding: Schuette, P.J., and Bandstra and Cooper, JJ.

HOUDINI PROPERTIES, LLC
a Michigan limited liability company,

Plaintiff/Appellant,

v

CITY OF ROMULUS, a Michigan
municipal corporation,

Defendant/Appellee.

MSC Docket No. 132018

COA Docket No. 266338

Lower Court Case No. 05-504139-CZ

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***AMICI CURIAE* BRIEF OF THE MICHIGAN MUNICIPAL LEAGUE AND PUBLIC CORPORATION LAW SECTION IN SUPPORT OF THE POSITION OF DEFENDANT/APPELLEE**

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ORDERS APPEALED AND RELIEF SOUGHT

Plaintiff/Appellee, Houdini Properties, LLC, ("Plaintiff") seeks leave to appeal from the Court of Appeals' June 13, 2006 Order affirming the decision of the Wayne County Circuit Court (the "Circuit Court") granting summary disposition in favor of Defendant/Appellee, City of Romulus ("City"), and its concurrent denial of Plaintiff's Motion to File an Amended Complaint. MCR 7.302 governs applications for leave to appeal to this Court. The Application for Leave to Appeal was filed within forty-two (42) days of the Court of Appeals' July 27, 2006 Order denying Plaintiff's timely Motion for Reconsideration. *Amici Curiae*, the Michigan Municipal League and the Public Corporation Law Section of the State Bar of Michigan, oppose Plaintiff's Application for Leave to Appeal for the reasons contained in this Brief.

STATEMENT OF QUESTIONS INVOLVED

Plaintiff/Appellant, Houdini Properties, LLC, ("Plaintiff") has raised five (5) issues on appeal. Defendant/Appellee, City of Romulus, ("City") has asserted three (3) arguments addressing the issues raised by Plaintiff. On June 8, 2007, this Court invited interested groups to file *Amicus Curiae* Briefs in this matter, and raised three (3) specific issues on which the Court sought *Amicus Curiae* assistance. The Michigan Municipal League and the Public Corporation Law Section address four (4) issues:

I. WERE PLAINTIFF'S CONSTITUTIONAL CLAIMS REQUIRED TO BE INCLUDED IN THE STATUTORY APPEAL OF THE ZBA DECISION PURSUANT TO THE STANDARD OF REVIEW CONTAINED IN THE ZONING ENABLING ACT AND EXISTING CASE LAW?

Plaintiff/Appellant answers: **No.**
Defendant/Appellee answers: **Yes.**
Trial Court answered: **Yes.**
***Amici Curiae* answers:** **Yes.**

II. WERE PLAINTIFF'S CLAIMS IN THIS CASE BARRED BY THE DOCTRINE OF *RES JUDICATA* WHERE ITS FIRST ACTION WAS DECIDED ON THE MERITS, BOTH ACTIONS INVOLVED THE SAME PARTIES, AND WHERE PLAINTIFF, EXERCISING REASONABLE DILIGENCE, EITHER DID OR COULD HAVE RAISED ALL CONSTITUTIONAL ISSUES IN THE ZBA APPEAL?

Plaintiff/Appellant answers: **No.**
Defendant/Appellee answers: **Yes.**
Trial Court answered: **Yes.**
***Amici Curiae* answers:** **Yes.**

III. SHOULD THIS COURT CONSIDER THE RIPENESS DOCTRINE IN THIS MATTER AS THE ZONING ENABLING ACT DEFINES A SPECIFIC PROCEDURE TO CHALLENGE A DECISION RENDERED BY A ZBA?

Plaintiff/Appellant answers: **Yes.**
Defendant/Appellee answers: **No.**
Trial Court answered: **Did not answer.**
***Amici Curiae* answers:** **No.**

IV. IF THIS COURT SHOULD DETERMINE THAT PLAINTIFF STATED AN INDEPENDENT, ORIGINAL CAUSE OF ACTION, SHOULD THIS SECOND ACTION WOULD BE BARRED BY THE RIPENESS DOCTRINE?

Plaintiff/Appellant answers:	**No.**
Defendant/Appellee answers:	**Yes.**
Trial Court answered:	**Did not answer.**
***Amici Curiae* answers:**	**Yes.**

INTRODUCTION AND STATEMENT OF INTEREST

Plaintiff, Houdini Properties, LLC, owns a small parcel in the City and sought to erect a billboard on that land. The subject property is zoned RC, Regional Center, under the City's Zoning Ordinance. The RC zoning district is designated for large scale development suitable to an area adjacent to the expanding Detroit Metropolitan Airport and Interstate 94. The property is located near Metropolitan Airport. The subject area contains scattered single-family residential homes and vacant lots. Vacant land exists to the north of the subject property, the I-94 expressway abuts the southern border, vacant land and Middlebelt Road exist to the east, and long-term parking facilities for the airport and the Extended Stay Hotel are adjacent to Plaintiff's property on the west. Many of the lots in the area have been purchased by the Federal Aviation Authority or Wayne County, in part due to the property lying within the flight zones, and also in part due to a goal to redevelop the area for commercial uses consistent with, and complimentary to, the Metropolitan Airport.

Plaintiff's property contains approximately .34 acre, and is located at the southern end of Kenwood Avenue, which is an unimproved street. Plaintiff purchased the property on April 21, 1998 for the total sum of $25,000.00. At the time of purchase, the property was zone BT, Business Transitional, under the Zoning Ordinance. Billboards are not a permitted use in either the BT (former zoning) or the RC (current zoning districts). Billboards are, however, permitted in other areas of the City, and exist elsewhere in the City.

In early 2004, consistent with amendments to the City's Master Plan, and as the next step to 2001 Zoning Ordinance amendments which had eliminated the BT zoning, the subject property and the surrounding 55 acres were rezoned to RC. Plaintiff received the required statutory notice of this rezoning, and did not appear at the public hearings or otherwise object to the rezoning.

On November 5, 2004, approximately six (6) years after purchasing the property, Plaintiff filed an application with the City of Romulus Zoning Board of Appeals ("ZBA") seeking a use variance to develop the property with a billboard, a use never permitted on the property under the Zoning Ordinance. Plaintiff claimed that the application of the zoning to the property was unconstitutional because: (1) the property was physically too small to meet the minimum area requirements, and (2) the property lacked road access. (Exhibit L).[1] Specifically, Plaintiff argued that it was unable to make use of the property within the bounds of the applicable Zoning Ordinance. Plaintiff further asserted that it was submitting evidence to justify that it had met its burden on each of the elements contained in Section 24.03(C)(2)(a)-(g) of the Zoning Ordinance to be considered for the use variance. Notably, Plaintiff's claim that the application of the zoning constituted a taking of property without just compensation - that is, that the property could not be reasonably or economically used as zoned - was one of the major arguments advanced in support of Plaintiff's position that a use variance should be granted.

The application for use variance was reviewed by the City's Planning Consultant. (Exhibit J). The Planning Consultant opined that there were no exceptional circumstances applicable to the subject property, which was in fact similar in size and configuration to many other lots in the area. Although the roads in the area were not paved, the Planning Consultant noted that the roads in the area were gravel and provided access to the residences which existed. The Planning Consultant expressed the opinion that erecting a billboard would have a negative impact on the surrounding neighborhood, and would cast a shadow on the lot to the north. On December 1, 2004, the ZBA denied Plaintiff's request for a use variance. (Exhibit M).

[1] The Reference is to Plaintiff's List of Exhibits.

Pursuant to MCL 125.585(11)[2], on December 16, 2004, Plaintiff appealed the decision of the ZBA to the Wayne County Circuit Court ("Circuit Court"), Case No. 04-438291-AA. (Exhibit N). During the course of that appeal, Plaintiff continued to argue the alleged unconstitutionality of the City's Zoning Ordinance. (Plaintiff's Memorandum in Support of Use Variance Application filed with the ZBA, Exhibit L, pgs. 1, 3-5, 7-8; Plaintiff's Brief on the ZBA Appeal, pgs. 2, 4, 5, Argument A, "The Zoning Ordinance, As Applied To The Property Is Undeniably Unconstitutional" [a takings argument], pgs. 7-8, and Argument C, "The ZBA's Decision Was Arbitrary And Capricious As It Did Not Bear A Real And Substantial Relationship To Public Health, Safety and Welfare..." [a substantive due process argument], pgs. 22-25; Transcript of hearing on ZBA appeal, August 11, 2005, pgs. 4, 13, 17). In addition to the appeal, on February 2, 2005, Plaintiff filed a Complaint and Jury Demand in the Wayne County Circuit Court, purporting to set forth independent and separate constitutional causes of action. (Exhibit P). The Complaint plainly stated as follows:

> **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 Case No. 04-438291-AA and is pending before the Honorable Gershwin A. Drain. That action is the Plaintiff's appeal of a decision by the Defendant Zoning Board of Appeals. (Id., emphasis added).

Based upon the existence of the first action, Defendant moved for summary disposition on this second litigation. (Exhibit Q). Later, on August 26, 2005, the Circuit Court entered an Order affirming the ZBA.[3] (Exhibit Z). With respect to the pending Motion for Summary

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[2] The City and Village Zoning Act, MCL 125.581 et. seq., was the governing statute at the time of Plaintiff's appeal. It has since been superseded by the Michigan Zoning Enabling Act, MCL 125.3101 et. seq. All references in this Brief are to the prior statute as required by MCL 125.3702(2). However, it should be noted that the Michigan Zoning Enabling Act did not change the statutory standard of review of a ZBA decision.

[3] Plaintiff then filed an Application for Leave to Appeal that decision to the Court of Appeals. The Application for Leave to Appeal was denied by the Michigan Court of Appeals in an Order dated March 22, 2006. (Exhibit U).

Disposition, the Circuit Court reviewed the parties' Briefs, conducted a hearing, and later determined that Plaintiff was required to "join" the two suits, finding them to be "substantially similar." Because Plaintiff had failed to so, the Circuit Court concluded that the second suit was barred by the doctrine of *res judicata* since the claims arose from the same transaction or occurrence. Plaintiff's Motion for Leave to Amend was denied as futile. (Exhibit X).

Plaintiff argues in this Application that joinder of the constitutional challenges in the ZBA was not required. This is apparently based upon Plaintiff's mistaken belief that the Circuit Court could not determine the constitutional claims, either federal or state, as part of the ZBA Appeal. If Plaintiff's arguments are accepted, not only would the goals of trial/litigation convenience and economy and judicial administration be ignored, but the specific remedy which has been fashioned by the Michigan Legislature for Zoning Board of Appeals' matters would be eviscerated. Plaintiff's position is contrary to the plain language of the Zoning Act, MCL 125.585(11) and existing case law.

On further appeal to the Court of Appeals, the Court agreed Plaintiff was required to join its actions, relying on MCR 2.203(A):

> Plaintiff's contention that the actions are distinguishable based on the type of relief asserted is without merit because, despite Plaintiff's assertion of different 'theories of liability,' 'proof of the same facts or evidence as required to sustain the previous action is necessary in this action.' (Exhibit A).

In so ruling, the Court of Appeals relied upon the Michigan Supreme Court statement in Macenas v Village of Michiana, 433 Mich 380, 387, 446 NW2d 102 (1989):

> Once pleadings are filed in the Circuit Court which constitute a claim of appeal from a decision by a Zoning Board of Appeals ... the Circuit Court acts as an appellate court.

Further, "[i]f a proper appeal to Circuit Court is filed, a 'cause of action' is stated..." Macenas, Id., at 388.

In addition, the Court of Appeals held that *res judicata* barred Plaintiff's subsequent action. There is no question that Plaintiff raised the constitutionality of the City's Zoning Ordinance both facially and as applied to the property, and asserted constitutional claims in the variance application, in its presentation before the ZBA, in its appeal of the ZBA's denial of its variance request to the Circuit Court, and in the Application for Leave to Appeal to the Court of Appeals. Under the specific standard of review established by statute law, the Circuit Court was authorized and required to consider such constitutional claims pursuant to MCL 125.585(11). Plaintiff sought to raise the same issues in this second case. Plaintiff's arguments that this lawsuit involved "different" issues and lacked a common factual basis were unsuccessful, in light of this Court's adoption of a broad transactional approach to determine what constitutes a cause of action. Adair v State, 470 Mich 105, 680 NW2d 386 (2004).

Finally, the Court of Appeals concluded that Plaintiff's Motion to Amend was properly denied as futile, since the Circuit Court's grant of summary disposition in favor of the City was proper. In so doing, the Court of Appeals concluded that Plaintiff's proposed Amended Complaint "did not vary substantially from the initial pleading. It merely provided greater elaboration and was 'an expansion upon the initial claims, not the provision of a new issue or legal theory.'" (Exhibit A).[4]

The decisions of the Circuit Court and the Court of Appeals were correct. The Michigan Legislature has defined a specific expedited review and limited remedy for a property owner who is dissatisfied with a decision rendered by a Zoning Board of Appeals. Rather than require that property owner to file a complaint, conduct discovery, and await an eventual trial, and later appeal if the property owner is dissatisfied with the result, a speedy procedure has been

[4] The Court of Appeals denied Plaintiff's Motion for Reconsideration on July 27, 2006. (Exhibit B).

established. Specifically, MCL 125.585(11) gives the property owner the right to immediately file an appeal of the ZBA decision to the Circuit Court. The record on appeal is filed, briefs are filed in conformance with the Court Rules, and the matter is set for oral argument within a short period of time. The statute further articulates the specific standard of review that will be employed by the Circuit Court in reviewing the ZBA's decision. That standard includes the obligation of the Circuit Court to review the decision to insure that it complies with the "constitution and laws of this state." If a property owner believes that a Zoning Board of Appeals' decision violates his or her constitutional rights, that property owner must raise those challenges during the appeal to Circuit Court. The remedy which the Circuit Court can grant with respect to the appeal is to affirm the decision of the ZBA, reverse the decision, or remand the matter for further proceedings before the Zoning Board of Appeals.[5] Damages are not a form of recovery. This was undoubtedly understood and recognized by the Michigan Legislature when the enabling legislation was written in the first instance, and was certainly understood when the new Michigan Zoning Enabling Act became effective in July of 2006. The approach was simple: provide a right to appeal with a quick decision in exchange for foregoing the ability to request damages.[6]

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[5]If Plaintiff sincerely believed that further evidence ("discovery") was needed to support its constitutional challenges, Plaintiff could have requested the Circuit Court to remand the matter to the ZBA for further proceedings. Plaintiff made no such request.

[6] Arguably, there was also the recognition that, given the rapid time frame in which an appellate decision can be obtained, any damages would be *de minimus.* See, for example, First English Evangelical Lutheran Church of Glendale v County of Los Angeles, 482 US 302, 321, 107 S Ct 2378, 96 L Ed 2d 250 (1987) (when finding that a temporary takings was compensable, "[w]e ... do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us."). Furthermore, an appeal can be taken to Circuit Court from the ZBA decision, and must raise those constitutional challenges, even though the constitutional claims are technically not ripe. The trade-off is the lack of a potential damage award in the event the ZBA is reversed based on constitutional claims.

In this case, Plaintiff was represented before the Zoning Board of Appeals by competent legal counsel who practices in the area of land use. The Plaintiff is also a sophisticated developer, which includes an attorney as one of its members. The Plaintiff and its counsel were fully aware of the proof which needed to be presented to the Zoning Board of Appeals, and later to the Circuit Court, to meet its burden to be entitled to a use variance under the law and Section 24.03 of the City's Zoning Ordinance. Plaintiff should not be permitted to create a second cause of action to supplement the statutory procedure in a hope to obtain a "second bite of the apple" in the event of an unfavorable decision from the Circuit Court on the ZBA appeal. There was no injustice to Plaintiff, nor is the position taken by the City inconsistent with the statute and law as Plaintiff claims. The Michigan Municipal League and the Public Corporation Law Section believe that it is important to clarify and provide their input on these issues for the Michigan Supreme Court.

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 516 Michigan local governments of which 425 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance. This brief *Amici Curiae* is authorized by the legal Defense Fund's board of directors whose membership includes: the president and executive director of the Michigan Municipal League, and the officers and directors of the Michigan Association of Municipal Attorneys: Debra A. Walling, corporation counsel, Dearborn; Andrew J. Mulder, city attorney, Holland; William B. Beach, city attorney, Rockwood; Randall L. Brown, city attorney, Portage; W. Peter Doren, city attorney, Traverse City; Clyde Robinson, city attorney, Battle Creek; Eric D. Williams, city attorney, Big

Rapids; Lori Grigg Bluhm, city attorney, Troy; Stephen K. Postema, city attorney, Ann Arbor; John E. Johnson, Jr., corporation counsel, Detroit; and William C. Mathewson, general counsel, Michigan Municipal League. The issues involved in this appeal are of significance to the members of the Michigan Municipal League.

The Public Corporation Law Section is a voluntary membership society of the State Bar of Michigan. Membership in the Public Corporation Law Section is open to all members of the State Bar of Michigan, but generally consists of attorneys who practice in the area of, or represent, governmental entities/public corporations. One mission of the Public Corporation Law Section is to provide information about current issues in municipal law.

The Michigan Municipal League and Public Corporation Law Section intend to address the following issues as requested by the Supreme Court: (1) Whether Plaintiff was required to raise its constitutional claims in the appeal from the decision of the ZBA to Circuit Court; (2) Whether this lawsuit is barred by *res judicata*; (3) Whether the Court should decide the ripeness issue based upon the peculiar issues present in this case; and (4) Whether Plaintiff's claims would be ripe if this case does involve an independent, original action.

The Michigan Municipal League and the Public Corporation Law Section believe that this case stands a chance of creating further confusion in the area of land use law. Plaintiff has taken a position with this Court that would alter long-established statutory authority and case law regarding the proper remedy when dealing with a decision of a Zoning Board of Appeals

STATEMENT OF FACTS

Amici Curiae Michigan Municipal League and Public Corporation Law Section accept and adopt the Statement of Facts in the City's Response in Opposition to Plaintiff's Application for Leave to Appeal. *Amici Curiae* believe that it is important that there is focus on certain key facts. First, Plaintiff purchased the property on April 21, 1998, at which time the property was

zoned BT. Billboards were not a permitted use in the BT zoning district. Second, consistent with the City's amended Master Plan, the property was rezoned to RC in 2004. Plaintiff was provided notice of that rezoning and did not object to it. The RC zoning also does not permit billboards. Third, Plaintiff waited some six (6) years after purchasing the property before applying to the ZBA for a use variance to erect a billboard, a use which was not permitted under either the former or current zoning.[7] Fourth, Plaintiff, a sophisticated developer, was represented by competent legal counsel during the use variance application, and before the ZBA. Plaintiff's counsel submitted extensive documentation to the ZBA, centered around certain themes:

1. That application of the Zoning Ordinance to the subject property was unconstitutional both on its face and as applied due to the fact that the property was physically too small to meet the minimum area requirements for development.

2. That there were no legitimate governmental interests advanced by the zoning as applied to the property.

3. That there was no public access to the subject property because of the vacation of Mary Avenue, and the non-maintenance of Kenwood Avenue.

4. That the Zoning Ordinance was unreasonable and amounted to a taking of property because of the size of the property and lack of access.

5. That the rezoning of the property resulted in a taking because it destroyed or diminished the subject property's value.

6. That denial of the variance would cause the Plaintiff to suffer great hardship because the property would not have any use or value, resulting in a taking.

Plaintiff repeated these themes in an attempt to show that it had met each of the legal standards to be considered for a use variance.

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[7] It should also be noted that a billboard at this location would also require an Airport Zoning Permit due to the fact that it would lie within Zone A of the Airport's zoning ordinance, which means that it is within the precision instrument zone for 10 runways. It appears that Plaintiff has not yet obtained the permit from the Airport to allow the erection of a billboard on the subject property.

Lastly, Plaintiff appealed the denial of the use variance to the Circuit Court, and again raised its constitutional challenges to the Zoning Ordinance in support of its position that a use variance should have been granted. Interestingly, although Plaintiff argued the constitutional claims, Plaintiff attempted to "[reserve] its damage claims for the taking of its property without just compensation, and its challenge to the Appellee's Zoning Ordinance, as such claims are subject to the original jurisdiction of this court in the form of a complaint." (Plaintiff's Brief on Appeal in ZBA case, Statement of Order Appealed From and Jurisdictional Basis). In other words, despite the fact that the Circuit Court was required to review the decision during the appellate process to see if it complied with the laws and constitution, Plaintiff apparently chose to half-heartedly argue its constitutional claims, consciously deciding to instead file a second, "original" action.

LAND USE TOOLS AND FRAMEWORK FOR ANALYSIS

At issue is the critical interplay of the relationship between the courts and the power of municipalities pursuant to the Michigan Zoning Enabling Act and Michigan Planning Act to review and decide land use issues. Also at issue is the ability of a property owner to sidestep long-standing statutory processes and legal precedence. Where the State Legislature has provided a mechanism for appeal of a ZBA decision, can a property owner ignore the clear statutory language defining that process? Where the State Legislature has clearly and unambiguously specified the review of a ZBA decision to include constitutional challenges to that decision, can a property owner choose to ignore that standard of review and try to "reserve" those issues for a later date? Can a property owner suggest to the court that it only partially conduct its required statutory review of the ZBA decision? The Plaintiff in this matter asserts a position that would permit a property owner to ignore his or her obligation to come

forward with all claims related to a ZBA decision, and a position that would limit the Circuit Court's review on appeal contrary to the statute.

Courts have long recognized that zoning is a legislative act. Paragon Properties Co v City of Novi, 452 Mich 568, 574, 550 NW2d 773 (1996); Albright v City of Portage, 188 Mich App 342, 470 NW2d 657 (1991). Zoning Ordinances enable government to manage land within its jurisdictions, and carry out the community's goal for development within its boundaries. Where property is subject to an existing Zoning Ordinance, a landowner may use the property as regulated or request that the regulations be changed. The request can take the form of a rezoning application, a conditional rezoning application, a use variance, or other creative land use tools (e.g. a planned unit development). Regardless of how the development is approached, processes are in place before the local municipality to insure that local government has the opportunity to review the proposal in light of surrounding land uses, the Master Plan setting the goals for community development, and any proposed development's impact on the infrastructure, roadways, utilities, police and fire services, and so on. The processes also provide for notice and public comment. The local municipality is in the best position to evaluate and dictate its development goals, desires, and needs, and our courts have long recognized the legislative discretion involved in these matters. As far back as 1957, the Michigan Supreme Court recognized that it was not the function of the court to serve as a "super zoning commission." As stated in Kropft v City of Sterling Heights, 391 Mich 139, 161, 250 NW2d 179 (1974), quoting Brae Burn Inc v City of Bloomfield Hills, 350 Mich 425, 430-431, 86 NW 166 (1957):

> This court does not sit as a super zoning commission. Our laws have wisely committed to the people of a community themselves the determination of the municipal destiny, the degree to which the industrial may have precedence over the residential, and the areas carved out of each to be devoted to commercial pursuits. With the wisdom or lack of wisdom of the determination, we are not concerned. The people of the community...and not the courts, govern its growth

> and its life. Let us state the proposition as clearly as may be: it is not our function to approve the ordinance before us as to wisdom or desirability.

This Court has consistently noticed that for alleged abuses involving zoning, the remedy is the ballot box, and not the Court. See, also, Daraban v Redford Twp, 383 Mich 497, 501-502, 176 NW2d 598 (1970); Parkview Homes Inc v City of Rockwood, 2006 WL 508647 (ED Mich, 2006). (attached as Exhibit 1).

As zoning is a legislative function, a court's role is to determine whether the legislative power has been "abused" when weighed against a constitutional attack. Challenges to the legislative act and decision are by way of an original action, subject to the ripeness doctrine. See, Sun Communities v Leroy Twp, 241 Mich App 665, 617 NW2d 42 (2000).

However, this case does not involve the denial of a rezoning application. Instead, the only relief that Plaintiff sought from the City was a use variance from the ZBA. The ZBA is expressly granted broad discretion to interpret, apply, vary, and grant relief from the Zoning Ordinance. Courts consider the ZBA "singularly flexible" to consider the specific problems of a parcel in order to make some adjustment to overcome the inability to meet various requirements. McDonald, Sommer & Frates v Yolo County, 477 US 340, 106 S Ct 256-266, 91 L Ed 2d 285 (1986) ("what they take with one hand they may give back with the other"). As noted by this Court in Paragon:

> Zoning ordinances, combined with mechanisms like land use variances, enable local governments to more adeptly manage land within their jurisdictions. Land use variances, when properly utilized, function interdependently with other zoning ordinance provisions to insure that the spirit of the ordinance shall be observed, public safety secured and substantial justice done. Paragon, at 452 Mich 575-576.

Unlike the legislative action involved with a rezoning, the decision of a ZBA has been classified by the courts as an administrative action. See, Sun Communities, 241 Mich App at 670.

A variance is a "license to use property in a way not permitted under an ordinance", i.e., permission to violate the law. See, Paragon, 452 Mich at 575; New Par v Saginaw, 161 F Supp 2d 759 (CA 6, 2001). In this case, the Plaintiff sought a use variance from the ZBA, which required a showing of "unnecessary hardship." See, National Boatland Inc v Farmington Hills, 146 Mich App 380, 380 NW2d 472 (1985); Reenders v Parker, 217 Mich App 373, 551 NW2d 474 (1996). Plaintiff had the burden to establish on the record facts that proved the standards to be entitled to a use variance. Lafayette Market and Sales Co v Detroit, 43 Mich App 129, 133, 203 NW2d 745 (1972). Since a use variance permits the utilization of land in a manner otherwise proscribed by a Zoning Ordinance, the burden is indeed great. Plaintiff must establish at a bare minimum that: (1) the property cannot be reasonably used in a manner consistent with the existing zoning; (2) the landowner's plight is due to unique circumstances and not to general conditions in the neighborhood; (3) a use authorized by the variance would not alter the essential character of the locality; and (4) the hardship is not the result of the applicant's own actions. See, Janssen v Holland Charter Township Zoning Board of Appeals, 252 Mich App 197, 201, 651 NW2d 464 (2002); Johnson v Robinson Township, 420 Mich 115, 125-126, 359 NW2d 526 (1984); see also, Romulus Zoning Ordinance, Section 24.03(C)(2)(a)-(g).[8] Deference is given to the findings of the ZBA in part because the court places weight on the municipality's interpretation of its own ordinance, and because the members of the ZBA are local residents who reside in the City and possess a much more thorough knowledge of local conditions, land uses, and what would be appropriate and desirable future development for those who reside in the community. See, Macenas, 433 Mich at 398.

The City and Village Zoning Act provides a specific remedy for a property owner who is dissatisfied with a decision rendered by a ZBA. MCL 125.585 provides in relevant part:

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[8] Notably, the first standard is remarkably similar to what a landowner must ultimately prove to establish a takings claim.

(11) The decision of the board of appeals shall be 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 insure that the decision meets all of the following:

(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.

(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.

(13) As a result of the review required by this section, the court may affirm, reverse, or modify the decision of the board of appeals.[9]

There is no question that the instant litigation arose as a result of the denial of Plaintiff's request for a use variance from the ZBA. *Amici Curiae* respectfully submit to this Court that the sole remedy provided by law was the appeal to Circuit Court pursuant to the Zoning Act.

ARGUMENT

I. PLAINTIFF WAS REQUIRED TO RAISE ITS CONSTITUTIONAL CLAIMS IN THE ZBA STATUTORY APPEAL.

In the Order dated June 8, 2007, this Court directed the Clerk to schedule oral argument on whether to grant this Application. Included among the issues to be addressed at oral argument was whether the Claim of Appeal from the ZBA variance denial was a "pleading" to which the compulsory joinder rule of MCR 2.203(A) applied, so as to require the Plaintiff to

[9] The Michigan Zoning Enabling Act recently confirmed this appellate process. See, MCL 125.3606. See, also, Michigan Constitution, Art. 6, Section 28.

assert and include its taking claim in the same document as its Claim of Appeal. *Amici Curiae* note that the issue of the application of the compulsory joinder rule has been briefed by the City. *Amici Curiae* submit, however, that the focus of the inquiry should be the clear language of the Zoning Enabling Act and long-standing case law rather than MCR 2.203(A).

A. The Constitutional Claims must be included in the ZBA Appeal under the clear and unambiguous language of the Zoning Enabling Act.

Issues of statutory construction present questions of law that are reviewed *de novo*. Rowland v Washtenaw County Road Commission, 477 Mich 197, 731 NW2d 41 (2007); Cruz v State Farm Mut Auto Ins Co, 466 Mich 588, 594, 648 NW2d 591 (2002); Eggleson v Bio-Medical Applications of Detroit Inc, 468 Mich 29, 32, 658 NW2d 139 (2003). The primary goal of statutory interpretation is "to discern and give effect to the legislature's intent as expressed in the words of the statute." Neal v Wilkes 470 Mich 661, 665, 648 NW2d 648 (2004); DiBenedetto v West Shore Hospital, 461 Mich 394, 402, 605 NW2d 300 (2000). Words of a statute are accorded their plain and ordinary meaning, and the courts look outside the statute to ascertain legislative intent *only if* the statutory language is ambiguous. Rowland, supra at 202; Pohutski v City of Allen Park, 465 Mich 675, 683, 641 NW2d 219 (2002). Where language is clear and unambiguous, it is presumed that the legislature intended the meaning expressed. Id.; DiBenedetto, 461 Mich at 402. "[N]o further judicial construction is required or permitted, and the statute must be enforced as written." Id.

It is fundamental that "courts may not rewrite the plain language of [a] statute and substitute their own policy decisions for those already made by the legislature." DiBenedetto, 461 Mich at 405. Nor may courts speculate about an unstated purpose or the probable intent of the legislature beyond the language used in the statute. Pohutski, 465 Mich at 683; Cherry

Growers Inc v Agricultural Marketing & Bargaining Board, 240 Mich App 153, 173, 610 NW2d 613 (2000).

In this case, the statutory language at issue is clear and unambiguous. MCL 125.585(11) specifically provides that the decision of a ZBA is final. However, a person who is aggrieved by the ZBA decision may appeal to Circuit Court. The statute articulates the specific standard of review which will be conducted by the Circuit Court on appeal. The standard requires that the court insure that the decision of the ZBA "complies with the constitution and laws of this state." And, the ultimate remedy to be provided by the court is also clearly articulated: The court may either affirm, reverse, or modify the decision of the ZBA. MCL 125.585(13). The statutory language at issue is unambiguous and must be given its plain meaning. Nowhere in the statute is there any statement "reserving" or preserving "original" causes of action related in any fashion to a ZBA decision. The Legislature could have easily included such an exception or clarification had it intended to do so when the Zoning Enabling Act was originally enacted. Further, the Legislature could have changed the statute but specifically chose not to do so with the adoption of the Michigan Zoning Enabling Act, effective July 1, 2006. Language omitted from a statute is presumed to have been done so intentionally. People v Wilson, 257 Mich App 337, 345, 668 NW2d 371 (2003), vacated in part on other grounds 469 Mich 1018 (2004). It is not within the province of our courts to rewrite the plain language of the statute and substitute the court's own policy decisions for those of the legislature. DiBenedetto, 461 Mich at 405. The statute must be interpreted and enforced as written. No further judicial construction is required or permitted. See, Rowland, 477 Mich at 202; by analogy, City of Rancho Palos Verdes, CA v Abrams, 544 US 113, 125 S Ct 1453, 161 L Ed 2d 316 (2005) ("Enforcement of Section 332(c)(7) of the Federal Telecommunications Act to include constitutional claims under 42 USC §1983 would distort the scheme of expedited judicial

review and limited remedies created by [the federal statute]. We therefore hold that the TCA - by providing a judicial remedy different from §1983 in Section 332(C)(7) [of the Federal Telecommunications Act] itself precluded resort to §1983." Id., at 127.)

Plaintiff requested a use variance in order to erect a billboard on property not zoned for such use. Both before the ZBA, and in the Circuit Court, Plaintiff argued that the use variance should have been granted because the property could not be used as zoned due to its small size and lack of road access. Plaintiff argued in its submissions to the ZBA and the Circuit Court that these factors resulted in the zoning being unconstitutional both on its face and as applied to the property.[10] Plaintiff also argued that there were other billboards in the area, and Plaintiff felt it was not being treated the same. In other words, Plaintiff made the arguments in support of its constitutional challenges to the ZBA decision, but simply did not label those constitutional challenges. There is no question the Circuit Court had the authority and jurisdiction to consider the constitutional claims related to the ZBA's denial of the use variance during the appeal. See, Choe v Charter Township of Flint, 240 Mich App 662, 668, 616 NW2d 739 (2000); Fox v Charter Township of Oxford, 2006 WL 2987624 (Mich App) (attached as Exhibit 2); MCL 125.585(11)(a). There is no question that the state courts can hear and decide federal constitutional claims. See, Office Planning Group Inc v Baraga-Houghton-Keweenaw Child Dev Br, 472 Mich 479, 493, 697 NW2d 871 (2005); Community Treatment Center Inc v Westland, infra.

Thus, under the clear language of the Zoning Enabling Act, Plaintiff was required to raise its constitutional claims in the ZBA Appeal. If the Michigan Legislature had intended to

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[10] Plaintiff freely admits in its Application for Leave to Appeal before this Court that it made the constitutional arguments in the ZBA appeal. See, pg. 6 "The BZA, despite being advised of the unconstitutionality of the application of its Zoning Ordinance to the Property and the fact that the Property cannot be developed in any other economically feasible way, denied the same"; Section IV B of the Brief, which repeats the arguments which were contained in the ZBA application.

make damages or attorney fees available, the statue would have so stated. Silence on this issue "can be likened to the [watch]dog that did not bark" in the night. City of Rancho Palos Verdes, CA v Abrams, 544 US 131, concurring opinion. It is the Circuit Court's obligation to review the decision to insure that it complies with the constitution and law. The Circuit Court cannot ignore its obligation to do so, and Plaintiff cannot elect to "reserve" those challenges for another day. The Michigan Legislature created a specific judicial remedy - an expedited review process and a limited remedy - to the exclusion of other remedies.

B. Case Law has recognized that the Constitutional Claims are not separate causes of action, but must be included in the ZBA Appeal.

Whether Plaintiff was required to raise the issues filed in this lawsuit in the appeal of the ZBA's decision involves a question of law that is reviewed de novo on appeal. Cardinal Mooney High School v Michigan High School Athletic Assn, 435 Mich 75, 80, 467 NW2d 21 (1991).

Case law has long recognized that a plaintiff must include the constitutional challenges related to the ZBA decision in the statutory appeal. In Krohn v City of Saginaw, 175 Mich App 193, 437 NW2d 260 (1989), a lawsuit arose out of plans by the defendant, Action Auto, Inc., to build an auto parts store and gasoline service center in the City of Saginaw. The plaintiffs in the case owned an adjoining parcel of property and were opposed to Action's plans. Action had originally placed two different requests before the Planning Commission which would have required a rezoning and variances. The Planning Commission denied these original requests. Thereafter, Action requested a special land use permit and variance from the Planning Commission. The sole variance was that the canopy over the gasoline pump have a setback of 7 feet rather than the 20 feet required by the Zoning Ordinance. The Planning Commission approved that request on July 22, 1986. Plaintiffs filed their Complaint on September 18, 1986 challenging that decision. The Complaint contained both an appeal from the decision of the

Planning Commission [which was acting as a Zoning Board of Appeals], and also contained claims for money damages for alleged violation of due process rights and a taking of property without just compensation. The Trial Court dismissed the Complaint on the basis that plaintiffs had failed to appeal within twenty-one (21) days of the ZBA decision. In affirming the denial, the Court of Appeals stated as follows:

> **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 and the procedures employed by 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 or the result reached by the Planning Commission. Accordingly, those are issues to be raised in an appeal from the Planning Commission. Accordingly, since Plaintiff's were tardy in claiming their appeal, those counts were properly dismissed.** Krohn, at 198 (emphasis added).

See also the following cases which noted that the constitutional claims were not separate causes of action: Sammut v Birmingham, 2005 WL 17844 (Mich App) (relied on by the Circuit Court and Court of Appeals in this matter and fully described in the City's Brief) (attached as Exhibit 3); Fox v Charter Township of Oxford, supra ("Plaintiff's complaint does not allege an equal protection claim; it merely challenges the ZBA's denial of a variance on the basis that the denial would violate equal protection. A claim that the ZBA's decision violated the constitution would be a valid basis for a circuit court appeal of that decision."); Cramer v Vitale, 2006 WL 2083551 (Mich App) (attached as Exhibit 4); Silver Creek Twp v Corso, 246 Mich App 904, 631 NW2d 346 (2001); Cunningham v City of Grosse Pointe Woods, 2001 WL 716882 (Mich App) (attached as Exhibit 5); Gerrish Twp v Teague, 2000 WL 33521086 (Mich App) (attached as Exhibit 6); S & S Diesel Inc v Village of Holly, 2000 WL 33385380 (Mich App) (attached as

Exhibit 7); Moore v Pajay Inc, 1998 WL 1997637 (Mich App) (attached as Exhibit 8); Salmon v City of Three Rivers, 1997 WL 33352800 (Mich App) (attached as Exhibit 9) ("Specifically, the issue of whether plaintiffs received adequate notice of the violations or a meaningful opportunity to be heard alleges a defect in the procedure employed by the Board of Appeals...Similarly, the issue of whether an unconstitutional taking occurred by the revocation of plaintiff's rental license addresses the result reached by the Board of Appeals in affirming defendant's action...In other words, these issues were not separate causes of action, but in essence, an appeal of the agency's decision, over which the Trial Court had no subject matter jurisdiction.").

In Gillette v Comstock Twp, 2004 WL 201602 (Mich App) (attached as Exhibit 10), defendant owned a piece of property upon which she had been conducting small scale farming activities. At some point, the Township adopted a new Zoning Ordinance which resulted in the farming activities becoming nonconforming. Plaintiff later purchased the property next to defendant. When defendant began having goats on her property, plaintiff complained, and defendant filed applications seeking approval to keep certain farm animals on her property. The Planning Commission tabled the applications and referred the matter to the ZBA for an interpretation of the ordinance. The ZBA interpreted the ordinance in such a manner to permit defendant's keeping of animals. The Planning Commission then granted a special use permit to defendant on October 12, 1995. On November of 1995, plaintiff appealed the decision of the Planning Commission to the ZBA, which affirmed. Plaintiff later appealed that ZBA decision to Circuit Court. Not one to give up easily, in August of 1996, plaintiff filed a petition for injunctive relief, damages, and attorney fees, alleging that the keeping of animals constituted a nuisance per se. The Township filed a Motion to Dismiss on the grounds that the petition was not a separate action, and that the matter should have been brought in the context of the appeal.

On May 5, 1997, the Circuit Court in Gillette upheld the Planning Commission's grant of the special use permit and affirmed the decision of the ZBA. Thereafter, the Township moved to dismiss plaintiff's petition for injunctive relief, damages, and attorney fees. The Circuit Court reserved ruling on the motion as the plaintiff had filed an Application for Leave to Appeal to the Court of Appeals on the Circuit Court's affirmance of the ZBA decision and special use permit. Eventually, the Court of Appeals and the Supreme Court denied plaintiff's Applications for Leave to Appeal. On October 11, 1999, plaintiff and the Township stipulated to dismissal of the Township.

Defendant then applied for site plan review for a stable. After site plan approval was granted, plaintiff filed two new legal actions. The first appealed the decision of the Planning Commission granting site plan approval. The second action sought declaratory judgment, damages, and other relief for various alleged statutory and constitutional violations pertaining to the site plan approval. The second action was held in abeyance pending a resolution of the claim of appeal. However, plaintiff voluntarily dismissed the claim of appeal.

The Township moved for summary disposition of the remaining action on the ground that plaintiff's abandonment of the appeal amounted to an abandonment of all associated issues in that case. The argument was that the appeal must be pursued to the Circuit Court raising all issues, including the constitutional issues, as they were not separate causes of action. The Circuit Court granted summary disposition in favor of the Township. On further appeal, the Michigan Court of Appeals affirmed the decision of the Circuit Court, noting that the plaintiff was free to raise substantive issues, including constitutional issues, in the appeal of the ZBA and Planning Commission decisions. Relying on Krohn v Saginaw, the Court stated:

> **Thus, a litigant may not choose to bypass the appeal procedure and proceed with separate litigation under other theories.** The issues raised by plaintiff address defects in the method employed by the Planning Commission in reaching its decision, or in the actual result reached by the Planning

> Commission, and are not separate causes of action. Thus, the Trial Court properly granted summary disposition in favor of the Township [on the second lawsuit]. (Emphasis added.)

More recently, in Stops v Charter Township of Watersmeet, 2007 WL 17200008 (Mich App) (attached as Exhibit 11), plaintiff sought to construct a dock longer than permitted under the Township Zoning Ordinance. The Zoning Administrator denied the building permit application. Plaintiff filed an appeal to the Township ZBA seeking a variance. The ZBA denied the variance request on October 1, 2003, and plaintiff did not appeal the ZBA denial to the Circuit Court. Approximately two (2) years later, plaintiff filed suit seeking a declaration that the Zoning Ordinance was invalid as a matter of law, and requesting issuance of a dock certificate. The complaint also alleged a substantive due process violation and maintained that the ordinance had not been properly adopted due to failure to provide required notice. Both sides moved for summary disposition, and the court granted summary disposition in favor of the Township finding that plaintiff's complaint was time barred, and that plaintiff's challenges to the ordinance were invalid. Plaintiff then appealed.

On appeal, the Court of Appeals first noted that plaintiff should have appealed the decision of the Zoning Administrator denying the permit to the Zoning Board of Appeals. Plaintiff argued that he was not required to go to the ZBA or timely appeal any ZBA decision, as he was stating independent claims, relying on Sun Communities v Leroy Twp, supra. The Court of Appeals again clarified that Sun Communities only applied to situations that involved the legislative act of zoning. In rejecting plaintiff's position, the court recently held:

> We find this case more similar to Krohn, supra at 198. As in Krohn, and unlike Sun Communities, supra at 671-672, plaintiff's complaint challenged an underlying administrative action of defendant Zoning Administrator and Planning Commission [ZBA], specifically the denial of his application for a certificate to construct his proposed dock and a variance for this purpose. Plaintiff never requested a zoning or rezoning decision by defendant. Furthermore, plaintiff's complaint plainly focuses on the alleged procedural defect that occurred with respect to the enactment of ordinance 5.04(C). The procedural allegations and

> the few paragraphs characterizing the application of Section 5.04(C) as an arbitrary and capricious violation of plaintiff's due process rights 'all raise issues relative to the decision of the [zoning administrator and] planning commission, and the procedures employed by the [zoning administrator and] planning commission in reaching that decision.' Krohn, supra at 198. Because the allegations of the complaint, filed nearly two (2) years after defendant's administrative decision denying the dock construction certificate and variance, all raise issues regarding the propriety of defendant's denial and the procedures by which it was made, 'they do not establish separate cause of actions.' Id. Given that plaintiff untimely sought to challenge defendant's decision in the circuit court, the court correctly granted defendant's summary disposition of the complaint, although the court should have granted summary disposition under MCR 2.116(C)(4) instead of subrule (C)(7).

This Court might find the case of Community Treatment Centers Inc v City of Westland, 970 F Supp 1197 (ED Mich, 1997) of interest.[11] In that case, plaintiff optioned a piece of property located in the City of Westland for operation of a federal community correction center. Under federal law and regulations, federal prisoners can be housed in either federal penal institutions, or non-federal institutions (community correction centers) under contractual arrangements with the Federal Bureau of Prisons. Plaintiff selected a site that was zoned OB-1. Plaintiff then applied for site plan and special land use approval to locate the center. The City Council denied the request because the proposed use was not a permitted special use in the OB-1 District. Thereafter, plaintiff appealed the special land use denial to the Wayne County Circuit Court. Approximately one (1) month later, plaintiff also filed a verified complaint in the Federal District Court, containing ten (10) separate counts alleging that the Zoning Ordinance was unconstitutional and that denial of the special use permit amounted to a taking of property without just compensation, a violation of substantive due process, and a violation of equal protection. The complaint also asserted that the City was preempted from applying its Zoning Ordinance, that the Zoning Ordinance was exclusionary, and that the plaintiff was exempt from

[11] Notably, Plaintiff's present legal counsel was also legal counsel for the plaintiff, Community Treatment Centers, Inc.

application of the Zoning Ordinance. The Federal Complaint sought both equitable relief and money damages.

The appeal proceeded before the Wayne County Circuit Court. Plaintiff argued that the City lacked authority to deny the application on the basis that it was not a special land use specifically provided in the district, that the decision was not based on competent, material and substantial evidence on the record, that the denial was arbitrary and capricious and a denial of due process, and that the denial violated substantive due process under the Fifth Amendment to the United States Constitution and the Michigan Constitution. In a supplemental brief, plaintiff also asserted that the City was estopped from denying the plaintiff's use of the property. On April 28, 1997, some three (3) months after the filing of the federal lawsuit, the Wayne County Circuit Court ruled on the appeal finding that the City Council had the authority to interpret the ordinance, that the City was correct in its analysis that plaintiff's proposed use was not a specifically listed permitted use in the OB-1 District, that the denial was supported by competent, material and substantial evidence, and was not an abuse of discretion or a violation of due process, that the City had not violated plaintiff's right to substantive due process because plaintiff had not gone to the ZBA requesting a determination of where the facility might be permitted, and that there was no basis for estopping the City from denying the application.

Both sides filed motions to dismiss in the Federal District Court. Among the issues raised by the defendant was the fact that the federal action was barred by the Rooker-Feldman[12] Abstention Doctrine because plaintiff's federal claims, including the constitutional claims, were "inextricably intertwined" with the issues decided by the Wayne County Circuit Court in the appeal. Just as in this case, plaintiff's counsel argued that the federal lawsuit involved "separate" causes of action because the Wayne County Circuit Court matter was an

[12] Rooker v Fidelity Trust Co, 263 US 413, 44 S Ct 149, 68 L Ed 362 (1923); District of Columbia Court of Appeals v Feldman, 460 US 462, 103 S Ct 1303, 75 L Ed2d 206 (1983).

appeal limited to the record and issues before the City Council which did not include, and could not have included, the matters of constitutional law, preemption and immunity raised in the federal lawsuit. Just as in this case, Plaintiff's counsel agreed that damages and attorney fees could not be recovered in the appeal, and thus, an original action seeking these remedies could be filed.

The Federal District Court discussed that the Rooker-Feldman Doctrine required the dismissal of claims which were the subject of, or inextricably intertwined with, state court decisions, **even where the inextricably intertwined issues underlying the claims before it were not raised in state court, or where the time for appeal in the state court system had expired.** Community Treatment Centers, supra, at 1212-1213. Rejecting plaintiff's position, the Court stated:

> ...State courts normally have concurrent jurisdiction of federal issues unless such jurisdiction is withdrawn by federal statute. See, also, GTE Mobilenet v Johnson, 111 F3d 469, 475, 482 (6th Cir 1997). Moreover, the Wayne County Circuit Court has plenary jurisdiction in matters of mandamus. Schobert v Intercounty Drainage Board, 342 Mich 270, 69 NW2d 814, 819 (1955), and may...issue other writs as may be necessary to carry into effect [its] orders, judgments, and decrees...Michigan Constitution Article 7, Section 10. **Therefore, the court finds that CTC was capable of raising before the Wayne County Circuit Court all the matters that it has raised before this court.** Id., at 21. (Emphasis added).

In a nutshell, the federal court noted that the state court on the appeal: (1) was required to determine whether the decision rendered was authorized by law and the constitution; (2) that the state court had jurisdiction to consider constitutional claims brought under both the Michigan and United States Constitutions; (3) that it was irrelevant that different relief was being requested; and (4) that plaintiff had an obligation to raise all its claims in the appeal. **The federal court also stressed the fact that the court should not focus on the labels placed on claims or appellate arguments.** Instead, "the court's inquiry is not whether CTC was capable of bringing a §1983 damages claim in Wayne County Circuit Court, but rather,

whether it had the opportunity to litigate the underlying constitutional deprivation." Id., at 1218.[13]

The federal court, relying on Feldman, held that the form of the proceeding was not significant, but rather, the nature and effect of the proceeding was what was controlling. Id., at 473. The federal court stated that the appeal of the City Council's decision was a judicial proceeding, and that it was irrelevant that the appeal was limited to the record made below at the municipal level. Thus, the federal court soundly rejected plaintiff's arguments that either a request for money damages, or the fact that the case was an appeal on the record versus an original litigation, made any difference whatsoever. The federal court found the ten counts asserted in the federal cause of action to simply be "cloaks" for the arguments that plaintiff had previously made in the Wayne County Circuit Court, or should have made.

The Zoning Enabling Act contains the standard of review of a ZBA decision by the Circuit Court. The Circuit Court is required to review the decision rendered by the ZBA to insure that it complies with the law and constitution of the state, which includes both the United States and Michigan Constitutions. Plaintiff in this case has attempted to sidestep both the clear language of the Zoning Enabling Act, and the extensive cases requiring that the constitutional claims be asserted as part of the appeal. Plaintiff's first tactic was to attempt to "reserve" the constitutional challenges for a later action. Plaintiff has not cited any authority to support the proposition that it can fail to address one of the standards of review on appeal, or moreover, direct the Circuit Court that it is not to consider its statutory review obligations. Second, a review of the record shows that the factual allegations that allegedly formed the basis of the

[13] For further support that the fact that the takings claims sought damages does not alter the result urged by *Amici Curiae,* see Sammut v Birmingham, supra; Weiss & Klempp Development LLC v Charter Township of Mundy, 2006 WL 20343557 (Mich App) (attached as Exhibit 12); Krohn, supra, at 198; W A Foote Memorial Hospital v Dept of Public Health, 210 Mich App 516, 524, 534 NW2d 206 (1995).

"independent claims" asserted in this action are the facts which were utilized by the Plaintiff in its application to the ZBA, in its presentation to the ZBA, and in its appeal to the Circuit Court and Court of Appeals, as the reasons why the use variance should have been granted. Just because the use variance application or Plaintiff's Appeal Brief did not apply constitutional labels to the arguments does not matter. The fact that the complaint filed in this matter did not candidly seek review of the ZBA decision is not dispositive. Instead, the simple question is whether the Circuit Court had the ability to review the claims in this second lawsuit in the ZBA appeal, and whether those claims were raised or could have been raised by Plaintiff in the ZBA appeal. In this case, there is simply no doubt that Plaintiff could have raised in the ZBA Appeal all the claims presently being asserted. See, Community Treatment Centers Inc v Westland, supra. All the various theories and labels on the constitutional claims in this Complaint are nothing more than arguments as to why Plaintiff believes the decision of the ZBA was wrong, why the Plaintiff believes the decision of the ZBA should have been reversed, and why the Plaintiff believes it should be permitted to proceed with its proposed use of the property.

When reviewing the matter on appeal, the Circuit Court did not act in a vacuum. The Circuit Court's review was not limited to only whether the evidence before the ZBA supported the decision. Instead, the Circuit Court was required to review the decision in light of existing law, both state and federal, to ascertain whether the decision reached by the ZBA was lawful. The claims in this lawsuit were the same as those raised in the ZBA Appeal, were clearly intertwined with the issues raised in the ZBA Appeal, and should have and could have been raised in that appeal. To the extent the claims were raised, those claims were finally decided; to the extent they were not raised, they should have been. Under either scenario, the claims would be barred by *res judicata*, and this Court would lack jurisdiction to entertain those claims

as untimely.[14] It should not be lost on the Court that Plaintiff is in effect collaterally attacking the Circuit Court's decision on the ZBA appeal, and the decision of the Michigan Court of Appeals rejecting Plaintiff's Application for Leave to Appeal the decision of the Circuit Court.

Plaintiff cannot file this second cause of action attempting to create an "independent" cause of action that does not exist in a hope to fabricate a safety net if Plaintiff is unsuccessful on the statutory ZBA appeal. In sum, the causes of action asserted in this lawsuit may contain different labels, but in substance, are the same issues and claims which were raised, or could have been raised, in the Plaintiff's appeal of the ZBA decision to the Circuit Court. The "causes of action" are nothing more than the reasons why the Plaintiff believes the ZBA should have granted it relief. The claims were required to have been joined and raised in the ZBA appeal to Circuit Court.

II. PLAINTIFF'S CLAIMS IN THIS SECOND LAWSUIT WERE BARRED BY *RES JUDICATA.*

In affirming the Circuit Court's order granting summary disposition to the City on the basis of *res judicata*, the Court of Appeals concluded that "the same evidence involved in the appeal would be used to prove allegations contained in the subsequent lawsuit." The Court of Appeals noted that Plaintiff's application for a use variance included arguments regarding the constitutional issues raised in Plaintiff's second lawsuit, which the Circuit Court was statutorily required to consider pursuant to MCL 125.585(11)(a).

The question of whether *res judicata* or collateral estoppel bars a subsequent action or claim is reviewed *de novo*. Adair v State of Michigan, supra, (*res judicata*); McMichael v

[14] Plaintiff was required to appeal the decision of the ZBA within twenty-one (21) days, and raise all the claims. See, Villa v Fraser Civil Service Comm, 57 Mich App 754, 226 NW2d 718 (1975); Schlega v Detroit Board of Zoning Appeals, 147 Mich App 79, 382 NW2d 737 (1985); Krohn v Saginaw, supra. The ZBA denied Plaintiff's use variance on December 1, 2004. Plaintiff filed the appeal to the Circuit Court on December 16, 2004. Plaintiff did not file this action until February 11, 2005, which is outside the 21 day limit at the time, and thus, the Court would lack jurisdiction to consider these untimely claims if not raised in the initial appeal.

McMichael, 217 Mich App 723, 726, 552 NW2d 688 (1996) (collateral estoppel). As stated in Annabel v Link Lumber Co, 115 Mich App 116, 122-123 (1982), quoting Strachau v Mutual Aide & Neighborhood Club, 81 Mich App 165, 169, 265 NW2d 66 (1978), rev'd on other grounds 407 Mich 928 (1979):

> Res judicata is a jurisdictional product founded upon the premise that litigation of a controversy must have a termination point. Otherwise, judicial resources would be unnecessarily expended, and the rights of litigants would be subjected to interminable contest.
>
> The doctrine of res judicata becomes applicable when an adjudicatory proceeding on a contested issue has progressed to a final determination, and all available courses of appeal have been exhausted or not pursued within the prescribed time limitations. Therefore, that issue becomes settled and may not be relitigated between the same parties in a collateral proceeding, absent some compelling equity not pertinent here.

Res judicata applies and the second action is barred when (1) the first action was decided on the merits; (2) the matter in the second action was or could have been resolved in the first; and (3) both actions involve the same parties or their privies. Dart v Dart, 460 Mich 573, 586, 597 NW2d 82 (1999); Baraga Co v State Tax Comm, 466 Mich 264, 269, 645 NW2d 13 (2002). Moreover, *res judicata* not only bars claims that were actually raised and decided, but also the relitigation of issues which might have been presented to the Court in the first action. Brownridge v Michigan Mutual Ins Co, 115 Mich App 745, 747 (1982); Gursten v Kenney, 375 Mich 330, 334-334, 134 NW2d 764 (1965). Michigan law defines *res judicata* broadly, and the doctrine applies "to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." Peterson Novelties Inc v City of Berkley, 259 Mich App 1, 11, 672 NW2d 351 (2003) (retailer's claims asserting violation of constitutional rights in seizure of allegedly illegal fireworks could have been raised in retailer's emergency motion for order to show cause in the first case filed, and thus, the second case was barred by *res judicata*).

Collateral estoppel precludes the relitigation of issues between the same parties. VanVorous v Burmeister, 262 Mich App 467,479, 687 NW2d 132 (2004). Collateral estoppel applies when (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had an opportunity to litigate the issue; and (3) there must be mutuality of estoppel. Monat v State Farm Ins Co, 469 Mich 679, 682-684, 677 NW2d 843 (2004).

Plaintiff wants this Court to adopt a narrow application that would preclude *res judicata* unless the issues, facts, and evidence in both cases were "identical." This argument misses the mark. The doctrine applies to not only claims that were raised and litigated, but also to those that could have been asserted. Plaintiff cannot pick and choose the claims it wants to raise, and then "reserve" other claims for another day if it is unsuccessful in the first case. As set forth in the Argument above, Plaintiff clearly could have, and was required to, raise the claims in this case in the appeal of the ZBA decision to the Circuit Court. Moreover, it is without question that Plaintiff raised constitutional challenges to the zoning of the property both in its application before the ZBA, and in its Circuit Court Appeal. (See, Plaintiff's Circuit Court ZBA Appeal Brief, p. 7 with the caption: The Zoning Ordinance, As Applied to the Property, is Undeniably Unconstitutional). Plaintiff argued in the application before the ZBA, and on appeal to the Circuit Court, that the City's Zoning Ordinance was unconstitutional, and that the ZBA's decision to deny the use variance violated the law because the property was too small to develop and did not have sufficient access for development, i.e. the property could not be used as zoned. By affirming the ZBA, the Circuit Court rejected each and every one of the issues and claims raised by Plaintiff, and confirmed that the ZBA decision was supported by law. There is no dispute that the parties are the same in each action and that the first action was decided on the merits. There is no question that the issues and claims were decided, or could have been

decided, and this second lawsuit is barred. See, Community Treatment Center v Westland, supra; Cramer v Vitale, supra (plaintiff failed to appeal decision of the ZBA to circuit court, and instead filed an action claiming constitutional violations some seven months after the ZBA decision. The Court found this to be an impermissible attempt to collaterally attack the ZBA decision without following the proper appeal procedure); Sammut v Birmingham, supra (constitutional claims should have been raised in the ZBA appeal, and second case was barred by *res judicata*).

III. THIS COURT SHOULD REFRAIN FROM DECIDING WHETHER THE CASE IS RIPE FOR ADJUDICATION.

This case involves the fundamental question of what remedy exists when a landowner is dissatisfied with a decision rendered by a ZBA. *Amici Curiae* submit that the Michigan Legislature has formulated a specific, expedited review and limited relief that applies to a ZBA decision. Unless a landowner timely appeals that ZBA decision to Circuit Court, the Court lacks jurisdiction to consider the appeal. As conceded by Plaintiff, the ZBA appeal does not include the possibility of any award of damages. The sole remedy is a speedy review of the ZBA decision, with the Circuit Court either affirming the ZBA, reversing the ZBA, or remanding the matter to the ZBA for further review. In other words a ZBA appeal is a unique animal.

The ripeness doctrine was formulated in part on the fact that it would be patently unfair to hold a municipality (and in reality, its citizens) liable for money damages for violation of constitutional rights in the land use context until such time as the municipality had the opportunity to fully review and decide the type and intensity of development which would be permitted on the property, and further due to the fact that a Court could not properly evaluate any constitutional attack in the absence of a final decision by the municipality. Obviously, at this juncture, Plaintiff's constitutional claims would not be ripe because Plaintiff has not obtained a final decision from the City as it has never applied for either a rezoning or

conditional rezoning of the property. The City's legislative body has never been given an opportunity to make a final decision on the use of the subject property. The Michigan Legislature, fully aware of the ripeness doctrine, again elected to limit any litigation related to the ZBA to an appeal of that decision when it recently adopted the Michigan Zoning Enabling Act. In exchange for the Plaintiff not having to obtain a final decision and ripen its claims, Plaintiff's only relief is the statutory appeal if Plaintiff elects to only proceed to the ZBA.

Assuming this Court recognizes that the sole remedy in this matter was the statutory appeal under the Zoning Enabling Act, there would be no need to address the ripeness issue.

IV. IF PLAINTIFF PREVAILS ON ITS ARGUMENT THAT THIS LAWSUIT CONTAINS SEPARATE CAUSES OF ACTION FROM THE ZBA APPEAL, THEN PLAINTIFF'S CONSTITUTIONAL CLAIMS ARE NOT RIPE FOR ADJUDICATION.

The United States Supreme Court first defined the ripeness doctrine in the landmark case of Williamson County Regional Planning Commission v Hamilton Bank of Johnson City, 473 US 172; 105 S Ct 3108; 87 L Ed 2d 126 (1985). In 1973, the County had adopted a zoning ordinance that allowed, among other things, "cluster" development of residential areas. The then owner of the property submitted a preliminary plat for cluster development. The preliminary plat was approved for 676 units. In 1977, the County changed its zoning ordinance which reduced the density permitted under the cluster development. The County continued to apply 1973 regulations to the subject property. However, in 1979, the Planning Commission "changed its mind" and applied the new ordinance regulations to the developer's request for renewal, and ultimately disapproved the preliminary plat for several reasons.

Hamilton Bank thereafter acquired through foreclosure the portion of the property that had not yet been developed. The bank then submitted two preliminary plats to the Planning Commission, which were denied. The Planning Commission declined to follow the decision rendered by the County Zoning Board of Appeals. Hamilton Bank sued, alleging that the County

had taken its property without just compensation. After a three week trial, the jury awarded the bank $350,000.00 for the temporary taking of property. The lower court granted judgment notwithstanding the verdict. A divided panel of the Sixth Circuit reversed, finding a temporary taking was compensable, and holding that the jury had found a vested right to develop under the former regulations.

Although the United States Supreme Court granted certiorari to address the question of whether damages must be paid for a temporary taking, the Court instead *sua sponte* raised and disposed of the case on the issue of ripeness, finding that because the claims were not ripe, the Court lacked jurisdiction. In discussing the first prong of the ripeness doctrine, the Court wrote:

> As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. Id., at 186.

The Court noted that the bank had failed to apply for available variances and waivers from the commission that may have provided the desired result.

The Court also explained the need to focus on the elements of claims necessary to be proven for a property owner to invalidate a land use decision or regulation on constitutional grounds. Courts had consistently indicated that among the factors of particular significance in any inquiry would be the economic impact of the challenged action and/or regulation, and the extent to which it would interfere with reasonable investment-backed expectations. The United States Supreme Court then stated:

> **Those factors simply cannot be evaluated until 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.** Here, for example, the jury's verdict indicates only that it found the respondent would be denied the economically feasible use of its property if it were forced to develop the subdivision in a manner that would meet each of the commission's eight objections. It is not clear whether the jury would have found that the respondent had been denied all reasonable beneficial use of the property had

> any of the eight objections been met through the grant of a variance. Indeed, the expert witness who testified regarding the economic impact of the commission's actions did not itemize the effect of each of the eight objections, so the jury would have been unable to discern how a grant of a variance from any one of the regulations at issue would have affected the profitability of the development. Accordingly, until the commission determines that no variances will be granted, it is impossible for the jury to find, on this record, whether a respondent 'will be unable to derive economic benefit' from the land. Id., at 191. (emphasis added).

Hamilton Bank had claimed that there was no requirement to "exhaust administrative remedies" before asserting the constitutional claims. The Court clarified its position as follows:

> The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable.... While the policies underlying the two concepts often overlap, the 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**; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate... Id., at 193. (emphasis added.)

The Court required that a property owner resort to the procedures available to obtain a "conclusive determination" as to whether the property could be developed "in the manner respondents proposed." Id., at 193. The Supreme Court has also confirmed this first prong of the ripeness doctrine in subsequent opinions. See, Palazzolo v Rhode Island, 533 US 606, 620; 121 S Ct 2448; 150 L Ed 2d 592 (2001) (landowner must first follow the "reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property"); Suitum v Tahoe Regional Planning Agency, 520 US 725, 117 S Ct 1659, 137 L Ed 2d 980 (1997); Tahoe-Sierra Preservation Council v Tahoe Regional Planning Agency, 535 US 302, 122 S Ct 1465, 152 L Ed 2d 517 (2002). There is also a second prong to the ripeness doctrine. In addition to obtaining a final decision, the Supreme Court held that the landowner must also seek compensation through the procedures the State has provided for doing so. "The Fifth Amendment does not proscribe the taking of property; it

proscribes taking without just compensation." Williamson, 473 US at 194. A federal claim is not ripe until a landowner has used the state procedures and been denied just compensation, because if that has not happened, the government's action is not complete:

> In sum, respondent's claim is premature, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the just compensation clause of the Fifth Amendment. Id., at 200.

Since Williamson County, federal courts throughout the nation have applied the final decision requirement, and found claims unripe for failure to obtain a final decision. The ripeness doctrine has been applied to takings claims, substantive due process claims, and equal protection claims. See, for example, the numerous cases in the Sixth Circuit Court of Appeals. Bigelow v Michigan Dept of Natural Resources, 970 F2d 154, 158-159, (CA 6, 1992) (ripeness applies to equal protection claim); Warren v City of Athens, Ohio, supra at 708 (ripeness requirements apply to claims that are ancillary to takings claims – based on the same set of facts); Peters v Fair, 427 F3d 1035, 1037 (CA 6, 2005) and Arnett v Nyer, 281 F3d 552, 556 (CA 6, 2002) (substantive due process and equal protection claims that are ancillary to a takings claim are subject to ripeness); J-II Enterprises LLC v Board of Commissioners of Warren County, 135 Fed Appx 804, 807 (CA 6, 2005) (equal protection claim not ripe if takings claims is not ripe for review).

Michigan Courts have followed the final decision requirement. In Paragon Properties Co v City of Novi, supra, plaintiff bought property located in the City of Novi which was zoned for single-family residential use. Approximately four years later, Paragon requested that the City of Novi rezone the land for a mobile home park, which rezoning request was denied. Litigation subsequently ensued. The City moved for summary disposition on the basis that Paragon's claims were not ripe for adjudication because no final decision had been made where Paragon had not sought a variance from the Zoning Board of Appeals. That motion was denied by the

Court. After trial, the Court found that the zoning of the property amounted to a taking of property without just compensation. Judgment was entered enjoining the City from enforcing the single-family residential classification, approving Paragon's proposed mobile home park, and awarding damages and attorney fees of approximately $500,000. The City's Motion for a New Trial or Judgment Notwithstanding the Verdict was denied, and an appeal was taken.

The central issue on appeal was whether the City's denial of Paragon's rezoning application constituted a "final decision" from which Paragon could seek redress in the Circuit Court. The City argued that Paragon had not received a final decision as it had failed to seek a variance from the Zoning Board of Appeals. The Court of Appeals, at 206 Mich App 74; 520 NW2d 34 (1994) agreed with the City that plaintiff had an obligation to seek a variance, even after the denial of rezoning, and reversed the Trial Court.

This Court, in Paragon, affirmed and applied the same reasoning:

> The finality requirement aids in the determination of whether a taking has occurred by addressing the actual economic effect of a regulation on the property owner's investment-backed expectations. As noted in Williamson, factors affecting a property owner's investment expectation 'simply cannot be evaluated until 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. Investment-backed expectations are distinguishable from mere financial speculation.' 452 Mich 568, 578-579; 550 NW2d 773 (1996).

See, also, Electro Tech Inc v HF Campbell Co, 433 Mich 57, 445 NW2d 61 (1989), cert den 493 US 1021 (1990); Lake Angelo Associates v White Lake Township, 198 Mich App 65; 498 NW2d 1 (1993).

In Braun v Ann Arbor Twp, 262 Mich App 154, 683 NW2d 755 (2004), the landowner filed an application to rezone the subject property from A-1 (Agricultural) and R-2 (Single-Family Suburban), to R-3 (Single-Family Urban) and R-6 (Mobile Home Park Residential). The Township Board denied the request. The landowner then filed a complaint asserting the following violations: (1) substantive due process; (2) equal protection; (3) inverse

condemnation; and (4) exclusionary zoning. Id., at 156. The Circuit Court ruled that plaintiff's claims were not ripe and dismissed the complaint. The Court of Appeals affirmed because the possible development of the land had not been established, explaining:

> The [United States] Supreme Court...observed...that its 'cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it.'
>
> * * *
>
> The Supreme Court has stated that '[until] a property owner has obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property it is impossible to tell whether the land retains any reasonable beneficial use or whether existing expectation interests have been destroyed.' Id., at 158.

The Braun Court emphasized that controlling United States Supreme Court authority, explained above, requires property owners to show that they sought and were denied alternative uses of the property, thus leaving the landowner with no economically feasible use of the property. The ripeness doctrine specifically requires that a landowner actually obtain a final decision - not play procedural games to bypass the local municipality in a hope to obtain alternative relief through the Court. Conlin v Scio Twp, 262 Mich App 379, 686 NW2d 16 (2004).

Put simply, Plaintiff's position is inconsistent and incorrect. If Plaintiff truly believes that it has an independent, original cause of action, then Plaintiff's claims asserted in this case clearly were not ripe. Contrary to the disingenuous arguments advanced by Plaintiff, the law does not require that the landowner either apply for a rezoning or a variance. Instead, the law clearly requires the landowner to make the applications necessary to obtain a final decision from the municipality as to the type and intensity of development that will be permitted on the property. Ripeness goes to the very heart of whether the Court has jurisdiction to consider the case. Bigelow v Michigan Dep't of Natural Resources, supra, at 157. Here, the Plaintiff requested a use variance from the ZBA, which was denied. There is no question that the

Plaintiff did not file any other applications to obtain a final decision from the City. Plaintiff never filed an application for a rezoning or conditional rezoning of the property. At a minimum, a denial of a rezoning, combined with a denial of a use variance, would be required to ripen Plaintiff's alleged constitutional claims in this instance, as all of these procedures could have afforded Plaintiff the use it sought. Plaintiff clearly did not have a final decision from the City, and Plaintiff cannot meet the first prong of the ripeness test. In addition, to the extent that Plaintiff is attempting to also raise federal constitutional claims, Plaintiff has not satisfied the second prong of the ripeness doctrine - Plaintiff has not pursued state claims to completion. Thus, if this Court determines that Plaintiff can assert an independent, original complaint in this matter, there can be no other conclusion but this lawsuit was not ripe for adjudication. Plaintiff's actions fly in the face of existing law, and are a clear end run around the ripeness doctrine.

CONCLUSION AND RELIEF REQUESTED

Plaintiff sought a use variance from the ZBA, and nothing more. Plaintiff argued to the ZBA that the City's Zoning Ordinance was unconstitutional and that a use variance was needed in order to provide Plaintiff with any reasonable use of the property. Plaintiff again raised the constitutional claims and arguments in the appeal of the ZBA decision to Circuit Court. To hedge its bet, Plaintiff also filed this lawsuit, purporting to set forth an independent, original cause of action. The Circuit Court correctly determined that the claims in this case should have been raised in the ZBA appeal, correctly ruled that the claims in this case were barred by *res judicata*, and correctly denied Plaintiff's Motion for Leave to Amend in order to end this litigation. The Michigan Court of Appeals reached the correct conclusion as well.

Amici Curiae, the Michigan Municipal League and the Public Corporation Law Section of the State Bar of Michigan, respectfully request that this Court deny Plaintiff's Application for Leave to Appeal the decision of the Court of Appeals.

Respectfully submitted,

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