



Report on Public Policy Position

Name of Section:

Real Property Law Section

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RE:

Amicus brief on *Houdini Properties, LLC v City of Romulus*, Sup. Ct. 132018; Court of Appeals 266338

Date position was adopted:

July 21, 2007

Process used to take the ideological position:

Discussion and vote of the Council of the Section

Number of members in the decision-making body:

17

Number who voted in favor and opposed to the position:

10 voted in favor; two abstained.

Position:

Please see attached statement.

The text (may be provided by hyperlink) of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report:

Not applicable.

Houdini Properties, LLC v City of Romulus, Supreme Court: 1320 18; Court of Appeals: 266338. The Michigan Supreme Court set oral argument on whether to grant leave to appeal or take other peremptory action and invited the Real Property Law Section to file an amicus brief.

The decision of the Court of Appeals and the order of the Supreme Court address the relationship between a property owner's constitutional challenge to a zoning ordinance and an appeal, by the same property owner, of an administrative decision to deny a particular proposed use for the property. The issues raised by those separate actions has been complicated (and multiplied) by the rule announced 10 years ago by the Supreme Court in *Paragon Properties Co. v City of Novi*, 452 Mich 568; 550 NW2d 772 (2006). The *Paragon* Court held that a property owner who claims that the zoning ordinance, as applied to its property, amounts to a taking

without compensation must request a variance to permit the use of the property. That request must first be denied before a claim that the property has been taken is ripe for consideration by the courts.

The Real Property Law Section, by vote of the Section Council, authorized the filing of an amicus brief intended to make clear that, as Michigan courts have held since *Paragon*, the request for a variance, required to ensure that a taking claim is ripe under the rule announced in *Paragon*, is legally distinct from the claim that the zoning ordinance is unconstitutional as applied to the plaintiffs property. The decision of the court upholding the denial of a request for a use variance, applying a different legal standard to review an administrative record, is therefore not *res judicata* as to a taking claim or substantive due process claim. Further, because the requirement of *Paragon* for a variance request is to determine how the local government in the first instance will apply its ordinance to the property, an appeal from the denial of a variance is not required for ripeness. Finally, an appeal of a variance is on the record established in the ZBA and distinct from the action challenging the ordinance, which the ZBA has no authority to decide, and should not preclude a separate constitutional claim. The Court of Appeals in *Sun Communities* and in *First Rural Housing* has held that a property owner need not appeal the denial of a variance but may still pursue a constitutional challenge to the ordinance, quoting the holding in *Paragon*.

In this case, Houdini Properties appealed the denial of a use variance to the circuit court and also filed an action (apparently separate), claiming that the ordinance as applied to its property deprived it of substantive due process and constituted a taking of its property without compensation. Under the ripeness rule of *Paragon*, the variance request is a necessary condition to bring a taking claim. The circuit court affirmed the decision of the zoning board of appeals to deny the variance and Houdini filed an application for leave to appeal that decision to the Court of Appeals.

Romulus then moved to dismiss the constitutional claims, asserting that they should have been joined with the appeal from the ZBA and that the denial of the variance and appeal is *res judicata* as to the constitutional claims. The trial court and the Court of Appeals agreed. The Court of Appeals reasoned that an appeal is a pleading, and that the constitutional claims "arise directly from defendant's denial of the use variance." Therefore, the compulsory joinder rule applies so as to require the plaintiff to assert and include its taking claim in the same document as its claim of appeal; when the plaintiff filed its claim of appeal to the Wayne County Circuit Court, its claim was ripe, and once the Wayne County Circuit Court affirmed the ZBA decision, that determination was *res judicata* with respect to the plaintiffs constitutional taking claim.

The Supreme Court directed the parties to include among the issues to be addressed at oral argument (1) whether the claim of appeal in circuit court was a "pleading" to which the compulsory joinder rule of MCR 2.203(A) applies, so as to require the plaintiff to assert and include its taking claim in the same document as its claim of appeal; (2) whether, when the plaintiff filed its claim of appeal, the plaintiffs taking claim was ripe for review under the rule in *Paragon*; and (3) whether, once the circuit court affirmed the ZBA's variance denial, that determination was *res judicata* with respect to the plaintiffs constitutional taking claim.

The constitutional claims in this and most other zoning cases say that the ordinance, as applied to the plaintiffs property, is arbitrary, unreasonable, and deprives the land of all of its value. It is therefore the ordinance, not the denial of the variance, that offends the Constitution. One of the predicted dangers of the *Paragon* rule that all takings plaintiff must first seek a variance (see, e.g., Friedlaender, "Paragon's Catch 22: Can Seeking and Being Denied a Use Variance from a ZBA Preclude the Litigation of a Subsequently-Filed Taking Claim?" 25 Mich Real Prop Rev 161, Fall 1998) was precisely what has happened in Houdini - that the courts would view the denial of the variance as the gravamen of the action and regard the constitutional claim as a restatement of the same claim.

The Court of Appeals and trial court decisions, in a variation of the theory put forward by the township in *Hendee v Putnam Twp*, confuse the administrative application of the ordinance and the distinct claim and remedy for a violation of the Constitution.

The brief is not intended to support the plaintiffs particular use (indeed, the Court of Appeals opinion and does not even disclose the plaintiffs proposed use), but to clarify the application of the *Paragon* ripeness rule and the court rules to ensure that constitutional protections for property are not lost in procedural and prudential requirements of the courts.