



## Landowners Do Not Need to Raise Constitutional Claims in ZBA Appeal

Administrative & Municipal Practice Group

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**PRACTICE AREAS**

Zoning & Land Use

In a recent case before the Michigan Supreme Court, *Houdini Properties, LLC v City of Romulus*, 480 Mich 1022, 743 NW2d 198 (2008) a landowner had requested a use variance to erect a billboard on its property. The City's Zoning Board of Appeals (ZBA) denied the request, based on the recommendation of its planning consultant. The landowner appealed the ZBA decision in circuit court by filing a "claim of appeal" under the former City and Village Zoning Act (now the Zoning Enabling Act). The landowner then filed a separate lawsuit against the City, asserting the constitutional claims of taking, violation of due process, and violation of civil rights. While this lawsuit was pending, the circuit court upheld the ZBA's decision in the claim of appeal. The circuit court then dismissed the landowner's separate lawsuit, finding that the constitutional claims should have been raised in the claim of appeal, and the landowner was not entitled to a second chance to raise them. The court applied the concept of *res judicata*, which means that when a party has an opportunity to raise an issue and does not, the party cannot raise that same issue in a second lawsuit involving the same facts and the same parties. The Court of Appeals agreed with this decision.

The Supreme Court, on January 18, 2008 reversed the decision in an order reversing both the trial court and the Court of Appeals. The Supreme Court ordered that the landowner was not required to raise the constitutional issues in its claim of appeal, and *res judicata* did not prevent the subsequent lawsuit. This decision was based largely on the fact that the ZBA did not have jurisdiction to decide constitutional issues, and it would therefore be futile to require a landowner to raise those issues before the ZBA. A claim of appeal to the circuit court is limited strictly to the record and decision of the ZBA. As a result, Plaintiff's lawsuit asserting the constitutional claims was allowed to go forward.



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The impact of this order is that a party who appeals a ZBA decision to the circuit court is not required to raise all possible claims in the appeal. If the ZBA does not have jurisdiction to decide certain issues, such as constitutional claims, the party may file a separate lawsuit asserting those issues. This would apply to any township zoning decision that a landowner may appeal, such as the denial of a rezoning request or special use permit.

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