

# CITY OF GRAND RAPIDS MICHIGAN

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September 30, 2011

***Via US Mail and MSC\_Clerk@courts.mi.gov***

Mr. Corbin Davis  
Clerk of the Michigan Supreme Court  
P.O. Box 30052  
Lansing, MI 48900

***Re: ADM file No. 2010-19, June 28, 2011***

Dear Mr. Davis:

The City of Grand Rapids Department of Law submits these comments on the proposed amendments to the Michigan Court Rules 7.100 et seq., concerning appellate procedure in the circuit court. We support the proposed MCR 7.101-7.115 and 7.123, oppose a portion of proposed 7.122, and take no position on proposed MCR 7.116-7.121.

We support the general revamping of circuit court appellate procedure as articulated in the proposed MCR 7.101 through 7.115 and 7.123. Appeals to the circuit court can be just as procedurally complicated as those to the Court of Appeals. But the current iteration of subchapter 7.100 is inadequate to handle these complexities. To cite one recent example, appellate counsel for a defendant convicted of OWI (first offense) filed a claim of appeal to the circuit court and subsequently filed a motion to remand in order to hold a *Ginther* hearing in the district court. What rules control motion practice, MCR 2.119 or MCR 7.211? Can the circuit court even entertain a special motion under MCR 7.211(C)? The current MCR 7.100 provides no guidance. While the issue was resolved and the motion heard, the proposed rules would have made the answers clear from the start.

Additionally, we believe that the way in which the Committee drafted proposed rules 7.101-7.115 effectively blends the circuit courts' general procedure with appellate procedure, thus providing the most effective way of handling appeals at the circuit court level. To praise a few examples of this attention to detail:

- Using MCR 2.119 for motion practice instead of 7.211. The general motion practice of the circuit court is sufficient and allows appellate motions to fit within the court's normal motion schedule.
- Keeping the brief page limit at fifty pages. Circuit court appeals can involve complex legal arguments (e.g., constitutional challenges of ordinances). Sometimes twenty pages aren't enough.
- Allowing the circuit court to decide the appeal without oral argument. As the current rule reads, oral argument is mandatory if requested by a party. MCR 7.101(L). As a matter of efficiency and judicial discretion, the circuit court should be free to decide a case without oral argument in the same manner as the Court of Appeals. *See* MCR 7.214(E); COA IOP 7.214(E).

Nevertheless, we must oppose proposed MCR 7.122, which governs appeals from zoning ordinance decisions. While this section is generally acceptable, we have two objections. First, proposed 7.122(F) states that briefing is to be done pursuant to MCR 7.211. We submit that the citation should be changed to 7.111; otherwise it appears that the Court of Appeals' briefing schedule of fifty-six days—not the standard 21 days for circuit court appeals—will control. Developers and cities need finality in a timely matter when it comes to land use; there are often significant financing, economic, and practical conditions that may change because of delay. In our experience, there is no reason why most appeals of zoning decisions cannot be adequately briefed within the twenty-one day period.

Second, and more substantially, the city opposes the last sentence of 7.122(A)(2), which states “An appeal under this section may be joined with a complaint for declaratory relief, injunctive relief, equitable relief, money damages, or other available relief.” This sentence is problematic for three reasons.

First, the sentence will undermine this Court's position that pleadings and appeals ought not to mix. *Houdini Properties, LLC v City of Romulus*, 480 Mich 1022, 1022; 743 NW2d 198 (2008). *Houdini*, although a preemptory order in lieu of granting leave to appeal, is precedent and has controlled the decisions of lower courts. *See Whitmore Lake 23/LLC v Ann Arbor Charter Tp*, COA No. 294696 (2011)(unpublished). The proposed MCR 7.122(A)(2) is not only contradictory to *Houdini*, but encourages the practice of bootstrapping “related” actions, like a takings claim, onto appeals of zoning decisions. Indeed, we submit that the wording of 7.122(A)(2) is so broad as to allow an aggrieved property owner to bring *any claim* it has against a city under the permissive joinder rules. Taken to its hypothetical extreme, an aggrieved property owner may appeal an adverse decision of the BZA, bring an injunctive action challenging the operative zoning ordinance, and bring a complaint against the city for damages from falling on a defective city sidewalk—all in the same action. One can imagine the potential for abuse created by this anything-under-the-sun interpretation.

Second, this sentence puts the circuit court in a bad position. Allowing a party to bring an original action at the same time as an appeal of an agency decision creates case management problems. The time-sensitive land use issue will be stuck in limbo while parties conduct discovery on the pleadings, keeping open on the circuit court's docket an appeal that could have been decided months ago. Most importantly, this sentence conflates the circuit court's different jurisdictional powers, thus inviting error on appeal. The standard of review on zoning decisions is narrow and based on the record before the agency. *See* Const. 1963, art. 6, § 28; MCL 125.3606, *Houdini, supra*. It will be difficult for the circuit court to bifurcate its jurisdictional duties: to review pleadings and newly submitted evidence through the eyes of a trial judge, on the one hand; but to review the agency record and errors on appeal through appellate blinders, on the other. In effect, this sentence may trigger the circuit court to mutate into the ever-dreaded "super-zoning board." *See e.g., Kyser v Twp*, 486 Mich 514, 538; 786 NW2d 543, 557, *reh den* 488 Mich 860 (2010).

Finally, this sentence may complicate the procedural posture of these appeals in the Court of Appeals. Appeal of the circuit court's decisions on the bootstrapped pleading will be of right, while its decision on the appeal of the zoning decision will be by leave. *See* MCR 7.203. Just as the last sentence of MCR 7.122 complicates the circuit court's jurisdiction, it may prove difficult for the Court of Appeals to sort out its own appellate jurisdiction.

In light of our objections, we recommend that the last sentence of MCR 7.122 be stricken. As a corollary, we recommend that a stay of enforcement provision, such as the one found in proposed MCR 7.123(E), be added to section 7.122. That way, aggrieved parties will be able to hold off irreparable results of zoning decisions, like demolition or construction, while the appeal is litigated.

Thank you for the opportunity to comment on this matter.

Respectfully,



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