STATE OF MICHIGAN
IN THE SUPREME COURT
(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

LAKESHORE GROUP AND ITS MEMBERS, LAKESHORE CHRISTIAN CAMPING, CHARLES ZOLPER, JANE UNDERWOOD, LUCIE HOYT, WILLIAM REININGA, KEN ALTMAN, DAWN SCHUMANN & MARJORIE SCHUHAM,
Petitioners-Appellants,

v.

DUNE RIDGE SA, LP, and MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,
Respondents-Appellees.

Supreme Court No. _____

Court of Appeals No. 340623 & 340647

Ingham Circuit Ct. No. 17-176-AA

MAHS Docket 14-026236

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PETITIONERS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

*****ORAL ARGUMENT REQUESTED*****

PROOF OF SERVICE

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*****ORAL ARGUMENT REQUESTED*****

NOTICE OF FILING APPLICATION

TO: Michigan Court of Appeals Clerk
PO Box 30022
Lansing, MI 48909

Ingham County Circuit Court Clerk
313 W. Kalamazoo St., Ste. 1
Lansing, MI 48933

MAHS
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NOW COME Petitioners-Appellants Lakeshore Group and its members, Lakeshore Christian Camping, Charles Zolper, Jane Underwood, Lucie Hoyt, William Reininga, Ken Altman, Dawn Schumann and Marjorie Schuham, and state that on May 2, 2019, their application for leave to appeal has been filed with the Michigan Supreme Court.

Respectfully Submitted,

Date: May 2, 2019

/s/ Dustin P. Ordway

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PETITIONERS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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STATEMENT IDENTIFYING JUDGMENT APPEALED

This is an application for leave to appeal from the unpublished Michigan Court of Appeals' opinion dated March 21, 2019, attached as Exhibit A, reversing the September 28, 2017 decision of the 30th Circuit Court, attached as Exhibit B, which had found that petitioners had standing to pursue a contested case review of multiple sand dunes development permits MDEQ issued to Dune Ridge. The Court of Appeals reinstated decisions by the administrative law judge that had (i) rejected the standing of parties previously found to satisfy the statutory grounds for standing to pursue a contested case petition pursuant to MCL 324.35305(1), (ii) rejected other grounds for standing and, as a result, (iii) summarily dismissed the consolidated contested case without a hearing. The Opinions and Orders of the ALJ are attached as:

Exhibit C	ALJ Opinion and Order dated October 28, 2015;
Exhibit D	ALJ Opinion and Order dated January 26, 2016;
Exhibit E	ALJ Opinion and Order dated July 7, 2016; and
Exhibit F	ALJ Opinion and Order dated February 13, 2017.

Lakeshore Group and its members, Lakeshore Christian Camping, Charles Zolper, Jane Underwood, Lucie Hoyt, William Reininga, Ken Altman, Dawn Schumann and Marjorie Schuham, respectfully submit this brief in support of their Application for Leave to Appeal the Appellate Decision. Exhibit A.

RELIEF SOUGHT

Petitioners-Appellants respectfully ask this Court to grant leave to appeal or, in the alternative, to take peremptory action reversing the Court of Appeals decision and upholding the standing of Lakeshore Group and at least one of its members to be heard in a contested case challenge to the Part 353 permits Respondent-Appellee MDEQ issued to Respondent-Appellee Dune Ridge to develop a 130-acre former church camp and remanding this case to the administrative tribunal for full contested case proceedings.

STATEMENT OF QUESTIONS PRESENTED

I. Where a person (Ms. Underwood; Mr. Zolper) is found to satisfy the narrow statutory standard for standing of MCL 324.35305(1) to file a contested case petition challenging sand dunes permits throughout a 130-acre property pursuant to Part 353 of NREPA because the petitioner is the "owner of property immediately adjacent to a proposed use" in protected sand dunes, and where said person with standing does not change his or her status as owner of the same property, may that petitioner proceed to hearing on multiple Part 353 permits notwithstanding the developer's sale of the sliver of property adjacent to the petitioner with standing?

Petitioners-Appellants answer: "Yes."

Respondents-Appellees Dune Ridge and MDEQ answer: "No."

The Administrative Tribunal (after first answering "Yes") answers: "No."

The 30th Circuit Court answers: "Yes."

The Court of Appeals answers: "No."

II. Where a person (Ms. Hoyt; Mr. Reininga) has the exclusive right to the possession and use of his or her home, is that person an "owner" of the home for purposes of standing under MCL 324.35305(1), which authorizes a person who is the "owner of property immediately adjacent to the proposed use" to pursue a contested case, despite the fact that the homeowner's association holds legal title to the property?

Petitioners-Appellants answer: "Yes."

Respondents-Appellees Dune Ridge and MDEQ answer: "No."

The Administrative Tribunal (after first answering "Yes") answers: "No."

The 30th Circuit Court answers: "Yes."

The Court of Appeals answers: "No."

III. Where a person has moved under MEPA to intervene into a pending contested case proceeding to review Part 353 sand dunes permits, does that person have standing to be heard in the contested case?

Petitioners-Appellants answer: "Yes."

Respondents-Appellees
Dune Ridge and MDEQ answer: "No."

The Administrative Tribunal answers: "No."

The 30th Circuit Court did not answer this question.

The Court of Appeals answers: "No."

IV. Where a person does not fall within the two statutory authorizations to file a contested case petition under MCL 324.35305(1) (permit applicant; owner of immediately adjacent property) but is an interested party under the statutory scheme of Part 353 and has a substantial interest different from the general citizenry in protecting the dunes where she lives, does that person have standing to participate in the contested case proceeding pursuant to Michigan common law?

Petitioners-Appellants answer: "Yes."

Respondents-Appellees
Dune Ridge and MDEQ answer: "No."

The Administrative Tribunal answers: "No."

The 30th Circuit Court did not answer this question.

The Court of Appeals answers: "No."

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Michigan Constitution

Const. 1963, art. IV, § 52:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

Const. 1963, art. VI, § 28:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. . . .

The Michigan Environmental Protection Act ("**MEPA"),** MCL 324.1701 *et seq.*

324.1701(1):

> (1) The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief *against any person* for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction (emphasis supplied).

324.1704(2):

> (2) If administrative, licensing, or other proceedings are required or available to determine the legality of the defendant's conduct, the court may direct the parties to seek relief in such proceedings. . . .

324.1705(1):

> (1) If administrative . . . proceedings are available by law, the agency or court may permit the attorney general or any other person to

> intervene as a party on the filing of a pleading asserting that the proceeding . . . involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources.
>
> 324.1705(2):
>
> (2) In administrative . . . proceedings . . . , the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resource, shall be determined. . . .

The full text of MEPA is provided with this application as **Exhibit G.**

The Sand Dunes Protection and Management Act, Part 353 of the Natural Resources and Environmental Protection Act or "NREPA," MCL 324.35301 *et seq*.

> 324.35302:
>
> The legislature finds that:
> (a) The critical dune areas of this state are a unique, irreplaceable, and fragile resource that provide significant recreational, economic, scientific, geological, scenic, botanical, educational, agricultural, and ecological benefits to the people of this state and to people from other states and countries who visit this resource.
> (b) The purpose of this part is to balance for present and future generations the benefits of protecting, preserving, restoring, and enhancing the diversity, quality, functions, and values of the state's critical dunes with the benefits of economic development and multiple human uses of the critical dunes and the benefits of public access to and enjoyment of the critical dunes. To accomplish this purpose, this part is intended to do all of the following:
> (i) Ensure and enhance the diversity, quality, functions, and values of the critical dunes in a manner that is compatible with private property rights.
> (ii) Ensure sound management of all critical dunes by allowing for compatible economic development and multiple human uses of the critical dunes.
> (iii) Coordinate and streamline governmental decision-making affecting critical dunes through the use of the most comprehensive, accurate, and reliable information and scientific data available.
>
> 324.35303(1):

> . . . the "atlas of critical dune areas" dated February 1989 . . . shall [be] mail[ed] . . . to each property owner of record who owns property within a critical dune area. . . .
>
> 324.35304(1)(c):
>
> . . . Upon the written request of 2 or more persons who own real property within 2 miles of the project, the local unit of government shall hold a public hearing pertaining to the permit application.
>
> 324.35304(1)(g):
>
> . . . [to determine whether or not to approve a permit] the department [must] determine . . . [whether] the use will significantly damage the public interest on the privately owned land . . . by significant and unreasonable depletion or degradation of any of the following . . . diversity . . . quality . . . functions of the critical dune areas within the local unit of government.
>
> 324.35304(3&4):
>
> . . . The proposed construction, to the greatest extent possible, shall be placed landward of the crest . . . .
>
> . . . a structure shall be constructed behind the crest of the first landward ridge of a critical dune area that is not a foredune. . . . Access to the structure shall be from the landward side of the dune . . . .
>
> 324.35317:
>
> . . . [requiring analysis of factors like those in 35304(1)(g), above and]
>
> (2) The decision . . . shall be based upon evidence . . . [and be] based upon sufficient facts or data . . . the product of reliable scientific principles and methods . . . applied the principles and methods reliably to the facts . . . .

The full text of Part 353 is provided with this application as Exhibit H.

GROUNDS FOR APPLICATION AND JURISDICTION

The Supreme Court should grant this application under several of the grounds set forth in MCR 7.305(B). First, this application should be granted because it involves "a legal principle of major significance to the state's jurisprudence" and the decision of the Court of Appeals "is clearly erroneous and will cause material injustice," *see* MCR 7.305(B)(3) and (5)(a).

MDEQ's Part 353 sand dunes permits authorize Dune Ridge to transform a 130-acre, century-old church camp open to the public into a gated community of paved roads, large homes and septic drain fields across many acres of statutorily-protected sand dunes. The Court of Appeals erroneously rejected the standing of all petitioners on various legal grounds, the acceptance of any one of which would have allowed the underlying contested case proceeding to go forward. The complete rejection of all administrative review and, thereby, of any judicial review of the permitting process causes material injustice.[1] Constitutional provisions mandate protection of the environment and provide for judicial review of final agency decisions. The injustice of rejecting all review here is made starker by the legislative mandates in Part 353 to involve the public in the balancing of public interests in protected sand dunes against private property rights.[2]

---

[1] Notably, in a related case involving Lakeshore's application for leave to appeal, Michigan Supreme Court case 159033, MDEQ argues that there is no need for judicial review under the Michigan Environmental Protection Act, ("MEPA") of its Part 353 permit decisions *for the very reason that* the contested case review process rejected outright in this case is available. If the Court grants leave, it may wish to consider consolidating the appeals.

[2] *See, e.g.*, discussion at argument point I, below.

Each of the following four grounds for standing provided the Court of Appeals an opportunity to uphold the integrity of the contested case process and is a separate basis for granting this application under MCR 7.305(B)(3) & (5)(a). The four grounds are:

i. Ms. Underwood and Mr. Zolper should not have been divested of their §35305(1) standing;

ii. Ms. Hoyt and Mr. Reininga are "owners" for purposes of standing under §35305(1);

iii. MEPA authorizes intervention; and

iv. The petitioners satisfy grounds for common law standing.[3]

i. Underwood and Zolper: The Court of Appeals decision bars neighbors Jane Underwood and Charles Zolper who satisfy the standing criterion of MCL 324.35305(1) ("owner of property immediately adjacent to the proposed use") from being heard solely because the developer sold land next to them. The effect of wrongly rejecting these two owners' previously-established standing is a material injustice because it creates new Michigan law (that a defendant can divest a plaintiff of its established statutory standing) which avoids completely any contested case hearing to review the issuance by MDEQ of Part 353 permits to developer Dune Ridge.

[3] Petitioners-Appellants address all four legal issues in this application as we submit that all involve important legal principles that merit this Court's attention. However, we do not mean to suggest that all must be decided in order to remand the matter for a contested case hearing; that would follow from finding standing for any one of the petitioners on any ground.

This case presents issues of important jurisprudential significance because after the administrative law judge had correctly ruled that four of these petitioners (Underwood, Zolper, Hoyt and Reininga) satisfied the narrow statutory authorization of §35305(1) ("owner of property immediately adjacent"), the ALJ then took it away from Underwood and Zolper based on actions of the regulated developer even though no petitioner gave up its ownership of the relevant property, the permitted actions at issue are located across the 130 acres and *the property the developer sold was not the location of any of the permitted actions* at issue in the contested case. The Court of Appeals decision takes the decisions in other cases where a plaintiff *by his or her own actions gave up or undermined his or her standing* and misapplies it to allow the respondent to divest the petitioner of standing in this case. The Court of Appeals applies those inapposite decisions to make new law and reverse the Circuit Court decision, which had correctly ruled that petitioners with established standing did not lose it through the "brazen efforts of the developer to undermine the administrative review process." Court of Appeals decision, Exhibit A, at p 4-5, quoting from the Circuit Court decision.

No Michigan precedent takes away standing from a petitioner or plaintiff other than in situations where the petitioner no longer satisfies the criteria for standing due to petitioner's own actions or failures.[4] This is especially important because these petitioners have a strong, legitimate concern as neighbors living in

[4] Appellee MDEQ acknowledges in its brief to the Court of Appeals at page 13, fn2, that there is no Michigan case law directly on point. The need to fill this gap is a key reason leave should be granted so that this Court can address the issue properly.

the affected dunes. They are clearly interested parties under Part 353, as well as four of them having satisfied the standing authorization of section 35305(1). The petitioners did not move away or sell their property or otherwise give up the basis for their standing and, thus, their right to a contested case hearing as to all of the developer's permits for actions across the 130-acre property. The clearly erroneous Court of Appeals decision rejecting the standing of Underwood and Zolper causes material injustice.

The Court of Appeals decision also errs with regard to this issue of Underwood and Zolper's standing when it misstates the Circuit Court's ruling as rejecting any possible loss of standing after the initiation of a case. Exhibit A, at 6 ("the circuit court erred in holding that standing . . . cannot be lost"). The Circuit Court did not rule and petitioners have never argued that a petitioner cannot lose or give up one's standing, which might happen, for example, under §35305(1) if a petitioner sold the property that underlay that petitioner's standing.[5] But that did not happen here, and the Court of Appeals decision allows the party *whose conduct and permits are to be reviewed* to take away the standing of petitioners who have not given up or undermined their standing in any way, with the effect of short-circuiting the contested case process so as to avoid all administrative and judicial review. The Circuit Court properly rejected this result and held that petitioners did

[5] Nor does this case raise the issue of how to handle a contested case where the permitted activity is located on the sliver of land the developer sells and thereby is transferred to the buyer of that sliver. Whether that would result in dismissal, intervention into the contested case by the buyer or some other outcome is irrelevant here; the developer actions MDEQ permitted which are the subject of these consolidated contested cases were never to take place on the slivers of land the developer sold but were on other portions of the 130-acre development site.

not lose their standing in this case.[6] The Court of Appeals jurisprudential ruling creating new law to take away standing in these circumstances is not required by law and is contrary to common sense, good judgment and legal principles of statutory interpretation.

When the Court of Appeals decision discusses tenets of statutory interpretation, it ignores the fundamental rule that a provision like §35305(1) must be read in the context of and consistent with the statute as a whole. Part 353 provides that the "owner of property immediately adjacent to the proposed use" which is the subject of MDEQ approval of a developer's permits[7] to transform a protected sand dune is entitled to a contested case hearing. MCL 324.35305(1). But Part 353 also says much more about the public interests and, specifically, the rights and interests of those who live in and around the affected dunes. See, for example:

- 35302(a): "The legislature finds that . . . [t]he critical dune areas of this state are a unique, irreplaceable, and fragile resource [for not only] . . . the people of this state . . . [but also for] people from other states and countries who visit . . . .
- 35302(b): "The purpose of this part is to balance for present and future generations the benefits of protecting, preserving, restoring, and enhancing the diversity, quality, functions, and values of the state's critical dunes with the benefits of economic development and multiple human uses . . . [and] public access to and enjoyment of the critical dunes. . . ."
- 35302(b)(i): The legislature intended Part 353 to "[e]nsure and enhance the diversity, quality, functions, and values of the critical dunes . . . ," all characteristics that pertain to the

[6] The Circuit Court decision is so plainly correct on this point that this Court could simply affirm that decision and remand the case.

[7] Note that a permit is required for as minor an action as planning an addition or deck on an existing home on one lot. See, MDEQ's "Common Activities Needing a Permit" attached as Exhibit I. The scope of the plan for two-lane roads through steep slopes, 20 homes sites and an extensive community septic system is of tremendously greater scope and worthy of review. Const. 1963, art. IV, § 52; MCL 324.35301 *et seq.*

interrelationship of an affected development footprint within the local region of dunes.

- 35302(b)(ii): The legislature intended Part 353 to "[e]nsure sound management of all critical dunes [with] . . . compatible economic development . . . ," which management must take into account the relationship of the planned actions with the surrounding area.
- 35302(b)(iii): The legislature intended Part 353 to "[c]oordinate and streamline governmental decision-making affecting critical dunes through the use of *the most comprehensive, accurate, and reliable information and scientific data available*." Science speaks to the interrelationship between zones of dunes from the shoreline to the more elevated and vegetated back dunes, as well as throughout a local region.
- 35303(1): The department must notify "each property owner of record . . . within a critical dune area" of the designated protected sand dunes in their area.
- 35304(1)(c): A public hearing must be held if "2 or more persons who own real property within 2 miles of the project" request it.
- 35304(1)(g): The "significant and unreasonable depletion or degradation" of identified dunes characteristics "within the local unit of government" must be evaluated to determine whether or not to deny a dunes permit.
- 35304(3 & 4): The public's interest in the view of the dunes natural features from the public trust along the shoreline is protected from structures being placed too close to the shore and from construction of access to structures from the water side.
- 35317: A decision on whether to grant a variance or special exception requires a determination by the department whether the proposal "will significantly damage the public interest" in the specified dunes characteristics of diversity, quality and functions "within the local unit of government." These criteria inherently require an assessment of impacts not just in the project footprint but across the region of dunes where the project is planned. Such a determination must be based on "sufficient facts or data" in the file and "reliable scientific principles and methods." §35317(2). *See, e.g.*, §35320 regarding environmental impact statements, referring to the "general location" and requiring an aerial and contour map "showing the development site in relation to the surrounding area." An environmental impact statement may be required for a special use project, §35317(3), which includes any commercial project or multifamily use of more than 3 acres. §35301(j).

In sum, Part 353 evinces a strong policy established by the legislature under the constitution, art. IV, § 52, in favor of analysis of permit applications from the perspective not only of the general public but particularly the potential impacts on the local public and the dunes in which they live and recreate. The importance of the standing of concerned neighbors is heightened here because two sides of the 130-acre property are entirely devoid of individual neighbors, with the Lake Michigan shoreline forming the west boundary and Oval Beach Park the north.

The "clearly erroneous" decision of the Court of Appeals "will cause material injustice" because it deprives the petitioners and the public of any contested case hearing whatsoever. The Michigan constitution establishes a right to judicial review of final agency decisions. Const. 1963, art. VI, § 28. These parties were held to have standing and yet were deprived of even the administrative level of review, without which the circuit courts have no record upon which to provide judicial review of the permits pursuant to the Administrative Procedures Act of 1969. MCL 24.201 *et seq*. Where a party meets the statutory standard for standing under an applicable provision such as §35305(1), it should not be taken away and all review quashed in these circumstances.

ii. Hoyt and Reininga: Petitioners Hoyt and Reininga also grounded standing in ownership based upon the exclusive right to possess one's home, which was and remains immediately adjacent to the 130-acre development property.[8] The

[8] Like Underwood and Zolper, Hoyt and Reininga were correctly found to have a home immediately adjacent to the proposed use. Also like Underwood and Zolper, they did not move away. *Nor in their case did the developer sell the land next to them.* No one has ever challenged the fact that their home location meets the standing qualification of §35305(1).

rationale of the Court of Appeals for rejecting their standing is that they belong to an association which holds legal title to the property pursuant to the Summer Resort and Park Associations Act. MCL 455.1 *et seq.* However, since §35305(1) refers to the "owner" of the immediately adjacent property, not to the "holder of title" (and does not limit standing to one owner), and Hoyt and Reininga have the exclusive right to the possession and use of the property, they were properly considered "owners" for standing purposes and should not have been dismissed. Their ownership involves a "principle of major significance" to any homeowner. Their interests are unique. Their home is immediately adjacent. Their deprivation of standing is "clearly erroneous" and has caused a "material injustice" not only because it was necessary to the dismissal of the contested case without a hearing but particularly because of the deprivation of their individual rights.

iii. MEPA Intervention: The application is also grounded pursuant to MCR 7.305(B)(3) and (5)(a) with regard to standing through intervention pursuant to MEPA, which authorizes the intervention of all petitioners into the pending contested case proceeding. MCL 324.1705(1) ("If administrative . . . proceedings are available by law, the agency . . . may permit . . . any person to intervene"). This basis of standing applies both to the four above-identified "immediately adjacent" owners as well as to the rest of the Lakeshore Group members, whose homes are all nearby in the same dunes. The Court of Appeals erred in rejecting MEPA intervention.

iv. Common Law Standing: Michigan's common law of standing authorizes the recognition that a party with substantial interests different from the

public at large may be heard, especially with regard to a public interest case like this one. *Lansing Schools Ed Assoc'n v Lansing Bd of Ed,* 487 Mich 349, 792 NW2d 686 (2010) ("*Lansing Schools*"). Petitioners submit that all of those Lakeshore Group members who are not addressed in the §35305(1) standing provision because their property is not "immediately adjacent" should have standing based upon their unique interests as a matter of common law. Yet, the Court of Appeals erroneously rejected common law standing as inapplicable, interpreting §35305(1) as exclusive and the Court's analysis in *Lansing Schools* as supporting that rejection of all others.

One of the points made in *Lansing Schools* is that common law grounds may apply where a statutory standing provision does not apply. *Lansing Schools*, 487 Mich at 359 (under historical principles of standing in Michigan, "where a cause of action was not provided at law [for a litigant], the Court, in its discretion, would consider whether a litigant had standing based on special injury or right or substantial interest that would be detrimentally affected in a manner different from the citizenry at large . . ."). The Court of Appeals interpreted that language to mean that where there is a statutory basis for standing for any one litigant there can be no different basis for another, that the common law of standing has no effect. But it is more reasonable for that language of this Court to mean that consideration must be given to common law grounds for standing as to any petitioner who does not fall within an enumerated statutory basis, especially where their interests fall within the overall statutory scheme, here that of Part 353. Given the legislature's mandates in Part 353 emphasizing the interests of the local public, the underlying constitutional

framework recognizing the importance of protection of natural resources and the duty the constitution places upon the legislature to protect that compelling public interest, the narrow interpretation of the Court of Appeals decision is "clearly erroneous and will cause material injustice." To enforce a restrictive interpretation that might follow if the legislature had stated in 35305(1) that "only" the two enumerated parties could have standing, using a restrictive word that MDEQ and the Court of Appeals both would insert into this provision, but *where the legislature did not say that* and the interpretation flies in the face of the overall scheme of Part 353, is erroneous and of "major significance to the state's jurisprudence."

The Court of Appeals rejected all of these independent grounds for standing, any one of which for even one petitioner would have been sufficient to have preserved the contested case hearing process for administrative and judicial review of these permits. Each rejection is erroneous and causes a material injustice and Petitioners-Appellants respectfully request that this Court's review is necessary because of these errors in the Court of Appeals' decision. Exhibit A.

This application is also grounded in MCR 7.305(B)(1), as it "involves a substantial question about the validity of a legislative act." This standard applies to two legislative acts whose validity is at issue.

First, the decision of the Court of Appeals rejecting the right to standing based upon MEPA intervention essentially nullifies the terms of MEPA's §1705(1) that authorize intervention. The Court of Appeals mistakenly ignored the fact that petitioners had moved to intervene on September 1, 2015 using MEPA, among other grounds, when a consolidated contested proceeding was already pending,

erroneously stating that there was no pending contested case proceeding into which the petitioners could intervene. Exhibit A, at 9 ("the statute . . . necessarily implies that a valid administrative proceeding must already exist in order for a party to intervene"). In fact, when the intervenors filed their motion on September 1, 2015, three contested cases were already pending and consolidated pursuant to ALJ's Notice of Proposed Consolidation dated December 16, 2014 ("the petitions . . . will be consolidated"). Exhibit J. No party objected by the January 19, 205 deadline and the three contested case proceedings were consolidated. See, for example, Exhibit C (in which the caption identifies states "Consolidated Cases"). Further, the ALJ had ruled that MEPA can be used to intervene, Exhibit D, at p 3 (MEPA "allows a party to intervene in an existing case"), yet, despite that recognition of this legislative provision, had failed to apply that legal ground for intervention. Exhibit C, p 6 (rejecting standing under MEPA). Now, the Court of Appeals has erroneously rejected it entirely.[9] Exhibit A at p 8-9. The Court of Appeals decision has essentially invalidated this provision of MEPA.

Second, another legislative provision whose validity is at issue is the standing provision of §35305(1) in relation to Part 353 as a whole. Petitioners-Appellants respectfully suggest that the Court of Appeals decision erred in its use of rules of statutory interpretation as it focused on the words of 35305(1) but failed to read that language in a way that is consistent with the statute, Part 353, as a

[9] The Circuit Court did not address this issue, having found that four petitioners had standing already by their satisfaction of the §35305(1) "immediately adjacent" standard. The issue was preserved and argued to the Court of Appeals to supplement support for the Circuit Court decision and has been ruled on by the Court of Appeals.

whole. If the Court of Appeals decision is correct that parties such as these petitioners have no standing under that provision despite the rest of the legislative provisions throughout Part 353, then 35305(1) must be rejected as inconsistent with Part 353 and the constitutional mandate of article IV, § 52, that underlies it (environmental protection is a "paramount public concern"). Rejecting these parties' standing on a narrow ground of the developer selling off what is adjacent to the petitioners undermines and conflicts with the emphasis on the public's interests throughout the statute as a whole. In sum, Petitioners-Appellants respectfully suggest that *if* the Court of Appeals is correct that parties such as these petitioners have no standing under 35305(1) despite the rest of the legislative provisions throughout Part 353, then 35305(1) is unconstitutional as so interpreted.

The language of 35305(1) provides authorization and is not exclusionary. Yet the Court of Appeals repeatedly describes the provision as stating that *only* those authorized by the provision have standing. See, for example, Court of Appeals decision at 7 ("a challenge to the DEQ's permitting decision may be brought *only* by . . .") and ("This express empowerment . . . indicates that *only* those two classes of parties have standing . . .") (emphasis supplied). Petitioners do not argue that the legislature *could not* have articulated such a limited standing provision; *but that it did not*. And where the legislature simply recognized the standing of certain described parties but did not exclude others, the question remains whether anyone else who falls into other classes of party might also have standing on other grounds.

This application is also grounded in MCR 7.305(B)(2) because the issue of standing as a contested case petitioner seeking review of sand dunes development

permits under Part 353 "has significant public interest" and this case is against MDEQ, a state agency. There is no question that there is significant public interest in protection of the environment and natural resources of this state, including these protected sand dunes. *See, e.g.*, Const. 1963, art. IV, § 52:

> The conservation and development of the natural resources of the state are hereby declared to be of *paramount public concern* in the interest of the health, safety and general welfare of the people. *The legislature shall provide* for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction (emphasis supplied).

See also, for example, Part 353, Exhibit H, MCL 324.35302 ("The purpose of this part is to balance for present and future generations the benefits of protecting, preserving, restoring, and enhancing the diversity, quality, functions, and values of the state's critical dunes . . . .") and other sections of Part 353 cited and quoted above. The Court of Appeals not only ignored and undermined the public interest, the decision erroneously states that the petitioners are not "aggrieved" simply because the small pieces of property the developer sold were not being transformed by it. Exhibit A, at 11 ("[w]hile petitioners may feel personally interested . . . they are not aggrieved") and 12 ("petitioners would no longer live next to Dune Ridge's proposed development and could not be aggrieved"). That is not the definition of "aggrieved" and constitutes a rejection of the ALJ's conclusion – which has never been appealed by MDEQ or Dune Ridge – that these parties are aggrieved. *See, e.g.*, Exhibit D at pages 4-5 ("objections to potential natural resource destruction are sufficient to render a party 'aggrieved' under Part 353"). These characterizations by the Court of Appeals misinterpret the language of 35305(1), which uses the word aggrieved apart from property location, and represent an

improper interpretation by the Court of Appeals that should be corrected. Thus, the additional ground of MCR 7.305(B)(2) also requires Supreme Court review. The other ways in which the Court of Appeals decision rejected standing, discussed above, are also of "significant public interest."

A further error of the Court of Appeals which is relevant to this basis for the Supreme Court's review is its erroneous deference to MDEQ's interpretation of the standing provision. There may be circumstances in which a court should defer to an agency's judgment to some degree based upon its expertise, for example when the question is the meaning of an agency's own regulation. But the language here is statutory and *the meaning and application of a standing provision is a question of law* reviewed *de novo* by this Court even when it has been ruled on by a lower court. Standing is not a question peculiarly within the special expertise of MDEQ. The court, not the agency, is the proper body to interpret the legal question of standing. MDEQ even admitted that the effect of divesting petitioners of standing based on the developer's actions is unfair and yet failed to make the obvious argument that Part 353 as a whole supports the standing of these petitioners and the contested case review process should go forward. The Court of Appeals conclusions that a court should defer to MDEQ's judgment that no one has standing and there can therefore be no APA review of MDEQ's permitting conduct must be corrected.

The arguments for standing as MEPA intervenors and as uniquely interested parties under Michigan common law, in addition to those who satisfied the criteria of 35305(1) also are of significant public interest and were opposed by MDEQ to

avoid judicial review of its permitting practices and actions. Thus, all of these Court of Appeals errors call for this Court's review under MCR 7.305(B)(2) as well as the other provisions of the court rules.

This Court has jurisdiction over this application for each of these reasons and should grant leave to appeal or issue a peremptory reversal recognizing the standing of one or more of these petitioners – and thereby Lakeshore Group – to proceed with their contested case regarding the Dune Ridge permits.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Overview: This appeal arises out of a developer's plan several years ago to transform a 130-acre, century-old church camp in an area of state-protected critical sand dunes in Saugatuck, Michigan. Intervenor-Appellee Dune Ridge SA LP or "Dune Ridge"[10] did not purchase the property in order to continue the camp but rather to develop it into waterfront sand dune home sites, upland dunes lots, and paved roads with utilities in a gated community. When MDEQ reviewed and granted sand dunes development permits for multiple portions of the overall project along the shoreline and in the upper dunes regions in a piecemeal fashion rather than review the plans for the property as a whole despite expressed public concerns, a number of neighbors living in the same dunes came together to seek contested case review, an administrative review process that is designed to lead to a quasi-judicial evidentiary hearing followed by a recommendation from the ALJ to the MDEQ director, who then issues a final decision on the permits subject to appeal to circuit court for judicial review on the record of the permits at issue.

During the contested case review process, three separate contested case proceedings brought by different petitioners were consolidated into one in 2015; additional petitioners filed motions to intervene into the pending consolidated contested case; four individual intervenors and Lakeshore Group were found to

[10] This application usually identifies Dune Ridge as Respondent-Appellee based upon its aligning itself with MDEQ to avoid any third-party review. However, Dune Ridge was originally an intervenor, not an original party, in the contested cases.

have standing and two of the original petitioning parties settled out; that left four individuals and Lakeshore Group and its members as the continuing petitioners in the contested case proceeding. *See generally,* ALJ Opinion and Order dated December 16, 2014 attached as Exhibit J and the four ALJ Opinions and Orders attached as Exhibits C-F. The pre-hearing process for the consolidated contested case continued and, in preparation for the quasi-judicial hearing, counsel and the ALJ met at the site for a walk-through on October 4, 2016. The process was to continue with the scheduling of the evidentiary hearing when the developer moved to disqualify petitioners with standing and to dismiss the contested case without a hearing. *See generally,* the 1639-page administrative record of the Michigan Administrative Hearings System (MAHS), cited as "AR ___," and Exhibit F.

This application arises out of the Court of Appeals decision of March 21, 2019, rejecting the standing of all petitioners and thereby upholding the dismissal of the contested case proceeding without any hearing. The Court of Appeals decision overturned the Circuit Court's decision reinstating the standing of four petitioners who the ALJ originally ruled satisfied the statutory criterion of being "owner[s] of property immediately adjacent to the [developer's] proposed use" of the dunes together with Lakeshore Group, and remanding the matter for the contested case hearing which had been denied. The March 21, 2019, Court of Appeals decision is attached as Exhibit A. The Circuit Court Opinion and Order dated September 26, 2017 is attached as Exhibit B.

Petitioners-Appellants: Petitioners-Appellants are Lakeshore Group and its members, Mr. Kenneth Altman, Ms. Marjorie Schuham, Mr. and Mrs.

Schumann, Ms. Lucie Hoyt, Mr. William Reininga, Ms. Jane Underwood, Mr. Charles Zolper, and Lakeshore Christian Camping. All of the individuals in Lakeshore Group own property in the same municipal area and the same protected sand dunes where the development is located. See two maps from the administrative record attached as Exhibit K. As these maps depict, the properties belonging to Lucie Hoyt, Bill Reininga, Jane Underwood and Charles Zolper share boundaries with the 130-acre development use property. *Id.* Underwood and Zolper own property immediately adjacent to the east side of the 130-acre development property. *Id*. Hoyt and Reininga own the waterfront property immediately adjacent to the development property's southern boundary. *Id.* Hoyt and Reininga own their property as shareholders in Shorewood Association and have the exclusive right to the possession and use of the property. Shorewood Bylaws at AR 0063-0079. Petitioners-Appellants Altman, Schuham and Schumann own property on the south side of the development in the same dunes**.** Exhibit K. The affected, legislatively-protected sand dunes are continuous from the Lake Michigan shoreline on the west to the Kalamazoo River on the east, and from Oval Beach Park along the northern boundary of the development through residential areas south of the development. *Id. See also,* web page containing atlas of sand dunes in Michigan that were designated as statutorily protected critical dunes at MDEQ's web site: https://www.michigan.gov/egle/0,9429,7-135-3311_4114-70207--,00.html.

The Developer's Plans or "Proposed Use": The 130-acre property Dune

Ridge bought to develop "for profit"[11] had been used as a church camp for over a century. Page AR 0902 in Exhibit K shows the property outline and the limited structures in place at the camp. The camp roads were single lane and, like the footpaths through the camp, unpaved. The structures were generally simple, foundation-post construction. MDEQ correspondence, AR 0620-628.

Appellant Dune Ridge has 30 or more sand dunes development permits at issue in this appeal, all of which pertain to work on various portions of the 130-acre property. The first ten permits sought permission to develop building sites on eight (8) residential lots 5-12 for large homes along the shoreline, in the foredunes and in the immediate back dunes, as well as construction of two-lane paved roads and utilities. *See, e.g.*, pages AR 1518, 1519 & 1592 from AR 1503-1639. The second set of permits sought permission to modify the first plans, as well as to make changes to additional portions of the property, for septic and drain field construction throughout the property. *See* page AR 0536 from AR 0516-0556. The third set of permits were to develop additional shoreline parcels, add more sites in the foredune and back dune areas of the overall property, lots 1-5 and 13-21, and install more roads, paths and utilities. AR 0436-0493. *See, for example*, AR 0438-0447, 0450 & 0470, pages of permit WRP001152 and figures depicting some of the plans, including a large septic drain field and home building lots 14-21. At no time did

[11] The lead owner/developer said exactly this at a public hearing. Petitioners-Appellants do not criticize or object to the profit motive. However, the scope of the overall development represents a dramatic departure from the minimal level of activity or "use" that state law identifies as meeting the threshold to require a Part 353 permit if the "use" is within the narrowly defined, statutorily protected "critical dunes," as this 130-acre development is. See "Common Activities Needing a Permit," attached as Exhibit I.

Dune Ridge seek overall review of the commercial project involving over 20 homes on 50 or more acres as a joint special use project. *See* AR 0061, attached as Exhibit L depicting development lots across large areas of the 130-acre property, with the focus on the waterfront and lake view areas.

Contested Case Consolidation: In his Opinion and Order dated December 16, 2014, Exhibit J, the ALJ proposed to consolidate the three separate contested case proceedings brought by three unrelated petitioners that all addressed the same Dune Ridge permits, subject to any objection; and the later orders reflect that decision was made. Exhibit C. *See also*, the 2016 decision to consolidate the three rounds of permits noted above. Exhibit E, at p 2-3 (the permits involved "the same critical dune"; "all concern a development on a 130-acre parcel"; consolidation approved without objection from MDEQ).

Petitioners-Appellants' September 1, 2015, Motion to Intervene Granted by ALJ: On September 1, 2015, several Petitioners-Appellants moved to intervene into the pending consolidated contested case, arguing that they had standing under (i) the standing section of Part 353, MCL 324.35305(1), (ii) the common law or 'broader public interest criteria' of Part 353, and/or (iii) the Michigan Environmental Protection Act (MEPA), Part 17 of NREPA, MCL 324.1701 et seq. *See* Exhibit C, at p 3. All three consolidated contested case petitions were still pending at that time.

The ALJ ruled that four intervening petitioners – Ms. Underwood, Mr. Zolper, Ms. Hoyt and Mr. Reininga – had standing based on their property locations immediately adjacent to the proposed use, namely the overall 130-acre property,

and noted that MDEQ's Water Resource Division or "WRD" "does not object to the intervention of these four Intervenors." *Id.*, at pages 3-5 ("no prejudice will result to the parties if the immediately adjacent property owners are allowed to intervene"). The ALJ ruled that their status gave them the right under §35305 to be heard as to the "use" of the property throughout the 130 acres; and that they satisfied the statutory standard of being "aggrieved" based on their possessing special concerns with regard to natural resource destruction. *Id.*, at pages 3-4:

> In §35305(1), the Legislature conferred standing upon "the owner of the property immediately adjacent to the proposed use [who] is aggrieved by a decision of the department in regard to the issuance of a permit or special exception under this part. . . ." MCL 324.35305(1). Of the proposed intervenors, four own property immediately adjacent to the Dune Ridge property: Lucie Reininga Hoyt; William Reininga Jr.; Jane Underwood; and Charles Zolper. See Exhibit 1 to Brief in Support. The proposed intervenors allege that they were aggrieved by the issuance of the special exception and permits in this case by, *inter alia,* DEQ's alleged failure "to evaluate the effects of the proposed development on the diversity, quality and functions of the critical dunes." Brief in Support at p. 2 [footnote 2 deleted].
>
> The WRD [Water Resources Division of MDEQ] does not object to the intervention of these four intervenors in this contested case. Dune Ridge objects to the intervention of these Intervenors on the grounds they are not the owners of property "immediately adjacent to the proposed use." MCL 324.35305(1).

The ALJ also ruled in the same decision that the developer could not avoid administrative review by leaving the outer areas of the property undeveloped and hence creating a buffer to shield its actions from review:

> Dune Ridge contends that none of the Intervenors live immediately adjacent to the "proposed use,"

> because Phase 1 of the project [footnote 3 deleted] is to occur on an interior portion of the Dune Ridge property. Dune Ridge argues that, because the Intervenors do not own property immediately adjacent to the proposed use, *i.e.*, Phase 1, they do not have standing under § 35305(1).
>
> In effect, *Dune Ridge is advancing a construction of § 35305(1) that only confers standing to the adjoining property owners if the proposed use is on the border of parcels owned by the applicant. To accept this construction would impermissibly limit an adjoining property owner's right to a contested case.* By its terms, § 35305(1) provides both the applicant and the owner of the immediately adjacent property the right to a contested case. In this case, Ms. Hoyt, Mr. Reininga Jr., Ms. Underwood, and Mr. Zolper are owners of the immediately adjacent property, and thus have standing to challenge the issuance of permits and/or special exception issued to Dune Ridge (emphasis supplied).

Exhibit C, at pages 3-4. The conclusion that the petitioners were aggrieved was addressed again by the ALJ in a later Opinion and Order on Intervenor-Appellee Dune Ridge's motion for reconsideration:

> As to Ms. Underwood and Mr. Zolper, the Permittee [Appellant Dune Ridge] contends that they are not aggrieved. However, their Motion to Intervene alleges that the "removal of woody vegetation … can affect the flora and fauna that inhabit" the critical dune, and that they are affected by changes to the dune landscape and changes to habitat for birds and animals…." Concomitantly, their Motion adopts the Petition of Lakeshore, which asserted challenges to the permits in order to protect "the flora and fauna of the critical dunes against improper and unnecessary intrusion, changes, slope alterations, plan removal, habitat destruction, development and any impairment not required to be permitted under Part 353…." In its Response to the Motion for Reconsideration, the WRD concedes that 'it is likely that objections to potential natural resource destruction are sufficient to render a party 'aggrieved' under Part 353." This tribunal agrees.

> The Motion for Reconsideration [arguing petitioners were not "aggrieved"] is denied . . . .

Exhibit D, at p 4-5. The ALJ rejected the use of the broader, common law public interest criteria of Part 353 and the reliance upon MEPA as grounds for standing. Exhibit C, at p 5-6.

On Motion for Reconsideration by Dune Ridge, ALJ Dismisses Ms. Hoyt and Mr. Reininga: Dune Ridge filed a motion for reconsideration to challenge the standing of Ms. Hoyt and Mr. Reininga, arguing that they did not own their home because the Shorewood Association held legal title to all property within the association boundaries. Exhibit D, at pages 1 and 4. The ALJ ruled that they did not have standing on the ground that they did not own their property, *but did not address the absence of any definition of "owner"* in Part 353. *Id*.

ALJ Rules that MEPA "Allows a Party to Intervene in an Existing Case" but does not apply it to grant intervention as sought: When the Lakeshore parties sought judgment on certain key points of law, the ALJ rejected their arguments that the provisions of MEPA and the rulings of this Court in *Lansing Schools Education Ass'n v Lansing Bd of Educ*, 487 Mich 349 (2010) ("*Lansing Schools*") supported standing in a contested case proceeding. Exhibits C & D. However, the ALJ ruled that, while "Section 1705 [of MEPA] does not, on its own, provide an independent basis for standing to file a contested case petition . . . it [does] allow[ ] a party to intervene in an existing case." Exhibit D at p 3. Nonetheless, the ALJ did not apply that ruling to grant intervention.

ALJ Approves Lakeshore Group Representational Standing: In the same Opinion in which the tribunal turned away Ms. Underwood based on the

developer's actions, the ALJ rejected the developer's attack on the standing of Lakeshore Group. Exhibit E, at p 5-6. Specifically, the ALJ recognized the authority of *Trout Unlimited v City of White Cloud,* 195 Mich App 343 (1992) and a 2014 decision in "*In re Petition of Saugatuck Dunes Coastal Alliance,* File No. 13-03-0079-P, issued August 21, 2014" to the effect that "Lakeshore Group similarly has standing in this contested case due to Mr. Zolper's membership in such association. Allowing re-entry of such individuals [as the other Group members] through an unincorporated association is not fundamentally unfair . . . ." *Id.* Thus, all Group members remained involved.

Administrative Tribunal dismisses Ms. Underwood based on developer's argument that its sale of land next to her with no permitted activity takes away her standing: Dune Ridge challenged Ms. Underwood's standing, arguing that since the developer had sold a portion of its property next to her, she no longer owned property adjacent to their development and had lost her standing. See Exhibit E and maps at Exhibits K & L. The ALJ ignored his earlier ruling rejecting the buffer defense and, after noting that "this Tribunal found that Ms. Underwood had standing under §35305(1) because her property is immediately adjacent to a portion of the 130-acre development," *Id.,* at page 4, the ALJ accepted Dune Ridge's argument that, because the developer had sold property next to Ms. Underwood, "the property is no longer a part of the development, *i.e.,* no development is occurring on the immediately adjacent property" and granted the motion to dismiss Ms. Underwood. Exhibit E, at page 4.

ALJ dismisses Mr. Zolper (and Lakeshore Group and the entire contested case) based on Dune Ridge's argument that its sale of a small area of land next to Mr. Zolper divested him of standing: Dune Ridge repeated its argument after selling a second portion of its 130-acre development property next to Mr. Zolper. Exhibit F, at p 2 ("Dune Ridge argues the Petitioners have no standing to challenge the permits and special exception issued by the WRD, because it has sold the property immediately adjacent to Mr. Zolper"):

> Without question, Mr. Zolper no longer is the owner of property immediately adjacent to the proposed use and, therefore, no longer has standing under Part 353. Because Lakeshore Group's standing is representational standing through Mr. Zolper's membership in the association, its standing must fail in this contested case as well.

Id. at p 2. The result was the complete dismissal of the contested case. *Id.* at p4.

Circuit Court overturns ALJ rejection of standing and reinstates Underwood, Zolper, Hoyt, Reininga and the Group: Upon Petitioners-Appellants' appeal to Circuit Court of all standing issues, the Circuit Court overruled the ALJ by reinstating the standing of Ms. Underwood, Mr. Zolper, Ms. Hoyt, Mr. Reininga and Lakeshore Group:

> The ALJ erred in holding that [developer/]Appellee Dune Ridge could strip [petitioner/]Appellants of standing by conveying slivers of its parcel to other entities so that Appellants were no longer owners of property immediately adjacent to the planned development. Dune Ridge's attempts to eliminate Appellants' standing are brazen, bad-faith efforts to circumvent the administrative review process. The ALJ's decision was contrary to long-standing Supreme Court precedent that standing is determined at time of filing. *See Girard,* 437 Mich 231.
> . . .
> . . . because Ms. Underwood and Mr. Zolper had standing as property owners adjacent to the proposed development at the time of filing, and Lakeshore Group had representative standing when it

> intervened, the ALJ's decisions dated July 7, 2016 and February 13, 2017 dismissing these Appellants are hereby REVERSED.
> . . .
> . . . the ALJ ignored Ms. Hoyt and Mr. Reininga's equitable ownership and exclusive rights to use of their individual lots pursuant to the Shorewood Association Bylaws in effect at the time . . . [and] Ms. Hoyt and Mr. Reininga were dismissed in error.
> . . . Ms. Hoyt, Mr. Reininga, Ms. Underwood, and Mr. Zolper, have standing individually and Lakeshore Group has representative standing under Part 353 . . . .

Exhibit B, at p 6-7.

Court of Appeals decision overturns Circuit Court decision recognizing four individuals' standing and also rejects standing based on MEPA and Michigan common law: By decision dated March 21, 2019, the Court of Appeals overturned the Circuit Court decision and rejected all four grounds for standing argued by Petitioners-Appellants, thus reinstating the MAHS order dismissing the contested case proceeding without any hearing on these permits. Exhibit A.

Petitioners-Appellants now seek peremptory action reversing the Court of Appeals' decision as to one or more petitioners and Lakeshore Group and remanding the case for contested case hearing or, failing that, leave to appeal the Court of Appeals' decision.

STANDARD OF REVIEW

The Supreme Court may grant an application for leave to appeal where "the issue involves a legal principle of major significance to the state's jurisprudence" or where the Court of Appeals' decision is "clearly erroneous and will cause material injustice." *See* MCR 7.305(B)(3) and (5)(a). This case involves both. This application also should be granted under MCR 7.305(B)(2) because it "has significant public interest" and is against a state agency, MDEQ; and under MCR 7.305(B)(1) because it involves "a substantial question about the validity of a legislative act." Any of these grounds is sufficient to grant this application.

This application raises questions of law regarding standing of parties to pursue a contested case petition for review of MDEQ permits pursuant to Part 353. Questions of law are reviewed *de novo. See Madison Dist Pub Sch v Myers,* 247 Mich App 583, 588, 637 NW2d 526 (2001). *See also*, *Mich Chiropractic Council v Comm'r of the Office of Fin & Ins Servs*, 475 Mich 363, 369, 716 NW2d 561 (2006) ("Whether a party has standing is a question of law that we review de novo"); *Miller v Allstate Ins Co*, 481 Mich 601, 606, 751 NW2d 463 (2008) ("Questions of statutory interpretation are reviewed de novo"); *Salem Springs, LLL v Salem Twp,* 312 Mich App 210, 215-216, 880 NW2d 793 (2015) ("a trial court's decision on a motion for summary disposition . . . [and] questions of law, including statutory interpretation and the issue of a party's standing, are reviewed de novo").

ARGUMENT

Introduction

The Supreme Court should grant this application for leave to appeal in order to correct erroneous decisions by the Court of Appeals denying standing to all petitioners, including four individuals who the administrative law judge originally held clearly satisfied the narrow standing provision of MCL 324.35305(1). Even one person with standing would enable the contested case process to proceed and yet the March 21, 2019, decision denies standing to all and bars any contested case review without any hearing ever being held on these numerous permits for significant alteration of many acres of protected sand dunes.

The rejection of standing for petitioners Ms. Underwood and Mr. Zolper, who both were found to satisfy the "owner of property immediately adjacent" statutory provision for standing, presents an important legal issue for this Court because no Michigan precedent supports taking away standing once it has been established solely on the basis of actions by the regulated party (rather than the person asserting he or she has standing). If this Court overturns the Court of Appeals' rejection of Ms. Underwood or Mr. Zolper and affirms the Circuit Court, that alone would be sufficient to remand the case for an administrative hearing.

The Court of Appeals decision to extend cases where a plaintiff did not originally satisfy the criterion for standing or gave up his or her own standing to this completely different situation in which the petitioner has not given up its basis for standing calls for correction by this Court. It presents a gap in our law of standing and an error as to how to address that gap. The need is especially great

where the review of permits allowing the transformation of many acres of protected sand dunes is at issue and yet the contested case hearing will never occur based on the Court of Appeals decision.

The standing of Ms. Hoyt and Mr. Reininga presents a different basic issue for this Court. Their property location clearly satisfies the standing provision of §35305(1) and they have the exclusive right to the use and possession of their home. Thus, they are "owners" of it in the ordinary sense of the word, which Part 353 does not define. Yet the Court of Appeals ignores this fact and takes words out of context from the *Slatterly* decision, *Slatterly v Madiol,* 257 Mich App 242, 668 NW2 154 (2003), which notes that the Summer Resort statute makes their association the holder of legal title. Then, ignoring entirely the balance of *Slatterly* which recognized exactly what is at issue here, that an association shareholder like Hoyt and Reininga has an exclusive right to the use and possession of their home despite the association's holding legal title, the Court erroneously held Hoyt and Reininga did not have standing to be heard in a contested case proceeding as to a dozen new neighbors adjacent to their lakefront home. As with either Underwood or Zolper, the reinstatement of the standing of either Hoyt or Reininga would be sufficient to allow the contested case process to proceed without addressing the other issues below of MEPA intervention and common law standing.

Petitioners-Appellants raise two other grounds for standing, neither of which is necessary if the above errors as to Underwood, Zolper, Hoyt and/or Reininga are corrected but each of which presents an important, separate legal ground for standing to proceed with this contested case. One is the right to intervene

into the pending consolidated contested case proceeding using MEPA, which these petitioners relied on in the administrative tribunal. The ALJ properly recognized that MEPA authorizes intervention but erroneously rejected such intervention and the Court of Appeals affirmed that error.

Second and finally, those individuals among Petitioners-Appellants who are not covered by the §35305(1) standing provision seek standing based upon the common law. Such standing, in particular for parties like these who have a substantial interest different from the general public, has been recognized by this Court in *Lansing Schools Educ Assoc'n v Lansing Bd of Educ'n,* 487 Mich 349, 792 NW2d 686 (2010) ("*Lansing Schools*"). Yet, the administrative tribunal held that its limited powers required it to ignore the common law and to reject any but a statutory basis for standing; the Court of Appeals once again upheld this error.

Petitioners-Appellants respectfully submit that the principles that a statutory body such as the administrative hearings office has limited powers does not require the hearings office to bar persons with common law standing from being heard in a contested case proceeding. Again, just as the standing of any one of Underwood, Zolper, Hoyt or Reininga would reinstate the contested case at issue here, any one petitioner's being recognized as having a right to proceed under MEPA intervention or common law principles of standing would lead to the same result – an administrative, quasi-judicial hearing being held before the administrative law judge on these many permits, a hearing which has now been avoided entirely by Dune Ridge and MDEQ for several years. Petitioners-Appellants respectfully ask

this Court to overturn each of the four erroneous rejections of standing by the Court of Appeals decision and remand this case for a full contested case hearing.

> **Point I. Where the administrative tribunal correctly rules that a person (Ms. Underwood; Mr. Zolper) is the "owner of property immediately adjacent to a proposed use [and] is aggrieved" and each thereby satisfies the statutory standard of MCL 324.35305(1) for standing in a contested case challenging multiple sand dunes permits throughout a 130-acre property pursuant to Part 353 of NREPA, and where neither Ms. Underwood nor Mr. Zolper changes his or her status as owner of the same property, neither loses standing but may proceed to hearing on the Part 353 permits notwithstanding the developer's sale of unused portions of the property adjacent to them.**

Introduction: Perhaps the greatest injustice this application attempts to remedy is this first issue of four. There are three simple reasons the Court of Appeals decision rejecting the standing of Ms. Underwood and Mr. Zolper must be overturned:

1. It is unfair;
2. It makes bad law; and
3. It fails to follow basic rules of statutory construction.

The ALJ found Ms. Underwood and Mr. Zolper (along with Ms. Hoyt and Mr. Reininga – see point II, below) to have standing to contest all of the permits MDEQ issued to Dune Ridge to alter protected sand dunes throughout the 130-acre development property, in particular the numerous home lots located in the interior and on the waterfront side of the property. See Exhibits K&L. After the ALJ rejected the developer's "buffer" defense that it was shielded from review because it was not developing the areas at the edges of its property next to these petitioning neighbors, it sold the unused slivers of land next to Ms. Underwood and Mr. Zolper and made the argument again but with the twist that it no longer owned the land

next to the petitioners; someone else now owned the buffer zones. The ALJ erred in accepting that as the equivalent of these concerned citizens selling their land and moving out of state (which they did not do), ignored the facts and their already-recognized legal status as contesting permits across the entire 130-acre property, and opined that it was enough that they could challenge permits on the sliver that was sold if the buyer sought a permit there. The affront to these citizens of this decision rejecting their concerns was palpable.

No one has objected to the developer's right to sell its land. It is the argument that principles of standing should be twisted and rights to contested case review should be thrown out that is objectionable. The Circuit Court correctly concluded that the developer's using these two sales as a basis to achieve a buffer-type defense that the ALJ had previously properly rejected was an unethical attempt to undermine these petitioners' constitutional right to a contested case review followed by judicial review on the record of these final agency decisions.[12] The Court of Appeals has now re-instated the ALJ's error and has added misleading characterizations that flip the standing criterion of the petitioner's owning land immediately adjacent to the proposed use by characterizing the situation as the developer no longer owning the land immediately adjacent to them.

Most Part 353 permits are sought by a homeowner who seeks to construct an addition to a single family home, add a deck or pave a driveway on a single

[12] The developer's permits are not final until the contested case process and all appeals are completed. *See Nat'l Wildlife Fedn v DEQ*, 306 Mich App 369, 375 & 379, 856 NW2d 394 (2014). This issue has been raised before and Dune Ridge knows it proceeds at its own risk with the development activities that are subject to these non-final permits.

parcel. The question of standing of a neighbor next to such a permit applicant is simple. The fundamental issue in this case is whether a developer who buys an entire 130-acre church camp to convert the most attractive portions of it into numerous high-value home sites with paved roads and utilities *can avoid all third party review* simply because of the scope of the project. If MDEQ's granting permits to undertake any change to protected dunes merits administrative and judicial review – and the law says that as little as one deck or fence would, Exhibit I – then surely the conclusion that justice does not require review here or recognize these citizens' right to be heard is unfair, unjust and unconstitutional.

These petitioners continue to have the same strong interest in the subject matter of this case involving the many permits across the 130-acre property and how MDEQ conducted its review of them; the contested case proceeding is not moot. Michigan law on standing should not be diluted or twisted by allowing, as the Court of Appeals decision does here, a regulated party to divest a petitioner of well-founded standing by taking steps unrelated to the subject of the litigation.

A. It is unfair to allow the developer to divest any petitioner of his or her well-qualified standing

1. The ALJ first ruled correctly that Ms. Underwood and Mr. Zolper had standing to challenge all Part 353 permits MDEQ issued to Dune Ridge across the 130-acre property

In his Opinion and Order dated October 28, 2015, the ALJ ruled on several parties' motions to intervene into three pending consolidated contested cases. Exhibit C, p 1 ("The petitions were consolidated in an Order entered on December 16, 2014"). The ALJ concluded that Ms. Underwood and Mr. Zolper (along with

Ms. Hoyt and Mr. Reininga – see next argument point) "have standing to challenge the issuance of permits and/or special exception issued to Dune Ridge." *Id*. at p 4.

2. The ALJ correctly decided that the developer could not avoid review by leaving an undeveloped buffer zone between the permitted activities under contested case review and the petitioners as that would "impermissibly limit" the petitioner's rights

In response to Dune Ridge's argument that the intervenors should not be approved "because Phase 1 of the project is to occur on an interior portion of the Dune Ridge property" and intervenors were not immediately adjacent to that, the ALJ ruled:

> In effect, Dune Ridge is advancing a construction of § 335305(1) that only confers standing to adjoining owners if the proposed use is on the border of parcels owned by the applicant. To accept this construction would impermissibly limit an adjoining property owner's right to a contested case. By its terms, § 335305(1) provides both the applicant and the owner of the immediately adjacent property the right to a contested case. In this case, Ms. Hoyt, Mr. Reininga Jr., Ms. Underwood, and Mr. Zolper are owners of the immediately adjacent property, and thus have standing to challenge the issuance of permits and/or special exception to Dune Ridge.

Id. at p 4.

3. The ALJ correctly ruled that Ms. Underwood and Mr. Zolper were "aggrieved" because of their concerns with natural resource destruction

When Dune Ridge moved for reconsideration, it challenged the "aggrieved" status of Ms. Underwood and Mr. Zolper. In his Opinion and Order dated January 26, 2016, the ALJ agreed with MDEQ that "objections to potential natural resource destruction are sufficient to render a party 'aggrieved' under Part 353." Exhibit D at p 5. The ALJ also supported this conclusion that the "aggrieved" element of the § 335305(1) standing provision was satisfied with reference to additional specific concerns expressed by Ms. Underwood and Mr. Zolper:

> . . . their Motion to Intervene alleges that the "removal of woody vegetation . . . can affect the flora and fauna that inhabit" the critical dune, and that they are "affected by changes to the dune landscape and changes to habitat for birds and animals . . ." [and that they sought] to protect "the flora and fauna of the critical dunes against improper and unnecessary intrusion, changes, slope alterations, plant removal, habitat destruction . . . [and more].

Id. at p 4-5.

4. It is unfair to ignore the scope of the contested case – focused on all permits across the 130-acre property including the waterfront and elevated dunes – and now pretend that Ms. Underwood and Mr. Zolper have no interest in or standing to challenge the same permits just because no activity is occurring next to them

The Court of Appeals decision takes the fact that "it is not alleged in this case that Dune Ridge did anything illegal" in selling its property, Exhibit A at 12, and appears to conclude that, because Dune Ridge "had the legal right to convey property it owned . . . that was immediately adjacent to petitioners' properties, petitioners could no longer live next to Dune Ridge's proposed development and could not be aggrieved . . . ." *Id*. This followed the explanation in the decision:

> . . . after Dune Ridge conveyed their property that was immediately adjacent to petitioners' property, and thereby abandoned their "proposed use" or plan to develop their property despite securing the permits to do so, petitioners could not be "aggrieved by" the decision to issue the permits as contemplated by the statute.

Id. at p 11. This explanation reflects a confused and erroneous interpretation of the facts. At no time did Dune Ridge seek or did MDEQ grant to Dune Ridge a permit to act on the parcels the developer sold next to Ms. Underwood or Mr. Zolper. The ALJ knew that when he recognized their standing and explicitly rejected the "buffer" defense for good reason. Here, the Court of Appeals treats the sale of land as if it constitutes the withdrawal of a permit application or the cancellation of

planned activities, neither of which occurred. Whether to correct the factual misunderstandings the decision is founded on or simply to correct the unfairness and injustice of the backward result of allowing a regulated permittee to divest a petitioner of standing and avoid all third-party review of a final agency decision, this Court of Appeals decision must be overturned.

5. The Circuit Court correctly held that the administrative tribunal erred when it divested Ms. Underwood and Mr. Zolper of standing because the developer had sold property next to them

Based upon the record of the administrative tribunal and on appeal from the dismissal of the contested case based on Dune Ridge's obtaining the rejection of every petitioner's standing, the Circuit Court ruled:

> The ALJ erred in holding that Appellee Dune Ridge could strip Appellants of standing by conveying slivers of its parcel to other entities so that Appellants were no longer owners of property immediately adjacent to the planned development. Dune Ridge's attempts to eliminate Appellants' standing are brazen, bad-faith efforts to circumvent the administrative review process.

Exhibit B, at p 6. In light of these conclusions of the Circuit Court based upon the record, it is not surprising that the Court called attention to the fact that Ms. Underwood and Mr. Zolper had standing when they first intervened: "The ALJ's decision was contrary to long-standing Supreme Court precedent that standing is determined at time of filing." *Id*. Where the proffered reason to take away standing represents a "substantial and material error of law," *Id.*, the original standing remains in effect. The Circuit Court then ruled that the dismissal of Ms. Underwood "is likewise in error." *Id*. The Circuit Court explained:

> In its motion to dismiss Ms. Underwood, Dune Ridge argued that Part 353 "only confers standing on adjoining property owners if the proposed use is on the border of parcels owned by the applicant."

> The ALJ had previously rejected this interpretation, finding that such an application would "impermissibly limit an adjoining property owner's right to a contested case."

Id. The Court reinstated both Mr. Zolper and Ms. Underwood, as well as Lakeshore Group based upon "representative standing." *Id*.

B. The Court of Appeals decision creates bad law by extending good law rejecting a plaintiff without standing and turning it on its head to empower the defendant by its own actions unrelated to the permits at issue to shield itself from third party review

1. As MDEQ has acknowledged, no Michigan decision addresses this unique circumstance

In its brief to the Court of Appeals at page 13, fn 2, MDEQ acknowledged that no precedent addresses this legal issue. All of the cases cited by MDEQ and Dune Ridge involve a plaintiff's failure *ab initio* to satisfy the applicable requirement for standing or the plaintiff's loss of standing *due to its own* actions or omissions. None of them involves a situation like this one where the plaintiff had standing and made no changes in the grounds for its standing and yet a court held that a defendant could divest the plaintiff of standing.

2. The Court of Appeals erred in relying upon cases in which a plaintiff did not have standing or gave up its basis for standing and extending them to empower the defendant to divest a plaintiff of standing by taking actions unrelated to the subject matter of the case

Nor did the Court of Appeals decision rely on any cases other than those cited by the parties. See Court of Appeals discussion, Exhibit A, at p 10, of *Sharma v Mooney*, unpublished *per curiam* opinion of the Court of Appeals, issued September 16, 2004 (Docket No. 246257), as to which the Court of Appeals notes that "the plaintiff did not have standing at the time the complaint was filed"; *Gorbach v US Bank Nat'l Ass'n,* unpublished *per curiam* opinion of the Court of

Appeals, issued December 30, 2014 (Docket No. 308754), where the Court of Appeals notes that "the party lost standing because of the party's own failure to redeem foreclosed property within the redemption period; which then segues into a discussion of mootness with reference to *In re Detmer/Beaudry*, 321 Mich App 49, 56, 910 NW2d 318 (2017), *Sumpter v Wayne Co*, 868 F3d 473, 490 (CA 6, 2017) and *Granger v Klein*, 197 FSupp2d 851 (ED Mich, 2002), concluding that a matter becomes moot if a plaintiff loses standing, but without any reference to or discussion of the continuing strong interest and commitment to this case by petitioners. *Id*.

The Court of Appeals discussed *Cleveland Branch, NAACP v City of Parma, Ohio*, 263 F3d 513, 524 (CA 6, 2001), which considered standing as applicable at the outset of a case and mootness later, but the decision below did not explain why it chose to ignore that and to ignore the abiding concern of these petitioners with this case. *Id*. at 11. Instead, the Court of Appeals decision jumped to the Dune Ridge sale as a basis for concluding that petitioners "are not aggrieved." *Id*. Similarly, the Court of Appeals decision discarded the federal court precedent of *Senter v Gen Motors Corp*, 532 F2d 511 (CA 6, 1976), which, the Court of Appeals decision noted, ruled that changes "after-the-fact do not moot questions already presented for review," *Id*., and then went on to say "Dune Ridge did not violate any laws." *Id*. *Senter* was not decided based on illegality and the notion that Dune Ridge's legal sale entitled it to avoid all review of its permits is relevant neither to the law of standing or to considerations of mootness or fairness.

The Court of Appeals then rejected the reasoning of *Blankenship v Superior Controls, Inc,* 135 FSupp3d 608 (ED Mich, 2015), and the principle that "it would be unreasonable to hold that a plaintiff . . . could lose standing [to pursue a shareholder claim] . . . simply because he ceases to be a shareholder after the lawsuit is filed," *Id*., quoting from *Blankenship*, by inserting the same point as above that "it is not alleged in this case that Dune Ridge did anything illegal." *Id*. That fact is simply irrelevant to the analysis of these federal decision examples, as well as to the outcome in this case. As in *Blankenship*, these petitioners clearly had standing when they began this case and do not lose that – certainly not based on the circumstances here. *Blankenship, 135 FSupp3d at 617* ("Plaintiff counters that, because he was a shareholder at the time he filed his Complaint, he has standing . . . . Plaintiff argues that it is a generally accepted rule of law that '[s]tanding is determined as of the time a lawsuit is filed.' *Senter* . . . . The Court agrees with Plaintiff—he has standing . . .").

In short, the Court of Appeals decision is making new law here and does so based on cases that have no bearing and conclusions that are not relevant to these facts. The extension of good law that a party who never had standing cannot proceed with its case to the bad law of dismissing someone with recognized standing on unrelated grounds is an error this Court should correct.

3. An important principle of law is at stake here because the petitioners who satisfied the standing requirement continue to own land in the same relation to the permitted alterations of the sand dunes and have the same substantial interest in obtaining review of the permits over the 130-acre property; this case is not moot

As noted above, this case is not moot. The petitioners still own the same property that satisfies the standing criteria. They continue to share the same concerns that led the ALJ to rule that they were "aggrieved." The portions of the Court of Appeals decision that say they are not aggrieved do not even address the underlying basis for the ALJ's correct conclusion that they are aggrieved and erroneously ground it in the developer's sale of land where no permit was sought or granted. The decision entirely ignores the original and abiding concern with MDEQ's process and the fact that substantial alterations of portions of the sand dunes where the permitted activities will occur will have extensive and lasting effects throughout the local dunes where these parties live. The case is not moot.

C. The Court of Appeals decision must be overturned as it conflicts with well-established rules of statutory construction.

1. The Court of Appeals erred in focusing its statutory interpretation narrowly on the language of 35305(1) rather than interpreting 35305(1) in the context of the Part 353 as a whole

"[W]e are guided by the rules of statutory construction. It is well-established that when the language of a statute is unambiguous, no judicial construction is permitted and the statute must be enforced as written in accordance with the plain and ordinary meaning of its words." Exhibit A at p 12. The decision starts with this guide and goes on to review §35305(1) for its unambiguous meaning using the ordinary meaning of its words. *Cf.* argument point II.

However, another equally important tenet of construction is that each provision must be read to be consistent with the statute as a whole. "We must avoid an interpretation that renders any part of a statute surplusage." *Huggett v DNR,* 464 Mich 711, 721, 629 NW2d 915 (2001), citing *In re MCI,* 460 Mich 396, 414, 596 NW2d 164 (1999) ("It is a maxim of statutory construction that every word of a statute should be read in such a way as to be given meaning, and a court should avoid a construction that would render any part of the statute surplusage or nugatory. *Altman v Meridian Twp,* 439 Mich. 623, 635, 487 N.W.2d 155 (1992)"). "Statutory language should be construed reasonably, keeping in mind the purpose of the act. *Nelson v Grays,* 209 Mich App 661, 664 . . ." *Attorney Gen ex rel DNR v Huron County Rd Comm'n,* 212 Mich App 510, 517, 538 NW2d 68 (1995).

But in this case, the Court of Appeals decision is devoid of any reference to, much less discussion of, Part 353 as a whole or its purposes. The decision does not discuss MDEQ's heavy burden to balance private rights against the public interest or the numerous provisions of the statute that invoke the interests of the local public and require an analysis of comprehensive, scientific data to understand the effects of the proposed actions on the dunes as a whole. See discussion of Part 353 provisions, below at sub-point 5. In short, by interpreting §35305(1) without reference to Part 353 as a whole, the decision violates fundamental principles of statutory construction.

2. The Court of Appeals decision erred in reading "only" into 35305(1) where the legislature did not place it

The decision also violates the tenet of statutory construction requiring that "the statute must be enforced as written," Exhibit A, at page 12, by repeatedly

describing the words of 35305(1) not "as written" but by adding the word "only." *See, e.g.*, p 12 (the balance between protection and development in Part 353 "was struck by allowing *only* immediately adjacent property owners and applicants to dispute a permit decision, not the public at large") (emphasis supplied). Not only does the decision add the word "only," it also denigrates the unique interests of person residing in the same dunes compared to "the public at large." *See also*, p 9 ("it is clear that the Legislature['s] . . . scheme extends *only* to . . . property owners whose property is immediately adjacent . . .") (emphasis supplied). While the decision interprets §35305(1) as meaning "only" two parties may seek a contested case because the legislature only listed two classes, the decision glosses over the obvious fact that that is not what the legislature said.

3. The decision mistakenly overruled the ALJ's decision that the petitioners are "aggrieved" for purposes of Section 35305(1) standing

The Court of Appeals decision repeatedly states that petitioners are not "aggrieved" simply because the developer sold the land next to them. *See, e.g.*, Exhibit A at p 11 ("not aggrieved owners") and 12 ("petitioners would no longer live next to Dune Ridge's proposed development and could not be aggrieved"). Those statements in the decision ignore the meaning and purpose of the legislature's use of "aggrieved" in 35305(1), which the ALJ aptly explained as arising out of their concern with the MDEQ's application of the statutory standards and the developer's affecting large areas of the dunes. *See* Exhibits C and D.

For this reason, also, the statutory interpretation put forward in the Court of Appeals decision is wrong and should be rejected.

4. The adage *expressio unius est exclusio alterius* should be applied to interpret a statutory provision like §35305(1) in the context of the legislature's overall purpose in the statute

The Court of Appeals decision rejects Petitioners-Appellants' objection to the application of this adage that simply means 'a listing of things implies the exclusion of anything not listed' simply by finding in a conclusory fashion that Part 353's "dominating purpose" is satisfied by rejecting these petitioners' standing. Exhibit A at p 8. Note that the decision does not analyze the purpose or the terms of Part 353 as a whole or in any detail other than to acknowledge it calls for balancing protection with development. *Id*. The decision does not explain how denying standing to an interested local citizen who satisfies the standing requirement but next to whom the developer sold a sliver of land comports with the statute's "dominating purpose." The decision does not, as noted above, explore the many provisions of the statute that emphasize local interest and local citizens.

Petitioners-Appellants respectfully suggest that "subordinat[ing the application of the adage *expressio unius est exclusio alterius*] to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose," Exhibit A at p 8 (quoting from the United States Supreme Court decision in *Herman & Maclean v Huddleston*, 459 US 375, 386-387 (1983)), calls for a more thoughtful analysis of standing under §35305(1) than the decision offers. That analysis must conclude that divesting persons who satisfy the statutory standing criteria of §35305(1) through the unrelated actions of the regulated party is not "in conformity with" Part 353's "dominating general purpose" to address the balancing of sand dunes protection with science and public participation. While divesting a

petitioner of standing must, in itself, be rejected, to do so in such a manner as to reject all administrative review of permits authorizing a tremendous amount of activity makes that conclusion all the more important under Part 353. The two constitutional provisions invoking the "paramount public concern" with protection of the state's valued natural resources and mandating that the legislature take steps to implement such protection, as well as the well-established right to judicial review of final agency decisions both support this conclusion.

5. Part 353 as a whole evinces a legislative purpose to involve the local public such as these petitioners in protecting the critical sand dunes and balancing the public interest with private rights

Part 353 includes provisions expressing the legislature's findings at §35302. That provision goes into great detail and not only calls for a balancing of protection and development but also articulates important requirements as to how that task must be handled in a serious and thorough way. For example, the findings provisions state (emphasis supplied):

- 35302(a): "The legislature finds that . . . [t]he critical dune areas of this state are a *unique, irreplaceable*, and fragile resource [for not only] . . . the *people of this state* . . . [but also for] *people from other states and countries who visit* . . . .
- 35302(b): "The purpose of this part is to balance for *present and future generations* the benefits of protecting, preserving, restoring, and enhancing the *diversity, quality, functions, and values* of the state's critical dunes with the benefits of economic development and multiple human uses . . . [and] *public access* to and enjoyment of the critical dunes. . . ."
- 35302(b)(i): The legislature intended *Part 353 to "[e]nsure and enhance the diversity, quality, functions, and values* of the critical dunes . . . ," all characteristics that pertain to the interrelationship of an affected development footprint with the local region of dunes.
- 35302(b)(ii): The legislature intended Part 353 to "[e]nsure sound management of all critical dunes [with] . . . compatible economic development . . . ," which management must take into

account the relationship of the planned actions with the surrounding area.

- 35302(b)(iii): The legislature intended Part 353 to "[c]oordinate and streamline governmental decision-making affecting critical dunes through the use of *the most comprehensive, accurate, and reliable information and scientific data available*." Science speaks to the interrelationship between zones of dunes from the shoreline to the more elevated and vegetated back dunes, as well as throughout a local region.

Other provisions of Part 353 invoke the special interests of local citizens and concerns for the local environment in permit review and decision making:

- 35303(1): The department must notify "each property owner of record . . . within a critical dune area" of proposed activities in the designated protected sand dunes in their area.
- 35304(1)(c): A public hearing must be held if "2 or more persons who own real property within 2 miles of the project" request it.
- 35304(1)(g): The "significant and unreasonable depletion or degradation" of identified dunes characteristics "within the local unit of government" must be evaluated to determine whether or not to deny a dunes permit.
- 35304(3 & 4): The public's interest in the view of the dunes' natural features from the public trust along the shoreline is protected from structures placed too close to the shore and from construction of access to structures from the water side.
- 35317: A decision on whether to grant a variance or special exception requires a determination by the department whether the proposal "will significantly damage the public interest" in the specified dunes characteristics of diversity, quality and functions "within the local unit of government." These criteria inherently require an assessment of impacts not just in the project footprint but across the region of dunes where the project is planned. Such a determination must be based on "sufficient facts or data" in the file and "reliable scientific principles and methods." §35317(2). *See, e.g.,* §35320 regarding environmental impact statements, referring to the "general location" and requiring an aerial and contour map "showing the development site in relation to the surrounding area." An environmental impact statement may be required for a special use project, §35317(3), which includes any commercial project or multifamily use of more than 3 acres. §35301(j).

Any reading of the statute as a whole supports the standing of these petitioners and the rejection of arguments that their standing can be undermined by a land sale that does not alter the underlying permitted sand dunes development activities at issue in the contested case.

Conclusion: The Circuit Court correctly reinstated the ALJ's initial finding that Ms. Underwood and Mr. Zolper had standing to be heard as contested case petitioners because the actions of the regulated permittee did not alter *either* their basis for standing *or* the activities that were the subject of the permits under review in the contested case. A peremptory order affirming the Circuit Court decision on this issue would be sufficient to support a remand for a full contested case hearing. In the alternative, Petitioners-Appellants respectfully ask this Court to grant leave to appeal all four legal issues on which the Court of Appeals erred.

Point II. Where a person (Ms. Hoyt; Mr. Reininga) has the exclusive right to the possession and use of his or her home, that person is an "owner" of the home for purposes of standing under MCL 324.35305(1) and the fact that the homeowner's association holds legal title to the property does not alter or undermine that individual's standing.

Introduction: This Court need not address the standing of Ms. Hoyt and Mr. Reininga if it reinstates that of either Ms. Underwood or Mr. Zolper. Similarly, reinstating either Hoyt or Reininga would in itself be a sufficient decision to support a remand for a full contested case hearing without any action on the other issues. Only one petitioner is needed, even though these four plus the other Lakeshore Group members all share an abiding interest based on their location within the same dunes in receiving a full and fair hearing on these permits.

The error in rejecting the standing of Hoyt and Reininga is different than the conundrum of the developer's trying to divest Underwood and Zolper of standing with sales unrelated to the contested permits. The home shared by Ms. Hoyt and Mr. Reininga is indisputably immediately adjacent to the development property; it is right at the southern boundary along the waterfront. Moreover, the developer did not sell any of its property adjacent to them. Thus, as the ALJ originally held, the property did and still does satisfy the location requirement of section 35305(1); and their aggrieved status is unquestioned.

Instead, Dune Ridge argues that, despite the truth of the matter being that Ms. Hoyt and Mr. Reininga have the right to the exclusive use and possession of their home and therefore are considered in any ordinary sense to be its owners, the fact that their home is in an association which holds legal title to all properties necessarily means that the association owns the land for standing purposes and they do not.

Section 35305(1) uses the term "owner" but does not define it. The Circuit Court correctly held that Ms. Hoyt and Mr. Reininga have the exclusive right to the use of their property and reinstated their standing as owners. The error of the Court of Appeals is ignoring the fact that these two individuals satisfy the common definition of "owner." Moreover, the statute does not limit how many parties may be considered an owner and thereby have standing, and the Court of Appeals decision simply assumes that since the association holds legal title no one else can be an owner.

In short, the standing of Ms. Hoyt and Mr. Reininga as "owners" under section 35305(1) is plain. Petitioners-Appellants respectfully request that this Court issue a peremptory reversal of this error by the Court of Appeals.

A. No one disputes that the Hoyt/Reininga home is "immediately adjacent to the proposed use" by Dune Ridge of the protected sand dunes. The ALJ initially found them to have standing as owners of their home.

When Ms. Hoyt and Mr. Reininga joined others in Lakeshore Group in their September 1, 2015, motion to intervene into the pending consolidated contested case, Dune Ridge opposed the motion but the administrative tribunal granted it, holding that they, along with Ms. Underwood and Mr. Zolper, were owners of property immediately adjacent to the proposed use. ALJ Opinion and Order dated October 28, 2015, attached as Exhibit C. The Hoyt/Reininga home is the northernmost waterfront home in the Shorewood subdivision and is thus right next to Dune Ridge's planned waterfront lots 1-12 along Lake Michigan. See maps at Exhibits K&L. At no time has any party argued that the property is not immediately adjacent. Instead, Dune Ridge has argued that Ms. Hoyt and Mr. Reininga are not owners of it for purposes of standing in a Part 353 permit contested case.

B. Part 353 does not define "owner" for purposes of the standing provision, MCL 324.35305(1) ("owner of property immediately adjacent to the proposed use")

Part 353 provides some definitions at section one of the statute, but "owner" is not included as a defined term. MCL 324.35301. The statute does not cross-reference any other provision that would incorporate a definition established by the legislature for this purpose. The state has never promulgated regulations under Part 353, as it has for many other environmental statutes, so no such regulatory

document provides a definition of the term "owner" for purposes of standing to be heard in a contested case challenge to Part 353 permits.

C. In the absence of a statutory definition, the ordinary and usual meaning should be used that the owner is one who has the right to the exclusive use and possession of the property

In the absence of a formal definition being provided, a basic rule of construction is to apply the common, everyday definition of the word. "A fundamental rule of statutory construction is that the Legislature is presumed to have intended the plain meaning of words used in a statute. . . . When a statute does not define a term, the term will be construed according to its common and approved usage . . . ." *Attorney Gen ex rel Dep't of Nat'l Res v Huron Co Rd Comm'n,* 212 Mich App 510, 517 (1995). *See also, Arrigo's Fleet Service, Inc v Michigan,* 125 Mich App 790, 792; 337 NW2d 26 (1983), citing *MacQueen v Port Huron City Comm,* 194 Mich 328, 342; 160 NW 627 (1916). It is common with respect to property to use the word "owner" for one who has the right to the exclusive use and possession of it. *See e.g., Cramer v State,* 2005 Mich App LEXIS 2512 (2005) at *15 ("ownership" of land is defined as "the exclusive right to possess and use" it), attached as Exhibit M.

D. Ms. Hoyt and Mr. Reininga are "owners" of their home because they alone have the right to the exclusive use and possession of it pursuant to the association bylaws, and the *Slatterly* decision upholds this right

The Shorewood Association bylaws, AR 0063-0079, provide that each shareholder in the association has a unique relationship to a piece of property within the association that is identified as appurtenant to that shareholder's share(s). *See, e.g.,* bylaws sections 3.1 (only the owners of shares to which a lot is appurtenant

are "entitled to the use of said lot"); 5 ("land attached to shares . . . shall be and remain . . . attached to said shares"); and 26 ("equitable title of lots appurtenant to shares . . . is vested in the stockholders owning such shares"). In short, each shareholder has the exclusive right to the use and possession of such appurtenant property. *Id.*

The *Slatterly* decision relied on in error by the Court of Appeals decision concerned a dispute between two shareholders in the same Shorewood Association 20 years ago. *Slatterly v Madiol*, 257 Mich App 242 (2003) ("*Slatterly*"). The Slatterlys and Madiols were both shareholders in the Shorewood Association. The Slatterlys sought to use part of the Madiol lot for parking. The Madiols had given permission to use it in that way after their purchase of their lot in 1988, *Slatterly,* 257 Mich App at 245, but "in May of 1998, James Madiol told Thomas Slatterly that he could no longer park his car in lot 56" belonging to the Madiols. *Id*. at 245-246. The Shorewood board took steps siding with Slatterlys. *Id*. The Slatterlys sued both the Madiols and the Association in 2000. *Id*. at 246-247. Among other relief, they sought a declaration that neither family "had a real property interest in the disputed space." *Id*. at 247. The Court of Appeals noted the trial court's finding that Shorewood was the actual owner and Madiols could not exclude Slatterlys, *Id*. at 247-248, but then proceeded to analyze the situation pursuant to the Summer Resort and Assembly Association Act, MCL 455.1 *et seq*. The *Slatterly* decision "conclude[s] that *the act* does not create a present real property interest in the Madiols' favor" and the shareholders' stock is merely "personal property"

(emphasis supplied). *Id*. at 253 & 255. This is where the Court of Appeals analysis and the arguments of MDEQ and Dune Ridge end.

However, the *Slatterly* decision goes on to find that the Madiols "do have certain rights pursuant to" the bylaws and analyzes the effect of the bylaws. *Id*. Those rights include "the use of the lot attached to the stockholder's shares" and that other stockholders do not have that right. *Id*. at 256. The *Slatterly* decision concluded that "the bylaws, as presently written, do not permit the corporation to exclude a stockholder from his lot, or require that a stockholder grant the use of his lot to another." *Id*. at 257. As a result, the Court ruled in Madiols' favor that the association's restricting Madiols use of their lot or designating it to Slatterlys violated the bylaws; the Court reversed the trial court decision. *Id*. at 258. In short, the ultimate conclusion of the *Slatterly* decision was to recognize the Madiols' right to exclude Slatterlys from the desired use of its property, even a small portion of it for parking. *Id*. Thus, the *Slatterly* decision's analysis and its ultimate holding both support recognition of Ms. Hoyt and Mr. Reininga as the persons with the right to exclude others from their home. Their rights to the exclusive use and possession of their home makes them its "owners" for purposes of Part 353 standing.

E. The Court of Appeals decision errs in using *Slatterly* to reject Hoyt and Reininga's standing

The Court of Appeals decision ignores the Circuit Court's finding that "the ALJ ignored Ms. Hoyt and Mr. Reininga's equitable ownership and exclusive rights to use of their individual" home, Exhibit B at page 6. Instead, the March 21, 2019, Court of Appeals decision reached to draw a different conclusion. First, it ignored the language just quoted and characterized the Circuit Court decision too narrowly,

saying it held "that equitable ownership was sufficient for standing under Part 353." Exhibit A at page 13.

The Court of Appeals then also focused its analysis not on Hoyt and Reininga's ownership but on the Association's and said, "The issue whether Shorewood Association owns the property . . . has already been decided by this Court. *Slatterly v Madiol*, 257 Mich App 242; 668 NW2d 154 (2003)." The decision ignores the rest of the *Slatterly* decision after page 255 and does not offer any analysis as to why the association and these shareholders cannot all be owners for purposes of standing here. With regard to this issue, the Court of Appeals also misstated Petitioners' position as "Petitioners argue that *Slatterly* is inapplicable." Exhibit A at p 13. To the contrary, Petitioners argued that *Slatterly* supports Ms. Hoyt and Mr. Reininga rather than MDEQ and Dune Ridge.

The Court then went on to rebut Petitioners' true point, Exhibit A at p 13 (they "also contend"), that Ms. Hoyt and Mr. Reininga's exclusive right to use and possess the property makes them its owners. The Court did this by noting that certain bylaws provisions provide some authority to the association and concluding that the "members' rights are not as 'exclusive' as petitioners contend." Exhibit A, p14. However, Petitioners did not (and *need not*) argue that Ms. Hoyt and Mr. Reininga have exclusive powers *in all respects* over their home, but only that they have the right to use and possess it and to exclude others from doing so. That is what "owner" means. And the fact that the association's holding legal title and

maintaining certain powers that may regulate other aspects of the members' actions does not change this legal conclusion.[13]

In sum, the *Slatterly* decision supports the conclusion that Ms. Hoyt and Mr. Reininga have the right to the exclusive use and possession of their home. Common usage of the term and their rights in their home make them its owners. There is no reason to conclude that they do not have standing to be heard in a contested case pursuant to §35305(1). Certainly, given the close proximity of their home to the many waterfront lots of the Dune Ridge development, they have a strong interest in being heard as to the effect of such tremendous changes on the protected sand dunes in which they live.

Conclusion: Ms. Hoyt and Mr. Reininga have a real interest in this case as the only people with rights to live in their home immediately adjacent to the development. Petitioners-Appellants respectfully ask this Court to issue a peremptory order affirming the Circuit Court decision reinstating their standing and remand the case for a full contested case proceeding, or in the alternative grant leave to address all issues raised in this application.

Point III. Where a person has moved to intervene under MEPA, MCL 324.1705, into a pending consolidated contested case proceeding to review Part 353 sand dunes permits, that person has statutory standing to be heard in the contested case.

Introduction: Petitioners raise the issue of MEPA intervention because it is a significant issue for all petitioners. The ALJ initially recognized MEPA

[13] We do not digress into a discussion of equitable title in this application as we submit it is not necessary for the Court to address that issue to find that Ms. Hoyt and Mr. Reininga are owners of their home. However, there is abundant case law we can address if the Court wishes.

authorizes intervention into an administrative proceeding but erroneously rejected the application of MEPA and did not authorize the intervention by Lakeshore Group or its members on this ground.

The Court of Appeals decision also erred in rejecting MEPA's application to the administrative proceeding. It appears this error was predicated on a factual misunderstanding that the consolidated contested case was not already pending when the motion for MEPA intervention was filed, which provides a simple basis for this Court to correct the error. The legislature's statutory authorization to use MEPA is especially relevant here because in the related case, Supreme Court case 159033, MDEQ argues against any right to use a MEPA suit under §1701 to obtain judicial review of its permitting conduct. To take away intervention using MEPA's §1705 would remove another right the legislature delegated to the public in MEPA.

A. MEPA §1705, MCL 324.1705, authorizes statutory standing through intervention by "any person" without regard to §35305(1) standing

MEPA authorizes "any person" to seek relief in Michigan circuit courts to protect the state's environment and natural resources from destruction or impairment. MCL 324.1701 *et seq.* MEPA supplements "existing administrative and regulatory procedures provided by law," MCL 324.1706, including other parts of NREPA, and is "[t]he chief legislative enactment currently fulfilling the Legislature's duty to protect our natural resources" pursuant to article IV, §52 of the constitution. *State Hwy Comm'n v Vanderkloot*, 392 Mich 159, 182-183, 220 NW2d 416 (1974).

While a very short statute, MEPA makes a number of important points. One of them is that MEPA requires that pollution or impairment "shall be determined"

in administrative proceedings. MCL 324.1705(2). It authorizes the circuit court to "direct the parties to seek relief in" administrative proceedings if they are available "to determine the legality of the defendant's conduct." MCL 324.1704(2). And it separately authorizes "the attorney general *or any other person to intervene* as a party" in an administrative proceeding (emphasis supplied). MCL 324.1705(1). In short, MEPA applies in an administrative proceeding such as a contested case and separately supports intervention as a party in such a proceeding.

B. Petitioners-Appellants relied on MEPA and moved to intervene

When Petitioners-Appellants moved to intervene, they argued that MEPA applied, that the permits violated MEPA, and that they had a right to be heard. *See* Exhibit C, p 2-3, where the ALJ quoted *Lansing Schools* for the principles that "[t]he purpose of the standing doctrine is to assess whether a litigant's interest in the issue is sufficient to 'ensure sincere and vigorous advocacy'" and "[a] litigant may have standing in this context if the litigant has a . . . substantial interest that will be detrimentally affected in a manner different from the citizenry at large . . . ." The ALJ summarized the assertions of standing as based on §35305(1), the common law "public interest criteria" and MEPA. *Id*.

C. The ALJ found that MEPA authorized intervention but rejected the application of MEPA in the contested case and did not allow intervention based on MEPA, but only for those "immediately adjacent"

In the ALJ Opinion and Order, Exhibit C, the administrative tribunal first rejected the application of MEPA in the contested case. Then, while acknowledging that MEPA authorized intervention, Exhibit D, the ALJ failed to apply it to recognize all Lakeshore Group members as parties through that intervention. This

result appears to be the outcome of his paradoxical rejection of the application of MEPA and was an error that Petitioners-Appellants appealed to both the Circuit Court and the Court of Appeals.

D. The Circuit Court did not reach the issue of MEPA intervention as a basis for standing as it ruled the four "immediately adjacent" parties had standing and Lakeshore Group did, as well

The Circuit Court ruled that four individuals and Lakeshore Group had standing, reversing those errors by the ALJ and remanding the case for hearing. Exhibit B. Based on those decisions, it was unnecessary to reach the issues of standing pursuant to MEPA and the common law, and the Circuit Court decision does not address those when it remanded the case.

E. The Court of Appeals erroneously rejected MEPA intervention

The Court of Appeals decision briefly addresses and rejects MEPA authorization to intervene. Exhibit A, at p 8-9. The Court of Appeals rejects reliance on MEPA on two grounds. First, the decision states that the "language of 1705(1) supports the ALJ's conclusion [to reject intervention], because the statute explains that when an administrative proceeding is available by law, other parties may intervene, which necessarily implies that a valid administrative proceeding must already exist in order for a party to intervene." *Id*. at 9. At the time these Petitioners-Appellants moved to intervene on September 1, 2015, there was a pending, consolidated administrative proceeding of three contested cases brought by different parties. *See generally* the administrative record; Exhibit J; and, for example, page 1 of Exhibit C. Thus, the Court of Appeals affirmance of the ALJ's error is based on a factual mistake that should be corrected.

Second, the Court notes that §1705(1) says the agency "may permit" intervention and dismisses intervention as discretionary without further discussion of the issue. *Id*. Petitioners-Appellants respectfully request that this Court exercise its discretion to overturn the ALJ's rejection of MEPA intervention and the Court of Appeals decision affirming that rejection. The ALJ held that MEPA does not apply in a contested case proceeding, plainly ignoring or rejecting the terms of MCL 324.1705(2) ("In administrative . . . proceedings . . . the alleged pollution, impairment, or destruction of the air, water, or other natural resources , or the public trust in these resources, shall be determined . . ."). In the context of this erroneous rejection of MEPA, this Court should not defer to the ALJ's exercise of discretion as to intervention but should instead exercise its own and recognize all Petitioners-Appellants as parties with standing based on MEPA intervention.

Conclusion: Petitioners-Appellants request a peremptory order correcting the Court of Appeals affirmance of the ALJ's error on MEPA intervention by granting standing as MEPA intervenors to all petitioners and remanding the case for a contested case hearing, or granting leave to appeal for further briefing on this and the other issues.

Point IV. Where a person does not fall within the two statutory categories with standing to file a contested case petition under MCL 324.35305(1) (permit applicant; owner of immediately adjacent property) but is an interested party under the statutory scheme of Part 353 and has a substantial interest different from the general citizenry in protecting the dunes where she lives, that person has standing to participate in the contested case proceeding pursuant to Michigan common law.

Introduction: This Court need not address the issue of common law standing if any one petitioner is found to have statutory standing under either Part 353's section 35305(1), or MEPA's section 1705(1).

Petitioners-Appellants place the issue of common law standing before the Court for two simple reasons. First and most importantly, Petitioners-Appellants dispute the position of the Respondents-Appellees (adopted by the administrative tribunal) that, because of the limited powers of that body, there is equally a limitation on standing or the right to be heard. Putting the argument another way, the limitation on the tribunal's power in what relief it can grant is not a reason to exclude interested parties from the hearing. Petitioners-Appellants see this linking of two unrelated issues (the ALJ's powers to grant relief versus who has a right to be heard) as a dangerous precedent this Court should address.

It is not unusual in contested case hearings for the tribunal to rule that it has no equitable powers because the ALJ's authority is statutory and, therefore, the ALJ cannot, for example, issue injunctive relief. Petitioners-Appellants suggest that this issue is different; the question of who has standing simply goes to who can be heard and does not implicate the powers of the administrative tribunal to make rulings on the permits at issue. A common law petitioner still cannot seek relief the ALJ cannot grant.[14] The standing argument does not go against the tide of limited administrative powers and those cases should not limit the right to be heard.

[14] The fact is that the outcome of a contested case review of MDEQ permits is simply a recommendation from the ALJ to the director of MDEQ, who makes the final decision. It is not the ALJ's role to grant relief in the true sense. *See, e.g.*, MCL 24.281 and R 324.74.

Equally important, the common law is just as much the law of our state as the statutes. The existence of an applicable statutory provision should not in and of itself require a conclusion that the common law does not also apply with equal power if the criteria for common law standing are satisfied.

Second, the decision in *Lansing Schools Educ. Assoc'n v Lansing Bd of Educ'n,* 487 Mich 349, 792 NW2d 686 (2010) ("*Lansing Schools*") makes a straightforward statement that the common law of standing applies where a statutory standard does not:

> While the [prudential] doctrine [of standing] continued to serve the purpose of ensuring "sincere and vigorous advocacy" by litigants, over time the test for satisfying this requirement was further developed. In cases involving public rights, the Court held that a litigant established standing by demonstrating a "substantial interest [that] will be detrimentally affected in a manner different from the citizenry at large." . . . In summary, standing historically developed in Michigan as a limited, prudential doctrine that was intended to "ensure sincere and vigorous advocacy" by litigants. If a party had a cause of action under law, then standing was not an issue. But where a cause of action was not provided at law [for a given litigant], the Court, in its discretion, would consider whether a litigant had standing based on a special injury or right or substantial interest that would be detrimentally affected in a manner different from the citizenry at large . . . ."

Lansing Schools, 487 Mich App at 358-359. *See also, id.* at 372-373, repeating this language and holding that the Lansing teachers "have standing because they have a substantial interest in the enforcement of . . . [the statute] that will be detrimentally affected in a manner different from the citizenry at large if the statute is not enforced."

We submit that there are two different ways this summary statement can be applied; and we put this distinction to the Court for clarification. Petitioners-

Appellants proffer the interpretation that, where a statutory standing provision does not explicitly exclude others not identified in the statute as having standing (see §35305(1) and argument point I, above), then anyone not covered by the statute could be considered under principles of common law standing. We propose that that interpretation means that the possible common law standing of all Lakeshore Group members besides Underwood, Zolper, Hoyt and Reininga (and including any of them who do not have statutory standing) must be considered as a separate ground for authorizing a contested case proceeding to go forward if they satisfy the criterion for common law standing.

The Court of Appeals decision takes the opposite approach and rules that where there is a statutory authorization for anyone (in this case the permit applicant or the owner of property immediately adjacent), the effect of that language is to exclude all others regardless of location, interest or satisfaction of this common law analysis. To support this conclusion, the Court of Appeals holds that §35305(1) authorizes "only" the two enumerated classes of petitioner. It rejects the "aggrieved" status of the petitioners. And the Court of Appeals focuses its statutory interpretation on the words of §35305(1) without analysis of Part 353 as a whole, even though the legislature repeatedly recognized the unique interest of local citizens in the statute.

These two different approaches to interpreting §35305(1) would either apply rules of common law standing as supplementing the statutory provision or reject that approach. Petitioners-Appellants suggest that the common law grounds for standing should be considered in a sand dunes permitting contested case. The

environmental protection priorities of the constitution, article IV § 52, together with Part 353 as a whole (and MEPA) support recognizing the standing of others not listed in §35305(1) whose concerns are with the protection of public interest in their local, legislatively-protected sand dunes, regardless of the narrow statutory authorization whose focus is proximity.

A. Standing is an important legal matter involving judicial discretion intended to empower those with serious interest in the litigation to be heard, and includes both statutory and common law components

The *Lansing Schools* decision involved a challenge by the teachers union to school board action (or inaction – failing to expel physically abusive students) where the statute did not grant the teachers standing. *Lansing Schools*, 487 Mich at 352 and 373 (despite the fact that the revised school code did not "create an express cause of action or expressly confer standing on plaintiffs to enforce the act's provisions . . . [the Court held that] plaintiffs have standing because they have a substantial interest in the enforcement of MCL 380.1311a(1) that will be detrimentally affected in a manner different from the citizenry at large if the statute is not enforced"). We submit that the same analysis supports the standing of these petitioners.

The issue of standing and the legal analysis regarding how to decide whether a party has standing have consumed many pages of jurisprudence. While there may be controversial issues with regard to standing in other circumstances, Petitioners-Appellants submit that the decision to exercise discretion and recognize that these petitioners have standing is an easy and non-controversial one.

In addition to the language quoted above concerning the emphasis on standing in public interest cases, one need only look to three factors:

1. These petitioners intense interest in the dunes in which they live: These petitioners live in the same sand dunes where the developer's permits will alter many acres, with resulting impacts across the dunes. These petitioners have for years had access to these dunes during the century the 130-acre property was a church camp from which the public was not excluded. That use of the land continued from before the enactment of Part 353 and for many years thereafter in this region of protected "critical dunes." While the dunes are recognized nationally for their beauty and draw tourists from around the world,[15] they are of special, unique interest to these local citizens. Their concern is substantial and it continues.

2. Const. 1963, art IV, §52: This constitutional provision not only recognizes the "paramount public concern" in protecting natural resources like these sand dunes; it also directs the legislature to enact provisions to protect these resources. The legislature has done that not only in a broad sense with MEPA but also through specific statutes like the Wetlands Protection Act and the Sand Dunes Protection and Management Act, Part 353. The title says it all – the legislature has

[15] See, for example, https://www.saugatuck.com/directory/oval-beach-2/: "Celebrated around the world for its beautiful sweep of shoreline and backdrop of rolling dunes, this [Oval Beach] is the main beach in town and the most happening place to soak in the sun. Its impressive pedigree of awards (Condé Nast Traveler's Top 25 Beaches in the World, National Geographic Traveler's Top Freshwater Beaches in the USA, and MTV's Top 5 Beaches in the USA) is proof of its status as a summertime favorite and natural beauty spot. Easy parking, concessions, and a picnic area will keep the whole group happy until the sun goes down."

created a duty to protect and to manage the designated critical sand dunes, including privately-owned portions of them.

3. The legislated emphasis on the interest of the local public in Part 353: Numerous provisions of Part 353 are cited above that set forth legislative priorities to protect the dunes for current and future generations and to involve the public when balancing the public interest with private uses. These provisions make clear that public perspectives on the protection of sand dunes are important.

In sum, the factual and legal framework in which the question of standing is raised here makes the answer obvious – of course these intensely interested local citizens should have standing.

B. §35305(1) authorizes two categories of petitioner but excludes no one

The language of §35305(1) bears repeating:

> If an applicant for a permit or a special exception or the owner of the property immediately adjacent to the proposed use is aggrieved by a decision of the department in regard to the issuance or denial of a permit . . . the applicant or owner may request a formal hearing on the matter involved. . . .

MCL 324.35305(1). Nowhere does this statutory basis for standing to initiate a contested case hearing state that "only" these two parties may seek a contested case. Nowhere does it exclude anyone else. Nowhere does it bar a party with common law standing.

C. Common Law standing applies to all potential petitioners not covered by the legislative authorization

1. Two interpretations of the common law doctrine of standing enunciated in *Lansing Schools*: As stated above, Petitioners-Appellants recognize there are two possible interpretations of the *Lansing Schools* explanation of the

common law of standing in a case involving public rights. On the one hand, we propose that, where a statutory standing provision does not explicitly exclude others not identified in the statute as having standing and certain individuals satisfy the substantial interest test for common law standing, they should be allowed to proceed. The Court of Appeals decision takes the opposite approach, that where there is a statutory authorization for anyone, the effect of that language is to exclude all others regardless of location, interest or satisfaction of this common law analysis.

2. Recognizing the standing of these petitioners is a better conclusion: This decision would not conflict with §35305(1) because that provision is not exclusive. It makes sense and follows the body of Michigan common law of standing because of the importance of the public interest with regard to sand dunes as a valued natural resource. The conclusion to find standing follows from the constitutional emphasis on the "paramount" public interest. And it follows from the emphasis on public interests and the involvement of local citizens the legislature included in the statutory scheme of Part 353.

D. In the interests of justice, this Court should substitute its judgment for the administrative tribunal and exercise its discretion to rule that these Petitioners-Appellants have standing to be heard in a contested case proceeding on the Dune Ridge sand dunes permits issued by MDEQ.

Given the years-long delay resulting from MDEQ and Dune Ridge's efforts to avoid any contested case review of the numerous Part 353 permits MDEQ issued to Dune Ridge, the question of standing should not be sent back down to a lower tribunal on remand for consideration in the discretion of that body. Rather, Petitioners-Appellants ask this Court to exercise its own discretion on this question

of standing. The Court reviews the legal question of standing *de novo*. We ask the Court to issue a peremptory order ruling that the individual members of Lakeshore Group have common law standing and remanding the case for a contested case hearing. In the alternative, we respectfully request that the Court grant leave to appeal the decision of the Court of Appeals on all issues.

CONCLUSION

For the reasons set forth above, Petitioners-Appellants respectfully request that the Court take peremptory action reinstating the standing of at least one individual petitioner and Lakeshore Group, thereby affirming at least part of the Circuit Court decision and reversing one or more of the decisions of the Court of Appeals, or grant leave to appeal the Court of Appeals decision of March 21, 2019, for review of all issues.

Respectfully Submitted,

Date: May 2, 2019

/s/ Dustin P. Ordway

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Index of Exhibits

Exhibit	Document
A	Court of Appeals' unpublished decision dated March 21, 2019
B	Circuit Court decision dated September 28, 2017
C	ALJ Opinion and Order dated October 28, 2015
D	ALJ Opinion and Order dated January 26, 2016
E	ALJ Opinion and Order dated July 7, 2016
F	ALJ Opinion and Order dated February 13, 2017
G	The Michigan Environmental Protection Act, MEPA, MCL 324.1701 *et seq.*
H	The Sand Dunes Protection and Management Act, Part 353, MCL 324.35301 *et seq.*
I	"A List of Common Activities Needing a Permit," from MDEQ's web site
J	ALJ Opinion and Order dated December 16, 2014
K	Two maps from AR 0137 and 0902
L	Map of Dune Ridge development locations from AR 0061
M	Unpublished decision in *Cramer v State*, 2005 Mich App LEXIS 2512 (2005)

STATE OF MICHIGAN
IN THE SUPREME COURT
(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

LAKESHORE GROUP AND ITS MEMBERS, LAKESHORE CHRISTIAN CAMPING, CHARLES ZOLPER, JANE UNDERWOOD, LUCIE HOYT, WILLIAM REININGA, KEN ALTMAN, DAWN SCHUMANN & MARJORIE SCHUHAM,
Petitioners-Appellants,

v.

DUNE RIDGE SA LP, and MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,
Respondents-Appellees.

Supreme Court No. _____

Court of Appeals No. _ and _

Circuit Court No. 17-176-AA

MAHS Docket No. _____

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PLAINTIFFS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

*****ORAL ARGUMENT REQUESTED*****

PROOF OF SERVICE

On this date I have caused to be served a copy of Notice of Filing of Application, Application for Leave to Appeal and Proof of Service on counsel noted above using the Truefiling system. The undersigned further states that the Notice of Filing Application and Proof of Service were served upon the following courts:

Michigan Court of Appeals PO Box 30022 Lansing, MI 48909	Via U.S. Mail
Clerk of the Court 30th Circuit Court 313 W. Kalamazoo St., Ste. 1 Lansing, MI 48933	Via U.S. Mail
MAHS PO Box 30695 Lansing, MI 48909	Via U.S. Mail

Respectfully Submitted,

Date: May 2, 2019

/s/ Dustin P. Ordway

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