STATE OF MICHIGAN
IN THE SUPREME COURT

LAKESHORE GROUP, CHARLES ZOLPER, JANE UNDERWOOD, LUCIE HOYT, and WILLIAM REININGA, Petitioners/Appellants, v	Supreme Court No. 159524 Court of Appeals No. 340647 Consolidated with No. 340623 Lower Court Case No. 17-176-AA
STATE OF MICHIGAN, DEPARTMENT OF ENVIRONMENTAL QUALITY, Respondent/Appellee, And DUNE RIDGE SA LP, Intervenor/Appellee.	MAHS Docket 14-026236

Dustin P. Ordway (P33213)
Ordway Law Firm, PLLC
Attorney for Petitioners-Appellants
3055 Shore Wood Drive
Traverse City, MI 49686
Tel: (616) 450-2177
Fax: (877) 317-6212
dpordway@ordwaylawfirm.com

Daniel P. Bock (P71246)
Office of the Attorney General
Attorneys for Resp't-Appellee DEQ
525 W. Ottawa Street
P.O. Box 30755
Lansing, MI 48909
Tel: 517-373-7540
bockd@michigan.gov

Kyle P. Konwinski (P76257)
Herman D. Hofman (P81297)
Varnum LLP
Attorneys for Resp't-Appellee Dune Ridge
333 Bridge Street, N.W.
P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6000

INTERVENOR/APPELLEE DUNE RIDGE SA LP'S RESPONSE IN OPPOSITION TO PETITIONERS/APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

The Administrative Law Judge's ("ALJ") decisions below collectively found that Petitioners/Appellants did not have standing to pursue a contested case hearing to challenge permits issued by Respondent/Appellee the Department of Environment, Great Lakes, and Energy, (formerly known as the Department of Environmental Quality ("DEQ")) to Dune Ridge under Part 353 of the Natural Resources Environmental Protection Act, MCL 324.35301 et seq. The circuit court's Opinion and Order reversed these three decisions of the ALJ.

Appellant filed an application for leave to appeal the circuit court's Opinion and Order with the Court of Appeals pursuant to MCR 7.203(B)(2), which the Court of Appeals had granted on April 10, 2018. In a March 21, 2019 Opinion, the Court of Appeals reversed the circuit court's September 26, 2017, Opinion and Order and remanded for proceedings consistent with that Opinion. Petitioners/Appellants' Application arises from that Order.

On April 15, 2019, consistent with the Court of Appeals' Opinion, the circuit court reinstated the ALJ's decision, dismissed the remaining Petitioners from the case, and closed the case.

Under MCR 7.302(B), applications for leave to appeal to the Supreme Court are required to show either that (1) the issue preserved for appeal involves legal principles of major significance to the State's jurisprudence; (2) the issue preserved for appeal has significant public interest; or (3) the decision of the Court of Appeals is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

Appellees cannot demonstrate any of these requisite grounds. Therefore, the Application should be denied.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. Can Petitioners lose statutory standing during the pendency of an administrative proceeding if Petitioners no longer meet the required elements for statutory standing as a result of a change in circumstances during the course of the proceeding?

Respondent-Appellee answers: Yes.

Intervenor-Appellee answers: Yes.

Petitioners-Appellants answer: No.

The ALJ answered: Yes.

The circuit court answered: No.

The Court of Appeals answered: Yes.

II. Are shareholders in an association "owners" of property for purposes of establishing statutory standing under MCL 324.35305(1) where they only hold certain personal property interests in the property, and the Court of Appeals previously held that members of the same association do not "own" the association's property?

Respondent-Appellee answers: No.

Intervenor-Appellee answers: No.

Petitioners-Appellants answer: Yes.

The ALJ answered: No.

The circuit court answered: Yes.

The Court of Appeals answered: No.

III. Is Petitioners' claim barred by res judicata when the Petitioners are members and shareholders of an association under the Summer Resort and Assembly Association Act, and the association already obtained a ruling on the merits?

Respondent-Appellee answers: Yes.

Intervenor-Appellee answers: Yes.

Petitioners-Appellants answer: No.

The ALJ did not answer this question.

The circuit court did not answer this question.

The Court of Appeals did not answer this question.

IV. Does the Michigan Environmental Protection Act (Part 17 of the Natural Resources and Environmental Protection Act "NREPA") entitle Petitioners to intervene in an already-existing contested case proceeding under Part 353 of NREPA?

Respondent-Appellee answers: No.

Intervenor-Appellee answers: No.

Petitioners-Appellants answer: Yes.

The ALJ answered: No.

The circuit court did not answer this question.

The Court of Appeals answered: No.

V. Do Petitioners have common-law standing to intervene in an administrative contested case proceeding where that proceeding (including who has standing) is entirely created by statute, petitioners/plaintiffs do not have statutory standing to intervene, and the ALJ lacks equitable powers to redress any of petitioners/plaintiffs' alleged injuries?

Respondent-Appellee answers: No.

Intervenor-Appellee answers: No.

Petitioners-Appellants answer: Yes.

The ALJ answered: No.

The circuit court did not answer this question.

The Court of Appeals answered: No.

CONSTITUTIONAL PROVISION, STATUTE, RULE INVOLVED

MCL 324.35305(1): If . . . 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 or special exception under this part, the applicant or owner may request a formal hearing on the matter involved.

MCL 324.1701(1): The attorney general or any person may maintain an action in the circuit 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.

MCL 324.1705(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.

I. INTRODUCTION AND COUNTER-STATEMENT REGARDING GROUNDS OF GRANTING LEAVE TO APPEAL

Interpreting the relevant statutory provision based on its clear and unambiguous language, the ALJ and Court of Appeals correctly held that Part 353 allows *only* "the owner of property immediately adjacent to the proposed use" to challenge a Part 353 permit in an administrative proceeding. MCL 324.35305(1). Two of the Petitioners (Jane Underwood and Charles Zolper) did not live "immediately adjacent to the proposed use and two others (Lucie Hoyt and William Reininga) are not "owners" of property.

First, Petitioners Underwood and Zolper did not live "immediately adjacent" because they did not live next to any property owned by Dune Ridge. The ALJ and Court of Appeals applied well-established Michigan standing principles to hold that Petitioners Underwood and Zolper lost any standing they may have had.

As for Petitioners Hoyt and Reininga, they live in an association created by the Summer Resort and Assembly Association Act. The ALJ and Court of Appeals rightly noted that they *use* property owned by Shorewood Association, but do not own it. Because they are not "owners" of the property, the ALJ and Court of Appeals held they do not have standing. MCL 324.35305(1). Furthermore, Shorewood Association already settled its Part 353 challenges with Dune Ridge, and thus Hoyt's and Reininga's claims are barred by the doctrine of res judicata.

Petitioners' attempted end-around the plain statutory language does not work. The ALJ and Court of Appeals correctly recognized the well-established principle that the ALJ—a function of an administrative agency—has no powers beyond those "plainly and affirmatively" granted by the Legislature. Accordingly, the ALJ had no authority to consider a request for a contested case hearing from anyone other than the "owner of property immediately adjacent" to

Dune Ridge's proposed use. MCL 324.35305(1). Consequently, the ALJ correctly dismissed all Petitioners because none of them satisfied the requirements of MCL 324.35305(1).

Leave to appeal should not be granted in this case because the Petitioners seek nothing more than a re-writing of the relevant statutory provisions based on their alleged "concerns" and purported "interest" in the statutorily-created proceedings. The questions presented in the Petitioners' Application do not involve novel issues or unsettled areas of law, as demonstrated by the Court of Appeals' unpublished decision. Rather, the issues presented represent nothing more than dissatisfaction with the Legislature's choice of words in MCL 324.35305(1), and the ALJ and Court of Appeals' application of those unambiguous words.

No reason under MCR 7.302(B) exists to grant leave to appeal.

II. COUNTER-STATEMENT OF FACTUAL AND PROCEDURAL BACKGROUND

A. FACTUAL BACKGROUND

This proceeding involves the DEQ's grant of Part 353 permits to Dune Ridge for a 21-unit condominium development ("the Project"). See, eg, Part 353 Permit Issued 3/11/2016 [AR 438-493]. The permits allow Dune Ridge to develop the Project on a portion of a large parcel (approximately 150 acres) that abuts the shoreline of Lake Michigan, including rebuilding a road that served the prior development (a church camp) for a century.

Dune Ridge sold large portions of the land that it originally purchased. A part of Dune Ridge's development plan (which does not involve the DEQ or Part 353) included the sale of approximately 30 acres of the property adjacent to Oval Beach (a City-owned beach and associated amenities) to the Oval Beach Preservation Society, which will preserve that property in its undeveloped state. See Aff of P Heule [AR 111]. Another component of Dune Ridge's development plan (again not involving the DEQ or Part 353) included selling undeveloped parcels without beach access or lake views to third parties. See *id.* at ¶ 10 [AR 111]. These sales

(along with the granting of conservation easements over nearly 50 acres) occurred after the DEQ granted Part 353 permits for the 21-unit condominium project. The sales will result in approximately 80 acres being preserved in their natural condition, which appears to be the result Petitioners sought in filing their petitions.

B. ADMINISTRATIVE HEARING PROCEDURAL BACKGROUND

Under Part 353, if "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 owner is entitled to a hearing on the matter. MCL 324.35305(1).

On October 3, 2014, three parties originally filed petitions: Shorewood Association, Gary Medler, and Lakeshore Camping. See Petitions [AR 1229-1639]. On August 28, 2015, Shorewood Association and Gary Medler withdrew their petitions following settlements with Dune Ridge. See Settlement Agreement [AR 1135-37]. As part of the settlement, Dune Ridge "altered the proposed development and made other concessions to the petitioners." 8/28/2015 Correspondence [AR 1133]. After the settlement, Lakeshore Camping was the only remaining Petitioner.

On September 1, 2016, three days after Shorewood Association submitted its settlement agreement to the ALJ, Petitioners (two of whom, Petitioners Hoyt and Reininga, are shareholders of Shorewood Association) attempted to intervene in the contested case hearing by filing their own petition. See 9/1/2015 Application to Intervene [AR 1126-28]. Dune Ridge objected to the intervention on the basis that they lacked standing.

At first, the ALJ dismissed all of the proposed intervenors except Mr. Zolper, Ms. Underwood, Ms. Hoyt, Mr. Reininga, and Lakeshore Group. After Dune Ridge filed a motion for reconsideration, this Tribunal also dismissed Ms. Hoyt and Mr. Reininga after the ALJ realized that they did not own the property on which they lived (Shorewood Association did).

See 1/26/2016 Op & Order at 4 [AR 568]. Lakeshore Camping was also dismissed from the case for lack of standing because Lakeshore Camping did not own any property immediately adjacent to Dune Ridge's. See 1/26/2016 Op & Order at 3 [AR 567]. Thus, the only individuals with standing were Mr. Zolper and Ms. Underwood, as they were the only two that "owned" property "immediately adjacent" to Dune Ridge's property.

On July 7, 2016, the ALJ dismissed Ms. Underwood from this proceeding. By then, Dune Ridge had sold the portion of its property that abutted Ms. Underwood's property to the Oval Beach Preservation Society, the sale of which occurred after Ms. Underwood was permitted to intervene. See 12/14/2015 Warranty Deed [AR 264-65]; see also survey showing the property sold in relation to Dune Ridge's property and Ms. Underwood's property [AR 272]. Because Ms. Underwood no longer owned any property "immediately adjacent" to any of Dune Ridge's property (let alone any property immediately adjacent to the proposed use), the ALJ dismissed Ms. Underwood for lack of standing. See 7/7/2016 Op & Order at 3-4 [AR 188-89].[1]

On February 13, 2017, the ALJ also dismissed Mr. Zolper, the last remaining individual Petitioner. As part of Dune Ridge's development plan that had been in place for over a year, Dune Ridge sold the portion of its property that abutted Mr. Zolper's property to a third party unrelated to either Dune Ridge or the Project. Aff of P Heule at ¶ 10 [AR 110-13]; Aff of B Rottschafer at ¶ 6 [AR 121-23]; Conveyance Documents [AR 131-33]. As a result, the ALJ found that Mr. Zolper lost any standing he may have had: "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." 2/13/2017 Op & Order at 2 [AR 3]. Further, because no individual Petitioner had standing, Lakeshore Group lost its standing too: "Because Lakeshore

[1] Ms. Underwood's property is now immediately adjacent to property that will be preserved in its natural state.

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.*

Because no Petitioner had standing, the ALJ dismissed the entire contested case proceeding.

C. THE CIRCUIT COURT'S DECISION

In the circuit court, Judge Aquilina reversed the ALJ's rulings that Petitioners Underwood, Zolper, Hoyt, and Reininga do not have standing. See 9/26/2017 Op & Order. First, citing a single case (which as explained below is inapplicable), the circuit court found that standing is determined only at the time a lawsuit is filed. Thus, the circuit court held, because Petitioners Underwood and Zolper satisfied MCL 324.35305(1) when they filed their petitions, they have standing throughout the proceeding. Second, the circuit court found that Petitioners Hoyt and Reininga are "owners" because the bylaws of Shorewood Association say that they have equitable title in the land they use. According to the circuit court, equitable title satisfies the ownership requirement of MCL 324.35305(1). Last, because several individual Petitioners had standing, the circuit court held Lakeshore Group had representational standing.[2] The circuit court remanded the case for the ALJ to hold the contested case hearing.

D. THE COURT OF APPEALS' DECISION

Dune Ridge filed an application for leave to appeal to the Court of Appeals, which the Court of Appeals granted on April 10, 2018. The DEQ also sought leave to appeal, which was also granted. The two appeals were consolidated. On March 21, 2019, the Court of Appeals reversed the circuit court's decision. See 3/21/2019 Op & Order.

[2] The circuit court did not address the issue of whether Petitioners Hoyt and Reininga were barred from filing contested case petitions by the doctrine of res judicata, even though Dune Ridge included this argument in its appeal brief and oral argument.

Interpreting the relevant statutory purpose and language, the Court of Appeals held that a challenge to the DEQ's permitting decision may only be brought by either (1) an applicant for a permit or special exception who is aggrieved by a decision of the department or (2) the owner of the property immediately adjacent to the proposed use who is aggrieved by a decision of the department. *Id.* at p 7. Citing this Court's precedent, the legislative history of the statute, and the DEQ's own interpretation of the statute, the Court of Appeals further held that the statute's express empowerment to applicants and owners of immediately adjacent property meant that only those two classes of parties had standing to challenge the decision in a contested case. *Id.* at pp 7-8.

The Court of Appeals rejected Petitioners' arguments that MEPA or the common law provided them with an independent basis for standing. *Id.* at pp 8-9. First, the Court of Appeals noted that the plain language of MCL 324.1705(1) required that a valid administrative proceeding must already exist in order for a party to intervene, and therefore did not create an independent basis to initiate a contested case. *Id.* at p 9. In any event, the Court of Appeals noted the relevant section gave the court and the agency discretion in determining standing. *Id.* Second, the Court of Appeals noted that common law principles of standing had no application because the Legislature already provided a "cause of action" to challenge a Part 353 permit. *Id.*

The Court of Appeals further held that statutory standing could be lost during the pendency of the proceeding as a result of the opposing party's conduct. *Id.* at p 9-11. While recognizing that, as a general matter, standing is determined at the time a party files suit, the Court of Appeals noted the well-established principle that a lack of standing could be raised at any time during a proceeding. *Id.* at p 10. Thus, because Petitioners Underwood and Zolper did not satisfy MCL 324.35305(1)'s criteria during the pendency of the contested case proceedings,

they lost the right to pursue the contested case. *Id.* at p 11. The Court of Appeals rejected Petitioners' argument that how Petitioners lost standing mattered in this case, distinguishing Petitioners' cases from the civil rights context or otherwise involving illegal conduct by an opposing party. *Id.* at pp 11-12.

Second, the Court of Appeals held that Petitioners Hoyt and Reininga also lacked standing to challenge the decision in the contested case because they were not "owners" of property immediately adjacent to the development. *Id.* at pp 13-14. Relying on its prior decision in *Slatterly v Madiol*, 257 Mich App 242; 668 NW2d 154 (2003), the Court of Appeals reiterated that the Petitioners Hoyt and Reininga only possessed the right to use the lot, which was personal property, not a property interest in the property on which they resided. *Id.* at p 13. Moreover, the Court of Appeals noted that pursuant to the bylaws of Shorewood Association, Petitioners' rights were not "exclusive" as they claimed, but instead subject to numerous restrictions. *Id.*

Accordingly, the Court of Appeals reversed the Circuit Court's decision and remanded for proceedings consistent with its Opinion. *Id.* at p 14. On April 15, 2019, the Circuit Court reinstated the ALJ's decision, dismissed the remaining Petitioners from the case, and closed the case.

III. STANDARD OF REVIEW

This Application for Leave to Appeal arises from a contested case hearing initiated under MCL 324.35305, which states that the hearing shall be conducted under the Administrative Procedures Act, MCL 24.201 *et seq* ("APA"). Under the APA, an administrative agency's order should be held unlawful or set aside:

> if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:
>
> (a) In violation of the constitution or a statute.

(b) In excess of the statutory authority or jurisdiction of the agency.
(c) Made upon unlawful procedure resulting in material prejudice to a party.
(d) Not supported by competent, material and substantial evidence on the whole record.
(e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
(f) Affected by other substantial and material error of law.

MCL 24.306(1).

Similarly, the Michigan Constitution provides in part:

> 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 order 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. [Const 1963, art 6, § 28.]

Whether a party has standing is a question of law that is reviewed de novo on appeal. *City of Huntington Woods v Detroit*, 279 Mich App 603, 614 (2008). "Courts . . . review de novo issues of constitutional law and statutory construction." *Oshtemo Charter Tp v Kalamazoo Cnty Rd Commn*, 302 Mich App 574, 583; 841 NW2d 135 (2013).

IV. ANALYSIS

Petitioners' Application should be denied. Contrary to Petitioners' argument, the Court of Appeals interpreted the unambiguous statutory language to effectuate the Legislature's intent and applied well-established principles of standing in Michigan. First, the ALJ and Court of Appeals correctly held that Petitioners Underwood and Zolper were divested of statutory standing because those Petitioners no longer fulfill the statutory requirements for standing and their claims are moot. Michigan case law is clear that Petitioners can, in fact, be divested of standing during the pendency of a legal proceeding, and that Petitioners' claim is moot.

Second, the Court of Appeals rightly held that Petitioners Reininga and Hoyt do not meet the applicable statutory property "owner" requirement for standing. Under clear precedent of the Court of Appeals, as well as the applicable by-laws for the association in which they live, Petitioners Reininga and Hoyt are not the "owners" of property. Instead, Shorewood Association–in which Reininga and Hoyt are shareholders–owns the property. Moreover, any claim raised by Petitioners Reininga and Hoyt is barred by the doctrine of res judicata, as their privy (Shorewood Association) already received a decision on the merits for challenging Dune Ridge's Part 353 permits.

A. THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONERS UNDERWOOD AND ZOLPER COULD BE DIVESTED OF STANDING.

"Our constitution requires that a plaintiff possess standing before a court can exercise jurisdiction over that plaintiff's claim." *Miller v Allstate Ins Co*, 481 Mich 601, 606; 751 NW2d 463 (2008)(citing *Rohde v Ann Arbor Public Schs*, 479 Mich 336, 346; 737 NW2d 158 (2007)). "This constitutional standing doctrine is longstanding and stems from the separation of powers in our constitution." *Miller*, 481 Mich at 606-07 (citing *Nat'l Wildlife Fedn v Cleveland Cliffs Iron Co*, 471 Mich 608, 612; 684 NW2d 800 (2004)).

1. MCL 324.35305(1) Governs Petitioners' Challenge to the Part 353 Permits and Limits Standing to Persons Who Own Property Immediately Adjacent to the Proposed Use.

Petitioners filed petitions for contested case hearing to challenge Dune Ridge's Part 353 permits. See MCL 324.35301 *et seq*. The Legislature gave standing to certain persons to challenge Part 353 permits in Section 35305(1):

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

MCL 324.35305(1).

"When a cause of action is governed by statute, the Legislature may, of course, choose to limit the class of persons who may raise a statutory challenge." *Salem Springs LLC v Salem Twp*, 312 Mich App 210, 216; 880 NW2d 793 (2015)(citation omitted); see also *Miller*, 481 Mich at 607 ("Although the Legislature cannot *expand* beyond constitutional limits the class of persons who possess standing, the Legislature may permissibly *limit* the class of persons who may challenge a statutory violation." (emphasis in original)). In other words, "a party that has constitutional standing may be precluded from enforcing a statutory provision, if the Legislature so provides." *Miller*, 481 Mich at 607.

Because Petitioners' claims are statutory, "the doctrine of statutory standing in particular requires statutory interpretation to determine whether the Legislature intended to 'accord[] *this* injured plaintiff the right to sue the defendant to redress his injury.'" *Salem Springs*, 312 Mich App at 216 (quoting *Miller*, 481 Mich at 607). "The principle of statutory standing is jurisdictional; if a party lacks statutory standing, then the court generally lacks jurisdiction to entertain the proceeding or reach the merits." *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 355; 833 NW2d 384 (2013).

In interpreting a statute, the Court's "primary goal is to discern the intent of the Legislature by first examining the plain language of the statute." *Driver v Naini*, 490 Mich 239, 246–247, 802 NW2d 311 (2011). "Statutory provisions must be read in the context of the entire act, giving every word its plain and ordinary meaning." *Id.* at 247, 802 NW2d 311. "When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted." *Id.*

As the ALJ and the Court of Appeals correctly held, the unambiguous, plain language of MCL 324.35305(1) limits standing to permit applicants and those who own property

immediately adjacent to the proposed use. See MCL 324.35305(1)("If an applicant . . . or the owner of the property immediately adjacent to the proposed use [that] is aggrieved by a decision of the department . . . ."). Because Section 35305(1) specifically authorizes those individuals to bring suits under that Section, *only* those individuals have standing to bring a Part 353 challenge. See *Salem Springs*, 312 Mich App at 217 (holding that when a statute "expressly empowers select persons to file suit, it follows under the principle of *expressio unius est exclusio alterius* that only those individuals specifically identified in the statute have authority to bring an action under the statute")(citing *Miller*, 481 Mich at 611-12). In other words, MCL 324.35305(1) prevents people not identified in the statute from challenging Part 353 permits. See *id.*

The Court of Appeals correctly found that Part 353's legislative history supports this interpretation. See 3/21/2019 Op & Order at p 8. In 2012, the Michigan Legislature amended MCL 324.35305(1). Prior to the 2012 amendments, Part 353 provided that any "aggrieved person" could bring a contested case hearing to challenge a DEQ sand dune permit decision. See 2012 PA 297 (**Exhibit A**). In 2012, however, the Legislature amended this provision to limit standing to permit applicants and those who own property immediately adjacent to the proposed use. See *id.*; see also MCL 324.35305 (**Exhibit B**). As the Court of Appeals rightly noted, this is compelling evidence that the Legislature intended *only* permit applicants and those who own property immediately to the proposed use to have standing to bring Part 353 challenges. See 3/21/2019 Op & Order at p 8; see also *McCormick v Carrier*, 487 Mich 180, 191; 795 NW2d 517 (2010)("[C]ourts must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute.")(citing *Bush v Shabahang*, 484 Mich 156, 166–167; 772 NW2d 272 (2009)).

Moreover, as evidenced by the DEQ's position in this case, the DEQ interprets Section 35305 to limit standing to applicants and to those who own property immediately adjacent to the proposed use. The Court of Appeals properly gave that interpretation weight in its analysis because the DEQ is the agency that manages and enforces Part 353 of the Natural Resources and Environmental Protection Act. See *Mich Farm Bureau v DEQ*, 292 Mich App 106, 129; 807 NW2d 866 (2011)("The construction of a statute by a state administrative agency charged with administering it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons." (citations and quotation marks omitted)); see also *Younkin v Zimmer*, 497 Mich 7, 10; 857 NW2d 244 (2014)(giving deference to the interpretation of agency officials who were acting in their official capacities at the time they gave meaning to the term at issue).

Petitioners claim that the Court of Appeals failed to read MCL 324.35302(1) "in the context of and consistent with the statute as a whole." That is wrong. The Court of Appeals' well-reasoned opinion devoted several paragraphs to consideration of Part 353's overall purpose and the statutory language of its relevant provisions. See 3/21/2019 Op & Order at pp 6-9. As the Court of Appeals noted, the paramount purpose of Part 353 is to "balance . . . the benefits of protecting, preserving, restoring, and enhancing the diversity, quality, and values of the state's critical dunes with the benefits of economic development . . . ." MCL 324.35302(a)-(b) (emphasis added). The Court of Appeals' ruling comports with that purpose by respecting the balance struck by the Legislature in limiting permit challenges only to permit applicants and those who "own property immediately adjacent to the proposed use." MCL 324.35305(1). Petitioners' contention that the Court of Appeals should have further "explore[d] the many provisions of the statute that emphasize local interest and local citizens" and engaged in "a more

thoughtful analysis of standing under § 35305(1)", Petrs Appl at p 28, is contradicted by the well-reasoned Court of Appeals decision. In any event, Petitioners' argument certainly fails to establish the Court of Appeals' decision was "clearly erroneous and will cause material injustice." MCR 7.305(B)(3) & (5)(a).

Part 353 provisions quoted by Petitioners actually support the Court of Appeals' construction of Section 324.35305(1) by emphasizing the balance between preservation of the dunes and permitting economic development that the Legislature intended to achieve by imposing certain limits on statutory standing to sue under that section:

- 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 . . . ." (emphasis added).
- 35302(b)(ii): Part 353 is intended to "[e]nsure sound management of all critical dunes [with] compatible economic development . . . ." (emphasis added).

The Court of Appeals rightly rejected Petitioners' request to ignore Section 35305's clear requirements based on Petitioners' "fairness" argument and one-sided interpretation of Part 353. 3/21/2019 Op & Order at p 8. As the Court of Appeals recognized, "courts are 'not the proper forum in which to debate the wisdom of the Legislature . . . .'" See 3/21/2019 Op & Order at p 12 (quoting *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003)). The language chosen by the Legislature in Section 35305(1) was not inadvertent, but should be interpreted and enforced as written. See *Bush*, 484 Mich at 169, 772 NW2d 272 ("This Court cannot assume that language chosen by the Legislature is inadvertent.").

Contrary to Petitioners' hyperbolic allegations, the Court of Appeals' decision was not a "complete rejection of all administrative review" and it assuredly does not prevent "any judicial review of the permitting process." Petrs/Appellants' Application for Leave to Appeal ("Application"), at xviii, xxiv. If either owner of property immediately adjacent property to Petitioners decides to develop the property, the owner would have to obtain a Part 353 permit. At that time, Petitioners would presumably have standing to request a contested case hearing under MCL 324.35305(1).[3] The ALJ's final decisions would be subject to judicial review.

Accordingly, the Court of Appeals properly respected the balance established by the Legislature. See *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004) ("If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written.").

2. Petitioners Can Lose Statutory Standing During the Pendency of a Proceeding, Which Moots Their Claims.

The ALJ and Court of Appeals also rightly held that Petitioners Underwood and Zolper lost statutory standing to challenge the permit decisions. Petitioners Underwood and Zolper originally had standing under MCL 324.35305(1). Because Dune Ridge sold the parcels of property to which Petitioners Underwood and Zolper were "immediately adjacent," the ALJ and Court of Appeals found that Petitioners Underwood and Zolper lost standing as they no longer were the "owners" of property "immediately adjacent" to Dune Ridge's proposed use. See 3/21/2019 Op & Order at pp 13-14; 7/7/2016 Op & Order at 3-4 (dismissing Ms. Underwood) [AR 188-89]; 2/13/2017 Op & Order at 2-3 (dismissing Mr. Zolper) [AR 3-4].

[3] It is extremely unlikely that any property immediately adjacent to Ms. Underwood's property will be developed as the Oval Beach Preservation Society purchased the 30-acre parcel adjacent to her property to preserve it in its undeveloped condition.

Contrary to Petitioners' unsupported allegation, Michigan case law amply supports the ALJ and Court of Appeals' holding that a party can lose statutory standing after the commencement of the action. See, eg, *Gorbach v US Bank Nat'l Assoc*, No 308754, 2014 WL 7440290, at *2-*4 (Mich App Dec 30, 2014)(holding that the plaintiffs lost standing to challenge the foreclosure of their home because the redemption period expired after they filed their complaint)(**Exhibit C**); *Awad v GMAC*, No 302692, 2012 WL 1415166, at *3-*4 (Mich App Apr 24, 2012)(when a party loses a property interest, which was the party's sole basis for standing, then the party loses standing)(**Exhibit D**); *Sharma v Mooney*, No 246257, 2004 WL 2072046, at *2 (Mich App Sept 16, 2004)("[A]fter a bankruptcy petition is filed, a debtor, like plaintiff here, loses standing to pursue these causes of action," namely, state law tort claims pled prior to the bankruptcy petition, "because they are part of the bankruptcy estate")(**Exhibit E**); accord *Aichele v Hodge*, 259 Mich App 146, 166; 673 NW2d 452 (2003)(explaining that Michigan law recognizes the distinction between sufficiently pleading standing and "actually being able to prove standing"); see also *Cnty Rd Ass'n of Mich v Governor*, 287 Mich App 95, 110; 782 NW2d 784 (2010)("[T]he burden that must be met to establish that standing exists increases over the course of the proceeding.")(emphasis added).

Accordingly, the Court of Appeals correctly held that Petitioners must be able to maintain a statutory interest (statutory standing) in bringing their claims at all times during the litigation. See *Arizonans for Official English v Arizona*, 520 US 43, 68 n22 (1997) ("The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)" (citation omitted)); *City Commns Inc v City of Detroit*, 888 F2d 1081, 1086 (CA 6 1989) ("A plaintiff must maintain standing throughout all stages of his litigation.").

As the Court of Appeals noted, loss of statutory standing is also sometimes analyzed as a mootness issue. 3/21/2019 Op & Order at pp 10-11. Michigan courts have "'eschew[ed] . . . cases that are moot at any stage of their litigation,'" not just at the time of filing. *Anglers of AuSable Inc v DEQ*, 486 Mich 982, 989; 783 NW2d 502 (2010)(quoting *Nat'l Wildlife Fedn*, 471 Mich at 614). "Where the facts of a case make clear that a litigated issue has become moot, a court is, of course, bound to take note of such fact and dismiss the suit . . . ." *Mich Chiropractic Council v Comm'r of Fin & Ins Servs*, 475 Mich 363, 371 n15; 716 NW2d 561 (2006)(overruled on other grounds by *Lansing Schs Educ Assoc v Lansing Bd of Educ*, 487 Mich 349, 792 NW2d 686 (2010); see also *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998)(recognizing that the court lost jurisdiction during the pendency of the case because the issue became moot).

The Court of Appeals' reasoning is in accord with federal courts' acknowledgment that standing can be lost during the pendency of an action, often analyzed as a mootness issue. See, eg, *Granger v Klein*, 197 F Supp 2d 851, 878 (ED Mich 2002)("If the plaintiff loses standing at any time during the pendency of the court proceedings, the matter becomes moot, and the court loses jurisdiction."). As the United States Supreme Court aptly noted, mootness is "standing set in a time frame." *US Parole Comm'n v Geraghty*, 445 US 388, 397 (1980). "[S]tanding applies at the sound of the starting gun, and mootness picks up the baton from there." *Sumpter v Wayne Cnty*, 868 F3d 473, 490 (CA 6 2017). "Mootness . . . is akin to saying that . . . changed circumstances have intervened to destroy standing." *Id.*

The Court of Appeals correctly rejected the Circuit Court's ruling that statutory standing may only be "determined at the time of filing". 3/21/2019 Op & Order at pp 9-10. The Circuit Court's analysis misconstrued *Girard v Wagenmaker*, 437 Mich 231, 244 (1991), which only

stands for the unremarkable proposition that standing must exist at the time the complaint is filed. See *Girard*, 437 Mich at 377-78. Unlike *Girard*, the issue in this case is not whether Petitioners Underwood and Zolper had standing when they filed their petitions; the issue is whether changed circumstances caused them to lose their statutory standing and moot their claims. The Court in *Girard* never analyzed whether changed circumstances could affect statutory standing. See *id.* Accordingly, the Circuit Court's reliance on *Girard* was entirely misplaced.

3. Petitioners Underwood and Zolper No Longer Have Statutory Standing to Sue and Their Claims are Moot.

As the ALJ and Court of Appeals found, when Dune Ridge moved for summary disposition, Petitioners Underwood and Zolper no longer owned property immediately adjacent to any property that Dune Ridge owned. Accordingly, Petitioners Zolper and Underwood no longer satisfied the Legislature's requirements for statutory standing. See MCL 324.35305(1). Petitioners no longer had standing to sue under that Section and their claims became moot.

The Court of Appeals correctly rejected the Circuit Court's holding that *how* Petitioners lost standing (i.e., by actions of Dune Ridge, not Petitioners), is somehow relevant.[4] 3/21/2019 Op & Order at pp 9-10. As the ALJ recognized, the basis for standing provided by the legislature—MCL 324.35305—does not depend on how the parties came to live "immediately adjacent" to each other, or how they stopped being immediately adjacent to each other. See 2/13/2017 Op & Order at 3 ("[T]he governing statute requires ownership, but is not concerned with how ownership is vested or divested.") [AR 4]. The Legislature simply said that the

[4] Without any factual support, the circuit court also called Dune Ridge's sales of its property "brazen, bad-faith efforts to circumvent the administrative review process." Opinion & Order at 6. The circuit court 's characterization is simply not true. Dune Ridge worked with Oval Beach Preservation Society and Vine Street Properties to sell those parcels of land well before the contested case ever started. See Aff of P Heule at ¶¶ 3-13 [AR 110-112].

petitioner must own property immediately to the proposed use. MCL 324.35305. Because Petitioners do not own any property immediately adjacent to any property owned by Dune Ridge, Petitioners do not have standing.

Petitioners claim that "[n]o Michigan precedent takes away standing from a petitioner or plaintiff" based on the defendant's action. That is wrong. Case law from this Court is clear that a defendant's voluntary action may divest a plaintiff of standing, and the court of jurisdiction, over a case. In *Street R Co of E Saginaw v Wildman*, 58 Mich 286, 286; 25 NW 193 (1885), the plaintiff railroad sought to enjoin the defendant from moving a building along its railroad tracks "to the great interruption of its business and profits, the serious inconvenience of the public, and the hindrance and delay of the United States mails which it carried . . . ." *Id.* Shortly after the lower court dismissed the plaintiff's claim, but before the plaintiff appealed to this Court, the defendant moved the building, thereby negating any ability to prevent the claimed harm or a basis for injunctive relief. *Id.* On appeal, this Court determined that "[i]f the complainant was ever entitled to the [equitable] relief prayed for, we cannot now make any decree to aid it" because "[w]e can hardly prevent [the defendant] from doing what has already been done." *Id.* More recently, in *People v Jones*, this Court held that a prosecution's voluntary dismissal of charges during a case deprived the court of jurisdiction. 486 Mich 29, 32-33; 782 NW2d 187 (2010).

Similarly here–as the Court of Appeals correctly reasoned–the fact that Dune Ridge conveyed parcels to third parties (thus negating Petitioners' standing) has no bearing on whether the Court can enforce statutory rights in this case. See *Jones*, 486 Mich at 32-33; *Street R Co of E Saginaw*, 58 Mich at 287. MCL 324.35305(1) only grants a statutory cause of action to permit

applicants or owners of property "immediately adjacent to the proposed use"; it is not concerned with how ownership is vested or divested.

Moreover, Petitioners' repeated assertions that they have an "interest" in the subject matter of the permitting process and remain "concerned" about the development's effect on the sand dunes generally, Petrs Appl, at pp 18, 23, 25, 31, neither preserves their statutory standing nor saves their claims from being moot. Section 35305's private cause of action does not predicate the right to intervene in a contested case on one's "concerns" or one's alleged "interest" in a contested case proceeding. Instead, Section 35305(1) requires a petitioner to be an "owner of property immediately adjacent to the proposed use." See MCL 324.35305(1). Because Petitioners Zolper and Underwood no longer satisfy that requirement, they lack statutory standing to pursue claims under that section and their claims are moot. See *Am Civil Liberties Union v Nat Sec Agency*, 493 F3d 644, 658, n19 (CA 6 2007)("[T]he analysis of whether the plaintiffs have standing to bring a statutory claim necessarily requires a determination of whether the plaintiffs were injured under the relevant statute.")(emphasis added).

The Court of Appeals aptly distinguished Petitioners' cases, which all involve a specific exception to the mootness doctrine "[w]here a party voluntarily ceases an activity challenged as illegal." *Dept of Social Servs v Emmanuel Baptist Preschl*, 434 Mich 380, 425; 455 NW2d 1 (1990). Dune Ridge's challenged activity–seeking Part 353 permits for a proposed use–has not ceased. And Dune Ridge's sales of adjacent parcels to third parties are not illegal; indeed, Petitioners do not object to those sales. See Petrs Appl, at p 17 ("No one has objected to the developer's right to sell its land."). Presumably, this is because the sales gave Petitioners the relief they sought (living adjacent to property not being developed by Dune Ridge).

The *Blankenship* case that Petitioners cited is distinguishable for another reason too: in *Blankenship*, the plaintiff sought redress for harm that already occurred. See *Blankenship v Superior Controls, Inc*, 135 F Supp 3d 608, 616-27 (ED Mich 2015). Thus, when the defendant attempted to negate the plaintiff's statutory standing, the plaintiff would not have been able to seek compensation for the harm already done. *Id.* In other words, the case was not moot because the plaintiff still needed the relief the plaintiff sought. Here, however, Petitioners seek to prevent harm that they claim will occur. Dune Ridge's actions (which negated Petitioners' statutory standing) ensured that Petitioners obtained the very relief they wanted (to live immediately adjacent to property not developed by Dune Ridge). Accordingly, Petitioners' attempt to shoehorn Dune Ridge's property sales into the federal mootness exception for voluntary cessation of illegal activity was rightly rejected by the Court of Appeals.

Because Petitioners are no longer owners of property immediately adjacent to the proposed use, they do not have standing to bring claims under Section 35305 and their claims are moot. Accordingly, the ALJ and Court of Appeals' holding is correct.

B. PETITIONERS HOYT AND REININGA DO NOT HAVE STANDING.

The ALJ and Court of Appeals also rightly held that Petitioners Reininga and Hoyt are not the "owners" of property immediately adjacent to Dune Ridge's proposed use. As the ALJ and the Court of Appeals found, Shorewood Association—in which Reininga and Hoyt are shareholders—owns the property. Moreover, any claim raised by Petitioners Reininga and Hoyt is barred by the doctrine of res judicata, as their privy (Shorewood Association) already received a decision on the merits for challenging Dune Ridge's Part 353 permits.

1. Petitioners Hoyt and Reininga Do Not "Own" Property Immediately Adjacent to Dune Ridge's Property; Shorewood Association Does.

Petitioners' argument regarding Petitioners Hoyt and Reininga was properly rejected by the Court of Appeals as wrong on the law and wrong on the facts. 3/21/2019 Op & Order at pp 13-14. To have standing under MCL 324.35305, the person who is immediately adjacent to the proposed use must be the "owner" of the property. See MCL 324.35305(1). The ALJ and Court of Appeals properly dismissed Petitioners Hoyt and Reininga based on their finding that neither is the "owner" of property immediately adjacent to Dune Ridge's property. See 3/21/2019 Op & Order at pp 13-14; 1/26/2016 Op & Order at 4-5 [AR 568] ("The Permittee submitted evidence that neither Ms. Hoyt nor Mr. Reininga own 650 Shorewood Drive, but rather Shorewood [Association] owns the property."). The ALJ and Court of Appeals also properly rejected Ms. Hoyt and Mr. Reininga's argument that being "shareholders" in Shorewood Association was sufficient to confer standing. See 3/21/2019 Op & Order at pp 13-14; 1/26/2016 Op & Order at n2 [AR 568] ("This is particularly important since Shorewood has settled with the Permittee and the [DEQ] in this contested case.").

In contrast, the Circuit Court erroneously held that Petitioners Reininga and Hoyt meet the applicable statutory "owner" requirement by inventing a new definition of "ownership" despite clear precedent from this Court to the contrary. The Circuit Court did not look to who actually owned the property immediately adjacent to Dune Ridge, but instead held that Petitioners Hoyt and Reininga have "equitable title" to their property because they have "exclusive rights to use of their individual lots pursuant to Shorewood Association Bylaws in effect at the time Ms. Hoyt and Mr. Reininga intervened." See Op & Order at 6-7.

Ms. Hoyt and Mr. Reininga reside at 650 Shorewood Drive. See Petrs Mot to Intervene at 1-2 [AR 1048-49]. They do not own the property. See Allegan Cnty Tax Records [AR 772-

73]; see also Shorewood Association Plat Map [AR 775]. Instead, "Shorewood Association is title holder to Lots 1-74 inclusive, all streets, the athletic area and the beach park and all land comprising the Plat of Shorewood." See Shorewood Association Claim of Appeal against City of Saugatuck at ¶ 5 (emphasis added) [AR 778]. Indeed, the Allegan County Tax records also show that the "Owner" of 650 Shorewood Drive is Shorewood Association, not Ms. Hoyt or Mr. Reininga. See Allegan Cnty Tax Records [AR 772].

Petitioners Hoyt and Reininga are shareholders in Shorewood Association, but the Michigan Court of Appeals—in a case in which Mr. Reininga was one of the litigants—previously held that shares in Shorewood Association are not a real property interest. See *Slatterly v Madiol*, 257 Mich App 242; 668 NW2d 154 (2003). The *Slatterly* Court held that the Summer Resort and Assembly Association Act ("SRAA") and Shorewood Association's bylaws do "not create a present real property interest in the [shareholders'] favor." *Id.* at 253. The court squarely rejected the argument that certain language in the bylaws—the exact language Petitioners said creates an ownership interest here—created a present real property interest. Compare *id.* at 254 ("The [shareholders] point to the 'attached and appurtenant' language . . . "), with Petrs Appl, at pp 34-35 (referencing bylaws sections 3.1, 5, and 26's "attached" and "appurtenant" language for the proposition that "each shareholder has the exclusive right to the use and possession of such appurtenant property."). *Slatterly* also held that the Shorewood Association's bylaws do not create a real property interest in favor of Petitioners Hoyt and Reininga. See *id.* ("[T]he bylaws provide the board with broad authority to control the property owned by the corporation . . . ." (emphasis added)). *Slatterly* slams the door shut on any argument that Petitioners Hoyt and Reininga own real property adjacent to Dune Ridge.[5]

[5] In their Application, Petitioners nowhere claim *Slatterly* was wrongly decided.

The Court of Appeals correctly held that Petitioners Hoyt and Reininga's "equitable title" to their property does not satisfy Section 35305(1)'s requirements. Michigan case law is clear that equitable title is a doctrine that only applies to land contract vendees and does not extend outside that context. See *Graves v Am Acceptance Mortg Corp*, 469 Mich 608, 614; 677 NW2d 829 (2004)("[U]nder a land contract, although the vendor retains legal title until the contractual obligations have been fulfilled, the vendee is given equitable title . . . ."); see also *Barker v Klingler*, 302 Mich 282, 288; 4 NW2d 596 (1942)(declining to extend doctrine of equitable title to ejectment action); *In re Estate of Williams*, Docket Nos. 281118, 281119, 2009 WL 1607595, at *6 (Mich App June 9, 2009)(declining to extend the doctrine of equitable title to context of tenant's option contract to purchase property)(**Exhibit F**).

Moreover, the Court of Appeals rightly held that Petitioners Hoyt and Reininga's "use" of their property does not satisfy Section 35305(1)'s requirements. If mere "use" of land was sufficient to have standing to sue under Section 35305, the Legislature would have utilized that term instead of the term "owner of the property" to define the class of persons eligible to challenge Part 353 permits under that Section. It did not. But the Legislature did use the terms "owner" and "use" in the same sentence in the relevant Section, clearly indicating that those terms have different meanings and should not be interpreted to mean the same thing.[6] See *Autodie LLC v City of Grand Rapids*, 305 Mich App 423, 435; 852 NW2d 650 (2014)("The use of different terms within the same statute indicates that the terms have different meanings.").

[6] Even if the Legislature had used the term "use" instead of "owner" to define the class of persons eligible to challenge Part 353 permits under that Section, Petitioners would not meet that definition. Part 353 defines "use" as "a developmental, silvicultural, or recreational activity done or caused to be done by a person that significantly alters the physical characteristic of a critical dune area or a contour change done or caused to be done by a person." MCL 324.35301(k). Obviously, Petitioners' "use" of their property does not even meet that definition.

Petitioners attempt to circumvent Section 35305(1)'s "owner" requirement by creating their own definition out of thin air–as "one who has the right to exclusive use and possession" of the property. See Petrs Appl at p 34. But Petitioners Hoyt and Reininga do not even meet their own proposed definition of "owner" because their possession, use, and control of their home is undisputedly not exclusive, as the Court of Appeals rightly found. See 3/21/2019 Op & Order at pp 13-14. The Amended and Restated Bylaws of the Shorewood Association clearly establish that Petitioners' right to use their individual lots is severely circumscribed. Petitioners' use of the lots is subject to the rules and regulations adopted by Shorewood's Board of Directors. See Bylaws at 2 [AR 64]. Additionally, Petitioners' use of the lots is subject to "historic encroachments," and any dispute regarding these encroachments is required to be "resolved by the Board of Directors." *Id.* Petitioners are prohibited from leasing or allowing any other person to use or occupy their lots unless full payment of arrearages has been made to the board of directors and they are granted prior approval by the board. *Id.* at 4 § 6.1 [AR 66]. The board of directors also has "the power to suppress any conduct" on Petitioners' lots "that they determine to be detrimental to other stockholders." *Id.* at 5 § 7.1 [AR 67]. The bylaws even provide the Board with the express authority to control pets or other animals on Petitioners' lots. *Id.* (providing the board with authority to "prevent the running at large of any dog or other animal"). Petitioners are prohibited from improving their lots in any manner—even with a simple landscaping structure—unless plans for such improvements are first submitted to the board of directors and approved by the board. *Id.* at 16 [AR 78]. Clearly, the sole party entitled to control the property in question is Shorewood Association, not Ms. Hoyt and Mr. Reininga.

Ms. Hoyt and Mr. Reininga do not own a present real property interest at their residence. Because Petitioners Hoyt and Reininga are not the "owners" of the immediately adjacent

property, the ALJ and Court of Appeals properly held they do not have standing under MCL 324.35305.

2. Res Judicata Bars Petitioners Hoyt and Reininga From Challenging Dune Ridge's Permits.

Another independent reason Petitioners Hoyt and Reininga were subject to dismissal is because—as shareholders of Shorewood Association—they are barred from re-litigating challenges to Dune Ridge's Part 353 permits under the doctrine of res judicata.[7]

The doctrine of res judicata bars a subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. *Adam v Bell*, 311 Mich App 528, 532; 879 NW2d 879 (2015). This Court "has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418; 733 NW2d 755 (2007).

All three elements are satisfied in this case. First, Shorewood Association's claim was dismissed through a settlement agreement, under which Shorewood Association expressly agreed to withdraw its contested case petition and "not file a Petition challenging a Part 353 Permit issued to Permittee." See Settlement Agreement [AR 1135-37]; see also 9/10/2015 Op at 2 (dismissing Shorewood Association's petition) [AR 1121]. The dismissal of Shorewood Association's petition through a settlement agreement constitutes a final judgment on the merits.

[7] Although this argument was presented to the Court of Appeals by Dune Ridge, the Court of Appeals declined to address it because it found Petitioners Hoyt and Reininga failed to establish statutory standing to contest the permits as "owners" under MCL 324.35305 in the first instance. See 3/21/2019 Op & Order at p 14. The circuit court also did not address this argument.

See *Boland v CD Barnes*, 126 Mich App 569, 571; 337 NW2d 581 (1983)("A voluntary dismissal with prejudice is a final judgment on the merits for res judicata purposes."); see also *Ditmore v Michalik*, 244 Mich App 569, 576; 625 NW2d (2001); *Laethem Equip Co v J & D Implement Inc*, No 266648, 2007 WL 2067935, at *5 (Mich App July 19, 2007)("For the purposes of res judicata, a settlement by agreement of the parties is substantive, so the prior litigation was 'decided on the merits.'")(**Exhibit G**).

Second, Ms. Hoyt and Mr. Reininga each own stock in Shorewood Association, and thus are in privy with Shorewood Association. See *Knowlton v City of Port Huron*, 355 Mich 448, 454-55; 94 NW2d 824 (1959)("a stockholder is normally so far deemed an integral part of the corporation in which he holds stock in the eyes of the law he is regarded as a privy to all judicial proceedings affecting the body of which he is a member."); see also *Blackward v Sower*, No 318346, 2014 WL 7004053, at *4 (Mich App Dec 11, 2014)(finding a member of an LLC to be a privy to a party)(**Exhibit H**).

Third, any matter raised by Petitioners could have been raised in Shorewood Association's case. The test is whether any claim raised by Petitioners could have been raised by Shorewood Association. See *Washington*, 478 Mich at 418 (The Michigan Supreme Court "has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not."). Shorewood Association certainly could have raised any claim raised by Petitioners. Indeed, if Petitioners have exclusive control to their property in Shorewood Association (as they claim they do), they presumably could have gotten Shorewood Association to assert whatever claims they wanted it to.

Moreover, it would be unfairly prejudicial to Dune Ridge for Petitioners Hoyt and Reininga to pursue their contested case. As part of the settlement agreement, Shorewood Association (i.e., its members, such as Petitioners Hoyt and Reininga) received an easement over Dune Ridge's parcel. See 8/28/2015 Letter [AR 1133] (Under the settlement agreement, "[t]he permit holder altered the proposed development and made other concessions to the petitioners"). Petitioners Hoyt and Reininga should not be allowed to receive the benefit of the bargain of the settlement achieved by Shorewood Association, but at the same time be able to contest Dune Ridge's development.

Therefore, the ALJ and Court of Appeals' holding that Petitioners Hoyt and Reininga lack standing is correct for this alternative, independent reason.

C. LAKESHORE GROUP DOES NOT HAVE STANDING.

The ALJ and the Court of Appeals dismissed Lakeshore Group after they found that none of Lakeshore Group's members have standing. See 2/13/2017 Op & Order at 1-4 [AR 2-5]. The Circuit Court reinstated Lakeshore Group as a Petitioner after the Circuit Court found that individual Petitioners do have standing. In briefing to the Circuit Court, the parties did not dispute that Lakeshore Group's standing depends upon whether an individual Petitioner has standing.[8]

Lakeshore Group does not have representational standing because none of its members do. See *Trout Unlimited v City of White Cloud*, 195 Mich App 343, 348-49; 489 NW2d 188 (1992)("[a] non-profit corporation has standing to advocate interests of its members where the members themselves have a sufficient stake or have sufficiently adverse and real interests.").

[8] Dune Ridge reserves the right to appeal the ALJ's dismissal of its argument that Lakeshore Group does not have standing also because Lakeshore Group is not the "owner" of any property. See Dune Ridge's Mot for Summ Disp at 8-9 [AR 103-04].

Because the ALJ and Court of Appeals correctly dismissed the individual Petitioners, Lakeshore Group was also rightly dismissed from the contested case proceedings.

D. COMMON LAW STANDING IS INAPPLICABLE.

Presumably acknowledging their lack of statutory standing, Petitioners attempt to bootstrap their standing to Michigan common law. Tellingly, Petitioners' reliance on common law for standing was not adopted by any tribunal in this case; in fact, Petitioners fail to cite any authority in support of their argument that common law somehow confers standing on them to challenge the permitting decisions. As the Court of Appeals rightly held, Michigan common law does not save Petitioners' claims. See 3/21/2019 Op & Order at p 9.

The Court of Appeals correctly distinguished *Lansing Schools Education Association v Lansing Board of Education*, 487 Mich 349, 792 NW2d 686 (2010). *Lansing Schools* explicitly confined common law standing to the context "[w]here a cause of action is not provided at law." *Id.* at 359. Here, the common law standing analysis in *Lansing Schools* is irrelevant because a cause of action is provided at law–by Section 35305(1).

In the context of this case, the only "inquiry is whether a party is empowered to seek . . . review under [that] particular statutory scheme." *Olsen v Jude & Reed LLC*, 325 Mich App 170, 192-93; 924 NW2d 889 (2018). As discussed above, the statutory scheme at issue here–MCL 324.35305(1)–only extends standing to Part 353 applicants and property owners whose property is immediately adjacent to the Part 353 applicants' proposed use. Petitioners do not meet those criteria. Accordingly, common law standing does not save Petitioners' claims. See *id.* at 192-193; 924 NW2d 889 (rejecting *Lansing Schools* in the context of statutes that empower administrative review).

E. MEPA DOES NOT PROVIDE PETITIONERS WITH STANDING

The ALJ and Court of Appeals also correctly rejected Petitioners' reliance on MEPA as an alternative basis for standing. Like with common law standing, Petitioners' reliance on MEPA for standing was not adopted by any tribunal in this case. Petitioners' MEPA argument is also not supported by any case law. See Petrs Appl at pp 38-42.

MEPA empowers the attorney general or "any person" to initiate a civil action in "circuit court." MCL 324.1701. Obviously, administrative review of a critical dune permit is not a civil action in circuit court, and that section therefore fails to provide Petitioners with standing in this case. See 3/15/2019 Op & Order at p 7.

MEPA also contains the following authorization:

> If administrative, licensing, or other proceedings and judicial review of such proceedings **are available by law**, the agency or the 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 or action for judicial review 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. [MCL 324.1705(1) (emphasis added)].

The ALJ and Court of Appeals correctly rejected Petitioners' argument that the above section somehow entitled them to challenge the permitting decisions. As the Court of Appeals held, MEPA's authorization to intervene "[i]f administrative, licensing, or other proceedings and judicial review of such proceedings are available by law" implies that a valid administrative proceeding must already exist. 3/21/2019 Op & Order at p 9. Here, however, the contested case proceeding is not "available by law" to Petitioners because–as discussed above–Petitioners do not have standing to pursue this proceeding. *Id.*

Moreover, the Court of Appeals also correctly noted that intervention in a contested case under MEPA is permissive, not mandatory. *Id.* The statute provides that the "the agency or the court may permit . . . any other person to intervene," demonstrating that the Legislature gave the

court and the agency discretion to allow or deny intervention. *Id.* (quoting MCL 324.1705(1))(emphasis added). Here, the ALJ denied Petitioners' request for intervention pursuant to MEPA. As discussed above, the ALJ correctly exercised its discretion in that regard.

Petitioners' request that this Court substitute its judgment to "overturn the ALJ's rejection of MEPA intervention", Petrs Appl, at p 42, flies in the face of Michigan courts' longstanding tradition of giving "due deference" to administrative expertise and its reluctance to "substitute [their] judgment for that of" an administrative tribunal. *Attorney Gen v Pub Serv Comm*, 237 Mich App 82, 88, 602 NW2d 225 (1999); see also *In re Elias*, 294 Mich App 507, 539; 811 NW2d 541 (2011)("Importantly, a reviewing court may not substitute its judgment for that of the [administrative tribunal]."). Petitioners' request should be rejected accordingly. *Id.*

Thus, the ALJ and Court of Appeals correctly rejected Petitioners' reliance on MEPA for standing.

V. CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Petitioners' Application for Leave to Appeal should be denied.

Respectfully Submitted,

VARNUM

Dated: May 30, 2019

By *__/s/ Herman D. Hofman_____*

Attorneys for Intervenor/Appellant
Dune Ridge SA LP
Kyle P. Konwinski (P76257)
Herman D. Hofman (P81297)
333 Bridge Street, N.W.
P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6000

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