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STATE OF MICHIGAN
IN THE SUPREME COURT

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 Nos. 159524 and 159525 (consolidated)

Court of Appeals Nos. 340623 and 340647 (consolidated)

Ingham Circuit Court No. 17-176-AA

MAHS Docket No. 14-026236

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY'S BRIEF IN OPPOSITION TO LAKESHORE GROUP AND ITS MEMBERS' APPLICATION FOR LEAVE TO APPEAL

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Dated: May 30, 2019

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COUNTER-STATEMENT OF JURISDICTION

The Michigan Court of Appeals issued its unpublished opinion in this matter on March 21, 2019. The Court of Appeals reversed the Ingham Circuit Court, and reinstated a series of orders issued by an administrative law judge in a contested case hearing which held that Petitioners-Appellants Lakeshore Group and its members (Lakeshore) lacked standing to challenge permits issued by the Respondent-Appellee Michigan Department of Environment, Great Lakes, and Energy[1] to Intervenor-Appellee Dune Ridge SA LP. Lakeshore now seeks leave to appeal pursuant to MCR 7.305(B)(1), (2), (3), and (5)(a).

[1] Pursuant to Executive Order 2019-06, effective April 22, 2019, the Department of Environmental Quality was renamed the Department of Environment, Great Lakes, and Energy.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Michigan law is clear that statutory standing is jurisdictional, cannot be waived, and may be raised at any time. Here, the administrative law judge held that Lakeshore Group and certain of its members had statutory standing at the beginning of the contested case, but subsequently lost standing due to changed circumstances. The circuit court reversed, holding that standing may not be lost due to changed circumstances. Did the Court of Appeals correctly reverse the circuit court?

   Appellants' answer: No.

   Appellee's answer: Yes.

   Administrative Tribunal's answer: Yes.

   Circuit Court's answer: No.

   Court of Appeals' answer: Yes.

2. Michigan's Sand Dune Protection and Management Act provides that an aggrieved person has the right to a contested case hearing if that person is the permit applicant or owns property immediately adjacent to the proposed use. Here, certain Lakeshore members reside immediately adjacent to the proposed use, but are not the owners of the property, which is owned by an incorporated association. Did the Court of Appeals correctly hold that these Lakeshore members lack standing?

   Appellants' answer: No.

   Appellee's answer: Yes.

   Administrative Tribunal's answer: Yes.

   Circuit Court's answer: No.

   Court of Appeals' answer: Yes.

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STATUTE INVOLVED

MCL 324.35305(1):

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 or special exception under this part, the applicant or owner may request a formal hearing on the matter involved. The hearing shall be conducted by the department as a contested case hearing in the manner provided for in the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328.

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INTRODUCTION

In this matter, Lakeshore invites this Court to ignore the standing requirements of the controlling statute and invent a new legal doctrine by which its members can claim ownership over real estate that they plainly do not own. The law in Michigan is clear that the Lakeshore members do not have standing as found by the administrative law judge (ALJ) below and affirmed by the Court of Appeals. Lakeshore provides no basis for revisiting such well-established law, and thus this Court should decline Lakeshore's invitation. The issues are otherwise fact bound and of limited jurisprudential significance.

In its application for leave to appeal, Lakeshore erroneously asserts that this matter involves a substantial question about the validity of both Part 353 and Part 17, Michigan Environmental Protection Act (MEPA), of the Michigan Natural Resources and Environmental Protection Act (NREPA). Not so. Rather, the case merely involves a decision that Lakeshore lacks standing under the plain language of Part 353's standing provision. Lakeshore's assertion that applying the plain language of the statute constitutes an invalidation of the statute is without merit.

This dispute arose when Lakeshore filed a series of petitions for contested case hearings to challenge the decisions of the Michigan Department of Environment, Great Lakes, and Energy (EGLE) to issue 10 sand dune permits and two special exceptions to Intervenor-Appellee Dune Ridge SA LP (Dune Ridge) under Part 353, Sand Dune Protection and Management, of NREPA. The ALJ granted summary disposition in favor of Dune Ridge and EGLE with respect to all of the Petitioners on the grounds that they lacked standing.

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These rulings were premised on MCL 324.35305(1), which provides that, in order to bring a contested case hearing to challenge a sand dune permit, a petitioner must be either the permit applicant or the owner of property "immediately adjacent to the proposed use." The decisions at issue here concern the standing (or lack thereof) of four of the Petitioners, none of whom currently own property immediately adjacent to the proposed use.

Two of the Petitioners, Lucie Hoyt and Charles Reininga, reside in property immediately adjacent to Dune Ridge's parcel, but do not own it. Rather, the property is owned by Shorewood Association. The Court of Appeals, like the administrative law judge, properly rejected Lakeshore's arguments that the Association members own the property where they reside, and thus held that they lack standing under Part 353.

Two other Petitioners, Jane Underwood and Charles Zolper, actually did own property immediately adjacent to Dune Ridge's parcel at the outset of these contested case hearings, but this changed as a result of conveyances made by Dune Ridge during the course of the litigation. As a result, Underwood and Zolper no longer owned property immediately adjacent to the proposed use, and thus no longer satisfied the statutory requirements for standing under MCL 324.35305(1).

Regardless of the reason for the conveyances by Dune Ridge, Michigan law is clear on two points:

First, when the Legislature creates a purely statutory cause of action, such as a contested case hearing under Part 353, it may limit standing as it sees fit. Here,

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the Legislature limited standing to the permit applicant and immediately adjacent property owners. MCL 324.35305(1).

Second, challenges to a party's standing, particularly in a statutory cause of action, cannot be waived and can be raised at any time. This means that a party must have standing not only at the time the complaint or petition is filed, but throughout the entirety of the litigation, or else that party's cause of action becomes moot and must be dismissed.

While the proposition that a Part 353 permit holder can divest a petitioner of standing to pursue a contested case hearing by conveying portions of its property to a third party may be viewed as unfair, it is the situation that the Legislature created when it restricted standing under Part 353 to permit applicants and immediately adjacent property owners. As the Court of Appeals noted in its opinion, it is not the function of the courts (or administrative tribunals) to substitute their judgment for that of the Legislature or ignore the plain language of statutory provisions that may be perceived as unfair or premised on undesirable policy. For these reasons, the Court of Appeals correctly reversed the circuit court and reinstated the opinion of the ALJ. The Court of Appeals opinion was correct and does not merit review by this Court.

Finally, this Court should deny leave to appeal because Lakeshore cannot show that review is warranted under the factors set forth in MCR 7.305(B) for the following reasons:

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- This matter does not involve any question, let alone a substantial question, about the validity of a legislative act;

- While this is a case brought against a state agency, it is not a matter of significant public interest. Rather, it is a limited question of whether the standing requirements of Part 353 mean what they plainly say.

- This matter does not involve legal principles of major significance to the state's jurisprudence. The legal principles at issue here are well settled: statutory standing is a jurisdictional doctrine that may be raised at any time, and one does not own real estate that one does not hold title to.

- The decision of the Court of Appeals to reverse the opinion and order of the circuit court and reinstate the orders of the ALJ was not clearly erroneous—in fact, it was correct. That decision will not cause material injustice to Lakeshore, nor does it conflict with any prior decisions of this Court or the Court of Appeals. To the contrary, it would conflict directly with multiple prior decisions of this Court and the Court of Appeals if this Court was to disregard the statutory standing requirements of Part 353, or to hold that one "owns" property that one plainly does not own.[2]

---

[2] After the ALJ's ruling, in addition to this appeal, Lakeshore filed an independent lawsuit against EGLE and Dune Ridge in the Ingham Circuit Court, alleging that the permits issued by EGLE violate Part 17, Michigan Environmental Protection Act, of the Michigan Natural Resources and Environmental Protection Act, MCL 324.1701 *et seq*. Lakeshore's claims against EGLE were transferred to the Court of Claims and dismissed for failure to state a claim on which relief can be granted. Lakeshore appealed that decision, and the Court of Appeals affirmed. *Lakeshore Group, et al. v State of Michigan and Michigan Dep't of Env. Quality*, unpublished opinion per curiam of the Court of Appeals, issued December 18, 2018 (Docket No. 341310). Lakeshore's application for leave to appeal is currently before this Court in case number 159033. In its application for leave to appeal here, Lakeshore asserts that EGLE's positions in these two appeals are inconsistent. (Lakeshore's 5/2/19 Application for Leave to Appeal, p xvii fn 1.) But EGLE's positions in the two cases are entirely consistent. As set forth in EGLE's brief in opposition to Lakeshore's application for leave to appeal in case number 159033, Michigan law is clear that EGLE permitting decisions must be challenged in contested case hearings, and not collaterally attacked in circuit court lawsuits under Part 17. In this case, EGLE argues that Lakeshore raised the appropriate procedural method to challenge the permits at issue, but Lakeshore simply lacks standing under Part 353. It is entirely consistent to argue that a litigant must file the appropriate lawsuit in the appropriate forum, and also must have standing to prosecute that lawsuit.

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COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

This appeal arises from three separate contested case hearings filed by Lakeshore and other petitioners, challenging a total of 10 permits and two special exceptions issued by EGLE to Dune Ridge under Part 353, all of which were eventually consolidated into one contested case hearing and then, ultimately, dismissed for lack of standing.

Issuance of initial permits and petitions for first contested case.

EGLE initially issued nine permits and two special exceptions to Dune Ridge, permit numbers 14-03-0020-P through 14-03-0028-P. (Admin Rec, pp 1503–1639.) Eight of these nine permits were issued on August 15, 2014, and the ninth was issued on August 20, 2014. (*Id.*) The first contested case hearing to challenge these permits was filed on September 30, 2014.[3] (*Id.*)

Dune Ridge applied for and received these permits for the purpose of building a 21-unit condominium project on the approximately 130-acre site of an abandoned church camp on the shore of Lake Michigan. (Dune Ridge's 6/15/17 Brief on Appeal to circuit court, p 5.) Much of the proposed impact to critical dunes involves widening and improving existing roads that previously served the church camp. (*Id.*) The challenges raised by Lakeshore allege that EGLE's decisions to issue these permits and special exceptions violate the requirements of Part 353, as well

[3] There were, initially, three petitions for contested case hearings filed by other parties, including Shorewood Association, all of which were resolved by settlement between the parties. (Admin Rec, pp 1229–1364; 1120–1122.)

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as Part 17, Michigan Environmental Protection Act, of the Natural Resources and Environmental Protection Act, MCL 324.1701, *et seq*. (Admin Rec, p 1505.)

Lakeshore (Lakeshore Group, Kenneth Altman, Lucie Hoyt, William Reininga, Marjorie Schuham, Jane Underwood, Dawn and George Schumann, and Charles Zolper, who are the Petitioners-Appellees still in the case today) applied for intervention on September 1, 2015. (Admin Rec, pp 1125–1131.) Shortly thereafter, the ALJ dismissed the other Petitioners who had filed previously, including Shorewood Association, with prejudice pursuant to a settlement agreement and stipulation reached by the Parties. (Admin Rec, pp 1120–1122; 1133–1138.)

On October 28, 2015, the ALJ initially granted the application to intervene with respect to Lucie Hoyt, William Reininga, Jane Underwood, and Charles Zolper, on the grounds that they owned (or appeared to own) property immediately adjacent to the proposed use. (Admin Rec, pp 978–985.) It is undisputed that Lakeshore Group did not actually own property immediately adjacent to the proposed use, but that Zolper did, and Zolper was a member of Lakeshore Group. Therefore, Lakeshore Group had "representational standing" based on Zolper having standing.

In the same order, the ALJ denied the application to intervene with respect to Kenneth Altman, Marjorie Schuham, and Dawn and George Schumann, on the grounds that they did not own property immediately adjacent to the proposed use. (*Id*.)

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On a motion for reconsideration, Petitioners Lucie Hoyt and William Reininga were dismissed via summary disposition for lack of standing on January 26, 2016. (Admin Rec, pp 565–571.) The basis for these rulings was the Petitioners did not actually own property immediately adjacent to the proposed use. (*Id.*) Hoyt and Reininga argued that they held "equitable title" to property owned by Shorewood Association (a previous Petitioner that had settled out of the case). The ALJ found that the property was actually owned by Shorewood Association, not Hoyt and Reininga, and thus Hoyt and Reininga did not own property immediately adjacent to the proposed use. (*Id.*) This left Underwood, Zolper, and Lakeshore Group (due to Zolper's status as a member) as the remaining Petitioners.

Permit modifications and filing of additional contested case hearings.

Dune Ridge then requested certain modifications to six of the nine previously-issued permits, which EGLE granted on February 3, 2016. (Admin Rec, pp 545–556.) The remaining Lakeshore Petitioners filed their second petition for a contested case hearing to challenge these permit modifications on February 19, 2016. (Admin Rec, pp 516–544.)

EGLE then issued a 10th permit to Dune Ridge on March 11, 2016. (Admin Rec, pp 438–496.) This was permit number WRP001152. (*Id.*) The Lakeshore Petitioners filed their third contested case hearing to challenge this permit on April 18, 2016. (Admin Rec, pp 436–496.) These three contested case hearings were consolidated on July 7, 2016. (Admin Rec, pp 186–193.)

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Conveyance to Oval Beach Preservation Society.

On December 14, 2015, Dune Ridge conveyed 20.6 acres of its property to a nature conservancy organization known as the Oval Beach Preservation Society, for the purpose of turning the parcel into a park. (Admin Rec, p 189.) This 20.6 acre parcel conveyed to the Oval Beach Preservation Society effectively separated the property owned by Underwood from the property owned by Dune Ridge, such that Underwood no longer owned property immediately adjacent to the proposed use, as required by MCL 324.35305(1). (Admin Rec, pp 188–189.)

Based on the language of MCL 324.35305(1) and case law that provides that a party must have standing throughout a lawsuit or else its claim must be dismissed, the ALJ dismissed Underwood for lack of standing on July 7, 2016. (Admin Rec, pp 186–193.) After the dismissal of Underwood, the remaining Petitioners were Zolper and Lakeshore Group.

Conveyance to Vine Street Cottages, LLC.

On September 30, 2016, Dune Ridge sold a 15-acre section of its property to an organization called Vine Street Cottages, LLC. (Admin Rec, p 3.) This 15-acre parcel included the land immediately adjacent to property owned by Zolper. (*Id.*) The ALJ granted summary disposition of the matter with respect to Zolper and Lakeshore Group for the same reasons that Underwood was previously dismissed—because Zolper and Lakeshore Group lost standing under MCL 324.35305(1) when circumstances changed and they no longer owned property immediately adjacent to the proposed use. (Admin Rec, pp 2–6.) With the last two remaining Petitioners

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dismissed, the ALJ granted summary disposition of the entire contested case in favor of Dune Ridge and EGLE. (*Id.*)

Appeal to Ingham Circuit Court.

Lakeshore appealed the ALJ's various orders to the Ingham Circuit Court on February 27, 2017. (Lakeshore's 2/27/17 Notice of Appeal.) Following briefing and oral arguments, which were held on August 2, 2017, the circuit court issued its opinion and order reversing the ALJ's orders and holding that Lakeshore Group and its members had standing on September 26, 2017. (9/26/17 Opinion and Order, a copy of which is attached as Exhibit A.)

Appeal to the Court of Appeals.

Both EGLE and Dune Ridge applied for leave to appeal the circuit court's opinion and order to the Court of Appeals. (EGLE's 10/16/17 Application for Leave to Appeal to the Court of Appeals; Dune Ridge's 10/17/17 Application for Leave to Appeal to the Court of Appeals.) The Court of Appeals granted both applications and consolidated them on April 10, 2018. After briefing and oral argument, the Court of Appeals issued its unpublished opinion reversing the circuit court. (3/21/19 Unpublished Opinion Per Curiam of the Michigan Court of Appeals, a copy of which is attached as Exhibit B.) It is from this opinion that Lakeshore now seeks leave to appeal.

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STANDARD OF REVIEW

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).

Additionally, this matter involves appellate review of a final administrative decision. When reviewing a lower court's review of an agency decision, the appellate court must determine "whether the lower court applied the correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Boyd v Civil Service Commission*, 220 Mich App 226, 234–235 (1996).

In determining whether the Court of Appeals properly held that the circuit court applied incorrect legal principles, this Court should look to the circuit court's standard of review of final agency decisions. This standard is codified in § 106(1) of the Administrative Procedures Act, 1969 PA 306, which provides that:

> Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency 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.

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> (f) Affected by other substantial and material error of law. [MCL 24.306(1).]

This statute has been interpreted as follows:

> To reverse an administrative agency's decision as an abuse of discretion . . . a court must find the result so palpably and grossly violative of fact and logic that is evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *In re Kurzyniec Estate v Michigan Dep't of Social Servs*, 207 Mich App 531, 537 (1994), citing *Marrs v Bd of Med*, 422 Mich 688, 693–94 (1985).

> To be arbitrary is to decide without reference to principles, circumstances, or significance. *Id.,* citing *Brandon Sch Dist v Michigan Ed Special Servs Ass'n*, 191 Mich App 257, 265 (1991).

A reviewing court should not substitute its own judgment for that of the administrative agency:

> Courts should accord due deference to administrative expertise and not invade administrative fact finding by displacing an agency's choice between two reasonably differing views. *MERC v Detroit Symphony Orchestra*, 393 Mich 116, 124 (1974); *Dignan v Michigan Pub Sch Employees Retirement Bd*, 253 Mich App 571, 576 (2002); *In re Kurzyniec Estate*, 207 Mich App 531, 537 (1994).

Finally, an application for leave to appeal to this Court must show that the issue involves a substantial question about the validity of a legislative act; the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or a state officer in his or her official capacity; the issue involves a legal principle of major significant to the state's jurisprudence; the decision of the Court of Appeals was clearly erroneous; or the decision of the Court of Appeals conflicts with a decision of this Court or another decision of the Court of Appeals. MCR 7.305(B).

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In addition to considering whether the circuit court applied the correct legal principles, this Court must also consider whether the Court of Appeals correctly determined that the circuit court misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. *Boyd*, 220 Mich App at 234–235.

The substantial evidence test refers to the Administrative Procedures Act's provision that a circuit court shall hold unlawful and set aside an agency decision that is "[n]ot supported by competent, material and substantial evidence on the whole record." MCL 24.306(1)(d).

The Court of Appeals has clarified this standard as follows:

> With regard to substantiality, "substantial evidence" is that which a reasonable mind would accept as adequate to support a decision. *Dukesherer Farms, Inc v Dir of the Dep't of Agriculture*, 172 Mich App 524, 535 (1988). Substantial evidence is more than a mere scintilla but less than a preponderance of the evidence. *Consumers Power Co v Pub Serv Comm*, 189 Mich App 151, 187 (1991). Under this test, it does not matter that the contrary position is supported by more evidence, that is, which way the evidence preponderates, but only whether the position adopted by the agency is supported by evidence from which legitimate and supportable inferences were drawn. *In re Payne*, 444 Mich 679, 692 (1994); *Arkansas v Oklahoma*, 503 US 91, 113 (1992). [*McBride v Pontiac Sch Dist*, 218 Mich App 113, 122–123 (1996).]

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ARGUMENT

I. This Court should deny leave because the Court of Appeals correctly held that statutory standing is a jurisdictional doctrine that may be raised at any time, not merely at the time a case is filed.

In its application for leave to appeal, Lakeshore asserts the following bases for standing:

- That it had common law standing to challenge Part 353 permits in contested case hearings under the standard set forth in *Lansing Schools Education Association v Lansing Board of Education*, 487 Mich 349 (2010). (Lakeshore's 5/2/19 Application for Leave to Appeal, pp xxv–xxvii, 15, and 42–49.)

- That the Court of Appeals interpreted MCL 324.35305(1) erroneously because the statute does not say that "*only*" permit applicants or immediately adjacent property owners have standing. (Lakeshore's 5/2/19 Application for Leave to Appeal, pp xxvii and 26–27.)

- That Dune Ridge's actions in selling portions of its property were unfair. (Lakeshore's 5/2/19 Application for Leave to Appeal, pp 18–19 and 19–20.)

- That Lakeshore had standing to intervene in the underlying contested case hearings pursuant to MEPA. (Lakeshore's 5/2/19 Application for Leave to Appeal, pp xxv and 38–41.)

These arguments are without merit and do not provide a basis for this Court to grant leave. The law of standing is well established. The Court of Appeals correctly held that common law standing does not apply here, where the Legislature has limited standing by statute. Additionally, the court correctly held that, while the plain language of Part 353 may have created an unfair result in this matter, Dune Ridge did nothing illegal, and it is not the function of the courts to rewrite statutes in order to avoid seemingly unfair results. And, finally, Lakeshore's argument that it has standing pursuant to MEPA is not supported by fact or law.

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A. When a cause of action is purely statutory in nature, the Legislature creates the standing requirements and here the Legislature required that a petitioner must own property immediately adjacent to the proposed use.

Michigan law is clear that, "Generally, in order to have standing, a party must merely show a substantial interest and a personal stake in the outcome of the controversy. However, when the cause of action is created by statute, the plaintiff may be required to allege specific facts in order to have standing." *Altman v Nelson*, 197 Mich App 467, 475 (1993), citing *Girard v Wagenmaker*, 437 Mich 231 (1991), and *Rogan v Morton*, 167 Mich App 483, 486 (1988).

This Court has further defined the doctrine of statutory standing as dependent on "statutory interpretation" as follows:

> 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. That is, a party that has constitutional standing may be precluded from enforcing a statutory provision, if the Legislature so provides. This doctrine has been referred to as a requirement that a party possess "statutory standing" . . . . Statutory standing "simply [entails] statutory interpretation: the question it asks is whether [the Legislature] has accorded *this* injured plaintiff the right to sue the defendant to redress his injury.
>
> [*Miller v Allstate Ins. Co.*, 481 Mich 601, 607 (2008) (internal citations omitted, emphasis in original).]

The Court of Appeals has also explained the difference between general principles of standing and statutory standing, describing the fact that for statutory standing the Legislature determines the scope of who may bring suit:

> Standing historically developed in Michigan as a limited, prudential doctrine that was intended to ensure sincere and vigorous advocacy by litigants. A litigant may have standing if the litigant has a special injury or right, or substantial interest, that will be detrimentally

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> affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. *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 (2015) (internal citations, quotation marks, and alterations omitted; emphasis added).]

A contested case hearing to challenge EGLE's decision to issue or deny a sand dune permit under Part 353 is entirely statutory. It is created by § 5(1) of Part 353 and is governed by the Administrative Procedures Act. MCL 324.35305(1); MCL 24.271 *et seq*. There was no common law sand dune permitting scheme, nor was there a common law right to challenge a sand dune permit. These are creatures of statute and, when the Legislature creates a permitting scheme and a contested case proceeding to challenge permitting decisions, the Legislature is free to limit who may challenge those decisions. It has done so here by limiting standing in Part 353 contested case proceedings to permit applicants and immediately adjacent property owners. MCL 324.35305(1).

In fact, in 2012, the Legislature amended § 35305 for the specific purpose of limiting and restricting who may bring such administrative challenges. Prior to the 2012 amendments, Part 353 provided that any "aggrieved person" could bring a contested case hearing to challenge an EGLE sand dune permit decision. MCL 324.35305, effective May 24, 1995 (copy attached as Exhibit C). In 2012, the Legislature amended this provision to limit standing to permit applicants and those who own property immediately adjacent to the proposed use. 2012 PA 297 (an excerpt of the relevant portion is attached as Exhibit D).

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In sum, Michigan law is clear that a petitioner may not rely on common law standing principles as a basis to file a contested case hearing under Part 353. The Court of Appeals, therefore, properly rejected Lakeshore's argument that it has common law standing. (Ex B, pp 7–9.)

B. Lakeshore's argument that Part 353's standing provision is meant to be inclusive, and not preclusive, because it does not include the word "only" is directly contrary to the canons of statutory construction.

As noted previously, whether a litigant has statutory standing is a matter of statutory interpretation. *Miller*, 481 Mich at 607. Part 353 clearly provides that, "If *an applicant for a permit* or special exception or *the owner of 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 324.35305(1) (emphasis added).

In its application for leave to appeal, Lakeshore argues that the Court of Appeals erred in interpreting this provision as precluding people other than the permit applicant or an immediately adjacent property owner from bringing a contested case hearing because the statute does not include the word "only." (Lakeshore's 5/2/19 Application for Leave to Appeal, pp xxvii and 26–27.) In other words, Lakeshore argues that the Legislature did not intend this provision to mean that *only* the specified parties have standing to bring a contested case hearing. Rather, Lakeshore argues that the Legislature simply sought to inform the public

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that a permit applicant and an immediately adjacent property owner are among the otherwise-undefined universe of people who have standing to file suit under this statute. Lakeshore's argument on this point fails, because it is inconsistent with controlling principles of statutory interpretation.

First, as the Court of Appeals correctly noted (p 7), the analysis must begin with the plain language of the statute. The phrase "the owner of the property immediately adjacent…" is not ambiguous. Where, as here, there is no ambiguity, the statute must be applied as written. *People v Morey*, 461 Mich 325, 329–330 (1999).

Second, Michigan courts interpret statutes according to the canon *expressio unius est exclusio alterius*, or the expression of one thing is the exclusion of all else. *Bradley v Saranac Community Schools Bd. of Educ.*, 455 Mich 285, 298 (1997). According to this canon, when the Legislature says that these two classes of people have standing to sue, that list is presumed to be exhaustive.

Third, as the Court of Appeals stated in its opinion, "[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." (Ex B, p 8) (citing *Bush v Shabahang*, 484 Mich 156, 167 (2009).) As previously noted, in 2012 the Legislature specifically amended MCL 324.35305(1) to narrow the universe of potential petitioners from any "aggrieved person" to the permit applicant or an immediately adjacent property owner. (Ex B, p 8; Exs C & D.) This

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legislative history militates strongly against Lakeshore's contention that MCL 324.35305(1) is not meant to limit the universe of who can bring a contested case hearing to these two classes of people.

It merits mentioning that, in its application for leave to appeal, Lakeshore mistakenly accuses the Court of Appeals of showing improper deference to EGLE's interpretation of Part 353. (Lakeshore's 5/2/19 Application for Leave to Appeal, p xxxi.) This is not an accurate description of the Court of Appeals opinion. The Court of Appeals correctly stated that, when a court reviews an agency decision, the agency's interpretation of the statute that it administers is entitled to "respectful consideration." (Ex B, p 7) (citing *Grass Lake Improvement Bd v Dep't of Env. Quality*, 316 Mich App 356, 362–363 (2016).) The Court of Appeals further explained that, "Legislative history and the DEQ's own interpretation of the statute *also support our conclusion* that only applicants and immediately adjacent property owners may challenge a Part 353 permit decision." (*Id.*, p 8 (emphasis added).) The Court of Appeals made clear that it showed EGLE's interpretation "respectful consideration" and that EGLE's interpretation supported the Court's conclusion, not that the Court in any way deferred to EGLE's interpretation.

Like its rejection of Lakeshore's argument that it has common law standing, the Court of Appeals properly rejected Lakeshore's argument that it has statutory standing. The Court of Appeals opinion on this issue is firmly grounded in the text of the statute and well-established principles of statutory construction. It does not merit review by this Court.

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C. Challenges to a litigant's standing may be raised at any time, and litigants must have standing throughout the entire proceeding, or else their case must be dismissed.

Michigan law is clear that a plaintiff or, in this case, a petitioner, must have standing in order for a court or administrative tribunal to assert jurisdiction over a case. The circuit court acknowledged this in its opinion and order, in which it noted that, "Standing and mootness are jurisdictional doctrines that cannot be waived and may be raised at any time." (Ex A, p 5) (citing *Michigan Chiropractic Council v Ins Comm'r*, 475 Mich 363 (2010), overruled in part on other grounds by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349 (2010).)

Additionally, the Court of Appeals has previously held that a party must maintain standing throughout the entirety of a lawsuit, or else its claim must be dismissed for lack of standing. *Sharma v Mooney*, unpublished per curiam opinion of the Court of Appeals, issued September 16, 2004 (Docket No. 246257), a copy of which is attached as Exhibit E.[4] The Court of Appeals holding in *Sharma* mirrors the federal requirement that standing must be maintained throughout the pendency of litigation. *Granger v Klein*, 197 F Supp 2d 851, 878 (ED Mich, 2002).

In a similar ruling, the U.S. Court of Appeals for the Sixth Circuit held that, while standing is determined at the outset of litigation, a change in circumstances that destroys a litigant's standing renders a lawsuit moot. *Sumpter v Wayne Co*,

[4] Pursuant to MCR 7.215(C)(1), EGLE relies on an unpublished case here because it has persuasive value and, while the principle that a party has to have standing throughout the proceedings is well established, there is no published Michigan case law that has dismissed a party that lost its standing during the proceedings.

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868 F3d 473, 490 (CA 6, 2017), citing *In re 2016 Primary Election*, 836 F3d 584, 588 (CA 6, 2016). Specifically, the Sixth Circuit held that, "Mootness . . . is akin to saying that, although an actual case or controversy once existed, changed circumstances have intervened to destroy standing." *Id.*

Based on these cases, regardless of whether a court views the loss of standing during the course of litigation as a standing issue or a mootness issue, the result is the same: a plaintiff or petitioner must have standing throughout the pendency of the lawsuit or else the lawsuit must be dismissed.

Here, however, the circuit court ultimately held, and Lakeshore continues to assert, that the opposite is true: that standing is determined only at the outset of litigation and may not be challenged subsequently due to changed circumstances. (Ex A, pp 5–6.) The only authority cited by the circuit court in support of this ruling was one sentence taken out of context from a distinguishable case in which this Court stated, "Because we are dealing with standing, the question is what the plaintiff must allege at the time of filing." (Ex A, p 5) (citing *Girard,* 437 Mich at 244.)

The circuit court's and Lakeshore's reliance on this one sentence is unfounded because *Girard* is distinguishable from this case, and from the cases relied upon by EGLE to show that a party can lose standing during litigation. In *Girard*, there was no allegation that a party lost standing during the course of litigation due to changed circumstances. Rather, it was a simple question of whether the plaintiff had standing at all, with no change in circumstances from the inception of the

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lawsuit to its conclusion. *Girard*, 431 Mich 231. As the Court of Appeals held, this does not even directly contradict, let alone overcome, the established case law, in both state and federal courts, that provides that a plaintiff's or petitioner's case must be dismissed if standing is lost due to changes in circumstance after filing. (Ex B, pp 9–10.)

In its application for leave to appeal, Lakeshore cites two cases that it claims support its interpretation of standing doctrine. The first of these cases—*Senter v GMC*—is clearly distinguishable from the instant case. *Senter* involves alleged racial discrimination in violation of Title VII of the United States Civil Rights Act of 1964. *Senter v GMC*, 532 F Supp 2d 511 (1976). The court in *Senter* predicated its holding on the fact that Congress intended for courts to interpret standing as broadly as possible in such cases, given clear national public policy and the "unique enforcement structure" of the Civil Rights Act. *Senter*, 532 F Supp 2d at 516–518.

There is no such precedent related to Part 353, nor is there any such applicable public policy reflected in Part 353. Thus, there is no basis for a Michigan court to construe standing to challenge someone else's sand dune permit as broadly as the federal courts historically construed standing to challenge racial discrimination in the workplace under Title VII of the Civil Rights Act.

This leaves Lakeshore with a single case, *Blankenship v Superior Controls*, in which the U.S. District Court for the Eastern District of Michigan adopted the position advocated by Lakeshore. *Blankenship v Superior Controls*, 135 F Supp 3d 608 (2015). This case is similarly distinguishable because its holding is premised

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entirely on *Senter*, as well as a pair of shareholder oppression cases that do not address the issue presently before this Court. *Id.* Because it is premised entirely on distinguishable authority, *Blankenship* lacks persuasive value here. Moreover, the case was subsequently settled by the parties, and so no guidance on this issue has been provided by an appellate court. (Ex F.) In short, *Blankenship* does not support Lakeshore's argument that this Court should disregard the prevailing rule in Michigan and the federal courts that standing, like jurisdiction, must be maintained throughout a lawsuit and may be challenged by the parties at any time.

In its application for leave to appeal, Lakeshore argues that the result reached by the Court of Appeals, and by the ALJ, is unfair. (Lakeshore's 5/2/19 Application for Leave to Appeal, pp 18–19 and 19–20.) EGLE does not dispute, and has never disputed, the apparent unfairness of a situation in which a respondent in a contested case hearing can divest a petitioner of standing. The Court of Appeals noted as much in its opinion, in which it stated, "We recognize, as does the DEQ, that the language of MCL 324.35305(1) may create potentially unfair situations in which a Part 353 permittee can eliminate a petitioner's standing by conveying a portion of its property." (Ex B, p 12.)

But, as the Court of Appeals noted, whether a statute is fair is not a proper consideration for the courts. (Ex B, p 12.) This is the result of the plain language of Part 353, and it is the function of the Legislature to correct problematic situations that arise from the application of plain statutory language. *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 650 (2003), citing *Hanson v Mecosta Co Rd Comm'rs*,

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465 Mich 492, 504 (2002). It is not the function of the courts to rewrite statutes in a manner that the Legislature did not intend so as to avoid any potentially unfair situations. *Id.*

D. MEPA does not provide an independent basis for standing to file a Part 353 contested case hearing, and Lakeshore's arguments to the contrary are both legally and factually inaccurate.

In addition to erroneously arguing that it has standing under Michigan common law and statutory standing under Part 353, Lakeshore argues that it has standing in the contested case under MEPA. (Lakeshore's 5/2/19 Application for Leave to Appeal, pp xxv and 38–41.) As a preliminary matter, this issue is not properly before the Court, nor was it properly before the Court of Appeals. The ALJ ruled that MEPA does not provide an independent basis for standing in a contested case hearing, and Lakeshore never appealed that ruling. Therefore, this matter was never ruled upon by the circuit court, and never appealed to the Court of Appeals.

Even if Lakeshore had properly preserved this issue for appeal, Lakeshore's argument would still fail because it is based on a misreading of MEPA. Throughout its application for leave to appeal, Lakeshore asserts that it has standing under MEPA. (Lakeshore's 5/2/19 Application for Leave to Appeal, pp xxv and 38–41.) Lakeshore selectively quotes portions of the relevant section of MEPA by stating that MEPA "separately authorizes 'the attorney general *or any other person to*

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intervene as a party' in an administrative proceeding." (Lakeshore's 5/2/19 Application for Leave to Appeal, p 40 (emphasis in original).)

Lakeshore misunderstands the significance of this provision of MEPA. MEPA does not "authorize" any person to intervene in an administrative proceeding. Rather, MEPA provides that an agency or a court *may permit* the attorney general or any other person to intervene in an administrative hearing. MCL 324.1705(1). MEPA does not provide any party standing to *initiate* a contested case hearing. And even the ability to intervene in an existing contested case hearing is entirely permissive—there is no intervention by right, only by the permission of the court or administrative tribunal.

In its application for leave to appeal, Lakeshore asserts, without any citation to the administrative record, that it did not seek to initiate contested case hearings, but rather that it sought to intervene in existing contested case hearings. (Lakeshore's 5/2/19 Application for Leave to Appeal, pp xxvii–xxviii and 41–42.) This is not an accurate description of the facts of this case. Two of the three contested case hearings that form the basis of this appeal were filed by Lakeshore and its members. (Admin Rec, pp 516–544 and 436–496.)

Lakeshore and its members did seek to intervene in one of the three contested case hearings. (Admin Rec, pp 1125–1131.) As set forth in the "statement of facts" portion of this brief, however, the claims of the original petitioners in that contested case hearing were resolved via a settlement agreement. (Admin Rec, pp 1120–1122.) This initial contested case, in which

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Lakeshore and its members sought to intervene, was then consolidated with the two subsequent contested cases that Lakeshore and its members filed as petitioners. (Admin Rec, pp 186–193.) The ALJ correctly held that nothing in MEPA provides an independent basis for standing in a contested case hearing and, as noted previously, whether to allow Lakeshore to intervene in the contested case hearing was a purely discretionary decision. MEPA did not in any way *require* the ALJ to permit Lakeshore to intervene.

II. This Court should deny leave because the Court of Appeals correctly held that the members of the Shorewood Association do not "own" property immediately adjacent to the proposed use.

The Court of Appeals, and the ALJ, properly held that Lucie Hoyt and William Reininga do not own property immediately adjacent to the proposed use, and therefore lack standing under Part 353.

1. Neither of the Association members own the property where they reside, because the title to the property is held by Shorewood Association.

Hoyt and Reininga were not originally petitioners in this litigation. Originally, one of the petitioners was Shorewood Association, which is an association incorporated under the Summer Resort and Park Associations Act, MCL 455.1, *et seq*.; *Slatterly v Madiol*, 257 Mich App 242, 244-245 (2003). Hoyt and Reininga are members of Shorewood Association. (Admin Rec, pp 978–985.) It is undisputed that Shorewood Association owns property immediately adjacent to the proposed use, and thus had standing under Part 353. Shorewood Association,

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however, settled its claims against Dune Ridge and stipulated to being dismissed from this matter with prejudice. (Admin Rec, pp 1120–1122.) Mere days before Shorewood Association was dismissed, Hoyt and Reininga joined the litigation as individual petitioners, but asserted standing *based on their membership in Shorewood Association*. (Admin Rec, pp 1125–1131.)

Part 353 does not define the word "owner" as used in MCL 324.35305(1). When a term is not defined in a statute, courts assign the term its ordinarily-understood meaning, commonly by referring to dictionaries. *Cain v Waste Management, Inc.*, 472 Mich 236, 247 (2005). Black's Law Dictionary defines the term "own" as "To have or possess as property; *to have legal title to*." Black's Law Dictionary, p 1130 (7th ed) (emphasis added). Additionally, Black's defines the term "owner" as "One who has the right to possess, use, and *convey* something; a proprietor." (*Id*.)

It is undisputed that Shorewood Association holds legal title to the property at issue, and therefore "owns" the property as that term is commonly understood. Additionally, it is undisputed that the members of Shorewood Association do not have the right to convey the property absent the approval of the Shorewood Association board of directors, and therefore are not "owners" as that term is commonly understood. (Ex B, pp 13–14.) Additionally, if there was any question as to who owns the property at issue, it was addressed by the Court of Appeals in the above-referenced *Slatterly* case, in which Shorewood Association and Reininga himself were litigants. *Slatterly*, 257 Mich App at 242.

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In *Slatterly*, the Madiol family asserted ownership of real property within Shorewood Association, based on their membership in the association and language contained in the association's bylaws. *Id*. at 242. In rejecting these claims, the Court of Appeals held that Shorewood Association holds legal title to real property, and that the association's members do not own any real property, but rather own shares of Shorewood Association, which are personal property. *Id*. at 251–254.

Specifically, the Court of Appeals held that, pursuant to the Summer Resort and Park Associations Act, "individuals acquire the right to use a lot by purchasing shares in the corporation. The act specifies that these shares are personal property," and, "the stock held by the stockholders 'shall be deemed personal property.'" *Slatterly*, 257 Mich App at 251, 253.

Furthermore, the Court of Appeals held that a shareholder does not have a present interest in the Association's property:

> The only provision in the act under which a stockholder might acquire ownership of the lot to which the share is attached is in the event the corporation was dissolved, at which time each stockholder would become the owner in fee of the lot to which the stockholder's share was assigned," and that this provision "while creating a *future* real-property interest in lots assigned to stockholders under the act in situations where the corporation chooses to assign specific lots, does not create a *present* real-property interest. Had the Legislature intended a present real-property interest, it could have used statutory language effectuating this intent rather than the language it actually used. [*Id*. at 252 and 254–255 (emphasis in original).]

In short, it is Shorewood Association, and not Hoyt, nor Reininga, nor any other member of Shorewood Association, that is the owner of property immediately adjacent to the proposed use. Therefore, only Shorewood Association, and not any

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of its individual members, would have standing to bring a contested case under Part 353. Shorewood Association did so, but its claims were resolved via settlement and it was dismissed, only to have two of its members immediately try to make the exact same claims.

2. Lakeshore's arguments for why Ms. Hoyt and Mr. Reininga are owners of the property where they reside, despite a lack of title ownership, are without any legal merit.

In the contested case hearing, and on appeal to the circuit court, Lakeshore argued that Hoyt and Reininga are owners of the property where they reside, despite someone else holding the deed, and despite the *Slatterly* opinion, because they held "equitable title." (Lakeshore's 5/25/17 Brief on Appeal to Ingham Circuit Court, pp 18–22.) Lakeshore never provided any legal authority to support this position, and indeed never explained what "equitable title" is, or how Hoyt and Reininga hold it. Nonetheless, the circuit court adopted this argument wholesale, holding that Hoyt and Reininga hold equitable title to the Shorewood Association property where they reside. (Ex A, p 7.) In so holding, the circuit court made no mention of the *Slatterly* decision and, like Lakeshore, cited no authority to support the holding that Ms. Hoyt and Mr. Reininga are owners via equitable title.

In the Court of Appeals, Lakeshore continued its argument that Hoyt and Reininga are owners via "equitable title," but also pivoted to a new argument, asserting that Hoyt and Reininga own the property at issue because they have the

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exclusive right to use it, and to exclude others from it. (Lakeshore's 7/9/18 Brief on Appeal to the Court of Appeals, pp 25–26.)

The Court of Appeals held that, as a matter of fact, Hoyt and Reininga do not have the exclusive right to use the Shorewood Association property. Specifically, the Court of Appeals noted a number of activities that Hoyt and Reininga are forbidden from engaging in without the permission of the Shorewood Association board of directors, including transferring their stocks in the Association (in other words, conveying their ownership interest in their shares of stock), leasing their lots in the Association, and being subject to various Association "police powers." (Ex B, pp 13–14.)

Now, in its application for leave to appeal to this Court, Lakeshore pivots once again. Lakeshore now asserts that Hoyt and Reininga do not need to demonstrate the *exclusive* right to use the property and exclude others. Rather, Lakeshore claims that Hoyt and Reininga merely need to show the right to use the property and to exclude others because, Lakeshore asserts, "That is what 'owner' means." (Lakeshore's 5/2/19 Application for Leave to Appeal, p 37.)

In sum, Lakeshore's most recent position on this issue is that a person owns property as long as that person has the non-exclusive right to use it, even when someone else holds title to the property. This latest version of its argument was not presented to either the circuit court or the Court of Appeals and is therefore not properly before this Court.

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In any event, even if there was not a published Court of Appeals opinion that directly contradicts Lakeshore here, this argument would be without legal merit. As previously noted, the commonly understood meanings of "own" and "owner" include holding legal title and having the right to convey the property (which Hoyt and Reininga do not). (Ex B, pp 13–14.) And a tenant who rents property from a landlord has the right to use and possess property, and to exclude others therefrom. *Macke Laundry Serv. Co. v Overgaard*, 173 Mich App 250, 253–254 (1988); *United Coin Meter Co v Gibson*, 109 Mich App 652, 655–656 (1981). Lakeshore's conception of real property ownership based upon a non-exclusive right to use property would lead to the manifestly untenable conclusion that a renter is an "owner." It should not be adopted here.

CONCLUSION AND RELIEF REQUESTED

Leave to appeal is not warranted because the opinion and order of the Court of Appeals is firmly grounded in two well-established principles of law. First, that standing, like mootness, is a jurisdictional doctrine that cannot be waived and must be raised at any time. Second, that a person does not own property that is plainly owned by someone else by virtue of legal title and binding case law. For these reasons, EGLE respectfully requests that this Court deny Lakeshore's application for leave to appeal.

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Dated: May 30, 2019

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