

STATE OF MICHIGAN  
IN THE SUPREME COURT  
APPEAL FROM THE MICHIGAN COURT OF APPEALS

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LAKESHORE GROUP, et al.,

Supreme Court No. 159524 & 159525

Petitioners/Appellants,

Court of Appeals No. 340647  
Consolidated with No. 340623

v

Lower Court Case No. 17-176-AA

STATE OF MICHIGAN, DEPARTMENT OF  
ENVIRONMENTAL QUALITY,

MAHS Docket 14-026236

Respondent/Appellee,

**RESPONDENT/APPELLEE DUNE RIDGE  
SA LP'S RESPONSE TO  
PETITIONERS/APPELLANTS'  
SUPPLEMENTAL BRIEF PURSUANT  
TO THE COURT'S NOVEMBER 27, 2019,  
ORDER**

And

DUNE RIDGE SA LP,

Respondent/Appellee.

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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](mailto:dpordway@ordwaylawfirm.com)

---

B. Eric Restuccia (P49550)  
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](mailto: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  
[kpkonwinski@varnumlaw.com](mailto:kpkonwinski@varnumlaw.com)  
[hdhofman@varnumlaw.com](mailto:hdhofman@varnumlaw.com)

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## COUNTER-STATEMENT OF JURISDICTION

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, ("EGLE") (formerly known as the Department of Environmental Quality ("DEQ")) to Respondent/Appellee Dune Ridge SA, LP ("Dune Ridge") under Part 353 of the Natural Resources Environmental Protection Act, MCL 324.35301 et seq.

In a March 21, 2019 Opinion, the Court of Appeals upheld the ALJ's decisions. Petitioners/Appellants' Application arises from that Order.

On November 27, 2019, this Court issued an Order stating Petitioners/Appellants' Application was considered. It requested the parties to brief the following issue:

[W]hether appellants Jane Underwood and Charles Zolper, as "owner[s] of [] property immediately adjacent to the proposed use" at the time of their intervention in these contested cases, satisfy the statutory standard for standing under MCL 324.35305(1), notwithstanding the developer's subsequent sales of land located between each appellant's respective property and the property being developed.

Because Petitioners/Appellants do not satisfy the statutory standard for standing, their Application does not satisfy MCR 7.302(B), and thus leave to appeal should be denied.

**COUNTER-STATEMENT OF QUESTION INVOLVED**

I. Whether Petitioners Jane Underwood and Charles Zolper<sup>1</sup> satisfy the statutory standard for standing under MCL 324.35305(1) when they do not own property immediately adjacent to Dune Ridge's proposed use and they cannot demonstrate any special injury or right, or substantial interest, that will be detrimentally affected in a manner different from a similarly situated property owner?

Respondent-Appellee EGLE answers: No.

Respondent-Appellee Dune Ridge answers: No.

Petitioners-Appellants answer: Yes.

The ALJ answered: No.

The circuit court answered: Yes.

The Court of Appeals answered: No.

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<sup>1</sup> Because this Brief only pertains to Petitioners Underwood and Zolper, "Petitioners" as used in this Brief refers only to them.

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

The ALJ and Court of Appeals correctly held that Part 353 requires a petitioner to be an "owner of property immediately adjacent to the proposed use" that is "aggrieved by a decision of the department in regard to the issuance or denial of a permit" to challenge a Part 353 permit in an administrative proceeding. MCL 324.35305(1). The statutory language is unambiguous. Petitioners do not currently, and never have, owned property "immediately adjacent to the proposed use." Moreover, they are not, and never have been, "aggrieved" by any decision of EGLE in connection with the issuance of a permit. See *id.*

Petitioners do not live "immediately adjacent" because they do not currently live next to any property owned by Dune Ridge, and Petitioners have never lived next to the "proposed use." Moreover, Petitioners are not "aggrieved" by any decision of EGLE—they lack any concrete and particularized injury or substantial interest that has been detrimentally affected in a manner different than the citizenry at large. The ALJ and Court of Appeals applied well-established Michigan standing principles to hold that Petitioners lack standing.

Petitioners' attempted end-run 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 an aggrieved permit applicant or an aggrieved owner of property immediately adjacent to Dune Ridge's proposed use. MCL 324.35305(1). Consequently, the ALJ correctly dismissed Petitioners because none of them satisfied the requirements of MCL 324.35305(1).

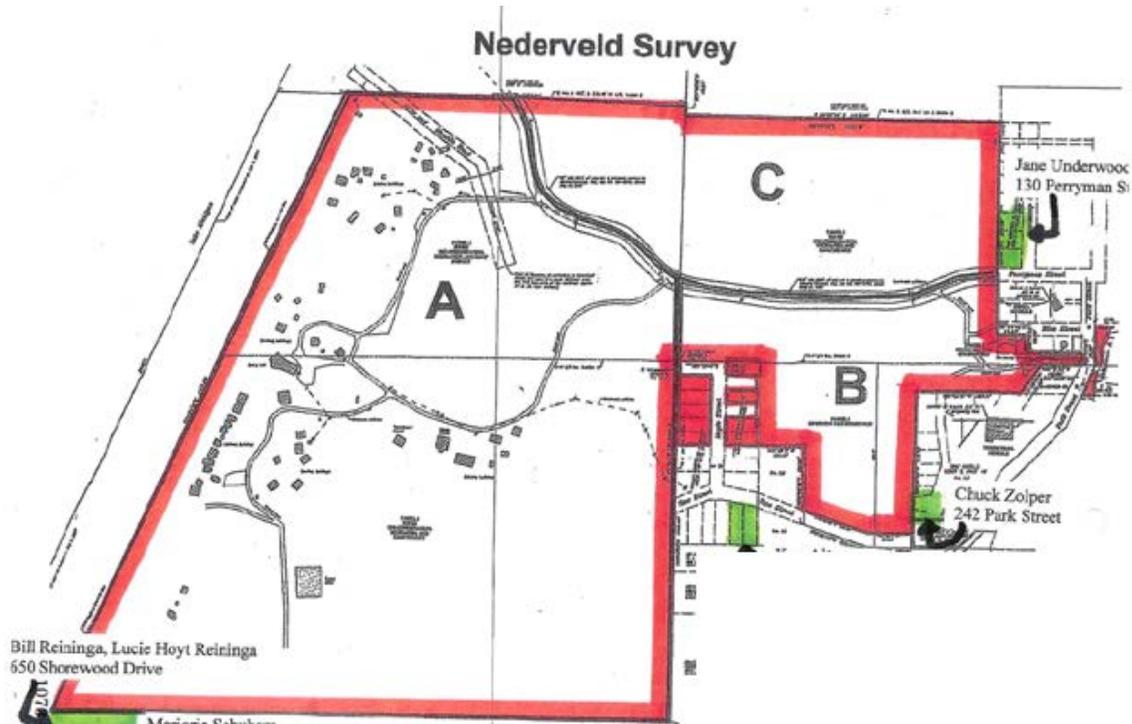
Leave to appeal should be denied because Petitioners seek nothing more than a re-writing of the relevant statutory provisions based on their alleged "concerns" and purported "interest" in the statutorily-created proceedings. The questions presented in Petitioners' Application do not involve novel issues 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's and Court of Appeals' application of those unambiguous words.

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

## **II. COUNTER-STATEMENT OF FACTUAL AND PROCEDURAL BACKGROUND**

### **A. FACTUAL BACKGROUND**

Dune Ridge originally purchased a large parcel, totaling 130 acres, from a church (the "Church Property"). The Church Property had been developed and used for a church camp for approximately 100 years. Dune Ridge Pre-Hearing Statement [Petitioners' Appendix ("AP") 517A]. The church camp had roads and many structures. See *id.* The Church Property is outlined in red below:

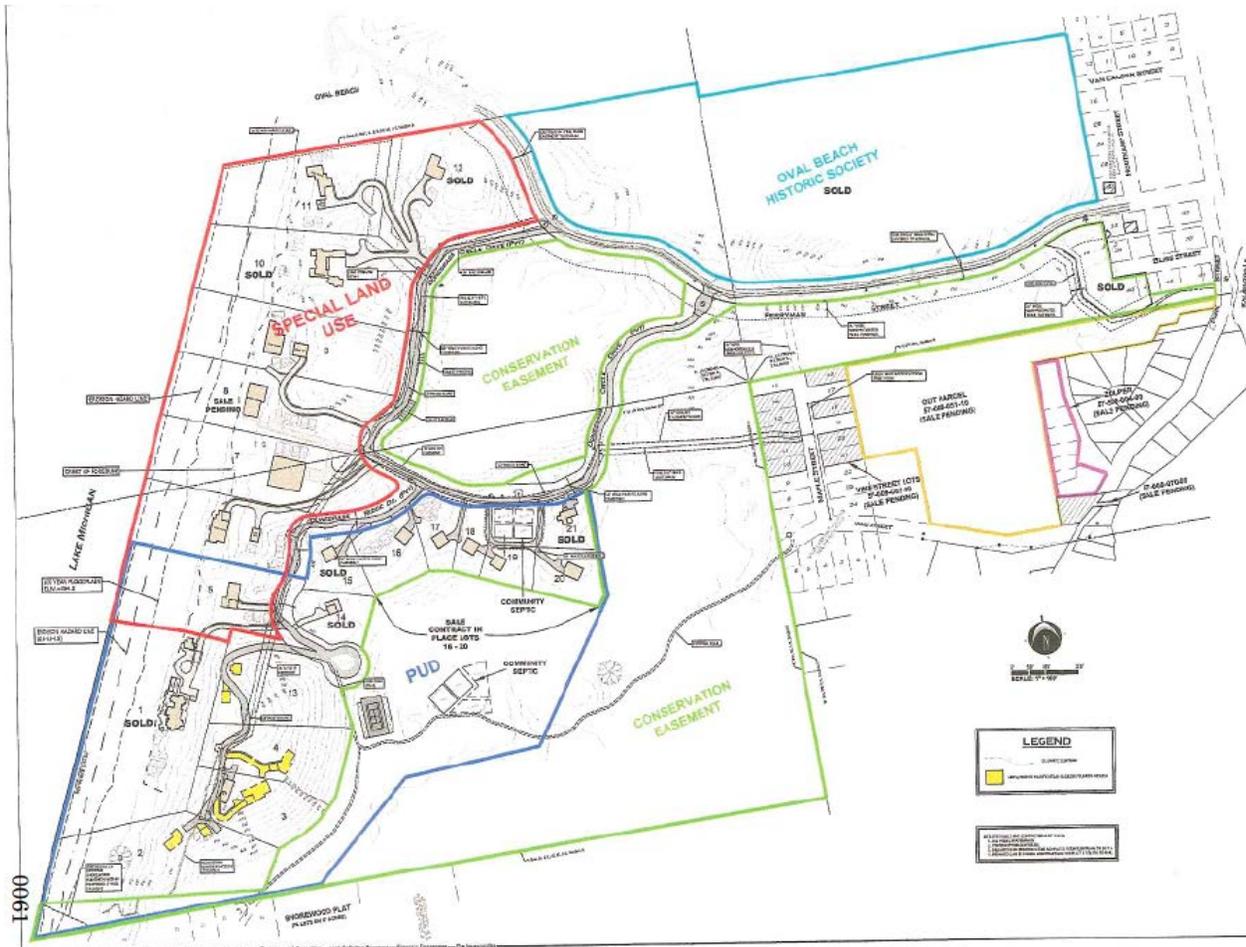


[AP 1036A].<sup>2</sup> The above diagram also indicates the location of Petitioners' properties.

Over 80 acres of the Church Property will not be developed by Dune Ridge. First, Dune Ridge sold large portions of the Church Property, which was Dune Ridge's intent all along. See *Aff of P Heule*, ¶ 10 [AP 118A]. Dune Ridge sold 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 *id.*, ¶¶ 7-9 [AP 118A]. Dune Ridge also sold parcels without beach access or lake views to third parties. See *id.*, ¶ 10 [AP 118A]. Second, Dune Ridge granted conservation easements over huge portions of the property, which will also preserve these areas in their natural state. See *Dunegrass Site Plan* [AP 68A].

<sup>2</sup> Petitioners submitted this diagram. Although Dune Ridge agrees that the property outlined in red is the entire Church Property originally purchased by Dune Ridge, Petitioners' description of the area outlined in red as the "proposed use area" is simply untrue, as explained below. Petitioners' description was merely an attempt to create standing when none existed.

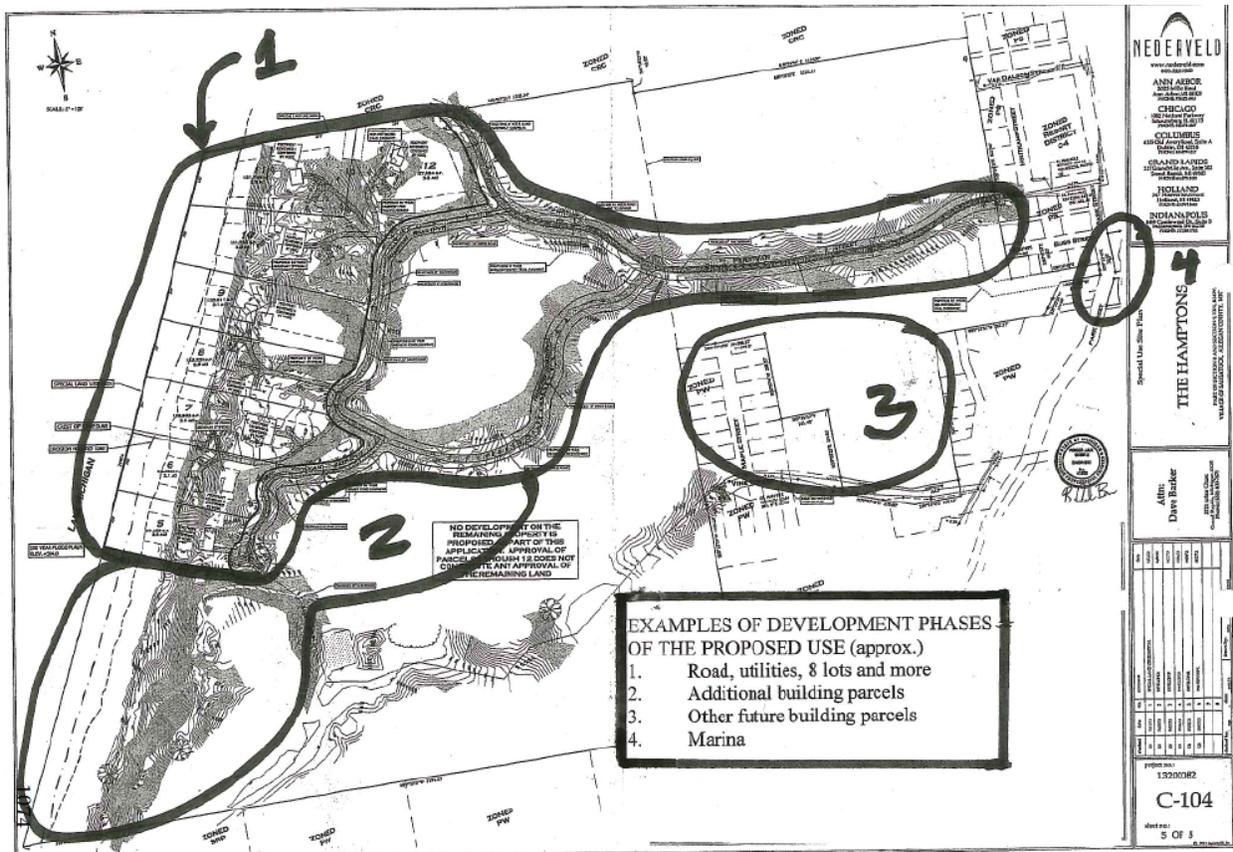
The parcel sold to the Oval Beach Preservation Society is encircled by blue, the parcel sold to third parties is encircled by yellow, and the conservation easements are encircled by green:



[AP 68A]. None of Dune Ridge's sales or conservation easements had anything to do with Part 353.

Consequently, the Petitions for Contested Case Hearings filed by Petitioners only pertain to a fraction of the original Church Property. The Petitions pertain to EGLE's grant of Part 353 permits to Dune Ridge for the development lots near the Lake Michigan shoreline, along with

ancillary services such as improving the existing road (the "Special Land Use Property").<sup>3</sup> See, e.g., Part 353 Permit Issued 3/11/2016 [AP 438-493]. The portion of the Church Property constituting the Special Land Use Property is generally circled and labeled "1" and "2" below:



[AP 1037A].

Dune Ridge's sales and conservation easements occurred after EGLE granted Part 353 permits to Dune Ridge. However, they occurred pursuant to discussions that began around the time Dune Ridge initially purchased the Church Property, and long before Petitioners attempted

<sup>3</sup> To develop this property, under the City of Saugatuck's zoning ordinance, Dune Ridge was required to obtain a special use permit from the City's planning commission. See Dune Ridge's Resp Br to Lakeshore Grp's Mtn for SD, at p 2-3 [AP 609A]. Dune Ridge received that approval from the City of Saugatuck, which covered Lots 1-21 (the Special Land Use Property). See *id.*

to intervene in the contested case proceeding. See Aff of P Heule at ¶¶ 10, 13 [AP 118A]; Aff of B. Rottschafer at ¶¶ 6-7 [AP 129A]. The land sales and conservation easements will result in approximately 80 acres (of the total 130 acres Dune Ridge originally purchased) being preserved in their natural condition.

Dune Ridge's application for Part 353 permits to EGLE contained detailed explanations of Dune Ridge's plans; explanations of why the project complies with Part 353; and professional survey drawings showing a variety of details, such as how the development will mesh with the topography of the dunes. See Dune Ridge's Application [AP 624A-680A]. Dune Ridge also submitted voluminous construction plans showing the minimal impact of the project on the dunes; what will be done to minimize any impact; and what will be done to restore the minimal impacts. See *id.* Dune Ridge's application also requested a public hearing so that EGLE could receive further input regarding Dune Ridge's compliance with Part 353. See *id.*

EGLE inspected the Special Land Use Property, held public hearings, and reviewed all documentation submitted by Dune Ridge and the public about the proposed development. Aff of Bayha at p 3 [AP 704A]. EGLE staff also conducted a thorough review of the development plans and Dune Ridge's environmental impact statement, and prepared a project review report and extended project review report. *Id.*; see also Project Review Report [AP 940A-943A]; Extended Project Review Report [AP 945A-952A].

Ultimately, EGLE approved the Part 353 permits in August 20, 2014, determining that the proposed project would not significantly damage the public interest on the private property owned by Dune Ridge and would not significantly and unreasonably deplete or degrade the diversity, quality, or function of the critical dunes at issue within the local unit of government. *Id.* EGLE's careful consideration of the proposed development's impact on the dunes is borne

out in the permits it issued. For example, in each Part 353 permit related to the development of a single-family home, certain slopes cannot be disturbed, contour changes can only occur within 10 feet of the building footprint, and vegetation changes can only be within 10 feet of the building footprint. See, eg, Permit No. 14-03-0020-P [AP 1241A-1266A]; Permit No. 14-03-0021-P [AP 121267A-1278A].

Later, Dune Ridge requested modifications to six of the nine previously-issued permits, which EGLE granted. [AP 552A-563A]. These modifications applied to the same parcels of property. See *id.* EGLE issued a tenth permit to Dune Ridge on March 11, 2016. [AP 445A-503A].

**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 may request a hearing on the matter. MCL 324.35305(1). Initially, three parties filed petitions: Shorewood Association, Gary Medler, and Lakeshore Camping. See Petitions [AP 1236A-1646A]. On August 28, 2015, Shorewood Association and Gary Medler withdrew their petitions following settlements with Dune Ridge. See Settlement Agreement [AP 1142A-1144A]. After the settlement, Lakeshore Camping was the only remaining Petitioner.

On September 1, 2015, Petitioners attempted to intervene in the contested case hearing. See 9/1/2015 Application to Intervene [AP 1133A-1135A]. Dune Ridge objected to the intervention on the basis that Petitioners lacked standing. See Dune Ridge's Resp to Proposed Intervenors' App to Intervene [AP 1024A]. Dune Ridge argued that Petitioners did not own property immediately adjacent to the "proposed use." See generally, *id.* [AP 1024A-1034A]. The ALJ rejected this plain wording of the statute and instead held that Petitioners Underwood

and Zolper could proceed because they lived next to property Dune Ridge owned. See 11/28/2015 Order [AP 985A-992A].

On July 7, 2016, the ALJ dismissed Ms. Underwood from the proceeding. By then, pursuant to the plan all along, 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 [AP 271A-272A]; see also Survey (showing the property sold in relation to Dune Ridge's property and Ms. Underwood's property) [AP 279A]. 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 Order at 3-4 [AP 195A-196A].<sup>4</sup>

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 [AP 117A-120A]; Aff of B Rottschafer at ¶ 6 [AP 128A-130A]; Conveyance Documents [AP 138A-140A]. 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 [AP 10A]. Further, because no individual Petitioner had standing, Lakeshore Group lost its standing too: "Because Lakeshore Group's standing is representational standing through Mr. Zolper's membership in the association; its standing must fail in this contested case as well." *Id.*

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<sup>4</sup> Ms. Underwood's property is now immediately adjacent to property that will be preserved in its natural state.

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. See 9/26/2017 Op & Order. With respect to Petitioners Underwood and Zolper, Judge Aquilina cited a single, inapplicable case for the proposition that standing is determined only at the time a lawsuit is filed. Thus, the circuit court held, because Petitioners satisfied MCL 324.35305(1) when they filed their petitions, they have standing throughout the proceeding. The circuit court remanded the case for the ALJ to hold the contested case hearing.

**D. THE COURT OF APPEALS' DECISION**

Dune Ridge and EGLE each filed an application for leave to appeal to the Court of Appeals, which the Court of Appeals granted on April 10, 2018. 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.

In pertinent part, the Court of Appeals interpreted the relevant statutory purpose and language to hold that a challenge to EGLE'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 EGLE'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 the Michigan Environmental Protection Act, MCL 324.1701 *et seq*

("MEPA") or the common law provided them with an independent basis for standing. *Id.* at pp 8-9.

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 pp 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 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.

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.

**E. THE MICHIGAN SUPREME COURT'S ORDER.**

On November 27, 2019, this Court considered Petitioners' application for leave to appeal the Court of Appeals' decision and ordered the parties to brief the following question:

[W]hether appellants Jane Underwood and Charles Zolper, as "owner[s] of [] property immediately adjacent to the proposed use" at the time of their intervention in these contested cases, satisfy the statutory standard for standing under MCL 324.35305(1), notwithstanding the developer's subsequent sales of land located between each appellant's respective property and the property being developed.

### III. STANDARDS OF REVIEW

Whether a party has standing is a question of law subject to review de novo. *Groves v Dep't of Corr*, 295 Mich App 1, 4; 811 NW2d 563, 566 (2011) (citation omitted). "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).

Petitioners' 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.

#### IV. ARGUMENT

Petitioners' Application should be denied. The ALJ and Court of Appeals correctly held that Petitioners lacked statutory standing because they did not fulfill the statutory requirements for standing and their claims are moot. Even if Petitioners had standing initially (they did not), Petitioners were divested of standing during the pendency of a legal proceeding and Petitioners' claim is moot.

##### A. PETITIONERS DO NOT HAVE (AND NEVER HAVE HAD) STANDING TO CONTEST THE PART 353 PERMITS.

A plaintiff must have standing before a court may exercise jurisdiction over that plaintiff's claim. See *Miller v Allstate Ins Co*, 481 Mich 601, 606; 751 NW2d 463 (2008). "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.

"[A] determination that a plaintiff lacks statutory standing to assert a cause of action is essentially the equivalent of concluding that a plaintiff cannot bring *any* action in reaction to an alleged legal violation." *Id.* at 609 (emphasis in original).

1. **The Legislature limited standing to challenge Part 353 permits to permit applicants and persons who own property immediately adjacent to the proposed use that are aggrieved by a decision of EGLE.**

An entity that wishes to initiate development within a critical dune area must obtain a permit as described in Section 324.35304 of the Sand Dunes Protection and Management Act, MCL 324.35301 *et seq.*<sup>5</sup> The issuance or denial of a Part 353 permit may be challenged in accordance with MCL 324.35305(1), which provides:

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.

MCL 324.35305(1) (emphasis added).

Because the Legislature provided for a cause of action under Part 353 and limited the individuals who may bring such a claim, whether Petitioners have standing hinges entirely on the interpretation of MCL 324.35305(1).<sup>6</sup> Petitioners' claims are statutory, and "the doctrine of

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<sup>5</sup> According to the Legislature, "[t]he purpose of [Part 353] 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 . . . ." MCL 324.35302(a)-(b). Moreover, Part 353 is intended to "[e]nsure sound management of all critical dunes [with] compatible economic development . . . ." (emphasis added). *Id.*

<sup>6</sup> Petitioners' reliance on common law standing is a losing argument that was not adopted by any tribunal in this case, even though Petitioners have tried raising it at every turn. In fact, Petitioners fail to cite any on-point authority in support of their argument that the common law somehow confers standing on them to challenge the permitting decisions. As the Court of Appeals rightly held, Michigan common law does not give Petitioners standing. 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, a cause of action is provided at law—by MCL 324.35305(1). In the context of this case, the only "inquiry is whether a party is empowered to seek . . . review

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).

To interpret 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, 246-47; 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. "When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted." *Id.*

"Courts may not speculate regarding legislative intent beyond the words expressed in a statute. Hence, nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself." *Mich Ed Ass'n v Secretary of State*, 489 Mich 194, 217-218; 801 NW2d 35 (2011) (quotation marks and citation omitted). "The words used by the Legislature are given their common and ordinary meaning." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). This Court may consult a dictionary to define terms that are undefined in the statute. *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

Here, the unambiguous language of MCL 324.35305(1) limits standing to contest Part 353 permits to aggrieved (1) permit applicants and (2) owners of property immediately adjacent to the proposed use. See MCL 324.35305(1). Because MCL 324.35305(1) specifically authorizes those classes of individuals to contest Part 353 permits (via an administrative contested-case hearing), only those individuals have standing to bring a Part 353 challenge. See *Miller*, 481 Mich at 611 (holding that because the Business Corporation Act "nam[ed] only the under [that] particular statutory scheme." *Olsen v Jude & Reed LLC*, 325 Mich App 170, 192-93; 924 NW2d 889 (2018).

Attorney General in this respect, the Legislature has indicated that the Attorney General alone has the authority to challenge corporate status"); *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") (citation omitted); *Mich Affiliated Health Care Sys Inc v Dep't of Pub Health*, 209 Mich App 699, 701; 531 NW2d 722 (1994) (competitor had no standing in light of a legislative restriction on standing to applicants for a license).

Part 353's legislative history supports MCL 324.35305(1)'s narrow definition for statutory standing. In 2012, the Michigan Legislature amended MCL 324.35305(1).<sup>7</sup> 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. In 2012, the Legislature amended this provision to limit standing to aggrieved permit applicants and aggrieved owners of property immediately adjacent to the proposed use. See *id.*; see also MCL 324.35305; Michigan Senate Fiscal Agency Bill Analysis, Senate Bill 1130, 11/29/2012 (stating that the 2012 amendments of Part 353 were intended to "[r]evise the people who may request a public hearing on a permit for a use in a critical dune area, a formal hearing on a permit decision, or enforcement action for a violation of an ordinance regulating critical dunes.").

As the Court of Appeals rightly noted, this is compelling evidence that the Legislature intended to limit standing to only permit applicants and those who own property immediately adjacent to the proposed use. 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

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<sup>7</sup> The relevant amendments and legislative history are included as part of Dune Ridge's Addendum to its brief.

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.").

Moreover, as evidenced by its position in this case, EGLE 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 EGLE 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).

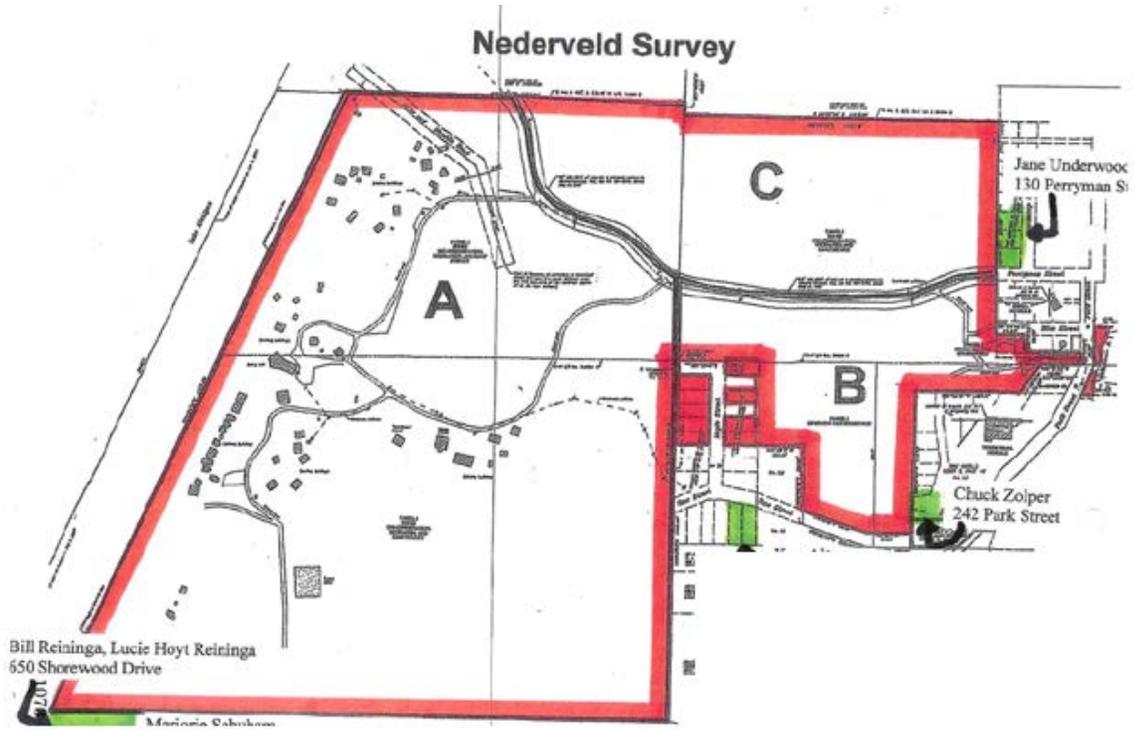
The Court of Appeals rightly rejected Petitioners' request to ignore MCL 324.35305(1)'s plain language based on supposed "fairness." 3/21/2019 Op & Order at p 8. "[C]ourts are 'not the proper forum in which to debate the wisdom of the Legislature . . .'" See 3/21/2019 Op & Order at p 12 (quoting *Amb's v Kalamazoo Co Rd Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003)). The language chosen by the Legislature in MCL 324.35305(1) was not inadvertent, but should be interpreted and enforced as written. See *Bush v Shabahang*, 484 Mich 156, 169; 772 NW2d 272 (2009) ("This Court cannot assume that language chosen by the Legislature is inadvertent.").

2. **Petitioners lack statutory standing because they are not, and never have been, owners of property immediately adjacent to the proposed use.**

A Part 353 challenger must be an owner of property immediately adjacent to the "proposed use." MCL 324.35301 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) (emphasis added). Because there is no statutory definition of the phrase "immediately adjacent" in MCL 324.35305, this Court may consult a dictionary to ascertain its plain meaning. See *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012). According to its plain and ordinary dictionary meaning, "immediately" means "in direct connection or relation," "directly." Merriam–Webster's Collegiate Dictionary (11th ed.). "Adjacent" means "having a common endpoint or border." *Id.*

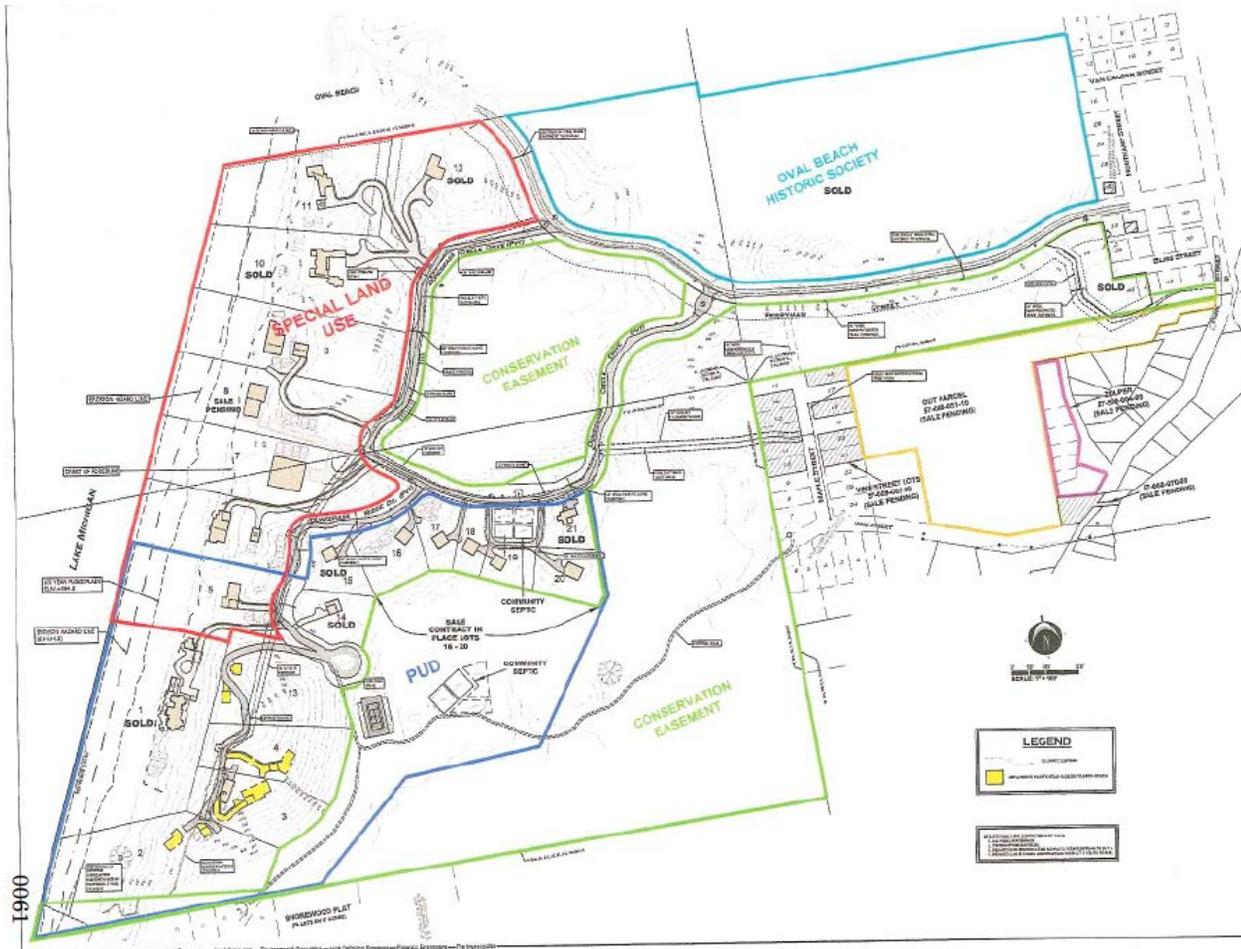
From these basic definitions, an "owner of property immediately adjacent to the proposed use" is someone who owns property that *directly borders* the "activity" which "significantly alters" the dunes. Any other interpretation would render the words "immediately" and "use" surplusage and nugatory, which is not permitted. See *Haynes v Village of Beulah*, 308 Mich App 465, 468; 865 NW2d 923 (2014) ("[C]ourts must interpret statutes in a way that gives effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.").

Petitioners are not, and never have been, owners of property that shares any directly adjoining endpoint, border, or boundary with *the proposed use*. The image below shows the entire land owned by Dune Ridge (the Church Property), outlined in red, in relation to Petitioners' property:



[AP 1036A].

In contrast, the image below shows the portion of Dune Ridge's land that Dune Ridge seeks to develop under its Part 353 permits, which is labeled the "Special Land Use" area:



[AP 68A].

As is evident, the "proposed use" covers only a portion of the land that Dune Ridge owns—the Special Land Use Property. As Petitioners admit, there is undeveloped property between the proposed use and Petitioners' properties, and *that* property "ha[s] nothing to do with (and ha[s] never been part of) the permitted development activities at issue in the contested case." Pet'r's Supp Br, at p 7. In fact, Petitioners admit that the land *actually adjoining* their property is "undevelopable . . . steep and elevated land that had not been the subject of any of the permits at issue." *Id.* at p 6. Moreover, "there were never plans to develop it." *Id.* Petitioners do not live immediately adjacent to the proposed use.

Petitioners' interpretation of MCL 324.35305(1)'s language—that they only need to live next to any property of Dune Ridge's—leads to absurd results. Consider the situation if Dune Ridge owned property five miles long, but only sought to develop 200 feet of the most southerly portion. Under Petitioners' argument, property owners immediately adjacent to the northern boundary of that property would have standing to challenge Dune Ridge's Part 353 permits, even though they would be nearly five miles away. Such an interpretation of MCL 324.35305(1) is absurd and should not be adopted. See *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999) ("[S]tatutes must be construed to prevent absurd results.").

Accordingly, Petitioners are not, and never have been, "owners" of "property immediately adjacent to the proposed use." The Court of Appeals correctly held that Petitioners lack statutory standing.

**3. Petitioners also lack statutory standing to challenge the Part 353 permits because they are not, and never have been, aggrieved by the decision of EGLE.**

The Court of Appeals also rightly held that Petitioners lack statutory standing on the independent basis that they are not, and never have been, *aggrieved* by any decision of EGLE.<sup>8</sup>

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<sup>8</sup> Contrary to Petitioners' unsupported allegation, the ALJ's October 28, 2015 Order never held Petitioners were "aggrieved" by any decision of the department. See 10/28/2015 Opinion and Order at pp 1-6, [AP 985A-992A]. In fact, the ALJ's October 28, 2015 Order never even analyzed that issue. See *id.* Furthermore, Petitioners' allegation that the Court of Appeals was somehow wrong to decide whether they lack "aggrieved party" status is meritless. Petitioners' lack of standing (based on their failure to satisfy the "aggrieved" party requirement, among other grounds) was properly challenged in connection with several motions, including a motion for summary disposition. See Dune Ridge's Br in Supp of Mot for Partial Summ Disp, at p 3 [AP 300] (discussing motions). Moreover, justiciability issues such as standing "may be raised at any stage in the proceedings, even sua sponte, and may not be waived by the parties." *Chiropractic Council v Insurance Comm'r*, 475 Mich 363, 370-74; 716 NW2d 561 (2006); see also *Cnty Rd Ass'n of Mich v Governor*, 287 Mich App 95, 110; 782 NW2d 784 (2010) ("[T]he question of standing is a fundamental jurisdictional question and a matter that may be raised at any time.").

As discussed above, MCL 324.35305(1) limits statutory standing to certain classes of persons who have been "aggrieved" by a decision of EGLE.

The term "aggrieved" is not defined in the Natural Resources Environmental Protection Act, MCL 324.1101 *et seq.* "An undefined statutory word or phrase must be accorded its plain and ordinary meaning, unless the undefined word or phrase is a 'term of art' with a unique legal meaning." *People v Flick*, 487 Mich 1, 11; 790 NW2d 295 (2010). Here, the term "aggrieved" has a unique legal meaning in the context of a person seeking to challenge land development as a nearby property owner.

In that context, "aggrieved" means that a person must have "suffered a concrete and particularized injury." *Federated Ins Co v Oakland Cnty Rd Comm'n*, 475 Mich 286, 291; 715 NW2d 846 (2006). The party must have "suffered some special damages not common to other property owners similarly situated." *Unger v Forest Home Twp*, 65 Mich App 614, 617; 237 NW2d 582 (1975). "There must be a unique harm, dissimilar from the impact that other similarly situated property owners may experience." *Olsen*, 325 Mich App at 185 (citation omitted).

Generally, a neighboring landowner's "increased traffic congestion, general aesthetic and economic losses, population increases, or common environmental changes are insufficient to show that a party is aggrieved." *Id.* (citation omitted). "Moreover, mere ownership of an adjoining parcel of land is insufficient to show that a party is aggrieved." *Id.* "[A]n interest in the proper enforcement of a statute has [also] never before been thought sufficient to confer standing." *Federated Ins Co*, 475 Mich at 291 n 4.

Petitioners claim they are "aggrieved" because they have a "special right or substantial interest that will be detrimentally affected in a manner different from the citizenry at large."

Petr's' Br at p 27. Petitioners only cite cases applying the standard for common law standing. However, the Michigan Court of Appeals recently reaffirmed that the "aggrieved person" standard for standing is a different (and higher) standard than common law standing.<sup>9</sup> See *Saugatuck Dunes Coastal Alliance v Saugatuck Township*, Nos 342588, 346677, 2019 WL 4126752 (Mich Ct App Aug 29, 2019).

In *Saugatuck Dunes Coastal Alliance*, the Michigan Court of Appeals relied on *Village of Franklin v Southfield*, 101 Mich App 554, 300 NW2d 634 (1980), to analyze whether property owners who lived and worked in the area near a proposed development of a critical dune area were "aggrieved" parties for purposes of appealing a Zoning Board of Appeals decision. The plaintiffs submitted numerous affidavits to the court showing that they would suffer harms distinct from the general public. *Id.* at \*4. The court, however, held that the plaintiffs were not "aggrieved" because they failed to show that they would "suffer harms distinct from *other property owners similarly situated*" as opposed to the citizenry at large (as required for common law standing). *Id.* (emphasis in original). The court reasoned that the plaintiffs' "articulated concerns are either speculative, broad environmental policy matters, or pertain to harms that could be suffered by any nearby neighbor, business, or tourist." *Id.* Ultimately, "[a] party generally cannot show a sufficiently unique injury from a complaint that 'any member of the community might assert.'" *Id.* (citing *Olsen v Jude & Reed LLC*, 325 Mich App 170, 192-93; 924 NW2d 889 (2018)) (emphasis in original).

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<sup>9</sup> Pursuant to MCR 7.215(C)(1), Dune Ridge cites this unpublished decision because it clearly explains the difference between the "aggrieved party" and common law standing analyses in a factual context similar to the instant case. Dune Ridge is not aware of any published opinion providing this analysis in a similar factual context (economic development of dune property). See MCR 7.215(C)(1) ("If a party cites an unpublished opinion, the party shall explain the reason for citing it and how it is relevant to the issues presented.").

Like the plaintiffs in *Saugutuck Dunes Coastal Alliance*, Petitioners have not identified any special or unique injury that is different from similarly-situated property owners. Simply residing near the proposed development or in the "dune area" and having "concerns" about the development is insufficient to be "aggrieved" under MCL 324.35305(1). See *Olsen*, 325 Mich App at 192-93.

**B. THE COURT OF APPEALS' DECISION SHOULD BE UPHELD ON THE ALTERNATIVE BASIS THAT PETITIONERS LOST STATUTORY STANDING DURING THE PENDENCY OF THE PROCEEDING, WHICH MOOTED THEIR CLAIMS.**

The ALJ and Court of Appeals' holding can also be affirmed on the ground that Petitioners lost any statutory standing they may have had. Because Dune Ridge sold the parcels of property to which Petitioners were "immediately adjacent," Petitioners lost any standing they may have had as they no longer were the "owners" of property "immediately adjacent" to Dune Ridge's property or proposed use. See 3/21/2019 Op & Order at pp 13-14; 7/7/2016 Op & Order at 3-4 (dismissing Ms. Underwood) [AP 195A-196A]; 2/13/2017 Op & Order at 2-3 (dismissing Mr. Zolper) [AP 10A-11A].

**1. MCL 324.35305(1) does not restrict the standing analysis to the time of the request to challenge the Part 353 permits.**

For the first time in their supplemental brief, Petitioners argue that MCL 324.35305(1)'s language somehow restricts *when* a court may analyze a party's standing. To be clear, Petitioners' argument has not been adopted by any tribunal in this case; in fact, Petitioners fail to cite *any* authority in support of their argument. Contrary to Petitioners' unreasonably cramped interpretation, the plain language of Section 35305(1) does not restrict this Court's standing analysis to the time of the attempted challenge. Again, MCL 324.35305(1) provides:

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.

MCL 324.35305(1) (emphasis added).

MCL 324.35305(1) does not say that the petitioner must be an owner of property immediately adjacent to the proposed use *only* "at the time of" the request for a hearing and not during the hearing or subsequent appeal as well. Nor does it provide that the petitioner must be aggrieved *only* "at the time of" the request for a hearing and not during the hearing or subsequent appeal as well. Instead, MCL 324.35305(1) contains a clause providing that *if* certain classes of individuals meet certain criteria, they "may request a hearing." Accordingly, satisfaction of MCL 324.35305(1)'s standard at one point in time does not automatically insulate one from all future challenges of standing.

MCL 324.35305(1)'s provision that "[t]he 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" does not help Petitioners. Petitioners' Brief is replete with misleading quotes of only the first five words of this sentence, which Petitioners use to argue that once Section 324.35305(1)'s standard has been met at one point in time, a hearing *must* occur *no matter what happens later*. Reading the sentence in its entirety, however, makes clear that it merely describes the *manner* in which the hearing "shall be conducted," and does not function as any guarantee of standing to request a hearing or for a hearing be conducted.

2. **A party may lose statutory standing during the course of a proceeding.**

The doctrines of statutory standing and mootness, as interpreted by Michigan courts, amply support the ALJ and Court of Appeals' holding that a party can lose statutory standing

after the commencement of the action.<sup>10</sup> See, e.g., *Gorbach v US Bank Natl 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); *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); *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"); 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)).

Michigan case law is in accord with federal and other states' case law, which all hold that a plaintiff can lose statutory standing over the course of an administrative proceeding.<sup>11</sup> See *Seventh Parvati Corp v City of Oak Forest, Ill*, 630 F3d 512, 516-18 (CA 7, 2010) (holding that plaintiff lost standing to challenge commission's decision by selling property subject to commission's decision); *Greenport Grp LLC v Town Bd of Town of Southold*, 167 AD3d 575,

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<sup>10</sup> "Although unpublished opinions are not binding precedent, MCR 7.215(C)(1), an unpublished opinion may be persuasive or instructive." *Kern v Kern-Koskela*, 320 Mich App 212, 241; 905 NW2d 453 (2017). Pursuant to MCR 7.215(C)(1), Dune Ridge cites these unpublished decisions because they are persuasive authority for the proposition that a party may lose standing over the course of a proceeding.

<sup>11</sup> Lower federal court decisions are not binding on this Court, but may be persuasive. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

577; 90 NYS3d 188 (2d Dept 2018) ("We agree with the Supreme Court's dismissal of the second through sixth causes of action insofar as asserted by Solof on the ground that she lacked standing. Prior to the implementation of the Local Law that rezoned the property, Solof had transferred ownership of the property to Greenport Group and, thus, lacked 'a legally cognizable interest' that was or would be affected by the zoning determination."); *Barkman v Zoning Appeals Bd of Jefferson Parish*, 442 So2d 1237 (La Ct App 5th Cir 1983) (where an application for a variance to construct a garage that would exceed the height limit was opposed by a neighboring landowner, but the neighbor subsequently sold his property, the neighbor no longer had standing to contest the granting of the variance).

As the Court of Appeals noted, loss of statutory standing is sometimes analyzed as a mootness issue. 3/21/2019 Op & Order at pp 10-11. "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*, 487 Mich 349); 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).

Federal courts hold that standing can be lost during the pendency of an action, often analyzing this 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.*

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.").

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; 470 NW2d 372 (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 only whether Petitioners had standing when they filed their petitions (they did not); the issue is also 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 Lack Statutory Standing to Sue and Their Claims are Moot.**

As the ALJ and Court of Appeals rightly held, when Dune Ridge moved for summary disposition, Petitioners did not own property immediately adjacent to any property that Dune Ridge owned, much less immediately adjacent to the proposed use. Accordingly, Petitioners

failed to satisfy the Legislature's requirements for statutory standing. See MCL 324.35305(1). Petitioners lacked standing and their claims were moot.

Petitioners' "fairness" argument is specious because they have already received the relief they want and could obtain, which was to live next to property that will remain in an undeveloped state. As the ALJ noted, "no development is occurring on property immediately adjacent" to Petitioner Zolper's property. 13/2/2017 Opinion and Order, at p 3. The same is true of Petitioner Underwood's property. See 7/7/2016 Opinion and Order, at p 4. Petitioners themselves admit this, stating "there were never plans to develop [this property], probably because it is so steep that construction would not be practical." Petrs' Supp Br at p 6. And if any such development were ever to occur, Petitioners could then seek to protest any agency action related to such Application. See *id.*

That Petitioners continued to litigate this case makes clear their underlying goal is not really to enforce their statutory rights, but instead to block any development whatsoever on Dune Ridge's property. Petitioners' attempted intervention abuses MCL 324.35305(1)'s statutory provisions, which require a petitioner to be the owner of property *immediately adjacent to the proposed use* and *aggrieved* by the department's decision. See MCL 324.35305(1). MCL 324.35305(1) was not passed (and amended) by the Legislature to permit Petitioners' conduct in this case—repeated attempts to stall and block Dune Ridge's development.

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 judicial review of Part 353's permitting process. For example, early on in this case, Dune Ridge developed a portion of property immediately adjacent to Shorewood Association's property, and had to obtain a Part 353 permit to do so. At that time, Shorewood Association—as the owner of property

immediately adjacent to Dune Ridge's proposed use—had standing to request a contested case hearing under MCL 324.35305(1). The ALJ's decisions in that proceeding were subject to judicial review, and the parties ultimately entered into a settlement.

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.<sup>12</sup> 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 standing is vested or divested. See 2/13/2017 Op & Order at 3 [AP 11A] ("[T]he governing statute requires ownership, but is not concerned with how ownership is vested or divested.").

Indeed, case law from this Court has long held 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*

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<sup>12</sup> 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 Part 353 permits were even applied for. See Aff of P Heule at ¶¶ 3-13 [AP 117A-119A].

*Jones*, 486 Mich 29, 32-33; 782 NW2d 187 (2010), this Court held that a prosecution's voluntary dismissal of charges during a case deprived the court of jurisdiction. *Id.*

Federal law likewise holds that a defendant's action can moot the plaintiff's claims. For example, in *Chirco v Gateway Oaks LLC*, 384 F3d 307 (CA 6, 2004), a plaintiff builder created architectural plans, from which he constructed condominiums. *Id.* at 308. The defendant builder then started constructing condominiums that were allegedly substantially similar to the plaintiff's condominiums. See *id.* The plaintiff sued for copyright infringement, seeking to enjoin further construction by defendant. See *id.* The defendant then moved to dismiss the suit as moot, claiming it already finished constructing the condominiums and had sold them to various third parties. See *id.* at 309. The Sixth Circuit held that the defendant's action of selling the condominiums mooted plaintiff's claim. *Id.* at 309-10. Moreover, the "capable of repetition yet evading review" exception to mootness did not apply because the plaintiff was unable to show that he would again be subjected to any action by the *same defendant*; the condominiums had been sold to third parties.<sup>13</sup> See *id.*

Similarly here—as the Court of Appeals correctly reasoned—the fact that *Dune Ridge* conveyed parcels to third parties has no bearing on whether Petitioners have standing. See *Jones*, 486 Mich at 32-33; *Street R Co of E Saginaw*, 58 Mich at 287; see also *Lathrop v Sakatani*, 111 Hawai'i 307, 312-14; 141 P3d 480 (2006) (holding defendant's sale of property at issue in case to third party rendered appeal moot, despite fact that plaintiff claimed the sale was

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<sup>13</sup> Other federal courts of appeal are in agreement. See, e.g., *Redfern v Napolitano*, 727 F3d 77, 84-85 (CA 1, 2013) (defendant's withdrawal of body-imaging machines from airport screening mooted the plaintiffs' challenge to those machines, even though the government admitted it might use those machines in the future again); *Owens v Isaac*, 487 F3d 561, 564 (CA 8, 2007) (plaintiff's claim for injunctive relief against conditions of confinement was mooted by defendant's transfer of plaintiff to a different prison); *Oliver v Scott*, 276 F3d 736, 741-42 (CA 5, 2002) (defendant's transfer of plaintiff after a two-month stay at the detention center where he was exposed to asbestos mooted his claim for injunctive or declaratory relief).

"phony" and "entered into by the defendants in an attempt to defeat the plaintiffs' recovery"). MCL 324.35305(1) only grants a statutory cause of action to permit applicants or owners of property "immediately adjacent to the proposed use" that are aggrieved; it is not concerned with how ownership is vested or divested.

Moreover, Petitioners' repeated assertions that they retain an "interest" in the subject matter of the permitting process and remain "concerned" about the development's purported effect on the sand dunes generally neither gives them statutory standing nor saves their claim from being moot. Section 35305(1) requires a petitioner to be an "aggrieved" "owner of property immediately adjacent to the proposed use." MCL 324.35305(1). Because Petitioners do not satisfy *that* requirement, they lack statutory standing to pursue claims under that section and their claims are moot.

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—obtaining 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).

Contrary to Petitioners' unsupported allegations, Dune Ridge never attempted to "evade" administrative or judicial review or "shield" its actions from anyone. Dune Ridge lawfully sold many acres of its property to third parties, who will now preserve that property in an undeveloped state. The Legislature struck the balance between lawful economic development

and environmental concerns by limiting intervention in permitting decisions to aggrieved persons who own property immediately adjacent to the proposed use. This Court should not rewrite the legislature and executive agency's considered judgment in that regard. See *Amb's*, 255 Mich App at 650 ("[I]t is not the role of the judiciary to second-guess a legislative policy choice") (citation and quotation marks omitted).

The *Blankenship* case that Petitioners cited is distinguishable for another reason too: in *Blankenship*, the plaintiff sought redress in the form of *damages* 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 recover damages 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 do not seek damages, but only to block the permits' issuance. Nor are Petitioners otherwise seeking 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 not owners of property immediately adjacent to the proposed use, they lack statutory standing to bring claims under Section 35305 and their claims are moot. Accordingly, the ALJ and Court of Appeals' holding is correct.

**V. CONCLUSION AND RELIEF REQUESTED**

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

Respectfully Submitted,

VARNUM

Dated: January 27, 2020

By /s/ Herman D. Hofman

Attorneys for Respondent/Appellee  
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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STATE OF MICHIGAN  
IN THE SUPREME COURT  
APPEAL FROM THE MICHIGAN COURT OF APPEALS

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LAKESHORE GROUP, et al.,

Supreme Court No. 159524 & 159525

Petitioners/Appellants,

Court of Appeals No. 340647  
Consolidated with No. 340623

v

Lower Court Case No. 17-176-AA

STATE OF MICHIGAN, DEPARTMENT OF  
ENVIRONMENTAL QUALITY,

MAHS Docket 14-026236

Respondent/Appellee,

**ADDENDUM TO**  
**RESPONDENT/APPELLEE DUNE RIDGE**  
**SA LP'S RESPONSE TO**  
**PETITIONERS/APPELLANTS'**  
**SUPPLEMENTAL BRIEF PURSUANT**  
**TO THE COURT'S NOVEMBER 27, 2019,**  
**ORDER**

And

DUNE RIDGE SA LP,

Respondent/Appellee.

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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](mailto:dpordway@ordwaylawfirm.com)

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B. Eric Restuccia (P49550)  
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](mailto: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  
[kpkonwinski@varnumlaw.com](mailto:kpkonwinski@varnumlaw.com)  
[hdhofman@varnumlaw.com](mailto:hdhofman@varnumlaw.com)

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2012 Mich. Legis. Serv. P.A. 297 (S.B. 1130) (WEST)

MICHIGAN 2012 LEGISLATIVE SERVICE

Ninety-Sixth Legislature, Regular Session

Additions are indicated by **Text**; deletions by

**\*\*\***

Vetoes are indicated by ~~Text~~ ;

stricken material by ~~Text~~ .

PUBLIC ACT NO. 297

S.B. No. 1130

ENVIRONMENTAL PROTECTION--PERMITS--CRITICAL DUNE AREAS

AN ACT to amend 1994 PA 451, entitled "An act to protect the environment and natural resources of the state; to codify, revise, consolidate, and classify laws relating to the environment and natural resources of the state; to regulate the discharge of certain substances into the environment; to regulate the use of certain lands, waters, and other natural resources of the state; to prescribe the powers and duties of certain state and local agencies and officials; to provide for certain charges, fees, assessments, and donations; to provide certain appropriations; to prescribe penalties and provide remedies; and to repeal acts and parts of acts," by amending sections 35301, 35302, 35304, 35305, 35306, 35310, 35311, 35312, 35313, 35316, 35317, 35319, 35320, 35321, 35322, and 35323 (MCL 324.35301, 324.35302, 324.35304, 324.35305, 324.35306, 324.35310, 324.35311, 324.35312, 324.35313, 324.35316, 324.35317, 324.35319, 324.35320, 324.35321, 324.35322, and 324.35323), sections 35301, 35316, and 35317 as amended by 1995 PA 262, sections 35302, 35305, 35306, 35310, 35311, 35312, 35313, 35319, 35320, 35321, 35322, and 35323 as added by 1995 PA 59, and section 35304 as amended by 2004 PA 325, and by adding sections 35311a and 35311b; and to repeal acts and parts of acts.

The People of the State of Michigan enact:

<< MI ST 324.35301 >>

**M.C.L.A. § 324.35301**

Sec. 35301. As used in this part:

- (a) "Contour change" includes any grading, filling, digging, or excavating that significantly alters the physical characteristic of a critical dune area, except that which is involved in sand dune mining as defined in part 637.
- (b) "Crest" means the line at which the first lakeward facing slope of a critical dune ridge breaks to a slope of less than 1-foot vertical rise in a 5-1/2-foot horizontal plane for a distance of at least 20 feet, if the areal extent where this break occurs is greater than 1/10 acre in size.
- (c) "Critical dune area" means a geographic area designated in the "atlas of critical dune areas" dated February 1989 that was prepared by the department of **natural resources**.
- (d) "Department" means the department of environmental quality.
- (e) "Foredune" means 1 or more low linear dune ridges that are parallel and adjacent to the shoreline of a Great Lake and are rarely greater than 20 feet in height. The lakeward face of a foredune is often gently sloping and may be vegetated with dune grasses and low shrub vegetation or may have an exposed sand face.

(d) The crest of the dune shall not be reduced in elevation.

(5) As soon as possible following adoption of a zoning ordinance enacted pursuant to this part, the local unit of government shall submit to the department a copy of the ordinance that it determines meets the requirements of this part. If the local unit of government has an existing ordinance that it contends is ~~\*\*\*~~ substantially equivalent to the model zoning plan, that ordinance may be submitted to the department at any time. The department shall review zoning ordinances submitted under this section to assure compliance with this part. If the department finds that an ordinance is not in compliance with this part, the department shall work with the local unit of government to bring the ordinance into compliance and inform the local unit of the failure to comply and in what ways the submitted ordinance is deficient. Unless a local unit of government receives notice, within 180 days after submittal of the ordinance ~~\*\*\*~~ to the department under this subsection, **that the ordinance is not in compliance with this part, the ~~\*\*\*~~ ordinance shall be considered to be approved by the department.**

(6) A local unit of government may adopt, submit to the department, and obtain approval of a zoning ordinance based on the model zoning plan or an equivalent ordinance as provided in this section by June 30, 1990. If a local unit does not have an approved ordinance by June 30, 1990, the department shall implement the model zoning plan for that local unit of government in the same manner and under the same circumstances as provided in subsection (1). Notwithstanding any other provision of this part, a local unit of government may adopt a zoning ordinance at any time, and upon the approval of the department, that ordinance shall take the place of the model zoning plan implemented by the department.

(7) If a local unit of government in which a proposed use is to be located does not elect to issue permits or does not receive **department** approval of a zoning ordinance that regulates critical dune areas, the department shall implement the model zoning plan in the place of the local unit of government and issue special exceptions in the same circumstances as provided in this part for the issuance of variances by local units of government, and issue permits pursuant to subsection (1) and part 13.

(8) The department shall assist local units of government in developing ordinances that meet the requirements of this part.

<< MI ST 324.35305 >>

M.C.L.A. § 324.35305

Sec. 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.**

(2) Following the hearing provided for under subsection (1), a decision of the department in regard to the issuance or denial of a permit or special exception under this part is subject to judicial review as provided for in ~~\*\*\*~~ **the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328.**

<< MI ST 324.35306 >>

M.C.L.A. § 324.35306

Sec. 35306. (1) The lawful use of land or a structure, as existing and lawful within a critical dune area at the time the department implements the model zoning plan for a local unit of government, may be continued although the use of that land or structure does not conform to the model zoning plan. The continuance, completion, restoration, reconstruction,

324.35305. Protest and appeal of department decisions, MI ST 324.35305

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Michigan Compiled Laws Annotated  
Chapter 324. Natural Resources and Environmental Protection  
Natural Resources and Environmental Protection Act (Refs & Annos)  
Article III. Natural Resources Management  
Chapter 1. Habitat Protection  
Land Habitats  
Part 353. Sand Dune Protection and Management

M.C.L.A. 324.35305

324.35305. Protest and appeal of department decisions

Effective: August 7, 2012  
Currentness

Sec. 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.

(2) Following the hearing provided for under subsection (1), a decision of the department in regard to the issuance or denial of a permit or special exception under this part is subject to judicial review as provided for in the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328.

**Credits**

P.A.1994, No. 451, § 35305, added by P.A.1995, No. 59, § 1, Imd. Eff. May 24, 1995. Amended by P.A.2012, No. 297, Imd. Eff. Aug. 7, 2012.

M. C. L. A. 324.35305, MI ST 324.35305

The statutes are current through P.A.2018, No. 164, of the 2018 Regular Session, 99th Michigan Legislature.

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MI S.F.A. B. An., S.B. 1130, 11/29/2012

## Michigan Senate Fiscal Agency Bill Analysis, Senate Bill 1130

November 29, 2012

Michigan Senate Fiscal Agency  
96th Legislature, 2012 Regular Session

CRITICAL DUNE AREAS S.B. 1130:

## COMMITTEE SUMMARY

Senate Bill 1130 (as introduced 5-15-12)

Sponsor: Senator Arlan Meekhof

Committee: Natural Resources, Environment and Great Lakes

Date Completed: 5-30-12

CONTENT

The bill would amend Part 353 (Sand Dunes Protection and Management) of the Natural Resources and Environmental Protection Act to do the following:

- Eliminate a provision allowing a local zoning ordinance regulating critical dune areas to be more restrictive of development than the model zoning plan of the Department of Environmental Quality (DEQ).
- Require a permit or a variance or special exception to an ordinance to be granted unless it was more likely than not that resulting harm to the environment would significantly damage the public interest or deplete or degrade the diversity, quality, or functions of the critical dune area.
- Revise the people who may request a public hearing on a permit for a use in a critical dune area, a formal hearing on a permit decision, or enforcement action for a violation of an ordinance regulating critical dunes.
- Establish limits on use on the first lakeward facing slope of a critical dune area or a foredune.
- Extend from 90 to 180 days the time the DEQ has to review a local ordinance for compliance with Part 353.
- Exempt from the operation of Part 353 a use involving the maintenance, repair, or replacement of existing utility lines, subject to certain conditions.
- Allow only the DEQ or a local unit's governing body to request an action to remedy a violation of the model zoning plan or a local zoning ordinance.
- Require the DEQ to appoint a team to review and update the "Atlas of Critical Dune Areas" every 10 years.
- Require the construction, improvement, and maintenance of a driveway and accessibility measures to be permitted for any building allowed in a critical dune area, subject to certain conditions.
- Require an affirmative vote of a local unit's governing body following a public hearing for the regulation of additional land determined essential to a critical dune area.

effect in that local unit that provides the same or a greater level of protection for critical dune areas and that is approved by the DEQ. The bill would refer to an existing ordinance that provides a substantially equivalent level of protection.

The bill would eliminate a provision allowing a local zoning ordinance regulating critical dune areas to be more restrictive of development and more protective of critical dune areas than the model zoning plan.

Subject to limitations prescribed in Part 353, a permit would have to be approved unless the local unit or the DEQ determined that it was more likely than not that the actual harm to the environment resulting from the use would significantly damage the public interest in the privately owned land, or, if the land were publicly owned, the public interest in the publicly owned land, by significant and unreasonable depletion or degradation of the diversity, quality, or functions of the critical dune areas within the local unit of government.

The decision of the local unit or the DEQ with respect to a permit would have to be in writing and be based upon evidence that would meet the standards prescribed for a contested case under the Administrative Procedures Act (APA). A decision denying a permit would have to document, and any review upholding the decision would have to determine, all of the following:

- That the local unit or the DEQ had met the required burden of proof.
- That the decision was based upon sufficient facts or data.
- That the decision was the product of reliable scientific principles and methods.
- That the decision had applied the principles and methods reliably to the facts.
- That the facts or data upon which the decision was based were recorded in the file.

A permit could not be granted if it would authorize construction of a dwelling or other permanent building on the first lakeward facing slope of a critical dune area or foredune except on a lot of record that was recorded before July 5, 1989, that did not have sufficient buildable area landward of the crest to construct the dwelling or other permanent use as proposed by the applicant. The proposed construction, to the greatest extent possible, would have to be placed landward of the crest. The portion of the development that was lakeward of the crest would have to be placed in the location that had the least impact on the critical dune area.

("Foredune" means one or more low linear dune ridges that are parallel and adjacent to the shoreline of a Great Lake and are rarely greater than 20 feet tall.)

Except as otherwise provided, a permit would have to provide that a use that was a structure would have to be constructed behind the crest of the first landward ridge that was not a foredune. If construction occurred within 100 feet measured landward from that crest, however, the use would have to meet all of the following requirements:

- The structure and access to it would have to be in accordance with plans prepared for the site by a registered professional architect or a licensed professional engineer.
- The plans would have to provide for the disposal of storm water without serious soil erosion and without sedimentation of any stream or other body of water.
- Access to the structure would have to be from the landward side of the dune.
- The dune would have to be restabilized with indigenous vegetation.
- The crest of the dune could not be reduced in elevation.

#### Review of Local Ordinance

provisions or involved in the modification or reversal of a decision regarding a special use. The bill would delete the reference to a person.

At the request of a member of the governing body of a local unit, or a person, the county prosecutor may institute an action for a restraining order or injunction or other proper remedy to prevent a violation of an approved zoning ordinance. The bill would refer to the governing body, rather than a member of the governing body, and would eliminate the reference to a person.

#### Review of Critical Dune Areas

Part 353 required the DEQ to appoint a team of qualified ecologists by May 23, 1995, to review the "Atlas of Critical Dune Areas", dated February 1989. The review team must evaluate the accuracy of the designations of critical dune areas within the atlas and recommend to the Legislature any changes or underlying criteria revisions that would provide more precise protection to the targeted resource. Under the bill, the Department would have to appoint the team of ecologists beginning with the bill's effective date and once every 10 years after that.

#### Driveways

Under the bill, notwithstanding prescribed prohibited uses or any other provision of Part 353, the construction, improvement, and maintenance of a driveway would have to be permitted for any dwelling or other permanent building allowed in a critical dune area, including one approved under Part 353 or a lawful nonconforming use, subject only to applicable permit requirements and all of the conditions described below.

A driveway would have to be permitted either to the principal building or, in the sole discretion of the applicant, to an accessory building. Additional driveways, if any, would have to meet the applicable requirements for any other use under Part 353. The bill provides that the development of a plan for a driveway should include consideration of the use of retaining walls, bridges, or other similar measures, if feasible, to minimize the impact of the driveway, parking, and turnaround areas, as well as the consideration of alternative locations on the same lot of record.

Driveways on slopes steeper than a one-foot vertical rise in a four-foot horizontal plane, but not steeper than a one-foot rise in a three-foot horizontal plane, would have to be in accordance with plans submitted with the permit application and prepared for the site by a registered professional architect or licensed professional engineer. The plans would have to include the following:

- Storm water drainage that provided for disposal of storm water without serious erosion.
- Methods for controlling erosion from wind and water.
- Restabilization by design elements including vegetation, cut-and-fill, bridges, traverses, and other elements required in the architect's or engineer's judgment to meet these requirements.

Driveways on slopes steeper than a one-foot vertical rise in a three-foot horizontal plane would have to be in accordance with plans submitted with a permit application and prepared for the site by a licensed professional engineer. The plans would have to include the same elements as required for a less severe slope.

Temporary access for all construction, including new construction, renovation, repairs, rebuilding, or replacement, and repair, improvement, or replacement of septic tanks and systems, would have to be allowed for any use allowed in a critical dune area for which a driveway was not already installed by the owner, subject only to the requirements that the temporary access could not involve a contour change or vegetation removal that increased erosion or decreased stability except as could be restabilized upon completion of the construction. The temporary access would have to be maintained in stable condition, and restabilization would have to be commenced promptly upon completion of the construction.

In addition, an application must include a site plan that contains data required by the planning commission concerning the physical development of the site and the extent of its disruption by the proposed development. The bill would delete a provision allowing the planning commission to consult with the soil conservation district in determining the required data.

The application also must include an environmental assessment that comports with Section 35319 for a special use project. Additionally, an environmental impact statement pursuant to Section 35320 may be required if the additional information is considered necessary or helpful in reaching a decision on a permit application for a special use project. The bill would delete these provisions.

(Under Section 35319, a required environmental assessment must include specific documentation and information, including a natural hazards review and an erosion review. Under Section 35320, an environmental impact statement must include more extensive documentation and information, such as an aerial photo and contour map, a soil review, a substrata review, and plans for compliance with prescribed standards.)

The bill would prohibit a local unit of government or the DEQ from requiring an environmental site assessment or environmental impact statement as part of a permit application except for a special use project.

Before issuing a permit allowing a special use project within a critical dune area, a local unit must submit the project application and plan and the local unit's proposed decision to the DEQ. The Department has 60 days to review the plan, and may affirm, modify, or reverse the local unit's proposed decision. The bill would reduce this time period to 30 days.

("Special use project" means any of the following:

- A proposed use in a critical dune area for an industrial or commercial purpose regardless of the size of the site.
- A multifamily use of more than three acres.
- A multifamily use of three acres or less if the density of use is greater than four individual residences per acre.
- A proposed use in a critical dune area, regardless of size, that the planning commission, or the DEQ if a local unit does not have an approved zoning ordinance, determines would damage or destroy features of archaeological or historical significance.)

#### Prohibited Uses

Under Part 353, a zoning ordinance may not permit certain uses in a critical dune area unless a variance is granted. These uses include a structure and access to it on a slope of a certain rise, unless the structure and access are in accordance with plans prepared by an architect or engineer and the plans provide for the disposal of storm water without serious soil erosion and without sedimentation of any stream or other body of water. The bill would delete a requirement that the planning commission consult with the local soil conservation district before approving the plan.

The prohibited uses also include uses involving a contour change, silvicultural practices, and uses involving a vegetation removal that are likely to increase erosion or decrease stability, or are more extensive than required to implement a use for which a permit is requested. The bill would refer instead to these uses if the local unit or the DEQ determined that they were more likely than not to increase erosion or decrease stability.

Part 353 also prohibits a use that is not in the public interest without a variance, and requires a local unit to consider both of the following in determining whether a proposed use is in the public interest:

- The availability of feasible and prudent alternative locations and/or methods to accomplish the benefits expected from the use.
- The impact that is expected to occur to the critical dune area, and the extent to which the impact can be minimized.

Under the bill, a replacement structure and its use could differ from the one that was destroyed if it did not exceed the original one in size and scope.

#### Appropriations

The bill would repeal Section 35326, which requires the Legislature to appropriate to the Michigan Department of Agriculture and Rural Development (MDARD), the Department of Natural Resources, and the Attorney General sufficient funds to assure the full implementation and enforcement of Part 353. This section also requires appropriations to MDARD to be sufficient to assure adequate funding for soil conservation districts to fulfill their responsibilities under Part 353.

#### Purpose of Part 353

Part 353 contains several legislative findings, including the following:

-- "Local units of government should have the opportunity to exercise the primary role in protecting and managing critical dune areas in accordance with this part."

-- "The benefits derived from alteration, industrial, residential, commercial, agricultural, silvicultural, and the recreational use of critical dune areas shall occur only when the protection of the environment and the ecology of the critical dune areas for the benefit of the present and future generations is assured."

The bill would delete these two findings.

The bill states, "The purpose of this part is to balance the benefits of protecting, preserving, restoring, and enhancing the diversity, quality, functions, and values of the state's critical dunes with the benefits of economic development and multiple human uses of the critical dunes and the benefits of public access to and enjoyment of the critical dunes. To accomplish this purpose, this part is intended to do all of the following:

(i.) Ensure and enhance the diversity, quality, functions, and values of the critical dunes in a manner that is compatible with private property rights.

(ii.) Ensure sound management of all critical dunes by allowing for compatible economic development and multiple human uses of the critical dunes.

(iii.) Coordinate and streamline governmental decision-making affecting critical dunes through the use of the most comprehensive, accurate, and reliable information and scientific data available."

MCL 324.35301 et al.

Legislative Analyst: Julie Cassidy

#### **FISCAL IMPACT**

The bill would have an indeterminate fiscal impact on State and local government. The bill would generally make it more difficult for the DEQ or local units to deny a permit under the critical dunes program by requiring that denials be subject to certain requirements detailed in the bill. These requirements could increase costs to the DEQ and local governments that issue critical dune permits. The bill also would require the DEQ to appoint a team to review and update the "Atlas of Critical Dune Areas" every 10 years. The cost of this review is unknown, but the annual cost would likely be fairly small since the review would happen only every 10 years.

Fiscal Analyst: Josh Sefton

2019 WL 4126752

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.UNPUBLISHED  
Court of Appeals of Michigan.SAUGATUCK DUNES COASTAL  
ALLIANCE, Plaintiff-Appellant,

v.

SAUGATUCK TOWNSHIP, Saugatuck Township  
Zoning Board of Appeals, and North Shores  
of Saugatuck, LLC, Defendants-Appellees.Saugatuck Dunes Coastal  
Alliance, Plaintiff-Appellant,

v.

Saugatuck Township Zoning Board of Appeals,  
Saugatuck Township, and North Shores  
of Saugatuck, LLC, Defendants-Appellees.

No. 342588, No. 346677

|  
August 29, 2019Allegan Circuit Court, LC Nos. 17-058936-AA, 18-059598-  
AA

Before: Gadola, P.J., and Markey and Ronayne Krause, JJ.

**Opinion**

Per Curiam.

\*1 In these consolidated appeals, plaintiff Saugatuck Dunes Coastal Alliance (plaintiff) appeals as of right the circuit court orders dismissing two separate appeals from decisions of defendant the Saugatuck Township Zoning Board of Appeals (ZBA). The ZBA's decisions each determined that plaintiff lacked standing to appeal the Saugatuck Township Planning Commission's (the Commission's) approvals of a condominium development project planned by defendant North Shores of Saugatuck, LLC (North Shores). Plaintiff is a nonprofit organization comprised of individuals who live and work in the Saugatuck area. In both of its orders, the trial court affirmed the ZBA's determinations that plaintiff lacked standing to challenge the approvals of the condominium

project. We affirm, but in Docket No. 342588, we remand for further consideration.

**I. BACKGROUND**

North Shores owns approximately 300 acres of land (the property) in Saugatuck Township, directly north and adjacent to the Kalamazoo River channel at its opening to Lake Michigan. The property and much of the surrounding area is considered critical dune areas<sup>1</sup> by the Michigan Department of Environment, Great Lakes, and Energy (EGLE<sup>2</sup>). The property was zoned as R-2 Residential, and North Shores applied for preliminary special-use approval of a condominium development. The development would consist of 23 single family homes surrounding a "boat basin," a private marina including 33 "dockominium" boat slip condominium units, and related open space. On April 26, 2017, the Commission granted conditional approval of North Shores's planned development. The conditions included obtaining permits from the DEQ, the United States Corps of Engineers (USACE), and the United States Environmental Protection Agency (USEPA). Plaintiff appealed that conditional approval to the ZBA, which, on October 11, 2017, adopted a resolution after holding a public hearing that plaintiff lacked standing to pursue that appeal. In Docket No. 342588, plaintiff appealed the ZBA's decision to the circuit court, which affirmed and dismissed the appeal.<sup>3</sup>

In the meantime, North Shores obtained the required approvals. On October 23, 2017, the Commission granted final approval of the condominium project. Plaintiff appealed that final decision to the ZBA, which, on April 9, 2018, adopted another resolution after holding a public hearing that plaintiff lacked standing to pursue that appeal. In Docket No. 346677, plaintiff appealed the ZBA's decision to the circuit court. Once again, the circuit court affirmed the ZBA's determination that plaintiff lacked standing, and it dismissed plaintiff's appeal. Plaintiff appealed by right to this Court from both orders of dismissal by the circuit court, and we consolidated those appeals.<sup>4</sup>

**II. JURISDICTION**

\*2 As an initial matter, North Shores contends that we lack jurisdiction over plaintiff's appeals. A challenge to subject-matter jurisdiction is a question of law, and it may be made at any time. *Smith v. Smith*, 218 Mich. App. 727, 729-730; 555 N.W.2d 271 (1996). North Shores presents a cursory

and conclusory argument that we would ordinarily refuse to consider. See *Mitcham v. Detroit*, 355 Mich. 182, 203; 94 N.W.2d 388 (1959). However, subject-matter jurisdiction is of such critical importance that we must consider it upon challenge, or even sua sponte where appropriate. See *O'Connell v. Director of Elections*, 316 Mich. App. 91, 100; 891 N.W.2d 240 (2016).

North Shore's challenge is based upon MCR 7.203(A)(1)(a), which states that this Court does not have jurisdiction over a claimed appeal by right from "a judgment or order of the circuit court ... on appeal from any other court or tribunal." Presumably, North Shore contends that the ZBA in these matters acted as a "tribunal." An administrative agency that acts in a quasi-judicial capacity may be considered a "tribunal" for purposes of MCR 7.203(A)(1)(a). See *Natural Resources Defense Council v. Dep't of Environmental Quality*, 300 Mich. App. 79, 85-87; 832 N.W.2d 288 (2013). However, it appears to us that the ZBA decisions from which plaintiff seeks to appeal were made after public hearings, and that they were not contested proceedings. We reject North Shores's implied contention that the ZBA acted as a "tribunal" for purposes of MCR 7.203(A)(1)(a). We therefore also reject North Shores's challenge to our jurisdiction to address these appeals.

### III. STANDARD OF REVIEW

This Court reviews "a circuit court's decision in an appeal from a decision of a zoning board of appeals ... de novo to determine whether the circuit court applied the correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the [ZBA's] factual findings." *Olsen v. Chikaming Twp.*, 325 Mich. App. 170, 180; 924 N.W.2d 889 (2018) (quotation marks and citation omitted; second alteration in original.) "Whether a party has standing is a question of law that is reviewed de novo." *Michigan Ass'n of Home Builders v. City of Troy*, — Mich. —, — *Michigan Ass'n of Home Builders v. City of Troy*, — Mich. —, —; — N.W.2d — (2019) — N.W.2d — (2019) (Docket No. 156737, slip op. at p. 6). However, a party's right to appellate review of a decision by a ZBA does not turn on traditional principles of standing, but instead on whether the party is "aggrieved" by the ZBA's decision within the meaning of MCL 125.3605. *Olsen*, 325 Mich. App. at 179-182. "This Court also reviews de novo questions of statutory interpretation," with the goal of ascertaining the intent of the legislature as derived from the express language of the statute. *Michigan Ass'n of Home Builders*, — Mich. at

— (slip op. at pp. 6-7). Ordinances are reviewed in the same manner as statutes. *Gora v. City of Ferndale*, 456 Mich. 704, 711; 576 N.W.2d 141 (1998).

### IV. "AGGRIEVED PARTY"

Although "[m]unicipalities have no inherent power to regulate land use through zoning," the Michigan Legislature granted this authority through legislation. *Olsen*, 325 Mich. App. at 179. The Legislature combined three historic zoning acts into the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq.*, which "grants local units of government authority to regulate land development and use through zoning." *Id.* "The MZEA also provides for judicial review of a local unit of government's zoning decisions." *Id.* MCL 125.3605 provides that "[t]he decision of the zoning board of appeals shall be final. A party aggrieved by the decision may appeal to the circuit court for the county in which the property is located ... " MCL 125.3606(1) states:

\*3 Any party aggrieved by a decision of the zoning board of appeals may appeal to the circuit court for the county in which the property is located. The circuit court shall review the record and decision to ensure that the decision meets all of the following requirements:

- (a) Complies with the constitution and laws of the state.
- (b) Is based upon proper procedure.
- (c) Is supported by competent, material, and substantial evidence on the record.
- (d) Represents the reasonable exercise of discretion granted by law to the zoning board of appeals.

In *Olsen*, 325 Mich. App. at 180, this Court explained the difference between "standing" and "aggrieved party" analyses in cases involving an appeal from a decision of a ZBA. This Court stated that the "term 'standing' generally refers to the right of a plaintiff initially to invoke the power of a trial court to adjudicate a claimed injury." *Id.* However, pursuant to the MZEA, "a party seeking relief from a decision of a ZBA is not required to demonstrate 'standing' but instead must demonstrate to the circuit court acting in an appellate context that he or she is an 'aggrieved' party." *Id.* at 180-181. We expressly do not consider or decide whether, or to what extent, plaintiff might have standing under some other procedural posture or context.<sup>5</sup>

In *Olsen*, the appellant requested a variance under a zoning ordinance that required lots in a subdivision to have a minimum area of 20,000 square feet and a rear setback of 50 feet. *Olsen*, 325 Mich. App. at 175. The lot at issue had a square footage of 9,676 feet and would require a rear setback of 30 feet. *Id.* at 175-176. Neighboring property owners argued against issuance of the variance; however, following public comments and extensive discussion at a hearing, the ZBA approved the variance request. *Id.* at 176. This Court determined that the plaintiff's alleged injuries were insufficient "to show that they suffered a unique harm different from similarly situated community members ... " *Id.* at 186. This Court acknowledged the potential for septic systems and setback requirements to affect the property of adjoining neighbors, but reasoned that the appellant would be unable to obtain permits to install any system in violation of the requisite health codes and building requirements. *Id.* Thus, the neighbors' anticipated harm was speculative. *Id.* at 186-187. Because the plaintiffs "failed to demonstrate special damages different from those of others within the community," this Court determined that the plaintiffs were not "aggrieved" pursuant to MCL 125.3605, and accordingly, "did not have the ability to invoke the jurisdiction of the circuit court ... " *Id.* at 194.

Plaintiff argues that concepts of "standing" and "aggrieved party" are, in application, essentially indistinguishable. Plaintiff's position is understandable, especially because *Olsen* observed that under both standing and "aggrieved party" analyses, "a party must establish that they have special damages different from those of others within the community." *Olsen*, 325 Mich. App. at 193. This Court in *Olsen* defined an "aggrieved party" as having "suffered some special damages not common to other property owners similarly situated," pursuant to "the long and consistent interpretation of the phrase 'aggrieved party' in Michigan zoning jurisprudence." *Id.* at 185 (citations and quotation omitted). Our Supreme Court concluded that a party may have standing by legislative grant or "if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry

at large." *Lansing Sch. Ed. Ass'n v. Lansing Bd. of Ed.*, 487 Mich. 349, 372; 792 N.W.2d 686 (2010); *Olsen*, 325 Mich. App. at 192. These definitions superficially appear similar. Critically, however, the aggrieved party analysis refers to "other property owners similarly situated," whereas the standing analysis refers to "the citizenry at large."

\*4 Additionally, *Olsen* enumerated a variety of conditions that will not suffice to establish that a party is "aggrieved." In particular, "mere ownership of an adjoining parcel of land," the "mere entitlement to notice," and "[i]ncidental inconveniences such as increased traffic congestion, general aesthetic and economic losses, population increases, or common environmental changes" were all deemed inadequate to establish that a party is "aggrieved." *Olsen*, 325 Mich. App. at 185. Ecological harms are also insufficient. *Id.* at 186. Concerns over potential harms are also insufficient, at least where there is some basis, such as health and building permit requirements, to conclude that the potential is unlikely to become actual. *Id.* at 186-187. We do not interpret *Olsen* as foreclosing any possibility that such harms *could* result in a party being aggrieved if, for some reason, those harms specifically or disproportionately affect that particular party in a manner meaningfully distinct from "other property owners similarly situated." However, plaintiff critically misapprehends the analysis by referring to injuries that differ from "the public at large."

Plaintiff has submitted numerous affidavits apparently tending to show that the affiants will suffer harms distinct from the general public.<sup>6</sup> Plaintiff has *not* shown, however, that the affiants will suffer harms distinct from *other property owners similarly situated*. A party generally cannot show a sufficiently unique injury from a complaint that "any member of the community might assert." *Olsen*, 325 Mich. App. at 193. We reiterate that we do not consider whether plaintiff might have *standing* in an appropriate procedural context. However, some of the affiants are not even actual owners of nearby property; and otherwise all of the articulated concerns are either speculative, broad environmental policy matters, or pertain to harms that could be suffered by any nearby neighbor, business, or tourist. Irrespective of the seriousness of those harms, or of whether those harms might differ from the citizenry at large, the trial court properly concluded that plaintiff was not an aggrieved party pursuant to MCL 125.3605, so plaintiff's appeals were correctly dismissed. See *id.* at 194.

#### V. OTHER CLAIMS

Finally, in Docket No. 342588, when plaintiff appealed the ZBA's conditional approval of the condominium project, plaintiff joined two original claims. Its first original claim was entitled "declaratory judgment," but it sought injunctive relief and fees in addition to declaratory relief. Its other original claim was entitled "nuisance per se," but again it sought

both injunctive and declaratory relief. In essence, plaintiff requested that the trial court find one of the components of the condominium project, the “boat basin,” to be a nuisance and in violation of the township zoning ordinance, and to enjoin its construction. The trial court made no specific reference to these original claims when it entered its order of dismissal in that proceeding. The trial court only referred to dismissing “the Appeal from the Saugatuck Township Board of Appeals.” Because “courts speak through their orders,”

*Piercefield v. Remington Arms Co.*, 375 Mich. 85, 90; 133 N.W.2d 129 (1965), we can only infer that the trial court treated plaintiff’s original claims as merely components or restatements of its appeal.

As we have discussed, the analysis of standing differs subtly but critically from the analysis of whether a party is aggrieved. The trial court and the parties did not have the benefit of *Olsen* at the time the trial court rendered its decision. It is not clear from the record whether the trial court regarded plaintiff’s original claims as *truly* distinct, but it appears from plaintiff’s complaint that plaintiff intended them to be distinct. We

conclude, in any event, that the trial court erroneously failed to rule on plaintiff’s original claims. We further conclude that plaintiff’s standing to bring those claims, and, as applicable, the substantive merits of those claims, should be addressed in the first instance by the trial court. We again emphasize that we express no opinion regarding plaintiff’s standing, and no such opinion should be inferred.

#### VI. CONCLUSION

\*5 In Docket No. 346677, we affirm. In Docket No. 342588, we affirm the trial court’s dismissal of plaintiff’s appeal from the ZBA, but we remand for consideration in the first instance of plaintiff’s original claims consistent with this opinion. We do not retain jurisdiction. Because of the importance of *Olsen* to this matter, and because *Olsen* was decided during the pendency of this appeal, we direct that the parties shall bear their own costs in both appeals. MCR 7.219(A).

#### All Citations

Not Reported in N.W. Rptr., 2019 WL 4126752

#### Footnotes

- 1 See <[https://www.michigan.gov/egle/0,9429,7-135-3311\\_4114\\_4236-70207--,00.html](https://www.michigan.gov/egle/0,9429,7-135-3311_4114_4236-70207--,00.html)>.
- 2 Formerly the Michigan Department of Environmental Quality (DEQ). See Executive Order 2019-2. The Department was known as the DEQ throughout the proceedings below.
- 3 As will be discussed, plaintiff also appended two original claims to its appeal to the circuit court, which the circuit court apparently dismissed in the same order.
- 4 *Saugatuck Dunes Coastal Alliance v. Saugatuck Twp. Bd. of Appeals*, unpublished order of the Court of Appeals, entered January 22, 2018 (Docket Nos. 342588, 346677, and 346679).
- 5 Additionally, the substantive merits of plaintiff’s concerns regarding the condominium project are not before us at this time, and we express no opinion as to those merits.
- 6 We do not express any opinion as to whether they are, in fact, sufficient to confer standing.

2014 WL 7440290

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.UNPUBLISHED  
Court of Appeals of Michigan.Michael J. GORBACH, Plaintiff–Appellant,  
and  
Rosalie Gorbach, Plaintiff,  
v.  
US BANK NATIONAL ASSOCIATION,  
Randall S. Miller & Associates, PC, and  
Jason R. Canvasser, Defendants–Appellees.

Docket No. 308754.

|  
Dec. 30, 2014.

Manistee Circuit Court; LC No. 11–014294–CZ.

Before: SAWYER, P.J., and MARKEY and M.J. KELLY, JJ.

AFTER REMAND

PER CURIAM.

\*1 This case, which alleges irregularities in a foreclosure by advertisement, returns to this Court after remand to the trial court. In December 2011, the trial court granted all defendants summary disposition; plaintiff Michael J. Gorbach appealed.<sup>1</sup> We remanded the case to the trial court for a determination of whether plaintiffs' pending bankruptcy petition deprived them of standing to bring this lawsuit. We now affirm the trial court's grant of summary disposition to all defendants, and, for the sake of clarity, remand for entry of judgment for defendants.

Initially on appeal, we determined that plaintiffs' claims against defendants Randall S. Miller & Associates, PC, and Jason R. Canvasser, were meritless. *Gorbach v. U.S. Bank Nat'l Ass'n*, unpublished opinion of the Court of Appeals issued January 29, 2013 (Docket No. 308754). We affirmed the trial court's award of sanctions to defendant Canvasser but reversed and remanded for reconsideration of sanctions awarded to the other defendants. *Id.* at 6. We also found the record unclear regarding whether plaintiffs had standing to

file their complaint because, at the time they did, plaintiffs' Chapter 7 bankruptcy petition was pending in the United States Bankruptcy Court for the Western District of Michigan. *Id.* at 2, 4. "Because a finding that plaintiff had no standing could render most of plaintiff's remaining issues moot, we conclude[d] it [was] premature and unnecessary for this court to address those issues...." *Id.* at 4. So, "we reverse[d] the trial court's grant of summary disposition to defendants and remand[ed] for consideration of this issue." *Id.* at 6. "We also affirm[ed] the trial court's imposition of \$4,000 in sanctions against plaintiff for filing frivolous claims against Canvasser; however, because the trial court failed to consider plaintiff's argument, we reverse[d] the court's imposition of \$2,000 in sanctions against plaintiff for failing to appear at the pretrial conference." *Id.* We retained jurisdiction.

On remand, plaintiffs and defendant Canvasser settled their claims, and a stipulated order of dismissal entered as to defendant Canvasser on March 18, 2013.<sup>2</sup> With respect to the effect of plaintiffs' bankruptcy on standing, the parties filed briefs and other documents and the trial court heard the parties' arguments on March 28, 2014. The trial court concluded that based on the evidence submitted, the law discussed in *Szyszlo v. Akowitz*, 296 Mich.App 40, 47–50; 818 NW2d 424 (2012), and the parties' arguments, plaintiffs' pending bankruptcy proceeding did not deprive plaintiffs of standing with respect to this case. Specifically, the trial court found that plaintiffs exempted from the bankruptcy proceedings a "possible claim against Indy Mac for illegal foreclosure proceeding." The trial court reasoned:

... I have to say plaintiff is correct. What's exempted is the lawsuit for wrongful foreclosure. Plaintiff says, well, it's confusing because we have assignments going on and we have some financial institutions that the U.S. government entity in effect directed someone else to take over, and those are a series of things that are happening and it's confusing and so we got the name wrong.

\*2 This Court has to agree that it is the lawsuit for wrongful foreclosure that is exempted. If we had several foreclosures that were going on, who the named defendant is could conceivably be more critical. But what we have in the instant case is only one piece of property and only one foreclosure.

Therefore, based on *Szyszlo*, the trial court ruled that plaintiffs had standing. More accurately, the trial court's ruling determined plaintiffs' pending bankruptcy case did not deprive them of standing to file their wrongful forfeiture

complaint. We find no clear error in this ruling. But the issue remains whether plaintiffs lost standing under Michigan law when two days after filing their complaint, the time period to redeem the foreclosed property expired. As we noted in our first opinion, “the parties discuss, at great length, plaintiff’s standing to sue defendants based on Michigan foreclosure law,” yet we deferred addressing that issue pending resolution of “the crucial question ... [of] plaintiff’s standing [and] whether the instant lawsuit against defendants is property vested with the bankruptcy estate.” *Gorbach*, unpub op at 4.

We first note that summary disposition on the basis of lack of standing is properly granted under MCR 2.116(C)(5) (lack of legal capacity to sue). *Aichele v. Hodge*, 259 Mich.App 146, 152 n 2; 673 NW2d 452 (2003). We also note that the trial court did not cite to MCR 2.116(C)(5) or specifically state that it was granting defendants summary disposition on the basis that plaintiffs lacked standing. In this regard, it is settled law that this Court will affirm the trial court when it reaches the correct result, even if for the wrong reason. See *Gleason v. Dep’t of Transportation*, 256 Mich.App 1, 3; 662 NW2d 822 (2003); *Estate of Mitchell v. Dougherty*, 249 Mich.App 668, 680 n 5; 644 NW2d 391 (2002).

“We review de novo a trial court’s summary disposition ruling.” *Szyslo*, 296 Mich.App at 46. When reviewing a motion for summary disposition pursuant to MCR 2.116(C)(5), “this Court must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties.” *Sprenger v. Bickle*, 302 Mich.App 400, 403, 419; 839 NW2d 59 (2013). To the extent questions of statutory interpretation are presented, our review is de novo. *Aichele*, 259 Mich.App at 152. Courts must apply clear and unambiguous statutes as written. *Sprenger*, 302 Mich.App at 403.

In this case, it is undisputed that plaintiffs took no action to redeem the foreclosed property and never sought a court order to stay the running of the redemption period. So it is undisputed that two days after plaintiffs filed this action, the redemption period expired. It is also clear that even if it had the power to do so, the trial court did not stay the running of the period to redeem the property. Moreover, although plaintiff argues fraud on appeal, plaintiffs never pleaded fraud in their complaint and never moved to amend the complaint; consequently, plaintiff may not now maintain a claim of fraud as a means of maintaining standing to sue. Under these circumstances, we conclude this case is controlled by

*Bryan v. JPMorgan Chase Bank*, 304 Mich.App 708; 848 NW2d 482 (2014), which was decided after this case was remanded and which adopted the reasoning of several unpublished cases. We hold plaintiffs lost standing when the redemption period expired without a court order staying it.

\*3 In *Bryan*, sometime after the redemption period had expired following a foreclosure by advertisement, the plaintiff filed an action that alleged “unjust enrichment, deceptive/unfair practice and wrongful foreclosure.” *Bryan*, 304 Mich.App at 711. The plaintiff argued that although the redemption period had expired, “she still had standing to sue because of ‘fraud or irregularity’ in the foreclosure process,” i.e., the defendant’s failure to record its mortgage interest before the sale. *Id.* The Court held that the plaintiff lacked standing to bring her action because the statutory period of redemption had expired, and the plaintiff had made no effort to redeem the property. *Id.* at 713. The Court opined:

Pursuant to MCL 600.3240, after a sheriff’s sale is completed, a mortgagor may redeem the property by paying the requisite amount within the prescribed time limit, which here was six months. “Unless the premises described in such deed shall be redeemed within the time limited for such redemption as hereinafter provided, such deed shall thereupon become operative, and shall vest in the grantee therein named, his heirs or assigns, all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter...” MCL 600.3236. If a mortgagor fails to avail him or herself of the right of redemption, all the mortgagor’s rights in and to the property are extinguished. *Piotrowski v. State Land Office Bd.*, 302 Mich. 179, 187; 4 NW2d 514 (1942).

We have reached this conclusion in a number of unpublished cases and, while unpublished cases are not precedentially binding, MCR 7.215(C)(1), we find the analysis and reasoning in each of the following cases to be compelling. Accordingly, we adopt their reasoning as our own. See *Overton v. Mtg. Electronic Registration Sys.*, unpublished opinion per curiam of the Court of Appeals, issued May 28, 2009 (Docket No. 284950), p 2 (“The law in Michigan does not allow an equitable extension of the period to redeem from a statutory foreclosure sale in connection with a mortgage foreclosed by advertisement and posting of notice in the absence of a clear showing of fraud, or irregularity. Once the redemption period expired, all of plaintiff’s rights in and title to the property were

extinguished.”) (citation and quotation marks omitted); *Hardwick v. HSBC Bank USA*, unpublished opinion per curiam of the Court of Appeals, issued July 23, 2013 (Docket No. 310191), p 2 (“Plaintiffs lost all interest in the subject property when the redemption period expired.... Moreover, it does not matter that plaintiffs actually filed this action one week before the redemption period ended. The filing of this action was insufficient to toll the redemption period.... Once the redemption period expired, all plaintiffs' rights in the subject property were extinguished.”); *BAC Home Loans Servicing, LP v. Lundin*, unpublished opinion per curiam of the Court of Appeals, issued May 23, 2013 (Docket No. 309048), p 4 (“[O]nce the redemption period expired, [plaintiff's] rights in and to the property were extinguished.... Because [plaintiff] had no interest in the subject matter of the controversy [by virtue of MCL 600.3236], he lacked standing to assert his claims challenging the foreclosure sale.”); *Awad v. Gen Motors Acceptance Corp.*, unpublished opinion per curiam of the Court of Appeals, issued April 24, 2012 (Docket No. 302692), pp 5–6 (“Although she filed suit before expiration of the redemption period, [plaintiff] made no attempt to stay or otherwise challenge the foreclosure and redemption sale. Upon the expiration of the redemption period, all of [plaintiff's] rights in and title to the property were extinguished, and she no longer had a legal cause of action to establish standing.”). We hold that by failing to redeem the property within the applicable time, plaintiff lost standing to bring her claim. [*Bryan*, 304 Mich.App at 713715.]

\*4 Although plaintiffs filed their complaint before the expiration of the redemption period, we conclude that the holding of *Bryan* applies to the present case. The *Bryan* Court adopted the reasoning of several unpublished cases, some of which, like the instant case, where owners of foreclosed properties filed complaints alleging fraud or irregularities following a sheriff's sale but before the redemption period had expired. In *Overton*, the plaintiff filed suit alleging fraud in the foreclosure proceedings and one month after filing suit the redemption period expired. The Court held that the plaintiff filing his lawsuit was insufficient to toll the redemption period. *Overton*, unpub op at 2. Further, the Court noted that “[e]ven if [the plaintiff's] assertions were true, and even if the cases he cites supported his arguments, the time to raise the arguments was when foreclosure proceedings began.” *Id.* “Once the redemption period expired, all of [the] plaintiff's rights in and title to the property were extinguished.” The

plaintiff lost standing to pursue his allegations of fraud when he failed to timely assert them. *Id.*

Similarly, in *Hardwick*, this Court held the plaintiffs lost standing to pursue their complaint alleging wrongful foreclosure when the redemption period expired one week after the lawsuit was filed; the filing of the lawsuit did not toll the redemption period. *Hardwick*, unpub op at 2. And in *Awad*, the plaintiff filed suit alleging improper foreclosure 18 days before the redemption period expired. *Awad*, unpub op at 2. Although the plaintiff filed suit before expiration of the redemption period, she made no effort to obtain an order staying or otherwise challenge the foreclosure and redemption sale; therefore, the Court held that after the expiration of the redemption period, all of the plaintiff's rights in and title to the property were extinguished, and she no longer had a legal cause of action to establish standing. *Id.* at 5–6.

Although these cases hold out the possibility that an equitable extension of the period to redeem after a foreclosure sale might be obtained on “a clear showing of fraud, or irregularity” in the foreclosure proceedings, *Schulthies v. Barron*, 16 Mich.App 246, 247–248; 167 NW2d 784 (1969), they consistently hold that the mere filing of a complaint, even if it alleges fraud or irregularity, is insufficient to toll the redemption period.<sup>3</sup> Thus, after the period to redeem a foreclosed property has expired, the mortgagor loses standing to assert a claim arising out of the foreclosure or related to the property. MCL 600.3236; *Bryan*, 304 Mich.App at 713, 715.

Last, we consider plaintiff's argument that defendants' motions for summary disposition, and the trial court's ruling granting the motions, violated the automatic stay of 11 USC 362(a) because plaintiffs bankruptcy petition remained pending at the time.<sup>4</sup> We review this question of law de novo. *Hamed v. Wayne Co.*, 490 Mich. 1, 8; 803 NW2d 237 (2011). When interpreting a statute, our goal is to “give effect to the intent of the Legislature.” *Superior Hotels, LLC v. Mackinaw Twp.*, 282 Mich.App 621, 628; 765NW2d 31 (2009). Unambiguous statutory language should be given its ordinary meaning and we presume the legislative body intended the meaning expressed in the statute. *Id.* at 629; *Deutsche Bank Nat'l Trust Co. v. Tucker*, 621 F3d 460, 462–463 (CA 6, 2010).

\*5 In general, the filing of a petition under the Bankruptcy Code, 11 USC 101 *et seq.*, “operates as a stay, applicable to all entities, of ... the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding *against the debtor* that was or could have been commenced before the commencement of the case...” 11 USC 362(a)(1) (emphasis added). The critical point in time to determine whether a judicial proceeding is automatically stayed under § 362 is the initiation of the proceeding. *Cathey v. Johns-Manville Sales Corp.*, 711 F.2d 60, 61–62 (CA 6, 1983). The stay applies to proceedings that were initially instituted “against the debtor.” *Id.* On the other hand, the statutory automatic stay patently does not apply to actions that the debtor initiates. “[A]s the plain language of the

statute suggests, and as no less than six circuits have concluded, the Code's automatic stay does not apply to judicial proceedings ... that were initiated by the debtor.”

*Brown v. Armstrong*, 949 F.2d 1007, 1009–1010 (CA 8, 1991). Consequently, the trial court did not err by finding that defendants did not violate the automatic stay by defending this action.

We affirm the trial court's original grant of summary disposition to all defendants and, for the sake of clarity, remand for entry of judgment for defendants. As the prevailing party, defendants may tax costs. MCR 7.219. We do not retain jurisdiction.

#### All Citations

Not Reported in N.W.2d, 2014 WL 7440290

#### Footnotes

- 1 Michael's wife, plaintiff Rosalie Gorbach, has not participated in this appeal.
- 2 The order is not limited to defendant Canvasser, which the record shows was the parties' intent.
- 3 Although not discussed in the cited cases, nothing in MCL 600.5856 provides for the tolling of a foreclosure redemption period. That statute provides for the tolling of a statute of limitations or repose on the filing of a complaint and service of a copy of the complaint and summons on a defendant. On the basis of statute's clear and unambiguous text, it would not toll a foreclosure redemption period because a redemption period is neither a period of limitations or repose. Furthermore, nothing in MCL 600.3236 suggests that the redemption period will be tolled or that title will not automatically transfer upon expiration of the period in the event that a party files a complaint challenging the validity of the foreclosure.
- 4 Plaintiffs filed their bankruptcy petition on June 16, 2011, an order of discharge was entered on October 12, 2011, the trustee filed his final report on December 19, 2011, and the bankruptcy case closed by final decree on January 24, 2012.

KeyCite Yellow Flag - Negative Treatment  
 Declined to Follow by *Elsheick v. Select Portfolio Servicing, Inc.*, 6th Cir. (Mich.), May 22, 2014

2012 WL 1415166

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK  
 COURT RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.

Nadia AWAD, Plaintiff–Appellant,

v.

GENERAL MOTORS ACCEPTANCE  
 CORP (GMAC), Defendant–Appellee,

and

Wayne County Board of Commissioners  
 and Orlans Associates, P.C., Defendants.

Docket No. 302692.

|  
 April 24, 2012.

Wayne Circuit Court; LC No. 01–013011–CK.

Before: WILDER, P.J., and O'CONNELL and WHITBECK,  
 JJ.

### Opinion

PER CURIAM.

\*1 In this consumer lending case, plaintiff, Nadia Awad, appeals as of right the trial court's order granting defendant, GMAC Mortgage, LLC's, motion for summary disposition pursuant to MCR 2.116(C)(8). On appeal, Awad asserts that the trial court erred by finding that she lacked standing to bring her complaint, that her complaint was barred by the doctrine of laches, that MERS's assignment to GMAC was valid, and that she was not able to amend her pleadings. We affirm on the issue of standing.

### I. FACTS

On September 14, 2007, Awad and non-party Amer Haidar–Ahmad received a loan in the amount of \$283,500 to purchase a property located in Dearborn Heights, Michigan. Their promise to repay this loan was evidenced by a promissory note that Haidar–Ahmad signed and that was secured by a

mortgage on the property. Non-party Mortgage Electronic Registration Systems, Inc. (MERS) was named as the mortgagee on the mortgage. On September 21, 2007, GMAC became the servicer of the loan. On January 5, 2010, MERS assigned the mortgage to GMAC. And on January 15, 2010, the assignment was recorded with the local register of deeds.

Upon default of the mortgage loan obligations, GMAC commenced foreclosure proceedings on March 31, 2010, in accordance with the power of sale to which Awad expressly agreed in the mortgage. A sheriff's sale occurred on May 26, 2010. Non-party Federal National Mortgage Association (Fannie Mae) was the successful bidder at the sheriff's sale. Pursuant to the sheriff's deed, Awad's statutory right to redeem the property was six months, which expired on November 26, 2010.

Awad failed to redeem the property before the expiration of the redemption period. Instead, she filed suit on November 8, 2010. Awad alleged the following counts against GMAC: Count I—Quiet Title (MCL 600.2932); Count II—Declaratory Judgment (MCR 2.705); Count III—Slander of Title (MCL 565.108); and Count IV—Temporary Restraining Order/Preliminary Injunction. Awad asserted that the foreclosure was improper and that the sheriff's deed was void because GMAC lacked standing to foreclose. As a result, Awad sought a declaration that the sheriff's sale be set aside, a declaration that the mortgage was void, the issuance of a temporary restraining order/preliminary injunction prohibiting eviction from the property, and damages.

GMAC then moved for summary disposition under MCR 2.118(C)(8). GMAC argued that Awad: (i) lacked standing to challenge the foreclosure sale because the statutory redemption period had expired and, therefore, she no longer had an interest in the property; (ii) was guilty of laches because she unreasonably delayed bringing this lawsuit; and (iii) failed to plead a prima facie case regarding irregularities in the foreclosure process to support a claim for quiet title.

After hearing oral arguments on the motion, the trial court granted GMAC's motion for summary disposition on the ground that Awad failed to redeem the property before expiration of the redemption period and, therefore, she lacked standing to challenge the foreclosure sale. Specifically, the trial court held that:

\*2 Plaintiff did not redeem the property.... She lost all right, title, and interest in the property when she failed to redeem within the period. Therefore, she lacks standing to bring a lawsuit regarding this property.

Awad now appeals.

## II. MOTION FOR SUMMARY DISPOSITION. STANDARD OF REVIEW

Awad argues that the trial court erred in granting GMAC summary disposition because she presented a prima facie case to quiet title and she had standing. According to Awad, she had an interest in the property, and there was a legal cause of action.

“A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of a claim and is tested on the pleadings alone.”<sup>1</sup> “All factual allegations must be taken as pleaded, as well as any reasonable inferences that may be drawn therefrom.”<sup>2</sup> A court should grant the motion only “when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery.”<sup>3</sup> This Court reviews de novo a trial court’s grant of summary disposition.<sup>4</sup> This Court also reviews de novo issues regarding whether a litigant has standing.<sup>5</sup>

### B. STANDING

In July 2010, in order to “restore Michigan standing jurisprudence to be consistent with the doctrine’s long-standing, prudential roots,” the Michigan Supreme Court overruled the standing test that had been applied in Michigan since 2001.<sup>6</sup> Specifically, the Court stated that:

[A] litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a

special injury or right, or substantial interest, that will be detrimentally 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.<sup>7</sup> Here, Awad brought her action under MCL 600.2932, which provides the right of a party to bring an action to quiet title. Specifically, it provides:

(1) Any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not.

However, following foreclosure, a different statutory scheme governs the rights and obligations of the subject parties.

Under MCL 600.3240, after a sheriff’s sale is completed, any lawfully entitled person under the mortgage may redeem the property by paying the requisite amount within the applicable prescribed time limit, which in this case was six months.<sup>8</sup> If the mortgagor does not redeem the property within the requisite period, the purchaser of the sheriff’s deed is vested with “all the right, title, and interest” in the property.<sup>9</sup> In other words, where a plaintiff does not avail herself of the right of redemption in the foreclosure proceedings before the expiration of such right, all of the plaintiff’s rights in and to the property are extinguished.<sup>10</sup> “The law in Michigan does not allow an equitable extension of the period to redeem from a statutory foreclosure sale in connection with a mortgage foreclosed by advertisement and posting of notice in the absence of a clear showing of fraud, or irregularity.”<sup>11</sup>

\*3 Here, the property was sold at a sheriff’s sale on May 26, 2010. Thus, Awad had until November 26, 2010 to redeem the property, which she failed to do. Instead, Awad chose to file suit against GMAC on November 8, 2010. Thus, the question is whether the filing of her suit tolled or avoided the redemption requirement.

In an unpublished opinion,<sup>12</sup> a panel of this Court, dealing with similar facts, decided that the filing of the cause of action did not toll or avoid the consequences of failure to follow the redemption procedures. In *Overton v. Mortgage Electronic Registration Sys.*,<sup>13</sup> the plaintiff received notice that he had fallen into default on his mortgage on March 21, 2007. The property was then purchased at public auction on April 18, 2007, which set the redemption period expiration at October 18, 2007. The plaintiff filed suit against the defendants on September 21, 2007, challenging the foreclosure of his property. But “[a]t no point did [the] plaintiff attempt to redeem the property or challenge the foreclosure proceedings directly.”<sup>14</sup> The defendants moved for summary disposition, arguing that the plaintiff had no standing because he lost any interest in the property when the redemption period expired. On appeal, the panel found the “[d]efendants’ arguments ... legally and factually sound.”<sup>15</sup> It explained as follows:

*Plaintiff's suit did not toll the redemption period.* Plaintiff is simply trying to wage a collateral attack on the foreclosure of the property. Even if his assertions were true and the cases he cites indeed supported his arguments, *plaintiff was required to raise the arguments when foreclosure proceedings began.* Plaintiff made no attempt to stay or otherwise challenge the foreclosure and redemption sale. *Although he filed his suit before the redemption period expired, that was insufficient to toll the redemption period.* “The law in Michigan does not allow an equitable extension of the period to redeem from a statutory foreclosure sale in connection with a mortgage foreclosed by advertisement and posting of notice in the absence of a clear showing of fraud, or irregularity.”<sup>16</sup> *Schulthies v. Barron*, 16 Mich.App 246, 247–248; 167 NW2d 784 (1969). Once the redemption period expired, all of plaintiff’s rights in and title to the property were extinguished.<sup>17</sup> *Piotrowski v. State Land Office Bd.*, 302 Mich. 179, 187; 4 NW2d 514 (1942); MCL 600.3236. [ 16 ]

Another panel of this Court reached a similar result in *Mission of Love v. Evangelist Hutchinson Ministries & George W Hutchinson*, where the plaintiff filed suit even before the foreclosure sale took place, yet the redemption period expired without plaintiff taking action to redeem the property.<sup>17</sup> In that case, the plaintiff filed suit in September 2004, alleging that a warranty deed on the subject property was invalid. The property was then purchased at a foreclosure sale in March

2005. One day before the redemption period expired, the plaintiff filed a motion for contempt and clarification, arguing that the foreclosure sale violated the trial court’s permanent injunction that it issued in November 2004. The plaintiff requested the trial court to abate the redemption period or void the mortgage assignment and foreclosure sale. The trial court denied the motion and dissolved the injunction, stating that the injunction was entered to prohibit use or possession of the property, not to prohibit foreclosure. The defendants in *Mission of Love* then moved for summary disposition, arguing that they now had legal title to the property because the redemption period had expired, and the plaintiff no longer had standing to maintain its suit. The trial court agreed with the defendants and granted their motion.

\*4 On appeal, the panel of this Court, also agreed with the defendants, explaining as follows:

[D]efendants are correct that, after title vested ... pursuant to the foreclosure, it was no longer necessary to resolve the subject matter of plaintiff’s lawsuit, i.e., the validity of the warranty deed, because plaintiff no longer had standing. In order to have standing, a party must have “a legal or equitable right, title or interest in the subject matter of the controversy.” After the redemption period expired, plaintiff no longer had any right or interest in the property, because the property had been validly purchased at a foreclosure sale. At that point, the trial court could not grant plaintiff the relief it sought (title to the property) if it were successful in its suit. Therefore, the trial court did not err in granting defendants’ motion for summary disposition and declining to decide the merits of plaintiff’s fraud claim. [ 18 ]

We find the reasoning and decisions in *Overton* and *Mission of Love* persuasive. Although she filed suit before expiration of the redemption period, Awad made no attempt to stay or otherwise challenge the foreclosure and redemption sale. Upon the expiration of the redemption period, all of Awad’s rights in and title to the property were extinguished, and she no longer had a legal cause of action to establish standing.

The trial court properly dismissed Awad’s complaint when Awad failed to redeem the property during the statutory six-month redemption period. Upon the expiration of the redemption period, Awad lost all right, title, and interest in the property and, therefore, lost her standing to sue.

Because our resolution of this issue is dispositive, we need not consider Awad’s other arguments on appeal.

## All Citations

We affirm.

Not Reported in N.W.2d, 2012 WL 1415166

## Footnotes

- 1 *Singerman v. Muni Serv Bureau, Inc*, 455 Mich. 135, 139; 565 NW2d 383 (1997).
- 2 *Id.*
- 3 *Kuhn v. Secretary of State*, 228 Mich.App 319, 324; 579 NW2d 101 (1998).
- 4 *Spiek v. Dep't of Transp*, 456 Mich. 331, 337; 572 NW2d 201 (1998).
- 5 *Manuel v. Gill*, 481 Mich. 637, 642; 753 NW2d 48 (2008).
- 6 *Lansing Sch Ed Ass'n v. Lansing Bd of Ed*, 487 Mich. 349, 353; 792 NW2d 686 (2010).
- 7 *Id.*
- 8 MCL 600.3240(1) and (8).
- 9 MCL 600.3236; see *Piotrowski v. State Land Office Bd*, 302 Mich. 179, 187; 4 NW2d 514 (1942) (noting that the "[p]laintiffs ... lost all their right, title, and interest in and to the property at the expiration of their right of redemption ...").
- 10 *Piotrowski*, 302 Mich. at 187.
- 11 *Schulthies v. Barron*, 16 Mich.App 246, 247–248; 167 NW2d 784 (1969).
- 12 "Although unpublished opinions of this Court are not binding precedent they may, however, be considered instructive or persuasive ." *Paris Meadows, LLC v. City of Kentwood*, 287 Mich.App 136, 145 n 3; 783 NW2d 133 (2010) (internal citations omitted); see MCR 7.215(C)(1).
- 13 *Overton v. Mortgage Electronic Registration Sys*, unpublished opinion per curiam of the Court of Appeals, issued May 28, 2009 (Docket No. 284950).
- 14 *Id.* at 1.
- 15 *Id.* at 2.
- 16 *Id.* (emphasis added).
- 17 *Mission of Love v. Evangelist Hutchinson Ministries & George W Hutchinson*, unpublished per curiam opinion of the Court of Appeals, issued April 12, 2007 (Docket No. 266219).
- 18 *Id.* at 6 (internal citations omitted).

2004 WL 2072046

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Vinod SHARMA, M.D., Plaintiff-Appellant,

v.

Peter T. MOONEY, Esq., Patric A. Parker, Esq.,  
Simen Figura & Parker, P.L.C., Daniel J. Rittman,  
Esq. and Scott Hope, Defendants-Appellees,

and

GENESEE COUNTY SHERIFF'S DEPARTMENT  
and Michael Gaylord, Defendants.

No. 246257.

Sept. 16, 2004.

Before: WHITBECK, C.J, and SAWYER and SAAD, JJ.

[UNPUBLISHED]

PER CURIAM.

\*1 This appeal involves an action filed by plaintiff Vinod Sharma, M .D., against defendants-appellees, attorneys Peter T. Mooney, Patric A. Parker, their law firm Simen Figura & Parker (SFP), attorney Daniel J. Rittman, and Genesee County Sheriff's Deputy Scott Hope, in which plaintiff alleged that defendants wrongfully obtained and enforced a writ of execution. The writ of execution stemmed from a prior breach of contract lawsuit against plaintiff by defendant Michael Gaylord, wherein Gaylord obtained a money judgment against plaintiff. Plaintiff now appeals from three separate orders of the circuit court that granted defendants-appellees (hereinafter defendants) summary disposition of plaintiff's complaint, and we affirm.<sup>1</sup>

I  
Plaintiff argues that the circuit court erred when it ruled that he lacked standing to bring any of the three counts of his complaint because the legal claims contained therein belong to the trustee in plaintiff's bankruptcy proceedings. Whether a party has legal standing to assert a claim constitutes a

question of law that this Court considers de novo. *Heltzel v. Heltzel*, 248 Mich.App 1, 28; 638 NW2d 123 (2001). This Court also reviews de novo a trial court's summary disposition ruling. *Spiek v. Dep't of Transportation*, 456 Mich. 331, 337; 572 NW2d 201 (1998). When considering a motion brought pursuant to MCR 2.116(C)(5), an appellate court must review the pleadings, admissions, affidavits and other relevant documentary evidence to determine whether as a matter of law the plaintiff lacked the capacity to bring the lawsuit. *Edgewood Development, Inc v. Landskroener*, 262 Mich.App 162, 165; 684 NW2d 387 (2004); *Aichele v. Hodge*, 259 Mich.App 146, 152; 673 NW2d 452 (2003).

Plaintiff filed for bankruptcy. Federal bankruptcy law provides that any property owned by a debtor, including causes of action, become part of the bankruptcy estate. Accordingly, after a bankruptcy petition is filed, a debtor, like plaintiff here, loses standing to pursue these causes of action, because they are part of the bankruptcy estate. Only the bankruptcy trustee has standing to pursue these claims, unless the trustee takes affirmative steps to abandon them and remove the claims from the bankruptcy estate. Here, plaintiff's claims against defendants are part of the bankruptcy estate that was created when he filed his bankruptcy petition. Plaintiff claims that the bankruptcy proceedings were closed and that the instant claims were abandoned, but provided little or no evidence to the circuit court to support these contentions. Accordingly, the circuit court correctly ruled that plaintiff lacked standing to pursue his claims, and correctly granted summary disposition in defendants' favor.

A

The circuit court ruled that the bankruptcy trustee had sole authority to pursue the instant claims filed by plaintiff because plaintiff had petitioned for bankruptcy protection before he filed this lawsuit. 11 USC 541(a) provides:

\*2 The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) ... all legal or equitable interests of the debtor in property as of the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

Federal cases interpreting § 541(a)(1) recognize that the broad category of debtor's interests that become a part of the bankruptcy estate includes, importantly for our analysis, causes of action possessed by the debtor at the time that he files a petition for bankruptcy protection. <sup>1</sup> *Integrated Solutions, Inc v Service Support Specialties, Inc*, 124 F3d 487, 490-491 (CA 3, 1997). "A cause of action is a property right which passes to the trustee in bankruptcy, even if such cause of action is not included in schedules filed with the bankruptcy court. Therefore, upon filing a petition for bankruptcy, a debtor loses standing to pursue any claims because those claims become part of the bankruptcy estate."<sup>2</sup>

Moreover, once a claim becomes the estate's property under § 541(a)(1),

certain conclusions follow. First, the automatic stay applies. Moreover, because the claim is property of the estate, the trustee is given full authority over it. Thus, before a debtor or a creditor may pursue a claim, there must be a judicial determination that the trustee in bankruptcy has abandoned the claim. Without such a determination, a creditor seeking to pursue a claim cannot maintain it. [<sup>3</sup> *Steyr-Daimler-Puch of America Corp v Pappas*, 852 F.2d 132, 136 (CA 4, 1988).]

Abandonment may only occur pursuant to 11 USC 554. *First New York Bank for Business v DeMarco*, 130 BR 650, 655 (SDNY, 1991). Under § 554,<sup>3</sup> a trustee may commence formal abandonment proceedings to abandon estate property, or property "may be abandoned by operation of law if it has been scheduled and not 'otherwise administered' at the time the case is closed."<sup>4</sup> *Stanley v. Sherwin-Williams Co*, 156 BR 25, 26 (WD Va, 1993).

A debtor's failure to list a claim within his schedule of assets at the time of his bankruptcy filing prevents any abandonment from occurring:

Once a cause of action becomes the property of the estate, the debtor may not bring suit on that action unless the property has been abandoned by the trustee. If a trustee chooses to abandon a claim or is ordered to do so, the debtor may assert title to the cause of action and bring suit upon it. If, however, the debtor fails to list a claim as an asset, the trustee cannot abandon the claim because he or she will have had no opportunity to determine whether it will benefit the estate. In such circumstances, the debtor may not claim abandonment and seek to enforce the claim after discharge....

[<sup>5</sup> *Krank v. Utica Mut Ins Co*, 109 BR 668, 669 (ED Pa, 1990), aff'd 908 F.2d 962 (CA 3, 1990), citing <sup>6</sup> *First Nat'l Bank v. Lasater*, 196 U.S. 115; <sup>7</sup> 25 S Ct 206; <sup>8</sup> 49 L Ed 408 (1905).]

\*3 See also <sup>9</sup> *In re Kottmeier*, 240 BR 440, 442-444 (MD Fla, 1999) (explaining that both causes of action predating and postdating the petition filing must appear in initial or revised bankruptcy schedules for abandonment to potentially occur).

B

Plaintiff contends incorrectly that he has standing to pursue instant claims because, by October 2002, when he commenced this lawsuit, his bankruptcy proceeding had concluded, and the trustee had abandoned the instant causes of action so that plaintiff could pursue them. The circuit court record contains scant documentation from the bankruptcy proceedings. Plaintiff attached to his complaint a copy of the personal bankruptcy petition he filed on November 9, 1999. Plaintiff also attached a copy of the petition that corporate entity Vinod Sharma, M.D., P.C. filed on February 25, 2000. Other than a copy of Gaylord's June 12, 2000, proof of claim against plaintiff's bankruptcy estate, the only bankruptcy-related document within the court file is an August 13, 2001, order regarding objections to claims, which allowed Gaylord's claim for \$35,963.95. The August 2001 bankruptcy court order reflects that the court consolidated both plaintiff's

personal bankruptcy and the subsequently filed bankruptcy of Vinod Sharma, M.D., P.C.

Plaintiff repeatedly has insisted that all bankruptcy proceedings concluded by May 2000 when the corporation, Vinod Sharma, M.D., P.C., received the discharge of its debt, or October 2000, when plaintiff obtained the discharge of his personal debts. Plaintiff apparently confuses the bankruptcy events of a discharge of debts with the final closing of the bankruptcy estate.<sup>4</sup> Even assuming that the discharges of plaintiff and Vinod Sharma, M.D., P.C. became effective in October and May 2000, respectively, a fact that plaintiff failed to support with any documentary evidence or testimony, the discharges did not close the consolidated bankruptcy proceedings, as evidenced by the bankruptcy court's subsequent August 2001 order regarding claims.

Plaintiff provided the circuit court with no evidence that the consolidated bankruptcy proceedings had closed by the time he commenced the instant case in October 2002. To the contrary, at the summary disposition hearing on January 2, 2003, defendant Mooney asserted that the bankruptcy proceedings remained open for administration because plaintiff had filed a claim against the bankruptcy trustee and his attorney. Moreover, and dispositively, at the summary disposition hearing, plaintiff essentially admitted that the bankruptcy proceedings had not closed.<sup>5</sup> Clearly, plaintiff failed to establish that the bankruptcy proceedings had closed, and his own statements reflect that the bankruptcy proceeding continued well after he filed his complaint in October 2002, and even after he filed his brief on appeal in September 2003. Because there is no evidence that the bankruptcies concluded, as a matter of law there is no abandonment of claims under § 554. *Stanley, supra* at 26.

\*4 In the circuit court, plaintiff introduced absolutely no evidence to support his contention that the bankruptcy trustee took affirmative steps to abandon his legal claims against defendant. On appeal, plaintiff presents an exhibit, which is not properly before this Court because it was not presented below, *Amorello v. Monsanto Corp.*, 186 Mich.App 324, 330; 463 NW2d 487 (1990), indicating that the bankruptcy trustee took affirmative action to abandon property of the bankruptcy estates on September 24, 2002.

#### Footnotes

Were we to consider the proffered exhibit, it establishes only that the trustee had filed an application to abandon "[t]he books and records of the debtor 60 days after the entry of the order closing the estate." Accordingly, no evidence supports plaintiff's suggestion that the bankruptcy trustee took affirmative and formal steps under § 554 to abandon any legal claims that plaintiff or the corporation possessed during the pendency of the consolidated bankruptcy proceedings. *First New York Bank for Business, supra* at 655.<sup>6</sup>

#### C

The various legal claims within the complaint that plaintiff raised concerning violations of his rights and the rights of Vinod Sharma, M.D., P.C., all arose before or during their respective bankruptcy proceedings, and therefore belonged to the bankruptcy estate. *In re Kottmeier, supra* at 442-444; *Carlock, supra* at 856. No evidence suggested that at the time plaintiff filed this case, the trustee formally had abandoned any legal claims of plaintiff or the corporation that belonged to the consolidated bankruptcy estate, that the trustee had the opportunity to formally abandon any such legal claims, or that abandonment of any legal claims had occurred as a matter of law when the consolidated bankruptcy estate closed. Because any causes of action possessed by plaintiff and Vinod Sharma, M.D., P.C. constitute property rights that passed to the bankruptcy trustee, plaintiff lacks standing to pursue all of the instant legal claims against defendants. *Shearson Lehman Hutton, supra* at 114; *Carlock, supra* at 791. Therefore, the circuit court properly granted defendants' motions for summary disposition of plaintiff's complaint pursuant to MCR 2.116(C)(5).<sup>7</sup>

#### II

Because we have held that the trial court properly granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(5), we decline to address plaintiff's remaining issues on appeal.

Affirmed.

#### All Citations

Not Reported in N.W.2d, 2004 WL 2072046

- 1 Plaintiff contends that the circuit court had subject matter jurisdiction to consider the state law tort claims that he raised in his complaint. We agree that that the state tort claims within plaintiff's complaint plainly fall within the broad scope of the circuit court's subject matter jurisdiction. Const 1963, art 6, § 13; *LME v. ARS*, 261 Mich.App 273, 279; 680 NW2d 902 (2004). Because the circuit court did not find that it lacked jurisdiction to consider this matter, and because defendants at no point have challenged the circuit court's subject matter jurisdiction, we decline to further address this issue.
- 2 *Carlock v. Pillsbury Co*, 719 F Supp 791, 856 (D Minn, 1989); see also *Shearson Lehman Hutton, Inc v. Wagoner*, 944 F.2d 114, 118 (CA 2, 1991) (observing that under the Bankruptcy Code, "the trustee stands in the shoes of the bankrupt corporation and has standing to bring any suit that the bankrupt corporation could have instituted had it not petitioned for bankruptcy," citing 11 USC 541-542).
- 3 Section 554 provides as follows:
- (a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
- (b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
- (c) Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.
- (d) *Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.* [Emphasis added.]
- 4 See *Stanley, supra* at 26 (observing that estate property "may be abandoned by operation of law if it has been scheduled and not 'otherwise administered' at the time the case is closed") (emphasis added).
- 5 Plaintiff said that he had "filed an objection to award [certain] payments. So currently there is an objection in the Court on file. And it is going to be heard. The date has not been set yet." Plaintiff further conceded in his brief on appeal that additional bankruptcy proceedings remained outstanding. According to plaintiff's brief, the trustee made decisions concerning abandonment of particular trust property on September 24, 2002, plaintiff then filed an "adversary complaint as to [defendants] in U.S. [B]ankruptcy Court ... for alleged violation of Federal Statutes," "the trial [wa]s scheduled to begin on October 23, 2003," and a "summary disposition [motion] by ... defendant's [sic] is on the docket without any known date of hearing being granted by the U.S. Bankruptcy Court."
- 6 Aside from the fact that no substantiation exists regarding affirmative trustee abandonment or abandonment through closure of the consolidated bankruptcy estate, another fact precludes any potential finding of abandonment. Plaintiff presented no proof that he or the corporation revealed any legal claims that they possessed in their bankruptcy schedules of assets, either at the time of their bankruptcy filings or by amendment. *In re Kottmeier, supra* at 442-444 (explaining that both causes of action predating and postdating the petition filing must appear in initial or revised bankruptcy schedules for abandonment to potentially occur); *Carlock, supra* at 856. "If ... the debtor fails to list a claim as an asset, the trustee cannot abandon the claim because he or she will have had no opportunity to determine whether it will benefit the estate. In such circumstances, the debtor may not claim abandonment and seek to enforce the claim after discharge." *Krank, supra* at 669.
- 7 In addition to plaintiff's bankruptcy-related lack of standing to pursue the instant legal claims, plaintiff does not appear to be the proper party to raise some of the allegations within his complaint for another reason. Plaintiff raises several complaint allegations concerning the wrongful execution against Vinod Sharma, M.D., P.C., on January 24, 2000. This Court has recognized that "[i]n Michigan, the law treats a corporation as entirely separate from its shareholders, even where one person owns all the corporate stock." *Belle Isle Grill Corp v. Detroit*, 256 Mich.App 463, 473-474; 666 NW2d 271 (2003). "The doctrine of standing provides that a suit to enforce corporate rights or to redress or prevent injury to a corporation ... ordinarily must be brought in the name of the corporation, and not that of a stockholder, officer, or employee." *Id.* at 474.