

STATE OF MICHIGAN
IN THE SUPREME COURT

LAKESHORE GROUP, et al.

Plaintiffs-Appellants,

v.

DUNE RIDGE SA, LP, and
MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Supreme Court Nos. 159524, 159525
Court of Appeals Nos. 340623, 340647
Ingham Circuit Court No. 17-176-AA
MAHS Docket No. 14-026236

Respondents-Appellees.

**BRIEF OF AMICI CURIAE¹ ENVIRONMENTAL ORGANIZATIONS IN SUPPORT OF
LAKESHORE GROUP'S APPLICATION FOR LEAVE TO APPEAL**

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STATEMENT OF JURISDICTION

1. This Court may grant discretionary review of a decision by the Court of Appeals under MCR 7.303(B)(1).
2. Proper grounds exist to grant Appellants' application for leave because the decision of the Court of Appeals is clearly erroneous and will cause material injustice. MCR 7.305(B)(5)(a). Moreover, the questions presented by this case involve principles of major significance to the state's Sand Dune Protection and Management Act jurisprudence.

STATEMENT OF QUESTION PRESENTED²

- 1. Did the Michigan Court of Appeals err by determining that a permittee developer could divest of standing the individuals challenging its permit in a contested case, where those individuals previously had satisfied the statutory standard for bringing or intervening in a contested case under MCL § 324.35305(1)?**

Appellants answer: Yes

Appellee Dune Ridge answers: No

Appellee Michigan Department of Environmental Quality answers: No

Proposed Amici Curiae Environmental Law & Policy Center, Michigan League of Conservation Voters, and Michigan Environmental Council answer: Yes

² To the extent that Appellants present other questions, proposed amici curiae take no position.

TABLE OF AUTHORITIES

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INTRODUCTION

Michigan's jurisprudence and constitution support an expansive and prudential approach to litigants' access to Michigan courts. *See Lansing Schools Educ. Ass'n v. Lansing Bd. of Educ.*, 487 Mich. 349, 364 (2010). "The purpose of Michigan's standing doctrine is to assess whether a litigant's interest in the issue is sufficient to ensure sincere and vigorous advocacy." *Id.* at 355 (internal quotation omitted). A litigant must have standing to access the courts, and once her claim is before a court, she cannot act to abandon her basis for standing. An opposing party's actions, while relevant to other inquiries such as mootness, have no bearing on its challenger's standing. Here, however, the Court of Appeals has allowed the opposing party to evade judicial review by knocking the legs out from under its challenger's basis for standing, while leaving the challenger's claims and issues unresolved by either the courts or the opposing party. This case presents the Supreme Court of Michigan with an opportunity to clarify that once a litigant has established standing, the opposing party cannot divest that litigant of standing.

INTEREST OF THE AMICI

Proposed Amici Curiae are three environmental organizations.

Proposed Amicus Curiae Environmental Law & Policy Center ("ELPC") is a non-profit public interest environmental legal advocacy and eco-business innovation organization. ELPC works to improve environmental quality by preserving natural resources, protecting clean water, advocating for cleaner air, and advancing clean renewable energy and energy efficiency resources in Michigan and the Midwest. ELPC has an office located in Grand Rapids, Michigan and has members throughout the state, including areas with statutorily protected critical sand dunes such as Saugatuck Township.

Through public comments, public hearings, legal actions, and other avenues, ELPC regularly supports community engagement in environmental matters. Because of its commitment to preserving natural resources, as well as preventing and combating pollution, ELPC is committed to enabling people and communities to have a voice in legal processes. ELPC has been involved in protecting the Saugatuck Dunes area since 2010. For example, ELPC attorneys have represented the Saugatuck Dunes Coastal Alliance (“Coastal Alliance”) on comments to a permit application by a developer to the Army Corps of Engineers for construction of a deep-water marina near the mouth of the Kalamazoo River.

ELPC, with the National Trust for Historic Preservation, has also filed an amicus brief in support of the Coastal Alliance’s application for leave to appeal in another case pending before this Court. *Amicus Br. for Env’tl. Law & Policy Ctr., Saugatuck Dunes Coastal Alliance v. Saugatuck Twp.*, No. 160358 (Mich. Supreme Court). Both the Coastal Alliance’s application for leave to appeal and the application filed by the Lakeshore Group in the instant case highlight the muddled nature of standing law in courts of appeals in Michigan. The orders being appealed suggest that Michigan statutes are being used by developers to restrict the availability of appellate review of agency decisions—by a local zoning board in the Coastal Alliance’s application and by the Michigan Department of Environmental Quality (now called the Michigan Department of Environment, Great Lakes, and Energy (“EGLE”)) in the instant case—that harm community members and their environmental interests. Because of ELPC’s commitment to public engagement in environmental matters and legal processes, as well as ELPC’s commitment to maintaining avenues for community members to challenge governmental actions that adversely affect natural resources, ELPC possesses a substantial interest in the outcome of both appeals.

Proposed Amicus Curiae Michigan League of Conservation Voters (“Michigan LCV”) is a non-partisan political and environmental organization that works to elect and hold accountable public officials who will champion a healthy and vital Michigan by preserving and protecting the state’s air, land, and water.

Proposed Amicus Curiae Michigan Environmental Council (“MEC”) is a non-profit coalition of over 60 environmental member groups. MEC promotes public policies to ensure that Michigan families can enjoy clear waters, clean beaches, beautiful landscapes, and healthy communities for years to come.

STATEMENT OF FACTS

This appeal arises from community members’ efforts to exercise their rights under the Sand Dune Protection and Management Act to participate in a contested case proceeding regarding the issuance of permits for a large development on critical dunelands. After successfully intervening in the contested case proceeding, the permit challengers were subject to a series of back-and-forth rulings by an Administrative Law Judge (ALJ), circuit court, and the Michigan Court of Appeals on whether the developer could deprive the challengers of their continued ability to challenge the permits.

Stretches of the Lake Michigan shoreline are made up of a unique freshwater ecosystem designated as “critical dunelands” by the State of Michigan under the Sand Dune Protection and Management Act. *See* MCL § 324.35302 (“The critical dunes of this state are a unique, irreplaceable, and fragile resource that provide significant recreational, economic, scientific, geological, scenic, botanical, educational, agricultural, and ecological benefits to the people of this state.”). The Michigan legislature passed the Sand Dune Protection and Management Act “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 economic development and with public access to and enjoyment of the critical dunes. *Id.* § 324.35302(b). The Act strikes that balance by: (1) requiring any person proposing a new use of or development on critical dunelands to obtain a permit, *id.* § 324.35304(1); *see also id.* § 324.35301(k) (defining "use" broadly, to include any activity done by a person to alter the physical characteristics of or change the contour of a critical dune area); and (2) allowing neighboring property owners to challenge the issuance of those permits, *id.* § 324.35305(1).

Specifically, "[i]f . . . 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," she may request a formal hearing. *Id.* § 324.35305(1). That hearing shall be conducted as a contested case hearing pursuant to Michigan's Administrative Procedures Act ("APA"), and is subject to judicial review as provided for in the APA. *Id.* § 324.35305(2); *see also id.* § 24.301. The legislature was careful to make sure judicial review was available, both by specifying who may request a formal hearing, *id.* § 324.35305(1), and by mandating that any issuance or denial of a permit be in writing and meet the standards of the APA, *id.* § 324.35304(2).

Dune Ridge purchased an approximately 130-acre parcel in a critical dune area along Lake Michigan with plans to turn it into a large residential development. *Lakeshore Grp. v. Dep't of Env'tl. Quality*, No. 340623, 2019 WL 1301795, at *1 (Mich. Ct. App. Mar. 21, 2019). The individual appellants here, who are also members of the organizational appellant Lakeshore Group, are neighboring community members who own property in the same municipal area and sand dunes as the development. *Id.* They oppose the development because of concerns about its impact on habitat for flora and fauna. Two individual appellants in particular, Jane Underwood and

Charles Zolper, own property that is immediately adjacent to the approximately 130-acre property Dune Ridge had purchased and planned to develop.

The Water Resources Division of the Michigan Department of Environmental Quality (now EGLE) granted permits and special exceptions to Dune Ridge in August 2014. *Id.* Non-parties to this appeal, most of whom have since settled with Dune Ridge, petitioned for contested case hearings on those permits.³ *Id.* Several community members and the Lakeshore Group moved to intervene, and the ALJ presiding over the contested case granted the motion with respect to some petitioners—the Appellants here—but not all of the petitioners. *Id.* The ALJ granted the motion to intervene for those community members who owned property “immediately adjacent” to the development, i.e., Ms. Underwood and Mr. Zolper. *Id.* at *1-2. Upon Dune Ridge’s motion for reconsideration, “the ALJ rejected Dune Ridge’s contention that the remaining petitioners, Zolper and Underwood, were not aggrieved and ordered that the contested case could proceed.” *Id.* at *2.

Then, in December 2015, Dune Ridge conveyed 20.6 acres of its property that bordered Ms. Underwood’s property to the Oval Beach Preservation Society. *Id.* Dune Ridge moved to dismiss Ms. Underwood from the contested case, and the ALJ granted the motion, finding that Ms. Underwood had lost standing because her property was no longer “immediately adjacent” to Dune Ridge’s development. *Id.*

Dune Ridge used the same method to remove Mr. Zolper from the case. The developer sold a 15-acre section of its property to Vine Street Cottages, LLC and then moved for his dismissal

³ The contested cases involving Dune Ridge’s permits have been consolidated. *Lakeshore Grp.*, 2019 WL 1301795, at *1 n.1.

for lack of standing. *Id.* The ALJ granted the motion, dismissing Mr. Zolper for lack of standing and, because it no longer had any members with standing, the Lakeshore Group. *Id.*

Ms. Underwood, Mr. Zolper, and the Lakeshore Group appealed to the circuit court. *Id.* The circuit court held, first, that they all had standing when they intervened in the contested case, and, second, that the ALJ erred in dismissing them from the case. *Id.* at *3. The circuit court stated, “Dune Ridge’s attempts to eliminate Appellant’s standing are brazen, bad faith efforts to circumvent the administrative review process,” and the ALJ’s decision was contrary to long-standing precedent. *Id.*

Dune Ridge appealed the circuit court’s decision to the Michigan Court of Appeals. *Id.* The Court of Appeals reversed the circuit court’s decision, holding that “statutory standing could be lost during the pendency of the proceeding as a result of the opposing party’s conduct.” *Id.* at 7. To reach that decision, the Court of Appeals relied on the language of the statute and cited federal case law addressing federal standing doctrine. *Id.* at *7-8. The Court of Appeals recognized that its interpretation of standing doctrine “may create potentially unfair situations in which a Part 353 permittee can eliminate a petitioner’s standing by conveying a portion of its property,” and that the very situation here, “allow[ing] Dune Ridge to divest petitioners of the power to contest the permit,” “may be inequitable.” *Id.* at *9.

The Lakeshore Group, Ms. Underwood, and Mr. Zolper now request that this Court grant leave to appeal to correct the Court of Appeals’ inequitable ruling. The proposed amici environmental organizations support the Appellants’ request so that this Court may clarify whether a defendant may deprive a petitioner of standing.

ARGUMENT

The Michigan Supreme Court should reverse the Court of Appeals' decision because it undermines the purpose of the standing doctrine in determining "whether a litigant's interest in the issue is sufficient to ensure sincere and vigorous advocacy." *Lansing Schools Educ. Ass'n v. Lansing Bd. of Educ.*, 487 Mich. 349, 355 (2010). Where a plaintiff's position remains unchanged and relief is still available to her, there is no reason to doubt her continued sincere and vigorous advocacy. Allowing a defendant to unilaterally take action that does not alter the plaintiff's interest, but creates a loophole in statutory language, undermines citizens' fundamental rights of access to Michigan courts. This access is especially critical as the state faces threats to drinking water from dangerous pollutants such as lead and per- and polyfluoroalkyl substances ("PFAS"). This Court's standing doctrine is clear: to pursue a case in Michigan's courts, a litigant has standing "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." *Id.* at 372. Importantly, Michigan's standing doctrine is *broader* than federal standing doctrine. *Id.* at 364.

Here, the statutory scheme explicitly provides that the Legislature intended to confer standing upon "the owner of the property immediately adjacent to the proposed use" to initiate contested case proceedings with regard to the issuance or denial of a permit under the Sand Dune Protection and Management Act, if that owner is "aggrieved" by issuance or denial of the permit. MCL § 324.35305(1). The issue before this Court is whether that owner can be stripped of her standing in a contested case when there is no change to the status of either her property ownership or the issuance or denial of the permit. She cannot.

First, standing is determined when the complaint is filed and a case is initiated. *Girard v. Wagenmaker*, 437 Mich. 231, 244 (1991) (“[B]ecause we are dealing with standing, the question is what the plaintiff must allege at the time of filing.”); *Cleveland Branch, NAACP v. City of Parma, OH*, 263 F.3d 513, 524 (6th Cir. 2001) (“[S]tanding does not have to be maintained throughout all stages of litigation. Instead, it is to be determined as of the time the complaint is filed.”); *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1061 (5th Cir. 1991) (“As with all questions of subject matter jurisdiction except mootness, standing is determined as of the date of the filing of the complaint, and subsequent events do not deprive the court of jurisdiction.”). Courts look to whether a litigant had standing at the “outset of litigation.” *Sumpter v. Wayne Cty*, 868 F.3d 473, 490 (6th Cir. 2017). So, in *Salem Springs, LLC v. Salem Twp.*, 312 Mich. App. 210, 221 (2015), where the plaintiff’s statutory standing depended on property ownership and the plaintiff had transferred its ownership in a property to a third party several years *before* initiating a suit regarding a zoning change, that plaintiff could not rely on that property to satisfy standing at the outset of the litigation. That is not the situation here. The Appellants satisfied the statutory standing test of MCL § 324.35305(1) at the outset of the litigation. See *Lakeshore Grp.*, No. 340623, 2019 WL 1301795, at *1–2; Supplemental Brief of Appellee the Michigan Dep’t of Env’tl. Quality at 1.

Second, whether a litigant maintains her standing depends on that litigant’s actions and interests – not on the actions and interests of the defendant. *But see Cleveland Branch, NAACP*, 263 F.3d at 524 (calling into doubt whether maintenance of standing is necessary or whether it can ever “be ousted by subsequent events”). For example, if a plaintiff files for bankruptcy, she may lose her standing to pursue a claim outside of the bankruptcy proceeding. *Sharma v. Mooney*, No. 246257, 2004 WL 2072046, *1 (Mich. App. Sept. 16, 2004). Similarly, if the Appellants here

had sold the property on which their standing was based, then they could potentially lose standing, as in *Parvati Corp. v. City of Oak Forest, Ill.*, 630 F.3d 512, 517 (7th Cir. 2010). But here, the Appellants' took no action to impact their compliance with the statutory standing test established by the Sand Dune Protection and Management Act and maintain their interests in the relevant property.

Third, through her unilateral actions, a defendant may moot a case, but a defendant cannot destroy the plaintiff's standing. "An issue is moot where circumstances render it impossible for a reviewing court to grant any relief." *Contesti v. Attorney General*, 164 Mich. App. 271, 278 (1987). But, "[w]here a court's adverse judgment may have collateral legal consequences for a [party], the issue is not necessarily moot." *In re Detmer/Beaudry*, 321 Mich. App. 49, 56 (2017). Here, defendant's efforts to divest Appellants of standing through sale of strategically located property does not prevent a court from granting relief to the Appellants by reversing the issuance of permits to Dune Ridge.

A defendant's actions to moot a case are legitimate where they resolve plaintiff's concerns such that a remedy is no longer available to the plaintiff. For example, where plaintiffs alleged violations of water laws based upon the defendant's plan to discharge contaminated water into a river, the case became moot when the "defendant no longer ha[d] the physical means of discharging water into" a particular river, the "defendant no longer ha[d] a permit" that allowed those discharges, the state environmental agency attested that there is "no possibility" of those discharges in the future, and the defendant had changed its practice for disposing of the contaminated water. *Anglers of AuSable, Inc. v. Dep't of Env'tl. Quality*, 489 Mich. 884, 884–85 (2011); see also *B P 7 v. Bureau of State Lottery*, 231 Mich. App. 356, 359 (1998) (recognizing an appeal as moot where "there is no meaningful relief this Court can provide" because the relief the

plaintiffs sought was provided by an amendment to the state statute). Courts do not, however, readily dismiss cases on a defendant's word that she will no longer act; a court may continue to exercise jurisdiction over the controversy if there is any "reasonable expectation that the wrong will be repeated." *Dep't of Social Servs. v. Emmanuel Baptist Preschool*, 434 Mich. 380, 425 (1990). In fact, the U.S. Supreme Court has cautioned that "[i]t is the *duty* of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform[.]" *U.S. v. W. T. Grant Co.*, 345 U.S. 629, 632 n.5 (1953) (emphasis added) (citing *United States v. Oregon State Medical Soc'y*, 343 U.S. 326, 333 (1952)). In the standing context, too, courts should "beware of efforts to defeat" the possibility of the court granting relief.

A defendant cannot act to deprive the plaintiff of standing. In the Title VII context, the Sixth Circuit has said it would be "anomalous" to allow an employer to "negate an employee's standing" and that allowing a defendant-employer to do so would "seriously threaten[]" the enforcement structure of Title VII.⁴ *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 519 (6th Cir. 1976). The same is true here. Dune Ridge sought to "negate" Appellants' standing by selling off narrow strips of its property so that Dune Ridge no longer shared borderlines with the Appellants. By allowing Dune Ridge to evade judicial review in this manner, the Court of Appeals threatens Michigan community members' ability to contest changes being made to the state's critical dunelands under the Sand Dune Protection and Management Act.

The Court of Appeals erred in its attempts to distinguish another analogous case. In *Blankenship v. Superior Controls*, 135 F. Supp. 3d 608, 616–17 (E.D. Mich. 2015), the court held

⁴ Even under the mootness doctrine, this Court has little tolerance for parties that "by [their] own conduct, render an issue moot *to preclude* an aggrieved party" from seeking review, and this Court has applied an exception to the mootness doctrine in such circumstances. *People v. Richmond*, 486 Mich. 29, 40 (2010) (emphasis added) (citing *Detroit v. Ambassador Bridge Co.*, 481 Mich. 29, 50–51 (2008)).

that the requirement that a plaintiff be a shareholder in order to pursue a minority shareholder oppression claim under a Michigan statute only demanded that the plaintiff be a “current shareholder” at the time of initiating suit. Otherwise, the court was concerned that defendants “in the midst of every shareholder oppression case,” could subvert legislative intent and create a loophole to evade judicial review by “simply squeez[ing] out the plaintiff shareholder.” *Id.* at 617. Here, Dune Ridge sought to divest the Appellants of their adjacent property border to avoid a contested case proceeding. The Court of Appeals attempted to distinguish *Blankenship* by saying that Dune Ridge was not doing anything illegal and had properly secured permits. *Lakeshore Grp.*, 2019 WL 1301795, at *9. That distinction is immaterial. Moreover, the Court of Appeals assumed that Dune Ridge would prevail on the merits of a proceeding challenging the permit—and it is inappropriate to assume a plaintiff will lose on the merits in order to deny the plaintiff standing. *See Detroit Fire Fighters Ass’n v. City of Detroit*, 449 Mich. 629, 633 (1995).

This Court should take the instant case on appeal and rectify this error of the Court of Appeals so that defendants, such as the permittee here, cannot create statutory loopholes that inequitably divest litigants of their established standing under the Sand Dune Protection and Management Act. This Court should conclude that unilateral actions by defendants in contested cases under Section 353 do not divest litigants of standing where such standing was established at the outset of the contested proceeding.

CONCLUSION

For the reasons stated above, proposed amici respectfully request that this Court grant leave to appeal and address whether a party may negate its challenger’s standing and deprive the challenger of access judicial review where relief otherwise remains available to the challenger.