

STATE OF MICHIGAN
IN THE SUPREME COURT

SAUGATUCK DUNES COASTAL
ALLIANCE,

Appellant/Plaintiff,

v

SAUGATUCK TOWNSHIP;
SAUGATUCK TOWNSHIP ZONING
BOARD OF APPEALS; and NORTH
SHORES OF SAUGATUCK, LLC,

Appellees/Defendants.

Supreme Court No.

Court of Appeals Nos. 342588, 346677

Lower Court Case Nos. 2018-059598-AA,
2017-058936-AA

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APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

1. This is an application for leave to appeal the August 29, 2019 per curiam opinion of the Court of Appeals resolving consolidated appeals bearing case numbers 346677 and 342588. In case no. 342588, the Court of Appeals affirmed the Allegan County Circuit Court's dismissal of Appellant's appeal to the Allegan Township Zoning Board of Appeals, but remanded the case for consideration of Appellant's original claims (nuisance per se and declaratory action). The Court of Appeals affirmed the Allegan County Circuit Court's "Order Denying Appeal of Saugatuck Dunes Coastal Alliance" in case no. 346677 *in toto*.

This Court has jurisdiction over this matter under MCR 7.303(B)(1).

STATEMENT OF QUESTIONS PRESENTED

- 1. Should the aggrieved party standard in a zoning appeal require a party to show they will suffer to suffer harms distinct from the general public as opposed to suffer harms distinct from other property owners similarly situated?**

The Appellant answers: Yes
The Appellee Township will answer: No
The Appellee Developer will answer: No
The Court of Appeals answered: No
This Court should answer: Yes

- 2. Did the Court of Appeals err in ruling that the Coastal Alliance members and adjacent property owners will not suffer harms distinct from other property owners similarly situated where, among other things, the laydown area for dredging spoils from the project will directly and uniquely harm the property?**

The Appellant answers: Yes
The Appellee Township will answer: No
The Appellee Developer will answer: No
The Court of Appeals answered: No
This Court should answer: Yes

- 3. Did the Court of Appeals err in failing to rule that Coastal Alliance members would suffer unique harms different from the general public due to the impact of the proposed development on their use and enjoyment of the natural features, waterways, and public lands in the area?**

The Appellant answers: Yes
The Appellee Township will answer: No
The Appellee Developer will answer: No
The Court of Appeals did not answer.
This Court should answer: Yes

INTRODUCTION

This Court has never opined on the meaning of “aggrieved party” for purposes of standing in zoning appeals. There are a number of Court of Appeals opinions that use different language and offer conflicting results. As such, Michigan zoning law is in serious need of guidance from this Court as to who has standing to bring a zoning appeal.

This matter presents the Court with a clear case to articulate the standard for zoning appeals. The Michigan Zoning Enabling Act states that a “person aggrieved” may appeal a decision of a municipal officer or body to a zoning board of appeals. Similarly, a “party aggrieved by the decision” of the ZBA may appeal the decision to circuit court. Focusing on this language, the Court of Appeals has adopted a test for standing in zoning matters that requires parties to establish that they will “suffer harms distinct from *other property owners similarly situated*” as opposed to suffering harms distinct from “*the general public.*”¹ In doing so, the Court of Appeals has artificially limited just who can challenge “the most injurious and widespread Government actions.”² The current case presents just such an injurious situation – the Court of Appeals’ narrow “aggrieved party” standard means that no person has been able to challenge a zoning permit that is clearly contrary to the plain language and purposes of the Saugatuck Township Zoning Ordinance.

The underlying case arises out of the Developer’s proposal to dredge a massive channel into critical dunes and sensitive environmental features along the Kalamazoo River. It is estimated construction of the harbor would require dredging approximately 160,000 tons of sand from the

¹ Ex 1, Court of Appeals Opinion dated August 29, 2019 at 5.

² *Karrip v Twp of Cannon*, 115 Mich App 726, 733; 321 NW2d 690 (1982), quoting *United States v Students Challenging Regulatory Agency Procedures*, 412 US 669, 687-688; 93 S Ct 2405; 37 L Ed 2d 254 (1973).

basin and Kalamazoo River.³ Additionally, construction of condominiums around the harbor would occur within and destroy sensitive coastal dunes.

The Township approved plans for the development, despite the fact that it is expressly prohibited by the Township's Zoning Ordinance. The planned development calls for the dredging of the critical dune area to create a boat basin canal, but Article XII - Water Access and Dock Density Regulations, Section 40-910(h) states "*In no event* shall a canal or channel be excavated for the purpose of increasing the Water Frontage." The Coastal Alliance appealed the approval to the Township Zoning Board of Appeals and also asked the circuit court to declare the project in violation of the zoning ordinance or determine it is a nuisance per se because of the clear violation of the plain language of the Zoning Ordinance. Unfortunately, the merits of the Coastal Alliance's appeal have not been heard by either the ZBA or the reviewing courts because the case has been dismissed for lack of standing. The Coastal Alliance requests this Court grant leave to appeal, correct the errs of the lower courts, and provide the bench and bar with guidance on the correct test for standing in zoning appeals.

STATEMENT OF FACTS

This appeal arises out of the Planning Commission's approval of North Shores of Saugatuck, LLC's (the "Developer") application to dredge a man-made canal or channel in a portion of Kalamazoo riverfront. The purpose of the channel, often referred to as a "boat basin" is to facilitate the construction of site condominium units and "dockominium" boat slip units situated around the canal. The development would lie in Saugatuck Township north of the Kalamazoo

³ North Shores' joint Department of Environmental Quality/US Army Corps of Engineers permit applications state 241,750 cubic yards of sand would be excavated from a 6.54-acre upland area approximately 1,639 feet long and up to 200 feet wide.

River just upstream from where the river channel meets Lake Michigan.

The property at issue in this appeal is one portion of a larger tract formerly known as the Denison property, which consists almost entirely of critical dunelands as designated by the State of Michigan. The proposed development is situated in the midst of undeveloped, natural spaces. It is directly adjacent to the Saugatuck Dunes State Park and Pine Trail Camp; Saugatuck Harbor Natural Area and Tallmadge Woods lie directly south across the river. Several other private properties under conservation easement, nature preserves, and parks are also nearby.⁴ It is estimated construction of the harbor would require dredging approximately 160,000 tons of sand from the basin and Kalamazoo River.⁵ Additionally, construction of condominiums around the harbor would occur within and destroy sensitive coastal dunes.

The Planning Commission Consideration of the Proposed Development

The North Shores of Saugatuck submitted PUD and SAU applications and plans to the Township in January 2017. The Developer requested approval from the Planning Commission for a planned unit development consisting of 33 “dockominium” boat slip units and 23 site condos together with a special approval use for a private marina⁶ available to the site condo owners and

⁴ See Ex 4, maps of the area.

⁵ North Shores’ recent joint Department of Environmental Quality/US Army Corps of Engineers permit applications state that 241, 750 cubic yards of sand would be excavated from a 6.54-acre upland area approximately 1,639 feet long and up to 200 feet wide.

⁶ The marina would utilize the site of Denison’s Broward Marine boat-building business that was formerly located on the property. Frank Denison obtained a special use permit in April 1977 for the boat-building facility on a parcel measuring 850’ x 850’. That permit has since lapsed, and the structures on the property were removed more than seven years ago. Accordingly, the entire area surrounding the proposed harbor cluster is undeveloped, natural lands. See Appendix Ex. 3 of Appellant’s Brief in COA Case No. 342588 (satellite view of the former Broward Marine site and site of the proposed boat basin). See Appendix Ex. 4 of Appellant’s Brief in COA Case No. 342588 for additional maps of the area.

property owners in future phases of the development. The underlying zoning is R-2 Riverside Residential.

Those applications were considered and public comments were received concerning the harbor cluster at consecutive Planning Commission meetings on February 28, March 28, and April 26, 2017. Prior to the March 28 meeting, the Coastal Alliance also submitted written comments expressing environmental concerns and identifying ways in which the proposal did not meet the requirements for approval under the Zoning Ordinance. The Coastal Alliance also pointed out that the number of planned slips in the “boat basin” canal far exceeded the permitted number under the ordinance.

Substantial concern was expressed by the public about the harbor cluster and the potential impacts on the surrounding area, in particular the critical dunes, the globally imperiled inter-dunal wetlands, and the archeological site of the former logging town known as Singapore. Community members, including Coastal Alliance members, expressed concerns that the harbor cluster would not be harmonious with the surrounding natural areas, that it would change the hydrology and overall ecology of the dunes and inter-dunal wetlands, that the necessary dredging would affect the contours of the dunes, and that the planned harbor cluster would be inconsistent with the Tri-Community master plan.

At the April 26, 2017 meeting, the Planning Commission reviewed the standards of the Ordinance and voted unanimously to approve both the PUD and SAU for the marina cluster. Little to no discussion took place among the Commissioners regarding *how* the proposal met each standard for approval. No findings of fact or conclusions were placed on the record.

Standing and the First Appeal to the Zoning Board of Appeals

The Coastal Alliance filed an appeal of the Planning Commission’s decision with the

Saugatuck Township Zoning Board of Appeals. On October 11, 2017, the ZBA held a public hearing to consider the Coastal Alliance’s appeal. Before reviewing the merits of the Coastal Alliance’s claims, the ZBA deliberated on the question of whether the Coastal Alliance had standing to appeal to the ZBA. The Coastal Alliance submitted written evidence of the facts that gave its members “special damages” sufficient to confer standing; members of the Alliance also testified to their interests in person at the hearing. That evidence and testimony included statements from the following individuals:

- **Senator Patricia Birkholz:** her 291-acre namesake preserve is located approximately 200 feet from the proposed boat basin canal. ROA⁷ at 164.⁸ See Appendix Exhibit 5 of Appellant’s Brief in COA Case No. 342588.
- **Diane Bily and Kathy Bily-Wallace:** owners of property adjacent to the site of the proposed boat basin canal. See Attached Exhibits 4 and 5.
- **Mort Van Howe:** owner of Sweetwater Sailing, a charter business in Saugatuck Township. ROA at 178. See Appendix Exhibit 7 of Appellant’s Brief in COA Case No. 342588.
- **Mike Johnson:** owner of the Coral Gables complex, which includes its own marina and jet ski rental business. ROA at 182. See Appendix Exhibit 8 of Appellant’s Brief in COA Case No. 342588.
- **Dave Engel:** Charter boat captain with more than 40 years of professional experience guiding salmon and trout fishing tours out of Saugatuck Harbor. ROA at 184. See Appendix Exhibit 9 of Appellant’s Brief in COA Case No. 342588.
- **Chris Deam:** The Deam family owns the Old Saugatuck Lighthouse in the northwestern corner of the Ox-Bow Lagoon, across the river from the proposed project. ROA at 188. See Appendix Exhibit 10 of Appellant’s Brief in COA Case No. 342588.
- **Liz Engel:** local realtor whose sales are reliant on the recreational and aesthetic values of the area. ROA at 191. See Appendix Exhibit 11 of Appellant’s Brief in COA Case No. 342588.

See also minutes of public hearing, ROA at 844-45, see Appendix Exhibit 12 of Appellant’s Brief in COA Case No. 342588.

The ZBA ultimately voted two to one to adopt a resolution “denying standing to the

⁷ Citations to “ROA” or the “Record on Appeal” are to the record of decision that was before the Zoning Board of Appeals and are part of the record for this appeal.

⁸ Senator Birkholz, a champion of conservation and preservation of important natural lands in Michigan, unfortunately passed away in May 2018. Her affidavit in support of the Coastal Alliance’s appeal was submitted to the ZBA in 2017, prior to her death.

Saugatuck Dunes Coastal Alliance.” Because of this decision, the ZBA never considered the merits of the Coastal Alliance’s appeal. Accordingly, the Coastal Alliance sought review of the ZBA decision in the Allegan County circuit court.

In the circuit court, the Coastal Alliance brought a claim of appeal of the ZBA’s decision and also alleged original claims for nuisance per se and declaratory relief, contending that the boat basin plan violates provisions of the zoning ordinance regulating dockage and the creation of waterfront access parcels, in particular, an express prohibition on the excavation of a canal or channel “for the purpose of increasing water frontage.” Once again, the Developer immediately challenged the Coastal Alliance’s ability to assert its claims in the circuit court through a motion for summary disposition for lack of standing.

In opposing the Developer’s motion, the Coastal Alliance reiterated that its members possess the requisite substantial interests – recreational, aesthetic, and economic – that Michigan courts have held give rise to representational standing. The circuit court, visiting Judge Nykamp presiding, dismissed the Coastal Alliance members’ concerns as shared with the public generally, and insufficient to confer standing for purposes of the ZBA appeal. Judge Nykamp did not consider the Coastal Alliance’s original claims, and dismissed the entire case based on a lack of standing to challenge the ZBA’s determination.

The Final Approval and the Second Appeal to the ZBA

The Saugatuck Township zoning ordinance also requires a second “final approval” of a PUD and SAU project.⁹ On October 22, 2017, the Saugatuck Township Planning Commission

⁹The Coastal Alliance asked the ZBA to review both of these approvals in order to ensure that it perfected its right to appeal the project.

gave final approval of a plan to develop condominiums and an artificial “boat basin” located directly among undeveloped, natural spaces. The plan was substantially the same as the one granted preliminary approval in Case No. 342588. Just as before, the Township approved plans for the development, despite the fact that it is expressly prohibited by the Township’s Zoning Ordinance: the planned development calls for the dredging of the critical dune area to create a boat basin canal, but Article XII - Water Access and Dock Density Regulations, Section 40-910(h) states that “*In no event* shall a canal or channel be excavated for the purpose of increasing the Water Frontage.”

The Coastal Alliance again sought review of the final approval by the Saugatuck Township Zoning Board of Appeals, just as it had with the first approval. The ZBA again refused to hear the appeal, concluding that the Coastal Alliance lacked “standing” to appeal. The Coastal Alliance and its members provided the ZBA with evidence of their substantial interests in the preservation of this extraordinary natural area that will be directly impacted by the proposed development -- interests of the type and degree that appropriately confer standing. However, the ZBA held, in effect, that no person could ever have standing to challenge the project because of the size of the parcel upon which the project is located.

The Coastal Alliance appealed the ZBA’s second decision to the Circuit Court. Once again the circuit court, in its two-page Order, relied largely on the judgment of the Zoning Board of Appeals to hold that “the Saugatuck Dunes Coastal Alliance was not an aggrieved party in regard to the October 22, 2017 decision by the Saugatuck Township Planning Commission granting final site plan approval to the project proposed by Intervening Appellee North Shores of Saugatuck LLC.”

The Court of Appeals Decision

Both of the Circuit Court decisions were appealed to the Court of Appeals, and ultimately both cases were consolidated upon request of the Coastal Alliance. The Court of Appeals ruled that the Coastal Alliance and its members were not aggrieved parties and, therefore, were not able to appeal to the ZBA. Importantly, the Court of Appeals distinguished between the test for standing established by this Court in *Lansing Schools*¹⁰ and the term “aggrieved party” as used in the Michigan Zoning Enabling Act:

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.”¹¹

The Court of Appeals then concluded that the Coastal Alliance had not met the aggrieved party standard because its proofs only established harms distinct from the general public:

Plaintiff has submitted numerous affidavits apparently tending to show that the affiants will suffer harms distinct from the general public. 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.” 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.¹²

The Coastal Alliance has filed this timely application for leave to appeal, and urges this

¹⁰ *Lansing Sch Ed Ass'n v Lansing Bd. of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010).

¹¹ Ex. 1, Opinion at 3.

¹² *Id.* at 4.

Court to grant leave. The Coastal Alliance respectfully suggests that this case involves a legal principle of major significance to the state's jurisprudence involves a decision that is clearly erroneous and will cause material injustice. MCR 7.305(B). Therefore, for the reasons stated in the following argument, Appellant requests this Court grant leave to appeal to provide practitioners with guidance and to correct the lower courts' errors.

ARGUMENT

As noted in the introduction, this case presents the Court with an opportunity to clarify and guide standing jurisprudence for zoning matters. The Michigan Zoning Enabling Act states that a "person aggrieved" may appeal a decision of a municipal officer or body to the ZBA.¹³ Similarly, a "party aggrieved by the decision" of the ZBA may appeal the decision to circuit court.¹⁴ As indicated above, the Court of Appeals distinguished the concept of aggrieved party from that of a person who has standing under the test provided by this Court in *Lansing Schools*. The aggrieved party analysis requires a showing of harms not shared by "other property owners similarly situated," whereas the standing analysis refers to harms distinct from those of "the citizenry at large."¹⁵

The distinction drawn by the Court of Appeals is not supported by the plain language of the MZEA, is based on a faulty and overly narrow reading of the case law, and is inconsistent with the vast majority of states that have opined on the meaning of an "aggrieved party" in the context of zoning. Similarly, there is no support for the requirement that a person must be a landowner to appeal to the ZBA. This requirement does not appear in the plain language of the MZEA and is

¹³ MCL 125.3604.

¹⁴ MCL 125.3605 and MCL 125.3606.

¹⁵ Ex. 1, Opinion at 3.

inconsistent with the majority of other states. Rather, a person must establish that they will suffer unique harms different in kind or character from the public at large. In the zoning context, it certainly may be easier for a landowner to establish those unique harms. However, there is no justification in the language of the MZEA to artificially limit potential appellants to only landowners. This is especially relevant to this appeal, which involves a large and environmentally significant property that is surrounded by public lands or waterways.

Finally, the Court of Appeals erred in applying its standards to the facts of this case. The Coastal Alliance provided a number of affidavits from persons who will be uniquely harmed by the proposed development. Among the affiants are Diane Bily and Kathy Bily-Wallace – owners of property adjacent to the site of the proposed boat basin canal. The use and enjoyment of the Bily property has already been impacted by security cameras aimed at their property and new “no trespassing” signs along the edge of their land. Even more significantly, the Bily property is adjacent to and within 300 feet of the “laydown area” – the spot where all of the dredging spoils from the excavation of the boat basin canal will be placed. The attendant blowing sand from the laydown area will uniquely impact the Bily property as opposed to other more distant neighbors of the project. As such, the Bily family will be uniquely harmed in ways that are different than other property owners similarly situated.

A. Standard of Review.

The ZBA, the circuit court, and the Court of Appeals made threshold determinations that the Coastal Alliance lacked standing to appeal the zoning approvals of the marina cluster and refused to entertain the merits of the case. Therefore, the singular issue before this Court is whether the lower courts erred in denying the Coastal Alliance representational standing to seek review of

the planning commission's decision and protect its members' recreational, aesthetic, and economic interests. The Court reviews questions of standing *de novo*.¹⁶ "In the context of appellate review, a truly *de novo* review would be a review of the record without deference to prior proceedings; on the basis of the record, the appellate court would make its own findings of fact and conclusions of law."¹⁷

B. The Court of Appeals Wrongly Required Coastal Alliance Members to Allege Harms that are Not Shared by Other Property Owners Similarly Situated.

The standard adopted or affirmed by the Court of Appeals is not supported by the plain language or a reasonable interpretation of the MZEA. This Court should take a hard look at the language of the MZEA and the standard for "aggrieved party" that has been adopted by the Court of Appeals. The Coastal Alliance submits that this Court should articulate a test for standing in zoning appeals that mirrors this Court's previous pronouncements on standing.

1. The Plain Language of the MZEA.

The Court of Appeals held that only property owners can have standing under the MZEA; an "aggrieved party" is defined as having "suffered some special damages not common to *other property owners similarly situated*."¹⁸ The Court further stated that "some of the affiants are not even actual owners of nearby property."¹⁹ However, the plain language of the MZEA concerning appeals from a zoning board of appeals never uses the term "property owner." First, Section 604 of the

¹⁶ *Coldsprings Twp v Kalkaska County Bd of Appeals*, 279 Mich 25, 28; 755 NW2d 553 (2008).

¹⁷ *Fletcher v Fletcher*, 447 Mich 871, 882; 526 NW2d 889 (1994), quoting Powell & McAlpine, *Standards of Review in Michigan*, 70 Mich B J 28, 29 (1991).

¹⁸ Ex 1, Opinion at 3.

¹⁹ *Id.* at 4.

MZEA states that “[a]n appeal to the zoning board of appeals may be taken by a *person* aggrieved”²⁰ The legislature specifically used the term “person” instead of the term “property owner.” This distinction is significant and indicates an intentional choice by the legislature, as the statute elsewhere specifically includes the term “property owner” or “owners of property.”²¹ If the Legislature had intended to limit the pool of potential zoning appellants only to property owners, it would have used the term “property owner” rather than “person”.

Second, Section 605 of the MZEA does *not* require that the individual appealing be a property owner. Rather, it states that “A *party* aggrieved by the decision may appeal to the circuit court.”²² The section does not use the words “property owner,” and there is no requirement that a “party” to a ZBA appeal be a property owner. (To the contrary, Section 604 says that any aggrieved *person* can be a party in front of the ZBA.) Therefore, the Court of Appeals’ Opinion is inapposite to the express language of the MZEA.²³

Third, there is no statutory basis for the requirement that the harm suffered be different than a *similarly situated* property owner. As is discussed in the next section, the “similarly situated” language is derived from case law, but has no origin in the actual statutory language. It is worth pointing out the

²⁰ MCL 125.3604.

²¹ See MCL 125.3103 (“Notice required under this act shall be given as provided under subsection (3) to *the owners of property* that is the subject of the request”); MCL 125.3401 (The legislative body shall grant a hearing on a proposed ordinance provision to an interested *property owner* who requests a hearing. . . .”); and MCL 125.3502 (“The notice shall indicate that a public hearing on the special land use request may be requested by any property owner or the occupant of any structure located within 300 feet of the property being considered for a special land use”).

²² MCL 125.3605.

²³ Of course, “[t]he words of a statute provide the ‘most reliable evidence of [legislative] intent. . . .’” *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999), quoting *United States v Turkette*, 452 US 576; 101 S Ct 2524; 69 L Ed 2d 246 (1981). The choice of a different word, or, as is the case here, the complete absence within MZEA Sections 604 and 605 of a word such as “property owner,” also provides insight into the legislative intent. *Eyde v Lansing Twp*, 109 Mich App 641; 311 NW2d 438 (1981), *aff’d* 420 Mich 287; 353 NW2d 277 (1984) (“[w]hen certain things are specified in the law, the intention to exclude all others from its operation may be inferred.”).

circular nature of the similarly situated requirement, though. If a property owner is truly “similarly situated,” just how do they suffer a unique harm? By definition two or more persons who are similarly situated would seem to share the same harms. If they do not, then they are likely no longer similarly situated. The standard offers up tautological and faulty logic, making its application to any particular case difficult at best and impossible at worst.

The actual terms used in the MZEA is a person or party who is “aggrieved.” Black’s Law Dictionary defines aggrieved as “[h]aving suffered loss or injury; damnified; injured.” The actual words of the statute (“person aggrieved” or “party aggrieved”) support the standard articulated in the *Lansing Schools* case – one who suffers harms distinct from those of “the citizenry at large” – as opposed to the standard relied on by the Court of Appeals.

This Court has made it abundantly clear that courts may not rewrite the plain statutory language or substitute its own judgment on policy decisions. “In short, this Court [has] no authority to add words or conditions to the statute.”²⁴ In interpreting statutory language,

Our primary focus in this case—and all cases in which we are called upon to interpret a statute—is the language of the statute under review. The words of the statute provide the best evidence of legislative intent and the policy choices made by the Legislature. Our role as members of the judiciary is not to second-guess those policy decisions or to change the words of a statute in order to reach a different result. In fact, a “clear and unambiguous statute leaves no room for judicial construction or interpretation.” Therefore, we start by examining the words of the statute, which “should be interpreted on the basis of their ordinary meaning and the context within which they are used in the statute.”²⁵

Reading in “similarly situated” and “property owner” is contrary to the plain language of the

²⁴ *Rowland v Washtenaw Co Rd Com'n*, 477 Mich 197, 214; 731 NW2d 41, 52 (2007) (citations omitted).

²⁵ *People v Harris*, 499 Mich 332, 345; 885 NW2d 832, 837–38 (2016)

MZEA and is contrary to the rules of statutory construction.

2. Prior Aggrieved Party Case Law.

Despite the Court of Appeals’ assertion that there has been a “long and consistent interpretation of the phrase ‘aggrieved party’ in Michigan zoning jurisprudence,” the case law has been anything but consistent. The most recent published opinion on point from the Court of Appeals is *Olsen v Chikaming Township*,²⁶ a case relied on extensively by the Court of Appeals in this matter. Unfortunately, there is clearly some inconsistent language in the *Olsen* opinion.²⁷ *Olsen* quotes *Unger v Forest Home Township* for the proposition that “this Court consistently concluded that to be a party aggrieved by a zoning decision, the party must have suffered some special damages not common to other property owners similarly situated[.]”²⁸ However, the *Olsen* opinion then goes on to use the term “community members” instead of property owners: “Because appellees failed to show that they suffered a unique harm different from *similarly situated community members*, they failed to establish that they are parties aggrieved by the decision of the ZBA.”²⁹ The opinion concludes with a reaffirmation that the lack of standing was based on a finding that the appellees had failed to “demonstrate special damages *different from those of others within the community*.”³⁰

The *Unger* case states that a party “must allege and prove that he has suffered some special damages not common to other property owners similarly situated,”³¹ citing *Joseph v Grand Blanc*

²⁶ *Olsen v Chikaming Twp*, 325 Mich App 170, 182–83; 924 NW2d 889, 898 (2018), app den sub nom. *Olsen v Jude & Reed, LLC*, 503 Mich 1018; 925 NW2d 850 (2019)

²⁷ *Olsen v Jude & Reed, LLC*, 325 Mich App 170; 924 NW2d 889 (2018).

²⁸ *Olsen* at 182-83, quoting *Unger v Forest Home Twp*, 65 Mich App 614; 237 NW2d 582 (1975).

²⁹ *Id.* at 186 (emphasis added).

³⁰ *Id.* at 194. The *Olsen* Court used “community member” or similar phrasing with the word “community” five times throughout the opinion.

³¹ *Unger v Forest Home Twp*, 65 Mich App 614, 617; 237 NW2d 582, 584 (1975).

Township.³² While the *Joseph* opinion does offer a quote of a Georgia case to that effect, it ultimately holds that “[t]his Court concurs in this reasoning in deciding that plaintiff did not allege that he had suffered any special damages, which were *different in kind from those suffered by the community*, so as to qualify as an aggrieved party.”³³

It is important to note that the use of “property owner” in the *Olsen* opinion occurs when the court is quoting from *Unger* or is discussing other cases. In each of those cases discussed, the question was whether an adjacent or nearby property owner had standing based on impacts to their land. *Unger* involved an appeal by a nearby property owner who relied on that status to allege standing.³⁴ *Joseph*, the case relied on in *Unger*, involved allegations of standing based by a non-abutting property owner.³⁵ Similarly, the *Village of Franklin* and *Brink* cases discussed within the *Olsen* decision were both zoning appeals where the litigants alleged standing based exclusively on the fact that they were adjacent property owners.³⁶ Due to the specific facts of *Unger*, *Joseph*, *Franklin*, and *Brink*, it is logical that all of the opinions would refer to property ownership, as that was the alleged basis for standing in each instance. However, none of these cases held that one *must* be a property owner to possess standing, and none even needed to address that question.

³² *Joseph v Grand Blanc Twp*, 5 Mich App 566, 147 NW2d 458 (1967).

³³ *Id.* at 571 (emphasis added).

³⁴ *Unger v Forest Home Twp*, 65 Mich App 614; 237 NW2d 582, 584 (1975) (“John Unger in his claim of appeal to the circuit court and in one affidavit alleged that he owned real property in the township bordering on the same lake as the land in question. Those allegations showed no special damages”).

³⁵ *Joseph v Grand Blanc Twp*, 5 Mich App 566, 570; 147 NW2d 458, 459 (1967) (“plaintiff, not being an abutting property owner, failed to show any special damage”).

³⁶ See *W Michigan Univ Bd of Trustees v Brink*, 81 Mich App 99, 102; 265 NW2d 56, 58 (1978) (no standing where all that was alleged was “Plaintiff, as an owner of land located within 300 feet of defendant Brink's premises, was entitled to and did receive notice of the proceedings before the Zoning Board of Appeals”); *Village of Franklin v City of Southfield*, 101 Mich App 554, 557; 300 NW2d 634, 635 (1980) (“Plaintiff Lilyan Victor relies on her status as the owner of land adjoining the proposed development site to establish standing and likewise failed to allege or prove special damages”).

The various decisions on aggrieved party status by the Court of Appeals stand in contrast to this Court's pronouncements on the doctrine of standing. The doctrine of standing is designed to ensure sincere and vigorous advocacy.³⁷ The doctrine requires that a plaintiff's interest in the case is different from that of the citizenry at large.³⁸ However, caselaw also cautions that standing is not to be denied simply because some people share an injury.³⁹ Indeed, "[t]o deny standing to persons who are in fact injured simply because many others are also injured would mean that the most injurious and widespread Government actions could be questioned by nobody."⁴⁰ This Court has previously opined that standing exists where a party can show "special damages" or "special injury" – that they will be affected by the permitting decision in a manner differently than a community at large.⁴¹ Special injury exists where the opposing party's "activities directly affected the plaintiffs' recreational, aesthetic, or economic interests."⁴² In this case, members of the Coastal Alliance established through affidavits substantial and unique interests that will be directly affected by the project. Therefore, the Coastal Alliance has standing to appeal.

Standing serves a gatekeeping function to ensure actual controversies and vigorous advocacy. It is designed to weed out cases where there is no actual interest or possibility of vigorous advocacy. It is *not* designed to prohibit any zoning challenge by any member of the public. However, this is in effect exactly how the lower courts ruled in this case. The Coastal

³⁷ *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 355; 792 NW2d 686 (2010); *House Speaker v Governor*, 443 Mich 560, 572; 506 NW2d 190 (1993).

³⁸ *House Speaker v Governor*, 443 Mich at 572.

³⁹ *Karrip v Twp of Cannon*, 115 Mich App 726, 733; 321 NW2d 690 (1982), quoting *United States v Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687-688; 93 S Ct 2405; 37 L Ed 2d 254 (1973).

⁴⁰ *Id.*

⁴¹ *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 356; 792 NW2d 686, 690 (2010).

⁴² *Kallman v Sunseekers Property Owners Ass'n*, 480 Mich 1099 (2008) quoting *Mich Citizens for Water Conservation v Nestle Waters North America Inc*, 479 Mich 280, 296; 737 NW2d 447 (2007).

Alliance respectfully suggests that this Court’s analysis and standard for standing to bring a case is synonymous with the aggrieved party language in the MZEA. The *Lansing Schools* standard matches the plain language of the statute, and also promotes consistency among different types of claims that may be made in the zoning context. As is discussed in the next section, using the *Lansing Schools* standard for aggrieved parties in zoning would bring Michigan in line with the vast majority of the States of the Union.

3. Aggrieved Party Case Law from Other Jurisdictions.

In its decision below, the Court of Appeals stood by its recent decision in *Olsen v Jude and Reed, LLC*, reiterating that case’s holding that to prove standing in a zoning appeal, the appellant must suffer “harms distinct from *other property owners similarly situated*.”⁴³ In so doing, the Court of Appeals further entrenches Michigan among the outliers of standing jurisprudence in zoning appeals. The mainstream position taken in most jurisdictions is that a zoning appellant need not be a “property owner.” No doubt owning property near a parcel which is the subject of a disputed land use decision may make demonstrating standing easier⁴⁴, but very few states rely on such a bright-line rule. Rather, most recognize that property ownership may be one piece of evidence among many tending to show the appellant is an “aggrieved party.”

More specifically, the Court of Appeals’ judicially-created “property owner similarly situated” formulation of the standing rule is shared by only a select few jurisdictions. The operative language was imported into Michigan case law from Georgia (one of the outlier states), by the Court of Appeals in *Joseph v Grand Blanc Township*, and has peppered Michigan jurisprudence ever since: “In order to maintain this action, plaintiff, a nonabutting property owner, must allege

⁴³ Ex 1, Opinion at 5 (emphasis original).

⁴⁴ *Benton Co Remonstrators v Bd of Zoning Appeals of Benton Co*, 905 NE2d 1090, 1098 (Ind App, 2009)

and prove that he has suffered a substantial damage which is not common to other property owners similarly situated.”⁴⁵ The *Joseph* court did not explain the reason for its reliance on the Georgia Court of Appeals decision in *Victoria Corp v Atlanta Merchandise Mart*, nor why it seemingly strayed from its prior precedent of just two years earlier holding that “the consensus of authority throughout the country is that to have any status in court to attack the actions of a zoning board of appeals, the party must be an aggrieved party, and said party must be more than a resident of the city.”⁴⁶

The strange, contradictory “similarly situated property owner” test does not seem to have ever enjoyed widespread adoption, but in the 50 years since *Joseph* and *Atlanta Merchandise* were decided, the trend seems to have been towards an acceptance of the standing inquiry as a fluid, fact-intensive concept and away from rigid rules.⁴⁷

Beyond Georgia and Michigan, the exact “similarly situated” language which featured prominently in the Court of Appeals decision is difficult to find replicated or followed elsewhere. In familiar fashion, Alabama equates “party aggrieved” with possessing “standing” in the zoning appeal context.⁴⁸ To establish oneself as a “party aggrieved,” a litigant must “present ‘proof of the adverse effect the changed status of the rezoned property has, or could have, on the use, enjoyment and value’ of his own property.”⁴⁹

⁴⁵ *Joseph v Grand Blanc Twp*, 5 Mich App 566, 570-71; 147 NW2d 458 (1967), citing *Victoria Corp v Atlanta Merchandise Mart, Inc*, 112 SE 793, 795 (Ga, 1960).

⁴⁶ *Joseph*, 5 Mich App at 570, quoting *Marcus v Busch*, 1 Mich App 134, 136; 134 NW2d 498 (1965).

⁴⁷ See *Heffernan v Missoula City Council*, 360 Mont 207, 221; 255 P3d 80 (2011) (“As for prudential requirements, we have observed that discretionary limits on the exercise of judicial power cannot be defined by hard and fast rules.” (internal quotation and citation omitted)); *Ray v Mayor and City Council of Baltimore*, 430 Md 74, 91; 59 A3d 545 (2013) (“there is no bright-line rule for exactly how close a property must be in order to show special aggrievement”).

⁴⁸ *Crowder v Zoning Bd of Adjustment*, 406 So 2d 917, 918 (Ala Civ App, 1981).

⁴⁹ *Id.*, citing *Cox v Poer*, 45 Ala App 295, 297; 229 So 2d 797 (1969) (emphasis added).

Idaho's Local Land Use Planning Act confers standing to seek review of a land use decision on an "affected person."⁵⁰ An "affected person" is defined as "one having a bona fide interest in real property" which may be adversely affected by the approval, denial, or failure to act upon an application for subdivision, variance, special use permit, and zoning changes.⁵¹

In 2005 the Supreme Court of Nebraska, citing decisions of New York, Missouri, and Iowa courts, determined that "[i]t is generally held that an adjacent landowner has standing to object to the rezoning of property *if such landowner* shows some special injury separate from a general injury to the public."⁵² Oddly, the cases cited by the Supreme Court of Nebraska do not necessarily stand for the proposition that property ownership is a mandatory element of standing in zoning appeals. For example, in *Reynolds v Dittmer*, the Iowa Court of Appeals states that a person having a general interest will not be able to initiate a zoning appeal, however, one whose "specific interest or property rights are specially damaged, in contrast to any effect suffered by the public generally, is entitled to challenge a zoning authority's decision" before ultimately adopting a multi-factor standing test from Florida, of which property ownership was only one factor.⁵³ Similarly, the Court of Appeals of New York in *Sun-Brite* recognized that "[b]ecause the welfare of the entire community is involved when enforcement of a zoning law is at stake there is much to be said for permitting judicial review at the request of any citizen, resident or taxpayer; this idea finds support in the provision for public notice of a hearing."⁵⁴ Thus, even in those jurisdictions which have at

⁵⁰ Idaho Code 67-6521(1)(d).

⁵¹ Idaho Code 67-6521(1)(a).

⁵² *Smith v City of Papillion*, 207 Neb 607, 614; 705 NW2d 584 (2005)(emphasis added), citing, e.g., *Sun-Brite v Bd of Zoning*, 69 NY2d 406; 508 NE2d 130 (1987) (emphasis added); *Lenette Realty v City of Chesterfield*, 35 SW3d 399 (Mo App, 2000); *Reynolds v Dittmer*, 312 NW2d 75 (Iowa App, 1981).

⁵³ *Reynolds v Dittmer*, 312 NW2d at 78, citing 82 Am Jur 2d Zoning & Planning, § 344, p 921 (1976) and *Renard v Dade Co*, 261 So 2d 832, 837 (Fla, 1972).

⁵⁴ *Sun-Brite*, 69 NY2d at 413.

times embraced some property ownership mandate, the commitment to the mandate seems to waver.

The Court of Appeals also endorsed the “similarly situated property owner” phrasing over the common formulation that a zoning appellant must possess an interest or experience a harm “different than the public at large.”⁵⁵ But the latter expression is a far more common concept used in many states, though the exact wording may differ slightly.

There are generally two variations on the “different than the public at large” theme. The first expresses the idea that the interest advanced or harm suffered by the appellant in a zoning appeal must be “different,” “distinct,” or “other” than that experience by the public. For example, the Supreme Court of Delaware has stated: “In order to achieve standing, the plaintiff’s interest in the controversy must be distinguished from the interest shared by other members of a class or the public in general.”⁵⁶ Similarly, in Maryland “the consequences of the Board’s decision must affect the petitioner specifically, ‘in a way different from that suffered by the public generally.’”⁵⁷ Likewise, the Indiana Court of Appeals has framed the requirement as a “special injury other than that sustained by the community as a whole.”⁵⁸ Additional examples abound.⁵⁹

⁵⁵ Ex. 1, Opinion at 5.

⁵⁶ *Dover Historical Society v City of Dover Planning Comm*, 838 A2d 1103, 1116 (Del, 2003).

⁵⁷ *Greater Towson Council of Community Ass’n v DMS Dev, LLC*, 234 Md App 388, 410; 172 A3d 939 (2017).

⁵⁸ *Benton Co Remonstrators v Bd of Zoning Appeals of Benton Co*, 905 NE2d 1090 (Ind App, 2009).

⁵⁹ See, e.g., *Ass’n for a Better Long Island, Inc v Dep’t of Environmental Conservation*, 988 NY2d 115, 119; 11 NE3d 188 (2014) (“In land use matters . . . petitioner ‘must show that it would suffer direct harm, injury that is in some way different from that of the public at large’”) (internal quotation omitted); *Mississippi Mfr Housing Ass’n v Bd of Alderman of Canton*, 870 So 2d 1189, 1193 (Miss, 2004) (“For standing, the person(s) aggrieved, or members of the association, whether one or more, should allege an adverse effect different from that of the general public.”) (internal citation omitted); *Reynolds v Dittmer*, 312 NW2d 75, 78 (“Only a person whose specific interest or property rights are specially damaged, in contrast to any effect suffered by the public generally, is entitled to challenge a zoning authority’s decision.”)

The second variation describes the harm felt or interest asserted by the appellant as being quantitatively more than that belonging to the public. In Arizona, the Court of Appeals has explained that the injury plead must be peculiar to appellant “or at least more substantial than that suffered by the general public.”⁶⁰ In that state it is further recognized that the appellant “may suffer damage ‘peculiar to himself’ even if his ‘immediate’ neighbors suffer the same damage as he from the alleged zoning violation.”⁶¹ In Florida, the interest required must be “definite” and “exceeding the general interest in community good share[d] in common with all citizens.”⁶² Lastly, the Commonwealth Court of Pennsylvania has defined the requisite “substantial interest” as “one that surpasses the common interest of all citizens in procuring obedience to the law.”⁶³

The cohesive concept that emerges from the foregoing discussion is that with the limited exceptions of Georgia and Michigan, the “similarly situated property owner” idea has not been broadly accepted. Though many may weigh property ownership and/or proximity as a factor tending to support a showing of standing, the vast majority of jurisdictions do not outrightly require it. Rather, the majority of jurisdictions rely on some definition of a “aggrieved party” combined with a version of the “different than the public at large” idea. Accordingly, it would be appropriate for this Court to accept review of the Court of Appeals’ decision below, and consider bringing Michigan standing law in zoning appeals into line with the majority rule.

C. The Coastal Alliance Members Will Suffer Unique Harms Sufficient to Demonstrate “Aggrieved Party” Status and Therefore Have Standing to Appeal the Zoning Decision.

The Court of Appeals erred when it held that the Coastal Alliance had “*not shown ... that*

⁶⁰ *Buckelew v Town of Parker*, 188 Ariz 446, 452; 937 P2d 368 (1996).

⁶¹ *Id.*

⁶² *Renard v Dade Co*, 261 So 2d at 837.

⁶³ *Spahn v Zoning Bd of Adjustment*, 922 A2d 24, 31 (Pa Commw, 2007).

the affiants will suffer harms distinct from *other property owners similarly situated*.”⁶⁴ The Coastal Alliance has established that its members will suffer harms different than “other property owners similarly situated,” *and* harms different than “the citizenry at large.”

1. Coastal Alliance Members Have Established Harms that are Different than Other Property Owners Similarly Situated.

The Coastal Alliance provided affidavits and information from the Bily family, owners of a cottage that neighbors the North Shores’ property. See attached Exhibits 4 and 5. As explained in their affidavits, the Bily family frequently visits and enjoys a cottage on their property that has been in the family since 1953. *Id.* They treasure their family cottage because of the natural and peaceful setting, and the viewshed from their cottage deck and dock looks across the river, into a natural area; and to the north and northwest, into the dunes and trees directly on the Property, including the site of the proposed boat basin canal. *Id.* As the affidavits from the Bilys indicate, the proposed boat basin canal would reduce the family’s recreational use of the river due to increased boat traffic and safety concerns; would impact the aesthetic beauty and surrounding landscape of the Bily property on the Kalamazoo river; and would impact the economic value of the property due to a change in viewshed and the character of the river.⁶⁵ The use and enjoyment of the Bily property has already been impacted by security cameras aimed at their property and new “no trespassing” signs along the edge of their land.

In addition to these concerns, the Bily property will be directly impacted by the “laydown area” for the development. That is, the massive dredging project proposed by Appellee North

⁶⁴ Ex. 1, Opinion at 5.

⁶⁵ Indeed, at the time of the oral argument in the circuit court, the Developer had already begun some excavation work on the harbor cluster site and had dumped excavation spoils less than 300 feet from the Bily property in an area within their viewshed that was previously forested.

Shores necessarily creates a byproduct: dredging spoils, on the order of 241,750 cubic yards of sand. Before the Planning Commission, North Shores vaguely explained that it would stockpile the spoils and use them for construction of roads and residences elsewhere within the development. What the Coastal Alliance eventually learned was that North Shores intended to remove all vegetation from a hilltop within its property and truck and dump sand there.⁶⁶ Near the bottom of that hillside, leeward from Lake Michigan, sits the Bily family cottage. As counsel for the Coastal Alliance explained to the ZBA:

Information obtained from the DEQ indicates that the dredging spoils from the project will be located within 300 feet of the Bily property. . . In addition to the Bilys' direct view of the project, and the impact to the use and enjoyment of their waterfront due to the project, the Bilys will also have to contend with a pile of dredging spoils within 300 feet of their property. Their use and enjoyment of their land will also be impacted by the heavy machinery operating just across the property boundary delivering the dredging spoils to the . . . site . . . and then later collecting dredged material for use during later stages of construction. This activity is substantially closer to the Bily residence than the "1000 plus" feet asserted by the developer previously. It is also a unique impact to the use and enjoyment of their property that is not shared by the public at large.⁶⁷

At the time of the ZBA hearing, a map of the laydown area was available, but in the months following, the hilltop overlooking the Bily cottage was completely denuded of all vegetation, an act which alone greatly increases the likelihood of blowing sand and the risk of destabilization of the dune and erosion. These impacts are in addition to impairment of the Bilys' use and enjoyment of their property and the Kalamazoo River.

⁶⁶ See laydown map, attached as Exhibit 6.

⁶⁷ The location of the Bilys' cottage, next to the laydown area and within the path of lake winds from Lake Michigan, was a chief reason that Administrative Law Judge Pulter determined the Bilys, and the Coastal Alliance through them, possessed standing to appeal the DEQ's grant of a permit to construct the basin. SDCA letter to the ZBA, April 6, 2018.

2. Coastal Alliance Members Have Established Special Injury Because the Proposed Boat Basin Canal Will Directly Affect their Recreational, Aesthetic, and Economic Interests.

The Court of Appeals recognized that the Coastal Alliance “submitted numerous affidavits apparently tending to show that the affiants will suffer harms distinct from the general public,” but did not “express any opinion as to whether they are, in fact, sufficient to confer standing.”⁶⁸ Based on this Court’s prior precedent, the affidavits clearly are sufficient to establish standing under the “harms different than the citizenry at large” standard.

This Court has explained precisely how a plaintiff may demonstrate standing in the context of zoning disputes over dockage and anti-funneling ordinances – nearly the exact factual pattern at issue here. In *Kallman v Sunseekers Property Owners Ass’n*, a lake association sued the operator of a dock with six mooring sites on a parcel with 25 feet of water frontage.⁶⁹ The lake association alleged that the dock was a nuisance in fact, and also a nuisance per se under MCL 125.294 because it violated frontage requirements for docks in the local zoning ordinance. The Court of Appeals held that the lake association did not demonstrate special damages sufficient to have standing, but this Court reversed. This Court held that the lake association must be given an opportunity to show it had standing, setting these parameters:

On remand, the plaintiffs must show that they have a substantial interest that would be detrimentally affected in a manner different from the citizenry at large. Standing may be proven by showing that the defendant’s activities *directly affected the plaintiffs’ recreational, aesthetic, or economic interests*. [Emphasis added.]⁷⁰

In the context of a non-profit or neighboring landowner challenging the environmental

⁶⁸ Ex. 1, Opinion at 5.

⁶⁹ *Kallman v Sunseekers Property Owners Ass’n*, 480 Mich 1099; 745 NW2d 122 (2008).

⁷⁰ 480 Mich at 1099.

effects of a use, courts have held a party can show that they will suffer a sufficient injury if they “aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.”⁷¹ For example, this Court has held that it is sufficient to establish an injury when parties and neighbors claimed they “bird-watched, canoed, bicycled, hiked, skied, fished, and farmed in the area” and submitted expert testimony demonstrating these activities would be affected by an environmental harm caused by the challenged activity on a nearby property.⁷²

In light of the above precedents, it is clear that members of the Coastal Alliance will suffer special injuries from the project that are different than the public at large.⁷³ The Coastal Alliance is a non-profit coalition organized for the purpose of working cooperatively to protect and preserve the natural geography, historical heritage, and rural character of the Saugatuck Dunes coastal region in the Kalamazoo River Watershed. Since its formation over nine years ago, the Coastal Alliance has remained committed to and focused on ensuring the protection of the Watershed. Coastal Alliance is a visible organization with numerous supporters; for example, the Coastal Alliance Facebook page has over 4100 followers.⁷⁴

Included in the Record on Appeal are additional affidavits of several Coastal Alliance

⁷¹ *Nat'l Wildlife Fedn v Cleveland Cliffs Iron Co*, 471 Mich 608, 629 (2004). The *Cleveland Cliffs* test was overruled for a more lenient standing test in *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349 (2010), but its recognition of a legally-protected interest is still instructive.

⁷² *Cleveland Cliffs*, *supra*. The Developer previously argued that some of these cases have been overruled by this Court's decision in the *Lansing Schools* case. However, this is a misreading of the decisions. *Lansing Schools* adopted a less restrictive standing test than what had been applied in previous cases. Since standing is less restrictive, any facts or circumstances in previous cases that gave rise to standing would certainly give rise to standing under the *Lansing Schools* test. To suggest that this Court overruled all previous standing decisions is misleading and incorrect.

⁷³ The Coastal Alliance has representational standing under *Trout Unlimited v City of White Cloud*, 195 Mich App 343, 348; 489 NW2d 188 (1992); see also *Coldsprings Twp v Kalkaska Co Zoning Bd of Appeals*, 279 Mich App 25, 29; 755 NW2d 553 (2008).

⁷⁴ See www.facebook.com/saugatuckdunes.coastalalliance, last accessed on October 10, 2019.

members establishing unique interests that are different than the citizenry at large. ROA 164-193 (App. Exs.5-11 of Appellant’s Brief in COA Case No. 342588). These interests clearly give rise to special damages and aggrieved party status. Of extraordinary significance is the affidavit of former Senator Patricia Birkholz. As the affidavit indicates, Senator Birkholz had a long legacy of conservation and preservation in the area. ROA at 164 – 169 (App. Ex. 5 of Appellant’s Brief in COA Case No. 342588). While many citizens have been instrumental in preserving the unique character and natural beauty of the Saugatuck Dunes and Kalamazoo River watershed, Senator Birkholz is clearly at the head of the line. So much so that there is a 291 acre preserve named the Patricia Birkholz Natural Area to honor her 30-year career in public service and efforts toward conservation of the Great Lakes, the Saugatuck Dunes, and Saugatuck Dunes State Park.⁷⁵ The proposed boat basin, 18 feet deep and 1,500 feet long, will come to within about 200 feet of the Patricia Birkholz Natural Area.⁷⁶ As Senator Birkholz explained in her affidavit, the proposed project threatens the natural area and her legacy:

The extreme depth and length of the proposed marina and boat basin, if permitted, will negatively impact the hydrology of the interconnected globally-imperiled interdunal wetlands that stretch from the Padnos property across the Patricia Birkholz Natural Area to Saugatuck Dunes State Park. If permitted, the boat basin will negatively impact the dunes that hold my name. I fear those dunes will be so altered that my children and grandchildren, and God-willing my great-grandchildren, will be unable to recognize what I spent my thirty-year career in public service trying to protect. [ROA at 164 (App. Ex. 5 of Appellant’s Brief in COA Case No. 342588).]

In addition, the Coastal Alliance member affidavits within the Record on Appeal demonstrate wide and varied interests in the Kalamazoo River Watershed, including:

⁷⁵ *Id.*

⁷⁶ *Id.*

- (1) **Mort Van Howe:** Mort and his wife own Sweetwater Sailing, a charter sailboat business in Saugatuck Township. The charter relies on the beauty of the surrounding area, and the proposed boat basin will ruin the rare and exceptional experience of sailing on the Kalamazoo River and along the Saugatuck dunes. The addition of significant number of potentially large boats as a result of the proposed boat basin canal will also increase safety concerns in what can already be an area crowded with small recreational boats. Mort's own experience, as well as that of his customers, will be dramatically impacted by the proposed development. ROA at 178 – 181 (App. Ex. 7 of Appellant's Brief in COA Case No. 342588).
- (2) **Mike Johnson:** Mike is owner of the Coral Gables complex, which includes its own marina and jet ski rental business. His business is dependent on having a safe river upon which to recreate. If the proposed project is allowed to be constructed, his business and livelihood will be negatively impacted by the additional river boat traffic and accompanying safety issues. ROA at 182 – 183 (App. Ex. 8 of Appellant's Brief in COA Case No. 342588).
- (3) **Dave Engel:** Charter boat captain with more than 40 years of professional experience guiding salmon and trout fishing tours out of Saugatuck Harbor. He is the winner of over 65 salmon and trout tournaments and is the number-one money winner of all time on the Great Lakes. Mr. Engels' interests will be impacted by the Planning Commission decision because it would set a poor precedent for allowing others to damage important aquatic habitat and increase funneling-accesses on the river by creating boat basins and marinas by cutting a canal or channel. ROA at 184 – 187 (App. Ex. 9 of Appellant's Brief in COA Case No. 342588).
- (4) **Chris Deam:** The Deam family owns the Old Saugatuck Lighthouse in the northwestern corner of the Ox-Bow Lagoon. There are no roads to the Lighthouse property and it is still accessed by boat (mainly a canoe). Three generations of the Deam family have helped shape the essential character of the surrounding area at the mouth of the river and Ox-Bow Lagoon. The character of the area surrounding the Deam property would be fundamentally altered as a result of the proposed project by dredging out a large area in the Kalamazoo River. The proposed marina and boat basin would disrupt the carefully balanced and harmonious neighborhood. ROA at 188 – 190 (App. Ex. 10 of Appellant's Brief in COA Case No. 342588).
- (5) **Liz Engel:** as local realtor, Liz believes the ecological, recreational, and aesthetic values of the area are a major selling point for homes in the area and add to property values and home sale prices. The proposed marina and boat basin will impair her ability to use the Kalamazoo River as a selling point, causing financial harm in the form of fewer sales and lower commissions due to lower selling prices. ROA at 191 – 193 (App. Ex. 11 of Appellant's Brief in COA Case No. 342588).

The affiants' interests and concerns are real, personal, and unique harms that will not be suffered by the general public or even other similarly situated persons. There can be no question that the concerns shared and interests advanced by the late Senator Birkholz are singularly unique to her, but the lower courts made no mention of her affidavit. Mort Van Howe and Dave Engel are two of only a handful of captains operating commercial U.S. Coast Guard-inspected vessels out of Saugatuck Harbor. Their long-term investments in building businesses that require safe navigation of the river mouth make them uniquely aggrieved.⁷⁷ Like the Bily family, Chris Deam described generational devotion to the preservation of the river mouth area, recreational pursuits, and enjoyment of the rustic family retreat among the dunes.⁷⁸ These are exactly the types of recreational, aesthetic and economic interests that this Court has recognized as creating "special damages" in other contexts.⁷⁹

3. The Purpose of the Zoning Ordinance Anti-funneling Provisions Supports the Coastal Alliance's Standing in this Matter.

Article XII of the Saugatuck Township Zoning Ordinance, Water Access and Dock Density Regulations, Section 40-910(h) states "*In no event* shall a canal or channel be excavated for the

⁷⁷ The Coastal Alliance's ability to assert representational standing on the basis of its members' loss of customers as a result of a diminished sailing, boating and sport fishing experience among the pristine Saugatuck Dunes is akin to this Court's determination in *Sackllah Investments LLC v Northville Twp*, unpublished per curiam opinion of the Court of Appeals, issued August 9, 2011 (Docket No. 293709) (attached Appendix Exhibit 15 of Appellant's Brief in COA Case No. 342588) that a commercial landlord of a strip mall whose tenants' right to post signs were restricted under the township zoning ordinance had suffered economic injury in a manner different than the public at large and had standing to challenge the ordinance.

⁷⁸ This Court has previously recognized that "neighboring property owners have an equitable cause of action to enforce compliance with local zoning regulations." *Schall v City of Williamston*, unpublished per curiam opinion of the Court of Appeals, issued December 4, 2014 (Docket No. 317731) (attached Appendix Exhibit 16 of Appellant's Brief in COA Case No. 342588) (internal citation omitted).

⁷⁹ *Kallman*, 480 Mich at 1100.

purpose of increasing the Water Frontage.” This provision was enacted to address exactly the type of harms threatened by North Shores’ development, and is the central legal issue in this zoning appeal. Section 40-906 describes the purpose of the water access and dock density regulations:

The township has concluded that a lack of regulation regarding the density of Docks on and general access to Inland Waterways and Lake Michigan within or adjacent to the township has resulted in a **Nuisance condition and an impairment of irreplaceable natural resources of the township.** Further, the lack of regulation is resulting in **the destruction of property values and constitutes a threat to the public health, safety and welfare of all persons utilizing these Inland Waterways and Lake Michigan** and occupying adjacent properties within the township. Consequently, the township desires to adopt reasonable regulations regarding Dock density and general water access to protect the public health, safety and welfare, as well as the irreplaceable natural resources of the township. [Emphasis added.]

Notably, these are exactly the potential harms that will be suffered by members of the Coastal Alliance if the development is allowed to go forward, as outlined by the various statements and unique interest of the Coastal Alliance members that are part of the record on appeal. In light of the Township’s legislative determination that impairment of natural resources, destruction of property values, and threats to safety and welfare are the result of excessive numbers of docks and riparian users on the Township’s waterways, the ZBA and lower court decisions to deny the Coastal Alliance standing to appeal to protect those interests is downright puzzling, particularly in a case where the merits of the appeal are strong and the violation of Section 40-910 of the ordinance is evident.

The ZBA and lower courts’ stance on standing essentially means that even where the Township has expressly codified the harms that might result from overdevelopment along its waterways, citizens are without recourse to enforce the ordinance when the planning commission will not. This Court should grant leave to appeal, reverse the lower courts’ denial of standing, and

remand for a determination of the case on the merits.⁸⁰

CONCLUSION AND RELIEF REQUESTED

Therefore, for the reasons stated above, Appellant Saugatuck Dunes Coastal Alliance respectfully requests that this Court grant leave to appeal and address the jurisprudentially significant issue of standing in zoning appeals. The law surrounding zoning appeals is in need of clarification, and the bench and bar are in need of guidance from this Court.

Respectfully submitted,

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Date: October 10, 2019

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⁸⁰ See *Brown v E Lansing Zoning Board of Appeals*, 109 Mich App 688, 701; 311 NW2d 828 (1981) (“We concur with the following commentary: ‘It is important that persons who have an interest in preserving an established plan have an opportunity to be heard when use changes are contemplated. For this reason statutory grants of aggrieved party status to third parties should be liberally construed. Since it is a matter of standing only, litigation on the merits of the complaint should be relied upon to expose any frivolous complaints.’”).