

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. 160358, 160359
Court of Appeals Nos. 342588, 346677
Lower Court Case Nos. 2018-059598-AA,
2017-058936-AA

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**APPELLANT'S REPLY BRIEF IN SUPPORT OF ITS
APPLICATION FOR LEAVE TO APPEAL**

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Former Justice (then Judge) Cavanagh quoted with approval the following view of zoning standing in the *Brown* case:

(I)t 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....The reasonableness of any denial of a variance can be examined by the board or the courts, but the requirement of standing should not be employed to inhibit expression of views.¹

Both North Shores of Saugatuck, LLC (the “Developer”) and Saugatuck Township (“the Township”) take the opposite approach, seeking to restrict zoning appeals to a narrow class of individuals who own property. According to the Developer and Township, recreational, aesthetic or environmental concerns are never sufficient to create standing. As is discussed in more detail below, this overly restrictive interpretation of the standing doctrine is not consistent with the statutory language at issue or the larger body of standing case law.

I. Recreational harms can give rise to zoning standing and the Developer’s argument fails to recognize the distinction between types and degrees of harm.

The Developer argues in this case that the harms “are not dissimilar to the harms that any neighbor, local business, or tourist could allege.”² Indeed, the Developer has consistently argued that if a case held that a certain type of injury was not *in that case* sufficient to establish special damages, it never could be. Appellant respectfully suggests that this is not the case. Rather, it is important for the Court to consider both the type and degree of injury and not categorically reject

¹ *Brown v E Lansing Zoning Bd of Appeals*, 109 Mich App 688, 701; 311 NW2d 828, 834 (1981).

² Developer’s Brief at 2.

an injury simply because an earlier case found that the particular party in that particular case had not suffered the injury to a sufficient extent. Otherwise standing law is an artificial limitation on just who can challenge “the most injurious and widespread Government actions” if more than one person may suffer the same harm.³ Ultimately, standing under the aggrieved party standard is a fact-specific inquiry that depends heavily on the context of specific case, and there are a wide variety of injuries that should establish standing if the person suffering the injury can show he/she experiences the injury in a manner different than the community at large.

A. The Types of Harms Suffered by Members of the Coastal Alliance Have Been Held Sufficient to Confer Standing in Past Cases.

In this instance, the members of the Coastal Alliance will suffer a number of impacts from approval of the boat basin canal plan resulting in impaired recreational opportunities, a loss of use and enjoyment of their property, and fundamental changes to the character of the area. These impacts are different in kind and character from the greater community. The specific impacts identified by Appellants are exactly the types of impacts that Michigan courts have recognized to confer standing in zoning matters in a number of different cases:

- (1) **Environmental Harm.** A party alleging that a potential development will cause environmental harm has standing to challenge Township approval of the development 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.”⁴

³See *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).

⁴ *Nat'l Wildlife Fed v Cleveland Cliffs Iron Co*, 471 Mich 608, 629; 684 NW2d 800 (2004), *overruled on other grounds by Lansing Sch Ed Ass'n, supra*. *Lansing Schools* held that no injury in fact is required to establish standing if a statutory standing test is met; however, it did not overrule the *Cleveland Cliffs* determination of what constitutes an injury or damage for an environmental user. See also *Concerned Citizens of Acme Twp v Acme Twp*, per curiam unpublished opinion of the Court of Appeals, issued September 20, 2007 (Docket No. 264109), attached as Appendix Exhibit 18.

- (2) **Interference with Beneficial Use and Enjoyment of Property.** People in the “immediate vicinity” of a project can show that they suffer “special damages” if the project has “at least a potential for interfering with the beneficial use and enjoyment of their own land.”⁵
- (3) **Economic Harm to Property.** A party may have standing if they establish a “substantial economic interest” in the outcome of the proceeding,⁶ such as decreasing property values or increased taxes.⁷
- (4) **Intensifying Change in Character of Neighborhood.** A project that will intensify changes to the character of a neighborhood, such as those caused by increased population, traffic, noise levels, lights, and air pollution, can give rise to standing.⁸
- (5) **Aesthetics and Interference with Views.** A neighbor has standing to appeal a zoning decision regarding a construction project where the project interferes with a neighbor’s view.⁹
- (6) **Adverse effects for community goals for region.** People who have participated in and relied on community goals for the region might have standing on this basis.¹⁰

The most recent of these cases was just released by the Court of Appeals after the Coastal Alliance filed its Application for Leave to Appeal and found standing existed based on facts strikingly similar to those alleged by the Coastal Alliance. In *Deer Lake Property Owners*

⁵ *Brown*, 109 Mich App at 699. See also *Fort Summit Holdings LLC*, unpublished per curiam opinion of the Court of Appeals, issued May 3, 2002 (Docket No. 233597), included in Appellant’s Supplemental Appendix.

⁶ *Brown*, 109 Mich App at 701.

⁷ *Meany v City of Saugatuck*, memorandum unpublished opinion of the Court of Appeals, issued February 17, 2004 (Docket No. 243694), attached as Exhibit 20.

⁸ *Brown*, 109 Mich App at 701.

⁹ *Meany*, *supra*, stating “where it was alleged that plaintiffs’ construction would block the neighbor’s lake view and reduce his property’s value, we conclude that the neighbor was an aggrieved party who had standing to appeal to the ZBA.” Accord *Gawrych v Rubin*, per curiam unpublished per curiam opinion of the Court of Appeals, issued July 20, 2006 (Docket No. 267447) (finding interference with viewshed sufficient to establish special damages in a public nuisance suit), attached as Exhibit 21.

¹⁰ *Brown*, 109 Mich App at 701.

Association v Independence Township,¹¹ a group of property owners and lake users challenged a special use permit allowing “keyhole access” to the lake on an outlot property. In the process of reviewing the case, the Court upheld standing on the part of the group to challenge the zoning approval.

The Knolls argues that the Property Owners failed to allege harm sufficient to meet this standard. Although overburdening is a generalized harm that is not directly tied to the SLUP decision, the other alleged harms of affected property values, and aesthetic and environmental impacts are sufficiently pleaded. While “[i]ncidental inconveniences such as . . . general aesthetic and economic losses, population increases, or common environmental changes are insufficient to show that a party is aggrieved,” Olsen, 325 Mich App at 185, the Property Owners pleaded more than mere generalized harms. In particular, the Property Owners alleged that the additional docks may disrupt or destroy the shoreline and its ecosystem. As riparian owners who share this shoreline, they have an interest beyond that of other lake users, the public at large, or even similarly situated neighbors. Moreover, the Property Owners are more likely to be affected by these additions and line of sight alterations than the public, or other lake users, by virtue of their proximity to the outlot and the situation of its members respective properties in relation to the outlot. Accordingly, the Property Owners are an “aggrieved party.”¹²

It is difficult to square the opinion from the Court of Appeals in the *Deer Lake* case with the Court of Appeals decision in this case. Just as in *Deer Lake*, the harms alleged by the Coastal Alliance include property owners with proximity to the development with allegations that the project will “destroy the shoreline and its ecosystem.” The existence of two very different conclusions by the Court of Appeals on two cases with substantially similar allegations supports the need for review and clarification of the aggrieved party standard by this Court.

¹¹ *Deer Lake Property Owners Association v Independence Township*, unpublished per curiam opinion of the Court of Appeals, issued October 10, 2019 (Docket No. 343965)), included in Appellant’s Supplemental Appendix.

¹² *Id.* at 8-9.

B. The Zoning Standing Case Law Should Focus on the Degree of Harm

In addition to having suffered the right *type* of injury, the second step in determining special damages is whether Appellant has the potential to suffer the right type of damages to a sufficient degree, i.e., that he/she is affected differently than the community at large by the alleged harm.

Members of the Coastal Alliance will suffer the impacts they have identified in a degree that is substantially more extreme than that suffered by the community at large because of their unique interests in the natural resources at issue, proximity to the development, and business interests reliant on the Kalamazoo Watershed. These effects will substantially impair their use and enjoyment of their property, their livelihood, and their quality of life.

The Coastal Alliance and its members have considerable aesthetic, recreational, professional, and economic interests in the environmental and aesthetic values of the Saugatuck Dunes and the Kalamazoo River Watershed. This is exactly the type and degree of injury that the Michigan Courts have held to be sufficient to establish special damages. In the context of a non-profit or neighboring landowner challenging the environmental 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.”¹³

The Developer and Township, along with the Court of Appeals, rely on *Olsen v Chikaming*

¹³ 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. *Natl Wildlife Fed 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.

*Township*¹⁴ and its citation to *Unger, Joseph, Village of Franklin and Brink*.¹⁵ All of these cases are discussed in greater detail in the Application for Leave to Appeal, but they all involve situations where general allegations of harms were not enough to establish standing. Unlike this case, *Olsen, Unger, Joseph, Village of Franklin and Brink* are examples of a reliance on general allegations of harm with a failure to establish specific facts evidencing a unique degree of harm from a zoning approval.

II. The Legislatures Use of “Aggrieved Party” Means What it Says.

The Developer argues that the Legislature intended to limit standing in zoning cases to those harmed in a way not common to similarly situated property owners by using the term “aggrieved party.” However, the use of the term “aggrieved” or “aggrieved party” in the MZEA is not synonymous with having “suffered some special damages not common to *other property owners similarly situated*.”¹⁶ First, as noted in the brief on appeal, Black’s Law Dictionary defines aggrieved as “[h]aving suffered loss or injury; damnified; injured.” Indeed, the term aggrieved is routinely used in a myriad of statutes to describe one who has the right to appeal or to bring a certain action. A quick search on the Michigan Legislature website reveals approximately 264 statutes using the term aggrieved.¹⁷ Some of the more significant include permitting actions similar to zoning matters under the Administrative Procedures Act¹⁸ and the Natural Resources and

¹⁴ *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)

¹⁵ *Unger v Forest Home Twp*, 65 Mich App 614; 237 NW2d 582 (1975); *Joseph v Grand Blanc Twp*, 5 Mich App 566, 147 NW2d 458 (1967); *W Michigan Univ Bd of Trustees v Brink*, 81 Mich App 99, 102; 265 NW2d 56, 58 (1978); *Village of Franklin v City of Southfield*, 101 Mich App 554, 557; 300 NW2d 634, 635 (1980).

¹⁶ Ex 1 to Application for Leave to Appeal, Slip Opinion at 3.

¹⁷ <https://www.legislature.mi.gov/> search term: “aggrieved”.

¹⁸ MCL 24.301 (“when a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision

Environmental Protection Act.¹⁹

Second, the Legislature could have incorporated “similarly situated property owners” into the statutory provision, but it did not. As an example, the Legislature limited persons who are able to appeal a decision under Part 353 of the NREPA to immediately adjacent property owners: “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.”²⁰ The Legislature could have written in a similar restriction in this instance, but it chose to use the broader and widely used term “aggrieved party.”

Third, the existing case law at the time the MZEA was created was anything but clear. As discussed above, there was a variety of standing decisions with sometimes contradictory outcomes. To imply an intention on the part of the Legislature in using the term “aggrieved party” is to ignore the state of the law at the time (continuing on through today). Indeed, the decisions in *Unger*, *Joseph*, *Village of Franklin* and *Brink* are often times internally unclear about whether the standard is harms different from other community members or similarly situated property owners. Even the *Olsen* opinion uses inconsistent language in this regard.²¹ As such, the plain language of the statute is instructive in this case and another intent should not be divined from a reading of past case law.

or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law....”)

¹⁹ MCL 324.101 *et seq*, including MCL324.30110; MCL 324.30319; MCL 324.31526; MCL 324.32723;

²⁰ MCL 324.35305, emphasis added.

²¹ The Developer’s brief also states that “This standard is neither circular nor impossible to apply. It simply requires a zoning appellant to demonstrate harms dissimilar (i.e., different in kind) from those experienced by other property owners *within the same community*.”

Developer’s Brief at 17, emphasis added.

III. The Denial of Leave in Olsen Does not Undermine the Importance of Review in this Case.

Both the Developer and Township point to this Court's denial of leave to appeal in the *Olsen* case as a reason to deny leave in this case. However, the facts at issue in *Olsen* were significantly different than those in this case. *Olsen* involved a property owner's request for a variance to the zoning board of appeals on a single lot of 9,676 square feet (the ordinance required 20,000).²² The decision before the zoning board of appeals involved a potential one-time variance from the zoning ordinance requirements limited to one small lot. In contrast, the zoning decision challenged by the Coastal Alliance involves massive changes in land use, the irreversible excavation of nearly seven acres of critical dune, and the construction of condominiums, roads, and additional infrastructure for dozens of residences. The contrast is even more pronounced when the scope of North Shores' entire proposed project is considered (additional single-family homes along Lake Michigan, the Kalamazoo River channel, and riparian property upriver, plus a commercial development). While the proposed variance in *Olsen* was a deviation from square footage and rear setback requirements (*i.e.*, a run of the mill-type request)²³, North Shores proposes to undertake a sizeable private marina project of the sort rarely seen today. These facts alone distinguish the instant case from *Olsen* by orders of magnitude.

IV. The Harms Suffered by Coastal Alliance Members Are Directly Related to the Developer's Dredging of a Boat Basin Canal.

The Developer argues that the "the Coastal Alliance's harms "arise from the fact that the property is being developed, not from the particular zoning approvals being appealed." Among other things, this argument ignores the dredging of a new boat basin canal to increase shoreline

²² *Olsen v Chikaming Twp*, 325 Mich App 170; 924 NW2d 889 (2018).

²³ *Id.*

froontage. The Development was approved 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." Particularly relevant here is Section 40-906 of the Township zoning ordinance, which recognizes and was enacted to address exactly the type of harms threatened by North Shores' development. Section 40-906 of the zoning ordinance 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.]

The Township's legislative determination was 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 Circuit 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 Developer's stance on standing essentially means that even where the Township has expressly recognized 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 reverse the denial of standing, and remand for a determination of the case on the merits.

V. The Remand for Consideration of the Original Claims Further Supports the Coastal Alliance's Application for Leave to Appeal.

This case has been remanded for consideration of the Coastal Alliance's two independent claims: nuisance per se and declaratory relief. The very same *Unger* case the Developer and Township rely on elsewhere indicates there is not a special damages requirement for a nuisance per se case: "an action to abate a public nuisance can be brought by any township property owner."²⁴ Similarly, in the *Lansing Schools* case, this Court held that a claimant for declaratory relief under MCR 2.605 has standing to bring their claim: "To begin with, under the proper approach to standing, plaintiffs may seek a declaratory judgment if the requirements in MCR 2.605 are met."²⁵ The Coastal Alliance suggests that this case presents an opportunity for this Court to harmonize the different rules of standing in these different causes of action following the principles stated in *Lansing Schools*.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above and in its Application for Leave to Appeal, Appellant Saugatuck Dunes Coastal Alliance respectfully requests that this Court grant leave to appeal.

²⁴ *Unger v Forest Home Twp*, 65 Mich App at 618 citing *Indian Village Association v Shreve*, 52 Mich App 35, 216 NW2d 447 (1974).

²⁵ *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 373; 792 NW2d 686, 700 (2010).

Respectfully submitted,

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