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Date	Description	Appx Vol/Page
January 30, 2017	North Shores Site Plan Review & Special Approval Use Applications	Vol. 1/0001a
March 16, 2017	North Shores Site Plans	Vol. 1/0009a
April 26, 2017	Saugatuck Township Planning Commission Amended Approved Minutes	Vol. 1/0012a
June 30, 2017	SDCA Notice of Appeal to ZBA	Vol. 1/0022a
August 17, 2017	Affidavit of Dave Engel	Vol. 1/0028a
August 17, 2017	Affidavit of Liz Engel	Vol. 1/0032a
August 17, 2017	Affidavit of Patricia Birkholz	Vol. 1/0035a
August 18, 2017	Affidavit of Mike Johnson	Vol. 1/0041a
August 18, 2017	Affidavit of Mort Van Howe	Vol. 1/0043a
August 21, 2017	Affidavit of Diane Bily	Vol. 1/0047a
August 21, 2017	Affidavit of Kathi Bily-Wallace	Vol. 1/0050a
August 22, 2017	Affidavit of Chris Deam	Vol. 1/0055a
September 18, 2017	SDCA Letter to ZBA	Vol. 1/0058a
October 11, 2017	Zoning Board of Appeals Minutes	Vol. 1/0070a
October 11, 2017	Zoning Board of Appeals Resolution	Vol. 1/0072a
December 7, 2017	SDCA Notice of Appeal to ZBA	Vol. 1/0076a
February 6, 2018	Opinion and Order, Allegan County Circuit Court Case No. 17-58936-AA	Vol. 1/0082a
April 6, 2018	SDCA Letter to ZBA	Vol. 1/0087a
April 9, 2018	Zoning Board of Appeals Minutes	Vol. 1/0090a
April 9, 2018	Zoning Board of Appeals Resolution	Vol. 1/0092a
November 14, 2018	Order Denying Appeal, Allegan County Circuit Court Case No. 18-059598-AA	Vol. 1/0095a
August 29, 2019	Unpublished Opinion, *Saugatuck Dunes Coastal Alliance v Saugatuck Twp et al.*	Vol. 1/0098a
Undated	Maps of Area Surrounding North Shores Project Site	Vol. 1/0104a
Undated	Aerial Views of North Shores Project Site	Vol. 1/0108a
Undated	Maps of Laydown Area	Vol. 1/0110a
June 4, 2020	Slip Opinion, *Ansell v Delta County Planning Commission*	Vol. 1/0113a
April 30, 2020	*Baker v Twp of Bainbridge*, unpublished per curiam opinion of the Court of Appeals	Vol. 1/0123a
September 20, 2007	*Concerned Citizens of Acme Twp v Acme Twp*, unpublished per curiam opinion of the Court of Appeals	Vol. 1/0127a
October 10, 2019	*Deer Lake Property Owners Ass'n v Independence Charter Twp*, unpublished per curiam opinion of the Court of Appeals	Vol. 1/0135a

May 3, 2002	*Fort Summit Holdings, LLC v Pilot Corporation*, unpublished per curiam opinion of the Court of Appeals	Vol. 1/0141a
July 20, 2006	*Gawrych v Rubin*, unpublished per curiam opinion of the Court of Appeals	Vol. 1/0147a
February 18, 2020	*Kingsbury Country Day School v Addison Twp*, unpublished per curiam opinion of the Court of Appeals	Vol. 1/0150a
February 17, 2004	*Meany v City of Saugatuck*, unpublished per curiam opinion of the Court of Appeals	Vol. 1/0159a
June 11, 2020	*Our EGR Homeowners Alliance v City of East Grand Rapids*, unpublished per curiam opinion of the Court of Appeals	Vol. 1/0160a
August 9, 2011	*Sakllah Investments, LLC v Charter Twp of Northville*, unpublished per curiam opinion of the Court of Appeals	Vol. 1/0163a
December 4, 2014	*Schall v City of Williamston*, unpublished per curiam opinion of the Court of Appeals	Vol. 1/0174a

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

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Rebecca L. Millican (P80869)
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APPELLANT'S APPENDIX

VOLUME 1

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Saugatuck Township
3461 Blue Star Hwy
Saugatuck, Michigan 49453
(269) 857-7721 Fax (269) 857-4542

SITE PLAN REVIEW APPLICATION & REQUIREMENTS

a. Applicant information:

Name North Shores of Saugatuck, LLC

Address 148 S River Ave Ste 100, Holland, MI 49423

Telephone 616-566-2899

Person in charge of project Jeff Padnos

b. Property information:

Address See attached

Parcel # ~~See attached~~ 03-20-004-006-00, 03-20-004-002-00, 03-20-004-007-10

Current Zoning R-2 , R-3b Conforming use in zones? Yes x No ____

Other action required?

Variance X Rezone ____ Special Approval Use ____

c. Type of improvement (check as many as possible):

____New Building ____Addition ____Alteration ____Change of Use

____Multi-Family ____School ____Church ____Recreational Facility

____Cemetery ____Utility ____Public Service X PUD

X Special Land Use X Other (describe) Special Use Permit (marina)

d. Engineer or Surveyor information:

Name Mitchell & Morse Land Surv. Address 234 Veterans Blvd

City South Haven State MI Zip 49090

Phone 269-637-1107 License# 16-1041

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e. State proposed use of property: _____

Single family homes surrounding boat basin, two large site condos for future development, and boat slip units, with a community building and other related amenities.

f. Provide site plan as per Chapter VIII.A of the Saugatuck Township Zoning Ordinance. Did you receive a copy of Chapter 40, Article IX?
Yes x No _____

g. Provide a Brief narrative describing the following:

a. The overall objectives of the proposed development
b. Types and size of structures to be erected
c. Timetable regarding stages of project and completion date
d. Any objective or subjective information you wish to convey to the Planning Commission.

Applications with completed site plan and other required information must be filed with the Zoning Department at the Township Office 28 days before the 4th Monday of the month. All amended site plans must be submitted at least 14 days before the meeting or the hearing/review will not be hold. All applicable fees must be paid at that time. By signing this application, I agree to pay all applicable fees and costs associated with the site plan review process as detailed on the reverse of this application.

I hereby authorize the Saugatuck Township Planning Commission members and Township staff to inspect the proposed site at their discretion.

Applicant Signature _____ Date 1/30/17

For Office Use: Date Recorded 1-30-17 Fee Recorded $5,000 Escrow

Fee Amount _____ HearingDate 2-28-17 Remarks _____

For Planning Commission Use:

Hearing Date 2-28-17 Disposition Table

2nd Hearing 3-28-17 Disposition Table

3rd Hearing 4-26-17 Dispostion Approve with Conditions

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Conditions Attached to minutes

Chairman, Saugatuck Township Planning Commission

Secretary, Saugatuck Township Planning Commission

Two copies of the approved site plans should be signed by the applicant and all Planning Commissioners present. One copy is retained for the permanent Township files and one copy is given to the applicant or representative.

Fee Policy – Added at all the pertinent non-refundable fees set for the in the Consolidated Fee Schedule will be the actual cost of planner, engineer, attorney, or other consultant in attendance, and any special reports or special reviews. An escrow fund may be established at the beginning of the project based upon reasonable anticipated costs for such consultants. These costs must be paid whether the project is approved or denied. Any portion of the fund not used for the above purpose will be refunded at the completion of the review process.

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SAUGATUCK TOWNSHIP

WWW.SAUGATUCKTOWNSHIP.ORG

3461 BLUE STAR HIGHWAY
P.O. BOX 100
SAUGATUCK, MI 49453

PHONE (269) 857-7721
FAX (269) 857-4542

APPLICATION FOR SPECIAL APPROVAL USE

1. Name of Applicant: North Shores of Saugatuck, LLC

   Address: 148 S River Ave Ste 100, Holland, MI 49423

   Telephone: 616-566-2899

2. Name of Land Owner: same as above

   Address: _____

   Telephone: _____

3. Location of property on which Special Approval is requested: (street address)

   see PUD site plan being submitted concurrently, which is on the (N, S, E, W) side

   of the street between n/a and n/a streets.

4. Proprietary interest of Applicant (owner, tenant, lease etc..)

   owner

5. Legal Description of Property:

   A portion of Gov lots 2 and 3 (PP#'s 03-20-004-006-00, 03-20-004-002-00) as more specifically depicted and described on the PUD site plan being submitted concurrently with this application.

6. Nature of use for which Special Approval is requested:
   (explain fully)

   This request is to create dock condos to be owned and used for the mooring of recreational watercraft by persons that do not own sites directly on the boat basin. This limited "marina" would not have gas pumps, a boat launch, pump out stations, boat storage, or in and out service.

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7. Duration of Special Approval Use requested:
(permanent, one year, two weeks, ect)

permanent

8. a. Will the Special Approval Use be designed, constructed, operated, and maintained in a manner harmonious with the character of the surrounding area?

yes

b. Will the Special Approval Use change the essential character of the surrounding area?

no

c. Will the Special Approval Use be hazardous or involve uses, activities, materials, or equipment which might prove detrimental to the health, safety or welfare of persons or property by reason of traffic, noise, vibration, smoke, fumes, or glare?

no

d. Will the Special Approval Use place additional demands on public services and facilities?

no

9. Additional comments by Applicant:

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10. I hereby agree to abide by the terms of the Township Zoning Ordinance, and the terms of the Special Approval Use permit as issued by the Planning Commission should such a permit be granted.

Signed:

Applicant

03-03-17

Date

Referred to Planning Commission by:

Zoning Administrator

3-3-17

Date

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NARRATIVE STATEMENTS PER ORD. § 40-772(3) AND 40-941

1. Overall Objectives of Development (Ord. § 40-941(4)). The objective of this Development is to arrange residential building sites, boat slip units, and open space in a more desirable and economical layout than traditional zoning would allow while preserving the natural characteristics and features of the surrounding dune landscape.

2. Access and Utilities (Ord. § 40-772(3)(h); Ord. § 40-941(5)). The Development will have an access road from 135th Avenue. Water will be provided by private wells and sanitary sewage disposal will be handled by private septic systems, both as approved by the Allegan County Health Department. Electric, gas, and internet services will be run in the road right of way and be made available to all residential sites.

3. Community Facilities (Ord. § 40-772(3)(i)). The residents of the Development will have access to the same schools, recreational facilities, and cultural facilities as other residents in the Township. Additionally, residents of the Development will have access to a dune lookout viewing area, a community center located on the Kalamazoo River, and beach access to Lake Michigan. Fire protection services shall be provided in accordance with paragraph 2 of the Consent Judgment entered in federal court, case number 1:10-cv-210-plm, docket number 199. The designated helicopter landing area required by the Consent Judgment will be provided outside of the PUD in the cul-de-sac at the end of Saugatuck Beach Road. Prior to final site plan approval, the Developer will record an easement in this regard for the benefit of the PUD.

4. Compatibility with Neighboring Properties (Ord. § 40-772(3)(k)). The proposed residential use of the Development is consistent with existing zoning as well as the neighboring properties.

5. Ownership and Maintenance of Open Space (Ord. § 40-772(3)(l)). Open space in the Development will be owned and maintained through a condominium association set up as a nonprofit Michigan corporation. A board of directors will be established to manage the affairs of the association, and owners will pay association dues to cover the costs of maintenance and upkeep. The association will be governed by the terms of a recorded master deed and association bylaws.

6. Boat Slips Within the Boat Basin. There will be essentially two types of boat slips within the boat basin: a) limited common element slips along the seawall adjacent to each of the waterfront residential site condominium units, and b) "dockominium" boat slip condominium units that property owners within the PUD or the North Shores' property as a whole may purchase and own.

The limited common element boat slips along the seawall will be assigned to the adjacent waterfront residential site condo unit. Essentially, each waterfront residential site condo unit will have the use of the full length of its seawall for access to the water and boat dockage. Each unit will have to comply with the dock density requirements of Ord. § 40-908.

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The boat slip condominium units (B1-B33) will be sold to property owners within the PUD and the North Shores property as a whole. For example, owners of lots along Lake Michigan or the channel which are not be able to dock boats on their own property, may purchase a boat slip condo unit as a means of being able to keep a boat docked. The owners of units 22-27 within the PUD may purchase boat slip condo units (most likely, those slips along the north end of the boat basin). Even owners of the waterfront residential condo units within the PUD may purchase boat slip condo units if the docking area on their own seawall is insufficient for the number of boats they own.

SAUGATUCK DUNE NATURAL AREA
LAKE MICHIGAN
40
39
EXISTING HOME NOT INCLUDED
KALAMAZOO RIVER
KALAMAZOO RIVER
KALAMAZOO RIVER
SAUGATUCK BEACH ROAD
SAUGATUCK BEACH ROAD
NORTHSHORE BOAT BASIN
EXISTING HOMES NOT INCLUDED
OWNED BY NORTHSHORES OF SAUGATUCK
16
17
18
19
20
21
22
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26
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31
32
33
34
35
36
37
38
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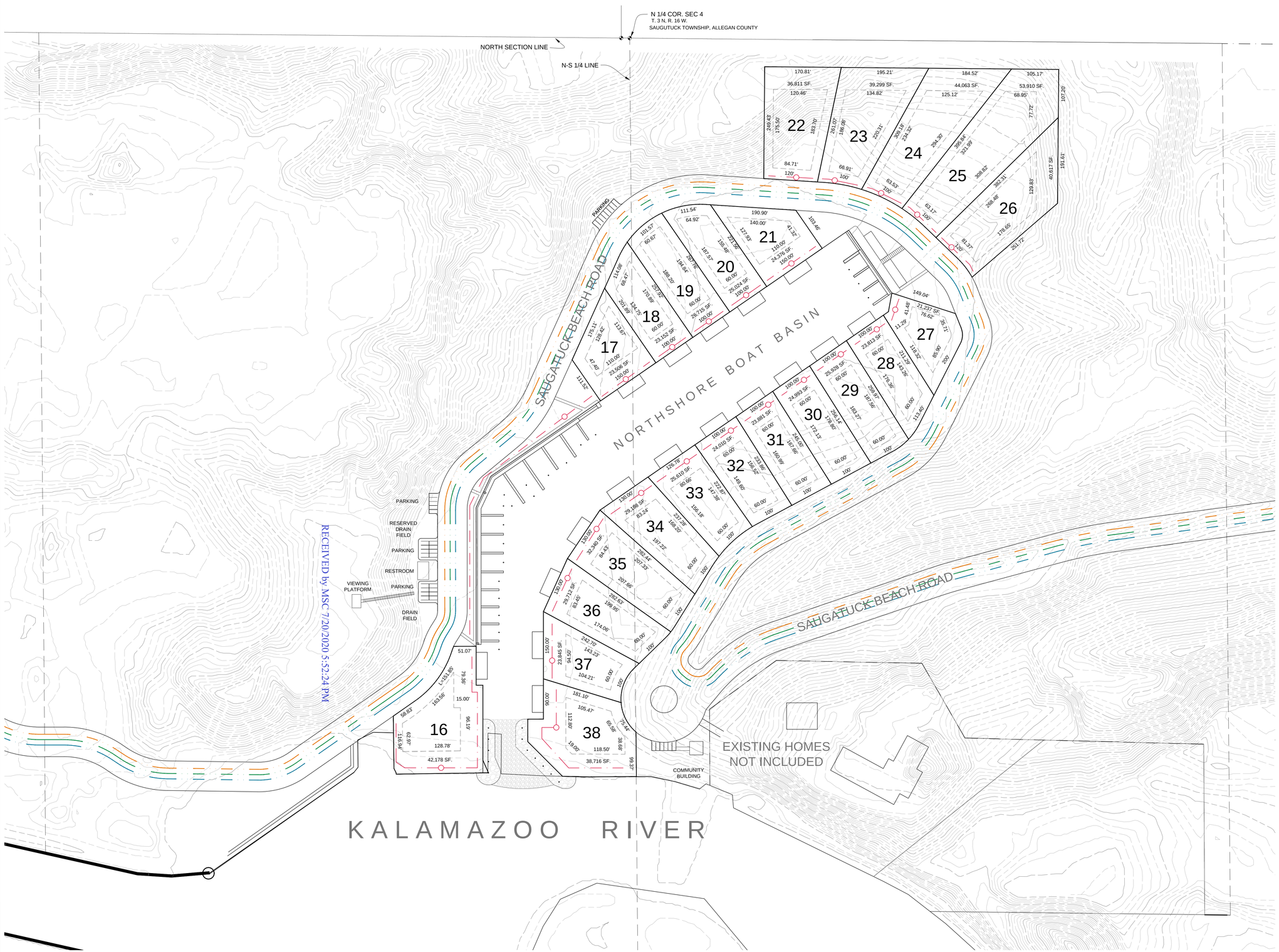
N
GRAPHIC SCALE
0
100
200
400
(IN FEET)
1 inch = 200 ft.
KEY PLAN
SITE CONDO LINE
GENERAL COMMON ELEMENT (OPEN SPACE)
1,244,278 SF. LAND
182,972 SF. WATER
GENERAL COMMON ELEMENT
LIMITED COMMON ELEMENT
FUTURE HOME SITES
PREPARED FOR: NORTHSHORES OF SAUGATUCK, LLC.
PROJECT NO. 16-1041
DATE 03.16.17
BOOK FILE
PAGE FILE
REVISION
DRAWN BY E. MORSE
SHEET 1 OF 1
3
NORTHSHORES OF SAUGATUCK
MITCHELL & MORSE LAND SURVEYING



SITE CONDO TOTAL

ACRES	SQ. FOOTAGE
92.9	4,046,527 SF.

GENERAL COMMON
OPEN SPACE TOTAL

ACRES	SQ. FOOTAGE
29.5	1,427,250 SF.

CONDOMINIUM LOT SIZE

UNIT	SQ. FOOTAGE
16	42,178
17	23,506
18	23,152
19	26,715
20	25,024
21	24,376
22	36,811
23	39,299
24	44,063
25	53,910
26	40,617
27	21,237
28	23,813
29	25,928
30	24,993
31	23,881
32	24,010
33	25,610
34	29,198
35	32,340
36	29,712
37	23,845
38	38,716
39	759,605
40	781,252
TOTAL	2,243,791

GRAPHIC SCALE

0 50 100 200

(IN FEET)
1 inch = 100 ft.

SITE UTILITY KEY PLAN

- GAS LINE
- ELECTRICAL CONDUIT
- DATA CONDUIT
- STORM DRAIN W/ SOCK

PREPARED FOR: NORTHSHORES OF SAUGATUCK, LLC.

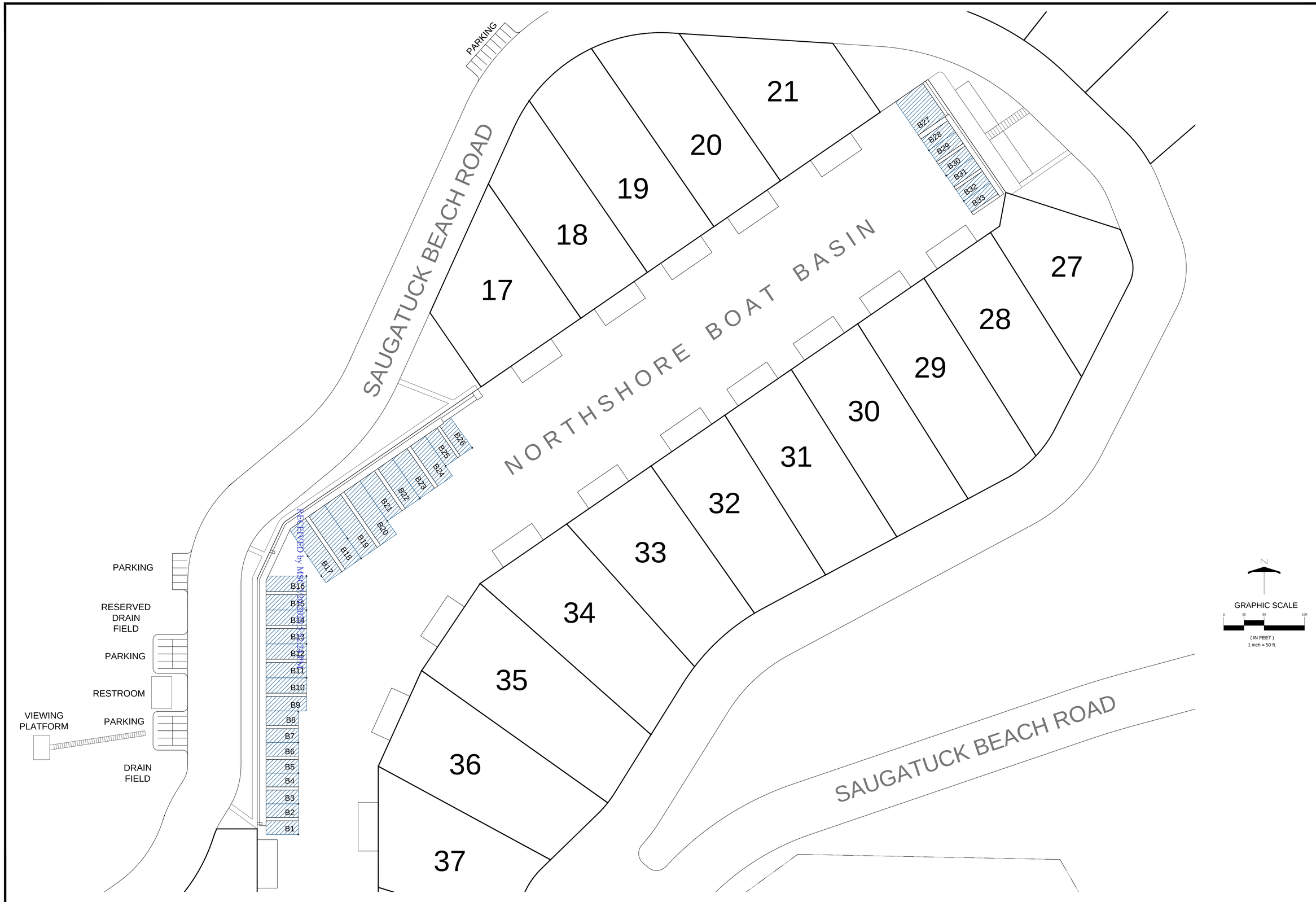
PROJECT NO. 16-1041 DATE 03.16.17

BOOK FILE PAGE FILE REVISION

DRAWN BY E.MORSE SHEET 2 OF 3

NORTHSHORES OF SAUGATUCK

MITCHELL & MORSE LAND SURVEYING
234 VETERANS BLVD. SOUTH HAVEN, MICHIGAN 49090
OFFICE (269) 637-1107 FAX: (269) 637-1907



PREPARED FOR:
NORTHSHORES OF SAUGATUCK, LLC.

PROJECT NO. 16-1041 DATE 03.16.17
BOOK FILE PAGE FILE REVISION
DRAWN BY E.MORSE SHEET OF 3 3

NORTHSHORES OF SAUGATUCK

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Saugatuck Township Regular Planning Commission Meeting April 26, 2017

AMENDED APPROVED MINUTES

The Saugatuck Township Planning Commission met on April 26, 2017 at the Saugatuck Public School cafeteria on 401 Elizabeth St, Saugatuck, Michigan, 49453.

Present:	Miller Cook, Rudich, Prietz, Conklin, Welk, Milauckas
Recused:	Rowe, due to possible financial conflict with Cottage Homes
Also Present :	ZA Kushion. Attorney Scott Smith and Attorney Nick Curcio

At 7:00 pm Chairperson Miller Cook called the meeting to order.

Pledge of Allegiance

Review and Adopt Agenda: Milauckas motioned to move the Public Comment portion of the meeting to item #5A. Miller Cook seconded. Attorney Smith advised that because the public was told that the public comment portion of these hearings was over, allowing public comment before the hearings at this meeting might be deemed inappropriate. Mr. Bosgraaf stated that he had many people who would have spoken on his behalf at this meeting but since he understood that the public comment portion of these hearings was over, he advised them not to come. Milauckas asked Attorney Smith if this action could be a required motion or if the chairperson, with support, could make such a change. Attorney Smith replied that since the agenda needs to be adopted by the whole body, the chairperson may not make changes individually. Milauckas stated that in his experience, someone might have information that is new and relevant to the hearing and should be heard. Roll call vote: Rudich-no, Welk-no, Prietz-no, Miller Cook-no, Milauckas-yes, Conklin-no. Motion failed. Rudich motioned to approve the agenda with an additional agenda item regarding the recusal of Bill Rowe as agenda item #5A, Prietz seconded. Motion approved unanimously.

Review of March 28. 2017 meeting minutes: change 'Coklin stated' to 'Conklin asked' on page 3, fourth paragraph. Change 'R-3' to 'R-3b on page 6. Prietz motioned to approve the minutes as amended, Welk seconded. Motion approved unanimously.

Recusal of Bill Rowe: Milauckas motioned that, in accordance with the rules of procedure 5.2 and after review by the township attorney, the board honor Mr. Rowe's request to be recused on the basis of a conflict of interest on this particular application, Rudich seconded. Motion approved unanimously.

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Saugatuck Township Regular Planning Commission Meeting April 26, 2017

AMENDED APPROVED MINUTES

Request for Preliminary Site Condominium and Preliminary R-2 PUD zoning for 23 residential single family home lots surrounding a boat basin. Parcels 03-20-004-006-00, 03-20-004-002-00. North Shores of Saugatuck LLC

Board discussion:

Attorney Smith explained that the last hearing was postponed so that the board could review information that was submitted shortly before the meeting was held. Since that meeting, additional correspondence has been received from, among others, a letter from Mr. Steve McKown and a letter from attorneys Howard & Miliken on behalf of the Saugatuck Dunes Coastal Alliance. The township attorneys have provided updated recommendations since the last meeting regarding additional conditions for approval and the developer has also provided some updates to the plan to address issues raised by the board, the township attorneys and township staff. Attorney Smith advised that all of these be made part of the public record so that the record is as complete as possible with regard to the information that the Planning Commission has before it. Attorney Smith commented on the procedural issues raised by the attorneys for the Saugatuck Dunes Coastal Alliance. He stated that plans often change after initial submission which is the reason for having a plan review and a public hearing. This gives an opportunity for improvement of the plans as originally submitted, to make sure there is full compliance with the ordinances and to make changes that the Planning Commission deems appropriate. There was an issue raised in the letter regarding the need for an outside consultant and who has the authority to make that request. The letter from the attorneys for the Saugatuck Dunes Coastal Alliance correctly pointed out that township planning ordinances, by-laws and state laws state that a planning commission may have assistance from an outside planner. However, since the Planning Commission is not an entity unto itself, it has to work within the budgeted funds that the township has and only the township board can enter into contracts with an outside consultant which has not been done in this case. He stated that the services of an outside consultant can be requested by the Planning Commission and would then go to the township board for approval. Attorney Smith stated that some of the other issues raised in the letter were added as additional conditions of approval to the application. He also remarked on the concerns raised about communication issues which might be improved by dialogue with the township board and training sessions. Milauckas asked Attorney Smith if his confidential response to the letters could be made available to the public. Attorney Smith stated that if the township board would waive the client/attorney privilege, the correspondence could be released. 'Attorney Smith indicated that, in his opinion, the memorandums could be released but would have to be approved by the township board. Miller Cook asked Attorney Smith if the PUD and site condominium could be approved separately or if they needed to be approved together. Attorney Smith replied that they can be approved or denied separately or together.

Miller Cook asked the commissioners if, after looking at the site condominium plan, they had any issues or questions. Milauckas asked if the plan that was under review by the Planning Commission was dated April 26, 2017. Miller Cook replied that it was. Miller Cook asked Brian Bosgraaf of Cottage Homes to address the parking space issue that was raised.

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Saugatuck Township Regular Planning Commission Meeting April 26, 2017

AMENDED APPROVED MINUTES

Mr. Bosgraaf stated that there are 26 slips that are available to property owners located in the development outside of the site condominium development for which the plan has designated 40 parking spaces. Discussion regarding the boat slips for property owners. Welk asked if this development will be a gated community, access available only to property owners and guests of property owners. Mr. Bosgraaf replied that it would be a gated community. Mr. Bosgraaf spoke regarding the density calculations of the site condominium plan. He stated that the total area of the site condominium development is 2,221,428 square feet of which 1,154,072 is open space which calculates to 52% open space. Milauckas asked why the western boundary of the site plan had changed from the last site plan submission. Mr. Bosgraaf explained that it was moved because more open space wasn't needed in the site plan. Milauckas asked if any of the land designated as open space contains wetlands. Mr. Bosgraaf stated that there were no wetlands in the open space. Milaukas asked if the land previously identified as lots 39 & 40 would be available for additional development in the future. Attorney Smith replied that it would be available for development but would be subject to approval from the Planning Commission. Milauckas asked if the land could be developed as a land division or had the property been included in the land division calculations for the property identified as lake cluster and river cluster. ZA Kushion stated that he thought there were no more land divisions available and that the land was included in the calculations for the land divisions that were previously approved. Miller Cook stated that she has concerns regarding section 7.12 of the preliminary construction requirements which deal with permitted variances. The section states that the review committee may, on a showing of practical difficulty or other good cause, grant variances from the requirements of this section but only to an extent and in a manner that does not violate the spirit and intent of the requirement. She also referenced section 7.13 which deals with setback lines and this section also states that the review committee may grant variances for setbacks. She was concerned because variances should only be granted by the township Zoning Board of Appeals. Mr. Bosgraaf stated that township ordinances would be followed and that some of the language in the preliminary construction requirements was probably carried over from other developments they had done in the past. He stated that the language would be revised to say that the standards of the township would not be exceeded. Milauckas referenced section 7.14 in the preliminary construction requirements that deals with building heights and stated that the township ordinances have a different way of defining building heights, etc. than the preliminary construction requirements do. Mr. Bosgraaf stated that the township ordinances supersede any boilerplate language found in their preliminary construction requirements and that the language would be changed before final approval would be requested. Miller Cook asked if any of the Planning Commission board members felt the need to require a performance bond for the PUD. None of the board members felt a performance bond should be required at the preliminary approval stage. Milauckas asked about storm water drainage. Mr. Bosgraaf stated that the county road commission would be addressing storm water runoff calculations during final approval of the road design. For the home sites, each one will have its own storm water management system which is designed so that water run off stays on each individual site. Milauckas asked if township ordinance #40-910, paragraph h which prohibits construction of a canal or channel is applicable in this case. Greg Weykamp from Edgewater Resources spoke to this issue.

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Saugatuck Township Regular Planning Commission Meeting April 26, 2017

AMENDED APPROVED MINUTES

He stated that the concept of key holing applies more to inland lakes when there is a large ratio between water frontage area and land acreage area. The frontage area of this development is 3000 linear feet with hundreds of acres of land. Milauckas stated that there is also a portion of the ordinance that deals with the number of docks allowed on the water frontage. Attorney Smith stated that this would not apply to the docks in the PUD development but might apply to the other docks. Attorney Smith explained that the beginning of township ordinance #40-910 states that 'in any zoning district where there is an intent to create or use a lot or parcel or condominium unit treated as a lot or parcel' (which is how these condominium units in the PUD development are treated), 'for the purpose of providing shared waterfront access by deed or otherwise, the following standards shall apply. Attorney Smith stated that since none of the condominiums in this PUD development have shared water access, each having their own waterfront access, the condition in paragraph h no longer applies. Milauckas asked what the definition of 'live-aboard' is. Mr. Weykamp stated that the definition of a 'live-aboard' is a permanent residence. Prietz read the list of conditions suggested by the township attorney and added at this meeting.

1. The applicant shall obtain all required state and federal permits and approvals to construct the boat basin, including, without limitation, any that are needed from the United States Army Corps of Engineers (USACE), the United States Environmental Protection Agency (USEPA), and the Michigan Department of Environmental Quality (MDEQ) before any construction permits are issued. These permits may be obtained following final PUD and site condominium plan approval, but the applicant shall fully inform the Planning Commission about the status of those permits and applications, including without limitation any decisions communications, etc. that indicate any alterations are needed from what is approved in the preliminary and final PUD and site condominium plans.
2. Compliance with all conditions and requirements related to the permits and other approvals obtained pursuant to condition1.
3. Obtain and comply with any terms and conditions of all needed state and county permits for private wells and septic systems.
4. Before any occupancy permit is issued for any dwelling unit, the private road leading to the site from the public road and through the site (currently shown as Saugatuck Beach Road) shall be constructed in compliance with the private road standards in Sec. 40-658 of the zoning ordinance and paved.
5. The plans shall be submitted to and, to the extent needed and not already provided in these conditions, approved by the County Health Department, County Road Commission, County Drain Commissioner, and any appropriate state agency before any construction permits are issued. These approvals may be obtained following final PUD and site condominium plan approval.
6. Fully dimensioned plans shall be submitted and staff shall confirm the developer's open space and other area and dimensional calculations before final PUD and site condominium plan approval.

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7. Anything shown on drawings outside the area of the PUD and site condominium project other than the private road leading to it is not part of this approval.
8. The project, including the marina, shall be constructed in a single phase beginning no later than March 15, 2018.
9. The developer shall provide the following items needed for the benefit of the condominium owners: (i) an emergency landing area for helicopters, (ii) a mooring space along the Kalamazoo River dedicated for fire, law enforcement or other federal, state or local public safety agency boat access, and (iii) standpipes in locations and meeting specifications approved by the Township Zoning Administrator after consultation with the Fire Chief. These items must be designated on the final plan. If any of these locations are outside the PUD, the developer shall grant and record an easement for the use of the item to the condominium owners in a form reasonably acceptable to the Township Attorney prior to approval of the final plan.
10. Open space shall not be reduced from the areas shown on the plans and shall be maintained as provided in the condominium documents provided during final site plan consideration.
11. No changes shall be made in the Preliminary Construction Requirements, the Preliminary Common Area Maintenance Provisions, or the Preliminary Use and Occupancy Restrictions presented, as part of the applications without the prior written consent of the Township Zoning Administrator, Township Building Official and Township Attorney. Any major change (i.e. a change that the Township Zoning Administrator, Township Building Official and Township Attorney believe is substantive enough to merit review by the Planning Commission) may not be made unless and until accepted by the Planning Commission. They shall be incorporated in the site condominium documents as required by the zoning ordinance. No waivers or variances may be granted in violation of any zoning ordinance provision.
12. No changes may be made to any front yard setbacks, side yard setbacks, rear yard setbacks, accessory building setbacks or other aspects of building envelopes as presented in the application materials unless and until accepted by the Planning Commission. The developer shall promptly inform the Township Zoning Administrator of any such proposed changes, and shall explain the reason for the proposal (e.g. reconfiguration in connection with state or federal permit applications).
13. The community building shall have the size and dimensions depicted on the plan.
14. The dock density regulations in sections 40-908 and 40-909 of the zoning ordinance apply to any docks constructed along portions of the seawall that adjoin condominium units 17-21 and 27-37.
15. Residences within the PUD shall be constructed in accordance with the standards and procedures provided in the 'Preliminary Construction Requirements' document submitted as part of the developer's application. No waivers or variances may be granted in violation of any zoning ordinance provision.
16. Compliance with all conditions for the special approval use of the marina.

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17. The following items were not addressed through the preliminary plan approval process, and must be addressed in the final plan: (a) landscaping, (b) signage, (c) construction staging, (d) lighting, (e) details regarding items required for condition 9, and (f) elevations of common-element buildings showing finish materials.
18. All heavy construction equipment accessing the site must use 135th Avenue and avoid 66th St.
19. A detailed storm water plan and description will be provided at the time of final site plan consideration.

Miller Cook read the general standards to approve a PUD. The Planning Commission shall review the particular circumstances of the planned unit development application under consideration in terms of the following standards and shall approve the PUD only upon a finding of substation compliance with each of the following standards as well as substantial compliance with applicable standards elsewhere in this chapter. (1) The Planned Unit Development shall be designed, constructed, operated and maintained in a way that is harmonious with the character and use of adjacent property and surrounding areas. (2) The Planned Unit Development shall not change the essential character of adjacent property and surrounding area. (3) The Planned Unit Development shall not create hazards to adjacent property or the surrounding area and shall not involve such uses, activities, materials or equipment which shall be detrimental to the health, safety or welfare of persons or property due to creation or maintenance of such nuisances as traffic, noise, smoke, fumes or glare. (4) The Planned Unit Development shall not place demands on public services and/or facilities in excess of current and anticipated capacity. Milauckas asked if there is language in the application guaranteeing the open space preservation. Mr. Bosgraaf stated that this language would be contained in the condominium association's documents and would be presented at the final hearing. Attorney Smith suggested adding language regarding the open space as an additional condition of approval.

Prietz motioned that the Preliminary Site Condominium and Preliminary R-2 PUD zoning plans as submitted by North Shores of Saugatuck satisfies the applicable criteria in Article 8 and Article 13 of the zoning ordinance for reasons discussed and to approve the plan dated April 26, 2017 including the narrative statements provided and submitted to the township with the plan dated April 23, 2017 and subject to conditions 1 through 19 as stated in the Dickinson Wright memo dated April 24, 2017 as amended this evening. Rudich seconded. Roll call vote: Rudich-yes, Welk-yes, Prietz-yes, Miller Cook-yes, Milauckas-yes, Conklin-yes. Motion approved unanimously.

Request for a Special Approval Use for a Private Marina, Parcels 03-20-004-006-00, 03-20-004-002-00 North Shores of Saugatuck LLC

Board Discussion:

Conklin asked the reason behind the need for condition #5 regarding the requirement for construction of all other elements designated on the final plan before construction of the boardwalk and dock extensions.

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Attorney Smith replied that the condition was to prevent the building of the marina with no homes or amenities around it. Milauckas asked about the portion of the narrative regarding boat slip ownership, specifically regarding property owners within the PUD or the North Shore property as a whole who may purchase and own boat slip condominium units. He wondered if a business that rents commercial property in the development might be able to purchase a boat slip condominium unit even though they were not property owners. Mr. Bosgraaf stated that the intent was for residential property owners in the development only to purchase and own boat slip condominium units and could be changed to be residential property owners instead of just property owners in the narrative. Prietz asked if the docks that are in front of the houses on the basin are strictly a side tie or broadside dock. Mr. Weykamp stated that the docks would not be perpendicular or protruding out into the basin.

Prietz read the list of conditions suggested by the township attorney and added at this meeting:

1. The applicant shall obtain all required state and federal permits and approvals to construct the boat basin and marina, including, without limitation, any that are needed from the United States Corps of Engineers (USACE), the United States Environmental Protection Agency (USEPA) and the Michigan Department of Environmental Quality (MDEQ).
2. There shall be no fuel sales, no pump-out services or facilities, no boat storage facilities, no boat launch facilities and no in and out boat service provided at the marina.
3. No itinerant use shall be allowed of any of the slips. The slips may be used only by the owners of the respective dockominium units and by the owners' guests.
4. "Live-aboard" use is not permitted on any boats stored in the slips. This condition will be further addressed in the condominium documents filed prior to final approval.
5. The boardwalk and dock extensions that are part of or adjacent to the dockominium units may not be constructed until all other common elements designated on the final plan (including the community building, community restrooms, streets, etc.) are fully constructed.
6. No more than 15 slips in the marina may be used or occupied until at least 5 residences are fully constructed.
7. The marina shall have only those buildings, parking areas, and other improvements and amenities shown on the approved PUD and site condominium plans.
8. All heavy construction equipment accessing the site must use 135th Avenue and avoid 66th St.
9. The docks may be sold only to residential property owners in the river cluster, channel cluster, lake cluster or PUD. Docks may not be owned or used by a commercial enterprise.

Miller Cook read the general standards for special approval use. (1) The duration of the special approval use is permanent. (2) Will the special approval use be designed, constructed, operated and maintained in a manner harmonious with the character of the surrounding area. (3) Will the special approval use change the character of the surrounding area. (4) Will the special approval use be hazardous or involve uses, activities, materials or equipment which might prove detrimental to the health, safety, welfare of persons or property by reason of traffic, noise, vibration, smoke, fumes or glare. (5) Will the special approval use place additional demands on public services and facilities.

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Discussion regarding the general standards and the procedures for approving or denying the special approval use based on these standards. Miller Cook expressed concerns regarding condition (3) and condition (5). She feels that this special approval use might not be harmonious with the character of the surrounding area and that there might be an issue with fire department access to the marina. Mr. Bosgraaf stated he felt that since the property has a large hill located on it, the development would not be visible from the state park. Milauckas stated that since the development is located in the lower elevation of the property, it might only be seen from the river. Captain Mantels from the Saugatuck Fire Department commented that he didn't anticipate the marina adding an additional load to the fire department services, especially since the fire boat would be docked close by.

Welk motioned that the special approval use for a marina as requested by North Shores of Saugatuck LLC satisfies the applicable criteria in article 6 of the zoning ordinance for the reasons discussed and to approve the request for the site plan dated April 26, 2017 subject to the conditions 1 through 9 as stated in the Dickinson Wright memo dated April 24, 2017 as amended this evening, Conklin seconded. Roll call vote: Rudich-yes, Welk-yes, Prietz-yes, Miller Cook-yes, Milauckas-yes, Conklin-yes. Motion approved unanimously.

Public Comment:

Steve McKown, 2845 Lake Breeze Dr, Mr. McKown feels that the interpretation of the waterfront access is incorrect and that if it is not changed, it could lead to serious problems. He stated that since the site condominium will be its own separate parcel of land, the argument by the developer of using the large acreage of the whole piece of property in the waterfront calculation is not valid. He thinks that other parts of the waterfront ordinance would also be violated by this site condominium plan.

Cynthia McKean, 3498 Riverside Dr, Ms. McKean stated that the most import part of the project is the marina and feels that the marina does not meet the intent of the ordinance. She does not think it should be approved because it is key holing. She is upset that the Planning Commission did not stand up and protect the dunes that the community has had for so long.

Patty Birkholz, 3413 64th St, Ms. Birkholz is disappointed in the people of the township board who would not allow the Planning Commission to ask for professional help. She clarified that sometimes when the water is high, it looks like there is an entrance into the Oxbow harbor from the river. She stated that it is not navigable and anyone who tries to go through should be stopped.

Lori Goshorn, 3512 64th St, Ms. Goshorn stated that she was disappointed in Cottage Home's snarky statement to the Commercial Record and subsequent lawyering up. She feels that requesting the necessary help in coming to a decision on such a project is good governance.

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Dayle Harrison, 3108 62nd St, Mr. Harrison feels that the ordinance is very clear and its requirements are not being met with this project. He says that irreplaceable resources will be lost with this project. He wonders why the language isn't already in place that specifies how the open space will be set aside.

Laura Judge, 6510 Oakwood Lane, Ms. Judge feels that this project will forever alter the area.

Jon Helmrich, 3522 64th St, Mr. Helmrich is dismayed by the Planning Commission's approval of this plan. He stated that he feels there was a rush to a vote, especially since the plan had only been submitted in February. He feels some members of the board have blocked requests for a planner.

Dave Burdick, 385 Fremont, Mr. Burdick encourages the board to reconsider requiring a performance bond to avoid being stuck with a hole in the ground.

Keith Charak, 560 Main St, Saugatuck, Mr. Charak is upset that a member of the Planning Commission and the Zoning Administrator blocked the request for a planner and feels that they should resign.

Marcia Perry, 6248 Blue Star Highway, Ms. Perry feels that she was blatantly lied to and was not given the latest plan that was submitted even though she had been at the township office today. She is very upset that this development will change the essential character of the area, digging a marina where there once was a town or where there are possible Native American artifacts. She encourages the Planning Commission to read the ordinances and the Master Plan.

Tracey Shafroth, 271 Water St, Ms. Shafroth would like the Planning Commission to slow down and read the information in front of them. She thinks that the process should have been delayed because of the timing of the information submitted.

Dayle Harrison, 3108 62nd St, Mr. Harrison would like a planner to be hired to assist in the process.

Miller Cook closed the Public Comment.

Milauckas responded to several of the comments. He stated that the change on the plan that was submitted the day of this meeting was very minor. He doesn't personally agree with the township attorney's interpretation of the waterfront access ordinance. Milauckas motioned to request from the township board the services of a planner to review the detailed site plan of this particular project, Miller Cook seconded. Roll call vote: Rudich-yes, Welk-no, Prietz-yes, Miller Cook-yes, Milauckas-yes, Conklin-yes. Motion passes five to one.

Board Discussion: Rudich stated that the reason he had objected to a planner was because the request was never made at an opening meeting of the Planning Commission. Attorney Smith stated that an individual planning commissioner cannot act individually and outside of a public meeting.

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Miller Cook stated that she had been in agreement with several of the Planning Commission members and the Zoning Administrator to contact Mark Sisson. When she learned that he was unavailable, she didn't realize that wasn't the route that they were going to go.

Township Board Updates and Planning Commission Comments: Rudich stated that township board clarified the land division act and took out the Planning Commission and the township supervisor. Milauckas asked why the Planning Commission was removed. Rudich stated that the land division act stipulates that there is a certain amount of time to act and, depending on the date of the next Planning Commission meeting, there might not be enough time for action.

Rudich motioned to adjourn, Welk seconded. Meeting adjourned.

Next Planning Commission Meeting: The next Planning Commission meeting will be on May 22, 2017.

_____

Janna Rudich, Recording Secretary

1. Motion to approve the agenda of the April 26, 2017 Planning Commission meeting. Rudich motioned, Prietz seconded. Motion approved unanimously.
2. Motion to approve the amended minutes of the March 28, 2017 Planning Commission meeting. Prietz motioned, Welk seconded. Motion approved unanimously.
3. Motion that, in accordance with the rules of procedure 5.2 and after review by the township attorney, the board honor Mr. Rowe's request to be recused on the basis of a conflict of interest on this particular application. Milauckas motioned, Rudich seconded. Motion approved unanimously.
4. Motion that the Preliminary Site Condominium and Preliminary R-2 PUD zoning plans as submitted by North Shores of Saugatuck satisfy the applicable criteria in Article 8 and Article 13 of the zoning ordinance for reasons discussed and to approve the plan dated April 26, 2017 including the narrative statements provided and submitted to the township with the plan dated April 23, 2017 and subject to conditions 1 through 19 as stated in the Dickinson Wright memo dated April 24, 2017 as amended this evening. Prietz motioned, Rudich seconded. Roll call vote: Rudich-yes, Welk-yes, Prietz-yes, Miller Cook-yes, Milauckas-yes, Conklin-yes. Motion approved unanimously.
5. Motion that the special approval use for a marina as requested by North Shores of Saugatuck LLC satisfies the applicable criteria in article 6 of the zoning ordinance for the reasons discussed and to approve the request for the site plan dated April 26, 2017 subject to the conditions 1 through 9 as stated in the Dickinson Wright memo dated April 24, 2017 as amended this evening. Welk motioned, Conklin seconded. Roll call vote: Rudich-yes, Welk-yes, Prietz-yes, Miller Cook-yes, Milauckas-yes, Conklin-yes. Motion approved unanimously.
6. Motion to request from the township board the services of a planner to review the detailed site plan of this particular project. Milauckas motioned, Miller Cook seconded. Roll call vote: Rudich-yes, Welk-no, Prietz-yes, Miller Cook-yes, Milauckas-yes, Conklin-yes. Motion passes five to one.

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OLSON, BZDOK & HOWARD

RECEIVED
JUL - 3 2017
BY SAUGATUCK TOWNSHIP

June 30, 2017

via hand delivery

Bill Rowe, Chair
Saugatuck Township Zoning Board of Appeals
3461 Blue Star Highway
Saugatuck, MI 49453

RE: Notice of Appeal of PUD and SAU approvals for North Shores of Saugatuck, LLC

Dear Mr. Rowe and Members of the Board:

On behalf of our client the Saugatuck Dunes Coastal Alliance, Olson, Bzdok & Howard, PC submits this letter as formal notice of an appeal[1] from the decision of the Saugatuck Township Planning Commission to approve North Shores of Saugatuck, LLC's request for a planned unit development (PUD) and special approval use (SAU) for the construction of site condominiums and a private boat canal on the former Denison property along the Kalamazoo River. The Planning Commission held a vote on North Shores' applications on April 26, 2017, and certified that decision on May 22. The Coastal Alliance makes this appeal under Sec. 40-72 of the Saugatuck Township Zoning Ordinance and timely appeals within 45 days.

BACKGROUND

As you likely know, the Coastal Alliance is a coalition of individuals and organizations who live, work, and recreate in the Saugatuck area. Members include neighbors adjacent to North Shores' proposed project, scientists conducting research in the coastal dunes, and many individuals who use and enjoy the recreational opportunities and aesthetic benefits of the Saugatuck Dunes via Lake Michigan and its shores, the Kalamazoo River, and the Saugatuck Dunes State Park. The Coastal Alliance is focused on "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, beginning with the Saugatuck Dunes." For ten years, the Coastal Alliance has remained committed to and focused on the protection of the dunes. It currently enjoys the support of more than 2,000 members.

The Coastal Alliance has opposed the North Shores' proposed project (and proposals that proceeded it put forth by the former owner of the Denison property, Aubrey McClendon) since its inception. Members attended each Planning Commission meeting at which the project was

[1] The Coastal Alliance is also submitting the ZBA appeal form, which appears intended for appeals from variance decisions, but has been completed to the extent relevant.

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reviewed, and offered public comments concerning the potential impact of the project on the dunes, the dunal ecosystem, and the Saugatuck area generally. Members urged the Planning Commission to take a measured and deliberative approach when considering the North Shores' applications.

PROCEDURAL ISSUES

As a preliminary matter and before considering the merits of this appeal, we request that the Zoning Board of Appeals first make a determination as to whether it may exercise jurisdiction over this matter. While Sec. 40-72 broadly states that the ZBA has the power to "hear and decide appeals from and review of any order, requirement, decision or determination made by the Zoning Administrator or the Planning Commission," Section 603 of the Michigan Zoning Enabling Act states that "For special land use and planned unit development decisions, an appeal may be taken to the zoning board of appeals only if provided for in the zoning ordinance." MCL 125.3603(1). Because the Zoning Ordinance does not specifically confer authority on this body to review decisions concerning PUD and SAU applications, it is potentially without jurisdiction to hear this matter. In either event, the Coastal Alliance has preserved its rights by also filing a claim of appeal of the Planning Commission's decision in the Allegan County Circuit Court, pursuant to Michigan Court Rule 7.122(B) (*Saugatuck Dunes Coastal Alliance v Saugatuck Township and Saugatuck Township Planning Commission*, Case No. 2017-58275-AA.).

GROUNDS FOR APPEAL

The Planning Commission's approvals of the PUD and SAU applications do not comply with state law, are an abuse of discretion, and are not supported by competent, material, and substantial evidence on the record. The Planning Commission Chair read aloud Sections 40-772 (regarding PUDs) and 40-693 (regarding SAUs), but the Commission did not deliberate about each of the standards for approval of those uses, nor did it hold a vote as to whether North Shores' application met each subpart of each standard. The Planning Commission also failed to prepare a report or findings of fact memorializing the reasons for its decision.

Not only did the Planning Commission's approvals fail procedurally, they are also legally incorrect and do not meet the requirements of the zoning ordinance. North Shores' applications were deficient because they did not include various plans or other required information. For those reasons alone, the applications should have been rejected. Moreover, the North Shores' proposed boat canal clearly violates provisions in the Zoning Ordinance prohibiting excavation of a channel or canal for the purposes of creating water frontage. The Planning Commission also

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failed to consider or apply Zoning Ordinance provisions regulating land use and sand mining in critical dune areas.

For these reasons, and as will be more thoroughly set forth in briefing and at a future hearing before this Board, the Coastal Alliance asks the Zoning Board of Appeals to reverse the decisions of the Planning Commission granting PUD and SAU approval to North Shores of Saugatuck.

Sincerely,

Rebecca L. Millican
rebecca@envlaw.com

xc: Steve Kushion, Zoning Administrator & Planner
Brad Rudich, Township Clerk
(via email)

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FAX (269) 857-4542

NOTICE TO APPLICANTS FOR VARIANCE FROM THE ZONING ORDINANCE

The Board of Zoning Appeals consists of 3 members who are residents of the Township, the first member of the Board of Appeals being the Chairman of the Township Zoning Board, the second member being a member of the Township Board appointed by the Township Board, and the third member being selected and appointed by the Township Board from among the electors residing in the Township.

The Board of appeals is empowered by Township ordinance and State law to grant a variance from the requirements of the Zoning Ordinance only when it finds from reasonable evidence that certain facts and conditions involved in complying with the requirements of the ordinance, all as outlined in the attached sheet.

The Board cannot change zoning. This can only be done be appropriate ordinance passed by the Township Board.

Before deciding upon an application, the Zoning Board must conduct a public hearing. Notice of such hearing is given to each property owner or occupant of property within 300 feet of the property in question. At this time of the hearing, the applicant or his representative is called upon to give reasons why his appeal or application should be granted. Any interested person who is present is then given an opportunity to be heard. The applicant or his representative will have the opportunity to speak in rebuttal or may be called upon to answer questions by the Board members relative to his/her case. Reference is again made to the information on the attached sheet. Each applicant must give evidence that there are practical difficulties or unnecessary hardships involved and that the four conditions do exist. It is mandatory that the applicant complete the form for filing with the application, and submit building and/or plot plans as appropriate.

After the Hearing is closed, the Board takes each case under advisement. The applicant is then notified in writing after a decision is made.

BOARD OF ZONING APPEALS
TOWNSHIP OF SAUGATUCK, ALLEGAN COUNTY, MICHIGAN

Application to the Zoning Board of Appeals to authorize a variance from the requirements of the Zoning Ordinance.

TO THE ZONING BOARD OF APPEALS:
Request is hereby made for permission to:

Extend N/A
Erect
Alter N/A
Use

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FAX (269) 857-4542

Convert N/A

Contrary to the requirements of Section (s) N/A of the Zoning

Ordinance, upon the premises known as _____ and described

as see attached letter.

The following is a description of the proposed use:

1. Name of ~~applicant~~ Appellant: Saugatuck Dunes Address: 345 Griffith St., Saugatuck, MI
2. Interest of Applicant in the premises: Coastal Alliance N/A
3. Name or Owner: North Shores of Saugatuck, LLC Address: 185 W. 8th St., Holland, MI
4. Size of property to be effected by the variance: N/A
5. Proposed use of building and/or premises: N/A
6. Present use of building and/or premises: N/A
7. Size of proposed building or addition to existing building, including height: N/A
8. Has the building official refused a permit? N/A
9. If there has been any previous appeal involving the premises, state the date of filing, nature or appeal and disposition of same: (use separate sheet) See attached letter.

Rebecca Millican 2017-06-30

Signature of Applicant

Rebecca L. Millican, Attorney for Appellant

Notes: Incomplete applications will be returned to the applicant.

This application must be accompanied with a fee of $ _____ payable to the Township Clerk.

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SUPPLEMENTAL INFORMATION FOR APPLICATION TO BOARD OF APPEALS

Since a variance cannot be authorized by the Board of Appeals unless it finds reasonable evidence that all of the following conditions exist, it is imperative that you give information to show that these facts and conditions do exist. (reference Zoning Ordinance 4-e).

A. That there are exceptional or extra-ordinary circumstances or conditions applying to the their property in question as to the intended use of same that do not apply generally to other properties in the same zone district.

N/A

B. That such variance is necessary for preservation and enjoyment of a substantial property right similar to that possessed by other property right similar to that possessed by other properties in the same zone district and in the vicinity; provided that the possibility of increased financial return shall not of itself be deemed to warrant variance.

N/A

C. That the authorizing of such variance will not be of substantial detriment of adjacent property and will not materially impair the intent and purposes of the Zoning Ordinance of the public health, safety, and welfare.

N/A

D. That the condition or situation of the specific piece of property or the intended use of said property for which the variance is sought is not of so general or recurrent a nature as to make reasonably practicable the formulation of a general regulation for such condition or situation.

N/A

Attach additional sheet (s) if necessary.

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AFFIDAVIT OF DAVE ENGEL

Dave Engel, being sworn, states:

1. I reside at 3041 Indian Point Road, Saugatuck, Michigan

2. I am a member of the Saugatuck Dunes Coastal Alliance.

3. I have more than 40 years of professional experience guiding salmon and trout fishing tours out of Saugatuck Harbor. I began my career as a first mate at a very young age. I then bought my first charter boat, The Best Chance, when I was 18. Later I operated a very successful sporting goods store on the Kalamazoo River in downtown Saugatuck from 1984 until 1998 when I sold the store, which is still operating. Following the sale of the store I focused on the tournament fishing circuit. My boat, The Best Chance Too, has won over 65 salmon and trout tournaments. I am the number-one money winner of all time on the Great Lakes.

4. I am on the river in my charter boat nearly every day from when the ice is gone through September, depending upon the weather. I captain over 100 charter groups a year. My son and I also take the Douglas Elementary sixth grade class out for an annual fishing charter.

5. The Best Chance Too, a 36' Tiara yacht, is Coast Guard-licensed and DNR-inspected for charter fishing cruises.

6. Fishing is my way of life. My son is also a charter boat captain.

7. I have safety concerns about the marina and boat basin proposed at the narrowest and busiest stretch of the Kalamazoo River. Adding nearly fifty large boats at that juncture of the river will create additional and unnecessary hazardous congestion.

8. Saugatuck Township addressed potential issues like this when it passed section 40-906 of the zoning ordinance, which states in its 'Intent and Purpose': 'Pursuant to its

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deliberations and discussions, 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.'

9. I am concerned, as a Saugatuck Township resident whose business relies on safe boating conditions and healthy fisheries, that the Saugatuck Township Planning Commission ignored Section 40-906 by granting preliminary approval for a marina and boat basin to North Shores of Saugatuck, LLC. I am concerned that by ignoring the 'Intent and Purpose' that the Planning Commission is once again creating a nuisance condition and impairment of the Township's natural resources.

10. As the third-generation caretaker, my son will be the fourth-generation caretaker, of the 1,000-acre Potowatomie Gun Club located on the Kalamazoo River in Saugatuck Township, I am also concerned that the Planning Commission decision could 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.

11. Allowing Saugatuck Township's Planning Commission to ignore the ordinance that clearly states, "**In no event** shall a canal or channel be excavated for the purpose of increasing the Water Frontage' will create unnecessary hazardous conditions for my charter boat company at the narrowest part of the Kalamazoo River, as well as create the potential for many canals and channels to forever alter natural resources around the Potowatomie Gun Club.

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12. My safety, and the safety of all others who use the Kalamazoo River, as well as my financial well-being is directly affected by the Saugatuck Township Planning Commission ignoring the ordinances in Section 40-906-910.

13. It is important for the health of the Kalamazoo River and the Great Lakes that we all follow the laws intended to protect the fisheries and aquatic resources, just as it is important that we all follow the laws intended to protect the safety of all boaters.

14. This Affidvait is made on my own personal knowledge. If called as a witness, I could competently testify to the facts in this Affidavit.

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[witness name]

STATE OF MICHIGAN)
)ss
COUNTY OF Allegan)

Acknowledged before me on this 17th day of August 2017, by David L Engel

Notary Public

Allegan Ottawa County, Michigan

ANDREW R. COOK
NOTARY PUBLIC - MICHIGAN
OTTAWA COUNTY
MY COMMISSION EXPIRES 04/10/2023
ACTING IN ALLEGAN COUNTY

Acting in Allegan County

My commission expires: 4/10/2023

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AFFIDAVIT OF LIZ ENGEL

Liz Engel, being sworn, states the following:

1. I reside at 3041 Indian Point Road, Saugatuck, MI.

2. I am member of the Saugatuck Dunes Coastal Alliance and have been since 2009.

3. I participated in the public process to develop and adopt the 2005 Tri-Community Master Plan for Saugatuck Township, and I support the goals of the Master Plan to: promote the preservation of open space and natural areas along the Kalamazoo River and Lake Michigan; protect the aesthetic value of the waterfront areas; and in particular to preserve the dune ecosystem in a natural state to the greatest extent possible.

4. I supported and participated in the public process to pass a millage in 2010 to fund legal defense of the Township's locally-determined zoning which sought to protect the parks and open spaces along the lakeshore, riverfront, and particularly those containing critical sand dunes.

5. I am a Realtor primarily selling residences in Saugatuck Township, Saugatuck, and Douglas.

6. When selling homes in these areas, a major selling point to my clients are the Tri-Communities' parks, natural areas and open spaces – particularly the Kalamazoo River and the Saugatuck Dunes. As well as our community's well-publicized efforts to protect these areas through land acquisition, conservation easements, and zoning laws. These areas are valued by my clients because of their ecological, recreational, and aesthetic qualities protected by local zoning laws.

7. I believe these areas add to the property values and home sale prices in the Tri-Community.

8. Consequently, I am very concerned that the Planning Commission's preliminary approval of the marina and boat basin is not only in violation of the guiding principles of our Tri-Community Master Plan and the 2010 millage, but specifically of our Township ordinance that clearly states, "**In no event** shall a canal or channel be excavated for the purpose of increasing the Water Frontage."

9. When selling homes along the Kalamazoo River my clients need to be assured that zoning laws are stable and enforced, especially those that are written to protect the area's natural resources which in turn drive property values. I am very concerned that the Planning Commission's preliminary approval of a marina and boat basin, in clear violation of local zoning and the Tri-Community Master Plan, will disrupt Saugatuck's strong real estate market.

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10. The Township's anti-funneling law that states "**In no event** shall a canal or channel be excavated for the purpose of increasing the Water Frontage" has made my job as a realtor easier; it has removed fear some clients have of purchasing property adjacent to another property that could be subject to 'funneling.'

11. Accordingly, I am concerned that the proposed marina and boat basin will significantly impair my ability to use the Kalamazoo River as a selling point to my clients when selling homes in the Tri-Community. I am also concerned that allowing the Planning Commission to arbitrarily ignore the anti-funneling ordinance will result in lower property values and selling prices. This market effect would cause financial harm to me in the form of fewer sales and lower commissions due to lower selling prices. It could also cause strife between adjacent property owners.

12. This Affidavit is made on my own personal knowledge. If called as a witness, I could competently testify to the facts in this Affidavit.

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Elizabeth A Engel
[witness name]

STATE OF MICHIGAN)
)ss
COUNTY OF Allegan)

Acknowledged before me on this 17th day of August 2017, by ELIZABETH A ENGEL

Notary Public
Ottawa County,
Michigan

ANDREW R. COOK
NOTARY PUBLIC - MICHIGAN
OTTAWA COUNTY
MY COMMISSION EXPIRES 04/10/2023
ACTING IN ALLEGAN COUNTY

Acting in Allegan County

My commission expires: 4/10/2023

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AFFIDAVIT OF PATRICIA BIRKHOLZ

Patricia Birkholz, being sworn, states:

1. I reside at 3413 Sixtyfourth Street, Saugatuck, Michigan.

2. I am a member of the Saugatuck Dunes Coastal Alliance.

3. Representing Saugatuck Township and Saugatuck Township Parks & Recreation, I was appointed Chair of Michigan's first ever Citizen's Advisory Committee in 1980 tasked with designing and planning Saugatuck Dunes State Park to ensure the Park reflected the majority view of local citizens not only in concept but also in the details of much of the design.

4. The plan was unanimously approved by the Natural Resources Commission in January 1982. In October of 1988, the 291 acres known as the Luther-Uhl property were subsequently dedicated as a state-designated natural area, under the provisions of the Wilderness and Natural Area Act. On November 4, 2010 the 291-acre Natural Area was re-named the Patricia Birkholz Natural Area to honor my 30-year career in public service. Among other things, I helped draft local and state legislation aimed at protecting the Great Lakes, the Saugatuck Dunes, and Saugatuck Dunes State Park during my career.

5. The 291 acre Patricia Birkholz Natural Area is immediately adjacent to the proposed marina and boat basin. The proposed boat basin, 18' deep and 1,500' long, will come to within about 200' of the Natural Area that was named after me.

6. 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.

7. Professor Lissa Leege[1], who has studied the interdunal wetlands or wetpannes since 1993, wrote in response to proposed development on the former McClendon property, stating, 'Wetpannes hold water near the soil surface and support an incredible diversity of plant and animal species found no where else in the dunes. This special hydrology is a life support system to the whole dune complex and is easily disrupted. Without functional wetpannes, the integrity of the dune system is threatened and the critical ecosystem services provided by the dune system will be compromised. Once altered, wetpanne hydrology is not readily restored. The

[1] Lissa Leege is Professor of Biology and Director of the Center for Sustainability at Georgia Southern University, and a plant ecologist with a PhD from Michigan State University. She has studied the Saugatuck Dunes for more than 20 years.

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wetpanne system is interconnected throughout the dunes, and impacts will not just be isolated to the location of [proposed] development.' Those same concerns still exist (indeed, have increased) today.

8. I have great concern that the marina and boat basin, as proposed, will damage the fragile, globally-imperiled interdunal wetlands that I have spent nearly my entire adult life trying to protect, especially the wetlands and dunes to which my name is attached. I fear that if the marina is dredged, the interconnected wetpannes system will forever be compromised and the integrity of the Patricia Birkholz Natural Area will be destroyed.

9. As an elected official I actively participated in the process to draft the 1989 Tri-Community Master Plan, as well as the update in 2005.

10. The Tri-Community Master Plan specifically addresses, at several points, how to address possible development at the river mouth:

- "The Plan seeks to define a balance between competing uses. It places protection of the natural environment as first and foremost in making future land use decisions along the Lake Michigan and Kalamazoo River waterfronts." [Pg 8-2.]
- "The northwest corner of the Township, along with the most of the land in Saugatuck west of the Kalamazoo lake should be preserved for public open space and the portion that remains in private ownership should be maintained for low intensity uses (like the art colony and church camp)." [Pg 10-7.]
- "Although waterfront lands have a high revenue generating potential, a major attraction of both the Lake Michigan and Kalamazoo River waterfronts is their scenic, natural shorelines composed of forested sand dunes and large wetland areas. Should these natural areas be greatly damaged or destroyed through inappropriate development, then the "goose that laid the golden egg" will be dead." [Pg 8-2.]

11. The proposed marina and boat basin contradict the goals and policies that were unanimously approved in the Tri-Community Master Plan; goals and policies that protect the natural resources that drive Saugatuck's tourist-based economy; goals and policies that protect the dunes that are named after me. For example, among the goals and policies embodied in the plan is a policy statement that development of high intensity residential uses along the waterfront should be discouraged. [Pg. 1-10.] Waterfront development is supposed to maintain visual access and the natural beauty of the waterfront for the broader public. [Pg 1-14.] Finally, waterfront development must be "consistent with environmental protection policies in this Plan" and "contribute to local quality of life." [Pg 1-13.]

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12. After helping to draft the Tri-Community Master Plan, I helped implement the goals and policies of the Master Plan including the establishment of the Saugatuck Harbor Natural Area in 2012 (across the river from the proposed marina) and placing Tallmadge Woods (immediately south form the proposed marina) into a conservation easement in 2008.

13. My name appears on the sign welcoming visitors to the Saugatuck Harbor Natural Area. I am extremely concerned that the proposed marina and boat basin will have a negative effect on the local, regional, and state investment of $20 million in acquiring the Saugatuck Harbor Natural Area.

14. More than 600 people donated to the acquisition of the Saugatuck Harbor Natural Area for the sole purpose of preserving the dunes, interdunal wetlands, marsh, and lagoon exactly how they are. As a citizen of Saugatuck Township, whose name appears on the sign welcoming visitors to the Natural Area, I feel a great responsibility that we should leave a legacy for those who come after us. As I've stated throughout my public service career, 'Only God can create a dunes eco-system, but it is up to us to protect them for the next generation.'

15. I feel a great responsibility as a former Saugatuck Township Trustee, State Legislator, and Director of the Great Lakes to ensure my local government is properly following all laws aimed at protecting the investments in Saugatuck Dunes State Park, Tallmadge Woods, and the Saugatuck Harbor Natural Area. The proposed marina and boat basin contradict the unanimously approved Tri-Community Master Plan and violate local zoning ordinance Sec. 40-910(h) that clearly states 'In no event shall a canal or channel be excavated for the purpose of increasing the Water Frontage.'

16. Any inappropriate development that damages the investments made by regional philanthropists and the State of Michigan will permanently damage the legacy of stewardship I have built over my 30-year career in public office, especially if my local unit of government ignored local zoning and was procedurally deficient in doing so.

17. I feel responsible to the Michigan Natural Resources Trust Fund Board to ensure their $10.5 million investment in the Saugatuck Harbor Natural Area[2], a grant that I lobbied harder for than nearly any legislation during my time in the house and senate, is not negatively impacted due to the local Planning Commission misreading local zoning ordinances. I also feel a great deal of responsibility to ensure the integrity of the project that so many stakeholders and their constituencies devoted so much time, energy, and financial support to achieve. It took the collective efforts of the Trust Fund, the Parks & Recreation department, members of the

[2] At the time, the $10.5 million grant was the largest ever considered by the Trust Fund, and it is still one of the largest. The grant was finally approved after convincing decision-makers that preserving the entire property as a whole was critical.

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Saugatuck township board, the Governor's office, and so many individuals to make the Natural Area become a reality, and their dedication and efforts should be considered in land use decisions impacting it.

18. I am greatly concerned that the boat basin will damage aquatic life and habitat in the river mouth area, including Ox-Bow lagoon and marsh, by artificially increasing the water temperature. And by allowing nearly fifty boats and adding more than 3,000 feet of frontage with concrete walkways, roads, driveways that will also negatively impact aquatic resources by adding run-off into the habitat we have paid tens of millions of dollars to protect.

19. I am very concerned that if the misinterpretation of our local zoning ordinance and Master Plan by the Township Planning Commission is allowed to go forward that I will no longer be seen as a trustworthy steward of grant money to help protect the natural resources in the Saugatuck Dunes that drives our $265 million a year local tourist-based economy.

20. I have helped raise tens of millions of dollars for projects in the Saugatuck area aimed at protecting the natural resources. If a marina and boat basin, contrary to local zoning, is allowed to be dredged in an area that is not only nearly completely surrounded by publicly-funded natural areas, but is also home to a historic site, globally-imperiled interdunal wetlands, and within the Michigan Critical Dune boundary, I am concerned that I will no longer be able to successfully raise money for conservation efforts; no funders will believe the projects will truly be protected by local zoning and the Tri-Community Master Plan.

21. My feeling of responsibility and concern is best communicated in the letter Lana Pollack, former Chair of the Michigan Natural Resources Trust Fund Board, wrote to the National Trust for Historic Preservation in 2010 requesting a special designation for the Saugatuck Dunes (this letter came just following Pollack's support of a $10.5 million grant for the acquisition of the Saugatuck Harbor Natural Area):

> 'My own valuation of this area is best demonstrated by the recent MNRTF decision to grant $10.5 million to protect a portion of the land now representing a significant part of this application. The grant approved in December 2009 is one of the largest MNRTF has ever made and is a particularly impressive commitment given the intense competition from other worthy applicants that year. Support for the grant did not come easily, but not because of a questioned worth of the project – 171 acres of critical dunes with globally imperiled inter-dunal wetlands, habitat that is home to several threatened and endangered species. The project's value was undoubtedly enhanced by its immediate proximity to Saugatuck's Oval Beach, the Saugatuck Lighthouse Cottage and the Ox-Bow School of Art. Although MNRTF is focused on saving natural landscapes, we also recognized in this case the historic and cultural context of the particular 171 acres that our grant was supporting. The designation that

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we now seek from the National Trust for Historic Preservation is needed because of the threat of development on the parcel immediately north of the Saugatuck Harbor Natural Area. The current proposal calls for a major marina development with a suggested nine story hotel, restaurants, retail businesses as well as a 70 slip marina near the site of the buried ghost town of Singapore – all prohibited by current zoning. If completed, the proposed development's impact on MNRTF's investment of $10.5 million still leaves me concerned that our public investment may become mostly the enhanced viewscape for a commercial development.'

'Fortunately, the history of preservation of the Saugatuck Dunes is strong. In the 1940's the State of Michigan looked at constructing a State Park at the mouth of the Kalamazoo River. In the 1950's the National Park Service surveyed the Saugatuck Dunes for its potential as a National Lakeshore. In the 1980's area citizens worked together to draft the Master Plan for the Saugatuck Dunes State Park and Natural Area. This followed the initial plan from the state DNR that called for paved roads and a parking plot on the beach, which was met with near unanimous resistance. Since that time several additional key parcels have been placed into conservation easements or turned into parks; historic buildings have been acquired by the local Historical Society; and progressive planning has established a Lakeshore Open Space District designed to better protect the historic and ecological treasures along the river and lakeshore.'

'It was with this in mind – the long and determinedly fought history of protecting the Saugatuck Dunes – that I felt comfortable urging MNRTF to award the $10.5 million grant. The tenacious commitment of the local community to protect the Saugatuck Dunes' many historic, cultural and ecological resources ultimately held more sway than the threat of a developer's legal war chest to overturn protective zoning controls.'

22. This Affidavit is made on my own personal knowledge. If called as a witness, I could competently testify to the facts in this Affidavit.

Dated: August 17, 2017.

Patricia Birkholz

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STATE OF MICHIGAN)
)ss
COUNTY OF Allegan)

Acknowledged before me on this 17 day of August 2017, by Merri-Anne McKellips

Merri-Anne McKellips
Notary Public
Allegan County, Michigan
Acting in Allegan County

My commission expires: June 8, 2020

Merri-Anne McKellips
Notary Public, Allegan County, Michigan
My Commission Expires: June 8, 2020
Acting in _____ County, Michigan

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AFFIDAVIT OF MIKE JOHNSON

Mike Johnson, being sworn, states the following:

1. I reside at 399 Park Street, Saugatuck MI 49453.

2. I am member of the Saugatuck Dunes Coastal Alliance and have been since 2007

3. I am the owner of Coral Gables Complex in Saugatuck. The Coral Gables includes three restaurants, four bars, and banquet facilities. We also have Jet Ski rentals, a 32-foot climbing wall, and coin-operated kiddie rides. In addition to our 15 slip marina we have space to moor 20 smaller boats.

4. A majority of the patrons that frequent the Coral Gables are tourists. These patrons visit Saugatuck because of the beautiful harbor, the safe and picturesque boat ride on the river, beaches, and dunes. Many of my patrons spend the day at the beach, hiking in the dunes at the Saugatuck Dunes State Park and Saugatuck Harbor Natural Area, boating on the Kalamazoo River, or visit from another port.

5. I participated in the drafting of the 2005 Tri-Community Plan by responding to the community-wide survey I fully support the economic vision of the Master Plan, especially the many paragraphs describing the importance of protecting the lakeshore, riverfront, and dunes from inappropriate development. My business is dependent upon tourists returning to enjoy the beaches, dunes, and river, but my own personal enjoyment of the landscape will also be impacted by the proposed marina and boat basin.

6. My business is also dependent upon having a safe river upon which to recreate. The Coral Gables accommodates dock space for 100' yachts, 9' zodiacs, kayaks, jet skis, and most other vessels in-between.

7 I worry about the safety of my patrons, especially those that rent jet skis, if the marina and boat basin proposed by North Shores of Saugatuck, LLC for the most congested and narrowest part of the Kalamazoo River is allowed to be permitted. I will be directly impacted financially if the added congestion causes an accident which would likely increase my insurance costs.

8. I worry that increased accidents on the Kalamazoo River due to uncontrolled congestion will create a nuisance for tourists.

9 I am concerned that the Saugatuck Township Planning Commission ignored local zoning laws that they had put into place to protect the safety of those who use the river

10. I fear the Planning Commission is creating a dangerous situation at the river mouth neighborhood by ignoring the Purpose of Section 40-906 that reads: '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.'

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11 I fear that my jet ski rentals will no longer be a safe way to enjoy the river mouth if the Planning Commission is allowed to ignore the Township's anti-funneling measure that reads: ''In no event shall a canal or channel be excavated for the purpose of increasing the Water Frontage.'

12. Allowing a channel to be cut into the river for the purpose of adding nearly 50 large boats is just not safe, especially at that point in the river. This is why the Township approved the anti-funneling law and its general water access laws.

13. I also worry that the severe congestion the proposed marina and boat basin will create by adding more than 3,000 additional feet of docks at the river mouth will impact those day boaters who visit Saugatuck harbor, local shops and restaurants, and specifically my businesses. The added congestion, which local laws aimed to regulate, will create such a nuisance situation that day boaters might not make the trip to Saugatuck harbor.

14. Safe passage along the Kalamazoo River for all boaters is crucial for my business and the economic success of the three communities that share Saugatuck Harbor.

15. I am very concerned that if local zoning, written to protect the safety of boaters, is ignored fewer tourists will visit the area and will negatively impact my business.

16. This Affidavit is made on my own personal knowledge. If called as a witness, I could competently testify to the facts in this Affidavit.

Date: August 18, 2017

Mike Johnson

STATE OF MICHIGAN)
)ss
COUNTY OF Allegan)

Acknowledged before me on this 18 day of August 2017, by Merri-Anne McKellips

Merri-Anne McKellips
Notary Public, Allegan County, Michigan
My Commission Expires: June 8, 2020
Acting in Allegan County, Michigan

Merri-Anne McKellips
Notary Public
Allegan County, Michigan
Acting in Allegan County
My commission expires: June 8, 2020

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AFFIDAVIT OF MORT VAN HOWE

Mort Van Howe, being sworn, states:

1. I reside at 2378 Lake Shore Drive, Fennville, MI 49408.

2. I am a member of the Saugatuck Dunes Coastal Alliance.

3. Together with my wife Fran, I own Sweetwater Sailing, a charter sailboat business in Saugatuck Township.

4. For more than 20 years, I have held a U.S. Coast Guard 100 ton captain's license. I have been sailing my entire adult life, and have cruised all of the Great Lakes with the exception of Lake Superior. In the winter, my wife and I sail from Florida to the Bahamas. We are both experienced sailors and we perform our own maintenance and upkeep on our boats.

5. Our charter sailboat, the "Drifter" is a 30 foot Nonsuch 324 of Cat Boat design. She is a U.S. Coast Guard and Michigan DNR inspected vessel.

6. The Drifter is moored in the marina nearest to and upriver from the proposed North Shores of Saugatuck development. Relatively few homes and a church camp are between our marina and the proposed North Shores site, and only some of them have boats.

7. The Drifter accommodates up to six passengers for two- to three-hour charter cruises down the Kalamazoo River channel and out into Lake Michigan. Through the years we have taken frequent trips down the river to sail on the big lake. We have experienced the river, channel, and Lake Michigan in a multitude of conditions.

8. By way of background, the Kalamazoo River in this area sees regular, and sometimes heavy, seasonal use. Many people in small boats use the river for fishing and visiting the cove. Rentals of larger boats, such as pontoons, are popular as well, in addition to traffic from charter vessels such as my own, and the Star of Saugatuck paddlewheel boat. Additionally, Saugatuck sees many daily visitors from places like Holland, who may travel upriver to have lunch at a local restaurant or sightsee. Many of these users are inexperienced, and are not adept at handling their vessels.

9. The channel opening, where the Kalamazoo River meets Lake Michigan, is a particularly tricky spot, even for experienced sailors. Unlike other area river channels outletting to Lake Michigan, such as at Holland, the seawall piers extend straight out into the lake. Sandbars form seaward, extending from the sides of the channel, further restricting an already narrow passage. The waves created from the river flowing out and the lake flowing in are akin to the ocean tides I have seen rushing out in the "cuts" in the Bahamas. Many people do not appreciate the difficulty of navigating in this area. I have seen many near misses at the mouth of

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the channel over the years, such as swamped boats and near collisions. There is simply not much leeway or forgiveness in the channel opening.

10. In addition, the turning basin directly across from the proposed site of the boat basin is frequently host to dozens of smaller boats. These boaters anchor there, picnic, raft, and swim. Such activities are at odds with the increased boat traffic the boat basin would bring.

11. I am greatly concerned about the proposed addition of a boat basin to the already crowded river channel. I expect that homeowners in the North Shores of Saugatuck development would mainly traverse the Kalamazoo River between their marina and Lake Michigan, compounding the congestion and risks described above.

12. The potential size of the boats in the proposed basin is of special concern. Most of the largest boats currently on the river are around 35 to 40 feet. A vessel of 50 to 100 feet – as I have heard might be moored in the boat basin – is dramatically larger than the typical boat you see today, and would make two-way traffic very challenging. (You never want to get too close to either side of the channel, because the seawall is cement and can cause damage to a boat even from minor broadside bumping.)

13. There are currently no boats on the river of a comparable size. Maybe once or twice per year a member of the DeVos or Van Andel families may visit the area with a very large boat (much larger than typical). I cannot imagine what the channel would be like with multiple similar boats on the water all the time.

14. Saugatuck has also hosted small cruise vessels (over 100') from time to time. Those vessels may require dredging of the channel, and special information is circulated to the public, alerting boaters of those vessels' arrivals and departures.

15. Further, the channel is not very deep. Generally, the boats on the river today have a draft of up to 6 feet, but the river bottom is constantly changing, and anyone might run aground, creating a navigational hazard. It seems likely that the channel will have to be dredged more frequently as a result. That process itself causes congestion and disruption to boat traffic, and I wonder who will bear the burden of dredging costs.

16. After you successfully navigate the river channel and the outlet, there are still plenty of risks sailing on Lake Michigan. Storms or high winds may come up quickly, boats may take on water. The more inexperienced sailors might run out of gas, run aground, or sometimes even fall off their boat.

17. The maritime "rules of the road" govern boat traffic in close quarters situations, provide guidance as to right-of-way (priority is to non-motorized vessels), set out requirements for lights and other safety measures, and guide the conduct of sailors at sea. In my experience,

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not all boaters on the river channel and Lake Michigan abide by these rules, and I would expect that some of the new boaters from the North Shores development would be no different.

18. It is also a long-standing maritime rule that if any nearby vessel is in distress, you are required to assist. Thus, any of the types of incidents I describe above might create a situation where I might also have to put myself (and potentially my passengers) in harm's way in order to render assistance. In one notable incident, I rescued a local 85-year-old man and his daughter who had capsized in their small sailboat without life jackets after a storm with high winds suddenly developed. I had intended to head back to the marina, but after a very heavy gust of wind I had to turn around quickly and check on the small sailboat, which had indeed tipped over leaving its passengers in the water clinging to the hull. I am concerned that similar dangerous situations will increase with the addition of dozens of new boats in the area.

19. Because of this maritime rule to keep a lookout and help others, an increase in boater traffic increases the risk and burdens on other boaters, such as myself.

20. Finally, I am worried that the proposed boat basin will ruin the rare and exceptional experience of sailing on the Kalamazoo River and along the Saugatuck dunes that I and so many others hold so dear. The scenery still takes my breath away.

21. People patronize our business because of the unique opportunity to take in the view of the land from the water. Many people have never experienced this before.

22. Yesterday I took a couple from Chicago on a private cruise. They had never visited Saugatuck before, but were astonished at how beautiful it is, and planned to visit again. After telling them about the proposed development, they were shocked and said they could not imagine such a dramatic change.

23. If the proposed North Shores of Saugatuck boat basin and marina is constructed, the Saugatuck area will no longer draw clients such as these, threatening our livelihood. I have heard that the Kalamazoo is the last undeveloped channel outlet on the Great Lakes. For that reason, it is a relic to be preserved. The experience that Sweetwater Sailing offers its guests is becoming harder to find. The opportunity to escape modern life for a few hours is clearly invaluable to our passengers, and I too view the area as a true treasure.

24. This Affidavit is made on my own personal knowledge. If called as a witness, I could competently testify to the facts in this Affidavit.

Dated: August 17, 2017.

Mort Van Howe

Mort Van Howe

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STATE OF MICHIGAN)
)ss
COUNTY OF Allegan)

Acknowledged before me on this 18 day of August 2017, by Mort Van Howe.

Notary Public
Ottawa County, Michigan
Acting in Allegan County
My commission expires: 12-15-2019

GARY B. CORSI
NOTARY PUBLIC - MICHIGAN
OTTAWA COUNTY
MY COMMISSION EXPIRES 12/15/2019
ACTING IN ALLEGAN COUNTY

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AFFIDAVIT OF DIANE BILY

I, Diane Bily, being sworn, state the following:

1. I am a member of the Saugatuck Dunes Coastal Alliance.

2. I own property at 3524 Dugout Road in Saugatuck Township, Michigan, on which my family cottage is located.

3. Our property is located adjacent to and within 300 feet of the property that is owned by North Shores of Saugatuck, LLC, and under the Zoning Ordinance and state law we receive notice of public hearings regarding the property.

4. The property has been in my husband's family since 1953, and it is a historic cottage.

5. I have been visiting the cottage since I was a teenager, and I raised my family spending summers at the cottage, enjoying the natural and peaceful area.

6. In a typical year, I spend most of the summer season at the property with my family.

7. Throughout my life, I have enjoyed sunbathing, swimming, boating, and sitting on our property, observing the natural beauty and wildlife and plan to continue to do so as much as I can.

8. The natural setting and beautiful views from the property are essential to my enjoyment of it.

9. I am very concerned about the negative impact to the surrounding neighborhood by the proposed marina and boat basin. I understand that houses can be built on many places on the North Shore of Saugatuck property, but placing so many boats at that part of the river will create unsafe conditions for current residents of the neighborhood.

10. The river mouth neighborhood is primarily park and camp with cottages along the river. Allowing one property to have 50 boats will change the character of the neighborhood and create a nuisance and safety concerns, especially since the property does not have the river frontage to support that many boats.

11. North Shores of Saugatuck does not own enough river frontage to support that many boats. Though their property is on the channel, that is not a safe place to dock boats. The channel was also dredged in 1906. I am very nervous about my family's safety on the river, in our river mouth neighborhood, if 50 more boats are added.

12. I have invested in the cottage because of my plans to continue to use it and my belief that the area would stay relatively natural and scenic, as well as safe.

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13. This Affidavit is made on my own personal knowledge.

14. If called as a witness, I could competently testify to the facts in this Affidavit.

The above is true to the best of my knowledge, information and belief.

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Dated: August 21, 2017.

Diane Bily

Diane Bily

STATE OF ILLINOIS)
)ss
COUNTY OF Cook)

Acknowledged before me on this 22 day of August 2017, by Margaret B. Urbanczyk

OFFICIAL SEAL
MARGARET B. URBANCZYK
Notary Public - State of Illinois
My Commission Expires 9/22/2019

Notary Public
Cook County, Illinois
Acting in Cook County

My commission expires: 09-22-2019

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AFFIDAVIT OF KATHI BILY-WALLACE

I, Kathi Bily-Wallace, being sworn, state the following:

1. I am a member of the Saugatuck Dunes Coastal Alliance.

2. I own property at 3524 Dugout Road in Saugatuck Township, Michigan, on which my family cottage is located.

3. Our property is located adjacent to and within 300 feet of the property that is owned by Singapore Dunes, LLC, and under the Zoning Ordinance and state law we receive notice of public hearings regarding the property.

4. The property has been in my family since 1953. It is a historic cottage that I have been visiting my entire life.

5. In a typical year, I spend most of the summer season at the property with my family.

6. I treasure our family cottage due to the peace and serenity of the area and the natural beauty of the area, especially between my cottage and Lake Michigan, and its proximity to the Saugatuck Dunes State Park and Natural Area, Tallmadge Woods, Ox-Bow Lagoon, and Saugatuck Harbor Natural Area.

7. I would describe the character of the area as very natural with its recreational and park uses. The houses on the river mostly have natural yards. Most of the houses have docks, but none interferes with others enjoyment of the river. And there are very few seawalls which allows an amazing variety of animals to thrive in the area.

8. I have for decades enjoyed sunbathing, stargazing, and sitting outside my cottage watching wildlife come to the river's edge in the natural setting that makes the surrounding area so peaceful and quiet.

9. Our property includes approximately 150 feet waterfront property on the Kalamazoo River, and I have for decades used the property for boating, including canoeing and boating along the Kalamazoo River and for access to Lake Michigan

10. I also enjoy walking while enjoying the natural scenery and wildlife at the Saugatuck Dunes State Park and Natural Area, Tallmadge Woods, and the Saugatuck Harbor Natural Area.

11. I plan to continue to use and enjoy my property in the way described in this affidavit in the future; with frequent and regular trips every year

12. I have made investments in my cottage and property consistent with this plan in part because I thought that the local zoning was designed to protect the Saugatuck Dunes and the

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natural setting of the surrounding area, including the safety of those who use the Kalamazoo River.

13. My family's continued investment in the cottage, in part, has been with the understanding that local zoning and the Master Plan would help protect the riverfront in our surrounding area from damaging development. Not 'no development,' but unsafe and damaging development. We've often heard local people reference the section in Master Plan that says, '"The northwest corner of the Township, along with the most of the land in Saugatuck west of the Kalamazoo Lake should be preserved for public open space and the portion that remains in private ownership should be maintained for low intensity uses (like the art colony and church camp)." I am very concerned that a marina and boat basin that adds 50 boats to our quiet neighborhood is not what the Master Plan and zoning tried to maintain.

14. If the new channel is dredged for the boat basin, I will reduce or stop using the river for swimming and boating due to safety concerns.

15. The value of my property, along with the use and enjoyment of my property, will be substantially diminished if the proposed project moves forward due to the change in character to the river, the natural landscape, and the increase in boat traffic around and in front of my property.

16. I am very concerned that the increased boat traffic from the marina will forever change our neighborhood. And it will also change how our family, especially the next generation, are able to use the river.

17. My son, Nick, grew up being able to take the boat across the river to Tallmadge Woods, the Ox-Bow Lagoon, the basin, and the Saugatuck Harbor Natural Area. He has learned a great deal about the amphibians, reptiles, and fish of our river mouth neighborhood. And he has taught the rest of the family so much about our neighborhood. My family has always felt comfortable allowing him to take the boat across the river to these parks and natural areas. With the increased boats in the neighborhood, it will no longer be safe to let his generation, and his children's generation, the same opportunity to explore. It will be too dangerous and congested.

18. I raised my son, Nick, boating in the river mouth neighborhood of the Kalamazoo River. Throughout his childhood he would travel across the river from our cottage to Tallmadge Woods, the Ox-Bow Lagoon, the basin, and the Saugatuck Harbor Natural Area. My son's passion for reptiles and amphibians was sparked during these outings.

19. I am dismayed at the thought that 50 large boats could be allowed to dock in the river mouth area creating such traffic congestion that my son and I, and one day my son's children, will no longer be able to safely boat to these areas from our own dock.

20. If the new channel is dredged for the boat basin, I will cut back on when and how I use the river due to safety concerns.

21. I am very concerned that the increased boat traffic from the marina will completely destroy the current peacefulness of our river neighborhood. And it will also change how our family, especially the next generation, will use the river.

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22. As a longtime property-owner in the neighborhood at the Kalamazoo River mouth I am extremely concerned that the Saugatuck Township Planning Commission made an awful mistake in ignoring the laws that limit the number of docks allowed on the river. Their mistake, if uncorrected, will completely change the surrounding area. I worry that their mistake will make boating on the river unsafe. And I am very fearful that someone in my family could be physically harmed if the marina and boat basin are allowed to add an extra 50 boats to our quiet river neighborhood.

23. Our property is located on a tree-lined, narrow, dirt dead-end road, in a very scenic natural setting, and the view from my property in all directions, and in particular looking toward the river mouth, is very natural.

24. The only building within my usual view from my property is the "infirmary" for the neighboring Pine Trail Camp, which I rarely have seen people using.

25. The property is also very quiet, and I do not hear noise from our neighbors except for very occasional singing or other activity from the campers a couple of times per year.

26. I occasionally hear noise from boat traffic, but the only time it is constant is a couple of the busier tourist days of the summer, such as July 4th weekend, when I can hear noise from boats gathering in the "cove," which is the larger circle area in the Kalamazoo River located just to the northeast of my property, and south of the North Shore of Saugatuck, LLC, property.

27. There is very minimal or no light from surrounding properties at night, particularly in the direction of the river mouth, which allows me to enjoy stargazing.

28. On my property and the Saugatuck Dunes State Park and Natural Area, I have seen many kinds of plants and animals, including some of the plants and animals that are thought to be rare or endangered, such as the hooded warbler, pileated woodpecker, various hawks, and the pitcher's thistle.

29. The natural beauty and quiet and peaceful setting of my property, including the lack of noise, the beautiful view from my cottage and from my boat along the river, and the lack of light, are all very important to me enjoying my family cottage.

30. As long as I have been visiting the property, it has been a quiet and natural setting, including when the Marine "Factory" was operating, as the "Factory" was really just a small and quiet facility that I do not remember generating noise or light.

31. Periodically the boats would be taken out of the building onto the river and moored there while assembly was completed, and then we would see them and there would be some noise, but it was generally very quiet and the noise and view was not inconsistent with the existing natural and recreational character of the area.

32. I worry that by adding 50 slips for large-scale boats in my neighborhood that the added light and noise, and especially the added congestion on the river, I will not enjoy

our cottage as much or as often as I would otherwise.

33. I am concerned that the overall effect of the development, if built as proposed, will affect-the value of our property due to its negative effects on its aesthetic and environmental value and the damage it will cause to the Saugatuck Dunes, the jewel of our area.

34. This Affidavit is made on my own personal knowledge.

35. If called as a witness, I could competently testify to the facts in this Affidavit.

The above is true to the best of my knowledge, information and belief.

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Dated: August 21, 2017.

Katherine L. Bily-Wallace
Kathi Bily

STATE OF ILLINOIS)
)ss
COUNTY OF COOK)

Acknowledged before me on this 21 day of August 2017, by Margaret B. U

OFFICIAL SEAL
MARGARET B. URBANCZYK
Notary Public - State of Illinois
My Commission Expires 9/22/2019

Notary Public
Cook County, Illinois
Acting in Cook County

My commission expires: 09-22-2019

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AFFIDAVIT OF CHRIS DEAM

Chris Deam, being sworn, states:

1. I reside at 162 Throckmorton Avenue, Mill Valley, CA 94941.

2. I am a member of the Saugatuck Dunes Coastal Alliance.

3. The Deam family began vacationing at the Old Saugatuck Lighthouse in the northwestern corner of the Ox-Bow Lagoon, where the Kalamazoo River used to flow into Lake Michigan, in the early thirties, which my grandparents then acquired in 1937.

4. Three generations of my family have helped shape the essential character of the surrounding area at the mouth of the river and Ox-Bow Lagoon. My grandfather, Arthur Deam was President of the Oxbow School of Art for more than fifteen years.

5. The surrounding area is quiet natural area and seasonal camps and cottages. At the far north of the surrounding area is the 291-acre Patricia Birkholz Natural Area which is a state-designated Natural Area. On the eastern end are Pine Trail Camp, which is the historic site Oak Openings from the James Fennimore Cooper novel, and the 100-year-old Ox-Bow School of Art. At the southern edge is the Saugatuck Harbor Natural Area. Interspersed throughout the area are cottages, mostly seasonal. The proposed marina and boat basin would disrupt this carefully balanced and harmonious neighborhood.

6. Looking at the surrounding area of roughly 1,231 acres on a map the essential character is comprised of 54% natural area or conservation easement (664 acres comprised of the Patricia Birkholz Natural Area, Tallmadge Woods, the Saugatuck Harbor Natural Area, the McEnroe Conservation Easement), 38% is residential including the steep rolling dunes of the Padnos property that may or may not be buildable (472 acres), 3% Camp (35 acres that includes Pine Trail Camp and Ox-Bow School of Art), and river which represents 5% (59 acres).

7. The essential character of the river mouth neighborhood is specifically detailed in the Tri-Community Master Plan: "The northwest corner of the Township, along with the most of the land in Saugatuck west of the Kalamazoo lake should be preserved for public open space and the portion that remains in private ownership should be maintained for low intensity uses (like the art colony and church camp)." [Pg 10-7.]

8. It was at great cost to two generations of my family that we successfully fought two separate legal challenges and stopped plans to construct a road across our property to bring vehicular traffic to what is now the Saugatuck Harbor Natural Area.

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9. We have no driveway to our cottage. We access our cottage by boat, primarily canoe. In fact, we removed an old piano and brought in a new one using two canoes.

10. In approving the North Shores of Saugatuck's initial plans for a condominium and boat basin along the Kalamazoo River, the Saugatuck Township Planning Commission stated that the essential character of the river mouth neighborhood is 'boating' as opposed to quiet natural area and camp. I worry that this finding could set in motion a precedent of ignoring guidelines set in the Master Plan that state: "The Plan seeks to define a balance between competing uses. It places protection of the natural environment as first and foremost in making future land use decisions along the Lake Michigan and Kalamazoo River waterfronts." [Pg 8-2.] Ignoring this guideline could destroy the Ox-Bow experience, the Crow's Nest experience, and the solace my family finds on the Ox-Bow Lagoon.

11. I am very concerned that if the Planning Commission's finding that the essential character of the surrounding area is "boating" (even when discussing an area of dry land that is the location of a historic site and within Michigan's Critical Dune boundary) is unchallenged that it will set a precedent that will allow other changes to the surrounding area that will destroy the investment my family has made over the course of three generations -- four generations now that my children are helping to maintain the Old Saugatuck Lighthouse Cottage.

12. I worry that if the Planning Commission is allowed to approve such a disruptive plan that will impact my entire neighborhood with no written findings of fact following a series of procedural deficiencies (plan submissions the day of the Planning Commission meetings) that the essential character of the neighborhood the Deam family has helped shape over eighty years will be forever altered and that the precedent will be set for future negative alterations.

13. I worry that the Saugatuck Township Planning Commission too quickly and rashly determined the essential character of my neighborhood as being principally focused on boating. It clearly is not when considering boats are used June through September and during daylight hours. The area used for boating in the river mouth area is a fraction of the area set aside for designated natural area.

14. When the Saugatuck Township Planning Commission gave preliminary approval of North Shores of Saugatuck's boat basin plan, it essentially granted a variance from the very clear ordinance that states, 'In no event shall a canal or channel be excavated for the purpose of increasing the Water Frontage.' The Planning Commission did not discuss feasible alternatives. Nor did it discuss a demonstrated hardship. The Padnos property already has significant frontage on the Kalamazoo River and Lake Michigan. They have not demonstrated a need for such a significant variance; a variance that will forever alter the character and aesthetic of the surrounding area.

15. The Township Planning Commission's decision that gave preliminary conditional approval for a marina and boat basin, based on the incorrect assumption that boating

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Ignoring this guideline could destroy the Ox-Bow experience, the Crow's Nest experience, and the solace my family finds on the Ox-Bow Lagoon.

11. I am very concerned that if the Planning Commission's finding that the essential character of the surrounding area is "boating" (even when discussing an area of dry land that is the location of a historic site and within Michigan's Critical Dune boundary) is unchallenged that it will set a precedent that will allow other changes to the surrounding area that will destroy the investment my family has made over the course of three generations -- four generations now that my children are helping to maintain the Old Saugatuck Lighthouse Cottage.

12. I worry that if the Planning Commission is allowed to approve such a disruptive plan that will impact my entire neighborhood with no written findings of fact following a series of procedural deficiencies (plan submissions the day of the Planning Commission meetings) that the essential character of the neighborhood the Deam family has helped shape over eighty years will be forever altered and that the precedent will be set for future negative alterations.

13. I worry that the Saugatuck Township Planning Commission too quickly and rashly determined the essential character of my neighborhood as being principally focused on boating. It clearly is not when considering boats are used June through September and during daylight hours. The area used for boating in the river mouth area is a fraction of the area set aside for designated natural area.

14. When the Saugatuck Township Planning Commission gave preliminary approval of North Shores of Saugatuck's boat basin plan, it essentially granted a variance from the very clear ordinance that states, 'In no event shall a canal or channel be excavated for the purpose of increasing the Water Frontage.' The Planning Commission did not discuss feasible alternatives. Nor did it discuss a demonstrated hardship. The Padnos property already has significant frontage on the Kalamazoo River and Lake Michigan. They have not demonstrated a need for such a significant variance; a variance that will forever alter the character and aesthetic of the surrounding area.

15. The Township Planning Commission's decision that gave preliminary conditional approval for a marina and boat basin, based on the incorrect assumption that boating is the principal character of the neighborhood, conflicts with the long-established harmonious essential character of the surrounding area. Allowing a marina and boat basin in the river mouth neighborhood will have a direct negative impact on my family's investment in and use of the Old Saugatuck Lighthouse Cottage.

16. This Affidavit is made on my own personal knowledge. If called as a witness, I could competently testify to the facts in this Affidavit.

Dated: August ~~21~~ 22, 2017.

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

Chris Deam

State of California
County of MARIN

Subscribed and sworn to (or affirmed) before me on this 22 day of AUGUST, 2017, by CHRISTOPHER C. DEAM, proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

Signature (Notary seal)
NOTARY PUBLIC

FAATI MAROOFI
NOTARY PUBLIC - CALIFORNIA
COMMISSION # 2149163
MARIN COUNTY
My Comm. Exp. May 13, 2020

STATE OF ~~MICHIGAN~~ ~~CALIFORNIA~~)

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OLSON, BZDOK & HOWARD

September 18, 2017

Saugatuck Township Zoning Board of Appeals ***via email***
3461 Blue Star Highway
Saugatuck, MI 49453
office@saugatucktownship.org

RE: September 20, 2017 Public Hearing

Dear Zoning Board of Appeals Members:

Olson, Bzdok & Howard, P.C. submits this letter on behalf of the Saugatuck Dunes Coastal Alliance in advance of the upcoming September 20 public hearing concerning the Coastal Alliance's appeal of the April 26, 2017 decision of the Saugatuck Township Planning Commission to approve North Shores of Saugatuck, LLC's request for a planned unit development and special approval use permit to construct site condominiums and a private boat canal on the former Denison property. We hope you will carefully consider the issues addressed below, and urge the Zoning Board of Appeals to reverse the Planning Commission's approval of this project.

FACTUAL BACKGROUND

The Coastal Alliance

The Coastal Alliance is a coalition of individuals and organizations "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, beginning with the Saugatuck Dunes." For nearly ten years, the Coastal Alliance has remained committed to and focused on the protection of the dunes. It currently enjoys the support of more than 2,000 members.

Members of the Coastal Alliance include individuals who use and enjoy the recreational opportunities and aesthetic benefits of the Saugatuck Dunes via Lake Michigan and its shores, the Kalamazoo River, and the Saugatuck Dunes State Park. Other members are researchers who have studied, or will in the future study, the globally-unique dunal ecosystem. Additional Coastal

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Alliance members live adjacent to or in the vicinity of the proposed North Shores of Saugatuck development.[1]

North Shores' Application

North Shores requested approval from the Planning Commission for the "harbor cluster" – the first of several planned phases of development – consisting of a planned unit development (PUD) of 33 "dockominium" boat slip units and 23 site condos together with a special approval use (SAU) for a private man-made boat basin available to the site condo owners and property owners in future phases of the development.

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. It is estimated construction of the harbor would require dredging approximately 160,000 tons of sand from the basin and Kalamazoo River. Additionally, construction of condominiums around the harbor would occur within and destroy sensitive coastal dunes.

The PUD and SAU applications and plans were submitted to the Township in January 2017. 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. On at least two occasions the developer submitted revised plans or other information only hours before the meeting, making it impossible for planning commissioners to review prior to the meeting, and contravening requirements that applications and materials be submitted and complete at least 14 days prior.

Public comments about the harbor cluster focused on 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.

[1] Standing Affidavits submitted to the Circuit Court in Allegan County Circuit Court Case No.17-58275-AA. **Exhibit A.**

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At the April 26 meeting, the Planning Commission reviewed the standards of the Ordinance and voted unanimously to approve both the PUD and SAU for the harbor 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. The Planning Commission did not take public comment at the April 26 meeting until after the vote had already been taken.

On May 22 during its regular meeting, the Planning Commission approved the minutes of the April 26 meeting and certified those minutes as the documents of decision and memorializing the votes approving the PUD and SAU. Again, no findings of fact or conclusions were included in the written decision. A copy of the certification and documents of decision are attached as **Exhibit B**.

PROCEDURAL BACKGROUND

After the Planning Commission certified its decision on May 22, the Coastal Alliance filed an appeal of the decision in the Allegan County Circuit Court (Case No. 2017-58275-AA) on June 20. That action is still pending. In order to preserve its rights, the Coastal Alliance also submitted a notice of appeal to the ZBA on June 30 under Sec. 40-72 of the Saugatuck Township Zoning Ordinance.[2]

GROUNDS FOR APPEAL

The Coastal Alliance asserts both procedural and substantive challenges to the Planning Commission's decision. As described below, the Planning Commission's approvals of the PUD and SAU applications do not comply with state law, are an abuse of discretion, and are not supported by competent, material, and substantial evidence on the record.

The Planning Commission's Approval of the "Boat Basin" is Clearly Contrary to the Zoning Ordinance

The proposed channel or canal along which the harbor cluster would be constructed is clearly disallowed by Sec. 40-910(h) of the Zoning Ordinance. Although the Planning Commission briefly discussed Sec. 40-910(h) during the April 26 meeting, it quickly concluded the provision did not apply. That conclusion is confounding, and obviously contrary to the plain language of the "anti-keyholing" ordinance:

[2] To the extent this letter raises issues regarding the proper interpretation of the Saugatuck Township Zoning Ordinance, this is also a request for interpretation under Section 40-72(2).

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> ***In no event*** shall a canal or channel be excavated for the purpose of increasing the Water Frontage required by this section. Canals or channels which interface with an Inland Waterway or Lake Michigan and were lawfully in existence as of the effective date of this section may be cleaned and maintained in accordance with applicable laws of the State of Michigan so long as they are not enlarged.

The harbor cluster would be built along a narrow strip of land fronting the Kalamazoo River channel. North Shores plans to use that narrow strip as an access point for boats docked within a man-made, newly-excavated "boat basin" – exactly what Sec. 910(h) prohibits.

North Shores may point to Sec. 910(i) to argue that the Planning Commission could flexibly apply the Ordinance, including the anti-keyholing provisions. Sec. 910(i) provides:

> To the extent applicable, this article shall be considered when the Township receives a Planned Unit Development application. At the discretion of the Township, and as allowed by the standards in Section 40-779 and the objectives of Section 40-780, the requirements of this article may be modified.

Importantly, Sec. 910(i) first contains a direct mandate that the Planning Commission consider "this article" [i.e., the entirety of Article XII – Water Access and Dock Density Regulations] "to the extent applicable." Section 910(h) is directly applicable, because it addresses excavation along an inland waterway, just as North Shores is contemplating. Sec. 910(i) does not absolve the violation of Sec. 910(h), because 910(i) discusses only modification of "requirements" – not disregard of express prohibitions. And, as a matter of statutory interpretation, Sec. 910(h)'s unequivocal "in no event" language would control over Sec. 910(i)'s discretionary language.

Moreover, North Shores' proposed "boat basin" is clearly contrary to the intent and purpose of Article XII of the Zoning Ordinance, which prioritizes the preservation of the "physical, cultural, and aesthetic characteristics of [the] Inland Waterways"; seeks to prevent nuisance conditions and the impairment of "irreplaceable" natural resources; and thwart risks to public health, safety and welfare of all persons utilizing the Inland Waterways and occupying adjacent properties.

The Planning Commission's Approval Process was Procedurally Defective

The Planning Commission's process in reviewing, deliberating, and approving North Shores' PUD and SAU applications fell short of several requirements of state and local law. In general, the Planning Commission failed to meet its obligations to specifically determine

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whether each applicable standard set out in the Zoning Ordinance was met. The Planning Commission Chair read aloud Sections 40-772 (regarding PUDs) and 40-693 (regarding SAUs) during the April 24 meeting, but the Commission did not deliberate about each of the standards for approval of those uses, nor did it hold a vote as to whether North Shores' application met each subpart of each standard. In general, the Planning Commission's consideration of the applications was cursory, and the members of the Planning Commission failed to engage in any meaningful discussion about whether the applicable standards of the Zoning Ordinance were met.

The Planning Commission also failed to prepare a report or findings of fact memorializing the reasons for its decision, as required by MCL 125.3503(6). Similarly, the Planning Commission failed to prepare a written statement of recommendations, including suggested or required changes to the site condominium plan (Sec. 40-939).

The Planning Commission's Approval was not Supported by Competent, Material, and Substantial Evidence

The Planning Commission overlooked or ignored a number of requirements of the Zoning Ordinance that were either incomplete or wholly missing from North Shores' application materials.

Planned Unit Development:

The proposed site plan and application failed to meet the requirements of Sec. 40-772 (PUD Application Procedures), because, among other reasons, it did not include plans for a stormwater drainage system (Sec. 40-772(3)(f)) nor did it explain the "principal ties to the neighborhood and community with respect to transportation, water supply and sanitary sewage disposal (Sec. 40-772(3)(h)). Moreover, the application did not contain "information as to whether the proposed Use is compatible with neighboring properties and Uses" (Sec. 40-772(3)(k)), beyond a conclusory statement that the harbor cluster would be compatible. The application also failed to include any information concerning ownership and maintenance of open space, and the legal mechanisms by which open space would be preserved (Sec. 40-772(3)(l)), other than a boiler plate statement that a condo association would be established.

The proposed site plan and application also failed to meet the requirements of Sec. 40-941 (Contents of the Site Condominium Project Plan), because, among other reasons, it did not include a storm drainage and stormwater management plan (Sec. 40-941(2)), a utility plan (Sec. 40-941(3)), a street construction, paving and maintenance plan (Sec. 40-941(6)), or a "complete list of other review and approval agencies and copies of any comments, recommendations or letters of approval of any agencies of the county, state or federal government having jurisdiction

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over any element of the plan or its construction." (Sec. 40-941(7)). Additionally, the information from North Shores concerning potable water supply, waste disposal facilities, and public and private utilities (Sec. 40-941(5)) contained no detail.

The proposed site plan and application also failed to meet the requirements of Division 5 of Article III of the Zoning Ordinance pertaining to the R-2 riverside residential district, because, among other reasons, it did not disclose the location, size, and height of accessory buildings; it depicted a boat shed positioned outside lot lines; it did not address the required 25-foot buffer at the water's edge; and North Shores requested excessive variances from various setback requirements. Additionally, the harbor cluster fails to preserve 35 percent of the total land area as open space (Sec. 40-275(a)(2)).

Special Approval Use:

The Planning Commission failed to consider the requirements of Sec. 40-740 as they pertain to the removal of approximately 160,000 tons of sand from the boat basin. Additionally, The Planning Commission failed to consider or apply the requirements of Sec. 40-337 of the Zoning Ordinance addressing management and regulation of uses in the designated critical sand dune areas.

The Planning Commission's Decision does not Adequately Protect the Environment and Preserve the Character of the Area

Finally, the proposed harbor cluster is generally inconsistent with the 2016 Tri-Community Master Plan created by the City of Saugatuck, Saugatuck Township, and the City of the Village of Douglas, which among other things, prioritizes protection of the natural environmental when making future land use decisions along the Lake Michigan and Kalamazoo River waterfronts.

The Planning Commission also failed to consider or apply the requirements of Sec. 40-337 of the Zoning Ordinance addressing management and regulation of uses in the designated critical sand dune areas, and failed to require that the harbor cluster be "designed, constructed, operated, and maintained in a manner harmonious with the character of adjacent property and the surrounding area." The natural, undeveloped character of the area surrounding the proposed boat basin was hardly mentioned by the Planning Commission, much less seriously considered.

The Coastal Alliance has Standing to Appeal to the ZBA

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North Shores sent a letter dated July 11, 2017 to the ZBA, in which it challenges the "standing" of the Coastal Alliance to appeal the Planning Commission decision. The purpose of this letter is to respond to the statements in North Shores' letter and provide you with further background on why the Coastal Alliance is the proper party to appeal this decision. Attached are affidavits from Coastal Alliance members that detail their uniquely impacted interest in Kalamazoo River and associated natural resources.

What Standing Requirements apply to the ZBA?

North Shores contends that the ZBA may only hear an appeal from "a person aggrieved." However, as allowed by the MZEA,[3] the Township Zoning Ordinance expands the ZBA's duties and the universe of potential appellants provided in the MZEA. Section 40-72(1) of the Ordinance states the ZBA "*shall*" have the powers and jurisdiction to:

> Hear and decide appeals from and review of any order, requirement, decision or determination made by the Zoning Administrator or the Planning Commission. **On appeal by any party affected thereby**, the Board of Appeals may reverse or affirm, wholly or partly, or may modify any order, requirement, decision or determination of the Zoning Administrator or the Planning Commission.

Because the Zoning Ordinance expands the duties of the ZBA in this way, **the ZBA's duty to hear appeals is broader under the Zoning Ordinance than the minimum duty provided in the MZEA.** The ZBA must hear appeals not only from "aggrieved" parties, but also any parties "affected" by a decision of the Planning Commission.

North Shores' letter urges the ZBA to ignore the Zoning Ordinance and apply only the MZEA's duty to hear appeals from "aggrieved' parties. However, the ZBA does not have the authority to ignore a duty provided in the Zoning Ordinance. It is mandatory that the ZBA follow the duties and procedures in the Zoning Ordinance because the MZEA requires that the ZBA "hear and decide on matters . . . upon which the [ZBA] is required to pass under a zoning ordinance adopted under this act."[4] As a result, the ZBA ***must*** hear this appeal if it determines

[3] MCL 125.3603(1): "The zoning board of appeals shall also hear and decide on matters referred to the zoning board of appeals … under a zoning ordinance adopted under this act."

[4] MCL 125.3603(1). See also *Grabow v Macomb Twp*, 270 Mich App 222, 229-30 (2006), explaining if an ordinance adopted pursuant to the TZA indicates a matter upon which the township ZBA is required to pass, then the ZBA "shall hear and decide" that matter (internal citations and quotations omitted). *Grabow* presented an analogous situation where the Court of Appeals held that a ZBA was required to review a use variance application, and did not have discretion to refuse to do so, because even though the zoning enabling act contained permissive

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that the Appellants are "affected by" the Planning Commission's decision to grant preliminary approval to the proposed project.

What Does It Mean to be "Affected" by the Planning Commission's Decision?

It does not take a lawyer, or pages of convoluted legal analysis of case law, to understand what it means to be "affected" by a decision of the Planning Commission. In fact, there is no case law that does answer the question of what it means for a party to be "affected" by a Planning Commission decision under the Township Zoning Ordinance. Instead, it is the job of the ZBA to interpret the zoning ordinance based on its plain meaning. According to the online Merriam-Webster dictionary, to "affect" is "to produce an effect upon."[5] Similarly, the free online dictionary defines "affected" as "changed, especially detrimentally" or "acted upon, influenced, or changed; emotionally stirred or moved."[6] Therefore, the question before the ZBA is whether the Planning Commission's decision will "produce an effect upon" Coastal Alliance members, or whether those members have interests that will be acted upon or changed, especially detrimentally?

What Does It Mean to be "Aggrieved" by the Planning Commission's Decision?

Despite the language of the Township' Zoning Ordinance, North Shores argues that the relevant question for standing in zoning appeals before the ZBA is whether the party bringing the appeal is "aggrieved"[7] rather than "affected." As explained above, this is not the correct reading of the Township's Zoning Ordinance. Even so, the Coastal Alliance and its members meet the definition of "aggrieved" under Michigan law.

A party that shows he/she will suffer "special damages" as a result of the zoning decision is considered an "aggrieved party."[8] In order to establish "special damages," a party must show they will be affected by the effects of the zoning decision in a manner different than the community at large. The Michigan Supreme Court has defined exactly what constitutes "special damages" in the context of zoning disputes over dockage and anti-funneling/anti-keyholing ordinances. In a case called *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.[9] The Supreme Court held that the lake association could show standing if the "defendant's activities directly affected the plaintiffs' recreational, aesthetic, or economic interests."[10]

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authority stating that the ZBA "may" hear a use variance, it was mandatory because the Zoning Ordinance provided a procedure to do so.

[5] www.merriam-webster.com/dictionary/affected

[6] http://www.thefreedictionary.com/affected

[7] MCR 7.122(C)(1)(a); MCL 125.3606.

[8] See *Brown v E Lansing Zoning Bd of Appeals*, 109 Mich App 688, 699; 311 NW2d 828 (1981).

[9] *Kallman v Sunseekers Property Owners Ass'n*, 480 Mich 1099; 745 NW2d 122 (2008).

[10] 480 Mich at 1099.

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Who Is the Appellant and How Are Its Members Affected?

The Appellant is the Coastal Alliance and its members.[11] 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. The Coastal Alliance is a visible organization with numerous supporters; for example, the Coastal Alliance Facebook page has over 3600 supporters.[12]

Attached to this submission are the affidavits of several Coastal Alliance members establishing their unique interests that are different than the citizenry at large. 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 has a long legacy of conservation and preservation in the area. 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. 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. As Senator Birkholz explains 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.[13]

In addition, Coastal Alliance members Diane Bily and Kathy Bily-Wallace own property adjacent to the site of the proposed boat basin canal. As explained in the attached affidavits, they frequently visit and enjoy a cottage on their property that has been in the family since 1953. They treasure their family cottage because of the natural and peaceful setting, and the viewshed from

[11] Coastal Alliance has representational standing under *Trout Unlimited v City of White Cloud*, 195 Mich App 343, 348; 489 NW2d 188 (1992).
[12] See www.facebook.com/saugatuckdunes.coastalalliance, last accessed on August 17, 2017.
[13] **Exhibit A**, Birkholz Affidavit.

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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 North Shores' property, including the site of the proposed boat basin canal. 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.[14] As neighboring riparian landowners on the Kalamazoo River, it is clear that the Bilys will suffer impacts that are far different and more direct than the citizenry at large. These impacts constitute "special damages" sufficient to show aggrieved party status.

Other Coastal Alliance member affidavits attached to this submission demonstrate wide and varied interests in the Kalamazoo River Watershed, including:

(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.[15]

(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.[16]

(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

[14] See Bily affidavits, **Exhibit A**.
[15] **Exhibit A**, Affidavit of Mort Van Howe
[16] **Exhibit A**, Affidavit of Mike Johnson

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aquatic habitat and increase funneling-accesses on the river by creating boat basins and marinas by cutting a canal or channel.[17]

(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.[18]

(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. [19]

These are exactly the types of recreational, aesthetic and economic interests that the Michigan Supreme Court has recognized as creating "special damages."[20] As such, the Coastal Alliance clearly has standing to pursue the current appeal.

CONCLUSION

The proposed Boat Basin canal is expressly prohibited by the Saugatuck Township Zoning Ordinance, Section 40-910(h) – "***In no event*** shall a canal or channel be excavated for the purpose of increasing the Water Frontage required by this section…." In addition, the Planning Commission's approval was procedurally defective; was not supported by competent, material and substantial evidence; and does not adequately protect the environment and character of the surrounding area. For all of these reasons, the Saugatuck Dunes Coastal Alliance respectfully submits that the ZBA must overturn the approval given to the North Shores' development proposal.

Thank you for your consideration of these issues.

[17] **Exhibit A**, Affidavit of Dave Engel
[18] **Exhibit A**, Affidavit of Chris Deam
[19] **Exhibit A**, Affidavit of Liz Engel
[20] Kallman, 480 Mich at 1100.

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Sincerely,

Scott W. Howard

SWH/klg

xc: Bill Rowe, ZBA Chair
Steve Kushion, Township Zoning Administrator
Brad Rudich, Township Clerk
Scott Smith & Nick Curcio, Township Attorneys
Jim Straub
Carl Gabrielse

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Attorney Scott Howard had affidavits from Patricia Birkholz, Diane & Kathy Bily, Mort Van Howe, Mike Johnson, Dave Engel, Chris Deam & Liz Engel that have unique interests in this development.

Attorney Carl Gabrielse, representing the owner and developer of North Shores of Saugatuck LLC, stated that the SDCA are opposed of any development. The SDCA contested it at the Planning Commission, ZBA and the Circuit Court. Attorney Gabrielse states that the SDCA are not an aggrieved party which means they would lack standing. Attorney Gabrielse questioned on who can initiate the process of the appeal to the ZBA. In 2013 the same appeal was brought to the Planning Commission for the decision of an approved preliminary PUD on the same property. The Zoning Board of Appeals concluded that SDCA and the Bily family did not have standing to appeal the decision of the Planning Commission. The Zoning Enabling Act states that the appeal must be taken by a person that is aggrieved. In 2015 the appeal for the same property went to Circuit Court and was determined that the SDCA did not have special damages and did not have standing. Attorney Gabrielse stated that the SDCA argues that it is entirely different projects. Attorney Gabrielse pointed out that the negative impacts from the SDCA are not different from either project. Allegations by the SDCA are similar regardless of the differences of the development.

Attorney Howard reiterated that there is standing beyond a reasonable doubt. The SDCA have rights with special interest. Attorney Howard stated that there are differences in the projects. The project now consists of dredging 160,000 tons of sand and a boat basin with river frontage which was not part of the previous development.

Public Comments and Correspondence:
Chairperson Putnam opens the floor up to the public and asked that they state your name, address and if you received a notice in the mail regarding this hearing and that public comment is based only on standing.

1. Patty Birkholz, 3413 64th St. Saugatuck twp, no notice received. Concerned about the channel changing the echo system dramatically.
2. Dave Burdick, 385 Fremont, Douglas, no notice received. Zoning Board of Appeals should have separate powers than from the Planning Commission board.
3. Jon Helmrich, 3522 64th St. Saugatuck twp, no notice received. Channel is very narrow.
4. Suzanne Dixion, 797 Center St. Douglas, no notice received. Concerned on water quality and temperature involving the sturgeons.
5. Dayle Harrison, 3108 62nd St. Saugatuck twp, no notice received. Believes it is not consistent to the Zoning Ordinance. Circuit court should decide if the SDCA has standing.
6. Larry Dickie, 6108 Old Allegan Rd. Saugatuck twp, no notice received. Zoning Board of Appeals made a mistake from the last standing regarding this development.
7. Steve McKown, 2845 Lake Breeze Dr. Saugatuck twp, no notice received. Concerned about environmental issues. Believes Circuit court defines standing differently than the Zoning Board of Appeals. Believes the 2013 decision by the ZBA was a mistake.
8. Laura Judge, 6510 Oakwood Ln. Laketown twp, no notice received. Will have effect on the public trust and the FDCA.
9. Jim Cook, 3507 64th St. Saugatuck twp, no notice received. Feels that every township resident is a co-owner of the state park which is adjacent to the project.
10. Liz Engel, 3041 Indian Point Rd. Saugatuck twp, no notice received. Concerns regarding the dredging and feels her and her husband would be affected by that because of their livelihood.
11. Dave Engel, 3041 Indian Point Rd. Saugatuck twp, no notice received. Charter boat captain and it would have a negative impact on him and his family. His concerns are safety based on the Deep Harbor marina development and also the increase of the traffic on the water.

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12. Cynthia McKean, 1000 Mason St. Saugatuck, no notice received. What the Planning Commission did was illegal.

Attorney Gabrielse addressed the public responses that their concerns were not based on standing.

Attorney Howard acknowledges that he was not sure who had standing if the SDCA had not been heard. He stated that there is a threshold when it comes to this level of government and Circuit court. Aesthetic, recreational, commercial interest gives you standing which the SDCA is referring to for their special damages and concerns.

Attorney Straub reaffirmed that there is no case law or statutory citation that says there is no difference between this body and the Circuit court pertaining to standing. Attorney Straub clarified that this Zoning Board of Appeals has the capacity as a quash jurisdiction.

13. Marcia Perry, 6248 Blue Star Hwy. Laketown twp, no notice received. Protecting the SDCA interest.

Close public hearing at 5:20 pm.

Chair Putnam asked ZA Kushion if he thought there were any changes from the 2013 hearing issue. ZA Kushion believed that they are very similar. The Bily parcel is further away from this development than the previous request and believed that the natural area was about the same distant as before.

Katherine Dritsas supports the SDCA standing at the local level. She believes the people have the right to express their issues.

Chair Putnam feels that if we support the SDCA standing, it would mean going against the Circuit court decision in 2013.

Rick Brady stated that looking at the guidelines at today's standpoint would determine that the SDCA would not have legal standing.

Chair Putnam stated he would have a struggle with reversing what had happened in 2013. Concern is that the courts have already upheld it and feels that nothing has changed from before.

Attorney Straub stated that he has a proposed resolution to deny standing and a proposed resolution to grant standing. He stated that the board needs to make a motion and someone to support one of these proposed resolutions.

Dritsas made a motion to grant the standing for the SDCA. No support.

Brady made a motion to deny standing, supported by Putnam.

Attorney Straub read the proposed resolution to deny standing that would be inserted into the minutes.

Attorney Straub stated that the board could make changes to the resolution and then make a formal vote on the resolution.

Motion by Brady, seconded by Putnam to deny standing. Motion passes 2-1.

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SAUGATUCK TOWNSHP
COUNTY OF ALLEGAN, MICHIGAN
ZONING BOARD OF APPEALS

EXCERPT OF MINUTES

This is an excerpt of minutes from a meeting of the Zoning Board of Appeals of Saugatuck Township (the "Township"), held at the Saugatuck Township Hall, 3461 Blue Star Highway, Saugatuck, Allegan County, MI 49453, on the 11th day of October, 2017, at 4:00 p.m.

Present: Mark Putnam, Rick Brady and Catherine Dritsas

The following Resolution was offered by RICK BRADY and supported by MARK PUTNAM.

RESOLUTON TO DENYING STANDING TO THE SAUGATUCK DUNES COASTAL ALLIANCE

WHEREAS, on April 26, 2017, the Saugatuck Township Planning Commission ("Planning Commission") granted preliminary site plan approval for a planned unit development ("PUD") and also for a special approval use ("SAU") by North Shores of Saugatuck, LLC ("North Shores") for a PUD development condominium project and SAU to develop a boat basin with docking facilities; and

WHEREAS, on July 3, 2017, the Saugatuck Dunes Coastal Alliance ("SDCA"), filed an appeal of the Planning Commission's April 26, 2017 decision; and

WHEREAS, on October 11, 2017, the Saugatuck Township Zoning Board of Appeals ("Zoning Board of Appeals") held a public hearing concerning whether or not the SDCA had standing to appeal the Planning Commission decision to the Zoning Board of Appeals; and

WHEREAS, the Zoning Board of Appeals carefully listened to the comments made at the public hearing on October 11, 2017; carefully considered the written materials submitted on behalf of the SDCA in support of standing; carefully considered the written materials submitted by North Shores against standing; carefully considered the provisions of the Michigan Zoning Enabling Act and the Zoning Chapter of the Township's Code of Ordinances ("Zoning Chapter") relative to standing; and carefully considered written confidential communications from Township counsel concerning this matter; and

WHEREAS, the Zoning Board of Appeals takes note that the Saugatuck Township Zoning Board of Appeals, after a public hearing held on April 4, 2013, denied standing to the SDCA and the Bily family, who own property at 3524 Dugout Road, regarding an appeal from a December 17, 2012 Saugatuck Township Planning Commission decision granting preliminary site plan approval to a condominium development proposed by Singapore Dunes, LLC, on a portion of the property that North Shores LLC now owns; and

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WHEREAS, the Zoning Board of Appeals takes note that on February 6, 2015, the Allegan County Circuit Court issued an opinion and order finding that SDCA lacked standing to appeal actions of the Michigan Department of Environmental Quality's ("MDEQ") with respect to the proposed construction of a road traversing the property that North Shores LLC now owns; and

WHEREAS, the Zoning Board of Appeals is aware that the SDCA has filed an appeal of the Planning Commission's April 26, 2017 decision with the Allegan County Circuit Court; and

WHEREAS, the Zoning Board of Appeals is aware that counsel for Saugatuck Township filed a Motion to Dismiss the SDCA appeal to the Circuit Court asserting that the SDCA lacked standing; and

WHEREAS, the Zoning Board of Appeals is aware that oral argument on the Township's Motion to Dismiss took place on August 28, 2017 and that the parties are awaiting the decision of Allegan County Circuit Court Judge, Kevin Cronin;

WHEREFORE, the Zoning Board of Appeals resolves the pending appeal as follows:

1. The Zoning Board of Appeals concludes that the SDCA does not have standing to appeal the April 26, 2017 decisions of the Planning Commission granting initial site plan approval for the PUD and SAU permits sought by North Shores, and therefore dismisses SDCA's appeal of those decisions.

2. In support of its conclusion that the SDCA does not have standing, the Zoning Board of Appeals makes the following findings:

A. Section 604(1) of the Michigan Zoning Enabling Act, MCL 125.3604(1), provides in relevant part: ". . . an appeal to the zoning board of appeals may be taken by a person aggrieved. . ." Courts have interpreted this standard as requiring proof of "some special damages not common to other property owners similarly situated." *Unger v Forest Home Township*, 65 Mich App 614 (1976). The Zoning Board of Appeals finds that this standard is required by state law, and that any lower standard that might be suggested in the Township's Zoning Ordinance conflicts with state law and is therefore invalid. *See id.*

B. The complaints made by the SDCA through its presentation and affidavits filed with its September 18, 2017 correspondence are complaints which might be true of any lakefront development on the property in question. Any development on the property might lead to additional dwellings, additional residents and visitors, motor vehicles, boats, all of which create additional noise and lights. In general, the complaints voiced by the SDCA in its presentation and affidavits would apply to any development of the property in question which establishes the general, as opposed to specific nature, of the damage that the SDCA is claiming associated with the proposed North Shores PUD and SAU.

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C. SDCA has not been able to explain satisfactorily how the Township Planning Commission would be able to prevent the development as proposed by North Shores with reference to adverse impact on wetlands or critical dune areas located within the property at issue. The SDCA has not been able to articulate how it would suffer any special damage, different from damage that would allegedly be sustained by the general public, with reference to the development of the subject real estate.

D. Various details of the proposed development have not been finally approved by the Michigan Department of Environmental Quality.

E. The SDCA, in support of its standing argument, provided an affidavit from the Bily family which owns property adjacent to the property owned by North Shores. However, the Bily family property is not adjacent to the property which is going to be developed. Rather, the site of the cottage owned by the Bily family is approximately 1575 feet from the southernmost boundary of North Shores' proposed PUD and approximately 1,071 feet from the easternmost boundary of North Shores' proposed PUD. Further, most of the easternmost portion of North Shores' proposed PUD will remain in open space, meaning that the Bily cottage would be even further than 1,071 feet from the improvements proposed by North Shores.

F. Neither the SDCA nor the Bily family articulated any "special damage" that the Bily family would incur as a result of the development of the PUD or the approval of the special approval use.

G. To the extent that the SDCA's standing claim relies upon the affidavit of Patricia Birkholz and the fact that the natural area in Saugatuck Dunes State Park is named after her, the ZBA finds that Ms. Birkholz should be congratulated for her work in supporting the creation of a natural area within the State Park. However, the ZBA also concludes that Ms. Birkholz does not maintain an ownership interest in the State park. The State Park and the Patricia Birkholz Nature Area therein is owned by the State of Michigan and managed by the Michigan Department of Natural Resources for the benefit of the general public. Even if North Shores' proposed development had any special impact on the State Park or the natural area contained within the park, the standing to contest the action of the Planning Commission would rest with the State of Michigan through its Department of Natural Resources, not with the SDCA or Ms. Birkholz.

H. The remaining affidavits submitted by SDCA allege damages even more remote than those described above, and are therefore insufficient to establish standing.

3. All resolutions in conflict in whole or in part are revoked to the extent of such conflict.

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YES: RICK BRADY MARK PUTNAM

NO: CATHERINE DRITSAS

RESOLUTION DECLARED ADOPTED.

Dated: October 11, 2017

Mark Putnam, Chairperson
Saugatuck Township Zoning
Board of Appeals

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3461 BLUE STAR HIGHWAY
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SAUGATUCK, MI 49453

PHONE (269) 857-7721
FAX (269) 857-4542

Convert N/A

Contrary to the requirements of Section (s) N/A of the Zoning Ordinance, upon the premises known as _____ and described as see attached letter.

The following is a description of the proposed use:

1. Name of ~~applicant~~ Appellant: Saugatuck Dunes Address: 345 Griffith St., Saugatuck, MI
2. Interest of Applicant in the premises: Coastal Alliance N/A
3. Name or Owner: North Shores of Saugatuck, LLC Address: 185 W. 8th St., Holland, MI
4. Size of property to be effected by the variance: N/A
5. Proposed use of building and/or premises: N/A
6. Present use of building and/or premises: N/A
7. Size of proposed building or addition to existing building, including height: N/A
8. Has the building official refused a permit? N/A
9. If there has been any previous appeal involving the premises, state the date of filing, nature of appeal and disposition of same: (use separate sheet) See attached letter.

Signature of Applicant

Rebecca L. Millican, Attorney for Appellant

Notes: Incomplete applications will be returned to the applicant.

This application must be accompanied with a fee of $ _____ payable to the Township Clerk.

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SUPPLEMENTAL INFORMATION FOR APPLICATION TO BOARD OF APPEALS

Since a variance cannot be authorized by the Board of Appeals unless it finds reasonable evidence that all of the following conditions exist, it is imperative that you give information to show that these facts and conditions do exist. (reference Zoning Ordinance 4-e).

A. That there are exceptional or extra-ordinary circumstances or conditions applying to the their property in question as to the intended use of same that do not apply generally to other properties in the same zone district.

N/A

B. That such variance is necessary for preservation and enjoyment of a substantial property right similar to that possessed by other property right similar to that possessed by other properties in the same zone district and in the vicinity; provided that the possibility of increased financial return shall not of itself be deemed to warrant variance.

N/A

C. That the authorizing of such variance will not be of substantial detriment of adjacent property and will not materially impair the intent and purposes of the Zoning Ordinance of the public health, safety, and welfare.

N/A

D. That the condition or situation of the specific piece of property or the intended use of said property for which the variance is sought is not of so general or recurrent a nature as to make reasonably practicable the formulation of a general regulation for such condition or situation.

N/A

Attach additional sheet (s) if necessary.

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OLSON, BZDOK & HOWARD

December 7, 2017

via email and facsimile
(269) 857-4542

Saugatuck Township Zoning Board of Appeals
3461 Blue Star Highway
Saugatuck, MI 49453

RE: Notice of Appeal of Approval of final site condominium PUD for North Shores of Saugatuck, LLC
Our File No. 5581.00

Dear Members of the Zoning Board of Appeals:

On behalf of our client the Saugatuck Dunes Coastal Alliance, Olson, Bzdok & Howard, PC submits this letter as formal notice of an appeal[1] from the Saugatuck Township Planning Commission's final approval of North Shores of Saugatuck, LLC's request for a planned unit development (PUD) for the construction of site condominiums on the former Denison property along the Kalamazoo River. The Planning Commission gave North Shores' site condos preliminary approval on April 26, 2017, and voted to approve the final site plan on October 23, 2017. The Coastal Alliance makes this appeal under Sec. 40-72 of the Saugatuck Township Zoning Ordinance and timely appeals within 45 days.

BACKGROUND

As you likely know, the Coastal Alliance is a coalition of individuals and organizations who live, work, and recreate in the Saugatuck area. Members include neighbors adjacent to North Shores' proposed project, scientists conducting research in the coastal dunes, and many individuals who use and enjoy the recreational opportunities and aesthetic benefits of the Saugatuck Dunes via Lake Michigan and its shores, the Kalamazoo River, and the Saugatuck Dunes State Park. The Coastal Alliance is focused on "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, beginning with the Saugatuck Dunes." For ten years, the Coastal Alliance has remained committed to and focused on the protection of the dunes. It currently enjoys the support of more than 2,000 members.

[1] The Coastal Alliance is also submitting the ZBA appeal form, which appears intended for appeals from variance decisions, but has been completed to the extent relevant.

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The Coastal Alliance has opposed the North Shores' proposed boat basin canal project since its inception. Members attended each Planning Commission meeting at which the project was reviewed, and offered public comments concerning the potential impact of the project on the dunes, the dunal ecosystem, and the Saugatuck area generally. Members urged the Planning Commission to take a measured and deliberative approach when considering the North Shores' applications.

At the October 23 meeting, more than a dozen Coastal Alliance members voiced their continuing concerns regarding the project, and their opposition to final site plan approval. More than one member suggested that final approval should not be granted until the Coastal Alliance's appeals over the project and other legal issues were addressed. Others reminded the Planning Commission of its obligation to consider the standards for final site plan approval contained within the Zoning Ordinance, and asserted that North Shores had not demonstrated that the project met the standards. Concerns over river traffic were also voiced, and members questioned whether the final site plan should be approved while permit applications for the construction of the boat basin around which the condos would be built remained pending with the Michigan Department of Environmental Quality and the United States Army Corps of Engineers.

Discussion amongst the Planning Commissioners focused on a potential walkway system within the PUD, North Shores' plan to protect a portion of the property through conservation easement (or lack thereof), and a performance bond. Planning Commissioners did not mention or consider the Zoning Ordinance or standards and requirements for approval before approving the final site plan by a 4-1 vote.

PROCEDURAL ISSUES

This notice represents the second appeal taken by the Coastal Alliance arising out of the Planning Commission's consideration of North Shores' proposed "marina cluster" development along the Kalamazoo River channel. The Coastal Alliance previously appealed the Planning Commission's preliminary approval of both the site condominium PUD and a SAU for a private marina or boat basin, around which the condos would be constructed. Because an ambiguity exists between Sec. 40-72 of the Zoning Ordinance and Section 603 of the Michigan Zoning Enabling Act concerning jurisdiction over appeals from the Saugatuck Township Planning Commission, the Coastal Alliance filed appeals both before this Board and in the Allegan County Circuit Court (*Saugatuck Dunes Coastal Alliance v Saugatuck Township and Saugatuck Township Planning Commission*, Case No. 2017-58275-AA).

On October 11, 2017, this Board conducted a public hearing on the Coastal Alliance's appeal. The ZBA did not reach the merits of the appeal, instead deciding that the Coastal Alliance did not have standing to appeal the Planning Commission's preliminary approval. That determination has been appealed in a new circuit court action (*Saugatuck Dunes Coastal*

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Alliance v. Saugatuck Township ZBA, Saugatuck Township, and North Shores of Saugatuck, LLC, Case No. 2017-58936-AA). On November 3, 2017, Judge Kevin Cronin dismissed the Coastal Alliance's first circuit court appeal, holding that the Coastal Alliance was required to bring its appeal to the Zoning Board of Appeals.

GROUNDS FOR APPEAL

The Planning Commission's approval of the final site plan for the site condominiums does not comply with state law, is an abuse of discretion, and is not supported by competent, material, and substantial evidence on the record.

During the April 26 meeting at which the preliminary site condo plans were considered, the Planning Commission Chair read aloud sections of the Zoning Ordinance, but the Commission did not deliberate about each of the standards for approval, nor did it hold a vote as to whether North Shores' application met each subpart of each standard. The Planning Commission also failed to prepare a report or findings of fact memorializing the reasons for its decision. At the October 26 meeting, the Planning Commission essentially doubled down on these failures, because it did not revisit the applicable Zoning Ordinance provisions or hold a vote on each applicable standard. Section 40-940 of the Zoning Ordinance governing Planning Commission review of final site condominium plans was not even mentioned.

Not only was the Planning Commission's final site plan review procedurally deficient, it also was also substantively inadequate. At the preliminary review stage, North Shores' application was incomplete because it did not include various plans or information required for preliminary approval of a site condominium and/or PUD. And again during final site plan review, there was no indication on the record that those insufficiencies were addressed. The Ordinance's mandate that the Planning Commission determine whether the final plan adequately incorporated and addressed the recommendations made and conditions placed on the site condominium PUD during the Planning Commission's preliminary review was also completely ignored.

As a specific example of the Planning Commission's abdication of its role, and as has been repeatedly pointed out by the Coastal Alliance, North Shores' "marina cluster" proposal continues to clearly violate Sec. 40-910(h) of the Zoning Ordinance prohibiting excavation of a channel or canal for the purposes of creating water frontage. Although final site plan approval of only the PUD was considered on October 23, such a narrow view ignores the reality that the condominiums are intended to be "waterfront" properties, abutting a newly-excavated boat basin constructed for exactly that purpose.

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As it did on April 26, the Planning Commission again failed to consider or apply numerous other substantive requirements of the Zoning Ordinance, including provisions regulating land use and sand mining in critical dune areas. For these reasons, and as will be more thoroughly set forth in briefing and at a future hearing before this Board, the Coastal Alliance asks the Zoning Board of Appeals to reverse the decision of the Planning Commission granting final approval of North Shores' site condominium PUD.

Sincerely,

Rebecca L. Millican
rebecca@envlaw.com

xc: Steve Kushion, Zoning Administrator & Planner
Brad Rudich, Township Clerk
(via email)

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ALLEGAN
48TH JUDICIAL CIRCUIT

SAUGATUCK DUNES COASTAL ALLIANCE,

Appellant/ Plaintiff

Court Address and Phone:
Allegan County Building
113 Chestnut Street
Allegan, MI 49010
(269) 673-0300

Assigned to Visiting Judge
Wesley J. Nykamp P18370

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v.

SAUGATUCK TOWNSHIP ;

SAUGATUCK TOWNSHIP ZONING BOARD OF APPEALS;
and

NORTH SHORES OF SAUGATUCK, LLC

Appellees/Defendants

Case No. 17-58936-AA

Scott W. Howard (P52028)

Rebecca L. Millican (P80869)
OLSON, BZDOK, & HOWARD, P.C.
Attorneys for Appellant/Plaintiff

Saugatuck Dunes Coastal Alliance
420 East Front St
Traverse City, MI 49686
(231) 946-0044

James M. Straub (P21083)
Sarah J. Hartman (P71458)
Straub, Seaman & Allen, P.C.
Attorneys for Appellees/Defendants
Saugatuck Township/Saugatuck Township Zoning Board of Appeals
1014 Main Street
St. Joseph, MI 49085
(269) 982-7717

Carl J. Gabrielse (P67512)
Gabrielse Law PLC
Attorney for Appellee/Defendant
North Shores of Saugatuck, LLC
301 Hoover Boulevard, Suite 300
Holland, MI 49423
(616) 403-0374

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OPINION AND ORDER

This appeal is not the first time the subject matter of this case has been before this Court. Case No. 17-58275-AA was an appeal of the Saugatuck Township Planning Commission's decision granting North Shores request for a planned unit development and special use permit to construct site condominiums and a private boat canal off the Kalamazoo River. On November 3, 2016, the Hon. Kevin Cronin dismissed the appeal "Pursuant to MCL 125.3604(1). Appellants have failed to exhaust their administrative remedies prior to imitating (sic) an appeal before this Court."

Appellants simultaneously brought this appeal following the Zoning Board of Appeals denial of their appeal.

Prior to the foregoing companion cases, the related case of Saugatuck Dunes Coastal Alliance, a Michigan non-profit corporation; Appellee and/or Cross-Appellant vs Michigan Department of Environmental Quality, a Department in the Executive Branch of the State of Michigan, and Dan Wyant, Director of the Michigan Department of Environmental Quality; Appellee, and Singapore Dunes, LLC a Michigan Limited liability Company, Intervening Appellant and/or Cross Appellant/Appellee. Allegan County Circuit Court case No. 14-053883-AA. As is obvious from the case name that case was brought by the same Appellants as the current Appellants in this case: Saugatuck Dunes Coastal Alliance (hereinafter referred to as the SDCA). That action was brought to stop the Department of Environmental Quality from approving the canal which is integral to the Township approved development of Saugatuck Dunes, LLC, in this case. "Singapore Dunes, LLC" was the predecessor in title to Saugatuck Dunes.

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On February 6, 2015, exactly three years prior to this judge drafting this opinion and order, Judge Cronin issued his OPINION AND ORDER ON TIMELY FILING AND STANDING. A copy of that opinion and order is attached to and made a part of this opinion as this Judge concurs in Judge Cronin's opinion as to the issue of standing. The gravamen of that issue is the provision set forth by MCL 324.35305(`1) which gives special exception to an owner of property "immediately adjacent to the proposed use" "aggrieved" by the project.

SDCA put forth the Bily property in that action as having a special exception as they have in this case. In this case we do not have the immediate adjacent exception consideration but focusing on the "aggrieved party" standard determined that Bily property 1000 feet away from the canal would not bolster SDCA standing.

Judge Cronin recognized that under the current standing rule in Michigan a litigant may have 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. *Lansing Schools Educ. Assoc v Lansing Board of Education*, 487 Mich 349, 372; 792 NW2d 686 (2010). Both Appellant and Appellee have acknowledged and argued that *Lansing* is the leading case on standing.

The exhibits submitted in this appeal confirm Judge Cronin's observation that the Bily property is at least 1000 feet away from the lagoon/canal being developed under the DEQ permit. The Opinion concluded that the Bily were not an "aggrieved" party in that "aggrieved" is by definition: "has suffered loss or injury; damnified; injured" "substantial grievance, denial of some pecuniary or property right, or imposition upon a party of a burden or obligation." Cronin's

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Opinion. Paragraph 10. Clearly "aggrieved" is no different from 'a special injury or right or substantial interest that will be detrimentally affected in a manner different from the citizenry at large." *Lansing, supra*, p 372.

SDCA argued that Appellee's Hydrology report established a lowering of the adjacent water table in the wetland area. Appellee points out that the slight lowering of the table would be caused by the lagoon if no clay liner was employed however North Shores has adopter the recommendation by the hydrology report submitted to the DEQ and will construct the lagoon with a clay liner which will result in "0" lowering of the water table.

SDCA members contend they will suffer impacts substantially more extreme than suffered by the community at large because of their unique interests. These unique interests include: the Bilys whose cottage is 1000 feet from the development. The dredging of the boat basin was clearly under scrutiny and permitted by the DEQ. Somehow affecting the enjoyment or view of the state Park and the river and being adjacent to the Patty Birkhold Natural Area, clearly is not different from the community at large. Recreational activity: the waters of Lake Michigan and the Kalamazoo River is shared by the community at large and not a special interest. Property values and taxes and public services: It seems ludicrous to argue that development of high end condominiums with water, dock frontage would affect property values in the community and increase taxes because of public services; and is a factor considered by the planning commission on behalf of the community at large in every request or a zoning decision and is in no way unique to this project.

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Business interests: Because Johnson's restaurant and marina owner up river, Mark Van Howe's commercial sailing, and Dave Engle, a charter boat operator, operate their business on the river have a special interest discrete from the community at large is beyond reason and common sense.

In short, SDCA members share the interests in common with the public generally which the Saugatuck Planning Commission, the Township of Saugatuck and the Department of Environmental Quality are charged to represent and protect.

THEREFORE, it is the Opinion of this Court that applying the standards for standing, the Appellee's Motion to Dismiss is granted and it is ordered that the Appeal from the Saugatuck Township Board of Appeals is dismissed.

Date: February 6, 2018

Wesley J. Nykamp, Visiting Circuit Judge

PROOF OF SERVICE

I certify that on this date the above parties were personally served, or mailed by ordinary mail, a copy of this FINAL ORDER.

02-8-2018
Date

Signature

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OLSON, BZDOK & HOWARD

April 6, 2018

Saugatuck Township Zoning Board of Appeals
3461 Blue Star Highway
Saugatuck, MI 49453
office@saugatucktownship.org

via email

RE: April 9, 2018 Zoning Board of Appeals Hearing

Dear Zoning Board of Appeals Members:

As you may know, the Coastal Alliance was previously before this Board on October 11, 2017 to appeal the Saugatuck Township Planning Commission's preliminary approval of the North Shores of Saugatuck's planned unit development and special approval use to construct a "boat basin" and surrounding condominiums. The Saugatuck Township Zoning Ordinance is not clear whether the appropriate time to appeal to the ZBA is after the preliminary approval or after this final approval. Therefore, the Coastal Alliance has appealed both.

The Coastal Alliance is again providing you with the substance of its appeal of the preliminary approval for North Shores' massive dredging and canal construction proposal. We are also providing you with copies of the information filed for the last ZBA hearing concerning standing to appeal. The facts and law discussed in those prior filings are equally applicable to this current appeal. We recognize that the last time the ZBA considered this matter it voted 2 to 1 to deny the Coastal Alliance standing. That decision was affirmed by visiting Judge Nykamp in circuit court, but is currently on appeal before the Michigan Court of Appeals.

It is important to note that standing to challenge a project approval "is a fact-bound concept." It is entirely consistent with standing case law for a party to have standing to challenge some activities on a property, while not having standing to challenge others. The ZBA needs to look at the facts of this case, and the interests expressed by the Coastal Alliance, independent from previous appeals. The Coastal Alliance has established special damages through unique recreational, aesthetic, and economic interests that are different than those of the public at large.

The following are additional facts supporting standing that were not available to the ZBA the last time it considered this matter. The Coastal Alliance respectfully suggests that these facts compel a reversal on the standing decision. The ZBA should review the substance of this permit in light of Section 40-910(h) of Zoning Ordinance which expressly states "In no event shall a canal or channel be excavated for the purpose of increasing the Water Frontage..."

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- **Dredging Spoils and The Bily Property.** Information obtained from the DEQ indicates that the dredging spoils from the project will be located within 300 feet of the Bily property. See **Ex 1**, Dredging Spoils Map. 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 identified site on the map, 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.

- **Sturgeon Restoration Efforts.** Habitat restoration has already been initiated by Gun Lake Tribe and Michigan DNR in the Kalamazoo River to aid this population in successful recruitment of larvae and juveniles into the breeding population. **Ex 2.** Further habitat improvements have been planned for the Lower Kalamazoo to aid in juvenile outmigration, but increased boat traffic, shoreline hardness, and dredging of available habitat would be a big hindrance on the progress already made to increase suitable habitat. Altering riverine habitat available to Kalamazoo Lake sturgeon, a small and declining population of this state threatened fish, by artificially increasing shoreline possibly leading them into unsuitable conditions. Mechanically altering flow in the proposed boat basin poses threats to the fish. Increasing boat traffic which will disturb staging adult and juvenile lake sturgeon.

- **Hydrologic Connection Between The Kalamazoo River and Wetlands.** Information submitted to MDEQ also indicates that there is a direct hydrologic connection between the Kalamazoo River and the wetlands on the adjacent Patricia Birkholz Natural Area and the globally-imperiled inter-dunal wetlands. Dr. Shu-Guang Li, the North Shores' expert, concluded that the boat basin would lower the groundwater level in the area of the interdunal wetlands by 2-6 inches. According to Li, that drawdown could be avoided by installing a 12-inch clay layer along the bottom of the boat basin. However, Dr. Li's report found that there would still be some impact to groundwater even with the clay layer. This hydrologic connection further demonstrates that Coastal Alliance concerns regarding potential impact to wetlands and the surrounding sensitive natural features are well-founded.

- **Patricia Birkholz Natural Area.** The Patricia Birkholz Natural Area is one of 20 natural areas in the State of MI. These natural areas contain the strictest regulations of state usage. The rarity of these natural areas within our state highlights the unique and special interest that the namesake, as a member of the Coastal Alliance, is trying to protect, including the inter-dunal wetlands mentioned above.

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- **Front Footage.** There have been a number of assertions about the measure of front footage on the Kalamzoo River for purpose of the development. This is significant as it relates to the anti-funneling provision in the Township's Zoning Ordinance. Recently the U.S. Army Corps of Engineers confirmed that the Developer *does not* own any frontage along the channel of the Kalamazoo River (despite previous assertions to the contrary). This is significant in that it highlights: (1) the purpose of this development is to increase water frontage for the property, which is specifically prohibited by Section 40-910(h) of the Ordinance; and (2) the importance of enforcing the anti-funneling provisions of the Ordinance to members of the Coastal Alliance. Members of the Alliance own property on the Kalamazoo River, recreate on the river, or own businesses that make use of the river. The purpose of the anti-funneling ordinance is to address safety and congestion issues of the exact kind that will result from this project, and will uniquely impact the members of the Coastal Alliance.

- **Sand Mining and Commercial Development.** A recent proposed development to dredge a pond in a sand dune area and create homes around the new pond was denied by the Township Planning Commission because it was a commercial mining operation inconsistent with the surrounding area. The exact same issue is present in this case – dredging a canal and using the sand for surrounding development.

The Coastal Alliance respectfully suggests that the ZBA should revisit the standing issue and conclude that the Coastal Alliance does have standing. As described above, there are a number of new facts for the ZBA to consider in this appeal that justify a reversal of the previous decision on standing. We appreciate the ZBA's consideration of this matter and look forward to presenting our case on Monday.

Sincerely,

Scott W. Howard

SWH/klg

xc: ZBA Members
Steve Kushion, Township Zoning Administrator
Brad Rudich, Township Clerk
Scott Smith & Nick Curcio, Township Attorneys
Jim Straub
Carl Gabrielse

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Saugatuck Township Zoning Board of Appeals 4-9-2018
Drafted **MINUTES**

SAUGATUCK TOWNSHIP ZONING BOARD OF APPEALS

Monday, April 9, 2018 4:00 p.m.
Saugatuck Township Hall
3461 Blue Star Hwy, Saugatuck, MI 49453

MINUTES

Catherine Dritsas called the meeting to order at 4:00 p.m.

Members present: Catherine Dritsas, Rex Felker, Alan Kercinik & John Tuckerman.

Also present: Zoning Administrator Steve Kushion, Saugatuck Township Litigation Attorney Jim Straub, North Shores of Saugatuck LLC Attorney Carl Gabrielse, Saugatuck Dunes Coastal Alliance Attorney Scott Howard and various members of the general public.

Review and Adopt agenda: Motion by Kercinik seconded by Felker to approve the agenda. Unanimously approved.

Approval of minutes: Motion by Felker seconded by Kercinik to approve the minutes of October 11, 2017. Unanimously approved.

Request for Appeal of Saugatuck Township Planning Commission final approval of PUD/Site Condo and SAU approval for North Shores of Saugatuck, LLC, Parcels 03-20-004-006-00 and 03-20-004-002-00, Saugatuck Dunes Coastal Alliance.

Chairperson Dritsas stated that the meeting will be broken in to two sections. The first part is whether the SDCA has a legal standing on this appeal. If the SDCA does have standing than the ZBA will go to the second portion of the public hearing and deal with their substances issues of their appeal.

David Swan, President of Saugatuck Dunes Coastal Alliance did a power point presentation of describing the characteristics of the surrounding areas around North Shores development.

Attorney Scott Howard, representing the Saugatuck Dunes Coastal Alliance stated that the Planning Commission failed to apply the zoning ordinance when it came to the boat basin, expansion of water front usage. He believes that the Bily's parcel will have a negative impact due to the dredging spoils or the staging area being approximately 300 feet from their parcel. He stated that people that use the surrounding areas are affected and would have standing to this development.

Attorney Carl Gabrielse, representing the owner and developer of North Shores of Saugatuck LLC, stated that the SDCA are an opposed party to this development but not an aggrieved party which doesn't give them legal standing. He feels that North Shores have not violated the zoning ordinance. He stated that a party that is bringing the challenge for standing has to have legal protected interest that is in jeopardy of being adversely affected.

Public Comments:
Chairperson Dritsas opens the floor up to the public and asked that they state their name, address and if you are a township resident.

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Saugatuck Township Zoning Board of Appeals 4-9-2018
Drafted **MINUTES**

1. Jon Helmrich, 3522 64th St. Saugatuck twp, feels that the Planning Commission didn't follow through on why they approved North Shores development. He supports the standing for the SDCA.
2. Cynthia McKean, 1000 Mason St, Saugatuck City, feels that what the Planning Commission did was illegal. She supports the standing.

Chairperson Dritsas closed the public hearing.

Correspondence:

1. Letter from Jeff Sluggett, Attorney for Saugatuck Township Fire District dated March 26, 2018.
2. Letter from Scott Howard, Attorney for Saugatuck Dunes Coastal Alliance dated September 20, 2017.
3. Letter from Scott Howard, Attorney for Saugatuck Dunes Coastal Alliance dated October 11, 2017.
4. Letter from Scott Howard, Attorney for Saugatuck Dunes Coastal Alliance dated April 6, 2018.

Discussion amongst the board took place.
Felker addressed a couple of the concerns from the SDCA which he felt they didn't have standing.
Dritsas stated she doesn't agree on what standing means but cannot go against what the law says.

Attorney Straub stated he had two proposed drafted resolutions. One that deny's standing and the other is to grant the standing.

Attorney Straub read the proposed resolution to deny standing that would be inserted into the minutes with the correction on page 2 sub-paragraph 1. Striking out SAU and permit should be singular and not plural.

Attorney Straub stated that the board could make changes to the resolution and then make a formal vote on the resolution.

Motion by Felker, seconded by Kercinik to deny standing. Motion passes 4-0.

Motion by Felker, seconded by Kercinik to deny the standing on this appeal as stated in the resolution. Felker, yes, Kercinik, yes, Dritsas, yes, Tuckerman, yes.

Motion by Dritsas to adjourn meeting, Felker seconded.

There being no further business meeting adjourned at 4:55 pm.

_____
Lori Babinski, Recording Secretary

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SAUGATUCK TOWNSHIP
COUNTY OF ALLEGAN, MICHIGAN
ZONING BOARD OF APPEALS

EXCERPT OF MINUTES

This is an excerpt of minutes from a meeting of the Zoning Board of Appeals of Saugatuck Township (the "Township"), held at the Saugatuck Township Hall, 3461 Blue Star Highway, Saugatuck, Allegan County, MI 49453, on the 9th day of April, 2018, at 4:00 p.m.

Present: Catherine Dritsas, Alan Kercinik, Rex Felker and John Tuckerman.

The following Resolution was offered by REX FELKNER and supported by ALAN KERCINIK.

RESOLUTION TO DENY STANDING TO THE SAUGATUCK DUNES COASTAL ALLIANCE

WHEREAS, on April 26, 2017, the Saugatuck Township Planning Commission ("Planning Commission") granted preliminary site plan approval for a planned unit development ("PUD") and also for a special approval use ("SAU") by North Shores of Saugatuck , LLC ("North Shores") for a PUD development condominium project and SAU to develop a boat basin with docking facilities; and

WHEREAS, on October 23, 2017, the Saugatuck Township Planning Commission ("Planning Commission") granted final site plan approval for a PUD submitted by North Shores of Saugatuck, LLC ("North Shores") for a planned unit development condominium project; and

WHEREAS, on December 7, 2017, the Saugatuck Dunes Coastal Alliance ("SDCA"), filed an appeal of the Planning Commission's October 23, 2017 decision; and

WHEREAS, on April 9, 2018, the Saugatuck Township Zoning Board of Appeals ("Zoning Board of Appeals") held a public hearing concerning whether or not the SDCA had standing to appeal the Planning Commission decision of October 23, 2017, to the Zoning Board of Appeals; and

WHEREAS, the Zoning Board of Appeals carefully listened to the comments made during the public hearing on April 9, 2018; carefully considered the written materials submitted on behalf of the SDCA in support of standing, including the recently submitted information concerning, among other things, the soil laydown area location near the Bily property; carefully considered the materials submitted by North Shores against SDCA standing; carefully considered the provisions of the Michigan Zoning Enabling Act and the Zoning Chapter of the Township's Code of Ordinances ("Zoning Chapter") relative to standing; and carefully considered the confidential communications of Township counsel concerning this matter;

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WHEREAS, the Zoning Board of Appeals takes note that the Saugatuck Township Zoning Board of Appeals, after a public hearing on April 4, 2013, denied standing to the SDCA and the Bily family, who own property at 3524 Dugout Road, regarding an appeal from a December 17, 2012, Saugatuck Township Planning Commission decision granting preliminary site plan approval to a condominium development property by Singapore Dunes, LLC, on a portion of the property that North Shores LLC now owns; and

WHEREAS, the Zoning Board of Appeals takes note that on February 6, 2015, the Allegan County Circuit Court issued an opinion and order finding that the SDCA lacked standing to appeal actions of the Michigan Department of Environmental Quality ("MDEQ") with respect to the proposed construction of a road traversing the property that North Shores LLC now owns; and

WHEREAS, the Zoning Board of Appeals is aware that the SDCA filed an appeal of the Planning Commission's April 26, 2017, decision with the Saugatuck Township ZBA; and that after a public hearing on the appeal, the Saugatuck Township Zoning Board of Appeals, after a public hearing on October 11, 2017, denied standing to the SDCA regarding an appeal from a April 26, 2017 decision of the Saugatuck Township Planning Commission granting preliminary site plan approval for a planned unit development and also a special approval use regarding the same property that North Shores LLC owns; and

WHEREAS, the Zoning Board of Appeals is aware that the SDCA filed an appeal of the Zoning Board of Appeals' decision of October 11, 2017, denying standing to the SDCA to the Allegan County Circuit Court; and

WHEREAS, the Zoning Board of Appeals takes note that on February 6, 2018, the Allegan County Circuit Court dismissed the Claim of Appeal of the SDCA from the decision of the Saugatuck Township Zoning Board of Appeals of October 11, 2017, because of lack of standing; and

WHEREAS, the Zoning Board of Appeals is aware that the decision of the Allegan County Circuit Court dismissing the Claim of Appeal of the SDCA to the Saugatuck Township Zoning Board of Appeals dismissal of the SDCA Claim of Appeal from the decision of the Planning Commission of April 26, 2017, has been appealed to the Michigan Court of Appeals;

NOW, WHEREFORE, the Zoning Board of Appeals resolves the pending appeal as follows:

1. The Zoning Board of Appeals concludes that the SDCA does not have standing to appeal the October 23, 2017 decision of the Planning Commission granting final site plan approval for the PUD [redacted] permits sought by North Shores, and therefore dismisses SDCA's appeal of those decisions.

2. In support of its conclusion that the SDCA does not have standing, the Zoning Board of Appeals makes the following findings:

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A. Section 604(1) of the Michigan Zoning Enabling Act, MCL 125.3604(1), provides in relevant part: ". . . an appeal to the zoning board of appeals may be taken by a person aggrieved. . ." Courts have interpreted this standard as requiring proof of "some special damages not common to other property owners similarly situated." *Unger v. Forest Home Township*, 65 Mich. App. 614 (1976). The Zoning Board of Appeals finds that this standard is required by state law, and that any lower standard that might be suggested in the Township's Zoning Ordinance conflicts with state law and is therefore invalid. See *Id.*

B. SDCA has not been able to explain satisfactorily how the Township Planning Commission would be able to prevent the development as proposed by North Shores with reference to adverse impact on wetland or critical dune areas located within the property at issue. The SDCA has not been able to articulate how it would suffer any special damage, different from damage that would allegedly be sustained by the general public, with reference to the development of the subject real estate.

C. Various details of the proposed development have not been finally approved by the Michigan Department of Environmental Quality.

D. To the extent that the SDCA's standing claim relies upon the representations and/or affidavit of Patricia Birkholz, and the fact that the natural area in Saugatuck Dunes State Park is named after her, the ZBA finds that Ms. Birkholz should be congratulated for her work in supporting the creation of a natural area within the State Park. However, the ZBA also concludes that Ms. Birkholz does not maintain an ownership interest in the State Park. The State Park and the Patricia Birkholz Nature Area therein is owned by the State of Michigan and managed by the Michigan Department of Natural Resources for the benefit of the general public. Even if North Shores' proposed development had any special impact on the State Park or the natural area contained within the Park, the standing to contest the action of the Planning Commission would rest with the State of Michigan, through the Department of Natural Resources, not with the SDCA or Ms. Birkholz, who is not a party to this appeal.

3. All resolutions in conflict in whole or in part are revoked to the extent of such conflict.

YES: FELKNER, KERCINIK, DRITSAS, TUCKERMAN

NO: _____

RESOLUTION DECLARED ADOPTED.

Dated: April 9, 2018

Catherine Dritsas

Catherine Dritsas, Chairperson
Saugatuck Township Zoning Board of Appeals

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STATE OF MICHIGAN

ALLEGAN COUNTY CIRCUIT COURT

SAUGATUCK DUNES COASTAL ALLIANCE,

Appellant,

v.

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

Appellees.

Hon. Roberts A. Kengis

Case No.: 18-059598- AA

Scott W. Howard (P52028)
Rebecca L. Millican (P80869)
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ORDER DENYING APPEAL OF SAUGATUCK DUNES COASTAL ALLIANCE

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ORDER DENYING APPEAL OF SAUGTUCK DUNES COASTAL ALLIANCE

At a session of said Court held on the 14th day of November, 2018, in the City of Allegan, County of Allegan, State of Michigan.

PRESENT: Honorable Roberts A. Kengis, Circuit Court Judge.

Saugatuck Dunes Coastal Alliance, having filed an appeal with the Saugatuck Township Zoning Board of Appeals from a decision reached by the Saugatuck Township Planning Commission on October 23, 2017; and the Saugatuck Township Zoning Board of Appeals, having made a finding at its meeting on April 9, 2018 that the Saugatuck Dunes Coastal Alliance did not have standing; and the Saugatuck Dunes Coastal Alliance having filed an appeal to this Court seeking to reverse the decision of the Saugatuck Township Zoning Board of Appeals approving the final site plan for development of the subject property by Intervening Party, North Shores of Saugatuck, LLC; and the Court having the benefit of briefs from the Appellant, Township Appellee and Intervening Appellee; and the Court having had benefit of oral argument from counsel for the parties in Open Court on October 25, 2018; and the Court being fully advised in the premises;

THIS COURT FINDS 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.

IT IS THEREFORE ORDERED that the Saugatuck Dunes Coastal Alliance appeal from the decision of the Saugatuck Township Zoning Board of Appeals of April 9, 2018 is DENIED for the reasons set forth on the record which is incorporated into and made a part of this Order.

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Dated: November 14th, 2018

ROBERTS KENGIS P-47062
ROBERTS A. KENGIS
Circuit Court Judge

Attest:

Clerk of the Circuit Court

ATTEST A TRUE COPY
Deputy Clerk

THIS ORDER DOES DISPOSE OF THE LAST PENDING CLAIM AND DOES CLOSE THE CASE.

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STATE OF MICHIGAN

COURT OF APPEALS

SAUGATUCK DUNES COASTAL ALLIANCE,

Plaintiff-Appellant,

v

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

Defendants-Appellees.

UNPUBLISHED
August 29, 2019

No. 342588
Allegan Circuit Court
LC No. 17-058936-AA

SAUGATUCK DUNES COASTAL ALLIANCE,

Plaintiff-Appellant,

v

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

Defendants-Appellees.

No. 346677
Allegan Circuit Court
LC No. 18-059598-AA

Before: GADOLA, P.J., and MARKEY and RONAYNE KRAUSE, JJ.

PER CURIAM.

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

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

I. BACKGROUND

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

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

II. JURISDICTION

As an initial matter, North Shores contends that we lack jurisdiction over plaintiff's appeals. A challenge to subject-matter jurisdiction is a question of law, and it may be made at any time. *Smith v Smith*, 218 Mich App 727, 729-730; 555 NW2d 271 (1996). North Shores presents a cursory and conclusory argument that we would ordinarily refuse to consider. See

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[1] See <https://www.michigan.gov/egle/0,9429,7-135-3311_4114_4236-70207--,00.html>.

[2] Formerly the Michigan Department of Environmental Quality (DEQ). See Executive Order 2019-2. The Department was known as the DEQ throughout the proceedings below.

[3] As will be discussed, plaintiff also appended two original claims to its appeal to the circuit court, which the circuit court apparently dismissed in the same order.

[4] *Saugatuck Dunes Coastal Alliance v Saugatuck Twp Bd of Appeals*, unpublished order of the Court of Appeals, entered January 22, 2018 (Docket Nos. 342588, 346677, and 346679).

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Mitcham v Detroit, 355 Mich 182, 203; 94 NW2d 388 (1959). However, subject-matter jurisdiction is of such critical importance that we must consider it upon challenge, or even sua sponte where appropriate. See *O'Connell v Director of Elections*, 316 Mich App 91, 100; 891 NW2d 240 (2016).

North Shore's challenge is based upon MCR 7.203(A)(1)(a), which states that this Court does not have jurisdiction over a claimed appeal by right from "a judgment or order of the circuit court . . . on appeal from any other court or tribunal." Presumably, North Shore contends that the ZBA in these matters acted as a "tribunal." An administrative agency that acts in a quasi-judicial capacity may be considered a "tribunal" for purposes of MCR 7.203(A)(1)(a). See *Natural Resources Defense Council v Dep't of Environmental Quality*, 300 Mich App 79, 85-87; 832 NW2d 288 (2013). However, it appears to us that the ZBA decisions from which plaintiff seeks to appeal were made after public hearings, and that they were not contested proceedings. We reject North Shores's implied contention that the ZBA acted as a "tribunal" for purposes of MCR 7.203(A)(1)(a). We therefore also reject North Shores's challenge to our jurisdiction to address these appeals.

III. STANDARD OF REVIEW

This Court reviews "a circuit court's decision in an appeal from a decision of a zoning board of appeals . . . de novo to determine whether the circuit court applied the correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the [ZBA's] factual findings." *Olsen v Chikaming Twp*, 325 Mich App 170, 180; 924 NW2d 889 (2018) (quotation marks and citation omitted; second alteration in original.) "Whether a party has standing is a question of law that is reviewed de novo." *Michigan Ass'n of Home Builders v City of Troy*, ___ Mich ___, ___; ___ NW2d ___ (2019) (Docket No. 156737, slip op at p 6). However, a party's right to appellate review of a decision by a ZBA does not turn on traditional principles of standing, but instead on whether the party is "aggrieved" by the ZBA's decision within the meaning of MCL 125.3605. *Olsen*, 325 Mich App at 179-182. "This Court also reviews de novo questions of statutory interpretation," with the goal of ascertaining the intent of the legislature as derived from the express language of the statute. *Michigan Ass'n of Home Builders*, ___ Mich at ___ (slip op at pp 6-7). Ordinances are reviewed in the same manner as statutes. *Gora v City of Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998).

IV. "AGGRIEVED PARTY"

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

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> Any party aggrieved by a decision of the zoning board of appeals may appeal to the circuit court for the county in which the property is located. The circuit court shall review the record and decision to ensure that the decision meets all of the following requirements:
>
> (a) Complies with the constitution and laws of the state.
>
> (b) Is based upon proper procedure.
>
> (c) Is supported by competent, material, and substantial evidence on the record.
>
> (d) Represents the reasonable exercise of discretion granted by law to the zoning board of appeals.

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

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

Plaintiff argues that concepts of "standing" and "aggrieved party" are, in application, essentially indistinguishable. Plaintiff's position is understandable, especially because *Olsen*

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[5] Additionally, the substantive merits of plaintiff's concerns regarding the condominium project are not before us at this time, and we express no opinion as to those merits.

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observed that under both standing and "aggrieved party" analyses, "a party must establish that they have special damages different from those of others within the community." *Olsen*, 325 Mich App at 193. This Court in *Olsen* defined an "aggrieved party" as having "suffered some special damages not common to other property owners similarly situated," pursuant to "the long and consistent interpretation of the phrase 'aggrieved party' in Michigan zoning jurisprudence." *Id*. at 185 (citations and quotation omitted). Our Supreme Court concluded that a party may have standing by legislative grant or "if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010); *Olsen*, 325 Mich App at 192. These definitions superficially appear similar. Critically, however, the aggrieved party analysis refers to "other property owners similarly situated," whereas the standing analysis refers to "the citizenry at large."

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

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

V. OTHER CLAIMS

[6] We do not express any opinion as to whether they are, in fact, sufficient to confer standing.

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Finally, in Docket No. 342588, when plaintiff appealed the ZBA's conditional approval of the condominium project, plaintiff joined two original claims. Its first original claim was entitled "declaratory judgment," but it sought injunctive relief and fees in addition to declaratory relief. Its other original claim was entitled "nuisance per se," but again it sought both injunctive and declaratory relief. In essence, plaintiff requested that the trial court find one of the components of the condominium project, the "boat basin," to be a nuisance and in violation of the township zoning ordinance, and to enjoin its construction. The trial court made no specific reference to these original claims when it entered its order of dismissal in that proceeding. The trial court only referred to dismissing "the Appeal from the Saugatuck Township Board of Appeals." Because "courts speak through their orders," *Piercefield v Remington Arms Co*, 375 Mich 85, 90; 133 NW2d 129 (1965), we can only infer that the trial court treated plaintiff's original claims as merely components or restatements of its appeal.

As we have discussed, the analysis of standing differs subtly but critically from the analysis of whether a party is aggrieved. The trial court and the parties did not have the benefit of *Olsen* at the time the trial court rendered its decision. It is not clear from the record whether the trial court regarded plaintiff's original claims as *truly* distinct, but it appears from plaintiff's complaint that plaintiff intended them to be distinct. We conclude, in any event, that the trial court erroneously failed to rule on plaintiff's original claims. We further conclude that plaintiff's standing to bring those claims, and, as applicable, the substantive merits of those claims, should be addressed in the first instance by the trial court. We again emphasize that we express no opinion regarding plaintiff's standing, and no such opinion should be inferred.

VI. CONCLUSION

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

/s/ Michael F. Gadola
/s/ Jane E. Markey
/s/ Amy Ronayne Krause

Maps of Area Surrounding North Shores Project Site

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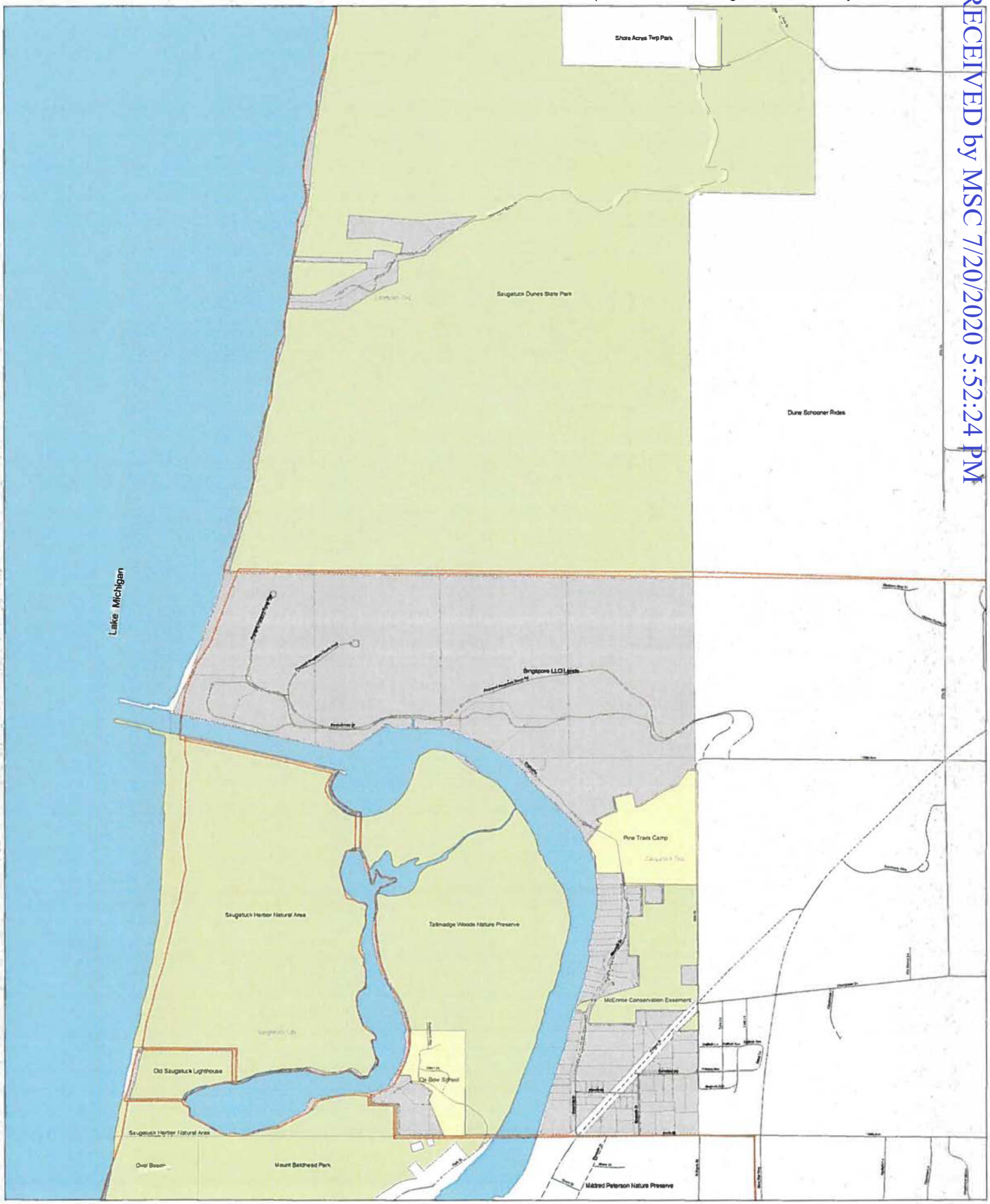

Legend

- City / Twp Lines
- Parks
- Camps
- Residential

N

0104a

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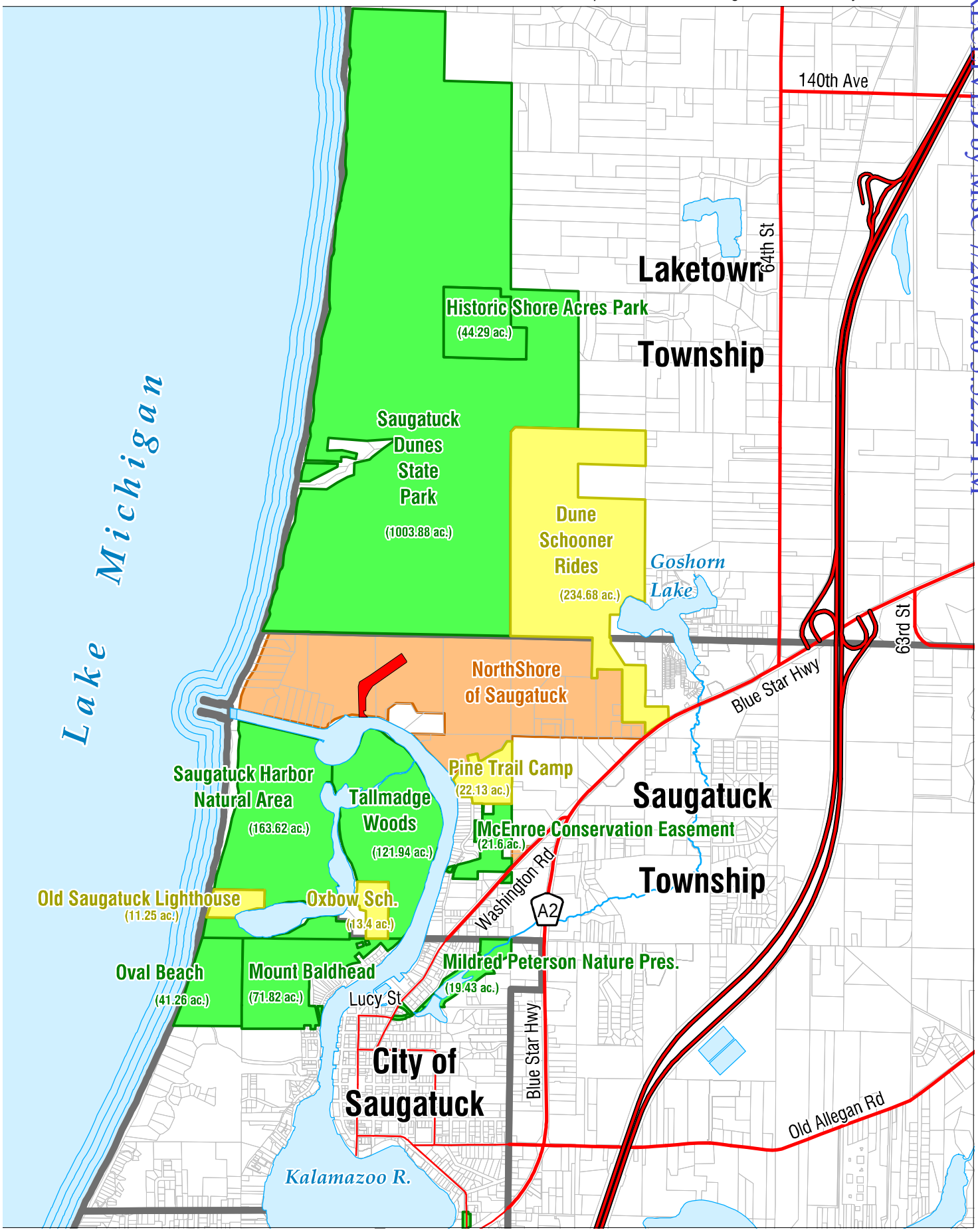

Public Spaces of the Saugatuck Dunes Region

Including Conservation Easements, Camps and Private Open Spaces

N W E S

Allegan County Land Information Services assumes no liability for the conclusions drawn from the use of these data

Map Scale: 1 inch = 2500 feet
Map Printed: 5/25/2018

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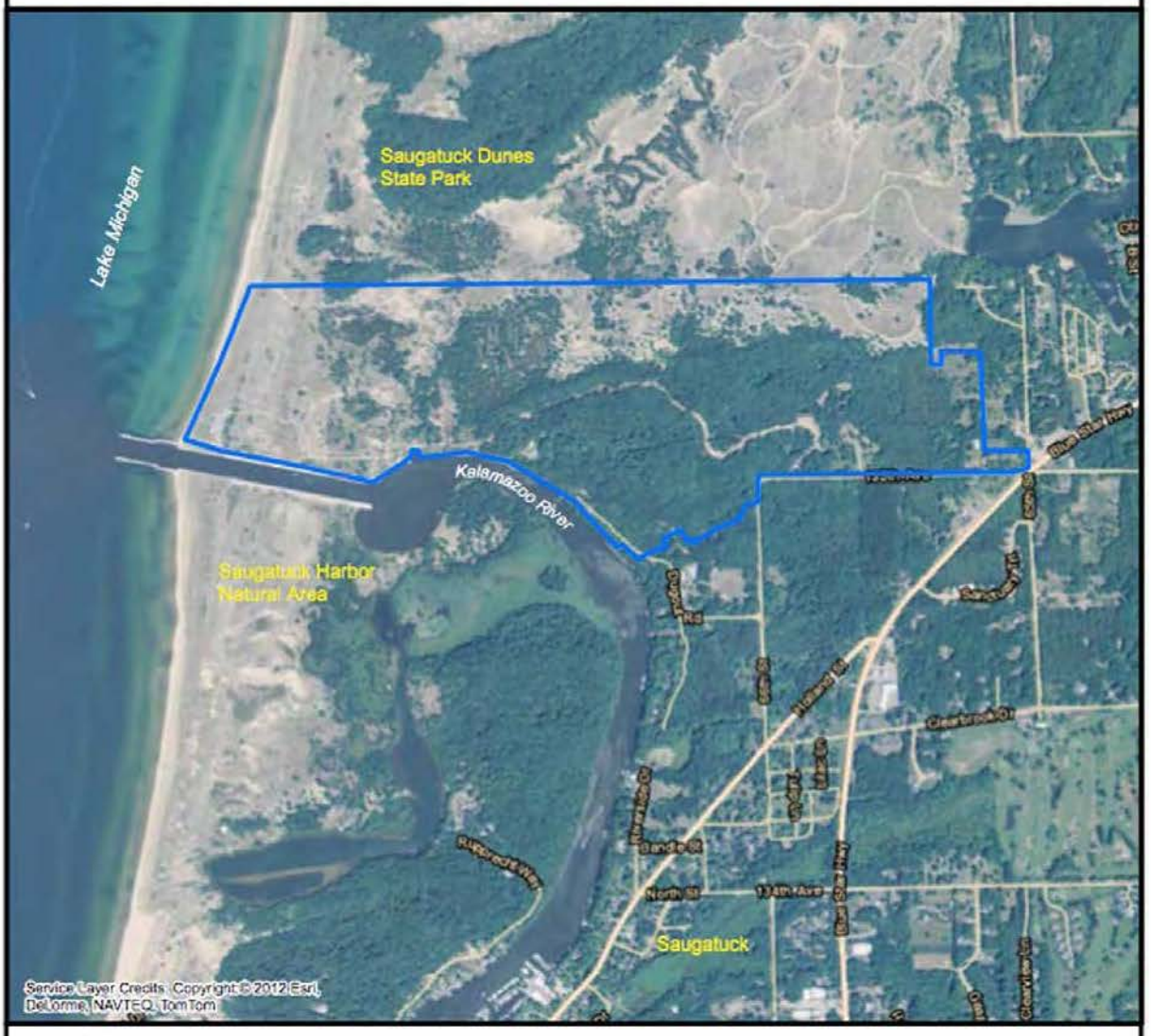
Aerial Photograph Obtained from ESRI World Imagery - April 2017
Allegan County - Michigan



KEY

Project Area

Kilometers: 0 0.2 0.4 0.8

Miles: 0 0.1 0.2 0.4

N

Proposed Northshores of Saugatuck in Context

Legend

Parcel Lines

- Parcels
- Biley Parcel

Lines

- Dimension
- Setback

Images Included:

1873 Plat of Singapore from 1873 Allegan County Atlas

2014 Ortho imagery of Allegan County

Proposed Northshores of Saugatuck

h - Laydown Area

MNFI Map of Wetlands

Date: 2/28/2018

Allegan County GIS Services

The information contained herewith has been compiled from recorded deeds, plats, tax maps, surveys, other public records, and records provided by client. It is not a legally recorded map or survey and is not intended to be used as one. Users should consult the information sources mentioned above when questions arise.

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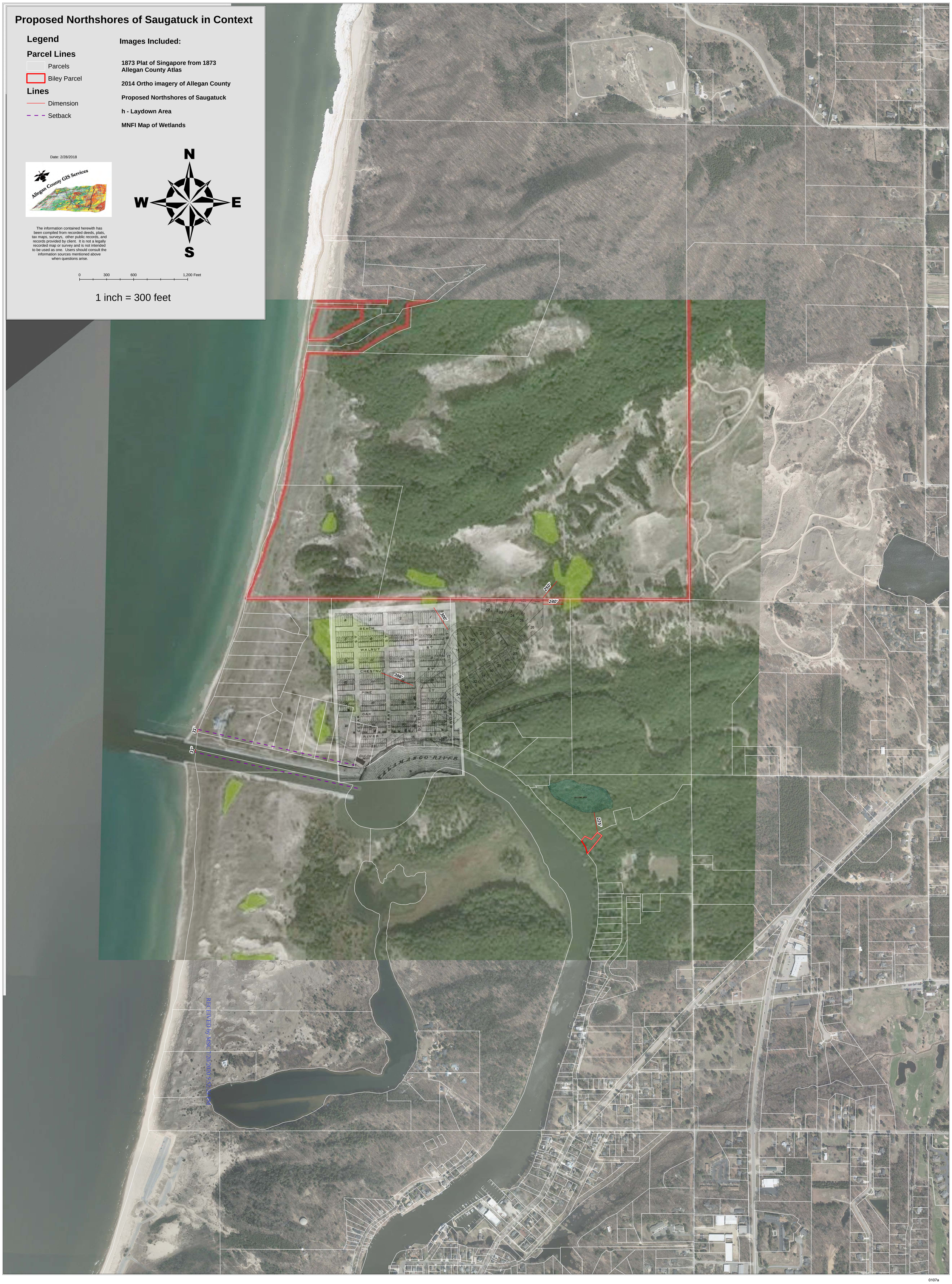
W E
S

0 300 600 1,200 Feet

1 inch = 300 feet



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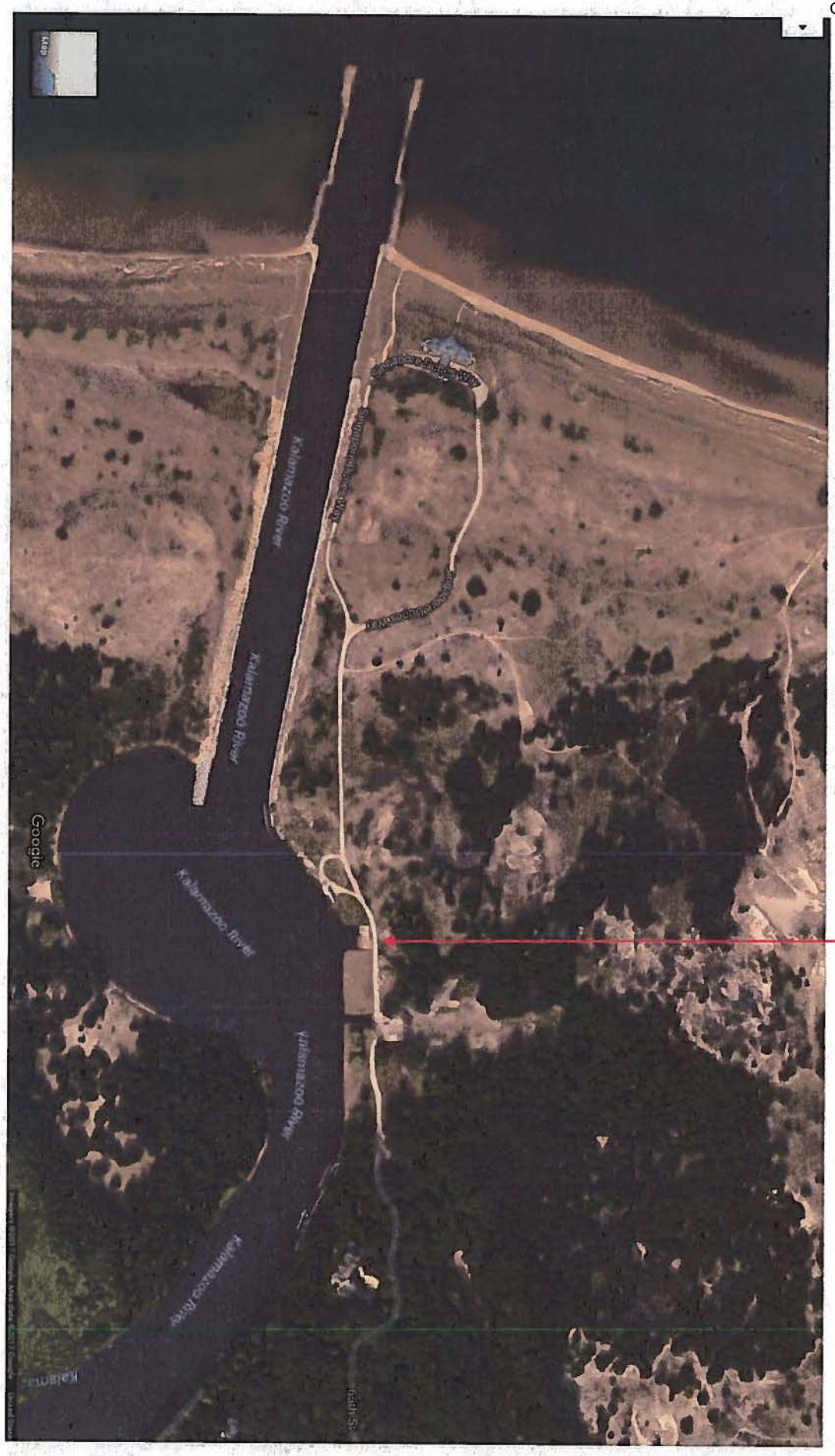

Proposed Boat Basin

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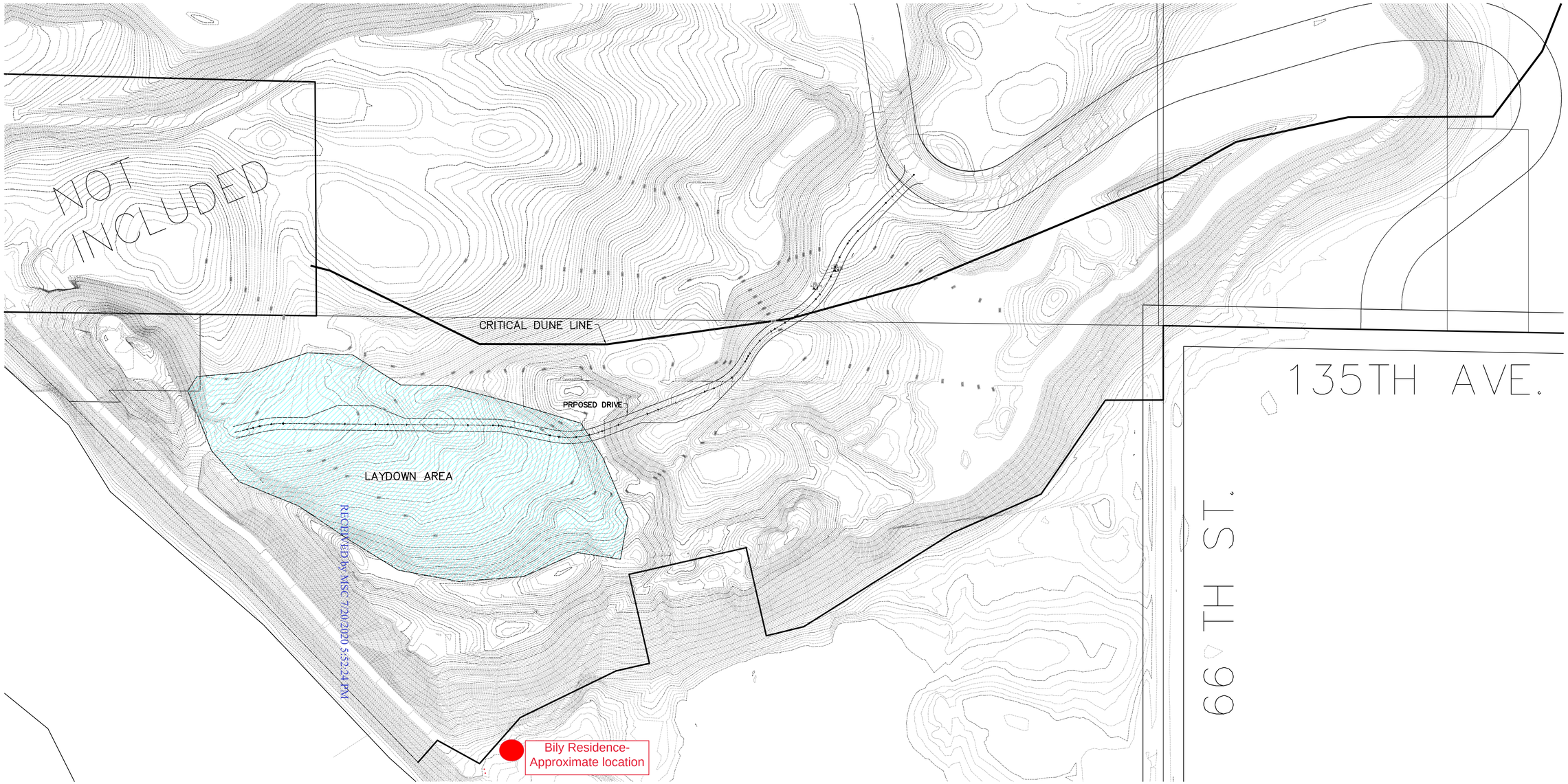
Proposed Boat Basin

DEQ-WRD
WRP010189 v1.0
Approved
Issued On:01/26/2018
Expires On:01/26/2023



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PREPARED FOR:
NORTHSHORE OF SAUGATUCK, LLC

PROJECT NO. 16-1041 DATE 12-6-17
BOOK FILE PAGE FILE REVISION —
DRAWN BY E. MORSE SHEET 1 OF 1

NORTHSHORE OF SAUGATUCK

MITCHELL & MORSE LAND SURVEYING
234 VETERANS BLVD - SOUTH HAVEN, MICHIGAN 49090
OFFICE: (269) 637-1107 FAX: (269) 637-1907

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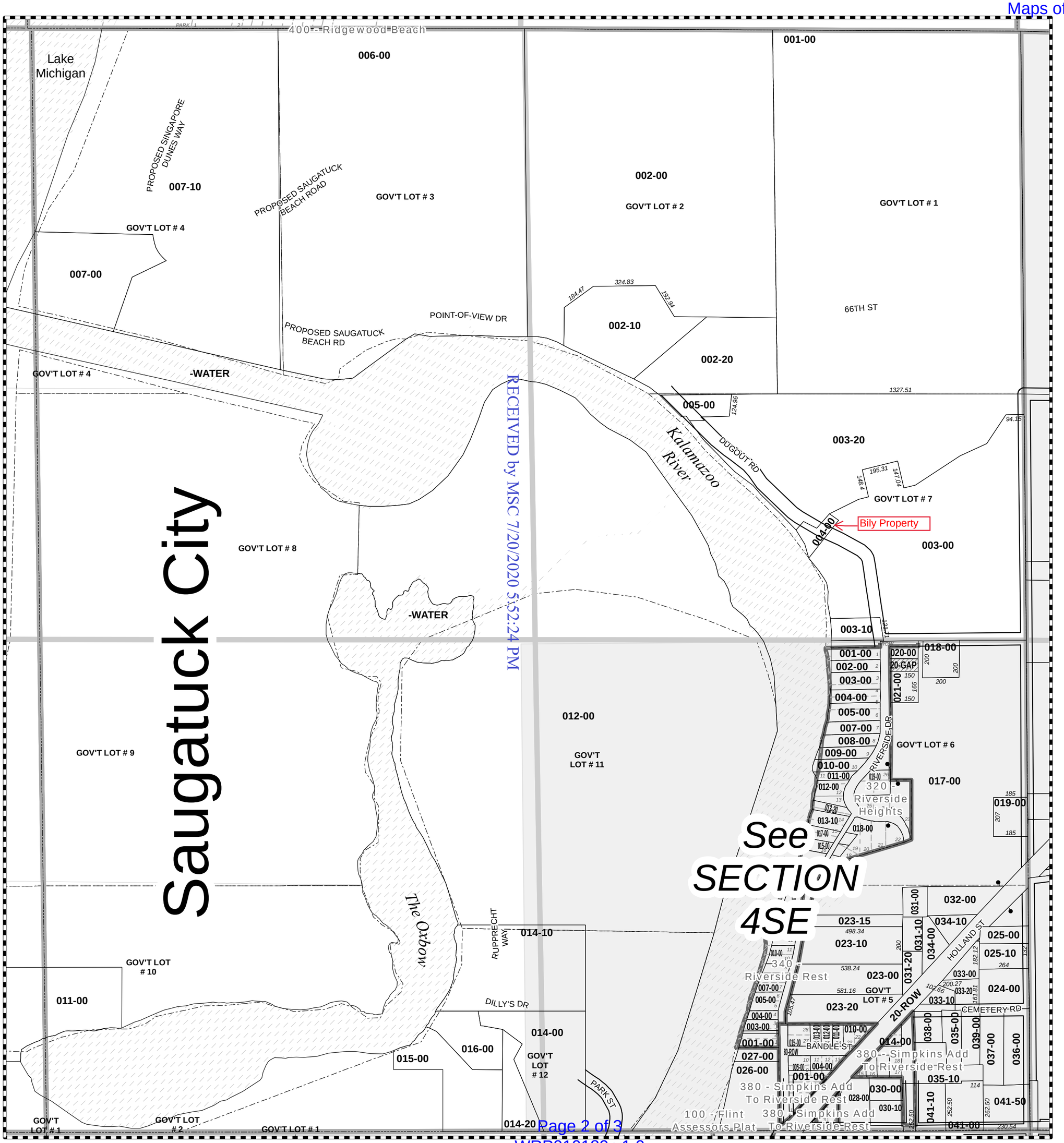

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S

1 in = 400 ft

This map was compiled for tax administration purposes only. It does not represent a legal property survey.

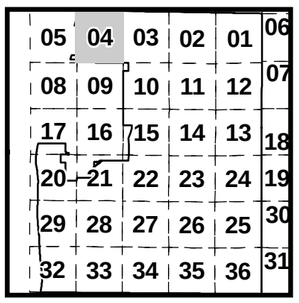
Tax Year: 2017

Map Printed: 5/10/2017

Saugatuck Twp
T3N R16W

Gaps
Overlaps
Waterbody

Parcel Prefix: 03-20-004-



SECTION 4

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0112a

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STATE OF MICHIGAN

COURT OF APPEALS

EARL L. ANSELL, JEANNE ANSELL, DELORES HAWTHORNE, DOUGLAS G. SMITH, VIRGINIA A. SMITH, ROBERT CHARLES VERTZ, PENNY JEAN VERTZ, JOHN GAVRE, CRISTILYN CURRIE, LARRY DEAN KELLEY, DEBBIE TATROW, BRENN ALBERT KURTH, MICHELLE KURTH, CYNTHIA SKINNER, HARRY WHALING, and DAVID WILKOWSKI,

Appellants,

v

DELTA COUNTY PLANNING COMMISSION, COUNTY OF DELTA, HERITAGE SUSTAINABLE ENERGY, LLC, and HERITAGE GARDEN WIND FARM, LLC,

Appellees.

FOR PUBLICATION
June 4, 2020
9:00 a.m.

No. 345993
Delta Circuit Court
LC No. 18-023775-AA

Before: STEPHENS, P.J., and SERVITTO and KRAUSE, JJ.

STEPHENS, P.J.

Appellants, residents of Delta County, appeal as of right the circuit court order dismissing appellants challenges to zoning decisions by the Delta County Planning Commission due to lack of jurisdiction. We affirm.[1]

[1] In deciding this appeal, we reject appellees' contention that appellants' filing of an appeal by right instead of an application by leave, and the circuit court's failure to reach the merits of appellants' appeal, deprived this Court of jurisdiction. The claim of appeal is taken from a circuit court order dismissing appellants' appeal to that court for lack of jurisdiction. MCR 7.203(A)(1)(a) generally precludes an appeal of right from a final order of a circuit court entered "on appeal from any other court or tribunal." But the appeal to the circuit court in this case involved a decision by appellee Delta County Planning Commission to grant applications for

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I. BACKGROUND

This case arises from the Delta County Planning Commission's decision to grant conditional use permits to appellees Heritage Sustainable Energy and Heritage Garden Wind Farm (Heritage) for the construction of 36 wind turbines[2] on the Garden Peninsula in Delta County.

Heritage submitted applications to the appellee planning commission in October 2017. The planning commission held public hearings on the applications on December 4 and 12, 2017, January 15 and 23, 2018, and February 5, 2018. The planning commission announced its decisions in favor of Heritage on January 23 and February 5, 2018, and the conditional use permits followed.

Appellants appealed the planning commission's grant of the permit applications to the Delta County circuit court, filing notices of appeal on February 26, 2018. On September 17, 2018, an appeal hearing was held in the circuit court. Appellants argued the planning commission granted the applications in error where the applications failed to comply with multiple provisions of Delta County's Zoning Ordinance No. 76-2. Appellants further argued how specific violations related to noise, vibrations, light pollution, property values, aesthetics, and environmental concerns affected residents living in the county. Heritage argued that appellants lacked standing to challenge the planning commission's decision and therefore, could not invoke the circuit court's appellate jurisdiction, because appellants were not "aggrieved parties" under the Michigan Constitution and court rules. Appellants responded that they were not required to prove they were aggrieved parties where their appeal was from a decision of the planning commission and not the Zoning Board of Appeals. They argued that even if the standing requirement had applied, they had an interest in the litigation and would suffer an adverse impact from the planning commission's decision.

The circuit court agreed with Heritage that it lacked jurisdiction to hear the appeal because appellants lacked standing. It found that case law concerning an appeal from a township board where no appeal to the zoning board of appeals existed, and the appellate court rules, both explicitly limited the exercise of appellate jurisdiction to aggrieved parties. The court determined that appellants had not established that they were aggrieved parties because they had not shown special damages or a unique harm uncommon to all other property owners. The circuit court

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conditional use permits for construction of windmills. Accordingly, the appeal to the circuit court was not taken from a court or tribunal because the planning commission is not a court and did not act as a tribunal in issuing the permits in question. See *Natural Resources Defense Council v Dep't of Environmental Quality*, 300 Mich App 79, 86-87; 832 NW2d 288 (2013) (holding that MCR 7.203(A)(1)(a) did not apply where Department of Environmental Quality did not act as a "tribunal" in issuing permits because the Department did not act in a judicial or quasi-judicial capacity). Further, the order appealed from is a final order under MCR 7.202(6)(a)(*i*) because it disposed of all claims at the circuit court level by dismissing the appeal. Finally, the claim of appeal was timely filed within 21 days after entry of the circuit court order appealed from. MCR 7.204(A)(1)(a). As to appellees' indications that appellants are arguing for relief beyond what would be appropriate in the posture of this appeal, those arguments go to the proper disposition of the merits of the appeal, not to whether this Court has jurisdiction over this appeal.

[2] Heritage advises that one of those "36 individual special use permits . . . has been abandoned".

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dismissed the appeal in its entirety without reaching the merits of appellants' claims regarding the planning commission's grant of Heritage's permit applications. This appeal followed.

II. STANDARD OF REVIEW

Zoning decisions are appealable by right to the circuit court. MCL 125.3605; *Carleton Sportsman's Club v Exeter Twp*, 217 Mich App 195, 200; 550 NW2d 867 (1996). This Court in turn reviews the circuit court's decision de novo, "because the interpretation of the pertinent law and its application to the facts at hand present questions of law." *Hughes v Almena Twp*, 284 Mich App 50, 60; 771 NW2d 453 (2009). See also *Risko v Grand Haven Charter Twp Zoning Bd of Appeals*, 284 Mich App 453, 458-459; 773 NW2d 730 (2009). This includes the circuit court's decision regarding whether its appellate jurisdiction has been properly invoked. See *Olsen v Chikaming Twp*, 325 Mich App 170, 180-181; 924 NW2d 889 (2018).

III. ANALYSIS

The circuit court held that the "aggrieved party" standard, applicable to appeals of decisions of the zoning board of appeals under MCL 125.3605, applied as well to appeals of zoning decisions where there was no provision for review by a zoning board of appeals. Whether the same standard applies is an issue of first impression for this Court. We hold that the circuit court correctly concluded that appellants were obliged to show themselves to be parties aggrieved by the zoning decisions below, in order to invoke judicial review in the circuit court.

Under the Michigan Zoning Enabling Act (ZEA), MCL 125.3101 *et seq.*, "[a] local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of 1 or more districts within its zoning jurisdiction which regulate the use of land and structures to meet the needs of the state's citizens . . . ." MCL 125.3201(1). "A request for approval of a land use or activity shall be approved if the request is in compliance with the standards stated in the zoning ordinance, the conditions imposed under the zoning ordinance, other applicable ordinances, and state and federal statutes." MCL 125.3504(3). "A party aggrieved by the decision [of the zoning board of appeals] may appeal to the circuit court for the county in which the property is located as provided under [MCL 125.3606]." MCL 125.3605. The circuit court is then obliged to ensure that the decision at issue comports with applicable law, follows from proper procedure, is supported by competent, material, and substantial evidence on the record, and constitutes a reasonable exercise of discretion. MCL 125.3606(1).

Under the Michigan Court Rules, "[t]he circuit court has jurisdiction of an appeal of right filed by an aggrieved party from . . . a final order or decision of an agency from which an appeal of right to the circuit court is provided by law." MCR 7.103(A)(3). MCR 7.122 "governs appeals to the circuit court from a determination under a zoning ordinance by any officer, agency, board, commission, or zoning board of appeals, and by any legislative body of a city, village, township, or county authorized to enact zoning ordinances." MCR 7.122(A)(1). "[T]he party aggrieved by the determination shall be designated the appellant." MCR 7.122(C)(1)(a). "In an appeal from a final determination under a zoning ordinance where no right of appeal to a zoning board of appeals exists, the court shall determine whether the decision was authorized by law and the findings were supported by competent, material, and substantial evidence on the whole record." MCR

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7.122(G)(2). MCR 7.122(G)(2) substantially mirrors MCL 125.3606(1), *supra*, and Const 1963, art 6, § 28, which provides in pertinent part:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. . . .

In *Carleton Sportsman's Club*, this Court held, "where a township zoning ordinance does not provide for review of a request for special land-use permit by a zoning board of appeals, the township board's decision is final and subject to appellate review by the circuit court pursuant to Const 1963, art 6, § 28." 217 Mich App at 200.

A plain reading of provisions of the ZEA, our court rules, and caselaw support the conclusion that only an aggrieved party may appeal the final determination under a zoning ordinance. "Municipalities have no inherent power to regulate land use through zoning." *Olsen*, 325 Mich App at 179. The Legislature granted local units of government this authority through enactment of the ZEA. *Id*. The ZEA provides for the creation of a zoning commission in each municipality, but also allows for the continuation of the exercise of powers by township zoning boards and planning commissions established before the act went into effect. The creation of a planning commission under the act did not also create a requirement for the establishment of a zoning board of appeals. *Nicholas v Charter Tp of Watertown*, 43 Mich App 510, 512; 204 NW2d 365 (1972); MCL 125.3601. Appellants have not provided any persuasive authority explaining why an appeal from a determination under a zoning ordinance from a township board should not be subject to the ZEA requirement that only an "aggrieved" party has standing to appeal. Both appeals from a township board and municipal zoning commission planning board are entitled to the same review. See MCR 7.122(G)(2), MCL 125.3606(1), and Const 1963, art 6, § 28.

Appellants' reliance on *Brown v East Lansing Zoning Bd of Appeals*, 109 Mich App 688, 699; 311 NW2d 828 (1981), for a different standard for determination of standing to appeal and jurisdiction to hear an appeal is unavailing. The statute interpreted in that case, MCL 125.585(6), has since been repealed.[3] In its place, the Legislature enacted MCL 125.3605, which adopted the "aggrieved person" threshold. An appeal from the township board was defined by *Carleton Sportsman's Club* as a final decision subject to appellate review by the circuit court. 217 Mich App at 200. MCR 7.103(A)(3) provides that the circuit court's jurisdiction over appeals of final decisions by right is limited to those filed by an aggrieved party. *Carleton*'s language is clear that to invoke the circuit court's jurisdiction, appellants must have been aggrieved parties.

To have the status of "aggrieved party" for purposes of obtaining the circuit court's appellate review of a decision under a zoning ordinance, "a party must allege and prove that he or she has suffered some special damages not common to other property owners similarly situated."

[3] See 2006 PA 110, § 702, effective July 1, 2006.

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Olsen, 325 Mich App at 185 (quotation marks and citation omitted). "Incidental inconveniences such as increased traffic congestion, general aesthetic and economic losses, population increases, or common environmental changes are insufficient to show that a party is aggrieved. Instead, there must be a unique harm, dissimilar from the effect that other similarly situated property owners may experience." *Id*. (Internal citation omitted).

The circuit court held that appellants lacked standing to challenge the planning commission's decision to grant Heritage's permit applications where they failed to establish having suffered special damages or a unique harm not common to other property owners similarly situated. We acknowledge that *Olsen* distinguished between being aggrieved for purposes of appeal and having standing to litigate in the first instance. However, *Olsen* noted that, "[i]n either situation, a party must establish that they have special damages different from those of others within the community." *Olsen*, 325 Mich App at 193, citing *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). In challenging the circuit court's conclusions, appellants here point to their participation in the proceedings below, and their raising concerns over how the proposed wind turbines would impact the environment, public health, property values, and the general aesthetic character of the area. Such concerns, however, do not show that appellants stand to suffer any greater negative impacts from the proposals than do their neighbors or others in the community. Heritage's site map, whose accuracy is not in dispute, illustrates the locations of the proposed wind turbines along with the residences of the various appellants. The map does not bring to light any special proximity of appellants to the proposed turbines, but instead suggests that appellants happen to be residents scattered about the community whose objections to the challenged zoning permits are more apparently driven by concerns of a general nature than by expected consequences of operation of the turbines peculiar to themselves.

Appellants also expressed concerns over the noise and "shadow flicker" that the turbines should be expected to produce. Appellants assert that the proposed turbines are to be located close enough to their residences that the noise and flicker the turbines generate will exceed what is allowed under the applicable ordinance provisions, and thus constitute "special damages" that arise to individual claims for recovery under private nuisance law. A violation of a zoning ordinance constitutes a public nuisance, and thus itself "gives no right of action to an individual and must be abated by the appropriate public officer." *Towne v Harr*, 185 Mich App 230, 232; 460 NW2d 596 (1990). However, a private individual who can "show damages of a special character distinct and different from the injury suffered by the public generally" may bring an action to abate a public nuisance arising from the violation of a zoning ordinance. *Id.* Appellants in this case fail to specify who amongst them will clearly experience such noise or flicker above ordinance levels in connection with a particular proposed turbine. Accordingly, appellants also fail to distinguish themselves in this regard from the unsuccessful appellants in *Olsen* who were "asserting only the complaints of anticipated inconvenience and aesthetic disappointment that any member of the community might assert." *Olsen*, 325 Mich App at 193. See also *id.* at 181, quoting *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006) ("'one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency.'").

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Affirmed.

/s/ Cynthia Diane Stephens
/s/ Deborah A. Servitto
/s/ Amy Ronayne Krause

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2020 WL 2096049
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Susan D. BAKER, Appellant,
v.
TOWNSHIP OF BAINBRIDGE and Bainbridge Township Zoning Board of Appeals, Appellees.

No. 347362
|
April 30, 2020

Berrien Circuit Court, LC No. 18-000022-AA

Before: Markey, P.J., and Jansen and Boonstra, JJ.

Opinion

Per Curiam.

***1** Appellant, Susan D. Baker, appeals by leave granted the circuit's order rejecting her appeal of appellee Bainbridge Township Zoning Board of Appeals' (ZBA) decision to grant a special land use permit to Baker's neighbor that allowed him to operate an automotive repair shop and used car business on his property. The circuit court concluded that Baker was not an "aggrieved party" for purposes of MCL 125.3605; therefore, the court lacked authority to adjudicate the substance of her appeal of the ZBA's decision. We hold that Baker is indeed an aggrieved party under the statute. Accordingly, we vacate the circuit court's ruling, reinstate Baker's appeal, and remand the case to the circuit court for a ruling on the merits of her appeal of the ZBA's grant of a special land use permit.

The underlying facts in this case are not in dispute. Baker owns and lives in a home located on a parcel of land within the boundaries of appellee Bainbridge Township (the township). Baker's property adjoins land owned by Steven F. Schrage. Both parcels are situated in a district zoned agricultural and are surrounded by farmland. At some point, Schrage, who resides on the property with his family, built an automotive repair facility on the land without permission from the township. He then sought to expand his operation to include a used car dealership. Schrage requested a special land use permit from the township that would allow him to operate the businesses. The township's planning commission denied the request. Schrage then appealed the planning commission's decision to the ZBA. Baker submitted a letter to the ZBA opposing Schrage's request, explaining that she did not want a commercial facility next to her house in the country that disrupted her use and enjoyment of the home. Baker's attorney also submitted a letter in opposition to Schrage's request. Baker posited that the particular special land use permit Schrage sought was not even available in an agricultural zone. Nevertheless, on December 13, 2017, the ZBA approved the issuance of a special land use permit thereby allowing Schrage to operate both his car repair business and a used car dealership. The permit was issued the next day.

Baker appealed the ZBA's decision to the circuit court under MCL 125.3605, which provides that a "decision of the zoning board of appeals shall be final[,]" and that "[a] *party aggrieved by the decision* may appeal to the circuit court for the county in which the property is located ...." (Emphasis added.) We note that MCR 7.103(A)(3) provides that "[t]he circuit court has jurisdiction of an appeal of right filed by an *aggrieved party* from ... a final order or decision of an agency from which an appeal of right to the circuit court is provided by law." (Emphasis added.) The township moved to dismiss the appeal on the basis that Baker was not an aggrieved party. The motion was denied by the circuit court on April 18, 2018. At a subsequent hearing on the merits of the appeal, the circuit court expressed confusion regarding whether Schrage had requested only a special land use permit or both a special use permit and a use variance and whether the ZBA had granted one or both. The court remanded the matter to the ZBA for clarification and further findings. Although the ZBA proceedings were a bit confusing, ultimately, the ZBA remained steadfast in its determination to grant Schrage a special land use permit, but it rejected any use variance.

***2** The matter returned to the circuit court. On July 3, 2018, this Court issued a published opinion in *Olsen v. Chikaming Twp.*, 325 Mich. App. 170; 924 N.W.2d 889 (2018). As will be discussed in more detail in our analysis, *Olsen* thoroughly examined and construed the "aggrieved party" provision found in MCL 125.3605. With *Olsen* in hand, the township again moved to dismiss the appeal, arguing that Baker was not an aggrieved party under the reasoning set forth in *Olsen*. To establish her claimed status as an aggrieved party, Baker

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executed and relied on an affidavit in which she averred as follows:

> 5. I can easily see and hear all the activities of Schrage's auto repair business and used car dealership.
>
> 6. I can see from my bedroom window the auto repair facility and can also see the auto repair facility from my back deck.
>
> 7. I have heard banging noises from the auto repair facility, the loud noise of the impact wrench and the revving of car engines.
>
> 8. I see all the comings and goings of the delivery vehicles, the customers, the testing of vehicles by Schrage, and the hauling of vehicles in and out on flatbed trucks.
>
> 9. In fact, my driveway is immediately adjacent to Schrage's driveway.
>
> 10. Further, I have a hot tub on my back deck and I see and hear all the loud activities of the auto repair business and used car dealership.
>
> 11. I observe tool trucks in and out, UPS delivery trucks in and out, the Schrage's employees coming in and out.
>
> 12. I hear the testing of motor vehicles, the revving of their engines and banging noises associated with repairing the engines and cars and other vehicles.
>
> 13. I observe cars parked all over Schrage's property, sometimes 10 or more.
>
> 14. I very rarely use my deck anymore or go in my backyard because all of the activities of these businesses; people using the businesses; servicing the business and employees at the business and the loss of my privacy connected therewith.
>
> 14.[1] I am constantly exposed to the noises and visual impact from these businesses and the auto repair shop is close enough where I will be exposed to the smells associated with repairing automobiles and trucks, including but not limited to degreasing, cleaning solvents, engine oil, anti-freeze, transmission fluids, brake fluids, refrigerants, the sm[e]ll of oily rags, leaking vehicles and the smells from accidental spills and leaks associated with these processes.
>
> 15. The presence of these 2 businesses are and shall interfere with the beneficial use and enjoyment of my own land, deck and backyard. I no longer have a peaceful, quiet home. I can no longer sit and relax in my hot tub.

By the time this motion was heard, the circuit court judge who had presided over earlier proceedings had retired and a new judge had been assigned to the appeal. The circuit court heard the motion to dismiss on December 17, 2018. The court discussed *Olsen* and then ruled that because the types of harm Baker alleged were not unique, and were in some cases, speculative, she was not an aggrieved party entitled to appeal the ZBA's decision. This Court granted Baker's application for leave to appeal. *Baker v. Bainbridge Twp.*, unpublished order of the Court of Appeals, entered June 14, 2019 (Docket No. 347362).

With respect to a circuit court's review of a decision made by a zoning board of appeals, MCL 125.3606 provides, in part, as follows:

> (1) Any party aggrieved by a decision of the zoning board of appeals may appeal to the circuit court for the county in which the property is located. The circuit court shall review the record and decision to ensure that the decision meets all of the following requirements:
>
> ***3** (a) Complies with the constitution and laws of the state.
>
> (b) Is based upon proper procedure.
>
> (c) Is supported by competent, material, and substantial evidence on the record.
>
> (d) Represents the reasonable exercise of discretion granted by law to the zoning board of appeals. And the circuit court "may affirm, reverse, or modify the decision of the zoning board of appeals" or "may make other orders as justice requires." MCL 125.3606(4). "Our review of a circuit court's decision in an appeal from a decision of a zoning board of appeals is de novo to determine whether the circuit court applied the correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the ... factual findings." *Olsen*, 325 Mich. App. at 180 (quotation marks and citations omitted). "In addition, we review de novo issues involving the construction of statutes ...." *Id.*

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We begin with a discussion of *Olsen*. In *Olsen*, the applicant land owner requested a nonuse dimensional variance that would allow him to construct a cottage on his land where his lot was otherwise too small to build upon under the controlling ordinance and where the rear-setback line for the planned cottage would otherwise violate the minimum rear-setback requirement of the ordinance. *Id.* at 175. The zoning board of appeals voted to approve the request for a variance despite objections by neighboring property owners. *Id.* at 176. The neighboring property owners filed an appeal of the decision in the circuit court, which determined that they were aggrieved parties and that the zoning board of appeals did not have the authority to grant the variance. *Id.* at 177. The applicant land owner appealed to this Court, arguing that the neighboring property owners lacked standing to challenge the decision of the zoning board of appeals. *Id.* at 178-179. This Court held that the neighboring property owners were not aggrieved parties; therefore, they were unable "to invoke judicial review by the circuit court." *Id.* at 179.

The *Olsen* panel examined the language in MCL 125.3605 requiring a party to be "aggrieved" in order to appeal a decision by a zoning board of appeals. The Court noted that the issue did not technically concern a question of "standing." *Olsen*, 325 Mich. App. at 180-181.[2] This Court reviewed numerous authorities addressing the term "aggrieved party" as used in the court rules and in zoning contexts outside of the current version of MCL 125.3605. *Id.* at 181-185. The *Olsen* panel extrapolated from the rules and caselaw the following principles:

> Given the long and consistent interpretation of the phrase "aggrieved party" in Michigan zoning jurisprudence, we interpret the phrase "aggrieved party" in § 605 ... consistently with its historical meaning. Therefore, to demonstrate that one is an aggrieved party under MCL 125.3605, a party must allege and prove that he or she has suffered some special damages not common to other property owners similarly situated. Incidental inconveniences such as increased traffic congestion, general aesthetic and economic losses, population increases, or common environmental changes are insufficient to show that a party is aggrieved. Instead, there must be a unique harm, dissimilar from the effect that other similarly situated property owners may experience. Moreover, mere ownership of an adjoining parcel of land is insufficient to show that a party is aggrieved, as is the mere entitlement to notice. [*Id.* at 185 (quotation marks, citations, and alterations omitted).]

***4** Pertinent to our discussion, the neighboring property owners in *Olsen* contended, in part, that they were aggrieved because "they would suffer aesthetic, ecological, practical, and other alleged harms from the grant of the zoning variance." *Id.* at 186. This Court rejected the argument, ruling that "[a]esthetic, ecological, and practical harms are insufficient to show special damages not common to other property owners similarly situated." *Id.* (quotation marks and citation omitted).[3]

We hold that Baker is an aggrieved party for purposes of MCL 125.3605 and that the instant case is distinguishable from *Olsen*. We first note that the impact of an automotive repair facility and used car dealership located on the surrounding, and zoned, agricultural environment, including Baker's home, is certainly more extreme than the simple construction of a cottage on a smaller than required lot with a shorter than required rear-setback line. Further, there is nothing in the *Olsen* opinion suggesting or indicating that the neighboring property owners alleged any harm unique to any one particular owner. Evidently, the neighboring property owners merely alleged general, generic claims of aesthetic, ecological, and practical harm incurred by all the owners. Here, Baker's affidavit set forth specific claims of harm in the form of sights, sounds, smells, and privacy invasion *unique to her property* when considered in conjunction with the aerial photographic evidence showing Baker's and Schrage's properties and the surrounding agricultural landscape. See *Olsen*, 325 Mich. App. at 185 ("general aesthetic" harm does not suffice; "[i]nstead, there must be a unique harm, dissimilar from the effect that other similarly situated property owners may experience"). Baker's property and Schrage's land are side-by-side, surrounded by farmland. Indeed, there truly is no other occupied property similarly situated to Baker's parcel when compared to the parcel's proximity and exposure (line of vision) to Schrage's car repair operation and a prospective used car dealership. Because of her

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unique position of being located next to Schrage's business operation, Baker's ability to use and enjoy her property has been detrimentally affected by the ZBA's decision to grant Schrage's request for a special land use permit. The noise, sights, smells, and lack of privacy Baker now experiences because of the automotive repair facility, without even considering the addition of a used car lot, are not general concerns or harms experienced by others in the township. While persons in the general vicinity might hear the same sounds, what they may hear would be much less than those constantly bombarding Baker's senses being immediately adjacent to the businesses. The simple fact is that Baker's home, and her home alone, is right next to and directly overlooks the car repair facility and would also be so situated in regard to a future used car operation; therefore, she suffers or would suffer unique harm unlike that incurred by anyone else. In sum, we must conclude that Baker is an aggrieved party for purposes of MCL 125.3605. Because the circuit court never reached the substance of Baker's appellate challenge of the ZBA's decision, we must allow the court to do so, i.e., at this juncture it would not be prudent or proper for us to address any other issues on appeal in this matter.

***5** We vacate the circuit court's ruling, reinstate Baker's appeal, and remand the case to the circuit court for a ruling on the merits of Baker's appeal of the ZBA's decision to grant a special land use permit. We do not retain jurisdiction. Having fully prevailed on appeal, Baker may tax costs under MCR 7.219.

All Citations

Not Reported in N.W. Rptr., 2020 WL 2096049

Footnotes

1 Two of the averments were numbered 14.

2 The "aggrieved party" language in the court rules in connection with claims of appeal to the circuit court, MCR 7.103(A), and this Court, MCR 7.203(A), regards the issue of jurisdiction.

3 In support of this proposition, the *Olsen* panel relied solely on *Unger v. Forest Home Twp.*, 65 Mich. App. 614; 237 N.W.2d 582 (1975). *Olsen*, 325 Mich. App. at 186. In *Unger*, 65 Mich. App. at 617, this Court observed:

> In order to have any status in court to challenge the actions of a zoning board of appeals, a party must be aggrieved. The plaintiff must allege and prove that he has suffered some special damages not common to other property owners similarly situated.
>
> It has been held that the mere increase in traffic in the area is not enough to cause special damages. Nor is proof of general economic and aesthetic losses sufficient to show special damages. Consequently, when the plaintiff alleges facts showing only those type of damages, summary judgment against him is proper. [Quotation marks and citations omitted.]

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Susan D. BAKER, Appellant,
v.
TOWNSHIP OF BAINBRIDGE and Bainbridge Township Zoning Board of Appeals, Appellees.

No. 347362
|
April 30, 2020

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Before: Markey, P.J., and Jansen and Boonstra, JJ.

Opinion

Per Curiam.

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Baker appealed the ZBA's decision to the circuit court under MCL 125.3605, which provides that a "decision of the zoning board of appeals shall be final[,]" and that "[a] *party aggrieved by the decision* may appeal to the circuit court for the county in which the property is located ...." (Emphasis added.) We note that MCR 7.103(A)(3) provides that "[t]he circuit court has jurisdiction of an appeal of right filed by an *aggrieved party* from ... a final order or decision of an agency from which an appeal of right to the circuit court is provided by law." (Emphasis added.) The township moved to dismiss the appeal on the basis that Baker was not an aggrieved party. The motion was denied by the circuit court on April 18, 2018. At a subsequent hearing on the merits of the appeal, the circuit court expressed confusion regarding whether Schrage had requested only a special land use permit or both a special use permit and a use variance and whether the ZBA had granted one or both. The court remanded the matter to the ZBA for clarification and further findings. Although the ZBA proceedings were a bit confusing, ultimately, the ZBA remained steadfast in its determination to grant Schrage a special land use permit, but it rejected any use variance.

***2** The matter returned to the circuit court. On July 3, 2018, this Court issued a published opinion in *Olsen v. Chikaming Twp.*, 325 Mich. App. 170; 924 N.W.2d 889 (2018). As will be discussed in more detail in our analysis, *Olsen* thoroughly examined and construed the "aggrieved party" provision found in MCL 125.3605. With *Olsen* in hand, the township again moved to dismiss the appeal, arguing that Baker was not an aggrieved party under the reasoning set forth in *Olsen*. To establish her claimed status as an aggrieved party, Baker

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With respect to a circuit court's review of a decision made by a zoning board of appeals, MCL 125.3606 provides, in part, as follows:

> (1) Any party aggrieved by a decision of the zoning board of appeals may appeal to the circuit court for the county in which the property is located. The circuit court shall review the record and decision to ensure that the decision meets all of the following requirements:
>
> ***3** (a) Complies with the constitution and laws of the state.
>
> (b) Is based upon proper procedure.
>
> (c) Is supported by competent, material, and substantial evidence on the record.
>
> (d) Represents the reasonable exercise of discretion granted by law to the zoning board of appeals. And the circuit court "may affirm, reverse, or modify the decision of the zoning board of appeals" or "may make other orders as justice requires." MCL 125.3606(4). "Our review of a circuit court's decision in an appeal from a decision of a zoning board of appeals is de novo to determine whether the circuit court applied the correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the ... factual findings." *Olsen*, 325 Mich. App. at 180 (quotation marks and citations omitted). "In addition, we review de novo issues involving the construction of statutes ...." *Id.*

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We begin with a discussion of *Olsen*. In *Olsen*, the applicant land owner requested a nonuse dimensional variance that would allow him to construct a cottage on his land where his lot was otherwise too small to build upon under the controlling ordinance and where the rear-setback line for the planned cottage would otherwise violate the minimum rear-setback requirement of the ordinance. *Id.* at 175. The zoning board of appeals voted to approve the request for a variance despite objections by neighboring property owners. *Id.* at 176. The neighboring property owners filed an appeal of the decision in the circuit court, which determined that they were aggrieved parties and that the zoning board of appeals did not have the authority to grant the variance. *Id.* at 177. The applicant land owner appealed to this Court, arguing that the neighboring property owners lacked standing to challenge the decision of the zoning board of appeals. *Id.* at 178-179. This Court held that the neighboring property owners were not aggrieved parties; therefore, they were unable "to invoke judicial review by the circuit court." *Id.* at 179.

The *Olsen* panel examined the language in MCL 125.3605 requiring a party to be "aggrieved" in order to appeal a decision by a zoning board of appeals. The Court noted that the issue did not technically concern a question of "standing." *Olsen*, 325 Mich. App. at 180-181.[2] This Court reviewed numerous authorities addressing the term "aggrieved party" as used in the court rules and in zoning contexts outside of the current version of MCL 125.3605. *Id.* at 181-185. The *Olsen* panel extrapolated from the rules and caselaw the following principles:

> Given the long and consistent interpretation of the phrase "aggrieved party" in Michigan zoning jurisprudence, we interpret the phrase "aggrieved party" in § 605 ... consistently with its historical meaning. Therefore, to demonstrate that one is an aggrieved party under MCL 125.3605, a party must allege and prove that he or she has suffered some special damages not common to other property owners similarly situated. Incidental inconveniences such as increased traffic congestion, general aesthetic and economic losses, population increases, or common environmental changes are insufficient to show that a party is aggrieved. Instead, there must be a unique harm, dissimilar from the effect that other similarly situated property owners may experience. Moreover, mere ownership of an adjoining parcel of land is insufficient to show that a party is aggrieved, as is the mere entitlement to notice. [*Id.* at 185 (quotation marks, citations, and alterations omitted).]

***4** Pertinent to our discussion, the neighboring property owners in *Olsen* contended, in part, that they were aggrieved because "they would suffer aesthetic, ecological, practical, and other alleged harms from the grant of the zoning variance." *Id.* at 186. This Court rejected the argument, ruling that "[a]esthetic, ecological, and practical harms are insufficient to show special damages not common to other property owners similarly situated." *Id.* (quotation marks and citation omitted).[3]

We hold that Baker is an aggrieved party for purposes of MCL 125.3605 and that the instant case is distinguishable from *Olsen*. We first note that the impact of an automotive repair facility and used car dealership located on the surrounding, and zoned, agricultural environment, including Baker's home, is certainly more extreme than the simple construction of a cottage on a smaller than required lot with a shorter than required rear-setback line. Further, there is nothing in the *Olsen* opinion suggesting or indicating that the neighboring property owners alleged any harm unique to any one particular owner. Evidently, the neighboring property owners merely alleged general, generic claims of aesthetic, ecological, and practical harm incurred by all the owners. Here, Baker's affidavit set forth specific claims of harm in the form of sights, sounds, smells, and privacy invasion *unique to her property* when considered in conjunction with the aerial photographic evidence showing Baker's and Schrage's properties and the surrounding agricultural landscape. See *Olsen*, 325 Mich. App. at 185 ("general aesthetic" harm does not suffice; "[i]nstead, there must be a unique harm, dissimilar from the effect that other similarly situated property owners may experience"). Baker's property and Schrage's land are side-by-side, surrounded by farmland. Indeed, there truly is no other occupied property similarly situated to Baker's parcel when compared to the parcel's proximity and exposure (line of vision) to Schrage's car repair operation and a prospective used car dealership. Because of her

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unique position of being located next to Schrage's business operation, Baker's ability to use and enjoy her property has been detrimentally affected by the ZBA's decision to grant Schrage's request for a special land use permit. The noise, sights, smells, and lack of privacy Baker now experiences because of the automotive repair facility, without even considering the addition of a used car lot, are not general concerns or harms experienced by others in the township. While persons in the general vicinity might hear the same sounds, what they may hear would be much less than those constantly bombarding Baker's senses being immediately adjacent to the businesses. The simple fact is that Baker's home, and her home alone, is right next to and directly overlooks the car repair facility and would also be so situated in regard to a future used car operation; therefore, she suffers or would suffer unique harm unlike that incurred by anyone else. In sum, we must conclude that Baker is an aggrieved party for purposes of MCL 125.3605. Because the circuit court never reached the substance of Baker's appellate challenge of the ZBA's decision, we must allow the court to do so, i.e., at this juncture it would not be prudent or proper for us to address any other issues on appeal in this matter.

***5** We vacate the circuit court's ruling, reinstate Baker's appeal, and remand the case to the circuit court for a ruling on the merits of Baker's appeal of the ZBA's decision to grant a special land use permit. We do not retain jurisdiction. Having fully prevailed on appeal, Baker may tax costs under MCR 7.219.

All Citations

Not Reported in N.W. Rptr., 2020 WL 2096049

Footnotes

1 Two of the averments were numbered 14.

2 The "aggrieved party" language in the court rules in connection with claims of appeal to the circuit court, MCR 7.103(A), and this Court, MCR 7.203(A), regards the issue of jurisdiction.

3 In support of this proposition, the *Olsen* panel relied solely on *Unger v. Forest Home Twp.*, 65 Mich. App. 614; 237 N.W.2d 582 (1975). *Olsen*, 325 Mich. App. at 186. In *Unger*, 65 Mich. App. at 617, this Court observed:

> In order to have any status in court to challenge the actions of a zoning board of appeals, a party must be aggrieved. The plaintiff must allege and prove that he has suffered some special damages not common to other property owners similarly situated.
>
> It has been held that the mere increase in traffic in the area is not enough to cause special damages. Nor is proof of general economic and aesthetic losses sufficient to show special damages. Consequently, when the plaintiff alleges facts showing only those type of damages, summary judgment against him is proper. [Quotation marks and citations omitted.]

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2007 WL 2743118
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

CONCERNED CITIZENS OF ACME TOWNSHIP,
Plaintiff-Appellee,
v.
ACME TOWNSHIP and Acme Township Board of Trustees, Defendants/Third-Party Plaintiffs-Appellees.
and
Village at Grand Traverse, LLC, Intervening Defendant/Third-Party Defendant-Appellant,
and
Meijer, Inc., Intervening Defendant-Appellant.
Acme Township and Acme Township Board of Trustees, Plaintiffs-Appellees,
v.
Village at Grand Traverse, LLC, and Meijer, Inc., Defendants-Appellants.
Village at Grand Traverse, LLC, and Meijer, Inc., Plaintiffs-Appellants,
v.
Acme Township and Acme Township Board of Trustees, Defendants-Appellees.

Docket Nos. 264109, 265753, 265962.
|
Sept. 20, 2007.

Grand Traverse Circuit Court; LC No. 04-024346-AS, LC No. 05-024483-CH, LC No. 04-024346-AS.

Before SERVITTO, P.J., and TALBOT and SCHUETTE, JJ.

Opinion

PER CURIAM.

***1** These consolidated cases arise out of Acme Township Board of Trustee's issuance of a special use permit (SUP) to Village at Grand Traverse, LLC (VGT) and Meijer, Inc. In Docket No. 264109, VGT and Meijer appeal by leave granted the trial court's July 6, 2005 decision and order and final judgment vacating the SUP. In Docket Nos. 265753 and 265962, VGT and Meijer appeal as of right the July 6, 2005 order, which also dismissed their conflict of interest claims against Acme Township and the Acme Township Board of Trustees. We affirm in part, reverse in part, and remand this matter for further proceedings consistent with this opinion.

I. FACTS

Acme Township is a general law township located on the east side of Grand Traverse Bay. VGT owned approximately 182 acres in Acme Township at the corner of M-72 and Lautner Road (the Property), and it desired to develop the Property as a town center for Acme Township that resembled the Eastwood Towne Center in Lansing with a Meijer store as its anchor. The Property was located in an area zoned as R-3 or low-to-medium density residential.

The Acme Township zoning ordinance provides two exceptions to the residential use restrictions. The board first granted VGT a conceptual SUP under section 8.26, the "town center" exception, on December 22, 2003. But that SUP was overturned by Grand Traverse Circuit Judge Thomas G. Power. *CCAT v. Acme Twp et al & Village at Grand Traverse, LLC,* Grand Traverse County Circuit Court Case No. 03-023264-CH. This Court denied VGT's application for leave to appeal, *Concerned Citizens of Acme Twp v. Acme Twp,* unpublished order of the Court of Appeals, issued October 15, 2004 (Docket No. 256403), as did our Supreme Court. *Concerned Citizens of Acme Twp v. Acme Twp,* 474 Mich. 874; 704 NW2d 75 (2005).

On May 3, 2004, VGT applied for a SUP under the "mixed-use planned development" exception in section 8.22.3 of the township ordinance. That section provides:
In acting upon an application for a Mixed Use Planned Development, the Township Board may alter and establish lot size limits, required facilities, buffers, open space areas, density limits, setback requirements, height limits, building size limits, off street parking regulations, landscaping rules, miscellaneous regulations and density and intensity limits where such regulations or changes are consistent with the intent of this section and the standards set forth herein.

The Township Board may also authorize principal and other uses not permitted in the district where the land is located, provided that such are consistent with the intent of this section, the standards set forth herein. Dimensional and parking use restriction of the underlying zoning shall

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not apply to the area within an approved Mixed Use Planned Development unless expressly retained in the permit.

The township ordinance provides for a two-step review process. First, "[a] Mixed-Use Planned Development application shall be submitted to the Planning Commission and Township Board for review and approval following the procedures set forth in Sections 8.1.2(3) and (4)." Sections 8.1.2(3) and (4) require that the planning commission review the application, hold a public hearing, and forward its findings and recommendations to the board, who then makes the final decision as to whether to issue the SUP. Second, after the SUP is issued, "the developer shall request site plan approval for all or any portion of the proposed development prior to the issuance of a Land Use Permit for any construction."

***2** The first planning commission meeting to review the application was held on June 7, 2004. Subsequent meetings were held to consider the matter, and the SUP was eventually approved at the August 16, 2004 meeting by a vote of five to two. The two dissenters believed that the commission needed more time to deliberate, given the fact that they did not have the traffic, environmental, or the market studies available to consider in making their decision, and they also expressed concern over upholding the master plan. The majority noted that those studies could be submitted later and that the board could consider them at that time.

The board held seven hearings and meetings regarding the SUP, and it was eventually issued on October 29, 2004. The SUP specified that that the development would consist of "retail uses (approximately 775,000 square feet); an area for civic uses to be developed by others (approximately 40,000 square feet); mixed use (approximately 228 units, and 225,000 square feet); a hotel use (approximately 250 units, and 225,000 square feet); and other residential uses of various kinds...."

The Concerned Citizens of Acme Township (CCAT) filed a complaint and claim of appeal on October 20, 2004, which was amended on November 10, 2004, that sought to overturn the board's decision to issue the SUP. The township filed an answer on November 16, 2004. A new board had been elected and sworn in, and on November 24, 2004, the township filed an answer and a third-party complaint against VGT, challenging the prior board's issuance of the SUP. On December 7, 2004, VGT and Meijer intervened by stipulation and filed an answer and a counterclaim against the township on December 29, 2004, alleging that the new board was delaying and interfering in the VGT project, and seeking declaratory, injunctive, and other relief. VGT and Meijer also alleged that members of the new board had a conflict of interest because they were members of CCAT, and they filed a petition for superintending control and a third-party complaint against members of the board individually.

On December 20, 2004, VGT and Meijer filed a motion for summary disposition under MCR 2.116(C)(5), arguing that CCAT lacked standing to challenge the board's issuance of the SUP, and this motion was denied on March 28, 2005. On July 6, 2005, the trial court vacated the SUP because it concluded that the proposed development was in reality a regional shopping mall, rather than a village like Suttons Bay or Elk Rapids, so it was inconsistent with the township's master plan. The trial court also found that the SUP violated the township ordinance because it took away all meaningful review by the board of traffic, environmental, and market studies. Finally, the trial court dismissed the conflict of interest claims as moot. VGT and Meijer now appeal those decisions.

II. STANDING

VGT and Meijer first argue that the trial court erred in determining that CCAT had standing to challenge the issuance of the SUP. We disagree.

A. Standard of Review

***3** " 'Whether a party has legal standing to assert a claim [is] a question of law that we review de novo.' " *Michigan Ed Ass'n v Superintendent of Pub Instruction,* 272 Mich.App 1, 4; 724 NW2d 478 (2006), quoting *Heltzel v. Heltzel,* 248 Mich.App 1, 28; 638 NW2d 123 (2001) (alteration by *Michigan Ed Ass'n* Court). Likewise, a trial court's decision regarding summary disposition under MCR 2.116(C)(5) for lack of legal capacity to sue is reviewed de novo. *Rohde v. Ann Arbor Pub Schools,* 265 Mich.App 702; 705; 698 NW2d 402 (2005), lv gtd 477 Mich. 924 (2006).

B. Analysis

As an initial matter, CCAT argues that because the issue

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of its standing to challenge VGT and Meijer's development plans was already litigated in *CCAT v. Acme Twp et al & Village at Grand Traverse, LLC,* Grand Traverse County Circuit Court Case No. 03-023264-CH, and that trial court implicitly determined that CCAT had standing, VGT and Meijer are collaterally estopped from raising the issue of standing on appeal. Conversely, VGT and Meijer argue that they are not collaterally estopped from challenging CCAT's standing because CCAT did not raise the collateral estoppel argument below, so it has failed to preserve the issue for appeal; further, the standing issue in this case is not the same as the one raised in the previous litigation. We agree with Meijer and VGT. Collateral estoppel is an affirmative defense, which is waived if not set forth in its first responsive pleading. *Cole v Ladbroke Racing Michigan, Inc,* 241 Mich.App 1, 8; 614 NW2d 169 (2000), citing MCR 2.111(F).

Turning now to the merits of VGT and Meijer's standing argument, they argue that the trial court erred in concluding that CCAT had standing to challenge the board's issuance of the SUP. We disagree.

Our Supreme Court has adopted a three-part test to determine whether a party has standing. *Lee v. Macomb Co Bd of Comm'rs,* 464 Mich. 726, 739; 629 NW2d 900 (2001); see also *Michigan Citizens for Water Conservation v Nestle Water North America, Inc.,* 479 Mich. ----; --- NW2d ---- (Docket Nos. 130802, 130803, decided July 25, 2007) slip op at 13-14 (reaffirming adoption and use of the three-part test for standing). The first part of the test requires that the plaintiff " 'have suffered an "injury in fact"-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' " ' " *Lee, supra* at 739, quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 112 S Ct 2130, 119 L.Ed.2d 351 (1992). " 'Second, there must be a causal connection between the injury and the conduct complained of....' " *Id.* In other words, " 'the injury has to be "fairly ... traceable to the challenged action of the defendant, and not ... the result [of] the independent action of some third party not before the court." ' " *Id.* Finally, the injury complained of must be redressable by a favorable decision. *Id.*

***4** In *Nat'l Wildlife Federation v. Cleveland Clifs Iron Co,* 471 Mich. 608, 630-632; 684 NW2d 800 (2004), our Supreme Court held that the plaintiffs had standing to challenge the expansion of mining activities where some of its members submitted affidavits that "they bird-watched, canoed, bicycled, hiked, skied, fished, and farmed in the area" along with affidavits by an expert that the mining expansion would threaten the activities enjoyed by members of the plaintiff because of its negative environmental impact. Our Supreme Court agreed with the principle stated by the United States Supreme Court that " 'environmental plaintiffs adequately allege injury in fact when 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.' " *Id.* at 629, quoting *Friends of the Earth, Inc v. Laidlaw Environmental Services (TOC), Inc,* 528 U.S. 167, 183; 120 S Ct 693; 145 L.Ed.2d 610 (2000), quoting *Sierra Club v. Morton,* 405 U.S. 727; 92 S Ct 1361; 31 L.Ed.2d 636 (1972). However, our Supreme Court then narrowed this broad view of standing, stating that "a plaintiff must include in the pleadings 'general factual allegations' that injury will result from the defendant's conduct." *Id.* at 631. On a motion for summary disposition, the plaintiff's allegations must be supported with documentation to "sufficiently support his claim, including allegations of injury, to meet his burden of proof." *Id.*[1]

In this case, CCAT has submitted the affidavits of two of its members that generally claim they will be harmed by the environmental impact caused by the proposed development. The affidavit of Tom Gokey reflects that he is concerned that the runoff problems caused by the development will cause environmental damage to Acme Creek and to his property. Another member of CCAT submitted an affidavit that stated he used Acme Creek and the surrounding area for recreation activities, including "trout fishing, hiking, snowshoeing, and wildlife viewing." Mr. Garvey also stated that he is concerned about the environmental impact that the development will have on the area and stated that he would discontinue these activities if the development went forward. The preliminary environmental assessment cited a finding by the Michigan Department of Natural Resources that the "[p]hysical habitat conditions were being adversely impacted by sedimentation from nonpoint sources such as subdivision development and streambank instability problems in the Village of Acme." The assessment then expressed concern "that the large scales and widespread paving and grading of the site as proposed will irreparably alter the site hydrology and likely result in water quality impacts on Acme Creek."

According to *Nat'l Wildlife,* CCAT has carried its burden in establishing that it has standing. First, the two affidavits establish an injury in fact by alleging that their property, aesthetic, and recreation activities will be harmed by the activities of VGT and Meijer, and this assertion is supported by expert documentation. Second, it cannot be reasonably disputed that the development will be the cause of their environmental concerns. Finally, a

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favorable decision for CCAT will help preserve the environmental integrity of Acme Creek for the foreseeable future, and, therefore, the redressability requirement is satisfied. Accordingly, the trial court did not err in concluding that CCAT had standing to challenge the SUP, and we affirm that portion of the trial court's decision.

III. ISSUANCE OF THE SUP

***5** Next, VGT and Meijer argue that the trial court erred in vacating the SUP because the SUP is not inconsistent with the township's amended master plan or the zoning ordinance. We agree.

A. Standard of Review

"This Court reviews a lower court's review of an agency decision to determine 'whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings.' " *Dignan v. Michigan Pub School Employees Retirement Bd,* 253 Mich.App 571, 575; 659 NW2d 629 (2002), quoting *Boyd v. Civil Service Comm,* 220 Mich.App 226, 234; 559 NW2d 342 (1996).

B. Analysis

The township's zoning ordinance lacks a provision for appeal to the township zoning board of appeals. Therefore, the statutorily prescribed provisions for judicial appeal in MCL 125.293a do not apply, and the board's decision is a final administrative decision subject to review by the trial court under Const 1963, art 6, § 28. *Carleton Sportsman's Club v. Exeter Twp Bd of Trustees,* 217 Mich.App 195, 200-201; 550 NW2d 867 (1996). Const 1963, art 6, § 28 provides, in pertinent part, as follows:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

Accordingly, the circuit court's review of the administrative agency's decision was "limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary and capricious, was clearly an abuse of discretion, or was otherwise affected by substantial and material error of law." *Dignan, supra* at 576. "Substantial evidence is any evidence that reasonable minds would accept as adequate to support the decision. " 'It is more than a mere scintilla of evidence but may be less than a preponderance of the evidence.' " *Jackson-Rabon v. State Employees Retirement Sys,* 266 Mich.App, 118, 120; 698 NW2d 157 (2005) (citations omitted). If the evidence is sufficient to support the agency's decision, the circuit court may not substitute its judgment for that of the agency, even if the court may have reached a different result. *Black v. Dep't of Social Services,* 195 Mich.App 27, 30; 489 NW2d 493 (1992).

The trial court vacated the SUP, concluding, in pertinent part, as follows:

For reasons that do not appear within the certified record, the predecessor Township Board provided conceptual approval to the Village's SUP without amending its Master Plan and for a project the scale of which is grossly inconsistent with its Master Plan. No competent, material and substantial evidence has been presented to this Court that would support the notion the this project bears any reasonable relationship to that "charming main street" envisioned within the Master Plan. The Township may approve a regional shopping center but such an approval will require an amendment to the Master Plan.

***6** Having provided conceptual SUP approval, the prior Township Board then stripped itself of meaningful site plan review and eliminated any meaningful control over the scale of this project with regard to traffic issues, environmental impact and potential adverse market conditions. Such approval is inconsistent with the two-step review process described within the Township Zoning Ordinance. The Township Board may not abdicate its authority under its own Zoning Ordinance without properly amending the Ordinance. Ordinance

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amendments are subject to referendum, a right which does not exists with regard to administrative determinations.

Here, the Township not only implicitly rewrote its Ordinance to provide a qualitatively different type of site plan review than is otherwise required, it did so with respect to such key issues as traffic, the environment and a market study for a project that will obviously have regional economic consequences. It is startling to learn that a rural township government rejected by its own citizens would approve a commercial project the scale of which dwarfs even the most intense commercial development presently within Grand Traverse County and do so in the absence of meaningful traffic, environmental and market studies. The notion that a township board could exercise its discretion so cavalierly and so irrevocably change the nature of the township and the county shocks the conscious [sic].

Significant commercial development has occurred in Grand Traverse County. Such development has proceeded in the face of referenda, litigation and political change. Despite such hurdles, these developments have been constructed and appear to be commercially viable. There is no reason in the law or in this record to allow Acme Township's prior Board to so irresponsibly deviate from the reasonable procedures and standards created by township government and endorsed by state statute as preconditions to a meaningful change in land use. The Court finds that in approving the conceptual SUP, the prior Township Board attempted by administrative permit to create approval for a project without meaningful site plan review. The attempt to do so violates the Township's own Ordinance and renders the Special Use Permit invalid.

Accordingly, the Court hereby vacates the Special Use Permit and returns this matter to the Acme Township Planning Commission for a determination regarding a resubmitted project that can rationally be shown to bear some reasonable relationship to the Township's Master Plan. Alternatively, the Township may wish to amend its Master Plan in a fashion consistent with the scale of this project. In either event, a conceptual Special Use Permit may not obviate the requirement for meaningful review of all aspects of the project described within the Zoning Ordinance and which are obligations of the Township as the body responsible for determining land use.

VGT and Meijer first argue that the trial court erred in concluding that the SUP was grossly inconsistent with the township's master plan. Specifically, they contend that the trial court erred in substituting its judgment for that of the board. We agree.

***7** The amended master plan[2] envisioned a town center for Acme Township with three key characteristics: street network, core area, and neighborhoods. The Plan contemplated streets in the town center that would be interconnected and narrow, with small lots and buildings on them, and a core area "that feels and functions like a Main Street," citing Elk Rapids and Traverse City as examples. The following was noted in the proposed town center conceptual plan portion of the plan:

A key issue in this conceptual plan is the relationship between the Meijer store and the rest of the town center. While superstores like WalMart have killed off many traditional downtowns, they have usually been located outside of the downtowns, pulling traffic and shoppers away from the town center. If a superstore is designed into a downtown, within a short walking distance of an easily accessible Main Street, it can help bring customers into the downtown. Such a store performs the critical function of retail anchor for the town center.
The businesses that would locate in the core area shown in this plan would be those that do not directly compete with Meijer, such as higher-end specialty shops, antique and used merchandise stores, bicycle shops, restaurants, coffee and ice cream shops, personal service establishments such as cleaners and hairdressers, art galleries, inns and hotels, video stores, movie theaters, and other types of entertainment venues. Civic buildings, such as the Township Hall, library and post office, would also attract people into the core area. There would be a synergy between Meijer and these commercial and civic places. Where else in the region could one walk from a store like Meijer directly into a place like downtown Traverse City or Elk Rapids?

VGT and Meijer's plan consists of "retail uses (approximately 775,000 square feet); an area for civic uses to be developed by others (approximately 40,000 square feet); mixed use (approximately 228 units, and 225,000 square feet); a hotel use (approximately 250 units, and 225,000 square feet); and other residential uses of various kinds...."

The trial court vacated the SUP, concluding that "no rational, thoughtful township official could possibly find that [VGT and Meijer's] proposal is consistent with a walkable community of quiet pleasant streets akin to the older neighborhoods of Traverse City or the Village of Elk Rapids or Suttons Bay." We respectfully disagree with the distinguished trial court judge.

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While the SUP was not completely consistent with the amended master plan-it is much larger in scope and it is more of a mall with a "town center" feel than a traditional downtown area-we do not believe that the trial court's characterization as "grossly inconsistent" to support its finding that issuance of the SUP was not supported by competent, material, and substantial evidence was accurate. Indeed, the SUP incorporates features specifically noted in the amended master plan, which would not normally be found in a mall, such as civic buildings, parks, soccer fields, clock towers, four types of residential development, a neighborhood clubhouse, hotel, offices and a 23-acre nature preserve. Further, the board is the entity charged with the discretion to grant special use permits and the ordinance states that the purpose of mixed-use plan development is to permit "flexibility in the regulation of land development and to encourage innovation and variety in Land use and design of projects ....." Finally, the trial court's assessment of gross inconsistency between the SUP and the amended master plan appears to be contradicted by the fact that at least five of the board members who were involved in the approval of the SUP were also involved in the amendment to the master plan.

***8** Therefore, given the deference that the trial court was required to give the board as the body charged with making land-use decisions, we conclude that the trial court erred in finding that the board's issuance of the SUP was not supported by competent, material, and substantial evidence because it was grossly inconsistent with the amended master plan.

The trial court also erred in concluding that the SUP violated the township's applicable zoning ordinance.

The trial court conceded in its decision and order and final judgment that under Section 8.22.5 of the ordinance, a special use permit can be granted without the submission of economic, environmental, or traffic data, as long as "the site plan review process is meaningful and the township retains the authority to approve, modify or reject the project based upon the reasonable implementation of those requirements and standards described in the Rural Township Zoning Act. MCL 125.286c." However, it went on to vacate the SUP because it concluded that the SUP violates the ordinance because it does not provide for "a meaningful site review process." The trial court voiced the following concerns with the SUP as granted:

[T]he SUP as granted strips the Township of meaningful site review and serves merely as a cost allocation device to lessen the traffic impacts of the project that is approved in all other respects.... Traffic, environmental and market studies have been reduced to mere formalities that do not provide the Township authority to rationally and reasonably modify or disapprove the project.

* * *

The SUP approved by the Township removes the provision recommended by the Planning Commission that would make a traffic study a factor in the overall approval process. Instead, this consideration of traffic has been reduced to a determination of monetary contributions for infrastructure improvements.

Similarly, the environmental impact is not a factor in approval....

* * *

[N]othing contained within the SUP as presently issued would provide the Township with the authority to modify or disapprove the project based upon a rational and reasonable assessment of adverse market impact.

However, while the board did make significant revisions to the planning commission's proposed SUP, it is charged with the authority to do so. And we conclude that the final version of the SUP does include "meaningful site review process" because, in addition to specific provisions addressing traffic, the environment, and the market studies, the SUP specifically states that VGT and Meijer are bound, at every phase of the development, by the site approval process set forth in Section 8.22.6 of the ordinance, which provides as follows:

Upon request for site plan approval of all or a portion of a Mixed Use Planned Development, the applicant shall provide the following information:

(1) Descriptive site and elevation plans in accord with Section 8.1.2(2) b & c and showing the type, character and proposed use of land and structures within the area of the Mixed Use Planned Development including square feet per unit, floor area for each use type, height of all structures, whether for rent or sale and any other information as required to describe the character of the proposed use or activity.

***9** (2) A plan identifying the location and type of individual trees of 10 inch diameter one foot off ground or larger, clusters and types of smaller vegetation clusters

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and types of smaller vegetation.

(3) A description of all exterior building materials.

(4) Population profile for the development.

(5) Proposed financing.

(6) Impact of development on local streets, natural features, schools and utilities.

(7) Market and economic feasibility.

(8) Such other information pertinent to the development or use.

Failure of the applicant to provide such requested information in a timely manner may be grounds for denial of the application.

Further, although there is no specific language providing for immediate recourse in the traffic, environmental, and market study provisions, VGT and Meijer conceded at oral argument that they are bound by the process set forth above for every site plan application at each phase of the project. Therefore, if the board is not satisfied with the results of the traffic, environmental, or market studies, it has recourse-it can deny site plan approval. We repeat, the board does have the ability to deny site plan approval if traffic, environmental, or market studies present obstacles to the township's objectives as set forth in the master plan.

Accordingly, we conclude that the trial court erred in vacating the SUP. Therefore, we reverse the trial court's decision and remand this case for reinstatement of the SUP.

IV. CONFLICT OF INTEREST

Finally, VGT and Meijer argue that the trial court erred in concluding that their conflict of interest claims were moot and in addressing the merits of those claims on reconsideration, when the substance of those claims had never been brought before the trial court before reconsideration.

A. Standard of Review

This Court reviews a trial court's decision regarding denial of a motion for reconsideration for an abuse of discretion. *Ensink v. Mecosta Co Gen Hospital,* 262 Mich.App 518, 540; 687 NW2d 143 (2004), citing *Herald Co, Inc v. Tax Tribunal,* 258 Mich.App 78, 82; 669 NW2d 862 (2003).

B. Analysis

In its decision and order and final judgment, after vacating the SUP, the trial court concluded that "the remaining issues contained within this litigation [including the conflict of interest claims] are rendered moot." On reconsideration, it reaffirmed its decision, stating:

The Township's decision to issue a SUP for the construction of the Village and Meijer project was the subject of the appeal. The Court has overturned that decision for the reasons stated in its July 6, 2005 Decision and Order and Final Judgment. Any effect that any alleged conflict of interest might have had upon the issuance of that permit or tabling the application for site plan approval was rendered moot by that decision. Recusal of the present Township Board is not properly before the Court as no Village or Meijer application is before this Court.

* * *

***10** [The Township Board has] not yet had the opportunity to make any official decision with respect to a revised Village Project or a proposed Meijer Lautner Commons Project. Therefore, allegations of conflicts of interest are speculative and not yet ripe for review.

Therefore, because we have concluded that the trial court erred in vacating the SUP, and its decision regarding VGT and Meijer's conflict of interest claims was based on that erroneous vacation, we remand this issue to the trial court for reconsideration in light of reinstatement of the SUP.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

All Citations

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Footnotes

1 The requirement of documentation to support the claims made in the affidavits by the members of CCAT represents the more narrow view of standing reflected in the dissenting opinion by Justices Scalia and Thomas in *Laidlaw.* Our Supreme Court quite clearly supports this narrow view. *Nat'l Wildlife, supra* at 631 n 20.

2 The master plan was amended in 2001 to incorporate the Acme Town Center Report. The purpose of the amendment was to "formulate a plan ... to create a new town center for Acme Township."

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2019 WL 5092617
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

DEER LAKE PROPERTY OWNERS ASSOCIATION, Fred Daris, Marie Daris, Gene English, Lorraine English, Richard Remsted, Mary Ann Remsted, Frank Strother, Matthew Zabel, and Andrea Zabel, Plaintiffs-Appellants/Cross-Appellees,
v.
INDEPENDENCE CHARTER TOWNSHIP, and Charter Township of Independence Planning Commission, Defendants-Appellees,
and
Deer Lake Knolls Homeowners Association, Intervening defendant-Appellee/Cross-Appellant.

No. 343965
|
October 10, 2019

Oakland Circuit Court, LC No. 2017-159031-AV

Before: Riordan, P.J., and K. F. Kelly and Cameron, JJ.

Opinion

Per Curiam.

***1** Plaintiffs Deer Lake Property Owners Association, Fred Daris, Marie Daris, Gene English, Lorraine English, Richard Remsted, Mary Ann Remsted, Frank Strother, Matthew Zabel, and Andrea Zabel (hereinafter collectively referred to as the "Property Owners"), appeal as of right from an Oakland Circuit Court opinion and order denying the Property Owners' motion for declaratory judgment, and affirming defendant Independence Township Planning Commission's [1] decision to grant a special land use permit ("SLUP") to Deer Lake Knolls Homeowners Association (the "Knolls"). The SLUP allows the Knolls to dock up to 10 boats on four seasonal docks on a 5.02 acre lakefront lot (the "outlot") owned by the Knolls.

There are three issues on appeal: (1) whether the Commission had the legal authority to issue the SLUP; (2) whether the Commission's decision to issue the SLUP was supported by competent, material, and substantial evidence; and (3) whether the Property Owners are an aggrieved party. We affirm on all issues.

I. BACKGROUND AND PROCEDURAL HISTORY

This appeal arises from a dispute over lakeshore access between two homeowners associations. Deer Lake is a public access lake with a public boat launch. The Property Owners are an association of approximately 70 riparian, [2] lakefront homeowners. The Knolls includes 27 lots, three of which are lakefront, and 24 are backlots. The Knolls owns the outlot which provides keyhole access [3] to the lake, and where Knolls erects seasonal docks. The Property Owners contend that the access and the additional docks increase boat traffic and create dangerously overcrowded conditions. This led to litigation that has spanned over five years, multiple courts, the township zoning board, the Commission, and an administrative appeal.

The township granted the Knolls a nonconforming validation certificate ("NVC") to erect on the outlot two season docks which moor four boats. The Knolls appealed that decision, [4] but the Property Owners declined to challenge that appeal, and while it was pending, the Knolls obtained the SLUP which allows for overnight mooring of up to 10 boats on four seasonal docks on the outlot. It is the SLUP decision that is at issue in this case.

***2** Prior to approval of the SLUP, the Commission held a public hearing. The hearing lasted nearly two hours, during which the Commission heard arguments from the attorneys for the Knolls and the Property Owners, heard concerns from local residents and members of the Knolls who had conflicting reports regarding overcrowding, safety, aesthetics, environmental impact, and the necessity of a permit from the Michigan Department of Environmental Quality ("MDEQ"). The Commission also considered the Knolls' application and supplemental application for the SLUP along with their attached documents which included the outlot property description, overall site plan, defined site plan, lake depth information, the NVC, the vesting deed, the Knolls' original and current by-laws, the outlot by-laws and additional restrictions, materials relating to the appeal to the

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zoning board, the Property Owners' by-laws, and the 1987 Deer Lake Study. Before the meeting, the Commission also received:

- a letter from resident Dr. Derrick Fries, a claimed "International Boating/Safety Expert," asserting that the SLUP posed no safety risk to marine traffic and boaters;
- a memo and supplemental memo from the township planning consultant Richard Carlisle recommending special use approval to allow up to six boats and three docks;
- a letter from Gregory Need on behalf of the Property Owners advocating that 10 boats would create a safety issue and would materially impact lake usage by the riparian owners, and that the docks would create aesthetic issues, and therefore, the NVC limit was more appropriate;
- a report, circa 2013, by Fred Daris, a Property Owners member, compiled from 11 publications purporting that Deer Lake was over its carrying capacity; and
- an email from Norm Froeschke, a resident, expressing concerns over Carlisle's report.

The minutes from the public hearing show that the Commission also considered aerial photographs of the lake and historical documentation regarding the Knolls' use of the property. After the hearing was closed to the public, the Commission discussed the ordinance as it relates to lake frontage, whether a MDEQ permit would be required, the aerial photographs of the lake with regard to the aesthetic impact and placement of the docks, alternative remedies for safety concerns, the impact that the mooring of a few additional boats could have on overcrowding, whether the ordinance concerned future development rather than correcting current conditions, and the limited precedential effect of the SLUP. The Commission unanimously approved the SLUP and placed its findings on the record.

The Property Owners appealed the Commission's decision to the circuit court and the Knolls joined as an intervening party. The Property Owners argued that the Commission's decision failed to comply with state law, was not based on proper procedure, and was not supported by competent, material, and substantial evidence on the record, and thus amounted to an abuse of discretion. The Property Owners also argued that the Commission's decision violated MCL 125.3508, that the outlot did not qualify for special land use approval, and that the only credible evidence presented weighed against granting the SLUP. The Property Owners theorized that the seasonal docks constituted a "marina" which required permitting by the MDEQ pursuant to various provisions of Michigan's Natural Resources and Environmental Protection Act ("NREPA"), and created nuisance conditions for neighboring property owners. The Property Owners requested a stay to prevent construction of the seasonal docks until the instant appeal was resolved.

The circuit court affirmed the Commission's approval of the SLUP and dismissed the Property Owners' appeal. In its opinion and order, circuit court denied the Property Owners' motion for declaratory judgment,[5] reasoning that the Property Owners' argument that the SLUP was an unlawful expansion of a nonconforming use was a challenge to the NVC, which the Property Owners had not raised before the Commission nor challenged on appeal. Thus, the issue regarding the NVC was not properly before the circuit court. The circuit court further held that the Commission's issuance of the SLUP conformed to Michigan's statutory and constitutional provisions and was appropriately considered under Articles 7 and 11 of the township's zoning ordinance. The decision was based on proper procedure as the Commission gave notice of the public hearing, the Property Owners had an opportunity to present their comments and concerns, the Property Owners were able to submit documents and evidence in support of their position prior to the public hearing, and the Property Owners' counsel attended the hearing.

***3** The circuit court also found that the SLUP decision was supported by competent, material, and substantial evidence because the record reflected that the Commission "discussed the application at length, listened to public comment, asked questions, engaged in dialogue, and conscientiously deliberated. Both sides presented evidence in support of their positions, and it appear[ed] that all evidence was considered." The circuit court said that this demonstrated that the Commission "considered the required factors, the safety of property owners and the public, aesthetics, traffic, natural resources, nuisance conditions, the impact of the proposal on surrounding land uses, and the like, it made a decision that was always going to be unpopular with one side." The parties then appealed.

II. UNLAWFUL EXPANSION OF THE NVC

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The Property Owners argue that the Commission lacked authority to issue the SLUP because (1) the Knolls' proposed use of the outlot as a private marina unlawfully expanded it to a nonconforming use, and (2) the outlot does not qualify for the special land use process set forth in zoning ordinance Section 11.08. We disagree.

This Court reviews zoning decisions de novo. *Edw C Levy Co. v. Marine City Zoning Bd of Appeals*, 293 Mich. App. 333, 340; 810 N.W.2d 621 (2011). Courts must affirm a zoning decision unless it is contrary to law, based on improper procedure, unsupported by competent, material, and substantial evidence on the record, or was an abuse of discretion. *Id.* The interpretation of a zoning ordinance presents a question of law subject to review de novo. *Gora v. Ferndale*, 456 Mich. 704, 711; 576 N.W.2d 141 (1998).

The rules of statutory construction apply to the interpretation of municipal ordinances. *Gora*, 456 Mich. at 711. As a general rule courts should defer to the interpretation of the statute by the administrative agency which is legislatively charged with enforcing it. *Ford Motor Co. v. Bruce Township*, 264 Mich. App. 1, 7; 689 N.W.2d 764 (2004). However, where the language used in the zoning ordinance is clear, the ordinance must be enforced as written. *Kalinoff v. Columbus Twp.*, 214 Mich. App. 7, 10–11; 542 N.W.2d 276 (1995). If reasonable minds could differ regarding the meaning of a statute, judicial construction is appropriate. *Adrian School Dist. v. Michigan Public School Employees Retirement System*, 458 Mich. 326, 332; 582 N.W.2d 767 (1998). Where specific definitions are not provided, "terms used in an ordinance must be given their plain and ordinary meanings." *Great Lakes Soc. v. Georgetown Charter Twp*, 281 Mich. App. 396, 408; 761 N.W.2d 371 (2008).

The Lake Access Regulations established under Section 11.08 of the Charter Township of Independence zoning ordinance states:

> B. Keyhole Water Access Prohibited. Keyhole water access shall be prohibited, except as may be permitted and approved under subsections C. and D. below.
>
> C. Special Land Use Approval for Private Access Property.
>
> 1. In any zoning district where a parcel of land is contiguous to a lake, special land use approval under Article 7.0 of this Zoning Ordinance is required, except as specifically exempted in subsections 2 and 3, below, to use all or any portion of such parcel as private access property.
>
> 2. Special land use approval is not required for property for the sole purpose of swimming and/or day usage.
>
> 3. Special land use approval is not required for direct water access from individual parcels occupied as a single family residence.

Section 2.02 defines a number of relevant terms, including "private access property," as "[a] site that is directly adjoined to and part of a single-family residential subdivision or condominium development and under the jurisdiction of a condominium association or subdivision association, which site is used, or proposed to be used, to provide water access exclusively to owners or occupants of residential units within the subdivision or condominium association."

***4** The Property Owners contend that the statute requires that the outlot must be a "private access property" in order to qualify for the SLUP, and that the Knolls' outlot does not qualify because the Knolls is not a "condominium association or subdivision association." As the circuit court correctly analyzed, the Property Owners' interpretation transposes the words of the ordinance. Section 11.08(C)(1) does not require that a parcel qualify as a "private access property," but merely requires an SLUP to use the outlot as such.

The Property Owners next argue that the SLUP is an unlawful expansion of the NVC, in violation of MCL 125.3208(2), which states in relevant part that a "legislative body may provide in a zoning ordinance for the completion, resumption, restoration, reconstruction, extension, or substitution of nonconforming uses or structures upon terms and conditions provided in the zoning ordinance."

"[O]ne of the goals of local zoning is the gradual elimination of nonconforming uses." *Century Cellunet of Southern Mich. Cellular, Ltd. Partnership v. Summit Twp.*, 250 Mich. App. 543, 546; 655 N.W.2d 245 (2002). "A prior nonconforming use is a vested right to continue the lawful use of real estate in the manner it was used prior to the adoption of a zoning ordinance" and "[a] zoning ordinance cannot operate to oust the property owner of his vested right even though the ordinance is reasonable." *Gackler Land Co., Inc. v. Yankee Springs Twp*, 427 Mich. 562, 573–574; 398 N.W.2d 393 (1986) (quotation marks omitted). However, the expansion of a prior nonconforming use is generally not permitted. *Edw C Levy Co.*, 293 Mich. App. at 342.

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The Knolls challenged the NVC decision in the circuit court but that challenge was dismissed by stipulation subject to reinstatement following the conclusion of the instant SLUP matter. Because the proceedings in this case are focused on the SLUP, the factual question of whether or not the SLUP decision effectively expands the NVC is not properly before this Court. Nor did the unanswered NVC issue present a valid reason for denial of the SLUP. See Salkin, *Abandonment, Discontinuance and Amortization of Nonconforming Uses: Lessons for Drafters of Zoning Regulations*, 38 Real Est LJ 486, 496 (2010) ("Once the special use permit is granted, it becomes the operative document regarding the permitted uses of the property, and the use of the property is no longer considered a nonconforming use ...."). Thus, the Commission had authority to issue the SLUP as the outlot, even with the NVC, qualified for the special land use process set forth in Section 11.08.

III. COMPETENT, MATERIAL, SUBSTANTIAL EVIDENCE

The Property Owners next argue that the SLUP decision was not supported by competent, material, and substantial evidence because the evidence that the Commission relied on was anecdotal and conjectural. They also contend that the Commission ignored the following evidence: (1) the report by Fred Daris that the lake is already overcrowded, (2) testimony from several riparian property owners regarding the impact that overcrowding has on their use and enjoyment of the lake, and (3) the Carlisle's report recommending no more than six boats and two docks. We disagree.

We stated in *Edw C Levy Co.*, 293 Mich. App. at 340–41:

> "Substantial evidence" is evidence that a reasonable person would accept as sufficient to support a conclusion. While this requires more than a scintilla of evidence, it may be substantially less than a preponderance. Under the substantial-evidence test, the circuit court's review is not de novo and the court is not permitted to draw its own conclusions from the evidence presented to the administrative body. Courts must give deference to an agency's findings of fact. When there is substantial evidence, a reviewing court must not substitute its discretion for that of the administrative tribunal even if the court might have reached a different result. A court may not set aside findings merely because alternative findings also could have been supported by substantial evidence on the record. [Internal quotation marks, footnotes, and citations omitted.]

***5** Prior to approval of the SLUP, the Commission held a public hearing on the matter, and considered evidence from all the stakeholders. The minutes indicate that the Commission received historical documentation regarding past use of the outlot in addition to public comments and anecdotes supporting both the Knolls and the Property Owners. The Commission inferred from this evidence that, based on the Knolls' history of self-policing and restraint, granting the SLUP would be appropriate under the standards listed in Section 7.03(g). The fact that some of the evidence was anecdotal is not surprising because the hearing was open for public comments, and the Property Owners give no reason why the Commission could not consider such evidence. *Hughes v. Almena Twp.*, 284 Mich. App. 50, 73; 771 N.W.2d 453 (2009) ("A local land use agency may properly consider relevant public comments as evidence."). Additionally, the Commission had to engage in speculation in order to consider potential future effects of the SLUP. Therefore, consideration of the outlot by-laws and the site plan, which disclosed how the outlot would be used, was relevant.

The minutes show that the Commission engaged in lengthy discussions regarding the safety issues raised by Daris and the riparian owners, and questioned Carlisle at length and discussed his report. The Commission did not ignore this evidence; rather, it considered it at length and still decided to issue the SLUP anyway.

In essence, the Property Owners are requesting that this Court consider the same evidence but draw a different conclusion. We decline to do so, as our role is to determine only whether the Commission's decision is supported by competent, material, and substantial evidence on the record, which we find it was. *Edw C Levy Co.*, 293 Mich. App. at 340–41 ("A court may not set aside findings merely

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because alternative findings also could have been supported by substantial evidence on the record.”).

IV. AGGRIEVED PARTY

The Knolls argues that the circuit court committed error requiring reversal when it found that the Property Owners are an aggrieved party because there is no evidence that the Knolls' docking will harm it in any way, let alone evidence that the docking will cause harm to it that is distinct from that of the general public who also use the public lake. We disagree.

The question whether a party has standing is a question of law that this Court reviews de novo. *Lee v. Macomb Co Bd of Comm'rs*, 464 Mich. 726, 734–736, 629 N.W.2d 900 (2001). As this Court noted in *Olsen*, “standing” in a case involving an appeal from a zoning decision is governed by MCL 125.3605, which permits appeals to the circuit court by an “aggrieved party.” *Olsen v. Chikaming Twp*, 325 Mich. App. 170, 180-181; 924 N.W.2d 889 (2018). Thus, the proper question is not whether Property Owners have “standing” but whether it is a “party aggrieved by the [SLUP] decision.” See *id.* This Court stated:

> Incidental inconveniences such as increased traffic congestion, general aesthetic and economic losses, population increases, or common environmental changes are insufficient to show that a party is aggrieved. See [*Unger v. Forest Home Twp*, 65 Mich. App. 614, 617; 237 N.W.2d 582 (1975); *Joseph v. Grand Blanc Twp.*, 5 Mich. App. 566, 571; 147 N.W.2d 458 (1967)]. Instead, there must be a unique harm, dissimilar from the effect that other similarly situated property owners may experience. See [*Western Mich. Univ. Bd of Trustees v. Brink*, 81 Mich. App. 99, 103 n. 1; 265 N.W.2d 56 (1978)]. Moreover, mere ownership of an adjoining parcel of land is insufficient to show that a party is aggrieved, *Village of Franklin*, [101 Mich. App. at 557–558], as is the mere entitlement to notice, *Brink*, [81 Mich. App. at 102–103]. [*Id.* at 185.]

The circuit court found that the Property Owners had alleged more than simply their status as lakefront property owners and so had standing based on *Higgins Lake Property Owners Assn v. Gerrish Twp*, 255 Mich. App. 83, 91; 662 N.W.2d 387 (2003). In *Higgins Lake*, this Court found that a similarly-situated set of property owners and their association had standing, explaining:

> ***6** The HLPOA is a nonprofit corporation whose members are primarily lakefront property owners. The purpose of the HLPOA is to protect the lake, the watershed, and the interests of its members. The HLPOA asserts that the alleged overuse of, and concentration of persons and watercraft, at the road ends is affecting its members' enjoyment of the lake as well as their property values. Accordingly, the HLPOA has standing to sue as a nonprofit membership organization litigating to vindicate the interest of its members. [255 Mich. App. 91.]

The Knolls argues that *Higgins Lake* is factually distinguishable because it concerned the issue of whether a homeowners association had standing as a nonprofit, not whether it had alleged harm sufficiently. At issue in that case was the scope of the public's right to use road ends on Higgins Lake. *Higgins Lake*, 255 Mich. App. at 88. The subdivision plats dedicated the streets and alleys “to the use of the public” and backlot owners used the road ends for “lounging, sunbathing, and picnicking,” as well as mooring boats and placing boat hoists at the road ends. *Id.* The plaintiffs argued that these activities exceeded the scope of the dedication and that the dedication was limited to access only while the defendants presented evidence of the traditional and historical uses of the road ends, which included sunbathing, picnicking, lounging, and boat mooring for many years. *Id.* at 89, 92. This Court concluded that the association had standing, where it had “alleged overuse of, and concentration of persons and

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watercraft, at the road ends [affected] its members' enjoyment of the lake as well as their property values." *Id.* at 91.

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."

V. CONCLUSION

The circuit court correctly concluded that the Commission had the authority to issue the SLUP, that its decision was supported by competent, material, and substantial evidence on the record, and that Property Owners are an aggrieved party.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2019 WL 5092617

Footnotes

1 Hereinafter defendant-appellees Charter Township of Independence and its Planning Commission are collectively referred to as "Independence." Where appropriate to differentiate between the two, the Charter Township of Independence is referred to as the "township" and the Charter Township of Independence Planning Commission is referred to as the "Commission."

2 To be precise, "land which includes or abuts a river is defined as riparian, while land which includes or abuts a lake is defined as littoral." *2000 Baum Family Tr v. Babel*, 488 Mich. 136, 138 n. 1; 793 N.W.2d 633 (2010) (citation omitted). "However, the term 'riparian' is often used to describe both types of land," and will be used in such a manner herein. *Id.* (internal quotation marks and citation omitted).

3 Keyhole water access is "[t]he use of property that adjoins or extends into a lake for water access by owners or occupants of other property that does not adjoin or extend into a lake." Charter Township of Independence Zoning Ordinance Article 2, § 2.02. Water access is "[t]he launching, mooring and/or docking of watercraft." Article 2, § 2.02.

4 That case was dismissed by stipulation, subject to the conditions stated in the consent order, which permits the Knolls to reinstate the matter after the instant appeal is concluded.

5 The circuit court's ruling on the declaratory judgment is not challenged here. However, the circuit court reasoned that, although the Property Owners moved under the proper court rule (MCR 2.605 which governs declaratory relief), what it actually was seeking was a temporary stay pending resolution of the issue of whether a MDEQ permit was required to install the docks. The circuit court characterized it as an injunction and noted that the Property Owners did not cite or argue the appropriate standard. The circuit court went on to find that the Property Owners were not likely to succeed on the merits (the only injunction factor discussed in its motion). The Property Owners' nuisance claim based on MDEQ permitting was premature and that, contrary to Property Owners' assertion, seasonal docking structures did not constitute a marina under NREPA anyway.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

FORT SUMMIT HOLDINGS, LLC, and BRIDGEWATER INTERIORS, INC., Plaintiffs-Appellants,
v.
PILOT CORPORATION and CITY OF DETROIT BOARD OF ZONING APPEALS, Defendants-Appellees.

No. 233597.
|
May 3, 2002.

Before: COOPER, P.J., and GRIFFIN and SAAD, JJ.

UNPUBLISHED

PER CURIAM.

***1** Plaintiffs appeal by leave granted the circuit court's order affirming the City of Detroit Board of Zoning Appeals' decision to grant defendant's application for a permit to construct a motor vehicle gasoline filling station on the subject property. We affirm.

I. Facts and Procedural History

Defendant applied to the Department of Buildings and Safety Engineering (DBSE) for a permit to build a truck stop and gasoline station on 4401 West Fort Street, between Clark Street and McKinstry Street, in Detroit. The proposed project includes a retail convenience store, a fast-food restaurant with a drive-through window, nine truck refueling pumps, truck-scale parking, and driver restrooms with showers. The site on which the filling station would be built is zoned M4, intensive industrial. The store, restaurant, parking, and restrooms are all permitted as a matter of right in this zone. Motor vehicle filling stations are also permitted as of right in M4 zones but are subject to certain "locational suitability" requirements.

The DBSE denied defendant's application for a permit because its proposed filling station did not meet the "locational suitability" requirements of the zoning ordinance under §§ 42.0631-42.0632 and 42 .0633. Specifically, the proposed filling station is not located at the intersection of two major thoroughfares or a major thoroughfare and freeway, and three other filling stations operate within one-thousand radial feet from the site. However, according to § 42.0634 of the zoning ordinance, when the filling station does not meet both of these locational suitability requirements, "[t]he request for waiver shall be heard by the Board of Zoning Appeals as a use variance, pursuant to Sections 42.0600 through 42.0664, 62.0403 and any other applicable provision of this ordinance."

Defendant appealed the DBSE's decision to the City of Detroit Board of Zoning Appeals (BZA) which, in turn, granted defendant's application for a permit. However, the circuit court subsequently reversed the decision of the BZA and remanded the case for a rehearing to comply with its procedural responsibility of notifying all of the surrounding and contiguous property owners of the hearing. After the hearing on remand, the BZA upheld its previous decision and granted defendant's application for

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a permit. The BZA found, among other things, that the travel center complied with the spirit and intent of the zoning ordinance and that defendant had satisfied all of the requirements for a variance under § 62.0403 of the zoning ordinance.

Plaintiffs appealed the BZA decision in the circuit court and argued that the BZA's decision to grant the permit was not supported by substantial evidence and the BZA did not follow the procedural requirements of the zoning ordinance. The circuit court affirmed the BZA decision and ruled that defendant presented sufficient evidence for the BZA to find that defendant demonstrated a practical difficulty in complying with the zoning ordinance, which was enough to grant defendant a locational waiver.

II. Analysis

A. Standing

***2** In granting plaintiffs' application for leave to appeal, this Court instructed plaintiffs to address the issue of their standing to challenge the BZA's decision. Whether a party has standing is a question of law that we review de novo on appeal. *Lee v. Macomb Co Bd of Comm'rs,* 464 Mich. 726, 734; 629 NW2d 900 (2001).

Under the City and Village Zoning Act ("CVZA"), "a person having an interest affected by the zoning ordinance may appeal to the circuit court." MCL 125.585(11). The essential question in determining whether a party has standing is whether the party has alleged "special damages." *Brown v East Lansing Zoning Bd of Appeals,* 109 Mich.App 688, 699-701; 311 NW2d 828 (1981). Possible adverse effects of the change on a person's property are enough to confer standing under this statute. *Id.* at 700. In *Brown,* this Court ruled that the plaintiffs had standing to challenge the zoning board decision because they alleged that the proposed project "in their immediate vicinity has at least a potential for interfering with the beneficial use and enjoyment of their own land." *Id.* at 699. This Court held that "[t]he fact that plaintiffs have an interest affected by defendant's decision to grant the variance is manifest in their active opposition to the variance and their participation in the different hearings." *Id.*

Here, Bridgewater owns a facility on a neighboring property owned by Fort Summit. Bridgewater alleged that it moved to this property because of the proposed industrial park and revitalization project. Plaintiffs now express concern that the proposed travel center will cause increased traffic, which they say would be detrimental to Bridgewater's success and might cause air pollution and might encourage prostitution. In *Brown,* this Court found that the plaintiffs had standing to challenge the zoning board decision because they demonstrated that the proposed project "might serve to intensify the change in the character of the neighborhood as well as increase the number of its residents." *Brown, supra* at 700. Plaintiffs have alleged that the travel center might change the character of the neighborhood and might adversely affect potential revitalization. Further, plaintiffs allege that this might cause them economic harm. We hold that these allegations meet the standard set forth in M.C.L. § 125.585(11) and under *Brown* and that plaintiffs have standing to challenge that BZA's decision.

B. BZA's Permit Decision

Plaintiffs challenge the BZA's decision to grant defendant a permit to build the proposed travel center and filling station. The standard of review for an appeal of a decision of a zoning board of appeals is set forth in M.C.L. § 125.585(11):

> Upon appeal, the circuit court shall review the record and decision of the board of appeals to ensure that the decision meets all of the following requirements:
>
> (a) Complies with the constitution and laws of this state.
>
> ***3** (b) Is based upon proper procedure.

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(c) Is supported by competent, material, and substantial evidence on the record.

(d) Represents the reasonable exercise of discretion granted by law to the board of appeals.

In *Michigan Ed Ass'n Political Action Committee (MEAPAC) v Secretary of State,* 241 Mich.App 432, 443-444; 616 NW2d 234 (2000), this Court explained the standard of review for an administrative agency decision:

> An administrative agency decision is reviewed by the circuit court to determine whether the decision was authorized by law and supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Ansell v Dep't of Commerce (On Remand),* 222 Mich.App 347, 354; 564 NW2d 519 (1997). Substantial evidence is any evidence that reasonable minds would accept as adequate to support the decision; it is more than a mere scintilla of evidence but may be less than a preponderance of the evidence. See *Korzowski v. Pollack Industries,* 213 Mich.App 223, 228; 539 NW2d 741 (1995). This Court's review of the circuit court's decision is limited to determining whether the circuit court "applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Boyd v. Civil Service Comm,* 220 Mich.App 226, 234; 559 NW2d 342 (1996). In other words, this Court reviews the circuit court's decision for clear error. *Id.* A decision is clearly erroneous when, "on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made." *Id.* at 235[.]

This Court must give due deference to an agency's regulatory expertise and may not invade the agency's fact-finding duties. *Gordon v. City of Bloomfield Hills,* 207 Mich.App 231, 232; 523 NW2d 806 (1994).

Plaintiffs argue that the BZA did not make the findings required by the zoning ordinance for a use variance and that the BZA decision was not supported by substantial evidence. On the other hand, defendant argues that the BZA was not required by the zoning ordinance to make the findings required for a use variance because the BZA did not grant defendant a *use* variance, but instead, granted defendant a *locational* waiver. Consequently, defendant argues, it was not required to present evidence sufficient to obtain a use variance. Therefore, the critical issue is whether the BZA granted defendant a use variance or a locational suitability waiver, and, if it granted defendant a locational suitability waiver, whether defendant was required to meet the requirements for a use variance.

The rules of statutory construction apply to ordinances. *Gora v. City of Ferndale,* 456 Mich. 704, 711; 576 NW2d 141 (1998). "The starting point for determining the Legislature's intent is the language of the statute itself." *Stozicki v. Allied Paper Co, Inc,* 464 Mich. 257, 263; 627 NW2d 293 (2001). "Statutes should be interpreted consistently with their plain and unambiguous meanings." *Id.* Questions of statutory interpretation are reviewed de novo on appeal. *Id.*

***4** Under § 42.0630, filling stations are permitted as a matter of right in M4 zoning districts. However, the zoning ordinance indicates that a permit to construct a filling station requires "locational suitability." As defined by § 42.0631, " '[l]ocational suitability' is the establishment of a proposed motor vehicle filling station at the intersection of two (2) or more major thoroughfares, or of a major thoroughfare and a freeway ...." If the proposed filling station is not located at such an intersection, under § 42.0633, the proposed site must be "a minimum distance of one thousand (1,000) radial feet from any existing or approved motor vehicle filling station," and a "waiver of 'Locational Suitability' [must be] obtained in accordance with [§] 42.0634."

Under § 42.0634, entitled "Procedure for waiver of 'Locational Suitability," 'if a filling station, like the one proposed in this case, is not at the intersection of two major thoroughfares and is less than one-thousand radial feet from another filling station, "[t]he request for waiver shall be heard by the Board of Zoning Appeals as a use variance, pursuant to [§§] 42.0600 through 42.0664, 62.0403 and any other applicable provision of this ordinance." Thus, the ordinance directs that, here, defendant must apply for a *waiver of locational suitability* which is heard by the BZA as a *use variance.*

The requirements for obtaining a locational suitability waiver under §§ 42.0600 through 42.0664 differ from the requirements for obtaining a use variance under § 62.0403. The zoning ordinance sets forth specific findings required if there are *no* other

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filling stations within one-thousand feet of the proposed filling station. However, the ordinance does not set forth required findings for locational suitability waivers heard by the BZA if the proposed location does not meet the "major thoroughfare" and "distance from other filling stations" requirements. Rather, generally, a party requesting a non-use variance such as a location waiver, as opposed to a use variance, does not have to show unnecessary hardship in following the ordinance, but rather, only needs to show practical difficulties in following the ordinance. *National Boatland, Inc v Farmington Hills Zoning Bd of Appeals,* 146 Mich.App 380, 387; 380 NW2d 472 (1985).

Here, however, the ordinance states that applications such as the one at issue here should be heard "as a use variance, pursuant to Section 42.0600 through 42.0664, 62.0403 and any other applicable provision of this ordinance." § 42.0634. Plaintiffs interpret this section to mean that the applicant must *meet the requirements* for obtaining a use variance under § 62.0403, which states that an applicant must demonstrate:

(a) That the property in question cannot be reasonably used only for a purpose permitted in that zone, and

(b) That the plight of the owner is due to unique circumstances and not to general conditions in the neighborhood, and

***5** (c) That the use to be authorized by the variance will not alter the essential character of the locality.

In contrast, defendant argues that § 42.0634, which directs that locational suitability waivers "shall be heard by the Board of Zoning Appeals as a use variance" merely means "that, unlike the other requested waivers of locational suitability, which are heard by the Buildings and Safety Engineering Department, these specified requests for waivers must be heard in the first instance by the BZA, as are requests for use variances." In other words, defendant maintains that the application is *heard* as a use variance, not *decided* as a use variance.

We agree with defendant for several reasons. First, filling stations are permitted as a matter of right in intensive industrial M4 zoning districts such as the one at issue here. It makes little sense to require a use variance for a use that the zoning ordinance clearly permits as of right. Defendant's proposed filling station is consistent with the existing zoning and, therefore, the critical issue is not whether the land is zoned to permit the use, but the location of the proposed project with respect to cross streets and other filling stations. As this Court explained in *National Boatland, supra* at 386:

> Variances fall within one of two categories: use variances or non-use variances. Use variances permit a use of the land which the zoning ordinance otherwise proscribes. Non-use variances are not concerned with the use of the land but, rather, with changes in a structure's area, height, setback, and the like.

"A land use variance is, in essence, a license *to use property* in a way that would not be permitted under a zoning ordinance." *Frericks v. Highland Twp,* 228 Mich.App 575, 582; 579 NW2d 441 (1998) (emphasis added). Here, a waiver of locational suitability is what is at issue.

Plaintiffs observe that § 42.0634 states that applications should be heard "as a use variance, pursuant to ... [§] 62.0403 ...." and argue that this reference to the "use variance" section implies that defendant must demonstrate the requirements of a use variance. However, § 42.0634 also refers to §§ 42.0600 through 42.0664, the locational suitability waiver sections. Thus, the zoning ordinance contemplates the application of both the locational suitability waiver sections *and* the use variance sections. The reference to both does not change the true nature of defendant's claim: the use of the property to operate a filling station is permitted as of right and the only issue is its locational suitability, not the nature of the use.

As defendant correctly observes, to rule otherwise would impose on defendant an impossible and illogical task. § 62.0403 specifically states that a "use variance shall be granted only in cases of property having unique characteristics which prevent reasonable use of the property as zoned" and that "[a] use variance shall not be granted unless the board finds, on the basis

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of substantial evidence, that the property cannot reasonably be used in a manner consistent with existing zoning ....” Again, defendant's use of the property as a filling station is permitted by existing zoning laws. There is no logic in requiring defendant to prove that the property cannot reasonably be used for that or another permitted purpose.

***6** “Courts attempt not to interpret statutes, and by implication ordinances, in a manner that leads to absurd results.” *Brandon Charter Twp v. Tippett,* 241 Mich.App 417, 424; 616 NW2d 243 (2000). Defendant's right to use the property as proposed is settled by its existing zoning designation and it is merely the location that remains in dispute. The only logical reading of the zoning ordinance is that, for the locational suitability waiver required in this case, the BZA shall *hear* defendant's claim, but its *decision* is whether to permit a waiver of locational suitability, not whether defendant has demonstrated a need for a use variance.

At the BZA hearing and in its written decision and order, the Board clearly applied and found sufficient evidence to meet the requirements for a use variance under § 62.0403. For the reasons stated, the BZA imposed an incorrect and unduly burdensome standard on defendant; under the facts of this case, defendant was not required to meet the criteria under § 62.0403. [1] As noted, on appeal, the circuit court affirmed the BZA's decision because it found that, while the zoning ordinance only required defendant to present evidence to justify a locational suitability waiver, the evidence in the record was sufficient to grant such a waiver.

Given our limited review powers and the broad discretion of the BZA, we hold that the circuit court correctly affirmed the BZA's decision. While statements in the record indicate that the Board applied a more onerous standard than required, its ultimate decision did not violate state laws, was procedurally correct, was supported by ample evidence and constituted a reasonable exercise of discretion granted by law. Furthermore, for the reasons stated, the circuit court applied the correct legal principle by finding that defendant merely had to show practical difficulties in following the ordinance to obtain a non-use waiver. *National Boatland, supra* at 387; MCL 125.585(9). On review of the record, we are left with the firm conviction that the circuit court reached the correct result and that the BZA correctly granted defendant a permit to build the filling station on the property.

Defendant presented competent, substantial and material evidence showing the practical difficulty of complying with the major thoroughfare and minimum distance restrictions for the property, particularly in light of the need in the area for additional filling stations based on already-existing truck traffic. Furthermore, given that defendant's intended use is a matter of right in this zone, defendant clearly showed that the location restrictions “would unreasonably prevent the owner from using the property for a permitted purpose.” *National Boatland, supra* at 388. Moreover, there was ample evidence in the record to support the BZA's ultimate conclusion that the use “as proposed would be in keeping with the spirit and intent of the Zoning Ordinance.” It would simply be a waste of judicial and agency resources to remand this case for the BZA to apply a less stringent standard, particularly because there is abundant evidence in the record to support its decision to permit defendant to build and operate the filling station. Accordingly, we affirm the trial court's order upholding the BZA's decision. [2]

***7** Affirmed.

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Footnotes

1 And, as plaintiffs correctly observe, defendant failed to present “competent, material, and substantial” evidence to support a use waiver under § 62.0403. Defendant failed to show that the property has unique characteristics which prevent reasonable use of the property as zoned or that it cannot be reasonably used for another purpose permitted in the zone. Indeed, defendant acknowledged at the hearing that the land could be used for other intensive industrial purposes.

2 We also reject plaintiffs' argument that the BZA's decision must be reversed because it decided the matter before the Planning and Development Department (PDD) submitted a written report. Neither § 42.0620 nor § 42.0640 prevents the BZA from making a decision without a PDD report. Both sections merely state that the PDD has a duty to submit a report to the DBSE and the BZA

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before a hearing. The language of the ordinance does not suggest that the BZA cannot act without a written report from the PDD or that a decision of the BZA is invalid without the submission of such a report.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Thomas GAWRYCH and Carol A. Gawrych,
Plaintiffs/Counter-Defendants-Appellees,
v.
Mark RUBIN,
Defendant/Counter-Plaintiff-Appellant.

Docket No. 267447.
|
July 20, 2006.

Alcona Circuit Court; LC No. 99-010306-CE.

Before: NEFF, P.J., and BANDSTRA and ZAHRA, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** Defendant claims an appeal from the trial court's decision on remand granting summary disposition in favor of plaintiff and ordering him to abate a nuisance. We affirm.

Plaintiffs own three lots in a subdivision in Alcona Township. Plaintiffs' lot 2 lies on the shore of Lake Huron, while their lots 10 and 11, on which their residence sits, are located across the street from lot 2. Defendant owns lots 3, 4, and 5 in the subdivision. Defendant's lot 3 is adjacent to plaintiffs' lot 2, and is located across the road from plaintiffs' lot 10.

Defendant erected a second pole barn on lot 3, and in the course of doing so, trespassed onto plaintiffs' lot 2. Plaintiffs filed suit, alleging that the construction violated the local zoning ordinance and thus constituted a nuisance per se, that defendant trespassed on their land while constructing the pole barn and on their riparian rights by constructing a boat dock in front of lot 2, that defendant's placement of the pole barn violated subdivision restrictions, and that the pole barn constituted a private nuisance because floodlights attached thereto disturbed them at night. Plaintiffs claimed that they suffered special damages in the use and enjoyment of their property because their view of Lake Huron from their home was blocked by the second pole barn, that the obstructed view diminished the value of their property, that the pole barn disrupted the residential character of the neighborhood, and that defendant's construction activities created unnatural runoff and erosion problems. Defendant filed a countercomplaint alleging that the location of plaintiffs' home violated subdivision restrictions, and therefore constituted a nuisance.

Plaintiffs filed an appeal with the Alcona Township Zoning Board of Appeals (ZBA), arguing that defendant's construction of a second pole barn violated the zoning ordinance. The ZBA ruled in favor of plaintiffs. The circuit court reversed that decision, concluding that plaintiffs' appeal to the ZBA was untimely.

The trial court denied plaintiffs' motion for summary disposition of their public nuisance claim, but granted summary disposition for defendant based on laches, holding that plaintiffs' delay in appealing to the ZBA resulted in prejudice to defendant. The trial court also granted partial summary disposition for plaintiffs on their trespass to land claims, and awarded plaintiffs $733.50 in damages. The trial court granted summary disposition for plaintiffs on their private nuisance claim based on the location of the floodlights, and ordered defendant to abate the nuisance. The trial court granted summary disposition for defendant on plaintiffs' claim of trespass on their riparian rights and on their claim for treble damages for trespass.

Subsequently, the trial court granted plaintiffs' unopposed motion for summary disposition of defendant's counterclaim, and granted plaintiffs' motion for voluntary dismissal of their remaining claims. The trial court granted defendant's motion for fees and costs.

***2** Plaintiffs appealed,[1] and in *Gawrych v. Rubin,* unpublished opinion per curiam of the Court of Appeals, issued October 26, 2004 (Docket No. 247744), this Court reversed in part and remanded for further proceedings. This Court affirmed the trial court's denial of summary disposition for plaintiffs on their public nuisance claim, but reversed the grant of summary disposition for defendant, and remanded for consideration of the issue of plaintiffs' standing to bring such a claim. This Court found that defendant's pole barn violated the zoning ordinance, and thus constituted a nuisance per se under MCL 125.294, but directed the trial court to consider

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"whether the obstruction of plaintiffs' scenic view of Lake Huron is a special damage that would permit plaintiffs to proceed on their public nuisance claim." *Id.,* slip op at 2. This Court rejected plaintiffs' argument that the trial court erred in holding that they were required to exhaust their administrative remedies before the ZBA prior to proceeding in circuit court. *Id.* This Court agreed with plaintiffs that the trial court erred by applying the doctrine of laches to their public nuisance claim, *id.* at 2-3, found that the trial court erred by failing to award plaintiffs treble damages under MCL 600.2919(1) on their trespass to land claim and reversed for entry of judgment for plaintiffs in the amount of $2,200.50 rather than $733.50, *id.* at 3, and vacated the trial court's award of costs and fees to defendant and remanded for further consideration of that issue. *Id.* at 3-4.

On remand, plaintiffs moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that the obstruction of their view of Lake Huron by defendant's second pole barn, and the accumulation of vegetation growth on their beach resulting from runoff caused by defendant's construction activities, constituted special damages that supported their claim for public nuisance. The trial court granted summary disposition for plaintiffs on the basis that the obstruction of their view of Lake Huron by defendant's second pole barn constituted special damages that gave them standing to bring a public nuisance claim, but denied summary disposition for plaintiffs on the basis that the beach vegetation allegedly resulting from the runoff from defendant's activities constituted special damages, and granted summary disposition for defendant on that issue. Subsequently, the trial court entered an order concluding that plaintiffs had standing to bring a claim for public nuisance, and requiring defendant to abate the nuisance by removing the second pole barn.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v. Burchell,* 249 Mich.App 468, 479; 642 NW2d 406 (2001).

A structure erected in violation of a zoning ordinance is a nuisance per se. MCL 125.294. A nuisance arising from the violation of an ordinance is by its nature a public nuisance. *Towne v. Harr,* 185 Mich.App 230, 232; 460 NW2d 596 (1990). A public nuisance is an unreasonable interference with a common right enjoyed by the general public, and includes conduct which: (1) significantly interferes with the public's health, safety, peace, comfort, or convenience; (2) is proscribed by law; or (3) was known or should have been known by the actor to be of a continuing nature which produces a permanent or long-lasting significant effect on the public's rights. A private citizen may pursue an action for a public nuisance if he can show that he suffered a type of harm different from that of the general public. *Cloverleaf Car Co v. Phillips Petroleum Co,* 213 Mich.App 186, 190; 540 NW2d 297 (1995).

***3** Defendant argues that the trial court on remand erred in not holding a hearing or trial on the issue of whether he violated the zoning ordinance by erecting a second pole barn. We disagree.

In *Gawrych, supra,* this Court held that defendant's construction of a second pole barn violated the zoning ordinance, and thus constituted a nuisance per se under MCL 125.294. The *Gawrych* Court's holding on this issue constitutes the law of the case. The law of the case doctrine provides that an appellate ruling on a particular issue binds the appellate court and all lower tribunals with regard to that issue. A question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case. *Reeves v Cincinnati, Inc (After Remand),* 208 Mich.App 556, 559; 528 NW2d 787 (1995). The doctrine applies to questions specifically decided in an earlier decision and to questions necessarily determined to arrive at that decision. *Webb v Smith (After Second Remand),* 224 Mich.App 203, 209; 568 NW2d 378 (1997). The trial court was bound by the *Gawrych* Court's holding that defendant's construction of a pole barn violated the zoning ordinance, and correctly declined to hold a hearing or trial on the issue.

Furthermore, defendant argues that the trial court erred by holding that plaintiffs demonstrated that they suffered special damages, i.e., the obstruction of their view of Lake Huron, that gave them standing to pursue their public nuisance claim. We disagree.

In *Towne, supra,* the plaintiffs sued to abate a public nuisance resulting from the defendants' erection of a pole building in violation of local zoning ordinances. The trial court found that the plaintiffs were the proper parties to institute such an action. This Court reversed, finding that the plaintiffs failed to prove special damages, and thus lacked standing to bring the abatement action. *Id.* at 231-233. The *Towne* Court did not hold that loss of view cannot constitute special damages, but simply noted without elaboration that the trial court's findings demonstrated that the plaintiffs did not prove that they suffered special damages as a result of defendants' violation of the zoning ordinance. Furthermore, in *Webb, supra,* in which the plaintiffs sued to enforce negative reciprocal easements, this Court held that a diminution in property value resulting from a lake view obscured by construction in violation of deed restrictions constituted

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substantial harm. *Id.* at 212-213.

In support of their motion for summary disposition on remand, plaintiffs submitted an affidavit in which they stated that defendant's second pole barn, located on defendant's lot 3, directly obstructed their view of Lake Huron from their home. Plaintiffs also stated that their home had diminished in value due to defendant's placement of a pole barn on lot 3. This uncontradicted evidence supported the trial court's finding that defendant's construction of a pole barn on lot 3 resulted in harm to plaintiffs that was different from the harm suffered by the public in general. *Cloverleaf Car Co, supra.* The trial court did not err in holding that plaintiffs demonstrated that defendant's construction of a pole barn caused them special damages, and that they had standing to bring a claim of public nuisance.

***4** Affirmed.

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Footnotes

1 Defendant filed a cross-appeal, but that appeal was dismissed pursuant to a stipulation.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

KINGSBURY COUNTRY DAY SCHOOL and Kingsbury School, Inc., Appellants,
v.
ADDISON TOWNSHIP, Addison Township Zoning Board of Appeals, and New Par, doing business as Verizon Wireless, Appellees.

No. 344872
|
February 18, 2020

Oakland Circuit Court, LC No. 2017-160571-AA

Before: Cavanagh, P.J., and Beckering and Gadola, JJ.

Opinion

Per Curiam.

***1** Appellants, Kingsbury Country Day School and Kingsbury School, Inc., appeal as of right the circuit court's order affirming the decision of appellee, Addison Township Zoning Board of Appeals (the ZBA), which granted a nonuse variance to appellee, Addison Township (the Township). We reverse.

I. FACTS

This appeal involves a parcel of land owned by the Township that consists of approximately 5.23 acres located at 5020 Hosner Road in Oxford Township. In 2016, appellee New Par, doing business as Verizon Wireless (Verizon), entered into an agreement with the Township to place a cellular tower on the parcel. In doing so, Verizon hoped to provide cellular service to its customers in what it describes as a service "dead zone." Under the agreement, Verizon would pay the Township approximately $17,000 annually to place its tower on the Hosner Road property. The Township has designated the zoning of the parcel as Public Institutional 1 (P-1), and the parties do not dispute that the proposed cellular tower is a permitted use in P-1 zoning. [1]

Section 4.47(4)(b)(3) of the Township's Wireless Communication Facilities ordinance requires that, for the placement of a cellular tower, "[t]he minimum lot size shall be twenty (20) acres." Thus, to locate the cellular tower on the Hosner Road property requires a dimensional variance for the parcel from the requirements of § 4.47(4)(b)(3) of the ordinance. In May 2017, the Township supervisor applied to the ZBA on behalf of the Township, seeking a dimensional variance for the parcel from the 20-acre requirement.

Kingsbury Country Day School is located on property adjacent to the Hosner Road parcel. The school is located partially on property owned by Kingsbury School, Inc. and leased to the school, and partially on property that the school leases from the Township. The parties do not dispute that if the cellular tower is constructed on the Hosner Road property in the location proposed, the school's playground is within the fall zone of the tower. The proposed tower would be 197 feet high and the placement of the cellular tower as planned would place the tower 90 feet from the boundary of the property adjoining the subject property where the school is located. The parties also do not dispute that § 4.47(4)(b)(3) of the Township's Wireless Communication Facilities ordinance requires that "[t]he setback of the [cellular tower] from all lot lines shall be no less than the height of the structure."

Although the Township's application requested a variance from the 20-acre dimensional requirement of the ordinance, the application did not specifically request a variance from the set-back requirement. However, during the public hearing on the application the Verizon representative speaking on behalf of the Township's application stated that the Township was requesting both a dimensional variance and a variance from the set-back requirement. After the public hearing on the Township's application, the ZBA held a second hearing and granted the application for the requested variance. The ZBA did not make any findings nor specify whether it was granting a variance from the set-back requirement.

***2** Appellants appealed the ZBA decision to the circuit court. The circuit court determined that appellants were entitled to appeal to that court as "aggrieved parties," then remanded the case to the ZBA for a further public hearing on the issue of the fall zone of the proposed tower. The ZBA held a public hearing as directed by the circuit court and again

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granted the variance. The circuit court thereafter affirmed the decision of the ZBA.

Appellants claimed an appeal as of right of the circuit court's decision to this Court. Appellees moved to dismiss the appeal under MCR 7.203(A)(1)(a), contending that this Court did not have jurisdiction to hear the appeal because the circuit court had been acting in its appellate capacity in reviewing the decision of a tribunal, requiring appellants to seek leave to appeal instead of claiming an appeal as of right. This Court denied the motions to dismiss, holding that appellees "have not shown that the Addison Township Zoning Board of Appeals was acting as a 'court' or 'tribunal' when it granted the application for variance at issue in this case. Therefore, MCR 7.203(A)(1)(a) does not apply and this Court has jurisdiction to hear this appeal as an appeal of right." *Kingsbury Country Day Sch. v. Addison Twp.*, unpublished order of the Court of Appeals, entered September 26, 2018 (Docket No. 344872).

Verizon again moved to dismiss the appeal, this time contending that this Court did not have jurisdiction because appellants are not "aggrieved parties" within the meaning of MCR 7.203(A)(1) and MCL 125.3606. This Court denied the motion to dismiss without prejudice to appellees raising that argument in their brief on appeal. *Kingsbury Country Day Sch. v. Addison Twp.*, unpublished order of the Court of Appeals, entered October 30, 2018 (Docket No. 344872).

II. DISCUSSION

A. JURISDICTION

As an initial matter, we address appellees' renewed assertions that this Court does not have jurisdiction to hear this appeal.

1. THE ZBA AS TRIBUNAL

The Township and the ZBA contend that this Court lacks jurisdiction to hear this appeal because the circuit court's decision affirming the decision of the ZBA is not a final judgment appealable as of right under MCR 7.203(A)(1)(a). Appellants previously raised this issue in motions to dismiss filed with this Court on August 15, 2018, and August 27, 2018. This Court denied the motions and stated, in relevant part:

> The motions to dismiss are DENIED. Defendants-appellees have not shown that the Addison Township Zoning Board of Appeals was acting as a "court" or "tribunal" when it granted the application for variance at issue in this case. Therefore, MCR 7.203(A)(1)(a) does not apply and this Court has jurisdiction to hear this appeal as an appeal of right. [*Kingsbury Country Day Sch. v. Addison Twp.*, unpublished order of the Court of Appeals, entered September 26, 2018 (Docket No. 344872).]

Generally, the law of the case doctrine provides that an appellate court's ruling on an issue binds the appellate court and all lower tribunals with respect to that issue. *Brownlow v. McCall Enterprises, Inc.*, 315 Mich. App. 103, 110; 888 N.W.2d 295 (2016). The rationale of this doctrine is the need for finality and the appellate court's lack of jurisdiction to modify its judgments except on rehearing. *Id.* Because this Court has already ruled upon this jurisdictional issue presented by the Township and the ZBA, ordinarily we would decline to again address this issue here. However, because subject matter jurisdiction is of such critical importance, we explain our previous ruling here for clarification. See *O'Connell v. Director of Elections*, 316 Mich. App. 91, 100; 891 N.W.2d 240 (2016).

***3** MCR 7.203(A)(1)(a) provides that this Court does not have jurisdiction of an appeal claimed by right of "a judgment or order of the circuit court on appeal from any other court or tribunal." The Township and the ZBA suggest that the ZBA in this case was acting as a tribunal when it granted the zoning variance, and that the circuit court's order affirming the grant of the variance therefore was an order on appeal from a tribunal. An administrative agency that acts in a quasi-judicial capacity may be considered a tribunal for purposes of MCR 7.203(A)(1)(a). See *Natural Resources Defense Council v. Dep't of Environmental Quality*, 300 Mich. App. 79, 85-87; 832 N.W.2d 288 (2013). To determine whether an administrative agency was acting in a quasi-judicial capacity, we consider whether the agency's procedures are akin to court procedures. *Id.* at 86. Quasi-judicial proceedings include the procedural characteristics common to court proceedings, such

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as the right to a hearing, to be represented by counsel, to present evidence, to subpoena witnesses, and to compel the production of documents. *Id.* Here, the decision of the ZBA was made after a public hearing that did not have these characteristics, and thus was not comparable to a court proceeding. The ZBA thus did not act in a quasi-judicial capacity and as a result was not acting as a "tribunal." For that reason, as we previously determined in our order addressing this issue, the circuit court's order was a final order under MCR 7.202(6)(a)(i), appealable as of right under MCR 7.203(A)(1).

2. APPELLANTS AS AGGRIEVED PARTIES

In its motion to dismiss filed with this Court on October 4, 2018, Verizon argued that this Court does not have jurisdiction to hear this appeal because appellants are not aggrieved parties under either MCL 125.3606(1) or MCR 7.203. This Court denied the motion, but without prejudice to appellees again raising this issue in their briefs on appeal. *Kingsbury Country Day Sch. v. Addison Twp.*, unpublished order of the Court of Appeals, entered October 30, 2018 (Docket No. 344872). As permitted by this Court's order, Verizon in its brief on appeal has renewed its contention that this Court does not have jurisdiction to hear this appeal because appellants are not "aggrieved parties" within the meaning of § 606 of the Michigan Zoning Enabling Act (MZEA), MCL 125.3606(1), and therefore are not entitled to claim an appeal as of right of the decision of the ZBA.

We observe that although both MCR 7.203(A) and MCL 125.3606 use the term "aggrieved party," the court rule and the statute address different situations. MCR 7.203(A) sets forth the jurisdiction of this Court to hear an appeal claimed as of right. That court rule provides, in relevant part:

> (A) **Appeal of Right.** The court has jurisdiction of an appeal of right filed by an aggrieved party from the following:
>
> (1) A final judgment or final order of the circuit court, or court of claims, as defined in MCR 7.202(6), ... [MCR 7.203(A).]

Thus, a party claiming an appeal as of right to this Court must be an aggrieved party within the meaning of MCR 7.203(A) to invoke the appellate jurisdiction of this Court. To be an aggrieved party within the meaning of MCR 7.203(A), the party must demonstrate "an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case." *Federated Ins. Co. v. Oakland Co. Rd. Comm.*, 475 Mich. 286, 292; 715 N.W.2d 846 (2006). In addition, to be aggrieved "one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency." *Id.* at 291 (citations omitted). A party must be "more than merely disappointed over a certain result. Rather the party must have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power." *Id.* at 291-292. Stated another way, "[a] party who could not benefit from a change in the judgment has no appealable interest." *Manuel v. Gill*, 481 Mich. 637, 644; 753 N.W.2d 48 (2008) (quotation marks and citation omitted).

In this case, the circuit court, having concluded that appellants were parties properly before that court, affirmed the decision of the ZBA to grant the variance to the Township and permit the construction of the cellular tower on the parcel adjacent to the school with the fall zone of the tower intersecting the school's playground. This decision was contrary to appellants' interests, which appellants characterize as loss of safety to the students and staff at the school, resulting in a loss of financial security for the school and a loss of financial value as a result of the threat of danger presented by the planned location of the cellular tower. Because appellants have demonstrated a pecuniary interest allegedly affected by the circuit court's decision and a concrete and particularized injury arising from the circuit court's decision, appellants are parties "aggrieved" by the decision of the circuit court. This Court therefore has jurisdiction under MCR 7.203(A) to review appellants' claim challenging the circuit court's decision.

***4** Verizon contends, however, that the circuit court erred when it determined that appellants were properly before the circuit court as parties aggrieved by the decision of the ZBA.[2] The MZEA provides for judicial review of a zoning decision of a local unit of government to the circuit court by a party aggrieved by the decision. *Olsen v. Chikaming Twp.*, 325 Mich. App. 170, 179; 924 N.W.2d 889 (2018). Section 605 of the MZEA, MCL 125.3605, provides, in pertinent part:

> The decision of the zoning board of appeals shall be final. A party aggrieved by the decision may appeal to the circuit court for the county

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> in which the property is located as provided under [MCL 125.3606].

Thus, a party seeking relief from a decision of a ZBA in the circuit court is required to demonstrate that he or she is an "aggrieved" party under the MZEA. *Olsen*, 325 Mich. App. at 180-181. We review de novo the circuit court's determination that appellants are aggrieved parties under the MZEA, and hold that the circuit court in this case did not err in this determination. See *Olsen*, 325 Mich. App. at 180.

Under the MZEA, as under MCR 7.203(A), to be a party aggrieved "one must have some interest of a pecuniary nature in the outcome of the case and not a mere possibility arising from some unknown and future contingency" and "have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power." *Olsen*, 325 Mich. App. at 181. This Court has consistently required 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[,]' " *Olsen*, 325 Mich. App. at 183, quoting *Unger v. Forest Home Twp.*, 65 Mich. App. 614, 617; 237 N.W.2d 582 (1975), and must have they suffered a "unique harm different from similarly situated community members." *Id.* at 186.

In this case, appellants assert that unlike other property owners or members of the community, they are aggrieved parties because the cellular tower is a fall risk to the school. To the extent that appellants allege that the school, and the students attending the school, are at heightened risk if the cellular tower were to collapse, and that enrollment could decline as a result of the fall risk of the tower, such considerations constitute special damages not incurred by other members of the community. Put another way, these potential harms are unique and dissimilar from effects that other property owners may experience as a result of the placement of the tower on the subject property. The circuit court therefore properly concluded that appellants are aggrieved parties under MCL 125.3605 and were entitled to appeal to that court from the decision of the ZBA as "aggrieved parties" of the ZBA's decision.

B. THE CIRCUIT COURT DECISION

Having reiterated that appellants are properly before this court, and having concluded that appellants were properly before the circuit court, we next consider appellants' challenge to the decision of the circuit court affirming the ZBA's decision. Appellants contend that the circuit court incorrectly determined that the ZBA's decision was supported by competent, material, and substantial evidence on the record and further contend that the ZBA failed to comply with its own variance ordinance and cell tower ordinance. We agree.

***5** The MZEA provides for judicial review of the zoning decisions of a local unit of government. *Olson*, 325 Mich. App. at 179. In that regard, MCL 125.3606 provides, in pertinent part:

> (1) Any party aggrieved by a decision of the zoning board of appeals may appeal to the circuit court for the county in which the property is located. The circuit court shall review the record and decision to ensure that the decision meets all of the following requirements:
>
> (a) Complies with the constitution and laws of the state.
>
> (b) Is based upon proper procedure.
>
> (c) Is supported by competent, material, and substantial evidence on the record.
>
> (d) Represents the reasonable exercise of discretion granted by law to the zoning board of appeals.
>
> * * *
>
> (4) The court may affirm, reverse, or modify the decision of the zoning board of appeals. The court may make other orders as justice requires.

"Substantial evidence" means evidence that a reasonable person would accept as sufficient to support a conclusion, and is considered to be more than a scintilla of evidence but "substantially less than a preponderance." *Edw. C. Levy Co. v. Marine City Zoning Bd. of Appeals*, 293 Mich. App. 333, 340-341; 810 N.W.2d 621 (2011). Under the substantial evidence test, the circuit court's review of the ZBA's decision is not de novo and the circuit court does not draw its own conclusions from the evidence, nor does the circuit court substitute its judgment for that of the ZBA, but instead determines whether, giving deference to the ZBA's factual findings, the ZBA's decision is supported by substantial evidence. *Id.* at 341.

Our review of a circuit court's decision in an appeal from a decision of a ZBA is de novo to determine whether the

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circuit court "applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the [ZBA's] factual findings." *Olsen*, 325 Mich. App. at 180, quoting *Hughes v. Almena Twp.*, 284 Mich. App. 50, 60; 771 N.W.2d 453 (2009) (quotation marks and citation omitted). But although the factual findings of the ZBA are entitled to deference, the manner in which a zoning ordinance applies to those facts is a question of law which this Court determines de novo. *Great Lakes Society v. Georgetown Charter Twp.*, 281 Mich. App. 396, 408; 761 N.W.2d 371 (2008). We review and interpret ordinances in the same manner as we do statutes, and thus the interpretation and application of a municipal ordinance presents a question of law that we review de novo. *Id.* at 407. If the language of an ordinance is unambiguous, we are required to enforce the ordinance as written. *Kalinoff v. Columbus Twp.*, 214 Mich. App. 7, 10; 542 N.W.2d 276 (1995). In applying this statutory standard, we are guided by our Supreme Court's statement under the prior, now repealed zoning statute that "[w]here the facts relating to a particular use are not in dispute, the legal effect of those facts, that is, how the terms of the ordinance are to be interpreted in relation to the facts, is a matter of law, and the courts are not bound by the decision of administrative bodies on questions of law." *Macenas v. Michiana*, 433 Mich. 380, 395; 446 N.W.2d 102 (1989) (quotation marks and citation omitted).

***6** In this case, the Township applied for a dimensional variance for the Hosner Road parcel from the 20-acre requirement of the Township's wireless communications ordinance. At the public hearing on the application, a Verizon representative provided additional information and answered questions on behalf of the applicant. Numerous citizens made public comments against the requested variance. At the following hearing, the ZBA granted the application. The ZBA did not make any factual findings on the record nor state its reasons for granting the application. Instead, at the conclusion of the ZBA's second hearing on the application on July 13, 2017, a member of the ZBA moved to approve the Township's variance application, stating:

> First, I want to start off by saying many people have asked why the township doesn't enforce ordinances as they're written. The township has enforced the ordinance[s] as they were written because they have denied or rejected the application because it didn't meet the ordinance. So the township did what they -- the planning commission did what they did.
>
> This board is existing to allow applicants to come and explain why they can't meet the ordinances. And most of what we've been talking about the last couple months have been based on why this variance, acreage variance, is necessary.
>
> The comments that I've heard from people in the public hearing and other stuff that has been sent to the township in my mind breaks down into two basic categories. One is fear of radiation, electromagnetic radiation. Number two is fear of or danger from the tower falling down. And the third is that the tower is ugly; or to say that a different way, it doesn't fit into the rural character of Addison Township.
>
> As far as the EMF radiation's concerned, there is a federal law that's Section 704 of the Federal Telecommunications Act of 1996 specifically preempts consideration – let me read it so I get it right here – specifically preempts consideration of the health and environmental setbacks of radiofrequency radiation at levels below federal current – Federal Communications Commission standards in decisions involving placement and construction and modification of wireless facilities. We cannot use fear of EMF radiation as a reason to approve or disapprove a variance. That's a federal law.
>
> The danger from a falling down tower I think has been described pretty well. The township says that the ordinance is written the way it is, 120 [sic] acres. So that [a] tower [that] is held up by [guy] wires will have a fall zone equal to the height of the tower. The tower – and the research I've been able to do, in Michigan there has never been a cell phone tower fail. I don't know where that picture comes from; I don't believe it's Michigan ...
>
> Building codes. There has never been a cell phone tower failure in Michigan for Verizon or any other service provider that I've been able to determine.
>
> Number three, the tower is ugly or not [in] keeping with our rural character. This board really isn't qualified to judge ugly; none of us probably would be on the board.
>
> The meaning of rural character is not really very substantive. We would like to think of it as the last 20 years or 50 years. But certainly, if you go back to 100 years, go back to the year 1900, there was no refrigeration or supermarkets. That was the rural character at that time.

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I don't think that would be acceptable to the people today. You know, CAT scans and kidney dialysis were unknown. We don't want to go back to that. There was no telecommunications of any kind in 1900. That was the rural character of this township at that time. I think we need to progress.

Having said all that, I'd like to make a motion that we approve the variance, acreage variance, for petition number 17-02.

***7** Although the ZBA then discussed certain requirements of the site plan, the ZBA thereafter voted to grant the variance without making findings regarding whether the application met the Township's ordinance for granting the application. Appellants appealed to the circuit court, which found that the ZBA had not created a sufficient record regarding the potential danger presented by the fall zone of the tower and remanded the matter to the ZBA for a further public hearing. The ZBA conducted another public hearing, during which Verizon, on behalf of the Township's application, provided further assurances that the tower cannot fall. A member of the ZBA thereafter again moved to grant the variance, stating that the record evidence supported the conclusion that the design of the tower prevented the tower from falling. The ZBA then voted to grant the variance, but without making further findings. The circuit court thereafter affirmed the order of the ZBA under MCL 125.3606(4).

Appellants contend that the Township's application did not meet the requirements of the Township's variance ordinance that would enable the ZBA to grant the variance, and that the ZBA's decision therefore was not supported by competent, material, and substantial evidence. We agree.

By enacting the MZEA, our Legislature has granted local units of government authority to regulate land use and development through zoning. *Maple BPA, Inc. v. Bloomfield Charter Twp.*, 302 Mich. App. 505, 515; 838 N.W.2d 915 (2013). Secion 604 of the MZEA empowers a local ZBA to grant variances from a zoning ordinance as follows, in pertinent part:

(7) If there are practical difficulties for nonuse variances as provided in subsection (8) or unnecessary hardship for use variances as provided in subsection (9) in the way of carrying out the strict letter of the zoning ordinance, the zoning board of appeals may grant a variance in accordance with this section, so that the spirit of the zoning ordinance is observed, public safety secured, and substantial justice done. The ordinance shall establish procedures for the review and standards for approval of all types of variances. The zoning board of appeals may impose conditions as otherwise allowed under this act.

(8) The zoning board of appeals of all local units of government shall have the authority to grant nonuse variances relating to the construction, structural changes, or alteration of buildings or structures related to dimensional requirements of the zoning ordinance or to any other nonuse-related standard in the ordinance. [MCL 125.3604(7), (8).]

In this case, the Township's variance ordinance sets forth the standards for approval for a variance as follows:

Section 28.10 – Zoning variances.

The board of appeals may upon appeal of a specific case authorize such variance from the terms of this ordinance as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of this ordinance would result in practical difficulty. **A variance from terms of this ordinance shall not be granted by the board of appeals unless and until**:

1. A written application for a variance is submitted demonstrating:

a. That special conditions and circumstances exist which are peculiar to the land, structure or building involved and which are not generally applicable to other land, structures or buildings in the same zoning district.

b. That literal interpretation of the provisions of this ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of this ordinance.

c. That the special conditions and circumstances do not result from the actions of the applicant or his or her predecessor.

d. That granting the variance requested will not confer on the applicant any special privileges that are denied by this ordinance to other lands, structures or buildings in the same zoning district.

e. No nonconforming use of neighboring land, structures or buildings in other districts shall be considered grounds for the issuance of a variance. [Emphasis added.]

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***8** In this case, the Township sought a variance from the Township's wireless communication facilities ordinance that provides, in pertinent part:

> Section 4.47 – Wireless communication facilities.
>
> (4) b. Standards and conditions applicable to special land use facilities. Wireless communication facilities as described in Subparagraph(3)(b) shall be permitted only after special approval is granted by the planning commission in accordance with the procedures, requirements and standards set forth in this section and in Article 30, and subject to any conditions imposed by the planning commission. The following standards shall be met:
>
> * * *
>
> 2) The minimum lot size shall be twenty (20) acres.
>
> 3) The setback of the support structure from all lot lines shall be no less than the height of the structure. Structures shall be set back from existing or proposed right-of-way line an additional fifty (50) feet beyond the height of the structure.

The Township's application for the variance stated in pertinent part:

> Applicant requests a variance for the placement of [a] wireless communication facility. A dimensional variance for lot area of 14.76 acres from zoning ordinance provisions: wireless communication facilities Article 4.47, Section 4.b2 "the minimum lot size shall be twenty (20) acres."
>
> 1. Due to the topography of this site, the site does not require the 20 acres.
>
> 2. The westerly property line on Hosner Road is shielded by a large hill. The base will not be visible from Hosner Road.
>
> 3. The parcel is vacant. Unlike other locations, there is no need to construct close to the road; the proposed tower is located 200 feet from the centerline of Oakwood Road. The selected location provides a natural landscape barrier for the surrounding properties.
>
> 4. The site will not house accessory wireless structures.
>
> 5. Proposed monopole collapsible tower does not require a fall zone.
>
> 6. The site area is carefully selected so that [placement of the tower] will not disturb the wetlands.
>
> 7. The fenced site area shall be shielded with 6-7 foot evergreen trees for year round visual protection as provided by Verizon and must be approved by the site plan process.

Thereafter, the Township supervisor submitted further correspondence to the ZBA citing the requirements of the Township's variance ordinance and explaining that the intent of the Township wireless communication facilities ordinance "is to have the wireless facilities on larger parcels in certain ... districts to avoid placement in a residential zone and for the larger parcels to 'hide' the cell tower." The Township supervisor further explained:

> Thus, the objective of the 20 acres [requirement] is to ensure that the cell tower is protected from view to the best extent possible. Historically, most wireless facilities are placed as close to the road as possible. Although our ordinance asks for a larger parcel, we cannot ask for the tower to be more centrally located. We are accomplishing this objective by using the parcel selected. We have a parcel that will be protected from future building projects. We are minimizing the disturbance to the natural features and visual impact. We will use the driveway to access the cemetery so we no longer disturb the school. The portion of the parcel that we lease to the school is not calculated in the parcel size. In summary, the parcel selected shields the cell tower by natural topography and accomplishes the goals and objectives of the applicable ordinances.

***9** Although the ZBA thereafter granted the requested variance, the ZBA did not make factual findings nor articulate whether the Township had met the requirements established by the Township's ordinance for granting a

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variance. Specifically, the ZBA did not articulate whether the Township had established

a. That special conditions and circumstances exist which are peculiar to the land, structure or building involved and which are not generally applicable to other land, structures or buildings in the same zoning district.

b. That literal interpretation of the provisions of this ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of this ordinance.

c. That the special conditions and circumstances do not result from the actions of the applicant or his or her predecessor.

d. That granting the variance requested will not confer on the applicant any special privileges that are denied by this ordinance to other lands, structures or buildings in the same zoning district.

Further, our review of the record indicates no support for the conclusion that the Township's application established these standards. The Township's application does not demonstrate that the parcel has special conditions and circumstances peculiar to it that are not generally applicable to other parcels in the same zoning district. A review of the record suggests that the parcel has neither a special condition nor a peculiar circumstance different from other parcels in the zoning district; it is simply too small to meet the dimensional requirement established by the Township's ordinance.

Rather than demonstrating that the parcel has a special condition or peculiar circumstance necessitating a variance, the Township's variance application addresses why the site is a desirable one for a cellular tower, suggesting that the topography of the subject property is so desirable for this purpose that a 20-acre parcel is not necessary. However, apparently because part of the 5-acre parcel consists of wetlands, to construct the tower on the parcel apparently requires that the tower be placed only 90 feet from the property line, contrary to the Township's ordinance requirement that the tower be placed as far from the property line as the tower is tall. This proximity of the tower site to the property line became one of the main points of contention during the public hearing, creating great public concern whether the fall zone of the tower poses a danger to the school next door. The record thus suggests that the size and topography of the parcel, far from being ideal, creates public concern likely avoidable on a larger parcel.

Similarly, although the Township's application states that denial of the variance would deny the Township the rights that are availed to other properties in the area that are zoned appropriately, the Township's application does not demonstrate that this is so. The Township's ordinance requires all parcels to be 20 acres or more to be an acceptable site for location of a cellular tower. Nothing in the Township's application demonstrates that other parcels that are smaller than 20 acres enjoy the right to host a cellular tower. Similarly, the Township's application does not demonstrate that granting the variance would not confer on the Township "special privileges" that are denied by virtue of the zoning ordinances to other parcels in the same zoning district. Because the ZBA did not make findings that the Township met the standards for granting a variance under the Township's variance ordinance, and because the Township's application did not demonstrate entitlement to a variance under the Township's variance ordinance, the circuit court erred in concluding the ZBA's decision was supported by competent, material, and substantial evidence on the record and was not an abuse of the ZBA's discretion.

***10** In light of our determination, we decline to reach appellants' additional arguments that their due process rights were violated by the decision of the ZBA.

Reversed.

All Citations

Not Reported in N.W. Rptr., 2020 WL 814703

Footnotes

1 Section 4.47(3)(b) of the Township's Wireless Communications Facilities ordinance provides that wireless communications facilities are a permitted accessory use within a district zoned P-1 after special land use approval is granted by the Township's planning commission.

2 Although considering whether a party is "aggrieved" within the meaning of MCL 125.3605 is similar to considering whether a party is "aggrieved" within the meaning of MCR 7.203, *Olsen v. Chikaming Twp.*, 325 Mich. App. 170, 179; 924 N.W.2d 889 (2018), whether the circuit court correctly determined that appellants were properly before that court because they

were “aggrieved parties” under § 606 of the MZEA, MCL 125.3606(1), is a separate question that does not implicate the jurisdiction of this Court under MCR 7.203(A).

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2004 WL 299176
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Christopher MEANY and Donna Morgan, Plaintiffs-Appellants,
v.
CITY OF SAUGATUCK and Saugatuck Zoning Administrator, Defendants-Appellees.

No. 243694.
|
Feb. 17, 2004.

Before: SCHUETTE, P.J., and METER and OWENS, JJ.

[UNPUBLISHED]

SCHUETTE, METER and OWENS, JJ.

MEMORANDUM.
***1** Plaintiffs appeal as of right the circuit court order denying their motion for summary disposition and granting defendants' motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs brought this action for mandamus and declaratory judgment, requesting the court to order defendants to issue a building permit for construction on their property. Mandamus is an extraordinary remedy that may lie to compel the exercise of some measure of discretion, but not to compel its exercise in a particular manner. *Teasel v. Dept of Mental Health,* 419 Mich. 390, 410; 355 NW2d 75 (1984). In general, "[i]ssuance of a writ of mandamus is proper where (1) the plaintiff has a clear legal right to performance of the specific duty sought to be compelled, (2) the defendant has the clear legal duty to perform such act and (3) the act is ministerial, involving no exercise of discretion or judgment." *Vorva v Plymouth-Canton Community School Dist,* 230 Mich.App 651, 655; 584 NW2d 743 (1998). The plaintiff must be without other adequate legal or equitable remedy. *Tuscola Co Abstract Co v Tuscola Co Register of Deeds,* 206 Mich.App 508, 510; 522 NW2d 686 (1994).

Plaintiffs had an adequate legal remedy through an appeal of the decision of the zoning board of appeals. MCL 125.585(11). Plaintiffs have waived their challenge to a neighbor's standing to appeal to the ZBA. At any rate, 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. See MCL 125.585(5), *Brown v East Lansing Zoning Bd of Appeals,* 109 Mich.App 668, 701; 311 NW2d 828 (1981), and *Joseph v. Grand Blanc Twp,* 5 Mich.App 566, 571; 147 NW2d 458 (1967).

Affirmed.

All Citations

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2020 WL 3121035
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UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

OUR EGR HOMEOWNERS ALLIANCE, Appellant,
v.
CITY OF EAST GRAND RAPIDS, Appellee,
and
Spectrum Health Hospitals, Intervening Appellee.

No. 346413
|
June 11, 2020

Kent Circuit Court, LC No. 18-005163-AA

Before: K. F. Kelly, P.J., and Fort Hood and Swartzle, JJ.

Opinion

Per Curiam.

***1** Our EGR Homeowners Alliance appeals by leave granted the trial court's order dismissing its appeal of zoning decisions made by City Commission of the City of East Grand Rapids. On appeal, Alliance argues that the trial court erred by concluding that Alliance failed to establish special damages as a result of the City Commission's decision and that, therefore, Alliance was not an "aggrieved party." However, because Alliance alleged speculative future damages that could possibly arise from the underlying construction activity and not specifically from the City Commission's decision, we affirm the trial court's dismissal of Alliance's appeal.

This case arises out of a construction project at the Spectrum Health Blodgett Hospital in East Grand Rapids, Michigan. Spectrum sought to replace an existing parking structure on the campus's southwest corner with a smaller parking garage and a surface lot, and to construct a new parking structure at the campus's northwest corner in place of an existing surface lot. The project would require the City Commission to approve two variances to the City's zoning ordinance—a variance to the setback requirement for the surface parking lot along Sherman Street and a variance regarding the percentage of building coverage on the lot. The City Commission would also have to approve Spectrum's site plan for the project. The Planning Commission voted to allow the variances and approved the amended site plan following a meeting. The City Commission, sitting in place of the zoning board of appeals (ZBA), approved the requested variances and the site plan. The City Commission's approval of the site plan was conditioned on several requirements, including Spectrum's agreement to monitor the foundations of nearby homes during construction.

Alliance, a nonprofit corporation including various owners and occupants of real properties located immediately adjacent to or surrounding Blodgett Hospital, along with additional individual nearby homeowners, appealed the City Commission's decision to approve the variances and site plan to the trial court. The City and Spectrum both filed motions to dismiss the appeal, arguing that the appellants were not "aggrieved parties" pursuant to MCL 125.3605. The trial court agreed and dismissed the appeal. Alliance then filed an application for leave to appeal the trial court's order in this Court, which we granted. *Our EGR Homeowners Alliance v. East Grand Rapids*, unpublished order of the Court of Appeals, entered April 12, 2019 (Docket No. 346413).

Alliance's sole argument on appeal is that the trial court erred in dismissing its appeal of the City Commission's decision to approve the requested variances and site plan. We disagree.

This Court reviews "a circuit court's decision in an appeal from a decision of a zoning board of appeals ... de novo to determine whether the circuit court applied the correct legal principles and whether it misapprehended or grossly misapplied the substantial[-]evidence test to the [ZBA's] factual findings." *Olsen v. Chikaming Twp.*, 325 Mich. App. 170, 180; 924 N.W.2d 889 (2018) (quotation marks and citation omitted; second alteration in original.) This Court also reviews issues involving the construction of statutes and ordinances de novo. *Id.* Whether a party has standing is a legal question that is reviewed de novo. *Id.*

***2** Although municipalities have no inherent power to regulate land use through zoning, the Michigan Legislature granted this authority through the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq. Id.* at 179. The Legislature combined three zoning acts into the MZEA, which grants local units of government authority to regulate land use and development through zoning. *Id.* "The MZEA also provides for judicial review of a local unit of government's zoning decisions." *Id*. MCL 125.3605 provides

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that "[t]he decision of the zoning board of appeals shall be final. A party aggrieved by the decision may appeal to the circuit court for the county in which the property is located ...." MCL 125.3606(1) states:

> Any party aggrieved by a decision of the zoning board of appeals may appeal to the circuit court for the county in which the property is located. The circuit court shall review the record and decision to ensure that the decision meets all of the following requirements:
>
> (a) Complies with the constitution and laws of the state.
>
> (b) Is based upon proper procedure.
>
> (c) Is supported by competent, material, and substantial evidence on the record.
>
> (d) Represents the reasonable exercise of discretion granted by law to the zoning board of appeals.

This Court stated that for a party to demonstrate that it was "aggrieved" pursuant to MCL 125.3605,[1] "a party must 'allege and prove that he [or she] has suffered some special damages not common to other property owners similarly situated[.]' " *Olsen*, 325 Mich. App. at 185, citing *Unger v. Forest Home Twp.*, 65 Mich. App. 614, 617; 237 N.W.2d 582 (1975) (alterations in original). Moreover, this Court clarified that "[i]ncidental inconveniences such as increased traffic congestion, 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. Rather, "there must be a unique harm, dissimilar from the effect that other similarly situated property owners may experience." *Id.* This Court determined that "mere ownership of an adjoining parcel of land is insufficient to show that a party is aggrieved." *Id.*

At the outset, the City argues that Alliance admitted in its application for leave to appeal that it could not establish that it was an aggrieved party pursuant to the standard in *Olsen*. According to the City, this appeal must fail because *Olsen* is binding on this Court and Alliance has already admitted that it cannot meet the *Olsen* standard. It is true that Alliance argued that this Court improperly interpreted provisions of the MZEA in *Olsen*. However, Alliance also asserts that, regardless of the analysis in *Olsen*, Alliance "members plainly meet the statutory test" as aggrieved parties.

Nonetheless, Alliance has failed to establish that it is an aggrieved party to challenge the City Commission's decision. Alliance asserts that the City and Spectrum are estopped from challenging Alliance's status as an aggrieved party because they recognized that adjacent landowners faced a risk of structural damage to their homes during construction. See *Spohn v. Van Dyke Pub. Sch.*, 296 Mich. App. 470, 480; 822 N.W.2d 239 (2012) (explaining that a party who successfully "asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding"). However, this is a mischaracterization of the record. Spectrum did agree to pay for the monitoring of nearby homes for structure damage. However, Spectrum never acknowledged that the project was likely to damage adjacent homes. Documents in the administrative record indicate that surrounding homes incurred damage from construction on the Blodgett campus in 2008. The likelihood of damage was discussed at a special meeting of the Planning Commission on February 6, 2018. Commissioner Brian Miller asked the senior vice president of facilities at Spectrum about vibrations from the construction and what would be different from the construction that occurred in 2008. He explained that construction techniques had changed. Spectrum would install temporary walls and propose a drilling process instead of driving pilings. Spectrum would improve communication with neighbors to alleviate anxiety and provide an independent survey of homes for damage that might occur. The vice president of Blodgett Hospital apologized for past issues. She stated that Spectrum would do everything possible to "make it right with this construction."

***3** Moreover, the vice president of facilities showed a PowerPoint presentation at the March 20, 2018 Planning Commission meeting. One slide explained the site's soil condition and vibration assessment. According to the slide, there are two types of soil at the Blodgett Hospital campus. Type A was classified as a suitable soil with low vibration transmission, and Type B was classified as poor soil with moderate vibration transmission. The slide stated that the 2008 construction occurred in mostly Type B soil, while the proposed construction would occur in mostly Type A soil. Monitoring during the 2008 construction confirmed that perimeter vibration levels were below the "appropriate threshold." The new construction was not expected to cause damage to hospital buildings or adjacent homes. However, Spectrum would offer home surveys to adjacent neighbors. As a result, Alliance's assertion that Spectrum and the City admitted that the construction was likely to cause damage to nearby homes is untrue. In fact, Spectrum presented the

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opposite, stating that the proposed construction would not damage adjacent homes.

This case is comparable to *Olsen*. Claims of aesthetic changes are insufficient to constitute special damages. See *Olsen*, 325 Mich. App. at 183 (stating that "a neighboring landowner alleging increased traffic volume, loss of aesthetic value, or general economic loss has not sufficiently alleged special damages to become an aggrieved party"). Further, like the septic systems at issue in *Olsen*, 325 Mich. App. at 186, vibrations from construction may affect nearby landowners. However, as was also the case in *Olsen*, Alliance has failed to show that its claim that the proposed construction will damage the foundations or driveways of nearby homes was "more than speculation or anticipation of future harm." *Id.* Alliance has not provided any evidence disputing Spectrum's claim that the construction will not cause harm to adjacent homes. Further, Alliance members submitted their own site plan proposals for Spectrum's consideration that would require construction. Alliance members also admitted that the existing parking garage required replacement. Alliance has not established, however, that Spectrum's requested variances and proposed site plan will result in more damage than their own proposed plans or the simple replacement of the existing parking garage. In addition, Spectrum was granted variances for parking setbacks and maximum lot coverage in 2008. Alliance has not established that damage (or additional damage) will occur as a result of the approval of the requested variances. See *id.* at 181 (stating that an appellant must demonstrate that it was aggrieved by the decision of the ZBA rather than the underlying facts of the case). Ultimately, Alliance has not presented any evidence that the City Commission's approval of the current variances and proposed site plan will cause the harm that it anticipates. See *id.* at 186-187. Because Alliance "failed to demonstrate special damages different from those of others within the community," it was not "aggrieved" pursuant to MCL 125.3605, and accordingly, "did not have the ability to invoke the jurisdiction of the circuit court ...." *Id.* at 194. As a result, the trial court properly dismissed Alliance's appeal of the City's Commission's approval of Spectrum's requested variances and site plan. See *id.*

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2020 WL 3121035

Footnotes

1 Although the City Commission was only sitting as a ZBA when it granted the variances and approved the site plan, the parties' arguments assume that MCL 125.3605 governs Alliance's right to appeal the City Commission's decisions.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

SACKLLAH INVESTMENTS, L.L.C., Plaintiff–Appellant,
v.
CHARTER TOWNSHIP OF NORTHVILLE, Defendant–Appellee.

Docket No. 293709.
|
Aug. 9, 2011.

Wayne Circuit Court; LC No. 08–111756–CH.

Before: TALBOT, P.J., and HOEKSTRA and GLEICHER, JJ.

Opinion

PER CURIAM.

***1** Essam Sackllah, the sole owner of Sackllah Investments, is an aggrieved landowner in Northville Township. Sackllah developed a strip mall in a rural area of the Township. He attributes his lack of financial success in this venture to the Township's stringent restrictions on outdoor signs and the Township's refusal to make exceptions for him. Sackllah filed a circuit court action challenging the constitutional validity of the Township's sign ordinance and the Township's actions in enforcing that ordinance, which the circuit court summarily dismissed. We affirm the circuit court's judgment that the Township's sign ordinance is a constitutional land use restriction. The Township's intent is not to restrict Sackllah's freedom of speech, but to limit the proliferation of outdoor signs, especially in its more scenic rural areas. Further, Sackllah has presented no evidence, beyond his personal beliefs, that the Township has singled him out for negative treatment.

I. NORTHVILLE TOWNSHIP'S SIGN ORDINANCE

As part of its existing zoning ordinance, the Township adopted a comprehensive scheme to regulate all outdoor signs within its borders. The stated intent of the ordinance "is to regulate outdoor advertising and all signs within the Township ... to enhance the physical appearance of the Township, to preserve scenic and natural beauty, and to create an attractive economic and business climate." Northville Twp Zoning Ordinance, § 145–2. Through the sign ordinance, the Township seeks to accomplish certain "objectives," including the promotion of "uniform traffic flow" and reducing the "potential for accidents" by limiting "the proliferation of signs." *Id.,* § 145–2.A. Similarly, the Township intended to "[p]rohibit certain types of signs," such as inflatable signs and signs with moving lights or parts, "due to the negative impact on traffic safety and aesthetics." *Id.,* § 145–2.J; § 145–4. Further, the Township aims or expects to "[m]aintain and improve the image of the Township by encouraging signs of consistent size which are complementary to related buildings and uses, and are harmonious with their surroundings." *Id.,* § 145–2.H. The Township desires to limit the overall number of signs by allowing their use only for their necessary purposes: identifying "an establishment on the premises" and enabling "the public to locate goods, services and facilities" while still protecting the public's right to exchange "religious, political, economic, social, [and] philosophical" messages through this medium of speech. *Id.,* § 145–2.C, D, F.

The ordinance proscribes the alteration, erection or construction of outdoor signs without a permit. *Id.,* § 145–9.A. The Township's Planning Department is tasked with reviewing all sign permits "for conformity with the requirements of [the sign] ordinance," and may condition approval on "compliance with reasonable regulations or limitations having regard to the character of the sign, the surroundings in which it is to be displayed, and the purposes of this ordinance." *Id.,* § 145–9.C. The Township exempts various types of "non-illuminated" signs from the permit requirements and allows their installation "in all sign districts" without preapproval, limited to (A) "regulatory and street signs;" (B) displays for "holidays, public demonstrations, promotions, civic welfare or charitable purposes;" (C) tenant directories positioned outside a building; (D) "municipal signs," such as "legal notices, emergency signs, special events or other signs sanctioned by the Township;" (E) "flags bearing the official design of the United States, State of Michigan, a public educational institution, or official design of a corporation or award flags;" (F) real estate flags marketing new developments; (G) "memorial signs or tablets, names of buildings and date of erection when signs are cut into a masonry surface or constructed of bronze or other noncombustible material;" (H)

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bulletin boards placed outside civic and religious buildings; (I) real estate "For Sale" signs; (J) "informational signs, attached to a building and of a size and scale intended to be viewed by pedestrians, such as but not limited to menus, hours of operation, etc.;" (K) garage sale signs; (L) "now hiring" signs; and (M) "temporary signs related to an election, to identify seasonal events or civic functions." *Id.,* § 145–5.

***2** The ordinance includes general standards for all signs, including the level of illumination, placement, and size. The ordinance provides more specific standards for various ground, wall and permanent window signs. *Id.,* § 145–6. The Township is divided into six sign districts (A, B, C, D, E, and All Other Areas), each with its own quantity and size limitations for wall, ground, and permanent window signs. *Id.,* § 145–7. The sign districts are differentiated by the character and density of the surrounding community. The Township allows a petitioner to seek a variance from the Township's Zoning Board of Appeals (ZBA) for uses that are inconsistent with the sign ordinance when the petitioner can establish "alleged hardships or practical difficulties, or both, [that] are exceptional and peculiar to the property." *Id.,* § 145–10.B.

II. FACTUAL BACKGROUND

In 2005, Sackllah purchased property at the corner of Napier and Seven Mile roads in Northville Township and constructed a strip mall. The property is located in a rural/low-density residential area, is zoned "B–1–Local Business"[1] and is located in the "All Other Areas" sign district. The Township requires land owners to submit site plans for official approval before construction as authorized by MCL 125.3501(1) of the Zoning Enabling Act. MCL 125.3101 *et seq.* In 2005, the Township approved Sackllah's site plan, which included blueprints for the proposed building, landscaping and parking schematics, and various other details describing the exact characteristics of the development. Relevant to this appeal, the approved site plan indicated that the tenant's "wall signs"[2] would identify the business by name, be wooden with routed lettering and be illuminated by external "gooseneck lighting." The sign and lighting design was specifically chosen to meld into the rural character of the neighborhood and to limit the nuisance of commercial lighting. In granting final approval of the site plan, the PC noted that Sackllah would be required to pull a "sign permit" from the Township's Building Department before installation as required by Northville Twp Zoning Ordinance, § 145–9.

Sackllah's development was unusual in that the rear of the building abutted the road, while the store fronts faced "inside," toward the neighboring residential parcel with the parking lot nestled between as a buffer. Because of this unusual design, Sackllah's tenants required signs on both the front and the back of the building-one to lure drivers into the parking lot and one to direct customers from the lot into the businesses. The ordinance permits only one wall sign for each business. *Id.,* § 145–6.G(10). Accordingly, in October 2006, Sackllah applied for a variance from the Township's ZBA, which was granted.

Sackllah soon discovered that his wooden wall signs could not withstand a Michigan winter. By 2007, Sackllah sought to replace these signs with "internally illuminated signs," i.e. signs with internal LED lights to illuminate a plastic or glass front. The Township specifically allows "internally illuminated" wall signs in the "All Other Areas" sign district. *Id.,* § 145–6.E. Even so, the Building Department denied Sackllah's sign permit because the proposed sign did not conform to Sackllah's site plan. Sackllah then applied to the PC to amend the site plan. The PC denied Sackllah's request, stating "the type of signage and the type of lighting that were offered were integral to the other issues with the site plan and ... changing those would have an adverse impact on the other considerations for site plan approval." The PC believed that Sackllah used inferior materials to construct the wooden signs and, therefore, encouraged Sackllah to "do his homework" and remedy the issues himself. Sackllah appealed the PC's decision to the ZBA. The ZBA rejected Sackllah's appeal, finding that the PC's decision was not arbitrary or capricious given the PC's statement that the lighting and signage elements "were integral to the entire site plan." While the ZBA appeal was pending, Sackllah installed an internally illuminated wall sign without a permit. The Township issued a civil infraction against Sackllah as a result.

***3** During this same period of time, Sackllah sought to install various "window signs."[3] The Township allows businesses to install a small permanent window sign to inform customers that a business is open. *Id.,* § 145–6.H. Permanent window signs, however, are prohibited in the "All Other Areas" signage district. Section 145–5 allows a business in any sign district to post *temporary* window signs without a permit limited to "now hiring" signs and signs "related to an election, to identify seasonal events or civic functions." Sackllah sought a variance from the ZBA to install otherwise prohibited permanent window signs, but was rejected.

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Sackllah installed a permanent window sign anyway, and the Township issued a civil infraction. Sackllah's tenants also displayed various prohibited signs during this period, which the Township simply removed without issuing a citation. Sackllah subsequently filed an amended variance request seeking to use the window sign requirements applicable to the other sign districts—a maximum of two permanent signs for each business not to exceed 25–percent of the window surface. The ZBA compromised and granted Sackllah a variance to permit one unlit window sign "stating the hours of operation and whether they were open or closed" for each tenant. [4]

As previously noted, the Township issued a civil infraction against Sackllah for erecting an internally illuminated wall sign without a permit. In an action separate from the appeal now before this Court, Sackllah fought the citation before 35th District Court Judge John E. MacDonald. The district court determined that Sackllah clearly violated the sign ordinance by erecting a sign without a permit. Sackllah excused his violation by contending that the Township denied him due process of law when it rejected his request to modify the site plan to include internally illuminated signs that were otherwise allowed under the zoning ordinance. Judge MacDonald disagreed, ruling that the Township PC's decision was not arbitrary or capricious:

> From this record it is very apparent that the [PC] had legitimate concerns with the lighting that would affect neighbors and the overall consistency of the signage. Specifically, the [PC] wanted to know why the signs and lighting suffered problems that similar signs and lighting in the area did not suffer. From what this court can gather, [Sackllah] failed to explain why his lighting and signs were different from the others, and so the [PC] had no basis of reasoning to allow the proposed modifications.

Sackllah did not appeal the district court's ruling.

Ultimately, Sackllah alleges that the Township acted favorably toward his development plans until October 2006. At that time, Sackllah instigated a Michigan State Police investigation against then-Township Trustee Bradley Werner for extortion. The investigation was eventually closed for lack of substantiating evidence. Sackllah alleges that the Township began taking adverse action against him following the investigation. In addition to denying his requests to amend the site plan and for variances to utilize window signs, Sackllah points to the Township's refusal to return his landscaping bond, revocation of the certificate of occupancy of two tenants, issuance of two civil infractions against him, and issuance of an order requiring him to test the development's sewer water discharge rate.

III. CURRENT CIRCUIT COURT PROCEEDINGS

***4** In the matter underlying this appeal, Sackllah initially filed two separate circuit court actions against the Township, one appealing the ZBA's denial of his variance requests and the other raising various constitutional and tort claims. After the circuit court dismissed the variance-related action as untimely, the court allowed Sackllah to file an amended complaint that basically merged Sackllah's complaints against the ZBA into the constitutional claims. Ultimately, Sackllah challenged the Township's sign ordinance on exclusionary zoning, equal protection, substantive due process, and free speech grounds. Sackllah also asserted that the Township committed the intentional torts of abuse of process by failing to follow its own zoning ordinance and tortious interference with a business relationship.

Near the close of discovery, the Township moved for summary disposition on several grounds. Sackllah filed a cross-motion for summary disposition and subsequently agreed to dismiss his exclusionary zoning claim. The circuit court ultimately ruled that the Township was immune from tort liability and dismissed the abuse of process and tortious interference claims. The court further ruled that Sackllah's constitutional claims were not viable. The circuit court rejected Sackllah's substantive due process claim because he did not have a vested interest in the right to install internally illuminated wall signs or any window signs absent a permit. The court further found that the Township cited clearly articulated reasons for denying Sackllah's requests and therefore did not act in an arbitrary or capricious manner. The court rejected Sackllah's equal protection claim because he failed to produce evidence of truly comparable properties that were given preferential treatment. Finally, the circuit court dismissed Sackllah's First Amendment claim, but based on equal protection grounds. Specifically, the court found that

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Sackllah failed to present any evidence that the Township selectively enforced the zoning ordinance against him to restrict speech on his property.

IV. STANDARD OF REVIEW

The Township sought summary disposition under MCR 2.116(C)(7) (governmental immunity and res judicata/collateral estoppel) and (10) (failure to present a genuine issue of material fact).[5] We review a trial court's grant of summary disposition de novo. *Coblentz v. Novi,* 475 Mich. 558, 567; 719 NW2d 73 (2006). To succeed on a motion under MCR 2.116(C)(7), the moving party must establish through admissible "affidavits, depositions, admissions, or other documentary evidence," that the plaintiff's claims are barred by "immunity granted by law" or by operation of a prior judgment. This Court accepts the statements made in the plaintiff's complaint as true unless contradicted by the evidence. *Odom v. Wayne Co.,* 482 Mich. 459, 466; 760 NW2d 217 (2008).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden v. Rozwood,* 461 Mich. 109, 120; 597 NW2d 817 (1999) (internal citations omitted).]

***5** We review the underlying issues regarding the interpretation and application of the Township's ordinance de novo as a question of law. *Great Lakes Society v. Georgetown Twp.,* 281 Mich.App. 396, 407–408; 761 NW2d 371 (2008). We also review plaintiff's constitutional challenges de novo. *Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp.,* 486 Mich. 311, 318; 783 NW2d 695 (2010).

V. SUMMARY DISPOSITION ON INCOMPLETE DISCOVERY

Sackllah argues that the circuit court prematurely dismissed his claims before the close of discovery. "[S]ummary disposition is generally premature if granted before completing discovery regarding a disputed issue." *Davis v. Detroit,* 269 Mich.App. 376, 379; 711 NW2d 462 (2006). The court may grant such a motion, however, where "there is no fair likelihood that further discovery will yield support for the nonmoving party's position." *Liparoto Constr., Inc. v. Gen. Shale Brick, Inc.,* 284 Mich.App. 25, 33–34; 772 NW2d 801 (2009). The nonmoving party may not rely on "mere conjecture" to overcome summary disposition. *Davis,* 269 Mich.App. at 380. Rather, it must come forward with independent evidence to support its allegations and show the existence of a genuine factual dispute. *Van Vorous v. Burmeister,* 262 Mich.App. 467, 477–478; 687 NW2d 132 (2004). If the nonmoving party claims that it cannot obtain information necessary to its challenge absent a witness deposition or affidavit, the party must comply with the requirements of MCR 2.116(H) to describe the nature of the missing evidence. *Coblentz,* 475 Mich. at 570–571.

While Sackllah contested the Township's motion for summary disposition as premature, he actually filed his own motion for summary disposition based on the evidence then before the court. Sackllah contends that he should have been allowed to depose several expert witnesses and to review the Township's answers to interrogatories before summary disposition was granted. Yet, Sackllah has never filed an affidavit naming these witnesses and describing their probable testimony as required by MCR 2.116(H) nor has he produced affidavits from the witnesses themselves. In any event, we discern no "fair likelihood" that additional discovery would have assisted Sackllah's cause. *Liparoto Constr.,* 284 Mich.App. at 33–34. As we discuss *infra,* Sackllah's claims lack merit and the additionally proposed evidence would not change that result.

VI. FIRST AMENDMENT

Sackllah challenges the validity of the Township's sign ordinance on First Amendment grounds. He contends that the ordinance is unconstitutional, both facially and as applied to his property. Specifically, Sackllah asserts that the ordinance pervasively restricts both commercial and noncommercial protected speech in the "All Other Areas" sign district by prohibiting all permanent window signs and by severely limiting the use of temporary signs based on content. Sackllah exhaustively analyzes the ordinance under the standards applicable to content-based restrictions of both commercial and noncommercial speech before concluding that the ordinance fails all tests of constitutionality. Sackllah

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adapts the same arguments to his claim that the ordinance violates his right to free speech as applied. [6]

***6** First and foremost, we reject the Township's claim that Sackllah lacked standing to raise a First Amendment challenge. The Township raised the issue of standing in its motion for summary disposition, but the circuit court rejected it. A party has standing where it "has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large." *Lansing Schools Ed. Ass'n. v. Lansing Bd. of Ed.,* 487 Mich. 349, 372; 792 NW2d 686 (2010). Sackllah has standing as the owner and landlord of a strip mall open to the public who has been denied the right to post various signs. Sackllah has suffered economic injury through the loss of tenants and his tenants' inability to attract customers through the use of signs. The Township has issued two civil infractions against Sackllah personally based on the installation of signs without a permit. The Township's actions "detrimentally affected" Sackllah's property interests "in a manner different from the citizenry at large." *Id.* Accordingly, Sackllah has standing to raise this claim. [7]

Sackllah raises both facial and as applied attacks to the sign ordinance.

> A facial challenge alleges that the mere existence and threatened enforcement of the ordinance materially and adversely affects values and curtails opportunities of all property regulated in the market. An "as applied" challenge alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution. [*Paragon Props. Co. v. Novi,* 452 Mich. 568, 576; 550 NW2d 772 (1996).]

Both the Michigan and federal constitutions protect the freedom of speech. U.S. Const, Am I ("Congress shall make no law ... abridging the freedom of speech."); Mich. Const 1963, art 1, § 5 ("[N]o law shall be enacted to restrain or abridge the liberty of speech."). Moreover, the United States Supreme Court has found that "signs are a form of expression protected by the Free Speech Clause ." *City of Ladue v. Gilleo,* 512 U.S. 43, 48; 114 S.Ct. 2038; 129 L.Ed.2d 36 (1994). But signs, regardless of their content, pose special problems that are properly subject to regulation under the state's police powers. *Id.; Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 805; 104 S.Ct. 2118; 80 L.Ed.2d 772 (1984). As noted in *City of Ladue,* 512 U.S. at 48, "signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation." In Michigan, the Legislature permits local governments to enact such regulations through the Zoning Enabling Act:

> A local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of 1 or more districts within its zoning jurisdiction which regulate the use of land and structures to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land, to ensure that use of the land is situated in appropriate locations and relationships, to limit the inappropriate overcrowding of land and congestion of population, transportation systems, and other public facilities, to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements, and to promote public health, safety, and welfare. [MCL 125.3201(1).]

***7** In general, an ordinance governing the use of land "comes to us clothed with every presumption of validity." *Delta Charter Twp. v. Dinolfo,* 419 Mich. 253, 268; 351 NW2d 831 (1984) (internal quotations omitted). The challenging party has the burden to show "that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of his property" and that the "restrictions on his property preclude its use for any purpose to which it is reasonably adapted." *Id.* First Amendment challenges to a zoning ordinance are reviewed under more specific

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standards depending on the nature of the restriction and the type of speech affected. At its most basic, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens,* —— U.S. ——; 130 S.Ct. 1577, 1584; 176 L.Ed.2d 435 (2010) (internal quotations omitted). Accordingly, when a party challenges the government's restriction of his speech, we must first determine whether the restriction is "content-based" or "content-neutral."

In determining whether a regulation is content-neutral, we focus on the government's intent:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech. [*Ward v. Rock Against Racism,* 491 U.S. 781, 791; 109 S.Ct. 2746; 105 L.Ed.2d 661 (1989).]

Once we categorize the restriction on speech, we can determine the level of review we must employ. If the restriction is content-neutral, we review it to determine if it is "narrowly tailored to serve a significant governmental interest" and if the government has left "open ample alternative channels for communication of the information." *Ward,* 491 U.S. at 791. We presume that content-neutral regulations are valid and constitutional. *Truckor v. Erie Twp.,* 283 Mich.App. 154, 162–163; 771 NW2d 1 (2009).

We presume that content-based restrictions, however, are invalid and unconstitutional. *Stevens,* 130 S.Ct. at 1584. Not all speech is created equal, however, and a government's restriction of noncommercial speech is reviewed more closely than a restriction of commercial speech. *Rochester Hills v. Schultz,* 459 Mich. 486, 490; 592 NW2d 69 (1999). A content-based restriction of *noncommercial* speech must withstand "strict scrutiny" review; "it must be narrowly tailored to promote a compelling Government interest" and must be the least restrictive alternative to accomplish the government's purposes. *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 813; 120 S.Ct. 1878; 146 L.Ed.2d 865 (2000). Commercial speech (speech proposing a commercial transaction or disseminating information relevant to the marketplace), *Posadas De Puerto Rico Assocs. v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 340; 106 S.Ct. 2968; 92 L.Ed.2d 266 (1986); *Central Hudson Gas & Electric Corp. v. Pub. Service Comm. of New York,* 447 U.S. 557, 561–562; 100 S.Ct. 2343; 65 L.Ed.2d 341 (1980), "occurs in an area traditionally subject to government regulation." *Id.* at 562. In recognition of the government's interest in regulation, we employ an "intermediate standard of review" to consider whether the restriction directly advances a substantial government interest. *Edenfield v. Fane,* 507 U.S. 761, 767; 113 S.Ct. 1792; 123 L.Ed.2d 543 (1993); *Central Hudson,* 447 U.S. at 563–565.

***8** Portions of the Township's sign ordinance are clearly content-neutral and Sackllah does not challenge their validity as permissible regulations on the placement and design of signs. Those provisions governing the size, physical placement, illumination, and other design elements of signs have no relation to the message conveyed. See, e.g., *King Enterprises, Inc. v. Thomas Twp.,* 215 F. Supp 2d 891, 909 (ED Mich.2002) (finding similar ordinance provisions to be content-neutral). Moreover, these types of regulations impose merely "reasonable time, place, and manner restrictions," are narrowly tailored to serve the Township's interests in traffic safety and aesthetics, and leave open ample channels of communication as the speaker may erect signs within allowable size, design and location limits.

We are given pause, however, by the ordinance provisions exempting certain signs from the ordinance's prohibitions and permit requirements. [8]

> [A]n exemption from an otherwise permissible regulation of speech may represent a governmental attempt to give

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> one side of a debatable public question an advantage in expressing its views to the people. Alternatively, through the combined operation of a general speech restriction and its exemptions, the government might seek to select the permissible subjects for public debate and thereby to control the search for political truth. [*City of Ladue,* 512 U.S. at 51 (internal quotations omitted).]

Our concern stems from the fact that no clear standards guide our determination of whether such exemptions impermissibly favor the topic or viewpoint of speech, thereby qualifying as "content-based." Our analytic challenge originates with the highly splintered United States Supreme Court opinion in *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490; 101 S.Ct. 2882; 69 L.Ed.2d 800 (1981). The San Diego ordinance generally prohibited billboards in order to improve traffic safety and aesthetics. *Id.* at 493. The ordinance permitted onsite billboards identifying onsite businesses but banned offsite billboards advertising messages unrelated to their location. *Id.* at 494. Similar to the ordinance in this case, the San Diego ordinance exempted 12 specific categories of signs from the offsite billboard prohibition, similar to the ordinance in this case. *Id.* at 494–495. Basically, the San Diego ordinance allowed "onsite commercial advertising" while prohibiting offsite commercial and noncommercial billboards "unless permitted by one of the specific exceptions." *Id.* at 495–496.

Justice White, writing for the plurality, noted that the city had a legitimate interest in regulating the secondary effects of this large-sized medium of speech, but that interest had to be carefully weighed against First Amendment rights. *Id.* at 502.

> Because regulation of the noncommunicative aspects of a medium often impinges to some degree on the communicative aspects, it has been necessary for the courts to reconcile the government's regulatory interests with the individual's right to expression. A court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation. [*Id.* (internal quotation omitted).]

***9** The plurality determined that the San Diego ordinance "reaches too far into the realm of protected speech," *id.* at 521, by allowing commercial onsite billboards while banning "all noncommercial signs except those specifically excepted." *Id.* at 520. [9]

Even though the ordinance discriminated against offsite commercial speech in favor of onsite commercial speech, the plurality accepted that the ordinance directly advanced a substantial governmental interest. The plurality rejected the city's justification, however, for favoring commercial speech over noncommercial speech. Noncommercial speech enjoys greater constitutional protection than commercial speech, and the city could not justify its inversion of that principle. *Id.* at 513.

Writing for the two-Justice concurrence, Justice Brennan opined that the San Diego ordinance was a "content-neutral" prohibition of all billboards and "the exceptions [did] not alter the overall character of the ban." *Id.* at 525–526. The concurrence believed that the city had not supplied a significant government interest to prohibit billboards because the city failed to establish that billboards actually impact traffic safety, *id.* at 528, and allowed too much speech to sincerely justify its concern with aesthetics. *Id.* at 529–531. The concurrence also rejected the plurality's insinuation that a city could constitutionally preview speech to categorize its content and then discriminate in favor of noncommercial speech over commercial speech. *Id.* at 536–537.

The Supreme Court reached no majority standard for classifying such regulatory ordinances as content-based or content-neutral. Neither did the Court reach a majority standard regarding the disparate treatment allowed between commercial and noncommercial speech or between messages within the categories of commercial and noncommercial speech. Accordingly, lower courts were left with no direction on how to analyze broad prohibitions of certain methods of communication containing specific exemptions. As noted by this Court, "[a] plurality opinion of the United States Supreme Court ... is not binding precedent." [10] Following the nonbinding plurality opinion in *Metromedia,* lower courts have reached highly divergent results in analyzing such ordinances.

In *HDV–Greektown, LLC v. Detroit,* 568 F3d 609 (CA 6, 2009), for example, the Sixth Circuit determined that a zoning ordinance could be content-neutral even if it categorized signs

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according to content. In that case, the plaintiff challenged a city ordinance that separately defined advertising, business, and political signs and imposed different size and design regulations on each. *Id.* at 622. The *HDV–Greektown* Court defined content-neutrality consistent with various United States Supreme Court precedents:

> An ordinance is not a content-based regulation of speech if (1) the regulation controls only the places where the speech may occur, (2) the regulation was not adopted because of disagreement with the message that the speech conveys, or (3) the government's interests in the regulation are unrelated to the content of the affected speech. [*HDV–Greektown,* 568 F3d at 621, citing *Hill v. Colorado,* 530 U.S. 703, 719–720; 120 S.Ct. 2480; 147 L.Ed.2d 597 (2000).]

***10** The Sixth Circuit rejected that the distinctions between the types of speech listed in the ordinance amounted to a content-based regulation. Rather, the court held, "[t]here is simply nothing in the record to indicate that the distinctions between the various types of signs reflect a meaningful preference for one type of speech over another." *Id.* at 622. In doing so, the Sixth Circuit expressly rejected the Eleventh Circuit's approach to analyzing such cases.

In *Solantic, LLC v. City of Neptune Beach,* 410 F3d 1250 (CA 11, 2005), the Eleventh Circuit held that an ordinance distinguishing between flags of " 'government, religious, charitable, fraternal, or other organization[s]' " and any other type of flag amounted to a content-based restriction on speech " 'because some types of signs are extensively regulated while others are exempt from regulation based on the nature of the messages they seek to convey.' " *HDV–Greektown,* 568 F3d at 622, quoting *Solantic,* 410 F3d at 1263, 1266. The Sixth Circuit held that the *Solantic* analysis "reflect[ed] an overly narrow conception of the definition of content-neutral speech." *HDV–Greektown,* 568 F3d at 622. The Sixth Circuit indicated that it would have found the *Solantic* ordinance to be content-neutral because it controlled "only the places where the speech may occur," "was not adopted because of disagreement with the message" conveyed, and the government's interests were unrelated to content. *Id.* at 622–623. Given the overly narrow definition given in *Solantic,* the Sixth Circuit Court doubted that any municipal sign ordinance could be deemed content-neutral within the Eleventh Circuit. *Id.* at 623.

We choose to follow the lead of the Sixth Circuit. [11] Pursuant to the standard advanced in *HDV–Greektown,* we hold that the Township's sign ordinance is content-neutral. The ordinance broadly prohibits certain types of signs regardless of content, such as banners, temporary window signs, inflatable signs and sandwich boards. Northville Twp Zoning Ordinance, § 145–4.E. The ordinance permits ground and permanent window signs, also without regard to content. *Id.,* § 145–6.F and H. The ordinance controls the location of the permitted styles of signs, but not the speech itself. In the more congested commercial areas of the Township, landowners may employ larger and more numerous signs. In the rural area of the Township, where Sackllah's property is located, landowners may employ only nonintrusive signage, both in style and amount. The Township's purpose in distinguishing between sign districts has no relation to the messages conveyed. Rather, the Township's interest is based solely on eliminating visual clutter to promote aesthetics, which is most important in its rural areas, and to promote traffic safety.

The exemptions allowing a landowner in the "All Other Areas" sign district to display certain temporary signs related to an election, seasonal event or civic function, *id.,* § 145–5.M, or seeking employees, *id.,* § 145–5.G, do not change the overall character of the ordinance. As noted by our Supreme Court in *Rochester Hills v. Schultz,* 459 Mich. at 494, the Township "is not required to remove all signs from [rural] areas in order to further its goal of preserving the character of [rural] neighborhoods.... [E]ven if some visual blight remains, a partial, content-neutral ban on signs may nevertheless enhance the City's appearance." The exemptions do not support that the Township's interest in limiting outdoor signs was related to any disagreement with the messages conveyed.

***11** As a content-neutral ban on certain styles of signs within the Township, we must determine if the ordinance is "narrowly tailored to serve a significant governmental interest" and leaves "open ample alternative channels for communication." *Ward,* 491 U.S. at 791. The Township identified two general interests served by the ordinance-aesthetics and traffic safety. It is well established that a township may enact content-neutral regulations to reduce

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or eliminate the visual clutter caused by signs and thereby advance its interest in aesthetics. *Taxpayers for Vincent,* 466 U.S. at 805–807; *Gannett Outdoor Co. of Michigan v. City of Troy,* 156 Mich.App. 126, 134; 409 NW2d 719 (1987). The confusion, distraction, and obstruction caused by signs, and their potential impact on traffic safety, are also significant governmental concerns. *Metromedia,* 453 U.S. at 507–508 (plurality opinion of White, J .); *Wheeler v. Comm. of Highways, Commonwealth of Kentucky,* 822 F.2d 586 (CA 6, 1987).

The Township's sign ordinance is narrowly tailored to achieve its stated significant government interests. Taken as a whole, the Township permits larger and more numerous signs in congested commercial areas where the sign's presence will have little effect on the aesthetics of the surrounding area or an impact on traffic safety. In the rural area in which Sackllah's property is located, however, signage must be more severely restricted to accomplish the government's goals. The differentiation between districts based on the character of the area is narrowly tailored to achieve the Township's more specific cited goal to "[m]aintain and improve the image of the Township by encouraging signs of consistent size which are complementary to related buildings and uses, and are harmonious with their surroundings." Northville Township Zoning Ordinance, § 145–2.H.

The Township's ordinance also leaves open ample channels of communication. "[T]he First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places." *Taxpayers for Vincent,* 466 U.S. at 812. While window and other onsite advertising signs may have "advantages over" other mediums of communication, *id.,* Sackllah and his tenants can and have used other mediums. Sackllah and his tenants could employ a personal mass mailing, advertise in the numerous coupon packets sent to residents in our metropolitan area, personally distribute coupons at other area businesses, or hire a person to dress in a chicken suit and dance on the curb. Ultimately, the Township's content-neutral restriction on outdoor signs is constitutional, both facially and as applied, and additional evidence could not affect our judgment of the ordinance's classification.

VI. SUBSTANTIVE DUE PROCESS

Sackllah next challenges the circuit court's dismissal of his substantive due process claim despite evidence that the Township denied his request to erect internally illuminated signs that were otherwise permitted by the sign ordinance. We need not reach the merits of this challenge, however, as the Township was entitled to summary disposition on other grounds.

***12** The Township contends that Sackllah's substantive due process challenge is barred by principles of res judicata or collateral estoppel because the issue was raised before and decided by the district court in the civil infraction case and Sackllah failed to appeal that ruling. The Township raised this issue in the circuit court, which implicitly rejected this defense when it decided the issue on the merits.

> Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. [*Dart v. Dart,* 460 Mich. 573, 586; 597 NW2d 82 (1999) (internal citations omitted).]

Collateral estoppel bars a second litigation of a particular issue when "(1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *Estes v. Titus,* 481 Mich. 573, 585; 751 NW2d 493 (2008).

The current circuit court lawsuit involves the same parties as the prior district court action. As noted by Sackllah, however, the district court issued its ruling after Sackllah filed his circuit court action. Sackllah argued in the district court that the Township violated his right to due process of law by rejecting his request to amend the site plan to include internally illuminated wall signs, which are expressly allowed in Northville Twp Zoning Ordinance, § 145–6.E. Both parties had an opportunity to verbally argue their positions before the district court and to submit supplemental briefing on the issue before that court made a ruling. The district court reached a final judgment on the issue—it explicitly rejected Sackllah's contention that the Township violated his right to due process

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of law, because the Township cited valid reasons to support its decision and therefore did not act in an arbitrary or capricious manner. Sackllah could have appealed the district court judgment to the circuit court and the two cases likely would have been consolidated. As the circuit court action was filed during the pendency of the district court, we will not treat the circuit court action as a "subsequent" suit for purposes of res judicata. However, the Township established the elements to dismiss Sackllah's substantive due process claims under the doctrine of collateral estoppel. The circuit court should not have considered the merits of this claim and neither should this Court.

Although the circuit court erred in rejecting the Township's challenge based on res judicata and collateral estoppel grounds, we need not reverse where the lower court reaches the right result but for the wrong reason. *Mulholland v. DEC Int'l. Corp.,* 432 Mich. 395, 411 n.10; 443 NW2d 340 (1989). The circuit court dismissed Sackllah's substantive due process challenge, albeit on the merits, and we affirm that result.

VII. EQUAL PROTECTION

***13** Sackllah next challenges the circuit court's dismissal of his equal protection claim. Sackllah asserts that the Township singled him out and treated him differently from other land owners in the "All Other Areas" sign district given that the Township had allowed another development to use internally illuminated signs. This type of equal protection challenge is called a "class of one" claim. *Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp.,* 486 Mich. 311, 319–320; 783 NW2d 695 (2010).

The equal protection clauses of the federal and state constitutions require "that all persons similarly situated be treated alike under the law." *Id.* at 318. Generally, an equal protection challenge is raised when the government draws distinctions between groups based on "suspect" factors. *Id.* at 318–319. When an ordinance is facially neutral and applicable to everyone equally, the plaintiff may show that he, as a "class of one," "was actually treated differently from others similarly situated and that no rational basis exists for the dissimilar treatment." *Shepherd Montessori,* 486 Mich. at 319–320.

Sackllah claims that another landowner within the "All Other Areas" sign district was allowed to install an internally illuminated sign. We do not doubt that this fact is true; the Township explicitly allows such signs in the "All Other Areas" sign district and so we assume there are many internally illuminated wall signs within that district. However, that is not the correct inquiry in this case. Sackllah sought to install internally illuminated wall signs after he designed a site plan, based on negotiations with the Township and neighboring residents, which included less invasive externally illuminated signs. The correct inquiry therefore is whether the Township treated Sackllah disparately by allowing another landowner to amend its site plan to alter integral characteristics while rejecting Sackllah's request. Sackllah still has not presented any evidence relevant to that inquiry or made an offer of proof in this regard. Accordingly, Sackllah did not create a genuine issue of material fact and the circuit court properly dismissed his equal protection claim.

VIII. TORT CLAIMS

Finally, Sackllah argues that the circuit court erroneously dismissed its claims for abuse of process and tortious interference with advantageous business relationships based on governmental immunity. The governmental tort liability act provides that a "governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). The act defines "governmental function" as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). Under this definition, the appropriate focus is on the general activity, not the specific conduct engaged in at the time of the alleged tort. *Ward v. Mich. State Univ. (On Remand),* 287 Mich.App. 76, 84; 782 NW2d 514 (2010); *Tate v. Grand Rapids,* 256 Mich.App. 656, 661; 671 NW2d 84 (2003).

***14** Sackllah challenges the method by which the Township applied and enforced its zoning ordinance. These are basic police powers delegated to the Township by statute. See MCL 125.3201 (local government has power to regulate land development through zoning); MCL 125.3501 (local government has power to approve or reject site plans for land development). The Township engaged in "an activity that is expressly ... mandated or authorized ... by statute ... or ordinance," MCL 691.1401(f), and is immune from tort liability. Accordingly, the circuit court properly dismissed Sackllah's tort claims.

Affirmed.

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All Citations

Not Reported in N.W.2d, 2011 WL 3476808

Footnotes

1 Northville Twp Zoning Ordinance, § 170–12.1 provides that the B–1 district "is intended to permit those uses necessary to satisfy the basic day-to-day convenience shopping and/or service needs of persons residing in nearby residential areas served by common vehicular parking areas and integrated pedestrian access." The district principally allows retail market stores, personal on-site service establishments, dry-cleaners, banks, medical offices, restaurants without drive-through amenities and health clubs. *Id.,* § 170–12.2. The Township Planning Commission (PC) may also grant a special land use for "open-front restaurants and restaurants with outdoor seating," such as provided in Sackllah's site plan. *Id.,* § 170–12.3.D.

2 A "wall sign" is defined as "[a] sign erected or fastened to the wall of a building and having the exposed face of the sign parallel to the plane of the wall...." *Id.,* § 145–3.

3 A "window sign" is "[a]ny sign or display that is visible from the exterior of any building window." *Id.,* § 145–3

4 Pursuant to the sign ordinance, Sackllah could have installed this type of informational sign on the building's wall, but not window, without a permit. *Id.,* § 145–5.J.

5 The Township also sought dismissal of Sackllah's exclusionary zoning claim under MCR 2.116(C)(8) (failure to state a claim), but Sackllah voluntarily dismissed that count.

6 It appears that Sackllah has only ever sought to convey commercial messages through the use of signs on his property. The record shows that Sackllah and his tenants wanted to use various large signs to advertise the grand opening of the strip mall and smaller signs for everyday advertising purposes. Sackllah now raises a theoretical challenge that he is unconstitutionally precluded from displaying noncommercial signs, such as a sign stating "Support Our Troops."

7 The parties spend considerable time discussing the relaxed standards for standing in First Amendment cases. We need not resort to such an inquiry as Sackllah has suffered a personal injury in this regard and, therefore, has standing under Michigan law.

8 The exempted signs under Northville Township Zoning Ordinance, § 145–5 include: (A) "regulatory and street signs;" (B) displays for "holidays, public demonstrations, promotions, civic welfare or charitable purposes;" (C) tenant directories positioned outside a building; (D) "municipal signs," such as "legal notices, emergency signs, special events or other signs sanctioned by the Township;" (E) "flags bearing the official design of the United States, State of Michigan, a public educational institution, or official design of a corporation or award flags;" (F) real estate flags marketing new developments; (G) "memorial signs or tablets, names of buildings and date of erection;" (H) bulletin boards placed outside civic and religious buildings; (I) real estate "For Sale" signs; (J) "informational signs, attached to a building and of a size and scale intended to be viewed by pedestrians, such as but not limited to menus, hours of operation, etc.;" (K) garage sale signs; (L) "now hiring" signs; and (M) "temporary signs related to an election, to identify seasonal events or civic functions."

9 The San Diego ordinance generally disallowed offsite billboards, yet created 12 exceptions for "various kinds of noncommercial signs, whether on property where goods and services are offered or not, that would otherwise be within the general ban." *Id.* at 514. The Supreme Court held that the ordinance's distinctions failed to pass constitutional muster, as "[w]ith respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse[.]" *Id.* at 515.

10 *People v. Beasley,* 239 Mich.App. 548, 559; 609 NW2d 581 (2000).

11 The opinions of lower federal courts are not binding precedent on our state courts; however, they may be persuasive and instructive to our review. *Abela v. General Motors Corp.,* 469 Mich. 603, 607; 677 NW2d 325 (2004).

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

William SCHALL and Melanie Schall, Plaintiffs–Appellees,
v.
CITY OF WILLIAMSTON, Patrick Sloan, Michael Gradis, McKenna Associates, Inc., Defendants,
and
D & G Equipment, Inc., Elden E. Gustafson, and Jolene Gustafson, Defendants–Appellants.

Docket No. 317731.
|
Dec. 4, 2014.

Ingham Circuit Court; LC No. 13–000250–CZ.

Before: OWENS, P.J., and MARKEY and SERVITTO, JJ.

Opinion

PER CURIAM.

***1** In this case, plaintiffs William Schall and Melanie Schall (plaintiffs), sought injunctive relief to compel their new neighbors, defendants D & G Equipment, Inc. (D & G) and its owners Elden Gustafson and Jolene Gustafson (defendants or the Gustafsons), to comply with the city of Williamston's zoning ordinance that allows the outdoor display of farm implements for sale only by special use permit, which in turn requires a green buffer zone to shield plaintiffs' property from the outdoor sales displays on D & G's property. Plaintiffs also sought a writ of mandamus to compel the city and its contract zoning administrator, McKenna Associates, Inc., [1] to enforce the ordinance. After a hearing on the parties' respective motions for summary disposition, the trial court granted plaintiffs' motion and denied defendants' motion. In its opinion and order, the trial court found that defendants' use of their property was in violation of the city's zoning ordinance—therefore a nuisance per se—and ordered the zoning administrator for the city to enforce the ordinance's buffering requirement. Defendants, D & G and the Gustafsons, appeal by right. For the reasons discussed below, we affirm.

I. JURISDICTION

We address first defendants' claim that the circuit court lacked jurisdiction over plaintiffs' complaint for injunctive relief. Defendants argue that the circuit court lacked jurisdiction because plaintiffs failed to timely appeal the planning commission's grant of a special use permit to defendants, did not exhaust their administrative remedies, lacked standing, failed to allege "special damages" necessary for an actionable nuisance claim, and that plaintiffs' claim was not ripe for adjudication because the zoning ordinance allowed three years for a landscape buffer to mature. We find that none of these claims have merit.

A. STANDARD OF REVIEW

The issue of jurisdiction presents a question of law reviewed de novo on appeal. *Michigan's Adventure, Inc v. Dalton Twp,* 287 Mich.App 151, 153; 782 NW2d 806 (2010). Whether a court should invoke the doctrine of exhaustion of administrative remedies to decline jurisdiction also presents a question of law reviewed de novo on appeal. *Shelby Charter Twp v. Papesh,* 267 Mich.App 92, 109; 704 NW2d 92 (2005).

B. DISCUSSION

Defendants' arguments that the circuit court lacked jurisdiction because plaintiffs did not timely appeal the granting of a special use permit and that plaintiffs lack standing because of their not suffering "special damages" are without merit because plaintiffs did not appeal the planning commission's administrative decision. Instead they sought enforcement of the zoning ordinance. Under MCL 125.3407, and the zoning ordinance, § 74–9.705, its violation is a nuisance per se over which the circuit court has jurisdiction to grant injunctive relief on the complaint of affected neighboring property owners. *Jones v. DeVries,* 326 Mich. 126, 135; 40 NW2d 317 (1949); *Towne v. Harr,* 185 Mich.App 230, 232; 460 NW2d 596 (1990) ("our Supreme Court has long recognized the propriety of private citizens bringing actions to abate public nuisances, arising from the violation of zoning ordinances").

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***2** Also, we find equally without merit defendants' assertions that plaintiffs' claim is not ripe either because of their failure to exhaust administrative remedies or because of the ordinance's three-year grace period to permit a landscape buffer to mature. Likewise, defendants' discussion regarding public nuisance or nuisance in fact is inapposite.

Subject-matter jurisdiction presents the question whether a court has " 'the power to hear and determine a cause or matter.' " *Bowie v. Arder,* 441 Mich. 23, 36; 490 NW2d 568 (1992) (citation omitted). The Zoning Enabling Act and the city's zoning ordinance do not specify the court having jurisdiction to abate zoning violations. MCL 125.3407 provides, "a use of land ... in violation of a zoning ordinance or regulation adopted under this act is a nuisance per se" and "[t]he *court* shall order the nuisance abated...." Section 74–9.705 of the zoning ordinance provides "any use of ... land ... in violation of any of the provisions thereof, is hereby declared to be a public nuisance per se, and may be abated by order of *any court of competent jurisdiction.*" The circuit court has "the power and jurisdiction" of "courts of record at the common law," and "judges in chancery in England on March 1, 1847" as subsequently altered by state law, and as "[p]rescribed by the rules of the supreme court." MCL 600.601. And, circuit courts "have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court...." MCL 600.605. The circuit court also is accorded specific authority to abate nuisances. MCL 600.2940(1). Furthermore, our Supreme Court has recognized that under the common law, a circuit court may grant equitable relief from a violation of a local zoning ordinance. *Farmington Twp v. Scott,* 374 Mich. 536, 540–541; 132 NW2d 607 (1965). We therefore conclude that the circuit court possessed subject-matter jurisdiction to hear plaintiffs' complaint and grant injunctive relief regarding a use of land found in violation of local zoning regulation.

We also find without merit defendants' contention that plaintiffs lacked standing. In general, standing requires not only that a party have a sufficient interest in the outcome of litigation to ensure vigorous advocacy but also have " 'in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.' " *Bowie,* 441 Mich. at 42 (citation omitted). Further, "a litigant has standing whenever there is a legal cause of action." *Lansing Sch Ed Ass'n v. Lansing Bd of Ed,* 487 Mich. 349, 372; 792 NW2d 686 (2010). Also, a litigant has standing if he or she "has a special injury or right, or substantial interest," which "will be detrimentally affected in a manner different from the citizenry at large...." *Id.* Plaintiffs satisfy these various iterations of standing and may assert a violation of the zoning ordinance landscape buffering requirements.

***3** As the abutting property owners for whom the landscape buffer is designed to shield from defendants' outdoor storage and sales of large farm equipment, plaintiffs patently have a real interest in the subject matter of the controversy and the outcome of litigation to ensure vigorous advocacy. *Bowie,* 441 Mich. at 42. Moreover, our Supreme Court has recognized that neighboring property owners have an equitable cause of action to enforce compliance with local zoning regulations. *Cook v. Bandeen,* 356 Mich. 328, 330–334; 96 NW2d 743 (1959) ("residents in the immediate vicinity" had the right to obtain injunctive relief from land use contrary to zoning ordinance); *Jones,* 326 Mich. at 128–135 ("property owners in the area affected" had a right to seek equitable relief from use in violation of local zoning); *Baura v. Thomasma,* 321 Mich. 139, 142–143, 146; 32 NW2d 369 (1948) (neighbors of proposed use in violation of zoning ordinance were "entitled to the equitable relief"). As this Court has explained:

> While the designated officials are undoubtedly the only persons who can commence any action of a penal nature for zoning violations ..., there is nothing to indicate that the Legislature intended to limit a private person's right to invoke the circuit court's jurisdiction to abate a public nuisance arising out of the violation of a zoning ordinance. [*Indian Village Ass'n v. Shreve,* 52 Mich.App 35, 38; 216 NW2d 447 (1974).]

The cases defendants cite, *Village of Franklin v. Southfield,* 101 Mich.App 554; 300 NW2d 634 (1980), *Unger v. Forest Home Twp,* 65 Mich.App 614; 237 NW2d 582 (1975), and *Joseph v. Twp of Grand Blanc,* 5 Mich.App 566; 147 NW2d 458 (1967), are inapposite as they address the "aggrieved party" criteria to have standing to appeal the administrative actions of zoning officials. These cases simply do not apply to plaintiffs' action because it is not an appeal of administrative zoning action; it is an independent action for equitable relief from a purported violation of the zoning ordinance.

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Furthermore, the *Unger* Court recognized this distinction in its discussion regarding "aggrieved party" status, noting that it did not apply to "an action to abate a public nuisance ... brought by any township property owner...." *Unger,* 65 Mich.App at 618. Simply stated, the cited cases cannot overrule Supreme Court precedent establishing the right of abutting property owners like plaintiffs to seek equitable relief from zoning violations. See *Cook,* 356 Mich. at 330–334; *Jones,* 326 Mich. at 128–135; *Baura,* 321 Mich. at 142–143, 146.

Moreover, to the extent plaintiffs must "show damages of a special character distinct and different from the injury suffered by the public generally," *Towne,* 185 Mich.App at 232, they have done so based on the fact they are the abutting property owners the zoning provisions are intended to benefit. They have alleged "special damages not common to other property owners similarly situated," *Village of Franklin,* 101 Mich.App at 557, because no other property owners are immediately affected by the alleged violation. In sum, plaintiffs have standing to assert their claim to equitable relief from the asserted zoning violation.

***4** For similar reasons, defendants' discussion of public nuisances is unavailing. There are two categories of nuisance: (1) nuisances per se and (2) nuisances in fact. *Martin v. Michigan,* 129 Mich.App 100, 107–108; 341 NW2d 239 (1983). "A nuisance per se is an act, occupation, or structure which is a nuisance at all times and under any circumstances." *Id.* at 108. A nuisance in fact "is a nuisance by reason of circumstances and surroundings, and [has a] ... natural tendency ... to create danger and inflict injury to person or property." *Id.* A nuisance in fact is also referred to as a public nuisance because the condition "must affect an interest common to the general public, rather than peculiar to one individual, or several." *Garfield Twp v. Young,* 348 Mich. 337, 342; 82 NW2d 876 (1956).

But in this case, plaintiffs do not allege a public nuisance or nuisance in fact. They assert a violation of the zoning ordinance, which both MCL 125.3407 and § 74–9.705 of the ordinance, declares a nuisance per se. As explained in *Ford v. Detroit,* 91 Mich.App 333, 335; 283 NW2d 739 (1979), proving the violation of the ordinance establishes a nuisance per se:

> The distinction between a nuisance per se and a nuisance in fact is an evidentiary one. A nuisance per se is an act, occupation or structure which is a nuisance at all times and under all circumstances. Once the act has been proved, the court decides as a matter of law whether the act complained of constitutes a nuisance per se. The defendant's liability at that point is established. [*Id.*]

As discussed already, a neighboring landowner may bring an equitable action to enjoin a violation of local zoning that is a nuisance per se.

We also find without merit defendants' claim that plaintiffs' action should have been dismissed because plaintiffs failed to exhaust their administrative remedies. Generally, " 'where an administrative grievance procedure is provided, exhaustion of that remedy, except where excused, is necessary before review by the courts.' " *In re Harper,* 302 Mich.App 349, 358; 839 NW2d 44 (2013) (citation omitted). Application of the doctrine is, however, excused where invoking administrative remedies would be futile. *Nalbandian v. Progressive Mich. Ins Co,* 267 Mich.App 7, 10–11, n 2; 703 NW2d 474 (2005); *West Bloomfield Charter Twp v. Karchon,* 209 Mich.App 43, 47; 530 NW2d 99 (1995). The only administrative remedy available to plaintiffs would consist of convincing the zoning administrator to take action to enforce the landscape buffer requirements of the zoning ordinance. The zoning administrator's (Patrick Sloan's) affidavits make clear plaintiffs' efforts to pursue administrative remedies without court intervention were and would remain futile.

Finally, we reject defendants' argument that plaintiffs' claim was not ripe. " '[T]he doctrine of ripeness is intended to avoid premature adjudication or review of administrative action. It rests upon the idea that courts should not decide the impact of regulation until the full extent of the regulation has been finally fixed and the harm caused by it is measurable.' " *Paragon Properties Co v. City of Novi,* 452 Mich. 568, 579 n 13; 550 NW2d 772 (1996), quoting *Herrington v. Sonoma Co,* 834 F.2d 1488, 1494 (CA 9, 1987). Section 74–7.304(B) of the ordinance requires that the landscape buffer must consist of "closely spaced evergreens ... which can be reasonably expected to form a complete visual barrier at least six feet in height within three years of installation." This plain language requires present plantings that can, within three years, "be reasonably expected to form a complete visual barrier at least

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six feet in height." This is a clear standard that is subject to proof regarding what is "reasonably expected." Here, plaintiffs presented such proof, and their claim was ripe for adjudication. To accept defendants' argument to the contrary would encourage continued extensions of the three-year time limit of § 74–7.304(B) for having a mature landscape screen in place.

***5** We conclude defendants have presented no arguments to support finding that the trial court erred. The circuit court had subject-matter jurisdiction of plaintiffs' claim for equitable relief from the alleged zoning violation, a nuisance per se. Plaintiffs have standing, no non-futile administrative remedy is available, and plaintiffs' claim was ripe for adjudication.

II. MOTIONS FOR SUMMARY DISPOSITION

A. STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. This Court reviews de novo trial court's decision regarding the motion. *Karbel v. Comerica Bank,* 247 Mich.App 90, 95–96; 635 NW2d 69 (2001). The moving party must specifically identify and support with evidence the issues as to which it believes there is no genuine issue of material fact, and that entitle it to judgment as a matter of law. MCR 2.116(G)(4); *Barnard Mfg Co, Inc v. Gates Performance Engineering, Inc,* 285 Mich.App 362, 369; 775 NW2d 618 (2009). "If the moving party properly supports its motion, the burden 'then shifts to the opposing party to establish that a genuine issue of disputed fact exists.' " *Id.* at 370, quoting *Quinto v. Cross & Peters Co,* 451 Mich. 358, 362; 547 NW2d 314 (1996). The nonmoving party must then present competent evidence, the content of which would be admissible at trial, showing that there is a genuine issue of disputed material fact. MCR 2.116(G)(4), (6); *Maiden v. Rozwood,* 461 Mich. 109, 121, 123 n 5; 597 NW2d 817 (1999); *Barnard Mfg Co,* 285 Mich.App at 373. When deciding the motion, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Quinto,* 451 Mich. at 362. When the submitted evidence fails to establish a disputed material fact and the moving party is entitled to judgment as a matter of law, the motion should be granted. MCR 2.116(G)(4); *West v. Gen Motors Corp,* 469 Mich. 177, 183; 665 NW2d 468 (2003).

B. DISCUSSION

We conclude that the trial court did not err by granting plaintiffs summary disposition by finding no material disputed fact that defendants' landscape buffer failed to comply with the zoning ordinance (and special use permit) and therefore was an abatable nuisance per se. MCL 125.3407 ("a use of land ... in violation of a zoning ordinance or regulation adopted under this act is a nuisance per se ... [t]he court shall order the nuisance abated ..."); § 74–9.705 ("any use of premises or land which is begun or changes subsequent to the time of passage of this section and in violation of any of the provisions thereof, is hereby declared to be a public nuisance per se, and may be abated by order of any court of competent jurisdiction"); *Indian Village Ass'n,* 52 Mich.App at 38 (a private citizen may bring an action to abate a public nuisances that arises from the violation of a zoning ordinance).

***6** The zoning ordinance is clear and unambiguous. Defendants cannot operate their outdoor sales and storage operation of large farm equipment without a special use permit and they cannot obtain a special use permit without complying with the pertinent landscape buffer requirements of the zoning ordinance. § 74–2.202; § 74–2.443 (unrestricted outdoor retail sales). The issuance of a special use permit requires a "determination that a special land use proposal is in compliance with the standards and requirements of this Ordinance and other applicable ordinances and laws ...." § 74–9.302(E)(1). The ordinance landscaping requirements are the minimum standards for landscaping and screening. § 74–7.101. The pertinent minimum standards in the ordinance for a landscape screen in a commercial district are "a minimum 15 feet wide" and "a staggered double row of closely spaced evergreens (i.e., no farther than 15 feet apart) which can be reasonably expected to form a complete visual barrier at least six feet in height within three years of installation." § 74–7.304(A), (B). The planning commission has no authority to modify these standards absent "a written request identifying the relevant landscape standard, the proposed landscaping, how the proposed landscaping deviates from the landscaping standard, and why the modification is justified." § 74–7.710.

In the present case, there was no "written request" to modify the ordinance standards meeting the criterion of § 74–7.710, but we will assume that defendants' site plan coupled with the zoning administrator's written and oral submissions to the planning commission satisfied this requirement and that the

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modified landscape site plan included incorporating existing vegetation for purposes of landscape screening. Still, when existing vegetation is utilized in the modified plan it must "achieve the same effect as the required landscaping." § 74–7.710(C). Thus, the planning commission had the authority and apparently did modify the ordinance landscape buffer requirements but only to the extent that the existing vegetation satisfied the "intent" or satisfied the required buffering effect. Specifically, the planning commission approved the special use in this case contingent on a landscape buffer being "installed and maintained in accordance with the landscape plan presented on the December 22, 2011 site plan, ... supplemented by spruce or evergreen trees to meet the intent of the Zoning Ordinance buffering requirements." In sum, the minimum standards of the ordinance apply except to the extent those standards are satisfied by the existing vegetation.

It is undisputed that at the time this lawsuit was initiated the landscape buffer at issue did not meet the minimum standard of "closely spaced evergreens" that "form a complete visual barrier at least six feet in height." § 74–7.304(B). The issue is whether within three years of installation such a visual barrier could reasonably be expected to form. *Id.* Plaintiffs presented two affidavits of a competent, qualified landscape architect, Deborah Kinney, who averred that "because the plantings were in many cases too short and too widely-spaced," the landscape buffer did not comply and could not reasonably be expected to comply within three years with the standard of § 74–7.304(B), and that an additional 30 evergreens, 10 to 12 feet tall, would need to be planted. Kinney's expert opinion is consistent with defendants' December 22, 2011 site plan that provided for planting White pines of that size to supplement the existing vegetation. Defendants' reliance on Sloan's affidavits to create a disputed question of fact whether the landscape buffer complied with the ordinance is misplaced for several reasons.

***7** First, in a February 14, 2013 letter, less than six months before his June 2013 and July 2013 affidavits, Sloan wrote that the landscape buffer did not comply with the ordinance in that he "identified 10 areas along the west side of the southern lot line that had openings that I did not expect to close up within the next 3 years." Sloan recommended planting six-foot tall Norway spruce trees in these gaps, but admitted he had no idea whether these additional plantings "will result in a 6–foot high screen within 3 years." In other words, Sloan acknowledged his ignorance regarding whether defendants' landscape plantings would mature within three years to provide the minimum screening required by § 74–7.304(B). Sloan also sets forth no facts in his affidavit to support his conclusion that defendants' plantings "meets or exceeds the conditions established by Planning Commission in its January 3, 2012, special use permit approval." "Mere conclusory allegations that are devoid of detail are insufficient to demonstrate that there is a genuine issue of material fact for trial." *Bennett v. Detroit Police Chief,* 274 Mich.App 307, 317; 732 NW2d 164 (2006), citing *Quinto,* 451 Mich. at 371–372.

Second, because Sloan had within the recent past expressed his ignorance regarding whether the landscape would sufficiently mature to meet the standards of § 74–7.304(B), he cannot create a question of fact on that issue with conclusory statements of compliance in an affidavit submitted on a motion for summary disposition. A party cannot avoid summary disposition by setting forth conclusory assertions in an affidavit that conflict with the actual historical conduct of the party. *Bergen v. Baker,* 264 Mich.App 376, 389; 691 NW2d 770 (2004).

Sloan's effort to support his conclusion regarding defendants' compliance because another section of the zoning ordinance only requires that newly planted evergreens be a minimum of six feet tall, see § 74–7.403(C), is also unavailing. As noted already, the planning commission required compliance with defendants' December 22, 2011 site plan that provided for 10–12 foot evergreens. Further, for the reasons discussed, the planning commission could not and did not waive the substance of the screening requirements of § 74–7.304(B). Additionally, plaintiffs presented competent expert evidence that showed six-foot tall evergreens would not satisfy the requirement of forming within three years of installation a complete visual barrier of at least six feet in height. In other words, while one section sets a general minimum height standard, the other more specific section sets performance standards that expert testimony showed required planting taller evergreens. Applying the rules of statutory construction, the general rule of § 74–7.403(C) regarding minimum height of evergreens cannot trump the more specific landscape screening requirements of § 74–7.304(B). See *In re Harper,* 302 Mich.App at 358, and *Slater v. Ann Arbor Pub Sch Bd of Ed,* 250 Mich.App 419, 434–435; 648 NW2d 205 (2002)(opining that "where two statutes or provisions conflict and one is specific to the subject matter while the other is only generally applicable, the specific statute prevails"). Moreover, the planning commission specifically imposed defendants' December 22, 2011 site plan that required planting 10–12 foot evergreens.

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***8** Finally, defendants' claim that Sloan's affidavits positioned this case as a battle of experts at trial is also without merit. The trial court specifically queried defendants' counsel regarding Sloan's qualifications and received no response. Sloan's own affidavits state only that he is a "planner," without further explication, and that he has scant experience as an employee of McKenna serving as the city's zoning administrator. No evidence was presented to the trial court to support concluding that Sloan possessed any expertise at all regarding landscaping or the rate at which recently planted evergreens might mature. Indeed, there was record evidence to suggest Sloan's lack of knowledge in this area. To be considered on a motion for summary disposition, the substance of evidence must be admissible. *Maiden,* 461 Mich. at 121, 123 n 5; *Barnard Mfg Co,* 285 Mich.App at 373. An expert must also be qualified for his opinion to be considered on a motion for summary disposition. MRE 702; *Amorello v. Monsanto Corp,* 186 Mich.App 324, 331; 463 NW2d 487 (1990). Sloan's opinion in his affidavits that defendants' landscape buffer complied with the ordinance did not meet the standard of competence required on summary disposition. See MCR 2.116(C)(G)(6)("Affidavits ... offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion."). An expert's opinion must have a basis in facts. See MRE 703; *Edry v. Adelman,* 486 Mich. 634, 639–641; 786 NW2d 567 (2010); *Gonzalez v. St John Hosp & Med Ctr (On Reconsideration),* 275 Mich.App 290, 305–306; 739 NW2d 392 (2007). When proposed expert testimony is based on speculation, it should be excluded. *Phillips v. Deihm,* 213 Mich.App 389, 402; 541 NW2d 566 (1995). Here, defendants did not establish Sloan's qualifications as an expert, MRE 702; his opinion was not shown to be based on facts, MRE 703, and his affidavits presented mere conclusory statements insufficient to withstand a supported motion for summary disposition. *Maiden,* 461 Mich. at 121, 123 n 5; *Quinto,* 451 Mich. at 362, 371–372.

As we have already noted, defendants' characterization of plaintiffs' action as an appeal of an administrative action is inaccurate. Although the trial court's opinion was less than clear when it referred to appeals under MCL 125.3607, the trial court granted relief on the basis that plaintiffs had established, on the basis of undisputed evidence, that defendants' use of their property was in violation of the landscape screening requirements of the zoning ordinance. As a result, we find that the trial court properly granted plaintiffs' motion and denied defendants' motion for summary disposition. MCR 2.116(C)(10), (G)(4); *West,* 469 Mich. at 183.

III. OTHER ISSUES

Defendants also argue that although the circuit court held their landscape screen did not comply with the zoning ordinance and ordered the zoning administrator to enforce the ordinance, its opinion and order was "void for vagueness" because it did not provide adequate notice of what must done to comply with it. They further argue the circuit court's order unlawfully delegates zoning authority to plaintiffs because plaintiffs have the power to seek enforcement of the zoning ordinance by filing motions for contempt. These claims were not raised before or decided by the trial court, so they are not preserved, *Gen Motors Corp v. Dep't of Treas,* 290 Mich.App 355, 386; 803 NW2d 698 (2010), and present questions of law reviewed de novo on appeal, *Beach v. Lima Twp,* 489 Mich. 99, 106; 802 NW2d 1 (2011).

***9** Defendants have failed to present any pertinent authority or logical argument in support of their claims that the court's order is too vague and unlawfully delegates zoning authority to plaintiffs. "It is axiomatic that where a party fails to brief the merits of an allegation of error, [or] ... fails to cite any supporting legal authority for its position, the issue is deemed abandoned." *Prince v. MacDonald,* 237 Mich.App 186, 197; 602 NW2d 834 (1999). As our Supreme Court explained in *Mitcham v. Detroit,* 355 Mich. 182, 203; 94 NW2d 388 (1959):

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.

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Accordingly, we find these claims are abandoned. *Id.; Prince,* 237 Mich.App at 197.

We affirm. As the prevailing party, plaintiffs may tax costs pursuant to MCR 7.219.

All Citations

Not Reported in N.W.2d, 2014 WL 6860265

Footnotes

1 Individual McKenna employees serving as zoning administrator at various times were Patrick Sloan, Michael Gradis, and Greg Milliken, who was not named as a defendant.

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