

**STATE OF MICHIGAN
IN THE SUPREME COURT**

SAUGATUCK DUNES COASTAL
ALLIANCE,

Appellant/Plaintiff,

vs.

Supreme Court No. 160358

COA No. 342588; 346677

LC 2017-058936-AA; 2018-059598-AA

SAUGATUCK TOWNSHIP;
SAUGATUCK TOWNSHIP ZONING
BOARD OF APPEALS; and NORTH
SHORES OF SAUGATUCK, LLC,
Appellees/Defendants.

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**APPENDIX TO APPELLEES SAUGATUCK TOWNSHIP AND
SAUGATUCK TOWNSHIP ZONING BOARD OF APPEALS
SUPPLEMENTAL RESPONSE BRIEF**

ORAL ARGUMENT REQUESTED

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SAUGATUCK TOWNSHIP ZONING BOARD OF APPEALS

**Wednesday, October 11, 2017 4:00 p.m.
Saugatuck Township Hall
3461 Blue Star Hwy, Saugatuck, MI 49453**

MINUTES

Mark Putnam called the meeting to order at 4:00 p.m.

Members present: Rick Brady, Mark Putnam & Catherine Dritsas.

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 Dritsas seconded by Brady to approve the agenda. Unanimously approved.

Approval of minutes: Motion by Dritsas seconded by Putnam to approve the minutes of June 27, 2017. Unanimously approved.

Request for Appeal of Saugatuck Township Planning Commission preliminary 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 Putnam 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.

Attorney Scott Howard, representing the Saugatuck Dunes Coastal Alliance stated that the SDCA is appealing the decision of the Saugatuck Planning Commission preliminary approval of a PUD/Site Condo and SAU approval for North Shores of Saugatuck, LLC, Parcels 03-20-004-006-00 and 03-20-004-002-00.

Attorney Scott Howard spoke on how the SDCA has standing. He stated that the community does have special interests which than creates special damages and that this piece of land is significant and special to this community. Attorney Howard noted that standing is handled at the court level and is not intended for administrative bodies at a local zoning level. Standing is defined on the court level that it's a gate keeping function and becomes a vigorous advocacy on both sides of this issue. He states that the SDCA has special damages meaning that they have a special interest on this particular development than the general public at large. The difference is that the SDCA have an interest of resources that are at issue; recreational, aesthetic and economic resources which the courts have recognized as creating special damages.

Attorney Scott Howard stated a court case that is similar to this situation. National Wildlife Federation vs Cleveland Cliffs Iron Company. The case was about expanding a mine company and the National Wildlife Federation appealed to the courts that they had standing due to the recreational and aesthetic scenery and wildlife. The Supreme Court did overrule and that the National Wildlife Federation did not have standing.

Saugatuck Township Zoning Board of Appeals
Drafted **MINUTES**

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 Dixon, 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.

Saugatuck Township Zoning Board of Appeals
Drafted **MINUTES**

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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.

**Motion by Brady, seconded by Putnam to deny the standing on this appeal as stated in the resolution.
Roll call vote: Brady yes, Putnam yes, Dritsas no.**

Motion by Putnam to adjourn meeting, Dritsas seconded.

There being no further business meeting adjourned at 5:47 pm.

Lori Babinski, Recording Secretary

**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 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

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.

- 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.

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

SAUGATUCK DUNES COASTAL ALLIANCE,

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

Appellant/ Plaintiff

Assigned to Visiting Judge
Wesley J. Nykamp P18370

v.

SAUGATUCK TOWNSHIP ;

SAUGATUCK TOWNSHIP ZONING
BOARD OF APPEALS;
and

NORTH SHORES OF SAUGATUCK, LLC

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Appellees/Defendants

Case No. 17-58936-AA

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(616) 403-0374

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.

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

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 adopted 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.

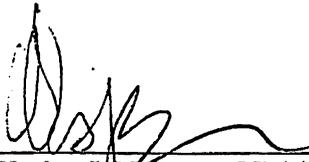
SDCA members contend they will suffer impacts substantially more extreme than suffered by the community at large because of their unique interests. These unique interests include: the Bilys whose cottage is 1000 feet from the development. The dredging of the boat basin was clearly under scrutiny and 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.

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

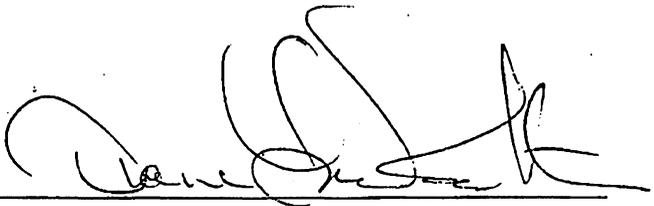


Wesley J. Nykamp, Visiting Circuit Judge

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

Saugatuck Township Zoning Board of Appeals
Drafted MINUTES

4-9-2018

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
Drafted MINUTES

4-9-2018

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

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;

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 ~~and SDCA~~ 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:

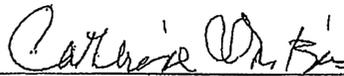
- A. Section 604(1) of the Michigan Zoning Enabling Act, MCL 125.3604(1), provides in relevant part: “. . . an appeal to the zoning board of appeals may be taken by a person aggrieved. . .” Courts have interpreted this standard as requiring proof of “some special damages not common to other property 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. 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, Chairperson
Saugatuck Township Zoning Board of Appeals

STATE OF MICHIGAN
ALLEGAN COUNTY CIRCUIT COURT

SAUGATUCK DUNES COASTAL
ALLIANCE,

Appellant,

Hon. Roberts A. Kengis

v.

Case No.: 18-059598- AA

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

Appellees.

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Rebecca L. Millican (P80869)
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carl@gabrielselaw.com

**ORDER DENYING APPEAL OF SAUGATUCK
DUNES COASTAL ALLIANCE**

STRAUB, SEAMAN & ALLEN, P.C.
1014 MAIN ST., ST. JOSEPH, MI 49085 269.982.1600
2810 EAST BELTLINE LANE NE, GRAND RAPIDS, MI 49525 616.530.6555

**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.

STRAUB, SEAMAN & ALLEN, P.C.

1014 MAIN ST., ST. JOSEPH, MI 49085 269.982.1600
2810 EAST BELTLINE LANE NE, GRAND RAPIDS, MI 49525 616.530.6555

Dated: November 14, 2018

ROBERTS KENGIS P-47062

ROBERTS A. KENGIS
Circuit Court Judge

Attest:



Clerk of the Circuit Court

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

STRAUB, SEAMAN & ALLEN, P.C.

1014 MAIN ST., ST. JOSEPH, MI 49085 269.982.1600

2810 EAST BELTLINE LANE NE, GRAND RAPIDS, MI 49525 616.530.6555

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

SAUGATUCK DUNES COASTAL
ALLIANCE, a Michigan non-profit
corporation,

Appellee and/or Cross-Appellee/Appellant,

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

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

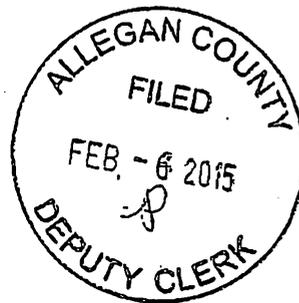
Assigned to Circuit Judge
Hon. Kevin W. Cronin
P38915
Case No. 14-053883-AA

Appellees,

and

SINGAPORE DUNES, LLC, A Michigan
limited liability company

Intervening Appellant and/or Cross-
Appellant/Appellee.



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48TH CIRCUIT COURT
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ALLEGAN, MICHIGAN

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James R. Bruinsma (P48531)
Charles W. Kierpiec (P75657)
McShane & Bowie, P.L.C.
Attorney for Intervening Appellees
99 Monroe Avenue NW, Ste 1100
Grand Rapids, MI 49503

OPINION AND ORDER ON TIMELY FILING AND STANDING

County Building in the City and County
Of Allegan, State of Michigan, on the

6th, day of FEBRUARY 2015

Present: The Honorable Kevin Cronin, Circuit Judge.

This Court, after a hearing on January 13, 2014, and having reviewed the court file, finds and
ORDERS the following:

- 1) Arguments were held in this Court on January 13, 2015. There are two primary issues that were heard.
 - a. The Saugatuck Dunes Coastal Alliance (SDCA) is seeking to challenge ALJ Pulter's Opinion and Order dated July 1, 2014 dismissing the SDCA's petition regarding a DEQ

wetland asses. ment under MCL 324.30321(3)-(4). This dismissal occurred in part because SDCA's application was untimely pursuant to the Administrative Procedures Act MCL 24.201 *et seq.*, and administrative rule R 324.21(2).

- b. Singapore Dunes separately sought dismissal of SDCA's second petition regarding critical dues on the basis that neither the SDCA nor its members satisfied the statutory requirements for standing to file such a petition. On August 21, 2014 ALJ Pulter refused to dismiss the SDCA's complaint, and issued an Opinion and Order which stated two members of the SDCA – the Bilys – *satisfied* the statutory standing requirements under MCL 324.35305 (1).
- 2) **TIMELINESS** of wetland assessment appeal. As noted above, the July 1, 2014 petition was for a wetland assessment under MCL 324.30321(3)-(4). Part 303 provides a judicial and statutory standing requirement which states that, "If a person is aggrieved by any action or inaction of the department, the person may request a formal hearing on the matter involved." MCL 324.30319.
 - 3) MCL 324.30321(3)-(4) allows a person who owns or leases a parcel of property to request that the Department of Environmental Quality (DEQ) to perform a wetlands assessment of their property, and establishes the parameters for the assessment. There are no notice provisions in accordance with this statute for when the DEQ performs an assessment, and it is not this Court's place to question the Legislature's motives for leaving it out. This Court does, however, view the DEQ's filing of their July 17, 2013 Wetland Identification Report pursuant to this statute as an "action" which satisfies the requirement of MCL 324.30319.
 - 4) Administrative rule R 324.21(2) states that, "Unless otherwise stated in a statute, a petition shall be filed within 60 days from the date of the department's decision to be considered timely." This Court finds that "the department's decision" was the issuance of the Wetland Identification Report. SDCA filed on January 17, 2014, 180 days after the MDEQ issued its July 17, 2013 Wetland Identification Report. This Court is not influenced by nor persuaded by the case of *Jeffrey A. King and Marrocco Enterprises, Inc. v DEQ* (Macomb Co Cir Ct No. 2002-1025, August 23, 2002). Administrative rule R 324.21(2) was promulgated one year after the *King* case, so this Court also finds that the *King* case is irrelevant. No arguments or case law were brought to this Court's attention indicating that rule R 324.21(2) is unenforced. **THEREFORE** this Court finds and **ORDERS** that the SDCA's petition must comply with R 324.21(2), and because it was filed on January 17, 2014, 180 days after the MDEQ issued its July 17, 2013 Wetland Identification Report, this Court finds and **ORDERS** that the petition was **UNTIMELY**.
 - 5) **STANDING**. Michigan's current standing doctrine states that 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 or if the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Lansing Schools Educ. Ass'n v. Lansing Bd. of Education*, 487 Mich. 349, 372; 792 NW2d 686 (2010).
 - 6) The statutory scheme in the case at bar is that set forth by MCL 324.35305 (1), which states that "if an applicant for a permit or a special exception or the owner of the property immediately adjacent to the proposed use is aggrieved by a decision of the department in regard to the issuance or denial of a permit or special exception under this part, the applicant or owner may request a formal hearing on the matter involved." Of particular interest to this Court are the words "immediately adjacent to the proposed use" and "aggrieved."
 - 7) The Bilys' property abuts a lot that is owned by Singapore Dunes. This lot is contiguously owned by Singapore Dunes with the lots that are subject to the part 353 application for the construction of a road on Singapore Dunes' property. The Bilys' property line is over 1000 feet

away from the lots that are the subject to the part 353 application and road construction. MCL 323.35305 (1) does not provide for a specified distance for a property owner to qualify as "immediately adjacent to the proposed use."

- 8) It is possible that a large land owner such as Singapore Dues, which own approximately 300 contiguous acres, could subdivide their property in such a way so as to frustrate the standing requirements for a neighboring property owner pursuant to this statute. Theoretically they could parcel off a narrow strip of land running the length of the neighbor's property line, and then the neighbor would no longer be immediately adjacent to the property where proposed uses are occurring. Although that is not what happened in the case at bar, this Court does recognize that as a possibility, and as such this Court will apply the doctrine of non-segmentation.
- 9) This doctrine holds that when evaluating the effect of a regulation on a parcel of property, the effect of the regulation must be viewed with respect to the parcel as a whole. Courts should not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. Instead, the court must examine the effect of the regulation on the entire parcel, rather than just the affected portion of the parcel. *Merkur Steel Supply Inc v City of Detroit*, 261 Mich App 116, 133; 680 NW2d 485 (2004). **THEREFORE**, based on the doctrine of non-segmentation this Court finds and **ORDERS** that the Bilys and the SDCA **MEET** this portion of the MCL 323.35305 (1) standing test.
- 10) The next prong of the MCL 323.35305 (1) standing test states that one must be aggrieved. No definition of "aggrieved" is provided. "When determining the common, ordinary meaning of a word or phrase, consulting a dictionary is appropriate." *Title Office, Inc. v. Van Buren Co. Treasurer*, 469 Mich. 516, 522, 676 N.W.2d 207 (2004). Black's Law Dictionary (6th ed) defines "aggrieved" to mean, "Having suffered loss or injury; damaged; injured." An "aggrieved party" is defined as follows:
- a. One whose legal right is invaded by an act complained of, or whose pecuniary interest is directly and adversely affected by a decree or judgment.... The word "aggrieved" refers to a substantial grievance, a denial of some personal, pecuniary or property right, or the imposition upon a party of a burden or obligation.
 - b. *See also, Maxwell v Dept of Env'tl Quality*, 264 Mich App 567, 571-72; 692 NW2d 68 (2004).
- 11) Other statutes use an aggrieved party standard for purposes for standing, one of which is the standing requirement of the *Michigan Zoning Enabling Act* MCL 125.3607, for which there are voluminous opinions interpreting what an aggrieved party is. The Court finds that this analysis is analogous to the statutes at bar. Courts have consistently ruled that to have standing parties must have special damages not incurred by other property owners similarly situated. *Unger v. Forest Home Twp.*, 65 Mich.App 614; 237 N.W.2d 582 (1975); *Brown v. East Lansing Zoning Bd. of Appeals*, 109 Mich.App 688; 311 N.W.2d 828 (1981). In *Village of Franklin v. City of Southfield*, the court determined that it was not enough to merely allege that there would be special damages. 101 Mich.App 554; 300 N.W.2d 634 (1980).
- 12) SCDA asks this Court to follow the analysis of the court in *Brown v. East Lansing Zoning Bd. of Appeals*, 109 Mich.App 688; 311 N.W.2d 828 (1981) where the plaintiffs were found to have standing. However, the "aggrieved party" standard is a stricter standard than that considered before the Court of Appeals in *Brown*. At that time of *Brown* the zoning statute used a "person having an interest affected" standard; this language went into effect on March 1, 1979. The previous year, February 1978, the court decided *Western Michigan University Bd. of Trustees v. Brink*, 81 Mich.App 99; 265 N.W. 2d 56 (1979) for which the statute used an "aggrieved party" standard. The *Brown* court interpreted this legislative change as a backlash against the *WMU v. Brink* decision, and so the *Brown* court loosened the standing requirement. 109 Mich.App 688, 698-700; 311 N.W.2d 828 (1981). As of July 1, 2006, MCL 125.3607 -

which is the successo the statute decided in *Brown* - now u:
standard.

- 13) In the case at bar, the SDCA claims that their special damages include loss of property value, congestion, loss of natural resources, and loss of the natural wildlife habitats. They also claimed that the new road would be visible from their property. These allegations are not considered special damages. *Joseph Grand Blank Twp.*, 5 Mich.App. 566, 571; 147 N.W.2d 458 (1967).
- 14) **THEREFORE**, the Court finds and **ORDERS** that the Appellee and/or Cross-Appellee/ Appellant – SDCA – **FAILED** to demonstrate that it would suffer special damages adequate to support its status as an aggrieved party under MCL 324.35305 (1), or that it has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large.

IT IS SO ORDERED AND ADJUDGED.



Kevin Cronin, 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 notice.

2/6/15
Date

Jocue Porter
Signature

 OLSON, BZDOK & HOWARD

JUL - 3 2017

BY SAUGATUCK TOWNSHIP

via hand delivery

June 30, 2017

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 appeal¹ 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.

Mr. Bill Rowe
June 30, 2017
Page 2 of 3

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.).

GROUND 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

OLSON, BZDOK & HOWARD

Mr. Bill Rowe
June 30, 2017
Page 3 of 3

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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If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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

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 areas¹ by the Michigan Department of Environment, Great Lakes, and Energy (EGLE²). 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

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).

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 Shore's implied contention that the ZBA acted as a "tribunal" for purposes of MCR 7.203(A)(1)(a). We therefore also reject North Shore'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:

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*

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.

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.

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

DEPARTMENT OF COMMERCE
HERBERT HOOVER, SECRETARY

**A STANDARD
STATE ZONING ENABLING ACT
UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING
REGULATIONS**

BY THE
ADVISORY COMMITTEE ON ZONING

APPOINTED BY SECRETARY HOOVER

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JOHN M. GRIES

Chief, Division of Building and Housing, Bureau of Standards
Department of Commerce



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FOREWORD

By HERBERT HOOVER

The importance of this standard State zoning enabling act can not well be overemphasized. When the advisory committee on zoning was formed in the Department of Commerce, the proposal to frame it received unanimous support from the public-spirited organizations represented on the committee and other groups interested in zoning. The urgency of the need for such a standard act was at once demonstrated, when, within a year of its issuance, 11 States passed zoning enabling acts which were modeled either wholly or partly after it.¹ Similar acts have been introduced in four other States, with the prospect of more to follow.

The discovery that it is practical by city zoning to carry out reasonable neighborly agreements as to the use of land has made an almost instant appeal to the American people. When the advisory committee on zoning was formed in the Department of Commerce in September, 1921, only 48 cities and towns, with less than 11,000,000 inhabitants, had adopted zoning ordinances. By the end of 1923, a little more than two years later, zoning was in effect in 218 municipalities, with more than 22,000,000 inhabitants, and new ones are being added to the list each month.²

In this rapid movement the fundamental legal basis on which zoning rests can not be overlooked. Several of our States, fortunately, already have zoning enabling acts that have stood the test in their own courts. This standard act endeavors to provide, so far as it is practicable to foresee, that proper zoning can be undertaken under it without injustice and without violating property rights. The committee did not make it public until it had given it the most exacting and painstaking study in relation to existing State acts and court decisions and with reference to zoning as it has been practiced and found successful in cities and towns throughout the country. Prac-

¹ By 1925 the following 19 States had used the standard act wholly or in part in their laws: Arizona, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Utah, and Wyoming.

² On January 1, 1926, there were at least 425 zoned municipalities, comprising more than half the urban population of the country.

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tical zoners who have been associated with a majority of zoned cities were consulted for their opinions, and the committee itself represents the professional, commercial, and civic societies most interested in zoning problems.

The drafting of the act has required very large effort, and the members of the advisory committee on zoning, particularly those who served on the subcommittee on standard law, merit the gratitude of the people of the United States for the thoroughness with which they executed their task.

FEBRUARY 15, 1924.

A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS

EXPLANATORY NOTES IN GENERAL

1. *An enabling act is advisable in all cases.*—A general State enabling act is always advisable, and while the power to zone may, in some States, be derived from constitutional as distinguished from statutory home rule, still it is seldom that the home-rule powers will cover all the necessary provisions for successful zoning.

2. *Constitutional amendments not required.*—No amendment to the State constitution, as a rule, is necessary. Zoning is undertaken under the police power and is well within the powers granted to the legislature by the constitutions of the various States.

3. *Modify this standard act as little as possible.*—It was prepared with a full knowledge of the decisions of the courts in every case in which zoning acts have been under review, and has been carefully checked with reference to subsequent decisions. A safe course to follow is to make only those changes necessary to have the act conform to local legislative customs and modes of expression.

4. *Adding new words and phrases.*—Especial caution is given to beware of adding additional words and phrases which, as a rule, restrict the meaning, from the legal point of view.

5. *Do not try to consolidate sections.*—It is natural to try to shorten the act by consolidating sections. This may defeat one of the purposes of the act, namely, of keeping the language of the statute as simple and concise as possible. It is much better to have an act broken up into a number of sections, provided they are properly drawn, than to have one or two, or a few long, involved sections. While it is recognized that some of the sections in the standard act could be combined, it is put purposely in its present form.

6. *Title and enacting clause necessary.*—No title of the act and no enacting clause have been included. These are purposely omitted, as the custom varies in almost every State. The act should, of course, be preceded by the appropriate title and enacting clause in accordance with the local legislative custom.

7. *Definitions.*—No definitions are included. The terms used in the act are so commonly understood that definitions are unneces-

sary. Definitions are generally a source of danger. They give to words a restricted meaning. No difficulty will be found with the operation of the act because of the absence of such definitions.

8. *Validity of one section affecting other sections.*—Some States have included in the enabling act a declaration to the effect that the finding void or unconstitutional by the courts of one section or provision shall not affect the rest of the act. This is so well accepted a principle of legal interpretation that it seems unnecessary to include it in the act. If any State desires to have it included, it can be added without danger.

9. *No declaration that act is not retroactive.*—Some laws contain a provision to the effect that "the powers by this act conferred shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted." While the almost universal practice is to make zoning ordinances nonretroactive, it is recognized that there may arise local conditions of a peculiar character that make it necessary and desirable to deal with some isolated case by means of a retroactive provision affecting that case only. For this reason it does not seem wise to debar the local legislative body from dealing with such a situation.

10. *The repeal clause.*—No repeal clause has been included in the act for the reason that the method of phrasing such a clause will vary in nearly every State. The local legislative custom as to repeal clauses should be followed.

11. *Date of taking effect.*—For similar reasons the act does not include any provision as to the date on which it will take effect. Here also the local legislative custom should be followed.

12. *Typical ordinances or local regulations.*—The department has made a careful study of the use, height, and area regulations embodied in 16 typical zoning ordinances, together with notes on the trend of certain newer ordinances. Single copies of this bulletin are available by application to the division of building and housing, Department of Commerce, Washington, D. C.

13. *Interim ordinances.*—After the local legislative authorities have the power to zone, they are nearly always pressed to bring immediate protection to certain threatened localities. Sometimes the authorities frame an ordinance to cover a few blocks, or only a part of the city; this is called piecemeal zoning. Its adoption is inadvisable and may lead to much litigation. Interim zoning, although undesirable, is not as objectionable as piecemeal zoning. Interim zoning, at least, has the advantage of applying to the whole city. For instance, an ordinance providing that wherever three-fourths of the houses in a block are residential then no new business structure or factory can be built in that block is an illustration of

interim zoning. The reason it is objectionable is because it is too general, not sufficiently adapted to the particular need of each street, and therefore likely to be arbitrary in many cases. In such case, if a new house is built or an old one destroyed, the legal protection of the district may be altered. In this sense the district is a "traveling zone." As such, a district has no stability, and as the police power may be differently applied according to the acts of property owners it is not looked upon with favor by the courts. To prevent this the words "at the time of the passage of this ordinance" should be inserted. If it is deemed necessary to prohibit a nonconforming building because of the consents or protests of the property owners, the ordinance should always be phrased so as to prohibit the nonconforming use, *unless* the desired majority files written consents with the officials. In other words, a provision which conditions the permission to have a nonconforming use upon the consents of a majority of the property owners is void. If at all possible, the first zoning ordinance should be comprehensive.

14. *Note to revised edition, 1926.*—A standard State zoning enabling act under which municipalities may adopt zoning regulations was first issued in mimeographed form in August, 1922. A revised edition was made public in the same form in January, 1923, and the first printed edition in May, 1924. In this second printed edition note 15a has been added to cover the needs of cases where it is found desirable to control the development of areas adjacent to the city limits; and section 8, dealing with enforcement and remedies, has been revised in order to give the municipality more effective means of obtaining conformance to the zoning ordinance.

The circulation of the standard act has not been confined to those directly interested in drafting State zoning legislation. Calls for it have been received from persons in all sections of the country who have desired to use it on account of its general bearing on the legal and social aspects of zoning. More than 55,000 copies of the first printed edition have been sold by the Superintendent of Documents.

A STANDARD STATE ZONING ENABLING ACT

SECTION 1. GRANT OF POWER.—For the purpose of promoting health,¹ safety, morals, or² the general welfare³ of the community, the legislative body⁴ of cities and incorporated villages⁵ is hereby empowered to regulate and restrict⁶ the height, number of stories,⁷

¹“*health*”: It is to be noted that the word used is “health,” not “public health,” for the latter narrows the application. There are some things that relate to the health only of the people living in a given dwelling, such, for instance, as the size of yards, and have only a remote relation to public health. If the term “public health” were used, the act might be set aside in a given case where it would be possible to show that the particular provision in which legal action was being taken did not concern itself with the public health but only with health.

²“*or*”: It should be noted that the word used is “or” and not the word “and.” If the latter word were used, then it might be necessary to show to the satisfaction of the court that all four of the purposes mentioned were involved in a given case, viz, health, safety, morals, and general welfare. The use of the word “or” limits the application to any one of the four instead of to all of them.

³“*general welfare*”: The main pillars on which the police power rests are these four, viz, health, safety, morals, and general welfare. It is wise, therefore, to limit the purposes of this enactment to these four. There may be danger in adding others, as “prosperity,” “comfort,” “convenience,” “order,” “growth of the city,” etc., and nothing is to be gained thereby.

⁴“*legislative body*”: This term is sufficiently understood to include all forms of government, including commission and city manager, as well as the older forms of government. Whatever form of government exists, there must be some local body performing legislative functions.

⁵“*cities and incorporated villages*”: This phrase includes those municipalities which ordinarily will find it advantageous to be given zoning powers. In some States, where different forms of governmental provisions exist, it will be necessary to add those municipalities to the term “cities and incorporated villages”; in other States the word “town” or “borough” will probably need to be added. The term “cities and incorporated villages,” however, will cover the normal situation.

⁶“*regulate and restrict*”: This phrase is considered sufficiently all-embracing. Nothing will be gained by adding such terms as “exclude,” “segregate,” “limit,” “determine.”

⁷“*number of stories*”: It is thought wise to add this to the term “height,” as courts may construe this expression narrowly, as limited to a given number of feet only, and may hold that this does not give the power to limit the number of stories, provided the building in question came within the limitation of the number of feet imposed by the ordinance. It is obvious that the power to restrict the number of stories should be granted.

and size of buildings⁸ and other structures,⁹ the percentage of lot¹⁰ that may be occupied, the size of yards, courts, and other open spaces,¹¹ the density of population,¹² and the location and use¹³ of buildings, structures, and land for trade, industry, residence, or other purposes.^{14, 15, 15a}

⁸“*size of buildings*”: The term “size” is a better expression to use than “bulk” or “area,” for the reason that both “bulk” and “area” imply, to some extent, a regularity of outline that may not be involved in all cases, whereas “size” is sufficiently all-inclusive to cover all contingencies.

⁹“*other structures*”: This phrase would include other structures which possibly might not be defined as “buildings,” such as open sheds, billboards, fences, spite fences, etc., none of which can be strictly considered as “buildings,” as commonly understood.

¹⁰“*percentage of lot*”: This is a better method of expression than granting the power to limit “the area of the building,” as has been done in some laws, for the latter expression does not imply a variation of the fraction of the lot built upon.

¹¹“*other open spaces*”: This is a catch-all expression and is necessary in view of the fact that “yards” and “courts” are not defined in the act.

¹²“*density of population*”: The power to regulate density of population is comparatively new in zoning practice. It is, however, highly desirable. Many different methods may be employed. For this reason the phrase “density of population” is a better phrase to use than one giving the power to “limit the number of people to the acre,” as this is only one method of limiting density of population. It may be more desirable to limit the number of families to the acre or the number of families to a given house, etc. The expression “number of people to the acre” is therefore more limited in its meaning and describes only one way of reducing congestion of population, while the phrase “limiting density of population” is all-embracing. It is believed that, with proper restrictions, this provision will make possible the creation of one-family residence districts.

¹³“*use*”: This term is broad enough to include all meanings desired.

¹⁴“*other purposes*”: This is a catch-all phrase. It will include every use.

¹⁵Although the power to require open spaces allows the fixing of setback building lines, some recent acts contain a specific grant of that power. The establishment of setback lines is somewhat novel in zoning practice but is beginning to be employed. As it is in the minds of some people of doubtful legality and has not as yet been sustained by the courts, this power has not been included here. If it should be desired to grant such power, it can readily be done by adding at the end of this section the following words: “and may also establish setback building lines.”

^{15a}Some communities find it desirable to control the development of areas adjacent to the city’s limits—which, in many cases, are ultimately to become a part of that city. Where it is desired to control those “fringes of cities,” the legislature may grant such power to any community. Where this power is desired, strike out the period after the word “purposes” at the end of section 1 and add the following: “within the boundaries of such city or village; and, in the case of cities having a population of 25,000 or over, also within that non-municipal territory immediately adjacent and contiguous to the boundaries of such city and extending for the radial distance of 5 miles beyond such boundaries in all directions.” Caution should be given, however, that this effort

SEC. 2. DISTRICTS.—For any or all of said purposes the local legislative body may divide the municipality¹⁶ into districts of such number, shape,¹⁷ and area as may be deemed best suited to carry out the purposes of this act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use¹⁸ of buildings, structures, or land. All such regulations shall be uniform for each class or kind of buildings throughout each district,¹⁹ but the regulations in one district may differ²⁰ from those in other districts.

SEC. 3. PURPOSES IN VIEW.²¹—Such regulations shall be made in accordance with a comprehensive plan²² and designed²³ to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other pub-

by one community to control the development of some other community will often give rise to political and practical difficulties. It is for this reason that this provision is not included in the text of the act but appended as a note, to be used by those who desire it. This question will ultimately have to be dealt with, however, in most cases, by a process of regional planning.

"*municipality*": This term is sufficiently broad to include cities, towns, villages, boroughs, or whatever governmental unit may be involved.

"*shape*": This permits districts of irregular outline, something that is quite necessary.

"*reconstruction, alteration, repair, or use*": All of these words are thought necessary, so as to allow no loophole for evasion of the law.

"*uniform for each class or kind of buildings throughout each district*": This is important, not so much for legal reasons as because it gives notice to property owners that there shall be no improper discriminations, but that all in the same class shall be treated alike.

"*may differ*": This is the essence of zoning, and without this express authority from the legislature to make different regulations in different districts zoning might be of doubtful validity.

"*Purposes in view*": This section should be clearly differentiated from the statement of purpose (under the police power) contained in the first sentence of section 1. That defined and limited the powers created by the legislature to the municipality under the police power. This section contains practically a direction from the legislative body as to the purposes in view in establishing a zoning ordinance and the manner in which the work of preparing such an ordinance shall be done. It may be said, in brief, to constitute the "atmosphere" under which the zoning is to be done.

"*with a comprehensive plan*": This will prevent haphazard or piecemeal zoning. No zoning should be done without such a comprehensive study.

"*and designed*": This is the statement of direction given by the legislature referred to in note 21. It has purposely been made to include many purposes. There are not the same dangers involved here that there are in adding to the statement of purposes under the police power, as set forth in the first sentence of section 1.

lic requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses,²⁴ and with a view to conserving the value of buildings²⁵ and encouraging the most appropriate use of land throughout such municipality.

SEC. 4. METHOD OF PROCEDURE.—The legislative body of such municipality shall provide for the manner²⁶ in which such regulations and restrictions and the boundaries of such districts shall be determined, established, and enforced, and from time to time amended, supplemented, or changed. However, no such regulation, restriction, or boundary shall become effective until after a public hearing²⁷ in relation thereto, at which parties in interest and citizens²⁸ shall have an opportunity to be heard. At least 15 days' notice²⁹ of the time and place of such hearing shall be published in an official paper, or a paper of general circulation, in such municipality.

SEC. 5. CHANGES.³⁰—Such regulations, restrictions, and boundaries may from time to time be amended, supplemented, changed, modified, or repealed. In case, however, of a protest against such change,³¹

"*peculiar suitability for particular uses*": This is a reassurance to property interests that zoning is to be done in a sane and practical way.

"*conserving the value of buildings*": It should be noted that zoning is not intended to enhance the value of buildings but to conserve that value—that is, to prevent depreciation of values such as come in "blighted districts," for instance—but it is to encourage the most appropriate use of land.

"*provide for the manner*": In view of the great variety in the form of government that exists throughout the country, it is not thought wise to use the expression "provide by ordinance," for that method may be inappropriate in those communities that have commission government or city managers.

"*after a public hearing*": It is thought wise to require by statute that there must be a public hearing before a zoning ordinance becomes effective. There should be, as a matter of policy, many such hearings.

"*and citizens*": This permits any person to be heard, and not merely property owners whose property interests may be adversely affected by the proposed ordinance. It is right that every citizen should be able to make his voice heard and protest against any ordinance that might be detrimental to the best interests of the city.

"*15 days' notice*": This requirement can be varied to conform to local custom. All that is important is that there should be due and proper notice and ample time for citizens to study the proposals and make their opposition manifest.

"*Changes*": It is obvious that provision must be made for changing the regulations as conditions change or new conditions arise, otherwise zoning would be a "strait-jacket" and a detriment to a community instead of an asset.

"*change*": This term, as here used, it is believed will be construed by the courts to include "amendments, supplements, modifications, and repeal," in view of the language which it follows. These words might be added after the word "change," but have been omitted for the sake of brevity. On the

signed by the owners of 20 per cent or more either of the area of the lots²² included in such proposed change, or of those immediately adjacent²³ in the rear thereof²⁴ extending — feet therefrom,²⁵ or of those directly opposite²⁶ thereto extending — feet²⁷ from the street frontage of such opposite lots, such amendment shall not become effective except by the favorable vote of three-fourths of all the members²⁸ of the legislative body of such municipality. The provisions of the previous section relative to public hearings and official notice shall apply equally to all changes or amendments.

SEC. 6. ZONING COMMISSION.—In order to avail itself of the powers conferred by this act,²⁹ such legislative body shall appoint a

other hand, there must be stability for zoning ordinances if they are to be of value. For this reason the practice has been rather generally adopted of permitting ordinary routine changes to be adopted by a majority vote of the local legislative body but requiring a three-fourths vote in the event of a protest from a substantial proportion of property owners whose interests are affected. This has proved in practice to be a sound procedure and has tended to stabilize the ordinance.

"*area of the lots*": Most laws heretofore enacted, based on the first enactment in New York City, have used ownership of feet frontage as the basis for this consent. This has given rise to many difficulties in practice, especially with corner lots which have frontage on two streets and whose owners accordingly have had two votes to the single vote of the other property owners. In order to get rid of this unnecessarily complex method of determining solely the question of assent to a change in the ordinance, it is recommended that *area of the lots* included in the proposed change be used as the basis instead of feet frontage. This will do away with the present unfair element of double voting and the unnecessary complications of the generally used method.

"*or of those immediately adjacent*": There are three groups of property ownership, and if 20 per cent of *any one* of these object to the proposed change it will require a three-fourths vote of the legislative body before the change can become effective. These three are (1) the owners of the lots included in the change, (2) the owners of the lots immediately adjacent in the rear, and (3) the owners of the lots directly opposite.

"*immediately adjacent in the rear thereof*": This phrase is necessary for precision; otherwise there will be doubt, and owners of lots in the rear but some distance away might claim the right to be included in the objection.

"*extending — feet therefrom*": There should be inserted in the act the number of feet which is the prevailing lot depth in the municipalities of the State.

"*directly opposite*": The same considerations apply to this phrase as to "immediately adjacent in the rear thereof."

"*all the members*": It is important to use this expression, otherwise changes in the ordinance might be made by a three-fourths vote of the members present at a given meeting.

"*In order to avail itself of the powers conferred by this act*": Without this phrase it would be necessary for the local legislative body forthwith to appoint a zoning commission, even though it was not desired to take up zoning at that time. This act is an enabling act *empowering* action, not making it mandatory.

commission,³⁰ to be known as the zoning commission, to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such commission shall make a preliminary report and hold public hearings thereon before submitting its final report, and such legislative body shall not hold its public hearings or take action until³¹ it has received the final report of such commission. Where a city plan commission³² already exists, it may be appointed³³ as the zoning commission.³⁴

SEC. 7. BOARD OF ADJUSTMENT.—Such local legislative body may provide for the appointment of a board of adjustment, and in the regulations and restrictions adopted pursuant to the authority of this act may provide that the said board of adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained.

"*shall appoint a commission*": Even though a committee of the local legislative body might be entirely competent to undertake the painstaking, careful, and prolonged detailed study that is ordinarily involved in the preparation of a zoning ordinance and map, the appointment of an outside body of representative citizens is most desirable as a means of securing that participation in and thorough understanding of the zoning ordinance which will insure its acceptance by the people of the particular municipality. One of the most important functions of such a commission is the holding of numerous conferences in all parts of the city with all classes of interests. No zoning ordinance should be adopted until such work has been done.

"*shall not hold its public hearings or take action until*": This is a proper safeguard against hasty or ill-considered action. It should be carefully noted that this is in no sense a delegation of its powers by the local legislative body to the zoning commission. The legislative body may still reverse the recommendations of the zoning commission.

"*city plan commission*": It is highly desirable that all zoning schemes should be worked out as an integral part of the city plan. For that reason the city plan commission, preferably, should be intrusted with the making of the zoning plan.

"*may be appointed*": It should be noted that its appointment is not made mandatory, however, as sometimes there will be local reasons for desiring a separate body.

"*Zoning commission*": Some laws contain a provision to the effect that all changes in the ordinance shall be reported upon by the zoning commission before action on them can be taken by the legislative body. Such a provision has *not* been included here. In the first place, that involves continuing the zoning commission as a permanent body, which may not be desirable. In the second place, it is *before* a zoning ordinance is established that the necessity exists for that careful study and investigation which a zoning commission can so well perform. Amendments to the original ordinance do not as a rule require such comprehensive study and may be passed upon by the legislative body, provided that proper notice and opportunity for the public to express its views have been given.

The board of adjustment shall consist of five members, each to be appointed for a term of three years⁴⁴ and removable for cause by the appointing authority upon written charges and after public hearing. Vacancies shall be filled for the unexpired term of any member whose term becomes vacant.

The board shall adopt rules in accordance with the provisions of any ordinance adopted pursuant to this act. Meetings of the board shall be held at the call of the chairman and at such other times as the board may determine. Such chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board shall be open to the public. The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board and shall be a public record.

Appeals to the board of adjustment may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of adjustment after the notice of appeal shall have been filed with him that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In such case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of adjustment or by a court of record on application on notice to the officer from whom the appeal is taken and on due cause shown.

The board of adjustment shall fix a reasonable time for the hearing of the appeal, give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney.

The board of adjustment shall have the following powers:

1. To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an ad-

⁴⁴ "each to be appointed for three years": This can be altered to provide for overlapping terms, if desired.

ministrative official in the enforcement of this act or of any ordinance adopted pursuant thereto.

2. To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.

3. To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

In exercising the above-mentioned powers such board may, in conformity with the provisions of this act, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from and may make such order, requirement, decision, or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken.

The concurring vote of four members of the board shall be necessary to reverse any order, requirement, decision, or determination of any such administrative official, or to decide in favor of the applicant on any matter upon which it is required to pass under any such ordinance, or to effect any variation in such ordinance.

Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer, or any officer, department, board, or bureau of the municipality, may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within 30 days after the filing of the decision in the office of the board.

Upon the presentation of such petition the court may allow a writ of certiorari directed to the board of adjustment to review such decision of the board of adjustment and shall prescribe therein the time within which a return thereto must be made and served upon the relator's attorney, which shall not be less than 10 days and may be extended by the court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order.

The board of adjustment shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof or of such portions thereof as may be called for by such writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

Costs shall not be allowed against the board unless it shall appear to the court that it acted with gross negligence, or in bad faith, or with malice in making the decision appealed from.

All issues in any proceeding under this section shall have preference over all other civil actions and proceedings.

SEC. 8. ENFORCEMENT AND REMEDIES.⁴⁵—The local legislative body may provide by ordinance for the enforcement of this act and of any ordinance or regulation made thereunder. A violation of this act or of such ordinance or regulation is hereby declared to be a misdemeanor, and such local legislative body may provide for the punishment thereof by fine or imprisonment or both. It is also empowered to provide civil penalties for such violation.

In case any building or structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained, or any building, structure, or land is used in violation of this act or of any ordinance or other regulation made under authority conferred hereby, the proper local authorities of the municipality, in addition to other remedies, may institute any appropriate action or proceedings⁴⁶ to prevent such unlawful erection, construction, reconstruction, altera-

⁴⁵ "Enforcement and Remedies": This section is vital. Without it the local authorities, as a rule, will be powerless to do more than inflict a fine or penalty for violation of the zoning ordinance. It is obvious that a person desiring undue privileges will be glad to pay a few hundred dollars in fines or penalties if thereby he can obtain a privilege to build in a manner forbidden by law, or use his building in an unlawful manner, when he may profit thereby to the extent of many thousands of dollars. What is necessary is that the authorities shall be able to stop promptly the construction of an unlawful building before it is erected and restrain and prohibit an unlawful use.

⁴⁶ "Any appropriate action or proceedings": Under the provisions of this section the local authorities may use any or all of the following methods in trying to bring about compliance with the law: They may sue the responsible person for a penalty in a civil suit; they may arrest the offender and put him in jail; they may stop the work in the case of a new building and prevent it going on; they may prevent the occupancy of a building and keep it vacant until such time as the conditions complained of are remedied; they can evict the occupants of a building when the conditions are contrary to law and prevent its reoccupancy until the conditions have been cured. All of these things the local authorities should be given power to do if zoning laws are to be effective.

tion, repair, conversion, maintenance, or use, to restrain, correct, or abate such violation, to prevent the occupancy of said building, structure, or land, or to prevent any illegal act, conduct, business, or use in or about such premises.

SEC. 9. CONFLICT WITH OTHER LAWS.—Wherever the regulations made under authority of this act require a greater width or size of yards, courts, or other open spaces, or require a lower height of building or less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required in any other statute or local ordinance or regulation, the provisions of the regulations made under authority of this act shall govern. Wherever the provisions of any other statute or local ordinance or regulation require a greater width or size of yards, courts, or other open spaces, or require a lower height of building or a less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required by the regulations made under authority of this act, the provisions of such statute or local ordinance or regulation shall govern.

"Conflict with other laws": By this provision the community is always assured of the maintenance of the higher standard. Without a provision of this kind the later enactment would probably govern. This requirement is especially necessary in those States which now have or later may enact housing laws, as housing laws also contain requirements as to height of dwellings, size of yards, and other open spaces, etc.

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COMMENTS

Standing To Appeal Zoning Determinations: The "Aggrieved Person" Requirement

During the twentieth century the states have increasingly utilized their police power to control the use of land.¹ All fifty states have now enacted zoning enabling legislation,² much of which is based in whole or in part on the Standard State Zoning Enabling Act.³ Typically, these zoning acts, like the Standard Act, empower municipalities⁴ to promulgate land use regulations by dividing the municipality "into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this act"⁵ Most zoning acts specify that "all such regulations shall be *uniform* for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts."⁶

Despite the desire for uniform land regulation, however, a number of "safety valves" have been incorporated into zoning procedures to provide for necessary diversity and to ensure fairness in the implementation of zoning regulations.⁷ One of the most important of these is the "board of adjustment,"⁸ which has the power to grant

1. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *City of Aurora v. Burns*, 319 Ill. 84, 149 N.E. 784 (1925); cf. *Brandon v. Board of Comm'rs*, 124 N.J.L. 135, 142-43, 11 A.2d 304, 309 (Sup. Ct.), *aff'd*, 125 N.J.L. 367, 15 A.2d 598 (Ct. Err. & App. 1940).

2. See Cunningham, *Land-Use Control—The State and Local Programs*, 50 IOWA L. REV. 367, 369 n.3 (1965).

3. The STANDARD STATE ZONING ENABLING ACT (hereinafter cited as STANDARD ACT) was sponsored by the United States Department of Commerce. Originally published in 1924, it is now out of print, but is reproduced at 3 RATHKOPF, *ZONING AND PLANNING* 100-1 to -6 (3d ed. 1956).

4. Over half the states also authorize counties or townships to enact zoning regulations. See, e.g., MICH. COMP. LAWS §§ 125.201-232, 125.271-301 (1948), as amended, MICH. COMP. LAWS §§ 125.201-218, 125.272-298 (Supp. 1961).

5. STANDARD ACT § 2. See, e.g., ALASKA STAT. ANN. § 29.10.219 (1962); IOWA CODE ANN. § 414.2 (1949).

6. STANDARD ACT § 2. (Emphasis added.) See, e.g., ARIZ. REV. STAT. ANN. § 9-461C (1956); KY. REV. STAT. § 100.067(2) (1962).

7. See *V. F. Zahodiakin Eng'r Corp. v. Zoning Bd. of Adjustment*, 8 N.J. 386, 86 A.2d 127 (1952); *Guenther v. Zoning Bd. of Review*, 85 R.I. 37, 125 A.2d 214 (1956); *Azalea Corp. v. City of Richmond*, 201 Va. 636, 112 S.E.2d 862 (1960).

8. See STANDARD ACT § 7; ARK. STAT. ANN. § 19-2816 (1956); GA. CODE ANN. § 69-815 (1957). Some statutes refer to this body as the Board of Appeals. See *Van Auken v. Kimmey*, 141 Misc. 105, 252 N.Y.S. 329 (Sup. Ct. 1930). Others title it the Zoning Board of Review. See *Buckminster v. Zoning Bd. of Review*, 69 R.I. 396, 33 A.2d 199 (1943).

For the general functions of such boards, see 2 RATHKOPF, *op. cit. supra* note 3, at 37-1 to -12. See also Anderson, *The Board of Zoning Appeals—Villain or Victim?*, 13 SYRACUSE L. REV. 353 (1962); Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273 (1962); McSwain, *The Zoning Board of Adjustment*, 13 BAYLOR L. REV. 21 (1961); Souter, *Zoning Appeals—How a Board of Zoning Appeals Functions*, Mich. S.B.J., May 1961, p. 26.

such "variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done."⁹ Moreover, in appropriate cases the board may make special exceptions to the terms of a zoning ordinance.¹⁰

Before an individual can obtain a variance or special exception, he must first apply for a permit from a building inspector to undertake the desired action. Since the building inspector has no power to grant a variance, this preliminary requirement appears unnecessary when it is clear that the contemplated use is outside the standards of the ordinance; the inspector can issue a permit only if he finds that the contemplated land use is in fact permitted by the terms of the ordinance.¹¹

If the building permit is denied for any reason, the applicant generally has the right to appeal to the board of adjustment as a "person aggrieved . . . by any decision of the administrative officer."¹² The board is then required to hold hearings on the denial of the permit and to determine whether a variance should be granted. If the requested variance is denied by the board, the applicant may appeal, as a person aggrieved, to a proper court.¹³ On the other hand, if the variance is granted by the board, third parties may qualify as persons aggrieved and may litigate the issue in court.¹⁴ "Aggrieved person," however, is not defined by the statutes. Consequently, it has been left to the courts to delineate the standards which govern the status of an applicant or a third party as an aggrieved person entitled to appeal. It is the purpose of this discussion to examine the requirements for applicants and for third parties to have standing as persons aggrieved by decisions of the

9. *E.g.*, STANDARD ACT § 7; NEV. REV. STAT. § 278.290(1)(C) (1963). In some states the power to grant variances may be given to the local governing body. See Dallstream and Hunt, *Variations, Exceptions and Special Uses*, 1954 U. ILL. L.F. 213.

10. *E.g.*, STANDARD ACT § 7; TENN. CODE ANN. § 13-706 (1955). For the distinction between a variance and an exception or a special use permit, see Devereux Foundation, Inc., 351 Pa. 478, 483-86, 200 Atl. 517, 521 (1945).

11. See, *e.g.*, *City of Yuba City v. Chernivasky*, 117 Cal. App. 568, 4 P.2d 299 (1931); *Jennings v. Connecticut Light & Power Co.*, 140 Conn. 650, 103 A.2d 535 (1954); *Boardwalk & Seashore Corp. v. Murdock*, 175 Misc. 208, 22 N.Y.S.2d 611 (Sup. Ct. 1940).

12. STANDARD ACT § 7. See, *e.g.*, FLA. STAT. ANN. § 176.11 (1943); N.Y. VILLAGE LAW § 179-b. A number of statutes specifically provide for an appeal to the board by "any person aggrieved by his inability to obtain a building permit." *E.g.*, NEV. REV. STAT. § 278.310(1)(a) (1931); PA. STAT. ANN. tit. 16, § 5230 (1956). Thus, in most states, appeals to the board are generally based on the refusal of a building inspector to issue a permit. See *Kelley v. Board of Zoning Appeals*, 126 Conn. 648, 650, 13 A.2d 675, 676 (1940).

13. See, *e.g.*, STANDARD ACT § 7; N.Y. VILLAGE LAW § 179-b.

14. See STANDARD ACT § 7.

administrative officer and the board of adjustment,¹⁵ and to consider the validity of some of the factors that have been emphasized by the courts in resolving the issue.

I. PERMIT APPLICANTS AS AGGRIEVED PERSONS

In general, the courts have not provided meaningful indicia as to the degree or kind of interest that an applicant must have to qualify as an aggrieved person. This judicial vagueness can be attributed in part to the fact that variance appeals are generally concerned solely with the basis of the denial; the standing of the appellants is assumed to be proper. When the standing issue is raised, however, it appears that two principal factors are relied upon to determine whether an applicant is a person aggrieved. First, the appellant must show some substantial legal or equitable incident of "ownership" in the property in question; second, he must show a significant economic interest in the outcome of the variance proceeding.¹⁶

In a majority of the decisions, it is the "legal or equitable interest" factor that has received primary consideration. In fact, most courts have held that even though a substantial economic interest is manifest, a party lacking a cognizable legal interest cannot be considered "aggrieved."¹⁷ It would seem, however, that economic factors should be given greater stress, especially in circumstances where the legal or equitable interest in the property is slight but the outcome of the litigation may have substantial economic effects. On the other hand, if a person has no interest in the property, he will not and should not be granted status as an aggrieved party.¹⁸

The effect of the two factors—legal and economic—can best be illustrated by a consideration of the various situations in which an applicant may become an aggrieved party. The problem arises, of course, when the possessor of some interest in the property in question applies for a permit or a variance and it is denied.¹⁹

15. The requirements for being aggrieved by decisions of the zoning board of adjustment or by the zoning officer overlap with, but are not identical to, the requirements for being aggrieved by *local legislative action* through enactment or amendment of the ordinance. The latter issue is not dealt with as such by this discussion, although the question is present in a few of the cases cited.

16. A few courts, however, adopt neither a legal nor an economic analysis. Instead, any applicant who is refused a permit is automatically "aggrieved." See *Smith v. Seligman*, 270 Ky. 69, 109 S.W.2d 14 (1937); *Buckminster v. Zoning Bd. of Review*, 68 R.I. 515, 30 A.2d 104 (1943).

17. See, e.g., *Chad Homes, Inc. v. Board of Appeals*, 5 Misc. 2d 20, 159 N.Y.S.2d 383 (Sup. Ct. 1957); *Kuznowski v. Board of Zoning Appeals*, 53 Lack. Jur. 53 (Pa. C.P. 1952).

18. *Krieger v. Scott*, 4 N.J. Misc. 942, 134 Atl. 901 (Sup. Ct. 1926) (per curiam); *Dimitri v. Zoning Bd. of Review*, 61 R.I. 325, 200 Atl. 963 (1938).

19. It is possible for an applicant to become aggrieved upon the *approval* of a variance. This occurs when the board grants the variance but attaches objectionable conditions. See *Rand v. City of New York*, 3 Misc. 2d 769, 155 N.Y.S.2d 753 (Sup. Ct. 1956).

A. Property Owners

One who owns property outright and is denied a permit or variance clearly has standing to appeal, since fee ownership carries with it the highest degree of both legal and economic implications. Indeed, the rule granting a property owner standing is so well established that few direct statements have been enunciated on this point. The major support for the rule comes from decisions that a person is a property owner *and* an aggrieved party,²⁰ or inferentially from cases allowing appeals by an agent of the owner or by a prospective vendee.²¹ For example, in *Dunham v. Zoning Bd.*²² the court ruled that it was unnecessary to decide whether a conditional vendee had a sufficient interest in the property to apply for a special exception, since "the application in question was also made, signed and prosecuted personally before the board by the owner of the land whose right under the ordinance to apply for such an exception is not questioned."²³

B. Agents of Property Owner

An application of ordinary rules of agency would seem to require that an agent be held to possess, for the purpose of determining standing, whatever interest his principal has in the property. Although few courts have ruled directly on the question, it seems clear that an agent of the fee owner may be an aggrieved party. For example, it has been held that a construction company²⁴ or an architect²⁵ may appeal in the capacity of "agent for the owner," and other courts have viewed successors in interest during the pendency of the application²⁶ or conditional vendees²⁷ as persons aggrieved. Generally, the courts have found the requisite interests on the theory that the party in question is an implied agent of the owner. Furthermore, at least one court has held a "straw man" to be a person aggrieved, on the theory that he was a fiduciary for the true owner.²⁸ It would appear, therefore, that standing to appeal should be granted to an agent whenever his principal, whether or not he is the outright owner of the property, could himself qualify as an aggrieved party.

20. See, e.g., *Scholl v. Yeadon Borough*, 148 Pa. Super. 601, 26 A.2d 135 (1942).

21. See cases cited notes 24-28, 34-41 *infra*.

22. 68 R.I. 88, 26 A.2d 614 (1942).

23. *Id.* at 92, 26 A.2d at 616.

24. *Stout v. Jenkins*, 268 S.W.2d 643 (Ky. 1954).

25. *Protomastro v. Board of Adjustment*, 3 N.J. Super. 539, 67 A.2d 231 (Super. Ct. L. 1949), *rev'd on other grounds*, 3 N.J. 494, 70 A.2d 873 (1950).

26. *Feneck v. Murdock*, 16 Misc. 2d 789, 181 N.Y.S.2d 441 (Sup. Ct. 1958).

27. *Arant v. Board of Adjustment*, 271 Ala. 600, 126 So. 2d 100 (1960); *Slater v. Toohill*, 276 App. Div. 850, 93 N.Y.S.2d 153 (1949) (memorandum decision); *Hickox v. Griffin*, 274 App. Div. 792, 79 N.Y.S.2d 193 (1948), *rev'd on other grounds*, 298 N.Y. 365, 83 N.E.2d 836 (1949).

28. *Dion v. Board of Appeals*, 344 Mass. 547, 183 N.E.2d 479 (1962).

C. Lessees

In *Nicholson v. Zoning Bd. of Adjustment*,²⁹ the Pennsylvania Supreme Court pointed out that a tenant occupies "a status which permits him to apply for a variance and . . . he is a 'party aggrieved' within the meaning of that term as used in the Enabling Acts and ordinances enacted pursuant to them."³⁰ The implication of the *Nicholson* case is that a tenant or lessee always has sufficient economic and legal interests in the property to qualify as an aggrieved party. While *Nicholson* represents the majority view,³¹ a few cases have come to the contrary conclusion. Thus, it has been held that if a lessee's interest is based on an oral lease,³² or a tenancy at will,³³ he cannot be granted standing. The validity of such distinctions is doubtful, because the degree of legal interest in a leasehold is the same regardless of whether it is based upon an oral contract, a written contract, a tenancy at will, or a tenancy for a definite period. Moreover, the economic interest in the leasehold does not depend upon the type of contract employed. Even where the lessee under an oral lease is viewed as holding a *de minimis* legal property interest, it does not necessarily follow that he has an insubstantial economic interest in the property. Consequently, if substantial fairness is to be maintained in the administration of zoning regulations, it would seem better to allow a tenant to appeal an adverse ruling whenever he has an overriding economic interest in the outcome of the variance application. Thus, the length of the unexpired term of the lease should be considered as a factor, although not a conclusive one, in the determination of the lessee's standing. As a result, even a *written* lease might not support the lessee's standing to appeal if it had only a short time to run and no renewal option.

D. Contract Vendees

The courts have had difficulty in determining whether a purchaser under a contract should be granted status as an aggrieved person. In general, it appears that the judiciary will not look through the form of the contract to examine the real interests involved in the appeal. If the contract is unconditional, the vendee will be

29. 392 Pa. 278, 140 A.2d 604 (1958).

30. *Id.* at 282, 140 A.2d at 606.

31. See, e.g., *Poster Advertising Co. v. Zoning Bd. of Adjustment*, 408 Pa. 248, 182 A.2d 521 (1962); *Richman v. Zoning Bd. of Adjustment*, 391 Pa. 254, 137 A.2d 280 (1958); *Ralston Purina Co. v. Zoning Bd.*, 64 R.I. 197, 12 A.2d 219 (1940).

A cotenant may attack the validity of a zoning ordinance in his own behalf. *Jones v. Incorporated Village of Lloyd Harbor*, 277 App. Div. 1124, 100 N.Y.S.2d 948 (1950), *aff'd mem.*, 302 N.Y. 718, 98 N.E.2d 589 (1951).

32. *In re McLaughlin*, 42 Del. Co. 388 (Pa. C.P. 1955). See also *Bloom v. Wides*, 164 Ohio St. 138, 128 N.E.2d 31 (1955).

33. *Gallagher v. Zoning Bd. of Review*, 186 A.2d 325 (R.I. 1962). See also *City of Little Rock v. Goodman*, 222 Ark. 350, 260 S.W.2d 450 (1953).

granted standing.³⁴ When the contract is conditioned upon the securing of a zoning variance or exception, however, the purchaser's qualifications are not as clear. In the majority of cases the courts have allowed such a purchaser to apply for a permit and to appeal a denial thereof as an aggrieved party.³⁵ Normally, this result is reached by regarding the conditional vendee as the agent or assignee of the owner,³⁶ or as an equitable owner.³⁷ On the other hand, a few courts have impliedly dropped the "legal or equitable interest" analysis and have held that a conditional vendee has a sufficient personal economic interest in the property to support his standing to appeal.³⁸ For example, the Supreme Court of Ohio has stated that "it is enough that an application was made for a permit to use this property for a filling station, by one having a contingent interest in using the property for that purpose"³⁹ In addition, several courts have used the fact that the owner joined in the application⁴⁰ or gave his consent and approval⁴¹ as a makeweight for allowing the conditional purchaser to appeal as a person aggrieved.

In a few decisions the contract vendee has been denied standing as an aggrieved party because he did not have a sufficient present interest in the property to enable him to seek a use change in the

34. See, e.g., *Goldreyer v. Board of Zoning Appeals*, 144 Conn. 641, 136 A.2d 789 (1957); *Sigretto v. Board of Adjustment*, 134 N.J.L. 587, 50 A.2d 492 (Sup. Ct. 1946); *Mandalay Constr., Inc. v. Zimmer*, 22 Misc. 2d 543, 194 N.Y.S.2d 404 (Sup. Ct. 1959); *Henry Norman Associates, Inc. v. Ketler*, 16 Misc. 2d 764, 183 N.Y.S.2d 875 (Sup. Ct. 1959); *Elkins Park Improvement Ass'n Zoning Case*, 361 Pa. 322, 64 A.2d 783 (1949); *Scheer v. Weis*, 13 Wis. 2d 408, 108 N.W.2d 523 (1961).

35. E.g., *Arant v. Board of Adjustment*, 271 Ala. 600, 126 So. 2d 100 (1960); *Reiskin v. County Council*, 229 Md. 142, 182 A.2d 34 (1962); *City of Baltimore v. Cohn*, 204 Md. 523, 105 A.2d 482 (1954); *Burr v. Keene*, 105 N.H. 228, 196 A.2d 63 (1963).

36. *Arant v. Board of Adjustment*, 271 Ala. 600, 126 So. 2d 100 (1960); *Wilson v. Township Comm.*, 123 N.J.L. 474, 9 A.2d 771 (Sup. Ct. 1939); *Hickox v. Griffin*, 274 App. Div. 792, 79 N.Y.S.2d 193 (1948), *rev'd on other grounds*, 298 N.Y. 365, 83 N.E.2d 836 (1949); *Colony Park, Inc. v. Malone*, 25 Misc. 2d 1072, 205 N.Y.S.2d 166 (Sup. Ct. 1960); *State ex rel. Waltz v. Independence*, 69 Ohio L. Abs. 445, 125 N.E.2d 911 (Dist. Ct. App. 1952).

37. *Hickox v. Griffin*, *supra* note 36; *O'Neill v. Philadelphia Zoning Bd. of Adjustment*, 384 Pa. 379, 120 A.2d 901 (1956); *Silverco, Inc. v. Zoning Bd. of Adjustment*, 379 Pa. 497, 109 A.2d 147 (1954).

38. E.g., *City of Baltimore v. Cohn*, 204 Md. 523, 105 A.2d 482 (1954); *Carson v. Board of Appeals*, 321 Mass. 649, 75 N.E.2d 116 (1947); *Colony Park, Inc. v. Malone*, 25 Misc. 2d 1072, 205 N.Y.S.2d 166 (Sup. Ct. 1960); *State ex rel. Sun Oil Co. v. City of Euclid*, 164 Ohio St. 265, 130 N.E.2d 336 (1955), see *State ex rel. River Grove Park, Inc. v. City of Kettering*, 118 Ohio App. 143, 193 N.E.2d 547 (1962).

39. *State ex rel. Sun Oil Co. v. City of Euclid*, *supra* note 38, at 269, 130 N.E.2d at 339.

40. *Marinelli v. Board of Appeal of the Bldg. Dep't*, 275 Mass. 169, 175 N.E. 479 (1931); *Colt v. Bernard*, 279 S.W.2d 527 (Mo. Ct. App. 1955); *Jersey Triangle Corp. v. Board of Adjustment*, 127 N.J.L. 194, 21 A.2d 845 (Sup. Ct. 1941); *State ex rel. Sun Oil Co. v. City of Euclid*, 164 Ohio St. 265, 130 N.E.2d 336 (1955).

41. *Wilson v. Township Comm.*, 123 N.J.L. 474, 9 A.2d 771 (Sup. Ct. 1939); *Slamowitz v. Jelleme*, 3 N.J. Misc. 1169, 130 Atl. 833 (Sup. Ct. 1925); *Stoll v. Gulf Oil Corp.*, 79 Ohio L. Abs. 145, 155 N.E.2d 83 (C.P. 1958); *Elvan v. Exley*, 58 Pa. D. & C. 538 (C.P. 1947).

first place; therefore, he could not be aggrieved by the denial of an application.⁴² In addition, some courts which would otherwise grant the applicant the status of an appellant distinguish between variance applicants and persons applying for other types of permits. Since many statutes require an applicant for a variance to show "unnecessary hardship,"⁴³ it has been reasoned that a vendee who knowingly acquires land with the expectation of using it for a prohibited purpose cannot thereafter apply for a variance, because his hardship is self-inflicted.⁴⁴ However, reliance on this distinction seems unwarranted. In the first place, the question of unnecessary hardship should not even arise until the merits of the variance application are reached. Second, since the owner-vendor clearly has standing as an aggrieved party, his vendee should also be entitled to aggrieved-party status. In effect, the vendee should be considered as having purchased this important right as a part of the normal incidents of property ownership. A few courts have impliedly adopted this position.⁴⁵

E. Option Holders

Many jurisdictions view the holder of an option to purchase as having a mere right of choice granted by his option rather than a present legal interest in the property.⁴⁶ Consequently, the optionee of property for which a variance or other use permit is sought and refused is generally not regarded as an aggrieved party.⁴⁷ However, some courts, adopting what appears to be the better reasoning,⁴⁸ make no distinction between an optionee and a vendee whose contract is conditioned upon the securing of a variance. Since each is considered to be acting at least impliedly on behalf of the owner,

42. *E.g.*, *Symonds v. Bucklin*, 197 F. Supp. 682 (D. Md. 1961); *Minney v. City of Azusa*, 164 Cal. App. 2d 12, 330 P.2d 255 (1958), *appeal dismissed*, 359 U.S. 436 (1959); see *Clark Oil & Ref. Corp. v. City of Evanston*, 23 Ill. 2d 48, 177 N.E.2d 191 (1961). Compare *Sun Oil Co. v. Macauley*, 72 R.I. 206, 49 A.2d 917 (1946), *with State ex rel. River Grove Park, Inc. v. City of Kettering*, 118 Ohio App. 143, 193 N.E.2d 547 (1962).

43. See, *e.g.*, STANDARD ACT § 7; KY. REV. STAT. ANN. § 100.076 (1962) (exceptional situations or conditions); N.Y. VILLAGE LAW § 179-b.

44. See *Clark v. Board of Zoning Appeals*, 301 N.Y. 86, 92 N.E.2d 903 (1950), *cert. denied*, 340 U.S. 933 (1951); *People ex rel. Fordham Manor Reformed Church v. Walsh*, 244 N.Y. 280, 155 N.E. 575 (1927); *McNichol v. Gallagher*, 66 Pa. D. & C. 338 (C.P. 1948).

45. See, *e.g.*, *Slater v. Toohill*, 276 App. Div. 850, 93 N.Y.S.2d 153 (1949) (memorandum decision); *Hickox v. Griffin*, 274 App. Div. 972, 79 N.Y.S.2d 193 (1948), *rev'd on other grounds*, 298 N.Y. 365, 83 N.E.2d 836 (1949). See also *Gray v. Board of Supervisors*, 154 Cal. App. 2d 700, 316 P.2d 678 (1957) (permit for church erection); *City of Baltimore v. Cohn*, 204 Md. 523, 105 A.2d 482 (1954) (special exception); *O'Neill v. Philadelphia Zoning Bd. of Adjustment*, 384 Pa. 379, 120 A.2d 901 (1956) (permit for dancing school).

46. *Lee v. Board of Adjustment*, 226 N.C. 107, 37 S.E.2d 128 (1946); see *Parise v. Zoning Bd. of Review*, 92 R.I. 338, 168 A.2d 476 (1961).

47. See, *e.g.*, *Parise v. Zoning Bd. of Review*, *supra* note 46; *Tripp v. Zoning Bd. of Review*, 84 R.I. 262, 123 A.2d 144 (1956). See also *First Nat'l Bank & Trust Co. v. City of Evanston*, 53 Ill. App. 2d 321, 203 N.E.2d 6 (1964).

48. See 2 RATHKOFF, *op. cit.* *supra* note 3, at 40-5.

both qualify as aggrieved parties whenever the owner could so qualify.⁴⁹ In any case, the decisions on point all indicate that if the legal owner joins in the original application, the holder of an option on the property will be allowed to appeal from a denial of the application.⁵⁰

F. Others

As previously stated,⁵¹ if both the legal and economic interests of a person in the property in question are lacking or ambiguous, standing to appeal as an aggrieved party will generally be denied. The courts vary, however, in the strictness of their attitude toward the requirement of the presence of *both* factors. Standing to appeal has been refused, for example, when an airplane club applied for a variance to permit the operation of an airfield on property in which it had no title or interest,⁵² and when a theatrical group sought a variance for land on which it merely intended to submit a bid.⁵³ Apparently, courts denying standing to appeal in such situations require the prospective appellant to have not only an economic interest in the property but also a legal or equitable interest.

On the other hand, a few courts seem to have placed less weight on the property interest and have relied more extensively on economic considerations. For instance, in one case an insurance company was allowed to appeal to the board from a denial of a repair permit to the owner, where the building had been damaged and the denial of the permit made the insurer liable for a constructive total loss.⁵⁴ Looking at the economic impact upon the insurance company of the denial of the repair permit, the court held that a decision which had the effect of increasing the company's liability qualified it as an aggrieved party.⁵⁵ Another recent decision allowed a non-owner to apply for rezoning of a lot upon which he intended to construct an office building.⁵⁶

49. See *Babitzke v. Village of Harvester*, 32 Ill. App. 2d 289, 177 N.E.2d 644 (1961); *Hatch v. Fiscal Court*, 242 S.W.2d 1018 (Ky. 1961); *Smith v. Selligman*, 270 Ky. 69, 109 S.W.2d 14 (1937). *But see* *Arant v. Board of Adjustment*, 271 Ala. 600, 126 So. 2d 100 (1960); *Conery v. City of Nashua*, 103 N.H. 16, 164 A.2d 247 (1960).

50. See, e.g., *Cranston Jewish Center v. Zoning Bd. of Review*, 93 R.I. 364, 175 A.2d 296 (1961); *Dunham v. Zoning Bd.*, 68 R.I. 88, 26 A.2d 438 (1942); cf. *Hickerson v. Flannery*, 42 Tenn. App. 329, 302 S.W.2d 508 (1956).

51. See text accompanying notes 17-18 *supra*.

52. *Underhill v. Board of Appeals*, 17 Misc. 2d 257, 72 N.Y.S.2d 588 (Sup. Ct.), *aff'd*, 273 App. Div. 788, 75 N.Y.S.2d 327 (1947), *aff'd mem.*, 297 N.Y. 937, 80 N.E.2d 342 (1948).

53. *Schaeffer Appeal*, 7 Pa. D. & C.2d 468 (C.P. 1956).

54. *State ex rel. Home Ins. Co. v. Burt*, 23 Wis. 2d 231, 127 N.W.2d 270 (1964).

55. "Under the facts of the instant action, the insurers stand to lose over \$21,000 as a result of the ruling of the board, which has the effect of turning a \$6,337.04 partial loss into a constructive total loss, requiring the insurers to pay \$28,000, the full amount of the policies. The city's contentions on this point are without merit, for the insurance companies are clearly 'persons aggrieved' . . ." *Id.* at 238, 127 N.W.2d at 273.

56. *Binford v. Western Elec. Co.*, 219 Ga. 404, 133 S.E.2d 361 (1963).

In the majority of cases, however, the courts will still strive to find some legal or equitable interest even when there are compelling economic considerations in the particular circumstances of the case. Thus, standing to appeal has been granted where it appears, other than from the record, that the appellant already is or intends to become the owner of the property.⁵⁷ Moreover, if the owner originally joined in the application, an appeal may be allowed by a person who could not himself qualify as aggrieved.⁵⁸ In *Feneck v. Murdock*,⁵⁹ for example, a corporation which had applied for a variance was subsequently dissolved pending the hearing before the board. Nevertheless, the principal stockholders were allowed to continue the application.⁶⁰

It would appear, therefore, that many courts have accorded "aggrieved party" status to individuals who would not normally be regarded as possessing substantial attributes of a legal interest in the property in question. However, it is incumbent upon the appealing party to plead the special facts of his particular situation if he is not the legal owner of the property involved in the application.

II. THIRD PARTIES AS PERSONS AGGRIEVED

When a board of adjustment *grants* a variance, the applicant generally would have no reason to appeal to a court.⁶¹ However, the result may be objectionable to persons other than the applicant. Third parties will be permitted to appeal to the courts as persons aggrieved⁶² if they can "show that . . . [their] property will suffer some special damages as a result of the decision of the board complained of, which is not common to other property owners similarly

57. See, e.g., *Board of Zoning Appeals v. Moyer*, 108 Ind. App. 198, 27 N.E.2d 905 (1940); *Tramonti v. Zoning Bd. of Review*, 93 R.I. 131, 172 A.2d 93 (1961).

58. See *Marinelli v. Board of Appeal of the Bldg. Dep't*, 275 Mass. 169, 175 N.E. 479 (1931) (conditional vendee); *Jersey Triangle Corp. v. Board of Adjustment*, 127 N.J.L. 194, 21 A.2d 845 (Sup. Ct. 1941) (conditional vendee); cf. *Taxpayers' Ass'n v. Board of Zoning Appeals*, 301 N.Y. 215, 93 N.E.2d 645 (1950) (property owners' association).

59. 16 Misc. 2d 789, 181 N.Y.S.2d 441 (Sup. Ct. 1958).

60. The corporation was held to be the agent of its stockholders; when it applied for a variance and conveyed the land to its principals, the variance ran with the land. See *id.* at 792, 181 N.Y.S.2d at 445.

61. Cf. note 19 *supra*.

62. Many courts define persons aggrieved as including landowners or residents who are adversely affected. E.g., *Jackson's Inc. v. Zoning Bd. of Appeals*, 21 Conn. Supp. 102, 145 A.2d 241 (C.P. 1958). The breadth of the statutes varies. E.g., Ky. Rev. Stat. Ann. § 100.480 (1962) ("any property owner or tenant") (cities of 20,000-100,000 population), § 100.872 ("any person, firm, corporation, organization") (cities of under 20,000 population). In Illinois, any property owner not given notice of a variance proceeding may appeal if he lives within 250 feet of the property in question. Ill. Ann. Stat. ch. 24, § 11-13-7 (Smith-Hurd 1962). Many statutes also allow any taxpayer to appeal. For the limited effect given some of these provisions, see text accompanying notes 102-11 *infra*.

situated."⁶³ Like the standards for an applicant to qualify as a person aggrieved, the standards for third parties have never been clearly specified. However, it appears that the courts attempt to justify the standing of third parties as a necessary counterbalance to the standing of applicants.⁶⁴ Since zoning statutes almost uniformly provide for the inclusion of the general public in hearings before the board,⁶⁵ it seems logical to assume that these same parties should, in some instances, be allowed to have their positions heard before a court. Although courts often speak of individual loss as a necessary prerequisite to a third party's standing to appeal as a person aggrieved, the actual test employed seems to vary from case to case.

A. Nearby Property Owners

A nearby landowner normally has standing as an aggrieved person. In fact, one commentator has referred to such property owners as private attorneys general asserting the public interest.⁶⁶ If the property owner's land abuts the land in question, the mere fact of proximity, without further proof of special damage, has often been sufficient to support his appeal.⁶⁷ If he does not abut, however, the requirements for standing may be more stringent.⁶⁸ It appears that a non-abutting property owner must allege both proximity and special damage for prima facie status as an aggrieved person.⁶⁹ To satisfy the "special damage" element, the third-party appellant must suffer some injury peculiar to his own property or more substantial

63. *Victoria Corp. v. Atlanta Merchandise Mart, Inc.*, 101 Ga. App. 163, 112 S.E.2d 793, 795 (1960); see *Downey v. Incorporated Village of Ardsley*, 152 N.Y.S.2d 195 (Sup. Ct. 1956), *aff'd mem.*, 3 App. Div. 2d 663, 158 N.Y.S.2d 306 (1957).

64. See generally Krasnowiecki, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 114 U. PA. L. REV. 47, 55-63 (1965); cf. BASSETT, *ZONING* 154 (1940).

65. STANDARD ACT § 7: "All meetings of the board shall be open to the public." See, e.g., OKLA. STAT. ANN. tit. 11, § 407 (1959); UTAH CODE ANN. § 10-9-8 (1953).

66. See Krasnowiecki, *supra* note 64, at 60.

67. See, e.g., *Heady v. Zoning Bd. of Appeals*, 139 Conn. 463, 94 A.2d 789 (1953); *Elwyn v. City of Miami*, 113 So. 2d 849 (Fla. Dist. Ct. App. 1959); *Hernreich v. Quinn*, 350 Mo. 770, 168 S.W.2d 1054 (1943); *Lynch v. Borough of Hillsdale*, 136 N.J.L. 129, 54 A.2d 723 (Sup. Ct. 1947), *aff'd per curiam*, 137 N.J.L. 280, 59 A.2d 622 (Ct. Err. & App. 1948). *But cf.* *Barnathan v. Garden City Park Water Dist.*, 21 App. Div. 2d 832, 251 N.Y.S.2d 706 (1964).

68. See *Heady v. Zoning Bd. of Appeals*, *supra* note 67; *Call Bond & Mortgage Co. v. City of Sioux City*, 219 Iowa 572, 259 N.W. 33 (1935); *Wright v. DeFatta*, 244 La. 251, 152 So. 2d 10 (1963); *Toomey v. Gomeringer*, 235 Md. 456, 201 A.2d 842 (1964); *Spaulding v. Board of Appeals*, 334 Mass. 688, 138 N.E.2d 367 (1956); *Gerling v. Board of Zoning Appeals*, 11 Misc. 2d 84, 167 N.Y.S.2d 358 (Sup. Ct. 1957); *Graves v. Johnson*, 75 S.D. 261, 63 N.W.2d 341 (1954).

69. See *Treadway v. City of Rockford*, 24 Ill. 2d 488, 182 N.E.2d 219 (1962); *Malena v. Commerdinger*, 233 N.Y.S.2d 549 (Sup. Ct. 1962); *Balsam v. Jagger*, 231 N.Y.S.2d 450 (Sup. Ct. 1962); cf. *Wright v. DeFatta*, *supra* note 68, at 264-65, 152 So. 2d at 15, where the damage alleged was a depreciation in value, "droves of kids," and "Negroes loafing on the streets."

than that suffered by the community at large.⁷⁰ For example, an increase in traffic as a result of the variance would generally affect all owners similarly situated. Under these circumstances, an individual would be "aggrieved" only if he could show that his property, or his property and that of his immediate neighbors, suffered injuries more substantial than those suffered by the general public.⁷¹ Thus, standing will be denied to non-abutting third parties whose injury is deemed to be *de minimis* because the property is too far away from the land for which a variance has been granted,⁷² or if the injury suffered is identical to that suffered by the general community.

B. Nonresidents

Most courts have held that nonresidents cannot challenge zoning regulations,⁷³ even if their property is adjacent to the questioned zoning.⁷⁴ For this reason, it has generally been assumed that a third party must reside or own property within the particular community to qualify as an aggrieved person.⁷⁵ Despite this authority, however, recent decisions appear to indicate a trend in favor of allowing nonresidents to attack the enactment⁷⁶ and application⁷⁷ of zoning ordinances and decisions within the neighboring municipality.

The Standard Act provides that zoning regulations "shall be made in accordance with a comprehensive plan,"⁷⁸ and the majority of current state zoning enabling acts retain this language.⁷⁹ Since rural residence in the United States is declining,⁸⁰ it has become apparent

70. See *S.A. Lynch Inv. Corp. v. City of Miami*, 151 So. 2d 858 (Fla. Dist. Ct. App. 1963); *Adams v. The Mayor*, 107 N.J.L. 149, 151 Atl. 863 (Ct. Err. & App. 1930); *Schultze v. Wilson*, 54 N.J. Super. 309, 148 A.2d 852 (Super. Ct. App. Div. 1959); *Moore v. Burchell*, 14 App. Div. 2d 572, 218 N.Y.S.2d 868, *appeal denied*, 10 N.Y.2d 709, 179 N.E.2d 716, 223 N.Y.S.2d 1026 (1961).

71. See *Victoria Corp. v. Atlanta Merchandise Mart, Inc.*, 101 Ga. App. 163, 112 S.E.2d 793 (1960).

72. See *Tyler v. Board of Zoning Appeals*, 145 Conn. 655, 145 A.2d 832 (1958) (5 miles away); *City of Greenbelt v. Jaeger*, 237 Md. 456, 206 A.2d 694 (1965) (7½ miles away); *Marcus v. Montgomery County Council*, 235 Md. 535, 201 A.2d 777 (1964) (¼ mile away); *Lampinski v. Rhode Island Racing & Athletics Comm'n*, 94 R.I. 438, 181 A.2d 438 (1962) (½ mile away).

73. *E.g.*, *Browning v. Bryant*, 178 Misc. 576, 34 N.Y.S.2d 280 (Sup. Ct.), *aff'd mem.*, 264 App. Div. 777, 34 N.Y.S.2d 729 (1942).

74. *E.g.*, *Village of Russell Gardens v. Board of Zoning and Appeals*, 30 Misc. 2d 392, 219 N.Y.S.2d 501 (Sup. Ct. 1961).

75. See *Kammerman v. LeRoy*, 133 Conn. 232, 237, 50 A.2d 175, 178 (1946); 2 METZENBAUM, ZONING 1039 (2d ed. 1955); 2 RATHROFF, ZONING AND PLANNING 40-8 (3d ed. 1956).

76. See *Koppel v. City of Fairway*, 189 Kan. 710, 371 P.2d 113 (1962).

77. See *Hamelin v. Zoning Bd.*, 19 Conn. Supp. 445, 117 A.2d 86 (C.P. 1955); *Borough of Leonia v. Borough of Fort Lee*, 56 N.J. Super. 135, 151 A.2d 540 (Super. Ct. App. Div. 1959).

78. STANDARD ACT § 3.

79. Fewer than ten states lack provisions for zoning regulations in accordance with a comprehensive plan. See Cunningham, *Land-Use Control—The State and Local Programs*, 50 IOWA L. REV. 367, 371 (1965).

80. In 1960 almost three quarters of the total population of the United States

that the impact of zoning is no longer of concern only to the enacting municipality.⁸¹ Because zoning may have extraterritorial effects, a few courts have interpreted "comprehensive plan" to permit⁸² or require⁸³ the taking into consideration of "regional"⁸⁴ factors when zoning ordinances are enacted. In fact, some states have given their cities explicit authority to adopt zoning regulations for areas within a specified distance outside the city limits.⁸⁵ Consequently, it would seem that such developments will inevitably lead to the granting of standing as persons aggrieved to affected nonresidents. A few cases illustrate the steps which have already been taken toward this goal.

In 1949 the New Jersey Supreme Court held:

[T]he most appropriate use of any particular property depends not only on all the conditions, physical, economic and social, prevailing within the municipality and its needs, present and reasonably prospective, but also on the nature of the entire region in which the municipality is located and the use to which the land in that region has been or may be put most advantageously.⁸⁶

Subsequently, in *Borough of Cresskill v. Borough of Dumont*,⁸⁷ a lower New Jersey court held that a borough and its residents had standing to challenge an adjoining borough's zoning.⁸⁸ On appeal, the New Jersey Supreme Court found it unnecessary to decide the issue, since a resident of the defendant borough was a party to the

lived in "urban" areas. See U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 15 (86th ed. 1965).

81. See Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515 (1957); cf. GULICK, *THE METROPOLITAN PROBLEM AND AMERICAN IDEAS* (1962).

82. See, e.g., *Valley View Village, Inc. v. Proffett*, 221 F.2d 412, 418 (6th Cir. 1955) ("It is obvious that Valley View, Ohio, on the periphery of a large metropolitan center, is not such a self-contained community, but only an adventitious fragment of the economic and social whole"); *Gordon v. City of Wheaton*, 12 Ill. 2d 284, 146 N.E.2d 37 (1957); *Schwartz v. Congregation Powolei Zeduck*, 8 Ill. App. 2d 438, 441, 131 N.E.2d 785, 786 (App. Div. 1956) ("[I]t is not unreasonable to base zoning regulations for one municipality upon the conditions or character of an adjoining municipality.").

83. See, e.g., *Borough of Cresskill v. Borough of Dumont*, 15 N.J. 238, 104 A.2d 441 (1954); *Kozesnik v. Township of Montgomery*, 24 N.J. 154, 177-78, 131 A.2d 1, 14 (1957) (dictum); *Garland v. Borough of Maywood*, 45 N.J. Super. 1, 6, 131 A.2d 529, 532 (Super. Ct. App. Div. 1957) (dictum).

84. "Regional" as used here refers to factors inherent in land outside the municipality which must or should be taken into consideration in order to comply with the requirements of a "comprehensive plan." This is to be distinguished from the type of regional plan put forth by a "regional planning agency." About one-half of the states have such agencies.

85. See, e.g., ILL. ANN. STAT. ch. 24, § 11-13-1 (Smith-Hurd 1962); *Petterson v. City of Naperville*, 9 Ill. 2d 233, 137 N.E.2d 371 (1956). See also Haar, *supra* note 81, at 527-29; Melli & Devoy, *Extraterritorial Planning and Urban Growth*, 1959 Wis. L. REV. 55.

86. *Duffcon Concrete Prods., Inc. v. Borough of Cresskill*, 1 N.J. 509, 513, 64 A.2d 347, 349-50 (1949).

87. 28 N.J. Super. 26, 100 A.2d 182 (Super. Ct. L. 1953).

88. *Id.* at 43, 100 A.2d at 191.

proceedings.⁸⁹ The court pointed out, however, that a municipality is required to give consideration to "residents and taxpayers of adjoining municipalities who may be adversely affected by proposed zoning changes."⁹⁰ A few years later the implications of this favorable attitude toward nonresident standing were confirmed in another New Jersey decision in which the court held that the right of a municipality to challenge the zoning of a contiguous municipality "is not questioned."⁹¹

Connecticut courts have also granted a limited right to protest the zoning activities of a neighboring municipality. In *Hamelin v. Zoning Bd.*,⁹² residents of the "town"⁹³ in which the defendant borough was located sought standing to appeal the borough commissioners' orders. The court concluded that those parties who took part in a zoning hearing were aggrieved persons, even though they were neither residents nor taxpayers of the borough itself.⁹⁴

The most liberal extension of nonresident standing in zoning cases can be found in a recent Kansas decision.⁹⁵ Under the Kansas protest statute, a zoning amendment protested by twenty per cent of the fronting landowners can be passed only by a four-fifths vote of the city council.⁹⁶ The Kansas Supreme Court held that nonresident landowners with land fronting on the area proposed to be altered should have their protests counted toward the twenty per cent objection requirement.⁹⁷ Since this decision allows nonresidents to participate in the enactment of zoning amendments, it would appear *a fortiori* that adversely affected nonresidents would have standing as aggrieved persons to contest the administration of the zoning regulations by the board of adjustment.

C. Business Competitors

It is uniformly held that a person who objects to the grant of a variance solely on the ground that it will create competition with

89. 15 N.J. 238, 245, 104 A.2d 441, 444 (1954).

90. *Id.* at 247, 104 A.2d at 445.

91. *Borough of Leonia v. Borough of Fort Lee*, 56 N.J. Super. 135, 139, 151 A.2d 540, 542 (Super. Ct. App. Div. 1959).

92. 19 Conn. Supp. 445, 117 A.2d 86 (C.P. 1955).

93. A New England town is roughly equivalent to what is known as a township in other parts of the country. 32 MUNICIPAL YEAR BOOK 14 (1965).

94. 19 Conn. Supp. at 446, 448, 117 A.2d at 86, 87: "While the plaintiffs are resident taxpayers of the town, none of them are residents, landowners or taxpayers in the borough. . . . We conclude that the plaintiffs who attended the hearing and took part in the proceedings are entitled to have the orders of the borough commission reviewed."

95. *Koppel v. City of Fairway*, 189 Kan. 710, 371 P.2d 113 (1962).

96. KAN. STAT. ANN. § 12-708 (1964).

97. The four-fifths requirement would have come into play in this case only if the nonresident protests were counted; less than 20% of the resident frontage owners protested, while 90% of the nonresident frontage owners objected.

his business is not "aggrieved."⁹⁸ An individual cannot be aggrieved "merely because a variance, even if improvidently granted, will increase competition in [his] business."⁹⁹ Any injury to the competitor's business stemming from the variance is viewed as *damnum absque injuria*. Naturally, a competitor could be "aggrieved" if he also had an interest, apart from his business interest, that would be adversely affected. For example, a competitor might own residential property within the zoned area.¹⁰⁰ His standing should therefore be determined by the usual "special damage" inquiry applicable to other third-party appellants.¹⁰¹

D. Taxpayers

The Standard Act provides that appeals may be taken from the board to the courts by a person aggrieved or by "any taxpayer."¹⁰² Only seventeen states, however, have retained this language.¹⁰³ Although such language would seem to imply that any taxpayer may appeal without satisfying the requirements for attaining the status of a "person aggrieved,"¹⁰⁴ only a few courts have so held.¹⁰⁵ In most of the jurisdictions where the language has been retained, the courts have required the taxpayer to show that he was "aggrieved" in some manner.¹⁰⁶ In other words, he must generally show *special damage* to his property.¹⁰⁷

98. See *McDermott v. Zoning Bd. of Appeals*, 150 Conn. 510, 191 A.2d 551 (1963); *Whitney Theatre Co. v. Zoning Bd. of Appeals*, 150 Conn. 285, 189 A.2d 396 (1963); *Benson v. Zoning Bd. of Appeals*, 129 Conn. 280, 27 A.2d 389 (1942); *Ratner v. City of Richmond*, 201 N.E.2d 49 (Ind. Ct. App. 1964); *Circle Lounge & Grille, Inc. v. Board of Appeal*, 324 Mass. 427, 86 N.E.2d 920 (1949); *Lampinski v. Rhode Island Racing & Athletics Comm'n*, 94 R.I. 438, 181 A.2d 438 (1962). *But see Jackson's Inc. v. Zoning Bd. of Appeals*, 21 Conn. Supp. 102, 145 A.2d 241 (C.P. 1958).

99. *Circle Lounge & Grille, Inc. v. Board of Appeal*, 324 Mass. 427, 430, 86 N.E.2d 920, 922 (1949).

100. See, e.g., *Farr v. Zoning Bd. of Appeals*, 139 Conn. 577, 95 A.2d 792 (1953).

101. See *McDermott v. Zoning Bd. of Appeals*, 150 Conn. 510, 191 A.2d 551 (1963); *Bettman v. Michaelis*, 27 Misc. 2d 1010, 212 N.Y.S.2d 339 (Sup. Ct. 1961).

102. STANDARD ACT § 7. See IOWA CODE ANN. § 414.15 (1949); PA. STAT. ANN. tit. 53, § 14759 (1957).

103. *Krasnowiecki*, *supra* note 64, at 56.

104. See *id.* at 55-56; Comment, *Zoning Variances*, 74 HARV. L. REV. 1396, 1400 (1961).

105. E.g., *O'Connor v. Board of Zoning Appeals*, 140 Conn. 65, 98 A.2d 515 (1953); *Mayor v. Byrd*, 191 Md. 632, 62 A.2d 588 (1948); *Norwood Heights Improvement Ass'n v. Mayor*, 195 Md. 1, 72 A.2d 1 (1950); see *Jackson's Inc. v. Zoning Bd. of Appeals*, 21 Conn. Supp. 102, 106, 145 A.2d 241, 243 (C.P. 1958): "[E]very taxpayer has a certain, though it may be a small, pecuniary interest in having the . . . law well administered." Cf. *Hamelin v. Zoning Bd.*, 19 Conn. Supp. 445, 117 A.2d 86 (C.P. 1955).

106. E.g., *DeVenne v. City of Lakewood*, 95 Ohio L. Abs. 361, 201 N.E.2d 80 (Ct. App. 1964) (per curiam); see *City of Fairfax v. Shanklin*, 205 Va. 227, 135 S.E.2d 773 (1964).

107. See *Tyler v. Board of Zoning Appeals*, 145 Conn. 655, 145 A.2d 832 (1958). Most acts also allow for appeals by any officer, board, or bureau of the municipality.

E. Associations

In most jurisdictions a civic, improvement, or property owners' association cannot qualify as an aggrieved person.¹⁰⁸ Since an association generally does not own property, it cannot meet the "special damages" requirement,¹⁰⁹ and a mere interest in strict enforcement of zoning regulations for the benefit of the community or the association has not been considered an adequate substitute for the showing of special damages.¹¹⁰ Moreover, even where a statute specifically provides that an association or organization may appeal,¹¹¹ it is not clear that courts will necessarily grant standing. Although there have been no decisions on the issue, it is likely that such provisions will be given the same narrow interpretation that has been given to provisions allowing "any taxpayer" to have standing. If that is so, an association will be forced to meet the stricter requirements of an ordinary aggrieved person.

III. CONCLUSION

Zoning regulation must be viewed not only as an instrument of public policy, but also as a protection, in the long run, against infringement of individual property rights. In order to harmonize the twin goals of uniformity and individual diversity, it is important that persons who have an interest in preserving an established plan have an opportunity to be heard when use changes are contemplated. For this reason statutory grants of aggrieved party status to third parties should be liberally construed. Since it is a matter of standing only, litigation on the merits of the complaint should be relied upon to expose any frivolous complaints.

At the same time, it is important that "aggrieved party" status be readily available to persons who apply for permits to change land

STANDARD ACT § 7; S.C. CODE § 47-1014 (1962); VA. CODE § 15.1-497 (1964). The scope of these provisions is not discussed in this comment because officials are not required to be aggrieved persons as well. See, e.g., *Dupuis v. Zoning Bd. of Appeals*, 152 Conn. 308, 206 A.2d 422 (1965); *Fox v. Adams*, 206 Misc. 236, 132 N.Y.S.2d 560 (Sup. Ct. 1954). A few cases have allowed appeals by the city as an aggrieved party. See *City of Mobile v. Lee*, 274 Ala. 344, 148 So. 2d 642 (1963); *City of Glen Cove v. Buxenbaum*, 17 App. Div. 2d 828, 233 N.Y.S.2d 141 (1962).

108. E.g., *Lido Beach Civic Ass'n v. Board of Zoning Appeals*, 13 App. Div. 2d 1030, 217 N.Y.S.2d 364 (1961). But see *KY. REV. STAT. ANN.* § 100.872 (1962).

109. *Norwood Heights Improvement Ass'n v. Mayor*, 195 Md. 1, 72 A.2d 1 (1950); *Lindenwood Improvement Ass'n v. Lawrence*, 278 S.W.2d 30 (Mo. Ct. App. 1955); *Feldman v. Nassau Shores Estates, Inc.*, 12 Misc. 2d 607, 172 N.Y.S.2d 769 (Sup. Ct. 1958). But cf. *Taxpayers' Ass'n v. Board of Zoning Appeals*, 301 N.Y. 215, 93 N.E.2d 645 (1950).

110. See *Property Owners Ass'n v. Board of Zoning Appeals*, 2 Misc. 2d 309, 123 N.Y.S.2d 716 (Sup. Ct. 1953); *Tyler v. Board of Zoning Appeals*, 145 Conn. 655, 145 A.2d 832 (1958). A person may not become aggrieved merely by assuming "the role of champion of a community." *Blumberg v. Hill*, 119 N.Y.S.2d 855, 857 (Sup. Ct. 1953).

111. E.g., *KY. REV. STAT. ANN.* § 100.872 (1962).

use. The reasonableness of any denial of a variance can be examined by the board or the courts, but the requirement of standing should not be employed to inhibit expression of views. If a person can demonstrate that he possesses a substantial economic interest in the outcome of the variance proceeding, he should be accorded standing for purposes of appeal regardless of the nature of his legal interest in the affected property.

Alfred V. Boerner

TOWNSHIP ZONING ACT
Act 184 of 1943

AN ACT to provide for the establishment in townships of zoning districts within which the proper use of land and natural resources may be encouraged or regulated by ordinance, and for which districts provisions may also be adopted designating the location of, the size of, the uses that may be made of, the minimum open spaces, sanitary, safety, and protective measures that shall be required for, and the maximum number of families that may be housed in dwellings, buildings, and structures, including tents and trailer coaches, that are erected or altered; to designate the use of certain state licensed residential facilities; to provide for a method for the adoption of ordinances and amendments to ordinances; to provide for emergency interim ordinances; to provide for the acquisition by purchase, condemnation, or otherwise of nonconforming property; to provide for the administering of ordinances adopted; to provide for conflicts with other acts, ordinances, or regulations; to provide sanctions for violations; to provide for the assessment, levy, and collection of taxes; to provide for the collection of fees for building permits; to provide for petitions, public hearings, and referenda; to provide for appeals; to authorize the purchase of development rights; to authorize the issuance of bonds and notes; to provide for special assessments; and to prescribe penalties and provide remedies.

History: 1943, Act 184, Eff. July 30, 1943;—Am. 1976, Act 395, Eff. Mar. 31, 1977;—Am. 1978, Act 637, Eff. Mar. 1, 1979;—Am. 1994, Act 24, Eff. May 1, 1994;—Am. 1996, Act 570, Eff. Mar. 31, 1997;—Am. 1998, Act 152, Eff. Mar. 23, 1999.

The People of the State of Michigan enact:

125.271 Zoning ordinance for regulation of land development and establishment of districts; division of township into districts; purposes; uniform provisions; jurisdiction relative to wells; ordinance subject to electric transmission line certification act.

Sec. 1. (1) The township board of an organized township in this state may provide by zoning ordinance for the regulation of land development and the establishment of districts in the portions of the township outside the limits of cities and villages 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 insure that use of the land shall be 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. For these purposes, the township board may divide the township into districts of such number, shape, and area as it considers best suited to carry out this act. The township board of an organized township may use this act to provide by ordinance for the regulation of land development and the establishment of districts which apply only to land areas and activities which are involved in a special program to achieve specific land management objectives and avert or solve specific land use problems, including the regulation of land development and the establishment of districts in areas subject to damage from flooding or beach erosion, and for that purpose may divide the township into districts of a number, shape, and area considered best suited to accomplish those objectives. Ordinances regulating land development may also be adopted designating or limiting the location, the height, number of stories, and size of dwellings, buildings, and structures that may be erected or altered, including tents and trailer coaches, and the specific uses for which dwellings, buildings, and structures, including tents and trailer coaches, may be erected or altered; the area of yards, courts, and other open spaces, and the sanitary, safety, and protective measures that shall be required for the dwellings, buildings, and structures, including tents and trailer coaches; and the maximum number of families which may be housed in buildings, dwellings, and structures, including tents and trailer coaches, erected or altered. The provisions shall be uniform for each class of land or buildings, dwellings, and structures, including tents and trailer coaches, throughout each district, but the provisions in 1 district may differ from those in other districts. A township board shall not regulate or control the drilling, completion, or operation of oil or gas wells, or other wells drilled for oil or gas exploration purposes and shall not have jurisdiction with reference to the issuance of permits for the location, drilling, completion, operation, or abandonment of those wells. The jurisdiction relative to wells shall be vested exclusively in the supervisor of wells of this state, as provided in part 615 (supervisor of wells) of the natural resources and environmental protection act, Act No. 451 of the Public Acts of 1994, being sections 324.61501 to 324.61527 of the Michigan Compiled Laws.

TOWNSHIP ZONING ACT

(2) An ordinance adopted pursuant to this act is subject to the electric transmission line certification act.

History: 1943, Act 184, Eff. July 30, 1943;—CL 1948, 125.271;—Am. 1978, Act 637, Eff. Mar. 1, 1979;—Am. 1995, Act 35, Imd. Eff. May 17, 1995;—Am. 1996, Act 47, Imd. Eff. Feb. 26, 1996.

125.271a Residence used to give instruction in craft or fine art; regulations not prohibited.

Sec. 1a. (1) A zoning ordinance adopted under this act shall provide for the use of a single family residence by an occupant of that residence for a home occupation to give instruction in a craft or fine art within the residence.

(2) This section does not prohibit the regulation of noise, advertising, traffic, hours of operation, or other conditions that may accompany the use of a residence described in subsection (1).

History: Add. 1994, Act 377, Eff. Mar. 30, 1995.

125.272 Formulation of zoning ordinance on initiative of township board or on receipt of petition; vote.

Sec. 2. The township board of an organized township may proceed with the adoption of a zoning ordinance containing land development regulations and establishing land development districts in accordance with this act upon appointment of a township zoning board as provided in section 4. The township board may appoint a township zoning board for purposes of formulating a zoning ordinance on its own initiative, or upon receipt of a petition requesting that action. Upon receipt of a petition signed by 8% of the persons who are residents and property owners in the portion of the township outside cities and villages, filed with the township clerk requesting the township board to appoint a zoning board for purposes of formulating a zoning ordinance, the township board, at the next regular meeting, shall vote upon whether to initiate action under this act. Upon a majority vote of the membership of the board, the township board shall proceed to formulate a zoning ordinance in accord with this act.

History: 1943, Act 184, Eff. July 30, 1943;—CL 1948, 125.272;—Am. 1955, Act 204, Eff. Oct. 14, 1955;—Am. 1961, Act 225, Eff. Sept. 8, 1961;—Am. 1978, Act 637, Eff. Mar. 1, 1979.

125.273 Zoning ordinance; basis; considerations.

Sec. 3. The zoning ordinance shall be based upon a plan designed to promote the public health, safety, and general welfare; to encourage the use of lands in accordance with their character and adaptability, and to limit the improper use of land; to conserve natural resources and energy; to meet the needs of the state's residents for food, fiber, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land; to insure that uses of the land shall be situated in appropriate locations and relationships; to avoid the overcrowding of population; to provide adequate light and air; to lessen congestion on the public roads and streets; to reduce hazards to life and property; to facilitate adequate provision for a system of transportation, sewage disposal, safe and adequate water supply, education, recreation, and other public requirements; and to conserve the expenditure of funds for public improvements and services to conform with the most advantageous uses of land, resources, and properties. The zoning ordinance shall be made with reasonable consideration, among other things, to the character of each district; its peculiar suitability for particular uses; the conservation of property values and natural resources; and the general and appropriate trend and character of land, building, and population development.

History: 1943, Act 184, Eff. July 30, 1943;—CL 1948, 125.273;—Am. 1978, Act 637, Eff. Mar. 1, 1979.

125.273a Airport layout plan or airport approach plan; incorporation into plan required under § 125.273; adoption of zoning plan; ordinance; consistency.

Sec. 3a. (1) If, after an airport layout plan or airport approach plan is filed with the township zoning board, a plan required under section 3 is adopted or revised, the township shall incorporate the airport layout plan or airport approach plan into the plan required under section 3.

(2) In addition to the requirements of section 3, a zoning ordinance adopted after the effective date of the amendatory act that added this section shall be adopted after reasonable consideration of both of the following:

(a) The environs of any airport within a district.

(b) Comments received at or before a public hearing under section 9 or 11 from the airport manager of any airport.

(3) If a zoning ordinance was adopted before the effective date of the amendatory act that added this section, the zoning ordinance is not required to be consistent with any airport zoning regulations, airport layout plan, or airport approach plan. However, a zoning ordinance amendment adopted or variance granted after the effective date of the amendatory act that added this section shall not increase any inconsistency that may exist between the zoning ordinance or structures or uses and any airport zoning regulations, airport layout plan, or airport approach plan. This

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section does not limit the right to petition for submission of a zoning ordinance amendment to the electors under section 12.

(4) If a zoning ordinance is adopted after the effective date of the amendatory act that added this section, the zoning ordinance shall be consistent with any airport zoning regulations, airport layout plan, and airport approach plan. This section does not limit the right to petition for submission of a zoning ordinance to the electors under section 12.

History: Add. 2000, Act 384, Eff. Mar. 28, 2001.

125.274 Township zoning board; appointment, qualifications, and terms of members; vacancy; removal.

Sec. 4. In a township in which this act becomes operative, there shall be a permanent township zoning board composed of 4 members. The township board may provide by resolution for a zoning board composed of not to exceed 7 members, each to be appointed by the township board. The members of the zoning board shall be selected upon the basis of their respective qualifications and fitness to serve as members of a zoning board and without consideration for their political activities. Of the members first appointed, 2 shall be appointed for terms of 2 years each. The other 2 members shall be appointed for terms of 4 years each; or in case of a township zoning board of more than 4 members, 3 shall be first appointed for 2 years each and the others first appointed for 4 years each. A member of the zoning board shall serve until a successor is appointed and has qualified. Upon the expiration of the terms of the members first appointed, successors shall be appointed, in like manner, for terms of 4 years each. A vacancy shall be filled in the same manner as is provided for the appointment in the first instance for the remainder of the unexpired term. An elected officer of the township or an employee of the township board shall not serve simultaneously as a member or an employee of the zoning board. Members of the zoning board shall be removable for misfeasance, malfeasance, or nonfeasance in office by the township board upon written charges and after public hearing.

History: 1943, Act 184, Eff. July 30, 1943;—Am. 1947, Act 137, Eff. Oct. 11, 1947;—CL 1948, 125.274 ;—Am. 1949, Act 310, Eff. Sept. 23, 1949;—Am. 1955, Act 204, Eff. Oct. 14, 1955;—Am. 1960, Act 146, Eff. Aug. 17, 1960;—Am. 1978, Act 637, Eff. Mar. 1, 1979.

125.275 Township zoning board; meetings; hearings; officers and employees.

Sec. 5. The township zoning board shall hold a minimum of 2 regular meetings annually, at which meetings any person having interests in the township, or their duly appointed representatives, shall be heard relative to any matters that should properly come before the zoning board. The zoning board shall elect from its members a chairperson, a secretary, and other officers or committees it considers necessary, and may engage employees, including technical assistance, it requires. The election of officers shall be held not less than once in every 2-year period.

History: 1943, Act 184, Eff. July 30, 1943;—CL 1948, 125.275;—Am. 1978, Act 637, Eff. Mar. 1, 1979.

125.276 Township zoning board; compensation and expenses of members.

Sec. 6. Members of the township zoning board may receive such compensation as may be fixed by the township board. The total annual amount to be allowed as expenses of all members of such board, including any compensation paid its employees, shall be appropriated annually in advance by the township board.

History: 1943, Act 184, Eff. July 30, 1943;—CL 1948, 125.276;—Am. 1949, Act 310, Eff. Sept. 23, 1949;—Am. 1954, Act 29, Eff. Aug. 13, 1954;—Am. 1961, Act 225, Eff. Sept. 8, 1961;—Am. 1969, Act 323, Imd. Eff. Aug. 20, 1969;—Am. 1974, Act 15, Eff. Apr. 1, 1975.

125.277 Township zoning board; recommendations.

Sec. 7. The township zoning board shall adopt and file with the township board recommendations as to:

(a) A zone plan for the unincorporated portions of the township as a whole which plan shall be based upon an inventory of conditions pertinent to zoning in the township and section 3.

(b) The establishment of zoning districts including the boundaries thereof.

(c) The text of a zoning ordinance with the necessary maps and zoning regulations to be adopted for a zoning district or the township as a whole.

(d) The manner of administering and enforcing the zoning ordinance.

History: 1943, Act 184, Eff. July 30, 1943;—CL 1948, 125.277;—Am. 1978, Act 637, Eff. Mar. 1, 1979.

125.277a Township zoning board; planning expert, compensation.

Sec. 7a. The township zoning board may engage the services of a township planning expert with the consent of

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the township board, and the compensation for the services shall be paid from appropriations made by the township board.

History: Add. 1956, Act 63, Imd. Eff. Apr. 2, 1956.

125.278 Township zoning board; information and counsel furnished.

Sec. 8. The township zoning board is directed to make use of such information and counsel which may be furnished by appropriate public officials, departments or agencies, and all public officials, departments and agencies having information, maps and data pertinent to township zoning are hereby directed to make the same available for the use of the township zoning board.

History: 1943, Act 184, Eff. July 30, 1943;—CL 1948, 125.278.

125.279 Public hearing; notice; affidavit of mailing.

Sec. 9. (1) Before submitting its recommendations of a tentative zoning ordinance to the township, the township zoning board shall hold at least 1 public hearing. Notice of the hearing shall be given by 2 publications in a newspaper of general circulation in the township. The first publication shall be printed not more than 30 days and not less than 20 days and the second not more than 8 days before the date of the hearing.

(2) Not less than 20 days' notice of the time and place of the hearing shall also be given by mail to each electric, gas, pipeline, and telephone public utility company, each railroad operating within the district or zone affected, and the airport manager of each airport, that registers its name and mailing address with the township zoning commission for the purpose of receiving the notice.

(3) An affidavit of mailing shall be maintained. The notices shall include the places and times at which the tentative text and any maps of the zoning ordinance may be examined.

History: 1943, Act 184, Eff. July 30, 1943;—CL 1948, 125.279;—Am. 1960, Act 146, Eff. Aug. 17, 1960;—Am. 1961, Act 225, Eff. Sept. 8, 1961;—Am. 1978, Act 637, Eff. Mar. 1, 1979;—Am. 2000, Act 384, Eff. Mar. 28, 2001.

125.280 Submission of proposed zoning ordinance for approval; composition and purpose of coordinating zoning committee; presumption; waiver.

Sec. 10. Following the hearing, the township zoning board shall submit the proposed zoning ordinance including any zoning maps to the county zoning commission of the county in which the township is situated for review and recommendation if a commission has been appointed, as provided by Act No. 183 of the Public Acts of 1943, as amended, being sections 125.201 to 125.232 of the Michigan Compiled Laws, and is functioning in the county, or to the county planning commission appointed as provided by Act No. 282 of the Public Acts of 1945, as amended, being sections 125.101 to 125.107 of the Michigan Compiled Laws, or, by resolution of the county board of commissioners, to the coordinating zoning committee of the county. If there is not a county zoning commission or county planning commission, the proposed zoning ordinance, including any zoning maps, shall be submitted to the coordinating zoning committee. The coordinating zoning committee shall be composed of either 3 or 5 members appointed by the county board of commissioners for the purpose of coordinating the zoning ordinances proposed for adoption under this act with the zoning ordinances of a township, city, or incorporated village having a common boundary with the township. If the recommendation of the county zoning commission, planning commission, or coordinating zoning committee has not been received by the township within 30 days after receipt of the ordinance by the county, it shall be conclusively presumed that the county has waived its right for review and recommendation of the ordinance. The county board of commissioners of a county by resolution may waive the county review of township ordinances and amendments required by this section.

History: 1943, Act 184, Eff. July 30, 1943;—CL 1948, 125.280;—Am. 1961, Act 225, Eff. Sept. 8, 1961;—Am. 1967, Act 190, Eff. Nov. 2, 1967;—Am. 1968, Act 100, Eff. Nov. 15, 1968;—Am. 1974, Act 102, Imd. Eff. May 14, 1974;—Am. 1978, Act 637, Eff. Mar. 1, 1979;—Am. 1980, Act 416, Imd. Eff. Jan. 11, 1981.

125.281 Transmitting summary of comments and proposed zoning plan and text to township board; additional hearings; notice; report on amendments; adoption and effective date of zoning ordinance.

Sec. 11. The township zoning board shall transmit a summary of comments received at the public hearing and its proposed zoning plan and text to the township board. The township board may hold additional hearings if the township board considers it necessary. Notice of a public hearing held by the township board shall be published in a newspaper which circulates in the township. The notice shall be published not more than 15 days nor less than 5 days before the hearing. If the township board considers amendments to the proposed text, or a zoning ordinance,

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advisable, the township board shall refer the amendments to the zoning board for a report thereon within a time specified by the township board. After receiving the report, the township board shall grant a hearing on a proposed ordinance provision to a property owner who by certified mail addressed to the clerk of the township board requests a hearing and the township board shall request the zoning board to attend the hearing. After a hearing at a regular meeting or at a special meeting called for that purpose, the township board may adopt, by majority vote of its membership, pursuant to this act, a zoning ordinance for the portions of the township outside the limits of cities and villages, with or without amendments that have been previously considered by the zoning board or at a hearing. Subject to section 12, the ordinance shall take effect upon the expiration of 7 days after publication under section 11a or at such later date after publication as may be specified by the township board.

History: 1943, Act 184, Eff. July 30, 1943;—CL 1948, 125.281;—Am. 1949, Act 310, Eff. Sept. 23, 1949;—Am. 1959, Act 204, Eff. Mar. 19, 1960;—Am. 1960, Act 146, Eff. Aug. 17, 1960;—Am. 1978, Act 637, Eff. Mar. 1, 1979;—Am. 1980, Act 43, Imd. Eff. Mar. 19, 1980;—Am. 1980, Act 416, Imd. Eff. Jan. 11, 1981;—Am. 1996, Act 297, Imd. Eff. June 19, 1996.

125.281a Filing zoning ordinance with amendments or supplements; publication and contents of notice of ordinance adoption.

Sec. 11a. (1) The zoning ordinance or subsequent amendments or supplements shall be filed with the township clerk, and 1 notice of ordinance adoption shall be published in a newspaper of general circulation in the township within 15 days after adoption. Promptly following adoption of a zoning ordinance or subsequent amendment by the township board, a copy of the notice of adoption shall also be mailed to the airport manager of an airport entitled to notice under section 9(2).

(2) The notice of ordinance adoption under subsection (1) shall include the following information:

(a) In the case of a newly adopted zoning ordinance, the following statement: "A zoning ordinance regulating the development and use of land has been adopted by the township board of the township of _____".

(b) In the case of an amendment to an existing zoning ordinance, either a summary of the regulatory effect of the amendment, including the geographic area affected, or the text of the amendment.

(c) The effective date of the ordinance.

(d) The place where and time when a copy of the ordinance may be purchased or inspected.

History: Add. 1978, Act 637, Eff. Mar. 1, 1979;—Am. 2000, Act 384, Eff. Mar. 28, 2001.

125.282 Filing petition for submission of ordinance to electors.

Sec. 12. Within 7 days after publication of a zoning ordinance under section 11a, a registered elector residing in the portion of the township outside the limits of cities and villages may file with the township clerk a notice of intent to file a petition under this section. If a notice of intent is filed, then within 30 days following the publication of the zoning ordinance, a petition signed by a number of registered electors residing in the portion of the township outside the limits of cities and villages equal to not less than 15% of the total vote cast for all candidates for governor, at the last preceding general election at which a governor was elected, in the township may be filed with the township clerk requesting the submission of an ordinance or part of an ordinance to the electors residing in the portion of the township outside the limits of cities and villages for their approval. Upon the filing of a notice of intent, the ordinance or part of the ordinance adopted by the township board shall not take effect until 1 of the following occurs:

(a) The expiration of 30 days after publication of the ordinance, if a petition is not filed within that time.

(b) If a petition is filed within 30 days after publication of the ordinance, the township clerk determines that the petition is inadequate.

(c) If a petition is filed within 30 days after publication of the ordinance, the township clerk determines that the petition is adequate and the ordinance or part of the ordinance is approved by a majority of the registered electors residing in the portion of the township outside the limits of cities and villages voting thereon at the next regular election which supplies reasonable time for proper notices and printing of ballots, or at any special election called for that purpose. The township board shall provide the manner of submitting an ordinance or part of an ordinance to the electors for their approval or rejection, and determining the result of the election.

History: 1943, Act 184, Eff. July 30, 1943;—CL 1948, 125.282;—Am. 1955, Act 204, Eff. Oct. 14, 1955;—Am. 1960, Act 146, Eff. Aug. 17, 1960;—Am. 1961, Act 225, Eff. Sept. 8, 1961;—Am. 1972, Act 107, Imd. Eff. Apr. 7, 1972;—Am. 1978, Act 637, Eff. Mar. 1, 1979;—Am. 1996, Act 297, Imd. Eff. June 19, 1996;—Am. 2001, Act 177, Imd. Eff. Dec. 15, 2001.

125.282a Violation of §§ 168.1 to 168.992 applicable to petitions; penalties.

Sec. 12a. A petition under section 12, including the circulation and signing of the petition, is subject to section

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488 of the Michigan election law, 1954 PA 116, MCL 168.488. A person who violates a provision of the Michigan election law, 1954 PA 116, MCL 168.1 to 168.992, applicable to a petition described in this section is subject to the penalties prescribed for that violation in the Michigan election law, 1954 PA 116, MCL 168.1 to 168.992.

History: Add. 1998, Act 152, Eff. Mar. 23, 1999.

125.283 Report on operations of zoning ordinance.

Sec. 13. Following the enactment of the zoning ordinance, the township zoning board periodically shall prepare for the township board a report on the operations of the zoning ordinance including recommendations as to the enactment of amendments or supplements to the ordinance.

History: 1943, Act 184, Eff. July 30, 1943;—Am. 1947, Act 165, Eff. Oct. 11, 1947;—CL 1948, 125.283 ;—Am. 1978, Act 637, Eff. Mar. 1, 1979.

125.284 Amendments or supplements to zoning ordinance; notice of proposed rezoning; adoption of amendment conforming to court decree; notice of adopted amendment.

Sec. 14. Amendments or supplements to the zoning ordinance may be made in the same manner as provided in this act for the enactment of the original ordinance. If an individual property or several adjacent properties are proposed for rezoning, the township zoning board shall give a notice of the proposed rezoning to the owner of the property in question, to all persons to whom any real property within 300 feet of the premises in question is assessed, and to the occupants of all single and 2-family dwellings within 300 feet. The notice shall be delivered personally or by mail to the respective owners and tenants at the address given in the last assessment roll. If the tenant's name is not known, the term "occupant" may be used. If the notice is delivered by mail, an affidavit of mailing shall be filed with the zoning board before the hearing. The notice shall be made not less than 8 days before the hearing provided by section 9 stating the time, place, date, and purpose of the hearing. An amendment for the purpose of conforming a provision of the zoning ordinance to the decree of a court of competent jurisdiction as to any specific lands may be adopted by the township board and the notice of the adopted amendment published without referring the amendment to any other board or agency provided for in this act.

History: 1943, Act 184, Eff. July 30, 1943;—Am. 1947, Act 137, Eff. Oct. 11, 1947;—CL 1948, 125.284 ;—Am. 1949, Act 310, Eff. Sept. 23, 1949;—Am. 1960, Act 26, Eff. Aug. 17, 1960;—Am. 1961, Act 225, Eff. Sept. 8, 1961;—Am. 1972, Act 55, Eff. Mar. 30, 1973;—Am. 1978, Act 637, Eff. Mar. 1, 1979.

125.285 Interim zoning ordinance.

Sec. 15. To protect the public health, safety, and general welfare of the inhabitants of the township, and the lands and resources of the township, during the period required for the preparation and enactment of an ordinance authorized by this act as provided by sections 7 to 12, the township board may direct the township zoning board to submit, within a specified period of time, recommendations as to the provisions of an interim zoning ordinance and to submit those recommendations without consideration for sections 7, 8, 9, 11, and 12. Before presenting its recommendations to the township board, the zoning board shall submit the interim zoning plan, or an amendment thereto, to the county zoning commission or the coordinating zoning committee, as provided by section 10, for the purpose of coordinating the zoning plan with the zoning ordinances of a township, city, or village having a common boundary with the township. Approval shall be conclusively presumed unless the commission or committee, within 15 days after receipt of the interim plan or amendment notifies the township clerk of its disapproval. Following approval the township board, by majority vote of its members, may give the interim ordinance or amendments thereto immediate effect. An interim ordinance and subsequent amendments shall be filed and published in accordance with section 11a. The interim ordinance, including any amendments thereto, shall be limited to 1 year from the date the same becomes effective and to only 2 years of renewal thereafter by resolution of the township board.

History: 1943, Act 184, Eff. July 30, 1943;—Am. 1947, Act 137, Eff. Oct. 11, 1947;—CL 1948, 125.285 ;—Am. 1952, Act 248, Eff. Sept. 18, 1952;—Am. 1960, Act 146, Eff. Aug. 17, 1960;—Am. 1961, Act 225, Eff. Sept. 8, 1961;—Am. 1978, Act 637, Eff. Mar. 1, 1979.

125.286 Nonconforming uses.

Sec. 16. (1) The lawful use of a dwelling, building, or structure and of land or a premise as existing and lawful at the time of enactment of a zoning ordinance, or, in the case of an amendment of an ordinance, then at the time of the amendment, may be continued although the use does not conform with the ordinance or amendment.

(2) The township board shall provide in a zoning ordinance for the completion, restoration, reconstruction, extension, or substitution of nonconforming uses upon reasonable terms set forth in the zoning ordinance. In

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establishing terms for the completion, restoration, reconstruction, extension, or substitution of nonconforming uses different classes of nonconforming uses may be established in the ordinance with different requirements applicable to each class.

(3) A township may acquire, by purchase, condemnation, or otherwise private property or an interest in private property for the removal of nonconforming uses. The cost and expense, or a portion thereof, of acquiring the private property may be paid from general funds or assessed to a special district in accordance with the applicable statutory provisions relating to the creation and operation of special assessment districts for public improvements in townships. The elimination of the nonconforming uses and structures in a zoning district is declared to be for a public purpose and for a public use. The township board may institute and prosecute proceedings for condemnation of nonconforming uses and structures under the power of eminent domain in accordance with Act No. 149 of the Public Acts of 1911, as amended, being sections 213.21 to 213.41 of the Michigan Compiled Laws or other applicable statute.

History: 1943, Act 184, Eff. July 30, 1943;—CL 1948, 125.286;—Am. 1978, Act 637, Eff. Mar. 1, 1979.

125.286a “State licensed residential facility” defined; state licensed residential facility considered residential use and permitted use; provisions inapplicable to adult foster care facilities; review by board of trustees; notice to residents; denial of license; exceptions.

Sec. 16a. (1) As used in this section, “state licensed residential facility” means a structure constructed for residential purposes that is licensed by the state pursuant to Act No. 287 of the Public Acts of 1972, as amended, being sections 331.681 to 331.694 of the Michigan Compiled Laws, or Act No. 116 of the Public Acts of 1973, as amended, being sections 722.111 to 722.128 of the Michigan Compiled Laws, which provides resident services for 6 or less persons under 24-hour supervision or care for persons in need of that supervision or care.

(2) In order to implement the policy of this state that persons in need of community residential care shall not be excluded by zoning from the benefits of normal residential surroundings, a state licensed residential facility providing supervision or care, or both, to 6 or less persons shall be considered a residential use of property for the purposes of zoning and a permitted use in all residential zones, including those zoned for single family dwellings, and shall not be subject to a special use or conditional use permit or procedure different from those required for other dwellings of similar density in the same zone.

(3) This section shall not apply to adult foster care facilities licensed by a state agency for care and treatment of persons released from or assigned to adult correctional institutions.

(4) At least 45 days before licensing a residential facility described in subsection (1), the state licensing agency shall notify the board of trustees or its designated agency of the township where the proposed facility would be located to review the number of existing or proposed similar state licensed residential facilities whose property lines are within a 1,500 foot radius of the property lines of the location of the applicant. The board of trustees or an agency of the township to which the authority is delegated shall, when a proposed facility is to be located within the township, give appropriate notification of the proposal to license the facility to those residents whose property lines are within a 1,500 foot radius of the property lines of the proposed facility. A state licensing agency shall not license a proposed residential facility when another state licensed residential facility exists within the 1,500 foot radius, unless permitted by local zoning ordinances, of the proposed location or when the issuance of the license would substantially contribute to an excessive concentration of state licensed residential facilities within the township. This subsection shall not apply to state licensed residential facilities caring for 4 or less minors.

(5) This section shall not apply to a state licensed residential facility licensed before March 31, 1977, or to a residential facility which was in the process of being developed and licensed before March 31, 1977, if approval had been granted by the appropriate local governing body.

History: Add. 1976, Act 395, Eff. Mar. 31, 1977;—Am. 1977, Act 29, Imd. Eff. June 15, 1977.

125.286b Special land uses.

Sec. 16b. (1) A township may provide in a zoning ordinance for special land uses which shall be permitted in a zoning district only after review and approval by either the zoning board, an official charged with administering the ordinance, or the township board, as specified in the ordinance. The ordinance shall specify:

(a) The special land uses and activities eligible for approval consideration and the body or official charged with reviewing special land uses and granting approval.

(b) The requirements and standards upon which decisions on requests for special land use approval shall be based.

(c) The procedures and supporting materials required for application, review, and approval.

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(2) Upon receipt of an application for a special land use which requires a decision on discretionary grounds, 1 notice that a request for special land use approval has been received shall be published in a newspaper which circulates in the township, and sent by mail or personal delivery to the owners of property for which approval is being considered, to all persons to whom real property is assessed within 300 feet of the boundary of the property in question, and to the occupants of all structures within 300 feet. The notice shall be given not less than 5 nor more than 15 days before the date the application will be considered. If the name of the occupant is not known, the term "occupant" may be used in making notification. Notification need not be given to more than 1 occupant of a structure, except that if a structure contains more than 1 dwelling unit or spatial area owned or leased by different individuals, partnerships, businesses, or organizations, 1 occupant of each unit or spatial area shall receive notice. In the case of a single structure containing more than 4 dwelling units or other distinct spatial areas owned or leased by different individuals, partnerships, businesses, or organizations, notice may be given to the manager or owner of the structure who shall be requested to post the notice at the primary entrance to the structure. The notice shall:

- (a) Describe the nature of the special land use request.
- (b) Indicate the property which is the subject of the special land use request.
- (c) State when and where the special land use request will be considered.
- (d) Indicate when and where written comments will be received concerning the request.
- (e) Indicate that a public hearing on the special land use request may be requested by any property owner or the occupant of any structure located within 300 feet of the boundary of the property being considered for a special use.

(3) At the initiative of the body or official responsible for approving special land uses, or upon the request of the applicant for special land use authorization or a property owner or the occupant of a structure located within 300 feet of the boundary of the property being considered for a special land use, a public hearing with notification as required for a notice of a request for special land use approval, as provided in subsection (2), shall be held before a decision is made on the special land use request which is based on discretionary grounds. If the applicant or the body or official responsible for approving special land uses requests a public hearing, only notification of the public hearing need be made. A decision on a special land use which is based on discretionary grounds, shall not be made unless notification of the request for special land use approval, or notification of a public hearing on a special land use request has been made as required by this section.

(4) The body or official designated in the zoning ordinance to review and approve special land uses may deny, approve, or approve with conditions, a request for special land use approval. The decision on a special land use shall be incorporated in a statement containing the conclusions relative to the special land use under consideration which specifies the basis for the decision, and any conditions imposed.

History: Add. 1978, Act 637, Eff. Mar. 1, 1979.

125.286c Planned unit development.

Sec. 16c. (1) As used in this section, "planned unit development" includes such terms as cluster zoning, planned development, community unit plan, planned residential development, and other terminology denoting zoning requirements designed to accomplish the objectives of the zoning ordinance through a land development project review process based on the application of site planning criteria to achieve integration of the proposed land development project with the characteristics of the project area.

(2) A township may establish planned unit development requirements in a zoning ordinance which permit flexibility in the regulation of land development; encourage innovation in land use and variety in design, layout, and type of structures constructed; achieve economy and efficiency in the use of land, natural resources, energy, and the provision of public services and utilities; encourage useful open space; and provide better housing, employment, and shopping opportunities particularly suited to the needs of the residents of this state. The review and approval of planned unit developments shall be by either the zoning board, an official charged with administration of the ordinance, or the township board, as specified in the ordinance.

(3) Within a land development project designated as a planned unit development, regulations relating to the use of land, including permitted uses, lot sizes, setbacks, height limits, required facilities, buffers, open space areas, and land use density, shall be determined in accordance with the planned unit development regulations specified in the zoning ordinance. The planned unit development regulations need not be uniform with regard to each type of land use if equitable procedures recognizing due process principles and avoiding arbitrary decisions have been followed in making regulatory decisions.

(4) The planned unit development regulations established by a township shall specify:

- (a) The body or official which will review and approve planned unit development requests.
- (b) The conditions which create planned unit development eligibility, the participants in the review process, and

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the requirements and standards upon which applications will be judged and approval granted.

(c) The procedures required for application, review, and approval.

(5) Following receipt of a request to approve a planned unit development, the body or official charged in the ordinance with review and approval of planned unit developments shall hold at least 1 public hearing on the request. An ordinance may provide for preapplication conferences before submission of a planned unit development request, and the submission of preliminary site plans before the public hearing. Notification of the public hearing shall be given in the same manner as required by section 16b(3) for public hearings on special land uses. Within a reasonable time following the public hearing, the body or official responsible for approving planned unit developments shall meet for final consideration of the request, and deny, approve, or approve with conditions, the request. The body or official shall prepare a report stating its conclusions on the request for a planned unit development, the basis for its decision, the decision, and any conditions relating to an affirmative decision. If the ordinance requires that the township board amends the ordinance to act on the planned unit development request, the zoning board shall hold the hearing as required by section 9, and the report and the documents related to the planned unit development request shall be transmitted to the township board for consideration in making a final decision. If amendment of a zoning ordinance is required by the planned unit development regulations of a township zoning ordinance, the requirements of this act for amendment of a zoning ordinance shall be followed, except that the hearing and notice required by this subsection shall be regarded as fulfilling the public hearing and notice requirement of section 9.

(6) If the planned unit development regulations of a township zoning ordinance do not require amendment of the ordinance to authorize a planned unit development, the body or official charged in the zoning ordinance with review and approval of planned unit developments may approve, approve with conditions, or deny a request.

(7) Final approvals may be granted on each phase of a multiphased planned unit development if each phase contains the necessary components to insure protection of natural resources and the health, safety, and welfare of the users of the planned unit development and the residents of the surrounding area.

(8) In establishing planned unit development requirements, a township may, when available and applicable, incorporate by reference other ordinances or statutes which regulate land development. The planned unit development regulations contained in zoning ordinances shall encourage complementary relationships between zoning regulations and other regulations affecting the development of land.

History: Add. 1978, Act 637, Eff. Mar. 1, 1979.

125.286d Discretionary decisions; requirements, standards, and conditions.

Sec. 16d. (1) If a township zoning ordinance authorizes the consideration and approval of special land uses or planned unit developments pursuant to section 16b or 16c, or otherwise provides for discretionary decisions, the requirements and standards upon which the decisions are made shall be specified in the ordinance. The standards shall be consistent with, and promote the intent and purpose of the zoning ordinance, and shall insure that the land use or activity authorized shall be compatible with adjacent uses of land, the natural environment, and the capacities of public services and facilities affected by the land use. The standards shall also insure that the land use or activity is consistent with the public health, safety, and welfare of the township. A request for approval of a land use or activity which is in compliance with the standards stated in the zoning ordinance, the conditions imposed pursuant to the ordinance, other applicable ordinances, and state and federal statutes, shall be approved.

(2) Reasonable conditions may be required with the approval of a special land use, planned unit development, or other land uses or activities permitted by discretionary decision. The conditions may include conditions necessary to insure that public services and facilities affected by a proposed land use or activity will be capable of accommodating increased service and facility loads caused by the land use or activity, to protect the natural environment and conserve natural resources and energy, to insure compatibility with adjacent uses of land, and to promote the use of land in a socially and economically desirable manner. Conditions imposed shall meet all of the following requirements:

(a) Be designed to protect natural resources, the health, safety, and welfare and the social and economic well being of those who will use the land use or activity under consideration, residents and landowners immediately adjacent to the proposed land use or activity, and the community as a whole.

(b) Be related to the valid exercise of the police power, and purposes which are affected by the proposed use or activity.

(c) Be necessary to meet the intent and purpose of the zoning ordinance, be related to the standards established in the ordinance for the land use or activity under consideration, and be necessary to insure compliance with those standards.

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(3) The conditions imposed with respect to the approval of a land use or activity shall be recorded in the record of the approval action, and shall remain unchanged except upon the mutual consent of the approving authority and the landowner. The approving authority shall maintain a record of conditions which are changed.

History: Add. 1978, Act 637, Eff. Mar. 1, 1979.

125.286e Site plan.

Sec. 16e. (1) As used in this section, "site plan" includes the documents and drawings required by the zoning ordinance to insure that a proposed land use or activity is in compliance with local ordinances and state and federal statutes.

(2) A township may require the submission and approval of a site plan before authorization of a land use or activity regulated by a zoning ordinance. The zoning ordinance shall specify the body, board, or official charged with reviewing site plans and granting approval.

(3) If a zoning ordinance requires site plan approval, the site plan, as approved, shall become part of the record of approval, and subsequent actions relating to the activity authorized shall be consistent with the approved site plan, unless a change conforming to the zoning ordinance receives the mutual agreement of the landowner and the individual or body which initially approved the site plan.

(4) The procedures and requirements for the submission and approval of site plans shall be specified in the zoning ordinance. Site plan submission, review, and approval shall be required for special land uses and planned unit developments. Decisions rejecting, approving, or conditionally approving a site plan shall be based upon requirements and standards contained in the zoning ordinance, other township planning documents, other applicable ordinances, and state and federal statutes.

(5) A site plan shall be approved if it contains the information required by the zoning ordinance and is in compliance with the zoning ordinance and the conditions imposed pursuant to the ordinance, other township planning documents, other applicable ordinances, and state and federal statutes.

(6) The purpose of this amendatory act is to clarify the authority of the township body, board, or official charged with reviewing site plans and granting approval of site plans, which is implied from the language of this act, but which is not specifically set forth in this act.

History: Add. 1978, Act 637, Eff. Mar. 1, 1979;—Am. 1987, Act 74, Imd. Eff. June 29, 1987.

125.286f Improvements; deposit of performance guarantee.

Sec. 16f. (1) As used in this section, "improvements" means those features and actions associated with a project which are considered necessary by the body or official granting zoning approval, to protect natural resources, or the health, safety, and welfare of the residents of a township and future users or inhabitants of the proposed project or project area, including roadways, lighting, utilities, sidewalks, screening, and drainage. Improvements does not include the entire project which is the subject of zoning approval.

(2) To insure compliance with a zoning ordinance and any conditions imposed thereunder, a township may require that a cash deposit, certified check, irrevocable bank letter of credit, or surety bond acceptable to the township covering the estimated cost of improvements associated with a project for which site plan approval is sought be deposited with the clerk of the township to insure faithful completion of the improvements. The performance guarantee shall be deposited at the time of the issuance of the permit authorizing the activity or project. The township may not require the deposit of the performance guarantee prior to the time when the township is prepared to issue the permit. The township shall establish procedures whereby a rebate of any cash deposits in reasonable proportion to the ratio of work completed on the required improvements will be made as work progresses.

(3) This section shall not be applicable to improvements for which a cash deposit, certified check, irrevocable bank letter of credit, or surety bond has been deposited pursuant to Act No. 288 of the Public Acts of 1967, as amended, being sections 560.101 to 560.293 of the Michigan Compiled Laws.

History: Add. 1978, Act 637, Eff. Mar. 1, 1979.

125.286g "Family day-care home" and "group day-care home" defined; family day-care home as residential use of property; permit for group day-care home meeting certain standards; compliance not required for certain homes; inspection; subsequent establishment of certain facilities; issuing permit to group day-care home not meeting certain standards; measurement of distances.

Sec. 16g. (1) As used in this section, "family day-care home" and "group day-care home" mean those terms as

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defined in section 1 of Act No. 116 of the Public Acts of 1973, being section 722.111 of the Michigan Compiled Laws, and only apply to the bona fide private residence of the operator of the family or group day-care home.

(2) A family day-care home licensed or registered under Act No. 116 of the Public Acts of 1973, being sections 722.111 to 722.128 of the Michigan Compiled Laws, shall be considered a residential use of property for the purposes of zoning and a permitted use in all residential zones, including those zoned for single family dwellings, and shall not be subject to a special use or conditional use permit or procedure different from those required for other dwellings of similar density in the same zone.

(3) A group day-care home licensed or registered under Act No. 116 of the Public Acts of 1973 shall be issued a special use permit, conditional use permit, or other similar permit if the group day-care home meets the following standards:

(a) Is located not closer than 1,500 feet to any of the following:

(i) Another licensed group day-care home.

(ii) Another adult foster care small group home or large group home licensed under the adult foster care facility licensing act, Act No. 218 of the Public Acts of 1979, being sections 400.701 to 400.737 of the Michigan Compiled Laws.

(iii) A facility offering substance abuse treatment and rehabilitation service to 7 or more people licensed under article 6 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.6101 to 333.6523 of the Michigan Compiled Laws.

(iv) A community correction center, resident home, halfway house, or other similar facility which houses an inmate population under the jurisdiction of the department of corrections.

(b) Has appropriate fencing for the safety of the children in the group day-care home as determined by the township.

(c) Maintains the property consistent with the visible characteristics of the neighborhood.

(d) Does not exceed 16 hours of operation during a 24-hour period. The township may limit but not prohibit the operation of a group day-care home between the hours of 10 p.m. and 6 a.m.

(e) Meets regulations, if any, governing signs used by a group day-care home to identify itself.

(f) Meets regulations, if any, requiring a group day-care home operator to provide off-street parking accommodations for his or her employees.

(4) A licensed or registered family or group day-care home that has operated prior to the effective date of the amendatory act that added this section is not required to comply with the requirements of this section.

(5) This section shall not prevent a township from inspecting a family or group day-care home for the home's compliance with the township's ordinance and enforcing the township's ordinance, if the ordinance is not more restrictive for that home than Act No. 116 of the Public Acts of 1973, being sections 722.111 to 722.128 of the Michigan Compiled Laws, or rules promulgated pursuant to Act No. 116 of the Public Acts of 1973.

(6) The subsequent establishment of any of the facilities listed in subsection (3)(a)(i) to (iv) of this section, within 1,500 feet of the licensed or registered group day-care home will not affect any subsequent special use permit renewal, conditional use permit renewal, or other similar permit renewal pertaining to the group day-care home.

(7) This section shall not prevent a township from issuing a special use permit, conditional use permit, or other similar permit to a licensed or registered group day-care home that does not meet the standards listed in subsection (3)(a) to (f).

(8) The distances specified in subsections (3)(a) and (6) shall be measured along a road, street, or place maintained by this state or a political subdivision of this state and generally open to use by the public as a matter of right for the purpose of vehicular traffic, not including an alley.

History: Add. 1988, Act 448, Eff. Mar. 30, 1989.

Administrative rules: R 400.1301 et seq. of the Michigan Administrative Code.

125.286h Qualified township zoning ordinances; option of landowner to develop land zoned for residential development; requirements; limitations; "qualified township" defined; zoning ordinance provisions cited as "open space preservation."

Sec. 16h. (1) Subject to subsection (4) and section 12, beginning 1 year after the effective date of the amendatory act that added this section, each qualified township shall provide in its zoning ordinance that land zoned for residential development may be developed, at the option of the land owner, with the same number of dwelling units on a portion of the land specified in the zoning ordinance, but not more than 50%, that, as determined by the township, could otherwise be developed, under existing ordinances, laws, and rules, on the entire land area, if all of the following apply:

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- (a) The land is zoned at a density equivalent to 2 or fewer dwelling units per acre, or, if the land is served by a public sewer system, 3 or fewer dwelling units per acre.
- (b) A percentage of the land area specified in the zoning ordinance, but not less than 50%, will remain perpetually in an undeveloped state by means of a conservation easement, plat dedication, restrictive covenant, or other legal means that runs with the land, as prescribed by the zoning ordinance.
- (c) The development does not depend upon the extension of a public sewer or public water supply system, unless development of the land without the exercise of the option provided by this subsection would also depend upon such an extension.
- (d) The option provided pursuant to this subsection has not previously been exercised with respect to that land.
- (2) After a land owner exercises the option provided pursuant to subsection (1), the land may be rezoned accordingly.
- (3) The development of land under subsection (1) is subject to other applicable ordinances, laws, and rules, including rules relating to suitability of groundwater for on-site water supply for land not served by public water and rules relating to suitability of soils for on-site sewage disposal for land not served by public sewers.
- (4) Subsection (1) does not apply to a qualified township if both of the following requirements are met:
- (a) Since on or before October 1, 2001, the township has had in effect a zoning ordinance provision providing for both of the following:
- (i) Land zoned for residential development may be developed, at the option of the land owner, with the same number of dwelling units on a portion of the land that, as determined by the township, could otherwise be developed, under existing ordinances, laws, and rules, on the entire land area.
- (ii) If the land owner exercises the option provided by subparagraph (i), the portion of the land not developed will remain perpetually in an undeveloped state by means of a conservation easement, plat dedication, restrictive covenant, or other legal means that runs with the land.
- (b) On or before the enactment date of the amendatory act that added this section, a land owner exercised the option provided under the zoning ordinance provision referred to in subdivision (a) with at least 50% of the land area remaining perpetually in an undeveloped state.
- (5) As used in this section, "qualified township" means a township that meets all of the following requirements:
- (a) Has adopted a zoning ordinance.
- (b) Has a population of 1,800 or more.
- (c) Has land that is not developed and that is zoned for residential development at a density described in subsection (1)(a).
- (6) The zoning ordinance provisions required by subsection (1) shall be known and may be cited as the "open space preservation" provisions of the zoning ordinance.

History: Add. 2001, Act 177, Imd. Eff. Dec. 15, 2001.

125.288 Township board of appeals; selection, qualifications, and terms of members; chairperson; per diem or expenses; removal; conflict of interest; misconduct in office; vacancies; majority required to conduct business.

Sec. 18. (1) In each township in which the township board exercises the authority conferred by this act, it shall appoint a township board of appeals. In a township having a population of 5,000 or more persons, the board of appeals shall be composed of not less than 5 regular members. In a township having a population of less than 5,000 persons, the board of appeals shall be composed of not less than 3 regular members. The precise number of regular members comprising the board of appeals shall be specified by the township board in the zoning ordinance. The first regular member of the board of appeals shall be a member of the township zoning board. In a township where the powers, duties, and responsibilities of the zoning board are transferred to the planning commission pursuant to section 11 of Act No. 168 of the Public Acts of 1959, as amended, being section 125.331 of the Michigan Compiled Laws, the first regular member of the board of appeals shall be a member of the township planning commission. The remaining regular members and any alternate members of the board of appeals shall be selected from the electors of the township residing outside of incorporated cities and villages. The members selected shall be representative of the population distribution and of the various interests present in the township. One regular member may be a member of the township board. An elected officer of the township shall not serve as chairperson of the board of appeals. An employee or contractor of the township board may not serve as a member of the township board of appeals.

(2) A township board may appoint not more than 2 alternate members for the same term as regular members to the zoning board of appeals. An alternate member may be called as specified in the zoning ordinance to serve as a

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regular member of the zoning board of appeals in the absence of a regular member if the regular member is absent from or will be unable to attend 2 or more consecutive meetings of the zoning board of appeals or is absent from or will be unable to attend meetings for a period of more than 30 consecutive days. An alternate member may also be called to serve as a regular member for the purpose of reaching a decision on a case in which the regular member has abstained for reasons of conflict of interest. The alternate member appointed shall serve in the case until a final decision is made. The alternate member has the same voting rights as a regular member of the zoning board of appeals.

(3) The total amount annually allowed the board of appeals as per diem or as expenses actually incurred in the discharge of duties shall not exceed a reasonable sum, which shall be appropriated annually in advance by the township board.

(4) A member of the board of appeals may be removed by the township board for nonperformance of duty or misconduct in office upon written charges and after public hearing. A member shall disqualify himself or herself from a vote in which the member has a conflict of interest. Failure of a member to disqualify himself or herself from a vote in which the member has a conflict of interest constitutes misconduct in office.

(5) Terms shall be for 3 years, except for members serving because of their membership on the zoning board, planning commission, or township board, whose terms shall be limited to the time they are members of the zoning board, planning commission, or township board, respectively, and the period stated in the resolution appointing them. When members are first appointed, the appointments may be for less than 3 years to provide for staggered terms. A successor shall be appointed not more than 1 month after the term of the preceding member has expired. Vacancies for unexpired terms shall be filled for the remainder of the term.

(6) A township board of appeals shall not conduct business unless a majority of the regular members of the board is present.

History: 1943, Act 184, Eff. July 30, 1943;—CL 1948, 125.288;—Am. 1966, Act 106, Imd. Eff. June 22, 1966;—Am. 1973, Act 146, Imd. Eff. Nov. 21, 1973;—Am. 1976, Act 131, Imd. Eff. May 27, 1976;—Am. 1978, Act 637, Eff. Mar. 1, 1979;—Am. 1990, Act 141, Imd. Eff. June 27, 1990.

125.289 Board of appeals; meetings, open to public, record of proceedings.

Sec. 19. Meetings of the township board of appeals shall be held at the call of the chairman and at such other times as the board in its rules of procedure may specify. The chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board of appeals shall be open to the public. The board shall maintain a record of its proceedings which shall be filed in the office of the township clerk and shall be a public record.

History: 1943, Act 184, Eff. July 30, 1943;—CL 1948, 125.289.

125.290 Township board of appeals; duties; variance.

Sec. 20. (1) The township board of appeals shall hear and decide questions that arise in the administration of the zoning ordinance, including the interpretation of the zoning maps, and may adopt rules to govern its procedures sitting as a board of appeals. It shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official or body charged with enforcement of an ordinance adopted pursuant to this act. It shall hear and decide matters referred to it or upon which it is required to pass under an ordinance adopted pursuant to this act. For special land use and planned unit development decisions, an appeal may be taken to the board of appeals only if provided for in the zoning ordinance.

(2) The concurring vote of a majority of the members of the township board of appeals is necessary to reverse an order, requirement, decision, or determination of the administrative official or body, or to decide in favor of the applicant any matter upon which the board is required to pass under the ordinance, or to grant a variance in the ordinance. An appeal may be taken by a person aggrieved or by an officer, department, board, or bureau of the township, county, or state. In addition, a variance in the ordinance may be applied for and granted pursuant to section 4 of the uniform condemnation procedures act, 1980 PA 87, MCL 213.54, and this act. The township zoning board of appeals shall state the grounds of each determination.

History: 1943, Act 184, Eff. July 30, 1943;—CL 1948, 125.290;—Am. 1978, Act 637, Eff. Mar. 1, 1979;—Am. 2000, Act 19, Imd. Eff. Mar. 8, 2000.

125.291 Board of appeals; appeals.

Sec. 21. Such appeal shall be taken within such time as shall be prescribed by the township board of appeals by general rule, by the filing with the officer from whom the appeal is taken and with the board of appeals of a notice

TOWNSHIP ZONING ACT

of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

History: 1943, Act 184, Eff. July 30, 1943;—CL 1948, 125.291.

125.292 Board of appeals; restraining order.

Sec. 22. An appeal stays all proceedings in furtherance of the action appealed from unless the officer from whom the appeal is taken certifies to the township board of appeals after the notice of appeal shall have been filed with him that by reason of facts stated in the certificate, a stay would in his opinion cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of appeals or by the circuit court, on application, on notice to the officer from whom the appeal is taken and on due cause shown.

History: 1943, Act 184, Eff. July 30, 1943;—CL 1948, 125.292.

125.293 Township board of appeals; appeals.

Sec. 23. The township board of appeals shall fix a reasonable time for the hearing of the appeal, give due notice thereof to the parties, and decide the appeal within a reasonable time. At the hearing, a party may appear in person or by agent or by attorney. The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination as in its opinion ought to be made in the premises, and to that end shall have all the powers of the officer or body from whom the appeal was taken and may issue or direct the issuance of a permit. Where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the zoning ordinance, the board of appeals in passing upon appeals may vary or modify any of its rules or provisions so that the spirit of the ordinance is observed, public safety secured, and substantial justice done. The board of appeals may impose conditions with an affirmative decision pursuant to section 16d(2).

History: 1943, Act 184, Eff. July 30, 1943;—CL 1948, 125.293;—Am. 1978, Act 637, Eff. Mar. 1, 1979.

125.293a Township board of appeals; decision final; judicial review.

Sec. 23a. (1) The decision of the board of appeals rendered pursuant to section 23 shall be final. However, a person having an interest affected by the zoning ordinance may appeal to the circuit court. Upon appeal the circuit court shall review the record and decision of the board of appeals to insure that the decision:

- (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 board of appeals.

(2) If the court finds the record of the board of appeals inadequate to make the review required by this section, or that there is additional evidence which is material and with good reason was not presented to the board of appeals, the court shall order further proceedings before the board of appeals on conditions which the court considers proper. The board of appeals may modify its findings and decision as a result of the new proceedings, or may affirm its original decision. The supplementary record and decision shall be filed with the court.

(3) As a result of the review required by this section, the court may affirm, reverse, or modify the decision of the board of appeals.

History: Add. 1978, Act 637, Eff. Mar. 1, 1979.

125.294 Violation as nuisance per se; abatement; liability; administration and enforcement of ordinance; penalties.

Sec. 24. A use of land, or a dwelling, building, or structure including a tent or trailer coach, used, erected, altered, razed, or converted in violation of a local ordinance or regulation adopted pursuant to this act is a nuisance per se. The court shall order the nuisance abated and the owner or agent in charge of the dwelling, building, structure, tent, trailer coach, or land is liable for maintaining a nuisance per se. The township board shall in the ordinance enacted under this act designate the proper official or officials who shall administer and enforce that ordinance and do either of the following for each violation of the ordinance:

- (a) Impose a penalty for the violation.
- (b) Designate the violation as a municipal civil infraction and impose a civil fine for the violation.

History: 1943, Act 184, Eff. July 30, 1943;—CL 1948, 125.294;—Am. 1978, Act 637, Eff. Mar. 1, 1979;—Am. 1994, Act 24, Eff. May 1, 1994.

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125.295 Fees for zoning permits; purpose; tax levy; application of fees or taxes.

Sec. 25. For the purpose of providing funds to carry out this act, the township board of an organized township may require the payment of reasonable fees for zoning permits as a condition to the granting of authority to erect, alter, or locate dwellings, buildings, and structures, including tents and trailer coaches, within a zoning district established under this act, both for the purpose of obtaining advance information as to building operations, locations, and proposed uses, and for the purpose of defraying the cost, in whole or in part, of the enforcement of this act in the township, and if the board has incurred or expects to incur any expense of public funds in carrying out this act, shall, for that purpose, in addition to the revenues of the fees, levy a sufficient tax, in addition to other taxes now authorized by law, upon the real and personal property subject to taxation in the township, and the taxes shall be collected as other taxes are collected. When the taxes or fees are collected, they shall be applied to the payment of any indebtedness incurred by the township subject to this act, and to no other purpose. However, the taxes assessed, levied, and collected shall not cause the limit of taxes established by law to be exceeded.

History: 1943, Act 184, Eff. July 30, 1943;—CL 1948, 125.295;—Am. 1978, Act 637, Eff. Mar. 1, 1979.

125.296 Prior ordinance effective until new ordinance adopted.

Sec. 26. In the event any township shall have an ordinance adopted and in effect or shall have had a referendum authorizing an ordinance under the provisions of Act No. 302 of the Public Acts of 1937, prior to the effective date of this act, such ordinance or any ordinance hereafter adopted by reason of such referendum under the provisions of said Act No. 302 of the Public Acts of 1937 shall remain in full force and effect until a new ordinance is adopted and in effect under the provisions of this act, and any such ordinance shall be deemed to have been adopted as an ordinance under the provisions of this act, and shall be governed thereby.

History: 1943, Act 184, Eff. July 30, 1943;—Am. 1947, Act 137, Eff. Oct. 11, 1947;—CL 1948, 125.296 .

Compiler's note: Act 302 of 1937, referred to this section, was repealed by Act 267 of 1945.

125.297 Repealed. 1996, Act 569, Eff. Mar. 31, 1997.

Compiler's note: The repealed section pertained to townships not subject to act.

125.297a Effect of zoning ordinance or decision in presence of demonstrated need.

Sec. 27a. A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a township in the presence of a demonstrated need for that land use within either the township or surrounding area within the state, unless there is no location within the township where the use may be appropriately located, or the use is unlawful.

History: Add. 1978, Act 637, Eff. Mar. 1, 1979.

125.298 Ordinances controlling.

Sec. 28. Insofar as the provisions of any ordinance lawfully adopted under the provisions of this act are inconsistent with the provisions of ordinances adopted under any other law, the provisions of ordinances adopted under the provisions of this act, unless otherwise provided in this act, shall be controlling.

History: 1943, Act 184, Eff. July 30, 1943;—CL 1948, 125.298;—Am. 1955, Act 204, Eff. Oct. 14, 1955.

125.301 Adoption of development rights ordinance; establishment, financing, and administration of purchase of development rights program; limitation; use; scope; separate ordinance; agreements between counties, cities, villages, and townships.

Sec. 31. (1) The township board of a township may adopt a development rights ordinance limited to the establishment, financing, and administration of a PDR program, as provided under this section and sections 32 and 33. The PDR program may be used only to protect agricultural land and other eligible land. This section and sections 32 and 33 do not expand the condemnation authority of a township as otherwise provided for in this act. A PDR program shall not acquire development rights by condemnation. This section and sections 32 and 33 do not limit any authority that may otherwise be provided by law for a township to protect natural resources, preserve open space, provide for historic preservation, or accomplish similar purposes.

(2) A township shall not establish, finance, or administer a PDR program unless the township board adopts a development rights ordinance. If the township has a zoning ordinance, the development rights ordinance may be adopted as part of the zoning ordinance pursuant to the procedures governing adoption of a zoning ordinance set forth in this act. Whether or not the township has a zoning ordinance, the development rights ordinance may be adopted as a separate ordinance pursuant to the procedures governing ordinance adoption in general.

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(3) A township board may promote and enter into agreements between counties, cities, villages, and townships for the purchase of development rights, including cross-jurisdictional purchase, subject to applicable development rights ordinances of townships and similar ordinances of counties, cities, and villages.

History: 1943, Act 184, Eff. July 30, 1943;—CL 1948, 125.301;—Am. 1996, Act 570, Eff. Mar. 31, 1997.

125.302 Development rights ordinance providing for PDR program; specifications; consistency with plan; conveyance; notice of application for purchase of development rights.

Sec. 32. (1) A development rights ordinance shall provide for a PDR program. Under a PDR program, the township purchases development rights, but only from a willing landowner. A development rights ordinance providing for a PDR program shall specify all of the following:

- (a) The public benefits that the township may seek through the purchase of development rights.
- (b) The procedure by which the township or a landowner may by application initiate a purchase of development rights.
- (c) The development rights authorized to be purchased subject to a determination under standards and procedures required by subdivision (d).
- (d) The standards and procedure to be followed by the township board for approving, modifying, or rejecting an application to purchase development rights including the determination of all of the following:
 - (i) Whether to purchase development rights.
 - (ii) Which development rights to purchase.
 - (iii) The intensity of development permitted after the purchase on the land from which the development rights are purchased.
 - (iv) The price at which development rights will be purchased and the method of payment.
 - (v) The procedure for ensuring that the purchase or sale of development rights is legally fixed so as to run with the land.
- (e) The circumstances under which an owner of land from which development rights have been purchased under a PDR program may repurchase those development rights and how the proceeds of the purchase are to be used by the township.

(2) If the township has a zoning ordinance, the purchase of development rights shall be consistent with the plan referred to in section 3 upon which the zoning ordinance is based.

(3) Development rights acquired under a PDR program may be conveyed only as provided pursuant to subsection (1)(e).

(4) The township shall notify each village in which is located land from which development rights are proposed to be purchased of the receipt of an application for the purchase of development rights and shall notify each such village of the disposition of that application.

History: Add. 1996, Act 570, Eff. Mar. 31, 1997.

125.303 Financing of PDR program; sources; borrowing money and issuing bonds or notes; pledge; lien; exemption from taxation; investment; disposition; special assessments.

Sec. 33. (1) A PDR program may be financed through 1 or more of the following sources:

- (a) General appropriations by the township.
- (b) Proceeds from the sale of development rights by the township subject to section 32(3).
- (c) Grants.
- (d) Donations.
- (e) Bonds or notes issued under subsections (2) to (5).
- (f) General fund revenue.
- (g) Special assessments under subsection (6).
- (h) Other sources approved by the township board and permitted by law.

(2) The township board may borrow money and issue bonds or notes under the revised municipal finance act, 2001 PA 34, MCL 141.2101 to 141.2821, subject to the general debt limit applicable to the township. The bonds or notes may be revenue bonds or notes; general obligation limited tax bonds or notes; or, subject to section 6 of article IX of the state constitution of 1963, general obligation unlimited tax bonds or notes.

(3) The township board may secure bonds or notes issued under this section by mortgage, assignment, or pledge of property including, but not limited to, anticipated tax collections, revenue sharing payments, or special assessment revenues. A pledge made by the township board is valid and binding from the time the pledge is made. The pledge immediately shall be subject to the lien of the pledge without a filing or further act. The lien of the

TOWNSHIP ZONING ACT

pledge shall be valid and binding as against parties having claims in tort, contract, or otherwise against the township, irrespective of whether the parties have notice of the lien. Filing of the resolution, the trust agreement, or another instrument by which a pledge is created is not required.

(4) Bonds or notes issued under this section are exempt from all taxation in this state except inheritance and transfer taxes, and the interest on the bonds or notes is exempt from all taxation in this state, notwithstanding that the interest may be subject to federal income tax.

(5) The bonds and notes issued under this section may be invested in by the state treasurer and all other public officers, state agencies and political subdivisions, insurance companies, banks, savings and loan associations, investment companies, and fiduciaries and trustees, and may be deposited with and received by the state treasurer and all other public officers and the agencies and political subdivisions of this state for all purposes for which the deposit of bonds or notes is authorized. The authority granted by this section is in addition to all other authority granted by law.

(6) A development rights ordinance may authorize the township board to finance a PDR program by special assessments. In addition to meeting the requirements of section 32, the development rights ordinance shall include in the procedure to approve and establish a special assessment district both of the following:

(a) The requirement that there be filed with the township board a petition containing all of the following:

(i) A description of the development rights to be purchased, including a legal description of the land from which the purchase is to be made.

(ii) A description of the proposed special assessment district.

(iii) The signatures of the owners of at least 66% of the land area in the proposed special assessment district.

(iv) The amount and duration of the proposed special assessments.

(b) The requirement that the township board specify how the proposed purchase of development rights will specially benefit the land in the proposed special assessment district.

History: Add. 1996, Act 570, Eff. Mar. 31, 1997;—Am. 2002, Act 204, Imd. Eff. Apr. 29, 2002.

125.310 Definitions; short title.

Sec. 40. (1) As used in this act:

(a) "Agricultural land" means substantially undeveloped land devoted to the production of plants and animals useful to humans, including forage and sod crops; grains, feed crops, and field crops; dairy products; poultry and poultry products; livestock, including breeding and grazing of cattle, swine, and similar animals; berries; herbs; flowers; seeds; grasses; nursery stock; fruits; vegetables; Christmas trees; and other similar uses and activities.

(b) "Airport" means an airport licensed by the Michigan department of transportation, bureau of aeronautics under section 86 of the aeronautics code of the state of Michigan, 1945 PA 327, MCL 259.86.

(c) "Airport approach plan" means a plan, or an amendment to a plan, adopted under section 12 of the airport zoning act, 1950 (Ex Sess) PA 23, MCL 259.442, and filed with the township zoning board under section 151 of the aeronautics code of the state of Michigan, 1945 PA 327, MCL 259.151.

(d) "Airport layout plan" means a plan, or an amendment to a plan, that shows current or proposed layout of an airport, that is approved by the Michigan aeronautics commission, and that is filed with the township zoning board under section 151 of the aeronautics code of the state of Michigan, 1945 PA 327, MCL 259.151.

(e) "Airport manager" means that term as defined in section 10 of the aeronautics code of the state of Michigan, 1945 PA 327, MCL 259.10.

(f) "Airport zoning regulations" means airport zoning regulations under the airport zoning act, 1950 (Ex Sess) PA 23, MCL 259.431 to 259.465, for an airport hazard area that lies in whole or part in the area affected by a zoning ordinance under this act.

(g) "Conservation easement" means that term as defined in section 2140 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.2140.

(h) "Development rights" means the rights to develop land to the maximum intensity of development authorized by law.

(i) "Development rights ordinance" means an ordinance, which may comprise part of a zoning ordinance, adopted under section 31.

(j) "Greenway" means a contiguous or linear open space, including habitats, wildlife corridors, and trails, that link parks, nature reserves, cultural features, or historic sites with each other, for recreation and conservation purposes.

(k) "Intensity of development" means the height, bulk, area, density, setback, use, and other similar characteristics of development.

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(l) "Other eligible land" means land that has a common property line with agricultural land from which development rights have been purchased and that is not divided from that agricultural land by a state or federal limited access highway.

(m) "PDR program" means a program under section 32 for the purchase of development rights by a township.

(n) "Population of" a specified number means the population according to the most recent federal decennial census or according to a special census conducted pursuant to section 7 of the Glenn Steil state revenue sharing act of 1971, 1971 PA 140, MCL 141.907, whichever is the more recent.

(o) "Undeveloped state" means a natural state preserving natural resources, natural features, or scenic or wooded conditions; agricultural use; open space; or a similar use or condition. Land in an undeveloped state does not include a golf course but may include a recreational trail, picnic area, children's play area, greenway, or linear park. Land in an undeveloped state may be, but is not required to be, dedicated to the use of the public.

(2) This act shall be known and may be cited as the "township zoning act".

History: Add. 1996, Act 570, Eff. Mar. 31, 1997;—Am. 2000, Act 384, Eff. Mar. 28, 2001;—Am. 2001, Act 177, Imd. Eff. Dec. 15, 2001.

913 N.E.2d 1245
Court of Appeals of Indiana.

LIBERTY LANDOWNERS ASSOCIATION, INC.,
Appellant–Plaintiff,
v.
PORTER COUNTY COMMISSIONERS,
Appellee–Defendant,
and
Northwest Indiana Health System, LLC,
Appellee–Intervenor.

No. 64A03–0905–CV–213.
|
Sept. 29, 2009.
|
Transfer Denied Jan. 14, 2010.

Synopsis

Background: Community landowner association brought action against county commissioners for declaratory judgment that the county commission's decision to rezone certain real property so as to permit hospital construction on the property, was invalid. Hospital intervened. The Superior Court, Porter County, A. James Sarkisian, Judge Pro Tem., dismissed the action for lack of standing. Landowner appealed.

[Holding:] The Court of Appeals, Baker, C.J., held that the association suffered no direct harm and had no standing to pursue the action.

Affirmed.

West Headnotes (19)

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| <p>[1] Pretrial Procedure ⇨ Parties, Defects as to</p> <p>The determination of whether a plaintiff's complaint should be dismissed for lack of standing is properly treated as a motion to dismiss for failure to state a claim upon which relief may be granted. Trial Procedure Rule 12(B)(6).</p> | <p>[2] Pretrial Procedure ⇨ Parties, Defects as to</p> <p>A successful motion to dismiss for failure to state a claim upon which relief may be granted on the basis of lack of standing requires the lack of standing to be apparent on the face of the complaint. Trial Procedure Rule 12(B)(6).</p> <p>2 Cases that cite this headnote</p> |
| <p>[3] Pretrial Procedure ⇨ Parties, Defects as to</p> <p>The determination of whether a plaintiff's complaint should be dismissed for lack of standing pursuant to a motion to dismiss for failure to state a claim upon which relief may be granted is generally one of law. Trial Procedure Rule 12(B)(6).</p> | <p>[4] Judgment ⇨ Motion or Other Application</p> <p>When affidavits or other materials are attached to motion to dismiss for failure to state a claim upon which relief may be granted, the motion is treated as one for summary judgment. Trial Procedure Rule 12(B)(6), 56.</p> |
| <p>[5] Declaratory Judgment ⇨ Zoning ordinances</p> <p>When a zoning decision is challenged, a plaintiff seeking declaratory relief must show that his rights, status, or other legal relations will be directly affected by enforcement of the statutes in question.</p> | |

Standing

A person must be “aggrieved” by a board of zoning appeals’s decision in order to have standing to seek judicial review of that decision. West’s A.I.C. 36–7–4–1003(a).

[6] Declaratory Judgment ⇌ Proper Parties

Regarding whether a potential party is “affected” by a statute, as defined in declaratory judgment statute, the term “affected” is used to assess a party’s standing to assert his or her claims. West’s A.I.C. 34–14–1–2.

[7] Action ⇌ Persons entitled to sue

“Standing” is a judicial doctrine that focuses on whether the complaining party is the proper party to invoke the trial court’s jurisdiction.

2 Cases that cite this headnote

[8] Action ⇌ Persons entitled to sue

The “standing” doctrine constitutes a significant restraint upon the ability of courts to act because it denies courts any jurisdiction absent actual injury to a party participating in the case.

[9] Zoning and Planning ⇌ Right of Review; Standing

“Standing” to challenge a rezoning ordinance requires a property right or some other personal right and a pecuniary injury not common to the community as a whole.

[11] Zoning and Planning ⇌ Right of Review; Standing.

To be aggrieved by a board of zoning appeals’s decision, for purposes of standing, the petitioner challenging the decision must experience a substantial grievance, a denial of some personal or property right or the imposition of a burden or obligation; the board of zoning appeals’s decision must infringe upon a legal right of the petitioner that will be enlarged or diminished by the result of the appeal and the petitioner’s resulting injury must be pecuniary in nature. West’s A.I.C. 36–7–4–1003(a).

[12] Zoning and Planning ⇌ Right of Review; Standing

To challenge a zoning decision, a party seeking to petition for certiorari on behalf of a community must show some special injury other than that sustained by the community as a whole. West’s A.I.C. 36–7–4–1003(a).

[13] Declaratory Judgment ⇌ Scope and extent of review in general

Community landowner association failed to preserve for appellate review its contention that it had standing to challenge county zoning decision under the “public standing doctrine,” where the association did not raise the issue of

[10] Zoning and Planning ⇌ Right of Review;

Liberty Landowners Ass'n, Inc. v. Porter County Com'rs, 913 N.E.2d 1245 (2009)

public standing in the trial court.

2 Cases that cite this headnote

[14] **Action** ⇒ Persons entitled to sue

The “public standing” doctrine, which is an exception to the general requirement that a plaintiff must have an interest in the outcome of the litigation different from that of the general public.

3 Cases that cite this headnote

[15] **Action** ⇒ Persons entitled to sue
Municipal Corporations ⇒ Nature and scope in general

The public standing doctrine or the availability of taxpayer or citizen standing is limited to extreme circumstances and should be applied with cautious restraint.

2 Cases that cite this headnote

[16] **Action** ⇒ Moot, hypothetical or abstract questions
Action ⇒ Persons entitled to sue
Constitutional Law ⇒ Advisory Opinions

Where the plaintiff has not a concrete legal interest sufficient to confer standing or warrant an action or else the defendant has no tangible conflicting interest, the court's judgment, if rendered, would not change or affect legal relations, and thus, such cases are not justiciable in character and are properly considered as seeking advice or an advisory opinion only.

[17] **Action** ⇒ Persons entitled to sue

Even when “public standing” is asserted, claimants must still have some property right or some other personal right and a pecuniary interest.

[18] **Corporations and Business Organizations** ⇒ Persons entitled to sue; standing
Declaratory Judgment ⇒ Subjects of relief in general
Zoning and Planning ⇒ Modification or amendment

Community landowner association's action for declaratory judgment challenging county's zoning amendment, which amendment had the effect of permitting construction of a hospital, did not allege any direct harm, and the association was not denied any rights, and thus, the association had no standing to pursue the action; the association owned no property and paid no taxes, and had no legal right, either personal or pecuniary, that was put in jeopardy by the county's decision. West's A.I.C. 34-14-1-2, 36-7-4-1003(a).

[19] **Declaratory Judgment** ⇒ Scope and extent of review in general

Community landowner association failed to preserve for appellate review its claim that its declaratory judgment action challenging county zoning amendment should not have been dismissed because the trial court did not address various constitutional claims, where its complaint for declaratory judgment raised no constitutional issues.

Liberty Landowners Ass'n, Inc. v. Porter County Com'rs, 913 N.E.2d 1245 (2009)**Attorneys and Law Firms**

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request, a public hearing was held on January 22, 2008, before the Plan Commission, where members of the public, including representatives of the Liberty Landowners, were afforded the opportunity to address concerns about the conversion.

Liberty Landowners is a voluntary not-for-profit community association that owns no property and pays no taxes. The organization incorporated in Indiana in 1983 with the stated purpose of protecting and preserving property, including its natural and aesthetic values. More specifically, the Articles of Incorporation provide that Liberty Landowners was formed in part:

To constitute and perpetuate an organization of persons concerned with the protection and preservation of property (real and personal); to promote the preservation of the esthetic value of property (real and personal); to promote the preservation of the natural state of property (both real and personal) and to insure the orderly development of the same for the general public.

OPINION

BAKER, Chief Judge.

Appellant-plaintiff Liberty Landowners Association, Inc., (Liberty Landowners) appeals the trial court's order dismissing its complaint for declaratory judgment that it filed against the appellees-defendants Porter County Commissioners (Commissioners) regarding the decision to rezone certain real property in Porter County, which permitted appellee-intervenor Northwest Indiana Health System, LLC (Northwest Health) to construct a hospital on the property. Specifically, Liberty Landowners argues that the trial court erred in concluding that it lacked standing to proceed with the action. Concluding that the trial court properly dismissed Liberty Landowners's complaint, we affirm.

Appellant's App. p. 8, 29.

At the hearing, Liberty Landowners maintained that the conversion of the site from a residential district to an institutional district would be contrary to the compatible adjacent use specifications of the Porter County Unified Development Ordinances (UDO). However, one of the Commissioners maintained that the proposed facility would bring "more taxes and good jobs" to the community. *Id.* at 67.

FACTS

On November 7, 2007, Northwest Health filed an application with the Porter County Plan Commission (Plan Commission) requesting that the Porter County zoning map be amended so that certain land in Liberty Township could be converted from a "residential" zoning category to an "institutional" category. Appellant's App. p. 6. Northwest Health sought adoption of the rezoning ordinance for the purpose of constructing a hospital on the real estate.

The Commissioners approved the proposed zoning map amendment. As a result, the Commissioners adopted Ordinance 08-02 (hereinafter referred to as the rezoning ordinance), which changed the zoning classification of the subject real estate from a low density single family residential district to an institutional district.

Thereafter, Liberty Landowners filed a complaint for declaratory judgment against the Commissioners. Liberty Landowners alleged (1) that the adoption of the rezoning ordinance was "arbitrary and capricious because the Commissioners failed to reasonably consider the incompatibility *1249 of an institutional zone adjacent to

Before the Commissioners acted upon Northwest Health's

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R-1 Zones under the terms of the UDO;" and (2) that "one of the Commissioner's votes was invalid due to a conflict of interest." *Id.* at 9-10.

At some point, Northwest Health intervened in the proceedings. Northwest Health and the Commissioners subsequently filed a motion to dismiss Liberty Landowners's complaint for lack of standing because Liberty Landowners does not own real estate within the requisite proximity to the rezoned tract. More particularly, it was alleged that

[Liberty Landowners] does not own any property whatsoever, and cannot otherwise show, nor did it allege, that it has a personal legal interest affected by the Rezoning Ordinance and a pecuniary injury not common to the community as a whole. A desire to protect and preserve property in Liberty Township, Porter County, and even concerns regarding traffic or the environment, are not enough to confer standing.... Such concerns are not unique to [Liberty Landowners], and [Liberty Landowners] cannot show, nor did it allege, that it will suffer a special injury as a result of the Rezoning Ordinance.

Id. at 30 (internal citation omitted).

Following a hearing, the trial court determined that Liberty Landowners lacked standing to bring the action and granted the Commissioners' motion to dismiss on April 8, 2009. In relevant part, the trial court's order provided as follows:

There being no dispute that [Liberty Landowners] owns no real estate in the vicinity of the subject Real Estate and there being no evidence presented to this Court that [Liberty Landowners] somehow suffered a pecuniary loss, this Court finds that [Liberty Landowners] lacks standing to bring this action....

Id. at 7. Liberty Landowners now appeals.

DISCUSSION AND DECISION**I. Standard of Review**

[1] [2] [3] [4] The determination of whether a plaintiff's complaint should be dismissed for lack of standing is properly treated as a motion to dismiss under Indiana Trial Rule 12(B)(6)—the failure to state a claim upon which relief may be granted. *Common Council of Michigan City v. Bd. of Zoning Appeals of Michigan City*, 881 N.E.2d 1012, 1015 (Ind.Ct.App.2008). A successful 12(B)(6) motion requires the lack of standing to be apparent on the face of the complaint. *Huffman v. Ind. Office of Env'tl. Adjudication*, 811 N.E.2d 806, 813 (Ind.2004). Additionally, the determination of whether a plaintiff's complaint should be dismissed for lack of standing pursuant to a Trial Rule 12(B)(6) motion is generally one of law. *Vectren Energy Mktg. & Serv. v. Executive Risk Specialty Ins. Co.*, 875 N.E.2d 774, 777 (Ind.Ct.App.2007). We apply a de novo standard of review, and we need not accord deference to the trial court's decision. Reversal is appropriate if an error of law is demonstrated. *State ex rel Steinke v. Coriden*, 831 N.E.2d 751, 754 (Ind.Ct.App.2005).¹

***1250 II. Liberty Landowners's Claims**

As noted above, Liberty Landowners contends that the trial court erred in granting the Commissioners' motion to dismiss on the grounds that it lacked standing to maintain the action. More specifically, although Liberty Landowners acknowledges that it did not have standing as a private individual, the doctrine of "public standing" permits it proceed with its claims. Appellant's Br. p. 6-12.

¹In resolving this issue, we initially observe that when a zoning decision is challenged, the plaintiff seeking declaratory relief must show that his rights, status, or other legal relations will be directly affected by

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enforcement of the statutes in question. *Morris v. City of Evansville*, 180 Ind.App. 620, 626, 390 N.E.2d 184, 188 (1979).

¹⁶¹ ¹⁷¹ ¹⁸¹ Pursuant to our Declaratory Judgment Statute:

[A]ny person ... whose rights, status, or other legal relations are affected by a statute, [or] municipal ordinance ... may have determined any question of construction or validity arising under the ... statute, [or] ordinance.

Indiana Code § 34-14-1-2. In construing this statute, the term “affected” is used to assess a party’s standing to assert his or her claims. *Reed v. Plan Comm’n of Town of Munster*, 810 N.E.2d 1126, 1127 (Ind.Ct.App.2004). Standing is a judicial doctrine that focuses on whether the complaining party is the proper party to invoke the trial court’s jurisdiction. *Vectren Energy*, 875 N.E.2d at 777. Moreover, the doctrine constitutes a significant restraint upon the ability of Indiana courts to act because it denies courts any jurisdiction absent actual injury to a party participating in the case. *Jones v. Sullivan*, 703 N.E.2d 1102, 1106 (Ind.Ct.App.1998).

¹⁹¹ ¹⁰¹ ¹¹¹ ¹²¹ With regard to zoning cases, it is well settled that standing to challenge a rezoning ordinance requires a property right or some other personal right and a pecuniary injury not common to the community as a whole. *Common Council of Michigan City*, 881 N.E.2d at 1015-16. As our Supreme Court observed in *Bagnall v. Town of Beverly Shores*, 726 N.E.2d 782, 786 (Ind.2000):

A person must be “aggrieved” by a board of zoning appeals’s decision in order to have standing to seek judicial review of that decision. Ind.Code § 36-7-4-1003(a); see also *Union Township Residents Ass’n v. Whitley County Redevelopment Comm’n*, 536 N.E.2d 1044 (Ind.Ct.App.1989). To be aggrieved, the petitioner must experience a “substantial grievance, a denial of some personal or property right or the imposition ... of a burden or obligation.” *Id.* at 1045. The board of zoning appeals’s decision must infringe upon a legal right of the petitioner that will be “enlarged or diminished by the result of the appeal” and the petitioner’s resulting injury must be pecuniary in nature. *Id.* “[A] party seeking to petition for certiorari on behalf of a community must show some special injury other than that sustained by the

community as a whole.” *Robertson v. Board of Zoning Appeals, Town of Chesterton*, 699 N.E.2d 310, 315 (Ind.Ct.App.1998).

This court has consistently held that landowner associations lack standing to challenge zoning decisions. See *Robertson v. Bd. of Zoning Appeals*, 699 N.E.2d 310, 316 (Ind.Ct.App.1998) (holding that a landowners’ association lacked standing to challenge a variance to build a grocery store on property zoned residential because the association did not own property near the sight of the variance and failed to prove that it had any personal legal interest affected by the variance); *1251 *Union Twp. Residents Ass’n, Inc. v. Whitley County Redevelopment Comm’n*, 536 N.E.2d 1044, 1045 (Ind.Ct.App.1989) (upholding the dismissal of a challenge to a redevelopment commission’s approval of a redevelopment plan brought by a residents’ association for lack of standing because the association owned no property and had no legal interest affected by the redevelopment commission’s final action, and because the association failed to demonstrate that it suffered a recognizable legal injury). Moreover, our Supreme Court recently determined that a landowner whose property line was less than a mile from a proposed confined animal feeding operation, was not an “aggrieved party” within the meaning of *Bagnall*. Thus, the landowner lacked standing to challenge the Board of Zoning Appeals’ ruling. *Thomas v. Blackford County Area Bd. of Zoning Appeals*, 907 N.E.2d 988, 991 (Ind.2009).

¹³¹ ¹⁴¹ In an effort to distinguish the long line of precedent holding that residents’ associations do not have standing to challenge zoning decisions, Liberty Landowners argues that its claim against the Commissioners survives in light of the “public standing doctrine,” which is an exception to the general requirement that a plaintiff must have an interest in the outcome of the litigation different from that of the general public. *Embry v. O’Bannon*, 798 N.E.2d 157, 160 (Ind.2003).

Notwithstanding this contention, the Commissioners point out that Liberty Landowners did not raise the issue of public standing in the trial court.² Rather, it is apparent that Liberty Landowners sought to have the trial court reverse established precedent that landowner associations owning no real estate are without standing to challenge zoning decisions. Thus, Liberty Landowners has waived the issue. See *Van Meter v. Zimmer*, 697 N.E.2d 1281, 1283 (Ind.Ct.App.1998) (holding that a party may not advance a theory on appeal which was not originally raised at the trial court level).

¹⁵¹ ¹⁶¹ ¹⁷¹ Waiver notwithstanding, we note that the public

standing doctrine or the availability of taxpayer or citizen standing is limited to extreme circumstances and should be applied with “cautious restraint.” *State ex rel. Cittadine v. Ind. Dep't of Transp.*, 790 N.E.2d 978, 983 (Ind.2003). In *Cittadine*, our Supreme Court discussed the public standing doctrine and its decision in *Pence v. State*, 652 N.E.2d 486 (Ind.1995), as follows:

Significantly, the majority opinion in *Pence* did not expressly discuss the public standing doctrine, but observed:

While the availability of taxpayer or citizen standing may not be foreclosed in extreme circumstances, it is clear that such status will rarely be sufficient. For a private individual to invoke the exercise of judicial power, such person must ordinarily show that some direct injury has or will immediately be sustained.

Id. ... This language clearly does not abrogate but rather acknowledges the public standing doctrine. We view application of the standing rule in *Pence* merely to express our exercise of judicial discretion with cautious restraint under the circumstances. We hold that *Pence* did not alter the public standing doctrine in Indiana.

The public standing doctrine, which applies in cases where public rather than private rights are at issue and in cases which involve the enforcement of a public rather than a private right, continues to be a viable exception to the general standing requirement. The public standing doctrine permits the assertion of all proper legal challenges, including claims that government action is unconstitutional.

*1252 However, persons availing themselves of the public standing doctrine nevertheless remain subject to various limitations.

Similarly, although the Indiana Declaratory Judgment Act expressly authorizes Indiana courts to “declare rights, status, and other legal relations whether or not further relief is or could be claimed,” Ind.Code § 34-14-1-1, to the extent that persons claiming public standing may be seeking only declaratory relief, they must be persons “whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise....” I.C. § 34-14-1-2. *See Town of Munster v. Hluska*, 646 N.E.2d 1009, 1012 (Ind.Ct.App.1995) (“In order to obtain declaratory relief, the person bringing the action must have a substantial present interest in the relief sought, not merely a theoretical question or controversy but a real

or actual controversy,’ or at least the ‘ripening seeds of such a controversy,’ and that a question has arisen affecting such right which ought to be decided in order to safeguard such right.”) (quoting *Morris v. City of Evansville*, 180 Ind.App. 620, 622, 390 N.E.2d 184, 186 (1979)).

Cittadine, 790 N.E.2d at 984. Moreover, as our Supreme Court observed in *City of Hammond v. Bd. of Zoning Appeals*:

Where the plaintiff has not a concrete legal interest sufficient to warrant an action or else the defendant has no tangible conflicting interest; ... the court’s judgment, if rendered, would not change or affect legal relations. These cases are not justiciable in character and are properly considered as seeking advice or an advisory opinion only.

152 Ind.App. 480, 490, 284 N.E.2d 119, 126 (1972). Indeed, even when public standing is asserted, claimants must still have some property right or some other personal right and a pecuniary interest. *Id.*

¹¹⁸¹ ¹¹⁹¹ As noted above, it is undisputed that Liberty Landowners owns no property and pays no taxes. Moreover, Liberty Landowners has no legal right—personal or pecuniary—that has been put in jeopardy by the Commissioners’ decision. In other words, Liberty Landowners has not alleged any direct harm and has not been denied any rights. As a result, Liberty Landowners’s claims fail.³

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and RILEY, J., concur.

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Footnotes

Liberty Landowners Ass'n, Inc. v. Porter County Com'rs, 913 N.E.2d 1245 (2009)

- 1 When, as here, affidavits or other materials are attached to the 12(B)(6) motion, it is treated as one for summary judgment pursuant to Trial Rule 56. *Thomas v. Blackford County Area Bd. of Zoning Appeals*, 907 N.E.2d 988, 990 (Ind.2009). The granting of summary judgment is appropriate only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Morgan County Hosp. v. Upham*, 884 N.E.2d 275, 279 (Ind.Ct.App.2008), *trans. denied*. Liberty Landowners asserts—and we agree—that the distinction is academic here because the undisputed evidence establishes that Liberty Landowners owns no real estate.
- 2 In fact, Liberty Landowners notes that “the phrase ‘public standing’ does not appear in [its] filings prior to the citation to additional authority.” Appellant’s Reply Br. p. 4.
- 3 As a final note, although Liberty Landowners also maintains that the case should not have been dismissed because the trial court did not address various constitutional claims that are presented in this appeal, the complaint for declaratory judgment raised no constitutional issues. Appellant’s App. p. 8–10. While Liberty Landowners presented an “Overview of Relevant Constitutional Provisions” in its opposition to the Commissioners’ motion to dismiss, appellant’s app. p. 44, counsel for Liberty Landowners argued at the hearing on the motion to dismiss that the facts of this case are distinguishable from the long line of cases holding that residents’ associations lacked standing to challenge zoning decisions. In other words, Liberty Landowners confined its challenge at the trial court level to the propriety of the rezoning. Therefore, we cannot say that the trial court erred in failing to address the purported constitutional challenges. Moreover, Liberty Landowners has waived those claims on appeal. See *Haak v. State*, 695 N.E.2d 944, 947 (Ind.1998) (observing that a party cannot assert grounds on appeal different from those argued to the trial court).

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Ohio Contract Carriers Ass'n v. Public Utilities Commission, 140 Ohio St. 160 (1942)

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140 Ohio St. 160
Supreme Court of Ohio.

OHIO CONTRACT CARRIERS ASS'N, Inc.,
v.
PUBLIC UTILITIES COMMISSION (two cases).

Nos. 29025, 29120.

June 24, 1942.

Synopsis

Appeals from the Public Utilities Commission.

Proceedings before the Public Utilities Commission of Ohio wherein the Ohio Contract Carriers Association, Inc., was a party. From orders of the Commission, the Ohio Contract Carriers Association, Inc., takes two appeals, and the Commission moves to dismiss the appeals.-[Editorial Statement].

Motions sustained and causes dismissed

West Headnotes (3)

[1] Appeal and Error—Parties or Persons Injured or Aggrieved

An appeal lies only on behalf of a party aggrieved by the final order appealed from.

135 Cases that cite this headnote

[2] Appeal and Error—Existence of Actual Controversy

Appeals are not allowed for the purpose of settling abstract questions, however interesting or important to the public generally, but are allowed only to correct errors injuriously affecting the appellant.

86 Cases that cite this headnote

[3] Public Utilities—Right of Review

That counsel for appellant were heard by the Public Utilities Commission in common with counsel and representatives of other interests and that appellant may have been made a party to proceedings before the commission gave appellant no right to appeal to the Supreme Court from commission's order in absence of showing that it was an aggrieved party whose substantial right was affected by order. Gen.Code, §§ 499-6a, 544, 614-83, 614-89.

76 Cases that cite this headnote

****758 Syllabus by the Court.**

*160 Appeal lies only on behalf of a party aggrieved by the final order appealed from. Appeals are not allowed for the purpose of settling abstract questions, but only to correct errors injuriously affecting the appellant.

On February 3, 1942, the Public Utilities Commission of Ohio entered an amended order:

'In the Matter of the Establishment During the Prosecution of the National Defense Program, or Such Other Period of Time as May Be Deemed Proper, of a Toledo Metropolitan Zone for the Operation of Service by Regular and Irregular Route Motor Transportation Companies Certificated to Transport Property.

'Special Motor Transportation Docket No. 1.

'Amended Order.'

Rehearing was denied by the commission and two appeals by the same appellant were taken to this court.

Appellant is an Ohio corporation not for profit, whose membership is composed of approximately ten per cent of

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the contract carriers by motor vehicle operating under permits issued by the Public Utilities Commission of Ohio. It does not hold any permit from the commission, nor does it appear that it is an owner of any stock or interest in any permit holder. It does not claim to represent any specific permit holder.

Appellee filed motions to dismiss the appeals because appellant is not the real party in interest and has suffered no loss or grievance from the order of the commission from which it has attempted to appeal.

Attorneys and Law Firms

*161 Ralph W. Sanborn and Lyman Brownfield, both of Columbus, for appellant.

Thomas J. Herbert, Atty. Gen., and Kenneth L. Sater, Asst. Atty. Gen., for appellee.

Opinion

**759 TURNER, Justice.

¹¹¹ It is fundamental that appeal lies only on behalf of a party aggrieved. Unless an appellant can show that *his rights* have been invaded, no error is shown to have been committed by the court or body which entered the final order.

As stated in 2 American Jurisprudence, 941, Section 149:

'It is a fundamental rule that to be entitled to institute appeal or error proceedings a person must have a present interest in the subject-matter of the litigation and must be aggrieved or prejudiced by the judgment, order or decree.'

In Section 150, *ibid*, it is said:

'A cardinal principle which applies alike to every person desiring to appeal, whether a party to the record or not, is that he must have an interest in the subject-matter of the litigation. His interest must be immediate and pecuniary, and not a remote consequence of the judgment; a future, contingent or speculative interest is not sufficient.'

¹²¹ In Section 152, *ibid*, it is said: 'In addition to the requirement of a substantial interest in the subject-matter of the litigation, it is essential, in order that a person may appeal or sue out a writ of error, that he shall be aggrieved or prejudiced by the judgment or decree. Appeals are not allowed for the purpose of settling abstract questions,

however interesting or important to the public generally, but only to correct errors injuriously affecting the appellant.'

Appellant claims that it was an 'interested party' to the proceeding before the commission. This claim is based upon that part of *162 Section 614-83, General Code, which authorizes the Public Utilities Commission to 'cooperate with the federal government and the several states, and the duly authorized officials thereof, and with any organization of motor carriers in the administration and enforcement of this chapter [Sections 487 to 614-128, General Code].'

Whatever may be claimed for appellant's rights under Section 614-83, General Code, such rights are subject to the limitations contained in other sections of the chapter relating to the Public Utilities Commission.

Section 544, General Code, provides: 'A final order made by the commission shall be reversed, vacated or modified by the supreme court on appeal, if upon consideration of the record such court is of the opinion that such order was unlawful or unreasonable.'

As Section 544, General Code, was reenacted as a part of the 'Act to establish a simplified method of appellate review' (116 Ohio Laws, 104, 120), we look to Section 12223-2, General Code (116 Ohio Laws, p. 105; 117 Ohio Laws, p. 615) for a definition of a final order. There it is defined as one 'affecting a substantial right.'

Section 499-6a, effective September 6, 1939, refers only to the persons who may practice before the commission and does not in any manner enlarge the list or character of parties who may appeal to this court.

Section 614-89, General Code, provides: 'In all respects in which the public utilities commission has power or authority under this act * * * applications and complaints may be made and filed with such commission, processes issued, hearings held, opinions, orders and decisions made and filed, petitions for re-hearings filed and acted upon, and all proceedings before the supreme court of this state considered and disposed of by such court in the manner, under the conditions and subject to the limitations and with *163 the effect specified in the sections of the General Code governing the supervision of other public utilities by the commission.' This section makes applicable Section 544 et seq., General Code.

¹³¹ At the hearing in this court, counsel for appellant admitted that appellant was not composed of more than approximately ten per cent of the contract motor carriers.

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Appellant did not claim to represent any specific permit holder. We need not stop to inquire whether appellant is such an 'organization of motor carriers' as is referred to in Section 614-83, General Code. The record discloses no interest of any kind of appellant which is or could be affected by the commission's order. The fact that counsel for appellant were heard by the commission in common with counsel and representatives of other interests, and the further fact the appellant may have been made a party to the proceedings before the commission, give appellant no right to appeal to this court in the absence of a showing that it is an *aggrieved* party whose *substantial* right has been affected by the questioned order.

****760** The motions to dismiss are sustained and the causes are dismissed.

Motions sustained and causes dismissed.

WEYGANDT, C. J., and WILLIAMS, MATTHIAS, HART, and ZIMMERMAN, JJ., concur.

BETTMAN, J., not participating.

All Citations

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68.06. Persons aggrieved, WI ST 68.06

West's Wisconsin Statutes Annotated

Municipalities (Ch. 59 to 68)

Chapter 68. Municipal Administrative Procedure (Refs & Annos)

W.S.A. 68.06

68.06. Persons aggrieved

Currentness

A person aggrieved includes any individual, partnership, limited liability company, corporation, association, public or private organization, officer, department, board, commission or agency of the municipality, whose rights, duties or privileges are adversely affected by a determination of a municipal authority.

Credits

<<For credits, see Historical Note field.>>

W. S. A. 68.06, WI ST 68.06

Current through 2019 Act 186, published April 18, 2020

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