

STATE OF MICHIGAN  
IN THE SUPREME COURT

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SAUGATUCK DUNES COASTAL  
ALLIANCE,

Plaintiff-Appellant,

v

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

Defendants-Appellees.

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Supreme Court Nos. 160358, 160359

Court of Appeals Nos. 342588, 346677

Allegan County Circuit Court Nos.  
2018-059598-AA, 2017-058936-AA

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**APPELLEE NORTH SHORES OF SAUGATUCK, LLC'S APPENDIX**

## APPELLEE'S APPENDIX

Date	Description	Appx Page
12.11.2014	Ex C to NorthShore's 8/9/18 Trial Ct Br, Case No. 18-59598-AA – Coastal Alliance's Response to Cross-Appellant Singapore Dunes' Appeal	0001b
04.14.2017	Memorandum from Smith and Curcio to Saugatuck Township Planning Commission regarding proposed PUD and Special Use Approval	0029b
04.24.2017	Curcio correspondence to Kushion regarding North Shore LLC Proposal	0036b
07.11.2017	Gabrielse correspondence to Rowe regarding Claim of Appeal	0039b
10.16.2017	Ex B to NorthShore's 8/9/18 Trial Ct Br, Case No. 18-59598-AA – McKenna Associates' correspondence to Saugatuck Township Planning Commission regarding detailed site plan review	0045b
07.19.2018	Appellant's Brief on Appeal, Case No. 18-59598-AA	0055b
10.25.2018	Hearing Transcript – Oral Argument on Appeal, Case No. 18-59598-AA	0082b
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Undated	Ex G to NorthShore's 8/9/18 Trial Ct Br, Case No. 18-59598-AA - Photo of camp dormitories adjacent to Billy's cottage	0144b
Undated	Ex I to NorthShore's 8/9/18 Trial Ct Br, Case No. 18-59598-AA - Pine Trail Camp Activities List and photos	0145b

STATE OF MICHIGAN  
ALLEGAN COUNTY CIRCUIT COURT

SAUGATUCK DUNES COASTAL ALLIANCE, a  
non-profit organization,

Cross-Appellee/Appellant

v

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;

Appellees and/or Appellants,

and

SINGAPORE DUNES, LLC, a Michigan limited  
liability company,

Intervening Cross-Appellant/Appellee.

Case N<sup>o</sup>: 14-53883-AA

Hon. Kevin Cronin

Lower Tribunal:  
Michigan Administrative Hearings System  
Contested Case File No.: 13-03-0079-P

Administrative Law Judge Daniel L. Pulter

(August 21, 2014 Opinion and Order)

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**RESPONSE TO CROSS-APPELLANT SINGAPORE DUNES' APPEAL**

**ORAL ARGUMENT REQUESTED**

**PROOF OF SERVICE**

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## COUNTER-STATEMENT OF JURISDICTION

Appellants Saugatuck Dunes Coastal Alliance (SDCA) maintain that Singapore Dunes, LLC, (the "Applicant") has not properly raised a "cross appeal" under MCR 7.106, and respectfully urges that the "cross-appeal" must be treated as an application for interlocutory leave to appeal under MCR 7.119(C) and MCL 24.301. The Applicant has filed a brief on appeal as if it is entitled to pursue a claim of appeal by right, and that is simply not the case, for the reasons stated in Appellants Answer to Appellee Singapore Dunes Application for Leave to Appeal or in the Alternative Claim of Appeal, submitted by SDCA on September 24, 2014. The SDCA files this response brief to preserve its rights, but urges the Court to treat the Applicant's filing as what it is: an application for leave to file an interlocutory appeal, which should be denied.

SDCA filed the claim of appeal by right that is properly before this Court from a final decision by the Department of Environmental Quality (DEQ) Administrative Law Judge (ALJ), issued on July 1, 2014. The ALJ's final decision dismissed a petition filed by SDCA on January 17, 2014, which challenged the November 1, 2013, DEQ decision that Appellee does not require a wetlands permit under MCL 324.30301, et seq. ("Part 303 Wetlands Petition Final Decision"). Appellee would have had the right to file a cross appeal any issues decided by the ALJ in the on issues raised in the Part 303 Wetlands Petition Final Decision. However, Appellee does not raise any such issues in this filing. Therefore, no valid "cross appeal" has been filed.

Instead, Appellee is attempting to file a "cross appeal" in this case based on issues arising out of a *separate* petition case, filed by SDCA on May 26, 2014, which challenges the DEQ decision to issue Appellee a critical dunes and floodplain permit under MCL 324.35301, et seq. and MCL 324.3101 ("Parts 353/31 Petition"). In the separate Parts 353/31 Petition case, unlike this case, the ALJ has not issued a final decision. Appellee wishes to challenge the ALJ's interlocutory decision to deny Appellee's motion to dismiss the petition for lack of standing, issued August 21, 2014 ("Parts 353/31 Petition Interlocutory Decision"). However, because it is not a final decision, the only avenue by which Appellee can do so is by filing an application to this court for leave to file an

interlocutory appeal. Appellees suggests that there is jurisdiction to file a cross-appeal because “the cross appeal relates to the same underlying permit application as the appeal brought by the SDCA.”<sup>1</sup> Perhaps this would be a basis for a court or tribunal, in its discretion, to consolidate the two cases, if the cases were at the same point in the administrative process. However, at this point, there are two separate cases, arising out of two separate petitions raising distinct issues, and a final decision has been issued by the ALJ in only one of the cases. Therefore, there is no legal basis for this Court to treat them as a single case for purposes of its jurisdiction, or to allow Appellee to file a cross-appeal “by right.”

Therefore, this so-called “cross appeal” must be denied for lack of jurisdiction and, for the reasons stated in SDCA’s Answer, SDCA respectfully submits that the interlocutory leave for appeal should be denied.

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<sup>1</sup> Appellee’s Brief on Appeal, dated November 18, 2014, p 2.

**COUNTER-STATEMENT OF QUESTIONS PRESENTED**

I. Did the Administrative Law Judge properly rule that Petitioners Saugatuck Dunes Coastal Alliance has standing to pursue an administrative appeal?

The ALJ answered: Yes

Appellant/Cross-Appellee SDCA answers: No

Appellee/Purported Cross-Appellant Singapore answers: Yes

## INTRODUCTION

The purported “cross appeal” filed by Singapore Dunes, LLC (the “Applicant”), alleges that Petitioners, the Saugatuck Dunes Coastal Alliance and its members (“SDCA”), lack “standing” under MCL 324.35301, *et seq* (Part 353), to petition for a contested case hearing. As an initial matter, the “cross-appeal” is not properly before this Court because the standing ruling the Applicant seeks to challenge is from a *different* administrative appeal that is still pending before the DEQ Administrative Law Judge.<sup>2</sup> Substantively, the Applicant’s argument lacks merit because members of the Appellants Saugatuck Dunes Coastal Alliance (“Petitioners”) meet the test for standing: they own property adjacent to the Applicant’s property and proposed use and are aggrieved by the DEQ’s decisions in this case. Moreover, Petitioners are challenging the actions, inactions, and permitting decision of the Michigan Department of Environmental Quality (“DEQ”), not only based on Part 353, but as an aggrieved party under a number of statutes.

From both a legal and common sense perspective, Petitioners are aggrieved by the agency decision. One of Petitioner’s members owns property adjacent to the property owned by the Applicant, including property mere feet away from the location of future housing phases. Expert testimony submitted to the DEQ demonstrates that the proposed project could have significant consequences throughout the fragile and rare and valuable Saugatuck Dunes ecosystem, including the neighboring publicly-preserved state park and nature preserve. Petitioners consist of neighbors, hikers, birders, swimmers, artists, scientists, and teachers for whom visiting the Saugatuck Dunes is a part of their regular, and sometimes even daily, lives, and who have chosen to visit or own property in this area precisely because of the environmental, aesthetic, and recreational values of these dunes. Moreover, Petitioner and its members have passionately and tirelessly advocated for greater protection of these dunes in public proceedings, including these permit proceedings. If Petitioners’ allegations regarding the errors in the DEQ’s review and approval of this permit

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<sup>2</sup> This is why the Applicant has alternatively asked that this Court grant an “interlocutory appeal” if it does not consider this a “cross-appeal.”

application are correct, there is no question that the errors will have substantial and detrimental effects on the Saugatuck Dunes, including the adjoining public and private lands, and Petitioners' use and enjoyment of those properties. Petitioners are aggrieved by those errors. As such, Petitioners respectfully request that this Court uphold the Administrative Law Judge's opinion granting Petitioners standing.

## COUNTER STATEMENT OF FACTS AND BACKGROUND

This petition arises out of the DEQ permit application to construct a road and houses in the Saugatuck Dunes, on property containing globally-imperiled wetlands and critical dunes. The Applicant's statement of facts includes a number of rhetorical statements about Petitioners that are charitably characterized as misrepresentations or falsehoods. However, the relevant facts that are necessary to this Court's review of this matter are undisputed and are summarized here. The SDCA also points this Court to the statement of facts in its Brief on Appeal, filed with this Court on November 19, 2014.

### A. The Property

The Applicant owns 300+ contiguous acres of Lake Michigan property that is the subject of this Petition ("Property"). The Property is located between Saugatuck Dunes State Park and the Kalamazoo River and the Saugatuck Harbor /Patty Birkholz Natural Area. According to testimony provided to the DEQ and summarized here, the Property is a central lynchpin in the Saugatuck Dunes, an otherwise publicly protected resource with tremendous environmental, historical, recreational, economic and cultural value.<sup>3</sup> Saugatuck Dunes are a uniquely intact freshwater dune system that is unmatched in its size and biodiversity; it provides critical ecosystem services such as coastal protection from flooding and storm surges, erosion control, water catchment and purification, maintenance of wildlife, tourism, recreation, research and more. The interdunal wetlands (or wetpannes) located on the Property are considered both globally and state imperiled. The wetpannes are fragile and easily disrupted but extremely valuable because they hold water near the soil surface and support an incredible diversity of plant and animal species, including federal and state endangered, threatened, and special concern species that have been documented in the dunes. The dunes system also has tremendous scientific, recreational, aesthetic, and educational value. They are used education from the elementary to the graduate school level, and numerous researchers conduct

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<sup>3</sup> **Exhibit A** - Letters from Experts Submitted to DEQ; **Exhibit F** - SDCA Public Comment (attachments excluded; can be provided upon request), pp 20-32.

scientific research here that cannot easily be done anywhere else due to the unique nature of the dunes. Saugatuck Dunes are culturally and historically significant were listed by the Natural Trust for Historic Preservation as one of America's Most Endangered Places. Further, public comment submitted to the DEQ emphasize the importance of these dunes to the public's enjoyment of the dunes and adjacent park for hiking, running, skiing, swimming, boating, sailboarding, and a variety of water recreational activities.<sup>4</sup>

The portion of this Property that is adjacent to Lake Michigan is an extremely unique and special. It is not just another dune; or just another wetland. Indeed, just this past fall, over 2000 letters were sent to the Michigan Department of Natural Resources Trust Fund to express support for dedication of public funds to permanently conserve the most ecologically sensitive areas, and the state was even poised to approve the funds, until, unfortunately the matter was made moot when Singapore Duness, LLC, announced that it would not sell the land.<sup>5</sup>

#### **B. The Property Development**

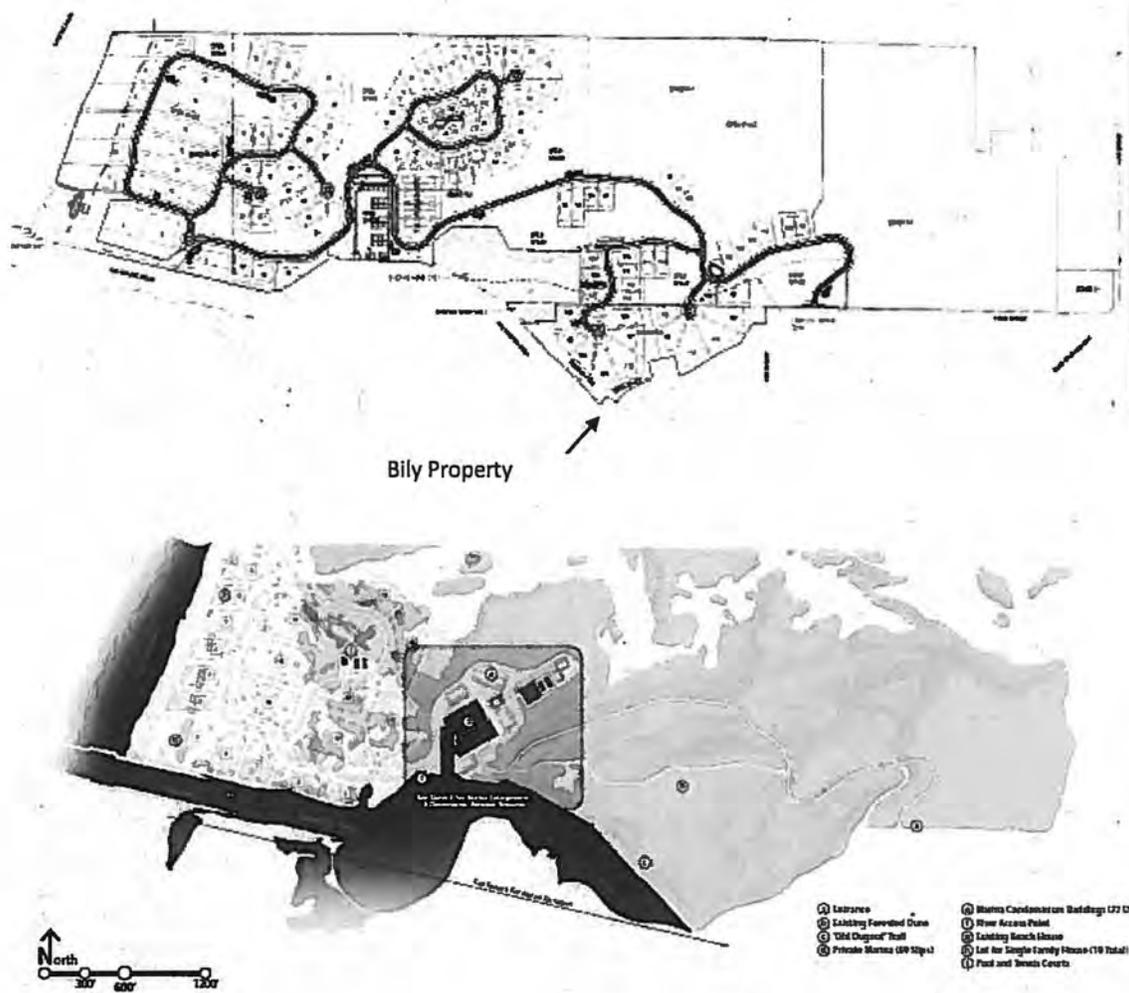
The Applicant is proposing a multi-phase development. According to the permit application, Phase I consists of building homes on subdivided parcels on the western edge of the Property, and a road to those homes that will span the entire Property. According to plans submitted to the township by Applicant in a variance application and Planned Unit Development proposal, the road will also lead to a Phase II will including a 69-slip marina, four multi-family condo buildings, and additional houses and road.<sup>6</sup> The map included in these plans clearly show the areas that will be served by the road, which extend to property owned by Petitioners and SDCA members, the Bily family:

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<sup>4</sup> See **Exhibit B** - SDCA Member Affidavits, including summary.

<sup>5</sup> See [www.saugatuckdunescoastalalliance.com/news.php?newsid=444](http://www.saugatuckdunescoastalalliance.com/news.php?newsid=444)

<sup>6</sup> **Exhibit C** - Variance Application; **Exhibit D** - Planning Unit Development Concept.



The Applicant misleadingly attempts to characterize this development, and its impacts, as being limited to a road, and the specific parcels on which the proposed road would be located. However, this is not a road to nowhere. Instead, the road, and these parcels, are part of the Applicant's 300+ contiguous acres on which the later phases of the development are planned, as emphasized by the Applicant's own development plans, and as further described below. For this reason, these properties were included the Applicant's application to the DEQ, and, as discussed below, are directly affected by the activities authorized by the DEQ permit.

### C. The Petitioners/Appellants

The Petitioners/Appellants include the SDCA and its members.<sup>7</sup> The SDCA is a non-profit coalition organized for the purpose of working cooperatively to protect and preserve the natural geography, historical heritage, and rural character of the Saugatuck Dunes coastal region in the Kalamazoo River Watershed. Since its formation over six years ago, the SDCA has remained committed to and focused on ensuring the protection of the dunes and is a visible organization with numerous supporters; for example, the SDCA facebook page has over 3000 supporters.<sup>8</sup> Contrary to the Applicant's insinuations, the SDCA is not a shady corporation with secret membership; it is a nonprofit organization operated for publicly-published purposes, subject to and in compliance with the same rules of disclosure as any other nonprofit organization, and the positions it takes are visible and subject to public debate on its website and its facebook page and twitter account.<sup>9</sup>

SDCA members Diane Bily and Kathi Bily-Wallace own property adjacent to the Property, and as explained in the attached affidavits, they frequently visit and enjoy a cottage on their property that has been in the family since 1953. Contrary to Applicant's allegations that this area is developed and noisy, the Bily affidavits and supporting photographs submitted by Marcia Perry demonstrate that they treasure their family cottage because of the natural and peaceful setting, and the viewshed

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<sup>7</sup> The ALJ erred in stating the Bily's are not petitioners. See Petition. However, as the ALJ states, it is not determinative because regardless the SDCA has representational standing under *Trout Unlimited v City of White Cloud*, 195 Mich App 343, 348; 489 NW2d 188 (1992).

<sup>8</sup> See [www.facebook.com/saugatuckdunes.coastalalliance](http://www.facebook.com/saugatuckdunes.coastalalliance), last accessed on December 11, 2014.

<sup>9</sup> The Applicant's brief also contains some misleading rhetoric about SDCA's "scorched earth tactics." These allegations are simply untrue and the Court is invited to look at the Federal Court consent judgment to verify how wildly inaccurate the claims are. There were no "secret payments" or injunction by the Federal courts. Moreover, these allegations are particularly ironic given that Singapore Dunes' owner has repeatedly been in the news for exactly these types of practices. See, e.g.: "The Two Sides of Aubrey McClendon, America's Most Reckless Billionaire," <http://www.forbes.com/sites/christopherhelman/2011/10/05/aubrey-mcclendon-chesapeake-billionaire-wildcatter-shale/>; and "Chesapeake Energy ordered to trial over canceled oil, gas leases in Northern Michigan," published at: [www.mlive.com/news/grand-rapids/index.ssf/2014/09/chesapeake\\_energy\\_ordered\\_to\\_t.html](http://www.mlive.com/news/grand-rapids/index.ssf/2014/09/chesapeake_energy_ordered_to_t.html).

from their cottage deck and dock looks across the river, into a natural area; and to the north and northwest, into the dunes and trees directly on the Property, including the site of Phase II development and where construction for the road will be staged according to the final permit. Their neighbors are quiet, and they have been rarely bothered by noise except on the major summer holidays. They do not see or hear campers on the neighboring property except on rare occasions, and they believe their view and experience will be directly affected by the proposed use.

In addition, the SDCA member affidavits presented in the contested case demonstrate wide and varied interests in Saugatuck Dunes, including:<sup>10</sup>

- a. **Rick Brigham:** birdwatcher - member since 2008, has been hiking and birdwatching in the dunes since the age of 10. He records bird observations for the Holland Christmas Bird Count and Cornell University's North American Migration Count, and his recorded siting include the Piping Plover, the Prairie Warbler, and many other birds.
- b. **Keith Charak:** hiker and local B&B owner - member since 2007. He hikes at the State Park several times per month and, as the owner of the local Sherwood Forest Bed and Breakfast, frequently recommends that guests visit the State Park and other natural areas and believes these are often the reason his guests return to the area.
- c. **Suzanne Dixon:** environmental lobbyist - member since 2007. She has been an environmental activist for many years at a local and statewide level and has a particular history of advocating for the Kalamazoo River and the health of the Great Lakes.
- d. **Liz Engel:** local realtor - member since 2009. She believes the ecological, recreational, and aesthetic values of the area are a major selling point for homes in the area and add to property values and home sale prices.
- e. **Wendell Garvelink** - local construction and property management business owner, sailborder - member since 2008. He owns Third Coast Homes and regularly sailboards along the dunes. His children train for cross country at the State Park and swim in the lake. He is concerned that the proposed development will affect his business negatively and that the decrease in the quality of water and beaches will harm his family's health and safety and enjoyment of their recreational activities.
- f. **Russ Harris:** hiker - member since 2008. He hikes in the Saugatuck Dunes daily in the summer and at least twice per week in the winter.
- g. **Mike Johnson:** local business owner - member since 2007. He owns the Coral Gables Complex in Saugatuck and is concerned the development will negatively impact his business because of the loss of the tourists.
- h. **Dr. Lissa Legge:** researcher - member. She has conducted research on the effect of the removal of the invasive Austrian pines for over two decades and is concerned that the development will affect the quality of her research.
- i. **Ann Luft:** skier, birdwatcher, wildlife enthusiast - member since 2007. She has 35+ year history of observing and photographing birds and wildflowers in the Saugatuck Dunes, and as a retired teacher appreciates the educational value of the dunes.

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<sup>10</sup> **Exhibit B.** The affidavits and summary were originally prepared for submission as part of township zoning proceeding.

- j. **Kathy Roper:** hiker - member since 2008. She regularly visits the State Park with her family to walk along the shore to the pier, enjoying the views and natural setting.
- k. **Marcia Perry:** artist, photographer, writer - member since 2007. She regularly walks through the dunes to sketch and photograph plants, animals, and scenic vistas, and takes advantage of the quietest areas to write poems and stories.
- l. **David Swan:** hiker and founder of Coastal Alliance - member since inception. He moved to the area specifically to be able to enjoy the Saugatuck Dunes and regularly walks in the State Park and the Patricia Birkholz Natural Area.

#### D. The Application

The Applicant originally filed a permit application in June 2013 with the DEQ, as amended in July, August, and January, requesting a public hearing under the Natural Resources and Environment Protection Act, MCL 324.30301, et seq (Part 303) and Part 353 ("Application"), to build the proposed project on the Property.<sup>11</sup> **The Application defines the "Property" to include all 300+ acres of contiguous property owned by the Applicant, including the parcel adjacent to the Bily family property.**<sup>12</sup> The Application boasts that the permit should be granted "because Singapore Dunes owns and controls 300 acres north of the channel, Singapore Dunes is in the unique position of controlling and regulation the entire build-out of this acreage."<sup>13</sup> **The Applicant includes the Bily family in its list of "Adjacent Property Owners" and the Applicant was required to send Bilys notice of the Application.**<sup>14</sup> The Application describes the proposed use as not only the road but also Phase I and II:

**Describe the purpose of the project and its intended use.**

The project underlying this Application involves a private access road and utilities across Singapore Dunes' property to service the residential development of the land. The access road will service 19 single-family lots (varying in size from 2 – 6 acres each), located on the western portion of the Property near Lake Michigan. *A second phase of development is contemplated at the former factory site along the Kalamazoo River. If approved and developed, Singapore*

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<sup>11</sup> Exhibit E - August Application, Part I

<sup>12</sup> Exhibit E, p 5 of Narrative Attachment. The "Property" is defined to include Parcel Number 20-004-003-20, which is the parcel identified in the permit as contiguous to the Bily property.

<sup>13</sup> Exhibit E, p 3 of Narrative Attachment.

<sup>14</sup> Exhibit E, p 20 of Narrative Attachment.

***Dunes intends to construct multi-family housing and a marina in that location.*** In connection with the potential second phase, Singapore Dunes expects to apply for a dimensional variance with Saugatuck Township in the summer of 2013, to be followed by a planned unit development application.

Although included in the Property and Proposed Use description, the impact of the Phase I homes and Phase 2 development were not considered as impacts in the DEQ analysis, which is a decision at issue in both petitions filed by the SDCA.

The DEQ received extensive public comment on the project from thousands of people, including from the Petitioner and its members, at a packed public hearing and in written submissions.<sup>15</sup> On November 7, 2013, the United States Environmental Protection Agency (EPA) exercised its authority under Section 404 of the Clean Water Act to object to the permit, stating the Application inadequately accounted for the impacts of the project because it did not sufficiently account for indirect impacts on wetlands and the Applicant needed to include the impacts from the full development, including the Phase I houses and Phase 2, and not merely the road.<sup>16</sup>

The Applicant submitted a revised application to the DEQ on November 7, 2013. The revised application proposed moving the road such that, while the road would still bisect the globally rare wetlands and dunes ecosystem, and require fill of "unregulated" wetlands hydrologically connected to regulated wetlands, the Applicant claimed it would technically not require fill of regulated wetlands.<sup>17</sup> The revised road design would still entail activities and fill requiring a permit under Part 303 if the wetlands are delineated as urged by the Petitioners and the EPA; if the wetlands even as delineated were properly considered "regulated" because they connect to each other and Lake Michigan; or if the Petitioners were required to take into the impact of the proposed houses, condos, marina, and additional buildings instead of improperly piecemealing the road from the remainder of the project. Despite this, on November 21, 2013, the DEQ issued a letter to the Applicant and the

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<sup>15</sup> **Exhibit F.**

<sup>16</sup> **Exhibit G - EPA Letter**

<sup>17</sup> See Final Permit Map.

EPA indicating that it had determined that the revised project would result in no activities in wetlands regulated by Part 303, such that no Part 303 permit was required. The EPA was forced to withdraw its objection because its interpretation of the law is that the DEQ has jurisdiction to determine whether wetlands permits are required for a project.

**E. The First Administrative Appeal.**

Petitioners first filed a timely administrative appeal challenging the DEQ decision not to require a Part 303 permit and raising seven specific claims as the basis for the petition.<sup>18</sup> These claims included the allegation that the application was not complete because the wetlands delineation was not sufficient and that the DEQ erred in determining no Part 303 permit was required in part because the wetlands delineation was insufficient.<sup>19</sup> The Administrative Law Judge ultimately granted the Applicant's motion to dismiss that appeal on the grounds that review of the wetlands delineation was untimely. The decision to dismiss that administrative appeal is the underlying action giving rise to the present appeal to this Court.

**F. The Second Administrative Appeal.**

The DEQ continued its review of the application under Parts 353 and 31 and ultimately issued a final permit on March 26, 2014. Petitioners filed a second timely administrative appeal on May 26, 2014 of the DEQ's final permit. The parties stipulated to the Applicant's intervention and the Applicant submitted a motion for summary disposition based on lack of "standing." The Administrative Law Judge denied the motion to dismiss, finding in part that the Petitioners included property owners adjacent to the proposed development who would be aggrieved by the project, such that Petitioners had standing under Part 353.

As has been argued and briefed elsewhere, this second administrative appeal is still pending before the ALJ. However, the Applicant has requested that this Court either treat its appeal of the standing decision as a "cross-appeal" on the decision challenged by the SDCA, or alternatively that

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<sup>18</sup> **Exhibit I** - January 17, 2014 Petition (exhibits excluded), pp 6-7.

<sup>19</sup> See Petition, Paras 30(a) and 32(a) and (b).

the Court grant leave for it to file an “interlocutory appeal.” The SDCA vigorously disputes that a “cross appeal” could be filed on this basis. The Petitioners are filing this Response Brief on the purported cross-appeal since the Applicant has briefed its position. However, Petitioners expressly incorporate the previous objection to allowing this “cross-appeal” or “interlocutory appeal” to proceed.

## ARGUMENT

### I. STANDARD OF REVIEW AND JURISDICTION

Petitioners agree with Singapore’s statement of the relevant standard of review for this Court for review of statutory interpretation and other questions of law. To the extent the ALJ’s decision depending on determinations of fact, this Court gives them some deference.<sup>20</sup> However, Petitioners reiterate their jurisdictional challenges to this attempt to “cross-appeal” the decision of the Administrative Law Judge in a separate contested case through the current appeal.

### II. THE ALJ CORRECTLY DETERMINED THAT PETITIONERS HAVE “STANDING” TO FILE THE ADMINISTRATIVE APPEAL UNDER PART 353.

Petitioners meet any and all of the statutory standards for “standing” to file an administrative appeal of the DEQ action, inaction, and decision.<sup>21</sup> As will be discussed further below, Petitioners have standing under several statutory provisions. However, as an initial matter, Petitioners will discuss standing under Part 353 because it is the main issue raised by the Applicant in its attempted “cross appeal.”

Petitioners have standing to file a contest case petition under Part 353, which provides:

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<sup>20</sup>*In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 101; 754 NW2d 259 (2008).

<sup>21</sup> “Standing” is a judicial doctrine that does not apply to administrative law judges because they are not part of the judicial branch. See generally *Lansing Sch Ed Ass’n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). However, this brief will use the term “standing” to refer to the statutory right to file a contested case petition.

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.

The ALJ correctly determined that Petitioners include an adjacent landowner within the meaning of Part 353 and Petitioners are aggrieved by the DEQ action and have a threatened legally protected interest in the decision under well-established law.

**A. Petitioners Bily Property is “Adjacent” to the Property.**

The Administrative Law Judge properly concluded that Petitioners have standing under Part 353 and properly rejected the Applicant’s claim that Petitioners lack standing under Part 353 because the road will not be located on the parcel most immediately adjacent to the Bily property.

**1. The Applicant admitted in the Application that the Bily Family parcel is adjacent to the Property included in the Application.**

Most simply, the Applicant admitted in the DEQ Application that the Bily parcel is adjacent to the Property included in the Application. The parcel adjacent to the Bily property is listed in the tax identification numbers described as the “Property” in the Application, and the Bily family is included as an “adjacent property owner” in the Application. As described in the facts, the Applicant’s narrative in favor of its application relied on its ownership of 300+ contiguous acres and boasted that “because Singapore Dunes owns and controls 300 acres north of the channel, Singapore Dunes is in the unique position of controlling and regulation the entire build-out of this acreage.”

The parcel adjacent to the Bilys is unquestionably part of the “proposed use” under the permit. The proposed use description includes discussion of Phase II, and the maps submitted to the township include the parcel in the proposed project as a development parcel. There are critical dunes located on the parcel, and it appears from the final permit approval drawings that some portion of dune stabilization and the revegetation process will occur on the parcel. The proposed road will be used to serve these later development phases. The parcel contiguous to the Bily property is, and should be, part of the permit application.

**2. Exclusion of the Parcel adjacent to the Bily Property would be unlawful.**

The parcel adjacent to the Bily property is also properly included in the permit under the plain language of Part 353 and under general nonsegmentation principles. The plain language of Part 353 states that “the owner immediately adjacent to the proposed use” can file an administrative appeal. The “proposed use” is a specific term required to be described in the application.<sup>22</sup> As explained in the facts section, the Application describes the “Proposed Use” as the construction of the road as well as the houses and Phase II. The plans submitted to the township make clear that the Applicant intends Phase II to include residential development on the parcel adjacent to the Bily property, and the residential development will be served by this road. Part of the critical dunes area extends onto the parcel. In addition, the construction plan for the road attached to the final permit seem to indicate that at least some portion of construction activity and revegetation will occur on the parcel and the parcel may be included in the easement included in the final permit. Therefore, the parcel adjacent to the Bily property is part of the “proposed use” of the Property subject to the permit, and the Bilys, as owners of a parcel immediately adjacent to the proposed use, have standing to appeal under Part 353.

The Applicant urges this Court to ignore this plain language and suggests that being the owner of an adjacent parcel is insufficient if the parcel is large enough or wooded enough. The Applicant does not, however, cite a case that stands for the proposition that a landowner can create a “buffer strip” on its own property that would prevent a lot or parcel contiguous to the property from being considered “immediately adjacent” to the subject property. There is no need for the Court to reach the issue of whether a nonadjoining parcel of land could be considered “immediately adjacent” to a proposed use because, unlike the cases cited by the Applicant, there is no strip of land owned by a third-party that separates the Bily property from the development.

Further, there is no buffer strip. The Applicant’s claim that the Bily property will experience no effects from this proposed use is simply untrue. The road construction process will be visible and

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<sup>22</sup> See **Exhibit E**; MCL 324.35304(a).

audible from their property and there will be environmental effects on the dunes system from the construction and maintenance of the road and the removed vegetation that will affect the plants and animal life they enjoy on their own property and viewing on the Property. Moreover, although the Applicant is not building a road to nowhere. Ultimately, there will be houses and condominiums perched on the dunes and a marina visible from the Bily property, and the Applicant's Planned Unit Development map shows houses built on lots backing up mere feet from the Bily property.

Finally, the Applicant's urged statutory construction is inconsistent with the "nonsegmentation" principle, well established in Michigan law, that when evaluating the effects of a regulation on a landowner's property, all parcels subject to contiguous ownership should be included in what constitutes the landowner's property. The Michigan Supreme Court has explained, "[t]his Court has recognized that contiguous lots under the same ownership are to be considered as a whole."<sup>23</sup> The Court further explained that the principle was particularly applicable where, as here, all the contiguous parcels are included in a comprehensive development plan.<sup>24</sup> The interpretation of the statute urged by the Applicant would not be consistent with the provisions of the APA allowing holders of legally protected interests the opportunity to file a contested case hearing as a "party," which are constitutionally compelled.<sup>25</sup> Under the basic rules of statutory construction, statutes should be interpreted in a manner that renders them constitutional where possible.

**B. Petitioners are Aggrieved by the DEQ's Permit Decision.**

At the most basic level, the Petition should move forward because Petitioners are aggrieved by the DEQ's actions and inactions, including its handling of the review of the Application and issuance of the permit.

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<sup>23</sup> *K & K Const, Inc v Dept of Natural Res*, 456 Mich 570, 580; 575 NW2d 531 (1998).

<sup>24</sup> *K & K Const*, 456 Mich at 581-582.

<sup>25</sup> Const 1963, Art VI, Sec 28. See also Const 1963, Art VI, Sec 1 and Art 1, Sec 17.

## 1. Petitioners have substantial interests.

As discussed in the facts section, Petitioners have asserted a number of substantial interests that will be significantly detrimentally affected by the proposed project and the alleged errors in the DEQ's interpretation and application of the law. Some of the likely effects described in the affidavits, and the summary of affidavits, are as follows:

- a. **Environmental effects.** This project is being built in not just another dunes system and wetland, but in the middle of globally imperiled and fragile resource that is critical to the integrity of the entire dunes ecosystem. The expert letters establish that these experts believe that: (1) the construction of the road according to the proposed plan will do "irreparable damage" to the dune habitat ; and (2) that this damage will not be contained to Singapore Dunes property but will also devastate the entire dunes ecological system, including the Saugatuck Dunes State Park, due to (a) the loss of the wetpannes habitat essential for survival of species throughout the dunes system, (b) damage from residential pollution such as pesticides and road salt, and (c) increased risk of invasive species. These changes will have significant effects on people who use and enjoy the adjacent public areas to observe and enjoy plants and wildlife, as well as collect data for scientific purposes.
- b. **Physical effects to Neighboring Properties.** Due to wetlands construction and fill, as stated in the expert letters, the effects the proposed development are going to have on the dunes system will not be contained to the Singapore Dunes property, but will also have severe effects for the dunes, plants, and wildlife throughout the system and neighboring properties such as the Bily family property, the State Park, and the Patty Birkholz Natural Area.
- c. **Aesthetic and viewshed effects.** This project will have aesthetic impacts from not only Lake Michigan and Kalamazoo River, but also the adjacent State Park and the Patty Birkholz natural area, including due to the changes in the plants and animals and removal of vegetation required and likely to result from the road construction, and the visibility and environmental effects of the structures proposed in Phase I and Phase II.
- d. **Recreation Activity.** The environmental and aesthetic effects will also affect on recreation activity in the area. The waters of Lake Michigan and the Kalamazoo River are used by boaters, swimmers, kayakers, sailboarders and fisherman, and the State Park is enjoyed by skiers, hikers, runners, and birders, often on even a daily or weekly basis.
- e. **Traffic, light, noise, and character of the area.** The construction of the road, as well as the rest of Phase I and Phase II, will result in noise, light, car and boat traffic, and air pollution. If the Bilys can hear noise when there is an increase in boats in the "Cove" on the busiest holidays, they will hear noise generated from the new marina.
- f. **Property Values and Taxes.** The loss of aesthetic, environmental, and recreational value may affect property values in the area, especially if the tourism industry is affected. Moreover, the increase in population will lead to an increased need for public services that might cause an increase in property taxes.
- g. **Local Tourism-Based Business.** Local businesses are concerned that the construction of the homes and road in the dunes wetland will significantly detract from the quality of the adjacent public areas, which will detrimentally affect their businesses and local home values in the area.
- h. **Physical and Other Effects on Riparian Users and Owners.** The proposed development will affect the riparian users/owners of the Kalamazoo River, due to air and water pollution; the effects of plants and animal wildlife; and the increased boat traffic.

- i. **Effects on Integrity of Scientific Data and Research.** The environmental effects will negatively affect the quality of the current research, and because the dunes are such a unique system, this research cannot easily be moved to another location.
- j. **Inconsistency with Master Plan.** The proposed project is inconsistent with the tri-community Master Plan for the area, in which many SDCA members were extremely involved in developing.

**2. Petitioners are aggrieved by the proposed use and the DEQ errors in reviewing and approving the permit application.**

There is not a lot of case law interpreting the meaning of the “aggrieved” standard in the context of the NREPA statutes. However, in the context of MCR 7.203(A), courts have explained:

An aggrieved party is not one who is merely disappointed over a certain result. Rather, to have standing on appeal, a litigant must have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power.<sup>26</sup>

In the context of a non-profit or neighboring landowner challenging the environmental effects of a use, courts have held a party can show that they will suffer a sufficient injury if they “aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.”<sup>27</sup> For example, in one case, the Supreme Court held that it is sufficient to establish an injury when parties and neighbors claimed they “bird-watched, canoed, bicycled, hiked, skied, fished, and farmed in the area” and submitted expert testimony demonstrating these activities would be affected by an environmental harm caused by the challenged activity on a nearby property.<sup>28</sup> Similarly, the Court of Appeals applied this standard and held that a citizen’s group had standing to appeal a zoning decision where its members submitted affidavits establishing its members’ recreational interests would be harmed by a project’s environmental impact.<sup>29</sup>

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<sup>26</sup> *Mathew R Abel, PC v Grossman Investments Co*, 302 Mich App 232, 240 (2013).

<sup>27</sup> *Natl Wildlife Fedn v Cleveland Cliffs Iron Co*, 471 Mich 608, 629 (2004). The *Cleveland Cliffs* test was overruled for a more lenient standing test in *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349 (2010), but its recognition of a legally-protected interest is still instructive.

<sup>28</sup> *Cleveland Cliffs, supra*.

<sup>29</sup> *Acme Twp v Village at Grand Traverse*, unpublished per curiam opinion of the Court of Appeals, issued September 20, 2007 (Docket No. 264109).

Under any understanding of “aggrieved,” the interests claimed by Petitioners are surely sufficient to meet these standards. Petitioner SDCA and its members have considerable aesthetic, recreational, professional, and economic interests in the environmental and aesthetic values of the Saugatuck Dunes. The testimony submitted to the DEQ by experts establish that even just the road construction and placement will have significant effects: building a road through the dunes system will have devastating effects for the fragile and globally-imperiled dunes system because the continuity of diverse ecosystems across the preserved natural areas is exactly what makes the area so special and unique. Moreover, the road construction and maintenance itself will require removal of trees and increase the likelihood of invasive species introduction into the dunes, which will affect plants and animals on neighboring properties as well as the Property. According to the construction and vegetation plans approved with the final permit, the old factory site clearly visible from the Bily property and the river will be used in constructing the road.

Because the ALJ correctly interpreted the statute and determined that Petitioners have standing, Petitioners respectfully urge this Court to affirm the tribunal’s determination that Petitioners have standing.

### **III. PETITIONERS ALSO HAVE STANDING TO FILE THE PETITION AND RAISE CLAIMS UNDER OTHER STATUTES.**

#### **A. The Petitioners Are “Aggrieved” and Have Standing Under Other Statutes.**

In addition to the challenges the petition raises to the permit under Part 353, Petitioners also included issues arising under a number of other statutes in NREPA, including:<sup>30</sup> (1) the manner in which the DEQ reviewed the application, held a public hearing, and determined the application was complete pursuant to applicable administrative procedural requirements; (2) whether the DEQ erred in failing to require the Applicant to meet the standards for a wetlands permit under MCL 324.30301, et seq (“Part 303”); (3) whether the DEQ erred in not complying with the Michigan

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<sup>30</sup> See Petition, Paras 30, 31, 33, 36, 38.

Environmental Protection Act (MEPA), MCL 324.1701, et seq, including by conducting a feasible and prudent alternatives analysis; and (4) whether the DEQ's decision complied with the Michigan Constitution, art 6, sec 28.<sup>31</sup> Under these statutes, Petitioners raise a number of issues. For example, in addition to challenging whether the standards for issuing the permit were met under these various sections, Petitioners will argue that DEQ erred in allowing the Applicant to "piecemeal" its application for NREPA permits and apply for a permit for a road to nowhere. Instead, Petitioners urge, as did the EPA, that the DEQ was required by state and federal law to compel the Applicant to include the impact of all "proposed uses" in the development, which would compel different review under Parts 353 and 31, as well as 301 and 303. Although the Part 303 issues were raised in the SDCA's first contested case petition, if they are not addressed in the scope of that petition, or if a court or tribunal determines that those issues were not ripe until the final permit was issued, then they must be heard as part of this petition and appeal.

Therefore, to the extent needed to raise the claims in the petition, also before this Court is the issue of whether Petitioners have standing under these various statutes, and to challenge the process by which DEQ reviewed the application, deemed it complete, and determined which permits if any are required under the various NREPA and APA provisions. The NREPA statutes and the APA have slightly varying but related standards for who can file a contested case petition related to these issues. Under several statutes, the key question is whether a person is "aggrieved" by the action (or inaction). Under Part 31 regulations, "[a] person who feels aggrieved by any action taken pursuant to [Part 31] or these rules may request a hearing in accordance with the provisions [the APA]." Under Part 303, "[i]f a person is aggrieved by any action or inaction of the department, the person may request a formal hearing on the matter involved."<sup>32</sup> Under MEPA, in an administrative

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<sup>31</sup> See Petition, Paras 32, 35, 37, 42

<sup>32</sup> MCL 324.30319(2). Part 303 defines a person as, inter alia, a "partnership, corporation, association ... or other legal entity." MCL 324.30301(n). And, more generally, organizations have standing to the same extent as their members. *Coldsprings Tp v Kalkaska Co Zoning Bd of Appeals*, 279 Mich App 25, 29; 755 NW2d 553 (2008).

proceeding, “any person” may intervene as a party upon the filing of a pleading asserting that the review involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources.<sup>33</sup> In addition, courts have recognized that where statutes and agency rules do not specifically address a basis for intervention, the APA more generally permits a party to file a contested case petition where the person can show they are a “party” within the meaning of the APA and have a legally “protected interest.”<sup>34</sup>

In this case, Petitioners meet all of these statutory standards. As described above, Petitioners are clearly aggrieved parties who will suffer unique harms and have a unique interest in challenging the DEQ permit. These interests are exactly the types of unique harms that the Courts recognize confer standing to appeal permitting decisions under these various statutory provisions.

The ALJ correctly determined that the Petitioners have standing because the Bilys own adjacent property and have averred facts that demonstrate that they meet the aggrieved party standard. They are similarly aggrieved for purposes of the remaining statutes, and SDCA requests that this Court additionally confirm that Petitioners have standing to file a petition for review under the additional statutes on that basis. However, SDCA also notes that the ALJ erred in determining that its remaining members would not have be “aggrieved” and have standing. For the reasons discussed, *infra*, the type of injuries they will suffer are exactly the type of injuries that are sufficient to meet the aggrieved party standard. The ALJ erred in determining otherwise. For example, under Part 31, the ALJ erred in determining that Petitioners are not aggrieved by damage to floodplain along the Kalamazoo River. Several of the affiants averred that they use the Kalamazoo River, which means that they will be affected by damage to the floodplain that affects the health of the river and the plant and animal habitat that it

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<sup>33</sup> Michigan courts have held that the meaning of “conduct” does not include an agency decision to issue a permit, but may include the underlying action of the landowner, who is a party in this proceeding. See, e.g., *Preserve the Dunes, Inc v DEQ*, 471 Mich 508, 519; 684 NW2d 847 (2004).

<sup>34</sup> See *In re Wayne Co Prosecutor*, 232 Mich App 482, 487; 591 NW2d 359 (1998), interpreting MCL 24.205(4), and quoting Michigan Administrative Law, § 6:15, pp. 26-27.

supports. In addition, particularly if the court or tribunal determined that the Petition did not meet the causes of action provided in other statutes, then the APA and MEPA provide a basis for persons or parties with legally protected interests to challenge agency decisions.

**B. The ALJ Erred in Determining that the SDCA Cannot Raise Part 303 Claims.**

The ALJ also committed a very significant error in determining that Petitioners do not have standing to bring claims under Part 303. The ALJ's sole reasoning was that Petitioners lack "standing" under Part 303 "[s]ince neither the permit nor the special exception authorize any activity under Part 303, any issues arising under that statute is irrelevant." This is clearly incorrect: Part 303 expressly grants standing to file a petition "[i]f a person is aggrieved by any action *or inaction* of the department."<sup>35</sup> Petitioners have properly filed a petition challenging the inaction of the DEQ to require a Part 303 permit, as well as its actions in deciding and sending a letter to the Applicant and the EPA declaring that a Part 303 is not required. Petitioners have standing to do so because, as they ALJ found, the Petitioners are aggrieved parties.

Relatedly, the ALJ erred in limiting the scope of the hearing to exclude Part 303 on the basis of a motion for summary disposition for standing. Standing is a gatekeeping doctrine that determines who has the right to bring a particular appeal or claim. Whether a particular claim or challenge to a permit is substantively valid is a different question from standing. In this instance, Petitioners have clearly established their unique interest and right to challenge the DEQ permit. The same analysis applies to all of the cited sections under NREPA. Therefore, it was inappropriate for the ALJ to limit the scope of the substantive issues in the hearing through the doctrine of standing.

In short, because the administrative appeal review challenges the DEQ review and approval process under a number of sections of NREPA and the APA, Petitioners have standing to continue with the contested case. Petitioners respectfully urge this Court to affirm the ALJ's determination that

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<sup>35</sup> MCL 324.30319(2).

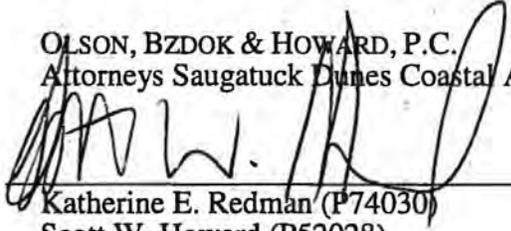
standing exists under Part 353 and 31, but reverse the ALJ's decision that standing does not exist under the remaining claims plead as part of the contested case appeal.

### **CONCLUSION AND RELIEF REQUESTED**

Petitioners respectfully urge this Court to dismiss the "cross appeal" for lack of jurisdiction and deny the alternative request for interlocutory leave to appeal. If this Court reaches the merits of the issues presented, Petitioners respectfully request that this Court remand the case to the Administrative Law Judge to hear and decide all of the claims raised in the case; affirm the Administrative Law Judge's determination that Petitioners have "standing" to file a contested case petition under Part 353; and further rule that the SDCA has standing to raise the issues under other statutory schemes, as well, and regardless the ALJ erred by limiting the scope of the issues that could be raised in the appeal based on standing. In addition, Petitioners request that the Court award Appellant costs, attorney fees, and any other relief that the Court deems to be appropriate and just.

Dated: December 11, 2014

OLSON, BZDOK & HOWARD, P.C.  
Attorneys Saugatuck Dunes Coastal Alliance

By:   
Katherine E. Redman (P74030)  
Scott W. Howard (P52028)

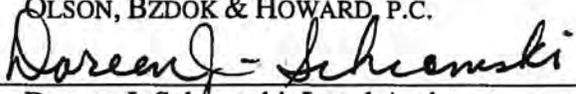
### **PROOF OF SERVICE**

On the date below, I sent by first class mail a copy of Response to Cross-Appellant Singapore Dunes' Appeal – Oral Argument Requested to the counsel of record of all parties to this cause, at their business address(es) as disclosed by the pleadings filed in this matter.

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

Date: December 11, 2014

OLSON, BZDOK & HOWARD, P.C.

By:   
Doreen J. Schramski, Legal Assistant

MEMORANDUM

To: Saugatuck Township Planning Commission  
From: Scott Smith & Nick Curcio, Township Attorneys  
Date: April 14, 2017  
Re: North Shores of Saugatuck, LLC – Proposed PUD and Special Use Approval

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**Introduction**

Your April 24 meeting agenda will include 2 applications from North Shores of Saugatuck LLC:

1. A request for preliminary site condominium and preliminary R-2 PUD zoning for 23 single family home lots surrounding a boat basin.
2. A request for a private marina special approval use.

The Planning Commission held public hearings on these applications at its meeting on March 28, but chose not to make a decision at that time.<sup>1</sup> No further public hearings are required or scheduled.

This memorandum provides relevant factual and legal background regarding the applications, and addresses several points raised by audience members at the March meeting. Accordingly, it is intended to supplement our prior memorandum dated March 28. For sake of completeness, some of the analysis in the prior memorandum is duplicated in this memo.

Because these applications involve differing zoning ordinance provisions, are impacted by some overlapping state and federal permitting, and are related to the settlement of the "Singapore Dunes" litigation, the issues are multi-dimensional and complex. We also recognize that heightened public sentiment related to the property adds complexity.

**Singapore Dunes Settlement**

The Singapore Dunes settlement is important because its provisions both limit and empower the Township and, while freeing the developer from some Township oversight, they also impose additional requirements on the developer. Therefore, reference to some highlights of the settlement may be helpful in your review of the developer's applications.

- A. The Township may not treat this property differently than similarly-situated property in the Township without a rational basis for the different treatment. Consent Judgment ¶2.a.
- B. The Township cannot require 2 means of access from a public street provided the development "otherwise implements alternative safety requirements, as reasonably imposed by the Township, such as":
  - i. A standpipe system or the equivalent for emergency water needs.
  - ii. Use of sprinkler systems in any non-residential buildings and any building containing more than 4 dwelling units.
  - iii. Designation of a space along the Kalamazoo River adjacent to the property for the exclusive use of a fireboat.
  - iv. Designation of an emergency landing area for helicopters.

Note, this is an exemplary list. It does not require these measures and does not preclude the Township from requiring other measures.

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<sup>1</sup> The Planning Commission also considered similar applications at its meeting on February 28, and determined that the applications lacked sufficient information and detail for approval. In particular, the applications presented at that meeting did not indicate whether the residential sites in the PUD were to be held in fee simple ownership or as condominium units, and did not delineate the boundaries of the PUD. The developer substantially revised and supplemented the applications prior to the March 28 meeting.

The Settlement and Release Agreement contemplate construction of up to 125 homes and a marina with up to 66 slips on the property. The settlement terms are to benefit the parties and any of their successors. Therefore, the provisions essentially run with the land.

#### Other Regulation

The developer is not seeking Township approval of the boat basin. The developer is seeking approval from the United States Army Corps of Engineers (USACE), the Michigan Department of Environmental Quality (MDEQ), and the United States Environmental Protection Agency (USEPA) for the boat basin. That application process is lengthy, includes public notices and preempts most local control. Questions about hydrology, effects on the shoreline and dunes, and about the disposal of excess soils will be addressed by the federal and state agencies as part of that procedure.

#### Item 1

This is a request to approve the PUD preliminary plan pursuant to Article VIII of the zoning ordinance and the preliminary site condominium approval pursuant to Article XIII of the zoning ordinance.

The underlying zoning is R-2 Riverside Residential. Homes, accessory buildings, and community buildings are permitted uses in this district and the uses permitted in a residential PUD (§40-272(1), (4) and (11); §40-779(c)). The proposed minimum dwelling unit sizes of 1,600 square feet for a single story dwelling and 1,800 square feet for a multi-story dwelling comply with the minimum floor areas required by §40-272(1).

Section 40-772 of the zoning ordinance requires the following for preliminary PUD plans:

The preliminary plan shall be drawn to scale and shall clearly show the following information:

- a. Boundaries of the property.
- b. Location and height of all existing and proposed Buildings and Structures.
- c. Existing and proposed interior roadway systems and parking facilities, and all existing rights-of-way and easements, whether public or private.
- d. Delineation of the various proposed areas, indicating for each such area its size and the number, size and type of Buildings existing and proposed.
- e. The interior open space system.
- f. The overall stormwater drainage system.
- g. If any grades exceed 30 degrees on portions of the site and if there is a moderate to high susceptibility of erosion, flooding and/or ponding, an overlay outlining the areas of such susceptibility shall be provided.
- h. The principal ties to the neighborhood and community with respect to transportation, water supply and sanitary sewage disposal.
- i. A general description of the availability of community facilities, such as schools, recreational facilities, fire protection services and cultural facilities, if any, and an indication of how such needs are proposed to be made available to occupants of the site.
- j. A location map showing the Uses and ownership of abutting lands, whether in or out of the township.
- k. Information as to whether the proposed Use is compatible with neighboring properties and Uses.
- l. A general statement as to how open space is to be owned and maintained.
- m. If the development is to be constructed in phases, general information as to how the sequence of phases is to proceed.

The drawings and information provided generally comply with these requirements. While previously submitted drawings did not clearly delineate the project boundaries, the developer has remedied that issue by submitting a survey and legal description prepared by Mitchell and Morse Land Surveying, dated March 27, 2017, labeled Job No. 16-1041-P2, and consisting of a total of 2 sheets. We are attaching that document to this memorandum for ease of reference.

As permitted by §40-780(c)(1) for residential PUDs, the developer is proposing reductions in certain requirements of the R-2 zoning district including:

MEMO: North Shores of Saugatuck Project  
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DICKINSON WRIGHT PLLC

- Minimum lot size of 20,000, rather than 40,000 square feet.
- Minimum lot frontage of 100, rather than 150 feet.
- Minimum rear yard setback of 50 feet, rather than 75 feet.
- Minimum accessory building setback on side and rear yards of 10 feet.
- Minimum front yard setback of 58, rather than 73 feet from the center line of the road.

It could be concluded that these deviations from standard requirements seem appropriate for the unique development and targeted market. The required construction materials, minimum dwelling unit sizes, and project amenities, together with the open space seem to offset the adjustments in the minimums. The project's location and layout ensures none of the reductions will adversely affect owners of nearby property.

The Planning Commission is also required to apply the following standards in its review of a proposed PUD:

Sec. 40-779. - General standards.

The Planning Commission shall review the particular circumstances of the Planned Unit Development application under consideration in terms of the following standards and shall approve the PUD only upon a finding of substantial compliance with each of the following standards, as well as substantial compliance with applicable standards established elsewhere in this chapter:

- (1) The Planned Unit Development shall be designed, constructed, operated and maintained so as to be harmonious with the character and Use of adjacent property in the surrounding area.
- (2) The Planned Unit Development shall not change the essential character of adjacent property in the surrounding area.
- (3) The Planned Unit Development shall not create hazards to adjacent property or the surrounding area and shall not involve such uses, activities, materials or equipment which shall be detrimental to the health, safety or welfare of persons or property through the creation or maintenance of such nuisances as traffic, noise, smoke, fumes or glare.
- (4) The planned unit development shall not place demands on public services and/or facilities in excess of current or anticipated capacity.

It could be concluded the proposed project complies with these requirements.

Section 40-491 of the zoning ordinance requires the following for site condominium plans:

Sec. 40-941. - Contents of Site Condominium Project Plan.

A Condominium project plan shall include the documents and information required by section 66 of the Condominium Act (MCL 559.166) and by sections 20-126 and 20-127 as applicable and as determined necessary by the Planning Commission for review of a preliminary plan or for review of a final plan and shall also include the following:

- (1) The Use and occupancy restrictions and maintenance provisions for all General and Limited Common Elements that will be included in the Master Deed.
- (2) A storm drainage and a stormwater management plan, including all lines, swales, drains, basins and other facilities and easements granted to the appropriate municipality for installation, repair and maintenance of all drainage facilities.
- (3) A utility plan showing all water and sewer lines and easements granted to the appropriate municipality for installation, repair and maintenance of all utilities.
- (4) A narrative describing the overall objectives of the proposed Site Condominium Project.
- (5) A narrative describing the proposed method of providing potable water supply, waste disposal facilities and public and private utilities.
- (6) A Street construction, paving and maintenance plan for all Private Roads within the proposed Condominium project.
- (7) A complete list of other review and approval agencies and copies of any comments, recommendations or letters of approval of any agencies of the county, state or federal government having jurisdiction over any element of the plan or its construction.

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Use and occupancy restrictions and other information have been provided. Topography and resulting drainage are depicted. There are not water and sewer facilities. The required narratives were provided. Other approvals have been discussed and are underway. Appropriate conditions can be added to the preliminary plan approvals.

**Item 2**

This is for the special approval of the marina in the R-2 zoning district. Marinas are permitted in the R-2 district by special approval (§40-272(12) and §40-1046).

Special use applications require the following under §40-692(2) of the zoning ordinance:

- (2) *Required information.* An application for a Special Approval Use permit shall be accompanied by the following documents and information:
- a. A Special Approval Use application form supplied by the Zoning Administrator which has been completed in full by the applicant.
  - b. A site plan, Building or Structure plans, specifications and other data required as set forth in the application.
  - c. A statement with regard to compliance with the standards required for approval, as set forth in section 40-693, and other criteria imposed by this chapter affecting the Special Approval Use under consideration.

In addition, §40-693 of the zoning ordinance provides standards for the Planning Commission's review of special approval use applications (in pertinent part):

Sec. 40-693. - Basis of determination.

- (a) *Compliance with standards.* Prior to approval of a Special Approval Use application, the Planning Commission shall ensure that the standards specified in this section, as well as applicable standards established elsewhere in this chapter, shall be satisfied by the completion and operation of the Special Approval Use under consideration.
- (b) *General standards.* The Planning Commission shall review the particular circumstances of the Special Approval Use application under consideration in terms of the following standards and shall approve a Special Approval Use only upon a finding of compliance with each of the following standards, as well as applicable standards established elsewhere in this chapter:
- (1) The Special Approval Use shall be designed, constructed, operated, and maintained in a manner harmonious with the character of adjacent property and the surrounding area.
  - (2) The Special Approval Use shall not change the essential character of the surrounding area.
  - (3) The Special Approval Use shall not be hazardous to adjacent property or involve Uses, activities, materials or equipment which will be detrimental to the health, safety, or welfare of the persons or property by traffic, parking requirements, noise, vibration, smoke, fumes or glare.
  - (4) The Special Approval Use shall not place demands on public services and facilities in excess of capacity.
- (c) *Conditions.* The Planning Commission may impose conditions on a Special Approval Use which are necessary to ensure compliance with the standards for approval stated in this section and any other applicable standards contained in this chapter. Such conditions shall be considered an integral part of the Special Approval Use application and shall be enforced by the Zoning Administrator. . . . .

It could be concluded the proposed marina is harmonious and will not adversely affect any nearby property. It will not place demands on public services.

### **Issues Raised During Public Hearing**

During the public hearing, some commenters referred to standards pertaining to zoning districts other than the R-2 district where the subject property is located. In particular, some referred to Section 40-337 of the zoning ordinance, which applies only to the R-3B zoning district. Others referenced standards for the former zoning classification known as R-4, which was the zoning designation of the property at the time of the Singapore Dunes litigation. None of these standards apply to the pending applications. The property is currently zoned R-2 and, pursuant to the consent judgment in the Singapore Dunes litigation, cannot be treated differently from similarly situated properties.

Some commenters also suggested that removal of sand for constructing the boat basin requires a special use permit under Section 40-740 of the zoning ordinance. We have determined that Section 40-740 does not apply because the removal of sand for purposes of site preparation does not constitute "sand mining." The term "mining" is commonly understood to mean the extraction of resources for the purpose of using those resources offsite (e.g. in manufacturing). Accordingly, a separate special use permit is not required for the sand removal itself. This does not prevent the Planning Commission from addressing possible offsite effects of sand removal with appropriate conditions aimed at minimizing those effects. For example, the Planning Commission could consider conditions on truck traffic to and from the site if there were reason to believe the volume of truck traffic will adversely affect property owners in the vicinity. However, because the site appears fairly isolated from the Township's population centers, such a condition is not included in the list of suggested conditions below.

Finally, some commenters suggested that mooring spaces in the boat basin are subject to the dock regulations in sections 40-908 and 40-909 of the zoning ordinance. This suggestion prompted further review and discussion with the developer's attorney regarding the intended use of the boat basin. Further information on this topic is provided below.

### **Intended Use of the Boat Basin**

In several recent phone conversations, the developer's attorney clarified the intended use of the boat basin. We are attaching a site drawing to this memorandum that may assist you in understanding the following explanation (the "boat basin plan"). We have also asked the developer to prepare its own narrative regarding the intended use of the boat basin, which will also be provided for your review.

Our understanding is that the plans contemplate two distinct categories of boat docks. The first category consists of the docks within the private marina. These are the docks adjacent to or part of the "dockominium" units labeled B1 through B33 on the boat basin plan. The dock regulations in sections 40-908 and 40-909 of the zoning ordinance do not apply to these docks, because the docks are part of a private marina subject to special use approval.<sup>2</sup> Sections 40-908 and 40-909 apply only to docks extending from individual lots or condominium units.

The dockominium units in the southern portion of the boat basin (B1 through B26) will be offered for sale to anyone who owns a residence within the approximately 200 acres of land commonly known as the Denison Property, including but not limited to individuals who own a residence within the PUD. The dockominium units in the northern portion of the boat basin (B27 through B33) will be offered for sale first to the owners of condominium units 22 through 26, which are directly across the street and do not front onto the boat basin.

A total of 33 paved parking spaces are available for marina users, one for each boat slip. The majority of the parking spaces are provided across the street from dockominium units B1 through B16. The remaining 8 parking spaces are provided across the street from condominium units 18 and 19.

The second category of boat docks within the boat basin would be located along the seawall adjacent to individual condominium units. The developer does not intend to construct these docks itself, but instead anticipates that individual condominium unit owners might do so in the areas shown on the boat

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<sup>2</sup> See Zoning Ordinance Section 40-1046 (stating that "Docks, Piers, and Wharves" are uses that are "not defined herein as marinas.")

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basin as rectangular extensions from the condominium units. By their terms, the dock regulations in sections 40-908 and 40-909 of the zoning ordinance apply to any construction in these areas. Nevertheless, we are recommending a condition of PUD approval that reiterates this point. (See below.)

### Conditions

A number of conditions might be considered if you decide to approve the PUD, site condominium plans, and the special approval use. Based on our review of the proposed plans, input from the public and Planning Commission members during the March meeting, and subsequent communications with the developer's attorney, we suggest considering the following conditions:

#### Conditions for PUD and Site Condominium Approval

1. The applicant shall obtain all required state and federal permits and approvals to construct the boat basin, including, without limitation, any that are needed from the United States Army Corps of Engineers (USACE), the United States Environmental Protection Agency (USEPA), and the Michigan Department of Environmental Quality (MDEQ) before any construction permits are issued. These permits may be obtained following final PUD and site condominium plan approval.
2. Compliance with all conditions and requirements related to the permits and other approvals obtained pursuant to condition 1.
3. Obtain and comply with any terms and conditions of all needed state and county permits for private wells and septic systems.
4. Before any occupancy permit is issued for any dwelling unit, the private road leading to the site from the public road and through the site (currently shown as Saugatuck Beach Road) shall be constructed in compliance with the private road standards in §40-658 of the zoning ordinance and paved.
5. The plans shall be submitted to and, to the extent needed and not already provided in these conditions, approved by the County Health Department, County Road Commission, County Drain Commissioner, and any appropriate state agency before any construction permits are issued. These approvals may be obtained following final PUD and site condominium plan approval.
6. Fully dimensioned plans shall be submitted and staff shall confirm the developer's open space and other area and dimensional calculations before final PUD and site condominium plan approval.
7. Anything shown on drawings outside the area of the PUD and site condominium project other than the private road leading to it is not part of this approval.
8. The project, including the marina, shall be constructed in a single phase beginning no later than March 15, 2018.
9. The developer shall provide the following items for the benefit of the condominium owners: (i) an emergency landing area for helicopters, (ii) a mooring space along the Kalamazoo River dedicated for fire, law enforcement or other federal, state or local public safety agency boat access, and (iii) standpipes in locations and meeting specifications approved by the Township Zoning Administrator after consultation with the Fire Chief. These items must be designated on the final plan. If any of these locations are outside the PUD, the developer shall grant and record an easement for the use of the item to the condominium owners in a form reasonably acceptable to the Township Attorney prior to approval of the final plan.
10. Open space shall not be reduced from the areas shown on the plans.
11. No changes shall be made in the Preliminary Construction Requirements, the Preliminary Common Area Maintenance Provisions, or the Preliminary Use and Occupancy Restrictions presented as part of the applications without the prior written consent of the Township Zoning Administrator, Township Building Official and Township Attorney. Any major change (*i.e.*, a change that the Township Zoning Administrator, Township Building Official or Township Attorney believe is substantive enough to merit review by the Planning Commission) may not be made unless and until

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DICKINSON WRIGHT PLLC

accepted by the Planning Commission. They shall be incorporated in the site condominium documents as required by the zoning ordinance.

12. No changes may be made to any front-yard setbacks, side-yard setbacks, rear-yard setbacks, accessory building setbacks or other aspects of building envelopes as presented in the application materials unless and until accepted by the Planning Commission. The developer shall promptly inform the Township Zoning Administrator of any such proposed changes, and shall explain the reason for the proposal (*e.g.*, reconfiguration in connection with state or federal permit applications).

13. The community building shall have the size and dimensions depicted on the plans.

14. The dock density regulations in sections 40-908 and 40-909 of the zoning ordinance apply to any docks constructed along portions of the seawall that adjoin condominium units 17-21 and 27-37.

15. Compliance with all conditions for the special use approval of the marina.

**Conditions for Marina Special Use Approval**

1. The applicant shall obtain all required state and federal permits and approvals to construct the boat basin an marina, including, without limitation, any that are needed from the United States Army Corps of Engineers (USACE), the United States Environmental Protection Agency (USEPA), and the Michigan Department of Environmental Quality (MDEQ).

2. There shall be no fuel sales, no pump-out services or facilities, no boat storage facilities, no boat launch facilities, and no in and out boat service provided at the marina.

3. No itinerant use shall be allowed of any of the slips. The slips may be used only by the owners of the respective dockominium units, and by the owners' guests.

4. "Live-aboard" use is not permitted on any boat stored in the slips.

5. The boardwalk and dock extensions that are part of or adjacent to the dockominium units may not be constructed until all other common elements designated on the final plan (including the community building, community restrooms, streets, etc.) are fully constructed.

6. No more than 15 slips in the marina may be used or occupied until at least 5 residences are fully constructed.

7. The marina shall have only those buildings, parking areas, and other improvements and amenities shown on the approved PUD and site condominium plans.

**Possible Action**

Since the April 24 meeting will be the third consecutive meeting at which the Planning Commission will consider proposed development for this site, we recommend that the Planning Commission take action on the applications. If the Planning Commission wishes to approve the applications, possible motions that could be made are as follows:

Motion to approve the preliminary PUD plan and preliminary site condominium plans as submitted by North Shores of Saugatuck, LLC subject to conditions 1 through 15 as stated in the Dickinson Wright memo dated April 14, 2017.

Motion to approve the special use for a marina as requested by North Shores of Saugatuck, LLC subject to conditions 1 through 7 as stated in the Dickinson Wright memo dated April 14, 2017.

You may, of course, modify or omit any or all of the suggested conditions, and/or add additional conditions

If you wish to deny one or more of the requests, it is important to state the reasons for your denial.

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April 24, 2017

*Via Email & U. S. Mail*

~~CONFIDENTIAL SUBJECT TO  
ATTORNEY-CLIENT PRIVILEGE~~

Planning Commission  
c/o Steve Kushion, Zoning Administrator  
Saugatuck Township  
3461 Blue Star Hwy  
Saugatuck, MI 49453

Re: Letter from attorney Stephen McKown regarding North Shores LLC proposal

Dear Planning Commissioners:

At your meeting on March 28, 2017, you will consider 2 applications from North Shores of Saugatuck LLC, both of which were postponed during the April meeting:

1. A request for preliminary site condominium and preliminary R-2 PUD zoning for 23 single family home lots surrounding a boat basin.
2. A request for a private marina special approval use.

We previously advised the Planning Commission on legal issues relating to these applications in memoranda dated March 28 and April 14. Last Thursday, April 20, we received a letter from local attorney Stephen McKown raising a variety of procedural and substantive issues.<sup>1</sup> Because Mr. McKown asserts that several aspects of the proposal are unlawful, we are providing this confidential letter to assist the Planning Commission in evaluating his contentions. For ease of reference, the section numbering below corresponds to the numbering in Mr. McKown's letter.

I. Basis for Decision

The letter begins by correctly pointing out that the Planning Commission is required to specify the basis for its decision and any conditions imposed.<sup>2</sup> This requirement is intended to create a sufficient record for a court to review the legality of the decision, if it were to be appealed.<sup>3</sup> If the record does not sufficiently indicate the reason for the decision, a reviewing court may vacate the Planning Commission's decision and remand for further proceedings.<sup>4</sup>

Here, the pending applications have been discussed at length in two prior Planning Commission meetings, and have been analyzed in several public legal memoranda. The discussion at the prior meetings — particularly during public comment — identified both pros and cons of the proposals. Accordingly, we believe that the record will be sufficient to enable judicial review of the ultimate decision on the applications. This will be particularly true after Wednesday's meeting, where we will encourage you to discuss the applicable standards for each application before voting on any motion to approve or disapprove. Moreover, in a new memorandum provided simultaneously with this letter, we suggest revised motion language that includes express findings regarding the applicable standards.

<sup>1</sup> Notably, Mr. McKown's letter does not indicate that it was written on behalf of a client. Thus, it appears the letter expresses his personal views.

<sup>2</sup> MCL 125.3502(4); MCL 125.3503(6).

<sup>3</sup> See, e.g., *Szluha v Charter Twp. of Avon*, 128 Mich App 402, 407; 340 NW2d 105 (1983).

<sup>4</sup> *Deling v Twp of Girard*, No 329767, 2016 WL 6780638, at \*1 (Mich. Ct. App. Nov. 15, 2016).

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II. Dockominium Units

The letter contends that the proposed “dockominium units” violate the zoning ordinance and state law in a variety of ways. These contentions all stem from the mistaken belief that the dockominium units would be limited common elements of the condominium. Instead, as explained in detail in our memorandum dated April 14, the dockominium units are separate condominium units consisting of water located alongside docks in the marina. This is clearly indicated in the drawing attached to our April 14 memorandum, which shows the dockominium units labeled as units B1 through B33.<sup>5</sup> The developer has recently provided a revised narrative and drawing set that should clear up any remaining confusion, both of which are enclosed with this letter for your review.<sup>6</sup>

When properly understood, the developer’s plans for the dockominium units do not violate the zoning ordinance or the Michigan Condominium Act. First, because the dockominiums are condominium units rather than limited common elements, there is no requirement that they be sold only to individuals who reside in the condominium development. Second, the new set of drawings submitted by the developer properly labels the dockominiums as condominium units, and the revised narrative clearly indicates their intended use. Third, the zoning ordinance does not require Township review and approval of master deed provisions pertaining to the use of condominium units. Instead, the Township only reviews the portions of the master deed pertaining to the common elements.<sup>7</sup> Fourth, the dockominium units do not require any variances from zoning ordinance requirements. As explained in our April 14 memorandum, the dockominium units are proposed as part of a private marina that is subject to special use approval. The zoning ordinance does not provide any dimensional standards for docks within the marina.

III. Waterfront Access

Next, the letter contends that the proposed boat basin violates the Township’s waterfront access rules in section 40-910 of the zoning ordinance. In particular, it argues that the bed of the boat basin will be a “waterfront access property” as defined by the zoning ordinance, and that as a result only 4 condominium units are permitted to access the natural portion of the Kalamazoo River from the boat basin. Mr. McKown further contends that the area where the boat basin intersects with the Kalamazoo River constitutes “water frontage” within the meaning of the ordinance.

We disagree with this interpretation. In our opinion, the mouth of the proposed boat basin is not a “waterfront access property”<sup>8</sup> because it is part of an artificial water body, and therefore is not a “lot” or “parcel” as those terms are defined in the zoning ordinance.<sup>9</sup> Moreover, the term “frontage” is commonly understood to mean a portion of *land* lying adjacent to a water body or street,<sup>10</sup> and does not include areas where artificial waterbodies intersect natural waterbodies.

As we explained in our April 14 memorandum, we believe that the water in the boat basin should be treated as an extension of the Kalamazoo River for purposes of the zoning ordinance, and should therefore be regulated as an “inland waterway.”<sup>11</sup> This means that any docks built adjacent to the land

<sup>5</sup> This drawing by Mitchell & Morse Land Surveying is dated March 25, 2017, and labeled Sheet 3 of 3 for Project Number 16-1041. Mr. McKown’s confusion was likely caused by the March 16 drawing labeled Sheet 1 of 3, which shows the docks shaded as limited common elements. The developer’s attorney has informed us that the shading on that drawing was a mistake that occurred due to a quirk in the surveyor’s CAD software.

<sup>6</sup> Specifically, the developer has submitted new copies of Sheets 1 and 2 for Project Number 16-1041. These drawings are both dated April 23, 2017. The copy of Sheet 3 dated March 16, 2017, is the third sheet in the set.

<sup>7</sup> See Zoning Ordinance § 40-941(1).

<sup>8</sup> The zoning ordinance defines the term “waterfront access property” to mean “a Lot or Parcel or two or more contiguous Lots or Parcels (or condominium units treated as Lots or Parcels), abutting an Inland Waterway . . . .” Zoning Ordinance § 40-907.

<sup>9</sup> The terms “lot” and “parcel” are both defined as being areas of “land” with certain characteristics. Zoning Ordinance § 40-7.

<sup>10</sup> See, <https://www.merriam-webster.com/dictionary/frontage>.

<sup>11</sup> The term “inland waterway” is defined to mean “Goshorn Lake, Silver Lake and the Kalamazoo River.” Zoning Ordinance § 40-907. It is true that man-made waterbodies are legally distinct from naturally occurring ones, but in this circumstance the purposes of the ordinance are best served by treating them the same for zoning purposes. Mr. McKown is correct that the condominium unit owners will not have riparian rights in the boat basin. See, e.g., *Thompson v Enz*, 379 Mich 667, 154 NW 2d 473 (1967). That is

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condominium units in the development would be subject to the dock density regulations in section 40-908. The developer agrees with this interpretation and is willing to accept it as an express condition on the PUD approval. It is included as one of the proposed conditions in our accompanying memorandum.

IV. Critical Dunes

Finally, the letter asserts that the Township should deny special use approval for the marina because the construction of the boat basin would require removing large quantities of sand from a critical dune. It specifically contends that denial is appropriate because state law requires that the special use approval criteria in a zoning ordinance ensure compatibility with the "natural environment."<sup>12</sup>

While it has true that state law provides some authority to regulate environmental effects through zoning, that authority only extends so far. In many instances, municipal authority is either expressly or impliedly preempted by state environmental statutes.

As some of you may remember, one of the lawsuits between the Township and the previous owner, Singapore Dunes LLC, related specifically to this issue. In 2013, Singapore Dunes sued the Township in state court alleging that the Township's critical dune overlay district was preempted by Part 353 of the Natural Resources and Environmental Protection Act.<sup>13</sup> Part 353 provides that local zoning regulation pertaining to critical dunes "shall not be more restrictive than the model zoning plan or the standard of review for permits or variances prescribed in the model zoning plan."<sup>14</sup> It further provides that Michigan Department of Environmental Quality ("MDEQ") has exclusive jurisdiction to issue permits for uses within designated critical dune areas unless the MDEQ has authorized the local municipality to do so, which it has not done for Saugatuck Township.<sup>15</sup> Based on these provisions, Singapore Dunes made a strong argument that the Township's overlay ordinance was preempted by Part 353, and the Township settled the lawsuit on unfavorable terms.<sup>16</sup> If the Planning Commission were to deny the pending applications on the grounds that they interfere with the critical dune, its decision would be subject to a similar legal challenge. In that circumstance, we think a reviewing court would likely side with the developer.

Moreover, as a practical matter, the proposed boat basin is subject to an extensive state and federal permitting process that will address environmental issues relating to the proposal. The MDEQ and EPA have special expertise in environmental issues, and are better suited than the Township to determine whether the proposal is appropriate from an environmental perspective.

We hope that this letter is helpful in your review of the arguments raised in Mr. McKown's letter. We will be in attendance at the April 26 meeting and can address any questions you might have at that time.

Sincerely,

DICKINSON WRIGHT PLLC



Scott G. Smith



Nicholas Curcio

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why the portion of the boat basin adjacent to each condominium unit is designated as a limited common element appurtenant to that unit.

<sup>12</sup> MCL 324.35301 *et seq.*

<sup>13</sup> MCL 324.35302(a).

<sup>14</sup> MCL 324.35312(2)

<sup>15</sup> MCL 324.35304(5)-(7).

<sup>16</sup> *Singapore Dunes, LLC v Saugatuck Twp*, Allegan County Circuit Court Case No 13-51770-CH, Consent Judgment (Oct 7, 2013) (providing that the Township cannot apply the overly district standards to the property).

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GABRIELSE LAW plc  
Attorney Carl J. Gabrielse

July 11, 2017

Bill Rowe, Chairman  
Zoning Board of Appeals  
Saugatuck Township  
Saugatuck Township Hall  
3461 Blue Star Memorial Hwy  
Saugatuck, Michigan 49453

**Re: PUD, SAU, and Site Condo Application of North Shores of Saugatuck, LLC**

Dear Mr. Rowe and Members of the Board,

I am writing you on behalf of North Shores of Saugatuck, LLC (“Northshore”) regarding the claim of appeal delivered to the Township on July 3, 2017 by the Saugatuck Dunes Coastal Alliance (“SDCA”). As will be explained more fully below, the Saugatuck Township Zoning Board of Appeals (“ZBA”) does not have jurisdiction over the claimed appeal because the SDCA lacks standing. Accordingly, no further action should be taken by the ZBA to hear or consider the appeal.

**I. The Township Ordinance Gives the ZBA the Authority Over the Subject Matter of This Appeal**

As a preliminary procedural matter, the ZBA should determine that the township ordinance provides gives the ZBA appellate authority over the subject matter of this appeal, namely, the review of a decision by the planning commission regarding a special land use or planned unit development.

The Michigan Zoning Enabling Act, MCL § 125.3101 *et seq* (“MZEA”), states that a ZBA has the power to hear appeals from the planning commission—including decisions on special land use and planned unit developments—as long as the township ordinance provides for it. MCL § 125.3603(1). The township ordinance indicates that the ZBA has the authority to:

hear and decide appeals from and review of any order, requirement, decision or determination made by the Zoning Administrator or the Planning Commission.

Ord. § 40-72 (emphasis added). The zoning ordinance provides for the appeal to the ZBA of any decision of the planning commission. Clearly the term “any order, requirement decision or determination” includes decisions concerning special land use and planned unit developments. Accordingly, the ZBA should determine as a preliminary matter that the township ordinance does give it the appellate authority over the subject matter of this appeal.

For the reasons stated below, however, once the ZBA has determine that it has appellate authority over the subject matter of this appeal, it should conclude that it does not have jurisdiction over this particular appeal because the SDCA lacks standing.

## II. The Jurisdiction of the ZBA is Dependent the Existence of Standing

The jurisdiction of the ZBA to hear an appeal is dependent on the appellant having standing to assert the claims being made. *See Michigan Chiropractic Council v. Comm. Of the Office of Fin & Ins Servs.*, 475 Mich 363 (2006). If the appellant lacks standing, the ZBA does not have jurisdiction to hear the appeal. *See Lansing Schools Education Association v. Lansing Board of Education*, 487 Mich 349, 372 (2010).

The power and jurisdiction of the ZBA are governed by state law, specifically, the MZEA. Although a township ordinance may limit the types of appeals that may be brought to the ZBA (ex. MCL § 125.3603(1)), it may not expand the jurisdiction of the ZBA beyond what is provided for by statute. *Unger v. Forest Home Township*, 65 Mich App 614 (1976). Accordingly, it is necessary to look to the MZEA to determine who may bring an appeal to the ZBA.

The MZEA provides that “an appeal to the zoning board of appeals may be taken by a person aggrieved...” MCL § 125.3604(1) (emphasis added). Thus, the threshold question the ZBA must ask—prior to exercising jurisdiction over an appeal—is whether the appellant has been “aggrieved.”

As will be shown below, the SDCA has not been aggrieved and therefore lacks standing to bring this appeal or invoke the jurisdiction of the ZBA.

## III. The SDCA Lacks Standing Because It has Not Been Aggrieved

The SDCA lacks standing to bring this appeal because it has not been aggrieved. In a 2015 case in the Allegan County Circuit Court involving the SDCA, Judge Kevin W. Cronin defined “aggrieved” as follows:

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. ... Courts have consistently ruled that to have standing parties must have special damages not incurred by other property owners similarly situated.

*Saugatuck Dunes Coastal Alliance v. MDEQ*, Opinion and Order Dated February 6, 2015, Case No.: 14-053883-AA (Allegan County Circuit Court) (emphasis added). This definition finds support from the Michigan Supreme Court:

a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large.

*Lansing Schools Education Association v. Lansing Board of Education*, 487 Mich 349, 372 (2010) (emphasis added). The burden of proof is on the party claiming to be aggrieved to establish “special damages;” mere allegations of some potential harm are not sufficient. *Joseph v. Grand Blanc Twp*, 5 Mich App 566, 570-71 (1967); *Unger v. Forest Home Twp*, 65 Mich App 614, 617-18 (1975); *Blue Lake Fine Arts Camp v. Blue Lake Twp Zoning Bd of Appeals*, 2010 WL 624892 (Mich App, Feb 23, 2010).

The NIMBY or “not-in-my-backyard” mindset prevalent in society today has led to a myriad of court decisions regarding what it means to be aggrieved for purposes of establishing standing. The following table contains a summary of types of alleged damages that the Michigan courts have determined do not confer standing:

<u>Case/Description</u>	<u>Damages Alleged</u>	<u>Court’s Decision</u>
<i>Joseph v. Grand Blanc</i> (commercial rezoning)	- Increase in traffic - Economic and aesthetic losses	<b>Not “aggrieved”</b>
<i>Unger v. Forest Home Twp</i> (apartment complex on lake)	- Increased lake traffic - Decreased property values	<b>Not “aggrieved”</b>
<i>Tobin v. Frankfort</i> (condominium development)	- Increased population, traffic, noise, lights, and pollution - Decreased home values - Environmental impacts/loss of trees and vegetation - Adverse effect on aesthetics of neighborhood	<b>Not “aggrieved”</b>
<i>City of Holland v. DNR</i> (coal plant)	- Adverse impacts on personal health, recreational activities, and aesthetic interests - Adverse impact on character of neighborhood	<b>Not “aggrieved”</b>
<i>LaBelle v. CMU</i> (hotel/conference center)	- Congestion, noise and traffic - Loss of architectural purity - Economic injury to nearby businesses	<b>Not “aggrieved”</b>
<i>Weber Land v. Deerfield</i> (mining operations)	- Environmental impacts from mining	<b>Not “aggrieved”</b>

These cases illustrate the type of alleged injuries that Michigan courts have determined do not constitute the basis for an appeal.

One of the cases cited in the table above, *Tobin v. City of Frankfort*, No. 296504, 2012 WL 2126096 (Mich Ct App, June 12, 2012), merits further discussion. The *Tobin* case involved the approval of a condo development in the City of Frankfort. The FRIENDS OF BETSIE BAY, a group of nearby landowners (“FOBB”), sought to block the project and claimed to be aggrieved. The Michigan Court of Appeals stated:

The generalized concerns relating to environmental impacts, population increases, aesthetics and pecuniary harm do not suffice to demonstrate special damages different in kind from those suffered by the community, so as to qualify [FOBB] as an aggrieved party.

*Tobin*, supra. Concluding that allegations of “development-related aesthetic changes” and “environmental impacts” were insufficient to qualify the FOBB as aggrieved, the Court determined that the group lacked standing to bring the appeal.

In the present appeal, the SDCA has not suffered, or even alleged, special damages that would give them standing to bring this appeal. The SDCA’s claim of appeal contains scant allegations regarding standing:

[T]he 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. ... Members attended each Planning Commission meeting ... and offered public comments concerning the potential impact of the project on the dunes, the dunal ecosystem, and the Saugatuck area generally.

(SDCA Claim of Appeal, pgs. 1-2, dated June 30, 2017) (emphasis added). These concerns—environmental impact, aesthetic benefits, recreational opportunities, and scientific research—are precisely the sort of generalized, speculative allegations that fall far short of the statutory threshold for standing.

It should be noted, in fact, that both the ZBA and the Allegan County Circuit Court have already determined in prior cases that the SDCA lacks standing to challenge matters related to the Northshore property.

In 2013, the SDCA and the Bily Family appealed the planning commission’s preliminary approval of a site condominium project to the ZBA. The Bily Family owned real estate adjacent to the Northshore property, and presumably was named specifically to strengthen the SDCA’s claim of standing. Citing to the MZEA and the Michigan Supreme Court’s decision in *Lansing Schools Education Association*, supra, the ZBA concluded that neither the SDCA nor the Bily Family had standing to appeal the planning commission’s approval:

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 ....’ For the reasons set forth in this Resolution, the Zoning Board of Appeals finds that the SDCA and the Bily Family do not have "a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large," per Lansing Schools Education Association, MEA/NEA v Lansing Board of Education, 487 Mich 349, 372 (2010), and therefore they do not have standing.

(ZBA Resolution dated April 4, 2013, ¶ 2(A)) (emphasis added) (Attached as Exhibit 1). Notably, the ZBA also observed that the SDCA is essentially opposed to any development of the Northshore property:

[T]he complaints of [the SDCA] apply to any development of the property in question, further showing the general nature of their alleged damages from the proposed development.

*Id* (emphasis in the original). Accordingly, the ZBA refused to hear the SDCA’s appeal.

In 2014, the SDCA and the Bily Family appealed a decision by the Michigan Department of Environmental Quality (“MDEQ”) regarding the Northshore property to the Allegan County Circuit Court. While this appeal concerned a decision by a state administrative agency, rather than the township’s planning commission, the Court nevertheless applied the same standing analysis:

The next prong of the [standing test] states that one must be aggrieved. ... 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. ... Courts have consistently ruled that to have standing parties must have special damages not incurred by other property owners similarly situated. ... 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. ... THEREFORE, the Court finds and ORDERS that [the SDCA] FAILED to demonstrate that it would suffer special damages adequate to support its status as an aggrieved party ..., 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.

*Saugatuck Dunes Coastal Alliance v. MDEQ*, Opinion and Order Dated February 6, 2015, Case No.: 14-053883-AA (Allegan County Circuit Court) (Attached as Exhibit 2).

**IV. Conclusion**

As the preceding discussion shows, the SDCA is not aggrieved and has no standing to appeal. Disturbingly, the SDCA and its attorney are well aware that this is a frivolous appeal because the ZBA told them so in 2013 and the Circuit Court reminded them again in 2015.

Their persistence in filing multiple frivolous proceedings can only be understood in light of the SDCA's self-described strategy:

**Our strategy [is] death by a thousand paper cuts.<sup>1</sup>**

Inundate Northshore and the Padnos family with so much paperwork that they eventually bleed out. Become the proverbial thorn in the Padnos' side. File as many challenges and appeals as possible, regardless of their merit. Delay the development as long as possible so that Northshore runs out of money.

The SDCA is philosophically opposed to any development on the Northshore property and are simply attempting to compel Northshore to maintain the property in its current condition. The SDCA's position amounts to nothing less than a proposed taking of private property without payment of compensation.

The ZBA should not facilitate this unlawful request, and no further consideration should be given to this appeal.

Please advise us and the purported appellants that the appeal will not be heard.

Yours Truly,

**GABRIELSE LAW PLC**



Carl J. Gabrielse

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<sup>1</sup> This is how a SDCA board member described its strategy at a public work shop on June 27, 2017. This is a verbatim quote.

October 16, 2017

Planning Commission  
Saugatuck Township  
3461 Blue Star Highway  
P.O. Box 100  
Saugatuck, Michigan 49453

**Subject:** Detailed Site Plan Review  
North Shores of Saugatuck, LLC  
Proposed Planned Unit Development (PUD) and Site Condominium

**Location:** Approximately 51 Acres – Part of Government Lots 2 & 3, Lying Northeasterly of the Kalamazoo River and the Kalamazoo River Channel - Served by Saugatuck Beach Road

**Zoning:** R-2 Riverside Residential Zoned District

Dear Commissioners,

Per your request, we have reviewed the above referenced application. The applicant proposes development of a residential planned unit development on the subject 51 acres that will consist of 23 single family home sites surrounding a boat basin; a private marina (including 'dockominium' boat slip condominium units); and related open space.

On March 28, 2017, the Planning Commission held a public hearing on the application for the proposed PUD/site condominium development and marina. On April 26, 2017, the Planning Commission granted conditional approval of the preliminary plan for the PUD/site condominium development dated April 26, 2017, including the narrative statements dated April 23, 2017 provided with the plan, and conditional special use approval for the proposed marina.

Pursuant to Section 40-772 (5), Zoning Ordinance, the applicant is requesting *Detailed Site Plan Approval* for the proposed PUD/site condominium development at this time. We have reviewed the Detailed Site Plan Application in consideration of 1) the conditional approval of the Preliminary Plan; 2) the Site Plan Review, PUD, and Site Condominium sections of the Township Zoning Ordinance; 3) the Consent Judgment and Final Order between the Township and Singapore Dunes, LLC; and, 4) sound planning and design principles. We offer the following comments for your consideration.

- 
- Pursuant to Section 40-772 (5), after receiving approval of a preliminary plan, a detailed site plan shall be submitted to the Planning Commission for approval. Further, the detailed site plan shall conform to the approved preliminary plan, and incorporate all revisions recommended by the Planning Commission.
  - The detailed site plan application (includes site plan dated September 15, 2017) has been reviewed in consideration of the conditionally-approved preliminary plan.

- The detailed site plan application reflects a relocation of the clubhouse/restrooms and related parking and a shift in the location of the required cul-de-sac, but is determined to substantially conform to the approved preliminary plan.
- The detailed site plan application has responded to the 19 conditions of approval set forth by the Planning Commission on April 26, 2017. The following is noted as to each condition of approval:
  1. *The applicant shall obtain all required state and federal permits and approvals to construct the boat basin before any construction permits are issued. These permits may be obtained following final PUD/site condominium plan approval.*
  2. *Compliance with all conditions and requirements related to the permits/approvals obtained pursuant to Condition #1.*
    - The Applicant is currently working toward securing the required state and federal permits and approvals.
    - This should remain a condition of approval.
  3. *Obtain and comply with any terms and conditions of all needed state and county permits for private wells and septic systems.*
    - The Detailed Site Plan Application states that ‘water will be provided by private wells and sanitary sewer disposal will be handled by private septic systems, both as approved by the Allegan County Health Department.’ (Attachment 1)
    - The Detailed Site Plan Application includes a Well and Septic Location Plan (Attachment 12), wherein it is noted ‘Exact locations subject to Allegan County Health Department Approval’.
    - This should remain a condition of approval.
  4. *The private road leading to the site from the public road and proposed to extend through the site (currently shown as Saugatuck Beach Road) shall be constructed in compliance with the private road standards set forth in Section 40-658, and paved.*
    - The proposed layout and design of the private road is consistent with the Terms of the Consent Judgment.
    - The proposed private road is located within an area designated by the MDEQ as ‘critical dunes’. Accordingly, the layout and design of the private road and the private road construction plans (Attachment 11) are subject to MDEQ review/approval.
    - The private road is proposed to be paved.
    - Applicable provisions of Section 40-658 require the following documentation be provided by the applicant:

- A recorded ingress/egress easement for the benefit of the owners and users of the building sites served by the private road, as well as for the construction, maintenance, repair, and reconstruction of utilities.
  - A recorded joint maintenance and easement agreement providing for the perpetual private (nonpublic) maintenance of the private road.
  - A performance guarantee covering the estimated cost of the private road.
  - Location map of the private road and its name.
5. *The plans shall be submitted to and, to the extent needed and not already provided in these conditions, approved by the County Health Department, County Road Commission, County Drain Commissioner, and any appropriate state agency before any construction permits are issued. These approvals may be obtained following final PUD and site condominium plan approval.*
- The Applicant is currently working toward securing the required county permits and approvals.
  - This should remain a condition of approval.
6. *Fully dimensioned plans shall be submitted and staff shall confirm the developer's open space and other area and dimensional calculations before final PUD and site condominium plan approval.*
- The survey and legal description for the subject site (Attachment 13) confirm a site area of 50.95 acres.
  - The maximum density and open space calculations set forth in Attachment 3 and on the detailed site plan have been confirmed.
  - The lot size, lot frontage and yard setback dimensions set forth in Attachment 2 and on the detailed site plan have been confirmed.
7. *Anything shown on drawings outside the area of the PUD and site condominium project other than the private road leading to it is not part of this approval.*
- The project boundaries reflected on the detailed site plan are unchanged from the approved preliminary plan.
8. *The project, including the marina, shall be constructed in a single phase beginning no later than March 15, 2018.*
- The Detailed Site Plan Application states 'It is anticipated that the Development will be constructed in a single phase, with the boat basin, access road and site condo infrastructure being constructed within the next 18 months.' (Attachment 1)
  - This should remain a condition of approval.

9. *The Developer shall provide the following items needed for the benefit of the condominium owners:*
  - *Emergency landing for helicopters* – shown on detailed site plan; easement prepared/submitted (Attachment 7).
  - *A mooring space along the Kalamazoo River dedicated for public safety agency boat access* – shown on detailed site plan; easement prepared/submitted (Attachment 7).
  - *Standpipes in locations and meeting specifications approved by the Township Zoning Administrator after consultation with the Fire Chief* – shown on detailed site plan; easement prepared/submitted (Attachment 7).
  - Attachment 7 should be reviewed/approved by the Township Attorney and be recorded.
10. *Open space shall not be reduced from the areas shown on the plans.*
  - The open space boundaries reflected on the detailed site plan are unchanged from the approved preliminary plan.
11. *No changes shall be made in the Preliminary Construction Requirements, the Preliminary Common Area Maintenance Provisions, or the Preliminary Use and Occupancy Restrictions presented as part of the applications without Township consent.*
  - This should remain a condition of approval.
12. *No changes may be made to any front yard setbacks, side yard setbacks, rear yard setbacks, accessory building setbacks or other aspects of building envelopes as presented in the application materials unless accepted by the Planning Commission.*
  - Dimensional deviations presented in the preliminary plan application were considered and approved by the Planning Commission consistent with the *Scope* of the PUD regulations set forth in Section 40-780. Specifically, the Planning Commission accepted reduced lot sizes, lot frontages and yard setbacks within the proposed PUD.
  - The dimensional deviations reflected in Attachment 2 and on the detailed site plan are consistent with the approved preliminary plan application.
13. *The community building shall have the size and dimensions depicted on the plan.*
  - The detailed site plan indicates the size, dimensions and location of the community building, as well as the location and layout of related parking.
  - The Detailed Site Plan Application (Attachment 8) provides renderings of the community building, including dimensions, building materials, elevations, and landscaping.
14. *The dock density regulations in Section 40-908 and 40-909 apply to any docks constructed along portions of the seawall that adjoin condominium units 17-21 and 27-37.*

- The detailed site plan application reflects the establishment of 1 boat slip/unit for condominium units 16-21 and 28-38, in compliance with dock density regulations set forth in Section 40-908.
  - Compliance with Section 40-909 – Dock Regulations should remain a condition of approval.
15. *Residences within the PUD shall be constructed in accordance with the standards and procedures provided in the 'Preliminary Construction Requirements' document.*
- The Detailed Site Plan Application (Attachment 6) sets forth the referenced construction standards as part of the condominium bylaws.
  - This should remain a condition of approval.
16. *Compliance with all conditions for the special use approval of the marina.*
- The use restrictions set forth in Conditions #2, #3, #4, and #9 of the special use approval of the marina are set forth in the Use and Occupancy standards (Attachment 4) as part of the condominium bylaws.
  - The remaining 5 conditions are permit- and construction-related and do not require reflection on the site plan.
  - These should remain conditions of approval.
17. *The final site plan shall address landscaping, signage, construction staging, lighting details, emergency access, building elevations.*
- All items have been included in the Detailed Site Plan Application.
    - Attachment 10 details the landscape plan and MDEQ Revegetation Plan for the project.
    - Signage details are set forth in Attachment 1 – no entrance sign is proposed.
    - Construction staging details are set forth in Attachment 1.
    - Lighting details are set forth in Attachment 1 – no street lights are proposed.
    - Emergency access-related improvements are detailed in Attachment 7.
    - Attachment 8 sets forth the design elements of the Common Element structures (community building; boat sheds).
18. *Heavy construction equipment must use 135<sup>th</sup> Avenue and avoid 66<sup>th</sup> Street.*
- The Detailed Site Plan Application does not address this requirement.
  - This should remain a condition of approval.
19. *Provision of a detailed storm water plan.*

- The Detailed Site Plan Application (Attachment 11) sets forth a grading and storm water management plan.
  - The proposed PUD is located within an area designated by the MDEQ as 'critical dunes'. Accordingly, the proposed grading and storm water management plan (Attachment 11) is subject to MDEQ review/approval.
- 

- Pursuant to Section 40-772 (6), after receiving approval on a preliminary plan, a detailed site plan shall be submitted to the Planning Commission for approval in accordance with the Site Plan Requirements set forth in Article IX.
- The detailed site plan application (includes site plan dated September 15, 2017) has been reviewed in consideration of the site plan requirements.
- The Detailed Site Plan Application meets the Site Plan Content Requirements set forth in Section 40-813.
- The Detailed Site Plan Application was reviewed pursuant to the Site Plan Review Standards set forth in Section 40-816. The following is noted:

- (1) The subject 51 acre project site is within the R-2 District, adjacent to Rural Open Space, R-1 and Lakeshore Residential zoning.

The proposed PUD will provide for single-family residential development at half the density allowed and with nearly twice the percent open space required within the R-2 District. This proposed density of development is more consistent with density levels allowed within the Rural Open Space District . . and is therefore compatible with the level of development allowed within the surrounding residential zoning.

The proposed development will be established as a planned unit development/site condominium. The bylaws for the proposed development set forth detailed use and construction requirements that exceed zoning standards applicable to the surrounding area.

- (2) and (3)

The proposed development has been designed to occupy only that portion of the 51-acre site not designated as 'steep slopes' by the MDEQ (approximately 50% of the project site). This design approach focuses the development to the interior of the property, where development has previously occurred, and results in the preservation of the topography and landscape in its natural state and contour on almost 50% of the property.

The preserved landscape (or 'open space') surrounds the proposed development area providing a natural buffer to adjoining areas and is proposed to be protected as a 'common element' of the development.

To more specifically meet the landscaping and natural resource protection objectives of Article XI – Landscaping and Article XIV – Tree Preservation, and as a ‘critical dunes’ site, a Landscape Plan/MDEQ Re-vegetation Plan has been provided. (Attachment 10) The proposed plan is generally consistent with the provisions of the Zoning Ordinance but is subject to MDEQ review/approval.

The required state and federal permits/approvals for the construction of the basin and marina will address the protection/preservation of the Kalamazoo River and the surrounding dunes.

The landscaping requirements set forth in Article XI do not generally apply to the proposed development. However, the limited off-street parking designed to serve the community building has been arranged and buffered consistent with the landscaping objectives of Section 40-879 – Off Street Parking Areas.

(4) and (5)

The PUD is located within an area designated by the MDEQ as ‘critical dunes’. The Grading and Storm Water Management Plan (Attachment 11) has been prepared to address the protection of steep slopes, proper site drainage, storm water flows off site, and the preservation of natural drainage characteristics and is subject to MDEQ review/approval.

(6) The 23 residential building sites within the PUD are proposed to be surrounded by 25 acres of open space and will be provided reasonable visual and sound privacy. Further, the individual building sites are proposed to be a minimum of one-half acre in area with development thereon proposed to meet separation requirements.

(7) and (17)

The proposed layout and design of the private road and the emergency access details provided in Attachment 7 (i.e. helicopter landing area, mooring space, and standpipes) are consistent with the Terms of the Consent Judgment.

(8) All 23 residential building sites are provided direct access to the private road serving the PUD and the common elements of the project (i.e. open space, basin).

(9) and (14)

The PUD will be served by a private road. The proposed layout and design of the private road is consistent with the Terms of the Consent Judgment.

The proposed private road is located within an area designated by the MDEQ as ‘critical dunes’. Accordingly, the private road construction plans (Attachment 11) are subject to MDEQ review/approval.

(10) and (13)

A pedestrian circulation system is lacking Design of a walkway system is subject to MDEQ review/approval given that the PUD is located within a 'critical dunes' area, but is recommended to facilitate connectivity to pedestrian routes in the area and in consideration of safety and good neighborhood design.

(11) No outdoor storage, loading activities or outdoor refuse containers are proposed in conjunction with the PUD.

(12) The installation of street lighting is not proposed; community building, boat shed and dock/sidewalk lighting is proposed and should be subject to compliance with Section 40-649.

(15), (16) and (20)

Proposed private wells and septic systems should be subject to Allegan County Health Department review/approval.

(21) The proposed site plan should be subject to compliance with all other applicable township ordinances; fire codes; county requirements, including but not limited to the county drain commissioner, county road commission, county soil erosion and sedimentation control, and county health department; and any other applicable requirements of local, state and federal statutes, agencies and administrative orders.

- 
- Pursuant to Section 40-774, after receiving approval on a preliminary plan, a detailed site plan shall be submitted to the Planning Commission for review in accordance with the general standards and regulations applicable to a **PUD** set forth in Section 40-779.
  - Pursuant to Section 40-940, after receiving approval on a preliminary plan, a detailed site plan shall be submitted to the Planning Commission for review in accordance with the general standards and regulations applicable to a **Site Condominium Project** set forth in Section 40-940.
  - The detailed site plan application has been reviewed in consideration of the PUD and Site Condominium Project requirements.

#### **Section 40-779 - PUD General Standards**

- The proposed PUD is a low-density, single family residential development with open space elements. Further, the PUD has been proposed as a site condominium development allowing it to be designed and operated through bylaws that can regulate building elements and use beyond the parameters of the Zoning Ordinance. Pending receipt of the aforementioned reviews/approvals from local, county, state and federal agencies, it can be conditionally determined that the proposed project provides for compatibility with adjacent

property, protection of character of the surrounding area, safety of persons and property, and efficient land use.

#### **Section 40-780 – PUD Regulations**

- The proposed residential development applies the design flexibility inherent in the PUD approach in order to ‘create a more desirable and economical development that provides a controlled degree of flexibility in the placement of structures and lot sizes, while maintaining adequate planning and development standards.’
- Specifically, the PUD approach has allowed the needed flexibility in the size and arrangement of building sites and the layout of building envelopes, both on individual building sites and for PUD accessory buildings/parking areas, to provide an overall project design that is consistent with the natural resource protection goals of a ‘critical dunes’ site and responsive to the objectives of a PUD.
- Namely, the proposed PUD design is consistent with the noted objectives to:
  - (1) preserve the natural character and natural assets of the site;
  - (2) provide open space and recreational facilities (community building; boat sheds) in a location within reasonable distance of all living units;
  - (3) use a creative and imaginative approach in the development of residential areas; and
  - (4) provide underground facilities.

#### **Section 40-780 – Residential PUD**

- The proposed project meets the minimum project area, permitted uses and maximum density standards for a residential PUD.
- Through the use of a ‘conservation subdivision design’ approach, the proposed project design is in keeping with the purpose of a PUD to ‘encourage more imaginative and livable housing environments through a planned reduction, or averaging of the lot area requirements’.

#### **Section 40-940 – Review of Final (Site Condo) Plans**

- Except for changes made as necessary to incorporate the recommendations of the Planning Commission, the final site condominium project plan (detailed site plan) substantially conforms to the preliminary plan that was reviewed by the Planning Commission.
- The Planning Commission shall require, where applicable, that the final site condominium project plan (detailed site plan) be submitted to the county health department, county road commission, county drain commission, the appropriate state agency and other appropriate

state and county review and enforcement agencies having direct authority over any aspect of the proposed Site Condominium Project.

- As a condition of approval, the Planning Commission may require that a cash deposit, certified check, irrevocable bank letter of credit, or surety bond acceptable to the Planning Commission covering the estimated cost of Improvements associated with the Site Condominium Project for which approval is sought be deposited with the Township.

#### **Section 40-941 – Contents of Site Condominium Project Plan**

- The documents and information required by this Section have been provided in the detailed site plan application.
  - Use and occupancy restrictions (Attachment 4) and maintenance provisions for common elements. (Attachment 5)
  - Storm drainage and storm water management plan. (Attachment 11)
  - Utility plan. (Attachment 12)
  - Narrative of the project objectives. (Narrative Statements)
  - Narrative of providing water supply and waste disposal facilities. (Narrative Statements)
  - Street construction and maintenance plan. (Attachments 5 and 11)
  - List of other required review agencies and copies of comments provided. (pending)

#### **RECOMMENDATION**

Section 40-778 allows for approval of the PUD/site condominium application following consideration of the detailed site plan application if the following are met:

1. Complies with the Preliminary Plan Conditions of Approval;
2. Complies with the Site Plan Content and Review Standards;
3. Complies with the PUD and Site Condominium Provisions;
4. Complies with other applicable ordinances, statutes and regulations.

**Based on our review of the detailed site plan application and the findings set forth herein, we recommend the Planning Commission approve the proposed PUD/Site Condominium for North Shores of Saugatuck based upon a finding of compliance with the standards set forth in the Zoning Ordinance and subject to the noted conditions.**

Respectfully submitted,

**McKENNA ASSOCIATES**

Rebecca Harvey, AICP, PCP  
Senior Principal Consultant

STATE OF MICHIGAN

ALLEGAN COUNTY CIRCUIT COURT

SAUGATUCK DUNES COASTAL  
ALLIANCE,

Appellant/Plaintiff,

v

Case N<sup>o</sup>. 2018- 059598-AA  
Hon. Robert A. Kengis

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

Appellees/Defendants.

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**APPELLANT'S BRIEF ON APPEAL**

**ORAL ARGUMENT REQUESTED**

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Const 1963, art 6, sec 28..... iv

### STATEMENT OF JURISDICTION

1. This is an appeal by right of a decision by the Planning Commission to give final approval of a special use permit, which this Court has jurisdiction to hear under MCL 125.3607; MCR 7.103(A)(4) and MCR 7.122(A)(3); and Const 1963, art 6, sec 28.
2. The decision under appeal was made at a Zoning Board of Appeals meeting held on April 9, 2018, and the resolution approving the ZBA decision was signed on April 9, 2018.
3. Appellant's claim of appeal was filed on May 9, 2018.

**STATEMENT OF QUESTIONS PRESENTED**

1. Did the Saugatuck Township Zoning Board of Appeals Err in Determining that Appellant Lacked Standing and Thereby Refusing to Hear the Merits of Appellant's Appeal?

Appellant contends the answer is Yes.  
Appellees will contend the answer is No.

## INTRODUCTION

The Saugatuck Dunes Coastal Alliance appeals the Saugatuck Township Planning Commission's final approval of a plan to develop condominiums and an artificial "boat basin" along the Kalamazoo River. The Coastal Alliance first sought review by the Saugatuck Township Zoning Board of Appeals, but the ZBA refused to hear the appeal, concluding that the Coastal Alliance lacked "standing" to appeal. The ZBA held, in effect, that no person could ever have standing to challenge the project because of the size of the parcel that the project is located on. However, the Coastal Alliance and its members have substantial interests in the preservation of this extraordinary natural area that will be directly impacted by the proposed development – interests of the type and degree that appropriately confer standing.

The underlying ZBA appeal arises out of the Developer's proposal to dredge a massive channel into critical dunes and sensitive environmental features along the Kalamazoo River. The property at issue in this appeal is one portion of a larger tract formerly known as the Denison property, which consists almost entirely of critical dunelands as designated by the State of Michigan. The proposed development is situated in the midst of undeveloped, natural spaces. It is directly adjacent to the Saugatuck Dunes State Park and Pine Trail Camp; Saugatuck Harbor Natural Area and Tallmadge Woods lie directly south across the river. Several other private properties under conservation easement, nature preserves, and parks are also nearby. It is estimated construction of the harbor would require dredging approximately 160,000 tons of sand from the basin and Kalamazoo River.<sup>1</sup> Additionally, construction of condominiums around the harbor would occur within and destroy sensitive coastal dunes.

The Township approved plans for the development, despite the fact that it is expressly

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

prohibited by the Township's Zoning Ordinance: the planned development calls for the dredging of the critical dune area to create a boat basin canal, but Article XII - Water Access and Dock Density Regulations, Section 40-910(h) states "*In no event* shall a canal or channel be excavated for the purpose of increasing the Water Frontage." The Coastal Alliance appealed the approval to the Township Zoning Board of Appeals and has also asked the circuit court to declare the project in violation of the zoning ordinance or determine it is a nuisance per se because of the clear violation of the plain language of the Zoning Ordinance.

Unfortunately, the merits of the Coastal Alliance's appeal have not been heard by the ZBA because the appeal has been dismissed for lack of standing. In particular, the Saugatuck Township Zoning Board of Appeals erroneously relied upon previous decisions of the ZBA and circuit court regarding a different development project in denying Appellant Saugatuck Dunes Coastal Alliance standing to appeal. The decision is rooted in a fundamental misapprehension of the facts – namely that the development under consideration is vastly different than one previously proposed that was the subject of the prior standing rulings – and a misinterpretation and misapplication of Michigan standing jurisprudence. Contrary to the conclusions of the ZBA, the Coastal Alliance and its members have substantial interests in the preservation of the extraordinary Saugatuck Dunes that will be directly impacted by the proposed development – interests of the type and degree that properly confer standing. The Coastal Alliance respectfully requests the Court reverse the decision of ZBA and remand the matter to the ZBA for full consideration the merits of the Coastal Alliance's appeal.

## STATEMENT OF FACTS

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

The property at issue in this appeal is one portion of a larger tract formerly known as the Denison property, which consists almost entirely of critical dunelands as designated by the State of Michigan. The proposed development is situated in the midst of undeveloped, natural spaces. It is directly adjacent to the Saugatuck Dunes State Park and Pine Trail Camp; Saugatuck Harbor Natural Area and Tallmadge Woods lie directly south across the river. Several other private properties under conservation easement, nature preserves, and parks are also nearby. It is estimated construction of the harbor would require dredging approximately 160,000 tons of sand from the basin and Kalamazoo River.<sup>2</sup> Additionally, construction of condominiums around the harbor would occur within and destroy sensitive coastal dunes.<sup>3</sup>

The PUD and SAU applications and plans were submitted to the Township in January 2017. The Developer requested approval from the Planning Commission for a planned unit

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<sup>2</sup>North Shores' recent joint Department of Environmental Quality/US Army Corps of Engineers permit applications state that 241,750 cubic yards of sand would be excavated from a 6.54-acre upland area approximately 1,639 feet long and up to 200 feet wide.

<sup>3</sup>The North Shores of Saugatuck is the second large-scale development planned for the site; in 2006 the property was purchased by energy tycoon Aubrey McClendon, whose proposal for a development sparked years of judicial and administrative proceedings over the future of the property and the pristine Saugatuck Dunes. Notably, however, the permitting and litigation over the McClendon project never involved a private marina. Construction never commenced. After McClendon died suddenly in 2016, the property was purchased by the North Shores of Saugatuck, LLC, owned by Jeff and Peg Padnos of Holland, Michigan. The new owners have once again put forward a proposal to develop the property, including condominiums and a marina, lakefront homes, and a commercial center. Thus far, the Developer has only released plans for one phase of the development, the "harbor cluster" of condominiums around a private marina.

development (PUD) consisting of 33 “dockominium” boat slip units and 23 site condos together with a special approval use (SAU) for a private marina<sup>4</sup> available to the site condo owners and property owners in future phases of the development. The underlying zoning is R-2 Riverside Residential.

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

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

At the April 26, 2017 meeting, the Planning Commission reviewed the standards of the

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<sup>4</sup> The marina would utilize the site of Denison’s Broward Marine boat-building business that was formerly located on the property. Frank Denison obtained a special use permit in April 1977 for the boat-building facility on a parcel measuring 850’ x 850’. That permit has since lapsed, and the structures on the property were removed more than six years ago. Accordingly, the entire area surrounding the proposed harbor cluster is undeveloped, natural lands. See attached Ex. 1 (satellite view of the former Broward Marine site and site of the proposed boat basin). See Ex. 2 for additional demonstrative maps of the area.

Ordinance and voted unanimously to grant preliminary approval of both the PUD and SAU for the marina cluster. Little to no discussion took place among the Commissioners regarding *how* the proposal met each standard for approval. No findings of fact or conclusions were placed on the record.

Among the Planning Commission's most egregious errors was its failure to apply Article XII of the zoning ordinance -- Water Access and Dock Density Regulations. In particular, the Planning Commission ignored Section 40-910(h), which states "*In no event* shall a canal or channel be excavated for the purpose of increasing the Water Frontage." The Developer has never denied the purpose of the "boat basin" is to expand the number of "waterfront" properties within its development, yet the Planning Commission was somehow unconvinced the express prohibition of Sec. 40-910(h) had any relevance to the proposed project.

The Coastal Alliance timely filed an appeal of the Planning Commission's preliminary decision with this Court. The Coastal Alliance also filed a separate appeal with the Township Zoning Board of Appeals, in the event that such an appeal would be necessary to exhaust administrative remedies. This Court ultimately ruled that the appeal was not ripe until the Coastal Alliance appealed to the ZBA and dismissed the appeal in light of the pending ZBA action. On October 11, 2017, the Township ZBA held a public hearing to consider the Coastal Alliance's appeal. Before considering the merits of the Coastal Alliance's claims, the ZBA deliberated on the question of whether the Coastal Alliance had standing to appeal to the ZBA, and ultimately voted two to one to adopt a resolution "denying standing to the Saugatuck Dunes Coastal Alliance." The ZBA's decision was appealed to this Court (Circuit Court Case No. 2017-58936-AA), visiting Judge Wesley Nykamp, presiding, who on February 6, 2018 entered summary disposition against the Coastal Alliance based upon a lack of standing. Judge Nykamp's ruling is currently before the Michigan Court of Appeals, Case No. 342588.

As this Court was entertaining the Coastal Alliance's appeal of the October 11, 2017 ZBA decision, the Saugatuck Township Planning Commission was considering *final* approval of North Shores' project. On October 23, 2017 the Planning Commission granted that approval, with even less study and deliberation of the applicable zoning ordinance standards and whether North Shores met those standards.

Due to ambiguities in the Saugatuck Township Zoning Ordinance as to whether final or preliminary zoning approval is subject to appeal, and not knowing for certain whether its appeal to circuit court of the October 11, 2017 ZBA decision sufficiently preserved its rights, on December 7, 2017 the Coastal Alliance then took a second appeal to the Zoning Board of Appeals, this time of the final Planning Commission approval.

On April 9, 2018, the ZBA conducted a public hearing on the appeal. The Coastal Alliance submitted written evidence of the facts that gave its members "special damages" sufficient to confer standing. Members of the Alliance also appeared in person at the hearing. That evidence and testimony included statements from the following individuals:

- **Senator Patricia Birkholz:** her 291-acre namesake preserve is located approximately 200 feet from the proposed boat basin canal.<sup>5</sup> ROA at 21.
- **Diane Bily and Kathy Bily-Wallace<sup>6</sup>:** owners of property adjacent to the site of the proposed boat basin canal. ROA at 29.
- **Mort Van Howe:** owner of Sweetwater Sailing, a charter business in Saugatuck Township. ROA at 32.
- **Mike Johnson:** owner of the Coral Gables complex, which includes its own marina and jet ski rental business. ROA at 36.
- **Dave Engel:** Charter boat captain with more than 40 years of professional experience guiding salmon and trout fishing tours out of Saugatuck Harbor. ROA at 38.
- **Chris Deam:** The Deam family owns the Old Saugatuck Lighthouse in the northwestern corner of the Ox-Bow Lagoon, across the river from the proposed project. ROA at 43.

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<sup>5</sup> Senator Birkholz, a champion of conservation and preservation of important natural lands in Michigan, unfortunately passed away in May 2018. Her affidavit in support of the Coastal Alliance's appeal was first submitted to the ZBA in 2017, and then again at the April 9, 2018 meeting – on both occasions, before her passing.

<sup>6</sup> Several pages of Kathy Bily-Wallace's affidavit were inadvertently omitted in the most recent filing with the ZBA. The entire affidavit is attached here as **Ex. 3**.

- **Liz Engel:** as local realtor whose sales are reliant on the recreational, and aesthetic values of the area. ROA at 46.

See also minutes of public hearing, ROA at 83-84. The record contained additional evidence (not available at the first ZBA hearing) that the excavation spoils from the planned dredging for the canal are to be deposited within 300 feet of the Bily property. Thus, the development will ruin not only the Bily's Kalamazoo River viewshed, but also the view towards the adjacent woods. Further, the Coastal Alliance presented information concerning local efforts to restore lake sturgeon spawning grounds within the Kalamazoo River, which would be adversely affected by the planned boat basin. Nevertheless, after the hearing, the ZBA approved a resolution again dismissing the Coastal Alliance's appeal for lack of standing and declining to reach the merits.

The April 9, 2018 resolution contains findings labeled 2.A-D that allegedly forms the basis of the ZBA's decision. See ROA at 11-13. Based on the findings contained in the resolution, it appears that the ZBA has a fundamental misunderstanding of the standing doctrine. Despite the fact that the ZBA did not hear the underlying merits of the appeal, it still found that "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." ROA at 13.<sup>7</sup> The ZBA also found that "Various details of the proposed development have not been finally approved by the Michigan Department of Environmental Quality." *Id.*<sup>8</sup> Rather than applying standing to serve as a gatekeeping function to ensure vigorous advocacy, the ZBA applied the doctrine in a way that

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<sup>7</sup> The answer is simple and is contained right in the Zoning Ordinance: the planned development calls for the dredging of the critical dune area to create a boat basin canal, contravening the prohibition of Section 40-910(h). That express proscription of such dredging projects provides the exact authority to "prevent the development" the ZBA believed the Planning Commission lacked.

<sup>8</sup> The findings do not explain how the DEQ's independent review and concurrent jurisdiction over parts of the project has anything to do with zoning review and whether the zoning ordinance expressly prohibits the boat basin canal plan. Moreover, that exact fact – the pending DEQ application – is one of the reasons identified by the Coastal Alliance as a basis upon which the Planning Commission should have denied approval of this project, and grounds for its appeal.

allowed it to simply avoid hearing the merits of the claims. Accordingly, the Coastal Alliance timely sought review of the ZBA's decision in this court.<sup>9</sup>

## ARGUMENT

The doctrine of standing is designed to ensure sincere and vigorous advocacy.<sup>10</sup> The doctrine requires that a plaintiff's interest in the case is different from that of the citizenry at large.<sup>11</sup> However, the caselaw also cautions that standing is not to be denied simply because some people share the same injury.<sup>12</sup> Indeed, "[t]o deny standing to persons who are in fact injured simply because many others are also injured would mean that the most injurious and widespread Government actions could be questioned by nobody."<sup>13</sup> Standing exists where a party can establish that the opposing parties' "activities directly affected the plaintiffs' recreational, aesthetic, or economic interests."<sup>14</sup>

In this case, members of the Coastal Alliance have substantial and unique interests that will be directly affected by the project. From a former State Senator for whom the adjacent natural area is named, to neighboring property owners, boaters, fishermen, academics, and artists, the members of the Coastal Alliance have interests in the Kalamazoo Watershed and this project that are substantially different than the public at large. Therefore, the Coastal Alliance has standing to appeal.

The ZBA ruled otherwise, holding that the members of the Coastal Alliance did not show

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<sup>9</sup> Again, the Saugatuck Township Zoning Ordinance is ambiguous as to whether the final or preliminary approval is subject to appeal, therefore the Coastal Alliance filed this second, protective appeal in order to ensure the preservation of its right to appellate review.

<sup>10</sup> *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich. 349, 355, 792 NW2d 686, 690 (2010); *House Speaker v Governor*, 443 Mich 560, 572; 506 NW2d 190 (1993).

<sup>11</sup> *House Speaker v Governor*, 443 Mich at 572.

<sup>12</sup> *Karrip v Twp of Cannon*, 115 Mich App 726, 733; 321 NW2d 690 (1982), quoting *United States v Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687-688; 93 S Ct 2405; 37 L Ed 2d 254 (1973).

<sup>13</sup> *Id.*

<sup>14</sup> *Kallman v Sunseekers Property Owners Ass'n*, 480 Mich 1099 (2008).

damages different than those that would be suffered by the public at large. Unfortunately, the ZBA's analysis and conclusions seem to be based on a fundamental misunderstanding of the doctrine of standing. Standing serves a gatekeeping function to ensure actual controversies and vigorous advocacy. It is designed to weed out cases where there is no actual interest or possibility of vigorous advocacy. It is *not* designed to prohibit any zoning challenge by any member of the public. However, this is in effect exactly how the ZBA ruled in this case: because the property is so big and the impacts are so significant and widespread, nobody has standing to appeal. As is explained below, this is a misunderstanding of the facts and a misreading of standing caselaw.

#### **A. Appellants Are "Aggrieved" by the Township's Zoning Approval**

The ZBA's findings state that the relevant question for standing in zoning appeals is whether the party bringing the appeal is "aggrieved." ROA at 82.<sup>15</sup> A party that shows he/she will suffer "special damages" as a result of the zoning decision is considered an "aggrieved party."<sup>16</sup> In order to establish "special damages," a party must show they will be affected by the effects of the zoning decision in a manner differently than a community at large.

The Michigan Supreme Court has defined exactly what constitutes "special damages" in the context of zoning disputes over dockage and anti-funneling ordinances. In *Kallman v Sunseekers Property Owners Ass'n*, a lake association sued the operator of a dock with six mooring sites on a parcel with 25 feet of water frontage.<sup>17</sup> The lake association alleged that the dock was a nuisance in fact, and also a nuisance per se under MCL 125.294 because it violated frontage requirements for docks in the local zoning ordinance. The Court of Appeals held that the lake association did not demonstrate special damages sufficient to have standing, but the Michigan

<sup>15</sup> See also MCR 7.122(C)(1)(a); MCL 125.3606.

<sup>16</sup> See *Brown v E Lansing Zoning Bd of Appeals*, 109 Mich App 688, 699; 311 NW2d 828 (1981).

<sup>17</sup> *Kallman v Sunseekers Property Owners Ass'n*, 480 Mich 1099; 745 NW2d 122 (2008).

Supreme Court reversed. The Supreme Court held that the lake association must be given an opportunity to show it had standing. The Court set these parameters:

On remand, the plaintiffs must show that they have a substantial interest that would be detrimentally affected in a manner different from the citizenry at large. Standing may be proven by showing that the “defendant’s activities directly affected the plaintiffs’ recreational, aesthetic, or economic interests.”<sup>18</sup>

*Kallman* is the most recent holding from the Michigan Supreme Court on third-party standing in a zoning case involving anti-funneling. To the extent that Appellees read older or unpublished Court of Appeals to restrict standing in zoning cases more narrowly than *Kallman*, such a reading should be rejected as inconsistent with current law.<sup>19</sup>

**B. The Proposed Boat Basin Canal Will Directly Affect Appellants Recreational, Aesthetic, and Economic Interests.**

The Appellants include the Coastal Alliance and its members.<sup>20</sup> The Coastal Alliance is a non-profit coalition organized for the purpose of working cooperatively to protect and preserve the natural geography, historical heritage, and rural character of the Saugatuck Dunes coastal region in the Kalamazoo River Watershed. Since its formation over nine years ago, the Coastal Alliance has remained committed to and focused on ensuring the protection of the Watershed. The Coastal Alliance is a visible organization with numerous supporters; for example, the Coastal Alliance Facebook page has over 3800 supporters.<sup>21</sup>

Included in the Record on Appeal are the affidavits of several Coastal Alliance members establishing unique interests that are different than the citizenry at large. ROA 21-48; Ex. 3. These

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<sup>18</sup> 480 Mich at 1099.

<sup>19</sup> The ZBA’s decision is addressed in more detail in Section C, below.

<sup>20</sup> Coastal Alliance has representational standing under *Trout Unlimited v City of White Cloud*, 195 Mich App 343, 348; 489 NW2d 188 (1992).

<sup>21</sup> See [www.facebook.com/saugatuckdunes.coastalalliance](http://www.facebook.com/saugatuckdunes.coastalalliance), last accessed on July 19, 2018.

interests clearly give rise to special damages and aggrieved party status. Of extraordinary significance is the affidavit of former Senator Patricia Birkholz. As the affidavit indicates, Senator Birkholz has a long legacy of conservation and preservation in the area. ROA at 21-26. While many citizens have been instrumental in preserving the unique character and natural beauty of the Saugatuck Dunes and Kalamazoo River watershed, Senator Birkholz is clearly at the head of the line. So much so that there is a 291-acre preserve named the Patricia Birkholz Natural Area to honor her 30-year career in public service and efforts toward conservation of the Great Lakes, the Saugatuck Dunes, and Saugatuck Dunes State Park. *Id.* The proposed boat basin, 18 feet deep and 1,500 feet long, will come to within about 200 feet of the Patricia Birkholz Natural Area. *Id.* As Senator Birkholz explained in her affidavit, the proposed project threatens the natural area and her legacy:

The extreme depth and length of the proposed marina and boat basin, if permitted, will negatively impact the hydrology of the interconnected globally-imperiled interdunal wetlands that stretch from the Padnos property across the Patricia Birkholz Natural Area to Saugatuck Dunes State Park. If permitted, the boat basin will negatively impact the dunes that hold my name. I fear those dunes will be so altered that my children and grandchildren, and God-willing my great-grandchildren, will be unable to recognize what I spent my thirty-year career in public service trying to protect. [ROA at 21.]

In addition, Coastal Alliance members Diane Bily and Kathy Bily-Wallace own property adjacent to the site of the proposed boat basin. ROA at 27-31. As explained in the attached affidavits, they frequently visit and enjoy a cottage on their property that has been in the family since 1953. *Id.* They treasure their family cottage because of the natural and peaceful setting, and the viewshed from their cottage deck and dock looks across the river, into a natural area; and to the north and northwest, into the dunes and trees directly on the Property, including the site of the proposed boat basin canal. *Id.* As the affidavits from the Bilys indicate, the proposed boat basin

canal would reduce the family's recreational use of the river due to increased boat traffic and safety concerns; would impact the aesthetic beauty and surrounding landscape of the Bily property on the Kalamazoo river; and would impact the economic value of the property due to a change in viewshed and the character of the river. *Id.* Further, North Shores later disclosed that it would dump excavation spoils from the boat basin near the boundary between the Bily and North Shores properties, in an area within the Bilys' viewshed that had previously been beautiful, forested dunes. As neighboring riparian landowners on the Kalamazoo River, it is clear that the Bilys will suffer impacts that are far different and more direct than the citizenry at large. These impacts constitute "special damages" sufficient to show aggrieved party status.

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

- (1) **Mort Van Howe:** Mort and his wife own Sweetwater Sailing, a charter sailboat business in Saugatuck Township. The charter relies on the beauty of the surrounding area, and the proposed boat basin will ruin the rare and exceptional experience of sailing on the Kalamazoo River and along the Saugatuck dunes. The addition of significant number of potentially large boats as a result of the proposed boat basin canal will also increase safety concerns in what can already be an area crowded with small recreational boats. Mort's own experience, as well as that of his customers, will be dramatically impacted by the proposed development. ROA at 32-35.
- (2) **Mike Johnson:** Mike is owner of the Coral Gables complex, which includes its own marina and jet ski rental business. His business is dependent on having a safe river upon which to recreate. If the proposed project is allowed to be constructed, his business and livelihood will be negatively impacted by the additional river boat traffic and accompanying safety issues. ROA at 36-37.
- (3) **Dave Engel:** Charter boat captain with more than 40 years of professional experience guiding salmon and trout fishing tours out of Saugatuck Harbor. He is the winner of over 65 salmon and trout tournaments, and is the number-one money winner of all time on the Great Lakes. Mr. Engels' interests will be impacted by the Planning Commission decision because it would set a poor precedent for allowing others to damage important aquatic habitat and increase funneling-accesses on the river by creating boat basins and marinas by cutting a canal or channel. ROA at 38-41.
- (4) **Chris Deam:** The Deam family owns the Old Saugatuck Lighthouse in the northwestern corner of the Ox-Bow Lagoon. There are no roads to the Lighthouse property and it is still

accessed by boat (mainly a canoe). Three generations of the Deam family have helped shape the essential character of the surrounding area at the mouth of the river and Ox-Bow Lagoon. The character of the area surrounding the Deam property would be fundamentally altered as a result of the proposed project by dredging out a large area in the Kalamazoo River. The proposed marina and boat basin would disrupt the carefully balanced and harmonious neighborhood. ROA at 43-45.

- (5) **Liz Engel:** as local realtor, Liz believes the ecological, recreational, and aesthetic values of the area are a major selling point for homes in the area and add to property values and home sale prices. The proposed marina and boat basin will impair her ability to use the Kalamazoo River as a selling point, causing financial harm in the form of fewer sales and lower commissions due to lower selling prices. ROA at 46-48.

These are exactly the types of recreational, aesthetic and economic interests that the Michigan Supreme Court has recognized as creating “special damages.”<sup>22</sup> Moreover, Saugatuck Township itself has recognized that overcrowding along the Kalamazoo River and Lake Michigan harms interests such as those advanced by the Coastal Alliance. Section 40-906 of the zoning ordinance describes the purpose of the water access and dock density regulations:

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

In light of the Township’s legislative determination that impairment of natural resources, destruction of property values, and threats to safety and welfare are the result of excessive numbers of docks and riparian users on the Township’s waterways, the ZBA’s decision to deny the Coastal Alliance standing to appeal to protect those interests is downright puzzling, particularly in a case

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<sup>22</sup> *Kallman*, 480 Mich at 1100.

where the merits of the appeal are strong and the violation of Section 40-910 of the ordinance seems evident. The ZBA's stance on standing essentially means that even where the Township has expressly recognized the harms that might result from overdevelopment along its waterways, citizens are without recourse to enforce the ordinance when planning commission will not. This Court should reverse the ZBA's denial of standing, and remand for a determination of the case on the merits.<sup>23</sup>

### C. The ZBA's Decision Ignores the Distinction between the Degree and the Type of Injury

The ZBA's decision expressly references *Unger v Forest Home Twp*, 65 Mich App 614; 237 NW2d 582 (1975),<sup>24</sup> where the Court of Appeals stated: "It has been held that the mere increase in traffic in the area is not enough to cause special damages. Nor is proof of general economic and aesthetic losses sufficient to show special damages."<sup>25</sup> Zoning cases that deny standing to neighbors or nearby residents typically cite *Unger* and interpret special damages in an overly restrictive manner. *Unger* should not control here, for several reasons. First, the *Kallman* case is the most recent holding from the Michigan Supreme Court on third-party standing in a zoning case. To the extent that older or unpublished Court of Appeals cases are read to restrict standing in zoning cases more narrowly than *Kallman*, such a reading should be rejected as inconsistent with current law.

Second, the special damages explained in the preceding section go far beyond "mere

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<sup>23</sup> See *Brown v E Lansing Zoning Bd of Appeals*, 109 Mich App 688, 701; 311 NW2d 828 (1981) ("We concur with the following commentary: 'It is important that persons who have an interest in preserving an established plan have an opportunity to be heard when use changes are contemplated. For this reason statutory grants of aggrieved party status to third parties should be liberally construed. Since it is a matter of standing only, litigation on the merits of the complaint should be relied upon to expose any frivolous complaints.'")

<sup>24</sup> *Unger*, 65 Mich App 614; 237 NW2d 582 (1975); see ROA at 82.

<sup>25</sup> 65 Mich App at 617 (citations omitted).

increase in traffic” or “general economic and aesthetic losses.” The special damages are specific, unique, and are exactly the types of special damages that have conferred standing in the past. As the Court of Appeals recently explained, standing to sue “is a fact-bound concept.”<sup>26</sup> In that regard, this case is similar to *Brown v E Lansing Zoning Bd of Appeals*. The plaintiffs in *Brown* opposed a request for a variance from a lot-width requirement for the construction of a duplex. In support of standing, plaintiffs presented evidence of the change in their neighborhood and adverse impacts of increased population density already experienced as a result of recent duplex construction. Similar to the *Brown* plaintiffs, the Coastal Alliance members express concern that the Kalamazoo River will become overdeveloped and overcrowded, harming property values and negatively impacting their businesses and livelihoods that depend on the river and the natural (undeveloped) beauty of the surrounding area.<sup>27</sup> The Court of Appeals in *Brown* expressly addressed the detail of the evidence on special damages:

However, a comparison of the present case with the others decided by this Court leads to the same conclusion. Plaintiffs have pleaded adverse effects far more substantial than those claimed by the plaintiffs in *Marcus, Joseph, Unger, Brink, and Village of Franklin*, supra. Even under the aggrieved party standard of those cases, plaintiffs have demonstrated special damages sufficient to confer standing.<sup>28</sup>

Notably, the *Brown* Court synthesized and analyzed earlier Court of Appeals cases (including *Unger*) and specifically held that the types of injuries claimed in those cases are sufficient where the evidence establishes that the special damages are suffered to a sufficient degree, different than the community at large, by a particular plaintiff.

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<sup>26</sup> *N Michigan Env'tl Action Council v City of Traverse City*, unpublished per curiam opinion of the Court of Appeals, issued October 24, 2017 (Docket No. 332590) (Ex. 4) citing *Lamkin v. Hamburg Twp Bd of Trustees*, 318 Mich App 546, 551; 899 NW2d 408 (2017).

<sup>27</sup> As described in Section 40-906 of the zoning ordinance, density along the river is a documented problem in the Township.

<sup>28</sup> *Brown*, 109 Mich App 688, 701; 311 NW2d 828, 834 (1981).

In a recent opinion, the Court of Appeals rejected the application of *Brown* to a zoning appeal, stating that *Brown* “involved the application of a more permissive threshold for standing under a previous enabling statute that a person ‘have an interest affected by the zoning ordinance.’”<sup>29</sup> While the *Brown* plaintiffs did indeed rely on the “affected person” standard, the Court of Appeals’ conclusion in *Olsen* that *Brown* is not persuasive is perplexing in light of the passage quoted above, in which the *Brown* court held that the plaintiffs had pleaded adverse effects “far more substantial” than in cases such as *Unger* (which the Developer and the ZBA rely upon) and the court even considered the facts under the more stringent “aggrieved party” standard. The rationale of the *Olsen* court and the Developer in arguing *Brown* shouldn’t apply are specifically and directly addressed within the *Brown* opinion. Therefore, the facts that the court determined were sufficient to confer standing in *Brown* are a useful reference point in assessing the interests affected and special damages suffered by Coastal Alliance members.

The Court of Appeals in *Olsen* affirmed that *Unger*, *Joseph*, and *Village of Franklin* continue to be good law on standing in zoning appeals in Michigan. But *Olsen* itself does not represent any new expression of the standing standard; rather, it stands for the unremarkable (and well-established) principle that proximity to a project site alone does not establish standing.<sup>30</sup> Much of the court’s focus in *Olsen* was on the plaintiff’s argument and the circuit court’s holding that status as recipients of statutory notice of a variance request under section 3103 of the MZEA was sufficient to confer standing. *Olsen* left unchanged the general rule that the “aggrieved party” standard controls, and that to meet that standard, a party must show he/she will suffer “special damages” different than the community at large as a result of the zoning decision.

Moreover, to the extent there is any controversy as to what case or standard should apply

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<sup>29</sup> *Olsen v Jude and Reed, LLC*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (2018) (Docket No. 337724); slip op at 10. (Ex. 5).

<sup>30</sup> *Id.* At 9-10 (attached Ex. 5).

here, the parties and Judge Nykamp agreed in the previous appeal that “*Lansing [Lansing Schools Educ Assoc v Lansing Bd of Educ, 487 Mich 349, 372; 792 NW2d 686 (2010)]* is the leading case on standing.” *Lansing Schools* reversed the “constitutional basis” for standing expressed previously by the Michigan Supreme Court in *Lee v Macomb County* and its progeny.<sup>31</sup> As a result, the *Lansing Schools* decision relaxed the requirements of standing and revived the “special injury” test to establish standing.

In this instance, the members of the Coastal Alliance will suffer a number of impacts from approval of the boat basin canal plan resulting in impaired recreational opportunities, a loss of use and enjoyment of their property, and fundamental changes to the character of area. These impacts are different in kind and character from the public at large. The specific impacts identified by Appellants are exactly the types of impacts that Michigan courts have recognized to confer standing in zoning matters in a number of different cases<sup>32</sup>:

- (1) **Environmental Harm.** A party alleging that a potential development will cause environmental harm has standing to challenge Township approval of the development if “they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.”<sup>33</sup>
- (2) **Interference with Beneficial Use and Enjoyment of Property.** People in the “immediate vicinity” of a project can show that they suffer “special damages” if the project has “at least a potential for interfering with the beneficial use and enjoyment of their own land.”<sup>34</sup>

<sup>31</sup> *Lee v Macomb Co Bd of Com'rs*, 464 Mich 726; 629 NW2d 900 (2001).

<sup>32</sup> Again, the Township’s own zoning ordinance clearly demonstrates the Township’s recognition that those interests and injuries described by the members of the Coastal Alliance are likely to result from the kind of development of the Township’s waterways that is proposed by North Shores.

<sup>33</sup> *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 629; 684 NW2d 800 (2004), *overruled on other grounds by Lansing Sch Ed Ass'n, supra*. *Lansing Schools* held that no injury in fact is required to establish standing if a statutory standing test is met; however, it did not overrule the *Cleveland Cliffs* determination of what constitutes an injury or damage for an environmental user. See also *Concerned Citizens of Acme Twp v Acme Twp*, per curiam unpublished opinion of the Court of Appeals, issued September 20, 2007 (Docket No. 264109) (Ex 6).

<sup>34</sup> *Brown*, 109 Mich App at 699. See also *Fort Summit Holdings LLC*, unpublished per curiam opinion of the Court of Appeals, issued May 3, 2002 (Docket No. 233597).

- (3) **Economic Harm to Property.** A party may have standing if they establish a “substantial economic interest” in the outcome of the proceeding,<sup>35</sup> such as decreasing property values or increased taxes.<sup>36</sup>
- (4) **Intensifying Change in Character of Neighborhood.** A project that will intensify changes to the character of a neighborhood, such as those caused by increased population, traffic, noise levels, lights, and air pollution, can give rise to standing.<sup>37</sup>
- (5) **Aesthetics and Interference with Views.** A neighbor has standing to appeal a zoning decision regarding a construction project where the project interferes with a neighbor’s view.<sup>38</sup>
- (6) **Adverse effects for community goals for region.** People who have participated in and relied on community goals for the region might have standing on this basis.<sup>39</sup>

In addition to having suffered the right *type* of injury, the second step in determining special damages is whether Appellant has the potential to suffer the right type of damages to a sufficient degree, i.e., that he/she are affected differently than the community at large by the alleged harm. An important factor in establishing sufficient “degree” of injury can be the proximity of the party to the zoning decision. Landowners who live close to a project do not automatically have standing, but courts have explained that it should be easier for them to plead allegations establishing standing because their proximity to the property means that they are more likely to be affected by a zoning decision than properties located farther away.<sup>40</sup> In addition, economic harm must be directly related to the person’s property or interest, and a threat due to increased competition for the same

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<sup>35</sup> *Brown*, 109 Mich App at 701.

<sup>36</sup> *Meany v City of Saugatuck*, memorandum unpublished opinion of the Court of Appeals, issued February 17, 2004 (Docket No. 243694) (Ex 7).

<sup>37</sup> *Brown*, 109 Mich App at 701.

<sup>38</sup> *Meany, supra*, stating “where it was alleged that plaintiffs’ construction would block the neighbor’s lake view and reduce his property’s value, we conclude that the neighbor was an aggrieved party who had standing to appeal to the ZBA.” Accord *Gawrych v Rubin*, per curiam unpublished opinion of the Court of Appeals, issued July 20, 2006 (Docket No. 267447) (Ex 8) finding interference with viewshed sufficient to establish special damages for a public nuisance suit.

<sup>39</sup> *Brown*, 109 Mich App at 701.

<sup>40</sup> See *W Michigan Univ Bd of Trustees v Brink*, 81 Mich App 99, 103; 265 NW2d 56 (1978), explaining that “[i]f adjoining landowners could suffer such special damages, then they can easily plead them.”

type of a commercial business is not sufficient.<sup>41</sup>

Members of the Coastal Alliance will suffer the impacts they have identified to a degree that is substantially more extreme than that suffered by the community at large because of their unique interests in the natural resources at issue, proximity to the development, and business interests reliant on the Kalamazoo Watershed. These effects will substantially impair their use and enjoyment of their property, their livelihood, and their quality of life.<sup>42</sup> As discussed above, some of the likely effects described in the affidavits include the following:

- (1) **Environmental effects.** This project is being built in not just another dunes system and wetland, but in the middle of a globally imperiled and fragile resource that is critical to the integrity of the entire dunes ecosystem. Scientists are of the opinion that: (1) the dredging of the boat basin according to the proposed plan will do “irreparable damage” to the dune habitat; and (2) that this damage will not be contained to the Developer’s property but will also devastate the entire dunes ecological system, including the Saugatuck Dunes State Park. These changes will have significant effects on people who use and enjoy the Kalamazoo River watershed and the adjacent public areas to recreate, observe and enjoy plants and wildlife, as well as collect data for scientific purposes.
- (2) **Physical effects to Neighboring Properties.** Due to the significant dredging for the boat basin canal, the effects from the proposed development on the dunes system will not be confined within the North Shores development, but will also reach beyond, severely affecting the dunes, plants, and wildlife throughout the system and neighboring properties such as the Bily family property, the State Park, and the Patty Birkholz Natural Area.
- (3) **Aesthetic and viewshed effects.** This project will have aesthetic impacts from not only Lake Michigan and Kalamazoo River, but also the adjacent State Park and the Patty Birkholz natural area, including changes in the plants and animals and removal of vegetation required and likely to result from the dredging, and the visibility and environmental effects of the change to the river and its coastline.
- (4) **Recreation Activity.** The environmental and aesthetic effects will also affect recreational activity in the area. The waters of Lake Michigan and the Kalamazoo River are used by boaters, swimmers, kayakers, sailboarders and fisherman, and the State Park is enjoyed by skiers, hikers, runners, and birders, often on even a daily or weekly basis.

<sup>41</sup> *Miller Apple Ltd P’ship v Emmet Co*, per curiam unpublished opinion of the Court of Appeals, issued February 9, 2010 (Docket No. 286730), explaining “a party’s financial interest in stifling competition posed by the development of neighboring properties is not a legally protected interest sufficient to grant standing to seek appellate review.” (Ex. 9).

<sup>42</sup> Moreover, the Appellants do not need to produce evidence to “prove” that they will suffer an injury; “possible adverse effects are apparently sufficient to confer standing” and courts should not “require plaintiffs to prove that adverse effects would necessarily follow.” *Brown*, 109 Mich App at 700.

- (5) **Property Values and Taxes.** The loss of aesthetic, environmental, and recreational value may affect property values in the area, especially if the tourism industry is affected. Moreover, the increase in population will lead to an increased need for public services that might cause an increase in property taxes.<sup>43</sup>
- (6) **Local Tourism-Based Business.** Several local businesses such as those owned by Mike Johnson, Mort VanHowe, and Dave Engel are reliant on the Kalamazoo River and its natural features. Local businesses are concerned that the construction of the boat basin canal will significantly detract from the quality of the adjacent public areas, which will detrimentally affect their businesses and local home values in the area. The boat basin will also increase use of the river causing safety concerns for operation of the businesses that already exist.
- (7) **Physical and Other Effects on Riparian Users and Owners.** The proposed development will affect the riparian users/owners of the Kalamazoo River, due to changes in the shoreline and dunes; the effects of plants and animal wildlife; and the increased boat traffic.
- (8) **Inconsistency with Master Plan.** The proposed project is inconsistent with the tri-community Master Plan for the area, in which many Coastal Alliance members were extremely involved in developing.

The Coastal Alliance and its members have considerable aesthetic, recreational, professional, and economic interests in the environmental and aesthetic values of the Saugatuck Dunes and the Kalamazoo River Watershed. This is exactly the type and degree of injury that the Michigan Courts have held to be sufficient to establish special damages. In the context of a non-profit or neighboring landowner challenging the environmental effects of a use, courts have held a party can show that they will suffer a sufficient injury if they “aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.”<sup>44</sup> For example, the Court of Appeals applied this standard and held that a citizen’s group had standing to appeal a zoning decision where its members submitted affidavits

<sup>43</sup> Affidavit of Liz Engel, ROA 46-48.

<sup>44</sup> The Supreme Court held that it is sufficient to establish an injury when parties and neighbors claimed they “bird-watched, canoed, bicycled, hiked, skied, fished, and farmed in the area” and submitted expert testimony demonstrating these activities would be affected by an environmental harm caused by the challenged activity on a nearby property. *Cleveland Cliffs*, 471 Mich 608, 629. The *Cleveland Cliffs* test was overruled for a more lenient standing test in *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349 (2010), but its recognition of a legally-protected interest is still instructive.

establishing its members' recreational interests would be harmed by a project's environmental impact.<sup>45</sup>

**D. Standing is a Fact Specific Inquiry and Standing in this Appeal is not Determined by Previous Appeals**

The preamble of the ZBA's resolution points to a previous appeal of a DEQ permit decision by the Coastal Alliance, implying that it may be determinative as to standing in the current zoning appeal. ROA at 80. However, this is a different case with a completely different project. The DEQ approval was for an interior road on the property as part of a different project by a different property owner. This project involves the dredging approximately 160,000 tons of sand from the basin and Kalamazoo River to create a new canal. It will fundamentally alter the river and the river's watershed. It will directly impact recreational and commercial use of the river in much different and more direct ways than the proposed road in the previous project. It is also worth noting that while it was determined the Coastal Alliance did not have standing to appeal to circuit court, the DEQ did grant standing during the administrative process and the previous land owner significantly altered the previous road project in light of the issues raised at the DEQ review stage.

Standing to challenge a project approval is a fact specific inquiry.<sup>46</sup> It is entirely consistent with standing jurisprudence for a party to have standing to challenge some activities on a property, while not having standing to challenge others.<sup>47</sup> The Court needs to look at the facts of this case, and the interests expressed in the standing affidavits contained in the record, independent from previous cases and appeals. As is explained in detail above, the facts and circumstances of this

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<sup>45</sup> *Concerned Citizens of Acme Twp v Acme Twp*, unpublished per curiam opinion of the Court of Appeals, issued September 20, 2007 (Docket No. 264109) (Ex. 6).

<sup>46</sup> *N Michigan Env't Action Council v City of Traverse City*, unpublished per curiam opinion of the Court of Appeals, issued October 24, 2017 (Docket No. 332590) (Ex. 4).

<sup>47</sup> *Michigan Citizens for Water Conservation v Nestle Waters N.A., Inc.*, 479 Mich 280, 296-97; 737 NW2d 447 (2007).

case provide the Coastal Alliance with standing to appeal. The Coastal Alliance has established special damages through unique recreational, aesthetic, and economic interests that are different than those of the public at large.

**CONCLUSION**

For the reasons stated above, Appellant Saugatuck Dunes Coastal Alliance respectfully requests that this Court reverse the decision of the Saugatuck Township Zoning Board of Appeals and remand the matter to the ZBA for consideration of the merits of the appeal.

OLSON, BZDOK & HOWARD, P.C.

Date: July 19, 2018

By:   
\_\_\_\_\_  
Scott W. Howard (P52028)  
Rebecca L. Millican (P80869)

STATE OF MICHIGAN  
48TH CIRCUIT COURT (ALLEGAN COUNTY)

SAUGATUCK DUNES COASTAL ALLIANCE,  
  
Appellant/Plaintiff,

v

File No.18-59598-AA

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

ORAL ARGUMENT ON APPEAL

BEFORE THE HONORABLE ROBERTS A. KENGIS

Allegan, Michigan - Monday, October 25, 2018

APPEARANCES:

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RECEIVED by MSC 8/24/2020 4:01:12 PM

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WITNESSES:

None

EXHIBITS:

None

1 Allegan, Michigan

2 Monday, October 25, 2018- 1:03 p.m.

3 THE COURT: This is file number 18-59598-AA. The  
4 Saugatuck Dunes Coastal Alliance versus the Saugatuck  
5 Township, Saugatuck Township Zoning Board of Appeals, and  
6 North Shores of Saugatuck.

7 And present in court on behalf of the Plaintiff  
8 Appellant Plaintiff Saugatuck Dunes Coastal Alliance is  
9 attorney Scott Howard. Also present from -- on behalf of the  
10 Intervening Appellee the North Shores of Saugatuck is  
11 attorney Carl Gabrielse. And also present on behalf of the  
12 township is attorney James Straub. Correct?

13 MR. STRAUB: Correct.

14 THE COURT: All right. Very good. Well, we're  
15 scheduled for oral argument with respect to the appeal in  
16 this case. And I just want to make sure that the attorneys  
17 know that I have read all of your briefs. I've also reviewed  
18 the record that was submitted by the township with respect to  
19 the zoning board of appeals their -- their record and their  
20 decision.

21 And I think that essentially what I'd like the  
22 attorneys to address, feel free to address whatever you think  
23 is relevant, but know that I'm quite familiar with everything  
24 and I think the two big issues that the Court has to consider  
25 is the applicability of the recent Court of Appeals case

1        *Olsen versus Jude and Reed*. And then secondly assuming that  
2        that decision and holding applies in this case and if it does  
3        then the issue of whether or not the Coastal Alliance is an  
4        aggrieved party under the statute and as interpreted by the  
5        Court of Appeals in that -- in that decision.

6                Also I'd like to limit each attorney initially to  
7        10 minutes at the most for their initial argument and I'll  
8        give you each an opportunity to make a second round of  
9        arguments for five minutes a piece after that. All right. Is  
10       that procedure acceptable to everybody?

11               MR. HOWARD: That is, your Honor.

12               MR. STRAUB: It is, your Honor.

13               THE COURT: All right. Very good. Mr. Howard,  
14       you're welcome to proceed with your arguments.

15               MR. HOWARD: Thank you, your Honor. Given the  
16       Court's statements I may -- I certainly will abbreviate. I  
17       have some photographs to use as demonstrative evidence as I  
18       went through my presentation. I will likely not use all of it  
19       or I may skip some of it but I did want to hand out copies of  
20       everything.

21               THE COURT: Sure.

22               MR. HOWARD: This is not, and again, I'm only using  
23       these photographs to help demonstrate what we -- the  
24       arguments that we made in our brief.

25               MR. GABRIELSE: Your Honor, It's my understanding

1 that these are -- were not attached to his brief. So without  
2 -- this is the first time I'm looking at it. I don't  
3 necessarily have any objection to photographs because they're  
4 obviously they are what they are. But I haven't looked at  
5 this packet so I just would reserve any objection that he  
6 might --

7 THE COURT: Okay. Why don't you take a few minutes  
8 to -- to go ahead and look at them now before we start with  
9 Mr. Howard's argument.

10 MR. STRAUB: My objection --

11 THE COURT: Mr. Straub?

12 MR. STRAUB: My objection's different.

13 THE COURT: Okay.

14 MR. STRAUB: My objection is if they're not in the  
15 record on appeal they're not to be considered by the Court.  
16 Period.

17 THE COURT: What authority do you have for that?

18 MR. STRAUB: Because this is an appeal based upon  
19 the record. This Court is to make its decision to determine  
20 whether the zoning board of appeals under MCL 1253606 sub 1  
21 did so in a cons-- based upon a constitutional ordinance.  
22 Whether it did so with competent material and substantial  
23 evidence on the record.

24 This information that was just handed to me, unless  
25 it appears in the record on appeal, is not relevant or

1 material to the decision that this Court makes under the  
2 statutory requirement of the Michigan Zoning Enabling Act.  
3 Therefor it's improper for this Court to consider the  
4 information and improper for the Court -- for Counsel to  
5 present it to the Court for consideration.

6 THE COURT: Mr. Howard, your response.

7 MR. HOWARD: Your Honor, again we're only asking --  
8 we're only using this as demonstrative evidence. There --  
9 substantially most of the slides are of -- of items that are  
10 from the record. There are some slides that are just recent  
11 photographs of the property. As Mr. Gabrielse said that sort  
12 of is what it is. It's a picture of the property and it's  
13 only being used to help the Judge understand, help the Court  
14 understand, the relationship of the various standing affiants  
15 to the proposed use or the use that is in fact happening.

16 All of this also is obviously happened since the  
17 appellate briefs were filed so it just gives a little bit of  
18 context but again we are not relying on anything in these  
19 photographs or slides as evidence to support our contention  
20 about the record.

21 THE COURT: Okay. Well what I'd like to do is just  
22 have Mr. Gabrielse and Mr. Straub go ahead and take a look at  
23 the photographs and I understand your objection Mr. Straub. I  
24 haven't yet decided what I'll do. But I think it would be  
25 wise at least to -- for you and Mr. Gabrielse to look at the

1 photographs and maybe there's nothing objectionable in there  
2 Maybe there are photographs of things that are already in the  
3 record. So if you don't want to you don't have to but I think  
4 it would be pertinent and wise.

5 MR. STRAUB: May I respond?

6 THE COURT: Yes.

7 MR. STRAUB: I think it's extraordinarily  
8 inappropriate to present documents at the time of oral  
9 argument that are not in the record on appeal for the reasons  
10 that I stated. I do not have time to compare the  
11 documentation that appears in this packet that I received  
12 moments ago with the record on appeal which is relatively  
13 extensive.

14 Any document that is in this packet recently  
15 received that is not in the record on appeal is completely  
16 inappropriate. I don't know how the Court would even mark it  
17 as an exhibit because it cannot be an exhibit. And it's  
18 inappropriate I would argue for the Court to even look at or  
19 consider it.

20 I will review the materials to the extent that I  
21 can determine that any of it was not in the record on appeal  
22 I would -- I would concur that the Court could review. On the  
23 other hand if it's not there it's completely inappropriate.

24 THE COURT: And I agree. What I'm trying to do is  
25 see if you might agree to some of them. So I'm not going to

1 consider them as part of the record on appeal but I think  
2 that if you and Mr. Gabrielse can look at them and see if you  
3 think some of them may be helpful for you so all I'm asking  
4 is that you take a look at them --

5 MR. STRAUB: Sure.

6 THE COURT: -- And let me know if you think that  
7 any of them that you can agree to that Mr. Howard can show  
8 and certainly obviously you and Mr. Gabrielse would be  
9 welcome to refer to them as well. So why don't you just take  
10 a minute to look at them and then we'll see if there's any  
11 that you can agree to that would be allowable.

12 (At 1:11 p.m., parties review the pack of documents  
13 presented by Mr. Howard)

14 (At 1:15 p.m., parties complete their review)

15 THE COURT: Any agreements?

16 MR. GABRIELSE: Your Honor, my position would be  
17 this, I'll leave Mr. Straub to his, I recall being in this  
18 courtroom standing over there where I had some photographs or  
19 something to show you saying Judge these are just some things  
20 I need to show and there was an object this was not disclosed  
21 this was not in your brief you can't and I was perhaps  
22 rightly with hindsight prevented from showing those.

23 I mean this is a packet of photographs, diagrams,  
24 websites, measurements, all kinds of stuff that would take  
25 hours to respond to. I mean, just, it's not just some aerial

1 photographs as was the, I guess, vague representation to us.

2 I mean, there's things from the Nation Wetlands  
3 inventory, diagrams that I have never seen before, it looks  
4 like illustrations that were created by different, I don't  
5 know. So I would -- other than those items that specifically  
6 reference, you know, there's a couple of slide that reference  
7 the Saugatuck Township Zoning Ordinance I guess that's the  
8 law so you can put it up on the screen. That's fine. But the  
9 rest is -- is absolutely inappropriate to surprise us at this  
10 last minute.

11 THE COURT: All right. Thank you. Mr. Straub?

12 MR. STRAUB: There are documents in here, for  
13 example, I don't have a page number but they have the cover  
14 sheet for the Judge Cronin decision of February 6, 2015. That  
15 may have been a document that was part of the record on  
16 appeal I frankly don't know. I can't recall. There are a  
17 couple of other documents like that but they have blowup of  
18 paragraphs blowup and extractions of paragraphs from them to  
19 emphasis that to the Court.

20 Again, this is a determination by the Court whether  
21 the zoning board of appeals decided this matter on competent  
22 material substantial evidence on the record. That's the  
23 statutory requirement. To introduce other materials beyond  
24 what was introduced to the zoning board of appeals is  
25 extraordinarily improper.

1           There was nothing that was done by the board of  
2 appeals to prevent the applicants, the SDCA from submitting  
3 this information prior to the April meeting. Nothing. In fact  
4 I thought I heard counsel say that some of these documents  
5 occurred after the meeting. Which is even more incredulous to  
6 introduce that type of information at this proceeding. My  
7 objection stands for all documents submitted.

8           THE COURT: Thank you. Mr. Howard?

9           MR. HOWARD: Your Honor, maybe I could short  
10 circuit this a little bit I did not mean to create a side  
11 issue. All I wanted to do is provide some context for our  
12 arguments in terms of the power point. The only -- and  
13 honestly the only thing we wanted to do was be able to  
14 reference some of the -- some of these items that are talked  
15 about in the record but didn't exist prior.

16           In the context of the photographs they didn't exist  
17 at the time of the hearing for example the lay down area. We  
18 have a drawing of it but we don't have a photograph of it.  
19 But that said I would withdraw my -- my request for the  
20 ability to use those exhibits. The only thing that I would  
21 request from Counsel is if we could just use this big picture  
22 as -- as a reference point as we're pointing things out to  
23 the Judge.

24           THE COURT: Okay. Any objection to that?

25           MR. GABRIELSE: No. No, your Honor.

1 MR. STRAUB: Yes.

2 THE COURT: You have an objection --

3 MR. STRAUB: Yes. Absolutely.

4 THE COURT: -- to this picture?

5 MR. STRAUB: I do.

6 THE COURT: All right. Very good. Then we won't --  
7 I agree that it would be improper for the Court to consider  
8 things that are just submitted today without an agreement  
9 from the other attorneys, Mr. Howard.

10 So anything that's in the record obviously, or has  
11 been submitted as part of your brief and the attachments I  
12 would allow. But anything new that hasn't already been filed  
13 with the Court should not be shown.

14 MR. HOWARD: Thank you, your Honor. I will so limit  
15 myself.

16 THE COURT: Thank you.

17 MR. HOWARD: I'll just -- I'm just going to unplug  
18 here.

19 THE COURT: Okay.

20 MR. HOWARD: Your Honor asked to focus on the *Olsen*  
21 case and so I'd like to start there. *Olsen v Jude* is -- is  
22 what I would suggest is a restatement of the series of zoning  
23 cases that have happened over a period of time. The *Joseph*  
24 case, the *Brink* case, the oh shoot I'm blanking on my names,  
25 the *Western Michigan* case, etcetera. All of which dealt with

1 at sort of the beginning stages of analyzing standing, how  
2 are we going to deal with this aggrieved party standing.

3 And through those court decisions the courts said a  
4 few different things. For example the court said you can't  
5 rely on your proximity to the project alone, you have to show  
6 -- still have to show some sort of special damage. So even if  
7 you were entitled to notice under the statute under the 300  
8 foot rule you still have to show special damages. You can't  
9 just allege sort of general allegations about increased  
10 traffic, increased noise, etcetera, etcetera. You have to  
11 provide the court and the parties with some level of  
12 specificity as to what your actual damage is.

13 And in the *Olsen* case in particular if you look at  
14 what happened in that there was a zoning board of appeal  
15 decision that was -- that was challenged. That ZBA decision  
16 was a lot size adjustment. Instead of a 20,000 square foot  
17 lot that the folks had a 9,000 square foot lot. Ultimately  
18 the ZBA decided that they could build on that 9,000 square  
19 foot lot and the appeal was taken.

20 Standing by the way wasn't raised as a preliminary  
21 matter at the zoning board of appeals it was only  
22 subsequently raised at the Circuit Court. And when it was  
23 raised at the Circuit Court the -- the Appellant said well  
24 hey we're, we got notice we're within 300 feet. And the Court  
25 agreed with that and said yep you're within 300 feet you have

1 the statutory right to notice and you must be aggrieved under  
2 the statutory scheme.

3 And they also said some of the stuff that had been  
4 talked about in some of the previous cases. Plus we think it  
5 will be noisy and will increase traffic. Vague allegations of  
6 harm.

7 And what the *Olsen* case did was it analyzed those  
8 older precedents in the context of the *Lansing School* case.  
9 I think honestly the Court of Appeals missed the mark a little  
10 bit when they start to talk about *Lansing School* not  
11 necessarily applying although they're a little bit confusing  
12 about that quite honestly. But I really see the *Olsen* case as  
13 a clarification that these prior decisions still exist. They  
14 weren't somehow overturned or changed by *Lansing Schools* and  
15 they're still a part of the statutory mechanism.

16 So really in argue *Olsen* is an affirmation of what  
17 has -- what had come before. It's also exactly what we have  
18 addressed throughout this case and in previous cases where we  
19 have talked about that the type -- both the type of injury  
20 but also the character of the injury.

21 So there's an important distinction we -- I feel in  
22 standing law between the idea that you have to show both a  
23 type of injury that is recognized as providing standing but  
24 also you have to show an injury to a certain specific degree.  
25 Because candidly that's the only way you can harmonize all

1 these standing cases that are out there.

2           Either you have some times where one particular  
3 impact causes standing and you have other -- another case  
4 where that same particular impact doesn't allow for standing  
5 So in the example of traffic, you can't just allege hey look  
6 we think there's going to be more traffic. But if you can  
7 show, for example like we did in this case, that there's  
8 going to be a substantial increase in boating traffic that's  
9 the whole purpose of doing this marina and this channel cut  
10 in the property that there's going to be that and that's  
11 going to impact people's safety, recreation, and livelihood.

12           That's something different and more specific and  
13 more concrete than just saying we think it's going to create  
14 traffic and we don't like that. Similarly when you look at  
15 impacts to recreational resources there's a lot of case law  
16 about what impacts are sufficient to show standing based on  
17 recreational resources.

18           And that case law has filtered down both from the  
19 Federal Courts and the State Court to say you have to have a  
20 substantial connection to those recreational resources, you  
21 can represent them. You don't have to own the State Park for  
22 example, you can be a frequent user of the State park but  
23 you've got to show us you're a frequent user and you've got  
24 to show us that your use is going to be detrimentally  
25 affected in a significant way.

1           So what is it that it's about -- What is it that -  
2           Where is your use and how is it impacted? It's a two-step  
3           process throughout this -- the entire proceeding. If you're  
4           land owner, the nearby property owners in the *Olsen* case,  
5           couldn't say that there was going to be any particular harm  
6           to them and their particular piece of property as a result of  
7           the grant of a variance.

8           Now one thing I'd like to highlight for the Court  
9           too is just if you look at the significance of the scale of  
10          what was going on in *Olsen* versus the scale of what's going  
11          on in this particular case one has to recognize that the --  
12          the scale of impacts of a project of this character is  
13          dramatically larger. The project's dramatically larger. It  
14          inherently has to do that.

15          But interestingly enough if you take a look at the  
16          case law and particularly the *Karrip* case that cites the --  
17          the *SCRAPE* United States Supreme Court case. The Court is  
18          very clear to say sometimes lots of people share an injury  
19          but the fact that lots of people are harmed doesn't mean they  
20          don't have standing. Because if that were the case the Court  
21          goes on to say the most injurious governmental actions would  
22          have no recourse, would have no challenge, they would go  
23          unabated.

24          So it's important to recognize that as these  
25          projects get bigger the circle of influence certainly is

1 going to get bigger. More people are going to be impacted.  
2 But that doesn't mean somebody doesn't have standing. If they  
3 show you that use and that it's going to be specially  
4 impacted.

5 Now lastly I want to talk a little bit about the  
6 Bily property and one of the critical distinctions. Now we  
7 got here from a series of cases that originally started with  
8 an opinion from Judge Cronin and then Judge Nykamp is a  
9 visiting judge latched onto Judge Cronin's opinion. Now when  
10 he did that he mistakenly understood this as the same project  
11 or substantially the same project as what was involved --  
12 this project is compared to the one that Judge Cronin was  
13 evaluating and when Judge Cronin found no standing. That's  
14 not the case.

15 Judge Cronin was evaluating a permit request for a  
16 road and that road went through and ultimately bisected some  
17 wetlands in its original version, I had a nice picture of  
18 that but I'm not showing you that, and then it ultimately was  
19 chopped off so that there was no wetland impact after all.  
20 And then for a variety of procedural reasons came back to  
21 Judge Cronin and he ultimately affirmed the dismissal of that  
22 contested case based on that change.

23 Now when Judge Nykamp looked at this case he looked  
24 at it and said, same project same impacts I just need to  
25 follow Judge Cronin. And that was just a fundamental mistake

1 on his part. Obviously we're here in a unique procedural  
2 situation where Judge Nykamp's already made his decision we  
3 had suggested that we just resolve everything the same way  
4 and then we'll just bring it all together on appeal. That was  
5 objectionable and I understand so at this point though that  
6 is at least an implicit if not explicit acknowledgement that  
7 this Court can make its own decision on the standing issue.

8           So we think Judge Cronin got it wrong and we think  
9 Judge Nykamp improperly followed him for the reasons that we  
10 state in our brief. But more -- more specifically the  
11 difference between the first appeal and the second appeal for  
12 this particular project. What we learned in the interim time  
13 was we learned exactly where the laydown, what they're  
14 calling the laydown, area is. And it's an area of land that  
15 has been cleared of all vegetation. It's a big sort of sand  
16 pit. Its 220 feet away from the Bily's residence. And this is  
17 all information that comes from the record. It's clearly  
18 articulated in our letter to the zoning board of appeals and  
19 there's a -- there's a -- there's a graphic picture of where  
20 that laydown area is. Again we had an actual photo of it but  
21 right now it looks like a giant sand pit. And what they're  
22 going to do is put the dredging spoils in the laydown area.  
23 And that's going to transform that from an area denuded of  
24 vegetation to a big sand pile. And that's just over the hill  
25 from where the Bily's live.

1                   So what you have is already noise, disturbance,  
2 machinery going through that laydown area creating the  
3 laydown area in the first place. That's impacting the Bily's  
4 But you also have the existence of that sand pile itself. And  
5 then the potential for as we all know what a sand dune does  
6 erosion right onto the Bily's property 220 feet away.

7                   Now in addition to that we have, again --

8                   THE COURT: About 30 seconds to wrap up, Mr.  
9 Howard.

10                  MR. HOWARD: Sounds good. The Bily's are already  
11 seeing this construction activity. They have a trail cam now  
12 that's across from their garage. There's no trespassing  
13 signs. Their unique interest in their property is being  
14 impacted in a way that's different than anybody else. Thank  
15 you, your Honor.

16                  THE COURT: Thank you. Mr. Gabrielse?

17                  MR. GABRIELSE: Can I have the screen up?

18                  MR. STRAUB: Can the Court inquire of Counsel to  
19 make certain that the documents that are going to be  
20 demonstrated on the board are in the record on appeal?

21                  MR. GABRIELSE: Yes. Nothing new other than names  
22 of cases and things like that.

23                  THE COURT: All right.

24                  MR. GABRIELSE: Just for -- as if I'm drawing on a  
25 board.

1 THE COURT: Thank you. If you have an objection  
2 just let me know.

3 MR. STRAUB: Thank you, your Honor.

4 MR. HOWARD: Thanks, your Honor.

5 MR. GABRIELSE: Your Honor, the first thing before  
6 jumping into *Olsen*, I will certainly do that, is to make sure  
7 that we're all on the same page as far as the limited  
8 physical scope that we're talking about here. And for, your  
9 Honor, if you can see in the corner of the screen I've  
10 referenced the exhibit where it's been attached to my brief  
11 so you know where it is.

12 This is the 51 acre parcel that is subject of this  
13 review. North Shore owns everything within the green. You can  
14 see there's lots over here. There's lots on the lake. And  
15 there's a laydown area. None of that is part of the PUD. None  
16 of that is approved or is subject to the planning  
17 commission's approval. So any allegations of anything to do  
18 with the laydown area simply is not relevant. The planning  
19 commission doesn't care whether the sand goes in my backyard  
20 for a huge sandbox for my kids or whether it's used somewhere  
21 on here. The planning commission doesn't do that at all.

22 Now getting right into *Olsen*, obviously this is the  
23 question, standing or aggrieved. *Olsen* makes it clear this is  
24 a quote I'm sure the Court has seen before, "It's not a  
25 question of standing it's whether the party is aggrieved".

1 There should be no dispute that *Olsen* applies. It is directly  
2 on point. It's an appeal under the MZEA to this Circuit  
3 Court.

4 Even with that as Mr. Howard has said the appellant  
5 continues to rely on these cases under the *Lee versus Macomb*  
6 *County* standing and its prodigy. Now it's got to be noted  
7 that of course those cases were overruled by *Lansing versus*  
8 *school -- Lansing Schools*. So even if standing cases were  
9 applicable it would be a different set.

10 But what *Olsen* says is it's not those. It's the  
11 aggrieved party cases. *Olsen, Unger, Brink, Village of*  
12 *Franklin*, those are the aggrieved party cases. Now while  
13 we're talking about case law I think it's important to  
14 reference the other cases that the Appellant relies on. *Brown*  
15 *versus East Board of Lansing -- East Lansing*, excuse me.

16 In 2015 Judge Cronin saw it and *Olsen* said it was  
17 well, it applies a different standard. It's not relevant. The  
18 Appellant also relies on unpublished after unpublished case.  
19 And I note this at least for the *Nothern Michigan* case there  
20 was a petition filed to the Court of Appeal to publish it and  
21 the Court of Appeals says no this is an unpublished case.

22 So we're back to *Olsen* and the cases it affirms.  
23 And there's three takeaways that I think I just want to  
24 emphasis for the Court. One is that the aggrieved status must  
25 be proved not just alleged. You've read the cases, I know

1 that, but here's what we have, is we have the Coastal  
2 Alliance making allegation after speculative allegation but  
3 they prove absolutely nothing.

4 The allegations this will do irreparable harm to  
5 the dunes. In fact the allegations is this I quote, "it will  
6 devastate the entire dunes ecological system". That's an  
7 allegation that's not proof. And there's absolutely no proof  
8 in the record. And later on if I have time I'm going to get  
9 to the point where we've demonstrated proof on the other  
10 side.

11 So I guess to back up here's our argument is that  
12 the allegations are insufficient under *Olsen* on their own.  
13 And we've gone the extra step and disproven some of them as  
14 well. But even this allegation about unsafe boating on the  
15 Kalamazoo River it's an allegation. There is not any proof  
16 that that will happen. Or that this -- this project is going  
17 to essentially torpedo the entire tourist economy of  
18 Saugatuck. There's no proof it's an allegation.

19 The second takeaway from *Olsen*, damages must be  
20 special not just incidental inconveniences. In Michigan law  
21 the term special damages has a very specific connotation and  
22 meaning. And I'm sure this Court is familiar with it in the  
23 terms as pleading special versus general damages. And that's  
24 contrasted with this group of harm that are referred to as  
25 incidental inconveniences. Those things that just happen with

1 development. You have a development you will have increased  
2 traffic. Whether it's a single family home there are two or  
3 three more cars on the road, period, that happens. There's  
4 going to be some dust. There might be some noise with  
5 construction. Those types of things. And the Courts  
6 identified some examples, traffic congestion, aesthetics,  
7 economic losses, population increases, environmental changes  
8 it's almost as if those incidental inconveniences are what  
9 served as the checklist for the allegations of the Coastal  
10 Alliance.

11 They say this will result in more boats being on  
12 the Kalamazoo River. Well that's an increase in traffic  
13 congestion. They say the project will affect property values.  
14 That's general economics. The property will increase taxes  
15 because of more people. That's an increase in population. The  
16 project will devastate the entire dunes ecological system and  
17 sand might blow on our property. Those are environmental  
18 changes. The homes will be visible. Not only stating the  
19 obvious but that's general aesthetics.

20 Now along that line I guess I want to pause a  
21 minute. We're not talking here about a case where the Bily  
22 family is concerned that this huge monstrosity of a  
23 skyscraper is going to be built on a property line and  
24 they're going to step out on their porch and say where did  
25 the sun go?

1           This is four to five football fields away. Four to  
2 five football fields away on the horizon. So instead of  
3 seeing a tree and another tree and another tree, you know  
4 this size, they're going to see a tree a tree and then a  
5 house and then another tree another tree and then another  
6 house. It's not blocking any view. It's I'm going to see on  
7 the horizon a house.

8           The third takeaway from *Olsen*, harm must be unique  
9 It's not shared with similarly situated property owners. And  
10 that's exactly what the *Olsen* case says, I mean that's almost  
11 a verbatim quote. Now one side note all of these case of  
12 course associate the harm and the damages with property  
13 ownership. That's -- that's important. It's not simply  
14 someone driving down a street and saying I like it that  
15 there's a field over here. I mean, we're talking about zoning  
16 issues. Zoning is supposed to protect neighboring properties  
17 from having incompatible uses. So that's important.

18           But the complaints here are not of unique harm to  
19 members. Again the project will cause congestion on the  
20 river. Well that's not true but even if it were it would not  
21 be unique to members of the Coastal Alliance. Every riparian  
22 right owner on the river and on Lake Kalamazoo would  
23 experience that congestion. Or the allegation that the  
24 project will devastate the Saugatuck Dunes State Park next  
25 door. Again not true. But if it were every one of the

1 thousands of visitor to the state park every year not just  
2 those Coastal Alliance members would experience that same  
3 devastation.

4 THE COURT: Mr. Gabrielse, can you remind me how  
5 many boat slips are planned?

6 MR. GABRIELSE: It is 23 houses are on the marina  
7 so each of them would have the opportunity to park there.

8 THE COURT: Okay.

9 MR. GABRIELSE: And it's 33 and I'm looking for  
10 confirmation, 33 for those property owners that are not  
11 directly on the water. In other words it's a neighborhood.

12 THE COURT: Right.

13 MR. GABRIELSE: And it's a private marina. This  
14 isn't a public marina --

15 THE COURT: Right.

16 MR. GABRIELSE: -- to go and gas up at.

17 THE COURT: So a total of 56 slips?

18 MR. GABRIELSE: Yes. Compared to the thousands.  
19 Your Honor, that's in fact the next slide I have is, I mean,  
20 look at the number of slips here in on the Kalamazoo River  
21 and on Lake Kalamazoo. And if you have any experience out on  
22 the water you know that where are most of those boats every  
23 day of the year. Right at their dock. It's not like there's a  
24 swarm every day every hour going back and forth.

25 So adding 50 to this mix of occasionally one boat

1 leaving the marina, come on.

2 MR. HOWARD: Your Honor, I don't recall seeing that  
3 exhibit in the record on appeal.

4 THE COURT: I do.

5 MR. GABRIELSE: Exhibit J.

6 MR. HOWARD: I know it's attached to your brief I  
7 just -- I think Mr. Straub's fundamental objection was that  
8 it needs to be a part of --

9 MR. STRAUB: Well it's not appropriate.

10 THE COURT: My ruling is that if it was attached to  
11 your briefs then it can be shown on the board.

12 MR. HOWARD: Okay.

13 THE COURT: That's my ruling, Mr. Straub.

14 MR. STRAUB: I understand. Which I'm indicating I  
15 disagree with, your Honor, for the record.

16 THE COURT: All right. Thank you. Go ahead, Mr.  
17 Gabrielse.

18 MR. GABRIELSE: Your Honor, I think I'm going to  
19 cut it off at that unless you have another question then I'll  
20 wait for my additional time.

21 THE COURT: No. I don't have any other questions.  
22 Thank you. Mr. Straub.

23 MR. STRAUB: Thank you, your Honor. I think  
24 Appellant Counsel and I agree that the *Olsen* case is a  
25 restatement of what the law has been for quite some time in

1 the State of Michigan. I believe that the *Olsen* decision  
2 reaffirmed the *Unger* case, the *Village of Franklin* case, and  
3 the *Western Michigan Brink* case. And those cases were the  
4 support for the predecessor to this case which is resting at  
5 the Court of Appeals.

6 So to the extent that we're here today, I believe,  
7 *Olsen* reinforces the position that the Township has taken all  
8 along in this case and that is that the Saugatuck Dunes  
9 Coastal Alliance does not have does not have standing in this  
10 matter.

11 I appreciate the contention made by the Appellant  
12 that Judge Nykamp perhaps made an oversight with regard to  
13 the interpretation of Judge Cronin's opinion from 2015.  
14 Understand if I were in Appellant Counsel's shoes I would  
15 argue the same.

16 However the issue is whether the law on which Judge  
17 Cronin and Judge Nykamp relied was proper law. And the answer  
18 to that was solved by *Olsen* which said yes it is. Those  
19 decisions may be from the 60's and 70's but they're still  
20 good and the principle is reinforced here in 2018.

21 That principle is stated on page 8, the -- I don't  
22 have the proper citation for it, but page 8 of the copy of  
23 the *Olsen* decision that's attached to the Townships brief. It  
24 appears the key citation the key quote that I'm referring to  
25 here is on page 12 of the Township's brief. Incidental

1 inconveniences such as traf-- such as increased traffic  
2 congestion, general aesthetic, and economic losses,  
3 population increases, or common environmental changes are  
4 insufficient to show that a party is aggrieved.

5 I spent a good portion of my brief addressing that  
6 standard to the specific individuals and entities, might have  
7 been a corporation that was represented there perhaps an LLC  
8 what their aggrieved status was based upon. And the reason  
9 that I did that is that that's the basis for standing. That's  
10 that *Olsen* said you got to be an aggrieved party to be able  
11 to come to the Court and make a claim for appeal.

12 And in each instance it appeared to me, and I  
13 understand about Ms. Birkholz and I understand that she did  
14 not own nor did I anticipate that she owned that portion of  
15 the state park or had any special interest. But there was no  
16 evidence to indicate that her day to day activities were  
17 adversely impacted beyond general aesthetic problems with the  
18 project. And thus is was as I proceeded down through those  
19 individuals.

20 No one prohibited the SDCA from bringing forward  
21 information about other members that it may have had that had  
22 substantial documented economic loss that was based upon  
23 information available from the, excuse me, approval process  
24 at the planning commission. That's why it is so important  
25 that we focus on what the zoning board of appeals had in

1 front of it as opposed to bringing in extraneous information  
2 Whether it be filed as part of a brief or whether it's filed  
3 here in oral argument. That zoning board of appeals, those  
4 people there's three members, had information. It is that  
5 decision that this Court is being asked to determine.

6 One other thing that I want to address that I find  
7 rather interesting in the SDCA assessment of the *Olsen*  
8 decision and I believe the word that I wrote -- in fact I  
9 know the word, I don't believe I know the word, I wrote down  
10 scale. Counsel's argument is well the *Olsen* decision was  
11 based upon a lot that was only 9,000 square feet where it  
12 should have been 20,000 square feet. Your Honor, you have to  
13 pay attention Counsel said, don't pay so much attention to  
14 that *Olsen* decision because it only involved a little tiny  
15 piece of property. And the impact on that -- the impact on  
16 that was so minute as not to be considered with this gigantic  
17 project we have over here in Saugatuck Township.

18 Now I'm going to suggest to the Court that there is  
19 absolutely absolutely not one single case to support that  
20 kind of concept to present to this Court as a legal basis.  
21 Now I'm arguing legal basis for this Court to arrive at a  
22 decision. I can since I live in Berrien County and had the  
23 Judge in my law firm that made the decision at the Trial  
24 Court level, I'm sure I can make contact with those people  
25 that were in that subdivision where that 9,000 square foot

1 lot was and they would be just as unhappy as members of the  
2 SDCA and the scale makes no difference.

3 This is not a question of dollars and cents, one is  
4 big money the other is not, one is big property the other is  
5 not. This cannot be the basis for a legal determination.  
6 That's what the statute says, competent material substantial  
7 evidence on the record. So I would urge you not to be swayed  
8 by that argument.

9 The second thing that you wanted us to talk about  
10 was whether or not the SDCA is an aggrieved party. I think  
11 I've touched on that in my primary concept here with this  
12 incidental inconveniences concept, that -- or with the idea  
13 that the the essence of the *Olsen* decision is incidental  
14 inconveniences such as increased traffic etcetera, don't  
15 count. They don't establish this aggrieved status.

16 I don't think any of the evidence that was  
17 presented to the zoning board of appeals meets that standard  
18 and therefor I believe that the zoning board of appeals  
19 decision that the SDCA does not have standing should be  
20 affirmed.

21 THE COURT: Thank you. Mr. Howard, five minutes to  
22 respond.

23 MR. HOWARD: Thank you, your Honor. I think  
24 honestly we've narrowed down the legal standard. Really this  
25 case is a lot about applying the facts to that legal standard

1 and now I certainly do have a few points that I disagree with  
2 opposing counsel on and I do what to touch on those. But  
3 really I think a lot of this comes down to the factual  
4 application when you're dealing with standing.

5 And I want to start off with the idea of proof.  
6 There's -- The case law is clear that at the varying stages  
7 of a case standing needs to be established. So based on the  
8 pleadings it has to be pled. At summary disposition stage  
9 there's a motion and a presumption and there needs to be some  
10 sort of evidence in the form of affidavits etcetera. At the  
11 end of the case when you're going to trial you've got to  
12 proof it beyond whatever the standard is that you need to  
13 establish, preponderance or whatever the standard is the  
14 judge is reviewing.

15 So in each stage there's a proof. We have plenty of  
16 proof here. We have documentary evidence. We have affidavits  
17 that function as testimony. And we have substantial  
18 information that shows the potential impact of this project  
19 on unique interests. So I just want to be clear that the  
20 suggestion that somehow we haven't established proof or  
21 evidence is simply not true. That's exactly what is in the  
22 record and what you've been provided with.

23 I want to touch briefly on the *Lee* cases and the  
24 cases that were prior to *Lansing Schools*. To be clear *Lansing*  
25 *Schools* adopted an easier standing test. It is easier to

1 prove standing under *Lansing Schools* than it was under *Lee* or  
2 *Cleveland Cliffs* or the other -- other cases.

3 So therefor if you can establish -- if you could  
4 establish standing under them, a more difficult test, you  
5 clearly can under the *Lansing Schools* test. So to suggest  
6 that those are somehow irrelevant because they were overruled  
7 on other grounds is not correct. They are relevant and they  
8 help provide context for what sort of affidavits are we  
9 looking for. And last time we were here before you we talked  
10 a bunch about the *Cleveland Cliffs* case which contains  
11 affidavits that are nearly identical to to what we have here.  
12 In fact here we have more proof than what was offered in the  
13 *Cleveland Cliffs* case.

14 I agree that incidental inconveniences are not  
15 enough to establish standing. They never were even before  
16 *Olsen* and under our first iteration. But what we have in this  
17 case are much more than incidental inconveniences. And for  
18 example the the language in *Olsen* that talks about sort of  
19 normal environmental changes that's a great segway to this  
20 case because we're not talking about normal environmental  
21 changes. We're talking about what have been designated as  
22 globally imperiled dunes and wetland resources that are  
23 hydrologically connected to what's going on according to the  
24 developer's own expert they're hydrologically connect to  
25 what's going on on this site.

1           So you're talking about substantially more than  
2 normal inconvenience. When you're talking about dredging  
3 spoils certainly, I honestly don't know off hand whether or  
4 not I assume at face value Mr. Gabrielse's statement that  
5 that wasn't part of the PUD, but that doesn't matter because  
6 it is part of the project. Part of the project includes  
7 dumping the sand that's going to be dredged for this project  
8 onto property that is 220 feet away from the Bily's. That's a  
9 unique harm that nobody else is suffering.

10           So when you talk about even if the suggestion is  
11 you have to be a property owner, which I disagree with, even  
12 if you say that it has to be special somehow to them they're  
13 the only ones who are suffering that. They're the only ones  
14 who are -- have that spoils area just right next to their  
15 house.

16           The last thing I want to clarify is Mr. Straub  
17 indicated that -- that the *Olsen* case involved an important  
18 issue to the folks that are -- were involved in *Olsen* and I'm  
19 sure that is absolutely the case. I'm sure that they  
20 advocated vigorously and raised the issue. The point was not  
21 that because it's a small lot it's a small problem or not  
22 relevant. The point was just that the impact circle of any  
23 development gets larger as the development gets larger and  
24 more complex.

25           We heard earlier that, well lots of people will

1 suffer this harm on the Kalamazoo River if they use the  
2 Kalamazoo regularly so there for you can't have standing  
3 based on impacts to your use of the Kalamazoo River. No,  
4 that's not what the case law says. The case law says, there  
5 can lots of times be with big projects lots of times there  
6 are a lot of people that are harmed and each one of them  
7 that's uniquely harmed does have standing to bring suit.

8 It's a gateway inquiry. It's not proving winning  
9 the case outright. It's determining whether or not you have  
10 the right parties who are going to vigorously advocate  
11 against one another in the room together.

12 So to suggest that you have to prove everything to  
13 the enth degree or you have to have the most unique damage  
14 that nobody else on the planet ever suffered is not true.  
15 It's just do you have the right people in the room and you  
16 certainly do in this case. Thank you.

17 THE COURT: Thank you, Mr. Howard. Mr. Gabrielse,  
18 anything further?

19 MR. GABRIELSE: Your Honor, we left off with this  
20 photo talking about traffic and Mr. Howard said we have  
21 proof. I would submit to the Court that the Court should  
22 review the brief and the affidavits. Simply because something  
23 is stated in a brief does not mean it's been proved nor even  
24 that it's been stated in an affidavit by somebody that says  
25 this project will make my boat experience on the river less

1 enjoyable.

2 But we also, on the issue of traffic, we also  
3 provided you with this report for Edgewater Resources that  
4 says the small number of vessels in the boat basin will not  
5 create a navigational hazard on the Kalamazoo River. They  
6 analyzed harbors all over the State and said in terms of the  
7 space and boat traffic and everything this is more user  
8 friendly than most of these harbors around.

9 With regard to the allegation about this project  
10 changing the character of the area. We've submitted evidence  
11 to your court, your Honor, that this fits in perfectly with  
12 the character of the area. It's zoned residentially and it's  
13 a boating hotspot right across from The Cove as it's called.  
14 And the development that we're proposing is a residential  
15 development with boating facilities directly in line with the  
16 character of the area.

17 With regard to the allegations about environmental  
18 impacts. We've given you the report from an independent  
19 outside planner hired by the Township to review this who  
20 lauded North Shore for their conservation based design  
21 approach. This is an approach that allowed North Shore to fit  
22 the development right within the natural contours of the  
23 property. I mean, you can see on the topographical map here  
24 exactly where it's going to be. The steep slopes are being  
25 left alone. That not only preserves those landscapes but it

1 also provides a buffer on three side of this development by  
2 50 to 60 foot forested dunes. It is also by the way right  
3 where a previous boat manufacturing factory existed. All by  
4 plan.

5 We've provided you with the report from Doctor Shu  
6 Guang Li, the hydrologist from Michigan State University, who  
7 North Shore hired to help design the boat basin in a way so  
8 that the interdunal wetlands aren't impacted. And we analyzed  
9 it two different ways, without a clay liner and with a clay  
10 liner. And based on his recommendations we have submitted and  
11 have been approved to put in a boat basin by the MDEQ with a  
12 clay liner. You can see these circle of impact without a clay  
13 liner on the water table. They're non-existent with the clay  
14 liner. There is no impact to these globally imperiled  
15 interdunal wetlands. We're protecting them.

16 And finally, your Honor, we've received the stamp  
17 of approval from the MDEQ. This is the agency tasked with  
18 protecting the environment and they have said, you know what  
19 your project does not negatively impact the environment you  
20 make go ahead. There's certain restrictions and requirements,  
21 absolutely, that we've agreed to but that's how it's going to  
22 be built.

23 And I would point the Court to the *Olsen* case. In  
24 that case one of the plaintiff's argued about well these  
25 septic systems or well systems are going to impact us. That's

1 one of the negative impacts. And what the Court said is don'  
2 argue about the planning commission's approval if it has to  
3 do with septic that's somebody else's wheelhorse. Assume  
4 that the Allegan County Health Department, assume in this  
5 case that the MDEQ is going to do their job. The planning  
6 commission does not approve those things. Those are not up  
7 for appeal.

8 So that's the proof that we've submitted. Your  
9 Honor, here's I guess what I'd like to end on here. And I  
10 just put up here on the right side is the Coastal Alliances  
11 brief that they've filed in this case. Okay. On the left is  
12 exhibit C that we've submitted which is a previous brief in  
13 which they were opposed in front of Judge Cronin to the road  
14 permit. And you can look word for word these allegations,  
15 unsupported allegations, the same ones against a road and  
16 against a boat basin. What does that tell you?

17 That tells you that the credibility is not there. A  
18 road is going to devastate the entire eco-- dunes ecological  
19 system. And then a boat basin is going to have the exact same  
20 impact. I think the Court can evaluate that in determining  
21 whether to take an affidavit at face value or whether to say  
22 you know what this just doesn't pass mustard.

23 The complaint in this case, I think it needs to be  
24 clarified, is on the PUD approval. Which again did not have  
25 anything to do with the laydown area at all.

1           And finally on the procedural posture, I think this  
2 might be one area in which Mr. Straub and I have a slightly  
3 different approach to things on this, but I think there's two  
4 ways this Court can analyze it. One is whether the zoning  
5 board of appeals got it right. Okay. The other is the  
6 threshold question for who walks in that door to this Court.

7           Now the standard for both of those is the same,  
8 aggrieved party. The MZEA says an appeal to the ZBA is  
9 aggrieved party and an appeal to the Circuit Court. But  
10 that's -- the analysis is the same. It's simply what outside  
11 cover this Court decides to put on that package.

12           In light of the standards articulated in *Olsen* and  
13 the proof that we've demonstrated I would submit to you these  
14 allegations made by the Coast Alliance are simply  
15 inappropriate and not enough. Thank you.

16           THE COURT: Thank you. Mr. Straub.

17           MR. STRAUB: Sure, your Honor. I'm going to address  
18 the issue of what this Court's to consider in making this  
19 determination. It's not often that the issue of standing  
20 comes in front of a township board like this and I  
21 acknowledge that there may be some question about what this  
22 Court ought to consider. However, I think it's absolutely  
23 clear that the record on appeal in this case contains 110  
24 pages, there was a supplement filed.

25           So my contention is that based upon the State

1 statute 1253606 and MCR 7122, 7.122, this Court is not,  
2 should not, cannot without error, consider matters that were  
3 not considered by this zoning board of appeals because if it  
4 did it's placing itself in a position that the zoning board  
5 of appeals did not have.

6 So consequently what this Court considers and upon  
7 which it makes its determination should be only those  
8 documents that were submitted as part of the record on  
9 appeal. Frankly I've handled a fair number of those and have  
10 never had to address this issue in the past. And I was quite  
11 surprised in looking at Counsel -- Counsels' presentations  
12 here that extraneous material was being supplemented to the  
13 record without ever having the zoning board of appeals  
14 address it and have the benefit of it.

15 So, and again, as to both parties involved in this  
16 case nothing was done by the zoning board of appeal to limit  
17 the presentations and the documents that were submitted to it  
18 back in April of this year. Submitting them now as part of  
19 the written presentation after the fact is inappropriate. And  
20 I'm not taking sides about whether it's SDCA or the  
21 developer. It is not appropriate and I would urge the Court  
22 to avoid using and referring to any of the documents that  
23 were submitted here today if they weren't marked with the  
24 page numbers in the bottom right hand corner starting with 1  
25 and going to 110.

1           Now I can suggest and I would agree that legal  
2 decisions and perhaps submissions that had been made by  
3 counsel for the SDCA in other proceedings, that would be fair  
4 game because that goes to the legal issue of the case as  
5 opposed to the factual determinations of the case. But short  
6 of that I don't see this Court properly receiving any  
7 additional information if it's not in the record on appeal.  
8 Thank you.

9           THE COURT: Thank you. Well just to address that  
10 issue the Court does intend to limit its decision to the  
11 record on appeal and obviously will consider the arguments  
12 that have been made in briefs that have been submitted by the  
13 parties.

14           And based upon what I've read in the briefs and my  
15 reading of the case of *Olsen verses Jude and Reed* I do find  
16 that that is the applicable case law that the Court has to  
17 follow in this case. And I understand Mr. Howard's arguments  
18 that it's just a continuation but I do think that it's an  
19 important continuation of the prior law with respect to who  
20 has standing to appeal decisions by the zoning board of  
21 appeals.

22           And the Court in *Olsen* started with the analysis of  
23 the statute itself, which obviously is the statute that  
24 governs the appeals to the zoning board being section 605 of  
25 the MZEA that states, the decision of the zoning board of

1 appeals shall be final. A party aggrieved by the decision may  
2 appeal to the Circuit Court for the County in which the  
3 property is located as provided under 606.

4 And therefor the Court of Appeals held that the ZBA  
5 -- that a party seeking relief from the decision of a ZBA is  
6 not required to demonstrate standing but instead must  
7 demonstrate to the Circuit Court that they are an aggrieved  
8 party. And that is what this Court feels I have to do is to  
9 decide whether or not the SDCA is an aggrieved party in this  
10 matter.

11 And I'm going to note some of the language that I  
12 found persuasive in the *Olsen* decision. From page 6, they  
13 state to be aggrieved one must have, and this is them quoting  
14 other prior decisions, but to be aggrieved one must have some  
15 interest of a pecuniary nature in the outcome of the case and  
16 not a mere possibility arising from some unknown and future  
17 contingency. An aggrieved party is not one who merely dis--  
18 is merely disappointed over a certain result rather to have  
19 standing on appeal a litigant must have suffered a concrete  
20 and particularized injury as would a party plaintiff  
21 initially evoking the Court's power.

22 So again, they say the question is not whether they  
23 had standing but whether or not the appellees in that case  
24 were parties aggrieved by the decision.

25 And then of course the Court of Appeals went on to

1 analyze different cases that had previously addressed the  
2 issue. Specifically the *Unger* case, the *Joseph v Grand Blanc*  
3 *Township, Village of Franklin versus Southfield* which this  
4 Court also finds persuasive.

5 And they quoted *Unger* for the proposition that the  
6 Court has consistently concluded that to be a party aggrieved  
7 by a zoning decision the party must have suffered some  
8 special damages not common to other property owners similarly  
9 situated. Generally quoting *Village of Franklin*, or at least  
10 relying on *Village of Franklin*, stating that generally a  
11 neighboring land own alleging increased traffic volume, loss  
12 of aesthetic value, or general economic loss is not  
13 sufficiently alleged special damages to become an aggrieved  
14 party because those generalized concerns are not sufficient  
15 to demonstrate harm different from that suffered by people in  
16 the community generally.

17 And finally on page 8 the Court stated what a party  
18 must demonstrate to be an aggrieved party. They must allege  
19 and prove, not just allege but prove, that he or she has  
20 suffered some special damages not common to other property  
21 owners similarly situated and again repeated the language I  
22 mentioned before, incidental inconveniences such as increased  
23 traffic congestion, general aesthetic, and economic losses,  
24 population increases, or common environmental changes are  
25 insufficient to show that a party is aggrieved. Instead there

1 must be unique harm dissimilar from the impact that other  
2 similarly situated property owners may experience. Moreover  
3 mere ownership of an adjoining parcel of land is insufficient  
4 to show that a party is aggrieved. As is the mere entitlement  
5 to notice.

6 All of those things that I quoted are instrumental  
7 in my decision today in ruling that the SDCA is not an  
8 aggrieved party in this matter. And therefor doesn't have  
9 standing to seek -- to appeal the zoning board of appeals  
10 decision here to the Circuit Court or to appeal the previous  
11 decision that they appealed to the ZBA because they are not  
12 an aggrieved party.

13 And the specific arguments that have been made by  
14 the SDCA with respect to why they are an aggrieved party, I'm  
15 going to briefly go into those for the sake of making a  
16 record of the items that were argued by the SDCA.

17 The environment effects that were argued the Court  
18 feels that a mere possibility of environmental damage is not  
19 enough to show special damages in this case. There has been  
20 no showing of unique harm that this Court is aware of.  
21 Especially in light of the evidence that's been presented to  
22 support that this is an environmentally friendly project.

23 And secondly, the physical effects to the  
24 neighboring properties, as the Court stated in *Olsen* and in  
25 previous cases they stated that just because someone owns

1 property adjoining the parcel of land is insufficient. They  
2 have to show special harm or unique harm. And with regards to  
3 the Bily property the Court finds that that showing has not  
4 been made especially in light of the buffer zone or the hill  
5 and the woods that are found between the Bily property and  
6 the property at issue here. The PUD that was -- was approved

7 Another point argued by the SDCA is the aesthetic  
8 and view shed effects of the project and again the Court of  
9 Appeals has addressed this issue in stating that general  
10 aesthetic losses are insufficient to show that a party is  
11 aggrieved. And there hasn't been a showing to this Court's  
12 satisfaction that there's any unique harm to the SDCA from an  
13 aesthetic basis.

14 The next issue is the, or the next issue raised by  
15 the SDCA, is the recreational activity and the impact on  
16 recreational activity in the area. And I note that this  
17 property that's being developed is not public property. It's  
18 not a park. It's private property. It's -- There has not been  
19 public access to it and the Court is not convinced that any  
20 harm has been shown to the public's or the SDCA's -- I should  
21 say, the SDCA's ability to access recreational areas by the -  
22 - by the project.

23 Another factor that's raised by the SDCA is the  
24 effect on property values and taxes. And that's something  
25 that the Court finds that the SDCA has not shown that they've

1 suffered special damages not common to other property owner  
2 similarly situated. The Court feels that that's something  
3 that's that's common. That's going to be felt, if its felt,  
4 it's going to be felt by everyone in the area and not just  
5 the members of the SDCA.

6 The next factor that they're -- they raise is a  
7 local tourism. That the negative effect on businesses with  
8 regards to the construction of the boat basin. And the Court  
9 feels that the scope of the project, although while large in  
10 acreage, the Court doesn't feel that the scope of the project  
11 will have a detrimental effect.

12 I don't think there's been a showing that there  
13 will be a detrimental effect beyond predictions that are made  
14 by people who are business owners but they haven't shown  
15 anything more than a mere possibility. And that's what the  
16 Court has to focus on. Speculation is not enough to say that  
17 the businesses would be effected and further more I feel that  
18 the -- the impact will not just be on businesses but everyone  
19 in the area if there is an impact and not just members of the  
20 SDCA but everyone in the area will be effected.

21 And as I said because there is 56 boat slips in  
22 this -- in this proposed development and the Court doesn't  
23 think that in light of the number of boats that are already  
24 on the river and docked in the area that that will have a  
25 significant impact on the local businesses.

1           The next issue is the physical and other effects on  
2 riparian users of the river and again the Court feels that  
3 there hasn't been a sufficient showing to show that there's  
4 some special injury to the SDCA in that regard. If there is  
5 an impact it's going to effect the community at large.

6           But again based upon 56 boats being added to the  
7 thousands of slips that are already used in the -- or  
8 approximately a thousand slips I don't remember the exact  
9 number but several hundred at the very least that are already  
10 used in the area. And the number of boats that use The Cove  
11 area near the PUD the Court feels that there isn't a  
12 sufficient showing that there's any sort of special damage to  
13 the SDCA based upon more users of the river.

14           Finally, the reference to the inconsistency with  
15 the master plan. The Court notes that the master plan itself  
16 indicated that this -- this area is zoned residential as was  
17 noted by Mr. Gabrielse and this is a residential development,  
18 multifamily residential use. And the master plan states that  
19 the waterfront should continue to be maintained and where  
20 necessary redeveloped with a mix of single and multiple  
21 family residential use along with waterfront related  
22 commercial developments such as marinas and other ship shore  
23 activities. So the Court does not find that there is an  
24 inconsistency with the master plan for the area.

25           In summary, the Court finds that the SDCA is not an

1 aggrieved party as it has been analyzed under the *Olsen*  
2 decision. And for all those reasons the Court will deny the  
3 appeal in this matter.

4 Anything further, Mr. Howard?

5 MR. HOWARD: No thank you, your Honor.

6 THE COURT: Mr. Gabrielse?

7 MR. GABRIELSE: No, your Honor, except to ask who  
8 will be drafting the order. Are you going to draft it or do  
9 you want us?

10 THE COURT: No I think you can draft the order or  
11 Mr. Straub. I don't know. One of you can draft the order or  
12 you can do it together I suppose. However you wish.

13 MR. STRAUB: I'll volunteer to draft the order,  
14 your Honor.

15 THE COURT: Pardon me?

16 MR. STRAUB: I'll volunteer to draft the order.

17 THE COURT: Very good.

18 MR. STRAUB: And submit it to Counsel under the  
19 seven day rule.

20 THE COURT: All right. Thank you.

21 MR. STRAUB: Thank you, your Honor.

22 THE COURT: You're welcome.

23 (At 2:18 p.m., proceedings concluded)  
24  
25

I certify that this transcript, consisting of 48 pages, is a complete, true, and correct transcript of the Oral Argument on Appeal and testimony taken in this case this on Monday, October 25, 2018.

Date: November 1, 2018

Carley Dalke  
Carley Dalke, CER-9355  
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48th Circuit Court  
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# Chapter 40 - ZONING

## ARTICLE I. - IN GENERAL

### Sec. 40-1. - Effect.

No Building, Structure or land shall be used or occupied, and no Building or Structure or part thereof shall be constructed, reconstructed, erected, moved, placed, extended, enlarged, razed or altered, except for ordinary maintenance and repairs, unless a permit for such activity has first been obtained from the Zoning Administrator, and such activity must comply with the terms and conditions of this chapter. (Ord. No. 39, § 1.02, 5-20-1987)

### Sec. 40-2. - Purpose.

- (a) This chapter is based upon the township general development plan and is designed to:
- (1) Promote the public health, safety and general welfare;
  - (2) Encourage the use of land in accordance with its character and adaptability and to limit the improper Use of land;
  - (3) 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;
  - (4) Ensure that Uses of land shall be situated in appropriate locations and relationships;
  - (5) Avoid the overcrowding of population;
  - (6) Provide adequate light and air;
  - (7) Lessen congestion on Streets;
  - (8) Reduce hazards to life and property;
  - (9) Facilitate the adequate provision of a system of transportation, sewage disposal, safe and adequate water supply, education, recreation and other public requirements; and
  - (10) Conserve the expenditure of funds for public Improvements and services so as to obtain the most advantageous Uses of land, resources and properties.
- (b) This chapter is adopted with reasonable consideration, among other things, for the character of each zoning district; its peculiarity 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.

### Sec. 40-3. - Scope, interpretation and control.

This chapter shall repeal, abrogate and annul the prior township zoning ordinance and any and all amendments thereto. However, this chapter shall not repeal, abrogate, annul or in any way impair or interfere with existing provisions of other laws, ordinances or regulations, except those repealed by specific reference, or with private restrictions placed upon property by covenant, deed, private agreement or appropriate court order or with lawful restrictive covenants running with the land. Where this chapter imposes greater restrictions, limitations or requirements upon the Use of Buildings, Structures, or land, the height of Buildings or Structures, Lot coverage, Lot Areas, Yards or other open spaces, or any other Use or utilization of land than are imposed or required by such existing laws, ordinances, regulations, private restrictions, or restrictive covenants, the sections of this chapter shall control, except as state law and/or the rules and regulations promulgated thereunder shall preempt or control.

**DIVISION 5. - R-2 RIVERSIDE RESIDENTIAL ZONED DISTRICT**Sec. 40-271. - Statement of purpose.

The R-2 riverside residential zoned district is that area of the township bordering the Kalamazoo River and its tributaries where controls are placed upon the use and development of areas adjacent to such river and its tributaries within the township and upon construction activity within such river and its tributaries. (Ord. No. 39, § 5.02(R-2), 5-20-1987)

Sec. 40-272. - Permitted Uses.

For the R-2 riverside residential zoned district, see article V of this chapter for certain applicable general provisions and sections 40-590 and 40-591 for permitted and prohibited Uses and such other overriding requirements and restrictions of that portion of the riverside residential zoned district which is located within the floodplain overlay district and/or within the natural rivers overlay district and section 40-1046 as to permitted and nonpermitted Uses or those requiring approval. Insofar as they serve the purposes outlined in section 40-271, the following are permitted Uses:

- (1) Minimum size of Dwelling Units. Each single-and two-family Dwelling Unit shall have minimum Floor Area as follows:
  - a. One Story: 1,000 square feet of Ground Floor Area.
  - b. One and one-half Story and two Story: 1,000 square feet of total Floor Area with a minimum of 700 feet located on the floor level nearest to ground level at the front of the Building.
  - c. The exterior sidewalls of any dwelling shall not be less than 24 feet in width on each side.
- (2) Home Occupations, but subject to the restrictions and regulations of section 40-642.
- (3) Churches and parish houses, public schools and educational institutions and other similar public Buildings, Structures or Uses.
- (4) Community Buildings, parks and public recreation areas.
- (5) Essential public utility service Buildings.
- (6) A single Private Garage for each Dwelling Unit for the keeping of not more than three Motor Vehicles.
- (7) A Mobile Home utilized as a temporary residence in conformance with section 40-648(b) and Located only by special permit of the Zoning Administrator while a permanent Dwelling is being constructed.
- (8) Wildlife and fish management operations and forest preserves.
- (9) Farming and agricultural operations, together with a reasonable number of Accessory Buildings incidental thereto.
- (10) Household pets and horses as provided in section 40-273.
- (11) Accessory Buildings, Structures and other Uses customarily incidental to any of the permitted Uses in this section when located on the same Lot or Parcel of land.
- (12) Any other permitted Uses set forth in section 40-1046 and such Special Approval Uses or Planned Unit Developments as shall be permitted by the Planning Commission.

(13) Waterfront Access Property, Docks and piers in accordance with the provisions of Article XII.

009)

Sec. 40-273. - Household pets/horses.

- (a) In the R-2 riverside residential zoned district, usual household pets as well as horses are allowed subject to their not becoming a public or private Nuisance to adjacent property owners or occupants through trespass, odors, noise or pollution of water, ground or air.
- (b) On Parcels of land of less than five acres in size, the keeping of usual household pets not exceeding a total of three in number is allowed, but the keeping of fowl, poultry, horses and other farm animals is not allowed.
- (c) On Parcels of land of five acres or more in size, the keeping of usual household pets not exceeding a total of five in number is allowed as is the keeping of horses for noncommercial purposes, provided such horses are not kept in or upon any open area located within 100 feet of a Building utilized for residential purposes that is on another Parcel of land. The keeping of fowl, poultry and farm animals other than horses is not allowed except as a Special Approval Use.
- (d) Any litter of dogs or cats which causes the limits of this section to be exceeded shall not constitute a violation of this chapter for a period of four months after birth, provided that not more than two such litters shall be allowed to so remain on the premises within any consecutive 12-month period.

Sec. 40-274. - Accessory Buildings.

In the R-2 riverside residential zoned district, Accessory Buildings may not occupy more than ten percent of the area of the Parcel upon which situated. (Ord. No. 39, § 5.08(R-2), 5-20-1987)

Sec. 40-275. - Area requirements.

- (a) In the R-2 riverside residential zoned district the minimum Lot Area requirements for Single-Family Dwellings shall be as follows:
  - (1) Lots which are not governed by the subdivision regulations in article III of chapter 20 of this Code or by the Site Condominium Project regulations in article XIII of chapter 40 of this Code shall have a minimum Lot Area of 65,000 square feet (exclusive of Street or Private Road rights-of-way) and a minimum Lot frontage (Lot Width at the Street or Private Road right-of-way line) of 150 feet.
  - (2) For Lots in developments governed by the subdivision regulations in article III of chapter 20 of this Code or by the Site Condominium Project regulations in article XIII of chapter 40 of this Code, the minimum Lot Area for Dwellings not serviced by both public water and public sanitary sewer utilities shall be 40,000 square feet (exclusive of Street or Private Road rights-of-way) and the minimum Lot frontage (Lot Width at the Street or Private Road right-of-way line) shall be 125 feet. Within each subdivision or Site Condominium Project open space equal to 35 percent of the total land area of the subdivision or Site Condominium Project shall be included. The calculation of the open space area, and its regulation, shall be governed by the provisions of section 40-190 concerning the rural open space option for the A-2 rural open space zoned district.

Sec. 40-778. - Decisions on contents of applications.

Any application for a Planned Unit Development shall be finally approved following consideration of the detailed site plan if the application:

- (1) Contains all the required information;
- (2) Complies with this chapter, and meets all of the standards specified by this chapter;
- (3) Complies with the conditions imposed pursuant to this chapter and by the Planning Commission; and
- (4) Complies with other applicable federal, state, county and local ordinances, statutes

(Ord. No. 39, § 8.14, 5-20-1987; Ord. No. 86, § 4(8.14), 9-6-2000; Ord. of 8-25-2014, § 32)

Sec. 40-779. - General standards.

The Planning Commission shall review the particular circumstances of the Planned Unit Development application under consideration in terms of the following standards and shall approve the PUD only upon a finding of substantial compliance with each of the following standards, as well as substantial compliance with applicable standards established elsewhere in this chapter:

1. The Planned Unit Development shall be designed, constructed, operated and maintained so as to be harmonious with the character and Use of adjacent property in the surrounding area.
2. The Planned Unit Development shall not change the essential character of adjacent property in the surrounding area.
3. The Planned Unit Development shall not create hazards to adjacent property or the surrounding area and shall not involve such uses, activities, materials or equipment which shall be detrimental to the health, safety or welfare of persons or property through the creation or maintenance of such nuisances as traffic, noise, smoke, fumes or glare.
4. The planned unit development shall not place demands on public services and/or facilities in excess of current or anticipated capacity.

(Ord. No. 39, § 8.16, 5-20-1987; Ord. No. 86, § 4(8.16), 9-6-2000)

Sec. 40-780. - Regulations.

(a) Scope. Traditional zoning, with its rigid separation of Uses into different zones under very restricted placement controls, has now been recognized as being inappropriate to many developments. Planned Unit Developments, which modify the traditional forms of zoning, permit a developer to secure advantages which can be passed on to the general public by virtue of more desirable and more economical development, thus providing a controlled degree of flexibility in the placement of Structures and Lot sizes and types of Uses, while maintaining adequate planning and development standards. The PUD provisions in this section shall affect those developments otherwise permitted in a given zoned district. Residential, Commercial and industrial PUD provisions may replace the normal Lot size, types of Uses and Yard Setback requirements with more general flexible requirements and may be utilized in one or more zoning districts as one development site.

(b) *Objectives.* The following objectives, principles and standards are intended to guide the applicant in the preparation of Planned Unit Development site plans and shall be used as the basis of the evaluation of the plans by the Planning Commission. Such objectives shall be considered in reviewing any applications for a PUD in order to realize any advantages in coordinated, flexible, comprehensive, long-range planning and development of such planned development. The objectives are to:

- (1) Provide more desirable living, shopping and working environments by preserving the natural character of open fields, stands of trees, brooks, ponds, hills and similar natural assets.
  - (2) Encourage with regard to residential Use the provision of open space and the development of recreational facilities and neighborhood Commercial facilities in a generally central location within reasonable distance of all living units.
  - (3) Encourage developers to use a more creative and imaginative approach in the development of residential areas, especially through the mixture of housing types in one development.
  - (4) Encourage underground facilities.
  - (5) Allow phased construction with the knowledge that subsequent phases will be approved as originally planned and approved.
- (a) Residential Planned Unit Development. Standards for residential Planned Unit Developments are as follows:
- (1) Purpose. It is the purpose of this subsection to encourage more imaginative and livable housing environments through a planned reduction, or averaging, of the individual Lot Area requirements for each zoned district. Such averaging or reduction of Lot Area requirements shall only be permitted when a landowner or group of owners acting jointly can plan and develop a tract of land as an entity and thereby qualify for regulation of that tract of land as one complex land Use unit, rather than an aggregation of individual Buildings located on separate, unrelated Lots. Under these conditions, approval may be granted for the construction and occupancy of a PUD, providing the standards, procedures and requirements in this chapter can be satisfied.
  - (2) Minimum area. The residential PUD shall not be less than five acres in area.
  - (3) Permitted Uses. The following Uses of land and Structures may be permitted within a residential PUD for primary or secondary, but not transient, Dwellings:
    - (a) Any permitted Use within the district in which the PUD is located.
    - (b) Single-Family Dwellings, Duplexes, Triplexes, Quadruplexes, Multifamily Dwellings, Apartments, Condominiums and Townhouses.
    - (c) Golf courses, tennis clubs and athletic clubs.
    - (d) Customary Accessory Uses, as permitted in the zoned districts where located.
  - (4) Maximum density. The maximum density for a PUD shall be the maximum density which would be allowed pursuant to the zoning district in which the PUD is located. Density shall be defined as the ratio of Dwellings in the PUD to the number of acres of the PUD.

- (c) *Commercial Planned Unit Development.* Standards for a Commercial Planned Unit Development shall be as follows:
- (1) *Purpose.* It is the purpose of this subsection to allow design flexibility in accordance with a master plan and to encourage development compatible with surrounding or abutting Uses, with suitable open spaces, landscaping and Parking Areas.
  - (2) *Objectives.* The following objectives shall be considered when applying for and reviewing any application for approval for a Commercial PUD. The objectives are to:
    - a. Conserve the value of property which includes optimum utilization of areas devoted to Commercial Use together with protection of the immediate environment.
    - b. Encourage creative and imaginative approaches in Commercial developments.
  - (3) *Qualifying conditions.* Any application for approval shall meet the following conditions to qualify for consideration as a Commercial PUD:
    - a. The PUD site shall be located within the commercial or light industrial zoned districts.
    - b. The proposed PUD shall be designed and developed with harmonious architectural treatment.
    - c. Utilities, roads and other essential services must be available for immediate use of occupants purchasing or leasing sites in the PUD.
    - d. Compatibility of site use with nearby residential areas must be evidenced and can be determined in relationship to the following criteria:
      1. Uses shall have no harmful or unpleasant effects such as noise, odors, fumes, glare, vibration, smoke, vapors and gases, electrical emissions and wastes.
      2. Appearance shall be harmonious with adjacent Uses, including but not limited to landscaping, enclosure of Principal and Accessory Uses, height control, Sign control, profile of Buildings and architectural controls.
      3. An appropriate buffer shall separate Structures within the PUD from surrounding areas.
      4. Loading docks and truck maneuvering areas and terminals shall be located as far as practicable from residential Lot Lines and residential Uses.
- (ci) Permitted Uses. The following Uses of land or Structures may be permitted within a Commercial PUD:
- (1) Any permitted Commercial Use within a commercial district, whether the PUD is located in a commercial district or the light industrial district.
  - (2) Customary Accessory Uses, as permitted in a commercial district, whether the PUD is located in a commercial district or the light industrial district.

- (4) *Development requirements.* In addition to the qualifying conditions, the following requirements shall be met:
- a. *Minimum site sizes.* The minimum area for a Commercial PUD shall be three acres.
  - b. *Circulation and parking.*
    1. Streets, Building locations, Parking Areas, pedestrian ways and utility easements shall be designed to promote public safety and compatibility of Uses and to minimize friction between Uses.
    2. Private Roads may serve circulation and parking purposes if they adequately provide for fire and police protection, rubbish collection, lighting, safe and adequate access and any necessary maintenance.
    3. Adequate access for fire and other emergency vehicles shall be provided on the site.
    4. Parking requirements shall be equal to the sum of the parking requirements for all Uses proposed. However, where it can be demonstrated by the applicant that, due to nonconflicting hours of operation, design of the circulation and parking plan or any other factor reasonably related to the need for parking, the total parking requirement can be reduced, the Planning Commission may do so provided legal notice of the application specifies that such reduction has been requested.
    5. Driveways and circulation roadways shall be designed to minimize traffic and congestion within the PUD and to minimize the amount of paving, although paving of driveways, circulation roadways and Parking Areas within a Commercial PUD is required.
    6. Where open Parking Areas are to be located immediately adjacent to any peripheral boundary, a separation or buffer of a type sufficient to ensure the privacy of the adjacent property shall be provided.
  - c. *Maintenance and utilities.* For any areas to be held under common ownership, a document showing the future maintenance provisions shall be submitted to the Planning Commission. Such provision shall include mandatory membership of all property owners in any association designed for maintenance of the common area.
  - d. *Open space and landscaping.* All open space and landscaping shall be provided in conformity with an approved site plan to be included as a condition of the PUD.
  - e. *Signs.* Signs shall be as approved by the Planning Commission.
  - f. *Off-Street loading.* Off-Street loading shall be provided as required by the Planning Commission.
- (5) Mixed use residential/commercial PUDs in the Blue Star Highway mixed use residential/commercial overlay district and within other C-1, C-2 and C-3 districts not otherwise included within the Blue Star Highway mixed use overlay district. Standards for mixed use residential/commercial PUDs in the Blue Star Highway mixed use residential/commercial overlay district and within other C-1, C-2 and C-3 districts not otherwise included within the Blue Star Highway mixed use overlay district are as follows:
- a. *Purpose.* This type of PUD is intended to permit higher density residential Uses to be mixed with Commercial Uses. This subsection is intended to provide greater flexibility for PUDs that combine residential and Commercial Uses in an Innovative way.
  - b. *Area.* The minimum site area of the PUD shall be five acres.

- (1) *Permitted Uses.* Permitted Uses are the following:
- a. Any permitted Uses in the C-1, C-2 or C-3 district.
  - b. Customary Accessory Uses to those permitted in the PUD.
  - c. Single-Family, Two-Family, Triplex, Quadruplex and Multifamily Dwellings.
  - d. Related recreational facilities such as tennis courts, golf courses, swimming pools, health clubs, etc.
- (2) *Development requirements.* Development requirements are as follows:
- a. The site plans for the PUD shall be submitted to the Planning Commission for its approval.
  - b. Uses within the PUD may be mixed within a single Building or within several separate Buildings on the same Parcel.
  - c. At least 35 percent of the gross area of the PUD shall be green space (i.e., land not covered by Buildings or hard-surfaced material). Increased density of housing units may be allowed by the Planning Commission in return for commensurate amounts of additional green space.
  - d. Signs shall be as approved by the Planning Commission.
  - e. Off-Street parking and loading shall be as approved by the Planning Commission.
  - f. An appropriate buffer shall separate Structures within the PUD from surrounding areas.
- (3) *Design considerations.* Design considerations are as follows:
- a. Open space and landscaping opportunities along the frontage of the Blue Star Highway will be promoted to preserve or enhance its existing visual character. Variable Setbacks should be used in order for parking to be placed behind Buildings wherever possible.
  - b. Residential and Commercial Buildings within a PUD should have a unified, architectural theme and have an attractive exterior reflective of the character of the area. The Building floor to site area ratio should be such that Buildings and Parking Areas do not appear out of scale relative to the size of the Parcel. A substantial portion of the Parcel should be devoted to open space and landscaping in order to achieve an appropriate and pleasing relationship of developed land to open areas.
  - c. Walkways should be provided to and from Parking Areas and between commercial and residential areas.
  - d. Vehicle access and parking in front of Building entrances and exits should be limited and well landscaped.
  - e. Landscaping around Buildings should be provided to soften the visual impact of larger Buildings and to screen parking. Landscaping of Parking Areas should be substantial and provide sufficient space for future growth of plantings without crowding.
  - f. Driveways leading off Blue Star Highway to Parking Areas should be sufficiently long to avoid backup of traffic in driveways.
  - g. Interior circulation should be designed so that traffic circulates with a minimum of conflict between various Uses of the property.
  - h. Building Signs should be unified, attractive and understated.
  - i. Outdoor lighting should be designed to reduce glare off site and be positioned to reflect light downward to minimize reflection into the night sky.
  - j. Outdoor lighting of Buildings and sites should be limited to the lighting necessary for safety and ease of use by pedestrians and Motor Vehicle circulation during the nighttime hours of operation. During nonoperating hours, lighting should be maintained at levels necessary for security purposes only.  
(Ord. No. 39, § 8.20, 5-20-1987; Ord. No. 51, § 25, 6-15-1994; Ord. No. 71, §§ 18, 19, 10-1-1997; Ord. No. 77, art. XII, 6-3-1998; Ord. No. 86, § 4(8.20), 9-6-2000; Ord. of 8-25-2014, § 33)

*Inland Waterways* means Goshorn Lake, Silver Lake and the Kalamazoo River.

*Launch* means the entry of a vessel into the Inland Waterways of this township, but not including the entry of a vessel into the Inland Waterways from a public Launch area approved or designated by the appropriate state agency.

*Shared Waterfront Property Ownership* means the multiple or divided interest in property having frontage on Inland Waterways or Lake Michigan, through deed, land contract, nonexclusive easement or other form of dedication or conveyance, which ownership is shared by two or more persons.

*Waterfront Access Property* means a Lot or Parcel or two or more contiguous Lots or Parcels (or condominium units treated as Lots or Parcels), abutting an Inland Waterway or other inland lake or Lake Michigan, used or intended to be used in whole or in part by persons having Shared Waterfront Property Ownership at that location, for gaining pedestrian or vehicle access to the Water Frontage of an Inland Waterway or other inland lake or Lake Michigan from land without Water Frontage. Waterfront access over the Waterfront Access Property may be gained by easement, common fee ownership, lease, or other form of dedication or conveyance. The dedication or conveyance may or may not entitle physical interaction with the water body itself and may or may not otherwise entitle or limit the use and purposes of the Waterfront Access Property.

*Water frontage* means that portion of a Lot or Parcel, existing on documentation recorded with the county register of deeds, which abuts or intersects with Inland Waterways or Lake Michigan, whether such Lot or Parcel is owned by one or more persons. The length of Water Frontage shall be the linear measure along the Water's Edge.

(Ord. No. 81, § 1(8.C.02), 9-15-1999; Ord. No. 2009-03, §§ 4, 5, 5-6-2009; Ord. No. 2010-01, § 3, 12-1-2010) **Cross reference**— Definitions generally, § 1-2.

Sec. 40-908. - Dock and Boat Slip density regulations.

These regulations are intended to limit the density of Docks and the number of Boat Slips in those zoned districts where Docks are permitted, except that Boat Slip areas for small and very shallow draft private Vessels and unimproved beach and shoreline areas used for the incidental beaching of such private Vessels are exempt from the regulations of this section. Vessels accommodated by this exemption include rowboats and sailboats less than 16 feet in length, rafts, paddleboats, swim floats, canoes and kayaks, all are not required to be registered by the state. Docks and Boat Slips in all zoned districts are subject to the applicable rules of Parts 301 and 303 of Public Act No. 451 of 1994.

On any Lot with Water Frontage, the density of Docks and the number of Boat Slips subject to these regulations shall be as follows:

Body of Water	Length of Water Frontage	Permitted Dock Density and Number of Boat Slips
Lake Michigan and Inland Waterways not governed by the	Existing Lots of record prior to September 15, 1999 with less than 50 feet of Water Frontage:	One Dock and two Boat Slips for a total docking capacity of not more than two Boats.

In any zoning district where there is an intent to create or use a Lot or Parcel (or condominium unit treated as a Lot or Parcel), easement, private park or common area for the purpose of providing shared Water Frontage access, by deed or otherwise, the following standards shall apply:

(a) *Area Requirements:*

- (1) The Waterfront Access Property shall be a separately described easement or Lot or Parcel (or condominium unit treated as a Lot or Parcel) or two or more contiguous Lots or Parcels.
- (2) The Waterfront Access Property shall encompass not less than the minimum Lot Area and Lot Width required for platted single-family Lots located in the same zoning district as the Waterfront Access Property. In zoning district provisions where a Lot Width is not specified the minimum length of Water Frontage and Lot Width shall be 100 feet (as measured from at least one point at the water's edge).
- (3) The Waterfront Access Property shall have at least 33 feet of frontage on a Street or Private Road unless it is adjacent to or connected by easement or other conveyance to land without Water Frontage in a manner which complies with subsections (b) and (e) below.
- (4) Waterfront access property may be bisected by a street or Private Road provided that each portion of the Waterfront Access Property is opposite and contiguous to the other and that each portion has measurable Lot Area outside of the Street or Private Road. On at least one side of the Street or Private Road there shall be a Lot Depth of at least 30 feet to either the Water's Edge or to the Rear Lot Line.

(b) *Easements:*

- (1) There shall be only one designated area on a Waterfront Access Property used to provide waterfront access. The width of the designated access area at the Water's Edge shall be equal to the width of the Waterfront Access Property at that location. Within the designated access area shall be a Designated Waterfront Activity area within which all permitted waterfront activities shall be contained. The setbacks for the Designated Waterfront Activity area from adjacent Lot Lines shall be as indicated in Table 40-910-1.
- (2) Any easement or other instrument used to convey access over or within the Waterfront Access Property or to provide connecting access to the Waterfront Access Property shall be not less than 15 feet in width and shall meet the contiguity requirements of subsection (e). The width of any connecting easement or street frontage shall be at least 33 feet where the access is to accommodate Motor Vehicles required by law to be licensed and registered by the state. All access easements and connecting easements shall be set back from adjacent property that is not benefitted by the easement. The setbacks shall be equal to or greater than the minimums established in Table 40-910-1.

(c) *Number of permitted accesses and required setbacks.* For purposes of this article, "accesses" shall mean the Parcels or Lots, condominium units treated as Lots or Parcels, or Dwelling Units permitted to share the waterfront access portion of the Waterfront Access Property. The number of such accesses and the required setbacks for the easements and designated areas facilitating the accesses shall be as follows:

Table 40-910-1 Number of Permitted Accesses and Required Setbacks			
Body of Water	Length of Water Frontage Providing	Maximum Number of Accesses Permitted (see subsection (d) for the number of accesses that may be allowed on	Minimum Setback of Access Easements to and Over Waterfront Access Property and of Designated Waterfront

	Waterfront Access	Substandard Lots or Parcels and Easements of record)	Activity Areas From Adjacent Non-benefiting Property
Inland Waterways governed by the natural river overlay district	150 feet	One access for each 150 feet	10 feet
Lake Michigan and Inland Waterways not governed by the natural river overlay district	100 feet	Four accesses	
	More than 100 feet to 200 feet	One access for each 25 feet for a total of not more than eight	
	More than 200 feet to 300 feet	One access for each 20 feet for a total of not more than 15	20 feet
	More than 300 feet to 400 feet	One access for each 15 feet for a total of not more than 26	
	More than 400 feet	One access for each 10 feet	

(d) *Substandard Waterfront Access Property of record:*

- (1) In any zoning district where there is an existing Lot or Parcel or easement of record with Water Frontage and width (as measured from at least one point at the Water's Edge) that is less than but at least 90 percent of the minimum Lot Width required for Lots in that zoning district, the Lot or Parcel may be used as Waterfront Access Property. The Waterfront Access Property will be allowed the same number of accesses allowed for parcels which meet the minimum Water Frontage required in the zoning district, in accordance with the table in the subsection above. If Shared Waterfront Property Ownership and use had been conveyed to more than the number permitted herein prior to the effective date of this Section, such use may continue as provided by Section 40-1011.
- (2) In any zoning district where there is an existing Lot or Parcel or easement of record with Water Frontage and width (as measured from at least one point at the Water's Edge) that is less than 90 percent of the minimum Lot Width required for Lots in that zoning district, and such Lot, Parcel or easement was, prior to the effective date of this section, not used for shared waterfront access, the Lot, Parcel or easement may not be used or conveyed as Waterfront Access Property. If Shared Waterfront Property Ownership and use had been conveyed prior to the effective date of this section, it may continue as provided by Section 40-1011 and the number of conveyed accesses may not be expanded.

(e) *Contiguity and proximity of ownership:* Every Waterfront Access Property created must be contiguous to each Lot or Parcel, condominium unit treated as a Lot or Parcel, or Dwelling Unit

deeded or otherwise granted a share in its ownership for waterfront access. For the purpose of this article, "contiguous" shall mean any one of the following:

- (1) The Waterfront Access Property is within the same platted subdivision, condominium project, or other legally created and described land development which subdivision, condominium project or other development is contiguous with itself (i.e., is not disconnected or located in two or more distinct areas of the Township).
  - (2) The Waterfront Access Property is directly adjacent to the platted subdivision, condominium project, or other legally created and described land development containing each of the Lots or Parcels, or condominium units treated as Lots or Parcels, or Dwelling Units granted shared ownership for waterfront access, by virtue of a shared and common property line not less than 15 feet in length.
  - (3) The Waterfront Access Property is directly adjacent to an aggregate of continuously adjacent Lots or Parcels, or condominium units treated as Lots or parcels, granted shared ownership for waterfront access, by virtue of at least one of the continuously adjacent Lots or Parcels, or condominium units, having a shared and common property line of not less than 15 feet in length with the Waterfront Access Property.
  - (4) The Waterfront Access Property faces, but is separated by a Street or Private Road from, a platted subdivision, condominium project, other legally created and described land development, or an aggregate of continuously adjacent Lots or Parcels or condominium units treated as Lots or Parcels granted shared ownership for waterfront access.
- (f) *Improvements*: In all zoning districts, and unless otherwise more strictly regulated under the provisions of Section 40-590, floodplain overlay district and requirements, and Section 40-591, natural river overlay district requirements, site improvements made to Waterfront Access Properties shall be subject to the following standards:
- (1) *Stairways, footpaths, walkways, driveways and non-Building structures*. Stairways, paved walkways, boardwalks, footpaths, driveways for vehicles and other structures which are not Buildings but which are allowed and constructed on Waterfront Access Properties shall be contained within easements and/or Designated Waterfront Activity Area in compliance with the setbacks required in Table 40-910-1. Docks shall be located as regulated under Section 40-909.
  - (2) *Parking Areas and Accessory Buildings*. Parking Areas and Accessory Buildings such as gazebos and pavilions may be permitted on Waterfront Access Property by the Planning Commission as Special Approval Uses under the provisions of Article VI. For Parking Areas, the provisions of Section 40-647 shall also apply. For Accessory Buildings, the standards of Section 40-631 shall also apply, except that the Planning Commission shall waive the requirement for a Principle Building and Accessory Buildings may not be used for the storage of Motor Vehicles.
  - (3) *Parcels or Lots supporting a Dwelling*. A Waterfront Access Property on which a Dwelling is constructed may not include a Parking Area or Accessory Building that is to serve more than four Lots or Parcels or condominium units treated as Lots or Parcels. When considering a Special Approval Use application which would exceed the limit of four, the Planning Commission shall require the creation of two distinct Lots or Parcels or condominium units treated as Lots or Parcels. One of the Lots or Parcels or units shall be created solely as an access property meeting the minimum standards contained in this section. The second Lot or Parcel or unit shall be a residential Lot or Parcel or unit encumbered by waterfront access easements which benefit not more than three other Lots or Parcels or condominium units treated as Lots or Parcels. The burdened residential Lot or Parcel or unit shall meet the minimum Lot Width, Lot Area and Setback standards applicable to Single-Family Dwelling Lots.
- (g) No Waterfront Access Property may be used for any purpose except in accordance with this section and in accordance with the Uses allowed by the underlying zoning district.

- (h) In no event shall a canal or channel be excavated for the purpose of increasing the Water Frontage required by this section. Canals or channels which interface with an Inland Waterway or Lake Michigan and were lawfully in existence as of the effective date of this section may be cleaned and maintained in accordance with applicable laws of the State of Michigan so long as they are not enlarged.
- (i) To the extent applicable, this article shall be considered when the Township receives a Planned Unit Development application. At the discretion of the Township, and as allowed by the standards in Section 40-779 and the objectives of Section 40-780, the requirements of this article may be modified.

(Ord. No. 81, § 1(8.C.05), 9-15-1999; Ord. No. 2009-03, § 9, 5-6-2009; Ord. of 8-25-2014, § 38)

**Editor's note**— Ord. No. 2009-03, § 9, adopted May 6, 2009, changed the title of § 40-910 from waterfront regulations to read as herein set out.

### **ARTICLE XIII. - REVIEW AND APPROVAL OF SITE CONDOMINIUM PROJECTS**

#### Sec. 40-936. - Purpose and scope.

- (a) Site Condominium Projects are Condominium developments in which each Condominium Unit consists of an area of vacant land and a volume of vacant airspace within which a Building or other Improvements may be constructed by the Condominium Unit owner. Each Site Condominium Unit may also have an appurtenant Limited Common Element reserved for the exclusive use of the owner of the Condominium Unit. Either the Condominium Unit itself or the Condominium Unit taken together with any contiguous, appurtenant Limited Common Element shall be considered to constitute a Building Site which is the functional equivalent of a Lot for purposes of determining compliance with the requirements of this chapter and other applicable laws, ordinances and regulations. Site Condominium Projects may also include General Common Elements consisting of common open space, recreational areas, Streets and other available areas for use by all owners of Condominium Units within the project.
- (b) This article requires preliminary review by the Planning Commission followed by final review and approval by the Planning Commission of Site Condominium Project Plans. These procedures are necessary to ensure that Site Condominium Projects comply with this chapter and other applicable laws, ordinances and regulations. Site Condominium Projects may be approved as provided by this article only for the support of land Uses that are permitted in the zoning district in which the project is proposed.

(Ord. No. 87, § 1(8.D.01), 9-6-2000)

#### Sec. 40-937. - Definitions.

- (a) For purpose of determining compliance with the applicable requirements of this chapter, including without limitation height, area, Yard and density requirements, or with other applicable laws, ordinances or regulations, a Building Site shall be considered to be the equivalent of a Lot.
- (b) Except as otherwise provided by this article, the following words and phrases, as well as any other words or phrases used in this article which are specifically defined in the Condominium Act, shall conform to the meanings given to them in the Condominium Act: "Common Elements," "Condominium Documents," "Condominium Unit," "Contractible Condominium," "Convertible Area," "Expandable Condominium," "General Common Elements," and "Master Deed."
- (c) The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Automobile/Motor Vehicle Service Stations (Fuel Facilities/Gas Stations with no repairs)	No	No	No	No	No	No	No	No <sup>2</sup>	SAU <sup>3</sup>	No <sup>3</sup>	No
Automobile/motor, boat vehicle sales	SAU	SAU	No	No	No	SAU	SAU	Yes	Yes	Yes	No
Bait and tackle	No	No	No	No	No	Yes	Yes	Yes	No <sup>1</sup>	No	No
Bars, taverns, lounges w/o dancing or floor shows	No	No	No	No	No	Yes	Yes	Yes	Yes	No	No
Bars, taverns, lounges with dancing or floor shows	No	No	No	No	No	SAU	SAU	SAU	SAU	No	No
Boarding Houses/lodging	SAU	SAU	No	No	No	SAU	ELE	No	No	No	No
Boathouses	No	No	No	SAU	SAU	No	No	No	No	No	SAU
Docks, Piers, Wharves (noncommercial and not defined herein as marinas)	No	Yes <sub>6,9</sub>	No	Yes <sup>6</sup>	Yes <sup>6</sup>	No	No	No	No	No	Yes <sub>6</sub>
Duplexes (two Dwelling Units in Building)	Yes	Yes	Yes	No	Yes	PUD	PUD	PUD	PUD	No	Yes
Marinas	No	No	No	SAU	No	No	No	No	No	No	No
Multifamily Apartments	No	No	SAU/OPUD	No	No	PUD	PUD	PUD	PUD	No	No
Parking Areas and Accessory Buildings on Waterfront Access Property <sup>6</sup>	No	SAU <sub>9</sub>	No	SAU	SAU	No	No	No	No	No	SAU <sub>7</sub>
Party, convenience store <sup>5</sup>	No	No	No	No	No	Yes	Yes	Yes	Yes	Yes	No
Planned Unit Developments/Commercial	Yes	Yes	No	No	No	Yes	Yes	Yes	Yes	Yes	No



# Activities

GAGA BALL, VOLLEYBALL, BASKETBALL, CANOEING, KAYAKING,  
PADDLE BOARDING, SWIMMING POOL

SOCCER, FOOTBALL, FIELD GAMES, ARCHERY RANGE, ZIP LINE,  
ARTS & CRAFTS, ARCHERY TAG

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