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STATE OF MICHIGAN
IN THE SUPREME COURT

SAUGATUCK DUNES COASTAL ALLIANCE,

Appellant/Plaintiff,

v

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

Appellees/Defendants.

Supreme Court No. 160358
Court of Appeals Nos. 342588, 346677
Lower Court Case Nos. 2018-059598-AA, 2017-058936-AA

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APPELLANT SAUGATUCK DUNES COASTAL ALLIANCE'S REPLY IN RESPONSE TO INTERVENING APPELLEE NORTHSHORES' SUPPLEMENTAL RESPONSE BRIEF

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APPELLANT SAUGATUCK DUNES COASTAL ALLIANCE'S REPLY IN RESPONSE TO INTERVENING APPELLEE NORTHSHORES' SUPPLEMENTAL RESPONSE BRIEF

Appellant Saugatuck Dunes Coastal Alliance submits the following Reply to NorthShores of Saugatuck, LLC's ("Developer" or "NSS") Supplemental Response Brief.

I. The Varied Definitions of Person or Party Aggrieved Advanced by NSS and the Township Underscore the Disarray of Standing Jurisprudence

Unlike the Township, NSS argues that property ownership is not a requirement for establishing aggrieved party status. See NSS Supplemental Brief at 14.[1] NSS argues that the Court of Appeals never held that "aggrieved party" is restricted only to property owners. Instead, NSS says "the standard only requires the would-be appellant to show the decision appealed has caused special damages that are not common to others in the community who have the same legally cognizable interest." *Id.* at 15.[2]

While the Coastal Alliance agrees that property ownership should not be a requirement to establish standing or aggrieved party status in a zoning appeal, NSS's sudden suggestion that property ownership is not a requirement for aggrieved party status is inconsistent with the language used in the Court of Appeals decision below. The Court of Appeals stated that

> Plaintiff has submitted numerous affidavits apparently tending to show that the affiants will suffer harms distinct from the general public. Plaintiff has not shown, however, that the affiants will suffer harms distinct from *other property owners similarly situated*.[3]

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[1] This is a change from NSS's response to the application for leave to appeal, where it argued that to be an "aggrieved party" one must show a unique harm not suffered by other "similarly situated *property owners*." NSS Response to Application for Leave to Appeal at 14, 16.

[2] NSS offers its interpretation of the standard using different language throughout its brief. See pp 2, 13, 22 24, 29, 41, 46.

[3] *Saugatuck Dunes Coastal Alliance v Saugatuck Twp*, unpublished opinion of the Court of Appeals, issued August 29, 2019 (Docket No. 342588), 2019 WL 4126752, p *4 (emphasis in original). Indeed, NSS quotes the Court of Appeals opinion using the phrase "similarly situated property owner" on page 13 of its brief, before suggesting an alternative definition for aggrieved party status on page 14.

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The Township similarly argues "that the party (and person) aggrieved standard set forth in Sections 604 and 605 of the Michigan Zoning Enabling Act require a party (or person) to show some special damages not common to other property owners similarly situated in order to have access to the zoning board of appeals or to the circuit court for review."[4]

It is understandable that there are multiple versions of the aggrieved party definition because, as discussed in the Coastal Alliance's Supplemental Brief, *Olsen* and the underlying case law uses inconsistent language about property owners and community members.[5] However, NSS newly advocates for a test that has never been cited -- let alone adopted by -- the Michigan appellate courts. NSS argues a person or party must demonstrate "(1) special damage to a legally cognizable interest, (2) that this harm is not suffered by others in the community sharing the same interest, and (3) that it arises out of the zoning decisions appealed."[6] This three-part test for aggrieved party status is seemingly untethered to any existing case law on standing in a zoning appeal; at no point does NorthShores identify cases supporting its reimagined standing test.

Moreover, NSS has replaced the property ownership element with a new test that is as unworkable as the "similarly situated property owner" standard. *Lansing Schools*, in contrast, articulated a standard that is understandable and preserves the gatekeeping role of the doctrine without being overly restrictive and unwieldy. In *Lansing Schools* this Court held that a litigant may possess standing "if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large . . . ."[7] Under the NSS test, on the other hand, one must show that the "harm is not suffered by others in the community

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[4] Twp Supplemental Brief at 37 (see also pages 25 and 38).
[5] Appellant's Supplemental Brief at 16-19.
[6] NSS Supplemental Brief at 46.
[7] *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686, 699 (2010).

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sharing the same interest." This test too, produces the same head-scratching as the *Olsen* formulation followed by the Court of Appeals below: it is hard to understand how others in the community who share the same interest alleged would not also share the same harm.[8]

Finally, NSS's new test is substantially similar to the federal test adopted in *Lee*[9] and overturned in *Lansing Schools*.[10] The *Lee* test, relying heavily on *Lujan v Defenders of Wildlife*, consisted of three elements:

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly trace [able] to the challenged action of the defendant . . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[11]

NSS's test requires a similar analysis:

> (1) special damage to a legally cognizable interest, (2) that this harm is not suffered by others in the community sharing the same interest, and (3) that it arises out of the zoning decisions appealed.

By seeking to impose a test that is substantially similar to the one expressed in *Lee*, NSS is advocating that this Court effectively overturn *Lansing Schools* in the context of zoning appeals.

II. The Legislature's Intent in Using Person and Party Aggrieved Should not be Overstated

NSS makes a similar argument as the Township, stating that "the Legislature intended

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[8] See Appellant's Supplemental Brief at 14. To the extent that this Court is inclined to accept some variant of the NSS "sharing the same interest" standard, the Coastal Alliance submits it should be consistent with the decision in *Mays v Governor of Michigan*, No. 157335, 2020 WL 4360845 (Mich, July 29, 2020), where this Court held that those "similarly situated," to Plaintiffs were municipal water users generally and not Flint water users more specifically. See Appellant's Reply Brief to Township at 10.

[9] *Lee v Macomb Co Bd of Comm'rs,* 464 Mich 726; 629 NW2d 900 (2001).

[10] *Lansing Schools, supra*.

[11] *Lee*, 464 Mich at 739 (quotation marks and citation omitted), citing *Lujan v Defenders of Wildlife,* 504 US 555, 560-61; 112 S Ct 2130; 119 L Ed 2d 351 (1992).

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'party aggrieved' to have its well-established meaning in the zoning jurisprudence."[12] However, the plain language of the statute is the clear expression of the Legislature's intent. Moreover, the uncertainty within the jurisprudence over the test for standing in a zoning appeal, combined with the fact that NSS's preferred aggrieved party test is unsupported by any authority, undermines the idea that the Legislature had a clear understanding of what "aggrieved party" meant when it revised the statute. NSS asserts that the Legislature "chose the more narrowly defined 'aggrieved' standard, which limits the pool of appellants to those who can show special damages not common to others sharing interests similar to those asserted by the appellant."[13] The lack of consistent language employed by the two Appellees and in the case law they cite demonstrates there was no clear definition of "party aggrieved" adopted by the Legislature with the advent of the MZEA.

III. This Court's Precedents in Lansing Schools, In re Draime, In re Critchell's Estate, and Spiek can be Harmonized

NSS cites to case law from both probate proceedings and takings law, arguing that "those precedents hold (1) that a party is aggrieved only if the decision directly and adversely affects a legally cognizable right or protected interest and (2) the law does not protect against incidental adverse effects of government decisions that are broadly felt by many similarly situated members of the public."[14] A review of the cases cited by NSS actually supports applying the *Lansing Schools* test for standing in the zoning context.

The *Lansing Schools* opinion explains that standing exists "if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from

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[12] NSS Supplemental Brief at 15. This issue is addressed in more detail in Appellant's Supplemental Brief and its Reply to the Township's Supplemental Brief.

[13] NSS Supplemental Brief at 21. At other times NSS states that the comparison must be to those with "the same interest" in order to establish standing. See NSS Supplemental Brief at 22.

[14] NSS Supplemental Brief at 24.

the citizenry at large."[15] Similarly, in *In re Draime*[16], this Court recognized in a probate proceeding that "a party is aggrieved by a judgment or a decree when it operates on his rights in property or *bears directly upon his interest*."[17] In that case, the denial of an adoption order gave rise to standing even though no pecuniary interests were at issue in the adoption proceedings. This Court held that the adoption proceedings still bore directly upon the litigant's interests, giving rise to standing.[18] This holding contrasts with *In re Critchell's Estate*, another probate case relied on by NSS, which involved only "pecuniary rights and interests" of an insurance carrier.[19] In that case the insurance carrier sought to appeal the reopening of an estate and appointment of an administrator. This Court explained that standing had to be established through a pecuniary interest because "[t]he parties to the controversy now before us are concerned wholly with pecuniary questions..."[20] The same could not be said about the Coastal Alliance's members. This Court ultimately held that the carrier was not entitled to appeal from the order because any claim against the carrier would be brought as a separate action and "[t]heir right to make their defenses in those actions is in no way affected by the appointment of the administrator."[21]

Both of these cases are consistent with *Lansing Schools*. *In re Critchell's Estate* was an example of a situation where there was no special injury or right to participate in the probate hearing. *In re Draime* was a case where the litigant had a substantial interest in the outcome of the probate proceeding. As such, both cases support the existence of standing "if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner

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[15] *Lansing Schools*, 487 Mich at 372.
[16] *In re Draime*, 356 Mich 368; 97 NW2d 115 (1959).
[17] 356 Mich at 372.
[18] *Id*.
[19] 361 Mich 432, 449; 105 NW2d 417, 425 (1960).
[20] *In re Critchell's Estate*, 361 Mich 432, 449; 105 NW2d 417, 425 (1960).
[21] *Id*. at 453.

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different from the citizenry at large."[22] While there are important differences between administrative zoning decisions and specific probate proceedings, the fundamental basis for standing remains the same – identifying a special injury or right, or substantial interest that will be detrimentally affected.

NSS asserts, without any support, that third parties regularly claim injury to their property rights due to zoning decisions, but that such decisions can "rarely have a direct adverse effect on the property rights of neighboring parcels."[23] Not only is this statement unsupported by any caselaw, it defies common sense and is directly contradicted by the language of the MZEA, which provides for notice of certain zoning decisions to nearby property owners.[24]

NSS also relies on *Spiek v Mich Dep't of Transportation*[25] for the proposition that "the law does not protect nearby landowners from the ordinary incidental effects of regulatory land use decisions on neighboring parcels unless those harms are peculiar and unique." *Spiek* was a condemnation case relating to the construction of I-696 in metro Detroit. This Court's opinion did not address the issue of standing or aggrieved party status. Rather, this Court addressed the substantive standard of the condemnation claim and ultimately determined that the takings claims were not cognizable as a matter of law: "[t]he right to just compensation, ***in the context of an***

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[22] *Lansing Schools*, 487 Mich at 372. The number of people who are "aggrieved" by a decision in a probate proceeding would naturally much smaller than an administrative decision under the MZEA due to the nature of the statutory interest at issue.

[23] NSS Supplemental Brief at 26.

[24] See MCL 125.3103(2). The Coastal Alliance recognizes that proximity and entitlement to notice must be coupled with a showing of special damages in order to establish standing. *Village of Franklin v City of Southfield*, 101 Mich App 554, 558; 300 NW2d 634, 636 (1980). Even so, the notice requirements represent a tacit recognition of the potential for greater impact on properties adjacent to the proposed project. This view is also shared by other jurisdictions in the United States. See Amicus Curiae discussion of Indiana, New York, and Rhode Island within the table of their 50-state survey results.

[25] *Spiek v Michigan Dept of Transp*, 456 Mich 331; 572 NW2d 201 (1998).

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inverse condemnation suit for diminution in value caused by the alleged harmful affects to property abutting a public highway, exists only where the land owner can allege a unique or special injury, that is, an injury that is different in kind, not simply in degree, from the harm suffered by all persons similarly situated."[26]

The most obvious distinction in this matter is that there is no compensation sought for diminution in value based on an inverse condemnation claim. Rather, this case is about the threshold requirement of standing to bring an appeal to the ZBA. The substantive standard for review in zoning matters is whether the ZBA either made an error of law or made a decision that is not supported by material, competent and substantial evidence on the record. It has nothing to do with the constitutional standard for just compensation. This distinction is consistent with the idea that standing is a threshold matter and is not designed to address the merits of a claim. "Since it is a matter of standing only, litigation on the merits of the complaint should be relied upon to expose any frivolous complaints."[27]

Moreover, the term "party aggrieved" does not appear in the inverse condemnation jurisprudence. To the extent that inverse condemnation law has any application to the standing inquiry in this case, the lesson is that the term "similarly situated" persons or property owners should not be narrowly construed. This Court recently addressed *Spiek* in *Mays v Governor*:

> In *Spiek*, this Court compared the plaintiffs to others whose property abutted highways, not to property owners who lived adjacent to the exact expressway at issue in that case. The plaintiffs' allegations involving noise, dust, vibrations, and fumes were common burdens shared by all members of the public in return for receiving the social benefit of public roadways. Rather than comparing plaintiffs to other Flint water users, we agree with the Court of Appeals that plaintiffs are similarly situated to municipal water users generally. We therefore compare plaintiffs to a generalized group of

[26] *Id*. at 348.
[27] *Brown v E Lansing Zoning Bd of Appeals*, 109 Mich App 688, 701; 311 NW2d 828, 833–34 (1981).

> similar individuals—other municipal water users—and consider what "common burden" the public bears from the provision of water.[28]

To the extent that this Court is relying formulations of the rule including a "similarly situated" element, the *Mays* opinion identifies the proper scope as those that are within a similar generalized group and not those with the "same" interest.

IV. NSS Misrepresents the Coastal Alliance's Argument on Degree of Harm

In its Supplemental Brief, the Coastal Alliance explains that it will suffer impacts that are different in kind and character from the greater community. NSS argues that the Coastal Alliance "would essentially have the Court hold that to be aggrieved, one need only identify an interest that is affected to a greater degree than some other citizen within the greater state of Michigan."[29] This is a substantial misstatement of the Coastal Alliance's argument. First, *Lansing Schools* is clear that standing requires one to show "a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large."[30] The Coastal Alliance outlines a number of harms that have given rise to standing in other cases.[31] Importantly, however, the Coastal Alliance recognizes that allegations of a special injury or right, or substantial interest, alone, are not sufficient to establish standing. The injury, right, or interest must also be affected in a manner different than the citizenry at large. One way to establish a difference in "manner" is by the degree in which the identified harm will be suffered. As an example, a recreational user who has visited the Patricia Birkholz Natural Area once to observe the globally-imperiled interdunal wetlands is much less likely to have standing for the loss of those wetlands due to marina dredging than a person who regularly visits and studies the wetlands. And a person who was instrumental

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[28] *Mays v Governor of Michigan*, No. 157335, 2020 WL 4360845, at *9 (Mich, July 29, 2020).
[29] NSS Supplemental Brief at 28.
[30] 487 Mich 349, 372.
[31] See Appellant's Supplemental Brief at 40-41.

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in preserving the land and for whom the nature area was named would be harmed to an even a greater manner and degree than the other two.

Second, it is a fundamental principle of the doctrine that standing is not to be denied simply because some people share an injury. To "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."[32]

V. The Coastal Alliance Meets the Aggrieved Party Standard as a Matter of Fact

NSS maintains that the harms asserted by the members of the Coastal Alliance either fail to establish a "legally cognizable right" or are "unsubstantiated conjecture" or complaints of generalized impacts. As explained in the Coastal Alliance's Supplemental Brief, neither of these arguments holds up to scrutiny. First, the harms alleged by the Coastal Alliance are the types found acceptable by this Court and others to confer standing.[33] Second, the allegations are specific personal statements provided to the ZBA that clearly outline unique interests that will be impacted in a way that is more substantial than similarly situated property owners, persons with the same interest, or the citizenry at large, whichever test is applied.[34]

Additionally, NSS argues that the alleged harms do not arise from the Township's approval of NSS's project because the property could be developed as a matter of right anyway and Coastal Alliance members would still suffer the same harms.[35] This argument ignores the fact that the

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[32] *Karrip v Twp of Cannon*, 115 Mich App 726, 733; 321 NW2d 690 (1982), quoting *United States v Students Challenging Regulatory Agency Procedures,* 412 US 669, 687-688; 93 S Ct 2405; 37 L Ed 2d 254 (1973). NSS cites *Spiek* for the proposition that differences in degree, rather than kind, are not compensable in the context of regulatory takings. However, as explained above, *Spiek* does not actually address the doctrine of standing.

[33] See Appellant's Supplemental Brief at 40-41.

[34] See Appellant's Supplemental Brief at 35-40.

[35] NSS Supplemental Brief at 36.

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PUD/SAU approval in this case expressly authorizes the marina development with homes around the new basin. The marina could not be developed as a matter of right under the Zoning Ordinance. It also ignores the purpose statement of Article XII of the Zoning Ordinance governing docking use.[36] The PUD/SAU is what NSS asked for, and the harms that will be suffered by the Coastal Alliance are a direct result of the project.[37] NSS inaccurately states that the "harms would not be meaningfully different if NorthShores developed the property with no zoning approvals," because even a development "by right" still requires zoning permits to be issued.[38] In addition, the members of the Coastal Alliance would not be harmed if the property were truly developed with conservation in mind, something that the Coastal Alliance has advocated for throughout this case. However, because of the marina proposal and associated development that was approved through the PUD/SAU by the Township, members of the Coastal Alliance will suffer unique harms to their interests that are directly related to the approval.

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Date: September 8, 2020

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[36] See Appellant's Supplemental Brief at 43.

[37] The Developer's Supplemental Brief contains inconsistent statements about the number of docks, at times saying that there would be 33 and other times stating there would be 50. See Brief at 7, 43. The exact number of homes and docks may not be of critical importance to the outcome of this appeal, but it should be observed that, contrary to NorthShores' insistence, the question of the number of docks allowed under the ordinance was at issue before the planning commission. See Appellant's Appx 0014a-0015a. NorthShores has never expressly stated the number of feet frontage its property possesses on the Kalamazoo River, but its calculations as to the number of lots and boat slips do not appear consistent with the ordinance, requiring, among other things, that a lot within the R-2 riverside residential district be at least 150 feet wide. Section 40-275.

[38] NSS Supplemental Brief at 43-44. The Supplemental Brief cites *Olsen*, 325 Mich App at 181 in support of this proposition, but there seems to be nothing on that page to support the idea that there is no standing where harms would arise "from the fact that the property is being developed at all" and not just from the particular project.

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