STATE OF MICHIGAN
IN THE SUPREME COURT

SAUGATUCK DUNES COASTAL ALLIANCE,

Plaintiff-Appellant,

v

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

Defendants-Appellees.
_____/

Supreme Court No. 160358, 160359

Court of Appeals No. 342588, 346677

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

BRIEF *AMICUS CURIAE* SUBMITTED BY MICHIGAN REALTORS® IN SUPPORT OF THE POSITION OF THE APPELLEES

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STATEMENT OF JURISDICTION

Amicus Curiae, Michigan Realtors®, states that this Court has jurisdiction pursuant to MCR 7.303(B)(1).

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE "PARTY AGGRIEVED" STANDARD OF MCL 125.3605 REQUIRES A PARTY TO SHOW SOME SPECIAL DAMAGES NOT COMMON TO OTHER PROPERTY OWNERS SIMILARLY SITUATED, SEE *OLSEN V JUDE & REED, LLC,* 325 MICH APP 170 (2018)?

Plaintiff-Appellant, answered,	"No."
Defendants-Appellees, answered,	"Yes."
The Court of Appeals answered,	"Yes."
The Circuit Court, answered,	"Yes."
Amicus Curiae Michigan Realtors®, answers,	"Yes."

II. WHETHER THE MEANING OF "PERSON AGGRIEVED" IN MCL 125.3604(1) DIFFERS FROM THAT OF "PARTY AGGRIEVED" IN MCL 125.3605, AND IF SO, WHAT STANDARD APPLIES?

Plaintiff-Appellant, answered,	"Yes."
Defendants-Appellees, answered,	"No."
The Court of Appeals,	"Did not answer."
The Circuit Court,	"Did not answer."
Amicus Curiae Michigan Realtors®, answers,	"No."

III. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE ALLEGAN CIRCUIT COURT'S DISMISSAL OF APPELLANT'S APPEALS FROM THE DECISIONS OF THE SAUGATUCK TOWNSHIP ZONING BOARD OF APPEALS?

Plaintiff-Appellant, answered,	"Yes."
Defendants-Appellees, answered,	"No."
The Court of Appeals answered,	"No."
The Circuit Court, answered,	"No."
Amicus Curiae Michigan Realtors®, answers,	"No."

I. INTRODUCTION[1]

Michigan Realtors® (the "Association") is Michigan's largest, nonprofit trade association, comprising 41 local boards and a membership of more than 34,000 brokers and salespersons licensed under Michigan law. Each year, the Association's members handle thousands of transactions involving new homes and residential home sites located in new developments.

One of the primary goals of the Association is to support laws and court decisions which promote conservation-minded development of residential property and preserve property rights. The opinion of the Court of Appeals in this case does that by upholding the legislative mandate of requiring a person seeking relief from a decision of a Zoning Board of Appeals ("ZBA") to demonstrate that he or she is "aggrieved." Opinion of the Court of Appeals, August 29, 2019 (the "COA Opinion"), p 5, attached as Exhibit 1. This holding, in turn, ensures that the use of property for development will not be unreasonably impeded through endless litigation by individuals who, as a result of the development, would not suffer special damages; that is, damages not in common to other property owners similarly situated.

Zoning decisions are made by elected representatives only after the occurrence of required public hearings in which the interests and concerns of neighbors and the public are heard and considered, as well as those of the owner of the property to be developed. Where local government restricts the use of private property, as zoning does, the "aggrieved party" standard strikes a balance. Without the "aggrieved party" standard, *any* member of *any* community who still dislikes the manner in which the development of property has been approved, even after

[1] Counsel for a party did not author any part of this Brief. Neither counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of this Brief.

having been heard at public hearings, can appeal that decision for years, all the way to this Court, all the while blocking the use of the property. Accordingly, the holding of the Court of Appeals ensures the continued balance of the rights of the owner of the property to be developed, local government development decisions, and the interests of surrounding property owners by limiting the pool of surrounding property owners who may appeal a decision of a zoning board of appeals.[2]

Saugatuck Dunes Coastal Alliance ("Coastal Alliance") in its Application and Amici Curiae Environmental Law and Policy Center and National Trust for Historic Preservation suggest that this Court should adopt a new standard and is free to choose from various broader interpretations. That is not the case. This Court is constrained by the language of the statute, and the history of Michigan's zoning enabling act which, as described in greater detail below, makes clear that the Legislature acted affirmatively to limit standing to appeal decisions of the zoning board of appeals, using language long applied by the Michigan courts.

The Association believes that this is a case of important public interest, and that the outcome of this case is of continued and vital concern to the Association, its members, and residents of the State of Michigan. The Association's experience and expertise could be beneficial to this Court in the resolution of the issues presented by this appeal. In *Grand Rapids v Consumers Power Co*, 216 Mich 409, 415; 185 NW 852 (1921), this Court stated: "This Court is always desirous of having all the light it may have on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief as

[2] That is not to say that surrounding property owners are without redress of their alleged injuries. In addition to being able to appeal as an "aggrieved party," property owners may bring original actions against local units of government for a variety of constitutional claims, including unconstitutional taking and due process claims. *Bonner v City of Brighton*, 495 Mich 209; 848 NW2d 380 (2014).

amicus curiae . . . ." The Association, therefore, seeks leave to file this brief amicus curiae in support of the position of the Appellees.

II. STATEMENT OF FACTS

The Association adopts the Statement of Facts set forth in the Briefs filed by Appellees, as highlighted by the following:

1. Appellee North Shores of Saugatuck, LLC ("North Shores") owns approximately 300 acres of land located in Saugatuck Township adjacent to the Kalamazoo River channel at its opening to Lake Michigan (the "Property").

2. The Property is zoned as R-2 Residential.

3. North Shores applied to Saugatuck Township for approval of a planned unit development/site condominium development consisting of 23 residential site condominium units and a community building surrounding a boat basin as well as private marina containing 33 boat slips (the "Development").

4. Appellant Coastal Alliance is a nonprofit organization comprised of individuals who live and work in the Saugatuck area.

5. After three (3) public hearings on North Shore's application, the Commission unanimously granted preliminary conditional approval of the Development.

6. Among other conditions, North Shore was required to obtain permits from the Michigan Department of Environment, Great Lakes and Energy f/k/a the Michigan Department of Environmental Quality, the United States Army Corps of Engineers and the United States Environmental Protection Agency.

7. Coastal Alliance appealed the Commission's preliminary approval to the ZBA, which adopted a resolution that Coastal Alliance lacked "aggrieved" status necessary to pursue an appeal. Coastal Alliance appealed the ZBA's decision to the Allegan County Circuit Court, which affirmed the decision of the ZBA.

8. After North Shore obtained all of the required permits, the Commission granted final approval for the Development.

9. Coastal Alliance appealed that final approval to the ZBA which, after public hearing, adopted a second resolution that Coastal Alliance lacked "aggrieved" status necessary to pursue an appeal. Again, Coastal Alliance appealed the ZBA's decision to the Allegan County Circuit Court, which, again, affirmed the decision of the ZBA.

10. Coastal Alliance appealed, as of right, both decisions of the Circuit Court to the Court of Appeals which consolidated those appeals.

11. In an unpublished opinion, the Court of Appeals affirmed both Circuit Court decisions, dismissing Coastal Alliance's appeals for lack of "aggrieved" status.

12. More specifically, relying on its recent published opinion in *Olsen v Chikaming Twp*, 325 Mich 170; 924 NW2d 889 (2018), the Court of Appeals held that under the "aggrieved party" standard, a plaintiff must have "suffered some special damages not common to other property owners similarly situated" which, the Court found, the members of Coastal Alliance had not. COA Opinion, p 5, Exhibit 1.

13. The Court of Appeals disagreed with Coastal Alliance that it is sufficient, for purposes of challenging the actions of the ZBA, if it "has a special injury or right, or substantial

interest, that will be detrimentally affected in a manner different from the citizenry at large." COA Opinion, p 5, Exhibit 1.

14. The Court of Appeals stated:

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

COA Opinion, p 5 (footnote omitted), Exhibit 1.

15. Coastal Alliance filed an Application for Leave to Appeal (the "Application") with this Court on October 10, 2019. By Order dated May 8, 2020, the Court directed the Clerk to schedule oral argument on the Application and ordered the parties to file Supplemental Briefs.

III. ARGUMENT

A. Standard of Review

In general, appellate review of a decision of a zoning board of appeals is de novo. *Hughes v Almena Twp*, 284 Mich App 50, 60; 771 NW2d 453 (2009). In addition, issues of statutory

construction are questions of law that are likewise reviewed de novo. *McJunkin v Cellasto Plastic Corp*, 461 Mich 590, 596; 608 NW2d 57 (2000).

B. The Current Standard – The Michigan Zoning Enabling Act

Local units of government have no inherent power to regulate land through the enactment of zoning ordinances. Instead, they must be authorized to do so by the Legislature. *Whitman v Galien Twp*, 288 Mich App 672, 679; 808 NW2d 9 (2010). That Legislative grant of authority has changed over time. Those changes include the standard by which one may invoke judicial review of a decision of a zoning board of appeals.

Over time, the Legislative authority to regulate land through zoning was granted to Michigan cities, villages, townships and counties via three separate zoning acts – the Township Zoning Act, the City and Village Zoning Act, and the County Zoning Act. See, Township Zoning Act, MCL 125.271 *et seq*; City and Village Zoning Act, MCL 125.581 *et seq;* County Zoning Act, MCL 125.201 *et seq*. Within each of those acts, the Legislature chose to require anyone challenging the actions of a zoning board of appeals in court to be "aggrieved." MCL 125.293; MCL 125.590; MCL 125.223. As described by the Court of Appeals:

> The "aggrieved party" requirement is a standard limitation in state zoning acts providing for review of zoning board of appeals decisions. See Comment, Standing to Appeal Zoning Determinations: The "Aggrieved Person" Requirement, 64 Mich L Rev 1070 (1966). This requirement has repeatedly been recognized and applied in the decisions of this Court. See *Unger v Forest Home Twp*, 65 Mich App 614; 237 NW2d 582 (1975), *Joseph v Grand Blanc Twp*, 5 Mich App 566; 147 NW2d 458 (1967), *Marcus v Busch*, 1 Mich App 134; 134 NW2d 498 (1965). Had the Legislature meant to unshoulder this burden from parties in plaintiff's status it could have done so in simple terms.

Western Mich Univ Bd of Trustees v Brink, 81 Mich App 99, 102-103; 265 NW2d 56 (1978). See also, *Village of Franklin v City of Southfield,* 101 Mich App 554, 556; 300 NW2d 634 (1980) (In order for a party to have standing in court to attack the actions of a zoning board of appeals, the party must be an aggrieved party.)

To be "aggrieved," a party must have suffered "special damages." The Michigan Court of Appeals has consistently held:

> In order to have any status in court to challenge the actions of a zoning board of appeals, a party must be 'aggrieved,' *Marcus v Busch*, 1 Mich App 134; 134 NW2d 498 (1965). The plaintiff must allege and prove that he has suffered some **special damages not common to other property owners similarly situated**, *Joseph v Grand Blanc Twp*, 5 Mich App 566; 147 NW2d 458 (1967). See, in general 8A McQuillan, Municipal Corporations (3d ed), s 25.292, and Note, Standing to Appeal Zoning Determinations: The 'Aggrieved Person' Requirement, 64 Mich L Rev 1070 (1966).

Unger v Forest Home Twp, 65 Mich App 614, 617; 237 NW2d 582 (1975) (emphasis supplied).

In 1979, the Legislature amended the city, township and county zoning acts. As relevant, here, the amendments replaced the "aggrieved party" standard with language which allowed for appeals of decisions of zoning boards of appeals to circuit courts by any "person having an interest affected by the zoning ordinance." MCL 125.293; MCL 125.590; MCL 125.223. In *Brown v East Lansing Zoning Bd of Appeals*, 109 Mich App 688; 311 NW2d 828 (1981), the Court of Appeals read those changes to vastly expand the pool of individuals able to appeal a decision of a zoning board of appeals. The Court in *Brown* explained:

> The opinion in *Brink* was decided in February 1978. Soon afterwards, HB 4591, 4592 and 4593 were introduced in the state Legislature. The bills proposed amendments of the state zoning enabling acts, including the sections pertaining to standing. The bills

survived to become 1978 PA 638, effective March 1, 1979, containing the following language:

> (6) The decision of the board of appeals shall be final. However, a person having an interest affected by the zoning ordinance may appeal to the circuit court.
>
> * * *
>
> The present case is the first opportunity that this Court has had to apply the amended language of MCL 125.585(6); MSA 5.2935(6). The fact that this Court in Village of Franklin, supra, recently found that certain plaintiffs were not "aggrieved parties" should not affect the decision in this case. In *Village of Franklin*, this Court expressly relied on the fact that the appeal in that case was taken under MCL 125.590; MSA 5.2940, which requires a party to be "aggrieved" in order to have standing to appeal. In the present case, on the other hand, plaintiffs' appeal was taken under MCL 125.585(6); MSA 2.2935(6), which requires only that a person have "an interest affected by the zoning ordinance." The fact that plaintiffs have an interest affected by defendant's decision to grant the variance is manifest in their active opposition to the variance and their participation in the different hearings.

Brown, 109 Mich App 697-698 and 699 (emphasis supplied).

The 1979 "interest affected by zoning ordinance" standard remained in effect until 2006, at which time the Legislature returned to the "aggrieved party" standard with its adoption of the Michigan Zoning Enabling Act ("MZEA"). MCL 125.3101 *et seq.* More specifically, the MZEA consolidated the city, township and county zoning acts, eliminated the "person having an interest affected by the zoning ordinance" standard, and reinstated the pre-1979 appeal standard as follows:

> Any party aggrieved by a decision of the zoning board of appeals may appeal to the circuit court for the county in which the property is located.

MCL 125.3606(1). The reinstatement of the "aggrieved party" standard for judicial review was purposeful and was an endeavor in which the Association actively participated. The principal

sponsor of the legislation, then-Representative Kevin A. Elsenheimer,[3] a practicing attorney with experience representing municipalities and with a thorough knowledge of zoning law, conducted months of workgroup meetings with a broad range of stakeholders. At the time of its introduction, HB 4398, the bill that became 2006 PA 110, contained an amalgam of the two standards, allowing an appeal to circuit court by a "person aggrieved by the zoning ordinance." House Bill No. 4398 excerpts, attached as Exhibit 2. When the bill was before the Senate, the Association, through its counsel, requested that the standard be changed, noting in an email to Brian Mills, Chief of Staff for Rep. Elsenheimer, with specific reference to case law on aggrieved party status, as follows:

> Section 605 [page 46, line 2] has a "person aggrieved by the zoning ordinance." "Aggrieved" was substituted for "affected," but the wording suggests a much broader range of appeals, especially with the remainder of the old section put into new 606. It should probably be a person aggrieved by the decision of the board of appeals; the case law on "aggrieved party" status could then tie it in to the ordinance. The sentence as revised might be moved to the beginning of 606 to replace the current first sentence.

Email Correspondence, June 17, 2005, attached as Exhibit 3. As amended by the Senate and concurred in by the House of Representatives, the change to "party aggrieved by a decision" was adopted in place of both the 1979 standard and the variation of that standard contained in the bill as introduced. Senate Substitute for House Bill No. 4398 excerpts, attached as Exhibit 4. The standard urged by Coastal Alliance in its Application would undo the Legislative act of reinstating the "aggrieved party" standard with the adoption of the MZEA. Such an outcome is expressly contrary to all well-established rules of statutory construction.

[3] Now serving as a judge of the 13th Circuit Court.

C. The "Party Aggrieved" Standard Requires a Party to Show Special Damages Not Common to Other Property Owners Similarly Situated

The MZEA provides, in relevant part:

> The decision of the zoning board of appeals shall be final. A party aggrieved by the decision may appeal to the circuit court for the county in which the property is located as provided under section 606.

MCL 125.3605. Thus, the unequivocal prerequisite under the MZEA, to invoking the appellate jurisdiction of the circuit court, is to prove that you are "aggrieved." The MZEA does not define the term "aggrieved." Coastal Alliance argues that "aggrieved" should be equated to the general standing requirement in Michigan – "special injury different from the citizenry at large." *Lansing Sch Ed Ass'n v Lansing Bd of Ed,* 487 Mich 349, 372; 792 NW2d 686 (2010). Coastal Alliance is incorrect. Applying Michigan's well-established rules of statutory interpretation demonstrates that a party "aggrieved" is defined as one who has suffered special damages not common to other property owners similarly situated.

The primary goal of the judiciary, when interpreting a statute, is to ascertain and give effect to the intent of the Legislature. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). This inquiry begins by examining the language of the statute itself. *Id.* If the statute is unambiguous, it must be enforced as written. *Id.*

Legislative history is an important tool for determining Legislative intent. *Bush v Shabahang,* 484 Mich 156, 168; 772 NW2d 272 (2009). "Moreover, courts must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute." *Id.* at 167. And, "[w]here the Legislature has considered

certain language and rejected it in favor of other language, the resulting statutory language should not be held to explicitly authorize what the Legislature explicitly rejected." *In re MCI Telecommunications Complaint*, 460 Mich 396, 415; 596 NW2d 164 (1999). That is, the express mention of one thing in a statute implies the exclusion of other similar things. *Jennings v Southwood*, 446 Mich 125, 142; 521 NW2d 230 (1994).

Further, Legislators are deemed to know the law when passing or amending a statute, *Walen v Dep't of Corrections,* 443 Mich 240, 248; 505 NW2d 519 (1993), including the rules of statutory construction. *Carson City Hosp v Dep't of Community Health*, 253 Mich App 444, 447-448; 656 NW2d 366 (2002). Therefore, the Legislature's use or omission of certain language is presumed to be intentional. *Id.* Further, and most important here, when statutory language has previously been the subject of judicial interpretation, courts are to assume that "the Legislature used the words in the sense in which they were previously interpreted." *Olsen*, 325 Mich App at 182, citing *People v Wright,* 432 Mich 84, 92; 437 NW2d 603 (1989); *People v Powell*, 280 Mich 699, 703; 274 NW 372 (1937).

In this case, the historical developments and statutory changes that gave rise to the language here at issue are especially instructive. In the context of zoning, the word "aggrieved" has been consistently defined to mean "suffered some special damages not common to other property owners similarly situated." *Olsen*, 325 Mich App at 182-183. As stated by the Court of Appeals in *Olsen*:

> In the context of zoning, but before enactment of the MZEA, this Court interpreted and applied the phrase "aggrieved party" in cases arising under former zoning enabling acts. In doing so, this Court consistently concluded that to be a "party aggrieved" by a zoning decision, the party must have "suffered some special

> damages not common to other property owners similarly situated[.]" *Unger v Forest Home Twp*, 65 Mich App 614, 617; 237 NW2d 582 (1975), citing *Joseph v Grand Blanc Twp*, 5 Mich App 566, 571; 147 NW2d 458 (1967). Generally, a neighboring landowner alleging increased traffic volume, loss of aesthetic value, or general economic loss has not sufficiently alleged special damages to become an aggrieved party, *Village of Franklin v Southfield*, 101 Mich App 554, 557; 300 NW2d 634 (1980), because those generalized concerns are not sufficient to demonstrate harm different from that suffered by people in the community generally.

Id.

In passing the MZEA, the Legislature is deemed to have known of these historical interpretations of the "aggrieved party" language. The fact that the Legislature originally adopted the "aggrieved party" standard, repealed it and has now returned to it, strongly indicates its intent to follow the pre-1979 Michigan case law interpreting and defining the word "aggrieved." Again, as summarized by the *Olsen* Court:

> Given the long and consistent interpretation of the phrase "aggrieved party" in Michigan zoning jurisprudence, we interpret the phrase "aggrieved party" in § 605 of the MZEA consistently with its historical meaning. Therefore, to demonstrate that one is an aggrieved party under MCL 125.3605, a party must "allege and prove that he [or she] has suffered some special damages not common to other property owners similarly situated[.]" *Unger*, 65 Mich App at 617; 237 NW2d 582. Incidental inconveniences such as increased traffic congestion, general aesthetic and economic losses, population increases, or common environmental changes are insufficient to show that a party is aggrieved. See *id.*; *Joseph*, 5 Mich App at 571; 147 NW2d 458. Instead, there must be a unique harm, dissimilar from the effect that other similarly situated property owners may experience. See *Brink*, 81 Mich App at 103 n 1; 265 NW2d 56. Moreover, mere ownership of an adjoining parcel of land is insufficient to show that a party is aggrieved, *Village of Franklin*, 101 Mich App at 557–558; 300 NW2d 634, as is the mere entitlement to notice, *Brink*, 81 Mich App at 102–103; 265 NW2d 56.

Id. at 185.

In sum, the Legislature adopted the MZEA after considering and rejecting the then-current appeal standard contained in each of the applicable zoning acts – which had allowed for appeals of zoning board decisions by any "person having an interest affected by the zoning ordinances." The Legislature expressly replaced that standard with the prior "aggrieved party" standard. The Legislature did so with knowledge of the Michigan case law defining "aggrieved party" as having "suffered some special damages not common to other property owners similarly situated." The Legislature did so with knowledge of Michigan's general standing requirements (special injury different from the citizenry at large) announced by this Court in *Lansing Schools.* On the face of it, "not common to other property owners similarly situated" is not the same as "different from the citizenry at large," nor has any Michigan court ever interpreted to be so. Thus, to agree with Coastal Alliance is to explicitly authorize what the Legislature rejected and, again, flies in the face of Michigan's well-established rules of statutory construction. The Court of Appeals reached the correct conclusion and its opinion should be affirmed and/or the Application rejected.[4]

D. The Meaning of "Person Aggrieved" Does Not Materially Differ from that of "Party Aggrieved"

At Section 604 of the MZEA, a "person aggrieved" may take an appeal to the zoning board of appeals. MCL 125.3604(1). The term "person" is used, rather than the term "party," because there is no lawsuit. Nonetheless, the "person" must be "aggrieved."

[4] Coastal Alliance also argues that the various panels of the Court of Appeals' use of language slightly different from "not common to other property owners similarly situated" (e.g., in the *Olsen* opinion – "different from those of others within the community"), somehow renders these opinions unreliable. This argument is unavailing. The language used by the Courts to define "aggrieved" is, in all cases, consistent in its meaning and consistently applied to reach cohesive conclusions. Again, the Court of Appeals reached the correct conclusion and should be affirmed.

At Section 605 of the MZEA, a "party aggrieved" may take an appeal to the circuit court. MCL 125.3605. The term "party" is used, rather than the term "person," because now there is a lawsuit. Again, however, the "party" must be "aggrieved."

Yet another canon of Michigan law on statutory interpretation is the presumption that the same words bear the same meaning throughout a statutory scheme. *United States Fidelity Guaranty Co v Mich Catastrophic Claims Ass'n*, 484 Mich 1, 14; 795 NW2d 101 (2009) ("If the Legislature had intended the same meaning in both statutory provisions, it would have used the same word."); *People v Smith*, 478 Mich 292; 733 NW2d 351 (2007) (Same offense language in double jeopardy provision of state constitution means the same thing in the contexts of the "multiple punishments" strand of the double jeopardy clause as it does in the "successive prosecutions" strand.) Accordingly, the term "aggrieved" has the same meaning in both statutes. And, since the only distinction between "person" and "party" is to recognize that in the latter instance, a lawsuit has been filed and in the former instance it has not, the meaning of the phrases "person aggrieved" and "party aggrieved" are not materially different.

E. The Court of Appeals Correctly Affirmed the Allegan Circuit Court's Dismissal of Appellant's Appeals – as a Matter of Public Policy

Zoning gives local government extraordinary power over an owner's use of property. It is confined, however, to the limits set by the Legislature in the zoning enabling act. *Krajenke Buick Sales v Kopkowski*, 322 Mich 250, 33 NW2d 781 (1948). Development, within the confines of government approval and oversight, includes a broad range of uses that may be unpopular – affordable housing, particular religious institutions, or even, as in this case, 23 single-family home lots around a boat basin and a private marina. Any use is susceptible to

determined opposition and delay. A development may produce jobs, spending, tax revenues, economic growth, or simply an affordable home, school, or place of worship. Halting, or even delaying, development denies jobs, spending, tax revenues, economic growth, and financial stability. Delaying a use or development can cause defaults on loans, loss of financing, or loss of contributors or investors. A property owner faced with endless litigation and mounting debts may simply abandon the project. Unfortunately, that becomes a strategy in and of itself.

By appealing the decisions of planning commissions, zoning boards of appeal, circuit courts, and the Court of Appeals, an individual can tie-up, if not completely destroy, the use or development of private property by its owner – even when the plans for that development have been approved by the local unit of government and any required state and federal agencies. This is not only an enormous amount of power for one private citizen to wield, but it is a power that is susceptible to being used for purely personal motives. As a result, the power must be checked, and the means by which the Legislature has determined to do so is through the "aggrieved" person or party standard. That determination should be left intact by this Court.

IV. CONCLUSION

The Court of Appeals, in this case, correctly followed its 2018 opinion in *Olsen*. A person or party "aggrieved" is an individual who has suffered some special damages not common to other property owners similarly situated.

V. RELIEF REQUESTED

For all the foregoing reasons, the Association respectfully requests that this Honorable Court grant the Association leave to file this Amicus Curiae Brief in support of the

position of the Appellees, deny the Application and affirm the Opinions of the Court of Appeals and Circuit Court.

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Michigan Realtors®

By: */s/ Melissa A. Hagen*
Melissa A. Hagen (P42868)
David E. Pierson (P31047)

Date: September 14, 2020

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LIST OF EXHIBITS TO BRIEF *AMICUS CURIAE* SUBMITTED BY MICHIGAN REALTORS® IN SUPPORT OF THE POSITION OF THE APPELLEES

1. Opinion of the Court of Appeals, August 29, 2019
2. House Bill No. 4398 excerpts
3. Email Correspondence, June 17, 2005
4. Senate Substitute for House Bill No. 4398 excerpts

EXHIBIT 1

STATE OF MICHIGAN

COURT OF APPEALS

SAUGATUCK DUNES COASTAL ALLIANCE, Plaintiff-Appellant, v SAUGATUCK TOWNSHIP, SAUGATUCK TOWNSHIP ZONING BOARD OF APPEALS, and NORTH SHORES OF SAUGATUCK, LLC, Defendants-Appellees.	UNPUBLISHED August 29, 2019 No. 342588 Allegan Circuit Court LC No. 17-058936-AA

SAUGATUCK DUNES COASTAL ALLIANCE, Plaintiff-Appellant, v SAUGATUCK TOWNSHIP ZONING BOARD OF APPEALS, SAUGATUCK TOWNSHIP, and NORTH SHORES OF SAUGATUCK, LLC, Defendants-Appellees.	No. 346677 Allegan Circuit Court LC No. 18-059598-AA

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

PER CURIAM.

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

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

I. BACKGROUND

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

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

II. JURISDICTION

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

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

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

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

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

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

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

III. STANDARD OF REVIEW

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

IV. "AGGRIEVED PARTY"

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

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

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

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

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

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

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

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

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

V. OTHER CLAIMS

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

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

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

VI. CONCLUSION

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

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

EXHIBIT 2

HOUSE BILL No. 4398

February 23, 2005, Introduced by Reps. Elsenheimer, Walker, Gaffney, Moore, Stakoe, Booher, Hildenbrand, Garfield, Baxter and Kahn and referred to the Committee on Local Government and Urban Policy.

A bill to regulate the development and use of land; to provide for the establishment in counties, townships, cities, and villages of zoning districts; to provide for the adoption of zoning ordinances; to provide for the assessment, levy, and collection of taxes and fees; to authorize the issuance of bonds and notes; to provide for special assessments; to prescribe penalties and provide remedies; and to repeal acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. This act shall be known and may be cited as the "zoning enabling act".

Sec. 2. As used in this act:

(a) "Agricultural land" means substantially undeveloped land devoted to the production of plants and animals, including, but not limited to, forage and sod crops, grains, feed crops, dairy

HOUSE BILL No. 4398

the occupants of single- and 2-family dwellings within 300 feet of the property at issue. The notice shall be delivered personally or by mail addressed to the respective owners and occupants at the address given in the last assessment roll.

(5) At the hearing, a party may appear in person or by agent or attorney. The zoning board of appeals may reverse or affirm, wholly or partly, or modify the order, requirement, decision, or determination and may issue or direct the issuance of a permit.

(6) If there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the zoning ordinance, the zoning board of appeals, in passing upon appeals, may grant a variance relating to the construction, or structural changes in, equipment, or alteration of buildings or structures, or the use of land, buildings, or structures, so that the spirit of the zoning ordinance is observed, public safety secured, and substantial justice done. The zoning board of appeals may impose conditions with an affirmative decision under section 26(2).

Sec. 34. The decision of the zoning board of appeals shall be final. A person aggrieved by the zoning ordinance may appeal to the circuit court for the county in which the property is located. Upon appeal, the circuit court shall review the record and decision of the zoning board of appeals to ensure that the decision meets all of the following requirements:

(a) Complies with the constitution and laws of the state.

(b) Is based upon proper procedure.

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

EXHIBIT 3

David Pierson

From: David Pierson [dpierson@malansing.com]
Sent: Friday, June 17, 2005 12:03 PM
To: 'Brian Mills'
Cc: 'Brad Ward'; Lee Schwartz (schwartz.lee@mahb.com)
Subject: Revisions to HB 4398

Brian,

I have pasted in below more complete comments on HB 4398 in the form in which it passed the House. Bill Anderson forwarded to me the comments from the MTA counsel, and I've included references to those as well. I do not think we have any substantive disagreement with their suggestions. I would be glad to discuss any of these further with you, Rep. Elsenheimer, or others. In light of the comments from the MTA concerning notice provisions, it may make sense to meet again to discuss how those might be changed.

Thanks for your consideration.

David

Our primary concerns are the sections concerning the zoning board of appeals, first as to standing and the scope of appeals, and then as to variances.

It had been our understanding from the first or second work group session that provisions with respect to appeals would be, essentially, returned to the form which they stood under the current zoning acts, and that aggrieved party status would be the general rule for appeals. The revisions to those sections were done at the same time as the reorganization of the entire bill, and some provisions were left or pulled together that do not reflect the agreed substance, at least as we understood it.

Appeals

Subsection 606(1), in particular, goes well beyond the appeals under the current statutes, and we believe the first sentence should be removed entirely. The current statutes, MCL 293(a) (townships) and MCL 125.585(11) (cities and villages), refer only to appeals from the zoning board of appeals. By contrast, subsection 606(1) [page 46, lines 5-9] appears to allow an appeal to the circuit court from every possible zoning action by every person and body with zoning authority, for review in the circuit court under a standard for administrative appeals. I assume that the review could not have been intended in quite this fashion, as the review standard is that applicable to administrative decisions, but the language used extends to legislative decisions of the local governing body. I do not know the source of this provision, but we do not think it should be added. Along the same lines, some other language has been removed in subsection 606(1)(d): On line 17, after "by law," the current statutes have the phrase "to the board of appeals." On line 21, "the decision-making body" has been substituted for a "board of appeals"; "board of appeals" should be restored.

Section 605 [page 46, line 2] has a "person aggrieved by the zoning ordinance." "Aggrieved" was substituted for "affected," but the wording suggests a much broader range of appeals, especially with the remainder of the old section put into new 606. It should probably be a person aggrieved by the decision of the board of appeals; the case law on "aggrieved party" status could then tie it in to the ordinance. The sentence as revised might be moved to the beginning of 606 to replace the current first sentence.

EXHIBIT 4

SENATE SUBSTITUTE FOR

HOUSE BILL NO. 4398

A bill to codify the laws regarding local units of government regulating the development and use of land; to provide for the adoption of zoning ordinances; to provide for the establishment in counties, townships, cities, and villages of zoning districts; to prescribe the powers and duties of certain officials; to provide for the assessment and collection of fees; to authorize the issuance of bonds and notes; to prescribe penalties and provide remedies; and to repeal acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

ARTICLE I

GENERAL PROVISIONS

Sec. 101. This act shall be known and may be cited as the

February 15, 2006.

(10) The authority granted under subsection (9) is subject to the zoning ordinance of the local unit of government otherwise being in compliance with subsection (7) and having an ordinance provision that requires a vote of 2/3 of the members of the zoning board of appeals to approve a use variance.

(11) The authority to grant use variances under subsection (9) is permissive, and this section shall not be construed to require a local unit of government to adopt ordinance provisions to allow for the granting of use variances.

Sec. 605. The decision of the zoning board of appeals shall be final. A party aggrieved by the decision may appeal to the circuit court for the county in which the property is located as provided under section 606.

Sec. 606. (1) Any party aggrieved by a decision of the zoning board of appeals may appeal to the circuit court for the county in which the property is located. The circuit court shall review the record and decision to ensure that the decision meets all of the following requirements:

(a) Complies with the constitution and laws of the state.

(b) Is based upon proper procedure.

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

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

(2) If the court finds the record inadequate to make the review required by this section or finds that additional material