

STATE OF MICHIGAN  
IN THE SUPREME COURT

SAUGATUCK DUNES COASTAL ALLIANCE,

Supreme Court No. 160358, 160359

Appellant/Plaintiff,

Court of Appeals No. 342588, 346677

-VS-

Lower Court Case No. 2018-059598-AA

SAUGATUCK TOWNSHIP, SAUGATUCK TOWNSHIP  
ZONING BOARD OF APPEALS and NORTH SHORES  
OF SAUGATUCK, L.L.C.,

Appellees/Defendants.

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**AMENDED AMICUS BRIEF ON BEHALF OF THE MICHIGAN MUNICIPAL LEAGUE  
AND MICHIGAN TOWNSHIPS ASSOCIATION**

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**STATEMENT OF THE BASIS OF APPELLATE JURISDICTION**

*Amicus* adopts the Statement of Appellate Jurisdiction as set forth by Appellees in their Answers to the Application for Leave to Appeal.

**STATEMENT OF THE 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.**

Appellant answers: No.  
Appellees answer: Yes.  
The Circuit Court answered: Yes.  
The Court of Appeals answered: Yes.  
This Amicus answers: Yes.  
This Court should answer: Yes.

**II. WHETHER THE MEANING OF "PERSON AGGRIEVED" IN MCL 125.36604(1) DIFFERS FROM THAT OF "PARTY AGGRIEVED" IN MCL 125.3605.**

Appellant answers: Yes.  
Appellees answer: No.  
The Circuit Court answered: No.  
The Court of Appeals answered: No.  
This Amicus answers: No.  
This Court should answer: 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.**

Appellant answers: Yes.  
Appellees answer: No.  
The Circuit Court answered: No.  
The Court of Appeals answered: No.  
This Amicus answers: No.  
This Court should answer: No.

## **INTRODUCTION & SUMMARY OF ARGUMENT**

Appellant and its supportive amici, the Environmental Law & Policy Center and National Trust For Historic Preservation (the “Environmental Amici”), ask this Court to discard not only more than a half century of zoning appeal-specific jurisprudence, but also a 150-year-old understanding of what it means to be “aggrieved,” an understanding of zoning challenges as being property interest-centric that dates back to a seminal decision that this Court issued in 1957, and a firmly-established distinction between standing to initiate original actions and standing to initiate an appeal that applies regardless of an action’s subject matter. The premise of Appellant’s arguments is that standing to initiate an original action and standing to initiate an appeal are functionally the same and that the zoning appeal standard should catch up with this Court’s articulation of general standing in *Lansing Schools Educ. Ass’n v. Lansing Bd. of Ed*, 487 Mich 349 (2010). But this premise is fundamentally flawed since the standards for original and appellate standing were not aligned even before *Lansing Schools*, nor should they be since appeals and original actions have distinctly different purposes.

Appellant and the Environmental Amici present this case as being a matter of novel statutory interpretation that requires guidance from foreign legal sources, but they overlook a deeply-rooted body of precedent herein Michigan addressing matters such as what it means to be “aggrieved,” “similarly situated,” or to have “special damages” in both original and appellate zoning contexts. And, insofar as Appellant and the Environmental Amici advocate adoption of the *Lansing Schools* standard as being in line with statutory interpretation, their argument overlooks the fact that *Lansing Schools* post-dates adoption of the Michigan Zoning Enabling Act (MZEA), Act 110 of 2006, MCL §125.3101 *et. seq.*, and that *Lansing Schools* itself is a creature of decades of judicial interpretation with no discernible connection to the state’s zoning appeals jurisprudence.

Most importantly, adopting the *Lansing Schools* standard would be of no help to Appellant's effort to appeal the zoning decision at issue in this case since Appellant's claims of special damages are not only common to the public at large, but do not flow from the Zoning Board of Appeals' decision itself. As this appeal is grounded in faulty premises, and Appellant's advocated change in the underlying rule for evaluating "aggrieved party" status would not even change its own status, this appeal does not present a question that should be reviewed by this Court. Likewise, this Application serves as a poor vehicle for overturning a decades-long line of zoning appeal precedent that not only properly articulates the standard for "aggrieved party" status in zoning appeals, but which has been consistently and reliably applied for decades in a manner that has allowed many third-party applicants to achieve "aggrieved party" status when their property interests have been tangibly implicated by a zoning decision.

The Court of Appeals in this case properly followed *Olsen v. Chikaming Township*, 325 Mich App 170 (2018), in determining that Appellant lacked "aggrieved party" status for failure to demonstrate special damages different from property owners similarly situated. *Olsen* serves as a restatement of decades of zoning appeals precedents that evaluate a party's status to appeal zoning decisions in a manner that is both consistent with this state's jurisprudence and theoretically sound. As this Court examines this issue, it should keep in mind its longstanding position that courts are not to serve as "super zoning commissions," and that those wishing to challenge a community's policy decisions or zoning ordinances should do so through the legislative process or at the ballot box.

It is also important to keep in mind that zoning regulation, by nature, is about property rights. The zoning appeals process begins with an individual property owner seeking relief from a community's general zoning program who must be "aggrieved" by the zoning ordinance. In the normal appellate process, only the applicant or the government would be parties able to

appeal the decision, but the zoning appeals process recognizes the need to include a limited right for third parties to seek court review of zoning decisions since those decisions, in some instances, result in secondary effects on the individual property rights of other persons. *Olsen's* requirement that prospective aggrieved parties demonstrate some substantial damage to a property interest different from other property owners similarly situated reflects the property interest-centric nature of the zoning process and the targeted purpose of opening appeals to those who will experience unique effects from the zoning decision.

Insofar as a zoning appeal by a third party threatens the property rights of the property owner who received the favorable zoning decision (and who could potentially pursue a takings claim against the municipality if reversal of the decision renders his or her property unusable as zoned), the *Olsen* standard appropriately requires a third party zoning appellant to prove that it has a direct property interest affected by the challenged decision. The zoning appeals process is not, and should not, be a means of challenging the wisdom of the decision, litigating hypothetical harms, or opening every zoning decision to appeal by members of the public. This does not mean that other individuals would be without recourse, but merely that the limited remedy of a zoning appeal is not the proper vehicle for them to pursue their claims.

In this case, the Saugatuck Township Zoning Board of Appeals (ZBA), circuit court, and Court of Appeals each correctly determined that the instant Appellant lacked "aggrieved party" status. As the matter first reached the ZBA in an appellate posture, it was appropriate for the ZBA to determine whether Appellant had alleged and proved that it was sufficiently "aggrieved" so as to invoke its jurisdiction. Insofar as the MZEA speaks to a "person aggrieved" in the context of a ZBA appeal and an "aggrieved party" in the context of a circuit court appeal, the terms present a distinction without a difference since both the terms "person" and "party" must be considered with reference to the term "aggrieved." Thus, the circuit court and Court of Appeals

correctly evaluated Appellant's claim to "aggrieved" status consistently with the ZBA. Ultimately, Appellant was not aggrieved because it and its members allege nothing but general personal, aesthetic, recreational, and environmental harms. The presented affidavits are largely based on hypothetical scenarios and personal worries, without any grounding in factual proof. In some cases, the allegations of individual affiants even conflict with each other to the point that, collectively, the affidavits reveal nothing but allegations of hypothetical concerns and harms that would be commonly experienced by any resident or visitor in the area, such that the allegations cannot even satisfy the standard of *Lansing Schools*.

Also lost in Appellant's discussion is that vacating the Saugatuck Township Planning Commission's approval of the Planned Unit Development (PUD) at issue in this case would not change the Appellant's position. Appellant does not allege a harm flowing from the Planning Commission's decision itself, but rather merely asserts general disgust with the underlying fact that North Shores' property will be developed at all. As explained in Appellees' briefing, under Saugatuck Township's Zoning Ordinance, North Shores could develop 33 residential homes and 48 boat slips *by right* without obtaining approvals from the Planning Commission. North Shores sought PUD approval to provide flexibility in the development's layout in order to provide more generous open spaces. The approved PUD contains ten fewer homes, and just two additional boat slips from what is permitted by right.

Appellant and its affiants clearly object to the fact that the property is being developed at all, not that they will suffer any distinct harm from the Planning Commission's decision to allow *fewer* homes, more expansive open spaces, or a mere two additional boat slips. North Shores has an absolute right to develop its property, and Appellant has no right to enlist the power of the Township or this state's courts to force North Shores to keep it vacant. Since, if Appellant prevails in this case, North Shores could simply go back to the Township and submit a proposal

to develop the property with more homes, greater density, and just two fewer boat slips by right, this case is a poor vehicle for discarding this state's decades-long zoning appeal jurisprudence.

Ultimately, *Olsen* properly articulates the "aggrieved party" standard in zoning appeals, the Court of Appeals properly applied that standard, and Appellant cannot demonstrate that it is "aggrieved" by the Planning Commission's decision even under a more lenient standard. Therefore, the Court of Appeals did not commit any error in this case, and Appellant's Application otherwise does not present an important question of jurisprudential significance meriting this Court's review. This Court should decline the Application for Leave to Appeal, or affirm the Court of Appeals without any further proceedings.

#### **STATEMENT OF INTEREST**

The Michigan Municipal League (MML) is a Michigan non-profit corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership comprises hundreds of Michigan cities and villages, many of which are also members of the Michigan Municipal League Legal Defense Fund (LDF). The Michigan Municipal League operates the LDF through a board of directors that is broadly representative of its members. The purpose of the LDF is to represent the member cities and villages in litigation of statewide significance.

The governing body of the Michigan Municipal League has authorized and directed this office to file an *amicus curiae* brief in the within cause in support of Appellees Saugatuck Township and Saugatuck Township Zoning Board of Appeals. The 2020-2021 Board of Directors of the Legal Defense Fund who approved this filing are: Lauren Tribble-Laucht, Vice Chair, City Attorney, Traverse City; John C. Schrier, City Attorney, Muskegon; Ebony L. Duff, City Attorney, Oak Park; Amy Lusk, City Attorney, Saginaw; Suzanne Larsen, City Attorney, Marquette; Clyde J. Robinson,



City Attorney, Kalamazoo; Laurie Schmidt, City Attorney, St. Joseph; and Christopher J. Johnson, General Counsel, Fund Administrator.<sup>1</sup>

### **STATEMENT OF MATERIAL PROCEEDINGS AND FACTS**

*Amicus* adopts the Statement of Material Proceedings and Facts as set forth by Appellees Saugatuck Township, Saugatuck Township Zoning Board of Appeals, and North Shores of Saugatuck, LLC in their responses to the Application for Leave to Appeal and their supplemental briefs submitted in response to this Court's order for supplemental briefing dated May 8, 2020

### **STANDARD OF REVIEW**

The question of whether the Court should accept this case for review is governed by MCR 7.305(B). This *Amicus* adopts the statements of relevant standards of review as set forth in Appellees' briefing.

### **ARGUMENT**

#### **I. THE "AGGRIEVED PARTY" STANDARD OF MCL 125.3605 REQUIRES A PARTY TO SHOW SOME SPECIAL DAMAGES NOT COMMON TO OTHER PROPERTY OWNERS SIMILARLY SITUATED.**

##### **A. The "aggrieved party" standard for appeals is, and should remain, conceptually distinct from the criteria for general standing set forth in *Lansing Schools*.**

Appellant responds to this Court's question of "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" by advocating that "this Court should articulate a test for standing in zoning appeals that mirrors this Court's previous pronouncements on standing." In other words, Appellant asks this Court to merge the standard for appellate "aggrieved party" status with the test for standing to initiate an original action as articulated in *Lansing Schools Educ. Ass'n v.*

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<sup>1</sup> No counsel for a party authored this Brief in whole or in part. No counsel or party made a monetary contribution to the preparation of this Brief.

*Lansing Bd. of Ed*, 487 Mich 349 (2010). Appellant takes the untenable position that “the concepts of ‘standing’ and ‘aggrieved party’ are, in application, essentially indistinguishable.” *Saugatuck Dunes Coastal Alliance v. Saugatuck Township*, unpublished opinion per curiam of the Court of Appeals issued Aug. 29, 2019, 2019 WL 4126752, at \*3 (Docket Nos. 342588 and 346677) (Ex. 1). However, this argument disregards this Court’s long-established position that the “aggrieved party” inquiry in the appellate context is in fact different from that of general standing.

This Court recognizes that “standing refers to the right of a party *initially* to invoke the power of the court to adjudicate a claimed injury in fact.” *Federated Ins. Co. v. Oakland County Road Com’n*, 475 Mich 286, 290 (2006), emphasis original. For purposes of appeal, “to be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency. *Id.*, at 291, citing *In re Estate of Trankla*, 321 Mich 478, 482 (1948) and *In re Estate of Matt Miller*, 274 Mich 190 (1936). This conceptualization of who is “aggrieved” has been “settled” for almost 150 years, going back to this Court’s decision in *Labar v. Nichols*, 23 Mich 310 (1871). *In re Estate of Matt Miller*, 274 Mich at 194. Thus, it is not enough that the prospective appellant is merely disappointed in the result. *Federated*, 475 Mich at 291. The key difference in evaluating aggrieved party status as compared to general standing is that “the litigant on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case.” *Id.*, at 292.

In other words, the distinction between an appeal and an original action is that, in an appeal, there is a readily-identifiable decision with reference to which a person’s “aggrieved party” status must be evaluated, and therefore there can only be a limited number of people who could claim a concrete harm flowing from that decision. In the most traditional sense, it would be only

the losing party that would be directly affected by the result and able to benefit from a reversal of the order being appealed.

In contrast, litigants initiating an original claim are merely tasked with alleging a set of facts indicating their right to pursue a legal cause of action, with respect to which the defendant has the benefit of conducting discovery to determine the validity of the allegations and the extent of any liability. In the zoning appeal context, if a third party challenges a community's grant of a property owner's zoning request, the appeal becomes a direct action between the third party and the municipality. Unless the property owner intervenes in the appeal (which it is not required to do), it will not even be a participant in the proceeding. At a minimum, even if the property owner does intervene, it will not have the benefit of discovery to interrogate the third party's claim to standing since the inquiry would proceed directly to whether the original decision-making body committed an error.<sup>2</sup> Thus, as will be further discussed, *infra*, insofar as third parties are provided a limited ability to appeal a decision, the proper conceptualization of "aggrieved party" status should require (as it does now) that third party to allege *and prove* a direct interest flowing from the decision itself, rather than merely allege a general set of factual circumstances that would otherwise be sufficient to open discovery regarding an original claim.

It should be noted at the outset that Appellant's contention that "standing" and "aggrieved party" status are indistinguishable could be a symptom of the fact that cases and other authorities sometimes use the term "standing" as a shorthand when addressing one's status to appeal. For example, *Federated* alternately refers to "aggrieved party" status on appeals and "standing *on appeal*." See, e.g., *Federated*, 475 Mich at 291-292, emphasis added. Nevertheless, it clearly establishes that "standing on appeal" is distinct from standing to initiate original action. *Id.*, at

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<sup>2</sup> This is because a zoning appeal evaluates the decision below solely based on the record created below, which cannot be expanded with additional evidence. See, e.g., MCR 7.122(E); *People v. Watkins*, 247 Mich App 14, 31 (2001).

290-291. Therefore, the mere fact that courts often address the “aggrieved party” issue as being one of “standing” on appeal should not be construed as indicating confusion about the standard that applies to appeals, nor as indicating that the appellate “aggrieved party”/standing inquiry is intended to be merged with the standard for evaluating standing in original actions. Thus, this Court should continue to acknowledge that the right to initiate an appeal is conceptually distinct from the right to initiate an original action, regardless of whether that right is labeled as “aggrieved party” status on appeal or “standing on appeal.”

In this case, the Court of Appeals correctly followed this Court’s instructions via its citations to *Olsen v. Chikaming Township*, 325 Mich App 17 (2018), which followed *Federated* verbatim. The Court of Appeals cited to *Olsen*’s recognition that there is a “difference between ‘standing’ and ‘aggrieved party’ analysis in cases involving an appeal from a decision of a ZBA,” such that a party taking an appeal from a ZBA decision is not required to show “standing,” but rather “aggrieved party” status. *Saugatuck Dunes*, *supra* at \*3, citing *Olsen*, 325 Mich App at 180-181. The section of *Olsen* that the Court of Appeals cited in the instant case expressly cites the portions of *Federated* outlined above. *Olsen*, 325 Mich App at 180-181, citing *Federated*, 475 Mich at 291. Thus, the Court of Appeals correctly declined to decide whether the instant Appellant would have standing to bring an original action. *Saugatuck Dunes*, at \*3. For the same reason, Appellant’s extensive citations to cases such as *Kallman v. Sunseekers Property Owners Ass’n*, 480 Mich 1099 (2008), *Schall v. City of Williamston*, unpublished opinion per curiam of the Court of Appeals issued December 4, 2017, 2014 WL 6860265 (Docket No. 317731) (Ex 2), and *Nat’l Wildlife Fed’n v. Cleveland Cliffs Iron Co*, 471 Mich 608 (2004) are all inapposite since they addressed a party’s claim to standing to initiate an original action.

Appellant does not even address *Federated* in its supplemental brief, and gives only brief attention to it in its reply to the Township’s supplemental brief. While Appellant suggests that

*Federated* should be disregarded because it was decided with reference to the pre-*Lansing Schools* conceptualization of standing for an original action, Appellant does not allege any error by the Court of Appeals in following *Federated* insofar as it stands for maintaining a distinction between the appellate “aggrieved party” standard and the general standing analysis of *Lansing Schools*. While *Lansing Schools* replaced the analysis for standing to initiate an *original* proceeding that was prevailing at the time that *Federated* was decided, it neither addressed nor disturbed *Federated’s* recognition that an “aggrieved party” on appeal is different from and more limited than a party with general standing.

Because applying the *Lansing Schools* standard to the appellate “aggrieved party” inquiry would blur the distinction between the standards for the original and appellate contexts so as to open the right to appeal a decision to a much broader universe of persons than those who could demonstrate a harm flowing from the decision, this Court’s inquiry should proceed under the assumption that, if *Olsen* is not the proper standard, then *Lansing Schools* is not the proper alternative. However, since *Olsen* properly articulates the “aggrieved party” standard consistent with the Court of Appeals’ decades-long precedent and this Court’s own principles for evaluating zoning and property rights-centric cases, *Olsen’s* approach to the “aggrieved party” inquiry in zoning appeals must be preserved.

**B. The proper showing required to be “aggrieved” in the context of a zoning appeal is to allege and prove special damages not common to other property owners similarly situated.**

Contrary to the inference invited by Appellants’ portrayal of *Olsen*, the Court of Appeals’ articulation of the “aggrieved party” standard for zoning appeals in *Olsen* was not a sea change in the law. Far from it, *Olsen* is a masterful restatement of over a half-century of published cases that clears up the very type of confusion that Appellant is attempting to introduce into this appeal regarding special damages analysis.

While Appellant claims that *Olsen* has “questionable underpinnings” dating back to *Joseph v. Grand Blanc Township*, 5 Mich App 566 (1967), *Joseph* reflected what the Court of Appeals identified as an emerging consensus of authority nationwide that, to challenge a zoning decision, “the party must be an aggrieved party, and said party must be more than a resident of the city.” *Joseph v. Grand Blanc*, 5 Mich App. at 570, quoting *Marcus v. Busch*, 1 Mich App 134, 136 (1965). Appellant specifically questions the Court of Appeals’ rationale for citing to *Victoria Corporation v. Atlanta Merchandise Mart, Inc.*, 101 Ga App 163 (1960) in refining the zoning-related aggrieved party test to require “substantial damage which is not common to other property owners similarly situated.” But, the Court of Appeals’ rationale is clarified by its complementary citation to the contemporary University of Michigan Law Review article, “Standing to Appeal Zoning Determinations: The ‘Aggrieved Person’ Requirement.” 64 Mich L Rev 1070 (1966) (Ex 3); *Joseph*, at 571. That article observed that the very fact that third parties may attain “aggrieved party” status at all in the zoning context is because a grant of a zoning request would otherwise be unlikely to be subject to review even though it may affect some other person who was not a party to the underlying administrative proceedings. 64 Mich L Rev at 1078. The author observed that courts justified granting third parties “aggrieved party” status to appeal zoning decisions as a counterbalance to the status of the applicants, and opined that “in some instances” third parties should be allowed the opportunity to have their positions heard in court. *Id.*, at 1079.

Thus, contrary to Appellant’s conceptualization of “aggrieved party” status being interpreted by the Court of Appeals in a way that *prohibits* review of zoning decisions, *Joseph* reflects an opening of the “aggrieved party” standard in the zoning appeal context to capture these unique situations. To the extent that courts had been called upon to apply the “aggrieved party” standard in a manner that would create this limited third-party appeal right, that effort was reflected in the decision of the Georgia Court of Appeals (and others) that required a showing

of “special damages not common to other property owners similarly situated.” *Id.*, at 1078-1079, citing *Victoria, supra*, and *Downey v. Incorporated Village of Ardsley*, 152 NYS2d 195 (Sup. Ct. 1956), *aff’d mem.*, 3 App Div 2d 663, 158 NY2d 305 (1957).

Considered in this context, *Joseph* was essentially a case of first impression regarding which third parties have the right to seek appellate review of a ZBA decision in Michigan’s courts. Therefore, the Court of Appeals’ choice to look to scholarly sources and other jurisdictions for guidance<sup>3</sup> in articulating the “property owners similarly situated” standard did not deviate from any preexisting Michigan authorities; indeed, Appellant does not identify any prior Michigan authorities that were dishonored by *Joseph*.<sup>4</sup> And, while Appellant and the Environmental Amici spend substantial time assessing *other state’s* zoning laws and case precedents as they exist today, conducting such a nation-wide review is unnecessary and inappropriate not only because these other states do not interpret the *Michigan* Zoning Enabling Act or *Michigan* Constitution, but because this state already has a deeply-rooted and consistent zoning jurisprudence with respect to which *Joseph’s* and *Olsen’s* treatment of “aggrieved party” status for zoning appeals is theoretically rooted, and a logical and necessary component.<sup>5</sup>

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<sup>3</sup> It is contradictory for Appellant to suggest that this Court should overturn the decades-long precedent refining *Joseph* based on other state’s jurisprudence as it exists today, all the while claiming that the *Joseph* case was “questionable” due to its reliance on out-of-state sources at a time when zoning appeals “aggrieved party” status was genuinely a question of first impression.

<sup>4</sup> To the extent that Appellant’s arguments suggest that the term “special damages” itself should be construed identically across different contexts, this assertion is negated by this Court’s takings jurisprudence, where it conceptualizes “special damages” for an inverse condemnation claim as being evaluated with reference to “all persons similarly situated” rather than the public at large. *See, e.g., Mays v. Governor of Michigan*, \_\_\_ Mich \_\_\_, 2020 WL 4360845, at \*8 (2020). While *Mays* is not a standing or “aggrieved party” case, that is exactly the point, as the “special damages” analysis can be different depending on the context.

<sup>5</sup> As this Amicus submits that this Court’s questions can be fully resolved using this state’s jurisprudence, and the parties have dedicated substantial briefing to the out-of-state authorities, this Amicus refrains from further engaging these authorities.

Framing the test for “aggrieved party” status in the zoning context with reference to the harm suffered by similarly situated property owners reflects the fact that zoning regulation is all about protecting private property rights. *K & K Construction, Inc. v. DEQ*, 267 Mich App 523, 527, n. 3 (2005). Mechanisms such as a zoning variance (or, in this case, review of a PUD request), are means of reconciling constitutional property rights against the government’s broad power to regulate on behalf of the general public health, safety, and welfare. *Howard Tp. Bd. v. Waldo*, 168 Mich App 565, 574-575 (1988). *See also*, 64 Mich L Rev at 1084, observing that “[z]oning regulation must be viewed . . . as a protection, in the long run, against infringement of individual property rights.”

So, it is fitting that the “aggrieved party” analysis in zoning cases focuses on whether damage is unique as compared to similarly situated property owners since the purpose of providing this limited third-party appeal opportunity is to capture those outlier scenarios where a third party’s individual property rights are poised to be uniquely burdened by the outcome of the zoning authority’s balancing of the applicant’s rights against the zoning ordinance. *See, e.g.*, 64 Mich L Rev at 1078. As that third party did not have the benefit of being a party at all stages of the administrative zoning review process (but did have the right to appear and object at the hearing), creating a limited opportunity for third parties appeals vindicates that person’s right to reconcile his or her own rights under the zoning ordinance by allowing him or her to obtain a ruling as to whether the challenged decision has properly burdened his or her property interest with those unique effects.

Insofar as the “aggrieved party” analysis not only evaluates special damages with reference to property owners, but also results in only property owners having the right to appeal, this result is consistent with the property rights-centric purpose of zoning regulation. It can also be seen as an appellate mirror image of an original regulatory takings claim, which requires an



affirmative action to have been taken by the government *toward the party's property* that has had an economic effect *on the property*. *K & K Construction, Inc. v. DNR*, 456 Mich 570, 577 (1998); *Hinojosa v. DNR*, 263 Mich App 537, 548-549 (2004). Appellant's urging of this Court to open zoning appeals to any person who could satisfy the minimal standing requirements of *Lansing Schools* would not only divorce zoning appeals from the property-centric focus of zoning regulation and challenges, but would allow third parties who could never establish a harm sufficient to recover for a taking to unilaterally interfere with the tangible property rights of the owner whose zoning request was approved. The impacted property owner would likely then have a cognizable claim for a taking against the municipality that had initially approved the request if reversal of the decision resulted in the property owner not being able to use the property as zoned.

Importantly, to say that a party is not "aggrieved" for zoning appeal purposes is not to say that a person with an interest other than a direct property interest in the decision would have no recourse outside of a zoning appeal, or that decisions and their effects would not be subject to review. In evaluating the specific claim to "aggrieved party" status by the party in *Joseph*, the Court of Appeals noted that issues such as increased traffic congestion "are matters which address themselves to the police authorities of the municipality rather than to the zoning authorities." *Joseph*, 5 Mich App at 571. This logic parallels this Court's own proclamation that a court is not to sit as a "super zoning commission," and that the remedy for questioning the wisdom or desirability of a local community's zoning decisions (or the underlying ordinances) is with the legislative or electoral processes. *See, e.g., Brae Burn v. Bloomfield Hills*, 350 Mich 425, 431 (1957).

In other words, just because one type of court action may not be the appropriate vehicle for addressing an alleged harm does not mean that the harm could not be remedied in some

other manner if it were to materialize. As the Court of Appeals acknowledged in this case, even where a zoning appeal is not available to a specific person, this does not preclude the person from seeking standing for an original action under the proper circumstances. *Saugatuck Dunes*, *supra* at \*4. In fact, in a case cited by Appellant, *Schall*, *supra*, the Court of Appeals concluded that the limited “aggrieved party” standard for zoning appeals does not preclude a properly pled action to abate a zoning violation.<sup>6</sup> *Schall*, at \*3. And, where a property owner proves actual special damages that are different in kind from the commonly-shared burden of a development, a takings claim is available. *See, e.g., Mays*, \_\_\_ Mich \_\_\_, 2020 WL 4360845, \*8-10. To the extent that Appellant fears that this limitation can cause decisions to escape review, it is also important to note that the Michigan Court Rules allow municipalities to appeal their own zoning and planning boards, which does happen.<sup>7</sup>

Moreover, contrary to Appellant’s assertion, *Olsen’s* use of the term “similarly situated” does not have any preclusive effect on the right to appeal. *Mays*, *supra*, provides an excellent example negating Appellant’s contention that it is impossible for one to be both “similarly situated” to others and to prove a unique harm. Appellant seems to conflate the idea of being “similarly” situated to being “identically” situated. If Appellant’s logic were to be accepted, then Appellant’s proposed substitute – the *Lansing Schools* “community at large” formula – ultimately implicates the same problem since, even though it does not expressly use the “similarly situated” language, the “community at large” is by nature the epitome of a group of similarly situated persons. The

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<sup>6</sup> Thus, insofar as Appellant relies upon *Schall* to advocate merging the “aggrieved party” zoning appeal standard with *Lansing Schools* on the basis that it recognizes the ability of abutting property owners to *initiate an original claim*, *Schall* actually works against their argument since it recognizes the distinction between appeals and original actions and otherwise relies on precedent related to relief from zoning *violations*, not alleged hypothetical harms flowing from a zoning decision that is being considered on appeal.

<sup>7</sup> See, MCR 7.122(C)(1)(b), establishing the manner of filing a zoning ordinance appeal when brought by a municipality; and, *City of Detroit v. City of Detroit Zoning Board of Appeals*, 326 Mich App 248 (2018), illustrating an instance where a City did sue its own zoning board.

“similarly situated” component of the analysis also mirrors this Court’s evaluation of alleged damage with reference to “similarly situated” persons in the context of a “class of one” equal protection claim. *See, e.g., Shepherd Montessori Center Milan v. Ann Arbor Charter Township*, 486 Mich 311, 320-322. As this Court has demonstrated in multiple contexts that it is possible to prove a distinct harm from others who are “similarly situated,” this Court should decline Appellant’s invitation to delete the “similarly situated” language from the “aggrieved party” standard for zoning appeals.

Thus, Appellant’s argument that the *Olsen* standard allows zoning decisions and/or their consequences to escape review is misguided. Rather, it properly recognizes that an appeal of a zoning decision should be limited to those with an immediate provable property interest affected by the zoning decision itself, while the types of harms alleged by the affiants in this case (i.e. nuisance effects, lost profits, recreational interests, and environmental effects) can be pursued through the Township’s police powers or properly pled original causes of action if those harms actually materialize.

Ultimately, *Olsen’s* requirement that zoning appellants allege and prove “aggrieved party” status by demonstrating special damages different from property owners similarly situated is the proper standard for identifying parties entitled to initiate a zoning appeal. The distinction between an “aggrieved party” on appeal and standing to initiate an original action is consistent with a longstanding recognition in this state’s jurisprudence that “aggrieved party” status is more limiting than standing insofar as it must flow from the *decision being appealed* rather than the overall facts of the case.

Moreover, the requirement that some unique property right be impaired as compared to those of similarly situated property owners establishes in the appellate context the same principles that this Court had already espoused with respect to general zoning challenges prior to the Court

of Appeals' decision in *Joseph*, and which it has recently reaffirmed in *Mays* in the context of evaluating special damages in takings claims. As *Olsen* and its progeny merely restate a standard that has been in use for decades and is consistent with this state's appellate and zoning jurisprudence, Appellant's Application does not present a question that should be reviewed by this Court. Alternatively, this Court should affirm the Court of Appeals' articulation and application of the "aggrieved party" standard in this case.

**C. *Olsen* correctly restored the post-*Joseph* body of case law identifying the types of harms that do not support "aggrieved party" party status. Appellant's advocacy of a different analytical approach relies upon an inconsistent fusion of different bodies of precedent that are not even consistent with the *Lansing Schools* standard.**

Strikingly, while Appellant and the Environmental Amici ask this Court to *change* the reference group used for evaluating special damages in zoning appeals to the public at large, Appellant expresses agreement with at least some of general principles of what harms do *not* amount to special damages as restated by *Olsen*, even though these principles were developed in the decades-long effort to build upon the "aggrieved party" standard with reference to similarly situated property owners. By supplanting the *Joseph-Olsen* standard with the *Lansing Schools* standard, the entire line of zoning appeal cases decided with reference to the *Joseph-Olsen* standard would lose its foundation, thus opening each decision made thereunder to review, including portions of *Olsen* with respect to which Appellant seems to agree - such as the principle that entitlement to notice alone is insufficient to be "aggrieved." (Appellant's Supp. Br. p. 17.) Appellant's simultaneous advocacy of overturning *Olsen*, but retaining some of the component parts of its related precedent begs the question: *what standard and line of precedent does Appellant actually want applied to zoning appeals?* Appellant's line of argument suggests no answer other than that the zoning appeal precedent would need to be completely reconstructed.

The concern that the zoning appeal precedent would be destabilized by reversing *Olsen* ironically arises from the one point on which Appellant and this Amicus appear to agree. Appellant clarifies that it “does not suggest that a person’s mere proximity or adjacency to a proposed land use should automatically result in a finding that the person possesses standing.” (Supp. Br. p. 17.) As such, Appellant endorses *Olsen’s* restatement of prior case law providing that merely being a person within the 300-foot radius of property owners entitled to notice of a project is insufficient to confer “aggrieved party” status, and that proximity alone is not enough. Appellant specifically endorses *W Michigan Univ Bd of Trustees v. Brink*, 81 Mich App 99 (1978) as cited by *Olsen*. In this respect, Appellant asserts that “*Olsen* does not break new ground.” (Appellant’s Supp. Br. p. 17.) This Amicus agrees, but asserts that Appellant’s selective endorsement of *Olsen* does not go far enough.

Appellant’s concession that *Olsen* is correct in invoking *Brink* casts doubt on the balance of Appellant’s conceptualization of where it believes this Court should take the “aggrieved party” standard in zoning appeals. *Brink* was decided as part of the very line of post-*Joseph* “aggrieved party” cases that Appellant asks this Court to overturn and to not regard as being incorporated into the “aggrieved party” standard of the MZEA. Appellant’s endorsement of *Brink* is also in tension with Appellant’s simultaneous generous references to *Brown v. E. Lansing Board of Appeals*, 109 Mich App 688 (1981) and its progeny, *Meany v. City of Saugatuck*, unpublished opinion per curiam of the Court of Appeals issued Feb. 17, 2004, 2004 WL 299176 (Docket No. 243694) (Ex 4). Appellant cites *Brown* and *Meany* for the propositions that “aggrieved party” status should be liberally construed and that one can be “aggrieved” by showing economic harm, neighborhood effects, aesthetic harm, and adverse community effects. However, *Brown* rejected *Brink* because it had been decided in 1978 under the “aggrieved party” standard that was replaced in 1979 by statute with the more lenient standard that only required a zoning appellant to show

an “interest affected by the zoning ordinance.” *Brown*, 109 Mich App at 697-698; *Olsen*, 325 Mich App at 189. Thus, it is not intuitive that overturning *Olsen* in favor of *Lansing Schools* would keep *Brink’s* notice and adjacency rulings alive.

Nor is it intuitive that *Brown* would be restored since it is not clear that its analysis under the “interested affected” standard is the same as the *Lansing Schools* standard. And, given that Appellant contradicts its endorsement of *Brink’s* finding that adjacency is not enough to be “aggrieved,” but asks this Court to apply *Schall’s* finding of standing for neighboring property owners in an *original* action to conclude that one of its affiants has “aggrieved party” status on appeal (Appellant’s Supp. Br. p. 40), it appears that the issues of notice and adjacency would need to be re-litigated with reference to any new zoning appeal standard that this Court would announce.

*Brown* also rejected *Joseph, Unger v. Forest Home Tp.*, 65 Mich App 614 (1975), and *Village of Franklin v. Southfield*, 101 Mich App 554 (1980), together with their pronouncements about the types of economic, aesthetic, traffic, and community harms that do not qualify one to be “aggrieved.” Insofar as Appellant wants to open the door to these types of harms as establishing “aggrieved party” status, it appears that Appellant approves of this section of *Brown*. But, as the 2006 MZEA restored the “aggrieved party” standard, *Olsen* restored not only *Brink*, but also *Joseph, Unger*, and *Village of Franklin*, while abrogating *Brown*. Thus, it is incompatible for Appellant to accept *Olsen’s* restoration of *Brink* as implicated by the legislature’s return to the “aggrieved party” standard to the MZEA, and then suggest that *Joseph, Unger*, and *Village of Franklin* should be rejected in favor of *Brown’s* more generous interpretation of a now-superseded law.<sup>8</sup>

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<sup>8</sup> Interestingly, in response to the Appellees’ arguments that the legislature intended to incorporate the past precedent involving the “aggrieved party” standard, Appellant argues that the “statutory scheme implies that the Legislature intended to confer standing on the litigant

Consequently, it appears that, even though replacing the “property owners similarly situated” standard would remove the foundation of the entire line of cases decided with reference to that standard, Appellant believes that some hybrid of the *Joseph-Olsen* line, the *Lansing Schools* line - and even the *Brown* line interpreting superseded law - would be the replacement. Appellant’s picking-and-choosing of pieces of precedent from each of these lines of cases reveals that it is not asking this Court to make a clean exchange of *Olsen* for some other coherent standard (e.g., simply replacing *Olsen* and its progeny with *Lansing Schools* and its progeny).

To Appellant’s credit, its hybrid approach appears to show some respect for the fact that being an “aggrieved party” on appeal can and should be different from the analysis for standing in an original case. But, since Appellant’s position is not premised on any cohesive existing precedent, it ultimately advocates the creation of an entirely new line of zoning appeal precedent that would blur the lines between past and present law, and appellate and original standing. Developing this new framework would inevitably take years to resolve as the courts would be inundated with a wave of new zoning cases by people who may have no real interest in the case at all, but who simply want to use the Court to second-guess a community’s zoning decisions or air grievances against neighbors, contrary to this Court’s articulation of the courts’ role in *Brae Burn*, *supra*.

Ultimately, Appellant’s real agenda appears to be to design a standard that it believes will work for Appellant in *this* case, without regard of the broader implications that it would have on this state’s stable and deeply-rooted “aggrieved party” jurisprudence. This is *precisely* the confusing approach that *Olsen* rejected and correctly preempted by determining that the restoration of the “aggrieved party” standard in the MZEA called for cleanly restoring the

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consistent with the test outlined in *Lansing Schools*.” This Amicus is at a loss as to how that leap can be taken given that the MZEA was codified in 2006, but *Lansing Schools* was decided in 2010.

"aggrieved party" case law in its entirety as it existed prior to the period that the "interest affected" had controlled. This Court should decline to further entertain Appellant's attempt to corrupt *Olsen's* sound decision, or otherwise issue an opinion affirming the Court of Appeals' application of *Olsen* and the "aggrieved party" precedent that it incorporates.

**D. *Olsen* does not oversimplify the "aggrieved party" analysis, as it contemplates special damages arising when alleged harm is different in kind or degree from property owners similarly situated.**

Appellant presents a brief argument that *Olsen's* special damages inquiry incorrectly only allows "aggrieved party" status when there is a difference in the kind of harm, without inquiring as to whether there is a difference in the degree of the harm. However, Appellant appears to be arguing against the proverbial straw man. *Olsen* articulates the "aggrieved party" standard as requiring "special damages not common to other property owners similarly situated . . . there must be a unique harm, dissimilar from the effect that other similarly situated property owners may experience." *Olsen*, at 185. The term "in kind" appears nowhere in *Olsen*. *Olsen* ultimately had no occasion to evaluate the *degree* of harm because the alleged harms were only "complaints of anticipated inconvenience and aesthetic disappointment," as well as claims based on notice and participation in proceedings; thus, there was no clear claim of a different degree of harm. *Olsen*, 325 Mich App, at 186, 193.

Notwithstanding the fact that *Olsen* did not require the Court of Appeals to address the degree of harm, the standard as articulated in *Olsen* does not preclude the review of the degree of harm, and the Court of Appeals has in fact considered the degree of harm in subsequent cases. See *e.g. Our EGR Homeowners Alliance v. City of East Grand Rapids*, unpublished opinion per curiam of the Court of Appeals issued June 11, 2020, 2020 WL 3121035, at \*3 (Docket No. 3469413) (Ex 5) ("Alliance has not established, however that Spectrum's requested variances and proposed site plan will result in *more damage* than their own proposed plans."); *Kingsbury*



*Country Day School v. Addison Township*, unpublished opinion per curiam of the Court of Appeals issued Feb. 18, 2020, 2020 WL 814703 (Docket No. 344872), at \*4 (Ex 6) (“to the extent that appellants allege that the school, and the students attending the school, are at a *heightened risk* if the cellular tower were to collapse . . . constitute special damages); *Ansell v. Delta County Planning Commission*, \_\_\_Mich App\_\_\_, 2020 WL 3005856, at \*4 (2020) (“Such concerns, however, do not show that appellants stand to suffer *any greater negative impacts* from the proposals than do their neighbors.”) (emphasis added in each quote).

Likewise, in this case, the Court of Appeals clearly stated “we do not interpret *Olsen* as foreclosing any possibility that such [general] 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.’” *Saugatuck Dunes*, at \*4, emphasis added. Thus, *Olsen* and its progeny *does* contemplate “aggrieved party” status being available when an alleged harm is proven to be different in degree.<sup>9</sup> Appellant consequently presents no reviewable question on this issue, but merely disagrees with the Court’s interpretation of whether its harms were sufficiently distinct in kind or degree.<sup>10</sup>

**E. The Court of Appeals’ application of the “similarly situated property owners” approach to “aggrieved party” analysis since *Olsen* has been consistent and reliable.**

Appellant additionally invites this Court to conclude that the current conceptualization of the “aggrieved party” test is being applied haphazardly, but its argument on this point rests on

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<sup>9</sup> This Amicus’ observations regarding the *Olsen* lines’ degree of harm assume that the reference group is similarly situated property owners. As North Shores points out, a standard evaluating the degree of harm with reference to the public at large would be unworkable, and likely would always result in “aggrieved party” status given that nearby property owners would be able to leverage their proximity to allege that they would experience certain harms to a greater degree than the public.

<sup>10</sup> Even if the standard were interpreted as requiring harms that are different “in kind,” this would be consistent with this Court’s interpretation of special damages in the takings context. *Mays*, *supra*, at \*10.

implausible inferences from a selective reading of five recent Court of Appeals decisions engaging the “aggrieved party” standard. Appellant presents a summary chart of these cases from which it infers that, because the Court of Appeals more often than not has affirmed the circuit court in these recent cases, the Court of Appeals must not be following the *de novo* standard of review and/or that the “aggrieved party” standard is not working. (Appellant’s Supp. Br. p. 20-21.) Appellant goes even further, claiming that, since different Court of Appeals judges have participated in the panels affirming circuit court decisions, there must be widespread confusion at the Court of Appeals. (Appellant’s Supp. Br. p. 21.)

Notably absent from Appellant’s case comparison is any meaningful engagement of the facts of these cases that would test the alternative hypothesis that the Court of Appeals reached the right decisions not out of confusion, but because they were the right outcomes on a *de novo* review of the facts with reference to the “aggrieved party” standard. Indeed, though Appellant attempts to portray these decisions as somehow inconsistent, it never actually asserts that any of them reached the wrong result. Nor does Appellant offer a coherent explanation as to why, taken as a whole, these five cases indicate a problem with the “aggrieved party” inquiry in zoning appeals. Likewise, Appellant glosses over the fact that the Court of Appeals found person to be “aggrieved” in three of these five cases, thus indicating that the longstanding formulation of the “aggrieved party” standard being employed by the Court of Appeals is hardly an impossible standard to meet when the facts warrant finding a person to be aggrieved.

Since Appellant has declined to explain why these five cases indicate that the “aggrieved party” standard is being applied incorrectly, it is a worthwhile endeavor to examine each of these cases individually. Doing so reveals that each properly applied the “aggrieved party” standard as articulated in *Olsen* and reached results that can be readily reconciled. Far from indicating confusion, these collective cases establish a valuable coherent framework for evaluating whether

a proposed zoning appellant is “aggrieved” that this Court should either decline to review, or expressly endorse.<sup>11</sup>

First, *Baker v. Township of Bainbridge*, unpublished opinion per curiam of the Court of Appeals issued April 30, 2020 (Docket No. 347362 (Ex 7)), presented an especially unique set of facts that epitomize the type of unique harm required for one to be “aggrieved.” The *Baker* plaintiff resided in the only home that was immediately adjacent to a challenged auto repair/used car sales center. The surrounding area was vacant farmland. In addition, the *Baker* appellant alleged specific non-aesthetic nuisance effects on the use of her home, including noise and odor intrusion from auto center operations. The circuit court had denied Ms. Baker aggrieved party status based on a conclusion that the types of harms she alleged were not unique, and that some were speculative. *Id.*, at \*2.

However, the Court of Appeals reversed, finding that, as compared to the surrounding properties, Ms. Baker’s was the only one that was occupied for residential use, and that the harms Ms. Baker alleged were accordingly specific and unique to her property. Indeed, this was an unusual case where there were no similarly situated properties. *Id.*, at \*4. And, while the Court of Appeals did refer to the fact that “others in the township” or the “general vicinity” might experience some of the conditions that Ms. Baker would experience (which certainly is consistent with an assessment of similarly situated surrounding property owners), the Court of Appeals’ very brief discussion to this extent appears to have been designed simply to punctuate the uniqueness of Ms. Baker’s harm as compared to the surrounding property owners. *Id.*, at \*4.

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<sup>11</sup> While unpublished opinions do not create binding precedent, this Amicus engages the following unpublished opinions insofar as they are properly used as a guide to discerning the Court of Appeals’ contemporary treatment of the “aggrieved party” standard in zoning cases, and to address the arguments that Appellant has advanced in relation to these cases. MCR 7.215(C)(1); *Paris Meadows v. City of Kentwood*, 2878 Mich App 136, 139 n. 3 (2010).

*Kingsbury County Day School, supra*, presented another very fact-specific claim to “aggrieved party” status that is far different from the sweeping claims to alleged by the Appellant in this case. That case involved a challenge to a township’s grant of a variance from the minimum setbacks required for a 197-foot-tall cellular tower, which would be built just 90 feet away from the property of the Kingsbury County Day School. The parties did not dispute that the school, including its playground, would be within the so-called “fall zone” of the cellular tower (which was calculated as being equal to the height of the tower). Because the school had a uniquely heightened risk of damage in the event that the cellular tower were to collapse, and the setback requirements were intended to protect property owners from such damage, the Court of Appeals found that the circuit court correctly held that the school was an “aggrieved party” qualified to challenge the township’s grant of the variance. *Id.*, at \*5.

Appellant does not dispute that the Court applied the “similarly situated property owners” standard of *Olsen* in this case. (Appellant’s Supp. Br. p. 20.) Nor does Appellant provide any evidence that the Court of Appeals’ reference to “other members of the community” (as modified by a reference to “other property owners” in the immediately following sentence) somehow indicated confusion about whether the *Lansing Schools* standard applied, or that this fleeting statement somehow generated an incorrect or inconsistent result.

Appellant likewise offers no plausible explanation as to how the decision in *Our EGR Homeowners Alliance, supra*, contributes to a narrative of confusion and inconsistency at the Court of Appeals. If anything, Appellant’s discussion of *Our EGR Homeowners* effectively endorses the Court of Appeals’ handling of the case. Appellant notes that the Court of Appeals engaged extensive factual evidence rebutting the appellant property owners’ alliance claiming that property owners adjacent to the hospital construction project at issue in that case would suffer unique aesthetic effects or property damage caused by construction.

Significantly, *Our EGR Homeowners* is not so much decided under the component of *Olsen* requiring special damages as it is the portion requiring the special damages to flow from the *zoning decision itself*, not the underlying facts of the case. Thus, while the Court of Appeals did conclude that the appellant had not proven the alleged damages, it also noted that the alleged damages would flow from *construction activities*, not the City Commission's grant of variance and site plan approval for the hospital project. *Id.*, at 3. Accordingly, while Appellant holds out *Our EGR Homeowners* as giving this Court a path to second-guess the factual determinations in this case and find that its affiants alleged and proved special damages, Appellant bypasses the question of whether those special damages flow from the zoning decision, consistent with Appellant's general overlooking of *Federated's* distinction between the source of harm in the general standing context versus the appellate context. As will be further discussed in Section III, *infra*, while the instant Appellant was correctly found not to have stated special damages at all, even if any facts were to be construed as stating a unique harm, that harm does not flow from the ZBA's decision in this case.

Next, Appellant cites *Ansell, supra*. The *Ansell* appellants challenged the Delta County Planning Commission's decision to grant conditional use permits to a windmill company for the construction of 36 wind turbines on the Garden Peninsula in Delta County. As characterized by the Court of Appeals, the *Ansell* defendants "argued how specific violations related to noise, violations, light pollution, property values, aesthetics, and environmental concerns affected residents living in the county." *Id.* They also claimed aggrieved party status based on their participation in the planning commission proceedings, and public health concerns. *Id.*, at \*4. The *Ansell* appellants additionally argued that the wind turbines were close enough to their homes that they would be uniquely impacted by turbine noise and flicker exceeding zoning ordinance limitations.

While the Court of Appeals speculated that such claims might provide standing for a future private nuisance abatement action if the appellants' concerns were to materialize, it found that the allegations did not create a private cause of action regarding wind turbine permit approvals, nor did they support a finding of special damages for purposes of the aggrieved party analysis. *Id.* Moreover, it pointed to the windmill company's undisputed site map, which the Court of Appeals noted "does not bring to light any special proximity of appellants to the proposed turbines," and supported the conclusion that the appellants – whether viewed collectively or individually – merely alleged a general harm. *Id.* Accordingly, the Court of Appeals quite reasonably found that the appellants had not shown harm different from their neighbors, and therefore did not satisfy the *Olsen* standard. *Id.*, at 4. And, again, insofar as the Court of Appeals referenced the general community, the context of those remarks simply emphasized the non-uniqueness of the appellants' harm. *Id.*, at 4. Once again, Appellant has not identified any reason as to why the outcome would be different if *Lansing Schools* had been directly applied.

Finally, Appellant references *Deer Lake Property Owners*, unpublished opinion per curiam of the Court of Appeals issued Oct. 10, 2019, 2020 WL 5092617 (Docket No. 343965). Appellant's chart claims that *Deer Lake* did not even cite *Olsen's* "other property owners similarly situated" standard to "aggrieved party" analysis, but it did cite the decision. *Id.*, at \*5. *Deer Lake* even recognized the distinction of *Olsen* echoing this Court's distinction in *Federated*, noting that "the proper question is not whether Property Owners have 'standing' but whether it is a 'party aggrieved' by the" decision below. *Id.*, at \*5. From there, *Deer Lake* did appear to take a detour from *Olsen*, as it ultimately relied upon *Higgins Lake Property Owners Assn v. Gerrish Twp*, 255 Mich App 83, 91 (2003) – which did not involve an appeal, but rather addressed standing to bring original actions under the standard predating *Lansing Schools*. That said, the operative language of the Court of Appeals' holding corrected that deviation insofar as it referred to "aggrieved" parties and

found that the alleged harms were not only different from those that might be experienced by the public at large, but also by “similarly situated neighbors.” *Id.*, 6.

In *Deer Lake*, the Court of Appeals appears to have given particular weight to the fact that the DLPOA appellants were riparian property owners, who were in close proximity to the lot at issue in the case that was owned by the Deer Lake Knolls Homeowners Association and had been approved for expanded keyhole access to Deer Lake by owners of back lots. *Id.*, at \*5. While the Court of Appeals correctly acknowledged that alleged harms related to aesthetics, environmental impacts, and overcrowding conditions are generally inadequate to establish “aggrieved party status,” the riparians had adequately pled that the additional docks – which, again, would serve non-riparian backlot owners – posed a risk of generating erosion, environmental effects, and property value risks unique to their riparian properties. *Id.*, at \*5. As will be further explained in Section III, these critical facts in *Deer Lake* make it distinguishable from the instant case, where none of the affiants’ alleged harms flow from any special proximity to the PUD development area, and where the only allegedly “adjacent” neighbor is not adjacent to the development itself, but to North Shores’ contiguous property nearly a half mile away and out of view of the development.

Ultimately, considering the recent “aggrieved party” cases as a whole, and with reference to each case’s complete facts, Appellant’s attempt to sound the alarm that the “aggrieved party” case law is in disarray is utterly unsupported. To the contrary, these five most recent cases demonstrate that the Court of Appeals has successfully and rapidly developed “aggrieved party” case law to provide powerful illustrations of what allegations do and do not qualify for “aggrieved party” status, based on strict adherence to the standards reaffirmed in *Olsen*. The decisions also reflect a fact-intensive inquiry, consistent with this Court’s longstanding guidance that zoning cases must be judged on their own facts. *Brae Burn*, 350 Mich at 432. And, while the Court of

Appeals has occasionally made fleeting references to general standing-style “community at large” language, Appellant does not cite, and the Court of Appeals’ opinions do not reflect, a single instance where the Court of Appeals mistakenly substituted *Olsen* with the *Lansing Schools* test, or where application of the *Lansing Schools* test would have generated a different result.

Stated simply, the “aggrieved party” standard as articulated in *Olsen* is working. Appellant just does not like how it works out for its specific claims. This Court should decline to further entertain this appeal, or should alternatively issue an opinion affirming the Court of Appeals’ articulation and application of the “aggrieved party” standard in this case.

**F. Reversing *Olsen* risks thwarting projects through the burden of the costs and timeline of the litigation process, while also exposing municipalities to uncertainty in the administration of their zoning ordinances and the risk of increased takings lawsuits.**

Aside from increasing the burdens on the courts, navigating Appellant’s proposed “aggrieved party” regime creates a risk that municipalities and property owners will unnecessarily incur increased costs to defend zoning decisions. It also would introduce uncertainty about the scope of interests communities need to take into account when making their zoning decisions.

Opening the zoning appeals process to a wide range of prospective appellants, including organizations with national memberships like the Environmental Amici, will also create uncertainty about the finality of zoning decisions. Many projects requiring zoning approval run on tight timetables (e.g. when an applicant has entered a purchase agreement for property contingent on zoning approval), while others run on tight margins (e.g. run-of-the-mill small residential projects, or larger projects whose financing is contingent on zoning approvals). The delaying effect of ongoing appeals can push back the timeline for construction, and missing an entire construction season can elevate construction costs and property holding costs. Expanding the scope of who can be an “aggrieved party” and/or the process of developing a new line of precedent testing who can be an “aggrieved party” will provide opponents of projects, business competitors, and



angry neighbors an enhanced means to thwart projects simply by imposing a disfavored property owner with the financial and time burden of the legal process. North Shores is fortunate to have the wherewithal to see this process through to this state's highest court, but for every North Shores, there is certain to be many other individual property owners, small businesses, and developers with more limited means who will be deprived of the opportunity to use their properties in a manner that is otherwise compatible with a community's zoning ordinance merely because one person or organization wants to have veto power over that property owner's rights.

And, in the worst case scenario, if this type of opposition results in a property owner being deprived of the right to use their property consistent with the zoning ordinance, then municipalities will pay the price as they become exposed to more takings, due process and equal protection claims. This is a realistic threat given that even a property owner of modest means can now directly pursue federal takings litigation without needing to pursue state court remedies to completion, and thus immediately pursue claims for which damages – as well as their fees and costs - may be fully compensable under 42 U.S.C. §1988. *Knick v. Twp. of Scott*, 139 S.Ct. 2162, 2167 (2019). This probability also illustrates a glaring inequity that could result from expanding the scope of the "aggrieved party" inquiry beyond one that aligns with existing appeal and zoning jurisprudence. As discussed previously, a person or entity with some rather tenuous claim to "aggrieved party" status (such as the affiants in this case), would enjoy the ability to potentially destroy a project despite the fact that, if the project were to proceed as approved, that challenger would not otherwise be able to satisfy the special damages standard for a takings claim.

Accordingly, this Court should maintain the properly-limited nature of the zoning appeals process as compared to the general standing process to ensure that the universe of persons who may be entitled to be "aggrieved parties" in zoning appeals is no greater than the universe of persons whose property interests could satisfy a takings claim under *Mays*. Per the preceding

discussion, the current conceptualization of “aggrieved party” status as restated in *Olsen* is a proper appellate complement to this Court’s articulation of the standards to be satisfied in original zoning-related challenges. Therefore, this Application does not present a question meriting this Court’s review, or the Court of Appeals should be affirmed.

**II. THE “PERSON AGGRIEVED” STANDARD OF MCL 125.3604(1) IS THE SAME AS THE “PARTY AGGRIEVED” STANDARD OF MCL 125.3605, AND THE *OLSEN* STANDARD APPLIES TO BOTH.**

**A. The proper emphasis in interpreting the terms “persons aggrieved” and “aggrieved party” is on the modifying effect “aggrieved,” which gives both terms the same meaning.**

Appellant proposes that, while a broad group of “persons aggrieved” should be able to appeal to the ZBA, “the class of individuals who may bring appeal [to the circuit court] is narrowed to aggrieved parties – those that brought, defended, or participated in the ZBA proceedings sufficient to confer status of a party to the proceedings.” (Appellant’s Supp. Br. p. 30.) However, if the term “aggrieved party” was so narrow as to be limited to the parties of record in a pre-circuit court proceeding, then presumably the statutes, court rules, and this state’s case law would be so direct. And, if this were the definition, then the lead question involved in this appeal – that is, whether the “party aggrieved” standard requires a showing of special damages not common to other property owners similarly situated – would be moot since the question would come down to whether or not the proposed aggrieved party was actually a party to the proceedings below.

Indeed, Appellant’s argument that the term “aggrieved party” should be so narrowly construed directly conflicts with its lead argument that the term “aggrieved party” should be evaluated with respect to the *Lansing Schools* standard. Notably, it appears that, rather than advocating some definition of “person aggrieved” that would afford Appellant a greater opportunity to seek review of a zoning decision than it would have under the *Olsen* test (or *Lansing Schools* test), it simply advocates shifting and confining the *Olsen* (or *Lansing Schools*)

test to the “person aggrieved” concept, while redefining the concept of an “aggrieved party” in a way that does not comport with this Court’s established definition of an aggrieved party on appeal as articulated in *Federated* and its progeny, and which would actually result in a *reduction* in appellate rights (as will be further discussed in part II-B, *infra*).

This line of thought is, admittedly, confusing. Fortunately, this Court need not further engage the matter, because the terms “person aggrieved” and “aggrieved party” are indistinguishable, and the *Olsen* test applies to both. The conflict and confusion inherent in Appellant’s arguments is avoidable if, instead of focusing on the words “person” and “party,” emphasis is placed on the universally applicable modifying effect that the term “aggrieved” has on both of these terms. While Appellant relies on rote definitions of the terms “person” and “party,” standing alone, it does not offer a single definition or case citation to support finding a difference in the meaning of the terms “person aggrieved” or “aggrieved party.” This is not surprising since applicable case law reflects that these terms are used interchangeably, such that they have the same effective meaning rooted in the significance of the term “aggrieved.”

For example, in *Olsen*, the Court of Appeals pointed to MCL §125.3605 (which includes the “aggrieved *party*” language), in support of its notation that the MZEA “incorporated the ‘aggrieved person’ threshold.” *Olsen*, 325 Mich App at 189, emphasis added. Likewise, it asserted that it was aligning its “decision interpreting that language of the MZEA with the body of caselaw interpreting the ‘aggrieved person’ threshold.” *Id.* Similarly, in a footnote within *Brink, supra*, the Court of Appeals referenced a law review article entitled the “Aggrieved Person” for the proposition that “we see no reason for abandoning the general rule that “(t)hird parties will be permitted to the courts as persons aggrieved if they can show . . . special damages.” *Brink*, 81 Mich App at 103, n. 1. This language was later expressly incorporated into the Court of Appeals’ discussion of the “aggrieved party” standard in *Village of Franklin*, 101 Mich App at 556.

*Brink* and *Village of Franklin* are notable since they invoke a definition of “party” as referring to a “third party” who may seek “aggrieved” status (like Appellant), as opposed to a “party of record” in a proceeding. And, while Appellant asserts that the term “person” is more inclusive than “party,” one need only look to its own offered definition of “party” to determine that the distinction is not so clear. As cited by Appellant, “The term ‘parties’ includes all persons who are directly interested in the subject-matter in issue,” among others. (Appellant’s Supp. Br. p. 29, fn. 119, citing Black’s Law Dictionary Online.) Thus, even under Appellant’s conceptualization, a party can be a person, and a person can be a party. Moreover, one can conceivably be “directly interested in the subject matter in issue” without being either a party of record *or* “directly interested” in a manner that qualifies one to be “aggrieved.”

Ultimately, for purposes of determining who can appeal a zoning decision at any particular stage of the appellate process, the operative question is not whether the proposed appellant is a “person” or a “party,” but whether the proposed appellant is “aggrieved.” Since the term “aggrieved” ultimately modifies the terms “person” and “party,” and Appellant’s conceptualization of the term “party” is more limited than the a decades-long line of “aggrieved party” caselaw would even suggest, Appellant does not present a viable case for this Court to entertain, must less adopt, its argument that the meaning of “person aggrieved” in MCL §125.3604(1) is different from that of “party aggrieved” in MCL §125.3605. This Court should therefore deny Appellant’s application for leave to appeal, or affirm the Court of Appeals.

**B. Appellant’s conceptualization of a distinction between “persons aggrieved” and “aggrieved party” is based on a mistaken premise that all zoning appeals to the circuit court are initially reviewed by the ZBA.**

As an alternative to citing definitions of “person” and “party,” standing alone, Appellant argues that the use of “person aggrieved” with reference to an appeal of a decision to a ZBA and “party aggrieved” with reference to an appeal of a zoning decision to the circuit court reflects that

“the Legislature was distinguishing between *the two stages of the zoning appeal process* by stating that ‘persons’ may appeal to a ZBA while the litigants that the next stage – appeal to circuit court – are the ‘parties to the appeal.’” (Appellant’s Supp. Br. p. 28, emphasis added.) More specifically, Appellant argues that “the Legislature intended that the class [of] people able to appeal a zoning determination to a zoning board of appeals should be broader than those who may later appeal a zoning board of appeals decision to circuit court.” (Appellant’s Supp. Br. p. 29.) However, Appellant’s premise is flawed, as the MZEA does *not* create a uniform “two-stage” zoning appeals process for all types of zoning decisions.

For special land uses (SLU) and planned unit development (PUD) decisions (as is at issue here), the MZEA provides that “an appeal may be taken to the zoning board of appeals *only if provided for in the zoning ordinance*.” MCL §125.3603, emphasis added. Thus, while the Saugatuck Township Zoning Ordinance existing at the time of Appellant’s appeal provided for ZBA review of the Planning Commission’s PUD decisions (creating what Appellant would style as a “two-stage” appeals process), the default that exists in many communities is for a PUD decision to be directly appealable to the circuit court, thus bypassing the ZBA. In fact, this is now the case in Saugatuck Township, as, during the pendency of this appeal, the Township amended its Zoning Ordinance to eliminate the ZBA’s authority to review the Planning Commission’s decisions regarding PUDs. Saugatuck Township Zoning Ordinance §40-72(b). (Ex 9.)

Where a zoning ordinance does *not* provide for ZBA review of an SLU or PUD decision, then that decision is considered final and may be appealed directly to the circuit court. *Ansell v. Delta County Planning Commission*, \_\_\_ Mich App \_\_\_, 2020 WL 3005856 at \*3 (2020), citing *Carleton Sportsman’s Club v. Exeter Tp.* 217 Mich App 195, 199 (1996). Through its recent published decision in *Ansell*, the Court of Appeals concluded that the “aggrieved party” standard as articulated in *Olsen* with respect to appeals from a ZBA equally applies to appeals of zoning

decisions for which no appeal to the ZBA is available. *Id.* This finding recognizes the parallels between MCL §125.3603, MCL §125.3606, and MCR 7.122(C)(1)(a), all of which refer to an “aggrieved party” bringing a zoning appeal to a circuit court, regardless of whether or not the challenged decision was issued by a ZBA. The *Ansell* decision ensures that “both appeals from a township board and municipal zoning commission planning board are entitled to the same review.” *Id.*, at \*3, emphasis added.

Contrary to the direction of *Ansell*, Appellant’s conceptualization of a difference between an “aggrieved party” and “person aggrieved” would result in appeals from non-ZBA decision-makers being subject to different review (i.e. by a different prospective pool of “aggrieved” appellants), *solely* based on whether an appeal is made to a ZBA or directly to the circuit court. By way of illustration, under Saugatuck Township’s old ordinance providing for appeals of Planning Commission PUD decisions to the ZBA (as is at issue here), Appellant’s conceptualization results in Appellant asserting that it is within the universe of prospective “persons aggrieved” who could try to prove “aggrieved” status for purposes of appealing the Saugatuck Planning Commission’s PUD decision to the ZBA, and then would become an “aggrieved party” qualified to appeal to the circuit court only after receiving a decision from the ZBA.

This begs the question of where Appellant would stand today now that Saugatuck Township has amended its zoning ordinance to eliminate the ZBA’s power to hear PUD appeals, thus making direct appeal to the circuit court the only avenue for challenging the Planning Commission’s decision. If, as Appellant claims, the “person aggrieved” concept is uniquely applicable to the ZBA’s jurisdiction to hear appeals, then it clearly would not be relevant to evaluating a direct appeal to the circuit court. And, if Appellant’s narrowed construction of an “aggrieved party” were to be uniformly applied to a direct appeal to the circuit court, then Appellant would have to concede that it would be excluded from even attempting to appeal the

Planning Commission's decision since it was not a party of record in the Planning Commission action. This result would conflict with *Ansell*, which just made it clear that any "aggrieved party" satisfying the *Olsen* test can directly appeal a non-ZBA decision to the circuit court.

Ultimately, the net effect of Appellant's "person" versus "party" arguments would ironically be to replace the theoretically-sound variation between original standing and appellate "aggrieved party status" with two novel inconsistencies in the application of zoning appeal standards - one between appeals to the ZBA and appeals to the circuit court, and the other between direct appeals from an administrative body and appeals from a ZBA reviewing another administrative body's decision. Appellant's manufactured distinctions would also result in a *reduction* of the universe of prospective persons who could seek direct review of a local administrative body's decision in the circuit court in cases where that decision is not subject to initial appellate review by a zoning board of appeals.

The only conceivable way around these outcomes would be to create two separate definitions of an "aggrieved party" tied to whether or not a community permits ZBA appeals for the decision, in which case the definition of "aggrieved party" applicable to direct appeals to the circuit court would presumably track the currently-existing definition of an "aggrieved party," overlap Appellant's proffered definition of a "person aggrieved" for ZBA appeals, and bring the inquiry full-circle to the point of determining that a "person aggrieved" and an "aggrieved party" is a distinction without a difference. This confusing outcome can be readily avoided by accepting the current lack of a distinction between "persons aggrieved" and "party aggrieved."

Aside from the disparities that would be created, Appellant's conceptualized distinction would also risk creating a disincentive for communities to provide an additional layer of due process for zoning appeals within their own administrative systems since doing so would expose communities' decisions to potential review by a wider range of "aggrieved persons" than could

bring an action in circuit court – which will ultimately impact a property owner’s right to use his or her property without extensive litigation. And, if municipalities choose not to assign their ZBAs additional appeal powers, or to eliminate those powers, then that means more local decisions could be channeled to the state’s courts, as discussed in Section I-F of this brief, *supra*. Thus, this Court should maintain a consistent approach to the “aggrieved party” standard that applies equally to appeals to a ZBA and appeals to a circuit court.

**C. It is appropriate and necessary for a ZBA to be empowered to review its own jurisdiction over a matter, such that the appellant must not only allege, but prove its “aggrieved” status to the ZBA.**

As a final attempt at distinguishing between a “person aggrieved” and an “aggrieved party,” and the standards that should be applied at each stage, Appellant insists (without citation to any legal authority) that the ZBA should be limited to receiving the appellant’s factual assertions underlying its claim to “standing,” while an actual determination as to whether those facts qualify the person as being “aggrieved” should be deferred until the circuit court hears the appeal. (Appellant’s Supp. Br. p. 32.) This assertion is premised on an overly restrictive interpretation of the ZBA’s powers and misapprehends the fact that a court need not defer to a ZBA’s interpretations on matters of law as indicating that the ZBA cannot rule on its jurisdiction to hear a matter.

This Court has recognized that substantive issues addressed in zoning cases commonly present mixed questions of law and fact. *Macenas v. Village of Michiana*, 433 Mich 380, 394 (1989). In some cases, ZBAs are even called upon to evaluate pure questions of law, as when an applicant seeks an interpretation of a zoning ordinance. *Id.*, at 396. While a reviewing court is to give deference to a ZBA’s *factual findings*, the court is not bound by a ZBA’s determination on *questions of law*. *Id.*, at 394-395. However, the fact that the courts are not bound by the



ZBA's interpretations of legal questions is not tantamount to a prohibition on the ZBA making such interpretations in the first instance.

Appellant does not appear to dispute that the ZBA may only decide matters within its jurisdiction. Nor does it appear to dispute that the ZBA could dismiss an appeal if a matter is not within its jurisdiction. (See, e.g., *Lubienski v. Scio Tp.*, unpublished opinion per curiam of the Court of Appeals issued March 23, 2010, 2010 WL 1052284 (Docket No. 288727 and 288769).) (Ex 10.) It follows that the ZBA should have the authority to determine whether a person is an "aggrieved party" to *invoke* the ZBA's appellate jurisdiction in the first place.

Allowing the ZBA to require an appellant to not only allege, but *prove*, its aggrieved party status is consistent with its role as the first body reviewing the matter on an appellate posture, similar to *Olsen's* treatment of evaluating "aggrieved party" status when the circuit court is the first reviewing body on appeal. In *Olsen*, the appellant argued that the appellees (who had initiated the circuit court appeal and prevailed) lacked standing to bring their appeal in the circuit court. The appellees argued in the Court of Appeals that the appellants waived their "standing" argument because they did not challenge the appellees' "aggrieved" status before the ZBA. However, *Olsen* involved only a "one stage" appeal, whereby the ZBA was the first body to hear the issue. Thus, when the appellees appeared before the ZBA, they did so in the context of the initial public hearing that was open to all, *not* as parties appealing a decision of another body. Thus, there was no basis for challenging whether the appellees had the right to offer public comment. Moreover, the ZBA had not even issued a final decision yet, so there was no way to know who or how a person might be "aggrieved." The Court of Appeals therefore determined that the circuit court was the first place where an appeal was being taken, and thus the first forum in which the "aggrieved party" issue could be raised and adjudicated.

*Olsen* is different from the instant case since, here, the ZBA itself was sitting as the appellate body over the Planning Commission. However, the same theory should apply to recognize the ZBA's ability to review its jurisdiction over the appeal. Under the logic of *Olsen*, since a person must be "aggrieved" to appeal a Planning Commission decision to the ZBA, it is appropriate for the ZBA to adjudicate whether the prospective appellant is "aggrieved" as required to invoke the ZBA's appellate jurisdiction. To simply allow a party to allege "aggrieved party" status, but wait until a *possible* circuit court appeal to prove "aggrieved party" status would introduce a further disparity in the treatment of zoning appeals based solely on the forum in which the appeal is first taken. It would also run contrary to the long-established requirement that a challenger of a zoning decision must not only allege, but prove, its "aggrieved party" status. *See, e.g., Marcus*, 1 Mich App at 135-136; *Joseph*, 5 Mich App at 569; *Unger*, 65 Mich App at 584.

Appellant's "allege now, prove later" approach to invoking appellate jurisdiction also implicates the same issues raised in the previous subsection, as an improper appellant that succeeds in challenging a grant of a zoning approval could conceivably thwart a project that had initially been appropriately approved by forcing a property owner to endure the cost and delay of the appellate process. And, since the ZBA's decision is "final" for purposes of ripening a federal constitutional claim regardless of whether other state remedies are exhausted, Appellant's proposed procedure could expose municipalities to a heightened risk of exposure to takings claims. *Knick, supra*.

Ultimately, since the ZBA acted appropriately in determining that it lacked jurisdiction in this case, the Application presents no question meriting review or reversal on this or any other portion of its Application that relies on the "person aggrieved" versus "party aggrieved" question.

**III. THE COURT OF APPEALS CORRECTLY AFFIRMED THE ALLEGAN COUNTY CIRCUIT COURT'S DISMISSAL OF APPELLANT'S APPEALS FROM THE DECISIONS OF THE SAUGATUCK TOWNSHIP ZONING BOARD OF APPEALS.**

As the Court of Appeals has not erred in articulating or implementing the “aggrieved party” standard as a general matter, the only remaining question is whether it applied the standard appropriately in the instant case. As the affiants in this case offer nothing but allegations of generalized hypothetical harms that relate to the general facts of the case rather than the ZBA’s decision itself, and do not allege and prove harms different from either other property owners similarly situated *or* the public at large, the Court of Appeals’ reached the correct result under the *Joseph-Olsen* line of cases, and Appellant would not even be able to succeed if the more generous *Lansing Schools* standard applied.

**A. Appellant’s alleged harm does not arise from the decision of the ZBA, itself.**

Notably absent from Appellant’s (and the Environmental Amici’s) defense of Appellant’s claim to “aggrieved party” status is any explanation regarding how Appellant’s alleged harm arises *from the ZBA’s decision itself*. Even if Appellant were to succeed in asserting that special damages should be considered with reference to the community at large rather than similarly situated property owners, it does *not* contest the portion of “aggrieved party” analysis articulated in *Olsen* and this Court’s decision in *Federated* indicating that the special damages must arise from the challenged decision, *not* the underlying facts of the case. As ably explained in Appellee North Shores’ briefing, the underlying zoning approval in this case was a PUD designed to give North Shores some *flexibility* in the layout of its development.

Here, *even without the PUD approval or any decisions of the Planning Commission or ZBA – North Shores could have developed the property, with waterfront access, and at a greater density*. The Zoning Ordinance would allow North Shores to develop 33 homes and 48 boat slips by right, and their approved plan provides for 23 homes and just two more boat slips. There is

nothing in any of the proffered affidavits indicating how the PUD approval, itself, has generated effects that would not otherwise have occurred if the property was developed without the PUD approval. Indeed, the affiants merely object to any development at the site – period. The zoning appeals process cannot be used purely to thwart development, and Appellant’s desire to prevent North Shores from ever using its property fails to establish that it is aggrieved by the ZBA’s decision as required to initiate an appeal of that decision.

**B. Appellant’s proffered affidavits fail to allege and prove special damages under either the *Olsen* standard or *Lansing Schools* standard.**

Even if the alleged harms in this case were construed as arising from the ZBA’s decision, rather than the general facts of the case, the affiants’ alleged harms are common both to similarly situated property owners *and, more importantly*, the citizenry at large. While these affidavits are couched in language of personal knowledge of facts, they actually are little more than lists of “worries,” hypothetical fears, and not-in-my-backyard-style arguments that are precisely the types of allegations that the “aggrieved party” standard is intended to deflect. Even where they allege a heightened interest, they do not present facts to *prove* that these alleged interests are anything but hypothetical or of a common kind and character to others. Thus, the affidavits fail to establish “aggrieved party” status under *Olsen*, and likewise could not do so under the *Lansing Schools* test.

Perhaps the most defective affidavit is that of Patricia Birkholz. While Ms. Birkholz is now deceased, even when she signed the affidavit, the affidavit did nothing to establish her or the Alliance’s status as an “aggrieved party.” Ms. Birkholz clearly had a laudable record of public service and was proud that she contributed to the designing and planning of Saugatuck Dunes State Park and had her name affixed to the Paritica Birkholz Natural Area. But this means nothing for the “aggrieved party” inquiry, as the mere fact that Ms. Birkholz participated in the design and/or preservation of a physical space gave her no more of a claim to “aggrieved party” status

than, for example, an architect who might be distraught that a building she designed would be leveled to make way for new development.

Likewise, nothing in either *Olsen*, *Lansing Schools*, or subsequent cases vests a former policymaker with “aggrieved party” status to challenge the policy decisions of a government based on her past involvement with those policies, or a fear that a new wave of political actors is threatening her “legacy” (Birkholz Affidavit, ¶16) or her ability to be perceived as a “trustworthy steward” of grant money. (Birkholz Affidavit, ¶19.) Ms. Birkholz’s focus on speculative personal reputational harm, policy disagreements, and broad platitudes about one’s experience with the dunes that would be common to any nearby property owner who enjoys the dunes is precisely the type of generalized and hypothetical harm that fails to establish “aggrieved party” status, whether reviewed under *Olsen* or *Lansing Schools*. Rather, these allegations sound in the type of grievances that this Court has long held should be negotiated in the legislative process or at the ballot box. *Brae Burn*, *supra*.

Similarly, affiant Liz Engle, who lives over three miles from the proposed development,<sup>12</sup> claims “aggrieved party” status based on being a real estate agent in the area, but her affidavit indicates nothing but mere disagreement with the Planning Commission’s decision and fear of speculative lost profits. Ms. Engle’s affidavit is based on multiple layers of speculation and conjecture, as she asserts that she “believes” (without any facts indicating the basis of her belief) that certain natural areas and past policy decisions drive up property values in the area, a “concern” that the decision will “disrupt Saugatuck’s strong real estate market” or “impair her ability to use the Kalamazoo River as a selling point,” and that she will enjoy “lower commissions” if all of these contingencies are realized. (Liz Engle Affidavit, ¶11.)

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<sup>12</sup> Distances cited in this brief are based on those presented in GIS mapping submitted in Appellee North Shores’ briefing to this Court (North Shores Supp. Br. p. 10), as compared to the addresses provided in the affiant’s affidavits.

Aside from being highly speculative, Ms. Engle's "concerns" are not fact-based allegations of harm, are nothing different from what may be experienced by any other person who lives miles away from the development, and certainly are not unique from what somebody who actually lived and/or owned a business close to the development might similarly experience. Even if the *Lansing Schools* standard were to apply, Ms. Engle's claim boils down to a claim of future "lost profits" in her line of work, which could be alleged by anybody claiming to have a business relying upon keeping the property in its current undeveloped state or that has any tangential relationship with the river. This is the very type of vague general "economic harm" that is insufficient to attain "aggrieved party status."<sup>13</sup>

The same goes for the affidavit of Dave Engle, who lives in the same house as Ms. Engle over three miles away from the proposed development. He claims standing because he is a charter fishing boat captain. Like Ms. Engle and Ms. Birkholz, he expresses disagreement with the decision, which is insufficient to achieve "aggrieved party" status. The balance of his affidavit alleges very general speculative economic harm that again could be experienced by any similarly situated property owner or member of the public at large who might have some economic connection to the river.

The same types of general allegations are raised by Mr. Mort Van Howe, who lives over six miles away from the development and repeats speculations about how commonly-experienced river traffic might be affected, including claims based on speculation about what sized boats may dock at the development. Mr. Van Howe goes on a further detour, warning that the development

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<sup>13</sup> Denying aggrieved party status based on speculative claims of future lost profits is also consistent with precedent in the takings context establishing that, absent accompanying evidence of lost property value, "claims for lost expected profits are generally too speculative to require just compensation." *Time Out L.L.C. v. New Buffalo Tp.*, unpublished opinion per curiam of the Court of Appeals issued Jan 8, 2009, 2009 WL 50065 at \*5. (Docket Nos. 278916, 2009 WL 50065) (Ex 11).

may bring inexperienced boaters who will not follow maritime rules and/or who might experience storms on Lake Michigan. (Van Howe Affidavit, ¶¶15-18.) Aside from being completely speculative, this is going extremely far afield of any harm actually traceable to the Planning Commission's decision. And, insofar as Mr. Van Howe alleges that these speculative scenarios will increase "the risk and burdens on other boaters, such as myself," and that a Chicago couple that he hosted on his yacht was shocked by news of the North Shores development (Van Howe Affidavit, ¶¶19, 22), his allegations prove nothing other than the non-uniqueness of his claimed harm.

The non-uniqueness of Mr. Engle's and Mr. Van Howe's alleged harm is further demonstrated by the affidavit of Mike Johnson, owner of the Coral Gables Complex in the City of Saugatuck (which is over a mile away from the actual development). Mr. Johnson raises a highly speculative claim of vicarious harm if a person rents one of his jet skis, if that person travels to the development area, if the area is congested at that time, if the person then gets in an accident, and then if his insurance costs increase. (Johnson Affidavit, ¶ 7.) And, while Mr. Johnson claims that the development may create a nuisance, the "aggrieved party" status is not a means of challenging approval of a project merely because it may be capable of generating nuisance effects.

Consistent with this Court's discussion in *Mays*, the issue of special damages recognizes that even the takings analysis tolerates the existence of commonly-experienced nuisance effects. *Mays*, \_\_\_Mich\_\_\_, 2020 WL 4360845 at\*9, citing *Spiek v. Dep't of Transp.*, 456 Mich 331, 332-333 (1998). The issue is not whether a project may generate a nuisance, but rather whether some "aggrieved party" is poised to experience a unique effect flowing from the Planning Commission's decision. The tourist and boater-related "nuisances" contemplated by Mr. Johnson would not only be experienced by his patrons, but by any other person using the river, including those property owners who live along the river (who, incidentally, may find Mr. Johnson's jet ski

renters to be just as much of a nuisance). Thus, Mr. Johnson's affidavit fails the *Olsen* "aggrieved party" standard, as well as the *Lansing Schools* standard.

Another highly speculative and vague claim to standing is found in the affidavit of Chris Deam, a resident of California who claims to have a cottage about a mile and a half away from the development. Mr. Deam offers an affidavit that is again heavy on "concern" "worry," and disagreement with the Planning Commission, but devoid of facts supporting so much as an inference of unique harm. A centerpiece of his concern is that the Planning Commission's findings related to the instant development "could set in motion a precedent of ignoring guidelines set in the Master Plan," which, he claims, "could destroy the Ox-Bow experience, the Crow's Nest experience, and the solace my family finds on the Ox-Bow Lagoon." (Deam Affidavit, ¶10.) If his concern is that *future* Planning Commission decisions may possibly follow this decision as a "precedent," then by definition Mr. Deam has not identified a non-hypothetical harm arising from the decision *actually at issue in this case*. The bulk of his objections relate to the aesthetic experience of the area, but nothing specific to his cottage. Accordingly, Mr. Deam's affidavit is just another that alleges general aesthetic harms common to any similarly situated property owner or user of the river.

Finally, affiants Diane Bily and Kathi Bily-Wallace claim aggrieved party status by virtue of having a cottage on the Kalamazoo River that is allegedly adjacent to the property at issue in the case. While their property technically is adjacent to the North Shores' expansive property holdings, it is actually nearly a half mile from the portion of the North Shores property that will be developed pursuant to the PUD. Being nearly a half mile away, their property will not actually be in view of the development, and therefore their alleged proximity does not indicate any unique aesthetic impact other than what any other property owner or member of the public would experience when incidentally passing by the development. This distinguishes their claims from



the direct view-based harms alleged by the riparians in *Deer Lake*. Both Bily affiants also allege the same type of safety concerns that many of the non-property-owning affiants assert.

It is also notable that the Bilys and other affiants who raise safety concerns describe an area that is *already* busy with boat traffic, and they present their concerns as run-of-the-mill complaints about increased boat traffic. Thus, even if additional boats may change the degree of the alleged boat traffic *compared to present conditions*, it does not change the *kind* of condition that already exists, nor does it indicate that the increased boat traffic would be disproportionately experienced by any of these affiants as compared to other similarly situated property owners or users of the Kalamazoo River. This is exactly the type of harm that was inadequate to establish aggrieved party status in *Unger, supra*. Moreover, even if the river is currently busy due to existing boat traffic, a property owner like North Shores that is simply trying to use its property consistent with the Zoning Ordinance and the existing development pattern in the area should not be forced to bear the brunt of the community's grievances merely because it is developing its property last, especially in a case like this one where the additional boat slips and boat traffic introduced by the development is consistent with what it could develop as of right.<sup>14</sup>

Moreover, while Ms. Bily-Wallace tries to infer that there will be some increase in noise from the boats, she also admits that she already hears boats go by, and that her cottage is near a favorite gathering spot for boats. (Bily-Wallace Affidavit, ¶26.) There is nothing in her affidavit to suggest that the boats from this new development will generate some consistent buzz of activity passing by her home, and certainly nothing of greater degree than any other property

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<sup>14</sup> See, e.g., *Troy Campus v. City of Troy*, 132 Mich App 441 (1984), applying similar reasoning in rejecting an City's traffic-based arguments in support of the City's denial of an application to rezone land from single-family to allow construction of medical and office professional buildings in an area that was already of a substantial office/commercial character. The Court of Appeals reasoned, "the burden and cost of dealing with these problems should be fairly distributed among the public, and should not depend upon the fortuity of who develops his land last." *Troy Campus*, 132 Mich App at 456.

owner in the area. In any event, waterfront property owners on a recreational waterway should expect to hear some amount of boat noise. And, as Ms. Bily-Wallace lives to the east of proposed development area (away from Lake Michigan), her speculation about where these new boats will be heading conflicts with the speculation of affiant Mort Van Howe, who believes that the boats from the North Shores development will most generally be traveling to the west to go out to Lake Michigan. (Van Howe Affidavit, ¶11.) If Mr. Van Howe is correct, then Ms. Bily-Wallace would actually experience the development to a *lesser* degree than any property owner or river user between the marina and Lake Michigan.

Ultimately, not only do the individual affidavits fail to allege *and prove* specific facts supporting a claimed unique harm to their individual property rights, but the collective whole of hypothetical allegations in these affidavits is so internally inconsistent that they cancel each other out and confirm that their allegations are so common that they could not even satisfy the *Lansing Schools* standard of establishing harm different from the community at large, much less the properly-applied *Olsen* standard. The affidavits speak to nothing other than commonly-experienced general aesthetic, environmental, or economic grievances, and are dominated by claims of “worry,” “concern,” and hypothesized scenarios without evidentiary support. They also seek to prematurely argue the merits of the appeal, as the common feature of all these affidavits is their allegations indicating why they disagree with the Planning Commission. Clearly these affiants do not want this development in their backyard (or, more accurately, a half mile or more away), but their mere disagreement and general allegations do not support “aggrieved party” status for themselves individually, or for Appellant as an entity, since they do not differ from those of similarly-situated property owners, from the community at large, or arise from the Planning Commission’s decision itself. Therefore, the Court of Appeals correctly affirmed the circuit court’s decision affirming the ZBA’s decision that it lacked jurisdiction over the matter. As Appellant has

no path to “aggrieved party” status even under the most generous review standard that they advocate, this case serves as a poor vehicle for assessing the broader legal questions presented. Leave to appeal should be denied, or the Court of Appeals should be affirmed.

### **CONCLUSION**

Appellant has tried to style this Application as involving novel questions of statutory interpretation and chaos at the Court of Appeals, but it really is a short-sighted attempt to overthrow decades of consistently-applied theoretically-sound zoning appeals jurisprudence to create some new ambiguous “aggrieved party” standard solely to serve their immediate purpose of thwarting North Shores’ property rights. While their personal success would be short-lived – since North Shores could simply come back to the Township to seek a *more* dense development as of right – Appellant would leave in its wake a devastated zoning appeals jurisprudence and leave it to the courts, municipalities, and future property owners to carry the burden of figuring out whether longstanding precedents developed with reference to the *Joseph-Olsen* standard would still apply with reference to a new *Lansing Schools*-based standard. Meanwhile, more property owners would be at risk of delays in their projects, or worse, would not be able to use their properties at all, which in turn will leave municipalities exposed to a newly-enhanced risk of exposure to takings litigation.

The Court of Appeals did not err in articulating the standard of review in this case, as both the “party aggrieved” standard of MCL 125.3605 and the “party aggrieved” standard of MCL 125.3604(1) properly require a zoning appellant to allege and prove special damages not common to other property owners similarly situated, as set forth in *Olsen* as well as the body of case law commencing with *Joseph*. The standard reflects this state’s longstanding understanding of an “aggrieved party” as a person who has a direct pecuniary interest in the matter being appealed, and likewise reflects the fact that zoning regulation is about property rights. As this Court has

stated, the courts should take a limited role in zoning matters, and not sit as “super zoning commissions.” Appellant’s proposal of merging the “aggrieved party” standard with the *Lansing Schools* standard in zoning cases would open zoning appeals to non-property-holding members of the public who lack a property interest as significant as the property owner whose zoning approval is being appealed, even to the point that the universe of persons who could appeal a decision they were not a party to would be larger than the class of persons who could claim a taking related to any effects of that same decision.

Nor should the standard be questioned for its inclusion of the term “similarly situated” or its use of a different reference group than the “special damages” inquiry in other contexts,” as the term “similarly situated” is successfully deployed in multiple legal contexts, and the term “special damages” appropriately varies depending on the context in which it is utilized. The *Olsen* conceptualization properly reflects the limited nature of the appellate processes as compared to the ability to initiate an original action, and does not preclude a party from attempting to remedy any actual negative impacts from a development through alternate means like urging the municipality to exercise of its police powers to correct zoning violations, or filing a properly-pled original lawsuit to abate a nuisance.

In this case, it would not even matter if the *Lansing Schools* standard were to apply, as Appellant does not satisfy that standard either. Under both *Olsen* and *Lansing Schools*, Appellant alleges nothing but commonly-experienced hypothetical effects of a development that is less dense and no worse than what North Shores could have applied to develop as of right, without the Planning Commission’s PUD approval. Though Appellant’s affiants exude great passion for the subject and disagreement with the Planning Commission’s decision, this is not enough to make any of the affiants or the Appellant aggrieved. Appellants cannot use the aggrieved party standard to deprive the Township of its ability to regulate land use in the best interest of the

entire community or to deprive North Shores of all rights to develop its property as zoned by offering nothing by unproven and even contradictory allegations of harm. As Appellant cannot demonstrate special damages with reference to either property owners similarly situated, or the public at large, this case serves as a poor vehicle for uprooting this state's decades-long zoning appeals jurisprudence.

Accordingly, amicus Michigan Municipal League asks that this Honorable Court deny Appellant's Application for Leave to Appeal or affirm the Court of Appeals' decision in this case.

Respectfully submitted,

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DATED: September 23, 2020

**INDEX OF EXHIBITS**

- Ex 1: *Saugatuck Dunes Coastal Alliance v. Saugatuck Township*
- Ex 2: *Schall v. City of Williamston*
- Ex 3: Law Review Article
- Ex 4: *Meany v. City of Saugatuck*
- Ex 5: *Our EGR Homeowners Alliance v. City of East Grand Rapids*
- Ex 6: *Kingsbury Country Day School v. Addison Township*
- Ex 7: *Baker v. Township of Bainbridge*
- Ex 8: *Deer Lake Property Owners Association v. Independence Charter Township*
- Ex 9: Saugatuck Township Zoning Ordinance §40.72
- Ex 10: *Lubienski v. Scio Township*
- Ex 11: *Time Out, LLC v. New Buffalo Township*

**EXHIBIT 1**



2019 WL 4126752

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.UNPUBLISHED  
Court of Appeals of Michigan.SAUGATUCK DUNES COASTAL  
ALLIANCE, Plaintiff-Appellant,

v.

SAUGATUCK TOWNSHIP, Saugatuck Township  
Zoning Board of Appeals, and North Shores  
of Saugatuck, LLC, Defendants-Appellees.Saugatuck Dunes Coastal  
Alliance, Plaintiff-Appellant,

v.

Saugatuck Township Zoning Board of Appeals,  
Saugatuck Township, and North Shores  
of Saugatuck, LLC, Defendants-Appellees.

No. 342588, No. 346677

August 29, 2019

Allegan Circuit Court, LC Nos. 17-058936-AA, 18-059598-AA

Before: Gadola, P.J., and Markey and Ronayne Krause, JJ.

**Opinion**

Per Curiam.

\*1 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<sup>1</sup> by the Michigan Department of Environment, Great Lakes, and Energy (EGLE<sup>2</sup>). 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.<sup>3</sup>

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.<sup>4</sup>

## II. JURISDICTION

\*2 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

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at any time. *Smith v. Smith*, 218 Mich. App. 727, 729-730; 555 N.W.2d 271 (1996). North Shores presents a cursory and conclusory argument that we would ordinarily refuse to consider. See *Mitcham v. Detroit*, 355 Mich. 182, 203; 94 N.W.2d 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 N.W.2d 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 N.W.2d 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 N.W.2d 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. —, — *Michigan Ass'n of Home Builders v. City of Troy*, — Mich. —, —; — N.W.2d — (2019) — N.W.2d — (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 N.W.2d 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:

\*3 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.<sup>5</sup>

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* 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 N.W.2d 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."

\*4 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.<sup>6</sup> 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

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 N.W.2d 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

\*5 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\(A\)](#).

## All Citations


Not Reported in N.W. Rptr., 2019 WL 4126752

## Footnotes

- 1 See <[https://www.michigan.gov/egle/0,9429,7-135-3311\\_4114\\_4236-70207--,00.html](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).
- 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.
- 6 We do not express any opinion as to whether they are, in fact, sufficient to confer standing.



# EXHIBIT 2

 KeyCite Yellow Flag - Negative Treatment  
Distinguished by *McGue v. Glenbrook Beach Association*, Mich.App.,  
March 6, 2018

2014 WL 6860265

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.

UNPUBLISHED  
Court of Appeals of Michigan.

William SCHALL and Melanie  
Schall, Plaintiffs–Appellees,

v.

CITY OF WILLIAMSTON, *Patrick Sloan*, Michael  
Gradis, McKenna Associates, Inc., Defendants,  
and

D & G Equipment, Inc., Elden E. Gustafson,  
and *Jolene Gustafson*, Defendants–Appellants.

Docket No. 317731.

|

Dec. 4, 2014.

Ingham Circuit Court; LC No. 13–000250–CZ.

Before: OWENS, P.J., and MARKEY and SERVITTO, JJ.

Opinion

PER CURIAM.


\*1 In this case, plaintiffs William Schall and Melanie Schall (plaintiffs), sought injunctive relief to compel their new neighbors, defendants D & G Equipment, Inc. (D & G) and its owners Elden Gustafson and Jolene Gustafson (defendants or the Gustafsons), to comply with the city of Williamston's zoning ordinance that allows the outdoor display of farm implements for sale only by special use permit, which in turn requires a green buffer zone to shield plaintiffs' property from the outdoor sales displays on D & G's property. Plaintiffs also sought a writ of mandamus to compel the city and its contract zoning administrator, McKenna Associates, Inc.,<sup>1</sup> to enforce the ordinance. After a hearing on the parties' respective motions for summary disposition, the trial court granted plaintiffs' motion and denied defendants' motion. In its opinion and order, the trial court found that defendants' use of their property was in violation of the

city's zoning ordinance—therefore a nuisance per se—and ordered the zoning administrator for the city to enforce the ordinance's buffering requirement. Defendants, D & G and the Gustafsons, appeal by right. For the reasons discussed below, we affirm.


I. JURISDICTION

We address first defendants' claim that the circuit court lacked jurisdiction over plaintiffs' complaint for injunctive relief. Defendants argue that the circuit court lacked jurisdiction because plaintiffs failed to timely appeal the planning commission's grant of a special use permit to defendants, did not exhaust their administrative remedies, lacked standing, failed to allege “special damages” necessary for an actionable nuisance claim, and that plaintiffs' claim was not ripe for adjudication because the zoning ordinance allowed three years for a landscape buffer to mature. We find that none of these claims have merit.

A. STANDARD OF REVIEW

The issue of jurisdiction presents a question of law reviewed de novo on appeal. *Michigan's Adventure, Inc v. Dalton Twp*, 287 Mich.App 151, 153; 782 NW2d 806 (2010). Whether a court should invoke the doctrine of exhaustion of administrative remedies to decline jurisdiction also presents a question of law reviewed de novo on appeal.  *Shelby Charter Twp v. Papesh*, 267 Mich.App 92, 109; 704 NW2d 92 (2005).

B. DISCUSSION

Defendants' arguments that the circuit court lacked jurisdiction because plaintiffs did not timely appeal the granting of a special use permit and that plaintiffs lack standing because of their not suffering “special damages” are without merit because plaintiffs did not appeal the planning commission's administrative decision. Instead they sought enforcement of the zoning ordinance. Under MCL 125.3407, and the zoning ordinance, § 74–9.705, its violation is a nuisance per se over which the circuit court has jurisdiction to grant injunctive relief on the complaint of affected neighboring property owners.  *Jones v. DeVries*, 326 Mich. 126, 135; 40 NW2d 317 (1949); *Towne v. Harr*, 185 Mich.App



230, 232; 460 NW2d 596 (1990) (“our Supreme Court has long recognized the propriety of private citizens bringing actions to abate public nuisances, arising from the violation of zoning ordinances”).

\*2 Also, we find equally without merit defendants' assertions that plaintiffs' claim is not ripe either because of their failure to exhaust administrative remedies or because of the ordinance's three-year grace period to permit a landscape buffer to mature. Likewise, defendants' discussion regarding public nuisance or nuisance in fact is inapposite.

Subject-matter jurisdiction presents the question whether a court has “the power to hear and determine a cause or matter.” *Bowie v. Arder*, 441 Mich. 23, 36; 490 NW2d 568 (1992) (citation omitted). The Zoning Enabling Act and the city's zoning ordinance do not specify the court having jurisdiction to abate zoning violations. MCL 125.3407 provides, “a use of land ... in violation of a zoning ordinance or regulation adopted under this act is a nuisance per se” and “[t]he court shall order the nuisance abated....” Section 74-9.705 of the zoning ordinance provides “any use of ... land ... in violation of any of the provisions thereof, is hereby declared to be a public nuisance per se, and may be abated by order of *any court of competent jurisdiction*.” The circuit court has “the power and jurisdiction” of “courts of record at the common law,” and “judges in chancery in England on March 1, 1847” as subsequently altered by state law, and as “[p]rescribed by the rules of the supreme court.” MCL 600.601. And, circuit courts “have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court....” MCL 600.605. The circuit court also is accorded specific authority to abate nuisances. MCL 600.2940(1). Furthermore, our Supreme Court has recognized that under the common law, a circuit court may grant equitable relief from a violation of a local zoning ordinance. *Farmington Twp v. Scott*, 374 Mich. 536, 540-541; 132 NW2d 607 (1965). We therefore conclude that the circuit court possessed subject-matter jurisdiction to hear plaintiffs' complaint and grant injunctive relief regarding a use of land found in violation of local zoning regulation.

We also find without merit defendants' contention that plaintiffs lacked standing. In general, standing requires not only that a party have a sufficient interest in the outcome of litigation to ensure vigorous advocacy but also have “in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest

in the subject matter of the controversy.” *Bowie*, 441 Mich. at 42 (citation omitted). Further, “a litigant has standing whenever there is a legal cause of action.” *Lansing Sch Ed Ass'n v. Lansing Bd of Ed*, 487 Mich. 349, 372; 792 NW2d 686 (2010). Also, a litigant has standing if he or she “has a special injury or right, or substantial interest,” which “will be detrimentally affected in a manner different from the citizenry at large....” *Id.* Plaintiffs satisfy these various iterations of standing and may assert a violation of the zoning ordinance landscape buffering requirements.

\*3 As the abutting property owners for whom the landscape buffer is designed to shield from defendants' outdoor storage and sales of large farm equipment, plaintiffs patently have a real interest in the subject matter of the controversy and the outcome of litigation to ensure vigorous advocacy.

*Bowie*, 441 Mich. at 42. Moreover, our Supreme Court has recognized that neighboring property owners have an equitable cause of action to enforce compliance with local zoning regulations. *Cook v. Banteen*, 356 Mich. 328, 330-334; 96 NW2d 743 (1959) (“residents in the immediate vicinity” had the right to obtain injunctive relief from land use contrary to zoning ordinance); *Jones*, 326 Mich. at 128-135 (“property owners in the area affected” had a right to seek equitable relief from use in violation of local zoning); *Baur v. Thomasma*, 321 Mich. 139, 142-143, 146; 32 NW2d 369 (1948) (neighbors of proposed use in violation of zoning ordinance were “entitled to the equitable relief”). As this Court has explained:

While the designated officials are undoubtedly the only persons who can commence any action of a penal nature for zoning violations ..., there is nothing to indicate that the Legislature intended to limit a private person's right to invoke the circuit court's jurisdiction to abate a public nuisance arising out of the violation of a zoning ordinance. [*Indian Village Ass'n v. Shreve*, 52 Mich.App 35, 38; 216 NW2d 447 (1974).]



The cases defendants cite, *Village of Franklin v. Southfield*, 101 Mich.App 554; 300 NW2d 634 (1980), *Unger v. Forest Home Twp*, 65 Mich.App 614; 237 NW2d 582 (1975), and *Joseph v. Twp of Grand Blanc*, 5 Mich.App 566; 147 NW2d 458 (1967), are inapposite as they address the “aggrieved party” criteria to have standing to appeal the administrative actions of zoning officials. These cases simply do not apply to plaintiffs’ action because it is not an appeal of administrative zoning action; it is an independent action for equitable relief from a purported violation of the zoning ordinance. Furthermore, the *Unger* Court recognized this distinction in its discussion regarding “aggrieved party” status, noting that it did not apply to “an action to abate a public nuisance ... brought by any township property owner...” *Unger*, 65 Mich.App at 618. Simply stated, the cited cases cannot overrule Supreme Court precedent establishing the right of abutting property owners like plaintiffs to seek equitable relief from zoning violations. See *Cook*, 356 Mich. at 330–334; *Jones*, 326 Mich. at 128–135; *Baura*, 321 Mich. at 142–143, 146.

Moreover, to the extent plaintiffs must “show damages of a special character distinct and different from the injury suffered by the public generally,” *Towne*, 185 Mich.App at 232, they have done so based on the fact they are the abutting property owners the zoning provisions are intended to benefit. They have alleged “special damages not common to other property owners similarly situated,” *Village of Franklin*, 101 Mich.App at 557, because no other property owners are immediately affected by the alleged violation. In sum, plaintiffs have standing to assert their claim to equitable relief from the asserted zoning violation.

\*4 For similar reasons, defendants’ discussion of public nuisances is unavailing. There are two categories of nuisance:

(1) nuisances per se and (2) nuisances in fact. *Martin v. Michigan*, 129 Mich.App 100, 107–108; 341 NW2d 239 (1983). “A nuisance per se is an act, occupation, or structure which is a nuisance at all times and under any circumstances.”

*Id.* at 108. A nuisance in fact “is a nuisance by reason of circumstances and surroundings, and [has a] ... natural tendency ... to create danger and inflict injury to person or property.” *Id.* A nuisance in fact is also referred to as a public nuisance because the condition “must affect an interest common to the general public, rather than peculiar to one

individual, or several.” *Garfield Twp v. Young*, 348 Mich. 337, 342; 82 NW2d 876 (1956).

But in this case, plaintiffs do not allege a public nuisance or nuisance in fact. They assert a violation of the zoning ordinance, which both MCL 125.3407 and § 74–9.705 of the ordinance, declares a nuisance per se. As explained in *Ford v. Detroit*, 91 Mich.App 333, 335; 283 NW2d 739 (1979), proving the violation of the ordinance establishes a nuisance per se:

The distinction between a nuisance per se and a nuisance in fact is an evidentiary one. A nuisance per se is an act, occupation or structure which is a nuisance at all times and under all circumstances. Once the act has been proved, the court decides as a matter of law whether the act complained of constitutes a nuisance per se. The defendant’s liability at that point is established. [*Id.*]

As discussed already, a neighboring landowner may bring an equitable action to enjoin a violation of local zoning that is a nuisance per se.

We also find without merit defendants’ claim that plaintiffs’ action should have been dismissed because plaintiffs failed to exhaust their administrative remedies. Generally, “‘where an administrative grievance procedure is provided, exhaustion of that remedy, except where excused, is necessary before review by the courts.’” *In re Harper*, 302 Mich.App 349, 358; 839 NW2d 44 (2013) (citation omitted). Application of the doctrine is, however, excused where invoking administrative remedies would be futile. *Nalbandian v. Progressive Mich. Ins Co*, 267 Mich.App 7, 10–11, n 2; 703 NW2d 474 (2005); *West Bloomfield Charter Twp v. Karchon*, 209 Mich.App 43, 47; 530 NW2d 99 (1995). The only administrative remedy available to plaintiffs would consist of convincing the zoning administrator to take action to enforce the landscape buffer requirements of the zoning ordinance. The zoning administrator’s (Patrick Sloan’s) affidavits make clear plaintiffs’ efforts to pursue administrative remedies without court intervention were and would remain futile.



Finally, we reject defendants' argument that plaintiffs' claim was not ripe. "[T]he doctrine of ripeness is intended to avoid premature adjudication or review of administrative action. It rests upon the idea that courts should not decide the impact of regulation until the full extent of the regulation has been finally fixed and the harm caused by it is measurable." "

*Paragon Properties Co v. City of Novi*, 452 Mich. 568, 579 n 13; 550 NW2d 772 (1996), quoting *Herrington v. Sonoma Co*, 834 F.2d 1488, 1494 (CA 9, 1987). Section 74–7.304(B) of the ordinance requires that the landscape buffer must consist of "closely spaced evergreens ... which can be reasonably expected to form a complete visual barrier at least six feet in height within three years of installation." This plain language requires present plantings that can, within three years, "be reasonably expected to form a complete visual barrier at least six feet in height." This is a clear standard that is subject to proof regarding what is "reasonably expected." Here, plaintiffs presented such proof, and their claim was ripe for adjudication. To accept defendants' argument to the contrary would encourage continued extensions of the three-year time limit of § 74–7.304(B) for having a mature landscape screen in place.

\*5 We conclude defendants have presented no arguments to support finding that the trial court erred. The circuit court had subject-matter jurisdiction of plaintiffs' claim for equitable relief from the alleged zoning violation, a nuisance per se. Plaintiffs have standing, no non-futile administrative remedy is available, and plaintiffs' claim was ripe for adjudication.

## II. MOTIONS FOR SUMMARY DISPOSITION

### A. STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. This Court reviews de novo trial court's decision regarding the motion. *Karbel v. Comerica Bank*, 247 Mich.App 90, 95–96; 635 NW2d 69 (2001). The moving party must specifically identify and support with evidence the issues as to which it believes there is no genuine issue of material fact, and that entitle it to judgment as a matter of law. MCR 2.116(G)(4); *Barnard Mfg Co, Inc v. Gates Performance Engineering, Inc*, 285 Mich.App 362, 369; 775 NW2d 618 (2009). "If the moving party properly supports its motion, the burden 'then shifts to the opposing party to establish that a genuine issue of disputed

fact exists.' " *Id.* at 370, quoting *Quinto v. Cross & Peters Co*, 451 Mich. 358, 362; 547 NW2d 314 (1996). The nonmoving party must then present competent evidence, the content of which would be admissible at trial, showing that there is a genuine issue of disputed material fact. MCR 2.116(G)(4), (6); *Maiden v. Rozwood*, 461 Mich. 109, 121, 123 n 5; 597 NW2d 817 (1999); *Barnard Mfg Co*, 285 Mich.App at 373. When deciding the motion, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Quinto*, 451 Mich. at 362. When the submitted evidence fails to establish a disputed material fact and the moving party is entitled to judgment as a matter of law, the motion should be granted. MCR 2.116(G)(4); *West v. Gen Motors Corp*, 469 Mich. 177, 183; 665 NW2d 468 (2003).

### B. DISCUSSION

We conclude that the trial court did not err by granting plaintiffs summary disposition by finding no material disputed fact that defendants' landscape buffer failed to comply with the zoning ordinance (and special use permit) and therefore was an abatable nuisance per se. MCL 125.3407 ("a use of land ... in violation of a zoning ordinance or regulation adopted under this act is a nuisance per se ... [t]he court shall order the nuisance abated ..."); § 74–9.705 ("any use of premises or land which is begun or changes subsequent to the time of passage of this section and in violation of any of the provisions thereof, is hereby declared to be a public nuisance per se, and may be abated by order of any court of competent jurisdiction"); *Indian Village Ass'n*, 52 Mich.App at 38 (a private citizen may bring an action to abate a public nuisances that arises from the violation of a zoning ordinance).

\*6 The zoning ordinance is clear and unambiguous. Defendants cannot operate their outdoor sales and storage operation of large farm equipment without a special use permit and they cannot obtain a special use permit without complying with the pertinent landscape buffer requirements of the zoning ordinance. § 74–2.202; § 74–2.443 (unrestricted outdoor retail sales). The issuance of a special use permit requires a "determination that a special land use proposal is in compliance with the standards and requirements of this Ordinance and other applicable ordinances and laws ...." §



74-9.302(E)(1). The ordinance landscaping requirements are the minimum standards for landscaping and screening. § 74-7.101. The pertinent minimum standards in the ordinance for a landscape screen in a commercial district are “a minimum 15 feet wide” and “a staggered double row of closely spaced evergreens (i.e., no farther than 15 feet apart) which can be reasonably expected to form a complete visual barrier at least six feet in height within three years of installation.” § 74-7.304(A), (B). The planning commission has no authority to modify these standards absent “a written request identifying the relevant landscape standard, the proposed landscaping, how the proposed landscaping deviates from the landscaping standard, and why the modification is justified.” § 74-7.710.

In the present case, there was no “written request” to modify the ordinance standards meeting the criterion of § 74-7.710, but we will assume that defendants' site plan coupled with the zoning administrator's written and oral submissions to the planning commission satisfied this requirement and that the modified landscape site plan included incorporating existing vegetation for purposes of landscape screening. Still, when existing vegetation is utilized in the modified plan it must “achieve the same effect as the required landscaping.” § 74-7.710(C). Thus, the planning commission had the authority and apparently did modify the ordinance landscape buffer requirements but only to the extent that the existing vegetation satisfied the “intent” or satisfied the required buffering effect. Specifically, the planning commission approved the special use in this case contingent on a landscape buffer being “installed and maintained in accordance with the landscape plan presented on the December 22, 2011 site plan, ... supplemented by spruce or evergreen trees to meet the intent of the Zoning Ordinance buffering requirements.” In sum, the minimum standards of the ordinance apply except to the extent those standards are satisfied by the existing vegetation.

It is undisputed that at the time this lawsuit was initiated the landscape buffer at issue did not meet the minimum standard of “closely spaced evergreens” that “form a complete visual barrier at least six feet in height.” § 74-7.304(B). The issue is whether within three years of installation such a visual barrier could reasonably be expected to form. *Id.* Plaintiffs presented two affidavits of a competent, qualified landscape architect, Deborah Kinney, who averred that “because the plantings were in many cases too short and too widely-spaced,” the landscape buffer did not comply and could not reasonably be expected to comply within three years with the standard of § 74-7.304(B), and that an additional 30 evergreens, 10 to 12 feet tall, would need to be planted. Kinney's expert

opinion is consistent with defendants' December 22, 2011 site plan that provided for planting White pines of that size to supplement the existing vegetation. Defendants' reliance on Sloan's affidavits to create a disputed question of fact whether the landscape buffer complied with the ordinance is misplaced for several reasons.

\*7 First, in a February 14, 2013 letter, less than six months before his June 2013 and July 2013 affidavits, Sloan wrote that the landscape buffer did not comply with the ordinance in that he “identified 10 areas along the west side of the southern lot line that had openings that I did not expect to close up within the next 3 years.” Sloan recommended planting six-foot tall Norway spruce trees in these gaps, but admitted he had no idea whether these additional plantings “will result in a 6-foot high screen within 3 years.” In other words, Sloan acknowledged his ignorance regarding whether defendants' landscape plantings would mature within three years to provide the minimum screening required by § 74-7.304(B). Sloan also sets forth no facts in his affidavit to support his conclusion that defendants' plantings “meets or exceeds the conditions established by Planning Commission in its January 3, 2012, special use permit approval.” “Mere conclusory allegations that are devoid of detail are insufficient to demonstrate that there is a genuine issue of material fact for trial.” *Bennett v. Detroit Police Chief*, 274 Mich.App 307, 317; 732 NW2d 164 (2006), citing *Quinto*, 451 Mich. at 371-372.

Second, because Sloan had within the recent past expressed his ignorance regarding whether the landscape would sufficiently mature to meet the standards of § 74-7.304(B), he cannot create a question of fact on that issue with conclusory statements of compliance in an affidavit submitted on a motion for summary disposition. A party cannot avoid summary disposition by setting forth conclusory assertions in an affidavit that conflict with the actual historical conduct of the party. *Bergen v. Baker*, 264 Mich.App 376, 389; 691 NW2d 770 (2004).

Sloan's effort to support his conclusion regarding defendants' compliance because another section of the zoning ordinance only requires that newly planted evergreens be a minimum of six feet tall, see § 74-7.403(C), is also unavailing. As noted already, the planning commission required compliance with defendants' December 22, 2011 site plan that provided for 10-12 foot evergreens. Further, for the reasons discussed, the planning commission could not and did not waive the



substance of the screening requirements of § 74–7.304(B). Additionally, plaintiffs presented competent expert evidence that showed six-foot tall evergreens would not satisfy the requirement of forming within three years of installation a complete visual barrier of at least six feet in height. In other words, while one section sets a general minimum height standard, the other more specific section sets performance standards that expert testimony showed required planting taller evergreens. Applying the rules of statutory construction, the general rule of § 74–7.403(C) regarding minimum height of evergreens cannot trump the more specific landscape screening requirements of § 74–7.304(B). See *In re Harper*, 302 Mich.App at 358, and *Slater v. Ann Arbor Pub Sch Bd of Ed*, 250 Mich.App 419, 434–435; 648 NW2d 205 (2002) (opining that “where two statutes or provisions conflict and one is specific to the subject matter while the other is only generally applicable, the specific statute prevails”). Moreover, the planning commission specifically imposed defendants’ December 22, 2011 site plan that required planting 10–12 foot evergreens.

\*8 Finally, defendants’ claim that Sloan’s affidavits positioned this case as a battle of experts at trial is also without merit. The trial court specifically queried defendants’ counsel regarding Sloan’s qualifications and received no response. Sloan’s own affidavits state only that he is a “planner,” without further explication, and that he has scant experience as an employee of McKenna serving as the city’s zoning administrator. No evidence was presented to the trial court to support concluding that Sloan possessed any expertise at all regarding landscaping or the rate at which recently planted evergreens might mature. Indeed, there was record evidence to suggest Sloan’s lack of knowledge in this area. To be considered on a motion for summary disposition, the substance of evidence must be admissible. *Maiden*, 461 Mich. at 121, 123 n 5; *Barnard Mfg Co*, 285 Mich.App at 373. An expert must also be qualified for his opinion to be considered on a motion for summary disposition. *MRE* 702; *Amorello v. Monsanto Corp*, 186 Mich.App 324, 331; 463 NW2d 487 (1990). Sloan’s opinion in his affidavits that defendants’ landscape buffer complied with the ordinance did not meet the standard of competence required on summary disposition. See *MCR 2.116(C)(G)(6)* (“Affidavits ... offered in support of or in opposition to a motion based on subrule (C)(1)–(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion.”). An expert’s opinion must have a basis in facts. See *MRE* 703;



*Edry v. Adelman*, 486 Mich. 634, 639–641; 786 NW2d 567 (2010); *Gonzalez v. St John Hosp & Med Ctr (On Reconsideration)*, 275 Mich.App 290, 305–306; 739 NW2d 392 (2007). When proposed expert testimony is based on speculation, it should be excluded. *Phillips v. Deihm*, 213 Mich.App 389, 402; 541 NW2d 566 (1995). Here, defendants did not establish Sloan’s qualifications as an expert, *MRE* 702; his opinion was not shown to be based on facts, *MRE* 703, and his affidavits presented mere conclusory statements insufficient to withstand a supported motion for summary disposition. *Maiden*, 461 Mich. at 121, 123 n 5; *Quinto*, 451 Mich. at 362, 371–372.

As we have already noted, defendants’ characterization of plaintiffs’ action as an appeal of an administrative action is inaccurate. Although the trial court’s opinion was less than clear when it referred to appeals under *MCL* 125.3607, the trial court granted relief on the basis that plaintiffs had established, on the basis of undisputed evidence, that defendants’ use of their property was in violation of the landscape screening requirements of the zoning ordinance. As a result, we find that the trial court properly granted plaintiffs’ motion and denied defendants’ motion for summary disposition. *MCR* 2.116(C)(10), (G)(4); *West*, 469 Mich. at 183.

### III. OTHER ISSUES


Defendants also argue that although the circuit court held their landscape screen did not comply with the zoning ordinance and ordered the zoning administrator to enforce the ordinance, its opinion and order was “void for vagueness” because it did not provide adequate notice of what must be done to comply with it. They further argue the circuit court’s order unlawfully delegates zoning authority to plaintiffs because plaintiffs have the power to seek enforcement of the zoning ordinance by filing motions for contempt. These claims were not raised before or decided by the trial court, so they are not preserved. *Gen Motors Corp v. Dep’t of Treas*, 290 Mich.App 355, 386; 803 NW2d 698 (2010), and present questions of law reviewed de novo on appeal, *Beach v. Lima Twp*, 489 Mich. 99, 106; 802 NW2d 1 (2011).

\*9 Defendants have failed to present any pertinent authority or logical argument in support of their claims that the court’s order is too vague and unlawfully delegates zoning authority

to plaintiffs. “It is axiomatic that where a party fails to brief the merits of an allegation of error, [or] ... fails to cite any supporting legal authority for its position, the issue is deemed abandoned.”  *Prince v. MacDonald*, 237 Mich.App 186, 197; 602 NW2d 834 (1999). As our Supreme Court explained in  *Mitcham v. Detroit*, 355 Mich. 182, 203; 94 NW2d 388 (1959):

It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either

to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.

Accordingly, we find these claims are abandoned. *Id.*;  *Prince*, 237 Mich.App at 197.

We affirm. As the prevailing party, plaintiffs may tax costs pursuant to [MCR 7.219](#).

#### All Citations

Not Reported in N.W.2d, 2014 WL 6860265

#### Footnotes

- 1 Individual McKenna employees serving as zoning administrator at various times were Patrick Sloan, Michael Gradis, and Greg Milliken, who was not named as a defendant.

# EXHIBIT 3



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

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## COMMENTS

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

During the twentieth century the states have increasingly utilized their police power to control the use of land.<sup>1</sup> All fifty states have now enacted zoning enabling legislation,<sup>2</sup> much of which is based in whole or in part on the Standard State Zoning Enabling Act.<sup>3</sup> Typically, these zoning acts, like the Standard Act, empower municipalities<sup>4</sup> to promulgate land use regulations by dividing the municipality "into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this act . . ."<sup>5</sup> Most zoning acts specify that "all such regulations shall be *uniform* for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts."<sup>6</sup>

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

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

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

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

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

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

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

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

8. See STANDARD ACT § 7; ARK. STAT. ANN. § 19-2816 (1955); GA. CODE ANN. § 69-815 (1957). Some statutes refer to this body as the Board of Appeals. See *Van Auken v. Kimmey*, 141 Misc. 105, 252 N.Y.S. 329 (Sup. Ct. 1930). Others title it the Zoning Board of Review. See *Buckminster v. Zoning Bd. of Review*, 69 R.I. 396, 33 A.2d 199 (1943).

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



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

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

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

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

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

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

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

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

14. See STANDARD ACT § 7.

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

#### I. PERMIT APPLICANTS AS AGGRIEVED PERSONS

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

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

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

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

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

17. See, e.g., *Chad Homes, Inc. v. Board of Appeals*, 5 Misc. 2d 20, 159 N.Y.S.2d 388 (Sup. Ct. 1957); *Kuznowski v. Board of Zoning Appeals*, 53 Lack. Jur. 53 (Pa. C.P. 1952).

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

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



A. *Property Owners*

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

B. *Agents of Property Owner*

An application of ordinary rules of agency would seem to require that an agent be held to possess, for the purpose of determining standing, whatever interest his principal has in the property. Although few courts have ruled directly on the question, it seems clear that an agent of the fee owner may be an aggrieved party. For example, it has been held that a construction company<sup>24</sup> or an architect<sup>25</sup> may appeal in the capacity of "agent for the owner," and other courts have viewed successors in interest during the pendency of the application<sup>26</sup> or conditional vendees<sup>27</sup> as persons aggrieved. Generally, the courts have found the requisite interests on the theory that the party in question is an implied agent of the owner. Furthermore, at least one court has held a "straw man" to be a person aggrieved, on the theory that he was a fiduciary for the true owner.<sup>28</sup> It would appear, therefore, that standing to appeal should be granted to an agent whenever his principal, whether or not he is the outright owner of the property, could himself qualify as an aggrieved party.

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

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

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

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

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

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

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

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

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

## C. Lessees

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

## D. Contract Vendees

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

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

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

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

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

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

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



granted standing.<sup>34</sup> When the contract is conditioned upon the securing of a zoning variance or exception, however, the purchaser's qualifications are not as clear. In the majority of cases the courts have allowed such a purchaser to apply for a permit and to appeal a denial thereof as an aggrieved party.<sup>35</sup> Normally, this result is reached by regarding the conditional vendee as the agent or assignee of the owner,<sup>36</sup> or as an equitable owner.<sup>37</sup> On the other hand, a few courts have impliedly dropped the "legal or equitable interest" analysis and have held that a conditional vendee has a sufficient personal economic interest in the property to support his standing to appeal.<sup>38</sup> For example, the Supreme Court of Ohio has stated that "it is enough that an application was made for a permit to use this property for a filling station, by one having a contingent interest in using the property for that purpose . . . ."<sup>39</sup> In addition, several courts have used the fact that the owner joined in the application<sup>40</sup> or gave his consent and approval<sup>41</sup> as a makeweight for allowing the conditional purchaser to appeal as a person aggrieved.

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

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

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

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

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

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

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

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

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



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

### E. Option Holders

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

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

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

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

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

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

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

48. See 2 RATHKOFF, *op. cit.* *supra* note 3, at 40-6.

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

#### F. Others

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

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

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

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

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

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

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

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

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

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



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

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

## II. THIRD PARTIES AS PERSONS AGGRIEVED

When a board of adjustment *grants* a variance, the applicant generally would have no reason to appeal to a court.<sup>61</sup> However, the result may be objectionable to persons other than the applicant. Third parties will be permitted to appeal to the courts as persons aggrieved<sup>62</sup> if they can "show that . . . [their] property will suffer some special damages as a result of the decision of the board complained of, which is not common to other property owners similarly

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

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

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

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

61. Cf. note 19 *supra*.

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

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

#### A. Nearby Property Owners

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

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

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

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

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

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

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

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



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

### B. Nonresidents

Most courts have held that nonresidents cannot challenge zoning regulations,<sup>73</sup> even if their property is adjacent to the questioned zoning.<sup>74</sup> For this reason, it has generally been assumed that a third party must reside or own property within the particular community to qualify as an aggrieved person.<sup>75</sup> Despite this authority, however, recent decisions appear to indicate a trend in favor of allowing nonresidents to attack the enactment<sup>76</sup> and application<sup>77</sup> of zoning ordinances and decisions within the neighboring municipality.

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

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

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

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

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

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

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

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

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

78. STANDARD ACT § 3.

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

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



that the impact of zoning is no longer of concern only to the enacting municipality.<sup>81</sup> Because zoning may have extraterritorial effects, a few courts have interpreted "comprehensive plan" to permit<sup>82</sup> or require<sup>83</sup> the taking into consideration of "regional"<sup>84</sup> factors when zoning ordinances are enacted. In fact, some states have given their cities explicit authority to adopt zoning regulations for areas within a specified distance outside the city limits.<sup>85</sup> Consequently, it would seem that such developments will inevitably lead to the granting of standing as persons aggrieved to affected nonresidents. A few cases illustrate the steps which have already been taken toward this goal.

In 1949 the New Jersey Supreme Court held:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### C. Business Competitors

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

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

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

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

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

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

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

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

96. KAN. STAT. ANN. § 12-708 (1964).

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



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

#### D. Taxpayers

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

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

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

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

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

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

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

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

105. E.g., *O'Connor v. Board of Zoning Appeals*, 140 Conn. 65, 93 A.2d 515 (1953); *Mayor v. Byrd*, 191 Md. 632, 62 A.2d 588 (1948); *Norwood Heights Improvement Ass'n v. Mayor*, 195 Md. 1, 72 A.2d 1 (1950); see *Jackson's Inc. v. Zoning Bd. of Appeals*, 21 Conn. Supp. 102, 106, 145 A.2d 241, 243 (C.P. 1958): "[E]very taxpayer has a certain, though it may be a small, pecuniary interest in having the . . . law well administered." Cf. *Hamelin v. Zoning Bd.*, 19 Conn. Supp. 445, 117 A.2d 86 (C.P. 1955).

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

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

## E. Associations

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

## III. CONCLUSION

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

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

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

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

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

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

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



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

*Alfred V. Boerner*

# EXHIBIT 4

2004 WL 299176

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Christopher MEANY and Donna  
Morgan, Plaintiffs-Appellants,

v.

CITY OF SAUGATUCK and Saugatuck  
Zoning Administrator, Defendants-Appellees.

No. 243694.

|

Feb. 17, 2004.

Before: SCHUETTE, P.J., and METER and OWENS, JJ.

[UNPUBLISHED]

SCHUETTE, METER and OWENS, JJ.

## MEMORANDUM.

\*1 Plaintiffs appeal as of right the circuit court order denying their motion for summary disposition and granting defendants' motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to [MCR 7.214\(E\)](#).

Plaintiffs brought this action for mandamus and declaratory judgment, requesting the court to order defendants to issue a building permit for construction on their property. Mandamus

is an extraordinary remedy that may lie to compel the exercise of some measure of discretion, but not to compel its exercise in a particular manner. [Teasel v. Dept of Mental Health](#), 419 Mich. 390, 410; [355 NW2d 75](#) (1984). In general, “[i]ssuance of a writ of mandamus is proper where (1) the plaintiff has a clear legal right to performance of the specific duty sought to be compelled, (2) the defendant has the clear legal duty to perform such act and (3) the act is ministerial, involving no exercise of discretion or judgment.” [Vorva v Plymouth-Canton Community School Dist](#), 230 Mich.App 651, 655; 584 NW2d 743 (1998). The plaintiff must be without other adequate legal or equitable remedy. [Tuscola Co Abstract Co v Tuscola Co Register of Deeds](#), 206 Mich.App 508, 510; 522 NW2d 686 (1994).

Plaintiffs had an adequate legal remedy through an appeal of the decision of the zoning board of appeals. [MCL 125.585\(11\)](#). Plaintiffs have waived their challenge to a neighbor's standing to appeal to the ZBA. At any rate, where it was alleged that plaintiffs' construction would block the neighbor's lake view and reduce his property's value, we conclude that the neighbor was an aggrieved party who had standing to appeal to the ZBA. See [MCL 125.585\(5\)](#), [Brown v East Lansing Zoning Bd of Appeals](#), 109 Mich.App 668, 701; [311 NW2d 828](#) (1981), and [Joseph v. Grand Blanc Twp](#), 5 Mich.App 566, 571; [147 NW2d 458](#) (1967).

Affirmed.

## All Citations

Not Reported in N.W.2d, 2004 WL 299176

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# EXHIBIT 5



2020 WL 3121035

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.UNPUBLISHED  
Court of Appeals of Michigan.OUR EGR HOMEOWNERS ALLIANCE, Appellant,  
v.  
CITY OF EAST GRAND RAPIDS, Appellee,  
and  
Spectrum Health Hospitals, Intervening Appellee.

No. 346413

|  
June 11, 2020

Kent Circuit Court, LC No. 18-005163-AA

Before: K. F. Kelly, P.J., and Fort Hood and Swartzle, JJ.

**Opinion**

Per Curiam.

**\*1** Our EGR Homeowners Alliance appeals by leave granted the trial court's order dismissing its appeal of zoning decisions made by City Commission of the City of East Grand Rapids. On appeal, Alliance argues that the trial court erred by concluding that Alliance failed to establish special damages as a result of the City Commission's decision and that, therefore, Alliance was not an "aggrieved party." However, because Alliance alleged speculative future damages that could possibly arise from the underlying construction activity and not specifically from the City Commission's decision, we affirm the trial court's dismissal of Alliance's appeal.

This case arises out of a construction project at the Spectrum Health Blodgett Hospital in East Grand Rapids, Michigan. Spectrum sought to replace an existing parking structure on the campus's southwest corner with a smaller parking garage and a surface lot, and to construct a new parking structure at the campus's northwest corner in place of an existing surface lot. The project would require the City Commission to approve two variances to the City's zoning ordinance—a variance to the setback requirement for the surface parking lot along Sherman Street and a variance regarding the percentage of building coverage on the lot. The City Commission would

also have to approve Spectrum's site plan for the project. The Planning Commission voted to allow the variances and approved the amended site plan following a meeting. The City Commission, sitting in place of the zoning board of appeals (ZBA), approved the requested variances and the site plan. The City Commission's approval of the site plan was conditioned on several requirements, including Spectrum's agreement to monitor the foundations of nearby homes during construction.

Alliance, a nonprofit corporation including various owners and occupants of real properties located immediately adjacent to or surrounding Blodgett Hospital, along with additional individual nearby homeowners, appealed the City Commission's decision to approve the variances and site plan to the trial court. The City and Spectrum both filed motions to dismiss the appeal, arguing that the appellants were not "aggrieved parties" pursuant to *MCL 125.3605*. The trial court agreed and dismissed the appeal. Alliance then filed an application for leave to appeal the trial court's order in this Court, which we granted. *Our EGR Homeowners Alliance v. East Grand Rapids*, unpublished order of the Court of Appeals, entered April 12, 2019 (Docket No. 346413).

Alliance's sole argument on appeal is that the trial court erred in dismissing its appeal of the City Commission's decision to approve the requested variances and site plan. We disagree.

This Court reviews "a circuit court's decision in an appeal from a decision of a zoning board of appeals ... de novo to determine whether the circuit court applied the correct legal principles and whether it misapprehended or grossly misapplied the substantial[-]evidence test to the [ZBA's] factual findings." *Olsen v. Chikaming Twp.*, 325 Mich. App. 170, 180; 924 N.W.2d 889 (2018) (quotation marks and citation omitted; second alteration in original.) This Court also reviews issues involving the construction of statutes and ordinances de novo. *Id.* Whether a party has standing is a legal question that is reviewed de novo. *Id.*

**\*2** Although municipalities have no inherent power to regulate land use through zoning, the Michigan Legislature granted this authority through the Michigan Zoning Enabling Act (MZEA), *MCL 125.3101 et seq.* *Id.* at 179. The Legislature combined three zoning acts into the MZEA, which grants local units of government authority to regulate land use and development through zoning. *Id.* "The MZEA also provides for judicial review of a local unit of



government's zoning decisions." *Id.* MCL 125.3605 provides that "[t]he decision of the zoning board of appeals shall be final. A party aggrieved by the decision may appeal to the circuit court for the county in which the property is located ...." MCL 125.3606(1) states:

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

- (a) Complies with the constitution and laws of the state.
- (b) Is based upon proper procedure.
- (c) Is supported by competent, material, and substantial evidence on the record.
- (d) Represents the reasonable exercise of discretion granted by law to the zoning board of appeals.

This Court stated that for a party to demonstrate that it was "aggrieved" pursuant to MCL 125.3605,<sup>1</sup> "a party must 'allege and prove that he [or she] has suffered some special damages not common to other property owners similarly situated[.]'" *Olsen*, 325 Mich. App. at 185, citing *Unger v. Forest Home Twp.*, 65 Mich. App. 614, 617; 237 N.W.2d 582 (1975) (alterations in original). Moreover, this Court clarified that "[i]ncidental inconveniences such as increased traffic congestion, general aesthetic and economic losses, population increases, or common environmental changes are insufficient to show that a party is aggrieved."

*Olsen*, 325 Mich. App. at 185. Rather, "there must be a unique harm, dissimilar from the effect that other similarly situated property owners may experience." *Id.* This Court determined that "mere ownership of an adjoining parcel of land is insufficient to show that a party is aggrieved." *Id.*

At the outset, the City argues that Alliance admitted in its application for leave to appeal that it could not establish that it was an aggrieved party pursuant to the standard in *Olsen*. According to the City, this appeal must fail because *Olsen* is binding on this Court and Alliance has already admitted that it cannot meet the *Olsen* standard. It is true that Alliance argued that this Court improperly interpreted provisions of the MZEA in *Olsen*. However, Alliance also asserts that, regardless of the analysis in *Olsen*, Alliance "members plainly meet the statutory test" as aggrieved parties.

Nonetheless, Alliance has failed to establish that it is an aggrieved party to challenge the City Commission's decision. Alliance asserts that the City and Spectrum are estopped from challenging Alliance's status as an aggrieved party because they recognized that adjacent landowners faced a risk of structural damage to their homes during construction. See *Spohn v. Van Dyke Pub. Sch.*, 296 Mich. App. 470, 480; 822 N.W.2d 239 (2012) (explaining that a party who successfully "asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding"). However, this is a mischaracterization of the record. Spectrum did agree to pay for the monitoring of nearby homes for structure damage. However, Spectrum never acknowledged that the project was likely to damage adjacent homes. Documents in the administrative record indicate that surrounding homes incurred damage from construction on the Blodgett campus in 2008. The likelihood of damage was discussed at a special meeting of the Planning Commission on February 6, 2018. Commissioner Brian Miller asked the senior vice president of facilities at Spectrum about vibrations from the construction and what would be different from the construction that occurred in 2008. He explained that construction techniques had changed. Spectrum would install temporary walls and propose a drilling process instead of driving pilings. Spectrum would improve communication with neighbors to alleviate anxiety and provide an independent survey of homes for damage that might occur. The vice president of Blodgett Hospital apologized for past issues. She stated that Spectrum would do everything possible to "make it right with this construction."

\*3 Moreover, the vice president of facilities showed a PowerPoint presentation at the March 20, 2018 Planning Commission meeting. One slide explained the site's soil condition and vibration assessment. According to the slide, there are two types of soil at the Blodgett Hospital campus. Type A was classified as a suitable soil with low vibration transmission, and Type B was classified as poor soil with moderate vibration transmission. The slide stated that the 2008 construction occurred in mostly Type B soil, while the proposed construction would occur in mostly Type A soil. Monitoring during the 2008 construction confirmed that perimeter vibration levels were below the "appropriate threshold." The new construction was not expected to cause damage to hospital buildings or adjacent homes. However, Spectrum would offer home surveys to adjacent neighbors. As a result, Alliance's assertion that Spectrum and the City

admitted that the construction was likely to cause damage to nearby homes is untrue. In fact, Spectrum presented the opposite, stating that the proposed construction would not damage adjacent homes.

This case is comparable to *Olsen*. Claims of aesthetic changes are insufficient to constitute special damages. See *Olsen*, 325 Mich. App. at 183 (stating that “a neighboring landowner alleging increased traffic volume, loss of aesthetic value, or general economic loss has not sufficiently alleged special damages to become an aggrieved party”). Further, like the septic systems at issue in *Olsen*, 325 Mich. App. at 186, vibrations from construction may affect nearby landowners. However, as was also the case in *Olsen*, Alliance has failed to show that its claim that the proposed construction will damage the foundations or driveways of nearby homes was “more than speculation or anticipation of future harm.” *Id.* Alliance has not provided any evidence disputing Spectrum’s claim that the construction will not cause harm to adjacent homes. Further, Alliance members submitted their own site plan proposals for Spectrum’s consideration that would require construction. Alliance members also admitted that the existing parking garage required replacement. Alliance has not established, however, that Spectrum’s requested variances and proposed site plan will result in more damage

than their own proposed plans or the simple replacement of the existing parking garage. In addition, Spectrum was granted variances for parking setbacks and maximum lot coverage in 2008. Alliance has not established that damage (or additional damage) will occur as a result of the approval of the requested variances. See *id.* at 181 (stating that an appellant must demonstrate that it was aggrieved by the decision of the ZBA rather than the underlying facts of the case). Ultimately, Alliance has not presented any evidence that the City Commission’s approval of the current variances and proposed site plan will cause the harm that it anticipates. See *id.* at 186-187. Because Alliance “failed to demonstrate special damages different from those of others within the community,” it was not “aggrieved” pursuant to MCL 125.3605, and accordingly, “did not have the ability to invoke the jurisdiction of the circuit court ....” *Id.* at 194. As a result, the trial court properly dismissed Alliance’s appeal of the City’s Commission’s approval of Spectrum’s requested variances and site plan. See *id.*

Affirmed.

#### All Citations

Not Reported in N.W. Rptr., 2020 WL 3121035

### Footnotes

- 1 Although the City Commission was only sitting as a ZBA when it granted the variances and approved the site plan, the parties’ arguments assume that MCL 125.3605 governs Alliance’s right to appeal the City Commission’s decisions.

# EXHIBIT 6



2020 WL 814703

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

KINGSBURY COUNTRY DAY SCHOOL  
and Kingsbury School, Inc., Appellants,

v.

ADDISON TOWNSHIP, Addison Township  
Zoning Board of Appeals, and New Par, doing  
business as Verizon Wireless, Appellees.

No. 344872

February 18, 2020

Oakland Circuit Court, LC No. 2017-160571-AA

Before: Cavanagh, P.J., and Beckering and Gadola, JJ.

## Opinion

Per Curiam.

\*1 Appellants, Kingsbury Country Day School and Kingsbury School, Inc., appeal as of right the circuit court's order affirming the decision of appellee, Addison Township Zoning Board of Appeals (the ZBA), which granted a nonuse variance to appellee, Addison Township (the Township). We reverse.

## I. FACTS

This appeal involves a parcel of land owned by the Township that consists of approximately 5.23 acres located at 5020 Hosner Road in Oxford Township. In 2016, appellee New Par, doing business as Verizon Wireless (Verizon), entered into an agreement with the Township to place a cellular tower on the parcel. In doing so, Verizon hoped to provide cellular service to its customers in what it describes as a service "dead zone." Under the agreement, Verizon would pay the Township approximately \$17,000 annually to place its tower on the Hosner Road property. The Township has designated the zoning of the parcel as Public Institutional 1 (P-1), and

the parties do not dispute that the proposed cellular tower is a permitted use in P-1 zoning.<sup>1</sup>

Section 4.47(4)(b)(3) of the Township's Wireless Communication Facilities ordinance requires that, for the placement of a cellular tower, "[t]he minimum lot size shall be twenty (20) acres." Thus, to locate the cellular tower on the Hosner Road property requires a dimensional variance for the parcel from the requirements of § 4.47(4)(b)(3) of the ordinance. In May 2017, the Township supervisor applied to the ZBA on behalf of the Township, seeking a dimensional variance for the parcel from the 20-acre requirement.

Kingsbury Country Day School is located on property adjacent to the Hosner Road parcel. The school is located partially on property owned by Kingsbury School, Inc. and leased to the school, and partially on property that the school leases from the Township. The parties do not dispute that if the cellular tower is constructed on the Hosner Road property in the location proposed, the school's playground is within the fall zone of the tower. The proposed tower would be 197 feet high and the placement of the cellular tower as planned would place the tower 90 feet from the boundary of the property adjoining the subject property where the school is located. The parties also do not dispute that § 4.47(4)(b)(3) of the Township's Wireless Communication Facilities ordinance requires that "[t]he setback of the [cellular tower] from all lot lines shall be no less than the height of the structure."

Although the Township's application requested a variance from the 20-acre dimensional requirement of the ordinance, the application did not specifically request a variance from the set-back requirement. However, during the public hearing on the application the Verizon representative speaking on behalf of the Township's application stated that the Township was requesting both a dimensional variance and a variance from the set-back requirement. After the public hearing on the Township's application, the ZBA held a second hearing and granted the application for the requested variance. The ZBA did not make any findings nor specify whether it was granting a variance from the set-back requirement.

\*2 Appellants appealed the ZBA decision to the circuit court. The circuit court determined that appellants were entitled to appeal to that court as "aggrieved parties," then remanded the case to the ZBA for a further public hearing on the issue of the fall zone of the proposed tower. The ZBA held a public hearing as directed by the circuit court and again



granted the variance. The circuit court thereafter affirmed the decision of the ZBA.

Appellants claimed an appeal as of right of the circuit court's decision to this Court. Appellees moved to dismiss the appeal under MCR 7.203(A)(1)(a), contending that this Court did not have jurisdiction to hear the appeal because the circuit court had been acting in its appellate capacity in reviewing the decision of a tribunal, requiring appellants to seek leave to appeal instead of claiming an appeal as of right. This Court denied the motions to dismiss, holding that appellees "have not shown that the Addison Township Zoning Board of Appeals was acting as a 'court' or 'tribunal' when it granted the application for variance at issue in this case. Therefore, MCR 7.203(A)(1)(a) does not apply and this Court has jurisdiction to hear this appeal as an appeal of right." *Kingsbury Country Day Sch. v. Addison Twp.*, unpublished order of the Court of Appeals, entered September 26, 2018 (Docket No. 344872).

Verizon again moved to dismiss the appeal, this time contending that this Court did not have jurisdiction because appellants are not "aggrieved parties" within the meaning of MCR 7.203(A)(1) and MCL 125.3606. This Court denied the motion to dismiss without prejudice to appellees raising that argument in their brief on appeal. *Kingsbury Country Day Sch. v. Addison Twp.*, unpublished order of the Court of Appeals, entered October 30, 2018 (Docket No. 344872).

## II. DISCUSSION

### A. JURISDICTION

As an initial matter, we address appellees' renewed assertions that this Court does not have jurisdiction to hear this appeal.

#### 1. THE ZBA AS TRIBUNAL

The Township and the ZBA contend that this Court lacks jurisdiction to hear this appeal because the circuit court's decision affirming the decision of the ZBA is not a final judgment appealable as of right under MCR 7.203(A)(1)(a). Appellants previously raised this issue in motions to dismiss filed with this Court on August 15, 2018, and August 27, 2018. This Court denied the motions and stated, in relevant part:

The motions to dismiss are DENIED. Defendants-appellees have not shown that the Addison Township Zoning Board of Appeals was acting as a "court" or "tribunal" when it granted the application for variance at issue in this case. Therefore, MCR 7.203(A)(1)(a) does not apply and this Court has jurisdiction to hear this appeal as an appeal of right. [*Kingsbury Country Day Sch. v. Addison Twp.*, unpublished order of the Court of Appeals, entered September 26, 2018 (Docket No. 344872).]

Generally, the law of the case doctrine provides that an appellate court's ruling on an issue binds the appellate court and all lower tribunals with respect to that issue. *Brownlow v. McCall Enterprises, Inc.*, 315 Mich. App. 103, 110; 888 N.W.2d 295 (2016). The rationale of this doctrine is the need for finality and the appellate court's lack of jurisdiction to modify its judgments except on rehearing. *Id.* Because this Court has already ruled upon this jurisdictional issue presented by the Township and the ZBA, ordinarily we would decline to again address this issue here. However, because subject matter jurisdiction is of such critical importance, we explain our previous ruling here for clarification. See *O'Connell v. Director of Elections*, 316 Mich. App. 91, 100; 891 N.W.2d 240 (2016).

\*3 MCR 7.203(A)(1)(a) provides that this Court does not have jurisdiction of an appeal claimed by right of "a judgment or order of the circuit court on appeal from any other court or tribunal." The Township and the ZBA suggest that the ZBA in this case was acting as a tribunal when it granted the zoning variance, and that the circuit court's order affirming the grant of the variance therefore was an order on appeal from a tribunal. An administrative agency that acts in a quasi-judicial capacity may be considered a tribunal for purposes of MCR 7.203(A)(1)(a). See *Natural Resources Defense Council v. Dep't of Environmental Quality*, 300 Mich. App. 79, 85-87; 832 N.W.2d 288 (2013). To determine whether an administrative agency was acting in a quasi-judicial capacity, we consider whether the agency's procedures are akin to court procedures. *Id.* at 86. Quasi-judicial proceedings include the procedural characteristics common to court proceedings, such



as the right to a hearing, to be represented by counsel, to present evidence, to subpoena witnesses, and to compel the production of documents. *Id.* Here, the decision of the ZBA was made after a public hearing that did not have these characteristics, and thus was not comparable to a court proceeding. The ZBA thus did not act in a quasi-judicial capacity and as a result was not acting as a “tribunal.” For that reason, as we previously determined in our order addressing this issue, the circuit court’s order was a final order under MCR 7.202(6)(a)(i), appealable as of right under MCR 7.203(A)(1).

## 2. APPELLANTS AS AGGRIEVED PARTIES

In its motion to dismiss filed with this Court on October 4, 2018, Verizon argued that this Court does not have jurisdiction to hear this appeal because appellants are not aggrieved parties under either MCL 125.3606(1) or MCR 7.203. This Court denied the motion, but without prejudice to appellees again raising this issue in their briefs on appeal. *Kingsbury Country Day Sch. v. Addison Twp.*, unpublished order of the Court of Appeals, entered October 30, 2018 (Docket No. 344872). As permitted by this Court’s order, Verizon in its brief on appeal has renewed its contention that this Court does not have jurisdiction to hear this appeal because appellants are not “aggrieved parties” within the meaning of § 606 of the Michigan Zoning Enabling Act (MZEA), MCL 125.3606(1), and therefore are not entitled to claim an appeal as of right of the decision of the ZBA.

We observe that although both MCR 7.203(A) and MCL 125.3606 use the term “aggrieved party,” the court rule and the statute address different situations. MCR 7.203(A) sets forth the jurisdiction of this Court to hear an appeal claimed as of right. That court rule provides, in relevant part:

(A) **Appeal of Right.** The court has jurisdiction of an appeal of right filed by an aggrieved party from the following:

(1) A final judgment or final order of the circuit court, or court of claims, as defined in MCR 7.202(6), ... [MCR 7.203(A).]

Thus, a party claiming an appeal as of right to this Court must be an aggrieved party within the meaning of MCR 7.203(A) to invoke the appellate jurisdiction of this Court. To be an aggrieved party within the meaning of MCR 7.203(A), the party must demonstrate “an injury arising from either the

actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case.” *Federated Ins. Co. v. Oakland Co. Rd. Comm.*, 475 Mich. 286, 292; 715 N.W.2d 846 (2006). In addition, to be aggrieved “one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency.” *Id.* at 291 (citations omitted). A party must be “more than merely disappointed over a certain result. Rather the party must have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court’s power.” *Id.* at 291-292. Stated another way, “[a] party who could not benefit from a change in the judgment has no appealable interest.” *Manuel v. Gill*, 481 Mich. 637, 644; 753 N.W.2d 48 (2008) (quotation marks and citation omitted).

In this case, the circuit court, having concluded that appellants were parties properly before that court, affirmed the decision of the ZBA to grant the variance to the Township and permit the construction of the cellular tower on the parcel adjacent to the school with the fall zone of the tower intersecting the school’s playground. This decision was contrary to appellants’ interests, which appellants characterize as loss of safety to the students and staff at the school, resulting in a loss of financial security for the school and a loss of financial value as a result of the threat of danger presented by the planned location of the cellular tower. Because appellants have demonstrated a pecuniary interest allegedly affected by the circuit court’s decision and a concrete and particularized injury arising from the circuit court’s decision, appellants are parties “aggrieved” by the decision of the circuit court. This Court therefore has jurisdiction under MCR 7.203(A) to review appellants’ claim challenging the circuit court’s decision.

\*4 Verizon contends, however, that the circuit court erred when it determined that appellants were properly before the circuit court as parties aggrieved by the decision of the ZBA.<sup>2</sup> The MZEA provides for judicial review of a zoning decision of a local unit of government to the circuit court by a party aggrieved by the decision. *Olsen v. Chikaming Twp.*, 325 Mich. App. 170, 179; 924 N.W.2d 889 (2018). Section 605 of the MZEA, MCL 125.3605, provides, in pertinent part:

The decision of the zoning board of appeals shall be final. A party aggrieved by the decision may appeal to the circuit court for the county



in which the property is located as provided under [MCL 125.3606].

Thus, a party seeking relief from a decision of a ZBA in the circuit court is required to demonstrate that he or she is an “aggrieved” party under the MZEA. *Olsen*, 325 Mich. App. at 180-181. We review de novo the circuit court’s determination that appellants are aggrieved parties under the MZEA, and hold that the circuit court in this case did not err in this determination. See *Olsen*, 325 Mich. App. at 180.

Under the MZEA, as under MCR 7.203(A), to be a party aggrieved “one must have some interest of a pecuniary nature in the outcome of the case and not a mere possibility arising from some unknown and future contingency” and “have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court’s power.” *Olsen*, 325 Mich. App. at 181. This Court has consistently required that to be a party aggrieved by a zoning decision, “the party must have ‘suffered some special damages not common to other property owners similarly situated[.]’ ” *Olsen*, 325 Mich. App. at 183, quoting *Unger v. Forest Home Twp.*, 65 Mich. App. 614, 617; 237 N.W.2d 582 (1975), and must have they suffered a “unique harm different from similarly situated community members.” *Id.* at 186.

In this case, appellants assert that unlike other property owners or members of the community, they are aggrieved parties because the cellular tower is a fall risk to the school. To the extent that appellants allege that the school, and the students attending the school, are at heightened risk if the cellular tower were to collapse, and that enrollment could decline as a result of the fall risk of the tower, such considerations constitute special damages not incurred by other members of the community. Put another way, these potential harms are unique and dissimilar from effects that other property owners may experience as a result of the placement of the tower on the subject property. The circuit court therefore properly concluded that appellants are aggrieved parties under MCL 125.3605 and were entitled to appeal to that court from the decision of the ZBA as “aggrieved parties” of the ZBA’s decision.

## B. THE CIRCUIT COURT DECISION

Having reiterated that appellants are properly before this court, and having concluded that appellants were properly

before the circuit court, we next consider appellants’ challenge to the decision of the circuit court affirming the ZBA’s decision. Appellants contend that the circuit court incorrectly determined that the ZBA’s decision was supported by competent, material, and substantial evidence on the record and further contend that the ZBA failed to comply with its own variance ordinance and cell tower ordinance. We agree.

\*5 The MZEA provides for judicial review of the zoning decisions of a local unit of government. *Olson*, 325 Mich. App. at 179. In that regard, MCL 125.3606 provides, in pertinent part:

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

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

(b) Is based upon proper procedure.

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

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

\* \* \*

(4) The court may affirm, reverse, or modify the decision of the zoning board of appeals. The court may make other orders as justice requires.

“Substantial evidence” means evidence that a reasonable person would accept as sufficient to support a conclusion, and is considered to be more than a scintilla of evidence but “substantially less than a preponderance.” *Edw. C. Levy Co. v. Marine City Zoning Bd. of Appeals*, 293 Mich. App. 333, 340-341; 810 N.W.2d 621 (2011). Under the substantial evidence test, the circuit court’s review of the ZBA’s decision is not de novo and the circuit court does not draw its own conclusions from the evidence, nor does the circuit court substitute its judgment for that of the ZBA, but instead determines whether, giving deference to the ZBA’s factual findings, the ZBA’s decision is supported by substantial evidence. *Id.* at 341.

Our review of a circuit court’s decision in an appeal from a decision of a ZBA is de novo to determine whether the



circuit court “applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the [ZBA’s] factual findings.” *Olsen*, 325 Mich. App. at 180, quoting *Hughes v. Almena Twp.*, 284 Mich. App. 50, 60; 771 N.W.2d 453 (2009) (quotation marks and citation omitted). But although the factual findings of the ZBA are entitled to deference, the manner in which a zoning ordinance applies to those facts is a question of law which this Court determines de novo. *Great Lakes Society v. Georgetown Charter Twp.*, 281 Mich. App. 396, 408; 761 N.W.2d 371 (2008). We review and interpret ordinances in the same manner as we do statutes, and thus the interpretation and application of a municipal ordinance presents a question of law that we review de novo. *Id.* at 407. If the language of an ordinance is unambiguous, we are required to enforce the ordinance as written. *Kalinoff v. Columbus Twp.*, 214 Mich. App. 7, 10; 542 N.W.2d 276 (1995). In applying this statutory standard, we are guided by our Supreme Court’s statement under the prior, now repealed zoning statute that “[w]here the facts relating to a particular use are not in dispute, the legal effect of those facts, that is, how the terms of the ordinance are to be interpreted in relation to the facts, is a matter of law, and the courts are not bound by the decision of administrative bodies on questions of law.” *Macenas v. Michiana*, 433 Mich. 380, 395; 446 N.W.2d 102 (1989) (quotation marks and citation omitted).

\*6 In this case, the Township applied for a dimensional variance for the Hosner Road parcel from the 20-acre requirement of the Township’s wireless communications ordinance. At the public hearing on the application, a Verizon representative provided additional information and answered questions on behalf of the applicant. Numerous citizens made public comments against the requested variance. At the following hearing, the ZBA granted the application. The ZBA did not make any factual findings on the record nor state its reasons for granting the application. Instead, at the conclusion of the ZBA’s second hearing on the application on July 13, 2017, a member of the ZBA moved to approve the Township’s variance application, stating:

First, I want to start off by saying many people have asked why the township doesn’t enforce ordinances as they’re written. The township has enforced the ordinance[s] as they were written because they have denied or rejected the application because it didn’t meet the ordinance. So the township did what they -- the planning commission did what they did.

This board is existing to allow applicants to come and explain why they can’t meet the ordinances. And most of what we’ve been talking about the last couple months have been based on why this variance, acreage variance, is necessary.

The comments that I’ve heard from people in the public hearing and other stuff that has been sent to the township in my mind breaks down into two basic categories. One is fear of radiation, electromagnetic radiation. Number two is fear of or danger from the tower falling down. And the third is that the tower is ugly; or to say that a different way, it doesn’t fit into the rural character of Addison Township.

As far as the EMF radiation’s concerned, there is a federal law that’s Section 704 of the Federal Telecommunications Act of 1996 specifically preempts consideration – let me read it so I get it right here – specifically preempts consideration of the health and environmental setbacks of radiofrequency radiation at levels below federal current – Federal Communications Commission standards in decisions involving placement and construction and modification of wireless facilities. We cannot use fear of EMF radiation as a reason to approve or disapprove a variance. That’s a federal law.

The danger from a falling down tower I think has been described pretty well. The township says that the ordinance is written the way it is, 120 [sic] acres. So that [a] tower [that] is held up by [guy] wires will have a fall zone equal to the height of the tower. The tower – and the research I’ve been able to do, in Michigan there has never been a cell phone tower fail. I don’t know where that picture comes from; I don’t believe it’s Michigan ...

Building codes. There has never been a cell phone tower failure in Michigan for Verizon or any other service provider that I’ve been able to determine.

Number three, the tower is ugly or not [in] keeping with our rural character. This board really isn’t qualified to judge ugly; none of us probably would be on the board.

The meaning of rural character is not really very substantive. We would like to think of it as the last 20 years or 50 years. But certainly, if you go back to 100 years, go back to the year 1900, there was no refrigeration or supermarkets. That was the rural character at that time.



I don't think that would be acceptable to the people today. You know, CAT scans and kidney dialysis were unknown. We don't want to go back to that. There was no telecommunications of any kind in 1900. That was the rural character of this township at that time. I think we need to progress.

Having said all that, I'd like to make a motion that we approve the variance, acreage variance, for petition number 17-02.

\*7 Although the ZBA then discussed certain requirements of the site plan, the ZBA thereafter voted to grant the variance without making findings regarding whether the application met the Township's ordinance for granting the application. Appellants appealed to the circuit court, which found that the ZBA had not created a sufficient record regarding the potential danger presented by the fall zone of the tower and remanded the matter to the ZBA for a further public hearing. The ZBA conducted another public hearing, during which Verizon, on behalf of the Township's application, provided further assurances that the tower cannot fall. A member of the ZBA thereafter again moved to grant the variance, stating that the record evidence supported the conclusion that the design of the tower prevented the tower from falling. The ZBA then voted to grant the variance, but without making further findings. The circuit court thereafter affirmed the order of the ZBA under MCL 125.3606(4).

Appellants contend that the Township's application did not meet the requirements of the Township's variance ordinance that would enable the ZBA to grant the variance, and that the ZBA's decision therefore was not supported by competent, material, and substantial evidence. We agree.

By enacting the MZEA, our Legislature has granted local units of government authority to regulate land use and development through zoning. *Maple BPA, Inc. v. Bloomfield Charter Twp.*, 302 Mich. App. 505, 515; 838 N.W.2d 915 (2013). Section 604 of the MZEA empowers a local ZBA to grant variances from a zoning ordinance as follows, in pertinent part:

(7) If there are practical difficulties for nonuse variances as provided in subsection (8) or unnecessary hardship for use variances as provided in subsection (9) in the way of carrying out the strict letter of the zoning ordinance, the zoning board of appeals may grant a variance in accordance with this section, so that the spirit of the zoning ordinance

is observed, public safety secured, and substantial justice done. The ordinance shall establish procedures for the review and standards for approval of all types of variances. The zoning board of appeals may impose conditions as otherwise allowed under this act.

(8) The zoning board of appeals of all local units of government shall have the authority to grant nonuse variances relating to the construction, structural changes, or alteration of buildings or structures related to dimensional requirements of the zoning ordinance or to any other nonuse-related standard in the ordinance. [MCL 125.3604(7), (8).]

In this case, the Township's variance ordinance sets forth the standards for approval for a variance as follows:

#### Section 28.10 – Zoning variances.

The board of appeals may upon appeal of a specific case authorize such variance from the terms of this ordinance as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of this ordinance would result in practical difficulty. **A variance from terms of this ordinance shall not be granted by the board of appeals unless and until:**

1. A written application for a variance is submitted demonstrating:
  - a. That special conditions and circumstances exist which are peculiar to the land, structure or building involved and which are not generally applicable to other land, structures or buildings in the same zoning district.
  - b. That literal interpretation of the provisions of this ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of this ordinance.
  - c. That the special conditions and circumstances do not result from the actions of the applicant or his or her predecessor.
  - d. That granting the variance requested will not confer on the applicant any special privileges that are denied by this ordinance to other lands, structures or buildings in the same zoning district.
  - e. No nonconforming use of neighboring land, structures or buildings in other districts shall be considered grounds for the issuance of a variance. [Emphasis added.]



\*8 In this case, the Township sought a variance from the Township's wireless communication facilities ordinance that provides, in pertinent part:

Section 4.47 – Wireless communication facilities.

(4) b. Standards and conditions applicable to special land use facilities. Wireless communication facilities as described in Subparagraph(3)(b) shall be permitted only after special approval is granted by the planning commission in accordance with the procedures, requirements and standards set forth in this section and in Article 30, and subject to any conditions imposed by the planning commission. The following standards shall be met:

\* \* \*

- 2) The minimum lot size shall be twenty (20) acres.
- 3) The setback of the support structure from all lot lines shall be no less than the height of the structure. Structures shall be set back from existing or proposed right-of-way line an additional fifty (50) feet beyond the height of the structure.

The Township's application for the variance stated in pertinent part:

Applicant requests a variance for the placement of [a] wireless communication facility. A dimensional variance for lot area of 14.76 acres from zoning ordinance provisions: wireless communication facilities Article 4.47, Section 4.b2 "the minimum lot size shall be twenty (20) acres."

1. Due to the topography of this site, the site does not require the 20 acres.
2. The westerly property line on Hosner Road is shielded by a large hill. The base will not be visible from Hosner Road.
3. The parcel is vacant. Unlike other locations, there is no need to construct close to the road; the proposed tower is located 200 feet from the centerline of Oakwood Road. The selected location provides a natural landscape barrier for the surrounding properties.
4. The site will not house accessory wireless structures.
5. Proposed monopole collapsible tower does not require a fall zone.

6. The site area is carefully selected so that [placement of the tower] will not disturb the wetlands.

7. The fenced site area shall be shielded with 6-7 foot evergreen trees for year round visual protection as provided by Verizon and must be approved by the site plan process.

Thereafter, the Township supervisor submitted further correspondence to the ZBA citing the requirements of the Township's variance ordinance and explaining that the intent of the Township wireless communication facilities ordinance "is to have the wireless facilities on larger parcels in certain ... districts to avoid placement in a residential zone and for the larger parcels to 'hide' the cell tower." The Township supervisor further explained:

Thus, the objective of the 20 acres [requirement] is to ensure that the cell tower is protected from view to the best extent possible. Historically, most wireless facilities are placed as close to the road as possible. Although our ordinance asks for a larger parcel, we cannot ask for the tower to be more centrally located. We are accomplishing this objective by using the parcel selected. We have a parcel that will be protected from future building projects. We are minimizing the disturbance to the natural features and visual impact. We will use the driveway to access the cemetery so we no longer disturb the school. The portion of the parcel that we lease to the school is not calculated in the parcel size. In summary, the parcel selected shields the cell tower by natural topography and accomplishes the goals and objectives of the applicable ordinances.

\*9 Although the ZBA thereafter granted the requested variance, the ZBA did not make factual findings nor articulate whether the Township had met the requirements established by the Township's ordinance for granting a



variance. Specifically, the ZBA did not articulate whether the Township had established

- a. That special conditions and circumstances exist which are peculiar to the land, structure or building involved and which are not generally applicable to other land, structures or buildings in the same zoning district.
- b. That literal interpretation of the provisions of this ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of this ordinance.
- c. That the special conditions and circumstances do not result from the actions of the applicant or his or her predecessor.
- d. That granting the variance requested will not confer on the applicant any special privileges that are denied by this ordinance to other lands, structures or buildings in the same zoning district.

Further, our review of the record indicates no support for the conclusion that the Township's application established these standards. The Township's application does not demonstrate that the parcel has special conditions and circumstances peculiar to it that are not generally applicable to other parcels in the same zoning district. A review of the record suggests that the parcel has neither a special condition nor a peculiar circumstance different from other parcels in the zoning district; it is simply too small to meet the dimensional requirement established by the Township's ordinance.

Rather than demonstrating that the parcel has a special condition or peculiar circumstance necessitating a variance, the Township's variance application addresses why the site is a desirable one for a cellular tower, suggesting that the topography of the subject property is so desirable for this purpose that a 20-acre parcel is not necessary. However, apparently because part of the 5-acre parcel consists of wetlands, to construct the tower on the parcel apparently requires that the tower be placed only 90 feet

from the property line, contrary to the Township's ordinance requirement that the tower be placed as far from the property line as the tower is tall. This proximity of the tower site to the property line became one of the main points of contention during the public hearing, creating great public concern whether the fall zone of the tower poses a danger to the school next door. The record thus suggests that the size and topography of the parcel, far from being ideal, creates public concern likely avoidable on a larger parcel.

Similarly, although the Township's application states that denial of the variance would deny the Township the rights that are availed to other properties in the area that are zoned appropriately, the Township's application does not demonstrate that this is so. The Township's ordinance requires all parcels to be 20 acres or more to be an acceptable site for location of a cellular tower. Nothing in the Township's application demonstrates that other parcels that are smaller than 20 acres enjoy the right to host a cellular tower. Similarly, the Township's application does not demonstrate that granting the variance would not confer on the Township "special privileges" that are denied by virtue of the zoning ordinances to other parcels in the same zoning district. Because the ZBA did not make findings that the Township met the standards for granting a variance under the Township's variance ordinance, and because the Township's application did not demonstrate entitlement to a variance under the Township's variance ordinance, the circuit court erred in concluding the ZBA's decision was supported by competent, material, and substantial evidence on the record and was not an abuse of the ZBA's discretion.

**\*10** In light of our determination, we decline to reach appellants' additional arguments that their due process rights were violated by the decision of the ZBA.

Reversed.

#### All Citations

Not Reported in N.W. Rptr., 2020 WL 814703

#### Footnotes

- 1 Section 4.47(3)(b) of the Township's Wireless Communications Facilities ordinance provides that wireless communications facilities are a permitted accessory use within a district zoned P-1 after special land use approval is granted by the Township's planning commission.
- 2 Although considering whether a party is "aggrieved" within the meaning of [MCL 125.3605](#) is similar to considering whether a party is "aggrieved" within the meaning of [MCR 7.203](#), [Olsen v. Chikaming Twp.](#), 325 Mich. App. 170, 179; 924 N.W.2d 889 (2018), whether the circuit court correctly determined that appellants were properly before that court because they

were “aggrieved parties” under § 606 of the MZEA, [MCL 125.3606\(1\)](#), is a separate question that does not implicate the jurisdiction of this Court under [MCR 7.203\(A\)](#).

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# EXHIBIT 7

2020 WL 2096049

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.UNPUBLISHED  
Court of Appeals of Michigan.

Susan D. BAKER, Appellant,

v.

TOWNSHIP OF BAINBRIDGE and Bainbridge  
Township Zoning Board of Appeals, Appellees.

No. 347362

April 30, 2020

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

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

**Opinion**

Per Curiam.

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

The underlying facts in this case are not in dispute. Baker owns and lives in a home located on a parcel of land within the boundaries of appellee Bainbridge Township (the township). Baker's property adjoins land owned by Steven F. Schrage. Both parcels are situated in a district zoned agricultural and are surrounded by farmland. At some point, Schrage, who resides on the property with his family, built an automotive repair facility on the land without permission from the township. He then sought to expand his operation

to include a used car dealership. Schrage requested a special land use permit from the township that would allow him to operate the businesses. The township's planning commission denied the request. Schrage then appealed the planning commission's decision to the ZBA. Baker submitted a letter to the ZBA opposing Schrage's request, explaining that she did not want a commercial facility next to her house in the country that disrupted her use and enjoyment of the home. Baker's attorney also submitted a letter in opposition to Schrage's request. Baker posited that the particular special land use permit Schrage sought was not even available in an agricultural zone. Nevertheless, on December 13, 2017, the ZBA approved the issuance of a special land use permit thereby allowing Schrage to operate both his car repair business and a used car dealership. The permit was issued the next day.

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

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



an aggrieved party, Baker executed and relied on an affidavit in which she averred as follows:

5. I can easily see and hear all the activities of Schrage's auto repair business and used car dealership.

6. I can see from my bedroom window the auto repair facility and can also see the auto repair facility from my back deck.

7. I have heard banging noises from the auto repair facility, the loud noise of the impact wrench and the revving of car engines.

8. I see all the comings and goings of the delivery vehicles, the customers, the testing of vehicles by Schrage, and the hauling of vehicles in and out on flatbed trucks.

9. In fact, my driveway is immediately adjacent to Schrage's driveway.

10. Further, I have a hot tub on my back deck and I see and hear all the loud activities of the auto repair business and used car dealership.

11. I observe tool trucks in and out, UPS delivery trucks in and out, the Schrage's employees coming in and out.

12. I hear the testing of motor vehicles, the revving of their engines and banging noises associated with repairing the engines and cars and other vehicles.

13. I observe cars parked all over Schrage's property, sometimes 10 or more.

14. I very rarely use my deck anymore or go in my backyard because all of the activities of these businesses; people using the businesses; servicing the business and employees at the business and the loss of my privacy connected therewith.

14. I I I am constantly exposed to the noises and visual impact from these businesses and the auto repair shop is close enough where I will be exposed to the smells associated with repairing automobiles and trucks, including but not limited to degreasing, cleaning solvents, engine oil, anti-freeze, transmission fluids, brake fluids, refrigerants, the sm[e]ll of oily rags, leaking vehicles and the smells from accidental spills and leaks associated with these processes.

15. The presence of these 2 businesses are and shall interfere with the beneficial use and enjoyment of my own land, deck and backyard. I no longer have a peaceful, quiet home. I can no longer sit and relax in my hot tub.

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

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

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

\*3 (a) Complies with the constitution and laws of the state.

(b) Is based upon proper procedure.

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

(d) Represents the reasonable exercise of discretion granted by law to the zoning board of appeals. And the circuit court "may affirm, reverse, or modify the decision of the zoning board of appeals" or "may make other orders as justice requires." MCL 125.3606(4). "Our review of a circuit court's decision in an appeal from a decision of a zoning board of appeals is de novo to determine whether the circuit court applied the correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the ... factual findings." *Olsen*, 325 Mich. App. at 180 (quotation marks and citations omitted). "In addition, we review de novo issues involving the construction of statutes ...." *Id.*



We begin with a discussion of *Olsen*. In *Olsen*, the applicant land owner requested a nonuse dimensional variance that would allow him to construct a cottage on his land where his lot was otherwise too small to build upon under the controlling ordinance and where the rear-setback line for the planned cottage would otherwise violate the minimum rear-setback requirement of the ordinance. *Id.* at 175. The zoning board of appeals voted to approve the request for a variance despite objections by neighboring property owners.

*Id.* at 176. The neighboring property owners filed an appeal of the decision in the circuit court, which determined that they were aggrieved parties and that the zoning board of appeals did not have the authority to grant the variance.

*Id.* at 177. The applicant land owner appealed to this Court, arguing that the neighboring property owners lacked standing to challenge the decision of the zoning board of appeals.

*Id.* at 178-179. This Court held that the neighboring property owners were not aggrieved parties; therefore, they were unable “to invoke judicial review by the circuit court.”

*Id.* at 179.

The *Olsen* panel examined the language in MCL 125.3605 requiring a party to be “aggrieved” in order to appeal a decision by a zoning board of appeals. The Court noted that the issue did not technically concern a question of “standing.”

*Olsen*, 325 Mich. App. at 180-181.<sup>2</sup> This Court reviewed numerous authorities addressing the term “aggrieved party” as used in the court rules and in zoning contexts outside of the current version of MCL 125.3605. *Id.* at 181-185. The *Olsen* panel extrapolated from the rules and caselaw the following principles:

Given the long and consistent interpretation of the phrase “aggrieved party” in Michigan zoning jurisprudence, we interpret the phrase “aggrieved party” in § 605 ... consistently with its historical meaning. Therefore, to demonstrate that one is an aggrieved party under MCL 125.3605, a party must allege and prove that he or she has suffered some special damages not common to other property owners similarly situated. Incidental inconveniences

such as increased traffic congestion, general aesthetic and economic losses, population increases, or common environmental changes are insufficient to show that a party is aggrieved. Instead, there must be a unique harm, dissimilar from the effect that other similarly situated property owners may experience. Moreover, mere ownership of an adjoining parcel of land is insufficient to show that a party is aggrieved, as is the mere entitlement to notice. [*Id.* at 185 (quotation marks, citations, and alterations omitted).]

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

We hold that Baker is an aggrieved party for purposes of MCL 125.3605 and that the instant case is distinguishable from *Olsen*. We first note that the impact of an automotive repair facility and used car dealership located on the surrounding, and zoned, agricultural environment, including Baker’s home, is certainly more extreme than the simple construction of a cottage on a smaller than required lot with a shorter than required rear-setback line. Further, there is nothing in the *Olsen* opinion suggesting or indicating that the neighboring property owners alleged any harm unique to any one particular owner. Evidently, the neighboring property owners merely alleged general, generic claims of aesthetic, ecological, and practical harm incurred by all the owners. Here, Baker’s affidavit set forth specific claims of harm in the form of sights, sounds, smells, and privacy invasion *unique to her property* when considered in conjunction with the aerial photographic evidence showing Baker’s and Schrage’s properties and the surrounding agricultural landscape. See *Olsen*, 325 Mich. App. at 185 (“general aesthetic” harm does not suffice; “[i]nstead, there must be a unique harm, dissimilar from the effect that other similarly situated property



owners may experience”). Baker’s property and Schrage’s land are side-by-side, surrounded by farmland. Indeed, there truly is no other occupied property similarly situated to Baker’s parcel when compared to the parcel’s proximity and exposure (line of vision) to Schrage’s car repair operation and a prospective used car dealership. Because of her unique position of being located next to Schrage’s business operation, Baker’s ability to use and enjoy her property has been detrimentally affected by the ZBA’s decision to grant Schrage’s request for a special land use permit. The noise, sights, smells, and lack of privacy Baker now experiences because of the automotive repair facility, without even considering the addition of a used car lot, are not general concerns or harms experienced by others in the township. While persons in the general vicinity might hear the same sounds, what they may hear would be much less than those constantly bombarding Baker’s senses being immediately adjacent to the businesses. The simple fact is that Baker’s home, and her home alone, is right next to and directly overlooks the car repair facility and would also be so situated

in regard to a future used car operation; therefore, she suffers or would suffer unique harm unlike that incurred by anyone else. In sum, we must conclude that Baker is an aggrieved party for purposes of [MCL 125.3605](#). Because the circuit court never reached the substance of Baker’s appellate challenge of the ZBA’s decision, we must allow the court to do so, i.e., at this juncture it would not be prudent or proper for us to address any other issues on appeal in this matter.

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

#### All Citations

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

#### Footnotes

- 1 Two of the averments were numbered 14.
- 2 The “aggrieved party” language in the court rules in connection with claims of appeal to the circuit court, [MCR 7.103\(A\)](#), and this Court, [MCR 7.203\(A\)](#), regards the issue of jurisdiction.
- 3 In support of this proposition, the *Olsen* panel relied solely on [Unger v. Forest Home Twp.](#), 65 Mich. App. 614; 237 N.W.2d 582 (1975). [Olsen](#), 325 Mich. App. at 186. In [Unger](#), 65 Mich. App. at 617, this Court observed:  

In order to have any status in court to challenge the actions of a zoning board of appeals, a party must be aggrieved. The plaintiff must allege and prove that he has suffered some special damages not common to other property owners similarly situated.

It has been held that the mere increase in traffic in the area is not enough to cause special damages. Nor is proof of general economic and aesthetic losses sufficient to show special damages. Consequently, when the plaintiff alleges facts showing only those type of damages, summary judgment against him is proper. [Quotation marks and citations omitted.]

# EXHIBIT 8

2019 WL 5092617

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.UNPUBLISHED  
Court of Appeals of Michigan.

## DEER LAKE PROPERTY OWNERS ASSOCIATION,

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

No. 343965

|  
October 10, 2019

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

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

## Opinion

Per Curiam.

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

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

## I. BACKGROUND AND PROCEDURAL HISTORY

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

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

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

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

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

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

The Property Owners appealed the Commission's decision to the circuit court and the Knolls joined as an intervening party. The Property Owners argued that the Commission's decision failed to comply with state law, was not based on proper procedure, and was not supported by competent, material, and substantial evidence on the record, and thus amounted to an abuse of discretion. The Property Owners also argued that the Commission's decision violated MCL 125.3508, that the outlot did not qualify for special land

use approval, and that the only credible evidence presented weighed against granting the SLUP. The Property Owners theorized that the seasonal docks constituted a "marina" which required permitting by the MDEQ pursuant to various provisions of Michigan's Natural Resources and Environmental Protection Act ("NREPA"), and created nuisance conditions for neighboring property owners. The Property Owners requested a stay to prevent construction of the seasonal docks until the instant appeal was resolved.

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

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

## II. UNLAWFUL EXPANSION OF THE NVC



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

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

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

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

B. Keyhole Water Access Prohibited. Keyhole water access shall be prohibited, except as may be permitted and approved under subsections C. and D. below.

C. Special Land Use Approval for Private Access Property.

1. In any zoning district where a parcel of land is contiguous to a lake, special land use approval under Article 7.0 of this Zoning Ordinance is required, except as specifically

exempted in subsections 2 and 3, below, to use all or any portion of such parcel as private access property.

2. Special land use approval is not required for property for the sole purpose of swimming and/or day usage.

3. Special land use approval is not required for direct water access from individual parcels occupied as a single family residence.

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

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

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

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



a prior nonconforming use is generally not permitted. *Edw C Levy Co.*, 293 Mich. App. at 342.

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

### III. COMPETENT, MATERIAL, SUBSTANTIAL EVIDENCE

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

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

"Substantial evidence" is evidence that a reasonable person would accept as sufficient to support a conclusion. While this requires more than a scintilla of evidence, it may be substantially less than a preponderance. Under the substantial-evidence test, the circuit court's review is not de novo and the court is not permitted to draw its own conclusions

from the evidence presented to the administrative body. Courts must give deference to an agency's findings of fact. When there is substantial evidence, a reviewing court must not substitute its discretion for that of the administrative tribunal even if the court might have reached a different result. A court may not set aside findings merely because alternative findings also could have been supported by substantial evidence on the record. [Internal quotation marks, footnotes, and citations omitted.]

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

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

In essence, the Property Owners are requesting that this Court consider the same evidence but draw a different conclusion. We decline to do so, as our role is to determine only whether the Commission's decision is supported by competent, material, and substantial evidence on the record,



which we find it was. *Edw C Levy Co.*, 293 Mich. App. at 340–41 (“A court may not set aside findings merely because alternative findings also could have been supported by substantial evidence on the record.”).

#### IV. AGGRIEVED PARTY

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

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



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


land is insufficient to show that a party is aggrieved, [*Village of Franklin*, 101 Mich. App. at 557–558], as is the mere entitlement to notice, *Brink*, [81 Mich. App. at 102–103]. [*Id.* at 185.]

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

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

The Knolls argues that *Higgins Lake* is factually distinguishable because it concerned the issue of whether a homeowners association had standing as a nonprofit, not whether it had alleged harm sufficiently. At issue in that case was the scope of the public's right to use road ends on Higgins Lake. [*Higgins Lake*, 255 Mich. App. at 88. The subdivision plats dedicated the streets and alleys “to the use of the public” and backlot owners used the road ends for “lounging, sunbathing, and picnicking,” as well as mooring boats and placing boat hoists at the road ends. *Id.* The plaintiffs argued that these activities exceeded the

scope of the dedication and that the dedication was limited to access only while the defendants presented evidence of the traditional and historical uses of the road ends, which included sunbathing, picnicking, lounging, and boat mooring for many years.  *Id.* at 89, 92. This Court concluded that the association had standing, where it had “alleged overuse of, and concentration of persons and watercraft, at the road ends [affected] its members' enjoyment of the lake as well as their property values.”  *Id.* at 91.

The Knolls argues that the Property Owners failed to allege harm sufficient to meet this standard. Although overburdening is a generalized harm that is not directly tied to the SLUP decision, the other alleged harms of affected property values, and aesthetic and environmental impacts are sufficiently pleaded. While “[i]ncidental inconveniences such as ... general aesthetic and economic losses, population increases, or common environmental changes are insufficient to show that a party is aggrieved,”  *Olsen*, 325 Mich. App. at 185, the Property Owners pleaded more than mere generalized harms. In particular, the Property Owners alleged that the additional docks may disrupt or destroy the shoreline and its ecosystem. As riparian owners who share this

shoreline, they have an interest beyond that of other lake users, the public at large, or even similarly situated neighbors. Moreover, the Property Owners are more likely to be affected by these additions and line of sight alterations than the public, or other lake users, by virtue of their proximity to the outlot and the situation of its members respective properties in relation to the outlot. Accordingly, the Property Owners are an “aggrieved party.”

## V. CONCLUSION


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

Affirmed.

## All Citations

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

## Footnotes

- 1 Hereinafter defendant-appellees Charter Township of Independence and its Planning Commission are collectively referred to as “Independence.” Where appropriate to differentiate between the two, the Charter Township of Independence is referred to as the “township” and the Charter Township of Independence Planning Commission is referred to as the “Commission.”
- 2 To be precise, “land which includes or abuts a river is defined as riparian, while land which includes or abuts a lake is defined as littoral.”  *2000 Baum Family Tr v. Babel*, 488 Mich. 136, 138 n. 1; 793 N.W.2d 633 (2010) (citation omitted). “However, the term ‘riparian’ is often used to describe both types of land,” and will be used in such a manner herein. *Id.* (internal quotation marks and citation omitted).
- 3 Keyhole water access is “[t]he use of property that adjoins or extends into a lake for water access by owners or occupants of other property that does not adjoin or extend into a lake.” Charter Township of Independence Zoning Ordinance Article 2, § 2.02. Water access is “[t]he launching, mooring and/or docking of watercraft.” Article 2, § 2.02.
- 4 That case was dismissed by stipulation, subject to the conditions stated in the consent order, which permits the Knolls to reinstate the matter after the instant appeal is concluded.
- 5 The circuit court's ruling on the declaratory judgment is not challenged here. However, the circuit court reasoned that, although the Property Owners moved under the proper court rule (*MCR 2.605* which governs declaratory relief), what it actually was seeking was a temporary stay pending resolution of the issue of whether a MDEQ permit was required to install the docks. The circuit court characterized it as an injunction and noted that the Property Owners did not cite or argue the appropriate standard. The circuit court went on

to find that the Property Owners were not likely to succeed on the merits (the only injunction factor discussed in its motion). The Property Owners' nuisance claim based on MDEQ permitting was premature and that, contrary to Property Owners' assertion, seasonal docking structures did not constitute a marina under NREPA anyway.

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# EXHIBIT 9

Sec. 40-72. - Jurisdiction and power.

- (a) The Board of Appeals shall have all the powers and jurisdiction granted by the Zoning Act and all powers and jurisdiction prescribed in other sections of this chapter, including the specific power and jurisdiction to:
  - (1) Hear and decide appeals from and review of any order, requirement, decision or determination made by the Zoning Administrator or the Planning Commission, except as provided in subsection (b) below. On appeal by any party affected thereby, the Board of Appeals may reverse or affirm, wholly or partly, or may modify any order, requirement, decision or determination of the Zoning Administrator or the Planning Commission. Such repeal or review must be requested within 45 days of such order, requirement, decision or determination.
  - (2) Act upon all questions as they may arise in the administration and enforcement of this chapter, including the interpretation of the zoning map and the text of this chapter.
  - (3) Authorize a Variance or modification of this chapter where there are practical difficulties or unnecessary hardships in carrying out the strict letter of this chapter, so that the spirit of this chapter shall be preserved.
- (b) The Board of Appeals shall not have the authority to hear appeals from a decision on a special approval use, planned unit development, or rezoning.

(Ord. No. 39, § 10.02, 5-20-1987; Ord. No. 2018-03, § 1, 6-20-2018)

# EXHIBIT 10



2010 WL 1052284

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.UNPUBLISHED  
Court of Appeals of Michigan.

Paul M. LUBIENSKI, George Lubienski, Rose Marie  
Lubienski, Walter Lubienski, Mary Flanagan, Robert  
Flanagan, Oakridge Estates Development, LLC,  
and Arbor Heights, LLC, Plaintiffs-Appellants,

v.

SCIO TOWNSHIP and SCIO Township  
Board Of Trustees, Defendants-Appellees.

Paul M. Lubienski, George Lubienski, Rose Marie  
Lubienski, Walter Lubienski, Mary Flanagan, Robert  
Flanagan, Oakridge Estates Development, LLC,  
and Arbor Heights, LLC, Plaintiffs-Appellants,

v.

SCIO Township and SCIO Township  
Board of Trustees, Defendants-Appellees.

Docket Nos. 288727, 288769.

|

March 23, 2010.

Washtenaw Circuit Court; LC No. 06-001098-CZ.

Before: BECKERING, P.J., and MARKEY and BORRELLO,  
JJ.

**Opinion**

PER CURIAM.

\*1 In these consolidated appeals, plaintiffs appeal the trial court's September 26, 2008,<sup>1</sup> order finding that the denial of their request for a conditional use permit and site plan approval by defendants Scio Township and Scio Township Board of Trustees (referred to collectively as "the township") complied with the law, was supported by competent, material and substantial evidence on the record, and reflected a proper exercise of discretion. Plaintiffs also appeal the trial court's October 20, 2008, order denying their motion for reconsideration. We affirm.

## I. Relevant Facts and Procedural History

Plaintiffs own adjoining pieces of property, totaling approximately 120 acres, in Scio Township. They seek to develop an "open space residential neighborhood" known as "Oakridge Estates," with 64 lots and a community wastewater treatment system, on the property. Plaintiffs allege that in 1997, they "divided the main parcel of the Property into six approximately 20-acre parcels," and that after the division, "there were 9 parcels." In 1999, they applied for and were granted approval by the township to divide a 25-acre parcel. They also received a variance to improve Daleview Drive, which is located on the property, as a private road. Plaintiffs continued discussions with the township regarding the proposed development and believed, based on representations by the township, that the density permitted on the property was 64 units.

On April 6, 2006, plaintiffs applied for a conditional use permit and site plan approval from the township. The site plan application indicated that there would be 64 units spread over the property and listed three separate property identification numbers: H-08-12-100-022, H-08-01-400-002, and H-08-12-200-039. In a letter dated April 27, 2006, the township's attorney, Michael Homier, advised plaintiffs' attorney that the density proposed by plaintiffs "grossly exceed[ed] that permitted by the [t]ownship's zoning ordinance." Homier stated that pursuant to the applicable formula in the ordinance, the maximum number of units permitted for the development was 31 units. According to plaintiffs, after several additional meetings with the township, the township planning commission recommended denial of their conditional use permit and site plan and the board of trustees followed the commission's recommendation. In regard to the density issue, the board's resolution stated: "The petition fails to conform to the density permitted by the Scio Township Zoning Ordinance as communicated to the Applicant [plaintiffs] by the Township Attorney's letter dated April 27, 2006 and concurring analysis of the Township's Planner, Carlisle Wortman, dated May 4, 2006, both of which are hereby incorporated by reference as support for denying the Petition." Plaintiffs sought review of the board's decision by the township's zoning board of appeals (ZBA), but the ZBA declined to review the decision based on lack of jurisdiction.

\*2 Thereafter, plaintiffs filed a four-count complaint against the township in the trial court. Count I of plaintiffs' complaint



challenged the township's rejection of their request for a conditional use permit and site plan approval. In addition, plaintiffs sought superintending control (Count II). They also advanced a substantive due process challenge to the validity of the township's zoning ordinance (Count III), and a temporary takings challenge (Count IV).

The township moved to dismiss plaintiffs' complaint for lack of jurisdiction under [MCR 2.116\(C\)\(4\)](#) and [\(I\)\(1\)](#). The trial court issued a March 15, 2007, order stating that count I of the complaint was an appeal as of right of an administrative decision. The court dismissed count II of the complaint, stating that a writ of superintending control was unwarranted and must be dismissed under [MCR 3.302\(D\)\(2\)](#), and dismissed counts III and IV of the complaint because they were not ripe for review. Plaintiffs subsequently filed a motion to amend their complaint to add a claim for declaratory judgment, which the trial court denied. Following oral arguments on count I of plaintiffs' complaint, the court issued its September 26, 2008, opinion and order, finding that the township's decision complied with the law, was supported by competent, material and substantial evidence on the record, and reflected a proper exercise of discretion. Plaintiffs filed a motion for reconsideration, which the trial court denied in its October 20, 2008, order.

On November 6, 2008, plaintiffs filed an application for leave to appeal in this Court, seeking to appeal the trial court's September 26, 2008, order (Docket No. 288727). On the same day, plaintiffs filed a claim of appeal in this Court, appealing the trial court's October 20, 2008, order (Docket No. 288769). The township filed a motion to dismiss docket no. 288769, arguing that the trial court's October 20, 2008, order was an order entered on appeal from a decision of a tribunal and, pursuant to [MCR 7.203\(A\)\(1\)](#), such an order may not be appealed as of right. The township argued that the appeal must be dismissed for lack of jurisdiction. A panel of this Court denied the township's motion to dismiss, granted plaintiffs' application for leave to appeal, and consolidated plaintiffs' appeals. *Lubienski v. Scio Twp.*, unpublished order of the Court of Appeals, entered January 8, 2009 (Docket No. 288727); *Lubienski v. Scio Twp.*, unpublished order of the Court of Appeals, entered December 23, 2008 (Docket No. 288769).<sup>2</sup>

## II. The Jurisdiction of the Trial Court

Plaintiffs first argue that count I of their complaint challenging the township's denial of their request for a

conditional use permit and site plan approval invoked the original, rather than appellate, jurisdiction of the trial court and therefore that the court applied the wrong standard of review. We disagree.

[Const 1963, art 6, § 28](#) states, in part:

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

**\*3** The Michigan Zoning Enabling Act (MZEA), [MCL 125.3101 et seq.](#), vests townships with the authority to regulate land development and use. Various actions under the MZEA, including approval or rejection of conditional use permit requests and site plans, are essentially administrative in nature. See [Sun Communities v. Leroy Twp.](#), 241 Mich.App. 665, 669, 617 N.W.2d 42 (2000) (stating that “[v]arious actions under the TZA, such as site-plan review and the approval of special use permit requests, are essentially administrative in nature”).<sup>3</sup> The MZEA anticipates that final decisions are made by the ZBA, which may then be appealed to the circuit court. See [MCL 125.3605](#) and [3606](#). [MCL 125.3606\(1\)](#) provides:

Any party aggrieved by a decision of the [ZBA] 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 [ZBA].

The MZEA does not address situations such as this where the township board of trustees, not the ZBA, makes the final decision. This Court has held that if a township's zoning ordinance does not provide for an appeal from an administrative decision of the township's board to the ZBA, then the board's decision is final and subject to appellate review by the circuit court pursuant to Const 1963, art 6, § 28. See *Carleton Sportsman's Club v. Exeter Twp.*, 217 Mich.App. 195, 198-200, 550 N.W.2d 867 (1996); see also *Krohn v. Saginaw*, 175 Mich.App. 193, 195-196, 437 N.W.2d 260 (1988). Plaintiffs argue that *Livonia Hotel, LLC v. Livonia*, 259 Mich.App. 116, 673 N.W.2d 763 (2003) controls here. But as the township points out, in that case, the plaintiffs' "complaint raised issues that 'had nothing to do with whether [the] appellant was entitled to special use approval.' Rather, [the] plaintiffs challenged the legal authority of the mayor to veto the city council's approval of a special use, asserted that it had a vested right to a restaurant licensed to serve alcoholic beverages, and 'challenged on constitutional grounds the validity of the zoning ordinance's treatment of restaurants in hotels.'" *Id.* at 124, 673 N.W.2d 763. Such issues fell within the original jurisdiction of the circuit court. *Id.* at 123-124, 673 N.W.2d 763. Whereas, in this case, count I of plaintiffs' complaint specifically dealt with the township's denial of their request for a conditional use permit and site plan, invoking the appellate jurisdiction of the court. Accordingly, the trial court properly concluded that count I was a claim of appeal of an administrative decision, subject to review under Const 1963, art 6, § 28.

### III. Ripeness

Plaintiffs next argue that the trial court improperly dismissed counts II, III, and IV of their complaint as not ripe for review. Again, we disagree.

\*4 First, as the township points out, the trial court did not dismiss count II on the basis that the count was not ripe. The court dismissed count II, plaintiffs' claim for superintending control, in light of its decision to treat count

I as a claim of appeal. The court reasoned that pursuant to MCR 3.302(D)(2), a "writ of superintending control is not only not necessary but is not warranted given the Court's ruling." MCR 3.302(D)(2) provides: "When an appeal in the Supreme Court, the Court of Appeals, the circuit court, or the recorder's court is available, that method of review must be used. If superintending control is sought and an appeal is available, the complaint for superintending control must be dismissed." Plaintiffs have not challenged the basis of the trial court's decision in regard to count II and we need not address it.

In count III of their complaint, plaintiffs asserted that the township's zoning ordinance, as applied to their property, had no reasonable relationship to public health, safety, and welfare, was arbitrary, discriminatory, and unreasonable, deprived them of the use and enjoyment of their property without due process, and unreasonably restricted the use of their property with no legitimate governmental purpose. In count IV, plaintiffs asserted that the zoning ordinance, as applied, constituted a temporary taking of their property without just compensation. The trial court held that because plaintiffs could have applied for rezoning but failed to do so, the administrative process was incomplete and plaintiffs' substantive due process and temporary takings claims were not ripe for review.

In dismissing counts III and IV, the trial court granted the township's motion for summary disposition pursuant to MCR 2.116(C)(4). Generally, we review "de novo a trial court's grant or denial of a motion for summary disposition.... Summary disposition for lack of jurisdiction under MCR 2.116(C)(4) is proper when a plaintiff has failed to exhaust its administrative remedies." *Braun v. Ann Arbor Charter Twp.*, 262 Mich.App. 154, 157, 683 N.W.2d 755 (2004) (quotation marks and citations omitted).

Our Supreme Court stated, in *Paragon Props. Co. v. City of Novi*, 452 Mich. 568, 576, 550 N.W.2d 772 (1996), that an "as applied" challenge, as opposed to a facial challenge, to the validity of a zoning ordinance, "whether analyzed under 42 USC 1983 as a denial of equal protection, as a deprivation of due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment, is subject to the rule of finality." The Court further stated that the "'finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.'



“*Id.* at 577, 550 N.W.2d 772 (citation omitted). “In other words, where the possibility exists that a municipality may have granted a variance-or some other form of relief-from the challenged provisions of the ordinance, the extent of the alleged injury is unascertainable unless these alternative forms of potential relief are pursued to a final conclusion.” *Conlin v. Scio Twp.*, 262 Mich.App. 379, 382, 686 N.W.2d 16 (2004).

\*5 In *Paragon Props.*, 452 Mich. at 572, 550 N.W.2d 772, the plaintiff claimed that its property had no economic potential for development as zoned, the zoning ordinance was unreasonable, confiscatory, and discriminatory as applied to the property, and the ordinance unconstitutionally deprived the plaintiff of its property in violation of the due process clauses of the Michigan and federal constitutions. The trial court held that the zoning ordinance as applied to the property effected an unconstitutional taking. *Id.* at 573, 550 N.W.2d 772. This Court reversed the trial court on the grounds that the plaintiff's constitutional claim was not ripe for review because the plaintiff had not sought a variance from the ZBA and had not brought a state inverse condemnation action. *Id.* The Supreme Court affirmed this Court's decision, stating that the city's denial of the plaintiff's “rezoning request is not a final decision because, absent a request for a variance, there is no information regarding the potential uses of the property that might have been permitted, nor, therefore, is there information regarding the extent of the injury [the plaintiff] may have suffered....” *Id.* at 580, 550 N.W.2d 772. While the city's “denial of rezoning is certainly a decision, it is not a final decision ... because had [the plaintiff] petitioned for a land use variance, [it] might have been eligible for alternative relief....” *Id.*

Similarly, in *Conlin*, 262 Mich.App. at 381, 686 N.W.2d 16, the plaintiffs alleged that the township's zoning ordinance, particularly the density restrictions therein, were ultra vires and a violation of substantive due process, both on their face and as applied. The trial court found that the action was not ripe for review because the plaintiffs did not exhaust their administrative remedies. *Id.* at 382, 686 N.W.2d 16. This Court agreed with the trial court that the plaintiffs' “as applied” challenge was subject to the rule of finality and explained that although the plaintiffs had participated in an informal preapplication conference, it was undisputed that they had never submitted “a formal site plan ... for preliminary or final approval [...] ... applied for conditional land use approval of a Rural Open Space Development,

or for a dimensional variance from the challenged density requirements[, or] ... applied for rezoning of their land to a classification that would allow developments at the density they desired.” *Id.* at 383, 686 N.W.2d 16. Accordingly, this Court held that “the trial court properly found that plaintiffs failed to exhaust their administrative remedies and, therefore, their ‘as applied’ challenge was not ripe for judicial review.” *Id.*

As the township notes in its brief on appeal, this Court in *Braun*, 262 Mich.App. at 158-159, 683 N.W.2d 755, applied the rule of finality to takings claims. The *Braun* Court adopted the rule of finality in *Palazzolo v. Rhode Island*, 533 U.S. 606, 620-621, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001):

Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established.

\*6 The *Braun* Court further stated that “a determination of alternative uses of property as zoned is a condition precedent to a valid takings claim. In other words, the landowner must show that he sought alternative uses of the property as zoned and was denied, thus leaving the property owner with land having no economically productive or reasonably beneficial use.” *Braun*, 262 Mich.App. at 159, 683 N.W.2d 755. We acknowledge that the rules articulated in *Braun* and its progeny, see, e.g., *Frenchtown Charter Twp. v. City of Monroe*, 275 Mich.App. 1, 7, 737 N.W.2d 328 (2007), are not directly applicable to this case. In those cases, the landowners claimed that the municipalities' denial of their requests for rezoning constituted unconstitutional takings. Thus, in order



to establish that the municipality had issued a final decision as to the use of their properties, the landowners had to prove that they sought alternative uses as *currently zoned* and were denied.

We agree with the trial court that claims III and IV of plaintiffs' complaint were subject to the rule of finality and, because plaintiffs failed to exhaust all administrative remedies, their claims were not ripe for review. The township's denial of plaintiffs' request for a conditional use permit and site plan approval was a decision, but it was not a final decision as contemplated by *Paragon Props* and *Conlin*. Plaintiffs could have applied for rezoning but failed to do so. Absent a rezoning request, "there is no information regarding the potential uses of the property that might have been permitted," or "the extent of the injury [plaintiffs] may have suffered." *Paragon Props.*, 452 Mich. at 580, 550 N.W.2d 772. Had plaintiffs applied for rezoning to a classification that would allow the density they desired, they "might have been eligible for alternative relief from the provisions of the ordinance." *Id.*

In arguing that their claims are ripe for review, plaintiffs rely almost exclusively on *DF Land Dev, LLC v. Ann Arbor Charter Twp*, unpublished opinion per curiam of the Court of Appeals, issued September 15, 2009 (Docket No. 287400). Initially, we note that unpublished opinions of this Court are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1). Moreover, *DF Land Dev* is materially distinguishable from this case on its face. The *DF Land Dev* Court held that "*Braun* only applies to those claims that combine a takings claim with one or more 'as applied' constitutional challenges," and because the plaintiff had not raised a takings claim, the trial court erred in "relying on *Braun* and concluding that the [plaintiff's] 'as applied' claims were not ripe for judicial review." *DF Land Dev*, unpub op at 7. Plaintiffs fail to recognize that they did, in fact, raise a takings claim, making the holding in *DF Land Dev* inapplicable here.

In their reply brief, plaintiffs additionally argue that a rezoning request would have been futile and thus should not be required. Plaintiffs assert that the township reached a "definitive position" in this case and "won't change their mind," rezoning request or not. In discussing the futility exception to the finality rule, this Court has stated that where it is clear that further administrative proceedings would be futile and nothing more than a formality, resort to the administrative

body is not mandated. *L & L Wine & Liquor Corp. v. Liquor Control Comm.*, 274 Mich.App. 354, 358, 733 N.W.2d 107 (2007). However, "[f]utility will not be presumed," and a mere expectation that a body will decide or act in a certain way is insufficient to satisfy the futility exception. *Id.* at 358-359, 733 N.W.2d 107. Plaintiffs' bald assertion that the township "won't change [its] mind[ ]," is insufficient to satisfy the exception.

\*7 The trial court properly determined that plaintiffs failed to exhaust their administrative remedies and properly dismissed their substantive due process and takings challenges to the zoning ordinance as not ripe for review.

#### IV. Plaintiffs' Motion to Amend Their Complaint

Next, plaintiffs argue that the trial court improperly denied their motion to amend their complaint. We find that the trial court properly denied their motion.

We review a trial court's denial of a motion to amend a complaint for an abuse of discretion. *Dorman v. Clinton Twp.*, 269 Mich.App. 638, 654, 714 N.W.2d 350 (2006). MCR 2.118(A)(2) states that "[e]xcept as provided in subrule (A) (1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires."

Thus, a motion to amend should ordinarily be denied only for particularized reasons, including undue delay, bad faith or a dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility. The trial court must specify its reasons for denying leave to amend, and the failure to do so requires reversal unless the amendment would be futile.

... An amendment would be futile if (1) ignoring the substantive merits of the claim, it is legally insufficient on its face; (2) it merely restates allegations already made; or (3) it adds a claim over which the court lacks jurisdiction. [*PT Today, Inc. v. Comm'r of the Office of Financial & Ins. Services*, 270 Mich.App. 110, 143, 715 N.W.2d 398 (2006) (citations omitted).]

In this case, after the trial court issued its order stating that count I of plaintiffs' complaint would be treated as a claim of appeal and dismissing counts II, III, and IV, plaintiffs filed a motion to amend their complaint to add a



claim for declaratory judgment. In their motion to amend, plaintiffs asserted: "The sole change proposed ... is to add a new and different Count V which seeks a declaratory ruling from the Court regarding the proper application of Scio Township Ordinance 6.04(D).... Count V seeks a declaration from the Court regarding the density permitted [on plaintiffs' property].... Any determinations made with regard to the pending appeal are unlikely to result in a determination of the proper application of Ordinance 6.04(D). A declaration is requested by the Amended Complaint to resolve the ambiguities in Ordinance 6.04(D) and avoid future litigation over the application of the ordinance.... The calculations made by both the [plaintiffs and the township] with regard to the ordinance demonstrate the varying nature of the interpretations provided under Ordinance 6.04(D). The interpretation of the ordinance can only be resolved with a declaration by the Court as to how the permitted density is calculated for [plaintiffs' property]."

The trial court denied plaintiffs' motion to amend because the amendment would be futile. Specifically, the trial court held that plaintiffs' request for a declaratory judgment as to the correct interpretation of the township's zoning ordinance was not properly before the court. The court determined that the ZBA was the proper body to interpret the ordinance and clarify any ambiguity therein, that plaintiffs had not raised the issue of ambiguity before the township or the ZBA, and that only after the ZBA had addressed the issue would it be ripe for the court's review.

\*8 We agree with the trial court's determination that permitting plaintiffs to amend their complaint would have been futile in that their proposed claim for declaratory judgment was not properly before the court. MCL 125.3603(1), a subsection of the MZEA, provides that the ZBA shall hear and decide matters referred to the ZBA or upon which the ZBA "is required to pass under a zoning ordinance adopted under this act." Scio Township Ordinance 36-427,<sup>4</sup> which addresses the powers and duties of the ZBA, provides that the ZBA "shall hear and decide requests for interpretation of this chapter or the zoning map, taking into consideration the intent and purpose of this chapter and the waste plan." Ordinance 36-427(d)(1). In their motion to amend, plaintiffs asserted that the zoning ordinance at issue is ambiguous and must therefore be interpreted by the trial court. Plaintiffs failed to raise this issue before the township board or the ZBA-the body authorized by Ordinance 36-427(d)(1) to interpret the township's zoning ordinance. Plaintiffs concede in their reply brief on appeal that "the ZBA was

the proper forum" for zoning ordinance interpretation, but claim that the trial court should have considered the issue because the ZBA denied their request for a hearing. But as the trial court alluded in denying plaintiffs' motion to amend, plaintiffs only requested that the ZBA review the township's denial of their conditional use permit and site plan. They did not request an interpretation of the township's zoning ordinance or claim that the ordinance was ambiguous. Given the timing of plaintiffs' motion to amend their complaint, which immediately followed the trial court's decision to treat count I as a claim of appeal and dismiss counts II, III, and IV, it appears that plaintiffs were attempting to invoke the original jurisdiction of the court, rather than its appellate jurisdiction, by adding the proposed count V to the complaint. The trial court could review the township's denial of plaintiffs' request for a conditional use permit and site plan approval under its appellate jurisdiction, but plaintiffs' claim that the zoning ordinance was ambiguous and required interpretation was not properly before the court.

The trial court properly exercised its discretion in denying plaintiffs' motion to amend their complaint.

#### V. Alleged Due Process Violation

Plaintiffs argue that they were denied due process of law by the ZBA's failure to grant them a hearing and review the township's decision, and, presumably, the trial court's failure to order a ZBA hearing after plaintiffs filed their motion for reconsideration. Plaintiffs' due process argument fails.

The township asserts that because plaintiffs failed to raise their due process argument before the ZBA or the trial court, this Court need not address the issue. See *Hall v. Small*, 267 Mich.App. 330, 335, 705 N.W.2d 741 (2005) (stating that in general, issues raised for the first time on appeal are not subject to review). The township correctly asserts that plaintiffs did not raise this issue before the ZBA, in their complaint, or in response to the township's motion for summary disposition. Plaintiffs did, however, raise it in their motion for reconsideration. The trial court denied plaintiffs' motion without addressing their due process argument. An argument is not properly preserved for appeal when a party raises an issue for the first time in a motion for reconsideration; however, this Court may address the issue if it involves a question of law and the parties have presented all of the facts necessary for its resolution. *Farmers Ins. Exch. v. Farm Bureau Gen. Ins. Co. of Michigan*, 272 Mich.App.



106, 117-118, 724 N.W.2d 485 (2006). The issue preservation requirements are designed to prevent a party from harboring error as an appellate parachute by “sandbagging” the trial court after an unfavorable ruling is rendered. See *Polkton Charter Twp. v. Pellegrum*, 265 Mich.App. 88, 95-96, 693 N.W.2d 170 (2005). Given plaintiffs’ limited briefing of this issue on appeal, we need not address it.

\*9 Moreover, plaintiffs’ due process argument fails. They assert in their brief on appeal that they “were denied any opportunity to speak or present any evidence before the ZBA, which is a denial of due process.” In civil cases, the “fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”

*English v. Blue Cross Blue Shield*, 263 Mich.App. 449, 459, 688 N.W.2d 523 (2004) (quotation marks and citations omitted). In denying plaintiffs’ request for a hearing and review of the township’s decision, the ZBA stated:

We have been advised by ... the Township Counsel that the [ZBA] cannot grant the relief that you have requested under the Township Zoning Ordinance and the [MZEA] as we do not have jurisdiction to hear this. So at this point we are just going to close this item and we are recommending that your fees be returned.

Plaintiffs assert that because the ZBA is charged with interpreting the township’s zoning ordinance, see Ordinance 36-427(d)(1), it had jurisdiction to consider plaintiffs’ application for review.<sup>5</sup> As discussed, however, plaintiffs did not request that the ZBA interpret the ordinance. Rather, plaintiffs requested that the ZBA review the township’s denial of their conditional use permit and site plan. Plaintiffs have not pointed to any authority indicating that such review was within the ZBA’s jurisdiction. In fact, in their application to the ZBA, plaintiffs stated that it was “unclear” in the township’s zoning ordinance whether the ZBA had the authority to review a site plan and conditional use decision on appeal, and that they were “being forced to appeal to the ZBA, to preserve their rights.” In their complaint, plaintiffs stated that the ZBA “does not have the authority to review site plan applications” or to “grant a variance to permit the Open Space Option requested.” Even on appeal, plaintiffs point to nothing

in the MZEA or the township’s zoning ordinance granting the ZBA the authority to review their application. A party may not leave it to this Court to search for authority in support of its position by giving “issues cursory treatment with little or no citation of supporting authority.” *Peterson Novelties, Inc. v. Berkley*, 259 Mich.App. 1, 14, 672 N.W.2d 351 (2003).

## VI. The Township Attorney’s First Opinion Letter

Plaintiffs next argue that the trial court erred in denying their request to obtain and review the first letter drafted by the township’s attorney regarding his opinion as to the density permitted on plaintiffs’ property because the court had a duty to review the whole record and the letter was vital to plaintiffs’ case. We disagree.

According to plaintiffs, the township’s attorney issued an opinion letter regarding the density permitted on plaintiffs’ property in September 2005. The township supervisor sent plaintiffs a letter dated September 9, 2005, stating: “Our Township Attorney has offered his opinion on density calculation in the letter you referred to. This information will be provided to our Planning Commission for their consideration.” On the same day, the township supervisor left plaintiffs a voicemail message indicating that he believed the density permitted on their property was 64 units. Thereafter, plaintiffs sent the township a request under the Freedom of Information Act (FOIA) for a copy of the opinion letter. The township denied the request, indicating that the requested document was subject to the attorney-client privilege and was therefore “exempt from disclosure pursuant to Section 13(1) (g) of the FOIA.” The township’s letter further stated that plaintiffs had the right to submit a written appeal or to “seek judicial review ... as stated in Section 10.”

\*10 Plaintiffs argue on appeal that the trial court erred in failing to obtain and review, *in camera* if necessary, the township attorney’s opinion letter. Plaintiffs did not appeal the township’s denial of their FOIA request or seek judicial review of the denial. Nor did plaintiffs raise this issue in their complaint. Based on our review of the record, plaintiffs first raised this issue in their motion for reconsideration, stating that the trial court should review the opinion letter before issuing its final decision and provide a copy of the letter to plaintiffs “as the argument that it is protected by attorney-client privilege is moot.” The trial court denied plaintiffs’ motion and did not address this issue. As indicated, an argument is not properly preserved for appeal when a



party raises an issue for the first time in a motion for reconsideration. *Farmers Ins. Exch.*, 272 Mich.App. at 117, 724 N.W.2d 485. In addition, because plaintiffs have provided this Court with limited briefing of this issue, we will only briefly address it. See *Peterson Novelties*, 259 Mich.App. at 14, 672 N.W.2d 351.

According to plaintiffs, the trial court should have obtained and reviewed the township attorney's opinion letter because the court was required to review the entire record and the opinion letter, which was vital to plaintiffs' case, was necessary to conduct a proper review of the township's decision. In so arguing, plaintiffs rely on MCL 125.3606, which provides, in part:

(1) Any party aggrieved by a decision of the [ZBA] 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 [ZBA].

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

Plaintiffs also cite *Schadewald v. Brule*, 225 Mich.App. 26, 570 N.W.2d 788 (1997), in which this Court stated that the “function of the trial court when reviewing the [ZBA's] grant of a variance is to determine whether the decision was supported by competent, material, and substantial evidence on the whole record” under the now repealed MCL

125.293a(1). *Schadewald*, 225 Mich.App. at 34, 570 N.W.2d 788.

Arguably, the township is correct and the township attorney's opinion letter is subject to the attorney-client privilege and therefore exempt from disclosure under the FOIA. See *Leibel v. Gen. Motors Corp.*, 250 Mich.App. 229, 238-239, 646 N.W.2d 179 (2002) (holding that a written memorandum drafted by an attorney for his client containing legal opinions and recommendations was protected by the attorney-client privilege). MCL 15.243(1)(g) provides that a “public body may exempt from disclosure as a public record” under the FOIA “[i]nformation or records subject to the attorney-client privilege.” But even if the letter is not subject to the privilege, plaintiffs have not established that, absent the letter, the record was inadequate for the trial court to properly review the township's decision in this matter. Even if, as plaintiffs suggest, the opinion letter revealed an initial density calculation of 64 units by the township's attorney, the existing record was adequate for the trial court to review the township's ultimate decision as to the permissible density and determine whether the decision complied with the law, was based on proper procedure, was supported by competent, material, and substantial evidence on the record, and represented a reasonable exercise of discretion. See MCL 125.3606.

## VII. The Density Calculation

\*11 Finally, plaintiffs argue that in affirming the township's denial of their conditional use permit and site plan, the trial court must have misread their application materials or misinterpreted and misapplied the township's zoning ordinance. Again, we disagree.

In considering plaintiffs' appeal of the township's decision, the trial court was charged with reviewing the record and determining whether the decision complied with the law and proper procedure, was supported by competent, material, and substantial evidence on the record, and represented a reasonable exercise of discretion. See MCL 125.3606(1); Const 1963, art 6, § 28. In reviewing the trial court's decision, we must determine “whether the ... court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the [township's] factual findings.” *Boyd v. Civil Service Comm.*, 220 Mich.App. 226, 234, 559 N.W.2d 342 (1996). This



standard regarding the substantial evidence test is the same as the clearly erroneous standard. *Id.* A finding is clearly erroneous if the reviewing court, on the whole record, is left with the definite and firm conviction that a mistake has been made. *Id.* at 234-235, 559 N.W.2d 342.

It is undisputed that plaintiffs' property is located in a general agricultural ("A-1") zoning district. Scio Township Ordinance 36-75, formerly Ordinance 4.08, Note 3, limits the density of developments in A-1 districts according to the following formula:

3. Single-family dwelling on lots a minimum 2 1/2 acres in size provided that the overall density permitted as of right upon a parcel existing as of March 31, 1997, shall be restricted to the following:

a. For a parcel of ten acres or less, existing as of March 31, 1997 up to a total of four dwelling units.

b. For a parcel of greater than ten acres, up to and including 120 acres, existing as of March 31, 1997 one additional dwelling for each whole ten acres in excess of the first ten acres, up to a maximum of 11 dwellings.

c. For parcels of greater than 120 acres existing as of March 31, 1997 one additional dwelling for each whole 40 acres in excess of the first 120 acres.

d. For a parcel of not less than 20 acres existing as of March 31, 1997 two additional dwellings may be permitted, if one of the following conditions apply:

(i) Because of the establishment of one or more new roads, no new driveway accesses to an existing public road for any of the resulting parcels under subsections 3.a through c of this section or this subsection 3.d are created or required.

(ii) One of the resulting parcels under subsections 3.a through c of this section and this subsection 3.d comprises not less than 60 percent of the area of the parent parcel or parent tract.

Plaintiffs applied for an open space development under Ordinance 36-130, formerly Ordinance 6.04, which begins with a base density calculated pursuant to Ordinance 36-75, and then adds "bonus density" if certain criteria are met. Ordinance 36-130(d)(1) provides:

\*12 (d) Project density. Land found within the districts noted in subsection (b) of this section may be developed,

at the option of the land owner, with the same number of dwelling units on a portion of land that, as determined by the township, could otherwise be developed, under existing ordinances, laws and rules, on the entire land area.

(1) The following special density standards shall apply to land found within the A-1, General agriculture district. The number of dwelling units permitted under the open space preservation option on property zoned A-1 shall not exceed the overall density permitted as of right as set forth in section 36-75, note 3, of the schedule of regulations, plus additional density based upon the application of one of the following criteria, whichever results in the least number of additional dwelling units:

a. Two dwelling units for the first ten acres plus one dwelling unit for each whole ten acres in excess of the first ten acres of the parcel; or

b. Seven dwelling units, or ten dwelling units if one of the resulting lots or parcels comprises not less than 60 percent of the area of the parcel being developed.

Plaintiffs argue that the township's zoning ordinance permits a total of 64 units on their property, while the township and trial court concluded that the ordinance permits only 31 units. The discrepancy between the parties' calculations arises from their disagreement regarding the number of parcels plaintiffs possess, within the meaning of the term "parcel" in the zoning ordinance. Plaintiffs' site plan application indicated that there would be 64 units spread over their property and listed three separate property identification numbers: H-08-12-100-022, H-08-01-400-002, and H-08-12-200-039. Plaintiffs assert that prior to March 31, 1997, they divided the largest parcel, H-08-12-100-022, between several family members. According to plaintiffs, after the divisions, plaintiffs possessed nine parcels to be developed. However, there is no record evidence that plaintiffs obtained township approval for the divisions, and the record indicates that plaintiffs did not record the deed transfers with the county register of deeds until after 1997.

Ordinance 36-5, formerly Ordinance 2.02, defines the term "parcel" as "a piece or tract of land." At the time of plaintiffs' alleged division of their property, the township regulated land division through the 1993 Acreage Parcel Division Ordinance (APDO), repealed in 1997. Under the APDO, all divisions were subject to the township's prior review and approval. Section 100.2(2) of the APDO provided that "[a]ny real property division, which has not been first approved by the



Township, will not be considered a valid division of such property under the terms of this Ordinance; and any parcel of real property, which has not received approval by the Township pursuant to the provisions of this Ordinance, will not be placed on the Township tax rolls as a separate and individual parcel of property.” Section 306.0 provided that “[n]o acreage parcel may be divided in the Township except in accordance with the terms of this article.” Section 201.0 defined “[a]creage parcel” as “[a]ny parcel of land in the Township which is not located in or part of a recorded plat,” and “[d]ivision or divide” as “[t]o separate into parts or parcels by virtue of change of ownership, separation on the tax rolls, or any other means, any parcel of land.”

\*13 Upon reviewing the township's zoning ordinance and the APDO, the township and trial court determined that plaintiffs possessed only three parcels as of March 31, 1997 because they failed to obtain prior township approval for their land divisions as required by the APDO. The township and trial court did not misread plaintiffs' application materials. Plaintiffs argue on appeal that the township and trial court improperly revised the definition of “parcel” in the zoning ordinance to mean “approved division” through application of the APDO. According to plaintiffs, under the APDO, the only consequence of failing to obtain township approval for a land division was that the divided pieces of land were not placed on the township tax rolls, and that such failure did not preclude the pieces of land from qualifying as separate parcels for purposes of density calculation under the zoning ordinance. We disagree.

The APDO provided that any real property division that has not been first approved by the township “will not be considered a valid division of such property,” section 100.2(2), and that no parcel in the township may be divided except in accordance with the ordinance, section 306.0. Moreover, plaintiffs have not pointed to any inconsistencies between the zoning ordinance and the APDO, or to any ambiguities in either ordinance. If statutory language

is unambiguous, judicial construction is normally neither necessary nor permitted. *Nastal v. Henderson & Assoc. Investigations, Inc.*, 471 Mich. 712, 720, 691 N.W.2d 1 (2005). The language must be enforced as written. *Fluor Enterprises, Inc. v. Revenue Div., Dep't of Treasury*, 477 Mich. 170, 174, 730 N.W.2d 722 (2007). Furthermore, “statutes that relate to the same subject matter or share a common purpose are in *pari materia* and must be read together as one law ... in order to effectuate the legislative purpose as found in harmonious statutes” and, if possible, construe and apply the statutes in a manner that avoids conflict. *In re Project Cost & Special Assessment*, 282 Mich.App. 142, 148, 762 N.W.2d 192 (2009) (citations omitted). See *Goldstone v. Bloomfield Twp. Pub. Library*, 479 Mich. 554, 568 n. 15, 737 N.W.2d 476 (2007) (stating that the rules of statutory construction also apply to local ordinances). It was therefore appropriate for the township to look to the APDO to determine how many parcels plaintiffs possessed as of March 31, 1997 in order to conduct the necessary density calculations under the zoning ordinance.

Plaintiffs do not dispute that if, in fact, they possessed only three parcels as of March 31, 1997, the township's density calculations under the zoning ordinance were correct, and its decision was supported by competent, material, and substantial evidence on the record and represented a reasonable exercise of discretion.<sup>6</sup> Therefore, because the township and trial court properly determined that plaintiffs had only three parcels to be developed, we affirm the court's order upholding the township's denial of plaintiffs' conditional use permit and site plan.


\*14 Affirmed. Defendants, being the prevailing parties, may tax costs pursuant to [MCR 7.219](#).

#### All Citations

Not Reported in N.W.2d, 2010 WL 1052284

#### Footnotes

- 1 While the trial court's register of actions states that the order was both signed and filed on September 29, the order itself indicates that it was signed on September 26.
- 2 Given this Court's orders, the township's arguments on appeal pertaining to this Court's alleged lack of jurisdiction are now moot.

- 3 The TZA is the Township Zoning Act (TZA),  [MCL 125.271 et seq.](#) It was repealed by 2006 PA 110, effective July 1, 2006, and replaced by the MZEA. The township issued its decision in this case on September 12, 2006 and applied the MZEA.
- 4 The township's website states that the township board adopted Ordinance 2009-04 on June 23, 2009. The website further states: "This ordinance codified all Scio Township Ordinances effective July 28, 2009 per [MCL 41.186](#). All previous stand alone ordinances, including the Township Zoning Ordinance, are now included as regulations in the Scio Township Code. Some modifications, mostly required updates, were made to previous ordinances and included in the Code. If items from previous ordinances are not included in the Code document, they are no longer valid." Township of Scio, Ordinances, <http://www.twp.scio.mi.us/ordinances> (accessed January 11, 2010). The current version of the township's ordinances indicates that Ordinance 36-427 was formerly Ordinance 15.04. See [http://library1.municode.com/defaulttest/home.htm?infobase=14234 & doc\\_ action=whatsnew](http://library1.municode.com/defaulttest/home.htm?infobase=14234&doc_action=whatsnew) (accessed January 11, 2010).
- 5 Plaintiffs additionally asserted in their brief on appeal that the ZBA improperly delegated its power to the township's attorney by allowing the attorney to interpret the township's zoning ordinance and make a decision on jurisdiction. But plaintiffs essentially abandon this issue in their reply brief on appeal.
- 6 During plaintiffs' rebuttal at the oral argument in this case, plaintiffs' counsel questioned for the first time the township's density calculation results based on three parcels, but provided no basis for or analysis of his challenge.

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# EXHIBIT 11



2009 WL 50065

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.UNPUBLISHED  
Court of Appeals of Michigan.TIME OUT, L.L.C. and Squirt Transfer & Storage,  
Inc., Plaintiffs-Appellants/Cross-Appellees,

v.

NEW BUFFALO TOWNSHIP,  
Defendant-Appellee/Cross-Appellant.

Docket No. 278916.

|  
Jan. 8, 2009.

LC No. 05-002978-CH; Berrien Circuit Court.

Before: MURRAY, P.J., and MARKEY and WILDER, JJ.

**Opinion**

PER CURIAM.

\*1 In this zoning dispute, plaintiffs Time Out, L.L.C. and Squirt Transfer & Storage, Inc. appeal by right the lower court's November 14, 2006 pretrial order granting partial summary disposition to defendant New Buffalo Township, dismissing plaintiffs' de facto taking and inverse condemnation claims. The township cross appeals the lower court's post-trial entry of declaratory judgment for plaintiffs, determining that the back portion of plaintiffs' property was not changed from "Industrial" to "C-1 Commercial" when on October 31, 2000, the township adopted a revised zoning ordinance. We affirm in part and reverse in part.

## I. Summary of Facts and Proceedings

Time Out owns a 14.5-acre parcel of property fronting on US-12 in New Buffalo Township. Squirt Transfer is a business that operates at the same property. Ross Bradley and Debbie Bradley own the businesses. The parties do not dispute that the first 500 feet of plaintiffs' property fronting on US-12 has always been zoned "C-1 Commercial." The township maintains that when it adopted a completely revised zoning ordinance on October 31, 2000, plaintiffs' entire parcel was

zoned "C-1 Commercial." Plaintiffs dispute this, contending that the back portion of the property was never rezoned, so it remains zoned "Industrial." This claim was the sole factual dispute the trial court resolved in plaintiffs' favor after a December 2006 bench trial. Defendant cross appeals the trial court's entry of judgment for plaintiffs.

The parties' dispute surfaced in 2002. Plaintiffs' principals wanted to operate an outdoor business selling lawn and garden supplies, concrete statuary, and local produce on their property fronting US-12. Although zoned commercial, "open air business" outside an enclosed building was not permitted. Plaintiffs applied to the township planning commission for a special land use permit (SLU) to operate an outdoors business. At a June 4, 2002 meeting, the planning commission voted to recommend to the township board that a SLU be granted for the first 500 feet of plaintiffs' property fronting US-12 that was zoned "C-1" but that the granting of the permit be conditioned on plaintiffs clearing "junk" from the entire parcel within 90 days of the township board's approval of the SLU permit. The township board never acted on plaintiffs' SLU application. The minutes of the township board meeting of July 15, 2002 state: "Bradley SLU-Withdrawn by applicant." Plaintiffs' first amended complaint states that plaintiffs rejected the tie-in to "cleaning up" the back of the property.

Instead of pursuing the SLU, plaintiffs applied in April 2002 for a building permit to construct a building within which to operate their proposed statuary business; the township granted the permit six months later. The delay in granting the permit apparently resulted from plaintiffs' failing to submit necessary documentation, including site plans and zoning permit, and paying necessary fees. After plaintiffs received the building permit they commenced construction but because of financial problems were unable to finish before the permit expired on April 4, 2003 because of lack of construction progress within 180 days of its issuance.

\*2 Plaintiffs applied for a new building permit to construct an accessory building to house their statuary business on August 10, 2004. Defendant eventually issued plaintiffs a building permit on November 22, 2004. Plaintiffs allege that the four-month delay in granting a permit was deliberate and unlawful. However, there was evidence the permit application was incomplete when filed because it lacked both building work plans drawn to scale and a site plan.



Plaintiffs filed this lawsuit on May 23, 2005, alleging their property had not been rezoned (count I), that proper procedure had not been followed to amend the zoning of plaintiffs' property (count II), and even if the property had been rezoned from industrial to commercial, plaintiffs use was a valid, "grandfathered" nonconforming use (count III). Plaintiffs' complaint was assigned to Judge Paul Maloney, who had presided over a prior proceeding the township had brought under its litter and debris ordinance against Ross Bradley. Judge Maloney had ruled that plaintiffs' property was zoned commercial, not industrial. Plaintiffs moved to disqualify Judge Maloney, who entered a recusal order. This case was then assigned to Judge Lynda Tolen. On March 20, 2006, the trial court granted plaintiffs' oral motion for leave to amend their complaint to add claims for just compensation for a de facto taking and inverse condemnation.

On September 11, 2006, defendant moved for summary disposition on all plaintiffs' claims. The trial court conducted a hearing on the motion on October 23, 2006. Regarding plaintiffs' claim that its property was never rezoned (count I), the trial court denied summary disposition, ruling that material questions of fact remained for trial. The trial court granted defendant's motion for summary disposition regarding plaintiffs' count II (alleging procedural error) but denied summary disposition on plaintiffs' claim to a valid nonconforming use (count III), viewing it as an alternative pleading to count I. However, the trial court ruled it would only conduct a trial on count III if defendant prevailed on count I. Plaintiffs subsequently dismissed count III during trial.

Regarding plaintiffs' counts IV and V alleging respectively a de facto taking and inverse condemnation, the trial court reasoned as follows:

Plaintiff argues that the four-and-a-half-month delay in issuing the building permit amounted to a de facto taking and inverse condemnation. First of all, they're the same thing. They're not two separate causes of action. De facto taking is inverse condemnation. But be that as it may, the Court-whatever the Court rules will apply to both counts.... Michigan law does recognize a cause of action for inverse condemnation, and under Michigan law it accrues when the property has been taken for public use either physically or by regulation with [out] commencement of formal condemnation proceedings. [Citing *Electro-Tech, Inc. v. H F Campbell Co.*, 433 Mich. 57; 445

NW2d 61 (1989) and *Hart v. Detroit*, 416 Mich. 488; 331 NW2d 438 (1982).] Inverse condemnation has also been found to lie where property "has been damaged by a public improvement undertaking or other public activity."

That's *In Re: Acquisition of Land, Virginia Park* (1982) 121 Mich.App 153, 158, where the Plaintiff claimed that the city's actions caused a substantial decline in property values. Plaintiffs in inverse condemnation actions have the burden of proving that governmental actions were a substantial cause of the deprivation or decline in value.

\*3 The Court finds that there is no material question of fact that Defendant's actions deprived Plaintiffs of all economically viable use of the land or were a substantial cause in bringing about a decline in the value of the property. First, there's no claim that Plaintiffs were ever denied possession of their property. Second, they have not set forth any documentary evidence to establish that they were denied all economically viable use the property for any period of time. And even if Defendant effectively rezoned the property, the Plaintiffs have always been able to use the property for commercial purposes, if not industrial. Plaintiffs have not produced any evidence to show that the Defendant caused a substantial decline in the value of the property or that its utility was largely destroyed. And as counsel for the Plaintiff has stated, the case law is replete with cases going up to this-the United States Supreme Court that a temporary diminution in use or value of a property is not enough to amount to an inverse condemnation. Therefore, the Court finds with regard to questions four-counts four and five that there are no genuine issues of material fact and the motion for summary disposition is granted. [Tr, 10/23/06, pp 57-59.]

The trial court entered its order implementing its summary disposition rulings on November 14, 2006. Subsequently, the issue whether plaintiffs' back lot property had been rezoned from "Industrial" to "Commercial" when the township adopted its revised zoning ordinance proceeded to a bench trial on December 20-21, 2006.

At the conclusion of the trial, the court accepted plaintiffs' argument that even though the adopted zoning maps clearly showed plaintiffs' entire parcel was zoned commercial, the township had not done so knowingly and intentionally. The trial court determined:



[M]y belief and fact finding is that this was not a knowing and intentional change of the plaintiff's property. However, defendant is correct when he says it did get changed.

\* \* \*

... I think it's been established that what actually got approved, what got recommended by the planning commission apparently, because the board wholesale approved it, had the plaintiff's property marked out as commercial. The problem is, I don't think that was done knowingly or intentionally. And the question is, what do you do about it? Can I do anything about it? [Tr, 592.]

Because the trial court was unsure it could grant the relief plaintiffs were requesting, it requested briefs on whether it could order reformation of the township's zoning map.

On February 12, 2007, the trial court issued its opinion and order for declaratory relief in favor of plaintiffs. In it, the trial court noted that after bench trial, it found "as a matter of fact, that the rear portion of Plaintiff's property was never knowingly and purposefully rezoned from industrial to commercial." Further, relying on *Prestige Community Developments v. Sumpter Twp*, unpublished opinion per curiam of the Court of Appeals, issued August 26, 1997 (Docket Nos. 193390; 193772), the trial court opined "it is not necessary that the Court reform the ordinance, but merely to find and rule that Plaintiffs property was never rezoned." Therefore, the trial court found and declared "that [plaintiffs'] property along the front of the highway is zoned commercial to a depth of 500 feet and the balance of the property is and remains zoned industrial." The opinion and order further directed the parties to submit a declaratory judgment in accordance with the court's opinion. Finally, the opinion and order stated, "Defendant Township shall issue a corrected Zoning Map and adopt it by Ordinance."

\*4 A hearing was held June 11, 2007 on defendant's motion to amend the trial court's findings of fact and conclusions of law, which the trial court considered an untimely motion for reconsideration. The court declined to do so, noting it had previously concluded, "plaintiff's property was never in fact or in law rezoned." And the court repeated its reliance on *Prestige*, *supra*, in finding that because plaintiffs' property had not been rezoned, it was unnecessary to reform the ordinance. Nevertheless, the court acknowledged that it ordered the township to correct its zoning map and to do so by adopting an ordinance. The court denied defendant's motion

to amend the court's findings of fact and conclusions of law. Consequently, the trial court entered a declaratory judgment that reiterated the court's finding that defendant "never knowingly and intentionally rezoned" plaintiffs' property and ordered that plaintiffs' property "is determined to be zoned C-1 (Commercial) on the front along the highway of U.S. 12 to a depth of 500 feet and the balance of the property is and remains zoned Industrial." The judgment also ordered defendant to "issue a corrected Zoning Map and adopt it by Ordinance" and denied defendant's motion for stay pending appeal.

Plaintiffs appeal by right the trial court's order granting summary disposition to defendant regarding dismissing plaintiffs' de facto taking and inverse condemnation claims. The township cross appeals the trial court's granting declaratory judgment in favor of plaintiffs.

## II. Plaintiffs' Appeal

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Dorman v. Clinton Twp*, 269 Mich.App 638, 644; 714 NW2d 350 (2006). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Id.* In reviewing such a motion, we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in the light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists. *Conlin v. Scio Twp*, 262 Mich.App 379, 382; 686 NW2d 16 (2004). If there are no genuine issues of material fact and if the moving party is entitled to judgment as a matter of law, summary disposition is appropriate. *Dorman*, *supra* at 644. We also review constitutional questions de novo.

*Hinojosa v. Dep't of Natural Resources*, 263 Mich.App 537, 541; 688 NW2d 550 (2004).

Both the Fifth Amendment of the United States Constitution and Const 1963, art 10, § 2 prohibit the taking of private property for public use without just compensation.<sup>1</sup> *Dorman*, *supra* at 645. The Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 315; 107 S.Ct 2378; 96 L.Ed.2d 250 (1987). Thus, the government is not constitutionally prohibited from








taking private property for public use but is only required to pay property owners just compensation when it does so. The government normally “takes” private property through the power of eminent domain and formal condemnation proceedings. See *Dorman*, *supra* at 645; *Merkur Steel Supply, Inc v. Detroit*, 261 Mich.App 116, 129; 680 NW2d 485 (2004). But the government may also effectively “take” private property without formal condemnation proceedings when it overburdens the property with regulations. *Dorman*, *supra* at 645, citing *K & K Const, Inc v. Dep’t of Natural Resources*, 456 Mich. 570, 576; 575 NW2d 531 (1998). “[T]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *K & K Const, supra* at 576, quoting *Pennsylvania Coal Co v. Mahon*, 260 U.S. 393, 415; 43 S Ct 158; 67 L Ed 322 (1922).


\*5 On appeal, plaintiffs argue that the township's actions improperly conditioning issuance of a special use permit on cleaning up an unrelated portion of its property and delaying issuance of a building permit for 3½ months while attempting to impose the same condition, amounted to a governmental taking. Plaintiffs further argue that the trial court erred by granting summary disposition in favor of defendant on their de facto taking and inverse condemnation claims because material questions of fact remained with respect to applying the three-part balancing test for determining whether governmental action has effected a regulatory taking requiring just compensation. See *K & K Const, supra* at 577, citing *Penn Central Transportation Co v. New York City*, 438 U.S. 104, 124; 98 S Ct 2646; 57 L.Ed.2d 631 (1978). Under the *Penn Central* balancing test, a court must consider “(1) the character of the government action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations.” *K & K Const, supra* at 577. Although the trial court did not specifically address the *Penn Central* balancing test, we nevertheless conclude that the trial reached the correct result when it ruled defendant was entitled the judgment as a matter of law on plaintiffs' taking claims. This Court will not reverse the trial court when it reaches the right result, even if the court does so for the wrong reason. *Netter v. Bowman*, 272 Mich.App 289, 308; 725 NW2d 353 (2006).

Defendant persuasively argues that there are several reasons why plaintiffs cannot base a regulatory taking claim on the township planning commission's decision to recommend conditioning approval of a special use permit to operate an outdoor business selling lawn and garden supplies and concrete statuary on plaintiffs' clearing “all junk” from plaintiffs' entire property. First, the undisputed facts establish plaintiffs abandoned any claim regarding their application for a special use permit by withdrawing it before the township board either approved or rejected the application. In other words, the township never acted on the recommended condition, so it cannot form the factual basis for a regulatory taking claim. Second, because the township board never rendered a final decision on the plaintiffs' SLU application, it was not ripe for adjudication. *Frenchtown Charter Twp v. City of Monroe*, 275 Mich.App 1, 6; 737 NW2d 328 (2007). The rule of finality applies to all constitutional challenges to zoning as applied to a particular parcel of property and ensures that a plaintiff has suffered an “actual, concrete injury.” *Braun v. Ann Arbor Twp*, 262 Mich.App 154, 160-161; 683 NW2d 755 (2004). Thus, until the government has rendered a final decision regarding the application of a regulation to a particular property, it is impossible to apply the *Penn Central* balancing test. *Id.* at 158-159.

\*6 [A]mong the factors of particular significance in [applying the *Penn Central* balancing test] are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question. *[Williamson Co Regional Planning Comm v. Hamilton Bank of Johnson City]*, 473 U.S. 172, 190-191; 105 S Ct 3108; 87 L.Ed.2d 126 (1985).






Moreover, plaintiffs advance no meaningful argument why the proposed condition at issue was unlawful. The government may attach lawful conditions to land-use permits. See  *Electro-Tech, Inc v. H F Campbell Co.*, 433 Mich. 57, 75, 77-79 n 22;  445 NW2d 61 (1989). Plaintiffs' claim that the proposed condition did not advance a legitimate state interest because it pertained to unrelated property, i.e., that portion of plaintiffs' property that plaintiffs believed to be zoned "Industrial," is without merit. The front and back portions of plaintiffs' property are one contiguous parcel of property. It is well settled that when considering a claim that a regulatory taking has occurred as to one parcel of property, all of the plaintiff's contiguous property must be considered as a whole. *K & K Const, supra* at 578-579. Further, although it is appropriate to consider whether a regulation "substantially advances a legitimate state interest" when reviewing a substantive due process challenge to an ordinance, it "is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment."  *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 541;  125 S Ct 2074;  161 L.Ed.2d 876 (2005). Finally, the proposed condition did not involve a physical taking or the ouster from private property for public use but rather involved an effort to enforce the township's litter and debris ordinance. A clear nexus exists between permitting plaintiffs' proposed outdoor sales use and compliance with the township's litter and debris ordinance.

The undisputed facts also fail to establish a regulatory taking on the basis of the time period between plaintiffs' application for a building permit in August 2004 and the township's issuing one in November 2004. Although, plaintiffs argue the delay was the result of the township's seeking to impose conditions, the evidence does not support these claims. Rather, the un rebutted testimony of the township's building official was that the building permit was not issued sooner because plaintiffs did not comply with the state construction code requirements that an applicant for a building permit must provide written building and site plans,  MCL 125.1510(1). Defendant's building official also testified that plaintiffs did not submit a necessary zoning permit application or pay a required fee. Plaintiffs did not contend they had fulfilled these requirements; they only asserted in their affidavits that they were not told that their building permit application was deficient. Further, plaintiffs argue that the permit was issued even though they did not provide the missing required items after their initial application for the

permit. Plaintiffs' argument, however, does not contradict the township official's testimony that plaintiffs never provided the documents required for issuance of a building permit. Likewise, that the township, in fact, issued the building permit without full compliance with state and local requirements does not alter the conclusion that because plaintiffs did not provide the necessary items they were not legally entitled to the issuance of a building permit under MCL 125.1511(1). Because the undisputed facts established plaintiffs were not entitled to the issuance of a building permit under state law, plaintiffs cannot base a claim for a regulatory taking on delay in its issuance. See *Frenchtown Charter Twp, supra* at 5-6 (a balancing-test regulatory taking cannot be established against a local government that is merely enforcing state-law requirements).

\*7 Moreover, plaintiffs claim for a temporary regulatory taking fails as a matter of law for the additional reasons that (1) such claims do not apply to normal delay attendant to issuance of building permits, zoning changes, or other similar administrative action regarding land use, (2) plaintiffs sole underlying basis for damages consists of speculative claims for lost profits, and (3) analysis under the three-part *Penn Central* balancing test confirms no regulatory taking requiring just compensation occurred under the facts and circumstances of this case.

The Supreme Court in *First English, supra* first recognized that if government regulation is so onerous that it amounts to a taking, just compensation is constitutionally required even if the taking is only temporary. *Id.* at 316, 321. But the Court specifically noted that its analysis did not address "the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." *Id.* at 321. The Supreme Court subsequently reasoned that "requiring a governmental agency to compensate a property owner for the loss of value while considering applications for permits and variances under a land-use regulatory scheme would either become cost-prohibitive or lead to governmental agencies making hasty, presumably haphazard, decisions." *K & K Const, Inc v. Dep't of Environmental Quality*, 267 Mich.App 523, 536 n 17; 705 NW2d 365 (2005), citing  *Tahoe-Sierra Preservation Council, Inc v. Tahoe Regional Planning Agency*, 535 U.S. 302, 334-335;  122 S Ct 1465;  152 L Ed.2d 517 (2002). The regulation in *Tahoe-Sierra* involved two moratoria lasting 32 months and banning virtually any residential development, but the Court held



the petitioners could not recover for a regulatory taking under a *Penn Central* analysis “because petitioners expressly disavowed that theory, and because they did not appeal from the District Court’s conclusion that the evidence would not support it.” *Tahoe-Sierra, supra* at 334. Here, a 3½-month time period can hardly be considered abnormal and of constitutional significance when plaintiffs failed to comply with the statutory requirements for the issuance of a building permit and also failed to pursue an administrative or judicial appeal that would be available if plaintiffs believed they had fulfilled all necessary requirements for its issuance. See MCL 125.1511(1): “Failure by an enforcing agency to grant, in whole or in part, or deny an application within [10 or 15 business days] shall be deemed a denial of the application for purposes of authorizing the institution of an appeal to the appropriate board of appeals.” See also MCL 125.1514-MCL 125.1518.

Plaintiffs also failed to raise a material issue of fact that it suffered any concrete injury requiring just compensation. In this regard, “it is well established that a municipality is not required to zone property for its most profitable use, and that ‘[mere] diminution in value does not amount to [a] taking.’” *Dorman, supra* at 647 (citations omitted). Moreover, “a plaintiff alleging inverse condemnation must prove a causal connection between the government’s action and the alleged damages.” *Hinojosa, supra* at 548; see also *Frenchtown Charter Twp, supra* at 5-6. Here, plaintiffs’ sole basis for damages is a claim for lost profits. But the Takings Clauses in the Fifth Amendment and Const 1963, art 10, § 2 do “not guarantee property owners an economic profit from the use of their land.” *Paragon Properties Co v. City of Nov i*, 452 Mich. 568, 579 n 13; 550 NW2d 772 (1996); see also *Sun Oil Co v. City of Madison Heights*, 41 Mich.App 47, 56; 199 NW2d 525 (1972). Although when not speculative, evidence of lost profits may be proper indirect evidence regarding the diminution in the value of property taken for public use, *Merkur Steel, supra* at 135-136, claims for lost expected profits are generally too speculative to require just compensation. See *Dorman, supra* at 644 (“an owner may not base his or her claim for just compensation on uncertain and speculative expected profits”); *Poirier v. Grand Blanc Twp (After Remand)*, 192 Mich.App 539, 545; 481 NW2d 762 (1992) (affirming the trial court’s determination of just compensation that rejected the plaintiff’s claim for lost profits on the ground that it was speculative); *City of Detroit v. Larned Assoc*, 199 Mich.App 36, 42; 501 NW2d 189 (1993) (in a condemnation case holding that

“because of their speculative nature, damages for lost profits are not recoverable in a business-interruption case”).

\*8 In the present case, plaintiffs did not have an on-going profitable business selling statuary and other items at the subject property; they wanted to start the business. Plaintiffs claim that delay in granting a building permit resulted in lost profits is belied by the fact that when granted a building permit in 2002, plaintiffs did not follow through by erecting a building to house the proposed business. Similarly, it is pure speculation to posit that the three-month period from application to issuance of a building permit resulted in lost profits. Plaintiffs cannot establish a causal connection between the township’s actions and their alleged damages, lost profits. *Dorman, supra* at 644; *Hinojosa, supra* at 548.

Finally, defendant was entitled to judgment as a matter of law because on the undisputed material facts plaintiffs cannot establish a regulatory taking under the *Penn Central* balancing test. That test exams (1) the character of the government action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations. *Penn Central, supra* at 124; *K & K Const, supra* at 577.

First, the character of the government action here consists of two types: (a) traditional zoning where the government exercises its police powers and adopts laws that regulate in which zones certain uses are permitted or prohibited, and (b) the issuance of building permits, which involves a combination of ensuring compliance with state construction code standards and local zoning compliance, including use location, set backs, and other similar requirements. When considering this first factor, the “relevant inquiries are whether the governmental regulation singles plaintiffs out to bear the burden for the public good and whether the regulatory act being challenged ... is a comprehensive, broadly based regulatory scheme that burdens and benefits all citizens relatively equally.” *K & K Const, supra*, 267 Mich.App at 559. Because the ordinance here is one imposing traditional zoning as part of a comprehensive plan and plaintiffs are both benefited and burdened like other similarly situated property owners, “this factor weighs heavily against finding that a compensable regulatory taking has occurred here.” *Id.* at 563. Similarly, state building code requirements apply equally to all citizens who equally share the burdens and benefits of enforcement. In sum, the character of the regulatory actions in this case weighs heavily in favor of finding that a regulatory taking did not occur.



The economic effect of either the zoning ordinance or the application of the state building code on the property also does not support the conclusion there was a taking. Plaintiffs only claim is that they were unable to profit as much as they had hoped. But as noted above, the "Taking Clause does not guarantee property owners an economic profit from the use of their land." *Paragon Properties*, *supra* at 579 n 13. Moreover, the township is not required to zone property for its most profitable use, and the mere fact that a zoning classification might diminish the value of a parcel of property does not amount to a taking. *Dorman*, *supra* at 647. As the trial court correctly observed, plaintiffs were never ousted from their property; none of their property was required to be dedicated to public use, and plaintiffs were not denied all economically viable use of their land. To establish a taking, "a property owner must prove that the value of his land has been destroyed by the regulation or that he is precluded from using the land as zoned." 🗲🗲 *Bevan v. Brandon Twp*, 438 Mich.

385, 403; 🗲🗲 475 NW2d 37 (1991), amended 🗲🗲 439 Mich. 1202 (1991). Here, the effect of the regulations was not "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, *supra* at 539. The mere fact that a regulation reduces the value of the regulated property is insufficient to establish a compensable regulatory taking. *K & K Const*, *supra*, 267 Mich.App at 553, citing *Penn Central*, *supra* at 131. So, this factor does not support finding defendant effected a regulatory taking of plaintiffs' property requiring just compensation.

\*9 The last *Penn Central* factor, the extent to which the regulation has interfered with plaintiffs' distinct investment-backed expectations, also favors finding that no regulatory taking occurred in this case. Plaintiffs concede that at all times the portion of the property on which they desired to operate a lawn and garden supplies, concrete statuary, and local produce sales business was zoned "Commercial." Plaintiffs were also aware that to operate the proposed business outdoors according to their own original plan required their obtaining a special land use permit. The record reflects that the township was willing to grant a special land use permit in 2002. But plaintiffs voluntarily chose to withdraw their SLU application because they were unwilling to accept a condition, which plaintiffs have not established was unlawful. Thereafter, in 2002, the township granted plaintiffs' application for a building permit that would have allowed plaintiffs to erect a structure to house their statuary business.

This plan fell through not because of defendant's regulatory action but because of plaintiffs' financial difficulties. The building permit then lapsed. Then, in 2004, 3½ months after plaintiffs' application, the township issued plaintiffs another building permit. As noted above, the Takings Clause does not require just compensation for "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like." *First English*, *supra* at 321; see also *Tahoe-Sierra*, *supra* at 332-335. Based on the record evidence, reasonable minds could only conclude that any abnormal delay plaintiffs experienced implementing their business plan was not substantially caused by government regulators but by plaintiffs' own choices, financial difficulties, and failure to provide necessary documents to support their second building permit application. Finally, plaintiffs claim for just compensation is based solely on their allegation of lost profits. For the reasons already noted, plaintiffs' claim for lost profits is too speculative to support a claim for just compensation. *Dorman*, *supra* at 644.

After examining all the *Penn Central* factors, we conclude that a regulatory taking requiring just compensation did not occur in this case. The trial court correctly ruled that plaintiffs failed to create a material fact dispute that defendant's zoning ordinance or the application of the building code amounted to a regulatory taking of plaintiffs' property.

### III. Defendant's Cross-Appeal

Following a bench trial, we review for clear error the court's factual findings and we review de novo its conclusions of law. 🗲 *Ligon v. Detroit*, 276 Mich.App 120, 124; 🗲 739 NW2d 900 (2007). A trial court's finding of fact is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made. *Essexville v. Carrollton Concrete Mix, Inc.*, 259 Mich.App 257, 265; 673 NW2d 815 (2003). When reviewing a trial court's findings of fact, we will give due regard to the trial court's opportunity to judge the credibility of the witnesses who appeared before it. MCR 2.613(C). The interpretation of a township zoning ordinance, as occurred here, presents a question of law we review de novo. *Brandon Charter Twp v. Tippet*, 241 Mich.App 417, 421; 616 NW2d 243 (2000).

\*10 "The power to zone and rezone property is a legislative function ." *Essexville*, *supra* at 265; see also 🗲 *Sun*



*Communities v. Leroy Twp*, 241 Mich.App 665, 669; 617 NW2d 42 (2000) (“[I]t is settled law in Michigan that the zoning and rezoning of property are legislative functions.”). Further, the board of a local unit of government legislates when it adopts or amends a zoning ordinance that incorporates a zoning map or maps.<sup>2</sup> *Id.* at 669-700, citing Crawford, Michigan Zoning and Planning (3d ed), § 1.11, p 53; see also *City of Hillsdale v. Hillsdale Iron & Metal Works, Inc*, 358 Mich. 377, 384-385; 100 NW2d 467 (1960).

The rules of statutory construction apply with equal force to local legislative acts, including zoning ordinances. *Gora v. City of Ferndale*, 456 Mich. 704, 711; 576 NW2d 141 (1998); *Kalinoff v. Columbus Twp*, 214 Mich.App 7, 10; 542 NW2d 276 (1995). The primary goal of judicial interpretation of a statute is to ascertain and give effect to the intent of the legislative body. *Green Oak Twp v. Munzel*, 255 Mich.App 235, 239; 661 NW2d 243 (2003). The first and foremost source in determining legislative intent is the specific language of the statute. *Roberts v. Mecosta Co Gen Hosp*, 466 Mich. 57, 63; 642 NW2d 663 (2000). If the language of an ordinance is clear and unambiguous, the judiciary must apply it as written. *Id.*; *Brandon Charter Twp*, *supra* at 422. Courts may not speculate about the probable intent of a legislative body beyond the language expressed in the statute or ordinance. *Green Oak Twp*, *supra* at 240; *Kalinoff*, *supra* at 10. Stated otherwise, when a statute or ordinance is clear and unambiguous, the judiciary may not employ other rules of statutory construction to reach a contrary result. *Green Oak Twp*, *supra* at 240. Pertinent here, “resort to legislative history of any form is proper *only* where a genuine ambiguity exists in the statute. Legislative history cannot be used to create an ambiguity where one does not otherwise exist.” *In re Certified Question (Kenneth Henes Special Projects Procurement, Marketing & Consulting Corp v. Continental Biomass Industries, Inc)*, 468 Mich. 109, 115 n 5; 659 NW2d 597 (2003).

In the present case, the undisputed evidence at trial established that the township, through its planning commission and board of trustees, worked for over two years on a total revision of its existing zoning ordinance, conducting numerous workshops and holding necessary public hearings. On June 29, 2000, the planning commission approved for recommendation to the township board a

totally revised zoning ordinance, which incorporated 27 sectional maps of the township displaying the proposed zoning of lands over which the townships zoning authority extended. According to the minutes of the township board meeting of October 31, 2000, as well as the testimony several witnesses, the township board unanimously approved the new revised zoning ordinance. The new ordinance unambiguously incorporates the 27 sectional zoning maps that were unequivocally identified at trial as defendant's exhibit 15, and also unambiguously repeals the township's prior zoning ordinance and its incorporated zoning maps. New Buffalo Township Zoning Ordinance, October 2000, § 2.2(A); § 18.6. The trial court recognized that this evidence established that the township's new zoning ordinance, through its zoning map, classified plaintiffs' entire parcel commercial. Nevertheless, the court in its written opinion and order concluded “as a matter of fact, that the rear portion of Plaintiff's property was never knowingly and purposefully rezoned from industrial to commercial.” The trial court's determination, whether it is a finding of fact or a conclusion law, is clearly erroneous.

\*11 The trial court did not elaborate on how it arrived at its conclusion, but the record suggests it was based on the fact that none of the participants in the rezoning process who testified at trial could specifically recall any details regarding the rezoning of plaintiffs' property. The trial court also focused on the lack of any written record documenting discussion of the proposed change in zoning for plaintiffs' property during the review process, other than the sectional zoning map the planning commission approved and the township board adopted. But, the new zoning map, which the new ordinance incorporated, unambiguously depicted plaintiffs' property as rezoned commercial. The township board minutes and the undisputed testimony of numerous witnesses established the township board unanimously adopted the new ordinance and its incorporated zoning map. Imposing a scienter requirement on the members of the township board as a requisite to the validity of all or part of its corporate legislative acts is contrary to Michigan law. “[T]he motivation of legislators who actually approve or reject zoning proposals is irrelevant to a determination of the validity of those actions.” *Pythagorean, Inc v. Grand Rapids Twp*, 253 Mich.App 525, 528; 656 NW2d 212 (2002). A local government “board speaks only through its official minutes and resolutions and their import may not be altered or supplemented by parol evidence regarding the intention of the individual members.” *46th Circuit Trial*



*Court v. Crawford Co*, 266 Mich.App 150, 161; 702 NW2d 588 (2005), rev'd on other grounds 476 Mich. 131 (2006). Justice Campbell explained in *Stevenson v. Bay City*, 26 Mich. 44, 46-47 (1872):

When the law requires municipal bodies to keep records of their official action in the legislative business conducted at their meetings, the whole policy of the law would be defeated if they could rest partly in writing and partly in parol, and the true official history of their acts would perish with the living witnesses, or fluctuate with their conflicting memories. No authority was found, and we think none ought to be, which would permit official records to be received as either partial or uncertain memorials. That which is not established by the written records, fairly construed, cannot be shown to vary them. They are intended to serve as perpetual evidence, and no unwritten proofs can have this permanence.

The trial court's apparent reliance on the lack of documentation in the legislative history was also erroneous. As noted above, resort to legislative history for the purpose of construing a statute is proper only where legislation is ambiguous, *In re Certified Question*, *supra* at 115 n 5. That is not the case here. Legislative history or lack of legislative history may not be used to create an ambiguity where none exists. *Id.* When the “ ‘plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted.’ ” *Green Oak Twp*, *supra* at 240, quoting *Guardian Photo, Inc v. Dep't of Treasury*, 243 Mich.App 270, 277; 621 NW2d 233 (2000).

\*12 The only legal authority on which the trial court relied to support its ruling was *Prestige Community Developments v. Sumpter Twp*, unpublished opinion per curiam of the Court of Appeals, issued August 26, 1997 (Docket Nos. 193390; 193772). But that case does not support the trial court's ruling. In *Prestige*, the plaintiff sought rezoning for its property to

permit a mobile home park, which a citizen group opposed. The defendant township board approved the rezoning, but the citizen group led a successful referendum that returned the property to its former classification. Litigation ensued. The plaintiff discovered that two months before the defendant township approving the change in zoning, the township's zoning map had been altered in anticipation of the board's approval. The trial court agreed with the plaintiff that the referendum did not affect the earlier change in the zoning map, so it entered an order declaring the plaintiff's property was zoned in accordance with the map change. *Id.* at 2. Much of this Court's opinion addressed the issue of the citizen group's intervention in the litigation. *Id.* at 2-4. As to the trial court's ruling regarding the map change, this Court ruled the change to the zoning map relating to the plaintiff's property was unauthorized by the township board, did not comply with the zoning procedures, and was therefore insufficient to rezone the plaintiff's property. *Id.* at 5-6.

In contrast to *Prestige*, the trial court here ruled that the township had followed proper procedures before it adopted by unanimous vote its revised zoning ordinance that incorporated new zoning maps, including one changing the zoning of the back portion of plaintiff's property from industrial to commercial. Nothing in this Court's decision in *Prestige* provides a basis for invalidating the clear and unambiguous provisions of the township's zoning ordinance and its incorporated zoning maps.

Finally, although we have determined that the trial court cleared erred as a matter of fact and law by invalidating the rezoning of plaintiffs' property, we also note that the trial court's order requiring the township to adopt an ordinance rezoning plaintiffs' property exceeded its authority under the separation of powers doctrine. *Schwartz v. City of Flint*, 426 Mich. 295, 307-308; 395 NW2d 678 (1986). While reaffirming the traditional role of the judiciary in reviewing the constitutionality of zoning ordinances in general, and when necessary, granting appropriate relief, the *Schwartz* Court also approved the statement of Justice T.G. Kavanagh dissenting in *Daraban v. Redford Twp*, 383 Mich. 497, 503; 176 NW2d 598 (1970): “ ‘Zoning is a legislative function that cannot constitutionally be performed by a court, either directly or indirectly-in law or in equity.’ ” *Schwartz*, *supra* at 307. So, even if the trial court had properly determined that the township had unlawfully zoned plaintiffs' property, “the trial court went too far when it ordered defendant to change the zoning classification of plaintiffs' property.” *English*



v. *Augusta Twp*, 204 Mich.App 33, 40;  514 NW2d 172 (1994).

#### IV. Conclusion




\*13 The trial court correctly ruled that plaintiffs failed to create a genuine issue of a material fact that defendant's zoning ordinance or the application of the building code amounted to a regulatory taking of plaintiffs' property. Accordingly, the trial court correctly granted defendant summary disposition regarding plaintiffs' constitutional claims. We affirm that ruling.


The trial court, however, clearly erred as a matter of fact and law in concluding that defendant did not rezone plaintiffs' property from industrial to commercial. We reverse, vacate entirely the trial court's opinion and order dated February 12, 2007, and its declaratory judgment dated June 11, 2007, and remand for entry of an order consistent with this opinion. We do not retain jurisdiction. Defendant, being the prevailing party, may tax costs pursuant to [MCR 7.219](#).




#### All Citations

Not Reported in N.W.2d, 2009 WL 50065

#### Footnotes

1 The pertinent clause in the Fifth Amendment “provides in relevant part that ‘private property [shall not] be taken for public use, without just compensation.’”  [First English Evangelical Lutheran Church v. Los Angeles County](#), 482 U.S. 304, 314;  107 S Ct 2378;  96 L.Ed.2d 250 (1987). Michigan's Constitution provides: “Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record.” [Const 1963, art 10, § 2](#).

2 Defendant enacted its zoning ordinance under the authority of the Township Zoning Act (TZA),  [MCL 125.271 et seq.](#), repealed by 2006 PA 110. The current local government zoning enabling legislation is the Michigan Zoning Enabling Act (MZEA), [MCL 125.3101, et seq.](#) The MZEA preserves “any pending litigation, administrative proceeding ... or any ordinance, order, permit, or decision that was based on” the TZA before its repeal. [MCL 125.3702\(2\)](#).

The former  [MCL 125.277\(c\)](#) provided that the “township zoning board” submit its recommendations to the township board regarding the “text of a zoning ordinance with the necessary maps and zoning regulations to be adopted for a zoning district or the township as a whole.”  [MCL 125.279](#) required that notices before required public hearings regarding the adoption of an ordinance specify where the tentative text and maps could be examined.  [MCL 125.290](#) vested the township zoning board of appeals with authority to “decide questions that arise in the administration of the zoning ordinance, including the interpretation of the zoning maps.” Similar provisions are found in the MZEA. See [MCL 125.3305](#), .3306, .3308, & .3603.