STATE OF MICHIGAN

48TH JUDICIAL CIRCUIT COURT (COUNTY OF ALLEGAN)

SAUGATUCK DUNES COASTAL ALLIANCE,
Plaintiff,
v. File No. 2017-58936-AA
2018-59598-AA
SAUGATUCK TOWNSHIP ZONING BOARD,
Defendant.

HEARING ON MOTION FOR CLARIFICATION

BEFORE THE HONORABLE MATTHEW ANTKOVIAK, CIRCUIT JUDGE

Allegan, Michigan – Monday, December 11, 2023

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THE COURT: Okay. All right.

Okay. I think we are finally ready in -- to call the cases of Saugatuck Dunes Coastal Alliance versus Saugatuck Township, Saugatuck Township Zoning Board of Appeals, and North Shores of Saugatuck, LLC. We're here today in the combined matters of files 2017-58936-AA and 2018-59598-AA.

And good morning, gentlemen. I've not had the privilege of meeting you all yet. But I have been trying to make myself very -- I know Mr. Gabrielse. But --

MR. GABRIELSE: Good morning, your Honor.

THE COURT: Good morning.

I'm trying to become as familiar as I can with these proceedings. But gentlemen, could you introduce yourselves so I can put a name with a face?

MR. STRAUB: Sure. James Straub from Straub, Seaman, and Allen on behalf of the Township of Saugatuck and the Township ZBA.

And Grant Semonin from our office is the associate attorney working on this file.

MR. SEMONIN: Good to meet your Honor.

THE COURT: Thank you. Good morning.

MR. HOWARD: Your Honor, Scott Howard on behalf of the Saugatuck Dunes Coastal Alliance.

THE COURT: Okay.

MR. GABRIELSE: And -- and your Honor --

THE COURT: Good morning, Mr. Howard.

MR. GABRIELSE: -- Mr. Gabrielse on behalf of North Shores of Saugatuck.

THE COURT: Thank you. Good morning, Mr. Gabrielse.

Okay. Let me get my papers in order. I'm sorry. Just a moment, please.

Okay. We're here today in respect to the motion for clarification and/or a relief from order that was filed by Saugatuck Township Planning Commission and the Saugatuck Township.

So, Mr. Straub, I believe this is your motion.

MR. STRAUB: Thank you, your Honor.

THE COURT: Sir, if you would please proceed?

MR. STRAUB: May it please the Court. First of all, this is a long enduring matter. But like all matters that long endure, we break it down into separate pieces.

It's really pretty straight forward what the circumstances are. And thankfully, the Court has staff Counsel who hopefully has been able to explain to the Court some of the history here that's involved in the case and bring the Court procedurally to the present point. And I'm going to assume that. And if my assumption is inaccurate, please be sure to interrupt me.

I'll try to be very brief. Because the issue here is quite precise.

THE COURT: Thank you.

MR. STRAUB: First of all, we're dealing with the Michigan Zoning Enabling Act.

And most lawyers that don't practice in the zoning law frequently have their eyes roll to the back of their head when you mention the term zoning. Because it's a particular area of the law that is governed by very particular statutes, much like Worker's Compensation. Much like other specialty areas of the law.

And that's what we're dealing with here, the Michigan Zoning Enabling Act. For the citation, it's MCL 125.3101 and subsequent sections.

And what we're dealing with here in particular is the appellate process dealing with decisions made by zoning officials. And the section that deals with -- the section of the MZEA that deals with that process is the 3601 and subsequent sections.

THE COURT: Excuse me.

MR. STRAUB: So, what -- what happens here is that a community passes a zoning ordinance, and it has a zoning path. I mean, it provides various areas that have classifications, which are defined in the zoning ordinance.

The determinations are made at the time that someone

comes into the township or municipality to develop a piece of property, whether it fits within that category. And that's what happened here way back when.

The particular piece of property here I'm sure is well-known to the Court. But the developer, represented by Mr. Gabrielse here, wants to develop the property and brought on a plan to do that to the planning commission, which is a body established by the Planning Enabling Act, not by the zoning or the Zoning Enabling Act, the Planning Act.

He brings that application to develop a particular parcel of property in a particular manner to the planning commission. And in April of 2017, the planning commission granted a particular status to that property referred to as a planned unit development. And it also preliminarily granted that and also granted a special acceptance use permit.

Now, those are decisions made by a zoning authority within the municipality, the township. And the Saugatuck Dunes Coastal Alliance took issue with that and filed an appeal of that determination made by the planning commission, separate from the ZBA, separate from the zoning board of appeals. Filed an appeal that was heard by the zoning board of appeals of the municipality in October of 2017.

And at that time, based upon the law that was in existence at that time, the zoning board of appeals ruled that the SDCA, Saugatuck Dunes Coastal Alliance, did not have

standing. Or if we use the technical terms in the Zoning Enabling Act, aggrieved person or aggrieved party status under sections 3604 of the Zoning Enabling Act. And it was their decision, the ZBA's decision, was based upon case law that primarily was developed in the mid '60s and early '70s.

Now, shortly after that meeting of the ZBA in October of 2017, the planning commission for the township made another determination regarding the developer's application to develop the property; October 23, about 12 days after the ZBA made its decision. And that decision granted more or less a final approval status for the planning use or the PUD status of the property and some other matters that were addressed. And the SDCA appealed that decision as well.

Now, the appeals for those planning commission decisions by statute, by the Zoning Enabling Act, go to the zoning board of appeals. It makes sense. That's right in the title. And the zoning board of appeals makes a determination at that time whether or not it adds -- whether or not the SDCA had standing. If it did, it would go on to decide whether or not its standing position gave it and there were proper grounds presented by them.

But in this case, in both determinations that the ZBA made from the two planning commission appeals, it decided that we don't even need to get to the issue. The ZBA did not need to get to the issue of substance, whether there was any

merit to the appeal that was being filed by the SDCA. Rather, the ZBA determined that the SDCA did not have standing. It wasn't an aggrieved person or party as set forth in the MZEA.

Now, those decisions by the ZBA were appealed to this Court. Section 3605 says that a decision by the ZBA, if you disagree with that, the party can then file a claim -- file an application or file an appeal with this court, the Circuit Court. And that was done.

So, in regard to the October 2017 decision by the ZBA, which said no standing for the SDCA, that appeal was brought to this Court. There was a visiting Judge. He affirmed the opinion.

The decision made by the ZBA, or excuse me, the appeal to the ZBA of the second decision of the planning commission was heard by the ZBA in April of 2018. And in April of 2018, the ZBA ruled once again, not on the substantive nature of the appeal, of -- of the process. It ruled that the SDCA was not an aggrieved party, because it didn't meet the case law requirements that were set up in the mid '60s and '70s by the prior case law.

That decision was appealed by the SDCA to the Court of Appeals along with the decision, the earlier decision. Strike that. Let me -- I got ahead of myself.

The decision in April of '18 was appealed to this Court. Judge Kengis had been appointed as the Judge of

that -- of the Circuit Court. He decided in November of 2018, look, I agree, the SDCA does not have standing.

Both of those cases, then, were appealed by the SCDA, both decisions finding no standing were appealed to the Court of Appeals. It -- they were joined together. The Court of Appeals affirmed.

It goes to application for leave to appeal filed by the SDCA to the Supreme Court. And on that application, the Court issued an opinion in July of 2021, I believe, that said, look, we basically agree with everything that was said by those cases back in the mid '60s and '70s, early '70s, with the exception that you don't have to be a property owner to have an aggrieved party status or standing.

It remanded the case back to this Court for determination. And Judge Kengis met with Counsel. We set up a scheduling order, in which the parties agreed that the first step to this whole process would be to argue the issue of standing before we even get to, or maybe we don't ever get to, the issue of whether or not the planning commission properly made decisions back in 2017 and '18.

The parties started the briefing process. And in the briefing process, the developer filed materials with the Court that occurred well after April of 2018. And at that time, the SDCA filed a motion to strike those materials, because they didn't exist at the time in 2018 and added

additional materials.

And that's where things kind of got to where we are today. So, the question is really quite straightforward. Section 3606, subsection two, is the real, of the Michigan Zoning Enabling Act, is the real issue in this case.

Now, 3602 is obviously the second paragraph of the section of the Michigan Zoning Enabling Act. And hopefully the Court has a copy of that in front of it or can get to it.

THE COURT: I can get to that.

MR. STRAUB: And I'll -- 'cause I'd like to point to that.

THE COURT: Yes. Let me pull that up very quickly.

MR. STRAUB: Great. Thank you. 125.3606.

THE COURT: Thank you, Counsel. I do have a copy. And I have that for my review, so.

MR. STRAUB: Good. Good. I'm -- and I'm -- I could tell that you -- you've -- you've read this or tried to plow through it, I should say, tried to sort it out.

And -- and really it -- it really boils down to pretty simple stuff. And -- and -- and we're gonna get into the simple part right now.

3606 sub one says any party aggrieved by a decision of the ZBA, zoning board of appeals, may appeal to the Circuit Court.

That's what's been going on here. The ZBA made a

decision in 2017 and one in 2018 that the -- that the SDCA did not have standing. So, its appropriate action, the SDCA's appropriate action was to appeal to this Court.

Now, 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 the decision meets all of the following requirements. And then, there's four requirements.

Now, what happens in a typical circumstance, we're not -- the typical argument isn't over whether the aggrieved party has standing. The typical circumstance is there's a property owner neighbor that's unhappy with the planning commission's decision, appeals it to the ZBA. And none of these people on the planning commission and ZBA are lawyers. And they do things sometimes without substantial documentation to support their decisions. Okay?

It's the position of the township that the legislature knew that when it was drafting the statute. Because I'm sure you've already had some cases land on your desk. And you're like, really, what's the issue here? How can I make a decision? Because I don't have the tools that I need. I don't have the findings necessary.

So, what this section does, 36061, it says it gives you four requirements that the decision by the ZBA was -- complies with the constitution; two, based upon proper

procedure. Is it supported by competent material and substantial evidence on the record? And D, represents the reasonable exercise of discretion. Okay? Now.

Now, we go into the section that's really at issue in this case. If the Court finds the record inadequate to make the review, then it can remand to the ZBA. Finds that -- if the Court finds that additional material evidence exists that with good reason was not presented, the Court shall further order proceedings on the conditions that the Court considers proper.

So, there's the -- there's the fulcrum point of what we're talking about. Okay?

So, when we brought this case -- when the case came back down from the Supreme Court, we're talking to Judge Kengis. And the argument is, all right, what is the issue with regard to standing?

Because that's the only thing we're dealing with here. We're not dealing with whether the PUD was properly granted, whether the SAU was properly granted. We're dealing with is this SDCA an aggrieved entity, aggrieved party or person.

Because those are the only two decisions that were made by the ZBA; one in October based upon the first PC meeting, one in April based upon the second PC meeting. Nothing else has been plead or has been considered by the ZBA

to this point.

So, now, what do we do on this appellate process that has now come back down from the Supreme Court to this Court? And what do we do with that as far as further material evidence standards are considered?

Now, the township has been unwavering in its concept that -- the township ZBA has been unwavering in its concept that in order for the evidence to be material and have good reason for not being submitted, it must have existed at the time of the decisions being made. Because if it didn't, then if it didn't exist at the time, then it has no materiality to the issue of standing slash aggrieved party status. That's been unwavering.

But the parties, SDCA and the developer, have kind of, how do I wanna say, been inconsistent about that position.

The first party to break that concept of it had to be in existence at -- at the time that the last -- the last hearing date was April of -- April 9, 2018. The first party to break that concept was the developer. It filed a series of materials in the first briefing process after the remand from the Court of Appeals, excuse me, from the Supreme Court to this Court. It filed some materials that had -- that were not in existence in April of 2018 and used its -- and used those documents to argue its position. At which point, the Coastal Alliance filed a motion to strike those materials.

Now, that motion to strike suggests that it agreed at that time with the position of the township, unwavering position, that documents, in order to be material and relevant to the determination made in 2017 or 2018 had to be in existence at that time. And some good reason had to be established.

A good reason would be the Supreme Court changed the document or changed the concept of you don't have to be a property owner to have standing. So, if there were documents that were material evidence on that, that should be the kind of material that would be considered by the ZBA upon rehearing. That's been the unwavering decision of the township ZBA.

The developer was first to break, brought in all this material. SDCA filed a motion to strike. But in hedging its legal position, said, well, you know, if there's some other material, maybe that ought to be considered as well. That began the series of decisions.

I'm sure the Court has had an opportunity to review the transcript of the hearing in April where this was argued back and forth. And what we're -- what we've come to is the decision -- the -- the statements made by Judge Kengis in that record, where he said, and I don't have it in front of me to quote. But you -- you know what I'm gonna talk about, 'cause it's in our brief. I find that there was material evidence

that with good reason was not presented.

But when Counsel, I believe it was me, pressed the Judge on well, what is that? Well, his response was, I'm not gonna tell. Because that's up to the zoning board of appeals to determine.

Well, that puts the zoning board of appeals in an awful spot. Because now, if their decision that they make is appealed, it goes back to Judge Kengis. If he's gonna remand it to the zoning board of appeals for determination, but he's already ruled that he finds as a matter of law that there's material evidence that with good reason wasn't presented, he's taken that potential ruling by the ZBA and eliminated it as a possibility. Because he's already made a finding.

When he issued his order, he didn't say anything restricted, I already find that; or if he did, he didn't make it clear that that was simply an option for the ZBA at all.

So, my position is, and the township's position is that creates a huge amount of controversy about what that ruling says.

Now, it was taken by both parties, the SDCA and the developer, when the ZBA started to set up hearings to say, all right, we're gonna try to figure out what's going on here, both parties opened, and I -- I hesitate to use this term, but I'll use it anyway, the floodgates. I mean, the law always talks about that. And I might as well use it.

In the artful term, inartful term of floodgates, the ZBA was presented with over -- around or over 2,000 pages of material, not counting the stuff that already existed before, and was asked to consider materials as late as August of 2023 on an issue of standing as of April of 2018, latest date.

One of the parties presents, the SDCA presents in its brief, well, why didn't you ask for a motion for reconsideration? Well, because at that time, the hope was that there was a very limited amount of material. That hope went out the door with the scheduling of the ZBA meetings and requests.

We had to give -- the ZBA has to give the parties an opportunity to present materials. And 2,000 -- around 2,000 pages. I'm -- I don't know. It could be 1,800. It could be 2,100. I don't know. Somewhere around there. Come in.

And now, the -- now, there's a glaring issue here. And the glaring issue is, what do we do with this material? Some of its six years post the decision that's at issue in this case. We have a decision of April -- in April, the latest, April 9, 2018. We've got material from August of 2023. Maybe my math is off. Five years plus.

Is there good reason for this material not to have been presented back in 2018? And the good reason that's offered is, by the SDCA, is well, it didn't exist.

Well, then, how is there ever a closed record for an

appeal? That's the real focus here. How do you ever get an appeal to -- to be closed? Because to appeal an issue, you have to have a record that's firm.

And I'm sure that the Court has had, in its recent practice, opportunity to appeal to the Court of Appeals. You have to have the record on appeal. It's gotta be certified. Up it goes. And that Court reads that to get the whole issue of what the lower Court did.

If that's never closed, then how does the appeal ever get determined? The record closes when the argument is over. The argument was over in April of 2018.

The exception provided by subsection two of 3606 allows for material evidence that for good reason was not presented. Guess what the good reason is in this case. The Michigan Supreme Court decision. There isn't any other good reason. That change of the property ownership requirement that existed in the earlier decisions is no longer in existence.

Does the party, SDCA or the developer, have material evidence on that issue that existed back in April of 2018 to present to the ZBA to make its decision now? Did the Supreme Court decision make any changes? The township's position is that's exactly how 3602 should be interpreted.

Now, whether it's our genius brief, the -- I would like to prefer to think that it's the logic of the

presentation of the issues here. The developer is in agreement with our position, with the township's position. It's because it's clearcut.

The only issue emanating from this appeal to start with is the issue of standing. Whether property ownership has something to do with that or not, that's certainly on the table.

If there's material evidence that with good reason wasn't presented back in 2018 or 2017 at the first decision, have at it. The ZBA's wide open. That's what we're here for. That's the position of the ZBA.

Now, I may have left the cloud -- the Court in a cloud of dust of the MZEA, hopefully not. Does the Court have any questions?

THE COURT: Mr. Straub, you've done a wonderful job of providing me a very nice overview of the Zoning Enabling Act and drilling down on the specific issue. And the Court appreciates that.

MR. STRAUB: Great.

THE COURT: I have a couple of more pointed questions for you.

MR. STRAUB: Sure.

THE COURT: Is it the township's opinion that the good cause related in this matter pertains only to the holding from the Supreme Court, which changes the definition of

standing. It's a new legal test. Is that -- is it the agreement of the township or the understanding that that is the good cause to revisit additional potential material information?

MR. STRAUB: With all do respect, and I'm guilty of this myself, so I -- I fully respect.

Technically, the term isn't good cause. It's good reason.

Now, the reason that I say that is that I made a mistake in my last argument of saying the word good cause. And that's not right. The statute talks about it. Because I'm gonna go off on a little tangent here. I apologize for that.

THE COURT: That's okay.

MR. STRAUB: The statute talks good reason. There's no case law in Michigan, none that defines good reason.

I -- I'd urge you to go -- I -- I'd look online to the Oxford dictionary online. And it talks about, I mean, the words good and reason are pretty common words. The Oxford dictionary gave a -- gave a distinction about that.

Good means to be desired or approved of. Reason, the power of the mind to think, understand, and form judgments by a process of logic. Desirable logic process. That's what I came up with.

So, the answer to that is, the township believes,

the township and it's ZBA believes that the material evidence that for good reason was not presented must be related to the decision of the Supreme Court changing that property ownership requirement and that it must've been in existence at the time of the hearing in April 2018.

Otherwise, there's some language in the statute, I could get more specific, that would be surplusage, which you can't allow. Okay?

So, did I answer your question?

THE COURT: Yes.

My second question to you is that in subpart two, it indicates that the Court shall order further proceedings on conditions that the Court considers proper.

Would you agree that that gives the Court discretion to permit information beyond that which was capable of being presented at the 2017 hearings? If it is -- if the Court believes that there is good reason, i.e., it was not known to the parties at the time, does that -- is it the township's position that the Court does not have that discretion?

MR. STRAUB: It's my position, it's the township's position, that is inconsistent with -- if -- if the Court would've ruled that way, that's inconsistent with the closed record requirement and reduces the closed record require to an absurdity.

What happens if the matter is on appeal, and you --

let's say you rule that way. And the Court rules that way and says, okay, everything's in. And the ZBA makes a determination. And it's now on appeal to this Court. And in walks the -- the loser on an appeal in front of this Court and says, oh, wait a minute. Two weeks ago, while this record was being taken, there's another piece of evidence that's material evidence to this that didn't exist. And it's good reason it didn't exist, because it didn't exist until today, you know, two weeks ago. We need you to consider that.

The record never gets closed. Because you could take that all the way up to the Supreme Court and argue to the Supreme Court. A week before your oral argument, oh, something just happened two weeks ago and the Court needs to consider this. So, the record's never closed.

The pleadings are the same. Go back to the original pleadings in this case. Look at that appeal. It appeals the decision of the ZBA from October 11, 2017. And the other appeal, April 9, 2018. We're constantly changing.

We're -- using, since it's football season or whatever they call college football these days, a crash or trainwreck.

The goalpost is constantly moving. And the purpose of a closed record is to keep that goalpost ten yards from the -- from the goal line. That's what it's there for.

And this carve out of subsection two of 3606 is

designed specifically to prevent unsophisticated people who are in planning commissions and zoning boards of appeal from not providing enough evidence to the Court to make a ruling on an appeal.

THE COURT: Okay. Thank you.

One last question.

MR. STRAUB: Sure.

THE COURT: On a remand to the ZBA to address a new test, wouldn't it make sense to reset the hearing to address the relevant information at that time of the hearing and thereby create the -- the closure of evidence after a remand? In other words, is a remand different than an initial hearing where the information is presented?

MR. STRAUB: I would argue not. Because the pleadings are an appeal from that decision of the ZBA.

The ZBA made its decision in 2017 and '18. The statute calls for that specific decision to be determined in accordance with the statute. The statute says if there is material evidence that for good reason was not presented.

The argument would be if you allow that door to open, then everything comes in. How do you stop? What date do you say, well, I want you to consider, ZBA, everything up to yesterday, last year, January 1, January 1 of 2021, the date of the -- the Supreme Court decision. It becomes arbitrary.

The pleadings are in -- in paper, black and white. Can't change those at this point.

THE COURT: Okay. Thank you, Mr. Straub.

MR. STRAUB: Thank you, your Honor.

THE COURT: Who wishes to argue next?

Mr. Howard, do you wish to argue?

MR. HOWARD: Your Honor, the -- your Honor, the only thing I'd say is I don't know if it makes sense for me to ping pong up here twice after Mr. Gabrielse does his presentation. But I'm happy to do that if it -- if that's what the Court prefers.

THE COURT: Mr. Gabrielse, do you wish to go next?

MR. GABRIELSE: That's fine, if the Court would --

THE COURT: Okay.

MR. GABRIELSE: -- were to ask for that.

THE COURT: Yeah. Yes. Thank you. You may proceed.

MR. GABRIELSE: I intend on using the screen. May I get the cord? I can grab the cord myself. But usually, you guys have one.

Good morning, your Honor. As I get this connected --

THE COURT: Thank you. Good morning, Mr. Gabrielse.

MR. GABRIELSE: As I get this connected, I think I can start by talking through what Mr. Straub said.

Mr. Straub is correct that we do concur and agree with the township's position. And as he said, it -- it appears that I was the first one to break ranks and introduce evidence that was not part of the record.

I'm thinking about a case with Judge Ed Post in -- in Ottawa County where he issued a motion for summary disposition, a decision. And then a couple weeks later, he issued another one that completely turned 180 degrees. And -- and his explanation was just it clicked, and I saw it.

And so, I -- I will give Mr. Straub absolute credit for his clarity in presentation. But it's, you know, with 20/20 hindsight, here's -- here's where we are.

And -- and I guess to clarify two things -- a couple items on that. Mr. Straub was correct that that introduction of evidence, we introduced evidence after the case came back from the Supreme Court. One point of clarity is that the evidence submitted at that point after it came down from the Supreme Court had already been submitted the first time around with this Court. And this Court had allowed it in.

So, we weren't trying to do something again and -- and break ranks again. It had already been blessed, if you will, by this Court. And we were simply doing it again. This -- this time around, Mr. Howard said hold on, we shouldn't have that in there.

THE COURT: Which evidence are you referring to,

Mr. Gabrielse? Are you re -- referring to reports that were referenced in Judge Kengis' ruling on April 27 of this year?

MR. GABRIELSE: It -- the specifics would be evidence attached to North Shore's brief to this Court a few months prior to that.

THE COURT: Okay.

MR. GABRIELSE: Attached as exhibits to this -- to our brief.

THE COURT: Okay.

MR. GABRIELSE: I -- I don't have the list for it. But if the Court is looking for it, that's where it was.

THE COURT: All right. Thank you.

Thank you. Please proceed.

MR. GABRIELSE: When we talk about this statute, I guess I wanna drill down on that for a little bit. And -- and I do have it on the screen here.

If the Court finds that additional material evidence exists that with good reason was not presented. We've talked about that, and we've focused on that.

Now, in order for the Court to make that finding, it has to be familiar with the evidence that's being proposed as additional evidence. Because otherwise, it can't determine whether that mat -- that evidence is material. It can't determine whether there was for -- good reason that it was not presented previously.

So, I would suggest to the Court that it's implicit in the statute that the determination that this Court makes of whether there's additional material evidence that with good reason was not presented means that this Court would also identify with specificity what that evidence is.

In other words, the Court would make that determination in the same way that it makes determinations on exhibits at trial. Is this in, or is this out? There really doesn't -- there really isn't another way for this Court to make that determination that makes sense that's consistent with the intent of the statute.

The alternative is that this Court would consider a bunch of these potential exhibits and make this, you know, universal pronouncement of I find that there's additional evidence that with good reason was not presented. But I'm not gonna tell you what it is. You're gonna have to guess.

That might be, you know, how a university professor tests the grad students or even a TV reality show eliminates contestants. But that's not how the Court, traditional Court works.

That finding needs to be specific as to specific materials. Is this material evidence? And for good reason, was -- why was it not presented?

And -- and another reason why I point that out is because this statute does not contemplate that the ZBA makes

that determination. This statute contemplates that the Court makes that determination.

And think about it. If the Court makes just this universal academic determination that in the realm of the entire universe there is additional evidence that with good reason was not presented, the ZBA still needs to make that exact determination as to the specifics. It has to look at an actual document and say is this material evidence and was it for good reason not presented. And the statute doesn't say that the ZBA is to make that determination.

Now, to -- to anticipate your question. This -- this does provide for you providing further order on conditions the Court considers proper. I would suggest to you, though, where the statute places the responsibility squarely with this re -- with this Court to make that determination, the Court should not delegate that to a ZBA, a nonjudicial, nontrained, nonexperienced body.

This Court, the -- the previous Judge, did, if you will, the first part of saying I find this. Now, the Court needs to unpack that and apply that to specific documents and make that determination.

Now, with that determination, Mr. Straub I think clearly addressed the issue of after acquired and after created materials.

And -- and really, to say it slightly different than

what he said, you know, anyone can create that. I mean, I have a pen and a paper right here. I could create some new documents that for good reason were not presented.

Even if there was, you know, an existing report that I -- that I was -- existed in 2017, but you ruled that -- that after acquired or after created satisfies that standard, I can commission the expert to write a new report. And I bet I can make it different enough that it's a new report, that I can say, Judge, this did not exist. It is a report as of now. And therefore, with good reason, it was not presented.

So, again, to find that that after acquired or after created materials is the standard all but eliminates that standard.

The other point I guess I wanna touch on is regardless of how this Court determines the after acquired, after created, is that under absolutely no interpretation of the statute is there any justification that would allow a party five years after the appeal was filed to add new claimants to the mix.

Now, in understanding this issue, it's important to remember that Coastal Alliance is not claiming that itself as a nonprofit entity, as a legal entity, has been harmed or has suffered an injury. Instead, it is a cert -- asserting this representational standing, where is says, you know, somebody that purports is a member of its association and that person

has -- is alleging aggrieved party status, then the association, the organization is able to speak on behalf, be a representative, be an advocate.

Here's how Michigan cases describe it. An organization may advocate for the interests of its members, if the members themselves have a sufficient interest. Nonprofit organizations representing injured members. But an association's only able to do that, of course, when the members themselves have a sufficient stake.

All these claims make -- all these cases make clear that the real claimants are the individuals. The organization is simply advocating.

In this case, in 2017, there were eight individuals that were identified as the true claimants, as those individuals that had suffered and had been aggrieved. Now, we strongly disagree with that claim. But that's what was alleged.

The Coastal Alliance never has asserted that it has been harmed, simply that it is able to advocate on behalf of those individuals. But again, the Coastal Alliance is simply the representative, the advocate, and not the actual claimant that is aggrieved.

Now, five years later, we have an effort by the Coastal Alliance to name all these new claimants, including, right under the -- the Zoom bucket there, the Nottawaseppi

Huron Band of Potaway -- Potawatomi Indians, which has over 1,500 members. So, they have just -- they are attempting to take eight claimants and turn it into at least 1,508 claimants.

And of course, this is all in the interest of finding that one individual that has a good enough story that allows the Coastal Alliance to oppose and obstruct the development of North Shores Private Property.

We understand the desire to do this and the writing on the wall. Because no Court or tribunal that has viewed the claims has determined that they're legitimate to establish standing in. So -- so, the, well, we've gotta scramble and find somebody else, it makes sense. But that's not proper under any circumstance.

Just a couple final thoughts. The Court has an option. Leave the remand order as is. This, of course, would make the ZBA members guess as to what the Court meant by material or the Court meant by good reason was not presented.

As Mr. Straub said, that makes this case ripe for appeal. And I would respectfully say ripe for reversal.

The other option, as I would present it, would be for the Court to complete the analysis contemplated by the statute. So, this is making that finding as to the specific pieces of evidence. Any other finding, if it's limited to what it was, is simply meaningless for the ZBA. And -- and I

would suggest to the Court that in doing that, it would follow the interpretation advocated for by Mr. Straub and myself of no after acquired, no after created materials. And certainly period, no new claimants.

I think the Court would also be justified in looking at that as -- as Mr. Straub said, you know, for good reason. The only good reason that we are able to see right now would be that change by the Michigan Supreme Court. And -- and it's not a significant change.

If you read the Court of Appeal -- the Supreme Court's decision, they even used words like we -- we modify these cases only to the limited extent, et cetera, this issue of the property ownership.

Perhaps there is another good reason. It's not that it didn't exist or that it was created after the fact. That allows for the fabrication and manufacturing of evidence. Off the top of my head, I cannot think of another good reason why it wouldn't have been presented, other than a change in the law.

A good reason is not we -- we, awe shucks, we -- we should've but we didn't. Right?

But also in that determination, the Court in -- in fulfilling that analysis, the Court should -- should focus on the term mater -- materiality. It's material evidence.

As Mr. Straub eloquently described, this is an

appeal of a very narrow planning commission decision. You know, this was -- this is not an appeal of the hydrology issues being reviewed by the Army Corp of engineers or the ecological issues by the -- by Eagle or anything else. This is the approval of a specific configuration of houses and boats.

Houses and boats and docks are permitted in this zoning section by right. It's simply we wanted to do them in a slightly different configuration. That is the small decision being appealed. So, all this stuff around it is simply not material.

Now, we had jumped on the bad -- bandwagon with Mr. Howard in responding to these allegations. We then said, you know what? If they're able to make all these allegations, we have to put our entire library in of everything we've done, all the environmentally friendly steps that we've taken to make sure we're developing this property responsibly.

But, you know, stepping back now with 20/20 hindsight, this needs to be pared back down to what it actually should be, the review of the narrow issue of the planning commission decision.

Does the Court have any questions for me?

THE COURT: If the new standard set forth in the Supreme Court decision 509 Mich. 561 required the ZBA to include a component in respect to their test that wasn't on

the radar of anyone in 2017 and 2018, wouldn't that require that additional reports or information come in to address an issue that wasn't even conceived previously under the standing or aggrieved party analysis?

MR. GABRIELSE: I -- I think I'd be echoing Mr. Straub when I say yes, that's exactly what we are saying, is if there is a justification for the production of, again, a particular document, not there might be some out there, but a particular document with an explanation for why this document responds or is responsive to the clarification from the Supreme Court, absolutely.

THE COURT: Okay. Thank you.

Thank you, Mr. Gabrielse. No further questions at this time.

MR. GABRIELSE: Thank you.

THE COURT: Mr. Howard?

MR. HOWARD: Thank you, your Honor. I appreciate the reshuffling. I just figured it'd be easier than --

THE COURT: You --

MR. HOWARD: -- jumping up and answering questions. So, going --

THE COURT: Certainly.

MR. HOWARD: -- last is hopefully helpful.

I was gonna start off with the Supreme Court opinion. But if -- if the Court doesn't mind, I'll -- I'd

like to stand here so that I can get to all my stuff.

THE COURT: Yes, feel free.

MR. HOWARD: Thank you.

I wanna start actually with -- with a quick look at the statutory language in 3606, in subparagraph two. And I wanna be sure that we're reading the entire paragraph there and not taking parts out.

It says if the Court finds the record inadequate to make the review required by this section or finds that additional material evidence exists with good reason not presented, the Court shall order further proceedings on conditions that the Court considers proper. The zoning board of appeals may modify its findings and decision as a result of the new proceedings or may affirm its original decision. Then, the supplementary record and decision shall be filed with the Court. Then, this Court may affirm, reverse, or modify that decision.

In the context of that statement, there's a -- there's -- there's several things going on. One of which, though, I think is important to note, and that is that the -- that the planning body, the ZBA in this instance, is acting as a fact finder for this Court. Ultimately, those facts are -- those findings are gonna come back to this Court. But just as a case may be sent to a special magistrate, there's -- there is the opportunity for that magistrate to make findings and

then present them to the Court.

Similarly, the ZBA's gonna serve a similar function when there's a remand to the ZBA. And then, that's obviously, that doesn't just happen all the time. And there's standards that are required to met in -- in the section, particularly that there's -- the -- the Court finds that the record is inadequate. That's one important reason why the Court could issue the ray -- remand. Or two, that the Court finds that there's evidence out there that for good reason wasn't presented the first time around.

And I think that maybe a little bit miraculously, we're all in agreement that the Supreme -- the new Supreme Court decision provides certainly good cause to relook at the facts and circumstances that were presented and then analyzed by the zoning board of appeals for its determination that there was no standing here. So, that, I think that the -- the -- that, at least I think I've heard all three -- all three of us say that that decision in and of itself constitutes good reason for -- for have -- needing some additional investigation by the zoning board of appeals.

And I think that the -- the -- that the Court has recognized that -- that it has the discretion to do that remand on conditions that it determines as -- is -- are -- are proper. And I think one of the suggestions that the Court had earlier was just that you -- you could have a hearing. And

once the hearing is finished, you would have a situation where, obviously, no more evidence is coming in. There's a clear record that's been made by the zoning board of appeals at that hearing. And then, that -- they make whatever decision they're going to make. And -- and then, it ultimately comes back before this Court.

So, I think there's a very straightforward mechanism to sort of close the hearing that I think addresses the concerns raised by Mr. Straub in particular and I think also North Shores. There is -- there is an end to this. It's not -- it -- it's not a forever sort of inquiry. It's a directed inquiry where the zoning board of appeals is going to be answering some specific questions, listening and taking in new evidence, and then making a decision based on that new evidence.

Now, I think it's awfully similar too to a situation where if this Court had a case that was remanded by the Court of Appeals or the Supreme Court; and -- and those -- and those appellate Courts said, Circuit Court, we need you to make additional findings of fact on this particular issue, because we don't feel that it was -- that that issue was fully developed enough. It would be -- it's no different in this circumstance.

This Court, in -- in effect, Judge Kengis said to the ZBA, there's information out there that you need to

consider and then bring back to me, and then I'll make a final decision as to whether or not I agree with your -- your decision or I'm gonna modify it.

The standard is you may affirm, modify, or -- or reverse the -- the dec -- decision of the zoning board appeals. But that's all contained in the statute. And -- and -- and again, there's important parts of that subsection two that I -- I don't wanna gloss over. Because they all play a role in this process.

Now, I'd like to talk a little bit about the Supreme Court case. And I think we have a substantial disagreement among the parties as to exactly what the -- that Supreme Court decision says. And obviously, I'll leave it up to the Court to -- to read the decision itself and -- and make it's own determination.

However, the Court doesn't just issue a little tweak to the -- the law on zoning standing. The Court provides a new framework that we all need to analyze this question of standing or aggrieved party status it's under.

And I think that going back to what we were talking -- what I was talking about earlier, this is exactly the -- the good cause that we need additional information from the zoning board of appeals or the lack of a sufficient record for this Court to be able to make its decision. But that's exactly -- that change is exactly what this statute is

referring to in terms of good cause.

There's -- there's other information that I -- I would suggest to the Court that there -- there may be good cause or good reason why things weren't originally presented. For example, there have been allegations that there's hydro -- hydrologic impacts to this project, and that creates standing. And there's been a suggestion that no, there are no hydrologic impacts, so there's no standing.

Well, to the extent that there has been documentation or scientific evidence that supports that one way or the other, one side or the other, that's the type of information that -- that -- that the zoning board of appeals should be considering in determining whether or not there's -- there was sufficient reason that that information needs to be considered and -- and it -- it wasn't previously provided, because it wasn't previously available.

But now, we're at a situation where we're determining a threshold question of standing. We're not -- we aren't, I agree with Mr. Gabrielse, we're not determining whether or not the -- the hydro -- hydrologic impacts are going to impact this property, these properties in a negative way. We're determining the threshold standing question of whether or not there's somebody who is out there that is going to suffer impacts to their unique interests that causes those special damages that grants standing to appeal in the first

place.

The -- the Supreme Court is really clear in its opinion about this section 3606(2). And it specifically references the ability. It says, hey, we are dealing with a closed record. But we're dealing with a closed record within the context of the ability to -- for -- for the -- for a remand to seek additional facts and add -- and -- and additional determinations by the fact finder. And again, that's the ZBA in this case.

And -- and that's where I have actually -- I have the cite to the slip opinion, but I don't have the cite to the -- to the, unfortunately, to the Mich. reporter. But it's in section -- it's page 29 of the slip opinion. And I think, again, that the Court -- the Supreme Court clearly outlines this process that would -- we have been talking about.

I wanted to talk a little bit about the -- the additional information that was presented to the -- to the zoning board of appeals. And I would suggest that it -- that at least to the -- from -- from what the Coastal Alliance has presented, this is not a herculean task to -- to review these additional pieces of information.

In fact, my prop is the binder that we handed the -- the zone -- members of the zoning board of appeals. And it's about yay big. It's not exact -- it's not exactly tiny. But it also is not an -- it is not enormous. And it is tabbed, it

is indexed, and we made references to exactly why each piece of information was added or proposed to be added to the record, how it fit that standard contained in section 3606 subparagraph two, how it relates to the Supreme Court's decision, how the people that we are talking about as -- as affiance were involved in the original decisions, either writing to object, speaking to object, participating in the decision-making process, all is part of this -- this approval that this project went through.

And I don't wanna talk too much about the -- the -- the merits in the case. 'Cause we're just not there yet.

But I do wanna mention that I -- I disagree strongly with north -- Counsel for North Shore suggesting that this is -- was a small decision about some -- a few lots on their property.

It's not a small decision about a few lots. It's a big decision about a marina. And that -- that marina decision was -- was specifically permitted as part of this process. And there's significant impacts and significant concerns on behalf of both my client and the members of the public about that.

Lastly, I just wanna emphasize I think we've done a lot of briefing and there's been a lot of argument. I'm happy to answer the Court -- answer any questions of the Court. But I just wanna emphasize that this isn't -- that this is a

sort -- there's going to be a closure to the loop for purposes of the appeal.

But I think that the Court is right that the -- that ultimately, or at least that the -- the point of your question was right spot on in -- in that the remand can happen, the -- the ZBA can do its job. It can consider its evidence and decide which evidence it thinks is important or which evidence it's going to disregard. But then, you have a complete record from your fact finder to make your legislatively per -- proscribed review and decision under 3606.

I'm happy to answer any other questions. But like I said, I think we've put a lot of information in front of you on the brief. And -- and I -- I rest on that as well.

THE COURT: Mr. Howard, what is the position of the -- the Coastal Alliance regarding a strict timeframe or date that no additional evidence or parties should be considered regarding whether your client is an aggrieved party or has standing in this matter?

MR. HOWARD: Maybe I -- I need to an -- answer your question with a question of my own. But if the Court is referring to is it possible to -- is it possible to sort of set a date to say any additional materials that are -- that are gonna before the ZBA have to be turned in by X date. And then, we'll have our hearing. I think that that is certainly something that the -- that the ZBA has the -- the authority to

do. And/or this Court could certainly prescribe a date from which, you know, materials have to be turned in.

So, if the question is is there a particular date at which we cut off consideration, i.e., does a document have to be in existence in 2017 for it to be considered, I would say no, it -- it doesn't.

The -- the -- the – I -- I would say that the -- that the issue, though, is that it needs to relate back to that Supreme Court standard. You know, how does it relate back to established events? Supreme Court standard is met. And standing exists in the -- in the -- in this instance.

And I would suggest then, again, I think the most logical way to do that is to have the -- the Court or the township issue some sort of cutoff date to say we're not gonna take anymore supplemental material, and we're gonna consider everything that we've got. And then, we're gonna give our clients back to the -- make our client exhibits and then give them to the Court.

THE COURT: Does that fall on the township? Or does that fall on the Court to set that date?

MR. HOWARD: I think honestly, either one could -- could do -- I think you have the discretion under the -- under the rule -- under the statute to do that.

The -- the township also has the ability to say, you know, at -- at some level, you have to get your material in by

this date, when we're gonna have our hearing. Then, once that hearing happens, there's no additional evidence presented in the record. I -- I think the township has that discretion as well, too.

THE COURT: All right. Would that pertain to a standard application or appeal to the ZBA? And does that different from -- differ from a remand from this Court to the ZBA? Do you understand the distinction and that question?

MR. HOWARD: I think I do.

Typically, a ZBA would say you need to have your materials, you know, for purposes of -- of an appeal, you need to have your materials in to us before our -- our hearing on X date. Then, the materials would show up. They'd have the hearing. They'd listen to the -- the arguments. They'd make their decision.

In -- in this case, because it's on remand, I think it's -- it's a little bit different. Be -- and that's where this Court I think has some authority to say I will esta, you know, because it's on a remand, I will establish X date as the final date for all materials to come in that you want to be considered.

So, procedurally, I think that those are -- those happen -- could happen a little bit differently. Because it's a remand. But in general, that's how the municipliance that I work with, that's how they and, you know, that's how they

establish sort of a cutoff for the ZBA hearing.

THE COURT: Thank you, Mr. Howard. I have no further questions for you.

MR. HOWARD: Thank you.

THE COURT: Mr. Straub, do you wish to offer any brief rebuttal?

MR. STRAUB: Very brief, your Honor.

THE COURT: Please do.

MR. STRAUB: First of all, I can only find a smidge of humor in us arguing about hydrological studies and the floodgates argument being in the same case. That -- that bit of humor didn't escape me. Hopefully it doesn't you.

Any date that this Court or the ZBA places on matters is arbitrary. The ZBA has in fact established dates to have documents submitted, only to have it -- additional materials be submitted.

Does the ZBA have the right from some unknown source to not consider that and avoid an appeal?

These dates are in concrete. Once the date is in concrete, once the determination is made and the appeal is filed, any date that this Court sets, this is the argument of the municipality. Any date that this Court sets or the ZBA sets, well you gotta have -- it's only by this date that something must've happened, it's arbitrary. And those closed record issue is presented right back in our face again.

And to make it clear, there's no case law on this. There's no -- no decision from on high at the Supreme Court or the Court of Appeals that says, oh, the closed record is defined as X and that's it.

This is a unique issue in a unique statute. And procedure would have it that the record is closed, save that carve out when there's not competent material, sufficient evidence.

Now, the only good reason that I can imagine, setting aside and allowing more evidence, has to do with that Supreme Court decision. That's the only basis that there's good reason.

And I say any other date is just arbitrary and is subject to be -- to be challenged, guaranteed. So, that'd be my position.

THE COURT: Thank you.

MR. STRAUB: For the township.

THE COURT: Thank you.

Mr. Gabrielse, did you wish to have any brief rebuttal?

MR. GABRIELSE: Yes, I did. Thank you.

Sticking on this concept of timing, the standing is to be determined under the facts as they exist at the time the appeal is filed.

And for that proposition, I'm citing League of Women

Voters v. Secretary of State, 506 Mich. 561. That's a 2020 case. And Lujan v. Defenders of Wildlife, US Supreme Court case, 504 US 555, 1992.

To piggyback on what Mr. Straub said, there is -- that I would suggest respectfully, there is no Court's discretion on that issue. The decision is made. And the record has been closed. The decision date is set. There isn't a well, let's set a new one.

This is not a redo of the decision. This is is there good reason that something, you know, I -- I would suggest a small bit of information was not presented back then. And it is allowed in.

And on that, the US -- the Michigan Supreme Court clarified that property ownership is not a prerequisite. Mr. Howard seemed to argue that somehow that allows all the ologies to come in; hydrology, ecology, everything else. The Supreme Court clarified that property ownership is not a prerequisite. That's it. That's the good reason for what else might come in. Thank you.

THE COURT: Thank you, Mr. Gabrielse.

The Court would like to thank Counsel and simply note that I feel that each of you have done an excellent job of briefing these matters.

The Court has poured over these files and your pleadings in the hopes of getting up to speed on these

matters. And I -- I appreciate the manner in which Counsel has educated the Court on -- on these various issues.

When you boil it right down, it is a fairly limited issue. And the question before the Court is is there a closed record? Or is there a timeframe in which this Court must designate that the ZBA can no longer consider additional information for purposes of determining whether Plaintiff, Saugatuck Dunes Coastal Alliances, an aggrieved party and has standing pursuant to the ZBA?

I note that the specific matter that we're here today on before the Court is the township and township zoning board of appeal's motion for clarification of relief, clarification of or relief from order of April 27 of this year. And that is an order that was prepared and entered by Judge Kengis.

I think it's important that we note that as a starting point in that particular order, Judge Kengis stated as follows: The Court conducted a hearing on April 24, 2023, regarding the appellant motion -- appellant's motion to strike, at which all parties were in attendance.

In lieu of issuing a decision regarding appellant's motion to strike, the Court hereby remands these cases to the Saugatuck Township Zoning Board of Appeals, ZBA, pursuant to MCL 125.3606(2) and the Michigan Supreme Court's decision on Saugatuck Dunes Coastal Alliance versus Saugatuck Township,

509 Mich. 561, a 2022 case. This Court, for reasons stated on the record, determines that the record is inadequate to make the review required by MCL 125.3605 and MCL 125.3606(1) and finds that additional material evidence exists that was -- that with good reason was not presented to the ZBA.

The ZBA is instructed to decide if the Saugatuck Dunes Coastal Alliance has standing to appeal the decision of the planning commission based upon the test announced in the above-cited Supreme Court decision. The ZBA is also instructed to consider the evidence submitted to it previously and also any additional material evidence that with good reason was not presented previously for purposes of analyzing standing and to follow the procedures outlined in MCL 125.3606(2).

Purpose of the motion here today appears to clarify a question as to the extent to which the ZBA can consider material that is presented, not previously presented for purposes of analyzing standing.

I agree with Attorney Straub that to some degree, this is an arbitrary date. Because how do you determine exactly when this date occurs? If a -- the record is indeed closed, it would relate back to the 2017 and 2018 proceedings.

On the other hand, if the record were open until a remand, that would allow all sorts of additional information to be included up until the time that the ZBA set a hearing.

And the record would close at the time of that hearing.

What is unique about this particular situation is that while the Court does acknowledge that under ordinary circumstances, the record is closed. And the Circuit Court serves as an appellate body in relation to ZBA decisions. In this particular case, the -- the Court has, under MCL 125.3606(6), an opportunity to refer the matter to the ZBA under special circumstances.

And that provision reads as follows: 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 zoning board of appeals may modify its findings and decision as a result of the new proceedings or may affirm the original decision. Supplementary record and decision shall be filed with the Court. The Court may affirm, reverse, or modify the decision.

To some degree, Judge Kengis has already largely ruled on this issue. And at the time that the case was remanded to the zoning board of appeals, Judge Kengis indicated in the transcript, and this is on page four and five, that he determined that the record was inadequate to make the review required by the statute or finds additional material evidence exists that for good reason was not

presented for purposes of analyzing standing under the statute. And the Court shall order further proceedings on the conditions that the Court considers proper. And the Court indicated that these additional proceedings may include a remand to the relevant planning or zoning body whose decision is being contested with the instructions as to what is expected by the Court.

So, at the time that Judge Kengis considered this previous issue on April 24 of this year, apparently he had in mind subsection 3606(2) as well.

But what's more telling, beginning on page four, line 20, he indicates that, I'm sorry, page -- line 17. And so, I feel that remand is appropriate, because of the fact that there is additional material evidence that exists that for good reason was not presented to the zoning board of appeals. Specifically, these are the reports. And then, he goes on. These are some of the information, includes the exhibits that the Plaintiff was moving to strike, along with the additional reports that were authored regarding the impact of the project on the dune area and on members of the Coastal Alliance. And that these were reports that were issued after the zoning board's decision. So, it's my feeling that additional material evidence does exist that would affect the decision regarding standing.

And then, he continues on line 12 of page five.

Because I feel that the record is inadequate and there is additional material evidence, then I do feel it's appropriate to remand the case.

The problem that we have in the request for clarification is that the date to which those matters relate back to are not entirely clear.

The township argues that they should relate back to any information that was available at the time of the initial hearings in 2017 and 2018 and that anything beyond that is considered to violate the closed record provisions of a standard appellate procedure.

Judge Kengis seems to indicate, though, that there is additional material evidence that was not presented at, and this is noted on page 32 of his decision on April 24 of this year beginning on line one. Because I do find that additional material evidence exists for good reason was not presented to the zoning board when they made their initial decision in the case regarding standing. And specifically, those are the reports that have been referenced by Mr. Howard in his brief and also the reports and exhibits that were submitted by North Shores which led to the original motion to strike these -- those exhibits. Because they're not part of the inaudible record. And in following the instructions from the Supreme Court or ruling that the Court has to the appellate body with the closed record. But because that record is inadequate, I'm

going to remand the case.

Mr. Straub asked for clarification, at which point, Judge Kengis indicates on page 33, beginning line 23. I'm not going to instruct them on what to consider. As I said, what my instructions will be is that they should consider additional material evidence that exists that with good reason was not presented to them at the time they made their decision in 2018. So, the zoning board will make that -- that decision of what is additional material evidence.

One thing that all parties can agree on is that the Supreme Court decision created good reason to review the issue of standing as it relates to the Plaintiff, Saugatuck Dunes Coastal Alliance.

And it is important to the -- to the Court, at least, to recognize that in reviewing this opinion, this was a significant change in the law, so much so that in the opening paragraph of Justice Viviano's dissent, he indicates as such when he in -- when he states the majority's decision today to redefine what it means to be a party aggrieved for purposes of the Michigan Zoning Enabling Act, MCL 125.3101 et seq., will have far-ranging and destabilizing effects on Michigan Zoning Law. The majority conjures new definitions, criteria, and factors that con -- the contours of which will be litigated for years to come. In doing so, the majority abandons the interpretation of aggrieved that has stood for decades

including at the time the legislature adopted the MZEA.

The majority's expansive new definition of party aggrieved is contrary to the intent of the legislature, confusing, and unnecessary to resolve this case. Its decision will unsettle an area of law that has been settled and has operated well for over a century. For these reasons, I respectfully dissent.

So, in trying to determine what would be an appropriate date as to what materials to consider, I have to look first at Judge Ke -- Kengis' ruling and try to ascertain what was his intention at the time that he made that ruling.

It appears that there had been a motion to strike that was filed in connection with documents that North -- North Shores of Saugatuck, LLC, presented. And the Judge in lieu of -- of making a ruling in that matter, remanded to the ZBA with specific instructions as to what documents they would consider. Presumably, what he had been aware of, meaning Judge Kengis, at the time that he issued that ruling.

And so, it appears to the Court that the intent of Judge Kengis at that time was to allow the zoning board of appeals to consider additional information that had been presented and which had already come into some form of contest as it relates to this matter, because there was a motion filed to strike the same.

What appears to the Court is that Judge Kengis was

then pressed as to the manner in which the ZBA should have considered those materials and what weight to give to those materials. And it's the Court's opinion that when Judge Kengis indicated that he was not going to tell the zoning board of appeals what to consider or instruct them on what to consider, the -- the interpretation at least of this Court is that they could consider whatever materials had been presented and determine whether they were material to their decision as to whether the Coastal Alliance had standing and was an aggrieved party or did not.

It would seem logical that Judge Kengis could not order a fact-finding body to make a determination as to specific factors, which could then come back to him on appeal, as if he would have instructed them essentially to consider only material within certain parameters that he approved or didn't approve of.

And so, it seems logical and not inconsistent that Judge Kengis would specify the certain documents, reports, things of that nature and then indicate that I'm not going to tell the ZBA what to consider or not consider or how much weight to give. That's their decision. Because that ultimately will likely come back on appeal before this Court.

So, to the extent that the Saugatuck Township and the zoning board of appeals asked for relief from the order, this Court does not find that there is a basis for relief from

the order that Judge Kengis entered on April 27 of 2023. And I will deny that request.

But I will grant in part the request for clarification, that the zoning board of appeals is to consider the materials that Judge Kengis referred -- referenced in his motion hearing on April 24 of 2023.

And as it relates to the test that was set forth in Saugatuck Dunes Coastal Alliance versus Saugatuck Township, again 509 Mich. 561, that is the portal upon which this Court is relying for the ZBA to consider the additional evidence and to make a record which would appear to be more adequate and to add additional material evidence that with good reason was not presented.

It wasn't presented because the Supreme Court had issued a new test, which significantly changed the -- the process in which they would determine whether a person was aggrieved. And for those reasons, it was unavailable at the time.

I don't think that the Court in any way can instruct the zoning board of appeals as to the weight of the material that it will consider. It may look at those 2,000 page --

UNIDENTIFIED SPEAKER: All right. We're back.

THE COURT: All right. Thank you.

Apologies, as we had some technical difficulties.

The Court was noting that it recognizes that local

boards and commissions are not generally comprised of legal scholars or attorneys and that the material before the ZBA is voluminous. And to that extent, the Court appreciates and recognizes the -- the task before the ZBA.

But I do find that the materials that are to be presented consistent with Judge Kengis' previous ruling as I indicated on April 24 are -- are material and with good reason were not presented because of the change in the law based on the Supreme Court decision.

As it relates to the addition of new parties, the Court does not find that that meets the standard. And for the same reasons that the Court indicates that the essentially the cutoff date is April 24 of 2023. And I -- I find that based on some discretion in the statute where it says the Court shall order further proceedings on condition that the Court considers proper.

The -- the date of April 24 of this year, in this opinion, the Court finds proper. Because it relates to a previous presiding Judge who had very familiar and extensive knowledge with this case. And I think it would be -- I think it would exceed the conditions that this Court believe is proper to add additional parties, which would be the additional new eight proposed parties.

But I will -- I will indicate that the clarification of Judge Kengis' order pertains to the materials referenced in

his transcript and that were known to him at the time of that hearing.

I hope that that provides some clarification in respect to this matter. Do any of the parties have anything further at this time?

MR. STRAUB: I do, your Honor. Clarification of the order of clarification.

THE COURT: Yes.

MR. STRAUB: I apologize. It's hard to listen and write at the same time.

The Court is ruling that -- that the ZBA is required to review the materials that were referenced by the Judge in his -- in his order of April 24, 2023. Of concern with this order of clarification is the materials that have been submitted after that date of April 24, 2023. What's the Court's ruling on that? I'm unclear.

THE COURT: The Court's ruling is that Judge Kengis referenced various reports and evidence that he determined to be additional material evidence, apparently that were either connected as a part of legal briefs submitted by parties in --

MR. STRAUB: Yes.

THE COURT: -- this matter or the reports and exhibits that the Plaintiff was moving to strike. That's on page four and page five of the transcript.

MR. STRAUB: All right.

THE COURT: And so, those materials are all fair game for the ZBA to consider.

MR. STRAUB: All right.

What about materials filed with the ZBA by the parties, disputes after April 24? What's the Court's ruling on that? Or is there a ruling?

THE COURT: Well, this is where it gets interesting.

MR. STRAUB: It does. It certainly does, your Honor. Thank you.

THE COURT: Because the -- the door, as I said, the portal to considering additional material evidence that for good reason was not presented is based upon the new test as set forth in the Supreme Court's ruling.

MR. STRAUB: Yes.

THE COURT: And so, in relation to those matters, it would be the Court's opinion that, at least at this point in time, if I'm asked for a determination as to what comes in and what does not, all I can really do is clarify Judge Kengis' order to say that the materials that he referenced, those come in.

This is not a request for a rehearing or, although I think the parties have treated it as such. So, I'm here to clarify Judge Kengis' order. I don't find that the order should be set aside. And so, I'm trying to provide clarification.

And I would reference what he previously ruled on April 24th of this year, that those materials that he was aware of should be considered.

Now, the -- the question that you're asking is what about everything filed afterwards? And that -- that is -- that's a good question.

MR. STRAUB: For another day, perhaps.

THE COURT: Perhaps for another day. I'm going to -- I'm going to leave that issue open.

If the zoning board of appeals believes that that is something that is relevant based on their factors to consider in relation to the Court of Appeals opinion, they may choose to do so. And I think it's important that I at least cite that for the record, what the test is, so that we're all clear on that.

MR. STRAUB: In -- in the Supreme Court opinion.

THE COURT: Correct.

MR. STRAUB: I mean, as opposed to the Court of Appeals, but.

THE COURT: Yeah. Excuse me. Not Court of Appeals.

MR. STRAUB: That -- understood.

THE COURT: The Supreme Court.

MR. STRAUB: All right.

THE COURT: So, the Court of Appeals opinion, excuse me, the Supreme Court, 509 Mich. 561, indicates that based on

our review of the statutes and other available authority, we hold that a party aggrieved under MCL 125.3605 and MCL 125.3606, the appellant must meet three criteria.

First, the appellant must have participated in the challenge proceedings by taking a position on the contested decision, such as through a letter or oral public comment.

Second, the appellant must claim some legally protected interest or protected personal, pecuniary, or property right that is likely to be affected by the challenged decision.

Third, the appellant must provide some evidence of special damages arising from the challenged decision in the form on an actual or likely injury to or burden on their asserted interest or right that is different in kind or more significant in degree than the affects on others in the local community.

They go on to say we use, in quotes, “others in the local community,” end quote, to refer to persons or entities in the community who suffer no injury or who’s injury is merely an incidental inconvenience and exclude those who stand to suffer damage or injury to their protected interest or real property that derogates from their reasonable use and enjoyment of it.

Factors that can be relevant to this final element of special damages include but are not limited to the type and

scope of the change or activity proposed, approved, or denied; the nature and importance of the protected right or interest asserted; the immediacy and degree of the alleged injury or burden and its connection to the challenged decision as it compares to others in the local community; and if the complaining party is a real-property owner or lessee, the proximity of the property to the site of the proposed development or approval, that the nature and degree of the alleged effect on that real property.

At this point, all I can do is direct the ZBA to consider the test. I am not ordering that they include anything that was filed after Judge Kengis' ruling on April 24 of this year. If they believe that that is something that is within their purview to consider, then they may do so.

MR. STRAUB: Last question, I hope. Is the Court going to prepare the order? Or does it expect Counsel to do that?

THE COURT: I think the Court would prepare the order.

MR. STRAUB: I'm sorry.

THE COURT: We'll take care of preparing the order.

MR. STRAUB: Thank you, your Honor.

THE COURT: All right. Very good.

Anything further, gentlemen?

MR. HOWARD: Your Honor, I just -- just so that

we're all clear, North Shores had a series of exhibits that it had supplied prior to the 24th, and those are to be considered. The Coastal Alliance also had exhibits that had been attached to its pleadings prior to the 24th, and those are to be considered. And then, the rest as -- as you and Mr. Straub were -- were discussing, is up to the ZBA; correct?

THE COURT: Yes.

MR. HOWARD: Okay. Just wanted to make sure that we're all clear on that.

THE COURT: That is --

MR. STRAUB: Thank you, your Honor.

THE COURT: That is correct.

Mr. Gabrielse?

MR. GABRIELSE: Yes. One final thing.

We had a motion regarding discovery on original claims. There's an appeal in this case and then original claims --

THE COURT: Yes.

MR. GABRIELSE: -- that the parties have all briefed.

You didn't mention it when you started the hearing today. I didn't know if your intent was to have them separate. But I just wanted to bring that up before --

THE COURT: Thank you.

MR. GABRIELSE: -- you said the magic word of

adjourned.

THE COURT: Yes. I do acknowledge that. And I don't know that they were scheduled for hearing today. Or if they were, it's after 1:00. And I think maybe we should push that off to another date.

I think, you know, at least as my understanding of that issue, the first matter to be addressed by the Court is the -- the question of standing. And then, once that matter was resolved, we'd cross the bridge and get into pretrial and discovery issues.

MR. GABRIELSE: Well, the -- the standing issue is as to the appeal. There's original claims that --

THE COURT: Okay.

MR. GAGBRIELSE: -- are a nuisance claim. There's -- that's -- that's not under the MZEA at all.

THE COURT: Okay.

MR. GABRIELSE: That is simply an original claim. So, I -- I'm only responding because the Court is saying --

THE COURT: Thank you.

MR. GABRIELSE: -- something. But, so what's -- what is your --

THE COURT: My preference --

MR. GABRIELSE: -- direction on that?

THE COURT: -- would be that we schedule that for another date. And I'd be happy to address it at that time.

MR. GABRIELSE: Okay. Thank you.

THE COURT: Thank you very much.

MR. STRAUB: Thank you, your Honor.

THE COURT: Thank you, everyone.

MR. SEMONIN: Thank you, your Honor.

MR. STRAUB: Thank you for taking so much time on a busy day.

THE COURT: Thank you. We are adjourned.

(At 1:03 p.m., proceedings concluded)

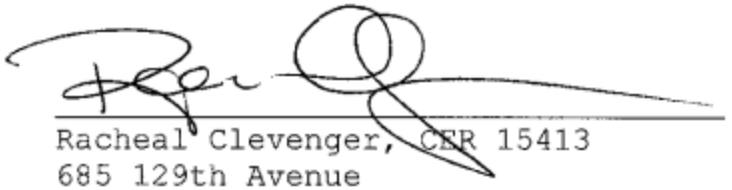
STATE OF MICHIGAN )

)

COUNTY OF ALLEGAN )

I certify that this transcript, consisting of 65 pages, is a complete, true, and correct transcript of the Hearing on Motion for Clarification and testimony taken in this case on Monday, December 11, 2023.

December 25, 2023



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