

**State of Michigan  
Charlevoix County Circuit Court**

LuAnne Kozma,

Appellant

v

Hayes Township and Hayes Township  
Zoning Board of Appeals,

Appellees

\_\_\_\_\_  
Scott and Debra Law,

Appellants

v

Hayes Township Zoning Board of Appeals,  
Appellee

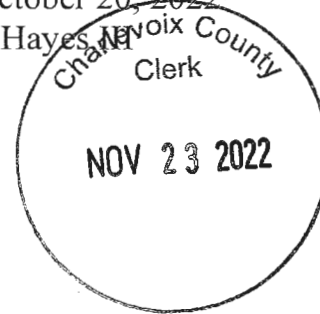
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Case # 22-0966-27CZ

Date filed: October 20, 2022

Hon. Roy C. Hayes III



Case # 22-0975-27CZ

Date filed: October 24, 2022

Hon. Roy C. Hayes III

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**Motion and Brief to  
Consolidate Claims of Appeal  
by Two Appellants of Township ZBA Interpretations,**

**and to allow  
Kozma to Intervene in the Laws' Claim,  
and to  
Dismiss the Laws' Claim,  
and  
Certificate of Service**

**I. Introduction and consolidation**

1. On October 20, 2022, in # 22-0966-27CZ, LuAnne Kozma claimed an appeal to this Court under MCL 125.3605 and 3606, of an interpretive decision of the Hayes Township Zoning Board of Appeals (“ZBA”) at a hearing of August 29, 2022, the minutes of which the ZBA approved on October 3, 2022.

2. Kozma's appeal concerned the ZBA's rejection of her contention, under the Township Zoning Ordinance (“ZO”), that the horizontal location of the Ordinary High Water Mark (“OHWM”) – the dividing line between bottomlands and uplands – would move inland on the creation of an artificial channel-basin. Instead the ZBA held the OHWM “will remain with the natural shoreline.”

3. On October 24, 2022, in # 22-0975-27CZ, Scott and Debra Law claimed an appeal to this Court under the same statute, of interpretive decisions of the ZBA at hearings of August 22 and 29, 2022, the minutes of both of which the ZBA approved on October 3, 2022. A copy of their Claim (with exhibits detached) is attached as Exhibit 1.

4. In ¶¶ 4-5 of the their Claim, the Laws proceeded under two theories, referred to herein as “counts.” The first Count (¶ 4) contested the ZBA's acceptance of Kozma's view that the ZO protects, and prohibits any excavation of, the Township's 50-

foot Shoreland Protection Strip (“SPS”) for an artificial boat basin or channel. The second Count (§ 5) contested the same one which Kozma appealed, about the horizontal location of the OHWM.

5. Kozma and the Laws are near-neighbors with residences near opposite ends of rocky Anglers Cove on Lake Charlevoix in the Township. Kozma's interpretation requests to the ZBA were prompted by the Laws' plan to excavate an inland channel, basin, and boathouse/event facility on their property, property as noted by the ZBA in its public notices for the hearings. Two family members who have property between Kozma and the Laws joined her requests. The ZBA accepted their aggrieved status and their standing.

6. Because they involve parallel ZBA rulings about the same project, Kozma moves under MCR 2.505 that her Claim and the Law Claims be consolidated in one Court proceeding.

7. Because Kozma's arguments regarding aggrievedness and standing in sections IV and V below may require the Court to review the record to be filed by the Township under MCR 7.122(E), she is not now setting a hearing date for this motion, but rather allowing the Court to set a date when convenient.

## **II. Kozma Intervention as a party in the Law Claims**

8. Because as a nearby resident Kozma had standing to initiate the ZBA proceeding leading to the decision for which the Laws claim appeals, she has standing to

intervene as a party in their Court claims. *Saugatuck Dunes Coastal Alliance v Saugatuck Township*, MSC Decisions ## 160358 and 160359 (7-22-22) (slip opinion, pp 30-31) (“We also agree with the parties’ arguments that 'aggrieved' must be given the same meaning in both MCL 125.3604(1) and MCL 125.3605.”)

### **III. The nullity issue and untimeliness**

9. Under MCL 125.3606(3)(b) the statute of limitations for both the Court claims expired on October 24, three weeks after ZBA approval of the minutes of its decisions. The Laws waited till the last day to file their Claims in this Court.

10. *Saugatuck Dunes* held further at slip opinion p 31 that determining a party's “aggrieved” status was essential to deciding if the party has standing. (“To determine whether the ZBA’s standing decision was correct in this case, on remand the circuit court first must determine whether appellant was aggrieved by the Commission’s decision for the purpose of appealing to the ZBA under MCL 125.3604.”)

11. Under MCR 7.122(C)(1)(b), in the Claims both of Kozma and the Laws, the Township is the proper appellee, not the ZBA.

12. But in # 22-0975-27CZ the Laws named the Township ZBA as the only appellee, and did not name the Township itself. The Township and Township ZBA are separate entities, as seen in the same MCR subsection, which provides for claims of appeal by a Township against a ZBA decision.

13. The Township not being the appellee, the Law Claims are a nullity, to be

treated as though they never existed. Moreover, the Laws cannot now re-Claim against the Township, as such claims would now be time-barred.

14. The Court of Appeals held in *Progress Michigan v Attorney General*, 324 Mich App 659 (2018) that a nullity complaint can be re-stated but only if the statute of limitation has not yet run. Otherwise it cannot. 324 Mich App at 673-74 n 3.

15. Though the COA decision in *Progress Michigan* was reversed and remanded, the Supreme Court did so on different grounds – that filing an unverified complaint under the Court of Claims Act can commence a civil action or toll the limitations period. Holding that “the original complaint . . . was not a 'nullity,’” the Court did not disapprove the COA's handling, had the complaint in that case actually been a nullity. 506 Mich 74, 99 n 18. Had the Laws not waited till the last day to file their Claims of Appeal, they could have amended but chose not to.

16. Michigan courts have recognized the “nullity” principle in relation to complaint amendments for decades. *Legion-London v Surgical Institute of Michigan Ambulatory Surgery Center*, 331 Mich App 364, 375 n 10 (2020) (noting that controlling case law applied the nullity principle in medical malpractice cases until MCR modifications in 2010 which were specific only to medical malpractice); *Scarsella v Pollak*, 461 Mich 547 (2000) (“The court then reasoned that because the filing was a nullity, it did not toll the period of limitation and therefore plaintiff's claim was time-barred months before the affidavit of merit was finally furnished. The case was

dismissed with prejudice. We find no error in the trial court's analysis.”).

17. That the nullity principle has been applied in Michigan only in medical malpractice cases does not detract from its general applicability to non-malpractice situations. Most likely it would come into play only in the few cases like that of the Laws, brought under statutes with such a short 21-day statute of limitations.

18. Like the plaintiffs in *Saugatuck Dunes*, Kozma included the ZBA as a co-appellee in her Claim # 22-0966-27CZ. She did so only so this Court could order complete relief. If the Court is inclined she would not object to the ZBA being stricken as a co-appellee in # 22-0966-27CZ.

#### **IV. Standing/aggrievedness for the Laws' Count I**

19. The Laws lack standing to claim an appeal of the prohibition of SPS excavation, because, to again quote *Saugatuck Dunes*, they did not “tak[e] a position on the contested decision, such as through a letter or oral public comment.” (Slip opinion, p 27).

20. That is, the Laws took no position on whether, to quote Count I, the ZO “protect[s], and prohibit[s] any excavation of, the Shoreland Protection Strip for an artificial boat basin or channel.” They presented no written argument on this point, and contented themselves with oral public comment on August 22, where they said nothing about excavation. That public comment is quoted in full in attached Exhibit 2, a transcript prepared by undersigned counsel from the Township's recording, with the

seven paragraphs being lettered in bold brackets for clarity, and two inaudible phrases also being noted in bold brackets. The recording is expected to be part of the record which the Township will provide to the Court.

21. In sum the Law public comment made seven points. None “took a position on” excavation of the Shoreland Protection Strip. The seven points were:

- a) Introduction.
- b) The proper role of the ZBA.
- c) The boathouse as a commercial building or residential building.
- d) Authority and actions of the Zoning Administrator (“ZA”).
- e) The meaning of the OHWM under the ZO.
- f) Whether the Interpretation request is really a disguised untimely appeal of a 2019 approval by the Planning Commission (“PC”).
- g) Thank you, and use your discretion.

22. Accordingly under *Saugatuck Dunes* the Laws have no standing as to their first Count. It must be dismissed.

#### **V. Standing/aggrievedness for the Laws' Count II**

23. As to this Count, the Laws did speak to the issue of the OHWM. But they have no standing for that either, because, to again quote *Saugatuck Dunes*, they did not:

provide some evidence of special damages arising from the challenged decision in the form of 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 effects on others in the local community. (Slip opinion, p 27, emphasis added).

24. That is, the Laws can allege no “actual or likely injury to or burden” to their interests, period. This is because the ZBA decision – that the OHWM would “remain with the natural shoreline” on creation of an artificial channel-basin – benefited them. It

would allow their project to go forward (provided they satisfy other prerequisites).

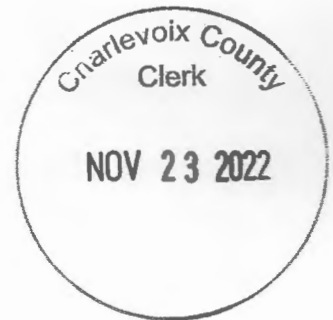
**VI. Conclusion**

- 25. Wherefore Kozma asks the Court to
  - a. consolidate # 22-0966-27CZ and # 22-0975-27CZ into one proceeding,
  - b. allow her to intervene in # 22-0975-27CZ, and
  - c. dismiss # 22-0975-27CZ, for being a nullity and for lack of standing.

Respectfully submitted,



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Dated: November 23, 2022

**Certificate of Service**

Ellis Boal certifies that he is filing this motion and exhibits today, and that he will serve a court-stamped copy on the above counsel and their above email addresses today after filing, as soon as he returns from Court.



Ellis Boal

Dated: November 23, 2022

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of a document on file  
in the office of  
Charlevoix County Clerk



Exhibit 1

Claim of Appeal  
(without exhibits)

Scott and Debra Law v Hayes Township  
Charlevoix Circuit Court Case # 22-0975-27-AA  
Filed October 24, 2022

**STATE OF MICHIGAN  
IN THE 33<sup>RD</sup> CIRCUIT COURT FOR THE COUNTY OF CHARLEVOIX**

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**SCOTT LAW and DEBRA LAW,**

**Appellants,**

CC Case No. 22-0975-27 -AA  
Hon. Roy C. Hayes III

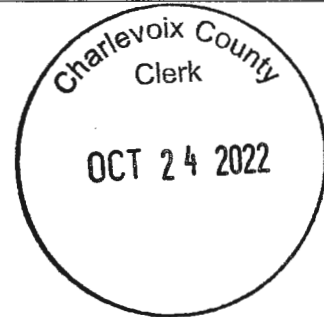
v.

**HAYES TOWNSHIP ZONING  
BOARD OF APPEALS,**

**Appellee.**

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**CLAIM OF APPEAL**

SCOTT LAW and DEBRA LAW, by and through counsel, JENNIFER J. SCHAFER, J. Schafer Law Firm, PC, pursuant to MCR 7.122, hereby claim an appeal of the interpretation decisions of the Hayes Township Zoning Board of Appeals (ZBA), made on August 22 and 29, 2022, and approved in the minutes of the ZBA on October 3, 2022, and state the following in support:

1. On a Request for Interpretation by Hayes Township resident LuAnne Kozma (Kozma), the ZBA rendered interpretations of the Hayes Township Zoning Ordinance, Sections 2.02 and 3.14(2), regarding the Ordinary High Water Mark (OHWM) and Shoreland Protection Strip (SPS), respectively, on August 22 and 29, 2022. The minutes of the ZBA, as approved on

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October 3, 2022, are attached hereto as **Exhibit A**. A certified copy of the ZBA record for the August 22 and 29, 2022, meeting has been requested. **Exhibit B**.

2. Kozma's Request for Interpretation identified the specific property involved as Hayes Township Parcel 15-007-132-005-25, owned by Appellants Scott and Debra Law.

3. Appellants are "aggrieved parties" pursuant to MCL 125.3607(1) and *Saugatuck Dunes Coastal Alliance v Saugatuck Township*, Mich Supr Ct Op No 160358/9 (July 22, 2022).

4. The ZBA made the following interpretation regarding the SPS: "[T]he Hayes Township Zoning Ordinance Waterfront Regulations Section 3.14 Subsections (1) thru (4) and (8) protect, and prohibit any excavation of, the Shoreland Protection Strip for an artificial boat basin or channel." ZBA Minutes, 8-22-2022.

5. The ZBA made the following interpretation regarding the OHWM: "[T]he Ordinary High-Water Mark [is at an] established elevation level in the ordinance and will remain with the natural shoreline." ZBA Minutes, 8-29-2022.

6. Contrary to MCL 125.3606(1), the ZBA's interpretations of the SPS and OHWM:
- a. Fail to comply with the constitution and laws of the state;
  - b. Were not based upon proper procedure;
  - c. Were not supported by competent, material, and substantial evidence on the record; and/or
  - d. Do not represent the reasonable exercise of discretion granted by law to the ZBA.

7. Specifically, the ZBA's interpretations:

- a. Conflict with and/or render nugatory other provisions of the Hayes Township Zoning Ordinance;

- b. Ignore the plain language of the Ordinance as written;
- c. Constitute legislation, rather than interpretation, which is within the exclusive jurisdiction of the Planning Commission, not the ZBA;
- d. Are arbitrary and capricious, lacking the support of competent, material, and substantial evidence on the record; and/or
- e. Represent an abuse of discretion by the ZBA.

WHEREFORE, Appellants Scott Law and Debra Law respectfully request that this Honorable Court REVERSE the interpretations of the Hayes Township Zoning Board of Appeals, and enter such further orders as the Court determines just and equitable.

Dated: October 24, 2022



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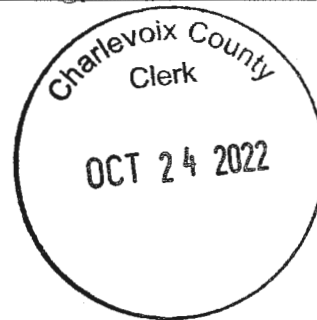


Exhibit 2

Argument of Harry Golski representing Scott and Debra Law  
on Interpretation Request of LuAnne Kozma, Irene Fowle, Elisabeth Hicklen  
Hayes Township Zoning Board of Appeals  
August 22, 2022  
Counter Numbers 3:56:30 to 4:03:10

**Golski argument for Scott and Debra Law, 8-22-22, ZBA Interpretation Hearing**  
Counter Numbers 3:56:30 to 4:03:10.

**[Material in bolded brackets added for clarity]**

**[a.]** Good afternoon. My name is Harry Golski. I am counsel for Scott and Debra Law.

**[b.]** The Laws and their counsel know that this Board is not being asked to greenlight or approve this project or to stop this project or to amend the Zoning Ordinance. You are acting here only to interpret the Ordinance that's already on the books. So some of the commenters have said that you stop this, you have stopped harm. I don't think they understand what your role is here. Your role here is to interpret the Ordinance as it's written.

**[c.]** There has been some talk in the audience about commercial versus residential, and R-1 zoning versus commercial zoning. The difference that we're not recognizing here is that this commercial zoning has to do with the use of a property not the type of structure. If I want to put a commercial building, a McDonalds, on my personal property so that I and my family can eat there every day, that is an acceptable use in a residential area. It's when I use that structure for commercial benefit that it becomes violative of the Zoning Ordinance. So the questions about use, about use for corporate retreats, or employees or anything like that, it's all speculative, and it has nothing to do with the character of the structures that may or may not be built there. If there is a problem down the road, that these structures being used for commercial ventures, or commercial leases, then it's up to the Zoning Administrator at that time to issue a citation for illegal use of the property. It's not the building that's bad, it's the use.

**[d.]** The request for interpretation regarding the authority and the actions of the Zoning Administrator is totally a red herring here. As the Chairman in asking Mr. Van Zee, there is no dispute about the language of the Ordinance or what the Zoning Administrator believes his role to be. This is only intended to look like an appeal that is trying to suck this Board into issuing a ruling that, guess what, the Zoning Administrator does not have authority to vary the Ordinance. No one has asked him to. No one is asking him to. This ruling is going to show up on the "Save the Lake" web page under the headline "Zoning Board rules Zoning Administrator didn't have authority to issue a permit." This is not a request for a Determination. There is no need for that. What this is is actually a request for an appeal of a decision that's already been made and is now irrelevant because of the expiration of the permit. Use discretion and decide not to interpret this section of the Ordinance because there is no need to do it and it's only being asked for improper purposes.

**[e.]** The requesters have used the word "shall" from the Ordinance probably 100 times,

quoting different portions of the Ordinance. The one that they never quote is [inaudible] Section 3.14 -- I'm sorry -- the definitional section of "Ordinary High Water Mark." And in that case the language that is not cited was the language that on Lake Charlevoix the Ordinary High Water Mark "shall" be the legally established lake level of 582.3 feet IGLD 1985. It is not relevant what definition of "Ordinary High Water Mark" the Army Corps of Engineers uses, what definition of "Ordinary High Water Mark" EGLE uses. What is relevant to this Board is what definition the Charlevoix Hayes Township Zoning Ordinance uses. And that language is mandated at 582.3 feet. All the other arguments and requests for interpretation are really beside the point, because the definitional language is absolutely clear and requires no interpretation about the Ordinary High Water Mark.

[f.] Shoreland Protection Plan. This as you have heard, this Plan was approved by the Planning Commission in 2019. Although the requesters here had the right to appeal for 30 days after that determination [inaudible] that was not done. And once they figured out they had lost their time to appeal, they thought "Why not do it by way of interpretation? Why not backdoor our appeal by calling it a request for a interpretation?" That's what's going on here and you are being sucked into this public relations snafu here.

[g.] Lastly I would like just like to say again, thank you for your time and consideration. I know it's been a tremendous job for you folks. We request that you use your discretion and decline to interpret because there is no reason to give an interpretation on any of these issues. Thank you.