STATE OF MICHIGAN

IN THE MICHIGAN COURT OF APPEALS

IN RE IMPLEMENTING PROVISIONS OF PUBLIC ACT 233 OF 2023	Court of Appeals Case No. 373259 MPSC Case No. U-21547

MICHIGAN ASSOCIATION OF COUNTIES' AMICUS CURIAE BRIEF IN SUPPORT OF THE POSITION OF APPELLANTS

THIS APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

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STATEMENT OF THE BASIS OF JURISDICTION

The Michigan Association of Counties agrees with Appellants' Statement of the Basis of Jurisdiction.

STATEMENT OF QUESTIONS PRESENTED

I. DID THE MICHIGAN PUBLIC SERVICE COMMISSION UNLAWFULLY EXCEED ITS AUTHORITY IN ISSUING ALL OR PARTS OF THE OCTOBER 10 ORDER?

Appellants answer: "Yes."

Appellee answers: "No."

Amicus Curiae Michigan Association of Counties answers: "Yes."

I. INTRODUCTION[1]

This dispute arose as a result of the overreaching conduct of the Michigan Public Service Commission (the "Commission") – conduct that, through its issuance of an Order on October 10, 2024 in PSC Case No. U-21547 ("PSC Order"), exceeds the scope of its authority. The PSC Order purports to be the Commission's interpretation of recent amendments to Michigan's Clean and Renewable Energy and Energy Waste Reduction Act and Zoning Enabling Act; specifically, 2023 PA 233 ("Act 233"), the purpose of which was to establish "procedures" for developers to follow to apply for renewable energy development project certificates and develop energy generation facilities.

Historically, in keeping with the Michigan Legislature's delegation of zoning and land use authority to local units of government, energy facilities adhered to local zoning and land use requirements.[2] Pursuant to Act 233, the Michigan Legislature created a limited exception to that comprehensive authorization. In particular, the Commission, rather than the local governmental unit in which an energy generation facility will be located, regulates, among other things, the zoning aspects of the development of a renewable energy project unless the local unit of government has a "compatible renewable energy ordinance" ("CREO").[3] The PSC Order, however, unlawfully expands Act 233's limited exemption to local zoning control.

The PSC Order purports to be authorized pursuant to the Commission's general power to interpret the statutes it administers. This is untrue. To the contrary, the PSC Order is both

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

[2] Examples of zoning requirements include lot size, placement, density, architectural style, open space, parking, signage, drainage, activities and traffic/access issues.

[3] Even then, local government may lose the right to exercise zoning jurisdiction if the local unit fails to approve the application within 120 days, denies the application or amends its zoning ordinance to impose requirements on the developer that are more restrictive than the zoning regulations set forth in Act 233. Act 233, § 223(3)(c).

substantively and procedurally flawed by its failure to follow (and, at times, contradict) the statutory provisions of Act 233 and failure to comply with the rulemaking procedure of the Administrative Procedures Act. The PSC Order usurps the traditional and statutory zoning functions of local government, including counties, in violation of Michigan law.

The Michigan Association of Counties (hereinafter "MAC") is a non-partisan, non-profit Michigan organization whose purpose is to advance the interests of municipal county government on key issues affecting counties. Its membership is comprised of all 83 Michigan Counties. MAC and its 83 County members have a significant interest in ensuring that Michigan's court and administrative rulings properly apply legal principles to municipal interests for its member Counties specifically relating to the Commission's interpretations of Act 233.

MAC filed its Motion for Leave to File Amicus Curiae Brief on February 28, 2025 ("MAC's Motion"). MAC's Motion was granted on March 25, 2025 with a deadline for the filing of MAC's Amicus Brief "within 21 days after the date of this Order" – April 15, 2025. This Brief is timely filed and, for the reasons discussed below, the PSC Order, or the provisions challenged herein, should be vacated.

II. STATEMENT OF FACTS

MAC accepts the Statement of Facts contained in the Appellants' Brief on Appeal, as highlighted by the following:

1. Act 233 allows the Commission to supplant local zoning laws and review and certify the development of renewable energy facilities in specific instances and grants limited powers and duties to the Commission as follows:

> a. prescribe the format and content of the notice required for certain public meetings. § 223(1).
>
> b. establish application filing requirements. § 224(1).
>
> c. reasonably require information to be contained in an application. § 225(s).
>
> d. conduct proceedings on applications. § 226(3).
>
> e. assess reasonable application fees. § 226(4).
>
> f. grant or deny applications and issue certificates. § 226(5).
>
> g. issue orders to protect the confidentiality of certain information. § 228(2).
>
> h. consolidate proceedings. § 230(2).

2. On February 8, 2024, the Commission opened a "docket" on its own motion and, after receiving comments and recommendations from Commission staff and the public, issued the PSC Order on October 10, 2024.

3. Pursuant to Act 233, the Legislature created defined terms relevant to the application of Act 233, as follows:

> (a) "Affected local unit" means a unit of local government in which all or part of a proposed energy facility will be located.[4]
>
> * * *

[4] A "local unit of government" includes counties, townships, villages and cities. MCL 460.1221(n).

(f) "Compatible renewable energy ordinance" means an ordinance that provides for the development of energy facilities within the local unit of government, the requirements of which are no more restrictive than the provisions included in section 226(8).[5] A local unit of government is considered not to have a compatible renewable energy ordinance if it has a moratorium on the development of energy facilities in effect within its jurisdiction.

The Legislature did not define the term, "hybrid facilities" in Act 233. And, on its face, Act 233 does not include, or apply to, "hybrid facilities." Rather, the Legislature expressly limited the application of Act 233 to a specific, enumerated list of facilities:

a. Any solar facility with a nameplate capacity of 50 megawatts or more.

b. Any wind facility with a nameplate capacity of 100 megawatts or more.

c. Any energy storage facility with a nameplate capacity of 50 megawatts or more and an energy discharge capability of 200 megawatt hours or more.

MCL 460.122(1).

4. Pursuant to the PSC Order, the Commission negated those legislatively defined terms and replaced them with:

- "[A]n ALU under Act 233 is limited to include only those local units of government that exercise zoning jurisdiction." PSC Order, p 10.

- "[A] CREO may only contain the setback, fencing, height, sound, and other applicable requirements expressly outlined in Section 226(8) of Act 233 and may not contain additional requirements …" PSC Order, p 18.

The Commission also unilaterally added "hybrid facilities" as an entirely new category of energy facility to which Act 233 applies. PSC Order, pp 5-6.

[5] Section 226(8) provides zoning and land use regulations such as minimum setback distances and noise regulation to be imposed by the Commission.

5. The enactment of the PSC Order circumvented the rulemaking process of the Administrative Procedures Act, Act 306 of 1969, MCL 24.201, *et seq*. (the "APA"), and legislative oversight mandated therein.

6. The PSC Order became effective November 29, 2024.

7. Appellants timely filed this action with this Court on November 8, 2024.

III. ARGUMENT

A. Standard of Review

MAC adopts the Appellants' statement of the Standard of Review as complete and accurate.

B. Planning, Zoning and Land Use in Michigan

More than a century ago, local government was given broad authority to govern, shape and develop a significant matter of local concern – zoning and land use regulation. Makes sense. Local government should reside with the form of government closest to the people who have a close and vested interest in zoning and land use regulation.

Michigan's constitutions reflect this deep-rooted and growing policy of local control. Michigan's 1908 Constitution established the authority of local units of government to "pass all laws relating to its municipal concerns." Mich Const 1908, art 8, §§ 8, 17 and 21. Michigan's 1963 Constitution extended and expanded that authority. Mich Const 1963, art 7, §§ 8, 17 and 22. As recently explained by the Michigan Supreme Court:

Article 7, § 22 of the 1963 Constitution provides:

> Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or *enacted* by the legislature for the government of the city or village. *Each such city and village shall have power to adopt resolutions* and ordinances relating to its municipal concerns, *property and government, subject to the constitution and law. No enumeration of powers granted to cities*

> *and villages in this constitution shall limit or restrict the general grant of authority conferred by this section*.

Explaining these highlighted changes, the Address to the People states:

> This is a revision of Sec. 21, Article VIII, of the present [1908] constitution and reflects Michigan's successful experience with home rule. *The new language is a more positive statement of municipal powers, giving home rule cities and villages* ***full*** *power over their own property and government, subject to this constitution and law* [emphasis added].

The 1963 Constitution also contained a new provision, Article 7, § 34:

> The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution.

> If it was ever the case, we conclude that, given the newly added language that expresses the people's will to give municipalities even greater latitude to conduct their business, there is simply no way to read our current constitutional provisions and reach the conclusion that "there is . . . grave doubt whether . . . there has been any enlargement or extension of the subjects of municipal legislation and control or of the powers of cities except as those subjects and powers are specifically enumerated and designated in the Constitution itself and in the home rule act." Under our current Constitution, there is simply no room for doubt about the expanded scope of authority of Michigan's cities and villages: "No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section." Moreover, these powers over "municipal concerns, property and government" are to be "liberally construed."

Associated Builders & Contractors v City of Lansing, 499 Mich 177, 185-187; 880 NW2d 765 (2016). Accordingly, Michigan's constitutional mandate is to favor counties, townships, cities and villages with the liberal construction of their constitutional powers. Mich Const 1963, art 7, § 34. Again, "local matter can be better regulated by the people of the locality than by the state or central authority." McQuillan, The Law of Municipal Corporations (3d Ed), § 1:40.

This policy of local control has been followed by and endorsed by Michigan courts. The Supreme Court's opinion in *Kyser v Kasson Twp*, 486 Mich 514; 786 NW2d 543 (2010) sets the tone:

> Zoning constitutes a legislative function. *Schwartz v. City of Flint,* 426 Mich. 295, 309, 395 N.W.2d 678 (1986). The Legislature has empowered local governments to zone for the broad purposes identified in MCL 125.3201(1). This Court has recognized zoning as a reasonable exercise of the police power that not only protects the integrity of a community's current structure, but also plans and controls a community's future development. *Austin v. Older,* 283 Mich. 667, 674-675, 278 N.W. 727 (1938). Because local governments have been invested with a broad grant of power to zone, "it should not be artificially limited." *Delta Charter Twp. v. Dinolfo,* 419 Mich. 253, 260 n. 2, 351 N.W.2d 831 (1984). Recognizing that zoning is a legislative function, this Court has repeatedly stated that it " 'does not sit as a superzoning commission.' " *Macenas v. Village of Michiana,* 433 Mich. 380, 392, 446 N.W.2d 102 (1989) (citation and emphasis omitted); *Brae Burn, Inc. v. Bloomfield Hills,* 350 Mich. 425, 430-431, 86 N.W.2d 166 (1957). Instead, "[t]he people of the community, through their appropriate legislative body, and not the courts, govern its growth and its life." *Brae Burn,* 350 Mich. at 431, 86 N.W.2d 166. We reaffirm these propositions.

Id. at 520-521.

And, of course, the Legislature has followed suit. On July 1, 2006, the Legislature enacted the Zoning Enabling Act ("MZEA"), 2006 PA 110, MCL 125.3101, *et seq*., to combine and replace the County, Township and City/Village Zoning Acts. In general, the MZEA provides detailed procedures for the adoption and amendment of a zoning ordinance. Under Section 203(1) of the MZEA, a zoning ordinance must be based upon a plan and coordinated with the plan to establish an orderly land use pattern. MCL 125.3203(1). Property should be zoned based on the natural suitability of the land for the intended purposes and compatibility with adjacent land uses. *Id*. Indeed, zoning ordinances must consider and account for the uniqueness of each locality AND even the differences and particularities of smaller divisions within the locality. Zoning ordinances must, with exclusive attention to the locality to which it applies, regulate everything from the land use and conservation of natural resources to sewage disposal to education to public transportation,

id., to the placement of foster care facilities and group homes. MCL 125.3206. And, subject to the oversight powers of zoning boards of appeal and the Michigan courts, they accomplish this regulation through zoning and planning commissions comprised of residents of each respective locality; that is, people with historical, institutional and personal knowledge and experience about the county, township, city or village. MCL 123.3301.

Two years after enacting the MZEA, the Legislature passed the Michigan Planning Enabling Act ("MPEA"). The MPEA is complementary to the MZEA as it requires, generally, the creation of a planning commission and a comprehensive plan (a master plan) which, in turn, are given effect by the zoning ordinance. The MPEA establishes the procedure by which the planning commissions of local units of government adopt a master plan, MCL 125.3839, as well as its contents. MCL 125.3832. And, again recognizing the differences between, and unique requirements of, smaller areas within the local unit, the Legislature provided a statutory mechanism for the creation of subplans "for a geographic area less than the entire planning jurisdiction." MCL 125.3835.

Overall, a simple but perfectly clear theme emerges – the primacy of local, hands-on government in matters that are local. Simply put, and as testified to before the Legislature by MAC's Governmental Affairs Associate, when it comes to zoning/land use, "one size does not fit all." Rather, land use regulations must be tailored to meet the wants and needs of that specific community. And, the expertise necessary to meet that standard lies with that community's residents. Therefore, as an initial matter, the state and its agencies are ill-suited to create, adopt and mandate standards for planning and zoning.

C. The Commission was Without Authority to Enact the PSC Order

Against this backdrop of the necessity for, and legislative recognition of, local planning, zoning and land use, the legal deficiencies with the PSC Order become even more apparent. For these reasons, the PSC Order should be vacated.

1. The PSC Order Rewrites the Legislature's Definitions of "Affected Local Unit" and "Compatible"

It seems to be a matter of simple common sense that when the Legislature has defined a term in a statute, the agency charged with enforcing that statute cannot discard the Legislature's definition and write its own. *In re Rovar Complaint Against SBC Mich*, 482 Mich 90, 108; 754 NW2d 259 (2008). Indeed, not only do the Michigan courts recognize this point of law, they enforce it! Michigan's basic rules of statutory construction require a court to interpret a statute in accordance with the intent of the Legislature and consistent with its plain and unambiguous meaning. *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). Similarly, Michigan courts commonly analyze challenges to administrative decision-making under a three-part test, one part of which is: whether it complies with the legislative intent underlying the enabling statute. *Lutrell v Dept's of Corrections*, 421 Mich 93, 100; 365 NW2d 74 (1984).

Here, the Commission's decision to essentially repeal the defined terms chosen by the Legislature and replace them with its own definitions unlawfully violated the Legislature's plain intent. For example, the Court of Appeals recently rebuked a state agency for its wholesale replacement of a statutorily required dental examination with a national or regional exam. In *Council of Michigan Dental Specialties v Bd of Dentistry*, 2001 WL 736724 (Mich Ct App, February 23, 2001), attached as Exhibit 1, the Board of Dentistry voted to use a regional certification exam in place of the Michigan Dental Specialty Exam. *Id*. at 1. The plaintiff, an association of practicing dental specialists which had participated in developing the Michigan State

exam, previously "used exclusively in Michigan," *id*., sought declaratory relief that the Board's adoption of the regional specialty exam was invalid. This Court agreed and affirmed the trial court's order that the Dentistry Board and the Department of Consumer and Industry Services must administer the state dental specialties exam. *Id*. at 1, 5. The court's narrow holding rested on its conclusion that the governing statute did not "grant the board unfettered discretion to wholly replace the state examination." *Id*. at 3. Rather, the statute in question required the Department to conduct examinations or other evaluations necessary to determine an applicant's qualifications and allow the Board to accept passing a national or regional exam for the purpose of meeting the state board exam, or a part thereof. *Id*.; MCL 333.16178. Therefore, even though the Dentistry Board had the broad power to certify dental specialists, "that power cannot include the power to adopt by resolution any specialty exam the board sees fit given that the plain language of section 16178(1) suggests that the state exam may not be wholly replaced by national or regional exams." *Id*. at 4.

Here, the Commission's wholesale rewrite of the Legislature's defined terms is even more explicit and demands a result similar to the *Bd of Dentistry* case. The statutory definitions of "ALU" and "CREO" are clear and unambiguous, but their meaning and application are drastically changed by the PSC Order.

Act 233	PSC Order
(a) "Affected local unit" means a unit of local government in which all or part of a proposed energy facility will be located.	• "[A]n ALU under Act 233 is limited to include only those local units of government that exercise zoning jurisdiction." PSC Order, p 10.
* * *	
(f) "Compatible renewable energy ordinance" means an ordinance that provides for the development of energy facilities within the local unit of government, the requirements of which are no more restrictive than the provisions included in section 226(8).[6] A local unit of government is considered not to have a compatible renewable energy ordinance if it has a moratorium on the development of energy facilities in effect within its jurisdiction.	• "[A] CREO may only contain the setback, fencing, height, sound, and other applicable requirements expressly outlined in Section 226(8) of Act 233 and may not contain additional requirements …" PSC Order, p 18.

A more egregious attempt to rewrite a statute, under the guise of interpretation, may not be possible. Moreover, the "new" definitions further curtail the constitutional and statutory zoning functions of local units of government.

First, the Commission's newly created definition of "ALU" excludes local units of government that do not exercise zoning jurisdiction, whereas the Legislature saw no need to do so. This may initially seem to be of little consequence because, after all, if the local government does not regulate zoning, then it shouldn't care if the Commission does. However, that is not the case. As discussed by Appellants at page 21 of their Brief, the term, "ALU," applies in many contexts throughout Act 233. Under the PSC Order's definition, ALUs without zoning ordinances would not be entitled to grant funds to participate in a contested case or payment under a "host community

[6] Section 226(8) provides zoning and land use regulations such as minimum setback distances and noise regulation to be imposed by the Commission.

agreement" – even though the new energy facility will be located within the ALU. This directly negatively affects the ALU's receipt of benefits, its bottom line and its residents. Even ALUs that do not exercise zoning jurisdiction have an interest in how a proposed energy facility will impact local land use within the ALU.

Second, the new definition of CREO overtly restricts the zoning functions of local units of government by limiting the categories of items that the local government can require of a developer applying for a certificate to develop an energy facility. The PSC Order precludes a local government from regulating more than the handful of typical zoning requirements listed in Section 226(8) of Act 233; specifically, setbacks, fencing, height and sound. That restraint, however, is not found anywhere in the Act 233 definitions. Rather, under the Act 233 definitions, the requirements under the CREO simply cannot be more restrictive than Section 226(8). The Legislature chose not to state that a CREO may not contain requirements beyond those listed in Section 226(8). And, it would be nonsensical if it had. There is no dispute that there are many requirements, in addition to setbacks, fencing, height and sound, that a developer must meet to build and operate an energy facility. Appellants, at page 20 of their Brief, use the example of a fire response and an emergency response plan. The PSC Order definitions, however, would render any ordinance requiring a fire response plan or emergency response plan "incompatible" with Act 233 and unenforceable as a CREO ("compatible renewable energy ordinance"). Without a CREO, local units of government are precluded under Act 233 from engaging in zoning control for energy facilities at all – a complete usurpation of the local government's constitutional and statutory authority to zone – a complete disregard of the need for local regulation of local matters.

2. The PSC Order Creates a Whole New Category of Facilities to Which Act 233 Applies

A similar analysis dictates that an agency's addition of a whole category of entities to the coverage of a statute that the Legislature itself did not include is likewise contrary to the intent of the Legislature. Again, the rules of statutory interpretation are instructive. Michigan's basic rules of statutory construction forbid courts from adding language to a statute or interpreting it "on the basis of [the] Court's own sense of how the statute should have been written." *Kirkaldy v Rim*, 478 Mich 581, 587; 734 NW2d 201 (2007) (J. Cavanaugh, concurring). Agencies have been given no greater license.

Neither the term "hybrid facilities" nor a discussion of how they are to be regulated can be found in Act 233. Instead, the Legislature chose to provide jurisdiction over three distinct types of facilities:

a. Any solar facility with a nameplate capacity of 50 megawatts or more.

b. Any wind facility with a nameplate capacity of 100 megawatts or more.

c. Any energy storage facility with a nameplate capacity of 50 megawatts or more and an energy discharge capability of 200 megawatt hours or more.

MCL 460.122(1). The Legislature further provided that a solar facility that meets the jurisdictional threshold may contain energy storage facilities and that a wind energy facility that meets the jurisdictional threshold may contain energy storage facilities. MCL 460.1221(w)-(x).

What the Legislature determined not to create, however, is "hybrid-facilities." And, it certainly did not grant the Commission jurisdiction over two or more of the differing types of facilities which must combine to meet one of the jurisdictional thresholds. In other words, although the PSC Order states that wind energy facilities and solar energy facilities may be combined to meet the 100 MW threshold for a wind energy facility to apply to Act 233, Act 233

does not. As a result, the PSC Order unlawfully and without authority expands Act 233 in a way that the Legislature expressly chose not to. In turn, this creates a whole new category of facilities that may be certified by the Commission and may circumvent the planning, zoning and land use regulations of local units of government. It is again a wholesale usurpation of the local government's constitutional and statutory authority to zone and a complete disregard of Michigan's constitutional determination of local regulation of local matters.

D. The PSC Order is an Administrative Rule in Disguise and is Invalid

The APA governs the creation of administrative rules and regulations by agencies. The APA has an important democratic function – it promotes accountability and transparency and is central to maintaining integrity in Michigan's administrative rules of law. The need for complete, accurate, straightforward and dependable administrative rules is essential to the common goal of solving real problems through regulation without exorbitant cost to the public. Strict compliance by an agency is required – not only because the Legislature has demanded it but also because "administrative" rules, while having the same legally binding effect as statutes enacted by the Legislature, are created and enforced by non-elected appointees and employees – not legislators elected by the public. Agencies have no inherent authority and may not act autonomously. An agency's power and authority are both granted and limited by the Legislature. An agency must, therefore, act solely within the restrictions dictated by statutes – including the procedural requirements of the APA. The failure to do so invalidates its actions. *Faircloth v Family Independence Agency*, 232 Mich App 391, 402; 591 NW2d 314 (1998), citing *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 239; 501 NW2d 88 (1993); *Blank v Dep't of Corrections*, 222 Mich App 385, 392; 564 NW2d 130 (1997), aff'd 462 Mich 103 (2000).

In particular, under Michigan law, whether an agency decision is authorized by law is evaluated using a four-part test as follows:

> An agency decision "in violation of [a] statute, in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or [that] is arbitrary and capricious" is not authorized by law. *Brandon Sch. Dist.*, 191 Mich.App. at 263, 477 N.W.2d 138. This Court adopted this particular formulation of the authorized-by-law standard, in part, because "**it focuses on the agency's power and authority to act rather than on the objective correctness of its decision.**" *Northwestern Nat'l Cas. Co. v. Ins. Comm'r,* 231 Mich.App. 483, 489, 586 N.W.2d 563 (1998).

Henderson v Civil Service Commission, 321 Mich App 25, 45; 913 NW2d 665 (2017) (emphasis supplied). See also, *Dearborn Heights Pharmacy v Dep't of Health & Human Services*, 338 Mich App 555, 559; 980 NW2d 736 (2021).

Agencies may act in many different ways when administering statutes they are assigned to enforce. The primary method is through the promulgation of administrative rules. Agency rules have the force of law. Therefore, the Legislature has put in place a strict procedure that must be followed by the promulgating agency when it enacts a rule. An agency's failure to follow the process outlined in the APA renders its proposed rule(s) invalid. *Michigan Charitable Gaming Ass'n v Michigan*, 310 Mich App 584, 594; 873 NW2d 827 (2015). The same, however, is not true if an agency decides to forego the rulemaking process and take a less cumbersome route such as issuing an interpretive statement. That is, to avoid foreseeable difficulties in the rulemaking process, agencies simply issue pronouncements in various forms such as guidelines or interpretative statements. Such pronouncements, however, circumvent the protections against agency overreach found in the APA. For that reason, Michigan administrative law has determined that it is necessary to dictate when the Commission is required to promulgate a rule rather than a less scrutinized form of guidance.

A "rule" is:

> an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the

> agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced by the agency.

MCL 24.207. A rule must be promulgated using all of the protections to the public established by the APA; specifically, before adopting a rule, an agency must provide notice of a public hearing and, at that hearing, provide the public with "an opportunity to present data, views, questions and arguments." MCL 24.241(1). At least 28 days before the public hearing, the agency must prepare a Regulatory Impact Statement ("RIS"). MCL 24.245(3). The Legislature specifically enumerated 28 categories of information that the agency is obligated to address in the RIS. *Id*.

Following the public hearing, the agency must review and prepare a report which discusses the comments received at the public hearing. MCL 24.245(2). Consistent with the legislative intent that the rule-making process be interactive as between the agency and the public, the APA allows the agency to make changes to the proposed rule following the public hearing. MCL 24.245(2).

Next, the final rules must be submitted to the Legislative Services Bureau and to the Michigan Office of Administrative Hearings and Rules. MCL 24.245 and 24.246. And, finally, the rules are sent to the Legislature's Joint Committee on Administrative Rules ("JCAR") which has 15 session days to consider the rule. MCL 24.245a(1)(a)-(d). JCAR may object, propose that the rule be changed or introduce bills to enact the subject of the rule into law. *Id*.

Here, the Commission, comprised not of elected officials but of three members appointed by the governor with the consent of the senate, **followed none of these steps**. Instead, the Commission circumvented these procedural protections against agency overreach by issuing the PSC Order rather than a rule. The PSC Order, however, is a rule under the APA definition – it is a regulation of general applicability that purports to implement Act 233 which prescribes procedure within the Commission. The problem is that Black-letter Michigan administrative law, however,

invalidates a rule disguised as an order and, in this case, renders the PSC Order invalid as a matter of law.

There are several exceptions to the definition of a rule – two of which the Commission relies on for the PSC Order. These are:

> (h) A form with instructions, an interpretative statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory.
>
> * * *
>
> (j) A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected.

MCL 24.207(h) and (j). Neither exemption applies here. Contrary to the Commission's claim, the PSC Order is not merely an interpretative statement – it purports to have the force of law. Likewise, the PSC Order is not a valid exercise of the Commission's "permissive statutory power" – it has general applicability.

As a general matter, under MCL 24.232(6), "[i]f a statute provides that an agency may proceed by rule-making or by order and an agency proceeds by order instead of rule-making, the agency shall not give the order general applicability to persons that were not parties to the proceeding or contested case before the issuance of the order, unless the order was issued after public notice and a public hearing." The PSC Order is generally applicable, but, as discussed *supra*, no public hearing was held. For this reason alone, the PSC could not proceed "by order" under MCL 24.232(6). Moreover, neither an interpretative statement nor an exercise of permissive statutory power may take the form of statutory "re-writes" of legislatively established definitions or the wholesale addition of a new category of facility to which Act 233 applies – which purport to have the force of law. Here, the PSC Order does violence to both. The PSC Order purports to impose a requirement that local governments not include any regulations beyond the strict

parameters of Section 226(8), even though, as discussed, such a limitation is contrary to the Legislature's intent and the plain language of the statute. And, the PSC Order purports to require local governments to exercise zoning jurisdiction to be considered an ALU, even though the statute specifically omits any such requirement. The PSC Order purports to have the force and effect of law; that is, if a unit of local government fails to comply – by failing to relinquish its zoning and land use power – the Commission takes over. The redefining and addition of terms "establish substantive standards" and do not simply "explain a statute." As a result, the Commission was required to follow the rulemaking procedure of the APA. *O'Halloran v Sec'y of State*, ____ Mich ____; ____ NW3D ____ (2024) (Docket No. 166424). Its failure to do so renders the PSC Order invalid.

IV. CONCLUSION/RELIEF REQUESTED

This Court has concisely stated:

> Accordingly, our cases carefully limit the powers of administrative agencies to ensure that they do not abuse or make baseless expansions of the limited powers delegated to them by the Legislature. Therefore, being creations of the Legislature, they are only allowed the powers that the Legislature chooses to delegate to them through statute. *York*, 438 Mich. at 767, 475 N.W.2d 346. Administrative agencies have no common-law powers. *McKibbin v. Mich. Corp. & Sec. Comm.*, 369 Mich. 69, 82, 119 N.W.2d 557 (1963). The "legislature, within limits defined in the law, may confer authority on an administrative officer or board to make rules as to details, to find facts, and to exercise some discretion, in the administration of a statute." *Argo Oil Corp. v. Atwood*, 274 Mich. 47, 52, 264 N.W. 285 (1935). The agency's authority to adopt rules (if it has any such authority) is usually found " 'in the statute creating the agency and vesting it with certain powers.' " *Clonlara, Inc. v. State Bd. of Ed.*, 442 Mich. 230, 237, 501 N.W.2d 88 (1993), quoting Bienenfeld, Michigan Administrative Law (2d ed.), ch. 4, pp. 18–19.
>
> The powers of administrative agencies are thus inherently limited. Their authority must hew to the line drawn by the Legislature. Our Supreme Court has repeatedly stressed the importance of this limitation on administrative agencies, stating that " '[t]he power and

> authority to be exercised by boards or commissions must be conferred by clear and unmistakable language, since a doubtful power does not exist.' " *Mason*, 343 Mich. at 326–327, 72 N.W.2d 292 (citation omitted). Further, powers " 'specifically conferred' " on an agency " 'cannot be extended by inference'; ... no other or greater power was given than that specified." *Alcona Co. v. Wolverine Environmental Production, Inc.*, 233 Mich.App. 238, 247, 590 N.W.2d 586 (1998), quoting *Eikhoff v. Detroit Charter Comm.*, 176 Mich. 535, 540, 142 N.W. 746 (1913).

Herrick Dist Library v Library of Michigan, 293 Mich App 571, 582-583; 810 NW2d 110 (2011) (footnotes omitted). See also, *City of Romulus v Michigan Dep't of Environmental Quality*, 260 Mich App 54, 65-66; 678 NW2d 444 (2003) ("[A court] will not defer to the administrative agency's interpretation of a rule where … we are convinced that agency's interpretation is 'clearly wrong.'").

Accordingly, agencies must act within the parameters of their authority. Those parameters can be exclusive – *e.g.*, an agency has no legislative authority to promulgate rules. Or, those parameters can be inclusive – *e.g.*, in order to promulgate a rule, the agency "shall" prepare and publish an RIS which includes specific statutorily required information. Either way, the agency's authority to act is not without legislatively created mandates and limitations.

Here, there can be no serious question that the Commission exceeded its authority with its issuance of the PSC Order – both substantively and procedurally. As a result, this Court should declare the PSC Order to be invalid as a matter of law.

Pursuant to MCR 7.212(B), this Brief contains 5,861 countable words.

Respectfully submitted,
COHL, STOKER & TOSKEY, P.C.

Dated: April 14, 2025

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EXHIBIT 1

2001 WL 736724
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

COUNCIL OF MICHIGAN DENTAL SPECIALTIES, Plaintiff-Appellee,
v.
BOARD OF DENTISTRY and DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES, Defendants-Appellants.

No. 227736.
|
Feb. 23, 2001.

Before: O'CONNELL, P.J., and ZAHRA and B.B. MACKENZIE [*], JJ.

Opinion

PER CURIAM.

***1** In this declaratory judgment action, defendants appeal as of right from an order granting plaintiff's motion for summary disposition. We affirm.

Plaintiff is an association of practicing dental specialists. Defendants are agencies responsible for licensing and regulation of the practice of dentistry in Michigan. At times prior to July 2000, plaintiff's members administered oral and written examinations to applicants seeking certification in dental specialties. Those exams were developed by the parties and used exclusively in Michigan.

In February 1999, defendant Board of Dentistry voted to utilize an exam developed and administered by the northeast regional board of dental examiners (NERB) in place of the state dental specialty exam. Thereafter, pursuant to the administrative procedures act, M.C.L. § 24.264; MSA 3.560(164), plaintiff sought a declaratory ruling that the board's adoption of the NERB specialty exam was invalid. Defendants denied that request. In December 1999, plaintiff filed the present declaratory action, seeking a stay of the administrative preparations to implement the NERB exam and an order directing the board to prepare state-administered exams. Eventually, plaintiff brought a motion for summary disposition, arguing that defendants could not substitute the NERB exam for the state exam without promulgating new administrative rules. The trial court granted that motion and ordered defendants to administer the state dental specialties exam. Thereafter, at defendant's request, this Court stayed the trial court's order. Our Supreme Court denied plaintiff's request to reverse the stay, [1] and ordered expedited consideration of this appeal.

On appeal, defendants first argue that plaintiff lacks standing to challenge the decision to use the NERB specialty exam. Defendants contend that only the individual applicants for the specialty exams could have standing to challenge the decision. Whether a party has standing is a question of law that we review de novo. *Dep't of Consumer & Industry Services v Shah,* 236 Mich.App 381, 384; 600 NW2d 406 (1999). The concept of standing focuses on whether a party's interest in the outcome of litigation will ensure sincere and vigorous advocacy. *Detroit Fire Fighters Ass'n v. Detroit,* 449 Mich. 629, 633 (Weaver, J.), 643 (Riley, J., concurring); 537 NW2d 436 (1995); *Kuhn v. Secretary of State,* 228 Mich.App 319, 333; 579 NW2d 101 (1998). However, standing is not determined simply by a party's demonstration of its ability to vigorously advocate a case. *Detroit Fire Fighters Ass'n, supra.* "The plaintiff must also demonstrate that his substantial interest will be adversely affected in a manner distinct from the citizenry at large, i.e., an actual injury or likely chance of immediate injury different from the public." *Id.* at 643. A party may demonstrate a personal interest in the outcome of litigation by showing that it has been injured or that it represents a person or group of persons who have been injured. *Id.* at 634, 643 n 4; see *Muskegon Building & Construction Trades v Muskegon Area Intermediate School Dist,* 130 Mich.App 420, 428; 343 NW2d 579 (1983), overruled on other grounds 455 Mich. 546 (1997) and *In re Filing Requirements for Complaints & Applications Filed Under the Michigan Telecommunications Act,* 210 Mich.App 681, 692; 534 NW2d 234 (1995).

***2** MCR 2.605(A)(1) provides that a court has authority to enter a declaratory judgment in a case of actual controversy within its jurisdiction, declaring the rights and other legal relations of an interested party. As noted *supra,* plaintiff satisfied the requirement of M.C.L. § 24.264; MSA

3.560(164) by seeking a declaratory ruling from defendant Board of Dentistry prior to bringing the present action for a declaratory judgment. However, the parties dispute whether plaintiff or its members are interested parties with substantial interests in the subject of the present litigation.

Plaintiff asserted below that defendants violated the administrative procedures act, M.C.L. § 24.201 *et seq.;* MSA 3.560(101) *et seq.,* when it adopted the NERB exam by resolution, and not through promulgation of a new administrative rule. Plaintiff claims that the public notice and public hearings attendant to the promulgation of a new administrative rule should be required in order to facilitate open discussions regarding the merit of and reasons for replacing the state exam with the NERB exam. According to plaintiff, its members have substantial interests in questions concerning specialty exams and licensure and have been adversely affected by defendants' decision to adopt the new exam without providing public notice or public hearings. We conclude that plaintiff's individual members have substantial interests in whether the NERB exam is a proper replacement for the previously used state exam.

While the general public has an interest in the quality of dental care available in the state, the interest of plaintiff's members in the reputation of the specialties is a distinct interest particular to the specialists themselves. The substance of the specialty exam has a direct bearing on which individuals will eventually be certified as specialists. As such, current specialists have substantial interests in ensuring that the exam is adequately stringent to preserve the reputation of the specialties. Moreover, already certified specialists will compete in the marketplace with specialists certified under the new exam. Therefore, those current specialists have valid economic interests in ensuring that qualifications remain consistent. Under these circumstances, plaintiff, as representative of individual specialists adversely affected by defendant's decision to adopt the NERB exam by resolution, has standing. *Detroit Fire Fighters Ass'n, supra; Kuhn, supra.*

Defendants next argue that the trial court erred in granting summary disposition for plaintiff because defendants have discretion to implement whichever dental specialty exam they determine meets the needs of the certification process. We review a trial court's decision on a motion for summary disposition de novo. *Spiek v. Dep't of Transportation,* 456 Mich. 331, 337; 572 NW2d 201 (1998). Likewise, statutory interpretation is a question of law that we review de novo. *Oakland Co Bd of Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n,* 456 Mich. 590, 610; 575 NW2d 751 (1998).

***3** Defendants claim that the public health code, M.C.L. § 333.1101 *et seq.;* MSA 14.15(1101) *et seq.,* and the administrative procedures act, M.C.L. § 24.201 *et seq.;* MSA 3.560(101) *et seq.,* provide the board discretion to adopt and use a dental specialty exam different from the state exam, without promulgating new administrative rules allowing a substitute exam. We disagree.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the Legislature's intent. *Frankenmuth Mut Ins v. Marlette Homes, Inc,* 456 Mich. 511, 515; 573 NW2d 611 (1998). If the plain and ordinary meaning of a statute is clear, judicial construction is neither necessary nor permitted. *Cherry Growers, Inc v Agricultural Marketing and Bargaining Bd,* 240 Mich.App 153, 166; 610 NW2d 613 (2000). We may not speculate as to the probable intent of the Legislature beyond the words expressed in the statute. *In re Schnell,* 214 Mich.App 304, 310; 543 NW2d 11 (1995). When reasonable minds may differ as to the meaning of a statute, the courts must look to the object of the statute, the harm it is designed to remedy, and apply a reasonable construction which best accomplishes the statute's purpose. *Marquis v Hartford Accident & Indemnity,* 444 Mich. 638, 644; 513 NW2d 799 (1994).

MCL 333.16178; MSA 14.15(16178) provides:

> (1) Unless otherwise necessary for a board to fulfill national or regional testing requirements, the department shall conduct examinations or other evaluations necessary to determine qualifications of applicants for initial licensure or registration at least annually and may conduct other investigations or evaluations necessary to determine the qualifications of applicants. A board may accept passing a national or regional examination developed for use in the United States for the purpose of meeting a state board examination or a part thereof.
>
> (2) An individual who fails to pass a required examination may be reexamined to the extent and in a manner determined by the board.
>
> (3) The department shall give public notice of the time and place of a required regular initial licensure or registration

> examination or evaluation in a manner it considers best not less than 90 days before the date of the examination or evaluation.

Subsection (1) plainly states that the board may accept a passing score on a national or regional examination for the purpose of meeting a state examination or a part thereof. However, contrary to defendants' claim, that statute does not grant the board unfettered discretion to wholly replace the state examination. The statute specifies that other exam scores may be accepted to meet the state exam, implying that the state-administered exam may not be wholly eliminated. Furthermore, we do not find any other provision in the public health code or administrative procedures act granting defendants discretion to replace the state dental specialist examination referenced in § 16178. [2]

***4** The Board of Dentistry has promulgated rules regarding dental specialties. See 1994 AACS, R 338.11501 *et seq.* An administrative agency is under a duty to follow its own rules. *Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Services,* 431 Mich. 172, 189; 428 NW2d 335 (1988). Rule 11505 provides, in pertinent part:

> An applicant for a specialty certificate shall comply with all of the following requirements:
>
> (b) Except as provided in R 338.11503(2) [exempting applicants in oral pathology], secure a minimum converted score of 75 in the state board written and clinical examination in the specific specialty pursuant to these rules. Submission of verification that an applicant for specialty certification has successfully passed the American board written examination is satisfactory compliance with the requirement for the written portion of the state board examination for certification in Michigan for the applicant's specialty.
>
> (c) The provisions of subdivision (b) of this rule are waived if the applicant has provided satisfactory evidence of the successful completion of the American board specialty written and clinical examinations. Other substantially equivalent specialty examinations approved by the board may be considered. [1994 AACS, R 338.11505.]

Subdivision (b) requires an applicant to attain a minimum score of seventy-five on the state specialty exam. Subdivision (c) provides that the minimum score on the state exam may be waived if an applicant provides satisfactory evidence of successful completion of the American board exams or other substantially equivalent exams. [3] However, the ability to waive the requirement to successfully meet the state exam requirements upon a request by an applicant does not vest the board with authority to eliminate the state exam.

Upon review of the statutory and administrative schemes, we are convinced that subdivision (c) was not intended to provide the board discretion to wholly replace the state exam with a regional or other exam. The Legislature granted the board power to certify dental specialists. MCL 333.16608; MSA 14.15(16608). However, that power cannot include the power to adopt by resolution any specialty exam the board sees fit given that the plain language of § 16178(1) suggests that the state exam may not be wholly replaced by national or regional exams. [4] Also, M.C.L. § 333.16174; MSA 14.15(16174), includes general requirements for dental specialty certification, but does not suggest that the state exam referenced in § 16178 and the administrative rules may be replaced. There is no administrative rule allowing the board to adopt a new dental specialty exam by resolution. Under the plain, unambiguous language of the current administrative rules, the board may not wholly replace the state dental specialty exam with a regional examination. Therefore, we conclude that defendants acted contrary to the express administrative rules when they adopted the NERB exam by resolution.

***5** We note that in reaching our conclusion, we do not rely on M.C.L. § 333.16145; MSA 14.15(16145). That section provides:

> (1) A board may adopt and have an official seal.
>
> (2) A board or task force may promulgate rules necessary or appropriate to fulfill its functions as prescribed in this article.
>
> (3) Only a board or task force shall promulgate rules to specify requirements for licenses, registrations, renewals, examinations, and required passing scores.

The trial court ruled that section specifically requires defendants to promulgate a new rule in order to adopt and use an examination other than the previously used state exam. We disagree that § 16145 includes such a requirement. We recognize that our Legislature's use of the word "shall"

is generally used to designate a mandatory provision. See *Depyper v. Safeco Ins Co of America,* 232 Mich.App 433, 438; 591 NW2d 344 (1998). However, the word "shall" in § 16145(3) should not be read to specially require promulgation of new administrative rules, but rather to express which entities have rule-making authority in the enumerated areas. The plain language of subsection (3) establishes that only a board or task force has rule-making authority. The statute does not require those entities to promulgate new rules.[5] Any other interpretation would render the word "only" in subsection (3) surplusage or nugatory. See *Hoste v Shanty Creek Management, Inc,* 459 Mich. 561, 574; 592 NW2d 360 (1999). In construing a statute, effect should be given to every phrase, clause and word. *Sun Valley Foods v. Ward,* 460 Mich. 230, 237; 596 NW2d 119 (1999); *Hoste, supra.* Our interpretation of § 16145 is further supported by subsection (2), which provides that the board or task force *may* promulgate rules necessary or appropriate to fulfill its functions.

Affirmed.

All Citations

Not Reported in N.W.2d, 2001 WL 736724

Footnotes

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

1 As a result of the stay, defendants administered the NERB exam to twenty-four applicants in July 2000.

2 In addition to § 16178, on appeal defendants generally cite M.C.L. § 333.16174; MSA 14.15(16174), M.C.L. § 333.16608; MSA 14.15(16608) and M.C.L. § 24.207(j); MSA 3.560(107)(j), as support for adopting the NERB exam by resolution. However, none of those provisions grant defendants discretion to replace the state exam.

3 We make no determination regarding whether the NERB exam qualifies as a "substantially equivalent" exam under R 338.11505(c).

4 See *supra,* our discussion of § 16178(1).

5 We recognize that our conclusion that the current administrative rules do not allow defendants to substitute tests necessarily suggests that a new rule must be promulgated if such substitution is to be made. However, § 16145 does not, itself, require that new rules be promulgated.