

STATE OF MICHIGAN
IN THE COURT OF APPEALS

In the matter, on the Commission's
own motion, to open a docket to
implement the provisions of Public
Act 233 of 2023

PSC Case No. U-21547

ALMER CHARTER TOWNSHIP, et al.,

Court of Appeals No. 373259

Appellants,

v

**MICHIGAN PUBLIC SERVICE
COMMISSION,**

Appellee.

**ANSWER AND BRIEF OF PROPOSED *AMICI CURIAE* CLARA AND LEONARD
OSTRANDER, TERESA HIMES, AND KEVIN HEATH TO APPELLANTS'
MOTION FOR LEAVE TO FILE RESPONSE TO *AMICI CURIAE*'S BRIEF**

GOODMAN ACKER, P.C.
MARK BREWER (P35661)
ROWAN CONYBEARE (P86571)
17000 W. Ten Mile Road
Southfield, MI 48075
(248) 483-5000
mbrewer@goodmanacker.com
rconybeare@goodmanacker.com

MATTHEW EISENSON
Pro Hac Vice Application Filed
Senior Fellow, Renewable Energy Legal
Defense Initiative
Associate Research Scholar
Sabin Center for Climate Change Law
Columbia Law School
435 W. 116th Street
New York, NY 10027
(508) 397-8177
matthew.eisenso@law.columbia.edu

Attorneys for Proposed *Amici Curiae*

INTRODUCTION

Proposed *Amici Curiae* Clara and Leonard Ostrander, Teresa Himes, and Kevin Heath (the “Property Owners”) have filed a motion for leave to file an *amicus curiae* brief opposing Appellants’ motion for a preliminary injunction. Appellants have filed an answer opposing the Property Owners’ motion, and have also filed a motion for leave to file a response to the *amicus* brief itself. Pursuant to MCR 7.211(B)(4), the Property Owners timely file this answer and brief in response to Appellants’ motion for leave to file a response.

For the reasons stated below, the Court should grant both motions and consider both the *amicus curiae* brief and the response as it decides whether to grant a preliminary injunction.

ARGUMENT

THE MOTIONS FOR LEAVE TO FILE AN *AMICUS* BRIEF AND TO FILE A RESPONSE SHOULD BOTH BE GRANTED.

I. THE PRACTICE OF MICHIGAN COURTS HAS BEEN TO GRANT MOTIONS FOR LEAVE TO FILE *AMICUS* BRIEFS IN CASES OF PUBLIC INTEREST.

Motions for leave to file *amicus* briefs are very rarely opposed. Such briefs are expressly permitted by the Court Rules, *see* MCR 7.212(H); MCR 7.312(H), and are typically granted when timely filed by “persons or groups interested in the determination of the issues presented” in the case, *see People v McFarlane*, 504 Mich 979; 933 NW2d 692 (2019). As the Michigan Supreme Court has long held, *amicus* briefs are welcomed in cases of “important public interest” and “leave is generally granted”:

This court is always desirous of having all the light it may have on the questions before it. In cases involving questions of important public interest leave is generally granted to file a brief as *amicus curiae*

Grand Rapids v Consumers Power Co, 216 Mich 409, 415; 185 NW 852 (1921).

Based on these principles, the Property Owners’ motion should be granted.

II. APPELLANTS’ SPECIFIC OBJECTIONS TO THE PROPERTY OWNERS PARTICIPATING AS *AMICI CURIAE* ARE MERITLESS.

Appellants argue that the Court should deny the Property Owners’ motion for leave to file an *amicus* brief because the Property Owners purportedly “do not have a significant interest in the appeal of the Michigan Public Service Commission’s . . . Order” and because they purportedly “fail to add any unique perspective or additive, useful information” not proffered by the Public Service Commission (“PSC”). *See* Appellants’ Resp to *Amici Curiae* Br, p 2 (hereinafter “Appellants’ Resp to Br”); Appellants’ Resp in Opp’n to Mot to File *Amici Curiae* Br, p 2 (hereinafter “Appellants’ Resp to Mot”).

This is wrong in three ways. First, the Property Owners have a significant interest in the outcome of the appeal. Second, the Property Owners’ interests are not adequately represented by other parties. Third, the Property Owners’ *amicus* brief offers the Court a unique perspective that will be helpful in reaching an informed decision in this case of public interest.

A. The Property Owners Have A Significant Interest In The Outcome Of This Appeal.

It is demonstrably false that the Property Owners “do not have a significant interest” in the outcome of the appeal. To the contrary, they have a direct interest in the outcome of the appeal, which will determine whether they are allowed to lease out their land to a solar developer. They need the income from a solar lease to avoid being forced to sell off their land in Milan Township. To their dismay, however, the local government in Milan Township has enacted severe restrictions on the use of agricultural land for utility-scale solar projects, which has impeded their participation in such projects. Critically, the new state law, 2023 PA 233 (“PA 233”), imposes reasonable limits on the types of restrictions that local governments can impose on renewable energy projects and offers a pathway for developers to submit applications to the

PSC when local governments do not adhere to those limits. In their motion for a preliminary injunction, Appellants are seeking to enjoin an Order implementing PA 233 from going into effect. If Appellants' request for a preliminary injunction is granted, it will stall the rollout of the law, allowing local governments such as Milan Township to continue violating PA 233 without recourse.

The Property Owners have a legitimate interest in protecting their property rights to earn lease payments from solar development. As discussed in their *amicus* brief, Clara and Leonard Ostrander, Teresa Himes, and Kevin Heath are private landowners and farmers, all of whom own agricultural land in Milan Township, Michigan. This land is their family heritage. The Ostrandersons, for example, live in a centennial homestead on farmland that has been in their family for 154 years. However, the economics of farming have become more and more challenging, and the Property Owners have increasingly found that income from agricultural use alone is insufficient to cover mounting medical bills and onerous loan obligations that have accrued over the years. Without an additional source of income, such as leasing their land for solar development, they fear they will be forced to sell off their land.

Moreover, the Property Owners have a real, non-hypothetical opportunity to receive income from solar leases, which will be substantially affected by the outcome of the appeal. In 2020, a renewable energy developer called Apex Clean Energy approached the Property Owners and offered to provide them with lease payments if they agreed to allow solar panels to be installed on their land for 30 years. At the end of those 30 years, the land could easily be restored to farmland. In the meantime, the lease would provide enough income for them to pay their bills, and they would not be forced to sell off their family land to a real estate developer. This seemed to offer the lifeline they needed, and the property owners accepted the terms. As Clara Ostrander

explained to Michigan Public Radio, “The other option would be sell off to a developer to build homes. And that would make it gone forever. It would never be farmland again.”¹

However, local restrictions imposed by the Milan Township government have prevented the project from moving forward. At the time they signed lease agreements, the township ordinance allowed large-scale solar projects, such as theirs, to be permitted as a special use in agricultural zoning districts.² However, groups such as Citizens Against Solar in Agriculture mounted an intense pressure campaign to amend the ordinance to prohibit solar on agricultural land.³ Ultimately, on February 9, 2023, the local zoning ordinance was amended to prohibit large solar projects in agricultural zoning districts.⁴ Over the past year, following the enactment of PA 233, Milan Township has continued to pursue restrictions that are more restrictive than those allowed under state law.

The outcome of the motion to enjoin the Order, as well as the ultimate outcome of the appeal, will thus have a significant impact on the Property Owners’ ability to participate in a solar project. While it is true, as a technical matter, that “[g]ranting an injunction of the Order does not render PA 233 obsolete,” *see* Appellants’ Resp to Br, p 4, that is a straw man argument. An injunction will substantially delay implementation of the statute—perhaps for years—by preventing the application instructions and procedures for the PSC’s review of projects from going into effect. In the meantime, if there is no process in place for the PSC to review

¹ Samilton, *State Law Could End Bitter Local Fights Over Bans of Large-Scale Renewable Energy on Farmland*, Michigan Public Radio (July 23, 2024).

² Milan Township Zoning Ordinance 2008-001, § 1327(M) (October 14, 2021), <https://perma.cc/7A6W-JJBC> (allowing large solar systems in AG-1 and AG-2).

³ *Milan Township: Who Is C.A.S.A.?*, No To Solar, <https://perma.cc/HP5R-GXJW> (November 1, 2023).

⁴ Milan Township Zoning Ordinance 2008-001, § 1327(M) (May 11, 2023), <https://perma.cc/9VRR-VPT5> (prohibiting large solar systems in AG-1 and AG-2).

applications, there will be no recourse available to the Property Owners if their local government continues to violate PA 233's prohibition against imposing requirements that are "more restrictive" than those set out in the statute.

B. The Property Owners' Interests Are Not Adequately Represented By Other Parties.

Appellants argue that *amicus* status should only be granted when an *amicus* has a special interest in a matter that is not being adequately or competently represented by any other party. Appellants' Resp to Mot, p 2. Appellants are incorrect that the PSC is adequately representing the interests of the Property Owners.

Appellants appear to contend that the Property Owners' interests are being competently represented in this case, on the basis that the "[t]he PSC's brief makes note of private landowners' interests in potentially hosting renewable energy facilities." *See* Appellants' Resp to Mot, p 4. To be sure, the PSC brief does "make[] note" of the Property Owners' interests, but the full extent of the PSC's discussion of those interests consists of *two sentences*:

[T]he requested preliminary injunction would harm the public interest in other practical ways. For example, a preliminary injunction would *harm landowners and developers seeking to site an energy facility on their property pursuant to the Act 233 process.*

Act 233 does not confer any powers of eminent domain. MCL 460.1230(4). All owners of land on which relevant projects will be sited are, therefore, willing participants who have decided to site a facility on their property. (*See* MPSC Case No. U-21547, 10/21/2024 Errata, p 2, n 1, F# 0026.) Issuance of a preliminary injunction at this stage would *harm these landowners' rights to make use of their land in the way they see fit pursuant to a valid Michigan law.*

Appellee's Answer in Opp'n to Appellants' Mot for Prelim Inj, p 46 (emphases added). In short, the PSC does little more than acknowledge, as a general matter, that a preliminary injunction would harm landowners by restricting their rights to use their land as they see fit. While the

PSC's assertions are accurate, they are not sufficient to adequately represent the interests of the Property Owners.

C. The Property Owners' *Amicus* Brief Offers A Unique Perspective That Is Not Provided By Other Parties.

The Property Owners offer a unique perspective in this matter that provides critical context on why PA 233 was necessary and why an injunction that delays the PSC's Order to implement PA 233 would not serve the public interest.

Appellants have no valid counterargument to this point. Nonetheless, they make two different claims in their brief, both of which are fatally flawed. First, they make the astonishing claim that the *arguments* in the Property Owners' amicus brief are too similar to those in the PSC's brief because *both briefs address the elements* for granting a motion for a preliminary injunction:

The Property Owners' proposed brief fails to provide the Court with any arguments not already found within the PSC's brief. Both the PSC and the Property Owners argue that Appellants fail to demonstrate any irreparable harm, are unlikely to prevail on the merits, the balance of harm weighs against the Appellants, and that a preliminary injunction does not serve the public interest.

Appellants' Resp to Mot, p 3. This is untrue—Property Owners make arguments and cite case law not found in the PSC's brief. *See, e.g., Amici Curiae* Br, p 10 (requirement of a compelling need); *id* at 16–17 (remedial statutes and liberal construction); *id* at 18 (definition of “unreasonable” under MCL 462.26(8)).

Second, Appellants also make the legally invalid claim that any *facts* offered by the Property Owners' brief are not relevant. *See* Appellants' Resp to Mot, p 4. To support this assertion, they cite an inapplicable proposition from a case holding that it is the responsibility of the legislature, not the courts, to weigh certain economic and social costs and benefits related to the PSC's ratemaking decisions and authority. *See id* (citing *Consumers Power Co v Pub Serv*

Comm'n, 460 Mich 148, 157; 596 NW2d 126 (1999)). However, the case cited by Appellants has nothing to do with the relevance of economic injury when balancing the equities or assessing the public interest in the context of a motion for a preliminary injunction. Harm to individuals such as the Property Owners is highly relevant to balancing of the equities and assessing whether an injunction would serve the public interest—particularly when Appellants’ motion makes the strident claim that granting the injunction would result in no injury whatsoever.

Ultimately, the *amicus* brief provides important context on why PA 233 and the Order implementing the statute matter to the State of Michigan and to individual Michigan residents. The *amicus* brief describes examples of actual ordinances implemented across the state, both before and after the passage of PA 233, and describes the individual experiences of Property Owners who have been inhibited by those ordinances. Further, it describes how an injunction, by delaying implementation of the law, will exacerbate the harms the Property Owners have suffered in the face of unreasonable local restrictions that violate state law.

III. IN THE CASE OF A DISPUTE OVER THE CONTENTS OF AN *AMICUS CURIAE* BRIEF, THIS COURT’S APPROACH HAS BEEN TO ALLOW ITS FILING, ALLOW A RESPONSE, AND LEAVE TO THE PANEL THE DECISION ABOUT THE MERITS OF *AMICI*’S ARGUMENTS.

Amici plainly meet the standards for granting leave to file their brief. This Court should, as it has done in the past, grant their motion for leave and also grant the Appellants’ motion for leave to file a response.

For example, in *O’Halloran v Secretary of State*, ___ Mich App ___; ___ NW2d ___ (2023) (Docket Nos. 363503 & 363505) (*per curiam*), *Amicus* League of Women Voters sought leave to file a brief. Plaintiffs-Appellees opposed that motion, contending that the brief raised arguments beyond the scope allowed by MCR 7.212(H)(2). Chief Judge Pro Tem GADOLA granted the motion for leave to file an *amicus* brief, allowed Plaintiffs-Appellees to file a response

(which they did), and left it to the panel to consider the arguments made. *See O'Halloran v Secretary of State*, order of the Court of Appeals, issued July 6, 2023 (Docket Nos. 363503 & 363505) (Ex 1).

The Court should do the same here—grant the motion for leave to file an *amicus* brief and the motion for leave to file a response.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons and those stated in their brief, *Amici Curiae* Property Owners pray that:

1. Their Motion for Leave to File *Amicus Curiae* Brief be granted;
2. Appellants' Motion for Leave to File Response be granted; and
3. The Motion for Preliminary Injunction be denied.

Respectfully submitted,

/s/ Mark Brewer

GOODMAN ACKER, P.C.
MARK BREWER (P35661)
ROWAN CONYBEARE (P86571)
17000 W. Ten Mile Road
Southfield, MI 48075
(248) 483-5000
mbrewer@goodmanacker.com
rconybeare@goodmanacker.com

MATTHEW EISENSEN
Pro Hac Vice Application Filed
Senior Fellow, Renewable Energy Legal
Defense Initiative
Associate Research Scholar
Sabin Center for Climate Change Law
Columbia Law School
435 W. 116th Street
New York, NY 10027
(508) 397-8177
matthew.eisenenson@law.columbia.edu

Attorneys for Proposed *Amici Curiae*

Dated: December 10, 2024

EXHIBIT 1

Court of Appeals, State of Michigan

ORDER

Philip M O'Halloran MD v Secretary of State; Richard Devisser v Secretary of State

Docket Nos. **363503; 363505**

LC Nos. **22-000162-MZ; 22-000164-MZ**

Michael F. Gadola, Chief Judge Pro Tem, acting under MCR 7.211(E)(2), orders:

The motion to file an amicus curiae brief on behalf of the League of Women Voters of Michigan is GRANTED. The brief that was received on June 15, 2023 is accepted for filing. This order is without prejudice to the ability of the case call panel to consider whether any arguments advanced in the amicus curiae brief go beyond the permissible extent under MCR 7.212(H)(2) of addressing “issues raised by the parties.” Also, in accordance with this Court’s flexible motion practice, any party that wishes may file a motion to file a supplemental brief in response to the amicus curiae brief.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

July 6, 2023

Date



Chief Clerk

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