IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS
Boonstra, P.J., and Ronayne Krause and Cameron, J.J.

ELIZABETH TRACE CONDOMINIUM ASSOCIATION, *Plaintiff/Appellee*, v. AMERICAN GLOBAL ENTERPRISES, INC., *Defendant/Appellant*.	MSC No. 164212 MCOA No. 355243 Oakland County Circuit Court Case No. 18-170537-CH Hon. Shalina D. Kumar

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BRIEF OF AMICUS CURIAE MICHIGAN CHAPTER OF COMMUNITY ASSOCIATIONS INSTITUTE IN OPPOSITION TO DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

Kayleigh B. Long (P82774)
Kevin M. Hirzel (P70369)
HIRZEL LAW, PLC
37085 Grand River Avenue, Suite 200
Farmington, Michigan 48335
(248) 478-1800
klong@hirzellaw.com
kevin@hirzellaw.com
Attorneys for Amicus Curiae Michigan Chapter of Community Associations Institute

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STATEMENT OF INTEREST AND INTRODUCTION[1]

Community Associations Institute ("CAI") is an international organization dedicated to providing information, education, resources, and advocacy for community association leaders, members, and professionals with the intent of promoting successful communities through effective, responsible governance and management. CAI's more than 43,000 members include homeowners, board members, property managers, and other professionals who provide services to condominium associations, homeowners associations, and other types of community associations. CAI is the largest organization of its kind, serving more than 74.1 million homeowners who live in more than 355,000 community associations in the United States. CAI has authorized its Michigan Chapter, Amicus Curiae, to file a brief in support of Plaintiff/Appellee, Elizabeth Trace Condominium Association (the "Association"), and in opposition to Defendant/Appellant's, American Global Enterprises, Inc. ("AGE"), application for leave to appeal.

Michigan courts have long recognized that property owners may be required to act within a certain timeframe in order to protect and maintain their property rights. In *Beach v Lima*, 489 Mich 99, 107 n 18; 802 NW2d 1 (2011), this Court did so in the context of adverse possession, stating that "'Michigan courts have followed the general rule that the expiration of the period of limitation terminates the title of those who slept on their rights and vests title in the party claiming adverse possession.'" (citation omitted). In *Kentwood v Estate of Sommerdyke*, 458 Mich 642, 655-56; 581 NW2d 670 (1998), this Court did so again with respect to the highway-by-user statute, stating:

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[1] Pursuant to MCR 7.312(H)(5), Amicus Curiae Michigan Chapter of Community Associations Institute certifies that no counsel for a party authored this brief in whole or in part or made a monetary contribution to fund or prepare the submission of this brief. No party other than Amicus Curiae, its members, or its counsel made a monetary contribution or contributed to this brief.

> [W]e conclude that the state may condition the permanent retention of a property right on performance of reasonable conditions that indicate a present intention to retain the property interest. We find that, by treating property that has not been reserved for private use for ten years or longer as dedicated to the public for use as a highway, the Michigan statute is a reasonable exercise of police power.

And this Court did so yet again in *Van Slooten v Larsen*, 410 Mich 21, 48; 299 NW2d 704 (1980), in the area of oil and gas interests, stating "[g]iven that a state has the power to require the recording of an interest as a condition to preserving title to the interest when no recording was required at the time the interest was created, the defendants have not demonstrated that due process prohibits a state from requiring further periodic rerecording to achieve similar objectives."

This case involves a statute that follows a long continuum of United States Supreme Court and Michigan Supreme Court cases holding that a property owner who sleeps on their rights may lose them to another automatically by operation of law. AGE requests this Court to seize vested property rights from the Association's co-owners and require that their claim to undeveloped, general common element land be subjected to the process outlined in MCL 559.167(4), as amended by 2016 PA 233, despite the fact that both the trial court and the Michigan Court of Appeals held that title to the undeveloped units vested in the Association's co-owners as general common element land no later than May 25, 2014.

This case does not satisfy the specific grounds required for this Court's review. The decisions in this case are consistent with the published opinion in *Cove Creek Condominium Association v Vistal Land & Home Development, LLC*, 330 Mich App 679; 950 NW2d 502 (2019), which held that MCL 559.167, as amended by 2016 PA 233, did not apply retroactively and a condominium developer could automatically lose all its rights to construct unbuilt units upon the expiration of the statutory time period in MCL 559.167(3), as amended by 2002 PA 283. *Cove Creek* also expressly rejected the argument that the automatic loss of property rights by operation

of law under MCL 559.167(3), as amended by 2002 PA 283, resulted in an unconstitutional taking without due process of law.

Since the publication of *Cove Creek* in 2019, two panels of the Michigan Court of Appeals have reconsidered the application of MCL 559.167, as amended by 2002 PA 283 and 2016 PA 233, and both of them affirmed and were consistent with *Cove Creek*. Twice now, this Court has denied requests to render a different opinion,[2] and this case does not present any facts or law that would compel a different result. Rather, the decisions in this case are consistent with the intent and purpose of MCL 559.167, as amended by 2002 PA 283, which is to encourage the completion of condominium projects within a reasonable time and prohibit unfinished condominium projects from existing in perpetuity, leaving condominium associations with underfunded projects and financially overburdened co-owners who have to pay more than their share of expenses to keep the condominium operable.

Review by this Court also is unnecessary because this case, and those that have come before it, have limited prospective application. The former, self-executing process codified at MCL 559.167, as amended by 2002 PA 283, only applies to a finite number of condominium projects in Michigan, specifically those condominium projects in which the statutory time periods to withdraw or construct undeveloped, "need not be built" units expired before 2016 PA 233 went into effect, and it simply does not make sense to disrupt condominium projects that have long been closed out by operation of law.

Finally, if this Court were to accept this case and potentially reverse the Michigan Court of Appeals, the decision would result in a scenario in which undeveloped, "need not be built" units

[2] See *Cove Creek Condo Ass'n v Vistal Land & Home Dev, LLC*, Docket No. 160884; *Wellesley Gardens Condo Ass'n v Manek*, Docket No. 160990.

that previously had become general common elements owned jointly by the condominium co-owners under existing published caselaw would magically come back into existence, creating numerous unintended negative consequences for Michigan condominium associations and their co-owners, as explained in further detail below:

1. **The negative impact on efficient administration of Michigan condominium associations.**

Another important purpose of MCL 559.167 is the triggering of key deadlines under the Michigan Condominium Act to facilitate smooth operations in Michigan condominium associations. Specifically,

> The problem Section 67(3) intended to address was that, in prior decades, condominium units had been legally created but not built. This made management of incomplete projects problematic. If there were "paper" units for which ground was not broken, should they have voting rights? Did the developer still have rights to appoint directors under the Act? Did the paper units have to be insured? Should or could there be different levels of dues for built units versus paper units? After years of latency should they pay the same dues? How could one justify different levels of dues payments when percentages of values were locked? What happened if and when construction took place years and years later? Gamalski & Thursam, *Beta Test: Proposed Revisions to Section 67(3) of The Condominium Act*, 39 Mich Real Prop Rev 18, 19 (2012).

The Michigan Condominium Act includes numerous provisions regarding the control and operations of a condominium association that are dependent on the number of units that exist and have been sold in the condominium project. These provisions include the following:

- **Transitional control date**: The "transitional control date," or the date on which a condominium developer turns over control of the condominium association to non-developer co-owners, which is dependent on the number of votes that may be cast in an election by non-developer co-owners.[3]

[3] See MCL 559.110(7) ("'Transitional control date' means the date on which a board of directors for an association of co-owners takes office pursuant to an election in which the votes that may be cast by eligible co-owners unaffiliated with the developer exceed the votes which may be cast by the developer.").

- **Association elections**: The process for electing directors in a condominium association, the number of spots that are elected by non-developer co-owners, and the number of spots appointed by a developer are dependent on the number of units in the condominium project.[4]

- **Assessments**: The amount that a condominium co-owner will pay in assessments is dependent on the number of condominium units in the project and may also depend on the percentage of value assigned to each unit. Undeveloped, "need not be built" units impact how much each condominium co-owner is required to contribute to the condominium association's operations because, many times, a developer, or an individual or entity that claims to have acquired the developer's rights, will not be required to financially contribute to the association's expenses.[5]

Cove Creek and the line of cases from the Michigan Court of Appeals that have followed *Cove Creek* brought clarity to these issues by confirming that the right to construct undeveloped, "need not be built" condominium units is automatically eliminated under MCL 559.167, as amended by 2002 PA 283, irrespective of who purportedly owned the units at the time, and providing finality as to the number of units within a condominium project. A different decision in this case would have a major negative impact on the operation of these Michigan condominium associations because it would revive the uncertainty and questions surrounding the transitional control date of the association, the voting powers within the association, the validity of prior

[4] See, e.g., MCL 559.152(2) ("Not later than 120 days after conveyance of legal or equitable title to nondeveloper co-owners of 25% of the units that may be created, at least 1 director and not less than 25% of the board of directors of the association of co-owners shall be elected by nondeveloper co-owners. Not later than 120 days after conveyance of legal or equitable title to nondeveloper co-owners of 50% of the units that may be created, not less than 33-1/3% of the board of directors shall be elected by nondeveloper co-owners. Not later than 120 days after conveyance of legal or equitable title to nondeveloper co-owners of 75% of the units that may be created, and before conveyance of 90% of such units, the nondeveloper co-owners shall elect all directors on the board, except that the developer shall have the right to designate at least 1 director as long as the developer owns and offers for sale at least 10% of the units in the project or as long as 10% of the units remain that may be created.").

[5] See MCL 559.169(3) ("The amount of all common expenses not specially assessed under subsections (1) and (2) shall be assessed against the condominium units in proportion to the percentages of value or other provisions as may be contained in the master deed for apportionment of expenses of administration.").

elections, and the proper calculation of assessments. CAI is interested in preserving the current operations of Michigan condominium associations and avoiding a domino effect of unintended consequences that would be disruptive to these operations.

2. **The negative impact on the financial health of Michigan condominium associations.**

MCL 559.205 requires all Michigan condominium associations to maintain a reserve fund "for major repair and replacement of common elements." Condominium associations often obtain reserve studies to ensure that they are sufficiently contributing to their reserve fund over time, and these studies ultimately are based on the number of condominium units in the project and the common elements that a condominium association is required to maintain. For Michigan condominium associations that have undeveloped, "need not be built" units that became general common element land by operation of law under MCL 559.167, as amended by 2002 PA 283, they have had no reason to factor these units into their reserve study analyses and have developed their budgets and assessments accordingly.

If, though, the Michigan Court of Appeals is reversed and these condominium projects are reopened for development with the addition of new condominium units and common elements, those condominium associations will be immediately impacted by increased and unplanned financial obligations. CAI has an interest in ensuring that Michigan condominium associations remain financially viable to avoid health and safety issues caused by large, unplanned financial burdens, such as the Surfside Condominium collapse.

3. **The negative impact on document amendments and real estate transactions in Michigan condominium projects.**

Michigan condominium associations also have relied on MCL 559.167, as amended by 2002 PA 283, and *Cove Creek* in amending their documents and structuring real estate transactions for many years. First, MCL 559.190(2) states that "the master deed, bylaws, and condominium

subdivision plan may be amended, even if the amendment will materially alter or change the rights of the co-owners or mortgagees, with the consent of not less than 2/3 of the votes of the co-owners and mortgagees." When amending condominium documents, then, it is necessary to determine the total number of units in a condominium project that are eligible to vote. Michigan condominium associations that have operated under MCL 559.167, as amended by 2002 PA 283, necessarily have relied on the elimination of undeveloped, "need not be built" units in conducting votes to amend their condominium documents and the reversal of *Cove Creek* and the Michigan Court of Appeals in this case will create uncertainty as to the validity of numerous amendments to condominium documents throughout the state.

Second, with respect to the land that has become general common elements in condominium projects under MCL 559.167, as amended by 2002 PA 283, some condominium associations have redeveloped that land to provide additional amenities to their co-owners. Reopening that land to development, then, opens the door to numerous uncertainties and legal issues. For example, if a condominium association built a clubhouse on land that had become general common elements under MCL 559.167, as amended by 2002 PA 283, would that clubhouse now be owned by the former condominium developer, whose units have been revived, or the condominium association that actually utilized the land in reliance on *Cove Creek*? CAI has an interest in ensuring that numerous years of document amendments and real estate transactions involving Michigan condominium projects, which relied on MCL 559.167, as amended by 2002 PA 283, and published case law, are upheld and do not become subject to numerous legal challenges in the future.

For all the reasons stated above, this Court should deny AGE's application for leave to appeal. If AGE's position prevails in this case, then a number of incomplete condominium projects

throughout the state of Michigan, which previously had been closed out under *Cove Creek* automatically by operation of law, will be reopened for development, opening pandora's box and creating uncertainty regarding the financing of condominium units, general condominium operations, the financial health of condominium associations, and the validity of various legal interests and real estate transactions.

4. The negative impact on property values in Michigan condominium projects.

MCL 559.167, as amended by 2002 PA 283, was enacted by the Michigan legislature to ensure that condominium projects were timely completed by automatically eliminating the right to construct undeveloped, "need not be built" units after a certain time period. While the Michigan legislature amended MCL 559.167 again in 2016 to create a new process to close out unfinished condominium projects, the need to ensure timely completion of condominium projects remains the same because the number of condominium units that have yet to be developed impacts an individual's ability to obtain financing to purchase a unit within the project.

Fannie Mae and Freddie Mac are federal government programs that help facilitate purchasers' ability to obtain a mortgage throughout the United States.[6] As of 2020, Fannie Mae and Freddie Mac owned 62 percent of all conforming loans in the United States and, accordingly, they play a major role in funding mortgages used to purchase homes, including units within a condominium project.[7] As it relates to mortgages for condominium units, under Fannie Mae and Freddie Mac lending guidelines, at least 50% of the total units in a condominium project, or at least 50% of the units in a "legal phase" of the condominium project, must be either conveyed or

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[6] See Sarah Sharkey, *Fannie Mae vs. Freddie Mac: What's the difference?* <https://www.bankrate.com/mortgages/fannie-mae-vs-freddie-mac/> (accessed December 1, 2022).

[7] *Id.*

under contract in order for a purchaser to qualify for a Fannie Mae- or Freddie Mac-backed mortgage in a new condominium project.[8] Consequently, condominium projects with a defined number of condominium units that have been or will be constructed within a designated timeframe are critical to ensuring the availability of mortgages from the largest lending programs in the country.

MCL 559.167, as amended by 2002 PA 283, provided an automatic mechanism by which undeveloped, "need not be built" units that remained within a condominium project after a certain period of time would become general common elements and, therefore, reduced the total number of units in the project. This, in turn, eliminated issues that arose when dozens, or even hundreds, of "need not be built" units within a condominium project, which were included in the total number of units within a project, remained unconstructed and ensured that lending guidelines from two of the largest mortgage backers could be satisfied.

If the Michigan Court of Appeals is reversed in this case, Michigan condominium projects that had previously been closed out under MCL 559.167, as amended by 2002 PA 283, would be reopened for development and the total number of units within their project would inevitably rise. In some of those projects, the numbers would rise to such a degree that purchasers would no longer be eligible to obtain traditional financing from two of the largest mortgage holders in the country, shrinking the potential pool of purchasers and impairing the overall marketability and value of

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[8] See Freddie Mac, *New Condominium Projects* <https://guide.freddiemac.com/app/guide/section/5701.6>; Fannie Mae, *Selling Guide* <https://selling-guide.fanniemae.com/Selling-Guide/Origination-thru-Closing/Subpart-B4-Underwriting-Property/Chapter-B4-2-Project-Standards/Section-B4-2-2-Project-Eligibility/1032993851/B4-2-2-03-Full-Review-Additional-Eligibility-Requirements-for-Units-in-New-and-Newly-Converted-Condo-Projects-06-05-2018.htm#Additional.20Requirements.20for.20Units.20in.20New.20and.20Newly.20Converted.20Condo.20Projects> (accessed December 1, 2022).

those condominium units. CAI has an interest in maintaining the property values and marketability of units within condominium projects, which increasingly are becoming the dominant form of homeownership in the United States.[9]

[9] See Foundation for Community Association Research, *2021-2022 U.S. National and State Statistical Review* <https://foundation.caionline.org/wp-content/uploads/2022/09/2021-2CAIStatsReviewWeb.pdf> (accessed December 1, 2022).

BACKGROUND OF MCL 559.167 AND ITS AMENDMENTS

I. The legislative history of MCL 559.167.

Prior to 2000, Section 67 of the Michigan Condominium Act, MCL 559.167, did not include a subsection (3) and, therefore, construction and development of units within a new condominium project had to be completed within a reasonable time as a matter of contract. In 2000, the Michigan legislature amended MCL 559.167 to add subsection (3), which stated, in pertinent part, the following:

> Notwithstanding section 33, if the developer has not completed development and construction of the entire condominium project, including proposed improvements whether identified as "must be built" or "need not be built", during a period ending 10 years from the date of commencement of construction by the developer of the project, the developer, its successors, or assigns have the right to withdraw from the project all undeveloped portions of the project without the prior consent of any co-owners, mortgagees of units in the project, or any other party having an interest in the project [. . .] If the developer does not withdraw the undeveloped portions of the project from the project before expiration of the time periods, such lands shall remain part of the project as general common elements and all rights to construct units upon that land shall cease. In such an event, if it becomes necessary to adjust percentages of value as a result of fewer units existing, a co-owner or the association of co-owners may bring an action to require revisions to the percentages of value pursuant to section 96. (**Ex. 1**).[10]

As explained by the House Legislative Analysis Section, the purpose for adding subsection (3) to MCL 559.167, as recommended by the State Bar of Michigan's Real Property Law Section, was to "[p]rovide a maximum time within which facilities and units must be built so that the 'percentages of value' used to apportion fees among co-owners in the association can be adjusted when developers fail to complete developments due to financial or market conditions." (**Ex. 2**).

In 2002, the Michigan legislature amended MCL 559.167(3) to limit the 10-year statutory deadline to the construction of "need not be built" units, stating, in pertinent part, the following:

> Notwithstanding section 33, if the developer has not completed development and construction of units or improvements in the condominium project that are

[10] 2000 PA 379.

> identified as "need not be built" during a period ending 10 years after the date of commencement of construction by the developer of the project, the developer, its successors, or assigns have the right to withdraw from the project all undeveloped portions of the project not identified as "must be built" without the prior consent of any co-owners, mortgagees of units in the project, or any other party having an interest in the project [. . .] If the developer does not withdraw the undeveloped portions of the project from the project before expiration of the time periods, those undeveloped lands shall remain part of the project as general common elements and all rights to construct units upon that land shall cease. In such an event, if it becomes necessary to adjust percentages of value as a result of fewer units existing, a co-owner or the association of co-owners may bring an action to require revisions to the percentages of value under section 95. (**Ex. 3**).[11]

This amendment to MCL 559.167(3) also was recommended by the State Bar of Michigan's Real Property Law Section (**Ex. 4**).

In 2016, the Michigan legislature amended MCL 559.167 again, which now states, in pertinent part, the following:

> (3) Notwithstanding section 33, for 10 years after the recording of the master deed, the developer, its successors, or assigns may withdraw from the project any undeveloped land or convert the undeveloped condominium units located thereon to "must be built" without the prior consent of any co-owners, mortgagees of condominium units in the project, or any other party having an interest in the project [. . .]
>
> (4) If the developer does not withdraw undeveloped land from the project or convert undeveloped condominium units to "must be built" before expiration of the applicable time period under subsection (3), the association of co-owners, by an affirmative 2/3 majority vote of the members in good standing, may declare that the undeveloped land shall remain part of the project but shall revert to general common elements and that all rights to construct condominium units upon that undeveloped land shall cease. When such a declaration is made, the association of co-owners shall provide written notice of the declaration to the developer or any successor developer by first-class mail at its last known address. Within 60 days after receipt of the notice, the developer or any successor developer may withdraw the undeveloped land or convert the undeveloped condominium units to "must be built". However, if the undeveloped land is not withdrawn or the undeveloped condominium units are not converted within 60 days, the association of co-owners may file the notice of the declaration with the register of deeds. The declaration takes effect upon recording by the register of deeds. The association of co-owners shall also file notice of the declaration with the local supervisor or assessing officer.

[11] 2002 PA 283.

> In such an event, if it becomes necessary to adjust percentages of value as a result of fewer condominium units existing, a co-owner or the association of co-owners may bring an action to require revisions to the percentages of value under section 95.
>
> (5) A reversion under subsection (4), whether occurring before or after the date of the 2016 amendatory act that added this subsection, is not effective unless the election, notice, and recording requirements of subsection (4) have been met.
>
> (6) Subsections (3) and (4) do not apply to condominium units no longer owned by the developer or by the owner of the property at the time the property became part of the condominium project, unless the purchaser from the developer or owner of the property at the time the property became part of the condominium project is a successor developer under section 135.
>
> (7) As used in this section, "undeveloped land" means land on which were recorded 1 or more condominium units, none of which were either identified in the condominium subdivision plan as "must be built" or have had construction commenced, although infrastructure construction or common element construction may have commenced. Undeveloped land does not include condominium units that are depicted or described on the condominium subdivision plan pursuant to section 66 as containing no vertical improvements. (**Ex. 5**).[12]

As explained by the Senate Fiscal Agency, the rationale behind these amendments to MCL 559.167 was that:

> The Act contains provisions under which the developer has 10 years to complete the development and construction of portions of a condominium project identified as "need not be built"; **if those portions are not developed, they are automatically transferred to the condominium association, unless the developer has withdrawn the undeveloped portions from the project. The transferred portions remain part of the condominium project as general common elements and all rights to construct units on that land cease. These provisions have caused confusion regarding the timing of the transfer of property and the title history of transferred property. It was suggested, therefore, that the process of transferring undeveloped portions of a condominium project to the association of condominium co-owners be revised.** (**Ex. 6**) (emphasis added).

II. Interpretation and application of MCL 559.167.

[12] 2016 PA 233.

Subsequent to the enactment of MCL 559.167, as amended by 2016 PA 233, questions arose as to what impact MCL 559.167(4)-(5) had on condominium projects in which the 10-year statutory deadline under MCL 559.167(3), as amended by 2002 PA 283, had already passed and whether MCL 559.167, as amended by 2016 PA 233, applied retroactively to those projects. In 2019, these questions were answered by the Michigan Court of Appeals' published opinion in *Cove Creek*, which held that MCL 559.167, as amended by 2016 PA 233, did not apply retroactively and that under MCL 559.167(3), as amended by 2002 PA 283, all rights to construct and develop "need not be built" units were automatically lost by operation of law:

> **The 2016 amendment of MCL 559.167 does not expressly provide that it is retroactive.** In other words, there is no clear, direct, or unequivocal language in the actual statute that the amended statute is to be applied retroactively, such as language stating that "these amendments shall be given retroactive application." **Defendants argue that the use of the word "occurring" in Subsection (5) expressly makes the 2016 amendment retroactive.** MCL 559.267(5) [sic] provides: "A reversion under subsection (4), whether *occurring* before or after the date of the 2016 amendatory act that added this subsection, is not effective unless the election, notice, and recording requirements of subsection (4) have been met." MCL 559.167(5), as amended by 2016 PA 233 (emphasis added). This language, however, is not a clear and unequivocal expression of the Legislature's intent to apply the amendment retroactively. **The Legislature's choice of the word "occurring," rather than "occurred," is significant. As the trial court determined, the present participle indicates that the 2016 amendment does not apply to any "reversion" that had already occurred. Before the 2016 amendment, MCL 559.167 did not use the term "reversion" or contain Subsection (4). Therefore, "[a] reversion under subsection (4)" could not have *occurred* before the effective date of the 2016 amendment. Likewise, the use of the word "occurring" in Subsection (5) signals the progressive aspect and shows that an action was, is, or will be unfinished at the time referred to.** *People v Manuel*, 319 Mich App 291, 301-02; 901 NW2d 118 (2017). **Thus, the statute signals that a "reversion under subsection (4)" may be in the process of occurring when the statute became effective. In those cases, the requirements of the 2016 amendment must be satisfied. As plaintiff argues, however, nothing suggests that completed transfers under the earlier versions of the statute are to be reversed.**
>
> Defendants also argue that the statute is remedial and that it must, therefore, be applied retroactively. "A statute is remedial or procedural in character if it is designed to correct an existing oversight in the law or redress an existing

> grievance[.]" *Davis* [*v State Employees' Retirement Bd*], 272 Mich App [151], 158-59; 725 NW2d 56 [(2006)] (quotation marks and citation omitted). Defendants specifically argue that the 2016 amendment was intended to address due-process deficiencies in the prior versions of the statute. However, the "legislative history" cited by plaintiff indicates that the purpose of the 2016 amendment was to address "confusion regarding the timing of the transfer of property and the title history of transferred property."
>
> **Nonetheless, even if the 2016 amendment is considered remedial, it cannot apply retroactively if it abrogates or impairs vested rights.** See *Davis*, 272 Mich App at 158; 725 NW2d 56. Under the 2002 version of MCL 559.167(3), "[i]f the developer does not withdraw the undeveloped portions of the project from the project before expiration of the time periods, *those undeveloped lands shall remain part of the project as general common elements and all rights to construct units upon that land shall cease.*" MCL 559.167(3), as amended by 2002 PA 283 (emphasis added). In this case, 10 years after the date of commencement of the project was sometime in 1999, or possibly sometime in 2012 at the latest. **When the right to construct units ceased, plaintiff obtained a vested right in the undeveloped lands (former Units 1 through 14). The trial court concluded that plaintiff's rights vested by operation of law, without any action. We agree.**
>
> Defendants' arguments against vesting are that (1) plaintiff did not prepare and record a replat under MCL 559.167(2), and (2) the 2002 version of MCL 559.167 violated defendants' due-process rights. That version of MCL 559.167(2), as amended by 2002 PA 283, provides: "If a change involves a change in the boundaries of a condominium unit or the addition or elimination of condominium units, a replat of the condominium subdivision plan shall be prepared and recorded assigning a condominium unit number to each condominium unit in the amended project." **As determined by the trial court, nothing in this language required a replat to be recorded or conditioned a "reversion" on the recording. Thus, a "reversion" occurred regardless of whether a replat was prepared or recorded. While plaintiff's failure to record a replat may have some other effect, it did not prevent the undeveloped property from remaining part of the project as general common elements and the right to construction ceasing under Subsection (3).** 303 Mich App at 698-01 (emphasis added).

The Michigan Court of Appeals' decision in *Cove Creek* was consistent with an earlier holding from a different panel in the unpublished opinion of *Ferry Beaubien LLC v Centurion Place on Ferry Street Condominium Association*:[13]

[13] Unpublished per curiam opinion of the Court of Appeals, issued Dec 14, 2017 (Docket No. 335571) (**Ex. 7**).

> In the trial court, defendant presented evidence showing that construction on the condominium project began by, at the latest, April 18, 2006. It is also clear from the condominium subdivision plan filed with the Master Deed that Units 9 and 10 were designated as "NEED NOT BE BUILT." **Under former MCL 559.167(3), as of April 18, 2016, or "10 years after the date of commencement of construction by the developer of the project," because the developer did not withdraw Units 9 and 10 from the project before that time, Units 9 and 10 became "part of the project as general common elements" and all rights to construct units on the land ceased. Therefore, under the version of MCL 559.167(3) in effect at the time in question, Units 9 and 10 reverted to general common elements of the condominium on April 18, 2016.** Docket No. 335571 at 4 (emphasis added).

The fourth footnote of the opinion also noted that "[t]he amended version of MCL 559.167(3) provides that the relevant time period is '10 years after the recording of the master deed,' but nothing in the language of amended Subsection (3) suggests that it applies retroactively. We presume that statutory amendments operate prospectively unless a contrary intent is clearly manifested in the language of the statute. *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001)." *Id*. at 5 n 4.

In *Cove Creek*, the Michigan Court of Appeals also expressly rejected the argument that the automatic transfer of undeveloped units to general common element land owned by a condominium association's co-owners under MCL 559.167, as amended by 2002 PA 283, violated due process rights, holding:

> "Both the state and federal constitutions provide that private property shall not be taken without due process of law or just compensation. Due process is violated only when legislation impairs vested rights." *Attorney General v Mich Pub Serv Comm*, 249 Mich App 424, 435; 642 NW2d 691 (2002) (citations omitted). "To constitute a vested right, the interest must be something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable, to the present or future enjoyment of property ...." *Id*. at 436; 642 NW2d 691 (quotation marks and citation omitted) [. . .]
>
> **Even if defendants had a vested property right in former Units 1 through 14, the lapse of that right did not deny defendants due process of law.** In *Kentwood v Sommerdyke Estate*, 458 Mich 642, 646; 581 NW2d 670 (1998), our Supreme

Court held that "the state has the authority to condition the retention of certain property rights on the performance of an affirmative act within a reasonable statutory period." That case involved the highway-by-user statute, MCL 221.20. *Kentwood*, 458 Mich at 645; 581 NW2d 670. As stated by the Court:

> **Even with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, the legislature acts within its powers in imposing such new constraints or duties. [L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.** [*Id*. at 652-53; 581 NW2d 670 (quotation marks and citation omitted; alteration in original).]

Therefore, the Court held that "the state may condition the permanent retention of a property right on performance of reasonable conditions that indicate a present intention to retain the property interest." *Id*. at 655-56; 581 NW2d 670. The Court concluded that "by treating property that has not been reserved for private use for ten years or longer as dedicated to the public for use as a highway, the Michigan statute is a reasonable exercise of police power." *Id*. at 656; 581 NW2d 670. **Regarding whether due process was afforded, the Court stated, "[G]enerally, a legislature need only enact and publish a law and afford citizens a reasonable opportunity to familiarize themselves with the terms of a statute to advise its citizens of the lapse of a property right."** *Id*. at 664; 581 NW2d 670.

Similarly, MCL 559.167(3), as amended by 2002 PA 283, conditioned the retention of a property right on the performance of reasonable conditions that indicate a present intention to retain that property interest. Within the 10-year period, defendants were required to either develop Units 1 through 14 or withdraw the undeveloped portions from the project. See MCL 559.167(3), as amended by 2002 PA 283**. Defendants had sufficient notice of the law and that their property rights would lapse if they did not take action within the 10-year period. Moreover, the requirements of either completing the project or withdrawing the units from the project are reasonable requirements designed to further the legitimate objectives of preventing incomplete projects and providing finality** [. . .] Under the applicable caselaw, however, defendants received all the process that was due. **As a consequence, any vested rights defendants possessed in the property lapsed by 2012.** 330 Mich App at 701-04 (emphasis added).

Mere weeks after the publication of the opinion in *Cove Creek*, a third panel of the Michigan Court of Appeals issued an unpublished opinion in *Wellesley Gardens Condominium*

Association v Manek,[14] reiterating that MCL 559.167(3), as amended by 2016 PA 233, did not apply retroactively and that undeveloped units automatically vested in the condominium's co-owners as general common element land without any action required by them:

> Under MCL 559.167(3) as in effect on July 8, 2011, any optional unbuilt units were required to be built, or the undeveloped portions withdrawn from the project, within six years after the developer exercised its rights "to either expansion, contraction, or rights of convertibility, whichever was exercised last." If optional units were not built within the time allotted by the statute nor the land timely withdrawn from the project, the undeveloped portions remained part of the project as general common elements and all right to construct units upon that land ceased. MCL 559.167(3) thus contemplated a firm end date to the completion of a condominium project, thereby providing condominium associations with a necessary tool for completion of development and for long-term financial planning. As this case illustrates, however, the elimination of property interests in unbuilt condominium units by operation of law under MCL 559.167(3) sometimes created problems for developers, taxing officials, and unwary purchasers.
>
> In this case, the developer last exercised it rights to expansion on July 8, 2005, when WBC recorded the Seventh Amendment to the Master Deed. The parties do not dispute that the units in question were not designated as "must be built" units, and also do not dispute that the units were neither built nor the undeveloped portions withdrawn from the project before July 8, 2011. **Therefore, by operation of MCL 559.167(3), as in effect on July 8, 2011, the undeveloped land on which the unbuilt units were to be built became part of the general common elements and all right to construct the unbuilt units ceased on that date.**
>
> Effective September 21, 2016, the Legislature amended MCL 559.167, by way of 2016 PA 233 [. . .]
>
> The Legislature, by amending MCL 559.167, changed the process by which "need not be built" units are eliminated from a condominium project. As amended, the statute now includes a process by which the co-owners of a condominium are obligated to notify the developer when the co-owners have approved reversion of land planned for unbuilt units. Only if the developer fails to withdraw the land or amend the master deed after notice and within the time provided by the amended statute, and upon filing with the register of deeds, does the land revert to the condominium as common elements. See MCL 559.167, as amended by 2016 PA 233.

[14] Unpublished per curiam opinion of the Court of Appeals, issued Jan 9, 2020 (Docket No. 344190) (**Ex. 8**).

In this case, Sim and Kim contend that the 2016 amendment to MCL 559.167 applies retroactively, and when applied retroactively precludes Units 210-427 from reverting to general common elements of the condominium. We disagree. This Court recently determined in *Cove Creek Condo Ass'n v Vistal Land & Home Development, LLC*, ––Mich App ––––, ––––; ––NW2d ––––(2019) (Docket Nos. 342372, 343144); slip op. at 9-10, that the 2016 amendment to MCL 559.167 does not apply retroactively with regard to transfers completed before the amendment's effective date, stating that "nothing suggests that completed transfers under the earlier versions of the statute are to be reversed." This Court reasoned that the language of the amendment does not expressly provide for retroactive application and that in any event the amendment cannot be applied retroactively if to do so would abrogate vested rights. *Id*. at ––––; slip op. at 10.

In this case, MCL 559.167(3), before the 2016 amendment, created in condominium co-owners an interest in lands that remained in the general common elements. As a result, the co-owners of Wellesley Garden Condominium, on July 8, 2011, became vested in the land on which the unbuilt units were never built. Because 2016 PA 233 is a substantive change to the Condominium Act that would impair these vested rights if applied retroactively, the 2016 amendment to MCL 559.167, does not apply retroactively in this case. See *Cove Creek*,–– Mich App at ––––; slip op. at 9-10. **Rather, in this case, by operation of MCL 559.167(3), as in effect on July 8, 2011, the undeveloped land on which the unbuilt units were to be built became part of the general common elements and all right to construct the unbuilt units ceased on that date** [. . .]

Sim and Kim and the Treasurer also contend that Wellesley did not record its interest in Units 210-427, and therefore is now estopped from asserting an interest in the units. This contention is without merit. Although MCL 559.167, as amended by 2016 PA 233, places certain burdens upon the condominium co-owners to provide notice of the reversion of undeveloped property, the version of the statute in effect at the times relevant here operated automatically without need for any further action by the co-owners. See *Cove Creek*, ––Mich App at ––––; slip op. at 10-11. Moreover, Wellesley does not claim an ownership interest in the unbuilt units; it contends that any interest in the unbuilt units ceased to exist on July 8, 2011. Because Wellesley had no interest to perfect, and no obligation to take any other action under MCL 559.167 with regard to the unbuilt units or the undeveloped land, this argument fails. Docket No. 344190 at 3-5, 7 (emphasis added).

Subsequent to the Michigan Court of Appeals' opinions in *Cove Creek* and *Wellesley Gardens*, applications for leave to appeal were filed in this Court in both cases.[15] On September 8, 2020, this Court entered an order in both cases, denying the applications for leave to appeal because it was not persuaded that the questions presented should be reviewed (**Ex. 9**).

More recently, in *Lakeside Estates Condominium Property Owners Association v Sugar Springs Development Company*,[16] a fourth panel in the Michigan Court of Appeals reaffirmed its line of cases holding that MCL 559.167, as amended by 2016 PA 233, did not apply retroactively and that the automatic transfer of undeveloped units to general common element land did not violate due process rights:

> The issues in this case are governed by Section 67(3) of the Condominium Act, MCL 559.167(3). That section was amended in both 2002 and 2016. As explained by this Court in *Cove Creek Condo Ass'n v Vistal Land & Home Dev, LLC*, 330 Mich App 679, 697-701; 950 NW2d 502 (2019), **the 2016 amendment of MCL 559.167 does not apply retroactively with regard to transfers completed before the amendment's effective date** [. . .]
>
> Here, the parties agreed below that the construction on the condominium project began no later than December 31, 1998. Thus, 10 years "after the date of commencement of construction by the developer of the project" was December 31, 2008. At that time, the 2002 version of MCL 559.167(3) was in effect. **As recognized by the trial court, under the 2002 amendment, defendant had until December 31, 2008, to withdraw or develop the disputed 12 units—which were not designated as "must be built." Defendant's failure to do so resulted in the undeveloped land remaining part of the project as general common elements. At that point, plaintiff's rights in the property vested by operation of law whereas defendant's rights were extinguished.** See MCL 559.167(3), as amended by 2002 PA 283; see also *Cove Creek*, 330 Mich App at 700.
>
> On appeal, defendant argues that application of the 2002 version of MCL 559.167(3) violates its right to due process. However, in *Cove Creek*, this Court held that the 2002 version of the statute did not violate a developer's due-process rights. *Cove Creek*, 330 Mich App at 701-04 [. . .]

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[15] See *Cove Creek*, Docket No. 160884; *Wellesley Gardens*, Docket No. 160990.

[16] Unpublished per curiam opinion of the Court of Appeals, issued Sep 16, 2021 (Docket No. 354451) (**Ex. 10**).

> Defendant directs this Court to the various due-process protections the legislature expressly included in the GPTA, and then notes that similar protections were not afforded under the 2002 version of MCL 559.167(3). Yet, as this Court recognized in *Cove Creek*, our Supreme Court held in *Kentwood* that "[g]enerally, a legislature need only enact and publish a law and afford citizens a reasonable opportunity to familiarize themselves with the terms of a statute to advise its citizens of the lapse of a property right." *Cove Creek*, 330 Mich App at 703, quoting *Kentwood*, 458 Mich at 664. The *Kentwood* Court also held that "[n]o specific notice need be given to an impending lapse." *Kentwood*, 458 Mich at 664. **Having examined both *Rafaeli*[*, LLC v Oakland Co*, 505 Mich 429; 952 NW2d 434 (2020)] and *Kentwood*, we are persuaded that the *Cove Creek* Court did not err by holding the 2002 version of MCL 559.167(3) did not violate due process because it "conditioned the retention of a property right on the performance of reasonable conditions that would indicate a present intention to retain the property interest."** *Cove Creek*, 330 Mich App at 703. As a result, we reject defendant's argument that the trial court erred by applying *Cove Creek* and its argument that the 2002 version of MCL 559.167(3) violated its constitutional right to due process. Docket No. 354451 at 1-3 (emphasis added).
>
> To summarize, between 2017 and 2021, the Michigan Court of Appeals has held that:

1. MCL 559.167, as amended by 2016 PA 233, does not apply retroactively four times;

2. No action needs to be taken by a condominium association or its co-owners to vest their rights in the undeveloped units as general common element land under MCL 559.167, as amended by 2002 PA 283, two times—their rights are fully vested automatically by operation of law; and

3. MCL 559.167, as amended by 2002 PA 283, does not violate due process rights two times.

As argued below, this case is no different than this previous line of cases and, therefore, a different result is not warranted and would be extremely harmful to Michigan condominium associations.

ARGUMENT

I. The Association's co-owners were not required to record an amendment to the condominium documents to vest their rights in the undeveloped units as general common element land.

"When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's

intent only if the statutory language is ambiguous." *Pohutski v Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (citations omitted). "We may not read anything into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Lesner v Liquid Disposal, Inc*, 466 Mich 95, 101; 643 NW2d 553 (2002) (citation omitted). "We do not read requirements into a statute where none appear in the plain language and the statute is unambiguous." *Nickola v MIC Gen Ins Co*, 500 Mich 115, 125; 894 NW2d 552 (2017) (quotation marks omitted). "A material change in language in the amendment or re-enactment of a statute must be regarded, unless otherwise indicated, as evidencing a purpose to change the force and effect of the existing law." *In re Loakes' Estate*, 320 Mich 674, 679; 32 NW2d 10 (1948) (citation omitted).

MCL 559.167(3), as amended by 2002 PA 283, states that "[i]f the developer does not withdraw the undeveloped portions of the project from the project before expiration of the time periods, those undeveloped lands shall remain part of the project as general common elements and all rights to construct units upon that land shall cease." On the other hand, MCL 559.167(4), created by 2016 PA 233, states:

> If the developer does not withdraw undeveloped land from the project or convert undeveloped condominium units to "must be built" before expiration of the applicable time period under subsection (3), the association of co-owners, by an affirmative 2/3 majority vote of the members in good standing, may declare that the undeveloped land shall remain part of the project but shall revert to general common elements and that all rights to construct condominium units upon that undeveloped land shall cease. When such a declaration is made, the association of co-owners shall provide written notice of the declaration to the developer or any successor developer by first-class mail at its last known address. Within 60 days after receipt of the notice, the developer or any successor developer may withdraw the undeveloped land or convert the undeveloped condominium units to "must be built". However, if the undeveloped land is not withdrawn or the undeveloped condominium units are not converted within 60 days, the association of co-owners may file the notice of the declaration with the register of deeds. The declaration takes effect upon recording by the register of deeds.

In its application for leave to appeal, AGE argues that MCL 559.167(4) must be applied to the facts of this case because, by the effective date of 2016 PA 233, the Association's condominium documents had not been amended to reflect that the undeveloped units had been eliminated and become general common element land—therefore, a "reversion" was still "occurring" under MCL 559.167(5) and the process under MCL 559.167(4) was required.[17] This argument, however, is unpersuasive based on this Court's jurisprudence which has held in at least two different settings that property rights may automatically vest by the expiration of a statutory time period without any additional action required.

The first of these settings is adverse possession claims. MCL 600.5801 states, in pertinent part, the following:

> No person may bring or maintain any action for the recovery or possession of any lands or make any entry upon any lands unless, after the claim or right to make the entry first accrued to himself or to someone through whom he claims, he commences the action or makes the entry within the periods of time prescribed by this section [. . .]
>
> (4) In all other cases under this section, the period of limitation is 15 years.

In *Marlette Auto Wash, LLC v Van Dyke SC Properties, LLC*, 501 Mich 192, 195; 912 NW2d 161 (2018), this Court held that a plaintiff held a prescriptive easement over a defendant's property, despite the fact that the plaintiff's predecessors had never taken any judicial action to claim the easement. In doing so, this Court explained:

> **It is not clear why the Court of Appeals believes a prior property owner must have previously asserted a prescriptive easement claim in order for a prescriptive easement to vest**, because, if a prior property owner had successfully asserted a prescriptive easement claim, marketable title of record as a result of the previous judicial decree would already exist for the property, and the current

[17] It is important to note that AGE *does not* ask this Court to consider whether MCL 559.167, as amended by 2016 PA 233, applies retroactively—only whether in this case a reversion was still occurring on the effective date of 2016 PA 233. Moreover, this Court declined to consider this question when presented with the opportunity to do so in *Cove Creek*, Docket No. 160884.

property owner would have no reason to file a lawsuit seeking to establish record title to the property by prescriptive easement. See *Escher v Bender*, 338 Mich 1, 8; 61 NW2d 143 (1953). Moreover, **nothing in *Gorte*** [*v Dep't of Transp*, 202 Mich App 161; 507 NW2d 797 (1993)], **requires that a prior property owner assert a legal claim in order for a prescriptive easement to vest.** In *Gorte*, the defendant argued that the plaintiffs' title to the land did not vest upon the expiration of the period of limitations but, instead, plaintiffs' possession of the property simply gave the plaintiffs the ability "to raise the expiration of the period of limitation as a defense to defendant's assertion of title." *Gorte*, 202 Mich App at 168; 507 NW2d 797. **The *Gorte* panel concluded**:

> **Contrary to defendant's arguments, however, Michigan courts have followed the general rule that the expiration of the period of limitation terminates the title of those who slept on their rights and vests title in the party claiming adverse possession. Thus, assuming all other elements have been established, one gains title by adverse possession when the period of limitation expires, not when an action regarding the title to the property is brought.** [*Id.* at 168-69; 507 NW2d 797 (citations omitted).]

Therefore, that portion of *Gorte* quoted by the Court of Appeals simply describes the general effect of an adverse-possession claim, assuming that all the other elements have been established. It does not stand for the proposition that a party must file a legal claim for title to vest by adverse possession. The final sentence of the quoted *Gorte* language specifically provides otherwise: one gains title by adverse possession when the period of limitations expires, not when an action regarding the title to the property is brought. **Furthermore, as this Court has explained, an adverse possessor acquires legal title to property when the statutory period ends, but that title is neither recorded nor marketable until the property interest is established by judicial decree** . . . . *Id.* at 208-10 (emphasis added).

The second of these settings is oil and gas interests. MCL 554.291 states, in pertinent part, the following:

> (1) Any interest in oil or gas in any land owned by any person other than the owner of the surface, which has not been sold, leased, mortgaged, or transferred by instrument recorded in the register of deeds office for the county where that interest in oil or gas is located for a period of 20 years shall, in the absence of the issuance of a permit to drill an oil or gas well issued by the department of environmental quality, or its predecessor or successor, as to that interest in oil or gas or the actual production or withdrawal of oil or gas from said lands, or from lands covered by a lease to which that interest in oil or gas is subject, or from lands pooled, unitized, or included in unit operations therewith, or the use of that interest in underground gas storage operations, during such period of 20 years, be deemed abandoned,

> unless the owner thereof shall, within 3 years after September 6, 1963 or within 20 years after the last sale, lease, mortgage, or transfer of record of that interest in oil or gas or within 20 years after the last issuance of a drilling permit as to that interest in oil or gas or actual production or withdrawal of oil or gas, from said lands, or from lands covered by a lease to which that interest in oil or gas is subject, or from lands pooled, unitized, or included in unit operations therewith, or the use of that interest in oil or gas in underground gas storage operations, whichever is later, record a claim of interest as provided in section 2.
>
> (2) Any interest in oil or gas deemed abandoned as provided in subsection (1) shall vest as of the date of such abandonment in the owner or owners of the surface in keeping with the character of the surface ownership.

In *Van Slooten*, 410 Mich at 49, this Court upheld MCL 554.291(2)'s automatic vesting of oil and gas interests in the surface owner upon the expiration of the time period in MCL 554.291(1), stating:

> A reasonable relationship also exists between the purpose of the statute and the provisions vesting title of the severed interest in the owner of the surface estate upon the failure to do any of the statutorily required acts. It places the title to the interest in one more likely to be located than the owners of the mineral interest. Potential developers, owners of other severed interests, and the owners of the surface estate are then in a position to begin the preparatory steps necessary for development. Similar results follow upon abandonment of other incorporeal mineral interests in other states, and under common-law concepts of adverse possession. Although vesting title in the owner of the surface estate does not guarantee that the interest's potential for development will be realized, the act was not designed to remove all possible impediments to development. Its purpose is to limit the difficulties presented by unknown or unlocatable owners.[18]

[18] *Marlette* and *Van Slooten* also are consistent with this Court's other holdings that transfers or conveyances that occur automatically by operation of law do not require affirmative action by the transferee. See, e.g., *Kim v JP Morgan Chase Bank, N.A.*, 493 Mich 98, 110; 825 NW2d 329 (2012) (explaining that "*Miller*'s interpretation of when a transfer occurs by 'operation of law' is consistent with Black's Law Dictionary's definition of the expression. Black's defines 'operation of law' as '[t]he means by which a right or a liability is created for a party *regardless of the party's actual intent.*' Similarly, this Court has long understood the expression to indicate 'the manner in which a party acquires rights *without any act of his own.*' Accordingly, there is ample authority for the proposition that a transfer that takes place by operation of law occurs unintentionally, involuntarily, or through no affirmative act of the transferee.") (citing *Miller v Clark*, 56 Mich 337; 23 NW 35 (1885) (emphasis original). These cases are also consistent with the statute of frauds, which states that the statute does not bar estates or interests in land that are created or conveyed by operation of law. See MCL 566.106 ("No estate or interest in lands, other than leases

Similarly, MCL 559.167(3), as amended by 2002 PA 283, only established a statutory deadline by which undeveloped units either had to be constructed or withdrawn from a condominium; otherwise they "shall remain part of the project as general common elements and all rights to construct units upon that land shall cease." As correctly observed by the Michigan Court of Appeals in both *Cove Creek*[19] and *Wellesley Gardens*,[20] MCL 559.167(3), as amended by 2002 PA 283, contains no express requirement that an amendment to the condominium documents be recorded in order to "complete" the vesting of undeveloped units to general common element land in the co-owners—the vesting occurs automatically upon the expiration of the statutory time period. The automatic vesting of this right under MCL 559.167(3), as amended by 2002 PA 283, without the need for any affirmative action is further evidenced by the later amendments to the statute under 2016 PA 233, adding a new subsection (4) that requires a vote of the co-owners, a declaration and written notice to the developer, and an opportunity for the developer to withdraw the undeveloped units or convert them to "must be built," and a condominium association's recording of the declaration before the undeveloped units can become

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for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.").

[19] 303 Mich App at 701 (stating "[a]s determined by the trial court, nothing in this language required a replat to be recorded or conditioned a 'reversion' on the recording. Thus, a 'reversion' occurred regardless of whether a replat was prepared or recorded. While plaintiff's failure to record a replat may have some other effect, it did not prevent the undeveloped property from remaining part of the project as general common elements and the right to construction ceasing under Subsection (3).").

[20] Docket No. 344190 at 7 (stating "[a]lthough MCL 559.167, as amended by 2016 PA 233, places certain burdens upon the condominium co-owners to provide notice of the reversion of undeveloped property, the version of the statute in effect at the times relevant here operated automatically without need for any further action by the co-owners.").

general common element land, all of which indicate that no similar actions are required to vest the right under MCL 559.167(3), as amended by 2002 PA 283.

In this case, neither the trial court nor the Michigan Court of Appeals clearly erred in holding that the undeveloped units automatically became general common element land vested in the Association's co-owners under MCL 559.167(3), as amended by 2002 PA 283, no later than May 25, 2014, over two years before the effective date of 2016 PA 233, and AGE's application for leave to appeal on this issue must be denied.

II. MCL 559.167(3), as amended by 2002 PA 283, applies to both developers and non-developers.

A. The plain, unambiguous language of MCL 559.167(3), as amended by 2002 PA 283, evidences that all rights to construct undeveloped units, including a non-developer's, are extinguished.

Again, "[w]hen faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous." *Pohutski*, 465 Mich at 683 (citations omitted). "We may not read anything into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Lesner*, 466 Mich at 101 (citation omitted). "We do not read requirements into a statute where none appear in the plain language and the statute is unambiguous." *Nickola*, 500 Mich at 125 (quotation marks omitted). "A material change in language in the amendment or re-enactment of a statute must be regarded, unless otherwise indicated, as evidencing a purpose to change the force and effect of the existing law." *In re Loakes' Estate*, 320 Mich at 679 (citation omitted).

MCL 559.167(3), as amended by 2002 PA 283, states that "[i]f the developer does not withdraw the undeveloped portions of the project from the project before expiration of the time

periods, those undeveloped lands shall remain part of the project as general common elements and ***all*** rights to construct units upon that land shall cease." (emphasis added). On the other hand, MCL 559.167(6), as amended by 2016 PA 233, states that "[s]ubsections (3) and (4) do not apply to condominium units no longer owned by the developer or by the owner of the property at the time the property became part of the condominium project, unless the purchaser from the developer or owner of the property at the time the property became part of the condominium project is a successor developer under section 135."

In its application for leave to appeal, AGE argues that MCL 559.167(3), as amended by 2002 PA 283, applies only to developers, not to "non-developers."[21] This argument, however, ignores the statute's plain, unambiguous language that ***all*** rights to construct undeveloped units upon the land, not just a developer's, shall cease. AGE's argument also was expressly rejected by the Michigan Court of Appeals in *Wellesley Gardens*:

> Manek argues that the trial court did not err in quieting title to Units 165-167 in his favor because on July 8, 2011, Units 165-167 were not owned by the developer or its successor or assign, and MCL 559.167(3) therefore did not operate to extinguish the owner's property interest in those units. **In other words, Manek argues that the statute only affects units owned by a developer, not those owned by non-developers** [. . .] We disagree.
>
> MCL 559.167(3), at the times relevant to this case, permitted the developer of the project, and its successors or assigns, to withdraw undeveloped portions from the project. That statutory section provided that "[i]f the developer does not withdraw the undeveloped portions of the project from the project before expiration of the time periods, those undeveloped lands shall remain part of the project as general common elements and all right to construct units upon that land shall cease." **Nothing in MCL 559.167(3), however, states that the owner of the unbuilt units must be a "developer" at the time the applicable period expires for this provision to take effect** [. . .]

[21] AGE describes MCL 559.167(3), as amended by 2002 PA 283, as the "repealed version of MCL 559.167(3);" however, MCL 559.167(3) was not repealed—it was amended. It also should be noted that while it argues that it is a "non-developer," AGE also asserts that it "may" be a successor developer under the Michigan Condominium Act.

> **In this case, the language of MCL 559.167(3) is clear and without ambiguity. The statute grants the developer the ability to withdraw undeveloped portions of the project before the expiration of the time periods established by that statutory section. The statute does not state that unbuilt units owned by someone other than a developer are not subject to this provision, nor that ownership of the units by the developer is a prerequisite to the operation of MCL 559.167(3). Thus, the ownership of units 165-167 by a non-developer did not preclude the operation of the statute to extinguish the property interests in those unbuilt units.** Docket No. 344190 at 8 (emphasis added).

Moreover, proper application of MCL 559.167(3), as amended by 2002 PA 283, to both developers and non-developers again is evidenced by the later amendments to the statute under 2016 PA 233, adding a new subsection (6) that states that the "reversion" of undeveloped units to general common element land and loss of construction rights does not apply to undeveloped units that are not owned by the developer or successor developer, indicating that there is no similar differentiation or application under MCL 559.167(3), as amended by 2002 PA 283.

Apart from attempting to argue that the statute is ambiguous, which it is not, AGE presents no argument as to why it should be treated differently than the defendant in *Wellesley Gardens* and, therefore, neither the trial court nor the Michigan Court of Appeals clearly erred in holding that the plain, unambiguous language MCL 559.167(3), as amended by 2002 PA 283, applies to both developers and non-developers.

B. The application of MCL 559.167(3), as amended by 2002 PA 283, to both developers and non-developers does not defy common sense and is not an absurd result.

To avoid an unfavorable outcome, AGE contends that MCL 559.167(3), as amended by 2002 PA 283, must be interpreted to comport with common sense and avoid "absurd" results, asserting that it would be absurd for a non-developer to automatically lose its rights to construct undeveloped units. This argument, however, defies this country's and this state's longstanding jurisprudence that it is not absurd for a state to condition the retention of a property interest by some affirmative action on the part of the property owner.

In *Texaco, Inc v Short*, 454 US 516, 526; 102 S Ct 781; 70 L Ed 2d 738 (1982), the U.S. Supreme Court held that the Indiana Dormant Mineral Interests Act did not result in an unconstitutional taking, reasoning:

> We have no doubt that, just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest. **From an early time, this Court has recognized that States have the power to permit unused or abandoned interests in property to revert to another after the passage of time.** (emphasis added).

The Supreme Court particularly emphasized that these laws provide mechanisms by which a property owner can preserve their property interest and it is the property owner's failure to act that results in the loss of their property rights:

> It is also clear that the State has not exercised this power in an arbitrary manner. The Indiana statute provides that **a severed mineral interest shall not terminate if its owner takes any one of three steps to establish his continuing interest in the property**. If the owner engages in actual production, or collects rents or royalties from another person who does or proposes to do so, his interest is protected. If the owner pays taxes, no matter how small, the interest is secure. If the owner files a written statement of claim in the county recorder's office, the interest remains viable. Only if none of these actions is taken for a period of 20 years does a mineral interest lapse and revert to the surface owner. *Id*. at 529 (emphasis added).

Relying on *Texaco*, in *Kentwood*, this Court adopted this same argument in the context of Michigan's highway-by-user statute, noting:

> In accordance with case law from the United States Supreme Court, **we hold that a state may condition the retention of a property right on performance of an affirmative action within a reasonable statutory period** [. . .]
>
> At oral argument, the appellees asserted that because property is a fundamental right, the state cannot put the burden on the landowner to do an affirmative act in order to retain the property right. This assertion has been rejected by the United States Supreme Court.
>
> In *Board of Regents of State Colleges v Roth*, 408 US 564, 577; 92 S Ct 2701; 33 L Ed 2d 548 (1972), the United States Supreme Court stated:

> **Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.**
>
> Through our highway-by-user statute, **Michigan has declared that appellees' property interest is of less than absolute duration and that retention of that interest is conditioned on the performance of certain actions within the ten-year period** [. . .]
>
> **We feel the statutory period of ten years provides ample opportunity for a property owner to rebut the presumption. Furthermore, we find reasonable the requirement that a property owner must assert the right within the prescribed period in a manner calculated to interfere with, disturb, or interrupt the use by the public, or by instituting an action in court. We do not find the requirements necessary to rebut the presumption to be arbitrary.** "The State surely has the power to condition the ownership of property on compliance with conditions that impose such a slight burden on the owner while providing such clear benefits to the State." *Texaco*, 454 US at 529-30; 102 S Ct 781. 458 Mich at 649-55 (emphasis added).

In the specific context of MCL 559.167(3), as amended by 2002 PA 283, the Michigan Court of Appeals in *Cove Creek* held that the conditions required to retain the property rights obtained under the statute were reasonable:

> **Similarly, MCL 559.167(3), as amended by 2002 PA 283, conditioned the retention of a property right on the performance of reasonable conditions that indicate a present intention to retain that property interest.** Within the 10-year period, defendants were required to either develop Units 1 through 14 or withdraw the undeveloped portions from the project. See MCL 559.167(3), as amended by 2002 PA 283. Defendants had sufficient notice of the law and that their property rights would lapse if they did not take action within the 10-year period. **Moreover, the requirements of either completing the project or withdrawing the units from the project are reasonable requirements designed to further the legitimate objectives of preventing incomplete projects and providing finality.** 330 Mich App at 703 (emphasis added).

This clear line of cases evidences that it is not unreasonable to require a property owner, whether a developer or not, to either withdraw undeveloped units or construct them within the timeframe required by MCL 559.167(3), as amended by 2002 PA 283, and application of the

statute to developers and non-developers alike furthers its purpose of preventing incomplete projects and providing finality. While AGE argues that a non-developer is left without a remedy under MCL 559.167(3), as amended by 2002 PA 283, if it does not have the ability to withdraw the undeveloped units from the condominium, AGE ignores the undisputed remedy within a non-developer's control—timely construction of the undeveloped units.[22] If AGE did not want to assume the risk of the statutory deadline it faced to construct the undeveloped units, it simply could have purchased land elsewhere. AGE presents no argument as to why it is nonsensical or absurd to require a property owner to timely construct an undeveloped piece of land in order to retain their interest in that land. Therefore, its application for leave to appeal on this issue also must be denied.

III. MCL 559.167(3), as amended by 2002 PA 283, applies to AGE.

When a statute fails to define a term, Michigan courts consult dictionary definitions to determine the term's plain and ordinary meaning. *People v Wood*, 506 Mich 114, 122; 954 NW2d 494 (2020) (quoting *People v Rea*, 500 Mich 422, 428; 902 NW2d 362 (2017)). "In every case requiring statutory interpretation, we seek to discern the ordinary meaning of the language in the context of the statute as a whole." *TOMRA of North America, Inc v Dep't of Treasury*, 505 Mich 333, 339; 952 NW2d 384 (2020).

[22] In its application for leave to appeal, AGE also presents the issue of whether a developer may withdraw from the condominium project an undeveloped unit that it no longer owns under MCL 559.167(3), as amended by 2002 PA 283. There is no dispute, however, that this case does not involve a developer that withdrew or attempted to withdraw an undeveloped unit that it no longer owned and, therefore, this issue is not properly before this Court. *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 599 n 60; 957 NW2d 731 (2020) (noting that "[t]he dissents express great concern that this resolution leaves important legal questions concerning the constitutionality of the statute unanswered. We agree that, when it is appropriate, this Court has an obligation to say what the law is. But we cannot let this desire for stability overcome the limits of our role. The judiciary cannot 'simply scan the horizon for important legal issues to opine on—we address such issues only as they arise in the genuine controversies between adverse parties that come before us.' [. . .] Because such a case is not before us, we are constrained from reaching the underlying merits.").

A. MCL 559.167(3), as amended by 2002 PA 283, applies to AGE because it is a "successor."

MCL 559.167(3), as amended by 2002 PA 283, states, in pertinent part, that:

> Notwithstanding section 33, if the developer has not completed development and construction of units or improvements in the condominium project that are identified as "need not be built" during a period ending 10 years after the date of commencement of construction by the developer of the project, **the developer, its successors, or assigns have the right to withdraw from the project all undeveloped portions of the project not identified as "must be built" without the prior consent of any co-owners, mortgagees of units in the project, or any other party having an interest in the project** . . . . (emphasis added).

While the Michigan Condominium Act defines the terms "successor developer,"[23] it does not define the term "successor." Therefore, it is appropriate to consult the dictionary definition of "successor" to determine whether AGE is a "successor" under MCL 559.167(3), as amended by 2002 PA 283. *Black's Law Dictionary* (11th ed. 2019) defines a "successor" as "1. [s]omeone who succeeds to the office, rights, responsibilities, or place of another; one who replaces or follows a predecessor. 2. A corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier corporation." *Merriam-Webster's Dictionary* also defines a "successor" as "one that follows."

In the context of condominium projects, the Michigan Court of Appeals has twice analyzed the definition of "successors" to developers. First, in *Walnut Brook Development Company v DeFlorio*,[24] the Michigan Court of Appeals held:

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[23] See MCL 559.235(1) ("As used in this section, 'successor developer' means a person who acquires title to the lesser of 10 units or 75% of the units in a condominium project, other than a business condominium project, by foreclosure, deed in lieu of foreclosure, purchase, or similar transaction.").

[24] Unpublished per curiam opinion of the Court of Appeals, issued Oct 9, 2014 (Docket No. 314554) (**Ex. 11**). The Association acknowledges that this is an unpublished opinion but cites it

> **A "successor" is "a person or thing that succeeds or follows" or "a person who succeeds another in an office, position, or the like."** *Random House Webster's College Dictionary* (2001). **"Succeed" is defined in relevant part as "to follow or replace another by descent, election, etc.," "to come next after something else in an order or series," "to come after and take the place of, as in an office," and "to come next after in an order or series, or in the course of events; follow."** *Random House Webster's College Dictionary* (2001).
>
> **Plaintiff presented evidence that it is a successor of RHREDC, as plaintiff followed or replaced RHREDC in its Developer role at the condominium project.** RHREDC experienced major financial difficulties in 2005 and 2006, and transferred all of its assets to plaintiff in a bill of sale executed on October 31, 2006 [. . .]
>
> Taken together, these facts support the conclusion that plaintiff followed or replaced RHREDC as the Developer of the condominium project. Defendants presented no evidence to dispute that plaintiff had replaced or followed RHREDC in this role. Plaintiff was entitled to summary disposition because, given that it was a successor of RHREDC, it held the right of first refusal as the Developer. Docket No. 314554 at 2-3 (emphasis added).

Second, in *Infinity-Brownstown LLC v Dove's Pointe Homeowners Association*,[25] the Michigan Court of Appeals defined a "successor" as the following:

> The meaning of "successors and assigns" in this context is controlled by *Fed Nat'l Mort Ass'n v Lagoons Forest Condo Ass'n*, 305 Mich App 258; 852 NW2d 217 (2014) [. . .]
>
> Specifically, the issue was whether Fannie Mae was a "successor and assign" of RBS Citizens Bank. See *Lagoons*, 305 Mich App at 265. This Court held that it was a "successor and assign" of RBS Citizens Bank, reasoning as follows:
>
> > The statute does not define "successors and assigns." ... ***Black's Law Dictionary*** **(9th ed.) defines "successor" as "one who replaces or follows a predecessor," and "successor in interest" as "[o]ne who follows another in ownership or control of property."** [. . .]

for its persuasive authority regarding the common-law definition of "successor" in the context of condominium development.

[25] Unpublished per curiam opinion of the Court of Appeals, issued May 27, 2021 (Docket No. 351827) (**Ex. 12**). The Association acknowledges that this also is an unpublished opinion but cites it for its persuasive authority regarding the common-law definition of "successor" in the context of condominium development.

> Neither party disputes that RBS Citizens Bank acquired the sheriff's deed to the condominium as the result of a purchase pursuant to a foreclosure sale on March 1, 2011. Further, neither party disputes that Fannie Mae obtained its interest in the condominium as a result of a quitclaim deed granted by RBS Citizens Bank. Therefore, RBS Citizens Bank can properly be described as the "purchaser" and Fannie Mae can properly be described as its "successor and assign." Accordingly, pursuant to MCL 559.158, both RBS Citizens Bank and Fannie Mae were not liable for any assessments and fees that had accrued on the condominium before RBS Citizens Bank's purchase on March 1, 2011. [*Id*. at 265-66.]

> The above analysis does not particularly identify whether Fannie Mae was a "successor," an "assign," or both, of RBS Citizens Bank. Nonetheless, **it reasonably stands for the proposition that when title to real property is transferred from one entity to another entity, the latter entity becomes a "successor and assign," at least absent other statutory or contractual language compelling a different conclusion.**
>
> As applied here, plaintiff is a "successor and assign" of King/Inkster II because it obtained title to the condominium project through the covenant deed and the otherwise valid chain of title . . . . Docket No. 351827 at 4-5 (emphasis added).

In this case, there is no dispute that AGE followed or replaced the initial developer of the Condominium (**Appl. Leave Appeal, p. 2**). Consequently, there is no dispute that AGE is a successor, as that term is ordinarily defined, and that, as a successor, AGE is subject to MCL 559.167(3), as amended by 2002 PA 283.[26]

B. MCL 559.167(3), as amended by 2002 PA 283, applies to AGE because its units were undeveloped when the statutory deadline expired.

MCL 559.167(3), as amended by 2002 PA 283, states, in pertinent part, that:

> Notwithstanding section 33, **if the developer has not completed development and construction of units or improvements in the condominium project that are identified as "need not be built"** [. . .] , the developer, its successors, or assigns have the right to withdraw from the project **all undeveloped portions of the project** not identified as "must be built" [. . .] If the developer does not withdraw **the undeveloped portions of the project** from the project before expiration of the time periods, **those undeveloped lands** shall remain part of the project as general

[26] Again, it is important to note that AGE asserts that it also "may" be a successor developer under the Michigan Condominium Act.

> common elements and all rights to construct units upon that land shall cease. (emphasis added).

Again, the Michigan Condominium Act does not define the term "undeveloped;" however, the Michigan Court of Appeals properly determined that AGE's units were "undeveloped," as that term is used in MCL 559.167(3), by construing the statute as a whole and holding:

> Defendant essentially contends that construction of general common elements supporting the units equates to commencement of construction of the units themselves, such that the units were not "undeveloped," they could no longer have been withdrawn from the project, and rights to develop them therefore could not have ceased. We disagree. The record shows only that construction had begun, to some extent, on roads, sidewalks, water systems, and other general common elements within the project. **MCL 559.167(3) contemplates that construction and improvements on "need not be built" units be *completed* within 10 years, absent withdrawal of those units during that time.** Defendant's interpretation would allow developers to indefinitely avoid MCL 559.167(3)'s time frame simply by starting construction of a single general common element, like a road. Docket No. 355243 at 5 (emphasis added).

The Michigan Court of Appeals' holding that the units had to be completely constructed in order to avoid the application of MCL 559.167(3), as amended by 2002 PA 283, also is consistent with the dictionary definition of the term "undeveloped." *Merriam-Webster's Dictionary* defines "undeveloped" as "not developed: lacking in development." It then defines "develop" or "developed" as "to make suitable for commercial or residential purposes." In *Horseshoe Bay Resort, Ltd v CRVI CDP Portfolio, LLC*, the Texas Court of Appeals also determined that units remained undeveloped unless they were completely constructed based on these dictionary definitions, reasoning:

> As used in the Contract, the terms appear to be synonymous in describing "developed and/or constructed" residential units. If anything, "developed" must mean something more than "constructed." To develop land means "to make suitable for commercial or residential purposes." Merriam–Webster's Collegiate Dictionary 341 (11th ed. 2004). **We consider the adjective "developed" in the Contract to mean that the residential unit is completely finished and ready for sale.** 415 SW3d 370, 377 (Tex App, 2013) (emphasis added).

While an out-of-state authority, *Horseshoe Bay Resort* supports the Michigan Court of Appeals' determination that MCL 559.167(3), as amended by 2002 PA 283, required completed construction of units before the expiration of the statutory deadline. Therefore, neither the trial court nor the Michigan Court of Appeals clearly erred in determining that AGE's units remained undeveloped and, therefore, had automatically become general common element land no later than May 25, 2014.

C. AGE's rights in the undeveloped units derived from the Michigan Condominium Act, and the condominium documents cannot shelter AGE from the application of MCL 559.167(3), as amended by 2002 PA 283.

AGE attempts to avoid the plain, unambiguous language of MCL 559.167(3), as amended by 2002 PA 283, by arguing that provisions within the condominium documents supersede or supplant any applications of the statute. It does so by first arguing that it cannot be a "successor" under MCL 559.167(3) because the condominium documents state that a "successor" does not mean a "successor developer" as defined by the Michigan Condominium Act, again ignoring the fact that it still qualifies as a "successor" under the commonly understood definition of the term. It also argues that the land cannot be "undeveloped" because the condominium documents define undeveloped as "all General and Limited Common Elements which are not required to support the existing Units in the Project, together with any Units where construction of the Units or General or Limited Common Elements required to support such Units has not commenced." AGE's arguments, though, suffer from two fatal flaws.

First, both of the contractual definitions relied on by AGE expressly state that they are "for purposes of this section" and they do not expressly state that they also are for purposes of defining these terms as used in the Michigan Condominium Act. Furthermore, AGE presents no legal authority to support its argument that contractual definitions, as opposed to commonly understood

and dictionary definitions, should be relied on when interpreting a statute. The unwieldiness of this approach is amplified by the fact that every set of condominium documents is different and, consequently, the interpretation of the same statute across all condominium associations within the state of Michigan would vary depending on the language in each set of documents, resulting in unclear and inconsistent applications of the law.

Second, as explained by the Michigan Court of Appeals in *Lakeside Estates*, AGE's property rights in this setting are *not* derived from or a matter of contract—instead, they are derived from the Michigan Condominium Act itself and any attempts to revive or extend an interest through a contract that was already lost under the statute are invalid:

> **Defendant also suggests that the trial court erred by holding that the Master Deed could not extend the time to complete the project beyond December 2008. We disagree. Condominiums are created by statute, and their establishment is governed by the Act.** See, e.g., MCL 559.172(1) ("A condominium project for any property shall be established upon the recording of a master deed that complies with this act.") [. . .]
>
> The Act lays out in detail the process for creating a condominium project, revising the project, and the documents required. See, e.g., MCL 559.153, MCL 559.172, and MCL 559.195. The Act describes the property interests for the condominium project. MCL 559.137. [. . .]
>
> **Defendant essentially contends that its contractual rights were improperly impaired by the Act. In other words, according to defendant, the Act infringes on its right to create and enforce a contract, i.e., the Master Deed and, more specifically, its amendments extending the construction deadline.** Defendant cites legal principles governing when the Legislature can infringe upon such general contractual rights. **However, defendant ignores the fact that the Master Deed and defendant's so called "contractual rights" were created by the Act itself. Condominiums are *not* products of common law; they are creatures of statute, and the Legislature gave developers any so called "contractual rights" via the Act.** Accordingly, the Act controls and determines the extent of the Master Deed and amendments.
>
> Furthermore, as previously explained, ***Cove Creek* demonstrates that the 2002 version of the Act applied and automatically converted the undeveloped land for the remaining units into general common elements of the Condominium. This happened due to *explicit* provisions of the Act.** See *Cove Creek*, 330 Mich

> App at 686-87; MCL 559.167(3), as amended by 2002 PA 283. **Defendant's contractual rights were not independent contractual rights that were affected by an unrelated statute; rather, condominium developer rights are created, defined, and controlled by the very statute that defendant claims is now infringing upon those rights.** MCL 559.167(3), as amended by 2002 PA 283, and *Cove Creek* demonstrate that defendant lost its rights to the undeveloped land long before it decided to construct the additional 12 units in 2019. Furthermore, as the trial court noted, nothing prevented the Master Deed and amendments from being read in harmony with the Act. Defendant could have extended the construction deadlines by designating the units as "must be built." Defendant failed to do so. Docket No. 354451 at 4 (emphasis added).[27]

Consequently, AGE's attempts to shelter itself from the effects of MCL 559.167(3), as amended by 2002 PA 283, which applies to all successors and requires completed construction before the expiration of the statutory deadline, are impermissible attempts to revive or extend an interest in property that was given by statute and taken away by AGE's failure to take appropriate action. The Michigan Court of Appeals, then, did not clearly err when it held that the provisions within the Association's condominium documents did not change the application of MCL 559.167(3), as amended by 2002 PA 283, and AGE's application for leave to appeal on this issue must be denied.

IV. MCL 559.167(3), as amended by 2002 PA 283 and as applied to AGE, is not unconstitutional.

AGE argues that MCL 559.167, as amended by 2002 PA 283 and as applied to itself, is unconstitutional because it was deprived of its interest in the undeveloped units without procedural due process. In Michigan, "[a] procedural due process analysis requires a dual inquiry: (1) whether a liberty or property interest exists which the state has interfered with, and (2) whether the

[27] Amicus Curiae acknowledges that *Lakeside Estates* is an unpublished opinion but cites it for its persuasive authority regarding interests derived from the Michigan Condominium Act and the Act's interplay with condominium documents.

procedures attendant upon the deprivation were constitutionally sufficient." *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 606; 683 NW2d 759 (2004).

As to the first inquiry, *Cove Creek* held that an owner of undeveloped units may have a vested property interest and that MCL 559.167(3), as amended by 2002 PA 283, potentially interferes with that interest;[28] however, as to the second inquiry, the U.S. Supreme Court's and this Court's jurisprudence establishes that statutes such as MCL 559.167(3), as amended by 2002 PA 283, provide sufficient procedures by which a property owner may protect their interest and, therefore, do not violate procedural due process.

First, the U.S. Supreme Court has held that these laws in and of themselves provide sufficient notice to a property owner that retention of their property rights is conditioned on certain affirmative action. In *Texaco*, the U.S. Supreme Court held that:

> Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply [. . .] **It is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property**.
>
> It is also settled that the question whether a statutory grace period provides an adequate opportunity for citizens to become familiar with a new law is a matter on which the Court shows the greatest deference to the judgment of state legislatures. **A legislative body is in a far better position than a court to form a correct judgment concerning the number of persons affected by a change in the law, the means by which information concerning the law is disseminated in the community, and the likelihood that innocent persons may be harmed by the failure to receive adequate notice** [. . .]
>
> [A]ppellants may be presumed to have had knowledge of the terms of the Dormant Mineral Interests Act. Specifically, they are presumed to have known that an unused mineral interest would lapse unless they filed a statement of claim. 454 US at 531-33 (emphasis added) (citations omitted).

[28] 303 Mich App at 702 ("Accordingly, defendants had a vested property interest in former Units 1 through 14 before the 10-year period expired.").

Both the U.S. Supreme Court and this Court have rejected arguments that notice above and beyond knowledge of the law itself is required. Continuing in *Texaco*, the U.S. Supreme Court held:

> **As noted by appellants, no specific notice need be given of an impending lapse** [. . .] **It is undisputed that, before judgment could be entered in a quiet title action that would determine conclusively that a mineral interest has reverted to the surface owner, the full procedural protections of the Due Process Clause—including notice reasonably calculated to reach all interested parties and a prior opportunity to be heard—must be provided** [. . .]
>
> The Court in *Mullane* itself distinguished the situation in which a State enacted a general rule of law governing the abandonment of property. It has long been established that "laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," but **it has never been suggested that each citizen must in some way be given specific notice of the impact of a new statute on his property before that law may affect his property rights.**
>
> As emphasized above, appellants do not challenge the sufficiency of the notice that must be given prior to an adjudication purporting to determine that a mineral interest has not been used for 20 years. Appellants simply claim that the absence of specific notice prior to the lapse of a mineral right renders ineffective the self-executing feature of the Indiana statute. That claim has no greater force than a claim that a self-executing statute of limitations is unconstitutional. **The Due Process Clause does not require a defendant to notify a potential plaintiff that a statute of limitations is about to run** . . . . 454 US at 533-36 (emphasis added) (citation omitted).

And this Court also twice rejected a requirement for more specific notice, first in *Kentwood*, noting that Michigan "enacted a rule of law uniformly affecting all citizens that establishes that a property interest will lapse through the inaction of its owner," 458 Mich at 664-65, and again in *In re Estate of Rasmer*, 501 Mich 18, 47; 903 NW2d 800 (2017), holding:

> That leaves the estate with the argument that specific and individualized notice was constitutionally required to apprise Ms. Rasmer of the law. The Supreme Court has rejected that notion: "it has never been suggested that each citizen must in some way be given specific notice of the impact of a new statute on his property before that law may affect his property rights." *Texaco*, 454 US at 536; 102 S Ct 781. Rather, as stated above, "a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply." *Id*. at 532; 102 S Ct 781 [. . .] The MMERP Act expressly noted that its provisions would apply exclusively "to medical assistance recipients

> who began receiving medicaid long-term care services after" September 30, 2007, MCL 400.112k, and that the recovery program would be limited to property subject to probate, see MCL 400.112h(a). Taken together, those statutes were sufficient to provide constitutionally adequate notice to Medicaid beneficiaries that their estates could be encumbered by MMERP.
>
> We, therefore, conclude that **due process did not require DHHS to provide Ms. Rasmer with individualized notice of MMERP** either when she enrolled in Medicaid or as a condition precedent to recovering disbursed funds. (emphasis added).

Second, in *Van Slooten*, this Court held that these self-executing statutes do not require a hearing:

> It has been repeatedly observed that due process requires that one deprived of liberty or property be afforded notice and an opportunity for a hearing held "at a meaningful time and in a meaningful manner" and that "(t)he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation". As the scope and extent of the due process protections have been drawn into sharper focus in recent cases concerning the requirement of a pre-deprivation hearing, it has been recognized that the constitutional necessity for such a hearing is determined by balancing the competing interests at stake. The predominant interests secured by a pre-deprivation hearing are protection against wrongful deprivation and, assuming ultimate vindication of the owner, protection against unnecessary interim damages. When the risks from wrongful deprivation are significant, a pre-deprivation hearing is required in the absence of any countervailing considerations.
>
> **However, considering the interests encompassed by this act, the risks of wrongful deprivation are minimal. The act does not deprive owners of productive interests of their property without a hearing but only applies to severed interests which have not been worked, as defined in the act, or recorded for over 20 years. Therefore, since the owner has not been in actual possession of the interest for over 20 years, the risks of financial or other harm from the interim deprivation are minimal. Moreover, a pre-deprivation due process hearing would not necessarily give the owner an opportunity to claim the interest, record it and preserve it but would only address the issue of whether the elements of abandonment had been proven. Balancing the minimal protection afforded by requiring a pre-deprivation hearing against countervailing considerations, the legislative determination not to require a pre-deprivation hearing did not deprive defendants of property without due process of law.**
>
> Furthermore, the act does not limit the owner's opportunity for a hearing to determine whether the statutory requirements have been met and to ascertain the

> ownership of the property. **Although a pre-deprivation hearing is not required, there exists an opportunity for a hearing to be held at a meaningful time. For these reasons, we hold that due process does not require a hearing prior to vesting title in the owner of the surface estate.**
>
> Because the due process guarantees do not require a hearing prior to vesting title in the owner of the surface estate, we do not accept defendant's claim that the absence of any provision in the statute for notice of such a hearing renders it constitutionally infirm. The constitutional right to notice of a hearing is implicit in and dependent upon a right to an opportunity for a hearing. **No such hearing is provided for or required by the statute; therefore it is not unconstitutional on the basis that it does not have adequate provisions for notice of such a hearing.** 410 Mich at 53-55 (emphasis added; citations omitted).

And in *Kentwood*, this Court noted that property owners are provided with statutory mechanisms by which they can protect their interest and it is *their* failure to take any action, not the actions of another, that results in the loss of their interest:

> The one notable difference between *Nollan* and this case is that **Michigan has not *required* the original property owners to give the property to the state**. Instead, the Michigan statute allows the landowner to assert the right to the property within ten years after the creation of the road as a public road by use. If ten years pass without a continuous assertion of right by the property owners, the law presumes that the owner intended to dedicate the entire four-rod width of the road. **It is only after the property owners have failed to act to preserve their right to the property that the property is deemed dedicated to the state**. 458 Mich at 662-63 (emphasis added).

In this case, consistent with the above cases and *Cove Creek*, the Michigan Court of Appeals rejected AGE's argument, holding:

> The record shows that defendant received sufficient notice that the units it purchased in 2012 were subject to expiration by 2014. Therefore, its interest in Units 15-41 was conditional from the start. Again, *Cove Creek* is instructive. In *Cove Creek*, we held that the lapse of the defendants' title to the project did not deny them due process of law because the 10-year time frame of MCL 559.167(3) was a reasonable provision that allowed them sufficient notice. *Cove Creek*, 330 Mich App at 704-05; 950 NW2d 502. The same is true in this case. In addition, our Supreme Court has held "the state has the authority to condition the retention of certain property rights on the performance of an affirmative act within a reasonable statutory period." *City of Kentwood v Sommerdyke Estate*, 458 Mich 642, 646; 581 NW2d 670 (1998). In *Cove Creek*, we noted that MCL 559.167(3) also "conditioned the retention of a property right on the performance of reasonable

> conditions that indicate a present intention to retain that property interest." *Cove Creek*, 330 Mich App at 703; 950 NW2d 502. Defendant's constitutional right to due process of law was not violated. Docket No. 355243 at 5.

Neither the trial court nor the Michigan Court of Appeals clearly erred in reaching this conclusion—AGE is presumed to know the law, including MCL 559.167(3), as amended by 2002 PA 283, and was presumed to know that if the undeveloped units were not withdrawn or constructed within the statutory deadline, or no later than May 25, 2014, those undeveloped units would automatically become general common element land by operation of law. When AGE purchased the undeveloped units in 2012, it had notice of when construction within the condominium had been commenced, based on the recording of construction liens[29] (see **Appl. Leave Appeal, p. 2; Ex. D to Ex. 1 to Appl. Leave Appeal**) and, therefore, knew it needed to complete construction of its undeveloped units within two years—AGE provides no explanation as to why it did not, or could not, complete construction of the undeveloped units within those two years and its failure to do so resulted in the lapse of its rights to those units. AGE suffered no deprivation of any of its constitutional rights and, consequently, its application for leave to appeal on this issue also must be denied.

[29] While AGE argues that it is impossible for an individual or entity other than the condominium developer to be able to ascertain when construction on a condominium project commenced under MCL 559.167, as amended by 2002 PA 283, this argument is not only undercut by the facts of its own case, in which construction liens were recorded with the register of deeds, but also by the other public information that is available to a purchaser, should they choose to look for it, such as recorded notices of commencement, the first recorded conveyance of a condominium unit to a non-developer co-owner, and the issuance of building permits and certificates of occupancy. MCL 559.167, as amended by 2002 PA 283 and as interpreted and construed by *Cove Creek*, does not present an impossible standard for condominium developers, condominium associations, condominium co-owners and purchasers, realtors, or title companies to abide by and, in effect, is no different than the standards set forth for establishing title to land via adverse possession, in which a purchaser or third-party may be required to gather additional information to determine title to and marketability of land.

V. Applying MCL 559.167, as amended by 2016 PA 233, in this case would deprive the Association's co-owners of their vested rights in the general common element land in their condominium.

While AGE argues that its own constitutional rights would be impaired by the application of MCL 559.167, as amended by 2002 PA 283, to the facts of this case, it fails to discuss how its proposed application of MCL 559.167, as amended by 2016 PA 233, would impair the vested rights of the Association's co-owners in the general common element land in their condominium.

"When new law comes into being by legislative enactment susceptible of two different interpretations, one producing a constitutional result and the other one which would be unconstitutional, it is a rule of statutory construction to adopt that which squares with constitutionality, on the presumption that the legislature intended to do and accomplish that which is constitutional." *McDaniel v Campbell, Wyant & Cannon Foundry Co*, 367 Mich 356, 367; 116 NW2d 835 (1962).

The Fourteenth Amendment of the United States Constitution and Article 1, Section 17 of the Michigan Constitution guarantee that no state shall deprive any person of "life, liberty or property, without due process of law." *People v Sierb,* 456 Mich 519, 522; 581 NW2d 219 (1998). The "due process clauses protect vested rights only . . . ." *Sherwin v Mackie*, 364 Mich 188, 197; 111 NW2d 56 (1961) (citation and quotation marks omitted). A vested right is defined as the following:

> "[A] right, so fixed, that it is not dependent on any future act, contingency, or decision to make it more secure." "A vested right is a present or future right to do or possess certain things not dependent upon a contingency." *Wylie v City Comm of Grand Rapids*, 293 Mich 571, 586-87; 292 NW 668 (1940) (citations omitted).

In *Gorte v Department of Transportation*, 202 Mich App 161; 507 NW2d 797 (1993), the Michigan Court of Appeals analyzed whether a prior version of an adverse possession statute created a vested property right that could not be retroactively abrogated by a later version of the

same statute. In that case, the plaintiff filed a quiet title complaint based on adverse possession against the state on March 3, 1988, but MCL 600.5821 had been amended to preclude adverse possession claims against the state and became effective two days earlier on March 1, 1988. *Id*. at 164. The trial court determined that plaintiff and its predecessors had adversely possessed the disputed land since 1966 and, therefore, its adverse possession claim was not barred by the amended statute because its rights in the land vested before March 1, 1988. *Id*. In affirming the trial court, the Michigan Court of Appeals held:

> Defendant argues that, in amending § 5821, the Legislature intended to void not only causes of action accruing after the effective date of the statute, but also causes of action for adverse possession against the state that could have been asserted before March 1, 1988, but were not [. . .] We are constrained, however, to follow the rules of statutory construction that dictate that a statute of limitations may not be applied retroactively to take away vested rights. **We therefore interpret § 5821, as amended, to preclude the running of the period of limitation against the state for purposes of adverse possession after the effective date of the statute. We further interpret § 5821 as inapplicable where applying the statute would abrogate or impair vested rights.**
>
> Because the statute cannot be applied if it would abrogate or impair a vested right, it is necessary to determine when a claim of title to property by adverse possession vests. Generally, the expiration of a period of limitation vests the rights of the claimant [. . .] Michigan courts have followed the general rule that the expiration of the period of limitation terminates the title of those who slept on their rights and vests title in the party claiming adverse possession. Thus, assuming all other elements have been established, **one gains title by adverse possession when the period of limitation expires, not when an action regarding the title to the property is brought.** *Id*. at 167-69 (citations omitted; emphasis added).

In this case, MCL 559.103(7) defines the common elements of a condominium as "the portions of the condominium project other than the condominium units,"[30] and the Michigan Condominium Act specifies that the condominium co-owners have an ownership interest in all the

[30] See also *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 146; 783 NW2d 133 (2010) (stating that "a condominium project consists of 'units' and 'common elements' only. Any part of the project that is not a unit *must* be a common element.") (emphasis original; citation omitted).

common element land in the project.[31] Consequently, upon purchasing a unit in a condominium, a condominium co-owner has a vested property interest in the common element land. And MCL 559.167(3), as amended by 2002 PA 283, vests the condominium co-owners with absolute title in undeveloped, "need not be built" units as general common elements by virtue of the expiration of the 10-year statutory deadline to withdraw or construct the units.

Similar to the plaintiff in *Gorte*, the Association's co-owners' rights in these undeveloped units as general common element land vested no later than May 25, 2014 and, consequently, MCL 559.167, as amended by 2016 PA 233, cannot be applied in this case because doing so would unconstitutionally deprive the Association's co-owners of their vested rights in that land. MCL 559.167, as amended by 2016 PA 233, must be construed in such a manner to produce a constitutional result and, in this case, that requires only a prospective application of the statute. Therefore, AGE's application for leave to appeal must be denied to avoid an unconstitutional deprivation of the Association's co-owners' vested rights.

RELIEF REQUESTED

For all the reasons stated above, Amicus Curiae Michigan Chapter of Community Associations Institute respectfully requests that this Court deny AGE's application for leave to appeal.

Dated: December 2, 2022

Respectfully submitted,

HIRZEL LAW, PLC

[31] See MCL 559.161 ("Upon the establishment of a condominium project each condominium unit, together with and inseparable from its appurtenant share of the common elements, shall be a sole property subject to ownership…."); MCL 559.163 ("Each co-owner has an exclusive right to his condominium unit and has such rights to share with other co-owners the common elements of the condominium project as are designated by the master deed.").

By: */s/ Kayleigh B. Long*

Kayleigh B. Long (P82774)
Attorney for Amicus Curiae Michigan Chapter of Community Associations Institute
37085 Grand River Avenue, Suite 200
Farmington, MI 48335
(248) 478-1800
klong@hirzellaw.com

Dated: December 2, 2022

Respectfully submitted,

HIRZEL LAW, PLC

By: */s/ Kevin M. Hirzel*

Kevin M. Hirzel (P70369)
Attorney for Amicus Curiae Michigan Chapter of Community Associations Institute
37085 Grand River Avenue, Suite 200
Farmington, MI 48335
(248) 478-1800
kevin@hirzellaw.com