STATE OF MICHIGAN
IN THE SUPREME COURT
(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

LAKESHORE GROUP AND ITS MEMBERS, LAKESHORE CHRISTIAN CAMPING, CHARLES ZOLPER, JANE UNDERWOOD, LUCIE HOYT, WILLIAM REININGA, KEN ALTMAN, DAWN SCHUMANN, GEORGE SCHUMANN & MARJORIE SCHUHAM,
Plaintiffs-Appellants,

v.

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,
Defendant-Appellee.

Supreme Court No. 159033

Court of Appeals No. 341310

Court of Claims No. 17-000140-MZ

APPELLANTS' REPLY TO DEPARTMENT'S SUPPLEMENTAL BRIEF

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*****ORAL ARGUMENT REQUESTED*****

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APPELLANTS' REPLY

Appellants ask the Court to overrule the decision of two out of three judges of the Court of Appeals. That is clearly and simply the correct decision and it is important. It is easy to see that a reversal is the correct outcome because the language of MEPA is clear and the decision in *Preserve the Dunes* supports it. It is important because the opposite outcome undermines a key legislative achievement of Michigan in the enactment of MEPA that is a critical tool in the state's development over time of environmental protections that work.[1] It is important because no agency is above the law, able by spinning the words of this Court to suit its self-interested wish to be free of independent judicial review under MEPA.

The Department seeks to create the impression that the opposite is true, that (A) the issue before the Court is a difficult one that raises complex issues of law and (B) the case is not of any consequence because the use of MEPA is simply "collateral" and unnecessary.[2]

1. A MEPA case is not "collateral"; it differs from administrative review in fundamental ways

The Department argues repeatedly and at length that administrative review of its permitting decisions is the "exclusive" means by which they can be reviewed. In addition to the fact that

[1] While the Department argues at pages 8-9 that, with so many individual statutes in NREPA enacted since MEPA, it is no longer needed, the truth is that the law of environmental protection is still in its infancy and continues to develop. MEPA remains a critical statute in that process and the legislature has not overturned or withdrawn it. It is not up to the Department to selectively decide which laws to follow and which to ignore.

[2] The Department's failure to contest certain points made by Appellants is also noteworthy. For example, it does not challenge Appellants' point that the conduct of the Department impacts the environment. It does not address, much less dispute, that the Department was a defendant in *Preserve the Dunes* and that this Court remanded the case for Court of Appeals review of the trial court's MEPA findings. It does not dispute that Appellants state a cause of action, with the sole exception of the erroneous argument based on *Preserve the Dunes*.

this is contrary to the words of this Court in *Preserve the Dunes*,[3] the argument ignores completely the substantial differences between a contested case and a MEPA cause of action. The two avenues of review are not equivalent; a MEPA case cannot fairly be labeled a "collateral attack."[4]

A MEPA case is brought in a Michigan circuit court with an independent, elected trial judge as the neutral third party who will address discovery disputes and conduct a trial in open court.[5] In contrast, a contested case is a quasi-judicial process without discovery overseen by a Department employee serving as an administrative law judge. A MEPA judge is empowered, not only by MEPA but by the authority of the circuit court, to grant declaratory and equitable relief; an ALJ has no equitable power.[6] In a MEPA case in circuit court, MEPA's purpose, to prevent impairment of natural resources, applies and governs the scope of the case; in contrast, it is standard in EGLE contested cases for the ALJ to rule that "MEPA does not apply" and focus narrowly on limited standards and defer to the Department. See, for example, January 26, 2016 Opinion and Order regarding this same matter, at page 6 ("*MEPA plays no role* in the

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[3] See *Preserve the Dunes,* 471 Mich at 514 ("MEPA provides for immediate judicial review of allegedly harmful conduct. The statute does not require exhaustion of administrative remedies before a plaintiff files suit in circuit court") and at 521 ("a challenge under MEPA may be filed in circuit court before or during the time that the alleged MEPA violation occurs, without any requirement that a litigant exhaust administrative remedies").

[4] In *Preserve the Dunes,* the reference to "collateral" had to do with using MEPA to challenge eligibility, not at all the point made in the Department argument about "three bites at the apple."

[5] Appellants note that MEPA specifically authorizes circuit courts to handle MEPA cases and that the Department with its transfer to the court of claims (housed in the court of appeals instead of in a trial court system, as it used to be) appears to reject that. The basis of the "three bites" criticism raised by the Department, *e.g.*, at pages 2 & 24, is due entirely to its own transfer of what was originally filed as one action against the developer and the Department in the same court. The Department can acquiesce to a regular trial court judge serving also as a designated court of claims judge and, upon information and belief, that used to be the normal practice. Query whether a remand should, in this Court's discretion, be to the circuit court with a direction to the assigned judge to serve on this case as a court of claims judge, instead of a remand to the court of appeals.

[6] The Department has acknowledged that one must go to circuit court to seek injunctive relief, so at least "two bites" appear to be necessary for that relief to be granted.

determination of whether an application should be granted under the strictures of Part 353," emphasis supplied), attached as Exhibit 1. Further, any judicial review of a contested case (on appeal to circuit court) is limited to the administrative record.

Another important distinction between administrative review and a MEPA action is that, while a MEPA action can be brought by any citizen to protect the environment, fulfilling the Legislature's direction to involve the general public in developing the common law of environmental protection, standing in contested cases is strictly limited to such a degree that the administrative process is often entirely unavailable.[7] It is not unusual in a contested case for the permittee and the Department to seek dismissal without any evidentiary hearing. Now, the Department seeks the same protection against any MEPA review of its conduct by asserting wrongly that *Preserve the Dunes* bars MEPA actions against the agency.

A MEPA action is not a collateral attack but an independent, legislatively-authorized action to protect the environment. Appellants respectfully request that this Court end the Department's self-serving rejection of MEPA and make clear that (A) the Department can be a defendant as to its permitting conduct, which does not "stand alone," *Preserve the Dunes,* 471 Mich at 519, but is inextricably linked to the actions of its permittees; (B) the scope of a MEPA action is defined in Section 1701 and is not limited by Section 1703's reference to conduct[8]; (C) MEPA also applies in administrative actions including contested cases and cannot be rejected by ALJs; and (D) MEPA

[7] Many parts of NREPA simply require a party to be "aggrieved." Some parts of NREPA require more. See, for example, MCL 324.35305(1). In contrast, in a MEPA case in circuit court, an elected judge can address standing under the State's well-established standards for standing.

[8] The *Preserve the Dunes* decision does note at several places that MEPA focuses on conduct based on the language of Section 1703. See, for example, 471 Mich at 515, 517, 518 & 521. Appellants respectfully request that this Court make clear that the use of the word "conduct" in Section 1703 does not limit the scope of Section 1701 and that the Department's permitting "conduct" is inextricably linked to the permittee's conduct and so is reviewable under MEPA. Appellants' Supplemental Brief at 30.

authorizes the intervention in an administrative action, including a contested case, by any person to protect the environment.

2. The plain language of MEPA: Potential defendants include "any person," not "any person except the Department"

MEPA clearly states that one may sue "any person" to protect the environment. MCL 324.1701(1). Basic rules of statutory construction require the court to follow the legislature's direction. "If the statute's language is clear and unambiguous, then judicial construction is inappropriate and the statute must be enforced as written." *People v Lewis*, 503 Mich 162, 165 (2018) (citations omitted); *Madugula v Taub*, 496 Mich 685, 696 (2014) ("When a statute's language is unambiguous, 'the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted'" (citations omitted)). MEPA is unambiguous; there is no basis in the language of MEPA to exclude a particular person such as the Department from being a potential defendant. The Department's effort to insulate itself is contrary to basic rules of statutory interpretation and, through that effort, constitutes an attempt to read part of MEPA out of existence. The Department's position should be unequivocally rejected.

Moreover, the language of Section 1701 that authorizes suit "for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources" does not condition such suit on the conduct of any party. While Section 1703 says that *if* one has made a prima facie case "showing that the conduct of the defendant has polluted [or] impaired" the environment, the defendant "may rebut the prima facie showing," it does not state even there that conduct is *required* in order to prove one's MEPA case. Further, Section 1701 makes clear by the omission of the term "conduct" that conduct is *not* required where protection of natural resources is at issue. "[W]hen the Legislature includes language in one part of a statute that it omits in

another, it is assumed that the omission was intentional." *People v Lewis, supra*, 503 Mich at 165-166. See also, *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196 (2005) ("where the language is unambiguous . . . the statute must be enforced as written"); *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402 (2000). Fundamental rules of statutory construction support the conclusion that Section 1701 is broader than the reference to conduct in Section 1703. Thus, one could conclude that, to the extent *Preserve the Dunes* said "only wrongful conduct offends MEPA" it was in error and this Court should clear up that misunderstanding now.

3. Courts should not defer to the Department on the interpretation of MEPA

Appellants have explained what the decision in *Preserve the Dunes* stands for based upon this Court's own words and analysis. The Department offers a different interpretation through its counsel.[9] In addition to the language of MEPA being plain and not excluding the Department from potential defendants, there is no basis to defer to the agency on this issue. The propriety of naming the Department as a defendant as to its permitting work is not a question that falls within the Department's special expertise regarding environmental conditions and the effects of human activity upon the environment and natural resources of Michigan.[10] Rather, it is a question of the legal interpretation of a statute. "[C]ourts may not abdicate their judicial responsibility to interpret statutes by giving unfettered deference to an agency's interpretation. Courts must respect legislative decisions and interpret statutes according to their plain language." *SBC Mich v PSC (In*

[9] The office of the attorney general, popularly referred to as the largest law firm in Michigan, is known for its zealous advocacy. Respectfully, Appellants submit, unwarranted judicial deference to that advocacy has led to the misuse of *Preserve the Dunes* that this Court can now correct.

[10] Where interpretation of a regulation promulgated by an agency is at issue and is genuinely ambiguous, a court may grant respectful consideration to the agency's position. See *Kisor v Wilkie,* __ US __, 139 S Ct 2400, 2414 (2019) ("the possibility of deference can arise only if a regulation is genuinely ambiguous. . . . not all reasonable agency constructions of those truly ambiguous rules are entitled to deference").

re Complaint of Rovas), 482 Mich 90, 93 (2008). A *Chevron* analysis resulting in deference to the agency is not appropriate where the legislature has not left a gap for the agency to interpret or delegated its authority to the agency. *Id.*, 482 Mich at l09-110.

The United States Supreme Court has agreed with this Court in rejecting deference to an environmental agency's interpretation where, to follow that agency's "reading would open a loophole allowing easy evasion of the statutory provision's basic purposes. Such an interpretation is neither persuasive nor reasonable." *County of Maui, HI v Hawaii Wildlife Fund*, 590 US __, __, 140 SCt 1462, 1474 (2020). In other words, sometimes there is good reason for an independent judiciary to "look over the shoulder" of the regulator. See also, statement of former Department Director quoted in Appellants' Supplemental Brief at 18-19. The clearly established purpose of MEPA is to protect the environment and it plainly authorizes such review.[11] Insulating the work of the one agency whose conduct most affects the environment of Michigan from the judicial scrutiny the Legislature authorized in MEPA pursuant to its constitutional mandate and authority would undermine the statute's basic purpose. That "evasion" is "neither persuasive nor reasonable," as the United States Supreme Court pointed out in *County of Maui, id.*, and should be soundly rejected. See also, *Ray v Mason County Drain Comm'r*, 393 Mich 294, 305 (1975) ("[n]ot every public agency proved to be diligent and dedicated defenders of the environment"); *WMEAC v Natural Res Comm'n*, 405 Mich 741, 752-754 (1979) (deference is error; courts must make de novo decisions and apply "strict scrutiny" to agency decisions); and *Nemeth v Abonmarche Dev*, 457 Mich 16, 31 (1998) (under MEPA, "courts are not bound by any state administrative finding").

MEPA provides a right to the public and a charge to the courts to engage in an independent third party evaluation whether or not any decisions or conduct threaten the environment; this Court

[11] See extensive authorities cited at Appellants' Supplemental Brief at footnote 12.

should enforce it. The Department should not be exempt from MEPA judicial review as to its permitting decisions.

4. No complex legal doctrine bars a judicial action under MEPA against the Department

The Department offers a potpourri of policy arguments at pages 21-31 of its Supplemental Brief to try to make this simple case seem complicated. These arguments are circular; they start from the false premise that administrative review is the "exclusive" avenue to obtain review[12] and try to use that to conclude that MEPA is an empty vessel and cannot ever be used to seek judicial review of Department permit review actions.

The Department argues at 21-22 that an administrative review has a "preclusive effect" barring any MEPA action. But the very cases cited make the point that "The preclusion doctrines serve an important function in resolving disputes by imposing a state of finality to litigation where *the same parties have previously had a full and fair opportunity to adjudicate their claims*" (emphasis supplied). *Nummer v. Michigan Dep't of Treasury*, 448 Mich. 534, 541 (1995). See also, *William Beaumont Hosp. v. Wass*, 315 Mich. App. 392 (2016) (does not address MEPA or the standing limits that apply to administrative review but *not* to MEPA; nor does it suggest that the Legislature in enacting MEPA intended it to be superfluous); *Minicuci v. Scientific Data Mgmt., Inc.*, 243 Mich. App. 28, 39 (2000) (unlike the terms of MEPA, in that case "the Legislature explicitly provided only one remedy from an adverse agency determination"). Administrative review options are alternatives, not the exclusive or "preclusive" paths to review of agency decisions.

[12] As noted above at footnote 3, that is contrary to what this Court said in *Preserve the Dunes.*

Cases the State cites to argue at pages 22-23 that MEPA presents a "conflict of laws" problem do not support its argument barring the use of MEPA in this case. *Kropf v. Sterling Heights*, 391 Mich. 139, 173 FN 8 (concurring opinion) (1974) (without any reference to MEPA, the court noted that, "[o]rdinarily a court action may be commenced only after exhaustion of the administrative remedy"); *In re Harper*, 302 Mich. App. 349, 356 (2013) (the court's statement that, "when an administrative scheme of relief exists an individual must exhaust those remedies before a circuit court has jurisdiction," applies when that is the only avenue of judicial review; it does not refer to or apply to MEPA). Compare *Preserve the Dunes* at 514 and 521.

The State's argument at page 24 pursuant to the "*expressio unius est exclusio alterius*" maxim that "the provision of one specific judicial review mechanism in Part 353," appeal from a final decision, does not support rejecting MEPA. To argue that MEPA's independent authorization to sue somehow conflicts with the fact that Part 353 does not address it but only addresses administrative appeal is a troubling argument. It ignores the fact that the enactment by the Legislature of MEPA made it unnecessary to add the same authority in each part of NREPA. It also asks this Court to grant immunity from independent judicial review to the Department based on a specious argument. When the Department goes on to argue at pages 24-25 that there is a conflict between Parts 17 and 353, the argument seeks to eviscerate the courts' authority pursuant to the judgment of the Legislature.[13]

The Department's argument at page 27-28 that allowing a MEPA action would violate the "exhaustion doctrine" ignores the fact that this MEPA action did not in any way prevent or

[13] The Department also argues at page 27 that its ALJs are "subject matter experts" without offering any authority for such a claim. Most importantly, the Department does not seem to realize that folding the ALJs into its embrace as its experts does not undercut the authority granted in MEPA to seek independent judicial review.

complicate the agency's completion of its administrative review; it ignores entirely the unique authorization to sue to protect the environment in MEPA; and it falsely suggests that the doctrine of exhaustion of administrative remedies somehow serves to bar the pursuit of an independent MEPA action. This argument is classic smoke and mirrors – it may sound good but is irrelevant. Instead of acknowledging to the Court the importance of MEPA, the state engages in calling forth one doctrine after another that might apply in a different circumstance but which have nothing to do with MEPA or *Preserve the Dunes*.

The Department goes so far at the end of its brief to argue that this case is moot. Perhaps the most important aspect of this argument is the fact that more than five years have passed since the developer sought Part 353 dunes permits because of the Department's litigious approach to avoiding all oversight of its work. In fact, however, the case is not moot. The permits the Department claims "have long since expired," Department Brief at 31, were never finalized because they have been subject to appeal all of this time. Any work performed by the developer was done at its own risk. And the status of the work under the permits is less an issue in this case than the work done by the Department staff in its review of the applications. Those issues remain alive and important. *People v. Richmond*, 486 Mich. 29, 34 (2010) (an issue is justiciable if "the issue is one of public significance that is likely to recur, yet evade judicial review") (citations omitted). The Department's mootness argument must be rejected.

The Department also overstates the facts when it says all lower court decisions have gone its way. The Department ignores the fact that it was a co-defendant in many of the cases, including the *Preserve the Dunes* action itself. It also ignores the Court of Appeals dissenting opinion, which

rejected its interpretation of *Preserve the Dunes*.[14] Appendix pages 163a-165a. Its argument that all decisions subsequent to *Preserve the Dunes* have agreed with its interpretation is misleading and wrong.

Conclusion and Request for Relief

Appellants respectfully request that the Court issue a peremptory order reversing the decision of the Court of Appeals and holding with sufficient elaboration to make clear to lower courts and administrative tribunals that:

A. The Department can be a Section 1701 defendant;

B. The actions of and standards used by the Department are reviewable under Section 1701 and MEPA generally;

C. MEPA applies in administrative proceedings including but not limited to NREPA permit reviews and contested cases; and

D. Any person may intervene in an administrative proceeding such as a contested case relying on MEPA to protect the state's environment and natural resources.

Respectfully submitted,

Date: March 7, 2022 */s/ Dustin P. Ordway*

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[14] See also, Appellants' Supplemental Brief at 27-28, discussing the limit of the *Preserve the Dunes* rejection of the use of MEPA to actions "unrelated" to impairment.

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PROOF OF SERVICE

On this date I have caused to be served a copy of this Appellants' Reply to Department's Supplemental Brief and Proof of Service on counsel using the Truefiling system.

Respectfully Submitted,

Date: March 7, 2022

/s/ Dustin P. Ordway

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Exhibit 1

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

In the matter of	**File No.:** **14-03-0020-P through 14-03-0028-P**
Lakeshore Camping, Gary Medler, and Shorewood Association on the permit issued to Dune Ridge SA LP (Consolidated Cases) /	**Part:** **353, Sand Dune Protection and Management** **323, Shorelands Protection and Management**
	Agency: **Department of Environmental Quality**
	Case Type: **Water Resources Division**

Issued and entered
this 26th day of January, 2016
by Daniel L. Pulter
Administrative Law Judge

This contested case concerns nine applications submitted by Dune Ridge SA, LP (Permittee), under Part 353, Sand Dune Protection and Management, and under Part 323, Shorelands Protection and Management, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended. MCL 324.35301, *et seq.*; MCL 324.32301, *et seq.* The applications were approved by the Department of Environmental Quality, Water Resources Division (WRD), through permits and a special exception issued in August 2014. Subsequently, those agency actions were challenged through separate petitions for contested case hearing filed by Lakeshore Camping (Lakeshore), Gary E. Medler, and Shorewood Association (Shorewood). The petitions of Mr. Medler and Shorewood were dismissed pursuant to a settlement agreement between the parties. By Order entered on October 28, 2015, Lucie Reininga Hoyt, William Reininga Jr., Jane Underwood, and Charles Zolper were granted leave to intervene as additional Petitioners. The Permittee seeks reconsideration of the October 28 Order, and the parties have filed cross-motions for summary disposition.

OPINION AND ORDER

As noted, three separate Motions have been brought by the parties, as follows:

- The Permittee has filed a Motion for Reconsideration of the October 28 Order, which grants Ms. Hoyt, Mr. Reininga, Ms. Underwood, and Mr. Zolper leave to intervene as additional Petitioners.

- The Permittee seeks to dismiss the Petition of Lakeshore, claiming that Lakeshore does not have standing to bring this contested case.

- Lakeshore and the Intervenors have sought summary disposition and extraordinary relief.

Each of these Motions will be addressed below.

1. The Permittee's Motion for Summary Disposition

In its Motion, the Permittee contends that Lakeshore does not have standing to bring this contested case. Generally, the concept of standing flows from the constitutional principle that courts can only grant "relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm...." *Lewis v Casey*, 518 US 343, 349; 116 S Ct 2174; 135 L Ed 2d 606 (1996). Standing does not address the merits of a case, but instead asks whether it is appropriate for a particular person to bring a challenge in a judicial proceeding, which includes contested cases.[1] The purpose of requiring a person to have standing to maintain a legal action is to "assure sincere and vigorous advocacy." *Michigan License Beverage Ass'n v Behan Hall, Inc.*, 82 Mich App 319, 324; 266 NW2d 808 (1978). However, such commitment does not confer standing. Rather, "[s]tanding requires a demonstration that the plaintiff's substantial interest will be detrimentally affected in a manner different from the citizenry at large." *House Speaker v Governor*, 441 Mich 547, 554; 506 NW2d 190 (1993).

The Supreme Court recently confirmed that "[t]he purpose of the standing doctrine is to assess whether a litigant's interest in the issue is sufficient to 'ensure sincere and vigorous advocacy.'" *Lansing Schools Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 355; 792 NW2d 686 (2010). The Court further held:

> A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.

[1] Contested case means a proceeding ... in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing." MCL 24.203(3).

487 Mich at 372. Lakeshore contends herein that it has standing through Legislative conference under Part 353 and Part 17, Michigan Environmental Protection Act (MEPA), of the NREPA. Each of these Legislative enactments will be addressed, *infra*.

Under Part 353, the Legislature has conferred standing upon an aggrieved party to contest the issuance of a permit through a contested case hearing. Specifically, § 35305(1) provides:

> If an applicant for a permit or a special exception or the owner of the property immediately adjacent to the proposed use is aggrieved by a decision of the department in regard to the issuance of a permit or special exception under this part, the applicant or owner may request a formal hearing on the matter involved....

MCL 324.35305(1). In its Motion, the Permittee alleges that Lakeshore is not the owner of property immediately adjacent to the proposed use, a point Lakeshore concedes in its Response. As a result, Lakeshore does not have standing to challenge the permits under Part 353.

Lakeshore also contends that it has standing in this action under the MEPA, relying on § 1705(1):

> If administrative, licensing, or other proceedings and judicial review of such proceedings are available by law, the agency or the court may permit the attorney general or any other person to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources.

MCL 324.1705(1). Section 1705 does not, on its own, provide an independent basis for standing to file a contested case. Rather, it allows a party to intervene in an existing case. While § 1701(1) of the MEPA provides a cause of action in circuit court, the Legislature has not conferred the right to a party to bring a contested case before an administrative agency under the MEPA. MCL 324.1701(1); MCL 324.1705(1). Therefore, the Petitioner has no standing under the MEPA, which does not provide a substantive basis for challenges to

the permits and special exception issued under Part 353 that are the subject of this contested case.

Based on the foregoing, the Permittee's Motion for Summary Disposition to dismiss the Petition of Lakeshore, is granted.

2. The Permittee's Motion for Reconsideration

In the October 28 Order, this Tribunal granted the requested intervention of Ms. Hoyt, Mr. Reininga, Ms. Underwood, and Mr. Zolper. In its Motion for Reconsideration, the Permittee contends that Ms. Hoyt and Mr. Reininga are not entitled to intervene, because they are not the owners of property immediately adjacent to the proposed use. See MCL 324.35305(1), *supra*. The Motion also contends that none of the Intervenors are aggrieved by the issuance of the permits. *Id.*

With respect to Ms. Hoyt and Mr. Reininga, their Affidavits recite that they reside at 650 Shorewood Drive. The Permittee submitted evidence that neither Ms. Hoyt nor Mr. Reininga own 650 Shorewood Drive, but rather Shorewood owns the property. This fact was conceded in Intervenors' Response.[2] Because Ms. Hoyt and Mr. Reininga are not the "owner[s] of the property immediately adjacent to the proposed use", they do not have standing under Part 353. MCL 324.35305(1). Therefore, the Motion for Reconsideration as to Ms. Hoyt and Mr. Reininga is granted.

As to Ms. Underwood and Mr. Zolper, the Permittee contends that they are not aggrieved. However, their Motion to Intervene alleges that the "removal of woody vegetation … can affect the flora and fauna that inhabit" the critical dune, and that they are

[2] Ms. Hoyt and Mr. Reininga allege that, as shareholders of Shorewood, they have standing to bring this contested case. Contrary to this assertion, only Shorewood as the owner has standing to bring a contested case, not the shareholders of Shorewood. This is particularly important since Shorewood has settled with the Permittee and the WRD in this contested case.

"affected by changes to the dune landscape and changes to habitat for birds and animals...." Concomitantly, their Motion adopts the Petition of Lakeshore, which asserted challenges to the permits in order to protect "the flora and fauna of the critical dunes against improper and unnecessary intrusion, changes, slope alterations, plant removal, habitat destruction, development and any impairment not required to be permitted under Part 353...." In its Response to the Motion for Reconsideration, the WRD concedes that "it is likely that objections to potential natural resource destruction are sufficient to render a party 'aggrieved' under Part 353." This Tribunal agrees. The Motion for Reconsideration is denied as to Ms. Underwood and Mr. Zolper.

3. Intervenors' Motion for Summary Disposition and Extraordinary Relief

The Motion for Summary Disposition and Extraordinary Relief was originally filed by Lakeshore, Ms. Hoyt, Mr. Reininga, Ms. Underwood, and Mr. Charles Zolper. At this point, only the petitions of Ms. Underwood and Mr. Zolper remain viable. Accordingly, the Motion is considered brought by those individuals.

The Motion argues that "MEPA authorizes this action..." because it "authorizes any person to maintain an action for declaratory and equitable relief for the protection of natural resources from impairment and destruction." Contrary to such assertion, Part 353 provides the right to a contested case hearing to a person "aggrieved by a decision of the department in regard to the issuance of a permit or special exception...." MCL 324.35305(1). Upon the filing of a contested case, this Tribunal is charged with conducting a de novo review of an application for a permit or special exception in order to ascertain whether the applicant is entitled to a permit or special exception under the statutory criteria. *See National Wildlife Federation v Department of Environmental Quality*, 306 Mich App 369, 378; 856 NW2d 394 (2014). Upon conducting such a review of the application, a final agency decision is rendered in accordance with § 85 of

the Administrative Procedures Act. MCL 24.285; *Petition of Richard C. Sprague*, 2002 WL 32082902, at *1 (Mich. Dept.Nat.Res.).

MEPA plays no role in the determination of whether an application should be granted under the strictures of Part 353. Indeed, Part 353 provides a comprehensive statutory scheme for the determination of whether a permit or a special exception is appropriate. For example, land features which are identified as critical dunes are resources regulated under Part 353. MCL 324.35303(1). As to those geographic areas identified in the "atlas of critical dune areas," the statute regulates "uses" which are defined as "a developmental ... activity done or caused to be done by a person that significantly alters the physical characteristic of a critical dune area or a contour change...." MCL 324.35301(k). A use may be permitted, provided that certain prohibitions are not implicated. MCL 324.35316(1). If the use cannot be permitted, a special exception may be issued, provided that an applicant demonstrates a "practical difficulty" will occur if the special exception is not granted. MCL 324.35317(1). In a contested case under Part 353, it is this Tribunal's responsibility to determine if a preponderance of the evidence supports the issuance of a permit or a special exception.

MEPA, on the other hand, provides a statutory basis for actions in circuit court brought by any person [3] for the protection of air, water and other natural resources. MCL 324.1701. Unlike a contested case, a MEPA circuit court action is not limited to the strictures of Part 353. In fact, MEPA authorizes the circuit courts to issue declaratory and equitable relief. MCL 324.1701(1). Although equitable relief is not available in this Tribunal, *Wikman v City of Novi*, 413 Mich 617, 647-648; 322 NW2d 103 (1982), Ms. Underwood and Mr. Zolper seek to enjoin the permits and special exception in this contested case. In so doing, they seek to transform this contested case into a circuit court type challenge to the permits and special exception. Because such relief is not available in

[3] Recall that a contested case may not be brought by "any person." Rather, it may only be brought by "the owner of the property immediately adjacent to the proposed use...." MCL 324.35305(1).

this Tribunal, the request for summary disposition under MEPA and request for extraordinary relief is denied.

The remaining allegations of the Motion are similarly without merit. The Motion contends the Permittee has failed to provide sufficient information upon which the WRD could issue a permit or special exception. Because this contested case is a de novo review of the application, the Permittee's evidence presented at the hearing may include evidence in addition to that which was originally presented to the agency. As a result, summary disposition on such basis is inappropriate at this time. Additionally, the Motion contends that the permits and special exception issued by the WRD will cause unlawful degradation to the diversity, quality and/or functions of the critical dunes. Ms. Underwood and Mr. Zolper have failed to proffer sufficient evidence for this Tribunal to grant summary disposition, which therefore requires a contested case hearing on such issue.

For each of the foregoing reasons, the Motion for Summary Disposition and Extraordinary Relief is denied.

NOW, THEREFORE, IT IS ORDERED:

1. The Motion for Summary Disposition to Dismiss the Petition of Lakeshore is GRANTED. Accordingly, the Petition for Contested Case Hearing filed by Lakeshore is hereby DISMISSED.

2. The Motion for Reconsideration is GRANTED as to the applications to intervene filed by Ms. Hoyt and Mr. Reininga, such that their Petitions for Contested Case Hearing are DISMISSED.

3. The Motion for Reconsideration is DENIED as to the applications to intervene filed by Ms. Underwood and Mr. Zolper. Having previously granted the applications to intervene of Ms. Underwood and Mr. Zolper, this contested case shall proceed with Ms. Underwood and Mr. Zolper as Petitioners.

4. The Motion for Summary Disposition Or, in the Alternative, An Order Suspending the Permits or Granting a Preliminary Injunction is DENIED.

5. Ms. Underwood and Mr. Zolper shall file and serve their pre-hearing statement by **February 17, 2016**. The WRD and the Permittee shall file and serve their pre-hearing statements by **March 2, 2016**. A pre-hearing statement form has been enclosed for your convenience.

6. A telephone pre-hearing conference in this matter has been scheduled for **March 10, 2016, at 10:00 a.m.** This Office will initiate the telephone call on that date and time to the parties at the telephone number provided in the pre-hearing statement. Please advise this Office as soon as possible if you wish to add additional parties to the conference call.

Daniel L. Pulter
Administrative Law Judge

PROOF OF SERVICE

I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by first class mail to all others at their respective addresses as disclosed by the file on the 26th day of January, 2016.

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STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

In the matter of	**File Nos.** 14-03-0020-P through 14-03-0028-P
Lakeshore Camping, Gary Medler, and Shorewood Association on the permit issued to Dune Ridge SA LP (Consolidated Cases) _____/	**Part:** 353, Sand Dune Protection and Management 323, Shorelands Protection and Management
	Agency: Department of Environmental Quality
	Case Type: Water Resources Division

Pre-Hearing Statement

1. Brief statement of factual allegations:

2. Statement of legal issues:

3. Proposed witnesses:

4. Proposed exhibits:

5. Possibility of settlement?: ___ NO ___ YES Explain:

6. Time required to present your case:

SIGNED: _____

ADDRESS: _____

_____

_____

_____

DAYTIME
TELEPHONE: (____)_____

FAX: _____

E-MAIL: _____

DATED: _____