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 & MARJORIE SCHUHAM,
Petitioners-Appellants,

v.

DUNE RIDGE SA, LP, and MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,
Respondents-Appellees.

Supreme Court No. 159524 & 159525

Court of Appeals No. 340623 & 340647

Ingham Circuit Ct. No. 17-176-AA

MAHS Docket 14-026236

Dustin P. Ordway (P33213)
Ordway Law Firm, PLLC
Attorney for Petitioners-Appellants
3055 Shore Wood Drive
Traverse City, MI 49686
Tel: (616) 450-2177
Fax: (877) 317-6212
dpordway@ordwaylawfirm.com

Daniel P. Bock (P71246)
Office of the Attorney General
Attorneys for Resp't-Appellee MDEQ
525 W. Ottawa Street
P. O. Box 30755
Lansing, MI 48909
Tel: 517-373-7540
bockd@michigan.gov

Kyle Konwinski (P76257)
Varnum Law
Attorneys for Resp't-Appellee Dune Ridge
PO Box 352
Grand Rapids, MI 49501-0352
Tel: 616-336-6000
kpkonwinski@varnumlaw.com

PETITIONERS-APPELLANTS' REPLY TO MDEQ

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

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REPLY

Introduction

Appellants provide separate replies to the opposition briefs of Dune Ridge and MDEQ. This reply responds to MDEQ's opposition or, perhaps more importantly, to MDEQ's errors and what it leaves out of its arguments. A short summary of the reasons Lakeshore Group and its members sought leave to appeal may help put this application in context.

Context: What is ultimately at issue here is whether a contested case hearing will ever be held to review the sand dunes development permits MDEQ issued to Dune Ridge in this case.[1] Such a hearing would include fact and expert testimony on the planned development, MDEQ's conduct processing the applications and testimony by petitioners and their experts.[2] So far, there

[1] These permits are for the development of large portions of the 130-acre property that was formerly a church camp in protected dunes. Petitioners will not repeat the details of the tremendous scope of the development noted in the Application statement of facts, but note in passing the attempts by both appellees to characterize the development in a limited way, referring for example (A) to a "condominium development" when large home sites are involved and (B) to 10 permits, DEQ Brief at 5&7, when permits for over 20 home sites plus roads and more "uses" are at issue. Common sense and sound judgment appear altogether missing when the agency responsible for evaluating the public interest in a dunes "use" as small as a fence or a deck on one home, *see* Exhibit I to Application, can suggest that a case involving a gated community of 20 homes does not merit a contested case hearing.

[2] Relevant legal issues at such a hearing would include, for example: Did MDEQ treat the overall development as a "special use" as required by Part 353? MCL 324.35301(j) (a proposed use with a commercial purpose and a multifamily use of more than 3 acres are both defined as special uses). Did Dune Ridge provide MDEQ all necessary information for permit review? MCL 324.35304(1)(a). Did MDEQ consider and evaluate the effects of the "proposed uses" on the diversity, quality, functions and values of the affected sand dunes? MCL 324.35302 & .35304. Did MDEQ base its decisions on comprehensive scientific information? *Id.* Did the application provide an approved sewage treatment plan and data showing the extent of disruption of the site? MCL 324.35313(1). Was an environmental impact statement provided for the whole project? MCL 324.35313(2), .35317(2) & .35320. Appellants submit that the answers to these questions will be 'No.' The hearing should also include testimony and an analysis of MEPA compliance. MCL 324.1705(2) (impairment of natural resources or the public trust "shall be determined" in administrative proceedings). *See also,* MCL 324.35310(2) (government authority to seek injunctive relief "shall be in addition to the rights provided in part 17 [MEPA], and as otherwise provided by law").

has been no contested case hearing despite the good faith efforts to obtain a hearing by these several neighbors – four of whom were found to satisfy the narrow statutory basis for standing and all of whom own property in the same sand dunes in Saugatuck, Michigan, where the development permits authorize substantial changes to statutorily-protected sand dunes. State law provides for contested case review (an evidentiary hearing followed by a recommendation to the agency director, who then issues a final permit decision appealable to circuit court) under the Administrative Procedures Act, MCL 24.201 *et seq.*, and Part 353, MCL 324.35305(2), and pursuant to the state constitution. Art. VI, §28. To hold no hearing whatsoever where parties satisfy §35305(1) standing criteria is a material injustice this Court can and should correct.[3]

Four separate grounds for standing: As the application explains, standing can be found using any of four separate grounds and this Court could overturn the Court of Appeals decision, find standing and remand the case for a contested case hearing based on any one of them:

1. *Michigan common law* of standing provides that parties who are not authorized by statute to proceed in a case may have common law standing; and appellants have argued that this basis applies to those of the Lakeshore Group members who do not fall within the Part 353 statutory standing provision. Application at 42-50.

[3] Petitioners have not argued that the presence of Oval Beach Park along the northern boundary of the development should support standing for every taxpayer who supports that park "immediately adjacent" to Dune Ridge. Petitioners have not argued that the public right to walk the beach along Dune Ridge, *Glass v Goeckel*, 473 Mich. 667, 703 N.W.2d 58 (2005), supports standing for local citizens. Petitioners have not argued that the presence of state land (the Lake Michigan bottomlands are owned by the State of Michigan) "immediately adjacent" to the entire western boundary of Dune Ridge should support these public advocates' standing. Petitioners have not thought it would be necessary to become creative in such ways because their members clearly and by decision of the ALJ already had standing and did not alter or give up their ownership of the property that satisfied the standing provision of §35303(1). The continued *rejection of any* contested case hearing presents this Court with a material injustice it can and should correct.

2. *Michigan statutory law* (in MEPA) provides that any party may intervene in a pending administrative proceeding pursuant to MCL 324.1701 *et seq*. and these Group members did precisely that. Application at 38-41. Appellees do not dispute the principle but seek to take it away by arguing, DEQ Brief at 23-25, that Appellants did not appeal the issue to the circuit court.[4]
3. *Two owners of a property that is indisputably adjacent* to the proposed use by the developer, Application at 33, are supposedly not "owners" for purposes of §35305(1) because their association holds title and appellees ask this court to ignore half of the decision in *Slatterly* where the decision recognized that a Shorewood association shareholder has the right to exclude others from his or her home and the parcel it is on. DEQ Brief at 25-28; Application at 31-38.
4. The fourth principle upon which this Court can and should rule a contested case hearing must be held is that *owners who have standing to challenge proposed uses should not be divested of their standing by actions of the respondent that are unrelated to the proposed uses that are at issue*. Application at 16-31. This principle merits this Court's attention above and beyond the previous issues (even though appellants submit all are legitimate arguments, worthy grounds for standing and would support the Court's reversal and remand).

A "legal principle of major significance to the state's jurisprudence," MCR 7.305(B)(3): While appellants submit that each of their arguments involves an important legal

[4] Petitioners do not understand why MDEQ would make this argument when Petitioners in fact did argue MEPA in their appeal of the contested case dismissal to the Circuit Court. *See* Brief in Support of Appeal, filed May 25, 2017, in court record. *See also* ALJ Order at Exhibit C to Application regarding the pending consolidated cases at the time of intervention.

principle and each merits this Court's attention, petitioners-appellants also submit that this issue of retention of standing is a principle that is at the heart, and forms the core purpose, of this appeal. What is most striking about MDEQ's opposition brief is the length to which the agency goes to avoid addressing this core issue.[5] Notably, MDEQ does admit that the issue of a petitioner's loss of standing based on a respondent's action is not addressed in our judicial decisions.[6]

I. The Core Purpose of this Appeal

The first purpose of this appeal is to ask this Court to recognize a legal principle of major significance to the state's jurisprudence – the narrow principle that parties who satisfy the Part 353 statutory test for standing to pursue a contested case petition challenging a sand dunes permit[7] and who could lose it by their own actions (such as moving away from that property)[8], do not lose their standing based upon the actions of the respondent, particularly where, as here, those respondent actions do not alter the "proposed uses" which are the subject matter of the permits and the contested case and do not alter the petitioners' relationship to the proposed uses.[9] Here, the

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[5] At the same time, MDEQ acknowledges that the result (loss of standing and dismissal of the contested case without a hearing) is "unfair." DEQ Brief at 13. It is disappointing that MDEQ does not proceed to the logical conclusion, that the "decision [of the ALJ and Court of Appeals] is clearly erroneous and will cause material injustice," MCR 7.305(B)(5)(a), and must be overturned so that the contested case proceeding can go forward.

[6] DEQ Brief at 21. Despite this acknowledgement, MDEQ wrongly claims at page 1 that petitioners want to "invent a new legal doctrine" instead of recognizing it is a "legal principle of major significance to the state's jurisprudence," MCR 7.305(B)(3), which both sides need this Court to resolve. Addressing gaps in our law of standing is precisely the role of this Court and not an improper "invention." *See also* MCR 7.305(B)(2).

[7] An "owner of property immediately adjacent to the proposed use" has standing. §35305(1).

[8] One's sale or giving up the property whose location establishes one's standing would be comparable to the cases appellees cite to support dismissal, DEQ Brief at 19 (*Sharma*) and DR Brief at 15, but they do not address the situation in this case because none of the petitioners moved.

[9] MDEQ focuses on the need or requirement for a petitioner to retain standing but avoids dealing with the fact that the petitioners here did not alter in any way the facts (ownership, property location, "proposed uses" throughout the 130-acre development property) that supported the correct initial determination that they had standing. That disparity between the MDEQ argument and the facts is the core issue for this Court and yet MDEQ sidesteps it.

respondent did not make a change to the "proposed uses" as to which Ms. Underwood and Mr. Zolper, for example, had standing for a contested case. The respondent did not alter Petitioners' distance from these proposed uses. The respondent did not buy their property to thus divest them of the foundation of their standing (not that it did not try). Instead, the respondent simply sold property unrelated to the proposed uses that happened to be adjacent to them. Flipping the §35305(1) standard on its head, appellees now argue that the development property is no longer adjacent to petitioners and ignore completely the fact that the relationship of the petitioners to the proposed uses has not changed at all.

A ruling by the Court can be narrowly focused on Part 353 contested case standing: Section 35305(1) grants standing to the "owner of property immediately adjacent to the proposed use," namely the planned changes to the dunes which are the subject of the DEQ permits under Part 353; the legislature found parties so situated to have an interest based on their property rights in proximity to the proposed use; *the permittee cannot divest a petitioner of standing by its actions that do not alter the proposed uses that are the subject of the contested case*.

Such a basic principle would avoid the injustice inherent in the dismissal rendering any hearing impossible which has so far occurred in this case. And it would not alter existing case law or other, valid principles upon which parties rely. For example:

A. *The parties agree and the decisions already state that standing is determined at the beginning of the case.* Circuit Court decision, Exhibit B to Application, at 5 (citing *Girard*). That aspect of standing would not change and does not need to be addressed. In other words, this principle would not say that standing cannot be challenged later, but only that a later challenge that is based on a change like the sale here by the respondent rather than by the petitioner would not divest the petitioner of standing.
B. *This rule would not say that the petitioners who obtain standing by owning property immediately adjacent to the proposed use could not give up their standing*. If one of these petitioners no longer owned their immediately adjacent property, the ownership of which

is the basis upon which their standing is grounded, they could lose standing.[10] This ruling would not alter the established principle that standing may be challenged at any time.[11]

C. *This principle would not require the court to find that the developer had unclean hands or had engaged in unlawful or unethical conduct* to reach a result that its actions failed to divest the petitioner of standing. The principle is not about misconduct but about preservation of established standing rather than flipping the standard on its head to let the respondent create a buffer adjacent to the petitioners.

D. *This principle would also recognize that*, since the standing criteria of §35305(1) is based on three things (ownership, real property proximity and proposed uses), it is sensitive not only to what it means to be an owner of real property that establishes standing and the retention of that property, but also to the fact that *the uses "proposed" at the beginning are the focus of the case*. The contested case challenging sand dunes development permits focuses on the plans or "proposed uses" that MDEQ reviews when considering and granting the permits.[12] The fact that the developer may later take steps with regard to any or all of the property not at issue in the permits, *i.e.*, not changing the proposed uses, would not affect petitioners' standing.

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[10] MDEQ inaccurately says that petitioners argue standing cannot be lost or challenged later in a case (and in proposed Question 1 they inaccurately say the circuit court so ruled); Petitioners have never argued there is or should be a complete bar on considering standing as a case proceeds, but rather have focused on the point that these Petitioners did not change the factual basis for their standing – they did not sell, did not change their focus on the permitted actions, those permitted actions did not change; the only change was an unrelated sale of property by the respondent. We agree a petitioner could give up its standing if he or she sold the property whose ownership is the basis of their standing, for example. MDEQ's overstating Petitioners' position and the Circuit Court's decision on this issue indicates that the agency realizes that petitioners-appellants' true position is reasonable and they must set up an extreme position in order to attack it.

[11] In this case, the ALJ ruled that Petitioners Underwood, Zolper, Hoyt and Reininga had standing based upon their ownership of certain property (property located immediately adjacent to the proposed use, which "use" was the development of approximately 20 housing sites, paving of roads, construction of utilities and more across the 130-acre property, and none of which was next to the petitioners but rather located throughout the development property). The ALJ properly rejected the ability of a developer to escape review by leaving an undeveloped "buffer zone" between its alterations of the dunes and the immediately adjacent neighbors, Exhibit C to Application at 4, and that decision has not been appealed. Most importantly, these neighboring petitioners did not sell their property or move away. As a result, their status in relation to the proposed use did not change. But this point is not the same as arguing that petitioners could not give up their standing if they had sold the property that established their standing.

[12] It makes no more sense to dismiss a petitioner challenging 21 housing lots based on the respondent's sale of one parcel closer to petitioner (that contains no housing unit) than it would to dismiss a challenge to 21 housing lots because the developer decided to create only 20. Neither change by the respondent alters or undermines the petitioner's original focus on the total development or the overall subject matter of the contested case.

II. Hoyt and Reininga are Owners of their Home in the Common Meaning of "Owner"

Two people who own their home in the common sense of the word even as their association holds title to the property have standing under the statutory standard.[13] Appellants' application for leave addresses the parts of the *Slatterly* decision that MDEQ continues to ignore. Application at 34-38 (the second part of the decision discusses the association bylaws to supplement the initial statements of the Court that consider only the statute, upon which MDEQ relies). MDEQ's taking the language cited, DEQ Brief at 26-27, out of context in *Slatterly* is like the agency's taking language from *Preserve the Dunes* out of context in the related appeal on MEPA. See Supreme Court case 159033.[14] In both cases, they present an argument that is supported by language a court actually used that they have excised and now offer for a conclusion that is contrary to the ultimate holding and overall analysis of each decision.[15]

MDEQ's discussion of two dictionary meanings of "owner" also supports applicants. First, MDEQ cites to Black's Law Dictionary for the definition of "own" as "*to have or possess as property*; to have legal title to." DEQ Brief at 26. Focusing on the second definition and emphasizing that the association holds legal title, MDEQ entirely ignores the first part of the

[13] Contrary to MDEQ's argument at 26, Hoyt and Reininga did not base their motion to intervene on association membership. *See, e.g.*, intervenors' arguments at AR 1059-1062.

[14] In that related appeal, MDEQ argues that this Court's rejection of the misuse of MEPA to challenge a non-environmental status decision about applicant eligibility should be extended to reject all judicial review of any MDEQ permit decision using MEPA. MDEQ uses language actually used by the Court but takes it out of context and ignores the fact that that decision in *Preserve the Dunes* resulted in a remand to the Court of Appeals to review the trial court's MEPA findings. *See generally* Applicants' papers in Supreme Court case 159033. Similarly, here, MDEQ asks this Court to ignore the conclusion of the *Slatterly* decision that the shareholder had such an exclusive right to the use of his property that he could bar a neighbor from using a part of it for parking. Also, MDEQ's fn 3 misstates the facts; there were three consolidated cases in this contested case and only two were resolved by settlement.

[15] There is a significant public interest in having a state agency accurately apply this Court's decisions. MCR 7.305(B)(2). The alternative is lawlessness and a profusion of lawsuits.

definition. It is Hoyt and Reininga who "possess" the property. According to every provision in the bylaws, including those that reserve some powers to the association, *only* the shareholders Hoyt and Reininga have the right to possess the property at issue here. Application at 31ff. MDEQ goes on to quote another definition from Black's Law Dictionary of "owner" – "One who has the right to possess, use, and convey something; a proprietor." MDEQ Brief at 26. MDEQ then argues that Hoyt and Reininga cannot convey the property without association approval but ignores entirely that in fact it really is *only* Hoyt and Reininga who can convey the property. See Application at 34-36 and bylaws generally. Once again, MDEQ tries to argue that the powers of the association board to regulate shareholders' actions prevent Hoyt and Reininga from being considered owners. In truth, however, all of these provisions simply reinforce the fact that, subject to limited regulation that does not take away their unique interests in their home, Hoyt and Reininga are the only persons with the right to possess and use it. They are "owners" in any normal, dictionary sense of the word and "holder of legal title" is not the standard used for standing in §35305(1).[16]

III. MEPA Intervention

MEPA authorizes intervention into a pending action, MCL 324.1705, which this was. The ALJ erred in rejecting MEPA intervention by saying MEPA did not apply and this Court, in its discretion, should enforce the legislature's enactment in MEPA and grant intervention under MEPA to all Lakeshore Group members. MDEQ's claim that Petitioners never appealed this issue to the Circuit Court is wrong. Rejecting MEPA intervention would invalidate a legislative act,

[16] A grant order could direct the parties to address equitable title in that equitable title further supports ownership here. It would also show that the concept of equitable title is not limited as MDEQ argues: Banking institutions holding equitable title to property used as collateral for loans were ruled liable owners under Superfund; lender liability using this concept only changed when state and federal regulatory changes created exemptions for lenders.

MCR 7.305(B)(1), and would be clearly erroneous and cause material injustice to these petitioners. MCR 7.305(B)(5)(a).[17]

IV. Common Law Standing

The common law applies in contested case proceedings just as statutory law applies; the rulings of this Court are not to be ignored by the ALJ simply because his tribunal has limited powers.[18] Michigan common law of standing recognizes that parties not granted standing by statute may have common law standing. *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 792 NW2d 686 (2010). In this case, the legislature did not make the list of parties granted standing in §35305(1) exclusive. The question of common law standing should be considered and §35305(1) interpreted in the context of the statute as a whole. Part 353 emphasizes the important role of local citizens and a change in one part of the dunes will affect other parts of the same area of dunes – in which all individual petitioners own property. As a result, all of these local petitioners have standing based on the statutory scheme of Part 353 and their substantial interests which are different from those of the general public. *See generally* Application at 42-50.

[17] While the matter of recognizing the power to intervene using MEPA may not have the general significance of correcting the improper divesting of a petitioner's standing by an irrelevant act of the respondent, discussed above, it nonetheless is a significant issue for this court because MEPA was enacted to promote the development of state law of the environment. *See* briefs in Supreme Court Case 159033. Denying intervention despite the clear statutory authorization nullifies this statutory provision and contravenes the constitutional emphasis on protection of our natural resources. Art. IV, §52. MDEQ opposes this intervention on the erroneous factual basis that there was no pending proceeding for the parties to intervene into. That is simply false and intervention using MEPA should be granted by this Court in its *de novo* exercise of judicial discretion.

[18] Once again, while perhaps not the most important point of this appeal – and potentially more of a lightning rod for disagreement given the various decisions issued on standing in recent years – the arguments by MDEQ and Dune Ridge that the limited powers of the administrative hearings office somehow justifies an ALJ's ignoring the law because it is common law and not statutory law merits attention and correction.

Conclusion

Only one person must have standing in order for the contested case hearing to be held, a hearing which was never conducted in this case despite the tremendous scope of changes MDEQ permitted the developer to undertake in these protected sand dunes. Four people clearly satisfied – and the ALJ found that they satisfied – the statutory standard for standing in §35305(1) and they did not alter their status or give up their ownership interest or their concerns with or relationship to the "proposed uses" at issue in the permits. At a minimum, their standing should be reinstated and the case remanded for a contested case hearing. In addition, all individual Lakeshore members have a substantial interest that is different from that of the general public; and all had and have a right to intervene under MEPA into the then-pending contested case proceeding. This Court should exercise its discretion in this *de novo* review to grant at least one of them standing to be heard and remand the case for a contested case hearing for one or all of these reasons.

Respectfully Submitted,

Date: June 20, 2019

/s/ Dustin P. Ordway

Dustin P. Ordway (P33213)
ORDWAY LAW FIRM, PLLC
3055 Shore Wood Drive
Traverse City, MI 49686
Tel: (616) 450-2177
Fax: (877) 317-6212
dpordway@ordwaylawfirm.com
Attorney for Pet'rs-Appellants Lakeshore Group and members Lakeshore Christian Camping, Charles Zolper, Jane Underwood, Lucie Hoyt, William Reininga, Ken Altman, Dawn Schumann and Marjorie Schuham

Index of Exhibits filed with Application

Exhibit	Document
A	Court of Appeals' unpublished decision dated March 21, 2019
B	Circuit Court decision dated September 28, 2017
C	ALJ Opinion and Order dated October 28, 2015
D	ALJ Opinion and Order dated January 26, 2016
E	ALJ Opinion and Order dated July 7, 2016
F	ALJ Opinion and Order dated February 13, 2017
G	The Michigan Environmental Protection Act, MEPA, MCL 324.1701 *et seq.*
H	The Sand Dunes Protection and Management Act, Part 353, MCL 324.35301 *et seq.*
I	"A List of Common Activities Needing a Permit," from MDEQ's web site
J	ALJ Opinion and Order dated December 16, 2014
K	Two maps from AR 0137 and 0902
L	Map of Dune Ridge development locations from AR 0061
M	Unpublished decision in *Cramer v State*, 2005 Mich App LEXIS 2512 (2005)

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Dustin P. Ordway (P33213)
Ordway Law Firm, PLLC
Attorney for Plaintiffs-Appellants
3055 Shore Wood Drive
Traverse City, MI 49686
Tel: (616) 450-2177
Fax: (877) 317-6212
dpordway@ordwaylawfirm.com

Daniel P. Bock (P71246)
Office of the Attorney General
Attorneys for Resp't-Appellee MDEQ
525 W. Ottawa Street
P. O. Box 30755
Lansing, MI 48909
Tel: 517-373-7540
bockd@michigan.gov

Kyle Konwinski (P76257)
Varnum Law
Attorneys for Resp't-Appellee Dune Ridge
PO Box 352
Grand Rapids, MI 49501-0352
Tel: 616-336-6000
kpkonwinski@varnumlaw.com

PLAINTIFFS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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PROOF OF SERVICE

On this date I have caused to be served a copy of this Reply to MDEQ and Proof of Service on counsel noted above using the Truefiling system.

Respectfully Submitted,

Date: June 20, 2019

/s/ Dustin P. Ordway

Dustin P. Ordway (P33213)
ORDWAY LAW FIRM, PLLC
3055 Shore Wood Drive
Traverse City, MI 49686
Tel: (616) 450-2177
Fax: (877) 317-6212
dpordway@ordwaylawfirm.com
Attorney for Petitioners-Appellants Lakeshore Group and its members, Lakeshore Christian Camping, Charles Zolper, Jane Underwood, Lucie Hoyt, William Reininga, Ken Altman, Dawn Schumann and Marjorie Schuham