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,
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

APPELLANTS' REPLY TO DEPARTMENT'S BRIEF

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Introduction

In its response brief, the Department[1] continues its effort to evade all review of its permitting decisions notwithstanding its acknowledgement that Ms. Underwood and Mr. Zolper satisfied the dual criteria of Section 35305(1) (ownership and being aggrieved) necessary to have standing. Preventing that problematic outcome and thus restoring integrity to review of Department conduct is the key reason to reverse the decision below and remand the case for a formal contested case hearing.

In a strained argument that attempts to transform the limited powers of an agency to act into a limitation on the rights of someone with standing to be heard, the Department argues that standing in a Part 353 contested case is "purely statutory" and the agency is "a creature of statute." Dept Brief at 9. Neither point supports the false conclusion the Department asks the Court to draw. Then, instead of recognizing the logical conclusion that the established standing in this case was unaffected, the Department asks the Court to ignore some of the plain language of the Section 35305(1) standing provision to achieve the absurd and unfair result of the regulated party divesting these petitioners of standing by taking action unrelated to the case. The Department also rejects the fact that Michigan's historical law of standing as set forth by this Court and adopted by the Court of Appeals supports the proper conclusion based on statutory interpretation that parties such as Ms. Underwood and Mr. Zolper have standing because their substantial interests as owners in the same protected dunes are detrimentally affected in a manner different from the interests of the

[1] Previously titled the Michigan Department of Environmental Quality or MDEQ (and before that sometimes known as MDNR) and now the Department of the Environment, Great Lakes, and Energy or EGLE, this state agency is referred to in Part 353 simply as the Department. See MCL 324.35301(d) and, for example, Section 35304(1) ("A person shall not initiate a use within a critical dune area unless the person obtains a permit from . . . the department"). Appellants will refer to the Department herein in lieu of using the various acronyms for the agency.

public at large. Finally, the Department's brief seeks to minimize the manifest injustice of the dismissal of the contested case review of the sand dunes development permits for this extensive, gated community project on a 130-acre parcel of legislatively-protected sand dunes in Saugatuck/Douglas, Michigan.

1. Department Seeks to Avoid Third-Party Review

Laypersons not focused on the application of the law as set forth by the state legislature to protect a key natural resource[2] of Michigan might be sympathetic to the Department's present desire to avoid having an independent third party evaluate whether or not its conduct complied with law. In this case, however, Michigan's constitution and the APA as well as Part 353 all provide a right to such review and this Court should enforce it. Ms. Underwood and Mr. Zolper are acknowledged (and were determined by all three lower tribunals) to satisfy the standing criteria of Section 35305(1) for a formal contested case hearing. The unstated but true goal of the Department's arguments supporting the absurd divestiture of the standing of Ms. Underwood and Mr. Zolper in this appeal is to achieve the result of avoiding all review of its permitting decisions.

Problems with the permit application and review process and, specifically, with the conduct of both the Department and Dune Ridge, comprise the subject matter of the contested case hearing that never occurred. The Department has consistently sought to avoid holding a formal hearing on these significant permits despite the mandate of Section 35303(1); and, in a related case, the

[2] It must be kept in mind that the legislature identified certain limited areas of majestic sand dunes as protected areas subject to Department regulation on the public's behalf long before popular national television designated some of Michigan's sand dunes the most beautiful place in America – and also long before Dune Ridge purchased the 130-acre critical dunes property to develop it. Dune Ridge was on notice that Part 353 required the Department to balance its private development rights by thorough consideration of the "most comprehensive . . . scientific" information to protect the public's lawful interest in the dunes. MCL 324.35302(b)(iii). This is *not* a case in which a property's use its property was restricted by later-enacted natural resource protections.

Department argues that there is no right to judicial review of its conduct in managing the permit review process and making decisions that affect the environment.[3]

A few examples from the legislature's standards in Part 353 that govern the processing of applications to significantly alter protected sand dunes may help illustrate some of the Department's conduct that will escape review if this case is not remanded for a formal contested case hearing:

1. The Department has a duty to follow and enforce the requirements of Part 353. See, for example, Section 35304 ("A person shall not initiate a use within a critical dune area unless the person obtains a permit from . . . the department . . ."). "Use" is defined at §35301(k).
2. The Dune Ridge development as a whole is a "special use project." Section 35305(j) defines a project such as this based on both its "commercial purpose" and the fact that it is a "multi-family use of more than 3 acres" as a "special use project." Instead of considering the whole, however, the Department reviewed portions of the project piecemeal.
3. An environmental impact statement is required for a special use project, *see, e.g.,* Sections 35313(2) and 35317(3), but was not prepared for the project.

[3] See Supreme Court case no. 159033. That related case, now held in abeyance, deals with the Department's argument that there can never be any judicial review of Department permitting actions under the Michigan Environmental Protection Act ("MEPA"). MCL 324.1701 *et seq*. The Department's argument takes words out of context from an earlier decision focused on Department conduct not affecting the environment in order to avoid judicial review even when its conduct does affect the environment. In connection with the standing of fellow petitioners Hoyt and Reininga (before this Court on this application and addressed briefly in Appellants' application but not the subject of this briefing), the Department used the same technique to take words out of context to support an argument inconsistent with the Court's decision. See Appellants' Application. Now, in its Brief presently before the Court concerning the standing of Ms. Underwood and Mr. Zolper, the Department asks this Court to end all administrative and judicial review of its conduct in this case.

4. Decisions by the Department under Part 353 are to be made "through the use of the *most comprehensive, accurate, and reliable information and scientific data* available" (emphasis supplied). Section 35302(b)(iii). See also Section 35304(2)(c) ("decision is the product of reliable scientific principles and methods"); and Section 35304(2) ("decision . . . shall be based upon evidence that would meet the standards in section 75 of the administrative procedures act of 1969").
5. Section 35304(1)(g) requires the Department to determine whether or not there will be "significant and unreasonable depletion or degradation" of certain characteristics of the protected sand dunes, identified in the statute as their "diversity," "quality," and "functions." *See also*, Section 35302(b)(i) (Part 353 is "intended to . . . [e]nsure and enhance the diversity, quality, functions, and values of the critical dunes . . .").
6. Section 35304(1)(a) requires the permit applicant to provide the "information necessary to conform to the requirements of this part."
7. Section 35313(1)(b) requires all permits to "include in writing" that "a proposed sewage treatment or disposal system on the site *has been approved* by the county health department" (emphasis supplied). No such approval had been issued, yet the Department proceeded with its review and granted the permits, and now characterizes that later multiple-parcel change dealing with sewage treatment as a single permit, the ninth. Dept Brief at 2.

The process the Department followed and its conduct that led to the granting of permits for a 20-parcel gated community merit review in a formal contested case hearing. The Department seeks to avoid all such review. This Court should grant peremptory relief, uphold Ms. Underwood and Mr. Zolper's standing, and remand the case for a formal contested case hearing.

2. The Department Agrees on Key Points

Appellants will not repeat at length the points made in their brief but note the Department's agreement with certain key findings of the ALJ. This agreement is significant at this time because it underscores the problem with Dune Ridge's arguments that Ms. Underwood and Mr. Zolper never had standing. See Appellants' Reply to Dune Ridge. These key points include the facts found by the ALJ that Ms. Underwood and Mr. Zolper owned property immediately adjacent to the proposed use and were aggrieved, supporting the legal conclusion that they had standing, which both the Circuit Court and Court of Appeals recognized. The Department also has acknowledged repeatedly that the result of dismissal of the contested case is unfair, a conclusion both lower courts also acknowledged.[4] The Department's positions throughout this case on these points supports Appellants' arguments against Dune Ridge's effort to derail this case without any formal hearing.

3. A "Purely Statutory" Agency Need Not and Should Not Ignore the Law

The Department argues that a Part 353 contested case proceeding is "purely statutory," Dept Brief at 7, and goes on, Dept Brief at 9, to argue that, as an agency, it is a "creature of statute." The Department claims that these points lead inexorably to the conclusion that the ALJ was required to dismiss the contested case. *Id*. The error the Department argument makes is inserting an unnecessary conclusion that there can be no standing and no power to proceed. But the decision the Department cites, *Detroit Public Schools v Conn*, 308 Mich App 234, 863 NW2d 373 (2014), does not support that conclusion. To the contrary, the decision says that "the power and authority of an agency must be conferred by clear and unmistakable statutory language." *Detroit Public*

[4] The ALJ sought to avoid acknowledging that unfairness by adopting the fiction promoted by Dune Ridge that Ms. Underwood and Mr. Zolper's true concerns were not the Dune Ridge development permits but only what might happen right next to their properties. See Appellants' Brief and Reply to Dune Ridge.

Schools, at 243. Part 353 at section 35305(1) unmistakably authorizes and even requires the Department to conduct a formal hearing on sand dunes development permits where an owner of property immediately adjacent to the proposed use who is aggrieved requests one. As the Department acknowledges, Ms. Underwood and Mr. Zolper satisfied that threshold here. The argument that the Department need no longer conduct the formal hearing simply because the developer sold land having no relationship to the subject matter of the contested case makes no sense and is not required by law, much less by limits on the authority of the ALJ or the Department. Put simply, the fact that the Department cannot act outside its authority (say, to decide a non-environmental issue beyond the scope of its powers) does not translate into, nor does it support the conclusion that, a party who has standing must lose that standing to be heard. The "purely statutory" argument diverts from this discussion and does not make the nonsensical Dune Ridge "unrelated sale takes away established standing" argument more sensible, fair or legally sound.

4. Department Ignores Michigan's Historical Law of Standing, which Supports the Standing of Ms. Underwood and Mr. Zolper

In focusing on "purely statutory" standing, the Department seeks to ignore and avoid the application of this Court's prior decisions, together with adoption by the Court of Appeals, of Michigan's historical law of standing. Appellants' Brief at 26-32. After noting that, in a different setting, an equitable solution to promote fairness could be applied to maintain the standing of Ms. Underwood and Mr. Zolper, Dept Brief at 10-11, the Department simply ignores that fact that the historical law of standing supports Appellants' interpretation of Section 35305(1) standing here.[5]

[5] While Appellants submit that the Department's arguments about the ALJ not having equitable powers is better rejected as irrelevant, we express some confusion over the effects of section 5 of article VI of the constitution of 1963 (which followed some cases cited by the Department but preceded others). It states, in part, "The distinctions between law and equity proceedings shall, as far as practicable, be abolished." Appellants do not understand that their established standing must

Michigan's historical standing doctrine, set forth in numerous decisions over more than a century, is the law and, as such, it supports Appellants' retention of standing based upon their satisfaction of the Section 35305(1) statutory criteria.

5. Errors in Department Brief Denigrate the Importance of this Case

A number of errors and characterizations in the Department's Brief direct attention away from the facts and fail to assist in addressing the key issue the Court has asked the parties to address, namely the narrow question whether the actions of Dune Ridge properly divest Ms. Underwood and Mr. Zolper of standing or fail to produce that result. For example:

a. The Department Brief at 1 says "the proposed use was to be constructed" on the slivers of land sold by Dune Ridge.[6] That error goes to the heart of why the rejection of standing is so ridiculous; none of the permitted activities at issue in the contested case proceedings were located on the parcels sold.[7]

b. The Department Brief at 4, final paragraph, refers to contested case *petitions* as "contested case hearings." The core problem in this case is that, although the constitution and

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be protected by equitable principles or that the administrative tribunal is barred by its limited powers from following applicable law.

[6] If the land that was conveyed had been the location of the permitted work, then the contested case would have continued, but the buyer would become the owner participating in the contested case regarding the permits. That would not result in rejecting the petition and dismissing the contested case. Here, the property sold had nothing to do with the permitted activities that were to be reviewed in the formal hearing. For that reason, also, the dismissal based on sales of irrelevant land makes no sense. The argument requires twisting the statute to its converse and leaping to conclusions that are not only unfair but ignore the plain language of the statute and the purpose of Part 353. See Appellants' Brief.

[7] Another error that seems to have no legal significance but misleads the Court as to the facts is the Department's statement, Dept Brief at 3, that none of the current Lakeshore Appellants were originally petitioners in the consolidated contested case into which Ms. Underwood and Mr. Zolper intervened. But Lakeshore Camping, a member of Lakeshore Group, was one of the three original petitioners along with Medler and Shorewood Association, and the consolidated proceeding of all three was still ongoing when the intervention was filed.

the APA and Part 353 all call for a formal administrative hearing to be conducted leading to a final permit decision, *no such hearing ever occurred*. The misuse of the word "hearing" appears to be intentionally misleading, creating the false impression of hearings had rather than a hearing denied.

c. The Department Brief at 5 & 6 describes Mr. Zolper as no longer owning property next to the Dune Ridge property. Apart from the fact that Mr. Zolper did still own his property, the Department inserts ownership next to the Dune Ridge *property* in place of the actual standard, ownership adjacent to *the proposed use*. The sale of uninvolved property should have no bearing on established standing where Mr. Zolper still owned property in the same relationship to the permitted uses.

d. The Department repeats an argument it has made before, that Appellants claim their standing can never be reviewed except at the start of a proceeding, by claiming that Appellants state the hearing must be conducted "regardless of any change in circumstances." Dept Brief at 11 (final two lines). But that is not Appellants' position and never has been. And the point Appellants make now, which the Department challenges, is that the plain language of Section 35305(1) that the formal hearing "shall be conducted by the Department" creates a duty to proceed with the hearing requested through the contested case petition and supports the standing of Ms. Underwood and Mr. Zolper. The Department correctly notes the sentence in the statute requires it to follow APA procedures, but attempts to avoid the mandatory duty inherent in the word "shall." It is not just a procedural guideline. The distraction the Department offers, falsely asserting that a petitioners argue they could give up their property ownership and aggrieved status and still claim a right to proceed, is simply irrelevant to this proceeding as it is a hypothetical situation contrary to the facts of the case.

e. What the Department describes, Dept Brief at 2-3, as the "tenth permit" was actually approval for a dozen homes on both waterfront and lake view lots high in the dunes, together with additional roads and paths. The Department's characterization of such a tremendous amount of change to large areas of the protected dunes as one permit appears intended to diminish, if not to mislead the Court about, the subject matter of the case.

f. The Department Brief at 12 cites MAC R 792.10129(1)(c) as authorizing a final decision dismissing the case, yet the Department ignores the point contained in Rule 129 that where, as here, the ALJ "does not have final decision authority" (as the contested case process requires the ALJ to offer a recommended decision to the director of the Department, who makes the final decision), the ALJ "may issue a proposal for decision" on standing. R 792.10129(1)(c). Appellants do not argue the case must be remanded for this reason, as well, because the fundamental error of rejecting the established standing of Ms. Underwood and Mr. Zolper requires a remand for a full hearing.

Finally, the Department misleadingly claims at the end of its brief, Dept Brief at 13, that Appellants devote "substantial portions" of their brief to argue irrelevant points. Actually, Appellants make very brief notes in passing on the three points the Department complains about: (1) the contents of the Department's "administrative record"[8]; (2) Ms. Underwood's property's adjacency because the property corners meet (a point made before); and (3) the relationship of this appeal with the other pending application for leave. Appellants do not devote substantial portions

[8] The Department excuses the incompleteness of the administrative record on the ground that it "consists of the materials that were filed with the ALJ." That explanation would appear to mirror the definition of a "court record" at MCR 1.109(A) ("recorded information of any kind that has been created by the court or filed with the court"). However, where the ALJ is acting on behalf of the Department to review the Part 353 permitting process, all application and public comment materials as well as recorded information showing the Department's correspondence and deliberations on the permits would be pertinent parts of the Department's record.

of their brief to these points and that characterization by the Department appears to suggest Appellants' brief is not focused on the issue the Court has directed the parties to address.

Conclusion

Appellants do not argue that standing cannot be reviewed or that it need not be maintained, but only that the developer's irrelevant actions (property sales of unaffected property) do not alter the correct conclusion that Ms. Underwood and Mr. Zolper have standing to be heard in a formal contested case hearing. Where, as here, a Part 353 contested case petitioner satisfies the statutory basis for standing and does not alter his or her circumstances, actions by the regulated party that are irrelevant to the underlying subject matter before the tribunal do not divest the petitioner of standing and the contested case hearing should be conducted.

The Court should issue a peremptory order reversing the rejection of Ms. Underwood and Mr. Zolper's standing, overturn the order of dismissal and remand the matter for a formal contested case hearing.

Respectfully submitted,

Date: February 10, 2020

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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 Brief and Proof of Service on counsel noted above using the Truefiling system.

Respectfully Submitted,

Date: February 10, 2020

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