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 DUNE RIDGE'S BRIEF

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

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

Introduction

The Court's November 27, 2019, Order directs the parties to address a specific question and to avoid repeating arguments made before. Appellants respectfully submit that Dune Ridge fails on both counts. Respondent Dune Ridge's brief rejects the question posed by the Court and posits a different one that ignores the history of this case and attempts to transform it into a different one. It then proceeds to argue that Ms. Underwood and Mr. Zolper never had standing. That last argument flies in the face of the rulings of the ALJ (and the Department's[1] position), as well as the decisions of the Circuit Court and the Court of Appeals, all of which stated that these petitioners satisfied the statutory standing requirements when they intervened into the pending contested case. The Court directed the parties to analyze the effects of Dune Ridge's actions on that status. By rejecting that starting point, Dune Ridge demonstrates it is unable to respond to the Court's question. The Court should strike the Dune Ridge brief as non-responsive to the question it was invited to brief and it should be deemed to have waived oral argument. MCR 7.305(F&G).

Dune Ridge repeats arguments it has made before that falsely characterize the positions of Ms. Underwood and Mr. Zolper as simplistic "NIMBY" arguments. This not only denigrates their motivations; it also appears intended to avoid addressing the true concern that stringent legislated standards for the review of Part 353 sand dunes permits were violated in this case. That is likely why Dune Ridge has worked so hard and for so long to avoid any review of its applications for permits (and the processing of them by the Department). This case is about Appellants' intention to obtain judicial review of those statutory violations – not a desire to avoid seeing a new mansion next door. Dune Ridge's attempts at misdirection are transparent and not helpful to the Court.

[1] Appellants use "Department" for Respondent Michigan Department of Environment, Great Lakes and Energy, formerly the Michigan Department of Environmental Quality.

Dune Ridge repeats its prior arguments that cases in which a plaintiff never had or gave up his or her standing somehow support the error made here of allowing irrelevant actions by it to divest Appellants of their established standing. These arguments, the unrealistic hypothetical of a 5-mile long lakeshore property and other points Dune Ridge makes do not contribute to a helpful analysis of this case. The Court can address the narrow issue before it by ruling that Dune Ridge's sales of land unrelated to the permitted activities do not divest petitioners of their standing. The case should be remanded for a formal contested case hearing.

1. Dune Ridge Ignores This Court's Order

Dune Ridge decided to ignore the question the Court asked the parties to address, and substituted its own question instead. While the Court's question starts with the prior decisions finding Petitioners Underwood and Zolper had statutory standing and asks whether Petitioners retain it despite the developer's actions, the Dune Ridge question ignores the case history and assumes Ms. Underwood and Mr. Zolper did not satisfy the criteria of property ownership and being aggrieved needed to qualify for standing under the statute. Dune Ridge's tactics convey that it has no response to Appellants' reasonable interpretation of the plain language of standing pursuant to Section 35305(1). Equally important, Dune Ridge's rejection of the question posed by the Court results in the complete failure to offer any helpful insights to the Court on the question before it.

Appellants note the parallel between this action by Dune Ridge and the developer's argument to the ALJ to dismiss the contested case without a hearing based on its sale of parcels unrelated to the subject matter of the contested case proceeding. That nonsensical position caused the ALJ to erroneously backtrack on his prior, sensible ruling that the developer could not avoid all administrative review simply by leaving an undeveloped buffer zone around the edges of the

130-acre property. It was that extreme effort to avoid all review that the Circuit Court characterized as "brazen"[2] and Dune Ridge once again seeks favorable treatment that flies in the face of the purpose of Part 353 by using a similar tactic of evading the Court's question.

Instead of answering the Court's question, Dune Ridge repeats the same statutory arguments it made in the Court of Appeals that offer the Court no insight into its position on the critical standing question. The Court asks whether petitioners with standing still have it notwithstanding Dune Ridge's actions; Dune Ridge argues petitioners never had standing and cases where a party never had standing somehow should help the Court decide this case.

The Dune Ridge brief is unresponsive to the question the Court ordered the parties to address. The Court should strike the Dune Ridge brief as non-responsive to the question the parties were invited to brief and Dune Ridge should be deemed to have waived oral argument by refusing to answer the Court's question. In the context of an application for leave to appeal, the Court can strike a nonconforming pleading. MCR 7.305(F). Dune Ridge's action is far worse than merely filing papers that fail to conform to technical requirements as it represents Dune Ridge's decision to ignore and defy this Court's order. The Court controls oral argument in these circumstances. *See, e.g.,* MCR 7.305(G) ("There is no oral argument on an application for leave to appeal unless

[2] See Circuit Court Opinion at page 6, Appellants' Appendix Vol 21 at 1652A ("Dune Ridge's attempts to eliminate Appellants' standing are brazen, bad-faith efforts to circumvent the administrative review process"). Appellants are compelled to repeat the point made before that the behavior of the developer that the Circuit Court criticized (and which Appellants oppose) was *not* the developer's sale of land. The land Dune Ridge sold did not involve the subject matter of the contested case as all Part 353 permits pertained to clearing and construction on other portions of the overall property. A sale for profit (like conserving an area to create a shield), especially of the less desirable (*e.g.*, no view; not reachable by car) or even undevelopable portions, is a common action intended to increase the developer's overall profit from the land. Appellants have never objected to the sales. The Circuit Court did not criticize them. The problem, rather, was the developer's attempts to use those irrelevant sales as a lever to end the contested case process without any hearing (and, thus, without any recommended decision on the permits by the ALJ or any final decision by the director of the Department).

ordered by the Court under subrule (H)(1)"). While the Court's November 27, 2019, Order directs the clerk to schedule oral argument, the focus of the briefs and oral argument is the question presented by the Court. Having ignored and rejected the Court's question, Dune Ridge should be deemed to have waived its oral argument.

It is well within the powers of the Court to enforce its orders. *In re Contempt of Calcutt*, 184 Mich. App. 749, 458 N.W.2d 919 (1990) ("Attorneys and parties to actions are obliged to obey this Court's lawful orders . . . . *Rose v Aaron*, 345 Mich 613, 615; 76 NW2d 829 [1956]; *Schumacher v Tidswell*, 138 Mich App 708, 722; 360 NW2d 915 [1984]. The Legislature vested this Court with the power to punish attorneys and parties to actions for contempt of this Court for disobedience of its orders. See MCL 600.1701 *et seq.*; . . ." [additional citations omitted]). An appropriate consequence of Dune Ridge's choosing to ignore and defy the Court's order is to strike its brief and deem its oral argument waived. In that way, the Court's time may be spent on matters that can be considered responsive to and helpful with the task of addressing the question before the Court.

2. Dune Ridge Repeats its Fictitious NIMBY Argument in an Effort to Avoid Review of its Noncompliance with Part 353

A second major deviation by Dune Ridge from compliance with the order of the Court is its decision to repeat its prior false arguments that the motivation of Ms. Underwood and Mr. Zolper is simply a "not-in-my-backyard" or "NIMBY" argument that they did not want development changes to the portion of the sand dunes immediately next to their property. That false argument – which Dune Ridge has made repeatedly before – was never the motivation guiding Ms. Underwood and Mr. Zolper for the obvious reason that the permitted activities that they challenged in the contested case were never on the parcels Dune Ridge sold. More fundamentally, however, the NIMBY mischaracterization appears to be offered intentionally to

obscure and avoid dealing with the heart of this case, which has always been to address concerns that both the developer and the Department violated Part 353 in the permit application and review process.[3] See one of many examples in the AR, a pre-hearing statement by Appellants identifying issues for the formal hearing, at Appellants' Appendix Vol 3 at 164A-174A. Appellants have cited to scientific authority in the Administrative Record that addresses the interconnectedness of conditions that affect flora and fauna within Lake Michigan sand dunes, and will not repeat that information here. But some attention to a few examples of stringent statutory requirements the legislature enacted in Part 353 to protect the small region of legislatively-protected sand dunes, requirements Dune Ridge honored in the breach or even made a mockery of by its wanton disregard for them, may be helpful.

Numerous provisions of Part 353 dictate that the applicant must satisfy certain criteria and the Department must determine whether the application satisfies legal standards the legislature incorporated to protect these natural resources that bring national and international attention to Michigan. Appellants have alleged that both Dune Ridge and the Department violated Part 353 standards enacted by the legislature to govern the balancing between private property rights and the interests of the public[4] in the small area of legislatively-protected sand dunes:

a. Section 35305(j) defines a project such as this (on two separate grounds, its "commercial purpose" and the fact that it is a "multi-family use of more than 3 acres") as a "special

[3] For example, the high elevation/high slope property Dune Ridge sold for $1 million to the Oval Beach Preservation Society had never been Ms. Underwood's concern as everyone knew it was undevelopable and best used for walking paths, if it could be used at all. Her concern was the permit application process Dune Ridge pursued to obtain Department approval for a gated community of over twenty homes across many acres of the 130-acre development property as a whole, together with the cumulative effects of those permitted actions across the region of protected dunes in her area of Saugatuck/Douglas.

[4] Dune Ridge cites to the balancing purpose of Part 353, DR Brief at 13, fn5, but studiously avoids specific provisions of Part 353 that set standards to achieve that purpose.

use project." The project as a whole should have been reviewed as a special use project for its cumulative effects. For example, Sections 35313(2) and 35317(3) provide for preparation of an environmental assessment or environmental impact statement for a special use project – not required for other, smaller projects. Sections 35319 and 35320 delineate minimum contents for such studies. Instead, Dune Ridge split up its one overall "special use project" into multiple separate permit applications and the Department reviewed them piecemeal.[5]

b. 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). Yet no such approval had yet been made as to how to manage sewage treatment when the first set of eight permits were offered by the applicant Dune Ridge and approved by the Department.[6] Later, when the developer made a decision and altered the existing building parcel permits (in the second round of applications), the Department approved it and now characterizes that multiple-parcel change as a single ("ninth") permit. See Reply to Dept Brief.

c. Section 35302(b) provides that the method by which the Department is to accomplish the balancing of private rights and the public interest in Part 353 decisions is to make decisions "through the use of the most comprehensive, accurate, and reliable information and scientific data available." *See also*, Section 35304(2)(c) ("decision is the product of reliable

[5] On the one occasion when the developer prepared an "EIS" for the first group or permits for waterfront building parcels and more, its focus was limited not just to the region involved (rather than the whole special use project) but even more narrowly to the footprints of planned impacts. See Appellants' App Vol 3 at 168A-169A. That approach was neither scientific nor comprehensive, yet the Department approved it.

[6] The choice between constructing septic systems or piping to connect to city sewer services would each have its own significant impacts upon the dunes. Yet, notwithstanding the plain dictate of Section 35313, the Department proceeded to approve the permits without the required decision in place.

scientific principles and methods")[7]; 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"). Appellants have alleged that Dune Ridge's information was not scientific or comprehensive and did not satisfy applicable evidentiary standards.

d. Section 35304(1)(g) directs 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 "intended to . . . [e]nsure and enhance the diversity, quality, functions, and values of the critical dunes . . ."). Instead, all that the Department has done with regard to these legislated requirements is check boxes on a form based on incomplete information provided by Dune Ridge.[8]

Appellants' allegations are not presently before this Court for review, but their existence – the fact that Ms. Underwood and Mr. Zolper made these allegations – is contained in the administrative record, such as in the pre-hearing statement cited above. They provide a clear insight into the true focus of the contested case proceeding and may help to illustrate why Dune Ridge has fought so hard and for so long to avoid all administrative and judicial review of its applications and the application review process for this substantial development in sand dunes that had been long-protected when Dune Ridge bought the land. The repeated mischaracterization of the concerns of Ms. Underwood and Mr. Zolper as a NIMBY concern focused on the portions of

[7] See also, Section 35317(2) ("decision [on a variance] is the product of reliable scientific principles and methods").

[8] Section 35304(1)(a) requires the permit applicant to "include information necessary to conform to the requirements of this part," Part 353). Appellants have alleged that Dune Ridge did not fulfill that statutory obligation. Nor did the Department require complete, "necessary" information in order to be able to reach the required scientifically-sound determinations.

land closest to them rather than on the significant degradation of the property as a whole is a red herring, the use of which the Circuit Court accurately characterized as a "brazen" attempt to evade all review.

3. Dune Ridge Mischaracterizes Its Sale of Land as the Equivalent of a Plaintiff Giving Up His or Her Standing

Dune Ridge ignores the need for this Court to address a gap that even the Department acknowledges exists in Michigan law of standing. While there are decisions that have ruled that plaintiffs gave up standing by their own failure to satisfy standing requirements, Michigan judicial decisions do not address the situation where, as here, the defendant seeks to undermine the plaintiff's standing even though plaintiffs satisfied the standing criteria and made no changes. Dune Ridge repeats citations to cases and adds new ones that rejected a plaintiff's standing; but the cases it cites are not pertinent. They all involve fact patterns in the former situation,[9] where the plaintiff never satisfied the criteria or gave up their status.[10] Dune Ridge's argument is logically irrelevant to the statutory criteria for standing under Section 35305(1). Michigan judicial decisions do not offer precedent on what to do in these circumstances.

Appellants submit that the correct solution for this gap in Michigan precedent on the possible effect of a defendant's actions on a plaintiff's standing is to rule that, where such actions do not alter the status (here property ownership) which gave the petitioners standing, then such

[9] Dune Ridge also cites cases for the argument that mootness substitutes for standing. DR Brief at 29-30. But unlike their fact patterns where a defendant's actions mooted the case, the sales by Dune Ridge had no effect on the case. They did not transfer permitted actions and the permits at issue were and still are not final. Application in this case at fn 12. Equally important, this case focuses on the parties' conduct in applying for and evaluating the permits. Those issues of statutory compliance are not moot.

[10] The parallel to those cases might have occurred if Ms. Underwood or Mr. Zolper had sold all of their property and moved away. That might arguably be cause to rule they no longer satisfied Section 35305(1) and no longer had the same substantial interest in these permits that was different from the interest of all citizens generally. But that has not happened.

irrelevant actions cannot take away their standing. That fair and reasonable result is reinforced by the fact that the plain language of the statute provides that these parties have a right to request a formal hearing and did so; and that the Department is mandated to provide a hearing that complies with the APA. This conclusion is further supported by Michigan's historical law of standing as articulated in decisions issued over more than a century, discussed in Appellants' Brief at 26-32.

4. **Miscellaneous Errors**

Other errors in Dune Ridge's brief include:

a. Dune Ridge wrongly states that the Circuit Court dismissed and closed the case. DR Brief at 10. The clerical error Dune Ridge notes was caught and corrected by the Circuit Court in an order dated April 25, 2019. See Appellants' Appendix Vol 24 at 1683A-1684A (and revised Appendix Table of Contents), filed with this Reply. Dune Ridge was served with the correction order, *id*. at page 2, and its ignoring it and reporting false information to this Court is akin to other misstatements it has made throughout this case.

b. Dune Ridge alleges erroneously that Ms. Underwood and Mr. Zolper did not intervene into the pending consolidated action, but it was still a consolidated three-petitioner contested case when they intervened. Appellants' Brief at 1.

c. Dune Ridge's 5 mile hypothetical is unrealistic and not relevant here. In this case, the whole 130-acre project is in a discrete area between Lake Michigan and the Kalamazoo River. Appellants' properties are in the same area. Dune Ridge is simply trying yet again to justify using the buffer defense that the ALJ rejected as unsound.

Conclusion

Statutory interpretation of the plain language of Section 35305(1) supports the conclusion that Ms. Underwood and Mr. Zolper were properly determined to have standing when they

intervened and that the actions of the developer unrelated to the subject matter of the contested case did not alter that conclusion. In addition, Michigan's long history of standing and recent decisions applying it support this conclusion based on the plain language of the statute. These petitioners' right to review of agency action under the constitution and the APA should have been upheld.

The ALJ erred in dismissing the contested case; and the Court of Appeals erred in agreeing standing was divested. The matter should be remanded for a full formal contested case hearing.

Respectfully submitted,

Date: February 10, 2020

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

Respectfully Submitted,

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