STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

In the matter of	**File No.** **06-11-0130-P**
Robert J. Buford _____/	**Part:** **353, Sand Dunes Protection and Management, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA)**
	Agency: **Department of Environmental Quality**
	Case Type: **Land and Water Management Division**

PROPOSAL FOR DECISION

Petitioner has a rather long history with the Department involving the subject property located in the village of Michiana, New Buffalo Township, Berrien County. The property lies approximately 1/3 of a mile north of the Indiana border on the shore of Lake Michigan. Petitioner initially rented the parcel, comprised of five subdivided lots, which, in total, comprise 160 feet of shoreline. The entire property lies within what is now a designated critical dune area.

In either 2000 or 2001 Petitioner exercised an option to buy. The existing home and ancillary structures were constructed sometime in the 1950s and, therefore, pre-existed the enactment of Part 353 or its predecessor which became effective July 5, 1989. Due to the fact the exiting home was old and in poor condition, Petitioner applied for a permit to rebuild, but was denied due to the fact the project applied for did not meet the requirements of Part 323, Shorelands Protection and Management, of the NREPA regulating designated high risk erosion areas. Through an application and, ultimately, a contested case filing, the high risk erosion designation was removed. Following the removal of the designation, Petitioner again applied for a permit to replace the home and

related amenities. The application included a smaller home than originally applied for, but included a pool, landscaping and other features. Again, he was advised the application could not be approved, but after withdrawing the request for the landscaping and pool portion of the project, a permit was granted for a home with the same footprint as the original, together with a breezeway and garage. Exhibit 6. By letter dated November 10, 2005, the Land and Water Management Division (LWMD) allow enclosure of the breezeway. The division also allowed a one-year extension to complete the activities allowed under the permit to May 13, 2007. The home, garage and breezeway have been completed.

On September 7, 2006, Petitioner applied for construction of an addition of a sun porch to the new home on the northeasterly side, together with a swimming pool and concrete deck, spa, pergola, fountain, circular concrete stairway, retaining walls and non-indigenous landscaping as depicted in a schematic attached to the application. Exhibit 22. The sun porch, swimming pool and related structures would be built in an area previously occupied by a basketball court, a concrete boat launch/storage area, and a terraced landscape area, all of which were landward of a three side seawall that encompassed all but the landward property line. It is uncontested these improvements have existed since at least 1967. Therefore, as of 1989 there was no area landward of the seawall that constituted a natural dune feature, even though the property is within what has subsequently been designated as a critical dune area.

It is Petitioner's position that, due to the fact the area on which he intends to conduct the activities was fully developed pre-regulation, the proposed activity is exempt pursuant to MCL 324.35306 (section 6) , which provides:

> The lawful use of land or a structure, as existing and lawful within a critical dune area at the time the department implements the model zoning plan for a local unit of government, may be continued although the use of that land or structure does not conform to the model zoning plan. The continuance, completion, restoration, reconstruction, extension, or substitution of existing non-conforming uses of land or a structure may continue upon reasonable

> terms that are consistent, to the extent possible, with the applicable zoning provisions of the local unit of government in which the use is located.

To the contrary, because Petitioner intends to replace the preexisting structures (basketball court and concrete boat launch) with a swimming pool and ancillary structures, the LWMD argues that the above exemption or "grandfather clause" does not apply in this instance. Specifically, it contends the exemption is limited to allowing continuance of exiting uses or structures or completion of those that are in progress at the time of enactment of regulation.

Therefore, the LWMD contends the proposed activities are regulated and cannot be permitted because they involve removal of vegetation and constitute contour changes more extensive than required for residential use of the property under MCL 324.35316(2)(f). In addition, the proposed sun porch addition, pool, spa, pergola, fountain, stairway and retaining walls all constitute structures that would be lakeward of the crest in violation of MCL 324.35316(2); the majority of the proposed stairs, fountain, pool decking, and portions of the swimming pool would be on slopes greater that 1:3 in violation of MCL 324.35316(1)(b), and; the proposed landscaping, other than the dune grass in the southwest corner is not indigenous dune vegetation as required in the 100 feet landward of the crest of the dune under MCL 324. 35316(2)(d).

The threshold question, therefore, is whether the proposed activities are exempt. If they are, the issues regarding whether they are noncompliant with Part 353 in the manner alleged by the LWMD need not be addressed.

In support of his opinion, Petitioner cites to the parallel language of the Michigan Zoning Enabling Act of 2006. MCL 125.3208(2), under which the legislature was granted authority to "provide in a zoning ordinance for the completion, resumption, restoration, reconstruction, extension, of substitution of nonconforming uses and structures[.]"

In addition, Petitioner contends that the rules of statutory construction support his position, citing MCL 8.3 which requires that:

> All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

Under *People v. Morey*, 461 Mich 325 (1999), where common words are not expressly defined, it is well established that such words must be given their plain and ordinary meaning and dictionary definitions may be used.

Based on these assertions, Petitioner cites to *Webster's Collegiate Dictionary* (1983) as defining "extension" as "an enlargement in scope or operation" or "a part constituting an addition…", and "substitute" as meaning "to put or use in the place of another". "Reasonable" is defined as "not extreme or excessive" or "moderate or fair". Therefore, he contends that his proposal fits squarely within the language of the exceptions under section 6 as merely continuing activity in an area that had been fully utilized previous to regulation.

Based on these terms, Petitioner contends the precise activity is irrelevant since the portion of the property has been impacted previous to regulation. That is, whatever critical dune features that may have existed were impacted pre-regulation and no longer exist. Therefore, for example, whether the use is a basketball court or a pool is irrelevant. The impact to what is now designated as a critical dune existed pre regulation and will not be changed.

As indicated, the LWMD contends that the "grandfather provisions" of section 6 are limited to allowing the continuance or completion of existing structures or uses that were in place or under construction at the time of the enactment of dune regulation. Therefore, while Petitioner could have maintained the pre-existing structures and uses, he may not alter those or change their nature.

The LWMD argues that section 6(1) must be read together with subsections (2) through (4) to fully understand the scope of non-conforming uses or structures that may be continued. Subsection (2) authorizes local units of government that have a zoning

ordinance approved by the Department to determine whether the use or structure may be continued. Subsection (3) pertains to exempting any use necessary for the continuance of an electric generating facility in existence at the time of regulation. Therefore, neither of these is applicable here.

That leaves subsections (1) and (4). The LWMD reads these subsections together to support its position that only existing uses or structures in existence or in the process of being completed, restored, reconstructed, extended or substituted on July 5, 1989, may be continued under subsection (1) and that only those that have been permitted may be completed under subsection (4). Therefore, the LWMD contends that since the proposed sun porch, pool, etc. were not in existence on July 5, 1989, they are not exempt and must pass scrutiny under Part 353.

I conclude, as a Matter of Law, that the narrow construction of section 6 espoused by the LWMD is contrary to the plain language of the provision and that the proposed structures so long as they are confined to the area previously used pre-regulation are exempt from regulation under Part 353 as a substitution of an existing non conforming use. The anticipated sun porch, pool, and ancillary structures fit the above definition as putting or using them in place of the pre-existing basketball concrete basketball court and boat storage/launch area.

I further, find, as a Matter of Fact the structures are reasonable as they will not impose any additional impact to the previously affected area. Dean Ray, a consultant, a natural resource consultant hired by Petitioner testified that in light of the historic uses of the property that the changes proposed constitute a reasonable continuation or expansion of pre-existing uses. T., pp. 59-60.

The testimony of the LWMD staff indicates that they do not consider the proposed improvements necessary to maintain a residential use of the property. Nancy Cuncannon considers the proposed uses secondary and Michelle DeLong deemed them unnecessary to a residential use. Martin Jannereth, chief of the lakes, streams and shoreland section,

LWMD testified he considered the proposals as ancillary. In addition, he did not consider them a continuation of pre-existing uses as they constitute a change in the nature of the use, i.e. a pool in place of a basketball court. There does not appear to be any language in Part 353 to justify this position of, essentially, giving discretion to staff to differentiate between so called primary and secondary uses in this instance. The issue of whether the proposals are greater than necessary or designed to minimize the impacts is irrelevant where there is a non-conforming use that has already fully impacted the area.

Lastly, the language of subsection (1) that such non-conforming uses "may" be continued should not be interpreted to sanction discretion on the part of the Department. While the language of subsection (2) grants that to local municipalities, there is no such provision pertaining to state regulation vested in the Department. Petitioner is also correct that "may" in this instance should be interpreted as mandatory as opposed to permissive in this statutory scheme. That is by providing that a non-conforming use or structure may be continued, a right to do so is granted. See *Browder v. International Fidelity Insurance Company,* 413 Mich 603, 612 (1982).

PROPOSAL FOR DECISION

It is proposed that a Final Decision and Order be entered determining that the activities proposed in Petitioner's most recent application are exempt from regulation under Part 353 as being a continuation or substitution of non-conforming uses or structures under MCL 324.35306(1).

EXCEPTIONS

The parties have until **September 15, 2008**, to file written Exceptions to the PFD. Those filings shall comport with § 81 of the Administrative Procedures Act. MCL 24.281(1). Director Steven E. Chester will issue the Final Determination and Order in this case after the September 15 filing date. These filings shall be sent to: Richard A. Patterson, State

Office of Administrative Hearings and Rules, Constitution Hall, South Tower Atrium, 525 West Allegan Street, P.O. Box 30473, Lansing, Michigan 48909-7973.

Dated: August 11, 2008

Richard A. Patterson
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 UPS/Next Day Air, facsimile, and/or by mailing same to them via first class mail and/or certified mail, return receipt requested, at their respective addresses as disclosed by the file on the 11th day of August, 2008.

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