STATE OF MICHIGAN

DEPARTMENT OF ENVIRONMENTAL QUALITY

SUBJECT: Part 301, Inland Lakes and Streams, and Part 353, Sand Dunes Protection and Management, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA)

Petition of Dune Harbor Estates, LLC
File No. 00-61-0039-P

FINAL DETERMINATION AND ORDER

This case was the subject of a contested case hearing resulting in the issuance of a Proposal for Decision (PFD) dated February 24, 2004. Subsequently, the Parties submitted written Closing Argument and Oral Argument was heard. After considering the evidentiary record, a deficiency was discovered in the evidence concerning feasible and prudent alternatives for the activity regulated under Part 353. The case was remanded to the Administrative Law Judge for the development of a record on that issue. [1] The remand hearing took place over the course of three days in May 2005. The Parties again submitted written Closing Argument, including proposed findings of facts and conclusions of law. Those filings have been reviewed and considered to the extent they accurately reflect the record and the law. Proposed findings and conclusions not addressed were either found to be unsupported by the record or unnecessary in preparing this Final Determination and Order (FDO). Having read the record created on remand, there is no need for a Supplemental PFD. MCL 24.281. This matter is now before the Director of the Department of Environmental Quality (DEQ) for a final agency decision. MCL 324.99903(7); 2003 MR 2, R 324.74.

I. Introduction

Nugent Sand has mined sand on its property along the Lake Michigan shore for over 90 years. In the course of its mining operations, groundwater was tapped resulting

[1] Subsequent to the close of the hearing, the Land and Water Management Division filed an "Evidentiary Objection Pursuant MRE 103 and Interlocutory Appeal." In essence, the filing seeks relief from a stipulation, initiated by the Land and Water Management Division's counsel, that routing the discharge to the Muskegon County Waste Water Treatment Plant is not a feasible and prudent alternative under Part 353. In an Order entered simultaneously with this FDO, that request was denied.

in the creation of North Lake and South Lake. As mining concluded at South Lake, Nugent Sand's owner created another company, Dune Harbor Estates, LLC (Dune Harbor), to develop the site for residential housing. Even though the lake level had fluctuated five to six feet each year because of the sand mining, Dune Harbor premised its housing plan on a certain predicted lake level. When the level rose above that mark, thereby reducing the number of building sites, Dune Harbor sought to remedy the situation. Specifically, Dune Harbor proposes to install a water control device on the bottomland of South Lake, and then pump water through a pipeline drilled through a 4,000 year old sand dune. The excess water would discharge on the lakeside of the dune and ultimately into Lake Michigan.

Consistent with the foregoing, Dune Harbor sought a permit for the water control device under Part 301, and a pipeline and a rock plunge pool under Part 353. [2] The application was denied by the Land and Water Management Division (LWMD), and Dune Harbor exercised its right to a contested case hearing under both statutes. MCL 324.30110(2); MCL 324.35305(1). The PFD found Dune Harbor was entitled to a Part 301 permit and Part 353 special exception. As noted, the case was remanded to the Administrative Law Judge in order to invite more evidence on "feasible and prudent alternatives" to the requested project. The City of Muskegon was granted intervention for the remand hearing.

The issue in this case is twofold. First, is Dune Harbor entitled to a permit for the activity on the bottomland of an inland lake? That inquiry turns on the permitting criteria of Part 301. See MCL 324.30106. Second, is Dune Harbor entitled to a Part 353 permit or special exception for the pipeline and rock plunge pool proposed through and on a critical dune? See MCL 324.35316; MCL 324.35317.

II. Part 353 Analysis

Part 353, known as the Sand Dune Protection and Management Act, is intended to protect the ecological integrity of Michigan's critical dune areas. With enactment, the Legislature explicitly found that critical dunes "are a unique, irreplaceable, and fragile resource that provide significant...benefits to the people of this state...."

[2] Part 301 (MCL 324.30101 *et seq.*), and Part 353 (MCL 324.35301 *et seq.*)

MCL 324.35302(a). In recognition of the nature of this resource, the Legislature found a use on a critical dune "shall occur only when the protection of the environment and the ecology...is assured." MCL 324.35302(c). These legislative findings go to the proposition that the critical dunes along Michigan's Great Lakes shoreline are truly "one of the state's prized natural resources." *Preserve the Dunes v Department of Environmental Quality*, 471 Mich 508, 530; 684 NW2d 847 (2004) (Kelly, J. dissenting).

To alleviate the elevated level of South Lake, Dune Harbor proposes to install: a rock plunge pool, consisting of an arrangement of three-ton rocks in a 55-foot by 35-foot pattern; an outfall from a flared and grated 36" pipe; erosion control fabric; and 16' wide outfall channel to Lake Michigan. Exhibit P-2. The project is proposed within a defined critical dune area. MCL 324.35301(c). Therefore, it is subject to the regulatory authority of Part 353. Since the City of Norton Shores has not adopted a zoning ordinance under Part 353, review of the project is within the jurisdiction of the DEQ. MCL 324.35304(8). In order to carry out the project, the Petitioner must demonstrate entitlement to a permit. MCL 324.35316. For the reasons set forth below, the project cannot be permitted under § 35316(1)(d) & (g), and § 35316(2). Consequently, the only manner through which the project can be installed is pursuant to a special exception under § 35317.

<u>Entitlement to a Permit Under § 35316</u>

The PFD found the proposed project is a use involving a contour change that is likely to increase erosion or decrease stability. Given this, the PFD concluded that the project was ineligible for a permit under § 35316(1)(d). I adopt the finding on this point. As a result, the project can only be completed if entitlement to a special exception is established. Prior to making that determination, other findings under § 35316 are necessary. The first entails the § 35316(1)(g) standard that asks whether the project is in the public interest. The determining factors in that inquiry are whether there is a feasible and prudent alternative location or method that would provide the benefit of the use, and a quantification of the impact to the dune and the extent it can be minimized. MCL 324.35316(1)(g)(i) and (ii). A great deal of evidence was entered on this record concerning the existence of alternatives. A detailed examination of that evidence, along

with the requisite findings, is made under the § 35317 special exception analysis. Suffice to say here, there is a feasible and prudent alternative method to the proposed use that would eliminate any impact to the dune. Therefore, the project cannot be permitted and a special exception is necessary under § 35316(1)(g).

The final inquiry under § 35316 is whether the proposed outfall and plunge pool constitutes a "structure." The LWMD contends these features are a structure, and as such are expressly prohibited under § 35316(2) because the location is lakeward of the crest of the first landward ridge of a critical dune area that is not a foredune. Dune Harbor contends that its proposal is not a structure, and that even if it is, § 35316(1)(c) allows its installation by special exception. A preliminary Opinion and Order in this case entered on June 24, 2003, held the outfall and plunge pool are not a structure, and hence not prohibited. This issue requires two determinations. First, is the outfall/plunge pool a "structure?" If so, is it prohibited as a matter of law?

Part 353 does not define what constitutes a structure. See MCL 324.35301. Therefore, the meaning of the term must be established under the rules of statutory construction:

> Fundamental canons of statutory interpretation require us to discern and give effect to the Legislature's intent as expressed by the language of its statutes. *DiBenedetto v West Shore Hosp.*, 461 Mich 394, 402; 605 NW2d. If such language is unambiguous, as most such language is, *Klapp v United Ins. Group Agency, Inc.*, 468 Mich 459; 663 NW2d 447, "we presume that the Legislature intended the meaning clearly expressed-no further judicial construction is required or permitted, and the statute must be enforced as written." *DiBenedetto*, *supra* at 402; 605 N.W.2d 300.
> *Garg v Macomb County Community Mental Health Services*, 472 Mich 263, 281; 696 NW2d 646 (May 11, 2005).

The preliminary Order held that in the context of Part 353, "structure" is a term of art and subject to interpretation. In support, that Order relied on the holding in the *Petition of Jay & Barbara Smit.* [3] The project in *Smit* was a lineal rock revetment. [4] The *Smit* PFD rejected the LWMD's argument that the dictionary definition of structure as any man-

[3] 2001 WL 496981(Mich.Dept.Nat.Res.), 7-9.

[4] The Parties framed the issue in *Smit* as whether the project was a structure, and thus prohibited as a matter of law under § 35316(2). This Final Order, *infra*, rejects the contention that § 35316(2) acts as an absolute bar to structures within a certain geographic area.

made object controls. In so doing, it noted the definition conflicted with projects the LWMD had historically permitted. The PFD also noted, correctly, that under § 35319(h) streets and driveways are distinguished from structures. Similarly, under § 35320(i) structures are separated from "streets, driveways, sidewalks, pedestrian ways, trails, off-street parking, and loading areas." MCL 324.35320(h). Since the Legislature carved out that group of objects from what would otherwise be structures, the *Smit* PFD reasoned that the dictionary definition of structure cannot control. In the end, the PFD concluded the Smit's proposed design was essentially a "pile of rocks" and not a "structure."

The analysis in the *Smit* is based on the premise that the term "structure" is ambiguous and subject to interpretation different from its plain and ordinary meaning. However, in considering the use of the term in § 35316(2) that premise is suspect. This is especially true because "a provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision, [citation omitted] or when it is equally susceptible to more than a single meaning." *Mayor of City of Lansing v Michigan Public Service Commission*, 470 Mich 154, 166; 680 NW2d 840 (2004). Section 35316(2) uses the term to preclude the issuance of permits for certain activities within a certain geographic area of a critical dune, and lists requirements for activities within another defined area. See MCL 324.35316(2)(a)-(g). There is simply no indication identifying those activities as "structures" renders the term ambiguous. It also does not create conflict, let alone an irreconcilable one, with the requirements for the contents of environmental assessment (§ 35319) and environmental impact statement (§35320). [5] Rather, the term is unambiguous, and must be construed under its dictionary definition. See MCL 8.3a.

The dictionary defines structure as a "construction" and "something made up of independent parts in a definite pattern of organization." [6] In this case, the activity proposed lakeward of the dune consists of an arrangement of three-ton rocks, an outfall, and erosion control fabric. The original design for the rock plunge pool had the rocks arranged in a 55-foot by 35-foot pattern. The PFD recommended the pattern of

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[5] For the same reasons, Dune Harbor's argument that because § 35317(1)(b) places a special limit on variances for any "dwelling and other permanent building," the term "structure" means a building cannot be sustained. See Oral Argument, Tr. p 12.

[6] *Webster's Seventh New Collegiate Dictionary* (1963).

the rocks be reduced to 15 feet long and 28 feet wide, but not their size. The project then consists of independent parts (i.e. large rocks, outfall and erosion control fabric) arranged in an organized pattern in order to achieve a desired function. It thus fits the dictionary definition of a "structure." Therefore, I find, as a Matter of Fact, the proposed outfall and rock plunge pool are a structure. However, I agree with Dune Harbor that determining that the rock plunge pool is a structure does not end the matter. Under § 35316(1)(c), even a "use that is a structure" that does not comply with subsection (2) may be permitted if the criteria for a special exception are met, and I so conclude, as a Matter of Law.

Having established three provisions in § 35316 that preclude the issuance of a permit for the project, the inquiry turns to whether it is entitled to a special exception to the requirements of Part 353.

Entitlement to a Special Exception Under § 35317

In consideration of a special exception, the following criteria are to be applied. First, a special exception can be granted "if a practical difficulty will occur to the owner of the property . . . ." MCL 324.35317(1).[7] In determining practical difficulty, "primary consideration shall be given to assuring that human health and safety are protected" and whether the project complies "with applicable local zoning, other state laws, and federal laws." *Id.* In addition, effect must be given to the holding in *National Boatland, Inc v Farmington Hills Zoning Board of Appeals*, 146 Mich App 380; 280 NW2d 472 (1985). In that case, the Court of Appeals utilized a three-part test to determine if the landowner demonstrated a practical difficulty warranting a variance from the zoning ordinance:

1) Whether compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.

[7] Part 353 uses the terms "variance" and "special exception" interchangeably. The term "variance" applies to local units of government under zoning ordinances, while the term "special exception" applies when the DEQ is regulating the critical dune areas in the absence of a local ordinance under the model zoning plan. Thus, there is no meaningful difference between the two terms.

2) Whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.

3) Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured. *Id.* at 388.

In applying this test, the PFD concluded a special exception could be granted. I agree that *National Boatland* is relevant in analyzing the Part 353 practical difficulty standard. However, the PFD failed to give full effect to Part 353, certain of the *National Boatland* standards, and other applicable zoning concepts identified in that case. Therefore, the PFD's findings and conclusions in this regard cannot be accepted.

National Boatland involves the application of a traditional zoning ordinance. In this form, zoning is an exercise of the police power that ensures compatible uses and dimensions in the development of property. See *Village of Euclid v Ambler Realty Co.*, 272 US 365, 395; 47 S Ct 114 (1926). As noted, Part 353 provides additional substantive legislative considerations, over and above those involved in traditional zoning:

> (a) The critical dune areas of this state are **a unique, irreplaceable, and fragile resource that provide significant** recreational, economic, scientific, geological, scenic, botanical, educational, agricultural, and ecological **benefits to the people of this state** and to people from other states and countries who visit this resource.
> ***
> (c) The benefits derived from alteration, industrial, residential, commercial, agricultural, silvicultural, and the recreational use of critical dune areas **shall occur only when the protection of the environment and the ecology of the critical dune areas for the benefit of the present and future generations is assured**.
> MCL 324.35302 (emphasis supplied).

Based on these legislative findings, Part 353 does not equate to traditional zoning, thereby precluding a mechanical application of *National Boatland.*

Given the unique nature of Part 353, the practical difficulty test entails consideration of the protection of critical dunes, or in the words of *National Boatland* the

statute's "spirit," coupled with principles of zoning law that complement that purpose. In determining whether a practical difficulty will result if the special exception is not granted, consideration must be given to whether the proposed use is protective of the dune and the benefits it provides. A component of that examination involves a determination on whether alternatives exist that minimize or eliminate the impact to the resource, and provide to some appreciable degree the benefits sought by the proposed use. [8] This consideration is closely tied to a principle of zoning law that requires a landowner establish "the property cannot be reasonably used in a manner consistent with existing zoning." *Puritan-Greenfield Improvement Ass'n v Leo*, 7 Mich App 659, 673; 153 NW2d 162 (1967). [9] This consideration tracks the first factor of the *National Boatland* test. 146 Mich App at 380.

The PFD also failed to apply a fundamental zoning principle: whether the problem for which the relief is sought was self-created. Michigan adopted the self-created problem doctrine in *Johnson v Township of Robinson*, 420 Mich 115; 359 NW2d 526 (1984). [10] This doctrine is grounded in the nature of a variance: a "safety valve" that operates to relieve the property owner from the hardship that would accrue to the property from applying the zoning ordinance. [11] The relief will generally not be granted when the asserted hardship or practical difficulty was created by an affirmative act of the owner or his predecessor. [12] Thus, "the plight of the landowner must be due to the unique circumstances of the property." *Johnson, supra* at 126. The Part 353 application form asks whether the problem is self-created. See Exhibit P-2. In response to that question, Dune Harbor's application states it "has no control over the rate of the ground water conditions occurring from adjacent lands (i.e. South Lake). The applicant has no control over the rate of ground water input into the lake nor did they cause the lake level to rise." *Id.* The validity of these contentions is addressed below.

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[8] Despite the Petitioner's argument to the contrary, an examination of alternatives that avoid or limit the impact to a resource is a hallmark of Michigan environmental law. Given the legislative mandate in § 35302(c) that the benefits of a use of the dune be allowed only if the resource is protected, consideration of alternatives under the practical difficulty standard is warranted.

[9] This principle also implicates an examination of alternatives that negate the need for a variance.

[10] Citing *Johnson*, *National Boatland* unequivocally holds that "[s]elf-created problems are not a proper basis for granting a variance." 146 Mich App at 386.

[11] See also Zeigler, et al, Rathkopf's The Law of Zoning and Planning, § 58.1, p 8. (2005 ed).

[12] Rathkopf, *supra* at § 58:21, p 124. See also Young, Anderson's American Law of Zoning (4th ed), § 20.44-46 (1996).

Based on the foregoing, the following factors control the determination on entitlement to a special exception under Part 353. First, the special exception must assure "that human health and safety are protected...and that the determination complies with applicable local zoning, other state laws, and federal law." MCL 324.35317(1).[13] Second, the use can be effectuated only if the protection of the resource is assured. MCL 324.35302(a) and (c). Included in this factor is an examination of alternatives that minimize or avoid impact to the resource and provide, to some degree, the benefits of the proposed use. Third, the problem for which relief is sought cannot be self-created, but must be due to the unique circumstances of the property. Controlling this inquiry is the requirement that the landowner must establish entitlement to the special exception or variance by affirmative evidence, and variances should be "sparingly granted." *Puritan-Greenfield Improvement Ass'n v Leo,* 7 Mich App 659, 668; 153 NW2d 162 (1967).[14]

Having identified the controlling legal basis for establishing entitlement to a special exception, the analysis turns to the facts on the record that go to each.

> 1. In determining whether a practical difficulty will occur if a variance or special exception is not granted, primary consideration shall be given to assuring that human health and safety are protected by the determination and that the determination complies with applicable local zoning, other state laws, and federal law. MCL 324.35317(1).

There is no contention that the project, if installed as proposed, would pose a threat to human health or safety. Further, if entitlement to a special exception was established, there is no contention the project would violate local zoning, state laws and federal laws. Based on this record, I find, as a Matter of Fact, the project does not threaten human health and safety, and complies with all other applicable law.

> 2. The benefits derived from alteration, industrial, residential, commercial, agricultural, silvicultural, and the recreational use of critical dune areas shall occur only when the protection of the environment and the ecology of the critical dune areas for the benefit of the present and future generations is assured. MCL 324.35302(c).

It is unrefuted that by its very scale, the project will fundamentally alter the

[13] Section 35317 contains other considerations not at issue in this case.
[14] See also Rathkopf, *supra* at § 57:56.

physical characteristic of the dune. On this point the testimony of Guy Meadows, a Professor of Naval Architecture and Marine Engineering at the University of Michigan, is illustrative. Dr. Meadows has spent 30 years studying the Lake Michigan shoreline and the effect of near-shore structures on the natural beaches. He testified the material in the proposed structure is "massive." Tr. p 997. In addition, he noted that simply placing the rock plunge pool/outfall structure on the dune would constitute a significant alteration of the physical characteristics of the dune area. I find, as a Matter of Fact, the proposed project will likely cause an adverse impact to the dune.

Without citing Dr. Meadows, the PFD agreed with his analysis by finding the project "involves the placement of rock rip rap and metal grates and in some plans, concrete or grout. Any of these designs would result in the replacement of the existing sand surface with an elevated form of impervious surface. Such an activity can only be termed a significant alteration of the dune's physical characteristic." PFD at pp 8-9. I adopt this finding. I also take this finding to its logical conclusion: the "scenic benefits" of the dune, which lies in its pristine and natural appearance would be spoiled by an artificial arrangement of massive, visible rocks. This is a value expressly identified in the legislative findings. MCL 324.35302(a).

Having established an impact to the resource from the proposed activity, the inquiry turns to whether the benefit of the use, residential development around South Lake, can be achieved by minimizing or avoiding the impact. In short, the issue is whether an alternative to the project exists. The PFD rejected the alternative of routing the discharge through a pipe installed on Lake Michigan bottomland. That finding is adopted. During the remand hearing other alternatives were advanced. To expedite this proceeding, I have thoroughly considered the entire record developed on remand, including the pleadings, transcripts and exhibits. Based on this review, a supplemental PFD from the Administrative Law Judge is unnecessary and the requisite findings will be made in this Final Order. MCL 24.281.

The remand to consider additional potential feasible and prudent alternatives to the proposed activity included the following instruction:

> The hearing [on remand] shall be limited to evidence concerning alternatives to the activity regulated under Part 353, including, but not limited to, a discharge to a municipal wastewater treatment facility.

A municipal wastewater treatment facility alternative was not addressed on the factual record on remand because of a stipulation that this alternative was not, in fact, feasible and prudent. This stipulation was based on information gathered by LWMD's counsel, from the Muskegon County Wastewater Treatment Plant Director, that the plant would not accept the lake water because it did not require treatment. Unfortunately, this stipulation may not have been made on sound information. [15] Nonetheless, the factual stipulation is binding. Therefore, consistent with the Parties stipulation, I find, as a Matter of Fact, based on this record discharging the lake water to a municipal wastewater treatment facility is not a feasible and prudent alternative.

Dune Harbor asserts there are no alternatives to the project, and thus did not offer any on remand, while LWMD and the City of Muskegon identified two alternatives. The first is depositing fill around the perimeter of South Lake to increase the developable land area. The evidence suggests that for this project to succeed the level of the lake would need to be drawn down over 20 feet to properly compact and configure the soils. Tr. p 228 (Hoymeyer). Without proper dewatering, the deposited soils would not support development. Tr. p 121 (Dunlap). In addition, there is no where to discharge the copious amount of water from the lake that is necessary to properly stabilize the soils. The second alternative involves discharging water from South Lake, through existing storm sewers or a new pipeline, to either Muskegon Lake or Mona Lake. The record also indicates that this alternative is not viable due to the necessity of obtaining authorization from a number of governmental entities (Tr. pp 148-149, 152-153 and 158 (Dunlap)), and the potential adverse affects to the receiving water bodies, water systems and surrounding communities (*Id.* at 111 and 115).

The final alternative involves developing the property based on the current level of South Lake. During the initial hearing, Mr. Hinks testified the lake level had stabilized at 592 feet. Tr. pp 382, 413. At that level a residential development of 48 lots is

[15] See *supra* n 1.

possible, and I so find, as a Matter of Fact.[16] Such a development would eliminate any need to impact the critical dune. Therefore, I find, as a Matter of Fact, Dune Harbor can realize the benefit of the proposed alteration, residential development of the site, while the environment and ecology of the dune is assured.

In regard to this alternative, Dune Harbor argues that the cost and reduced profit of a smaller, redesigned development meets the practical difficulty test. However, both courts and commentators have written that the increased cost or lesser profit from complying with zoning requirements does not meet the practical difficulty standard for a variance.[17] For example, our Court of Appeals held "it is not sufficient to show that the property would be worth more or could be more profitably employed if the restrictions were varied to permit another use." *Puritan-Greenfield Improvement Ass'n*, *supra* at 668. In another jurisdiction, a developer who could build on 40 lots, instead of 44, without a variance did not meet the statutory unnecessary hardship test. The Texas Court of Appeals characterized this limitation as "merely a financial hardship."[18] Consistent with *Puritan-Greenfield*, Dune Harbor's contention on this point is rejected.

3. Is the problem for which the relief sought, a special exception, self-created. *Johnson v Township of Robinson,* 420 Mich 115; 359 NW2d 526 (1984).

Importantly, the following facts relevant under this test are uncontested. Robert Chandonnet is the sole shareholder of Nugent Sand. Tr. Pp 59. Mr. Chandonnet also owns Dune Harbor. *Id.* at 53. Dune Harbor was created to develop the area around South Lake. *Id.* at 98. That property was owned by Nugent Sand and is now owned by Dune Harbor. I find, as a Matter of Fact, there is significant commonality of ownership between Nugent Sand and Dune Harbor. This fact requires Nugent Sand and Dune Harbor be considered one entity for the limited purpose of determining eligibility for a special exception under Part 353.

Nugent Sand owns 440 acres of land in Muskegon County fronting on Lake Michigan, and has mined sand there since 1912. *Id.* at 59-60. Nugent Sand applied for

[16] During the remand hearing Dune Harbor's witnesses testified that as of March 2005, the level has risen an additional two feet. Tr. p 97 (Dunlap); Exhibit PS-7. However, on remand the Parties were not allowed to re-litigate the alternatives entered during the initial hearing. Therefore, the record is silent on whether the higher level impacts the number of buildable lots.

[17] Rathkopf, *supra* at §58:5, pp 25-26; Rohan, *supra* at § 43.02[5], p 63.

[18] *Bat'tles v Board of Adjustment and Appeals,* 711 SW2d 297, 300 (1986).

and received a permit from the DEQ or its predecessor to create artificial lakes from its mining operations. The mining operations resulted in the formation of two lakes, a North Lake and South Lake. As Nugent Sand continued to mine, South Lake continued to grow. Mr. Chandonnet testified that at the end of each fall, when the mining season ended, "there [was] a recharge of that lake. The groundwaters flow right back into it." *Id.* at 118. The lake size allowed by permit was increased with each permit renewal. For example, in 1981, Nugent Sand received a permit to increase the size of the lake from nine acres to 120 acres. Through its mining, Nugent Sand "progressively expanded the size of the lake." *Id.* at 74-75. As a factual matter, I find that Nugent Sand/Dune Harbor created both North and South Lake through sand mining operations that reached and tapped into groundwaters.

Mining operations have concluded in the area of South Lake, and it is around this feature that Nugent Sand's related entity, Dune Harbor, proposes to build housing. The housing development plan consists of three phases. Phases one and two would be built around South Lake. *Id.* at 53-54. The proposed phase one housing development would consist of 65 single family homes. *Id.* at 229, 239. Mr. Chandonnet testified that he also intends to build more housing around North Lake (phase three) when mining operations are completed there in five to seven years. *Id.* at 72. As a factual matter, I find that Dune Harbor plans on three housing development phases around the two lakes, including the 65 homesites around South Lake in phase one.

Nugent Sand completed the mining in South Lake in 1998 and in 1999 hired a developer to come up with a housing development plan. *Id.* at 68. Dune Harbor prepared a comprehensive site plan for phase one of the housing developments in 1999-2000, and obtained approval for the plan in November 2001 from the City of Norton Shores. *Id.* at 232-233. As a factual matter, I find that Dune Harbor created its own timeframe when it planned the housing development in relation to the conclusion of mining, and when it chose to submit its plans to Norton Shores.

Dune Harbor based its housing plan on its own prediction that since mining stopped around South Lake, the lake level would stabilize at a "conceptual design" of 584 feet. *Id.* at 75, 188, 234. Mr. Chandonnet explained that based on the highest elevation that South Lake had achieved in the past, "we anticipated" that it would return

to that 584-foot level. *Id.* at 75. Unfortunately, when mining concluded at South Lake, the water level rose, creating both a larger lake and less land for housing. In April 2001, Dune Harbor was informed by its engineering firm that that South Lake had risen six feet to about 590 feet. At the time of the hearing, the lake level had risen another two feet to about 592 feet. Dune Harbor's landscape architect Mr. Stebbins said it was his "understanding" that it could rise another three feet. *Id.* at 234-235.

South Lake sat on Nugent Sand's property, had been monitored closely in the past, and Nugent Sand knew that its own mining activities caused an annual fluctuation in the lake level; yet the lake's final, 592-foot level was an alleged surprise to Nugent Sand. Dune Harbor's witness, Alan Hinks, a hydrogeologist, testified that Nugent Sand's mining had caused a five to six-foot annual fluctuation in South Lake. *Id.* at 380. Nevertheless, he also testified that the rise to 592 feet was "unexpected." *Id.* at 384. Mr. Hinks testified that he believed the lake has fully recovered and "topped out" at 592 feet. *Id.* at 382, 413.

As factual matters, I find that: (a) Dune Harbor relied on its own prediction in planning the housing development around a "design level" of 584 feet; (b) Dune Harbor knew of the lake's fluctuating levels during sand mining operations, knew that it had tapped into groundwaters that recharged the lake, and could have readily monitored the lake level from 1998 through 2001 while it was developing housing plans; however, it did not do so, thus creating what it characterizes as an "unexpected" lake level; (c) based on Dune Harbor's own testimony, the lake has reached its final, stabilized level of 592 feet; and (d) Dune Harbor's witnesses who testified about a possible further rise to 595 feet provided no basis for so concluding.

The essence of this point is straightforward: a higher lake level means a bigger lake; a bigger lake means less land; less land means fewer houses; fewer houses means less revenue and profit from house sales. Mr. Chandonnet testified that it took over two years and over $800,000 to obtain approval for the existing site plan. Home sites, roads, and sewers would have to be re-designed in order to build a development around a bigger lake with less acreage for home sites. *Id.* at 76, 78. If the lake indeed rises another three feet to an uncontrolled level of 595 feet, 17 home sites would be lost and 14 others would be "greatly reduced" in size. *Id.* at 238.

There is no evidence on the sale price of the 14 "greatly reduced" lots. According to its witnesses, eliminating 17 lake-front lots would cost Dune Harbor approximately $1.7 million in lost revenue. The total cost of redesign, reapproval, and lost revenue is estimated to be $3.1 million. *Id.* at 276-277. Dune Harbor originally estimated total revenues from phase one of $8-9 million, and total costs of $4 million. *Id.* at 284-285. Adding the $3.1 million cost of a redesign and lost revenue to the expected $4 million cost figure, Dune Harbor can still expect to realize a profit on phase one of roughly $900,000 to $1.9 million instead of $4-5 million.

As a factual matter, I find that Dune Harbor's estimates of financial loss are based on unfounded speculation that South Lake will rise another three feet, or to a level of 595 feet. I further find that Dune Harbor has failed to prove any problem or difficulty at the 592-foot level. I further find that with no alteration of the South Lake level, and even assuming it rises to 595 feet, Dune Harbor can still build and sell 48 (all but 17) of the original 65 phase one lots and would realize a profit of at least $900,000.

To solve its lake level problem, Dune Harbor proposed installing a water-control device that would control the lake levels in both lakes. The two lakes would be connected through a channel. The control device would draw down the level on South Lake by about six feet to 586 feet, thus reducing the size of the lake by approximately 12 acres. The control device would pump water from South Lake into Lake Michigan through a 36-inch, underground pipe that would be bored 350 feet by a "jack and bore" method through critical dunes to the Lake Michigan shore. [19] There, the pipe would discharge the water from South Lake (and ultimately North Lake too) from an outfall into a rock plunge pool. The outfall and rock plunge pool would be a visible structure on the beach. It would consist of an arrangement of huge rocks, the outfall, and an erosion control fabric.

There is no doubt as to Dune Harbor's problem: the level of South Lake. The cause of that lake level is inescapable-the mining operation that dredged deep enough to tap into groundwaters to create a small lake. The dredging continued and the surface area of the lake kept growing. Dune Harbor candidly acknowledges that it wants to

[19] Bazinet, Tr. pp 352, 365. The advantage of the jack and bore method is that it does not dig a trench or otherwise disturb the dune surface.

maintain a consistent lake level "in the artificial lakes it created." [20] Were it not for the lakes, there would be no lake level problem. The two go together. Nugent Sand/Dune Harbor bear sole responsibility for the South Lake level. No other party contributed to this problem. In addition to the creation of the problem, Dune Harbor exacerbated the situation in a number of manners. First, it failed to recognize the lake was rising. Dune Harbor attempts to escape blame by claiming the situation was a surprise. In support, it offered the testimony of Mr. Hinks, a well-credentialed hydrogeologist, who stated the lake's rise above the predicted 584-foot level was "unexpected." *Id.* at 384. Mr. Chandonnet sounded the same theme, affirming that the higher lake level was unexpected. *Id.* at 75. The PFD accepted that testimony, finding that the rise in South Lake's level to 592 feet was "wholly unanticipated and fortuitous."

By delving beneath the surface of the testimony concerning Dune Harbor's purported "surprise" at the rising lake level, it becomes evident the argument is a red herring. Mr. Hinks' testimony has no legal significance. Neither Dune Harbor nor the PFD cites any authority for the proposition that an "unexpected" problem of this type qualifies a landowner for a variance. A relevant legal principle has to be applied to the testimony to breathe legal significance into it. The relevant, applicable legal principle is the self-created problem doctrine. Under that doctrine, the question becomes, who created the expectation? The answer is Dune Harbor, which relied on historical lake levels in assuming or calculating that the lake would stabilize at about 584 feet. [21] The PFD correctly found that "Dune Harbor reasonably relied on existing data in its assumption" that South Lake would return to its original, end-of-mining-season level. [22] However, the PFD went awry in tying this finding of responsibility for who created the lake level expectation to a "reasonable reliance" standard, as if that exonerates Dune Harbor from its mistake. No authority is cited for this standard.

Whether or not Dune Harbor reasonably relied on certain data, its prediction that the lake would return to the 584-foot level turned out to be inaccurate. It forged ahead with development plans based on its own inaccurate prediction. When its prediction

[20] Dune Harbor Closing Argument, p 36.
[21] Chandonnet, Tr. p 118. The decision to base the design on an expected lake level of 584 feet was premised on "watching that lake elevation from the day we started mining at South Lake."
[22] PFD at 17.

turned out to be inaccurate, Dune Harbor hired Mr. Hinks to explain that its prediction was reasonable, i.e., that the higher lake level was "unexpected." Nevertheless, Hinks' testimony does not alter the fact that Dune Harbor created its own expectation based on its own inaccurate prediction.

The "surprise" from the rising lake level could have been averted if Dune Harbor had simply monitored the feature. Beneath Dune Harbor's position that the higher lake level was "unexpected" lies the tacit acknowledgement that it failed to monitor the rising lake level. That is the only reason Dune Harbor can claim surprise. There is no excuse for this surprise. South Lake sits on Dune Harbor's own property in plain view. Mr. Chandonnet testified that during years of mining operations, the company had paid careful attention to the lake level. *Id.* at 75, 118. Dune Harbor knew that South Lake's level fluctuated five to six feet every year and knew they had tapped into groundwaters that recharged the lake when mining stopped for the winter. The lake level was "very important" in planning the housing development. *Id.* at 112. Yet, by the time Dune Harbor was first notified by its engineering firm that the lake was rising the level went from 584 feet to 590 feet. Given the history of annual fluctuations, given the importance of the lake level to its plans, given the ease of observing the lake level, how Dune Harbor could fail to notice a six-foot increase in the lake level is hard to fathom. In any case, even accepting Dune Harbor's version of events, the Company's failure to monitor the lake level until plans had been developed and submitted to Norton Shores is a problem Dune Harbor created, and I so find, as a Matter of Fact.

The second manner in which Dune Harbor exacerbated the problem was a series of business decisions that put it in a predicament. The LWMD criticizes Dune Harbor for "negligent" business decisions. [23] That criticism misses the mark because the wisdom of Dune Harbor's decisions is irrelevant. Under the self-created problem doctrine, the relevant issue is who created the problem asserted as a reason for the variance? Dune Harbor portrays its problem as being caught down the road with a substantial investment in housing plans and approval for those plans, only to find out that South Lake had risen beyond expectations. However, Dune Harbor decided to proceed with its housing development plans and to apply for approval for those plans,

[23] Respondent's Closing Argument, pp 7-8.

rather than wait for the lake level to stabilize. Mr. Chandonnet acknowledged that Dune Harbor's predicament was the result of its own business decisions. *Id.* at 136. Had Dune Harbor's own business decisions been different, it would not have the problem it seeks to remedy through a special exception.

Based on the foregoing, I find, as a Matter of Fact, Dune Harbor created the problem for which it seeks relief under the special exception provision of Part 353. Under the self created problem doctrine, Dune Harbor cannot claim a practical difficulty will result if it is not granted a special exception.

The other side of the self-created problem doctrine is the requirement that the "plight of the landowner must be due to unique circumstances of the property." *Johnson, supra* at 126. Under this concept, the hardship or difficulty complained of must arise through circumstances or conditions uniquely affecting the property. [24] A classic example would be a small or irregularly shaped lot on which it is nearly impossible to build without a variance from setback requirements. Here again, Nugent Sand's 90-year long use for sand mining is relevant because the long and successful use of the property shows that there is no unique circumstance about it that prevents a reasonable use without a variance. Dune Harbor's "plight" arises not from a unique circumstance of the property, but from its newly desired use for the property. [25] Further, any contention that the rising level of South Lake equates to unique circumstance fails under the self-created problem doctrine. The significance of the fact that Dune Harbor's predecessor created both the lake and lake level problem cannot be over-stated. In addition, that Dune Harbor proceeded with its development plans in the face of that problem is also important. Given this, the rising lake level is not a unique circumstance of the property, and Dune Harbor has failed to satisfy the unique circumstances test established in *Johnson*.

Nugent Sand used the property for decades as a sand mining operation without a Part 353 special exception, and would not need one now if it just had more sand to mine. It is only because its sand mining operations have ceased that Nugent

[24] Rathkopf, *supra* at §§ 58:18, 58:21; 8 Rohan, *supra* at §§ 43.02(4), 43.02(5), p 65.

[25] Given that Dune Harbor's predecessor was able to profitably utilize this property for 90 years is in marked contrast to the facts in *Johnson*. Here, the property was utilized for decades as envisioned, and in the process the intended purpose and benefit was achieved. In contrast, in *Johnson* the landowner was left with a 60-foot lot on which they had not enjoyed any prior use.

Sand/Dune Harbor now seeks a special exception for a new use. Under *Puritan-Greenfield*, the law disfavors variances where the property owner enjoyed a prior use consistent with the regulatory scheme. Importantly, Dune Harbor has a future use of the South Lake property for a permitted purpose, i.e., housing. This use can be achieved without implicating Part 353, or more accurately without a special exception, if it limits the phase one development to 48 homes rather than 65, and I so find, as a Matter of Fact.

The principle that emerges from the applicable case law, which serve as the predicate of the foregoing factors, is that so long as the landowner can enjoy a reasonable use of the property without the variance, the relief is not warranted. [26] That concept applies equally to the factor grounded in § 35302(c) and the first factor in *National Boatland*. 146 Mich App at 388. Applying that principle here, Dune Harbor, through its predecessor, has enjoyed a long use of its property without the Part 353 special exception. Dune Harbor can continue using the property without the special exception by building a smaller housing development, which is a reasonable use, and I so find, as a Matter of Fact.

Based on the foregoing findings, I conclude, as a Matter of Law:

1. The proposed activity will significantly alter the physical characteristic of the dune. MCL 324.35301(j).

2. The proposed activity will result in a contour change on the dune. MCL 324.35301(a).

3. The proposed activity is not eligible for a permit. MCL 324.35316(1)(d) and MCL 324.35316(1)(g); MCL 324.35316(1)(c) and MCL 324.35316(2).

4. If a special exception is granted the proposed activity will not imperil human health and safety, and comports with all other regulation. MCL 324.35317(1).

5. The proposed activity will impair the benefits provided by the dune, and there is no assurance for both the present and future protection of the ecology and environment of the dune if the proposed activity is installed. MCL 324.35302.

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[26] *Puritan-Greenfield Improvement Ass'n, supra* at 673.

6. The proposed activity violates the spirit of Part 353. *National Boatland, Inc v Farmington Hills Zoning Board of Appeals*, 146 Mich App 380; 280 NW2d 472 (1985).

7. Dune Harbor can achieve the benefit of the proposed activity, residential development of its property, without a special exception. *Puritan-Greenfield Improvement Ass'n v Leo*, 7 Mich App 659, 673 (1967).

8. Dune Harbor created the problem for which it seeks relief. *Johnson v Township of Robinson*, 420 Mich 115; 359 NW2d 526 (1984).

9. Dune Harbor is not entitled to a special exception. MCL 324.35317.

III. Part 301 Analysis

In order to install a water control device on the bottomlands of either North or South Lake, Dune Harbor must obtain a permit under Part 301. The requirements for a permit under Part 301 are different than the requirements for a variance or special exception under Part 353. Thus, a successful showing under Part 353 does not necessarily lead to a successful showing under Part, 301, and vice versa. The PFD has accurately analyzed the law and facts concerning this aspect of the project, and I adopt the findings of fact and conclusions of law in the PFD.

The decision in this case is based solely on the PFD, the written Exceptions, exhibits, transcripts, pleadings, and arguments. Upon the consideration of the entire record in this matter, the PFD, including its Findings of Fact and Conclusions of Law, is adopted and affirmed as modified by this FDO. Based upon those Findings of Fact and Conclusions of Law, it is DETERMINED Dune Harbor is not entitled to either a permit or special exception under Part 353. Dune Harbor is entitled to a permit for the activity regulated under Part 301.

NOW, THEREFORE, IT IS ORDERED:

1. The Proposal for Decision of February 24, 2004, is adopted as modified in this Final Order.

2. The application for a permit and special exception submitted by Dune Harbor for the activity regulated under Part 353 is DENIED.

3. Dune Harbor is entitled to a permit for the activity regulated under Part 301.

4. The Department of Environmental Quality does not retain jurisdiction in this matter.

Dated: 12-7-05

Steven E. Chester, Director
Department of Environmental Quality