STATE OF MICHIGAN

COURT OF APPEALS

LAKE ISABELLA DEVELOPMENT, INC.,

Plaintiff-Appellee,

V

VILLAGE OF LAKE ISABELLA,

Defendant-Appellee,

and

DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant-Appellant.

FOR PUBLICATION
November 13, 2003
9:05 a.m.

No. 247156
Isabella Circuit Court
LC No. 01-000596-CZ

Before: Donofrio, P.J., and Sawyer and O'Connell, JJ.

DONOFRIO, J.

Defendant Michigan Department of Environmental Quality (MDEQ), appeals by leave granted an order granting summary disposition to plaintiff, Lake Isabella Development, Inc., declaring one of MDEQ's administrative rules, 1999 AC, R 299.2933(4) (Rule 33) invalid after finding it arbitrary and capricious and not in compliance with the legislative intent of MDEQ's enabling statute. The matter arose because Rule 33 requires applicants seeking to construct a private sewage system to obtain a resolution from the local government agency agreeing to take over the sewage system if the owner fails to operate or maintain it properly. Plaintiff sought to construct a sewer system for a development project but the Village of Lake Isabella (the Village) denied plaintiff the resolution and MDEQ refused to consider the developer's application. On an action for injunctive and declaratory relief, MDEQ and plaintiff each moved for summary disposition, and the trial granted summary disposition in favor of plaintiff. This Court granted leave for this interlocutory appeal and we affirm because we find Rule 33 invalid as it is not in conformity with the legislative intent of MDEQ's enabling statute and is arbitrary and capricious.

FACTS

The facts of this case are not in dispute. Plaintiff owns a twenty-five acre parcel of land adjacent to Lake Isabella. The property is zoned LR-1 (Lake Residential), and permits single-

family dwellings. Plaintiff sought to develop a thirty-eight unit single-family condominium project on the property and requested approval of its site plan from the Village. The site plan proposed to construct a private wastewater disposal system to serve the development because the Village did not have a public sewer system, and the lakefront land contained soils unsuitable for on-site septic systems. The Village agreed that plaintiff's site plan "was a permitted use under the Village Zoning Ordinance." The Village also pointed out its lack of a public sewage system, its lack of money to construct one, and the necessity of a private wastewater treatment system for the proposed project. The Village's planning commission approved the site plan, conditioned on plaintiff obtaining all required state and county permits and approvals.

Plaintiff submitted a detailed engineering plan and permit application to MDEQ. MDEQ refused to review the plan or issue a permit until the Village provided a resolution as required by 1999 AC, R 299.2933(4) ensuring that the Village agreed to take over the private wastewater disposal system in the event it was not properly operated or maintained. In accordance with Rule 33, plaintiff requested the necessary resolution from the Village. The Village rejected plaintiff's request at a council meeting. According to plaintiff, "MDEQ's requirement that the Village adopt the resolution at issue and/or the Board's decision to not provide such resolution has effectively killed the Project."

Plaintiff filed a complaint against the Village asserting claims of regulatory taking and violation of due process.[1] Plaintiff also filed a claim against MDEQ seeking a declaratory ruling that Rule 33 exceeded the scope of MDEQ's rule-making authority and was therefore invalid. Plaintiff also sought injunctive and/or mandamus relief. MDEQ moved for summary disposition under MCR 2.116(C)(8), asserting that Rule 33 is within the scope of its authority granted by the Legislature in the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq.*, and that Rule 33 is consistent with the Michigan constitution. Plaintiff filed a cross-motion for summary disposition. After hearing oral arguments, the trial court issued an opinion and order declaring that "Rule 299.2933(4) does not comply with the legislative intent underlying the enabling statute and is arbitrary and capricious. Therefore, the court finds that Rule 299.2933(4) created by they [sic] MDEQ invalid." The trial court denied summary disposition to MDEQ and granted it to plaintiff. It is from this order that defendant MDEQ appeals by leave granted from this Court.

ANALYSIS

This issue concerns interpretation of statutes and administrative rules. Statutory construction applies to administrative rules.[2] Statutory interpretation is a question of law

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[1] These are not issues on appeal.

[2] *Bunce v Sec of State*, 239 Mich App 204, 209; 607 NW2d 372 (1999).

reviewed de novo.[3] The validity of an administrative rule is dependent on a three-part test set out by this Court in *Dykstra v Dep't of Natural Resources*[4]:

> (1) whether the rule is within the subject matter of the enabling statute; (2) whether it complies with the legislative intent underlying the enabling statute; and (3) whether it is arbitrary or capricious.

The Legislature created MDEQ when it enacted MCL 324.99903 and assigned MDEQ the authority under Part 41 of the NREPA, MCL 324.4101 *et seq*., concerning sewerage systems. The parties agree that Rule 33 here was promulgated pursuant to MCL 324.4104, that states in part that:

> the department may promulgate and enforce rules as the department considers necessary governing and providing a method of conducting and operating all or a part of sewerage systems including sewage treatment works.

Rule 33 provides in pertinent part:

> R 299.2933 Submittal of plans and specifications.
>
> Rule 33. (1) Before the construction or alteration of a sewerage system or portions thereof, plans and specifications therefor shall be submitted to the department for review and issuance of a construction permit.
>
> * * *
>
> (4) *When the owner of the proposed sewerage system is not a governmental agency, the application for a permit shall include a resolution from the local governmental agency having jurisdiction, stating that the governmental agency shall assume responsibility for the effective and continued operation and maintenance of the proposed sewerage system if the owner in any way fails to perform in this capacity.* A copy of contractual or other arrangements between the owner and the governmental agency, which provide for the continuity of service agreement, shall also be submitted. [Emphasis added.]

MDEQ argues the trial court erred when it declared Rule 33 invalid. It is MDEQ's position that Rule 33 was promulgated pursuant to the NREPA, and that the NREPA grants MDEQ the authority to promulgate rules and provide for the proper operation of all sewerage systems for the purpose of preventing pollution of the waters of the state. To further that purpose, Rule 33 requires a private owner of a proposed sewerage system to obtain an agreement

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[3] *Koontz v Ameritech Services, Inc*, 466 Mich 304, 309; 645 NW2d 34 (2002).

[4] *Dykstra v Dep't of Natural Resources*, 198 Mich App 482, 484; 499 NW2d 367 (1993).

from the local unit of government to run the system in the event of a default by the private owner. MDEQ further states that local units of government are liable for sewage in their jurisdiction and are in a unique position to assess property owners the cost of continued operation of the system and prevent pollution to the waters of the state.

I

First, we must address whether Rule 33 is within the subject matter of MDEQ's enabling statute.[5] The circuit court, after reciting the statutory preambles to MCL 324.101 and MCL 324.4104, found that "it is clear that the legislature empowered the Michigan Department of Environmental Quality to promulgate rules and the rule at issue is within the subject matter of the enabling statute." We agree.

MDEQ argues that the rule in question was promulgated for the purposes of implementing the NREPA. Rule 299.2901 states that "these rules are promulgated for the purpose of implementing the provisions of the act." Under Rule 299.2903(a), "'Act' means . . . MCL 324.101 *et seq*." Plaintiff, joined by the Michigan Association of Realtors in its amicus brief, argue that the subject matter of the enabling statute is limited to methodology of the operation of sewerage systems and not who should be liable for that operation. In any event, the parties agree that Rule 33 was promulgated pursuant to the rulemaking authority granted in MCL 324.4104. MCL 324.4104 states in part:

> The department may promulgate and enforce rules as the department considers necessary governing and providing a method of conducting and operating all or a part of sewerage systems including sewage treatment works.

Without deciding the scope of MDEQ's rule-making authority concerning the operation of sewerage systems, we find Rule 33 does concern itself with the operation of a sewage system. Irrespective of whether Rule 33 complies with the underlying intent of MCL 324.4101 *et seq.*, the subject matter is the operation of sewerage systems. Therefore, Rule 33 is within the subject matter of MDEQ's enabling statute, MCL 324.99903.

II

Now we must turn to the second prong of the analysis and determine if Rule 33 complies with the legislative intent underlying MDEQ's enabling statute, MCL 324.99903. In order to engage in this analysis, we must ascertain the plain meaning of the statute.

This Court has held that "[a] statute that grants power to an administrative agency must be strictly construed and the administrative authority drawn from such statute must be granted plainly, because doubtful power does not exist."[6] Although "[w]here an agency is charged to

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[5] *Dykstra, supra*, 198 Mich App 484.

[6] *In re Procedure and Format for Filing Tariffs Under Michigan Telecommunications Act*, 210 (continued…)

administer an act, as here, that agency's construction of the statute must be given deference," that deference "cannot be used to overcome the statute's plain meaning," and "where powers are specifically conferred they cannot be extended by inference."[7]

The circuit court held that Rule 33 does not comply with the legislative intent underlying MDEQ's enabling statute for the following reasons:

> The statute [MCL 324.3109(2)] is intended to regulate the discharge of both private and public sewage systems. The rule grants absolute discretion to the local governmental agency without any objective criteria to reject sewage disposal methods authorized by statute and regulated by Michigan Department of Environmental Quality. An arbitrary rejection of the requested resolution of the local governmental authority prevents safe and sound sewage treatment practices which are authorized and encouraged by the law, and would thus require the use of individual septic systems or some other sewage disposal system which are discouraged by the law. Under the rule promulgated by the agency which requires the local governmental agency to pass a resolution that they will assume responsibility for the sewage system should the developer be unable to maintain it before the developer is able to get past the application process, the local governmental agency has unfettered discretion for denial of systems which would otherwise be encouraged by laws and regulations. This unchecked discretion allows a local governmental unit to prevent development or simply roadblock a specific developer that they may dislike without any standards or rational basis. If the municipality does not have a sewage system of its own it may not, as in this case, pass a resolution because it does not want the potential liability. The purpose of the statute is to regulate discharge of sewage, not to prevent the development of reliable sewage treatment plants. Thus, this rule is not rationally related to the legislative purpose in any manner.

For background purposes we read the statutory preamble to the NREPA, MCL 324.101 *et seq*. We note that "[a]lthough a preamble is not to be considered authority for construing an act, it is useful for interpreting its purpose and scope."[8] However, so long as the result is "consistent with other rules of interpretation," a "preamble may be employed to extend the meaning of an ambiguous statute beyond the limited language of the purview."[9] The statutory preamble to the NREPA, MCL 324.101 *et seq.* states:

> An act to protect the environment and natural resources of the state; to codify, revise, consolidate, and classify laws relating to the environment and natural resources of the state; to regulate the discharge of certain substances into

(…continued)

Mich App 533, 539; 534 NW2d 194 (1995).

[7] *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 247; 590 NW2d 586 (1998).

[8] *Malcolm v City of East Detroit*, 437 Mich 132, 143; 468 NW2d 479 (1991).

[9] *King v Ford Motor Credit Co*, 257 Mich App 303, 312; 668 NW2d 357 (2003).

> the environment; to regulate the use of certain lands, waters, and other natural resources of the state; to prescribe the powers and duties of certain state and local agencies and officials; to provide for certain charges, fees, and assessments; to provide certain appropriations; to prescribe penalties and provide remedies; to repeal certain parts of this act on a specific date; and to repeal certain acts and parts of acts.

The parties do not dispute that MDEQ has the power to promulgate rules; the question specifically before us is whether the Legislature intended MDEQ to be able to promulgate a rule that in essence requires a local governmental agency to be responsible for a sewerage system as a condition precedent to permitting development. The crux of MDEQ's argument urging us that that is the case is that Rule 33 is merely an enforcement mechanism for preexisting duties providing increased efficiency in the protection of the environment. Conversely, the other parties insist that Rule 33 acts as a liability-shifting mechanism, is an impermissible delegation of authority, and that its end result will either interfere with development or result in proliferation of inferior sewage arrangements all contrary to the legislative intent underlying MDEQ's enabling statute.

In support of its argument that Rule 33 does not exceed or operate contrary to its statutory authority, MDEQ first cites MCL 324.3109(2) that provides as follows:

> (2) The discharge of any raw sewage of human origin, directly or indirectly, into any of the waters of the state shall be considered prima facie evidence of a violation of this part by the municipality in which the discharge originated unless the discharge is permitted by an order or rule of the department. If the discharge is not the subject of a valid permit issued by the department, a municipality responsible for the discharge may be subject to the remedies provided in section 3115. If the discharge is the subject of a valid permit issued by the department pursuant to section 3112, and is in violation of that permit, a municipality responsible for the discharge is subject to the penalties prescribed in section 3115.

MDEQ asserts that MCL 324.3109(2) imposes strict liability and uses the provision to support its assertion that the Legislature intended to make municipalities strictly responsible for the discharge of sewage that originates in the municipality. Strict liability is "liability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe."[10] In order to find a violation of MCL 324.3109(2), MCL 324.3115 states that liability requires actual knowledge, constructive knowledge, or disregard. Clearly, the operation of MCL 324.3115 makes MDEQ's assertion that local governments will be strictly liable for a discharge under MCL 324.3109(2) erroneous. And we therefore agree with the

[10] Black's Law Dictionary (7th ed.), 926.

circuit court that MCL 324.3109(2) does not impose strict liability on municipalities and does not provide statutory authority for the challenged Rule 33 requirement.

MDEQ also points us to MCL 78.23(f) stating that "each village charter shall provide for . . . the public peace and health, and for the safety of persons and property." In the same vein, MDEQ relies on Const 1963, art 7 § 29 as establishing a pre-existing duty requiring anyone operating a public utility to obtain a franchise from a village in order to, among other things, "transact local business therein." In furtherance of this argument, MDEQ contends that MCL 324.4302(1) makes the sewerage system at issue a "public utility." MCL 324.4302(1) states as follows in pertinent part:

> The waterworks system, intercepting sewers, pumping stations, sewage disposal plant and system, transfer station, and garbage and refuse processing or disposal plant and system, are public utilities within the meaning of any constitutional or statutory provisions for the purpose of acquiring, purchasing, owning, operating, constructing, equipping, and maintaining the waterworks system, intercepting sewers, pumping stations, sewage disposal plant and system, transfer station, and garbage and refuse processing or disposal plant and system.

But MCL 324.4302(1) is part of the whole of MCL 324.4301 *et seq.* that refers to the control of waterworks systems and sewers by a "local unit of government" *not* by a private entity. In this case, we are not concerned with any unit of government, but rather a private developer establishing a sewerage system for a development that will include a group of private property owners. The record indicates without question that the sewerage system will be a closed system servicing only those private individuals comprising owners of the development and will not be accessible to the public at large. Moreover, there is legal precedent for the proposition that simply because a "sewer system serves the public and is, therefore, a public utility in the ordinary sense of the word," the sewer system is not necessarily a "public utility."[11]

Because the sewerage system at issue plainly is not a public utility and does not implicate any unit of government, we find Const 1963, art 7 § 29 together with MCL 324.4302(1) and MCL 78.23(f) irrelevant to the instant case. For these reasons, we are not persuaded by any of MDEQ's arguments that Rule 33 is nothing more than an efficient enforcement mechanism for preexisting duties.

One of the amicus, the Michigan Onsite Wastewater Recycling Association (MOWRA), asserts that the NREPA is intended, in relevant part, to give the state sole jurisdiction over sewage system operation. MOWRA takes the position that Rule 33 is contrary to that intent because it grants local governments the power to authorize a sewage system. MCL 324.4105(1) states in part that:

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[11] *Butcher v Grosse Ile Twp*, 24 Mich App 389, 399; 180 NW2d 367 (1970), aff'd in part, vacated in part on other grounds 387 Mich 42, app dis 409 US 814; 93 S Ct 69; 34 L Ed 2d 71 (1972).

> Before constructing a sewerage system, filtration or other purification plant, or treatment works or any alteration, addition, or improvement to the system or plant, the mayor of each city, the president of each village, and the responsible official of all other governmental agencies, associations, private corporations, and partnerships or individuals shall submit the plans and specifications to the department and secure from the department a permit for construction. The department may promulgate and enforce rules regarding the preparation and submission of plans and specifications and for the issuance and period of validity of construction permits for the work. A contractor, builder, governmental agency, corporation, association, partnership, or individual shall not engage in or commence the construction of a sewerage system, filtration or other purification plant, or treatment works or an alteration, addition, or improvement until a valid permit for the construction is secured from the department.

MCL 324.4105(2) further states:

> A municipal officer or an officer or agent of a governmental agency, corporation, association, partnership, or individual who permits or allows construction to proceed on a sewerage works without a valid permit, or in a manner not in accordance with the plans and specifications approved by the department, is guilty of a misdemeanor.

A plain reading of these statutes in the analysis of this issue leads us to the inference that, because both individuals and government agencies are required to obtain permits from MDEQ, MDEQ has exclusive jurisdiction over those permits. MDEQ stresses that the decision to grant a permit remains with MDEQ, but concedes that Rule 33 "allows the local government to exercise discretion." Undoubtedly, a municipality's exercise of discretion pursuant to Rule 33 cannot guarantee that MDEQ will grant a permit for a proposed sewerage system, but it can guarantee that a permit will not be granted. As is demonstrated in the instant case, Rule 33 empowers a municipality to deny an otherwise proper use of property simply by refusing to grant the resolution required by Rule 33. For this reason, we find a municipality's discretion in the application of Rule 33 fundamentally a "veto power." To the extent that Rule 33 relinquishes decision making authority from MDEQ to municipalities, we find this contrary to the legislative intent underlying the enabling statute.

Plaintiff asserts in its brief on appeal that Rule 33 is not concerned with MDEQ's regulation of the planning, construction and/or operation of the sewer system, but instead is a liability shifting provision purporting to transfer statutory liability and responsibility from the permittee, or MDEQ itself, to a municipality. A plain reading of Rule 33 reveals that if the municipality grants the required resolution, then Rule 33 imposes liability on the municipality to "assume responsibility for the effective and continued operation and maintenance of the proposed sewerage system if the owner in any way fails to perform in this capacity." This liability imposes a new burden on municipalities.

We do agree in some respects with MDEQ's characterization of Rule 33 as an enforcement mechanism, but Rule 33, under the guise of "enforcement" imposes a liability on

municipalities. This burden goes beyond enforcement and operates as essentially a new remedy rather than a means of implementing existing remedies. Because the NREPA "creates and regulates," this Court has held that "the method prescribed in a statute for enforcing the rights provided in it is . . . presumed to be exclusive."[12] MDEQ is authorized to promulgate rules regarding the governing, operating, and conducting of a sewerage system. However, under MCL 324.4111, enforcement must be conducted by "an appropriate action in the name of the people of this state." We do not find the promulgation of a rule imposing a new burden on a municipality an appropriate method of enforcement and again find this contrary to the legislative intent underlying the enabling statute.

In sum, we find that Rule 33 effectively confers municipalities indirect veto power in contravention of a grant of exclusive jurisdiction to MDEQ. Also Rule 33 does not merely articulate a preexisting liability as an enforcement mechanism, it creates a new burden and a new remedy. For these reasons we find that Rule 33 does not comport with the legislative intent underlying MDEQ's enabling statute.

III

The third and final prong of the analysis requires us to determine if Rule 33 is arbitrary and capricious. This Court has held:

> A rule is arbitrary if it was fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance. A rule is capricious if it is apt to change suddenly or is freakish or whimsical. If a rule is rationally related to the purpose of the statute, it is neither arbitrary nor capricious. Further, if there is any doubt as to the invalidity of a rule in this regard, the rule must be upheld.[13]

MDEQ maintains that Rule 33 is not arbitrary and capricious because it is rationally related to the purpose of the statute, namely, efficient enforcement of the laws preventing pollution of the waters of the state. MDEQ asserts that the requirement imposed by Rule 33 makes enforcement of existing laws preventing pollution more efficient because local municipalities are in a better position to carry out Rule 33's requirements than MDEQ. Plaintiff and the amicus insist that the application of Rule 33 will cause a proliferation of unsafe septic systems, a result directly contrary to the goal of reducing pollution. MDEQ points out that any system a developer wished to install would require safety approval by some appropriate governmental unit.

The only law cited to reinforce either position is a reference to MCL 333.12752. MCL 333.12752 is a legislative declaration that septic tanks are less safe than public sanitary sewer systems. Clearly, the Legislature would prefer sewers to septic tanks but if individual septic

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[12] *Williams v Coleman*, 194 Mich App 606, 613; 488 NW2d 464 (1992).

[13] *Dykstra, supra*, 198 Mich App at 491 (internal citations and quotations omitted).

systems were a feasible option for this development and similar developments, this matter would not be before this Court.

We can easily envision a scenario where upon a municipality's refusal to grant a resolution under Rule 33 development simply will not take place and the relevant project abandoned. MDEQ does not rebut this possibility. The functional result of this outcome is an obvious illustration of the veto power over private sewer systems granted municipalities by Rule 33 discussed *supra*. Plaintiff and the amicus contend that the indirect veto power conferred upon municipalities amounts to an illegal or unconstitutional delegation of absolute discretionary authority to municipalities regarding whether to permit a private sewerage system.

As plaintiff points out, this Court has stated, "[i]t is well settled that an administrative agency may not subdelegate the exercise of discretionary acts unless the Legislature expressly grants it authority to do so."[14] We also recognize that this Court has also found it acceptable to delegate "authority or discretion as to the execution of the law."[15] But, even under the latter, delegation of power must be accompanied by at least some standards regarding the exercise of that power.[16] In light of the applicable law, we find that MDEQ is not empowered to grant to a local municipality such discretionary power. Also, in light of applicable law, MDEQ's claim that neither the Legislature nor MDEQ has to articulate the criteria a local unit of government must apply in the approval process fails.

The parties also dispute whether MDEQ or the local municipality is in the better position to assess the costs of operations and maintenance on the users of the system. MDEQ argues that municipalities can use assessments to adequately fund and manage sewer systems in the event they are called on to take over a sewage system pursuant to a resolution. The Village states that it has no funds to build a sewer system for its citizens, much less guarantee the obligations of a private developer. In a situation as here, where the Village has no money, public works, law enforcement, or operating engineers to effectuate a safe, let alone efficient sewerage system, we fail to understand how the Village is in a superior position than MDEQ to further the purpose of the statute, i.e., efficient enforcement of the laws preventing pollution of the waters of the state.

MDEQ is empowered to enforce laws directly without the application of Rule 33 by operation of MCL 333.2455 concerning nuisance and unsanitary conditions. MCL 333.2455 declares that "a local health department or the department" is authorized to "correct" unsanitary conditions at the expense of the owner. Hence, akin to a local municipality, MDEQ is able to directly assess the costs of operations and maintenance of a sewerage system on the users of the system in the instance when a wastewater system is not properly operated or maintained. Unlike a local municipality like the Village, however, MDEQ has tools including expert managers and engineers who can ensure that abandoned wastewater systems are quickly made operational to prevent pollution of the waters of the state.

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[14] *Edmond v Dep't of Corrections*, 143 Mich App 527, 536; 373 NW2d 168 (1985).

[15] *Mobil Oil Corp v City of Clawson*, 36 Mich App 46, 51; 193 NW2d 346 (1971).

[16] *Id*. at 51-52.

We find Rule 33 is arbitrary and capricious because it constitutes an unlawful delegation of discretionary power to local municipalities, seeks to impose operational mandates upon a municipality ill-adapted to reach those mandates, and is unnecessary to MDEQ for enforcement.

CONCLUSION

We find Rule 33 invalid because it is not in conformity with the legislative intent of MDEQ's enabling statute and is arbitrary and capricious.

Affirmed.

/s/ David H. Sawyer
/s/ Pat M. Donofrio

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O'CONNELL, J. (*dissenting*).

I respectfully dissent. The majority concedes that the Department of Environmental Quality (DEQ) satisfies *Dykstra's*[1] first prong because Rule 33 falls within the general purpose of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101, *et seq*. The only issues that remain are whether the rule complies with the legislative intent behind the act, and whether the rule represents arbitrary and capricious action by the DEQ.

According to MCL 324.4104, the DEQ "may promulgate and enforce rules as the [DEQ] considers necessary governing and providing a method of conducting and *operating* all or a part of sewerage systems . . . ." Also, MCL 324.4108, states that the DEQ, "shall exercise due care to see that sewerage systems are properly planned, constructed and *operated* to prevent unlawful pollution of the . . . water resources of the state." These statutes do not restrict the DEQ to rubber-stamping sewage systems that temporarily comply with the safe operation requirements. They anticipate that the DEQ will demand substantive assurance of continuous operation for the length of the system's use and beyond. Rule 33 accomplishes this goal by disallowing the

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[1] *Dykstra v Dep't of Natural Resources*, 198 Mich App 482, 484; 499 NW2d 367 (1993)

construction of the system without proof of the local government's willingness to assume its operation if it is abandoned. Regulations that require local governments to properly manage the sewage generated within their boundaries pervade the NREPA. Given this solid legal foundation for the rule and the broad rulemaking authority bestowed on the DEQ, I cannot find that it falls outside the authority that the Legislature properly delegated to the DEQ.

Furthermore, the rule "complies with the [NREPA's] underlying legislative purpose." *Dykstra, supra*, at 486. According to the majority, if a developer or his successor in title fails to maintain a sewage system, the DEQ faces the prospect of necessarily stepping in and taking responsibility for the abandoned cesspool. The majority posits that the Legislature intended this result, despite the fact that local governments, through forty years of legislation designed to require them to manage their sewage, possess the resources, information, and local accountability needed to take responsibility for the abandoned systems. Looking at the NREPA and the burdens it generally places on local governments, Rule 33 conforms perfectly to the greater legislative scheme. Local governments should bear the responsibility for managing an abandoned facility within their bounds and should also have the preemptory option of declining that responsibility. Contrary to the majority's position, the rule does not grant "veto power" to a local government any more than it would grant veto power to a bonding company. It does not delegate sewage authority because the DEQ fully retains the right to reject the proposed sewage system. The rule does not require local approval of the system, but rather it requires an agreement to run the system if abandoned. If plaintiff can present a satisfactory bond to the DEQ, then nothing prevents him from presenting an equally satisfactory bond to the village.

Finally, the rule has a valid purpose and intelligent design. It assigns responsibility for the competent perpetual operation of sewage systems so that we can pass on our heritage of clean, pure water without concern about who should clean up after developers who no longer find it economically feasible to safely operate their sewage dumps. It recognizes that the desire to encourage development drives local government; the desire to ensure the perpetually safe operation of sewage systems drives the DEQ; and the desire to cut costs, increase profit, and *finish* projects drives the developer.

Nothing will stunt development more than charging the DEQ with the never ending responsibility of cleaning up every abandoned system that receives a permit without local backup. Permits will only issue, if at all, to developers who can afford to bond out the perpetual operation of their proposed sewage plans regardless of the local government's willingness to independently ensure the system's continuous operation. Nothing could threaten our watersheds more than allowing haphazard developers to receive permits, build large sewage retention lagoons, sell their lots, and leave the lagoons' maintenance to ill equipped and poorly funded homeowners and neighborhood associations who would not know of grave environmental disasters until far too late. Whatever fault may be found with Rule 33, it corresponds with the act's purpose of ensuring the continuous and proper maintenance of sewage facilities and is rationally related to that end. *Dykstra, supra*, at 491. I would reverse.

/s/ Peter D. O'Connell