STATE OF MICHIGAN

IN THE 13TH CIRCUIT COURT FOR THE COUNTY OF LEELANAU

LILIAN P. MATTSON, LILIAN P. MATTSON TRUST AND STEVE R. MATTSON,

Petitioners,

v

File No. 00-5203-AA
HON. PHILIP E. RODGERS, JR.

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, a Michigan executive agency, and RUSSELL J. HARDING, Director of the Michigan Department of Environmental Quality,

Respondents.
_____/

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DECISION AND ORDER

This case involves Petitioners' appeal from a Tribunal decision allowing the construction of a house, garage, driveway and holding tanks on pilings in a regulated wetland. The parties were given an opportunity to present oral argument on October 2, 2000 and the Court took the matter under advisement.

Introduction

On August 10, 1998, Larry Knowles applied to the Department of Environmental Quality ("DEQ") for a permit to fill regulated wetlands in order to build a house, garage, driveway and holding tanks on a piece of waterfront property on Northport Bay. Mr. Knowles did not own the property, but he had an agreement to purchase it that was expressly contingent on his ability to get

a wetland permit to build on the property. After conducting a public hearing and receiving written comments, the DEQ denied the application. In a letter dated November 23, 1998, the DEQ advised Mr. Knowles that his permit application had been denied because "the proposed project will have a significant adverse impact on the natural resources associated with Grand Traverse Bay," the "activity is not dependent upon being located in the wetland" and "there is a feasible and prudent alternative . . . to use the property as is or seek another piece of property to accommodate your proposal."

Mr. Knowles then submitted a revised permit application requesting permission to construct the house, garage, driveway and holding tanks on pilings instead of filling the wetland. No new information was submitted regarding the modified permit application. The surrounding landowners were not notified of the modified permit application and the DEQ did not hold a public hearing on the application. The DEQ nonetheless approved the modified permit.

The Petitioners initiated the underlying contested case challenging the DEQ's grant of the permit. The issue was whether DEQ staff conducted a proper review of the permit criteria set forth in Part 303 of the Natural Resources and Environmental Protection Act, MCL 30301, et seq., (the "Wetlands Act"). After hearing testimony and arguments, the Tribunal issued its Proposal for Decision on January 19, 2000. The Tribunal held that the DEQ properly approved the applicant's revised permit. The Proposal for Decision was adopted in the DEQ's Final Decision and Order on March 14, 2000 and the Petitioners filed this timely appeal.

In its Proposal for Decision, the DEQ found that the availability of other waterfront property was not a "feasible and prudent alternative" within the meaning of the Wetlands Act because it would be "absurd" to interpret the Wetlands Act to prohibit activity in a regulated wetland because "other real property is always available where the activity could be accomplished." The DEQ further found that the statute required only that there be no other feasible and prudent alternative "on the same site."

The DEQ also found that the modified permit, with restrictions, was properly approved because "[t]he Permittee could not do less and build on this parcel." Even though the subject property was the only remaining wetland on Northport Bay, the DEQ concluded that the activity should still be permitted because "there is no adverse impact."

Finally, the DEQ found that building a residence on the subject property was a wetland-dependent activity because "[i]f the entire parcel is wetland, as is the situation in this case, the activity must occur in the wetland."

The Petitioners contend that the DEQ erred: (1) when it held that there was no feasible and prudent alternative to the permitted activity; (2) when it held that due to the *de novo* nature of the proceeding, it could remedy deficiencies in the information submitted by the applicant through testimony from the DEQ staff; and (3) when it held that construction of the house was a "wetland dependent" activity. The Court will consider issues (1) and (3) separately. Issue (2) has been rendered moot.

I.

In *Citizens Disposal, Inc v Dep't of Natural Resources*, 172 Mich App 541; 432 NW2d 315 (1988), the Court of Appeals discussed the Legislative intent behind the Wetlands Act, saying:

> Clearly, a prime purpose of the wetlands act is to ensure the preservation and protection of the wildlife habitats known as wetlands. To this end, the act, among other things, authorizes the DNR to contract with governments, agencies, or persons for the purpose of conducting studies for the efficient preservation, management, protection, and use of wetland resources, MCL § 281.704; MSA § 18.595(4), prohibits certain acts in wetlands by any person except as allowed by way of permit issued by the DNR, MCL § 281.705; MSA § 18.595(55), establishes a procedure in accordance with which permit requests are to be granted or denied, MCL § 281.708; MSA § 18.595(58), and provides for remedies and penalties applicable to those who violate the act, MCL §§ 281.713, 281.714; MSA §§ 18.595(63), 18.595(64). The language of the statute itself is replete with statements evidencing the strong legislative concern for protecting wetlands. For example, the statute provides that "[w]etland conservation is a matter of state concern," MCL § 281.703(1)(a); MSA§ 18.595(53)(1)(a), that the "loss of a wetland may deprive the people of the state" of several enumerated benefits to be derived from a wetland, MCL § 281.703(1)(b); MSA § 18.591(53)(1)(b)3 , that a permit request to conduct a prohibited activity in a wetland shall not be approved unless the DNR first determines that the activity is in the public interest, such determination being made in light of "the national and state concern for the protection of natural resources from pollution, impairment, and destruction," MCL § 281.709(2); MSA § 18.595(59)(2), and that a permit shall not be issued unless the applicant shows either that the proposed activity is primarily dependent upon being located in the wetland or that a feasible and prudent alternative does not exist, MCL § 281.709(4); MSA § 18.595(59)(4).

Citizens was decided under the Michigan Environmental Protection Act, being MCLA §§ 600.631, 691.1201 et seq., which has been replaced by the Natural Resources and Environmental Protection Act ("NREPA"). Provisions similar to those referred to by the Court in the *Citizens* case exist under the NREPA.

Section 30304 of NREP provides as follows:

> Except as otherwise provided by this part or by a permit obtained from the department under sections 30306 to 30314, a person shall not do any of the following:
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> > (a) Deposit or permit the placing of fill material in a wetland.
> >
> > (b) Dredge, remove, or permit the removal of soil or minerals from a wetland.
> >
> > (c) Construct, operate, or maintain any use or development in a wetland.
> >
> > (d) Drain surface water from a wetland.

Section 30311 sets forth the requirements for the issuance of a permit. It provides as follows:

> (1) A permit for an activity listed in section 30304 shall not be approved unless the department determines that the issuance of a permit is in the public interest, that the permit is necessary to realize the benefits derived from the activity, and that the activity is otherwise lawful.
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> (2) In determining whether the activity is in the public interest, the benefit which reasonably may be expected to accrue from the proposal shall be balanced against the reasonably foreseeable detriments of the activity. The decision shall reflect the national and state concern for the protection of natural resources from pollution, impairment, and destruction. The following general criteria shall be considered:
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> > (a) The relative extent of the public and private need for the proposed activity.
> > (b) The availability of feasible and prudent alternative locations and methods to accomplish the expected benefits from the activity.

(c) The extent and permanence of the beneficial or detrimental effects that the proposed activity may have on the public and private uses to which the area is suited, including the benefits the wetland provides.

(d) The probable impact of each proposal in relation to the cumulative effect created by other existing and anticipated activities in the watershed.

(e) The probable impact on recognized historic, cultural, scenic, ecological, or recreational values and on the public health or fish or wildlife.

(f) The size of the wetland being considered.

(g) The amount of remaining wetland in the general area.

(h) Proximity to any waterway.

(i) Economic value, both public and private, of the proposed land change to the general area.

(3) In considering a permit application, the department shall give serious consideration to findings of necessity for the proposed activity which have been made by other state agencies.

(4) A permit shall not be issued unless it is shown that an unacceptable disruption will not result to the aquatic resources. In determining whether a disruption to the aquatic resources is unacceptable, the criteria set forth in section 30302 and subsection (2) shall be considered. A permit shall not be issued unless the applicant also shows either of the following:

(a) The proposed activity is primarily dependent upon being located in the wetland.

(b) A feasible and prudent alternative does not exist.

The Petitioners contend that the DEQ can and should have considered feasible and prudent off-site alternatives. Specifically, Petitioners argue that the DEQ should have considered the fact that the applicant did not own the property for which he sought the permit and other waterfront

property that was not wetlands was available on Northport Bay. In response, the DEQ asserts that "it is not the policy of the tribunal to require an applicant to purchase offsite property." Rather, the DEQ contends that it "must consider the propriety of the proposal before it." The DEQ would have this Court conclude that construction of the house, garage, driveway and holding tanks on pilings is a feasible and prudent alternative to the original request to fill the wetlands and supports the DEQ's decision to issue the permit without any consideration of offsite alternatives available to an applicant who did not own the subject property.

The only case in which the Michigan courts have dealt with the issue of what constitutes a "feasible and prudent alternative" is the *Friends of Crystal River v Kuras Properties*, 218 Mich App 457; 554 NW2d 328 (1996). In that case, the Friends of Crystal River, an environmental organization, brought an action against George Kuras, the owner of the Homestead Resort, and Department of Natural Resources ("DNR"), claiming that the proposed construction of a golf course at the resort would violate Wetlands Protection Act ("WPA") and Michigan Environmental Protection Act ("MEPA"). The Circuit Court affirmed the findings of Natural Resources Commission ("NRC") recommending issuance of the permit. The Friends of Crystal River appealed.

The Court of Appeals was faced with the task, among others, of giving meaning to the phrase "feasible and prudent alternative" as used in the WPA. The Court said:

> Our duty is to identify and effectuate the intent of the Legislature, and, if necessary, interpret language that does not on its face reveal legislative intent. *Piper v Pettibone Corp*, 450 Mich 565, 571; 542 NW2d 269 (1995). A fundamental rule of statutory construction is that the Legislature is presumed to have intended the plain meaning of words used in a statute. *Attorney General v Sanilac Co Drain Comm'r*, 173 Mich App 526, 531; 434 NW2d 181 (1988). Because the words "feasible" and "prudent" are not defined by the statute, an acceptable method of determining intent is to refer to a dictionary for the common usage of the words. *Nelson v Grays*, 209 Mich App 661, 664; 531 NW2d 826 (1995). A "feasible" alternative is one that is "capable of being put into effect or accomplished; practicable" or "capable of being successfully utilized; suitable." Funk & Wagnalls Standard Dictionary (1980). "Prudent" is defined as "exercising sound judgment." Id.
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> In *Ray v Mason Co Drain Comm'r,* 393 Mich 294; 224 NW2d 883 (1975), the Court noted the Legislature's imprecise language in the area of environmental regulation:

> The Legislature in establishing environmental rights set the parameters for the standard of environmental quality but did not attempt to set forth an elaborate scheme of detailed provisions designed to cover every conceivable type of environmental pollution or impairment. Rather, the Legislature spoke as precisely as the subject matter permits and in its wisdom left to the courts the important task of giving substance to the standard by developing a common law of environmental quality. *Id.* at 306; 224 NW2d 883.
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> Given the flexibility offered the courts by *Ray*, and using the dictionary definitions above, we find that defendant met his burden of showing that there existed no "feasible and prudent" alternative to the proposed golf course. Kuras' goal in proposing the golf course was to reduce the seasonality of the resort and to increase its competitiveness in the marketplace, where each other destination resort possessed at least one contiguous eighteen-hole golf course. The evidence showed that much of the property near the Homestead was owned by the National Park Service or the Department of the Interior, was underwater, or was otherwise unavailable. Kuras demonstrated that, in order to be competitive with other northern Michigan destination resorts, the Homestead golf course needed to be contiguous to the resort as opposed to several miles away. The evidence at the administrative hearing established that the proposed site was the only location that could accomplish Kuras' goals of being competitive in the marketplace and reducing the seasonality of the resort. Accordingly, we find that Kuras satisfied his burden of showing the lack of "availability of feasible and prudent alternative locations." MCL § 281.709(2)(b); MSA § 18.595(59)(2)(b). In accomplishing Kuras' legitimate objectives, no other location was "practicable," "suitable," or "capable of being successfully utilized," nor would building the course in another location constitute the "exercis[e] [of] sound judgment." Funk & Wagnalls Standard Dictionary (1980).

Id. at 466-467.

The *Friends* case is significant because the Court defined "feasible and prudent alternative" as follows: "A 'feasible' alternative is one that is 'capable of being put into effect or accomplished; practicable' or 'capable of being successfully utilized; suitable.'" *Id.* at 466. *Friends* is also significant because off-site alternatives were considered. "The evidence showed that much of the property near the Homestead was owned by the National Park Service or the Department of the Interior, was underwater, or was otherwise unavailable." *Id.*

Thus, even though the DEQ claims that it is not its policy to require an applicant to purchase off-site property, the DEQ has in the past considered off-site alternatives. *Friends, supra* at 467.

Certainly, it was important to the *Friends* court that no off-site alternative was feasible or prudent. Considering off-site alternatives in the instant case is especially compelling because the applicant/permittee did not own the property where he sought the permit. He had an agreement to purchase that was expressly contingent upon his being able to obtain the permit.

In order to serve the Legislative mandate to protect and preserve our wetlands, feasible and prudent alternatives both on and off the site can and should be considered. The record in the instant case indicates that there are other waterfront lots available on Northport Bay. The applicant/permittee failed to show that these other parcels do not provide feasible and prudent alternatives to his proposal to construct a home, garage, driveway and holding tanks on pilings in the wetlands.

Even if the building of structures on pilings is a feasible and prudent alternative, because it will result in less disturbance to the wetlands than the original fill proposal this should not be the end of the inquiry. On remand, if the DEQ should find that there are off-site alternatives, then the DEQ must decide whether such alternatives are feasible, prudent and preferable to piling construction so as to properly assess the relative merits of the requested permit.

In its Proposal for Decision, the DEQ found that the modified plan for construction on pilings would have no adverse impact on the wetlands. This conclusion is inconsistent with the testimony at the contested case hearing. At that hearing every witness acknowledged that activity in the wetland would have some adverse impact. The DEQ's expert "considered the piling proposal as minimizing the impacts to these functions to an acceptable level." No effort was made to quantify this harm relative to off-site alternatives for reasons already discussed. As the following discussion will illustrate, this failure is an error of law.

In *Association Concerned About Tomorrow, Inc v Slater*, 40 F Supp 2d 823 (ND Texas 1998), the United States Department of Transportation, Federal Highway Administrator, and Texas Transportation Commission sought to dissolve an injunction against construction of federally-funded primary highway route. The Court said:

> Section 102(2)(c)(iii) of NEPA requires a federal agency in assessing the environmental effects of a project to discuss alternatives to the proposed action. The purpose of the alternatives requirement is to assure that the government agency as a decision-making body has considered methods of achieving the desired goal through means other than the proposed action. *Piedmont Heights Civic Club v Moreland*, 637 F2d 430, 436 (5th Cir.1981).

> Courts have interpreted this to impart a "rule of reason" that governs both the agency's choice of alternatives to discuss and the extent to which it discusses them. *City of Grapevine*, 17 F3d at 1505; *Burlington*, 938 F2d at 195-96. Under this rule of reason, as long as the agency makes these choices reasonably in light of the goals, needs, and purposes that it has set for the project, its discussion of alternatives is upheld. *Burlington*, 938 F2d at 196. Therefore, the Court's inquiry is limited to whether defendants reasonably chose to limit their discussion of the IRA, in light of the goals, needs, and purposes they have defined for the project.

In the instant case, the DEQ did not consider or discuss off-site alternatives to the piling proposal. Where, as here, the Legislative mandate is to protect and preserve our wetlands, an analysis of the feasible and prudent alternatives requires a rigid least-harm standard. The balancing process employed in *Concerned Citizens* is applicable in the instant case. The DEQ can and should total the harm caused by each feasible and prudent alternative and, if there is a feasible and prudent alternative that causes less harm to the wetlands than the proposed project, it should deny the permit.

II.

Section 30311(4)(a) provides that a permit shall not be issued unless the applicant can show that the proposed activity is primarily dependent upon being located in the wetland or there is no feasible and prudent alternative. The DEQ at first admitted in its Proposal for Decision that "construction of houses is not an activity that must occur in a wetland." The DEQ went on, however, to interpret the phrase "dependent upon being located in the wetland" to mean "whether the activity must extend into the portion of the parcel which is wetland" and concluded that, because this entire parcel is wetland, the activity "must occur in the wetland" and, therefore, is "dependent upon being located in the wetland."

Unless the construction of a statute by the body charged with administering it is clearly wrong or another construction is plainly required, the court will accord deference to that construction. *Tulsa Oil Corp v Dep't of Treasury*, 159 Mich App 819, 824; 407 NW2d 85 (1987).

The DEQ's construction of "dependent upon being located in the wetland" is clearly wrong and another construction is plainly required. To accept the DEQ's construction would result in any property that is entirely wetlands being exempt from meaningful regulation. The Wetlands Act would be effectively gutted. Under the DEQ's construction of the wetlands regulations, if a person

In *Concerned Citizens Alliance, Inc v Department of Transportation*, 176 F3d 686 (3d Cir 1999), the plaintiffs challenged the Department of Transportation's selection of a bridge alignment that would send traffic through an historic district. The Department of Transportation Act, 23 USCA § 138, provides that the Secretary of Transportation "shall not approve any project which requires the use of any land from an historic site unless there is no feasible and prudent alternative and the project includes all possible planning to minimize harm to the historic site." The Court held that this provision of the Department of Transportation Act "requires a simple balancing process which totals the harm caused by each alternate route to historic areas and selects the option which does the least harm; the only relevant factor in making such a determination is the quantum of harm to the historic site caused by the alternative, and considerations that might make the route imprudent are not relevant to this determination, and if the route does not minimize harm, it need not be selected."

In *City of South Pasadena v Slater*, 56 F Supp 2d 1106 (9th Cir 1999), the Federal Court reached a similar conclusion where the Secretary of Transportation's decision regarding a freeway extension was challenged. The Court said:

> The purpose of Section 4(f) is to protect the natural beauty and availability of parks and other environmental and historic resources. 49 USC § 303(a); see also *Citizens to Preserve Overton Park, Inc v Volpe*, 401 US 402, 411; 91 S Ct 814; 28 L Ed 2d 136 (1971), overruled on other unrelated grounds, *Califano v Sanders*, 430 US 99; 97 S Ct 980; 51 L Ed 2d 192 (1977) (discussing purposes of Section 4(f)). Section 4(f) states that "the Secretary 'shall not approve any program or project' that requires the use of any [Section 4(f) resource] 'unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such [resources].'" *Overton Park*, 401 US at 411; 91 S Ct 814, quoting 23 USC § 138; 49 USC § 1653(f) (now codified at 49 USC § 303).
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> Section 4(f) is "a plain and explicit bar to the use of federal funds for construction of highways [which use Section 4(f) resources]--only the most unusual situations are exempted." *Id.* The Supreme Court has defined "no feasible alternative" to mean that "the Secretary [of Transportation] must find that as a matter of sound engineering it would not be feasible to build the highway along any other route." *Id.* The Supreme Court has defined "no prudent alternative" to mean that the Secretary must "find[ ] that alternative routes present unique problems." *Id.* at 412; 91 S Ct 814.

> The Ninth Circuit explained *Overton Park's* definition of a "feasible and prudent alternative" by stating that Section 4(f) resources "may be 'used' for highway purposes only if 'there [are] truly unusual factors present in [the] case,' if 'feasible alternative routes involve uniquely difficult problems,' or if 'the cost or community disruption resulting from alternative routes [reach] extraordinary magnitudes.'" *Stop H-3 Ass'n v Dole*, 740 F2d 1442, 1449 (9th Cir.1984), quoting *Overton Park*, 401 US at 413, 416; 91 S Ct 814.

In *City of Bridgeton v FAA*, 212 F3d 448 (8th Cir. 2000), two cities and a county located west of an international airport petitioned for judicial review of the decision by Federal Aviation Administration ("FAA") approving and authorizing federal funding for a proposed westward expansion of the airport. In reviewing the FAA's choice among feasible and prudent alternatives, the court applied the arbitrary and capricious standard of review. The Court said:

> Section 4(f) of the Transportation Act, 49 USC § 303(c), requires that the FAA take certain measures if it determines that a transportation project will 'use' natural and historic resources protected by the statute. The Act requires the FAA to make a comparative analysis when there are multiple feasible alternatives. Yet, in airport expansion cases, the Court said "the statute does not mandate a rigid least-harm standard" because "[s]uch a reading might well conflict with the congressional mandate 'that airport construction and improvement projects that increase the capacity of facilities to accommodate passenger and cargo traffic be undertaken to the maximum feasible extent so that safety and efficiency increase and delays decrease.' 49 USC § 47101(a)(7)." *Id.* at 460.

In *Corridor H Alternatives, Inc v Slater*, 982 F Supp 24 (Dist of Columbia, 1997), which is another transportation case, the Court said:

> Under NEPA, defendants cannot identify a Preferred Alternative without considering and discussing other alternative means of achieving their goal. To that end, the FEIS must contain a discussion of these alternatives to the chosen plan. 42 USC § 4332(2)(C)(iii). However, NEPA does not require an agency to ultimately choose one alternative or another; it only requires that the agency take a "hard look"at environmental impact and at all alternatives. *City of Grapevine, Texas v Dep't of Transportation,* 17 F3d 1502, 1504 (DC Cir.1994); *Citizens Against Burlington, Inc v Busey*, 938 F2d 190, 195 (DC Cir.1991). See also *Laguna Greenbelt, Inc v United States Dep't of Transportation*, 42 F3d 517 (9th Cir.1994); *North Buckhead Civic Ass'n v Skinner*, 903 F2d 1533 (11th Cir.1990).
>
> NEPA does not describe how many alternatives--or which alternatives--an agency must discuss in the FEIS, and CEQ regulations state only that an agency must discuss those alternatives that are reasonable and feasible. 40 CFR § 1502.14.

owned a parcel of land that was entirely wetlands and wanted to build a parking deck or a marina or any other structure allowed by applicable zoning, the DEQ would permit it because the construction would be "wetland-dependent." The need to show "no feasible and prudent alternative," would be effectively eliminated. Yet, in no sense of the ordinary meaning of the word "dependent" is any residential or commercial construction activity "dependent upon being located in a wetland."

According to Webster's New Collegiate Dictionary "dependent" means (1) contingent; (2) relying on another for support, (3) subject to another's jurisdiction; (4) subordinate. In order for an activity to be dependent upon wetlands, the activity must be contingent upon the wetlands or rely upon the wetlands for support. The building of a residence is not contingent upon wetlands nor does it rely upon wetlands for support. In other words, the statute restricts the use of wetlands to activities that must be conducted on wetlands because they are wetlands, unless there is a showing that there is no feasible and prudent alternative.

The decision of the DEQ to approve the subject wetland permit for the construction of residential structures following a finding that the permitted activity is "dependent upon being located in a wetland" must be reversed. This DEQ finding is a clear error of law. Protection of our wetlands has been entrusted to the DEQ. The statutory interpretations in this case show a stunning disregard for the Legislature's intent and the people's trust.

Conclusion

A consideration of construction in a wetlands requires the analysis of on and off-site feasible and prudent alternatives. No construction activity becomes wetland dependent simply because the entire parcel is wetlands. The Tribunal's decision was tainted by clear errors of law. The magnitude of these errors would strip the wetlands regulations of their legislatively intended meaning and subordinate the primacy of Michigan's environmental law contrary to its clear expression in NREPA. The case is hereby reversed and remanded to the Tribunal for reconsideration in light of this Decision and Order.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge
Dated: 12/05/00