STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

In the matter of	**Docket No.: 18-018938**
Petition of Dr. Taite Anderson and Dr. Lindsey Anderson	**Agency No.: HND-2Z1J-RNKDP**
	Parts: 353, Sand Dunes Protection and Management **323, Shorelands Protection and Management**
	Agency: Department of Environment, Great Lakes, and Energy
_____/	**Case Type: Water Resources Division**

Issued and entered
this 26th day of April 2021
by Daniel L. Pulter
Administrative Law Judge

FINAL DECISION AND ORDER

This contested case concerns an Application submitted by Dr. Taite Anderson and Dr. Lindsey Anderson (Petitioners) for a permit under Part 353, Sand Dunes Protection and Management, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended. MCL 324.35301, *et seq*. The Application was denied by the Water Resources Division (WRD) of the Department of Environment, Great Lakes, and Energy (EGLE) on July 20, 2018. [1] That agency decision was challenged by a Petition for Contested Case Hearing filed by the Petitioners on September 18, 2018.

[1] The Application was denied by the Department of Environmental Quality (DEQ). Pursuant to Executive Order 2019-06, effective April 22, 2019, the name of the agency was changed to the Department of Environment, Great Lakes, and Energy (EGLE). All citations in the record to DEQ shall be treated as a reference to EGLE. In addition, Executive Order 2019-06 also abolished the Michigan Administrative Hearing System (MAHS) and created the Michigan Office of Administrative Hearings and Rules (MOAHR). In that Executive Order, the authorities, power, duties, functions, and responsibilities of MAHS were transferred to MOAHR.

JURISDICTION

Part 353 grants the right to a contested case hearing "[i]f an applicant for a permit … is aggrieved by a decision of the department in regard to the issuance or denial of a permit or special exception under this part…." MCL 324.35305(1). The Petitioners are the owners of property who claim to be aggrieved by the denial of their Application for a permit under Part 353. Consistent with § 35305(1), the contested case hearing on November 13 and 14, 2019, was conducted under the applicable provisions of the Administrative Procedures Act (APA), 1969 PA 306, as amended. MCL 24.201, *et seq*. The record was closed at the conclusion of the hearing on November 14, 2019. Closing Briefs and Response Briefs were filed in accordance with the agreed schedule of the Parties. A site visit in the presence of counsel and the Parties was conducted on July 18, 2019.

PROPERTY RIGHTS PRESERVATION ACT

Pursuant to the Property Rights Preservation Act, 1996 PA 101, MCL 24.421, *et seq*., the undersigned, in formulating this Final Decision and Order, reviewed the Takings Assessment Guidelines and considered the issue of whether this governmental action equates to a constitutional taking of property. Const 1963, art 10, § 2.

PARTIES

The Petitioners were represented by Timothy A. Stoepker of the firm Dickinson Wright, PLLC. The Petitioners offered the testimony of Dr. Taite Anderson and Dean Ray. Through these witnesses, the Petitioners entered Exhibits P-1, P-2, P-4 through P-7, P-12, P-13, P-18, P-21, P-26, P-27, P-31 through P-33, P-37 through P-64, P-67 through P-77, and P-79. [2]

The WRD, which administers Part 353, was represented by Daniel P. Bock and Luanne Laemmerman, Assistant Attorneys General. The WRD offered the testimony of Ben Zimont and Kathleen Lederle. Through these witnesses, the WRD entered Exhibits R-1, R-2, and R-4 through R-19.

STIPULATIONS ON THE RECORD

During the Pre-Hearing Conference held on May 2, 2019, the Parties stipulated that:

1. The Petitioners are the proper applicant.

2. The Application was processed correctly.

[2] Some of the Petitioners' Exhibits were enlarged and placed on foam boards and are included in the record.

Scheduling Order entered on May 6, 2019. Stipulations by the Parties are evidence and are binding on the Parties. MCL 24.278. Since these stipulations are factual, I adopt them as Findings of Fact.

FINDINGS OF FACT

The Petitioners are the owners of property located in the city of Edwardsburg, Chikaming Township, Berrien County, Michigan. Exhibit R-6. Their land is located within a critical dune area. Exhibit R-7; Exhibit R-8. Their residence was constructed pursuant to a permit issued by the WRD in 2017. Exhibit R-5 at p 22. The beach is over 500 feet [3] from their residence and access is by virtue of a trail from the home down a steep slope. See 1 Tr 221. As a result, the Petitioners desire to construct a structure towards the beach in which to store kayaks and beach equipment. *Id*. On April 21, 2018, the Petitioners filed an application to construct a two-story, 1400 square-foot storage building. Exhibit R-6; Exhibit R-17; 1 Tr 34. Eventually, the Petitioners contemplate adding restroom facilities to this structure. 1 Tr 221-222. The Petitioners' application was denied by correspondence from the WRD dated July 20, 2018. Exhibit R-17.

The Petitioners' property is located along the shoreline of Lake Michigan, which trends in a northeast to southwest direction. See Exhibit R-5 at p 2. Their irregular-shaped property is bounded on the north by the Blew property and on the south by the Horwitz property. 1 Tr 82-83. The Petitioners' frontage on Lake Michigan is approximately 100 feet. Exhibit P-71. Most of the Petitioners' property is located on the interior of a blowout, near its northern flank. See Exhibit P-71. "A blowout is a saucer-, cup- or trough-shaped depression or hollow formed by wind erosion on a preexisting sand deposit" or dune. Exhibit P-77 at p 11. This blowout has been in existence since at least 1938. Exhibit R-5 at p 8; 1 Tr 50. According to Mr. Ray, this blowout "stems back to a disturbance from logging back in the late 1800's…." 2 Tr 279. At its widest, the blowout is at least 600 feet from flank to flank. Exhibit R-5 at p 7. The center axis of the blowout faces in a northwest direction. Exhibit P-71.

Houses have been constructed on the edge of the bluff or escarpment which defines the "saucer" of the blowout. Specifically, the house on the Blew property was built on the northeastern escarpment, which is the northern-most boundary of the blowout. Exhibit R-18 at p 2; 1 Tr 80. The next house built surrounding the blowout is the Petitioners' residence on the eastern escarpment of the blowout. Exhibit R-18 at p 2. The Horwitz house was constructed southwest of the Petitioners' residence. Exhibit R-18 at p 2. South of the Horwitz property is the tract owned by the Chapman Trust. 1 Tr 134. While a permit was issued for the Chapman Trust property, no house was ever built on the tract. Exhibit P-2; 1 Tr 155. South of the Chapman Trust property, on land owned by parties not identified in the record, a house was constructed on the southwestern escarpment of

[3] Several measurements in feet are based on the scale contained on two foam board Exhibits prepared by the Petitioners. Exhibit P-71; Exhibit P-72 (Site Section 3).

the blowout, which is the southern-most boundary of the feature. Exhibit R-18 at p 2; 1 Tr 82-83.

To determine if the Petitioners' proposed structure is permittable, it is necessary to establish if the building is proposed to be constructed either on a **foredune** or landward of the crest of the first dune **ridge** that is not a foredune. MCL 324.35304(4). The definition of foredune also indicates that it consists of one or more dune **ridges**. MCL 324.35301(e). When the Petitioners applied for a permit to build their residence in 2017, "the crest of the first landward **ridge** of a critical dune area that is not a foredune" was determined by the WRD to be near the edge of the escarpment. MCL 324.35304(4) (emphasis supplied); Exhibit R-17 at p 4. Prior to applying for a permit for the structure at issue in this case, the Petitioners requested the WRD to re-evaluate the location of the first landward **ridge** determined in 2017. 1 Tr 37.

Hence, this contested case involves a set of complicated facts. There are four identified ridges in this case. The determination of whether the Petitioners can construct their storage building is based on a finding of whether these ridges are located on a foredune or whether the ridge is the first lakeward face of a dune that is not a foredune. MCL 324.35304(4). Therefore, a review of the surrounding dune area is appropriate.

Traveling southeast from the water's edge on the Petitioners' property, the beach is over 200 feet in width. Exhibit P-72 (Site Section 3). The wave-cut is nearly a vertical face (the First Ridge), and is on a feature that the WRD described as a foredune and Mr. Ray described as an "incipient" foredune. *Id*; Exhibit P-70. From the wave-cut, the width of this foredune is over 300 feet and is 13 feet in height. Exhibit P-72 (Site Section 3); Exhibit R-14 at pp 2-3. This foredune is vegetated with dune grasses, which Mr. Ray has identified as Ammophila. Exhibit R-14 at p 2; 2 Tr 315.

The next landward feature on the Petitioners' property is a ridge (the Second Ridge) which is located on what the WRD opined is a foredune and Mr. Ray opined is an "established" foredune. Exhibit R-14 at p 2; Exhibit P-70. The lakeward face of the Second Ridge is greater than a 33⅓% slope. [4] 2 Tr 293-294; Exhibit P-73 (Photograph 2). Measuring the height of the Second Ridge from the bottom of its wave-cut face to the peak of the dune is 13 feet. 1 Tr 129. When measuring the height of the Second Ridge from the landward side, it was computed to be 14 feet in height. Exhibit R-14 at p 2; 1 Tr 64. If measured from the shoreline, the Second Ridge is 27 feet in height. [5] 1 Tr 129; Exhibit R-9 at p 3. The Second Ridge is vegetated with dune grasses on its lakeward face. Exhibit P-73 (photograph 2). The balance of the Second Ridge is vegetated with grasses, shrubs and

[4] When measuring the steepness of dune slopes, Part 353 does not compute the degree of incline of the slope. Rather, the Act addresses the percentage of the increase. For example, a permit cannot be issued for a so-called "steep slope," which is "a slope steeper than a 1-foot vertical rise in a 3-foot horizontal plane." MCL 324.35316(1)(b). A slope with a 1-foot vertical rise in a 3-foot horizontal plane is a 33⅓% (or 1 ÷ 3) slope. To construct a structure on a steep slope, a variance or special exception is required. MCL 324.35317. See also the definition of "crest" discussed *infra*. MCL 324.35301(b).

[5] The question of how to measure a foredune to determine its height is one of the legal issues of this contested case.

small trees. Exhibit R-14 at p 2. With respect to trees, the Second Ridge is vegetated with catalpa, oak, cottonwood, and white pine trees. See, e.g., 2 Tr 321-334.

Mr. Ray opined that the peak of the Second Ridge satisfies the definition of "crest" in §35301(b). MCL 324.35301(b). However, if a line were drawn connecting each of the flanks of the blowout, positioned at the location of the statutory "crest" on these flanks, this line is landward of Mr. Ray's determination of the "crest." Exhibit R-11 at p 2. [6] A gazebo was constructed on the Second Ridge, landward of Mr. Ray's definition of crest, on the Horwitz property. Exhibit R-5 at pp 5-13; 1 Tr 95. Mr. Zimont testified that the gazebo was not constructed at a legal location, but that the WRD could not require its removal because the Statute of Limitations had passed before the WRD became aware of its existence. 1 Tr 95.

The next feature within the blowout is a deep trough or trench that is behind the Second Ridge. See generally 1 Tr 87; Exhibit R-14 at p 2. The trough was identified in the map from the 1930s. Exhibit R-5 at p 8. Due to its steepness, the boardwalk on the adjoining Horwitz property is a footbridge over the trough. See, e.g., Exhibit R-10 at p 4. The northeastern end of the trough is present on the south side of the Petitioners' property. See Exhibit P-71.

Adjacent to and northeast of the trough, the land on the Petitioners' property levels out. Exhibit P-71. At this location, the Petitioners' property is a relatively flat and sandy area, which is the proposed location of the Petitioners' storage structure. Exhibit P-38; 2 Tr 321-322; Exhibit R-7 at pp 7-8. The proposed structure is contemplated to be built behind the Second Ridge. [7] See Exhibit R-7 at p 7. Access to the structure at the proposed location would occur by using the main trail down the blowout from the Petitioners' residence, which is significantly sloped. Exhibit R-7 at p 7; 1 Tr 221-222.

Landward from the trough, the blowout is wooded. Exhibit R-14 at p 2. The slopes of the dune gently rise out of the trough but increase in steepness to around a 25% slope.[8] Exhibit R-14 at p 2. The WRD identified this slope as the first lakeward facing slope of a critical dune ridge (the Third Ridge). *Id*. See MCL 324.35301(b). In 2018, the WRD identified the Third Ridge as the revised location for the "crest" on this dune. Specifically, the Third Ridge is located at the first landward elbow of the boardwalk on the Horwitz property, where the elbow faces the Petitioners' property. See Exhibit R-17 at p 4. At the location of this elbow, the Third Ridge is parallel with the shoreline. *Id*; 1 Tr 40.

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[6] The location of Mr. Ray's "crest" is set forth in blue on page 2 of Exhibit R-11, while the location of the crest line extended from the flanks of the blowout is in red.

[7] The record does not contain a picture of the proposed location. Exhibit P-8 was taken toward the location, but most of the proposed location in this picture is blocked by foliage. However, the undersigned was advised of the proposed location at the site visit conducted on July 18, 2019.

[8] A 25% slope is one that measures from a 1-foot vertical rise in a 4-foot horizontal plane (or 1 ÷ 4). See, e.g., MCL 324.35316(1)(a).

Landward of the Third Ridge, on the south boundary of the Petitioners' property, the WRD identified a permittable location for a structure. See Exhibit R-17 at p 4. At that location, the dune breaks to a slope of less than "1-foot vertical rise in a 5-1/2-foot horizontal plane" or a slope of approximately 18% (or 1 ÷ 5.5). MCL 324.35301(b); Exhibit R-14 at p 2. This area of the dune is also more than 20 feet and more than 1/10 of an acre. *Id*. However, since this location is south of the trail from the Petitioners' residence to the beach, there is currently no access to the site. 1 Tr 226. Dr. Anderson testified that to obtain access to this building site, it would be necessary to construct either a stairway or a tram to the location. *Id*. The estimated cost to construct a stairway is $20,000 to $30,000, and to construct a tram is $100,000 to $150,000. 1 Tr 227.

The Fourth Ridge on the Petitioners' property is located on the edge of the escarpment of the blowout. See, e.g., Exhibit P-71. The WRD first determined the Fourth Ridge to be the location of the statutory "crest" for the construction of the Petitioners' residence. 1 Tr 121. In June of 2018, the Petitioners contacted the WRD and asked it to revise its determination of the crest's location on their property. 1 Tr 121. As a result of this request, the WRD determined that the crest was located at the Third Ridge. Exhibit R-14 at p 2.

PART 353, SAND DUNES PROTECTION AND MANAGEMENT

I. The Regulatory Scheme

Under Part 353, land features which are identified as critical dunes provide a number of benefits to the citizens of the state of Michigan, and those who visit the state. MCL 324.35302(a). Among the benefits identified by the Legislature are recreational, scenic and ecological benefits. *Id*. Part 353 was intended to balance the benefits that derive from the uses of the critical dunes with the benefits of protecting and preserving the resource. MCL 324.35302(b). Local units of government have the authority to administer the regulation of proposed uses. MCL 324.35303(1)(b). If the local unit of government does not elect to assume such authority, EGLE is vested with administration.[9] *Id*.

Regulation of critical dunes is limited to those geographic areas identified in the "atlas of critical dune areas." MCL 324.35303(1). As to these areas, EGLE regulates "uses" which are defined as "a developmental … activity done or caused to be done by a person that significantly alters the physical characteristic of a critical dune area…." MCL 324.35301(k). Under Part 353, "[a] person shall not initiate a use within a critical dune area unless the person obtains a permit…." MCL 324.35304(1).

To obtain a permit, the proposed structure must "be constructed behind the **crest** of the first landward ridge of a critical dune area that is not a **foredune**." MCL 324.35304(4) (emphasis supplied). The Parties contend that the single issue in this case is the

[9] Since EGLE was the agency to whom the Petitioners applied for a permit rather than Berrien County, it is reasonable to infer that the County returned the administration of Part 353 to EGLE. The Supreme Court has held that evidence includes reasonable inferences that can be drawn from the facts. *Zytkewick v Ford Motor Co*, 340 Mich 309, 318; 65 NW2d 813 (1954).

determination of the location of the "crest." EGLE's Closing Brief at p 1; Petitioners' Closing Brief at p 1. Contrary to the Parties' assertion, the central issue in this case is whether the Petitioners' project proposes to construct a structure upon a "foredune," which is not permissible under Part 353. MCL 324.35304(4). The definitions of "crest" and "foredune" will be examined in detail *infra*.

II. Jurisdiction

Part 353 provides that "[a] person shall not initiate a use within a critical dune area unless the person obtains a permit…." MCL 324.35304(1). Hence, jurisdiction is limited to "uses" in an "critical dune area." The word "use" is defined as "a developmental, silvicultural, or recreational activity done or caused to be done by a person that significantly alters the physical characteristic of a critical dune area…." MCL 324.35301(k). Section 35304(4) makes it clear that this regulation applies to "a use that is a structure…." MCL 324.35304(4). The phrase "critical dune area" is defined as "a geographic area designated in the 'atlas of critical dune areas' dated February 1989 that was prepared by the department of natural resources." MCL 324.35301(c).

Mr. Zimont testified that the Petitioners' property is located "within the mapped critical dune area atlas." 1 Tr 34. Mr. Ray's testimony indicated his general agreement that the Petitioners' property is located within a critical dune area. See, e.g., 2 Tr 263-266. With respect to the use, the Petitioners propose to construct a two-story, 1400 square-foot structure. Exhibit R-6; Exhibit R-7. Mr. Ray concedes that the Petitioners' property is regulated by Part 353. Exhibit P-5. Based on this evidence, I find, as a Matter of Fact, that the Petitioners propose to construct a use within a critical dune area. Accordingly, I conclude, as a Matter of Law, that the Department has jurisdiction over the proposed activity. Therefore, the proposed activity will be reviewed under the Part 353 permitting standards.

III. The Statutory Requirements

A. Section 35304(3)

Section 35304(3) provides that "[a] permit shall not be granted that authorizes the construction of a dwelling or other permanent building on the first lakeward facing slope of a critical dune area or foredune **except on a lot of record that was recorded prior to July 5, 1989**…." MCL 324.35304(3) (emphasis supplied). Mr. Zimont testified that the Petitioners' property was not a lot of record as of July 5, 1989. 1 Tr 42. See also Exhibit R-13 at p 2. This evidence was not controverted in the record. Based on this evidence, I find, as a Matter of Fact, that the Petitioners' property was not a lot of record as of July 5, 1989. Based on this finding, § 35304(3) is inapplicable in this contested case.

B. Section 35304(4)

Section 35304(4) stipulates that, "[e]xcept as provided in subsection (3), a permit shall provide that a use that is a structure shall be constructed behind the crest of the first landward ridge of a critical dune area that is not a foredune." MCL 324.35304(4). The important factual question for this contested case is whether the Petitioners propose to construct a structure on a foredune. Therefore, it is necessary to review the definition of foredune, which is defined in entirety as follows:

> "Foredune" means 1 or more low linear dune ridges that are parallel and adjacent to the shoreline of a Great Lake and are rarely greater than 20 feet in height. The lakeward face of a foredune is often gently sloping and may be vegetated with dune grasses and low shrub vegetation or may have an exposed sand face.

MCL 324.35301(e).

Before addressing each of the elements of a foredune from this definition, it is necessary to review the testimony of Mr. Ray. He defined foredunes in one of two manners: either as an "incipient" foredune or as an "established" foredune. He defined an incipient foredune as "ephemeral, they come and they go, and there are times when there is no foredune because the lake removes it all…." 2 Tr 328. With respect to an established foredune, Mr. Ray testified:

> Established foredune is international nomenclature that everybody is using these days if you're up-to-date on … how to name foredunes. Established foredune is one that stays there for a long time and you get developed vegetation, you get developed soils, and it … doesn't move. It's also parallel to the lake and historically I think it's referred to as the first inland dune.

2 Tr 327. Mr. Ray pointed to scientific literature to support his definitions of incipient and established foredunes. See, e.g., Exhibit P-77. As justification for Mr. Ray's definition of foredune, the Petitioners also cite § 35304(2), which provides that a decision denying a permit shall be "the product of reliable scientific principles and methods." MCL 324.35304(2)(c). Based on the arguments asserted by the Petitioners, it is necessary to review the principles of statutory construction.

Initially, statutory construction is a question of law for this Tribunal. See *Paige v City of Sterling Heights*, 476 Mich 495, 504; 720 NW2d 219 (2006). The fundamental purpose of statutory construction is to assist in both discovering and giving effect to legislative intent. *Ansell v Department of Commerce*, 222 Mich App 347, 355; 564 NW2d 519 (1997). "[A] clear and unambiguous statute leaves no room for judicial construction or interpretation." *Coleman v Gurwin*, 443 Mich 59, 65; 503 NW2d 435 (1993).

However, if the language of a statute is unclear or of a doubtful meaning, it must be given a reasonable construction, looking to the legislative purpose. *Blackwell v Bornstein*, 100 Mich App 550, 554; 299 NW2d 397 (1980). The task of discerning the Legislature's intent begins with an examination of the language of the statute itself. *People v Borchard-Ruhland*, 460 Mich 278, 284; 597 NW2d 1 (2001). When construing a statutory phrase, the meaning of the phrase itself must be considered but also its placement and purpose within the statutory scheme. *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). Moreover, "[i]t is a maxim of statutory construction that every word of a statute should be read in such a way as to be given meaning, and a court should avoid a construction that would render any part of the statute surplusage or nugatory." *In re MCI Telecom Complaint*, 460 Mich 396, 414; 596 NW2d 164 (1999). Finally, "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language…." MCL 8.3a. To accomplish this task, it is salutary to consult with a dictionary when defining common words or phrases in a statute. *People v Thompson*, 477 Mich 146, 151-152; 730 NW2d 708 (2007).

Applying such principles to this case, the Petitioners contend that the definition of "foredune" is vague and ambiguous. See, e.g., Petitioners' Closing Brief at p 22. However, the Petitioners are not attempting to discern the meaning of words or phrases within the statute. Rather, they are attempting to re-write the definition of "foredune" by creating two definitions in place of one. The Petitioners cannot justify this construction of the statute by relying upon the requirement that the WRD's decision must be based upon "reliable scientific principles and methods." MCL 324.35304(2)(c). If the statutory definitions are inconsistent with current scientific principles, it is for the Legislature (and not this Tribunal or the courts) to amend the statute to bring it into compliance with scientific thought. Hence, it is the function of this Tribunal to discern the Legislature's intent by examining the language of the statute itself. *People v Borchard-Ruhland*, *supra*. Therefore, this Tribunal rejects the Petitioners' use of "incipient" and "established" foredune in the application of the statute.

1. Definition of Foredune

The definition of "foredune" (quoted in total *supra*) is somewhat formulaic. Specifically, a "foredune" is defined as (a) one or more low linear dune ridges, (b) that are parallel and adjacent to the shoreline of a Great Lake, (c) that are rarely greater than 20-feet in height, (d) with a lakeward face that is often gently sloping, (e) which lakeward face may be an exposed sand face or may be vegetated with dune grasses or low shrub vegetation. MCL 324.35301(e). This formulaic definition will be applied in more detail in the analysis *infra* to determine if the Second Ridge is on a foredune.

a. One or more low linear dune ridges

As noted *supra*, Mr. Ray identified features as either "incipient" foredunes or "established" foredunes. Because the WRD believed that the location of the crest was the paramount

determination, Mr. Zimont admitted that he did not "identify or document where the foredune was." 1 Tr 122. In Exhibit R-14, Mr. Zimont noted that the First Ridge was located on a foredune. Exhibit R-14 at p 2. However, Exhibit R-14 also describes the Second Ridge as being located on a foredune. What is unclear from the record is whether the WRD believed that the Second Ridge is located on a separate foredune, or whether it was considered as a second ridge on the foredune. This evidence begs the question of whether there can be more than one foredune under Part 353's statutory scheme.

Nowhere in Part 353 is the word "foredune" used in a plural sense. Rather, the first clause in the definition of foredune is that it consists of "1 or more low linear dune ridges…." MCL 324.35301(e). Therefore, I conclude, as a Matter of Law, that there can be only one foredune under Part 353. Because this clause in the definition allows for more than one ridge on a foredune, it is reasonable to find that the Second Ridge is located on the same feature as the First Ridge. Therefore, I find, as a Matter of Fact, that the Second Ridge is one of the ridges of the foredune.

b. Parallel and adjacent to the shoreline of a Great Lake

The second clause in the definition of foredune is that these low linear dune ridges must be "parallel and adjacent to the shoreline of a Great Lake." MCL 324.35301(e). There is no question in this case that the Second Ridge is "parallel … to the shoreline of a Great Lake." See, e.g., Exhibit P-73 (Photograph 2); Exhibit R-5 at pp 4-7. The question in this case is whether this ridge is "adjacent" to a Great Lake. According to Black's Law Dictionary, the word adjacent is defined as "[l]ying near or close to, but not necessarily touching." Black's Law Dictionary 42 (7th ed 1999). The Legislature could have described this feature as being "immediately adjacent" like its use of the phrase in §35305(1). MCL 324.35305(1). Instead, the Legislature simply used the word "adjacent."

It should be recalled that the "foredune" (not the ridge) is the feature that must be adjacent to a Great Lake. The evidence in this case is clear that the foredune is the first landward feature from Lake Michigan. Exhibit R-14 at p 2; Exhibit P-70. If the Second Ridge is located on this foredune, it is certainly adjacent to Lake Michigan and satisfies the second clause of the definition of foredune. As one of the ridges of the foredune, I find, as a Matter of Fact, that the Second Ridge is located on a feature that is parallel and adjacent to the shoreline of a Great Lake.

c. Rarely greater than 20-feet in height

The third clause in this definition is that a foredune is rarely greater than 20 feet in height. MCL 324.35301(e). One of the questions in this contested case is how to measure the height of a foredune. The definition of "foredune" expressly references the word "height" which is defined as "[t]he distance from the base to the top of something." American Heritage Dictionary 602 (2d ed 1985) (definition 3a). To measure the height of a feature, I conclude, as a Matter of Law, that each feature should be separately measured.

The First Ridge is located on the first lakeward feature, which both of the Parties agree is a foredune, and has a height of 13 feet. Exhibit R-14 at pp 2-3. This feature clearly satisfies the statutory definition of foredune. The problem in this case is that the WRD has appeared to treat both the First Ridge and the Second Ridge as being located on separate foredunes. As noted *supra*, the statutory scheme does not provide for multiple foredunes. Because the Second Ridge appears to sit on top of the foredune (see Site Section 3 on Exhibit P-72), its height must be added to the height of the First Ridge to arrive at the height of the entire feature.

As noted, the height of the First Ridge is 13 feet. Exhibit R-14 at pp 2-3. When measured from the landward side, the Second Ridge was computed to be 14 feet in height. Exhibit R-14 at p 2; 1 Tr 64. When measured from the lakeward side, the Second Ridge was computed to be 13 feet in height. [10] 1 Tr 65. By adding the height of the two ridges together, the Second Ridge, if located on the foredune, has a height of either 26 or 27 feet.

By definition, a foredune is "rarely greater than 20-feet in height." MCL 324.35301(e). This clause uses the word "rarely" which is defined as "not often; infrequently." American Heritage Dictionary 1027 (2d ed 1985). Therefore, this requirement is not definitive. Rather, the definition concedes that "infrequently" the height of a foredune may exceed 20 feet. Under such an interpretation, it is reasonable to find that the Second Ridge is located on a foredune. Therefore, I find, as a Matter of Fact, that the Second Ridge is located on a foredune with a height of 26 or 27 feet.

d. Lakeward face often gently sloping

The fourth clause in the definition of foredune provides that "[t]he lakeward face of a foredune is often gently sloping…." MCL 324.35301(e). The phrase "gently sloping" is not defined in the statute. Generally, there are three "slopes" expressly referenced in Part 353:

- An 18.18% (or 1 ÷ 5.5) slope, which is 1-foot vertical rise in a 5-1/2-foot horizontal plane, MCL 324.35301(b);

- A 25% (or 1 ÷ 4) slope, which is a 1-foot vertical rise in a 4-foot horizontal plane, MCL 324.35306(4)(e) & (f); MCL 324.35311a(1)(b); MCL 324.35311b(1)(a); and MCL 324.35316(1)(a); and

[10] The height of the feature should be the same if measured from the landward side or if measured from the lakeward side. Most likely, the incongruence occurred due to the fact that a trench is located on the landward side of the Second Ridge, and it is difficult to determine where the trench ends and the Second Ridge begins. See generally 1 Tr 87; Exhibit R-14 at p 2.

- A 33⅓% (or 1 ÷ 3) slope, which is a 1-foot vertical rise in a 3-foot horizontal plane, MCL 324.35306(4)(a); MCL 324.35311a(1)(b) & (c); MCL 324.35311b(1)(a) & (b); and MCL 324.35316(1)(a) & (b).

As stated in footnote 6 *supra*, a slope of 33⅓% is a so-called "steep slope." Neither a 25% nor an 18.18% slope was designated by the Legislature as a "gentle slope." This Tribunal is not inclined to provide a bright-line test for its definition. Rather, the parties in each case can provide evidence or testimony regarding an appropriate usage of the phrase "gently sloping."

In this case, the lakeward face of the First Ridge is found on a feature which both the WRD and the Petitioners identified as a foredune. Exhibit R-14 at p 2; Exhibit P-70. Although both Parties admittedly deemed this feature to be a foredune, the lakeward face of the feature is a "[n]ear-vertical wave-cut face…." Exhibit R-14 at p 2. Hence, the lakeward face of this admitted foredune is not "gently sloping."

However, the fourth clause in the definition of foredune provides that "[t]he lakeward face of a foredune is **often** gently sloping…." MCL 324.35301(e) (emphasis supplied). The word "often" is defined as "frequently." American Heritage Dictionary 864 (2d ed 1985). By using the word "often," the Legislature did not intend to make it a requirement for the lakeward face of all foredunes to be gently sloping. Therefore, I conclude, as a Matter of Law, that the lakeward face of a foredune is not required to be gently sloping to satisfy the statutory definition. Accordingly, the lakeward face of the foredune satisfies the fourth clause of the definition.

The evidence in this case indicates that the lakeward face of the Second Ridge has a 33⅓% slope, which is a steep slope. 2 Tr 293-294; Exhibit P-73 (Photograph 2); MCL 324.35316(1)(b). However, the slope of the lakeward face of the Second Ridge is irrelevant because the First Ridge is the lakeward face of the foredune. Because the Second Ridge is one of the ridges of the foredune, it satisfies the fourth clause of the definition. Accordingly, I find, as a Matter of Fact, that the lakeward face of the foredune in this case satisfies the definition.

e. Lakeward face may be vegetated

The fifth and final clause in the definition of foredune provides that "[t]he lakeward face of a foredune … may be vegetated with dune grasses and low shrub vegetation or may have an exposed sand face." MCL 324.35301(e). Hence, the final clause of the definition concerns vegetation on the lakeward face. According to the definition, this face may be vegetated with dune grasses, low shrub vegetation, or no vegetation at all. In this case, the lakeward face of the First Ridge (which the Parties agree is a foredune) is mostly an exposed sand face with some dune grasses. See, e.g., Exhibit R-5 at p 11. Therefore, the First Ridge is located on a feature which satisfies the fifth clause in the definition of foredune. Vegetation on the Second Ridge is irrelevant, because the First Ridge is the lakeward face of the foredune. Because the Second Ridge is one of the ridges of the

foredune, it satisfies the fifth clause of the definition. Accordingly, I find, as a Matter of Fact, that the lakeward face of the foredune in this case satisfies the definition.

It should be noted, however, that Mr. Ray testified that the Second Ridge is not located on a foredune due to the existence of trees, other than cottonwood, on its landward face. 2 Tr 450. However, this assertion is not consistent with the definition of foredune. The statute is silent with respect to vegetation found on a foredune's landward face. Rather, the definition deals only with the lakeward face. MCL 324.35301(e). Accordingly, the Petitioners' assertion is rejected.

f. Conclusion

A review of the elements of the definition of foredune demonstrates that this case is very complex and reasonable minds can differ on the interpretation of the facts. As noted *supra*, the central question of the case is whether the Second Ridge is located on a foredune. Based on the evidence in this case, I find, as a Matter of Fact, that the Second Ridge is located on a foredune. This finding was arrived at for three reasons.

First, to arrive at a decision, this Tribunal reviewed each of the elements of the definition, as demonstrated in the following table:

Definition	Satisfied	Not Satisfied
One or more low linear dune ridges	X	
Parallel and adjacent to the shoreline	X	
Rarely greater than 20-feet in height	X	
Lakeward face often gently sloping	X	
Lakeward face may be vegetated	X	

To conclude that the Second Ridge is located on a foredune, it was necessary to rely upon two qualifying words in the definition: rarely and often. The word "often" precedes "gently sloping." MCL 324.35301(e). The lakeward face of the First Ridge is almost vertical. As a result, it does not meet the statutory definition without the qualifying word "often." However, the Parties agreed that this face was the lakeward edge of the foredune. Because it is this Tribunal's understanding that each dune system has a foredune, it is both necessary and reasonable to rely in this case upon the qualifying word "often."

The second qualifying word "rarely" was relied upon because the foredune (measured by adding the heights of the First Ridge and the Second Ridge), was 26 or 27 feet. By using the word "rarely," the Legislature knew that there were exceptional cases in which the height of the foredune would exceed 20 feet. This is such an exceptional case. As noted *supra*, the foredune is located within a blowout. Blowouts are exceptional features of the critical dune areas. Ms. Lederle has statewide oversight for EGLE's critical dune program. 1 Tr 164. In her 13 years with the Department, in which she has reviewed hundreds of Part 353 applications, she has only dealt with six or eight blowouts. 1 Tr 212.

Because blowouts are extremely rare, it is reasonable to rely upon the qualifying word "rarely" in this case. Moreover, because the Second Ridge exceeds the 20-foot height by a mere 6 or 7 feet, it is also reasonable to rely upon the qualifying word.

Second, the testimony of Mr. Ray convinced the Tribunal that the Second Ridge is located on the foredune. Specifically, he explained how the foredune on the Petitioners' property has been cut by wave-action on two main occasions. He testified that the Second Ridge was cut in 1986 or 1987 when the water was as high in Lake Michigan as it is today. 2 Tr 287-288; Exhibit P-72 (Site Section 3). He opined that, "[a]t that time, there was no foredune at this location." Mr. Ray's opinion is inconsistent with the statutory scheme. By definition, a ridge that is adjacent to and parallel to a Great Lake constitutes a foredune. MCL 324.35301(e). Therefore, as of 1986 or 1987, the Second ridge was clearly part of the foredune on the Petitioners' property. The mere fact that additional sands have been deposited lakeward of this ridge does not change the nature of this ridge from being part of the foredune.

Third, Mr. Zimont suggested that the formation of a blowout should not result in the crest being located further lakeward than where it had been historically. 1 Tr 71. He further suggested that if a line were drawn connecting each of the flanks of the blowout, positioned at the location of the statutory "crest" on these flanks, this line is landward of Mr. Ray's determination of the "crest." 1 Tr 70; Exhibit R-11 at p 2. In fact, Mr. Ray agreed with the location of the crest on the flanks of the blowout. 2 Tr 426.

I agree with the reasoning of Mr. Zimont due to the nature of Part 353, which is essentially a zoning statute that "provides additional substantive legislative considerations, over and above those involved in traditional zoning." See *Petition of Dune Harbor Estates, LLC*, 2005 WL 3451406, at *5 (Mich.Dept.Nat.Res.). Similar to zoning, Part 353 uses the "crest" as a setback requirement, which is the distance between the building line and the lot line. See, e.g., *Shirk v Vandyk*, 2002 WL 866626, *6 (Mich App Apr 26, 2002) (unpublished).[11] The placement of a structure within a blowout – upon a dune that is lakeward of the crest on adjacent properties – would obviate the setback built into the statute. [12] For this additional reason, I find that the Second Ridge is located on a foredune.

Based on the foregoing, I find, as a Matter of Fact, that the Second Ridge is located on a foredune. Because the Second Ridge is part of a foredune, I conclude, as a Matter of Law, that the Petitioners are not entitled to construct their proposed building behind the ridge of the Second Ridge. MCL 324.35304(4).

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[11] Rule 7.215(C)(1) of the Michigan Court Rules of 1985 provides that "[a]n unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1). Moreover, the Supreme Court has held that "it is only opinions issued by the Supreme Court and published opinions of the Court of Appeals that have precedential (…continued) effect under the rule of stare decisis." *City of Detroit v Qualls*, 434 Mich 340, 360 n 35; 454 NW2d 374 (1990). While this decision is not binding precedent, it provides some guidance with respect to an understanding of setback requirements.

[12] The fact that the gazebo built on the Horwitz property was improperly built upon a foredune does not negate the setback requirement or the prohibition of building a structure on a foredune.

2. Definition of Crest

Notwithstanding the determination that the Petitioners' proposed location for their structure is on a foredune, this Tribunal will address the definition of "crest," which the Parties have contended is the determinative fact in this contested case. EGLE's Closing Brief at p 1; Petitioners' Closing Brief at p 1. Before reviewing the language of the definition, there are two general observations under the statute that need to be made. First, Part 353 does not guarantee a buildable site for a structure. Ms. Lederle testified that properties within a blowout "have limited areas for construction." 1 Tr 167, 189, 212. However, by statute, to constitute a buildable site, the location must be located behind a "crest."

The second observation is that § 35304(4) stipulates "a permit shall provide that a use that is a structure shall be constructed behind the crest of the first landward ridge of a critical dune area that is not a foredune." MCL 324.35304(4). Because this Tribunal determined that the Second Ridge is located on a foredune, the Petitioners' proposed location of the "crest" is rejected. Therefore, this Tribunal will limit its analysis of "crest" to the location espoused by the WRD, *i.e.*, the Third Ridge.

The definition of "crest" contained in Part 353 requires a determination of the location of (a) the first lakeward facing slope of a critical dune ridge, (b) where it breaks to a slope to less than 1-foot vertical rise in a 5.5-foot horizontal plane for a distance of at least 20 feet, (c) the areal extent of where the break occurs is greater than one tenth of an acre. MCL 324.35301(b). Applying these factors to the evidence in this case, the WRD located the crest at the first landward elbow of the boardwalk on the Horwitz property where the elbow faces the Petitioners' property. See Exhibit R-17 at p 4. At the location of this elbow, the WRD's crest is parallel with the shoreline. *Id*; 1 Tr 40. Additionally, at this point the dune breaks to a slope of less than "1-foot vertical rise in a 5-1/2-foot horizontal plane" or a slope of approximately 18% (or 1 ÷ 5.5). MCL 324.35301(b); Exhibit R-14 at p 2. This area of the dune is also more than 20 feet and more than 1/10 of an acre. *Id*.

The Petitioners' only challenge with respect to the WRD's conclusion is that there is currently no access to this location because it is south of the trail from the Petitioners' residence to the beach. 1 Tr 226. The Petitioners also note that to obtain access to this building site, it would be necessary to construct either a stairway or a tram to the location. *Id*. The estimated cost to construct a stairway is $20,000 to $30,000, and to construct a tram is $100,000 to $150,000. 1 Tr 227. However, access or cost of access to a building site is not a statutory factor in determining the "crest."

Based on the record in this case, I find, as a Matter of Fact, that the location of the crest of the Petitioners' property is parallel to the shoreline at a point adjacent to the first landward elbow of the boardwalk on the Horwitz property where the elbow faces the Petitioners' property. I also find, as a Matter of Fact, that this location has a slope of less than 1-foot vertical rise in a 5.5-foot horizontal plane for a distance of at least 20 feet with an areal extent of greater than one tenth of an acre. For these reasons, I conclude, as a

Matter of Law, that the Petitioners are not entitled to construct their proposed building behind the Second Ridge, as requested in their Application. MCL 324.35304(4).

B. Section 35304(1)(g)(i)-(iii)

In their Closing Brief, the Petitioners allege that § 35304(1)(g)(i)-(iii) mandates issuance of a permit in this case. Petitioners' Closing Brief at p 17. That section provides as follows:

> Subject to section 35316, a permit shall be approved unless the local unit of government or the department determines that the use will significantly damage the public interest on the privately owned land, or, if the land is publicly owned, the public interest in the publicly owned land, by significant and unreasonable depletion or degradation of any of the following:
>
> (i) The diversity of the critical dune areas within the local unit of government.
>
> (ii) The quality of the critical dune areas within the local unit of government.
>
> (iii) The functions of the critical dune areas within the local unit of government.

MCL 324.35304(1)(g)(i)-(iii). The Petitioners attempt to construe this subsection as requiring the issuance of a permit if the proposed location does not affect the diversity, quality and functions of the critical dune, regardless of its proposed location. The Petitioners argue that the WRD ignored and never evaluated the environmental criteria of this subsection. Petitioners' Closing Brief at p 18. As a result, the Petitioners assert that they are entitled to a permit. However, the Petitioners' assertion is contrary to basic principles of statutory construction.

As noted *supra*, "[i]t is a maxim of statutory construction that every word of a statute should be read in such a way as to be given meaning, and a court should avoid a construction that would render any part of the statute surplusage or nugatory." *In re MCI Telecom Complaint*, 460 Mich 396, 414; 596 NW2d 164 (1999). The Petitioners' interpretation of § 35304(1)(g) negates the provisions of § 35304(4) and renders them nugatory. MCL 324.35304(1)(g); MCL 324.35304(4). The Petitioners are correct that an applicant is entitled to a permit if the proposed use will not degrade the diversity, quality and functions of a critical dune. However, to be entitled to such a permit in the first place, the applicant must propose to construct a structure "behind the crest of the first landward ridge of a critical dune area that is not a foredune." MCL 324.35304(4). Because the Petitioners propose to construct a structure on a foredune, it is presumed that the use will degrade the diversity, quality and functions of the dune. The Petitioners' argument is without merit.

CONCLUSIONS OF LAW

Based on the Findings of Fact, I conclude, as a Matter of Law:

1. The Department has jurisdiction over the proposed activity. MCL 324.35304(1); MCL 324.35301(k); MCL 324.35304(4); MCL 324.35301(c).

2. The proposed activity is regulated, and a permit is required. MCL 324.35304(1); MCL 324.35304(4).

3. The measurement of the height of a foredune is limited to the individual feature, from its toe to its peak. *People v Borchard-Ruhland*, 460 Mich 278, 284; 597 NW2d 1 (2001); *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999); *In re MCI Telecom Complaint*, 460 Mich 396, 414; 596 NW2d 164 (1999); MCL 8.3a; *People v Thompson*, 477 Mich 146, 151-152; 730 NW2d 708 (2007); American Heritage Dictionary 602 (2d ed 1985) (definition 3a).

4. The lakeward face of a foredune is not required to be gently sloping to satisfy the statutory definition. *People v Borchard-Ruhland*, 460 Mich 278, 284; 597 NW2d 1 (2001); *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999); *In re MCI Telecom Complaint*, 460 Mich 396, 414; 596 NW2d 164 (1999); MCL 8.3a; *People v Thompson*, 477 Mich 146, 151-152; 730 NW2d 708 (2007); American Heritage Dictionary 602 (2d ed 1985) (definition 3a).

5. The Petitioners are not entitled to construct their proposed building behind the Second Ridge. MCL 324.35304(4).

FINAL DECISION AND ORDER

The Application for a permit under Part 353 (Exhibits R-6 and R-7) is **DENIED**.

Daniel L. Pulter
Administrative Law Judge

PETITION FOR REVIEW

Consistent with § 1317 of the NREPA, this is a Final Decision and Order (FDO) for EGLE. MCL 324.1317(1). The Parties have the right to file a Petition for Review of this FDO with the EGLE Director within 21 days of receiving this FDO. Upon the timely and proper filing of a Petition for Review, the EGLE Director will convene a panel of the Environmental Permit Review Commission.

A Petition for Review must be filed with the EGLE Director in one of two manners, either by mail to the Department of Environment, Great Lakes, and Energy at Executive Office, Attn: Director Clark, 525 West Allegan Street, P.O. Box 30473, Lansing, Michigan 48909-7973, or electronically at EGLE-PermitAppeal@michigan.gov. (See form at www.michigan.gov/egle website). A copy of the Petition for Review must also be sent to the Michigan Office of Administrative Hearings and Rules (MOAHR) either by mail to: 611 West Ottawa Street, P.O. Box 30723, Lansing, Michigan 48909-7973, or electronically at MOAHR-EGLE-PermitPanel@michigan.gov.

PROOF OF SERVICE

I certify that I served a copy of the foregoing document upon all parties and/or attorneys, by electronic delivery, unless indicated otherwise, this 26th day of April 2021.

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