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

Updated Copy
January 30, 2004

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

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 . . . ." (Emphasis added.) Also, MCL 324.4108, states that the DEQ "shall exercise due care to see that sewerage systems are properly planned, constructed and *operated* to

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

prevent unlawful pollution of the . . . water resources of the state." (Emphasis added.) 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 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."[2] According to the majority, if a developer or its 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 an 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 systems. 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

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[2] *Dykstra, supra,* at 486.

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 maintenance of the lagoons 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.[3] I would reverse.

/s/ Peter D. O'Connell

[3] *Dykstra, supra,* at 491.