STATE OF MICHIGAN

COURT OF APPEALS

BOBBY BURLESON, Petitioner-Appellant, v DEPARTMENT OF ENVIRONMENTAL QUALITY, Respondent-Appellee.	FOR PUBLICATION May 12, 2011 9:10 a.m. No. 292916 Ingham Circuit Court LC No. 08-001507-AA

Before: MURPHY, C.J., and METER and GLEICHER, JJ.

METER, J.

Petitioner appeals by leave granted from a circuit court order that affirmed respondent's declaratory ruling that its jurisdiction as set forth in MCL 324.32502, a provision of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*., extends to the natural ordinary high-water mark produced by the action of water against the shore. We agree with petitioner that respondent has misconstrued MCL 324.32502 and that respondent's jurisdiction extends instead to the specific elevations delineated in the statute. Accordingly, we reverse.

Petitioner wishes to construct a home on land that he owns on the shore of Lake Michigan at the Indiana border. According to his site plans, the house will be built at a minimum elevation of 585 feet above sea level, roughly 150 feet away from the water's edge. The property lies within a critical dune area, so petitioner applied to respondent Michigan Department of Environmental Quality (MDEQ)[1] for a permit under Part 353 of the NREPA, MCL 324.35301 *et seq*. Respondent refused to issue the permit, insisting that petitioner was also required to obtain a permit under Part 325 of NREPA, the Great Lakes Submerged Lands Act (GLSLA), MCL 324.32501 *et seq.* Petitioner argues that MCL 324.32502 does not give respondent jurisdiction over the land on which he wishes to build.

[1] The MDEQ became part of the Michigan Department of Natural Resources and Environment on January 17, 2010. For purposes of this case, however, the parties have continued referring to respondent as the MDEQ.

The key statutory provision provides:

> The lands covered and affected by this part are all of the unpatented lake bottomlands and unpatented made lands in the Great Lakes, including the bays and harbors of the Great Lakes, belonging to the state or held in trust by it, including those lands that have been artificially filled in. The waters covered and affected by this part are all of the waters of the Great Lakes within the boundaries of the state. This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section, to provide for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands, and to permit the filling in of patented submerged lands whenever it is determined by the department that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition. *The word "land" or "lands" as used in this part refers to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors of the great lakes lying below and lakeward of the natural ordinary high-water mark*, but this part does not affect property rights secured by virtue of a swamp land grant or rights acquired by accretions occurring through natural means or reliction. *For purposes of this part, the ordinary high-water mark shall be at the following elevations above sea level, international Great Lakes datum of 1955:* Lake Superior, 601.5 feet; *Lakes Michigan and Huron, 579.8 feet*; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet. [MCL 324.32502.]

Petitioner requested a declaratory ruling from respondent to address the shoreline elevation along Lake Michigan that constitutes the limit of respondent's jurisdiction for purposes of MCL 324.32502. Respondent's declaratory ruling stated that its jurisdiction is based on the natural ordinary high-water mark (NOHWM), which is distinct from the ordinary high-water mark (OHWM). The OHWM for Lake Michigan is statutorily set at 579.8 feet of elevation, but respondent, citing *Glass v Goeckel*, 473 Mich 667, 693; 703 NW2d 58 (2005), held that the NOHWM is found at the point where the "presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic." Respondent held that the NOHWM is coterminous with the public trust that applies to littoral lands.[2]

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[2] "Littoral" refers to land along a lake or seashore, while "riparian" properly refers only to land along rivers. *Thies v Howland*, 424 Mich 282, 288 n 2; 380 NW2d 463 (1985). Historically, however, the term "riparian" has often been used to refer to both types of land. *Id.*; see also *Glass*, 473 Mich at 672 n 1.

Petitioner appealed to the Ingham Circuit Court, arguing that the Legislature expressly limited respondent's jurisdiction to lands lakeward of 579.8 feet in elevation. The trial court upheld the declaratory ruling, finding respondent's interpretation of the statute more logical than petitioner's proposed interpretation. This appeal followed.

Statutory interpretation is a question of law that we review de novo. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 102; 754 NW2d 259 (2008). An agency's interpretation is not binding on a court. *Id*. at 103. However, "the construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons." *Id*. (internal citations and quotation marks omitted). Still, the agency's interpretation may not conflict with the intent of the Legislature as statutorily expressed, and "respectful consideration" does not mean "deference." *Id.* at 103, 108.

Respondent has jurisdiction to require permits under Part 325 of the GLSLA concerning lands "lying below and lakeward of the natural ordinary high-water mark . . . ." MCL 324.32502. Because there is no provision defining the phrase "natural ordinary high-water mark," statutory interpretation is necessary. The main goal of statutory interpretation is to give effect to the intent of the Legislature. *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008). When statutory language is unambiguous, the Legislature is presumed to have intended the plain meaning of the statute. *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 591; 735 NW2d 644 (2007).

Unless defined in the statute, each word or phrase in a statute should be given its plain meaning. *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008). "A lay dictionary may be consulted to define a common word or phrase that lacks a unique legal meaning." *Id*. This Court should also presume that each statutory word or phrase has some meaning, and thus avoid rendering any part of a statute nugatory. See *Robinson v City of Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010). The various parts of the statute must be read in the context of the whole statute, to produce a harmonious whole. See, e.g., *Henry v Dow Chemical Co*, 484 Mich 483, 495; 772 NW2d 301 (2009), and *Haliw v Sterling Heights*, 471 Mich 700, 706; 691 NW2d 753 (2005).

Again, the statute at issue states, in part:

> This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section . . . . The word "land" or "lands" as used in this part refers to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors of the great lakes lying below and lakeward of the *natural ordinary high-water mark*, but this part does not affect property rights secured by virtue of a swamp land grant or rights acquired by accretions occurring through natural means or reliction. For purposes of this part, the *ordinary high-water mark* shall be at the following elevations above sea level, international Great Lakes datum of 1955: Lake Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet. [MCL 324.32502 (emphasis added).]

The parties agree that the "natural ordinary high-water mark" constitutes the limit of respondent's jurisdiction under Part 325. However, they differ regarding the proper interpretation of that phrase. In its declaratory ruling, respondent stated that the elevations specified in the last sentence of MCL 324.32502 are not used to express the NOHWM, only the OHWM. Respondent concluded that the NOHWM must be different from the OHWM, because otherwise, the word "natural" would be rendered superfluous. Respondent pointed out that the statute exempts lands formed by reliction from its jurisdiction. The declaratory ruling explained that reliction is the gradual recession of water in a sea, lake, or stream, leaving permanently dry land. Thus, land that has become permanently dry is not subject to respondent's jurisdiction. Respondent argued that this idea is incompatible with a rigid determination that its jurisdiction extends to a certain elevation.

Respondent's declaratory ruling went on to hold that the purpose of MCL 324.32502 was to protect the rights contained in the public trust and that, therefore, the NOHWM in the statute is the same as the "ordinary high-water mark" discussed by the Supreme Court in *Glass*. Respondent pointed to the language in the statute that it "shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section" and to ensure that the "public trust of the state will not be impaired . . . ." MCL 324.32502. Respondent indicated that because the *Glass* Court held that the public trust is not limited by the elevations in MCL 324.32502, and because that statute is intended to preserve the public trust, respondent's jurisdiction should not be limited to the specified elevations, either.

We cannot agree with respondent's interpretation. A number of considerations leads us to conclude that the trial court erred in affirming respondent's declaratory ruling. First, it strains credulity and common sense to conclude that phrases as similar as "natural ordinary high-water mark" and "ordinary high-water mark," employed within the same statutory paragraph, were intended by the Legislature to encompass the very different meanings that respondent sets forth.

Second, respondent's interpretation would pose serious difficulties concerning *why* the statutory elevations were included in MCL 324.32502 in the first instance. Respondent contends that the elevations are relevant for regulating activities such as dredging, beach maintenance, and the mowing and removal of vegetation. See MCL 324.32512, MCL 324.32501(b), MCL 324.32512a(3), MCL 324.32513(2)(b), and MCL 324.32516. However, most of these "uses" for the elevations were added many years after the elevations were added. See 2003 PA 3 and 1968 PA 57. Although one of the "uses" cited by respondent was in effect in 1968, before the 1968 amendment that added the elevations, the language containing the elevations was proposed in 1967. See 1968 PA 3 and 1967 HB 2621. It again strains credulity to conclude that the Legislature included the elevations in the proposed statute for purposes that were not yet in existence.[3]

[3] The dissent reasons that the phrase "ordinary high-water mark" was employed in other sections of the GLSLA when the Legislature enacted MCL 324.32502 in 1995; we note, however, that the

Third, had the Legislature meant to apply respondent's definition to the NOHWM, it could easily have added language explicitly doing so. Indeed, the Inland Lakes and Streams Act (ILASA), enacted two years before the GLSLA was introduced, defines the phrase "ordinary high-water mark" in this manner. 1965 PA 291; former MCL 281.732(b); MCL 324.30101(m).

Fourth, petitioner argues persuasively that the reference to reliction in the statute tends to negate respondent's interpretation. MCL 324.32502 states that "this part does not affect property rights secured by virtue of a swamp land grant or rights acquired by accretions occurring through natural means or reliction." If the NOHWM were independent of the listed elevations and defined in accordance with respondent's interpretation, then the "reliction exception" would be superfluous, because relicted lands would, by definition, fall outside the boundary of the NOHWM as defined by respondent.

Fifth, that the *Glass* Court held that the public trust is not limited by the elevations in MCL 324.32502 does not give us license to apply respondent's definition to the NOHWM in the instant case. The *Glass* Court stated: "Moreover, the [GLSLA] never purports to establish the boundaries of the public trust. Rather, the GLSLA establishes the scope of the regulatory authority that the Legislature exercises, pursuant to the public trust doctrine. Indeed, most sections of the act merely regulate the use of land below the ordinary high water mark." *Glass*, 473 Mich at 683. In other words, the scope of respondent's regulatory authority under the GLSLA is not *automatically equivalent* to the scope of the public trust. We find that the pertinent statutory wording and the legislative history make clear that the scope of respondent's regulatory authority under the GLSLA should be defined using the listed elevations.

Finally, we find that the term "natural" in the statute has an alternative, and reasonable, purpose. The ILASA provides guidance regarding how this adjective should be applied in the context of the present case. 1965 PA 291 stated:

> "Ordinary high water mark" means the line between upland and lake or stream bottom land which persists through successive changes in water levels, and below which the presence and action of the water is so common or recurrent as to mark upon the soil a character, distinct from that which occurs on the upland, as to the soil itself, the configuration of the surface of the soil and the vegetation. In case of an inland lake for which a level has been established by law, it means the high established level. *In case of permanent removal or abandonment of a dam resulting in the water returning to its natural level it means the natural ordinary high water mark*. [Emphasis added.]

The current version of the ILASA contains similar language at MCL 324.30101(m). The ILASA uses the phrase "natural ordinary high water mark" to refer to the specifically defined "[o]rdinary high water mark" as it would exist without alteration by humans. In addition, Random House Webster's College Dictionary (1997) defines "natural" as "existing in or formed by nature . . . ." When considering MCL 324.3250, it is logical to conclude that the Legislature, in defining the

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elevations were actually added in 1968 and so any credible argument based on this line of reasoning should use 1968 as a reference point.

phrase "ordinary high-water mark" using specific elevations, and, within the same paragraph, modifying that phrase with the adjective "natural," intended the phrase "natural ordinary high-water mark" to refer to the specified elevations as measured by the land in its natural state, unaltered by humans.[4] We adopt this logical conclusion.

In light of the foregoing considerations, we reverse the decision of the trial court.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ William B. Murphy

[4] A party that filed a brief amicus curiae makes certain arguments concerning how and when the elevations should be measured. We leave this question for another day, when the issue is ripe and has been fully briefed by the parties to the appeal.