STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Hon. Donald S. Owens, Hon. David H. Sawyer, and Hon. Peter D. O'Connell

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MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY and STEVEN E. CHESTER, Director,

Plaintiffs/Appellants,

v

WORTH TOWNSHIP,

Defendant/Appellee.

Supreme Court No. 141810
Court of Appeals Docket No. 289724
Ingham County Circuit Court
File No: 07-970-CE

BRIEF ON APPEAL – APPELLEE

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

COUNTER-STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT 1

STATEMENT OF QUESTION PRESENTED 2

COUNTER-STATEMENT OF FACTS 3

COUNTER-STATEMENT OF STANDARDS OF REVIEW 4

ARGUMENT 5

I. IN CASES INVOLVING THE DISCHARGE OF RAW SEWAGE OF HUMAN ORIGIN INTO STATE WATERS, THE PLAIN LANGUAGE OF MCL 324.3109(2) CREATES A REBUTTABLE PRESUMPTION THAT THE STATE, COUNTY, CITY, VILLAGE OR TOWNSHIP IN WHICH THAT DISCHARGE ORIGINATED WAS THE DISCHARGING PARTY IN FACT. THIS REBUTTABLE PRESUMPTION CANNOT BE APPLIED TO VISIT LIABILITY ON A MUNICIPALITY THAT DISCHARGED NO SUBSTANCES INTO STATE WATERS AND ENGAGED IN NO CONDUCT CAUSING INJURY OR POTENTIAL INJURY TO THE STATE'S NATURAL RESOURCES 5

II. CONSISTENT WITH OTHER PROVISIONS OF MICHIGAN'S NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT, ESTABLISHING A VIOLATION OF MCL 324.3109 REQUIRES PROOF OF A DEFENDANT'S CONDUCT CAUSING ENVIRONMENTAL INJURY. SUCH PROOF WAS NEITHER PRESENTED NOR AVAILABLE IN APPELLANTS' LAWSUIT AGAINST WORTH TOWNSHIP 12

III. MICHIGAN TOWNSHIPS ARE NOT OBLIGATED TO PROVIDE SANITARY SEWER SERVICES TO THEIR RESIDENTS, AND MCL 324.3109 AND 324.3115 CANNOT BE JUDICIALLY REWRITTEN TO IMPOSE SUCH A REQUIREMENT 17

A. The Headlee Amendment. 19

B. The Right of Local Self Government. 22

C. The Separation of Powers Doctrine. 27

CONCLUSION AND RELIEF REQUESTED 30

TABLE OF AUTHORITIES

Cases

Ahearn v Bloomfield Twp, 235 Mich App 486; 597 NW2d 858 (1999) 17
American Casualty Company v Costello, 174 Mich App 1; 435 NW2d 760 (1989) 7
Anglers of the AuSable Inc v Dep't of Environmental Quality, 488 Mich 69; 793 NW2d 596 (2010) vacated by ___ Mich ___; 796 NW2d 240 (2011) 16
Armstrong v Ypsilanti Charter Twp, 248 Mich App 573; 640 NW2d 321 (2002) 29
Browder v International Fidelity Ins Co, 413 Mich 603; 321 NW2d 668 (1982) 25
Cameron v Auto Club Ins Assoc, 476 Mich 55; 718 NW2d 784 (2006) 12
Damico v Shelby Twp, 64 Mich App 271; 236 NW2d 69 (1975) 26
Delta Co v Dep't of Nat Resources, 118 Mich App 458; 325 NW2d 455 (1982) 20, 21, 22
Dixon Road Group v City of Novi, 426 Mich 390; 395 NW2d 211 (1986) 25
Durant v State Bd of Ed, 424 Mich 364; 381 NW2d 662 (1985) 20
Graham v Kochville Twp, 236 Mich App 141; 599 NW2d 793 (1999) 23
Hess v Cannon Twp, 265 Mich App 582; 696 NW2d 742 (2005) 25
Horace v City of Pontiac, 456 Mich 744; 575 NW2d 762 (1998) 8
Howell Twp v Rooto Corp, 258 Mich App 470; 670 NW2d 713 (2003) 23
Huggett v Dep't of Nat Resources, 232 Mich App 188; 590 NW2d 747 (1998) 10
In re Investigation of 1999 Riots, 463 Mich 378; 617 NW2d 310 (2000) 10, 30
In re Petition of Attorney General for Investigative Subpoenas, 282 Mich App 585; 766 NW2d 675 (2009) 11
Kuriakuz v West Bloomfield Twp, 196 Mich App 175; 492 NW2d 757 (1992) 17
Lake Isabella Development Inc v Village of Lake Isabella, 259 Mich App 393; 675 NW2d 40 (2003) 18
Lessner v Liquid Disposal Inc, 466 Mich 95; 643 NW2d 553 (2002) 12
McCormick v Carrier, 487 Mich 180; 795 NW2d 517 (2010) 4, 6
McSwain v Redford Twp, 173 Mich App 492; 434 NW2d 171 (1988) 17, 26
Mich Dep't of Environmental Quality v Worth Twp, 289 Mich App 414; ___ NW2d ___ (2010) 1, 3, 7, 8, 14
Northwood Properties Co v Royal Oak City Inspector, 325 Mich 419; 39 NW2d 25 (1949) 27, 28
Oakland Co Rd Comm v Mich Prop & Cas Guar Ass'n, 456 Mich 590; 575 NW2d 751 (1998) ..4
People v Jackson, 487 Mich 783; 790 NW2d 340 (2010) 12
People v Licavoli, 264 Mich 643; 250 NW2d 520 (1933) 7
People v McIntire, 461 Mich 147; 599 NW2d 102 (1999) 19
Preserve the Dunes Inc v Dep't of Environmental Quality, 471 Mich 508; 684 NW2d 847 (2004) 16, 17
Randall v Meridian Twp, 342 Mich 605; 70 NW2d 728 (1955) 27, 28
Raptis v Safeguard Ins Co, 13 Mich App 193; 163 NW2d 335 (1968) 7
Roberts v Mecosta Co General Hosp, 466 Mich 57; 642 NW2d 663 (2002) 10
Saffian v Simmons, 477 Mich 8; 727 NW2d 132 (2007) 4
Schwartz v City of Flint, 426 Mich 295; 395 NW2d 678 (1986) 29
South Haven Twp v Dep't of Nat Resources, 132 Mich App 222; 346 NW2d 923 (1984) 22
Western Mich Univ Bd of Control v State of Michigan, 455 Mich 531; 565 NW2d 828 (1997) 11, 30

Statutes

33 USC 1251, *et seq.* 10
33 USC 1311(a) 10
33 USC 1362 10
Const 1963, art 3, § 2 ..... 27, 29
Const 1963, art 7, § 34 25
Const 1963, art 7, § 8 25
Const 1963, art 9, § 25 ..... 19, 20, 21, 22, 30
Const 1963, art 9, § 29 19
MCL 123.742(2) 26
MCL 21.234(1) 20
MCL 229.401, *et seq.* 20
MCL 24.201, *et seq.* 20
MCL 323.6 21
MCL 323.7 22
MCL 324.101, *et seq.* 7, 10, 12, 13, 15, 26
MCL 324.1701, *et seq.* 15, 16, 17
MCL 324.1703(1) 14, 16
MCL 324.3101 14
MCL 324.3101(l) 14
MCL 324.3101(m) 13
MCL 324.3101, *et seq.* 7, 9, 11, 13, 15, 16
MCL 324.3103(1) 15
MCL 324.3109 ..... 1, 5, 6, 7, 12, 13, 14, 15, 17, 19, 21, 22, 26
MCL 324.3109(1) 7, 10, 11, 15, 16, 17
MCL 324.3109(2) 1, 5, 7, 8, 9, 10, 11, 13, 14, 18, 24, 27, 30
MCL 324.3109(3) 8, 9
MCL 324.3112(1) 15
MCL 324.3115 ..... 9, 13, 15, 16, 17, 19, 21, 22, 24, 26, 27
MCL 324.3115(1) 30
MCL 324.4101[h] 9
MCL 324.4301 26
MCL 324.4301, *et seq.* 18
MCL 325.296 20
MCL 41.181 25
MCL 41.181, *et seq.* 18
MCL 41.411 26
MCL 41.411, *et seq.* 18, 26
MCL 41.412 26
MCL 41.413 26
MCL 41.721, *et seq.* 23
MCL 41.723(2) 23
MCL 41.723(3)(a) 23
MCL 8.3a 4

Rules

1980 AC R325.2721(4) 21

Other Authorities

American Heritage Dictionary of the English Language (4th ed., 2000) 15
Black's Law Dictionary (5th ed) 7
Random House Webster's College Dictionary (2d ed) 8

COUNTER-STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Plaintiffs/Appellants appeal the published opinion of the Court of Appeals which reversed the trial court's order granting their motion for summary disposition.[1] They claim that the Court of Appeals "erred in interpreting [MCL 324.]3109's plain and ordinary language, which operates exactly as the trial court applied it."[2] To the contrary, here the Court of Appeals followed this Court's guidance regarding statutory construction, properly read the plain language of MCL 324.3109(2), and ascribed to that language its ordinary meaning and common usage. Both parties acknowledge that this case presents an unambiguous statute, and the Court of Appeals correctly held that the provisions in question clearly do "not impose blanket responsibility upon a municipality for any sewage discharge that occurs within its jurisdiction without regard to cause and a corresponding obligation to remedy such discharges."[3]

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[1] *Mich Dep't of Environmental Quality v Worth Twp,* 289 Mich App 414; ___ NW2d ___ (2010). Appellants' Appendix, pp 132a-150a. A copy of the trial court's Order Granting Summary Disposition is included in Appellants' Appendix, pp 129a-131a.
[2] Appellants' Brief, p 1.
[3] *Worth Twp, supra*, p 424.

STATEMENT OF QUESTION PRESENTED

Defendant/Appellee adopts and incorporates by reference Appellants' Statement of Question Presented as an accurate recitation of the issue framed by this Court in its March 23, 2011, Order Granting Leave to Appeal.

COUNTER-STATEMENT OF FACTS

As the Court of Appeals recognized, the meaning of unambiguous statutory provisions is in no way altered by the particular facts of the cases to which those provisions apply. Thus, the succinct recitation of facts set forth by that Court sufficiently summarizes the only facts necessary for review and disposition of this case:

> Defendant is a common law township in Sanilac County along the shores of Lake Huron. It does not operate a public sanitary sewer system. All of the residences and businesses within the township rely on private septic systems for waste disposal. A problem has developed with a number of those private septic systems located on a strip of land approximately five miles long located between highway M-25 and Lake Huron. Some of these septic systems are failing, resulting in effluent being discharged into Lake Huron and its tributaries. For the past several years, plaintiff DEQ, as well as the county health department, has been pushing for defendant to install a public sanitary sewer system. Defendant has declined to do so, concluding that such a project was not financially feasible.
>
> Defendant's refusal to pursue a sanitary sewer project has resulted in the instant litigation to force it to do so. The parties pursued cross-motions for summary disposition, resulting in an order of the circuit court granting summary disposition to plaintiffs, establishing a time frame for defendant to design, begin construction on and begin operating a sewer project intended to remedy the failing septic system and resulting discharges. The order also imposed a $60,000 fine and awarded attorney fees. Defendant appeals from this order and we reverse.[4]

[4] *Worth Twp, supra*, pp 416-417.

COUNTER-STATEMENT OF STANDARDS OF REVIEW

As the issue has been framed by the Court, this case presents questions of law. Both parties agree that the statutes to be analyzed in the context of this appeal are unambiguous.[5]

Decisions granting or denying a motion for summary disposition, as well as questions of statutory interpretation, are subject to *de novo* review on appeal. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007); *Oakland Co Rd Comm v Mich Prop & Cas Guar Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

In *McCormick v Carrier,* 487 Mich 180, 191-192; 795 NW2d 517 (2010), this Court recently reiterated the judiciaries' limited role in applying unambiguous statutes:

> The primary goal of statutory construction is to give effect to the Legislature's intent. This Court begins by reviewing the language of the statute, and, if the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute. Judicial construction of an unambiguous statute is neither required nor permitted. When reviewing a statute, all non-technical "words and phrases shall be construed and understood according to the common and approved usage of the language," MCL 8.3a, and if a term is not defined in the statute, a court may consult a dictionary to aid it in this goal. (Internal citations omitted.)

[5] Plaintiffs/Appellants state: "Here the [statutory] language is unambiguous requiring nothing other than to give effect to the language as clearly intended by the Legislature." Appellants' Brief, p 11.

ARGUMENT

I. IN CASES INVOLVING THE DISCHARGE OF RAW SEWAGE OF HUMAN ORIGIN INTO STATE WATERS, THE PLAIN LANGUAGE OF MCL 324.3109(2) CREATES A REBUTTABLE PRESUMPTION THAT THE STATE, COUNTY, CITY, VILLAGE OR TOWNSHIP IN WHICH THAT DISCHARGE ORIGINATED WAS THE DISCHARGING PARTY IN FACT. THIS REBUTTABLE PRESUMPTION CANNOT BE APPLIED TO VISIT LIABILITY ON A MUNICIPALITY THAT DISCHARGED NO SUBSTANCES INTO STATE WATERS AND ENGAGED IN NO CONDUCT CAUSING INJURY OR POTENTIAL INJURY TO THE STATE'S NATURAL RESOURCES

Appellants' Brief on Appeal points to four studies indicating that, under wet weather and certain soil conditions, a number of private septic tanks in Worth Township discharged substances containing identifiable contaminants at unacceptable levels.[6] To be clear, the Township has never disputed that there are private properties within its geographic boundaries that have failing septic systems. But the erroneous interpretation of MCL 324.3109 upon which Plaintiffs' case relied renders the number of defective private systems within a municipality wholly irrelevant. Indeed, under the Department's version of the statute, ***one discharge of human sewage from one private septic tank is enough to judicially mandate the adoption of a local sanitary sewer ordinance and compel remedial action by a local unit of government.***

The present action against Worth Township was entirely dependent upon MCL 324.3109.[7] Interestingly, Appellants, Appellee, the trial court, and the Court of Appeals all agree

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[6] Appellants' Brief, pp 4-5.

[7] Appellants refer to the Township's refusal to honor a District Compliance Agreement. Appellants' Brief, p 5. However, at no time did the Department initiate an action seeking to enforce this Agreement nor did the Appellants advance any claims based upon it in the context of this litigation. If they had, the Township was fully prepared to defend against the Agreement's enforceability, and the record would have included evidence relevant to that defense.

that this statute is unambiguous, but Appellants disagree with the Court of Appeals' interpretation of the statute.[8] The relevant parts of Section 3109 provide:

> (1) A person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious to any of the following:
> (a) To the public health, safety, or welfare.
> (b) To domestic, commercial, industrial, agricultural, recreational, or other uses that are being made or may be made of such waters.
> (c) To the value or utility of riparian lands.
> (d) To livestock, wild animals, birds, fish, aquatic life, or plants or to their growth or propagation.
> (e) To the value of fish and game.
>
> (2) The discharge of any raw sewage of human origin, directly or indirectly, into any of the waters of the state shall be considered prima facie evidence of a violation of this part by the municipality in which the discharge originated unless the discharge is permitted by an order or rule of the department. If the discharge is not the subject of a valid permit issued by the department, a municipality responsible for the discharge may be subject to the remedies provided in section 3115. If the discharge is the subject of a valid permit issued by the department pursuant to section 3112, and is in violation of that permit, a municipality responsible for the discharge is subject to the penalties prescribed in section 3115.
>
> (3) Notwithstanding subsection (2), a municipality is not responsible or subject to the remedies provided in section 3115 for an unauthorized discharge from a sewerage system as defined in section 4101 that is permitted under this part and owned by a party other than the municipality, unless the municipality has accepted responsibility in writing for the sewerage system and, with respect to the civil fine and penalty under section 3115, the municipality has been notified in writing by the department of its responsibility for the sewerage system.

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[8]In a puzzlingly contradictory sequence, Appellants state: "Here the language [of Section 3109] is unambiguous requiring nothing other than to give effect to the language as clearly intended by the Legislature." Yet, they subsequently dedicate three pages of their Brief to a discussion of legislative history and statutory language that has not been in place for decades – language vastly different from the current version of the statute. Appellants' Brief, pp 11, 15-18. In any event, as this Court, the Court of Appeals, and the parties are well aware, where a statute is unambiguous, resort to legislative history is unwarranted and inappropriate. *McCormick, supra,* p 221.

The first subsection of MCL 324.3109 sets forth the elements of a violation of Part 31 of Michigan's Natural Resources and Environmental Protection Act (NREPA).[9] In order to establish such a violation, each of the following facts must be proven by a preponderance of the evidence:

(1) A person has discharged a substance;

(2) The substance is or may become injurious to identified protected interests; and

(3) The discharge was made directly or indirectly into the waters of the State of Michigan.

To assist in the prosecution of claims arising under MCL 324.3109(1), subsection (2) of the same statute provides that, where the substance discharged is raw sewage of human origin, this fact shall be considered prima facie evidence of a violation "by the municipality in which the discharge originated."

In conducting its analysis, the Court of Appeals first addressed the meaning of "prima facie evidence." Because this phrase is not defined in Part 31, the Court relied on the definition in Black's Law Dictionary (5th ed), p 1071, which "makes it abundantly clear that prima facie evidence is rebuttable."[10] Michigan case law is equally clear:

> Prima facie evidence is evidence which, if not rebutted, is sufficient by itself to establish the truth of a legal conclusion asserted by a party. *People v Licavoli,* 264 Mich 643, 653; 250 NW2d 520 (1933). Statutory language making proof of one fact prima facie evidence of another fact is analogous to a statutory rebuttable presumption. See, e.g., *Raptis v Safeguard Ins Co*, 13 Mich App 193, 199; 163 NW2d 335 (1968). *American Casualty Company v Costello*, 174 Mich App 1, 7; 435 NW2d 760 (1989).

Notwithstanding the rebuttable nature of the presumption upon which they rely, Appellants maintain that MCL 324.3109(2) visits liability upon any municipality in which a

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[9] MCL 324.101, *et seq.*
[10] *Worth Twp, supra,* p 419.

discharge of raw sewage of human origin originates, even though that municipality is indisputably not the discharging party. In so arguing, they contort the language of 3109(2) to claim that its rebuttable presumption is not that a municipality is engaged in a prohibited discharge but rather that raw sewage is or may become injurious to public health.

The operative language of Section 3109(2) is as follows:

> The discharge of any raw sewage of human origin, directly or indirectly, into any of the waters of the state shall be considered prima facie evidence of a violation of this part by the municipality in which the discharge originated unless the discharge is permitted by an order or rule of the department.

In rejecting the Department's attempt to confuse a self-explanatory statute, the Court of Appeals correctly concluded that proving prohibited *conduct* on the part of a municipality is the focus of the forgoing rebuttable presumption:

> Second, we look to the meaning of the phrase "by the municipality." . . . The word "by" has many meanings. As a nonlegal term, we look to a layman's dictionary rather than a legal one. *Horace v City of Pontiac,* 456 Mich 744, 756; 575 NW2d 762 (1998). We find these from the Random House Webster's College Dictionary (2d ed) to be particularly helpful: "10. through the agency of" and "12. as a result or on the basis of." Thus, MCL 324.3109(2) imposes responsibility on the municipality not merely because the violation occurs within the boundaries of the municipality, but when the violation occurs "through the agency of" the municipality or "as a result" of the municipality. That is to say, where it is the actions of the municipality that leads to the discharge.[11]

The Court of Appeals also observed that Section 3109(3) buttresses the conclusion that a municipality must actually cause the discharge constituting a statutory violation. Section 3109(3) applies to those situations involving a sewerage system (i.e., pipes and structures including sewage treatment works) owned by a party other than a municipality. In such a factual setting:

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[11] *Worth Twp, supra*, p 419.

> Notwithstanding subsection (2), a municipality is not responsible or subject to the remedies provided in section 3115 for an unauthorized discharge from a sewerage system as defined in section 4101[h] that is permitted under this part and owned by a party other than the municipality, ***unless the municipality has accepted responsibility in writing for the sewerage system.*** MCL 324.3109(3) (emphasis added).

Clearly, a municipality that doesn't own a sewerage system cannot be held liable for a discharge of raw sewage from that system absent its formal and affirmative assumption of such responsibility. Yet, in this case, Appellants have tried to impose responsibility for faulty private septic systems upon Worth Township without either ownership or the kind of formal assumption required in cases involving sewerage systems that pose greater threats to public health than private septic systems in the event of failure.

Under Part 31 of NREPA, municipal responsibility for unlawful discharges attaches when either: (1) the municipality is itself the discharging party; or (2) the municipality is not a discharging party but it has assumed responsibility for a system from which an injurious substance is discharged. The prima facie evidence feature of MCL 324.3109(2) does not alter these essential prerequisites of municipal liability. Instead, it addresses those settings in which there are both private septic systems and municipally owned sewage treatment facilities within the same geographic boundaries.

The mere presence of raw sewage of human origin in state waters will rarely, if ever, establish the identity of the discharging person or entity. To ascertain the responsible party in such cases, the prima facie evidence feature of MCL 324.3109(2) identifies the municipality as the violator *unless* the statutory presumption is rebutted, as it was here.

Rather than providing assistance to prove who discharged raw sewage into state waters, Appellants contend the presumption contained in MCL 324.3109(2) assists in establishing that

raw sewage of human origin may become injurious to public health. But Section 3109(2) does not say that raw sewage is prima facie evidence of an injurious substance within the meaning of Section 3109(1). The Legislature could have easily inserted such a provision into the statute, had it chosen to do so. It did not and courts cannot properly "read" into a statute a provision that is not there. *Roberts v Mecosta Co General Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002); *In re Investigation of 1999 Riots,* 463 Mich 378, n 10; 617 NW2d 310 (2000).

Moreover, NREPA was created, in significant part, to facilitate Michigan's administration of the federal Clean Water Act. 33 USC 1251, *et seq*. If the Department of Environmental Quality is to carry out this responsibility, Michigan law must be enforced in accordance with, and be just as or more stringent than, its federal counterparts. *Huggett v Dep't of Nat Resources,* 232 Mich App 188, 194-195; 590 NW2d 747 (1998). Under the Clean Water Act, "pollutant" is statutorily defined to include "sewage" (33 USC 1362), and "the discharge of *any* pollutant by any person shall be unlawful." 33 USC 1311(a) (emphasis added). Thus Appellants cannot credibly assert that the rebuttable presumption they seek to unilaterally reassign to raw human waste has any purpose whatsoever. Such a proposed "presumption" could never be rebutted. Indeed, its underlying premise – that there are circumstances when the discharge of raw sewage into state waters is not even potentially injurious to the environment – is the antithesis of the position the Department is obligated to advance as an administrator of the Clean Water Act. It is also contrary to the very first sentence of the Introduction to Appellants' Brief: "There are precious few threats to the environment more serious than the discharge of human waste into State waters."[12]

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[12] Appellants' Brief, p 1.

Given their introductory statement, Appellants must concede that proving untreated human waste is potentially injurious to health requires no statutory assistance whatever. Indeed, it is a fact indelibly impressed upon children as soon as they are capable of comprehending their surroundings. Given the extremely low threshold that applies under Section 3109(1) – "a substance that is *or may become* injurious" to people, animals, plants or property – it is indisputable that "raw sewage of human origin" qualifies as one of the substances prohibited from being discharged into state waters. Instead, the evidentiary aspect of MCL 324.3109(2) that utilizes the phrase "violation of this part by the municipality" plainly addresses the "who" and not the "what" element of an unlawful discharge. Thus, where raw sewage of human origin is discharged into state waters, two of the three elements of a Part 31 violation are satisfied. Because a presumption is a fact assumed by operation of law,[13] any statutory language providing for the assumption of these *already proven* elements would be unnecessary and superfluous.[14] In such cases, the *only* element still requiring proof is the identity of the discharging party.

MCL 324.3109(2) could not be clearer with respect to the prima facie nature of its evidentiary component. Appellants' interpretation is not what the plain language of the controlling statute provides, and MCL 324.3109(2) cannot be judicially revised to accommodate the Department's revisionism. *Western Mich Univ Bd of Control v State of Michigan,* 455 Mich 531, 544; 565 NW2d 828 (1997). "The wisdom of a statute is for the determination of the Legislature and the law must be enforced as written." *In re Petition of Attorney General for Investigative Subpoenas*, 282 Mich App 585, 597; 766 NW2d 675 (2009) (internal citation omitted).

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[13] See Benson, *Michigan Rule of Evidence 301, I Presume*, 87 Mich B J 34 (2008).

[14] Such a result cannot be countenanced by a court called upon to construe a statute. *Koontz v Ameritech Services Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

In cases such as this, a court's duty:

> . . . is to apply the language of the statute as enacted, without addition, subtraction, or modification. We may not read anything into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. In other words, the role of the judiciary is not to engage in legislation. *Lessner v Liquid Disposal Inc*, 466 Mich 95, 101-102; 643 NW2d 553 (2002) (citations omitted).

As explained in *Cameron v Auto Club Ins Assoc*, 476 Mich 55, 63, 65-66; 718 NW2d 784 (2006), courts "[m]ust assume that the thing the Legislature wants is best understood by reading what it said." *Id.,* p 63. "It is the legislators who establish the statutory law because the legislative power is exclusively theirs." *Id.,* p 65. "Courts cannot revise, amend, deconstruct, or ignore the product of the Legislature and still be true to the responsibilities that give their branch only the judicial power." *Id.,* p 66. Simply stated, courts are "to declare what the law is, not what it ought to be." *Id.,* p 76.

II. CONSISTENT WITH OTHER PROVISIONS OF MICHIGAN'S NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT, ESTABLISHING A VIOLATION OF MCL 324.3109 REQUIRES PROOF OF A DEFENDANT'S CONDUCT CAUSING ENVIRONMENTAL INJURY. SUCH PROOF WAS NEITHER PRESENTED NOR AVAILABLE IN APPELLANTS' LAWSUIT AGAINST WORTH TOWNSHIP

The issue with respect to which leave was granted by this Court expressly recognizes that MCL 324.3109 is but one section of one Part of Michigan's Natural Resources and Environmental Protection Act (NREPA). This is a critical starting point, because all statutory provisions contained in the same act must be read as a harmonious whole[15] and because what NREPA authorizes and directs the MDEQ to investigate and prosecute is *conduct* harmful to the State's natural resources.

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[15] *People v Jackson,* 487 Mich 783, 791; 790 NW2d 340 (2010).

The Natural Resources and Environmental Protection Act authorizes enforcement actions against persons, private entities and municipalities that either engage in, or have affirmatively assumed responsibility for, activities injurious to Michigan's natural resources. As a Part of the act and within the ambit of its intended reach, MCL 324.3109 prohibits a person from directly or indirectly discharging into state waters a substance that is, or may become, harmful to a variety of statutorily specified interests. However, no part of MCL 324.3109 visits liability for such a discharge on any person or entity other than one proven to be the discharging party or one that has affirmatively assumed responsibility for the source of the discharge. In this case, Worth Township was neither. Nevertheless, the Department seeks to hold the Township answerable for faulty private septic systems even though it does not own, authorize, operate, or regulate them.

The Court of Appeals recognized that, by adopting Appellants' flawed interpretation of the prima facie evidence provision found in MCL 324.3109(2), the trial court created a chain of potentially responsible governmental entities stretching from the Township to Sanilac County, the State of Michigan, and even the Department of Environmental Quality itself! As the Court of Appeals observed:

> [E]ven if we were to agree with plaintiffs that MCL 324.3109(2) creates a responsibility by a municipality for an unauthorized discharge of raw sewage and the municipality is thus subject to the remedies of § 3115, plaintiffs face another hurdle: the definition of "municipality." For purposes of Part 31 of NREPA, MCL 324.3101(m) supplies a particular definition of "municipality": "this state, a county, city, village, or township, or an agency or instrumentality of any of these entities." Thus, the state is as much a municipality as is defendant. And, by extension, the state bears as much responsibility for the unauthorized discharges at issue in this case as does defendant. Thus, even if we were to agree with plaintiffs that MCL 324.3109(2) imposes upon a "municipality" the responsibility for installing a sanitary sewer system to abate a problem with the discharge of raw sewage, plaintiffs offer no compelling reason why they should be able to shift their own responsibility to install a sanitary sewer onto defendant. Or, to put

> it another way, if plaintiffs are entitled to prevail in this action, then we see no reason why defendant could not counterclaim against plaintiff and prevail in a claim seeking to require plaintiff to install the sewerage system.
>
> Indeed, if the purpose of Section 3109(2) is to impose responsibility on a governmental unit, it would seem that the legislative intent would be to make the DEQ the primary responsible agency because the Legislature had available to it the use of a term that did not include the state, namely "local unit." MCL 324.3101(l), defines "local unit" to mean "a county, city, village, or township or an agency or instrumentality of any of these entities." The only difference between the definition of "local unit" and "municipality" in section 3101 is the inclusion of "this state" in the definition of "municipality" and not in the definition of "local unit." The Legislature's choice of "municipality" rather than "local unit" in section 3109(2) must have been intentional and it must have been for the purpose of imposing liability on the state as well as a local unit.
>
> But the more logical explanation is that section 3109(2) simply is not designed to establish responsibility for a discharge without causation. If the Legislature intended to, as plaintiffs suggest, impose responsibility upon a governmental unit where an inhabitant causes a discharge, why would it use a term that would simultaneously impose such responsibility on three or four units of government without any clear mandate as to which of those units were responsible? But if we interpret the statute as suggested by defendant, then the statute creates the presumption that each of those units of government are the cause of the discharge and each avoids responsibility when it establishes that it was not the source of the discharge. *Worth Twp, supra*, pp 422-424.

In leveling their attack on the Court of Appeals' decision, Appellants seek to distinguish MCL 324.3109 from another provision of NREPA, MCL 324.1703(1). They assert that, unlike the latter, "no language exists under § 3109(2) imposing responsibility based upon the *conduct* of the defendant."[16] They also claim that the resolution of problems created by multiple

[16] Appellants' Brief, p 15 (emphasis in original).

governmental entities being potentially liable for the same failing private septic systems should be left to the exercise of the Department of Environmental Quality's "enforcement discretion."[17]

Both the need for, and the Department's assumption of, such broad "enforcement discretion" should be firmly rejected by the Court. Only by ignoring that NREPA requires direct, circumstantial or unrebutted presumptive evidence of a municipality's discharge of raw sewage to find it in violation of MCL 324.3109 can one conclude that multiple governmental entities are all potentially liable for sewage discharged into state waters when none of them was the discharging party.

A violation of NREPA's Part 31, like a violation of Part 17, requires a showing of *conduct* that is or may become injurious to the environment. This key element is repeated throughout Part 31. By way of example:

- §3103(1) directs the Department to protect state waters "which are or may be affected by waste disposal <u>of</u> any person." The word "of" is defined by the American Heritage Dictionary of the English Language (4th ed., 2000) to mean "derived or <u>coming from</u>" or "<u>caused by</u>." (Emphasis added.)
- §3109(1) is violated by the <u>act</u> of directly or indirectly discharging an injurious or potentially injurious substance into state waters.
- §3112(1) is violated by the <u>act</u> of discharging waste or waste effluent into state waters without a permit issued by the Department.
- §3115, the penalty provision of Part 31, variously refers to "the <u>actions</u> of a civil defendant," a defendant who "knowingly or recklessly <u>acted</u>," a defendant who

[17] Appellants' Brief, p 21.

was aware of the danger posed by "his or her conduct" and one "who acted in gross disregard" of a reasonable person standard of care. (Emphasis added.)

MCL 324.3109(1) imposes liability upon a person who has engaged in the *conduct* of discharging injurious substances into state waters. This specific type of conduct is certainly within the scope of that addressed in Part 17 of NREPA, i.e. conduct that has "polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the . . . water . . . or the public trust" in this resource. MCL 324.1703(1). In its Brief on Appeal filed as Appellee in *Anglers of the AuSable Inc v Dep't of Environmental Quality,* 488 Mich 69; 793 NW2d 596 (2010) vacated by ___ Mich ___; 796 NW2d 240 (2011), the Department wrote:

> As this Court correctly concluded in *Preserve the Dunes* [*Preserve the Dunes Inc v Dep't of Environmental Quality,* 471 Mich 508, 519; 684 NW2d 847 (2004)], Section 1703(1) establishes that a complaint under MEPA may be filed when the conduct of the defendant, by itself, is likely to pollute impair or destroy the environment: "An improper administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends MEPA." Conduct that does not itself harm the environment is not actionable in a MEPA civil action.[18]

Inclusion of the word "conduct" into MCL 324.3109(1) would be a redundancy as this statute expressly prohibits a *specific type* of conduct: the discharge of injurious or potentially injurious substances into state waters. An actor's conduct causing environmental injury is as essential to a violation of this section of Part 31 as it is to a violation of Part 17. In MCL 324.3109(1), the Legislature singled out particular conduct for significant civil and criminal sanctions,[19] but it did not remove the element of conduct causing environmental injury as an essential prerequisite to liability. Just as conduct that does not itself harm the environment is not

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[18] See Michigan Department of Environmental Quality's Brief on Appeal filed in *Anglers of the AuSable, supra,* Supreme Court Docket No. 138863, Appellee's Appendix, p 24a.
[19] See MCL 324.3115.

actionable in a MEPA civil action,[20] conduct that does not involve the defendant's direct or indirect discharge of a substance into state waters is not a violation of MCL 324.3109(1).

III. MICHIGAN TOWNSHIPS ARE NOT OBLIGATED TO PROVIDE SANITARY SEWER SERVICES TO THEIR RESIDENTS, AND MCL 324.3109 AND 324.3115 CANNOT BE JUDICIALLY REWRITTEN TO IMPOSE SUCH A REQUIREMENT

In *McSwain v Redford Twp*, 173 Mich App 492, 499-500; 434 NW2d 171 (1988), it was held that a Michigan township has no affirmative duty to construct sanitary sewers. Subsequently, in *Ahearn v Bloomfield Twp*, 235 Mich App 486, 494-495; 597 NW2d 858 (1999), the Court of Appeals rejected the assumption that, where a township has historically provided sewer services, it is under an affirmative duty to continue to provide them. And, similarly, in *Kuriakuz v West Bloomfield Twp*, 196 Mich App 175, 177; 492 NW2d 757 (1992), the Court found no duty is imposed upon townships to construct storm sewers.

Appellants have made it abundantly clear that the objective of their statutory construction arguments is to effectively overrule the foregoing cases. Throughout these proceedings, the Department has sought to force Worth Township into financing, designing, constructing and operating a sanitary sewer collection and treatment system. On pages 18-19 of their Brief, Appellants freely admit that governmental entities other than Worth Township have the statutory authority to take action against failing private septic systems. They acknowledge that dwellings attached to such systems may be declared a health hazard and the premises can be ordered vacated by these nonparty units of government. But, Appellants argue, Worth Township was properly targeted by them because Michigan townships have the statutory authority to undertake sanitary sewer projects and to adopt ordinances related to them.

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[20] *Preserve the Dunes, supra,* p 519.

The fundamental error in Appellants' analysis is that it converts a township's discretionary ***ability*** to undertake, finance, construct and operate sanitary sewer systems with the ***statutory responsibility*** to do so. In fact, neither the Township and Village Improvement Act, MCL 41.411, *et seq.*, nor the Township Ordinance Act, MCL 41.181, *et seq.*, nor Part 43 of NREPA, MCL 324.4301, *et seq.*, impose any duty upon municipalities to exercise the permissive grants of authority those statutes contain.

This is not the first time Appellants have sought to hold local units of government strictly liable for sewage discharges. In the case of *Lake Isabella Development Inc v Village of Lake Isabella,* 259 Mich App 393; 675 NW2d 40 (2003), the Court of Appeals struck down a Departmental rule requiring a local unit of government to assume responsibility in the event of a developer's violation because "MCL 324.3109(2) does not impose strict liability on municipalities and does not provide statutory authority for the challenged . . . requirement." *Id.,* p 404.

Appellants' arguments in this case are just as flawed as the one rejected in *Lake Isabella.* They were, however, effective at the trial court level. In adopting the MDEQ's version of MCL 324.3109(2), the circuit court mused:

> But what Subsection Two does is it creates a presumption that raw human sewage is injurious to public health, the uses of water, etcetera, all of the things that are listed. And it clearly imposes liability on the municipality in which the discharge originated.
>
> Now why would it do that? Well, probably because local governments have the ability to construct and maintain wastewater treatment systems, to require homeowners to hook up to those systems to adopt public health ordinances, to institute condemnation proceedings, etcetera, etcetera.[21]

[21] Transcript, [Second] Motion for Summary Disposition heard October 29, 2008, pp 37-38, Appellee's Appendix, p 51a.

This is precisely the kind of nontextual approach to statutory construction the judiciary was cautioned to avoid in *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999), because such an approach "necessarily invite[s] judicial speculation regarding the probable, but unstated, intent of the Legislature with the likely consequence that a court will impermissibly substitute its own policy preferences." As this Court instructed in *McIntire,* when called upon to apply the terms of a statute to the circumstances of a particular case, courts ought not "attempt to create an ambiguity where none exists in order to reach a desired result albeit one with which [we] might wholeheartedly agree [if we were legislators] authorized to enact policy." *Id.*

Reaching beyond the literal language of MCL 324.3109 to advance a Departmental objective, and converting a municipality's ability to voluntarily undertake public works projects into a never-before mandated obligation to do so, Appellants place MCL 324.3109 and 324.3115 squarely at odds with the Headlee Amendment. They also seek to interfere in the exercise of local self-government and violate the constitutionally based separation of powers doctrine.

A. The Headlee Amendment.

Article 9, §§ 25 and 29 of Michigan's Constitution provide as follows:

> **Sec. 25**. Property taxes and other local taxes and state taxation and spending may not be increased above the limitations specified herein without direct voter approval. The state is prohibited from requiring any new or expanded activities by local governments without full state financing, from reducing the proportion of state spending in the form of aid to local governments, or from shifting the tax burden to local government. A provision for emergency conditions is established and the repayment of voter approved bonded indebtedness is guaranteed. Implementation of this section is specified in Sections 26 through 34, inclusive, or this Article.
>
> **Sec. 29**. The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law. ***A***

> ***new activity or service[22] or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs.*** The provision of this section shall not apply to costs incurred pursuant to Article VI, Section 18. (Emphasis added.)

These sections were part of an amendatory package presented to, and approved by, state voters under the popular term "Headlee Amendment." They were proposed as part of a nationwide "taxpayer revolt" in which taxpayers were "attempting to limit legislative expansion of requirements placed on local government." *Durant v State Bd of Ed,* 424 Mich 364, 378; 381 NW2d 662 (1985).

In *Delta Co v Dep't of Nat Resources*, 118 Mich App 458, 465; 325 NW2d 455 (1982), the Court of Appeals was called upon to determine whether the former Solid Waste Management Act, MCL 229.401, *et seq.,* required new or increased services within the ambit of the Headlee Amendment.

After summarily rejecting the Department of Natural Resources' assertion that the municipality had a pre-existing constitutional duty to dispose of solid waste, the court held that the statutory predecessor to the Solid Waste Management Act imposed no duty upon a local unit of government with respect to solid waste management. The Department's argument that rules promulgated under the former Act created a duty predating Headlee fared no better:

> [T]he defendant's claim that the rule imposed a preexisting mandatory duty on municipalities to dispose of solid waste must be rejected. The repealed act, MCL 325.296; MSA 14.435(6), specifically required that all rules promulgated under the statute be adopted pursuant to the Michigan Administrative Procedures Act (APA), MCL 24.201, *et seq.*; MSA 3.560(101), *et seq*. Therefore,

[22] The Legislature has defined a "service" as a specific and identifiable program of a local unit of government which is provided for the citizens of that unit. MCL 21.234(1). The collection, transmission and treatment of waste unquestionably meet this definition of "service."

> due process requirements must be satisfied. See *Westervelt v Nat Resources Comm, supra*. The standards under the rule did not establish any specific duties. The only sweeping requirement of the rule was to avoid "unlawful pollution." This standard merely echoes the standards in the statute to promulgate "sanitary standards." In contrast, the Solid Waste Management Act imposed the duties, and expenditures, now complained of, namely, the requirement of 30 mil PVC liners or two-foot clay backups on disposal sites and the mandatory duty to dispose of waste. There was no indication that these specific requirements were imposed by 1980 AC R325.2721(4).
>
> Therefore, 1980 AC R325.2721(4) cannot be viewed as imposing a valid preexisting duty on municipalities equivalent to the regulations now sought to be enforced. The reliance on the rule to avoid the purview of the Headlee amendment is misplaced. The duties under the Solid Waste Management Act clearly are "new or increased."

The *Delta Co* court also considered whether the newly required services or activities occasioned "necessary increased cost" within the meaning of the Headlee amendment. Answering this question in the affirmative, the court was convinced "that the new statute will cause localities to incur substantial costs." *Id.*, p 466.

Worth Township, which has never owned, operated or controlled any sanitary sewer system, cannot be compelled to provide sewer services to its residents. Here, as in *Delta Co*, a local unit of government was commanded to undertake a new or increased level of service that it was under no duty to provide prior to 1978. Here, as in *Delta Co*, that unfunded mandate is violative of the Headlee Amendment.

Any assertion by Appellants that the duties they have read into MCL 324.3109 and 324.3115 could be found prior to 1978 in MCL 323.6 should be rejected. MCL 323.6 did not include the mandates imposed upon Worth Township. Instead, the former statute provided:

> Any . . . township which permits, allows or suffers the discharge of . . . raw sewage of human origin into any of the waters of the state by any of its inhabitants or persons occupying lands from which

> said raw sewage originates, shall be subject ***only*** to the remedies provided for in section 7 of this act. (emphasis added).

Section 7 then provided for a hearing in front of a commission that could fashion an appropriate order. Nowhere in the former statute was there a directive requiring a municipality to undertake a sanitary sewer project such as the one ordered here. And, by now claiming that this obligation is inherent in MCL 324.3109 (enacted subsequent to 1978), Appellants seek to require a new or increased level of service without funding, in violation of Headlee. See *South Haven Twp v Dep't of Nat Resources*, 132 Mich App 222; 346 NW2d 923 (1984); and *Delta Co, supra.*

Michigan has no law requiring a township to adopt a sanitary sewer ordinance and build a public sewer system to address one or more failing private septic tanks within its geographic boundaries. However, if MCL 324.3109 and 324.3115 are judicially rewritten to revive the result reached in the circuit court, there will be no question but that new or increased levels of activity are being required without State funding, contrary to Michigan's Constitution.

B. The Right of Local Self Government.

It is beyond serious contention that the circuit court order entered in this case effectively required Worth Township to install a sanitary sewer system. Yet, in an apparent effort to avoid the legal implications of this fact, Appellants equivocate with respect to the nature of the order they convinced the circuit court to adopt. On the one hand, the Department observes that "[t]he only practical corrective action available is the installation of a municipal sewer system in the area of concern."[23] On the other, the Department claims that the order it authored did not "compel a specified corrective action such as [the] installation of a collection and treatment sewer system."[24] Given the Department's position regarding what constitutes the "only practical

[23] Appellants' Brief, p 5.
[24] Appellants' Brief, p 25.

corrective action available" and the trial court's order specifically requiring the Department's approval of all actions the Township was compelled to perform, it is clear that the design, construction and operation of a sanitary sewer collection and treatment facility was mandated.

An essential part of this mandate is the requirement that by May 1, 2009, the Township had to submit *for DEQ approval* a proposed service area that minimally included "the area of concern as identified in [the Department's] motion for summary disposition."[25] This portion of the circuit court's order calls for the creation of a special assessment district, the ultimate boundaries of which may be dictated by the DEQ. Here is a truly unique district. Unlike those created to pay for public works projects that can be lawfully undertaken by a township under its grant of authority from the legislature,[26] this judicially mandated district is insulated from the statutory process providing for input by affected property owners.

Michigan law allows townships to create special assessment districts to pay for sanitary sewer systems in one of two ways. The first is via a petition in favor of the project signed by property owners of more than 50% of the total land area within the special assessment district. See MCL 41.723(2). An alternative method authorizes a township board to initiate a public works project on its own, without a petition. MCL 41.721, *et seq*. However, if the township's governing body invokes this alternative, written objections signed by more than 20% of affected property owners within the proposed assessment district will halt the process. Thereafter, the project cannot proceed unless more than 50% of property owners subject to being assessed file a petition in favor of the improvement. MCL 41.723(3)(a). The DEQ's interpretations of MCL

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[25] See Circuit Court Order Granting Plaintiffs' Motion for Summary Disposition issued December 23, 2008, Appellants' Appendix, p 130a.

[26] Townships have no inherent powers, but have only those limited powers conferred on them by the legislature or by the Michigan Constitution. *Howell Twp v Rooto Corp*, 258 Mich App 470, 475; 670 NW2d 713 (2003); *Graham v Kochville Twp*, 236 Mich App 141, 146; 599 NW2d 793 (1999).

324.3109(2) and the enforcement provisions of MCL 324.3115 eliminate a township property owner's statutory right to either petition for, or object to, a sanitary sewer project for which that owner must pay.

As Appellants have conceded, both the Department of Environmental Quality and the Sanilac County Health Department have the ability to shut down faulty private septic systems and preclude occupancy of the dwellings that use them. The focus of these enforcement actions is appropriate. After all, the party ultimately responsible for any waste treatment system, public or private, is the party who owns and operates it.

In response to such enforcement activity, property owners have a number of options. If conditions permit, they can repair or replace, at their own expense, their septic system with one capable of treating sewage onsite. If not, they can – again at their own expense – have their septic system essentially operate as a holding facility from which sewage can be periodically pumped and hauled for offsite treatment and disposal. Or, they can invoke the statutory process described above to seek the creation of a special assessment district and the construction, operation and maintenance of a public sewer system. Alternatively, property owners can do nothing and use their property for limited purposes not including human habitation.

Worth Township recognizes that the final option may be less than desirable from a number of perspectives. But no one should be misled: regardless of whether the solution adopted is private or public in character, the cost of sewage treatment and disposal will be borne by individual property owners. Properties whose small size, configuration and prospective uses cap their market values even when served by an adequate septic system are subject to being abandoned by owners who can afford neither the cost of upgrading their onsite systems or the special assessments levied to pay for a public one. Further, with respect to properties having such

limited economic potential, significant challenges to large assessments[27] levied for a public works project are virtual certainties. This is true because there must be a substantial and reasonable proportionality between the amounts assessed for the project and the value the improvement occasions to the assessed property. *Dixon Road Group v City of Novi*, 426 Mich 390, 403; 395 NW2d 211 (1986).

Townships have no inherent powers; rather, they possess only those conferred upon them by the Legislature or Michigan's Constitution and those fairly implied. *Hess v Cannon Twp*, 265 Mich App 582, 590; 696 NW2d 742 (2005); Const 1963, art 7, § 34. But township boards have been granted legislative and administrative powers, and those powers must be liberally construed in favor of the local units of government. Const 1963, art 7, §§ 8, 34. Pursuant to MCL 41.181, townships possess "the power to enact ordinances that regulate the public health, safety, and general welfare."

The right to local self-government is recognized in MCL 41.181, which gives townships a choice regarding the enactment of ordinances: "the township board . . . *may* adopt ordinances regulating the public health, safety, and general welfare of persons and property . . . " (Emphasis added.) This permissive language is clear and unambiguous. It cannot be ignored:

> A necessary corollary to the plain meaning rule is that courts should give the ordinary and accepted meaning to the mandatory word "shall" and the permissive word "may" unless to do so would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole. *Browder v International Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982) (internal citations omitted).

[27] The estimated capital cost of constructing a sanitary sewer system to serve roughly 1,600 residences in Worth Township exceeds $30,000,000 dollars. This cost, which does not include the expense of system operation and maintenance would result in an approximate assessment of $18,000 for each property served.

Appellants' construction of MCL 324.3109 and 324.3115 ignores the basic legal foundation of municipal law. Their application strips local governments of legislative discretion predicated upon discharges of human waste from private septic systems. But the statutes in question simply do not, and cannot, support such a result. Worth Township is not required by any law to own or operate a sanitary sewer system. Nothing in NREPA, or any other statute in Michigan, requires townships to construct sanitary sewer facilities. And while MCL 324.4301 provides that local units of government may own, build or operate sanitary sewer systems, that language is permissive, not mandatory.

Similarly, the Township and Village Public Improvement Act, MCL 41.411, *et seq.*, allows townships to construct or acquire and maintain sanitary sewers and sewage disposal plants and equipment. But even this "statute cannot be read as authorizing a township to proceed *sua sponte* to make public improvements." *Damico v Shelby Twp,* 64 Mich App 271, 273; 236 NW2d 69 (1975). Rather, MCL 41.412 requires a valid petition by landowners, and MCL 41.413 requires other conditions precedent to undertake such a public improvement. As explained in *McSwain v Redford Twp, supra,* pp 499-500:

> [C]ontrary to what plaintiffs argue, we do not believe defendant was required by statute to install a sanitary sewer system under the instant circumstances. MCL 41.411 vests townships with the authority to make public improvements, including the installation of sanitary sewers, upon approval by a certain percentage of the affected residents. MCL 41.412. Here, defendant submitted the matter for approval by the residents and it was defeated in a voter referendum. Although defendant could possibly have taken subsequent measures to construct the sewer system (see, e.g., MCL 123.742(2)), we find nothing mandated that it do so.
>
> Where, as here, the governmental unit has no affirmative duty, by statute or otherwise (e.g., a permanent injunction), to construct a sanitary sewer, we do not believe it can be held liable for damage which might not have occurred had the sewer been constructed.

In excess of their powers, Appellants almost succeeded in imposing sewage discharge obligations and controls upon Worth Township that circumvent the statutory process applicable to public works projects. Appellants' efforts to improperly broaden the scope of their authority at the expense of local government and the citizens of the State of Michigan were properly rejected by the Court of Appeals. They should be similarly rejected by this Court.

C. The Separation of Powers Doctrine.

Appellants' flawed interpretations of MCL 324.3109(2) and the enforcement provisions found in MCL 324.3115 would expose any municipality to the oversight of its legislative processes by the judicial and executive branches of government upon the occurrence of even a *single* discharge of raw human sewage from a *single* private septic system. These interpretations invite the very violation of the separation of powers doctrine that occurred in this case.

Michigan's Constitution is unequivocal: "The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2.

Township boards have been delegated the power to adopt ordinances regulating the public health, safety and general welfare of persons and property. And while "it is within the province of the courts to pass upon the validity of . . . ordinances, courts may not legislate nor undertake to compel legislative bodies to do so one way or another." *Northwood Properties Co v Royal Oak City Inspector*, 325 Mich 419, 423; 39 NW2d 25 (1949).

In *Randall v Meridian Twp*, 342 Mich 605; 70 NW2d 728 (1955), the plaintiffs sought to enjoin the township from amending a zoning ordinance, claiming they had received insufficient notice of the public hearing at which the amendment was considered. The trial court dismissed

the plaintiff's complaint for failure to exhaust legal remedies. On appeal, this Court held that both the plaintiffs and the trial court had overlooked a dispositive point: the circuit court was without jurisdiction to grant the requested relief. *Id.*, pp 607-608.

Relying in part upon its decision in *Northwood*, the *Randall* court explained:

> The function of the township board in enacting a zoning ordinance is legislative. "The court may not direct or control legislative action." "Injunctive or consequential relief to compel action by the legislature may not be granted by the court."
>
> While it is within the province of the courts to pass upon the validity of statutes and ordinances, courts may not legislate nor undertake to compel legislative bodies to do so one way or another. The court erred in seeking to compel the defendant mayor and city commission members to amend the ordinance. *Id.*, pp 607-608 (internal citations omitted).

The municipalities' authority to enact or amend zoning ordinances in *Northwood* and *Randall* were grounded in the same delegation of legislative power granted Worth Township. As illustrated by those cases, a township board's legislative power to enact ordinances for the public health, safety, and welfare of its residents is separate and distinct from a court's power of review. Just as with the enactment of ordinances, the decisions to construct, maintain and operate a sanitary sewer system call for legislative action. As such, those decisions cannot be compelled by judicial directive. *Randall*, *supra*.

At the hearing on Defendant's first Motion for Summary Disposition, Appellants' counsel seemingly recognized the separation of powers obstacle confronting the MDEQ's request for relief:

> And we concede the Department does not have the authority to, or ask the Court to compel them to, in fact, put in a sewer system. That's correct. However the Court has the authority, and we have

> the ability to request the Court to compel the Township to take whatever action is necessary to stop the illegal discharges.[28]

However, when the parties appeared before the circuit court one year later, Appellants' counsel could not have been clearer about the specific and sweeping nature of the relief requested:

> There is, in this situation here, we feel, in light of the site conditions, in light of the high water table there, it's not an appropriate location for septic systems. There is a need for a uniform, wide-spread, fix, in effect, a municipal sewer system.[29]

And the final order that Appellants prepared and convinced the circuit court to enter over Defendant's objections required the Township to engineer, design, construct and operate a sanitary sewer project with MDEQ approval and oversight.[30]

The separation of powers doctrine is violated when the whole power of one department is exercised by those who possess the whole power of another department. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 585; 640 NW2d 321 (2002). A court "has no power either to give or take away a municipality's authority to legislate or re-legislate; nor may it legislate in lieu of the municipality. Such is the essence of separation of powers." *Schwartz v City of Flint*, 426 Mich 295, 318; 395 NW2d 678 (1986).

Here, an agency of the executive branch, the Department of Environmental Quality, convinced a component of the judicial branch, the Ingham County Circuit Court, to join with it in subsuming the legislative decision making functions of the Worth Township board. The Court of Appeals' decision undid the impermissible entanglements set in motion by Appellants and

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[28] Transcript, [First] Motion for Summary Disposition, September 26, 2007, pp 18-19, Appellee's Appendix, p 38a.
[29] Transcript, [Second] Motion for Summary Disposition, October 29, 2008, p 13, Appellee's Appendix, p 45a.
[30] See Order Granting Summary Disposition, Appellants' Appendix, pp 129a-131a.

restored an appropriate distance between the governmental branches involved. That decision should now be affirmed.

CONCLUSION AND RELIEF REQUESTED

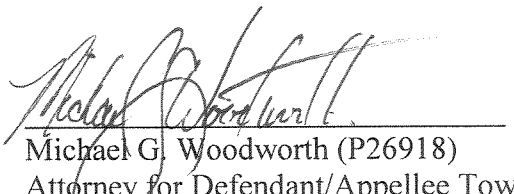
The Court of Appeals' decision was neither clearly erroneous nor in conflict with any decision of this Court or another panel of the Court of Appeals. Further, that decision was consistent with well-established limitations imposed upon courts called upon to apply unambiguous statutes. The Court of Appeals recognized that any judicial deference given to an agency's construction of a statute that agency is charged with administering cannot overcome the plain meaning of the statute itself. *Western Mich Univ Bd of Control, supra,* p 544. And, contrary to Appellants' assertions, what the Legislature might have adopted cannot alter what the Legislature actually did adopt. *In re Investigation of 1999 Riots, supra*, n 10.

In this case, when presented with an unambiguous statute, the Court of Appeals properly read the plain language of MCL 324.3109(2) in accordance with its ordinary meaning and common usage, and applied that language to the uncontestable facts that Worth Township does not own or control *any* sanitary sewer system and engaged in *no* conduct causing, or potentially causing, environmental injury. Thus the Township plainly rebutted any prima facie evidence that it violated the statute upon which the MDEQ's action was based.

Accordingly, the Court of Appeals' decision should be affirmed. Further, as both the prevailing party and the victim of a Headlee violation, Worth Township asks that it now be: (1) awarded its attorney fees and costs incurred as provided for by MCL 324.3115(1); and (2) reimbursed for all expenses the Township was obligated to incur to meet the unfunded mandates imposed by the Ingham County Circuit Court's December 23, 2008, Order Granting Plaintiffs' Motion for Summary Disposition.

Respectfully submitted,

June 22, 2011



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