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.

STATE OF MICHIGAN

COURT OF APPEALS

BOBBY BURLESON,

Petitioner-Appellant,

v

DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent-Appellee.

FOR PUBLICATION
May 12, 2011

No. 292916
Ingham Circuit Court
LC No. 08-001507-AA

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

GLEICHER, J. (*dissenting*).

This case turns on whether the Michigan Legislature intended that state regulation of our Great Lakes shorelines extends to the natural ordinary high water mark. The majority circumscribes the state's regulatory jurisdiction to a fixed, static elevation above sea level defined by the International Great Lakes Datum (IGLD) for the year 1955, a level that MCL 324.32502 labels an "ordinary high-water mark." Because the Legislature deliberately inserted the word "natural" to delineate the scope of the state's ordinary high water mark jurisdiction, I respectfully dissent.

In 1995, our Legislature enacted in MCL 324.32501 *et seq*., the Great Lakes submerged lands act (GLSLA). "[T]he GLSLA establishes the scope of the regulatory authority that the Legislature exercises, pursuant to the public trust doctrine." *Glass v Goeckel*, 473 Mich 667, 683; 703 NW2d 58 (2005). Section 32502 of the GLSLA commences with a broad designation of "[t]he lands covered and affected" by the act, generally describing them as "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 GLSLA then sets forth the core principles governing its interpretation:

> 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. . . .

This sentence underscores the Legislature's intent that the state serve as a steward of the shores of our Great Lakes. The sentence's first clause posits, "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." I cannot envision a clearer directive. The second clause recognizes the interests of private littoral owners, but establishes no rights or entitlements. It merely states that the GLSLA "provide[s] for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands." The third clause returns to the public interest theme introduced in the first clause, reiterating that although private owners possess a property right to fill in "patented submerged lands," the exercise of this and other property rights remains contingent on the state's determination "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." Preservation of the precious Great Lakes as a public resource animates the Legislature's prescribed construction of the GLSLA.

My construction of the next two sentences of MCL 324.32502 flows directly from the principles guiding the GLSLA's interpretation. After establishing the act's general purview, the Legislature set forth the reach of the state's jurisdiction as follows:

> 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. . . . [Emphasis added].

This language contains no hint of ambiguity. The sentence clearly expresses the meaning that the natural ordinary high water mark determines the state's regulatory authority. The Legislature selected the natural ordinary high water mark as the boundary line of state jurisdiction because this reference point most securely safeguards the public's interest in the shores of the Great Lakes.

The natural ordinary high water mark delineates a distinct point on the land created by the continuous action of water, and evidenced by physical characteristics including the appearance of the soil surface, vegetation changes, and the presence of debris. *Glass*, 473 Mich at 691; 33 CFR § 329.11(a)(1). In *Glass*, the Michigan Supreme Court observed that the term "ordinary high water mark" derives from "the common law of the sea," which governs waters with regular high and low tides. *Id*. at 690. Despite the absence of tides in the lakes surrounding Michigan, the common law has long applied the term to the Great Lakes, in light of the recurrent

and sometimes substantial fluctuation in their water levels. *Id*. at 691, 693. The Supreme Court described as follows the legal pedigree of the ordinary high water mark:

> The concepts behind the term "ordinary high water mark" have remained constant since the state first entered the Union up to the present: boundaries on water are dynamic and water levels in the Great Lakes fluctuate. In light of this, the aforementioned factors will serve to identify the high water mark, but the precise location of the ordinary high water mark at any given site on the shores of our Great Lakes remains a question of fact. [*Id*. at 694.]

The natural ordinary high water mark may prove difficult to locate on a shoreline, but it occupies a firmly entrenched position in the common law.[1]

My interpretation of the term "natural ordinary high water mark" derives from bedrock principles of statutory construction.

> The Court's responsibility in interpreting a statute is to determine and give effect to the Legislature's intent. The statute's words are the most reliable indicator of the Legislature's intent and should be interpreted based on their ordinary meaning and the context within which they are used in the statute. Once the Court discerns the Legislature's intent, no further judicial construction is required or permitted because the Legislature is presumed to have intended the meaning it plainly expressed. [*People v Lowe*, 484 Mich 718, 721-722; 773 NW2d 1 (2009) (internal citation and quotation marks omitted).]

Each word of a statute is "presumed to be made use of for some purpose, and, so far as possible, effect must be given to every clause and sentence." *Univ of Mich Bd of Regents v Auditor Gen*, 167 Mich 444, 450; 132 NW 1037 (1911). This Court may not substitute or redefine a word chosen by the Legislature, or assume that the Legislature mistakenly utilized one word or phrase instead of another. *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931); *People v Crucible Steel Co of America*, 150 Mich 563, 567; 114 NW 350 (1907). "A well recognized rule for construction of statutes is that when words are adopted having a settled, definite and well known meaning at common law it is to be assumed they are used with the sense and meaning which they had at common law unless a contrary intent is plainly shown." *People v Covelesky*, 217 Mich 90, 100; 185 NW 770 (1921). "All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." MCL 8.3a.

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[1] The parties do not dispute that neither Bobby Burleson nor the Department of Environmental Quality (DEQ) has sought to ascertain the location of the natural ordinary high water mark on Burleson's property.

In the GLSLA, the Legislature unambiguously selected the "natural ordinary high-water mark" as the boundary for "[t]he lands covered and affected" by the act. The Legislature's incorporation of the modifier "natural" signals its intent that benchmarks created by nature, such as eroded soil and altered patterns of vegetation, demarcate the extent of the DEQ's jurisdiction. And given that the term "natural ordinary high-water mark" represents both a centuries-old legal term of art and a concept well-known to surveyors, I presume that the Legislature understood the meaning and significance of the language it engrafted into MCL 324.32502.[2]

The last sentence of MCL 324.32502 reads: "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." With this sentence, the Legislature introduced a concept distinct from the *natural* ordinary high water mark. Invoking the IGLD of 1955, the Legislature established a specific reference point for the term "ordinary high-water mark." In my view, a basic understanding of the IGLD of 1955 facilitates a construction of this sentence and illuminates the intended distinction between the natural ordinary high water mark and the ordinary high water mark.

The IGLD represents "a reference system used for expressing elevations in the Great Lakes area." *State v Trudeau*, 139 Wis 2d 91, 107 n 7; 408 NW2d 337 (1987). A November 1991 "update letter" concerning Great Lakes levels authored by the United States Army Corps of Engineers explains the IGLD as follows:

> What is IGLD 1985?
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> Because of movement of the earth's crust, the "datum" or elevation reference system used to define water levels within the Great Lakes-St. Lawrence River system must be adjusted every 25 to 35 years. The current datum is known as the International Great Lakes Datum, 1955 (IGLD 1955). The date of the new

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[2] A 1959 Michigan regulation reinforces my conclusion that the Legislature purposefully chose the term "natural" to delimit the state's ordinary high water mark jurisdiction:

> "Ordinary high water line" shall refer to that *natural* line between the upland and the lake bottom land which persists through periodic changes in water levels and below which the character of the natural soil and vegetation and the profile of the surface of the soil have been affected and worked upon by the waters of the lake at high stages as to make them distinct in character from the upland. This character of the soil, surface shape, or vegetation may be somewhat altered during exposure at low stages in the fluctuations of the water levels, but will be reestablished with the return of high stages. When the soil, vegetation, or shape of the surface have been directly or indirectly altered by man's activity, the ordinary high water line shall be located where it would have occurred had such alteration not taken place. [1959 AACS, R 299.371(a) (emphasis added).]

> datum, 1985, is the central year of the period 1982-1988 during which water level information was collected for preparing the datum revision.
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> Why is a revised datum required?
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> Water levels gaging [sic] responsibility for the Great Lakes-St. Lawrence River system is shared by the United States and Canada. The harmonious use of these waters requires international coordination of many aspects of their management. The most basic requirement for coordinated management is a common elevation reference or "datum" by which water levels can be measured. [US Army Corps of Engineers, Great Lakes Levels, Update Letter No. 76, November 4, 1991 <http://www.lre.usace.army.mil/Search/index.cfm?AllWords=IGLD&section_id=0>, accessed April 20, 2011.]

The "ordinary high-water mark" numbers listed in MCL 324.32502 correspond to each Great Lake's water surface elevation above sea level, as reported in the 1955 datum. These numbers supply a readily available, unchanging plane of reference for lake elevations, which the Legislature designated "ordinary high-water mark[s]."

In my view, it defies logic to equate a static number representing lake water elevation in 1955 with a "natural" ordinary high water mark that expressly controls the state's jurisdiction. Instead, the 1955 lake levels and the natural ordinary high water mark are conceptually distinct. A permanently set elevation linked to 1955 water levels constitutes an artificial location with no connection to "natural" benchmarks. In contrast, the contour of the land surrounding the natural ordinary high water mark predictably shifts with time, producing ever changing elevations. Moreover, lake water elevations above sea level defined by the IGLD embody a vertical plane, while the site of a natural high water mark suggests a horizontal reference. The natural ordinary high water mark represents a discernible intersection between the water and the shoreline. But "[t]he most ordinary effect of a large body of water is to change the shore line by deposits or erosion gradually and imperceptibly." *Hilt v Weber*, 252 Mich 198, 219; 233 NW 159 (1930). Because the topography of the Great Lakes shoreline constantly changes, as wind and waves move sand and soil, a fixed elevation may or may not reflect a location landward of the *natural* ordinary high water mark. Due to shifting shorelines and varying beach elevations, a static elevation of 579.8 feet may denote the top of a sand dune in one year, while being underwater the next.

Unlike the majority, I credit our Legislature with awareness of the critical difference between a natural ordinary high water mark impressed on the land notwithstanding varying water levels and shifting shore topography, and unchanging numbers signifying lake water elevations. Consequently, it does not strain my "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" very different meanings. *Ante* at 6. Rather, I believe that the Legislature inserted the word "natural" because it intended to distinguish between an unchanging line in the sand and the reality of our dynamic Great Lakes shorelines. Because a fundamental difference exists between the meanings of the two terms, I cannot accept that the Legislature accidentally inserted the word "natural" into MCL

324.32502 to describe the lands subject to state jurisdiction, or that the Legislature inadvertently omitted the word "natural" from the statute's last sentence.

Nor do I find troubling the specter of "serious difficulties concerning *why* the statutory elevations were included in MCL 324.32502 in the first instance." *Ante* at 6 (emphasis in original). As the majority recognizes, the Legislature employed the term "ordinary high-water mark" elsewhere in the GLSLA. When the Legislature enacted MCL 324.32502 in 1995, the term "ordinary high-water mark" appeared in at least two other sections of the GLSLA: MCL 324.32503(3) ("The department shall not enter into a lease or deed of unpatented lands that permits drilling for exploration purposes unless the drilling operations originate from locations above and inland of the ordinary high-water mark."), amended by 2002 PA 148; and MCL 324.32513(2)(a)(*ii*) ("For . . . a permit for . . . the mowing of vegetation in excess of what is allowed in section 32512(2)(a)(*ii*), in the area between the ordinary high-water mark and the water's edge, a fee of $50.00."), amended by 2003 PA 163.[3]

Furthermore, I disagree with the majority's analysis of the portion of the statutory language addressing property rights acquired "by accretions occurring through natural means or reliction." MCL 324.32502. After defining the word "land" in the penultimate sentence of § 32502 as including "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," the Legislature added "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." The majority opines, "If the [natural ordinary high water mark] 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 [natural ordinary high water mark] as defined by respondent." *Ante* at 7. However, the majority has read out of the statute the words "affect property rights." Littoral owners possess "property rights" in land *subject to state regulation*. Regardless whether the surface of a property owner's fast land expands with reliction or contracts through erosion, exercise of state regulatory powers does not negate ownership. See Abrams, *Walking the Beach to the Core of Sovereignty*: *The historic basis for the public trust doctrine applied in* Glass v Goeckel, 40 U of Mich Journal of Law Reform 861, 899-902 (2007). As the Supreme Court observed in *Glass*, the state's "status as trustee does not permit the state, through any of its branches of government, to secure to itself property rights held by littoral owners." *Glass*, 473 Mich at 694. Relicted land below the natural ordinary high water mark may remain subject to private ownership. But "land-use regulation does not effect a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land." *Nollan v California Coastal Comm*, 483 US 825,

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[3] It also seems reasonable to conclude that when the Legislature enacted the GLSLA, it intended that future regulatory provisions would utilize the ordinary high water mark, instead of the natural ordinary high water mark. Indeed, this is precisely what occurred when the Legislature enacted MCL 324.32501(b), MCL 324.32512, MCL 324.32512a(3), MCL 324.32513, and MCL 324.32516.

834; 107 S Ct 3141; 97 L Ed 2d 677 (1987) (internal citation and quotation marks omitted). Just as "public rights may overlap with private title," *Glass*, 473 Mich at 700, the state's regulatory jurisdiction may overlie property rights. In my view, the phrase "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" means nothing more than, irrespective of the location of the natural ordinary high water mark, relicted land still amounts to property of the fee owner, rather than converting to the state.

Finally, I agree with Burleson that the use of a fixed elevation enhances predictable regulatory boundaries. Yet by selecting the word "natural," the Legislature opted to link the state's regulatory realm to the reality of an ever changing environment. In accordance with the Legislature's command that preservation and protection of the Great Lakes must guide interpretation of the GLSLA, I reject that the Legislature intended that an elevation corresponding to the water's edge in 1955 would forever limit the state's ability to protect our beaches.

I would affirm the circuit court's order upholding the DEQ's declaratory ruling.

/s/ Elizabeth L. Gleicher