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## City of Romulus v. Mich. Dep't of Env'tl. Quality, 260 Mich. App. 54 (Mich. Ct. App. 2003)

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waterways. The court further explained that even if the statute did not expressly grant this right to the Commonwealth, the public trust doctrine would permit the Department to assess Trio the displacement fee.

Nonetheless, the court determined that the Department's assessment of tidelands occupation fees may have been in derogation of the wharfing statute grant to Trio. The court analyzed the history of the Commonwealth's practice of granting title to tidelands. Prior to 1866, Massachusetts granted title to tidelands in fee simple subject to a condition subsequent, as was done under the wharfing statutes. However, in 1866, the Commonwealth established a licensing scheme whereby the legislature issued revocable licenses for the use of tidelands and charged fees—tidelands occupation fees—for the privilege of occupying the lands. The legislature took care to state that its new licensing scheme would have no affect whatsoever on previous grants. Thus, the court determined that if a landowner seeking a license to fill or occupy tidelands held title to the land, the occupation fees did not apply; but if a landowner did not hold title to the land, the fees did apply. Thus, the status of Trio's land was determinative of whether or not it was subject to the tidelands occupation fee. Since the superior court never defined Trio's title, the court remanded the issue for further proceedings.

*Kate O. Lively*

## MICHIGAN

**City of Romulus v. Mich. Dep't of Env'tl. Quality, 260 Mich. App. 54 (Mich. Ct. App. 2003)** (holding it was not improper for the Michigan Department of Environmental Quality to issue a permit for a hazardous waste underground deep injection well facility in a legally filled wetland, and that need for such a facility is not a factor considered when issuing such permits).

Environmental Disposal Systems Inc. ("EDS") undertook a project to obtain a permit to construct a hazardous waste underground deep injection well facility on an undeveloped site in the City of Romulus. EDS obtained many of the necessary permits and was in the process of applying to the Michigan Department of Environmental Quality ("MDEQ") for a Part 111 permit, required under the Natural Resources and Environmental Protection Act ("NREPA"), when they learned of wetlands located on the proposed site. According to applicable regulations, a facility of this nature could not be located in a wetland. Upon learning of the wetland, EDS obtained an NREPA Part 303 permit from MDEQ authorizing them to fill the wetland and destroy it. EDS then proceeded to fill the wetland and continued with the application process for the Part 111 permit to construct the facility.

The City of Romulus, the City of Taylor, and Wayne County challenged the decision by MDEQ to issue a Part 111 permit allowing EDS to construct and operate the facility on the site. The Wayne Circuit Court held the MDEQ did not violate any regulations by issuing the Part 111 permit.

The Cities of Romulus and Taylor and Wayne County appealed, and the Court of Appeals of Michigan considered two significant issues. First, whether MDEQ erred in issuing the Part 111 permit since Rule 603 of the Michigan Administrative Code prohibits location of a deep injection well facility in a wetland. Second, whether MDEQ erred by not considering the necessity of a facility of this type, in this area, before issuing the permit.

On the first issue, the appellate court affirmed the decision of the lower court noting that it was proper for MDEQ to issue the permit although the site had once contained a wetland. The Cities of Romulus and Taylor and Wayne County did not challenge the validity of the Part 303 permit that gave EDS the authority to fill the wetlands on the site. The court noted that upon filling, a wetland ceases to be a wetland, so MDEQ was correct in issuing the Part 111 because the wetland would no longer exist when the facility was constructed.

The appellate court then held that because Part 111 and Part 303 both fell under the NREPA, the drafters of the statutes must have anticipated that a builder could fill a wetland upon obtaining a Part 303 permit prior to obtaining a Part 111 permit. Since the NREPA did not forbid this sequence of events, MDEQ was justified in issuing the Part 111 permit to EDS. The court concluded by noting that Rule 603, which prevents construction of a hazardous waste disposal facility in a wetland, did not preclude MDEQ from issuing a Part 111 permit in an area where wetlands no longer exist because of legal filling under a Part 303 permit.

On the second issue, the appellate court again affirmed the trial court finding that MDEQ was correct in not considering the need for a facility prior to issuing a Part 111 permit. MDEQ applies a market-driven approach to facility permitting, which allows the prospective builder of such facilities to evaluate the need on an economic basis. The City of Romulus, the City of Taylor, and Wayne County cited several sections of Part 111 and other NREPA statutes in support of the argument that MDEQ must evaluate the need for such a facility prior to issuing a Part 111 permit. The court evaluated the sections individually and ultimately held that nothing in the regulations or statutes required MDEQ to evaluate the need for a facility. Therefore, MDEQ was correct in not evaluating the need, and allowing EDS to assume the economic risk involved with the possibility that the market would not support the proposed facility. In addition, the court held that nothing required MDEQ to promulgate a rule dictating their market-driven approach to facility permitting. The court reasoned that the market-driven approach was not actually a rule or procedure, but rather MDEQ's abstention from evaluating a market's need for a specific facility.

The court noted that MDEQ based its decision on competent, material and substantial evidence, and the trial court did not err in their review of the decision. The City of Romulus, the City of Taylor, and Wayne County argued that the trial court erred in its review of MDEQ's actions, but they did not allege any specific error in the trial court's review. On appeal, this court held that, without a more specific allegation of error, the trial court was correct in reasoning that MDEQ's decision was valid.

The court thus affirmed the trial court's decision, finding that the trial court did not err in its evaluation of the MDEQ's decision to issue the Part 111 permit allowing EDS to construct their hazardous waste underground deep injection well facility.

*Ryan D. Phillips*

**Dyball v. Lennox, No. 241296, 2004 WL 345278 (Mich. Ct. App. Feb. 24, 2004)** (holding trial court may not consider circumstances surrounding a grant when interpreting an unambiguous easement for ingress and egress to a body of water, and right of way in easement did not give rise to riparian rights).

George and Linda Dyball were riparian owners of property on Lake Fenton. The Dyball property was subject to an easement that Edith Crane granted Bob Crane in 1955. William Lennox owned a lot in Cranewood No. 1 that enjoyed a dominant estate regarding the easement. Crane's deed provided, "The Easterly 16 feet of the above described premises being reserved for the use of those parties, their heirs, assigns, and successors, owning lots in Cranewood No. 1 Subdivision . . . for the purposes of ingress and egress to and from the premises in which they may have an interest to the water's edge of Lake Fenton." The Dyballs filed a complaint seeking declaratory judgment limiting Lennox's easement use for ingress and egress only and a permanent injunction restraining improper use. The Dyballs alleged Lennox abused the easement by installing and maintaining a dock, using the premises to temporarily store boating equipment, using the premises for recreation, and attempting to exercise general dominion over the premises. Lennox argued that factual circumstances demonstrated the original grantor's intent to include use and placement of a dock within the easement's scope. Lennox asked the court for a judgment (1) declaring the easement included riparian rights for the dominant tenement holders, and (2) reflecting Lennox's rights to store the dock on the easement and continue historic dock placement at the end of the easement. The trial court denied the Dyballs' motion for summary disposition, finding that the easement was for ingress, egress, and riparian rights, and was not limited to the right to maintain a dock on the lake end of the easement.

On appeal to the Michigan Court of Appeals, the Dyballs argued