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Senate Bill 179 (as enrolled)

**PUBLIC ACT 147 of 1989**

Sponsor: Senator Connie Binsfeld

Senate Committee: Natural Resources and Environmental Affairs

House Committee: Conservation, Environment, and Tourism

Date Completed: 7-11-89

**RATIONALE**

Many people believe that sand dunes are one of Michigan's most precious resources. They are irreplaceable, fragile environments to which many rare ecological wonders are native. Continued mining of the dunes coupled with increased recreational use and commercial development, however, have led to a dramatic decrease in the number of dunes in Michigan. Some dunes have virtually disappeared while others have suffered irreparable damage. In addition, since there often is no careful regulation of residential development in dune areas, damage also has occurred to homes built on dunes. A Natural Resources Commission study initiated in 1984 found that the dunes are not managed in a comprehensive manner and that local zoning ordinances to protect the dune areas are not consistent. Since the dunes are interconnected sand formations, inconsistent levels of protection eventually will lead to the depletion of the State's sand dunes. Some people feel that there should be consistent regulation of dune areas, implemented and enforced by local interests where local regulation is desired, in order to preserve the integrity of Michigan's invaluable sand dunes.

**CONTENT**

The bill would amend the Sand Dune Protection and Management Act to outline a "model zoning plan" to specify minimum requirements of a local zoning ordinance to regulate the use of "critical

dune areas". Pursuant to House Bill 4296, which would amend the same Act (and to which the Senate bill is tie-barred), an ordinance, consisting of all of the plan's provisions or comparable provisions that were at least as protective of critical dune areas, would have to be adopted by a local unit of government that had critical dune areas within its jurisdiction and would have to be approved by the Department of Natural Resources (DNR). Publicly owned lands would have to be managed in a manner consistent with the model zoning plan. House Bill 4296 also specifies the process for obtaining a permit for uses in critical dune areas; would allow the DNR to regulate a local unit's critical dune areas under the model zoning plan if the local unit failed to adopt a DNR-approved zoning ordinance by June 30, 1990; and require the creation of a legislative committee to report on the bill's effectiveness. Both bills would be repealed on June 15, 1995.

Senate Bill 179 also would allow a local unit to regulate additional lands as critical dune areas, if such regulation were considered appropriate by the planning commission and the local unit determined that the land was "essential to the hydrology, ecology, topography, or integrity of a critical dune area". A local zoning ordinance would have to provide for the protection of such land that was within 250 feet of a critical

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dune area. If the local unit did not adopt an approved zoning ordinance and the DNR regulated the critical dune area under the model zoning plan, the DNR could regulate additional lands within 250 feet from the dune area's landward boundary only if the local unit authorized such an extension.

#### Permit Applications

A local zoning ordinance would have to require that applications for use permits included all of the following, in writing:

- That the county enforcing agency designated by the Soil Erosion and Sedimentation Control Act found the proposed project in compliance with that Act and any applicable local soil erosion and sedimentation control ordinance.
- That a proposed sewage treatment or disposal system was approved by the county health department.
- Assurances that the cutting and removing of vegetation and trees and other vegetation would be performed in compliance with requirements of the local soil conservation district. (The soil conservation district could require a program to mitigate the removal of trees and vegetation by providing assurances that the applicant would plant more trees or other vegetation than was removed for the proposed use.)
- A site plan containing data, as required by the planning commission, concerning the site's physical development and the extent of disruption by the proposed use.
- For a "special use project" an environmental assessment or, if additional information were considered necessary or helpful in reaching a decision on the application, an environmental impact statement.

(According to House Bill 4296, a "special use project" would be a proposed use for industrial or commercial purposes, regardless of size; a multifamily use of three acres or less, if the use's density were greater than four individual residences per acre; or a proposed use of any size that the planning commission, or the DNR if the local unit had no approved zoning ordinance, determined would "damage or destroy features of archaeological or historical

significance".)

#### Requirements and Prohibitions

A local zoning ordinance would have to provide for lot size, width, density, and front and side setbacks; storm water drainage that precluded serious erosion; methods for controlling erosion caused by wind and water; and restabilization. Each zoning ordinance would have to require that any proposed subdivision development be reviewed to ensure compliance with the model zoning plan.

A zoning ordinance could not permit the disposal of sewage on-site, unless applicable sanitary codes were met or exceeded, nor could an ordinance allow a use that was not in compliance with the minimum setback requirements of rules promulgated under the Shorelands Protection and Management Act. In addition, unless a variance were granted, a local zoning ordinance could not permit any of the following:

- A structure on a slope of 18% to 25%, unless it was in compliance with plans prepared by a licensed professional engineer or a registered professional architect that provided for storm water disposal without serious soil erosion or sedimentation of bodies of water. (Before the plan was approved, the local unit would have to consult the local soil conservation district.)
- A use on a slope greater than 25%.
- Silvicultural practices, vegetation removal, or a use that involved a contour change that likely would increase erosion, decrease stability, or be more extensive than required to implement the proposed use.
- A use that was not in the public interest.

In determining whether a use was in the public interest, the local unit would have to consider the availability of "feasible and prudent" alternative locations or methods to accomplish the proposed use's expected benefits, and the expected impact on the critical dune area and the extent to which it could be minimized. If a proposed use were a single family dwelling on the applicant's own lot of record, the consideration of "feasible and prudent"

alternatives would be limited to that lot. A lot of record could not be created strictly for the purpose of avoiding consideration of alternative locations.

A structure could be built only behind the crest of a critical dune area's first landward ridge that was not a foredune. ("Crest" would be defined as "the line at which the first lakeward facing slope of a critical dune ridge breaks to a slope of less than 18% for a distance of at least 20 feet" if the break's areal extent were greater than one-tenth of an acre; "foredune" would mean one or more low linear dune ridges, rarely greater than 20 feet in height, parallel and adjacent to the shoreline of a Great Lake.) If construction occurred within 100 feet of such a crest, however, the applicant for a use permit would have to demonstrate all of the following:

- The use would not destabilize the critical dune area and access to the structure was from the dune's landward side.
- Contour changes and vegetative removal were limited to "that essential to siting the structure", the dune's crest was not reduced in elevation, and the dune was restabilized with indigenous vegetation.
- Construction techniques and methods were employed to mitigate the impact on the dune.
- If the DNR were implementing the model zoning plan, the use met all of the plan's other requirements.

If the local unit were uncertain of the degree of slope on the property for which an applicant sought a permit, it could require the applicant to supply contour maps with five-foot intervals or consult with the local soil conservation district regarding the degree of slope.

#### Variances

A local unit could issue variances from a zoning ordinance, or the DNR could issue special exceptions from the model zoning plan, if an "unreasonable hardship" would occur to a property owner if a variance or special exception were not granted. A variance or special exception from a setback requirement could not be granted unless the property were any of the following:

- A nonconforming lot of record that was

recorded before the bill's effective date and became nonconforming due to the bill or a zoning ordinance adopted pursuant to the bill.

- A lot legally created after the bill's effective date that became nonconforming due to natural shoreline erosion.
- Property on which the base of the first landward critical dune of at least 20 feet in height was located at least 500 feet inland from the first foredune crest or line of vegetation on the property. (The setback would have to be at least 200 feet from the foredune crest or line of vegetation, however.)

A variance also could not be granted if it would authorize the construction of a dwelling or other permanent building on the critical dune area's or foredune's first landward facing slope. A variance could be granted, however, if the proposed construction were "near the base of the lakeward facing slope of the critical dune on a slope of less than 12%" on a nonconforming lot whose borders lay entirely on the critical dune area's first lakeward facing slope that was not a foredune and that was recorded before the bill's effective date.

Each local government that issued variances for uses other than special use projects would have to file with the DNR an annual report that indicated variances granted during the previous year.

#### Environmental Assessments and Impact Statements

A zoning ordinance would have to provide that an environmental assessment, which would be required for a special use project, include all of the following information pertaining to the site of the proposed use:

- The applicant's name and address and a description of his or her proprietary interest in the site.
- The name, address, and professional qualifications of the person who prepared the environmental assessment, as well as the preparer's opinion on whether the proposed development was consistent with "protecting features of environmental sensitivity and

archaeological or historical significance that may be located on the site".

- The description and purpose of the proposed use, the location of existing utilities and drainageways, and the general location and approximate dimensions of proposed structures.
- Major proposed changes of land forms; sketches showing the scale, character, and relationship of structures, streets, or driveways, and open space; and approximate location and type of proposed drainage, water, and sewage facilities.
- A legal description of the property and a physical description of the site, including its dominant characteristics, vegetative character, present use, and other relevant information.
- Natural hazards and soil erosion reviews.

If an environmental impact statement were required before a proposed use was permitted, a zoning ordinance could require the statement to include all of the following:

- The name and address of the applicant, a description of his or her proprietary interest in the site, and the description and purpose of the proposed use.
- The name, address, and professional qualifications of the proposed professional design team members, including the designation of the person responsible for the preparation of the impact statement.
- Six copies and one reproducible transparency of a schematic of the proposed use showing the general location of the site and its major existing physical and natural features.
- The location of the existing utilities and drainageways and the location and notation of public streets, parks, and railroad and utility rights-of-way.
- The general location and dimensions of proposed streets, driveways, sidewalks, pedestrian ways, trails, off-street parking, and loading areas; the general location and approximate dimensions of proposed structures; and major proposed change of land forms.
- Approximate existing and proposed contours and drainage patterns; sketches showing the scale, character, and

relationship of structures, streets, or driveways, and open space; and approximate location and type of proposed drainage, water, and sewage treatment and disposal facilities.

- A legal description of the property; an aerial photo and contour map; and a description of the physical site, including its dominant characteristics, vegetative character, present use, and other relevant information.
- Soil, natural hazards, substrata, and erosion reviews.

In addition, an environmental impact statement would have to include, at a minimum, plans for compliance with all of the following standards for construction and post-construction periods:

- Surface draining designs and structures would have to be erosion-proof, and drainage patterns would have to promote natural vegetation growth.
- The design would have to include trash collection devices when handling street and parking drainage to contain solid waste and trash.
- Watercourse designs, control volumes, and velocities of water to prevent bottom and bank erosion.
- If vegetation were removed, or were not able to occur, the developer would have to stabilize and control the affected surface areas to prevent wind erosion.

### Reviews

A zoning ordinance would have to require that, in reviewing a site plan, the Planning Commission determine whether the zoning ordinance's requirements were met and whether the plan was consistent with existing law; determine whether the advice or assistance of the soil conservation district would be helpful in the review; and recommend alterations of a proposed development to minimize adverse effects and to assure compliance with all applicable State and local requirements.

Before it issued a permit for a special use project within a critical dune area, a local unit would have to submit the application and plan and the local government's decision to the

DNR. The DNR would have to review the plan within 60 days, and could affirm, modify, or reverse the local unit's decision.

#### Exemption, Purchase of Property, and Appropriations

A structure or use in a critical dune area that was destroyed by fire (unless the owner was found responsible for arson) or an act of nature (other than erosion) would be exempt from the bill, or a zoning ordinance adopted pursuant to it, for the purpose of rebuilding or replacement. In order to be exempt, the structure or use would have to have been lawful at the time of construction, could not exceed in size or scope the structure or use that was destroyed, and could not vary from its prior use.

The Natural Resources Commission or local units of government could purchase land or interest in land in a critical dune area from a willing seller, for the purpose of maintaining or improving the critical dune areas. Interests purchased could include easements designed to provide for the preservation of critical dune areas and to limit or eliminate development in the area.

The bill would require the Legislature to appropriate "sufficient funds to assure the full implementation and enforcement" of the bill to the Departments of Agriculture, Natural Resources, and the Attorney General. Appropriations to the Department of Agriculture would have to assure adequate funding to soil conservation districts to cover their responsibilities under the bill.

Proposed MCL 281.680 et al.

#### FISCAL IMPACT

The bill would have an indeterminate fiscal impact on State and local government. The amount of local government participation, which affects both cost and revenue estimates, is not known.

The DNR has estimated that a critical dune area program would require an additional \$200,000 in start-up costs, for activities such as studies, local assistance, and rules promulgation. For FY 1988-89 the DNR has allocated 1 FTE and approximately \$45,000 in

the Land and Water Management Division to prepare for a critical dune area program. In addition, \$18,000 has been spent so far this fiscal year for mapping critical dune areas as part of the Resource Inventory Act, and the Geological Survey Division has been appropriated \$144,700 for sand dune mining regulation. There would also be some overlap in bill implementation with the Shoreline Protection Act, but the amount is not known at this time.

Local governments would incur indeterminate additional costs if they chose to administer a local zoning ordinance. These costs would cover development and enforcement of a model ordinance, reviewing permit applications, reviewing site plans, considering alternative locations or methods, and granting variances.

State or local governments could also incur additional costs if they chose to purchase critical dune areas for preservation purposes, or had to provide just compensation to a land owner. Independent sources have indicated that sand dune property values can range from \$400 to \$1,500 per frontage foot (on water), or approximately \$58,000 to \$218,000 per acre. The DNR has paid \$1,000 per frontage foot for sand dune property. To purchase 1% of the estimated 31,000 acres of private critical dune areas would require between \$18 million and \$68 million.

Additional revenue for State and local government would be generated by the bill through permit and inspection fees authorized in House Bill 4296, but the amount of activity is undetermined. This revenue would not be designated to a restricted fund, but credited to the General Fund if the fees were collected by the State. The FY 1988-89 DNR appropriation for sand dune mining extraction fees was \$144,700.

#### ARGUMENTS

##### Supporting Argument

Formed over 10,000 years ago during the last glacial period, Michigan's coastal sand dunes are a rare resource that constitute a fragile interface between water and land and are extremely sensitive to alteration. The vegetation that occurs naturally in the dunes' ecosystems stabilizes that interface. Such

ecosystems deserve the protection and care of the State's citizenry, but increased, and all too often indiscriminate, development of dune areas has hindered or even destroyed their ecological habitats. While it would not prohibit all development activities in Michigan's more than 70,000 acres of critical dune areas, the bill would help to improve public policies pertaining to coastal dunes by regulating acceptable dune uses and prohibiting unacceptable uses.

#### **Supporting Argument**

Currently, there is no consistent method for making land use decisions in critical sand dune areas. Local protection varies widely. While some local units of government have recognized the dunes' sensitivity and the importance of their protection by adopting stringent zoning requirements for land use in dune areas, others have virtually no regulation at all. By outlining a model zoning plan on which localities would have to base zoning ordinances, the bill would provide consistent standards throughout the State for regulating the use of dune areas, while keeping enforcement of those standards under the jurisdiction of local units.

**Response:** While protecting the environmentally sensitive sand dune areas of the State is an admirable goal, the bill would force the terms of such protective measures upon local units of government. The bill would provide no real local control of zoning regulations. Though not as directly as in previous versions of the bill (and previous versions of House Bill 4296), the local units that adopted zoning ordinances still would be answerable to the DNR. Under House Bill 4296, the DNR would have to approve a local zoning ordinance before it could be implemented and enforced, and unless approval were gained by June 30, 1990, the DNR would implement Senate Bill 179's model zoning plan and enforce zoning regulations in the local unit. In addition, the DNR annually would review variances granted by local units that adopted approved zoning ordinances and would have to approve any land use permit issued by a local unit for a special use project.

#### **Supporting Argument**

Since the dunes are one of the State's major tourist attractions, protecting them would increase tourist activity and the development of jobs in industries serving tourists. The bill would help ensure effective protection of the

State's coastal dunes and property owners' investments in dune areas, while preserving one of Michigan's prime tourist attractions.

**Response:** Far from encouraging tourism, the bill could discourage it because the development of resorts and other tourist attractions along the shores of Michigan's Great Lakes would be limited or eliminated. Further, restraining individual landowners from using their land as they desired could discourage others from purchasing vacation property.

#### **Supporting Argument**

The bill would require the formation of a legislative committee to study and report back to the Legislature on the effects of Senate Bill 179 and House Bill 4296. In addition, the two bills' zoning provisions would be repealed in 1995, unless the Legislature revisited the Act to remove those sunset dates. The six years between the Legislature's passage of the bills and their expiration dates would provide adequate time to assess the bills' effectiveness in protecting dune areas and accommodating property owners.

#### **Opposing Argument**

The bill would protect land, but not landowners. The bill should exempt individual landowners from its excessive regulation. The threat of the dunes' destruction comes from large developers who seek to build condominiums, hotels, and other tourist attractions. Individual landowners, on the other hand, seek safe, serene havens away from such bustling activity. Indeed, owners of small parcels of land have purchased property in dune areas precisely because they care about the dunes and are not likely to desecrate them. As written, the bill could preclude the construction of a small cottage for personal use. Private use should either be exempt from the bill's restrictions or be handled on a case-by-case basis. Further, restricting personal use of individually owned parcels could lead to a decrease in the value of property in critical dune areas, which, in turn, could have the detrimental effect of decreasing the revenues of school districts and local units of government.

**Response:** The bill would not prohibit all uses of land in critical dune areas, but would merely regulate acceptable uses. Obviously, major development projects, rather than construction of single-family dwellings, are

likely to cause the most damage to the dunes, so those large proposed projects would receive greater scrutiny and be subject to more stringent restrictions. The bill would allow for variances from zoning regulations, so there would be an opportunity for case-by-case review of smaller developments.

#### **Opposing Argument**

The bill would not adequately protect land owners' individual rights. It does not address the issue of taking land without just compensation. If use of a land owner's property were to be restricted to such a degree that he or she could not use the land, it should be clear that the State would have to compensate that person. In addition, the bill should offer land owners the opportunity to appeal the designation of their land as part of a critical dune area.

**Response:** There is an established body of case law sufficient to ensure that a person's property is not taken without just compensation. It would be unnecessary for the bill to attempt to specify those constitutional requirements.

#### **Opposing Argument**

The bill would give those involved in sand dune mining a favored status over those wishing to use their own land for individual benefit. While the bill would prohibit future sand dune mining within a critical dune area, it would exempt from that prohibition mining on parcels of land adjacent to those for which the operator already had a mining permit, if he or she owned the land before the bill's effective date. If such an exemption were given to miners, the same consideration also should be offered to individual property owners.

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