SFA BILL ANALYSIS

Senate Fiscal Agency • Lansing, Michigan 48909 • (517) 373-5383

Senate Bill 179 (Substitute S-1)
Sponsor: Senator Connie Binsfeld
Committee: Natural Resources and Environmental Affairs

Date Completed: 4-4-89

SUMMARY OF SENATE BILL (Substitute S-1):

The bill would create the "Sand Dune Model Ordinance Act" to do the following:

- **Require local units of government (cities, villages, townships, and counties) having "environmentally sensitive areas" within their jurisdiction to formulate a model zoning ordinance.**
- **Require applications for the development of environmentally sensitive areas to establish that the development would not adversely affect a site's environmental quality.**
- **Specify provisions that a model zoning ordinance would have to include for development on a Great Lakes shoreline.**
- **Regulate development on slopes.**
- **Require a variance for a use that did not comply with minimum setback requirements, and specify conditions under which a variance could be granted.**
- **Require site plans to be reviewed by local planning commissions with the advice of soil conservation districts.**
- **Require "key development projects" to be approved by the Department of Natural Resources (DNR).**
- **Provide that private property could not be taken for a public purpose under a model zoning ordinance without just compensation to the owner, and describe circumstances under which a taking would be presumed.**
- **Provide for fees, regulation of publicly owned land, and legislative appropriations.**

"Environmentally sensitive area" would mean a geographic area designated in the "atlas of proposed critical dune areas" dated May 1, 1988, prepared by the DNR. "Key development project" would mean the proposed development in an environmentally sensitive area of three acres or more for a multifamily, industrial, or commercial purpose; and the proposed development in an environmentally sensitive area, regardless of size, that the local planning commission and soil conservation district determined would damage or destroy natural features of environmental sensitivity or archaeological or historical significance.

Model Zoning Ordinance

As soon as possible after the bill's effective date, the DNR would have to mail a copy of the atlas of proposed critical dune areas to each local unit of government having environmentally sensitive areas within its jurisdiction. Local units then would have six months to identify environmentally sensitive areas within their jurisdiction and determine the metes and bounds descriptions of those

S.B. 179 (4-4-89)

areas. A local government would have to give public notice, as required in its authorization act, that it was enacting a model zoning ordinance. A local unit would have one year after the bill's effective date to formulate a model ordinance, after consultation with the local soil conservation district.

A model zoning ordinance would have to be based upon the model ordinance set forth in the bill and would have to be at least as protective of the environment, although a local ordinance could be more restrictive of development and more protective of environmentally sensitive areas than the model zoning plan.

As soon as possible after adopting a model ordinance pursuant to the bill or a more protective local ordinance, a local unit would have to give a copy of the ordinance to the DNR, which would have to review model zoning ordinances to assure compliance with the proposed Act and work with a local unit whose ordinance did not comply. Unless a local unit received notice that its ordinance was not in compliance within 90 days of submittal, the local unit would be considered in compliance. The Attorney General could seek injunctive relief against a local unit that was not in compliance.

Application for Development of Environmentally Sensitive Area

All applications for the development of an environmentally sensitive area would have to establish that the proposed development would not adversely affect the environmental quality of the site or its surrounding areas; document that the county enforcing agency designated under the Soil Erosion and Sedimentation Control Act found that the project complied with that law and any applicable local erosion and sedimentation control ordinance; document that a proposed sewage treatment or disposal system on the site had been approved by the county health department or the wastewater division of the DNR; provide assurances that the cutting and removal of trees and other vegetation would be performed according to the instructions or plans of the local soil conservation district; and include a site plan that contained data required by the local planning commission and the local soil conservation district concerning the physical development of the site and extent of disruption of the site by the proposed development.

Applications also would have to include an environmental impact statement for each key development project that proposed the development of three or more acres for a multifamily, industrial, or commercial purpose, and for a key development project that proposed the development in an environmentally sensitive area, regardless of size, that the planning commission and soil conservation district determined would damage or destroy natural features of environmental sensitivity or archaeological or historical significance, if the local unit determined that an environmental impact statement was necessary to assure the protection of the site's special features. In addition, applications would have to include an environmental assessment for key development projects that did not require an environmental impact statement.

Shoreline Development

A model zoning ordinance would have to include all of the following provisions related to development on the shoreline of one of the Great Lakes:

- Sewage treatment and disposal systems within the shoreline area would have to have a setback of at least 150 feet from the mean high water mark, and be designed so that effluent would not degrade the quality of ground or surface water. ("Shoreline area" would mean an area within 500 feet of the ordinary high water level on a Great Lake as defined in the Great Lakes Submerged Lands Act.)
- Sewage treatment and disposal system tile fields would have to be at least six feet above the mean high water mark.
- Structures with plumbing would have to be set back at least 100 feet from the mean high water mark.

-- The filling, grading, and other alteration of natural drainage within the shoreline area would have to be reviewed and approved by the local planning commission and the soil conservation district.
-- The digging or drilling of wells or other domestic water supply sources in the floodplain would be prohibited. ("Floodplain" would mean an area of land adjoining a lake or watercourse that would be inundated by a "100-year flood", that is, a flood having a 1% chance of being equaled or exceeded in a given year.)

Slope Development

A model zoning ordinance could not permit a structure on a slope exceeding 18% unless the structure were in accordance with plans prepared for the site by a registered professional architect or engineer and the plans provided for the disposal of storm waters without serious soil erosion and without sedimentation of any stream or other body of water. Before approving the plan, the planning commission would have to require the approval of the appropriate officials of the soil conservation district.

An on-site sewage treatment and disposal system could not be permitted on a slope over 12% unless the system were approved by a county health department.

If the local unit were not certain of the degree of slope on property for which a development permit was sought, the local unit could require contour maps with five-inch intervals at or near any proposed structure or roadway.

Minimum Setback Requirements/Variances

A local unit could not permit a use within an environmentally sensitive area that did not comply with the minimum setback requirements mandated by rules promulgated under the Shorelands Protection and Management Act, unless a variance had been granted under the proposed Act. A variance could not be granted from a setback requirement in a model zoning ordinance unless the property for which the variance was requested was a nonconforming lot of record that was recorded before the bill's effective date; a lot legally created after the effective date that later became nonconforming due to natural shoreline erosion; or, property on which the base of the first landward critical dune at least 20 feet high, that was not a foredune, was located at least 500 feet inland from the first foredune crest or line of vegetation on the property, although the setback would have to be at least 200 feet measured from the foredune crest or line of vegetation.

A local unit could not grant a variance that authorized construction of a dwelling or other permanent building on the first lakeward facing slope of a critical dune area or a foredune unless the proposed construction were near the base of the lakeward facing slope of the critical dune on a slope of at least 12% on a nonconforming lot of record that was recorded before the bill's effective date and had boundaries that lay entirely on the first lakeward facing slope of the dune that was not a foredune. If a local unit determined that granting a variance under this provision was appropriate, the local unit would have to submit the proposal to the DNR. If the DNR found that the decision was contrary to the proposed Act, it could deny the request within 90 days of submittal.

In addition, a variance could not be granted unless a local unit found that unreasonable hardship would occur to the owner of the site if a variance were not granted, and that granting the variance was consistent with the Act.

Environmental Impact Statement

The bill specifies information that an environmental impact statement would have to contain if it were required in an application for development of an environmentally sensitive area. This information would include the qualifications of the proposed professional design team members; the description and purpose of the proposed development; a schedule development plan; the location of

existing utilities and drainageways; the location of adjacent streets, parks, and railroad and utility rights-of-way; the location and dimensions of proposed streets, sidewalks, off-street parking, loading areas, and structures; major proposed change of land form such as new lakes, terracing, or excavating; contours and drainage patterns; location and type of proposed drainage, water, and sewage treatment and disposal facilities; a general narrative, physical description of the site; a soil review describing the soil types found on the site and whether the soil permitted the use of septic tanks or required central sewer; a natural hazards review element; a substrata review; and, an erosion review showing how erosion control would be achieved.

In addition, an environmental impact statement would have to include plans for compliance with the following standards for construction and postconstruction periods:

- -- Surface drainage designs and structures would be erosion-proof through control of the direction, volume, and velocities of drainage patterns, which would promote natural vegetation growth.
- -- The design included trash collection devices when handling street and parking drainage to contain solid waste and trash.
- -- Watercourse designs, control volumes, and velocities of water prevented bottom and bank erosion.
- -- If vegetation had been removed or unable to occur on surface areas, the developer would be responsible for stabilizing and controlling the affected surface areas to prevent wind erosion and the blowing of surface material through the planting of grasses, and windbreaks and other such barriers.

Environmental Assessment

The bill specifies the information that an environmental assessment would have to contain if an assessment were required in an application for development. The information would include the professional qualifications of the person preparing the assessment and his or her opinion as to whether the development were consistent with protecting features of environmental sensitivity and archaeological or historical significance that could be located at the site; the description and purpose of the proposed project; the location of existing utilities and drainageways; the location and dimension of proposed structures; major proposed change of land form such as new lakes, terracing, or excavating; the location and type of proposed drainage, water, and sewage facilities; a general narrative, physical description of the site; a natural hazards review element; and an erosion review.

Site Plan Review

In reviewing a site plan required under the bill, the planning commission, with the advice and assistance of the soil conservation district, would have to determine whether the requirements and conditions of the model zoning ordinance had been met; whether the intent of all State and county regulations, including the model ordinance, were served by allowing the proposed development; and, whether the development safeguarded against adverse effects on air and water quality, and the area's natural resources. Based on the advice and assistance of the soil conservation district, the planning commission would have to recommend alterations of a proposed development to minimize adverse effects anticipated if the development were approved and to assure compliance with all applicable State and local requirements.

Permit Issuance

Before issuing a permit allowing a key development project within an environmentally sensitive area, a local unit would have to submit the project application and plan to the DNR. The DNR would have 60 days to review the plan and could affirm, modify, or reverse the proposed decision of the local unit. If the Department's reversal caused serious injury to the value of the property and abused the DNR's legitimate powers aimed directly at the applicant's property, this would be prima facie evidence of a de facto taking of property within the meaning of Section 2, Article 10 of the

State Constitution (which prohibits the taking of private property for public use without just compensation). (That is, there would be a presumption that the reversal constituted such a taking.) If the DNR did not act within the 60-day time limit, the local unit could assume that the Department had no objection to its proposed decision.

In addition to any other appellate remedies otherwise lawfully available, an applicant who was aggrieved by a decision of a local unit under a model zoning ordinance would have the right to appeal that decision to the DNR, which could affirm, alter, or reverse the decision.

Just Compensation

Private property could not be taken for a public purpose under a model zoning ordinance without just compensation being made to the owner. There would be prima facie evidence of such a taking if both of the following circumstances existed:

-- There was a lack of clear standards or criteria provided to the property owner by the government as to any private development or use that could be allowed.
-- The State abused its legitimate powers in affirmative actions that were aimed at an applicant's property and that substantially reduced the property's value.

For the purpose of determining whether there had been a taking requiring just compensation, a property owner who had sought and been denied a permit or whose permit application had been modified or had conditions attached to it, and who was aggrieved by the action or inaction of a local unit or the DNR, could file an action in a court of competent jurisdiction. If it determined that there had been a taking, the court could award reasonable attorney fees, costs, and disbursements, and would have to order the DNR to do one or more of the following:

-- Compensate the property owner for the full amount of the lost value.
-- Purchase the property in the public interest as determined before its value was affected by the bill or the Department's action or inaction.
-- Modify its action or inaction with respect to the property so as substantially to minimize or eliminate the detrimental effect on the property's value and prescribe compensation or purchase.

Fees

A local unit could establish a permit and inspection fee as necessary to implement a model zoning ordinance. The fee could not exceed the costs of inspection and application processing. Fee revenue would have to be credited to the treasury of the local unit to be used to cover the cost of administering development regulated under the bill.

In addition to the permit and inspection fee, a soil conservation district could charge a separate fee to cover the expense of providing services under the bill and for providing technical assistance and advice to individuals who sought the district's assistance in matters pertaining to compliance with the proposed Act.

Also, a local unit or the DNR Director could require the holder of a permit to file with the Director a bond executed by an approved surety in this State, or another form of financial assistance approved by the Director, in an amount necessary to assure faithful conformance with the permit.

Public Land

Federally owned land, to the extent allowable by law, and State-owned land within environmentally sensitive areas would have to be managed by the Federal or State government in a manner that was consistent with the model ordinance in effect within that jurisdiction. If the areas were barrier dunes located on State land that was accessible to the public, the State would have to build walkways on all paths open to the public to assure the proection of those areas. If a local unit, with DNR concurrence, determined that no use should occur on a barrier dune, that property

would have to be purchased by the State, at the property owner's request. ("Barrier dune" would mean the first landward sand dune formation along the shoreline of a Great Lake.)

A local unit could acquire land or interest in land in environmentally sensitive areas for the purpose of maintaining or improving the areas in conformance with the Act. Interest that could be acquired would include easements designed to provide for the preservation of environmentally sensitive areas and to limit or eliminate development in such areas.

Other Provisions

A person could not dispose of sewage on-site in an environmentally sensitive area unless the standards of applicable sanitary codes were met or exceeded, and sewage effluent would not degrade the quality of ground or surface waters.

Each model zoning ordinance would have to contain provisions related to the prevention of flooding and water damage that were at least as stringent as applicable Federal statutes and regulations.

The Legislature would have to appropriate to the Departments of Agriculture, Natural Resources, and Attorney General sufficient funds to assure the full implementation and enforcement of the proposed Act. Appropriations to the Agriculture Department would have to be enough to assure adequate funding for the soil conservation districts to fulfill their responsibilities under the Act.

The bill would not apply to sand dune mining regulated under the Sand Dune Protection and Management Act.

Legislative Analyst: S. Margules

FISCAL IMPACT

The bill would have an indeterminate fiscal impact on State and local government. The amount of local government participation and potential landowner compensation, which affect 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, 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.

The bill would require that the DNR pay "just compensation" for property covered under the proposed Act, but the quantity and cost of land involved vary widely and are not certain at this time. There are approximately 70,000 acres of critical dune areas, with 31,000 acres privately owned. 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. DNR has paid $1,000 per frontage foot for sand dune property. The range of potential costs to the State to provide compensation or purchase 1% of the private critical dune areas under consideration would be from $18 million to $68 million.

Additional revenue for State and local government would be generated by the bill through permit and inspection fees, 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.

Fiscal Analyst: G. Cutler

S8990\S179SA

This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.