



**House
Legislative
Analysis
Section**

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EXPAND SAND DUNE PROTECTION

House Bill 4251 as passed by the House
Second Analysis (6-22-88)

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AUG 04 1988

Sponsor: Rep. H. Lynn Jondahl
Committee: Conservation & Environment

Mich. State Law Library

THE APPARENT PROBLEM:

Sand dunes are one of the state's most valuable resources. They are irreplaceable, fragile resources and home to many rare ecological wonders. However, continued mining of the dunes coupled with increased recreational use and commercial development have lead to a dramatic decrease in the number of dunes in the state. Some dunes have virtually disappeared while others have suffered irreparable damage. In addition, because there is not careful regulation of residential development in dune areas property damage has also occurred to homes built on dunes. At the governor's request the Department of Natural Resources recently completed a study which extensively details critical dune areas in the state. However, since the critical dune areas of the state have not been designated, nor has an extensive study been done on acceptable uses of dunes, more of the them may perish. Many assert that the state should take action to detail which uses are harmful to critical dunes and to regulate more stringently the current uses of its coastal dunes.

THE CONTENT OF THE BILL:

The bill would amend the Sand Dune Protection and Management Act, extending regulation to non-mining uses of sand dunes, critical dune areas, and limiting permits for new mining sites.

Notification of Critical Dune Area Designation. Within 60 days of the effective date of the bill, the director would be required to notify each property owner of record who owned property within barrier dunes or dunes designated in the Atlas of Proposed Critical Dune Areas (date May 1, 1988) or a local unit of government that had barrier dune areas or dunes designated in the atlas within its jurisdiction of the following:

- that the Department of Natural Resources had designated the property as critical dune areas that were subject to interim regulation and permanent regulation under the bill; and
- that following the development of rules providing for permanent regulation, the local unit of government could either adopt an approved critical dune area zoning ordinance or the use of the critical dune area would be regulated under the Commission of Natural Resources' critical dune area plan.

Following the expiration of the 60-day notice, if the director determined that critical dune areas existed in a local unit of government that did not receive notice within the 60-day period the director would be required to immediately notify that local unit of government of the critical dune areas within its jurisdiction and each property owner of record who owned property within the critical dune area. Immediately upon the development of rules designating additional critical dune areas that were essential to the protection of barrier dune areas, the department would be required to provide notice as detailed above. A person who received written notice from the department or

through recorded instrument that a parcel of his or her property contained a critical dune area could not sell any interest in the property before he or she provided written notice to the purchaser that the real property contained a critical dune area that could be regulated by the commission's critical dune area plan or by a critical dune area zoning ordinance. The written notice provided by the seller would be a separate instrument, and if the instrument conveying the interest in the property was recorded, the written notice would have to be recorded with the register of deeds in the appropriate county along with the instrument conveying the interest in the property. A contract or sale entered into in violation of the bill would be voidable at the option of the purchaser.

Critical Dune Areas. Within one year of the effective date of the bill, the bill would require the director of the Department of Natural Resources (DNR) to submit rules to the Joint Committee on Administrative Rules to designate certain areas of the state as critical dune areas essential to the protection of the integrity of a barrier dune. The bill would define critical dune areas to mean the following:

- barrier dunes;
- a geographic area within two miles of the ordinary high-water mark on a Great Lake designated in the Atlas of Proposed Critical Dunes dated May 1, 1988 as prepared by the department because it had areas supporting exemplary dune-associated plant communities as identified by the Michigan Natural Features Inventory within the boundaries of a sand dune area, or it had areas composed primarily of dune sand or dune-associated sands as identified in the United States Geological Survey Soil Survey which were contiguous to the Great Lakes shoreline and exhibited dune-like characteristics in terms of topography and vegetation, including dunes at least 20 feet in height (for areas without soil surveys, the landward boundaries of these areas would be demarcated by a marked change in topography, or where this change was not evident, a change in soil type);
- a geomorphic feature designated by the Department of Natural Resources in a rule as being essential in terms of hydrology, ecology, or topography to the integrity of a barrier dune (the area so designated by the department could not extend more than 1,000 feet from the boundary of the barrier dune).

Within 60 days of the development of the rules submitted to the Joint Committee on Administrative Rules the bill would require the director of the DNR to notify each local unit of government that had critical dune areas within its jurisdiction and each property owner of record who owned property in the critical dune areas (that were not included in the previous notification) as detailed above. Following the expiration of the 60-day notice period, if the director determined that critical dune areas existed in a local unit of government that did not receive notice within the 60-day

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period, the director would immediately notify the local unit of government of any additional critical dune areas within its jurisdiction, and each property owner of record who owned property within the critical dune area.

Within one year of the effective date of the bill the DNR would also be required to make a comprehensive study that would include at least the following:

- a summary of existing and suitable critical dune area land uses;
- the regulatory criteria and land use standards that should apply to the different classifications or critical dune areas;
- the recommended density of permitted uses within critical dune areas;
- a report on ecological and other natural characteristics relevant to the preservation and maintenance of critical dune areas, including the manner in which wildlife and vegetation would be affected by different uses;
- historical, cultural, and archaeological or natural characteristics of critical dune areas;
- erosion-prone areas and areas of geological significance;
- a summary of opinion that was submitted to the department from persons affected by (or interested in) critical dune preservation, management, protection, regulation, development, or use;
- position statements submitted to the department by local units of government related to the characteristics and use of critical dune areas within or adjacent to their areas of jurisdiction;
- additional information including reports relevant to the preservation, management, protection, or regulation of critical dune areas.

The bill would require the director to solicit position statements from local units of government and to provide public notice to allow persons interested to file written opinions or position statements. In addition, the director would be required to submit a copy of the notice to the Legislative Service Bureau for publication in the Michigan Register.

Interim Regulation of Critical Dune Areas. Following receipt of notice of designation of critical dune areas to local units of government and property owners and until a local unit of government zoning ordinance was approved by the Commission of Natural Resources or a commission zoning plan was adopted, a person proposing any new use within a critical dune area would be required to obtain a permit from the director unless the local unit of government in which a proposed use was to be located elected to process applications and issue permits during the interim period, as outlined below.

Following passage of an enabling ordinance, a local unit of government in which a proposed use was to be located could issue permits during the interim period by resolution of its governing body. A person proposing any use within a critical dune area would file an application with the local unit of government including any information that may be necessary to conform with the requirements of the bill (one application could be filed for projects proposing the use of more than one critical dune area location within a local unit of government). Upon receipt of an application, the local unit of government would send a copy of the application to the director of the DNR. If requested by the local unit of government, the director would review an application and provide the local unit of government with comments regarding the application within 30 days of receipt of the application. Notice of an application would be sent to any person who made a written request to the

local unit of government for notification of pending applications accompanied by an annual fee established by the local unit. The local unit would also prepare a monthly list of the applications made during the previous month and would promptly mail copies of the list for the remainder of the calendar year to the persons who had requested notice. The monthly list would state the name and address of each applicant, the legal description of the lands included in the applicant's project, and a summary statement of the purpose of the use.

The local unit of government could hold a public hearing on pending applications. Notices sent to persons requesting local units of government for notification of pending applications would state that unless a written request was filed with the local unit of government within 20 days after the notice was mailed, the local unit of government could grant the application without a public hearing. The local unit of government would be required to hold a public hearing pertaining to a permit application upon the written request of two or more persons. At least ten days' notice of a hearing would be given by the publication in one or more newspapers of general circulation in the county in which the proposed use was to be located (and in other publications, if appropriate, to give notice to persons likely to be affected by the proposed use) and by mailing copies of the notice to the persons who had requested notice and the person(s) requesting the hearing.

After the filing of an application, the local unit would grant or deny the permit within 60 days, or within 90 days if a public hearing was held. When a permit was denied, the local unit of government would provide to the applicant a concise written statement of its reasons for denial of the permit, and if it appeared that a minor modification of the application would result in the granting of the permit, the nature of the modification would be stated. The local unit of government would base a decision to grant or deny a permit on restrictions set forth in the bill or on existing ordinances that were in effect in the local unit that provided the same or greater level of protection for critical dune areas than those found in the bill. The local unit would be prohibited from permitting any of the following uses within a critical dune area:

- a use that was lakeward of a minimum setback (100 feet measured landward from the crest of the first landward ridge of a barrier dune that was not a foredune);
- a use that did not comply with the minimum setback requirements required by rules developed under the Shorelands Protection and Management Act;
- a use on any slope that was greater than 25 percent;
- a use involving a contour change that was likely to increase erosion, decrease stability, or was more extensive than required to implement a use for which a permit was requested;
- the clear cutting of timber that was likely to increase erosion, decrease stability, or was more extensive than required to implement a use for which a permit was requested (timber would mean trees that were primarily intended for building, structural, manufacturing, processing, or energy purposes, and would not include fruit trees, christmas trees or other trees that were grown for ornamental or aesthetic use);
- a use that involved a vegetation removal that was likely to increase erosion, decrease stability, or was more extensive than required to implement a use for which a permit was requested;
- a use that was not in the public interest, considering the benefit to be derived from the proposed use balanced against the reasonably foreseeable detriments of the use,

and considering the availability of alternative locations and methods to accomplish the expected benefits, the impact to the critical dune area, and whether the public benefit would outweigh the private benefit of the proposed use.

If the governing body of a local unit did not elect to issue permits during the interim period the director of the DNR would process applications for permits subject to the same procedures, time restraints, and criteria that were applicable when local units processed applications for permits.

The bill would allow local units, or the Commission of Natural Resources when the local unit did not elect to process applications and issue permits during the interim period, to establish an interim permit and inspection fee. The interim regulatory system would be implemented for barrier dunes and dunes designated in the Atlas of Proposed Critical Dune Areas (dated May 1, 1988) without regard to when rules designating areas of the state as critical dune areas were promulgated. However, when rules were promulgated, the interim regulatory system described in the bill would be implemented for those critical dune areas that were defined in the rules.

Model Regulatory Criteria and Land Use Standards. Within two years after the effective date of the bill, the director of the DNR would be required to submit rules to the Joint Committee on Administrative Rules that established model regulatory criteria and land use standards for critical dune areas which could be incorporated in ordinances of local units as provided for in the bill. The director would provide the representatives of local units and other interested parties the opportunity to participate in the development of model regulatory criteria and land use standards. The rules would be applied by the Commission of Natural Resources to formulate a plan to regulate critical dune area use in the absence of an approved local ordinance. The rules could authorize or establish different levels of regulatory criteria and land use standards and variances that were applicable to different classifications of critical dune areas found within the state. The rules could not permit any of the uses prohibited in the interim regulatory system. The bill would require rules to be formulated to insure that the environment and the ecology of the critical dune areas and the benefits that critical dune areas offered to the present and future generations were maintained. The rules would include:

- circumstances under which residential, commercial, or industrial use and other physical alterations could occur;
- circumstances under which recreational and tourism use could occur; and
- circumstances under which the use of an area would be restricted.

Zoning a Critical Dune Area. Following promulgation of rules, the bill would allow a local unit to formulate a plan (at any time) according to the rules to zone a critical dune area within its jurisdiction. A zoning plan of a local unit of government that was approved by the Commission of Natural Resources would take the place of a commission plan adopted for that local unit of government.

The bill would require a zoning ordinance, or modification of an existing zoning ordinance, that regulated critical dune area uses to be submitted to the Commission of Natural Resources for its approval or disapproval. The commission would be required to issue a written notice approving or disapproving the submitted ordinance within 120 days of receipt of the ordinance. The commission could not approve an ordinance unless it determined that the ordinance did not permit any of the uses prohibited in the interim regulatory system and that it provided the same or

a greater level of protection for critical dune areas as those found in the commission rules. A new or modified ordinance that was approved by the commission would be given immediate effect. An ordinance could not become effective without the approval of the commission. Any proposed modification of a previously approved ordinance would be resubmitted to the commission for review and would be processed in the same manner. The director of the DNR would be required to assist local units in developing zoning ordinances that met the requirements of the bill.

The bill would require local units to adopt a critical dune area zoning ordinance within one year following the promulgation of rules. If a local unit failed to adopt a critical dune area zoning ordinance or if, prior to that date, the local unit notified the director of its intent to waive its option to adopt and seek commission approval for a critical dune area zoning ordinance, the commission would adopt a critical dune areas zoning plan that applied to the critical dune areas within the local unit of government. The plan would be developed in accordance with commission rules regulating critical dune areas. The bill would require the commission to use its rules to develop site specific local plans. Before a zoning plan was adopted by the commission, the director of the DNR would:

- mail a copy of the proposed critical dune area zoning plan to the governing body of each local unit of government located in the critical dune area;
- conduct a public hearing in the county seat of each county in which a portion of the critical dune area was located (notices of the hearing would be published in one or more newspapers of general circulation within the county in which a portion of the critical dune areas was to be located and in other publications, if appropriate, to give notice to persons likely to be affected by the commission's critical dune area zoning plan); and
- provide copies of the proposed commission zoning plan to all members of the public expressing interest in the proposed plan.

The bill would allow local units to adopt a critical dune area zoning ordinance after January 1, 1990, and upon commission approval of the plan, the plan would take the place of the commission's critical dune area zoning plan.

Upon adoption of a commission critical dune area zoning plan, the plan would be in effect in the critical dune areas covered by the plan. Prior to commencing any use of a critical dune area, a person would be required to obtain a permit from the director of the DNR for the proposed use. Within 60 days of the development of rules submitted to the Joint Committee on Administrative Rules, the director of the DNR would be required to establish permit application and review procedures necessary to implement the bill. The director would make a decision on a permit application within 60 days.

Upon adoption of a critical dune area zoning ordinance by local unit or upon adoption of a commission plan, certified copies of the maps showing critical dune areas, existing development and uses, and restrictions on use would be filed by the director with the local assessing officer and the State Tax Commission.

Nonconforming Uses of Land or Structures. The lawful use of land or a structure within a critical dune area at the time a commission plan was adopted could continue although the use of the land or structure did not conform to the provisions of the plan. The commission would provide in the plan for the completion, restoration, reconstruction, extension, or substitution of existing nonconforming uses of land or a structure upon reasonable terms. Different

classes of nonconforming uses could be established in the plan with different regulations applicable to each class. The lawful use of land or a structure within a local unit of government that had a critical dune area zoning ordinance approved by the commission could continue subject to the provisions of current zoning laws pertaining to existing uses of land or structures. A state-owned land located within a critical dune area would be managed and administered according to the bill and rules promulgated under the bill. A use that was required as a condition of obtaining or maintaining a permit or license that was required by law to continue operating an electric utility generating facility that was in existence on the effective date of the bill would not be precluded under the bill.

Except as provided in the preceding section, the bill would prohibit a surface drilling operation that was utilized for the purpose of exploring for (or producing) hydrocarbons or natural brine, or for the disposal of the waste or by-product of the use of a critical dune area. The bill would also prohibit production facilities regulated under the Mineral Well Act in a critical dune area, except as provided in the preceding section. However, uses which were lawfully in existence at a site when the site became subject to the bill could be continued. The completion, restoration, reconstruction, extension, or substitution of the existing uses would be permitted upon reasonable terms described by the director of the DNR.

Permit and Inspection Fees. The bill would allow local units or the Commission of Natural Resources to establish a use permit and inspection fee. The fee could not exceed the costs of inspection and the costs of processing an application for a permit. Fees collected by the commission under the bill would be deposited in the state treasury and credited to the general fund to be used to defray the costs of administering the sections of the bill that did not pertain to sand dune mining. Fees collected by a local unit of government would be credited to the treasury of the local unit to be used to defray the cost of administering uses under the bill. A local unit or the director of the DNR could require the holder of a permit granted under the bill to file a bond with the director of the DNR which was executed by an approved surety in the state in an amount necessary to assure faithful conformance with the permit.

Penalties. If the director found that a person was not in compliance with the bill, the rules developed under the bill, or a provision of a permit issued under the bill, the director could suspend or revoke the permit. At the request of the director or any person, the attorney general could institute an action for a restraining order, injunction, or other appropriate remedy to prevent or preclude a violation of a permit, the bill or its rules, or a critical dune area zoning ordinance. This provision would be in addition to rights currently provided in the Environmental Protection Act. An action taken by the attorney general's office could be instituted in the circuit court of Ingham County or in the county in which the defendant was located, resided or was doing business. In addition to any other relief provided by the bill, the court could impose on a violator a civil fine of not more than \$5,000 per each day of violation or order a violator to pay the full cost of restoration (or replacement) of any critical dune area (or other natural resource) that was damaged or destroyed as a result of a violation, or both.

Acquisition of Interests in Lands in Critical Dune Areas. The commission or local units could acquire lands or interests in lands in critical dune areas for the purpose of maintaining or improving the critical dune areas and its environment in conformance with the purposes of the

commission rules. Interests that could be acquired could include easements designed to provide for the preservation of critical dune areas and to limit or eliminate development in critical dune areas.

Taking Private Property. The bill would prohibit the taking of private property for public use without just compensation being made to the owner. The bill would provide that owners of private property could file an action for the purpose of determining if private property had been taken for public use without just compensation being made. If the court determined that an action of the DNR under the bill had resulted in taking private property without just compensation being made, the court could award reasonable attorney's fees, costs, and disbursements, and would order the department 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) under the bill;
- modify its action (or inaction) with respect to the property so as to minimize the detrimental effect to the property's value.

Other Provisions. Sand dune mining would continue under present law, although limits would be placed on new mining sites. The zoning provisions of the bill would not apply to land now under sand dune mining permits, but the DNR would be prohibited from issuing sand dune area mining permits within a critical dune area after the bill took effect unless the operator sought to renew or amend a sand dune mining permit that had been issued before the bill took effect, or the operator already had a mining permit and was seeking a permit for adjacent land which he or she owned (or owned rights in) before the effective date of the bill.

Under the act, operators are required to pay a fee for surveillance, monitoring, administration and enforcement of the act. The bill would specify that funds collected by fee assessment would not exceed actual costs to the department of implementing the sections of the Sand Dune Protection and Management Act that pertained to sand dune mining. The bill would also specify that penalties paid for late payment of the fees would be used for the implementation, administration, and enforcement of the sections of the act that pertained to sand dune mining.

The bill would repeal a redundant section of the bill.

MCL 281.652 et al.

FISCAL IMPLICATIONS:

According to the Department of Natural Resources, it would cost the state approximately \$200,000 to administer the bill, depending upon the degree of local participation. (5-27-88)

ARGUMENTS:

For:

Coastal sand dunes are a rare resource of the state and deserve the protection and care of its citizens. The bill is part of the governor's efforts to improve state policies that affect coastal dunes by regulating acceptable dune uses and prohibiting unacceptable uses. The dunes are one of the major tourist attractions in the state. If the state effectively protects this resource it will increase tourist attraction to the state and development of jobs in industries

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serving tourists. The bill will help ensure effective protection of the state's coastal dunes. In addition, the bill will also protect property owners' investments in dune areas.

Against:

As the bill is currently written, it will encourage property owners to seek compensation when the state takes private property by requiring courts to award reasonable attorney's fees, costs and disbursements if the courts found that an act of the DNR did result in the taking of private property for public use. The language allowing property owners to seek "just compensation" for the taking is not needed since it can already be found in the U.S. constitution. Further, if this language is necessary it should also be included in other Michigan laws addressing the taking of land for public use (such as in the Wetland Protection Act).

Response: No matter what language is used in the bill, some property owners will seek judicial relief. At this writing, few if any cases involving the state taking private property have ever been decided in favor of property owners. However, small landowners should have access to the courts just as do large developers. The bill would provide small landowners accessibility to the courts while also giving the court three options of action to curtail endless litigation.

Against:

The bill would usurp local zoning authority. Under the bill local units would not be included in the process to set standards and criteria for acceptable uses of the dunes. Local units are aware of the delicate nature of the dunes and feel that they should be a part of the decision making process affecting the dunes in their area.

Response: The bill would allow local units to submit position statements to the department related to the characteristics and use of critical dune areas within or adjacent to their areas of jurisdiction. This provision would allow local units ample input into the development of critical dune use standards and criteria.

POSITIONS:

The governor's office supports the bill. (6-22-88)

The Department of Natural Resources supports the bill. (6-22-88)

The Mackinac Chapter of the Sierra Club supports the bill. (6-22-88)

The Michigan Environmental Council supports the bill. (6-22-88)

The West Michigan Environmental Action Council supports the bill. (6-22-88)

Consumers Power Company does not oppose the bill. (6-22-88)

The Michigan Oil and Gas Association does not oppose the bill. (6-22-88)

The Michigan Townships Association opposes the bill. (6-22-88)

The Michigan Municipal Electric Association opposes the bill. (6-22-88)