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BILL



ANALYSIS

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Senate Bill 1130 (as introduced 5-15-12)  
Sponsor: Senator Arlan Meekhof  
Committee: Natural Resources, Environment and Great Lakes

Date Completed: 5-30-12

### **CONTENT**

The bill would amend Part 353 (Sand Dunes Protection and Management) of the Natural Resources and Environmental Protection Act to do the following:

- Eliminate a provision allowing a local zoning ordinance regulating critical dune areas to be more restrictive of development than the model zoning plan of the Department of Environmental Quality (DEQ).
- Require a permit or a variance or special exception to an ordinance to be granted unless it was more likely than not that resulting harm to the environment would significantly damage the public interest or deplete or degrade the diversity, quality, or functions of the critical dune area.
- Revise the people who may request a public hearing on a permit for a use in a critical dune area, a formal hearing on a permit decision, or enforcement action for a violation of an ordinance regulating critical dunes.
- Establish limits on use on the first lakeward facing slope of a critical dune area or a foredune.
- Extend from 90 to 180 days the time the DEQ has to review a local ordinance for compliance with Part 353.
- Exempt from the operation of Part 353 a use involving the maintenance, repair, or replacement of existing utility lines, subject to certain conditions.
- Allow only the DEQ or a local unit's governing body to request an action to remedy a violation of the model zoning plan or a local zoning ordinance.
- Require the DEQ to appoint a team to review and update the "Atlas of Critical Dune Areas" every 10 years.
- Require the construction, improvement, and maintenance of a driveway and accessibility measures to be permitted for any building allowed in a critical dune area, subject to certain conditions.
- Require an affirmative vote of a local unit's governing body following a public hearing for the regulation of additional land determined essential to a critical dune area.
- Prohibit a local unit or the DEQ from requiring an environmental site assessment or environmental impact statement as part of a permit application or for a variance except for a special use project.
- Revise the conditions under which a variance is required for certain uses in a critical dune area.
- Reduce from 60 days to 30 the time a local unit has to review an application for a special exception under the model zoning plan.
- Reduce from 60 days to 30 days the time the DEQ has to review a local unit's decision to issue a permit allowing a special use project within a critical dune area.

- **Allow a building constructed to replace one that was destroyed and its use to differ from the original use.**
- **Eliminate references to a local unit's consultation with local soil conservation districts.**
- **Revise legislative findings regarding critical dune areas.**

**The bill also would repeal a section requiring appropriations to several State departments for implementation and enforcement of Part 353, and to soil conservation districts to fulfill their responsibilities under this part.**

#### Permits

Under Part 353, a local unit of government that issues permits for a use within a critical dune area or the DEQ, if the DEQ issues permits as provided, must issue the permits subject to the conditions described below. The bill, instead, would prohibit a person from initiating a use within a critical dune area unless the person obtained a permit from the local unit of government in which the area was located or the DEQ, as applicable, subject to the prescribed conditions.

("Critical dune area" means a geographic area designated in the "Atlas of Critical Dune Areas" dated February 1989 that was prepared by the Department of Natural Resources. "Use" means a developmental, silvicultural, or recreational activity done or caused to be done by a person that significantly alters the physical characteristics of a critical dune area or a contour change done or caused to be done by a person. The term does not include sand dune mining.)

A person proposing a use within a critical dune area must file an application with the local unit of government, or with the DEQ if it is issuing permits under the model zoning plan (described below). The local unit must provide notice of an application to each person who makes a written request for notification of pending applications. If the DEQ issues permits within a local unit, notice also must be given to the local conservation district office, the county clerk, the county health department, and the local unit in which the property is located.

(Part 353 allowed a local unit to adopt, submit to the DEQ, and obtain approval of a zoning ordinance based on the model zoning plan or an equivalent ordinance by June 30, 1990. If a local unit did not have an approved ordinance by that date, the DEQ had to implement the model zoning plan for that local unit. A local unit may adopt a zoning ordinance at any time, and, upon DEQ approval, that ordinance takes the place of the model zoning plan.)

The notice must state that unless a written request is filed with the local unit within 20 days after the notice is sent, the local unit may grant the application without a public hearing. Upon the written request of at least two people who own real property or reside within the local unit or an adjacent local unit, the local unit must hold a public hearing pertaining to a permit application. The bill would refer to people who own real property within one mile of the project, rather than those who own property or reside within that local unit or an adjacent local unit. Additionally, the bill would increase the minimum number of people who must request a hearing to five.

After an application is filed, the local unit must grant or deny the permit within 60 days, or within 90 days if a public hearing is held. The local unit must base a decision to grant or deny a permit on the model zoning plan or on any existing ordinance in effect in that local unit that provides the same or a greater level of protection for critical dune areas and that is approved by the DEQ. The bill would refer to an existing ordinance that provides a substantially equivalent level of protection.

The bill would eliminate a provision allowing a local zoning ordinance regulating critical dune areas to be more restrictive of development and more protective of critical dune areas than the model zoning plan.

Subject to limitations prescribed in Part 353, a permit would have to be approved unless the local unit or the DEQ determined that it was more likely than not that the actual harm to the environment resulting from the use would significantly damage the public interest in the privately owned land, or, if the land were publicly owned, the public interest in the publicly owned land, by significant and unreasonable depletion or degradation of the diversity, quality, or

functions of the critical dune areas within the local unit of government.

The decision of the local unit or the DEQ with respect to a permit would have to be in writing and be based upon evidence that would meet the standards prescribed for a contested case under the Administrative Procedures Act (APA). A decision denying a permit would have to document, and any review upholding the decision would have to determine, all of the following:

- That the local unit or the DEQ had met the required burden of proof.
- That the decision was based upon sufficient facts or data.
- That the decision was the product of reliable scientific principles and methods.
- That the decision had applied the principles and methods reliably to the facts.
- That the facts or data upon which the decision was based were recorded in the file.

A permit could not be granted if it would authorize construction of a dwelling or other permanent building on the first lakeward facing slope of a critical dune area or foredune except on a lot of record that was recorded before July 5, 1989, that did not have sufficient buildable area landward of the crest to construct the dwelling or other permanent use as proposed by the applicant. The proposed construction, to the greatest extent possible, would have to be placed landward of the crest. The portion of the development that was lakeward of the crest would have to be placed in the location that had the least impact on the critical dune area.

("Foredune" means one or more low linear dune ridges that are parallel and adjacent to the shoreline of a Great Lake and are rarely greater than 20 feet tall.)

Except as otherwise provided, a permit would have to provide that a use that was a structure would have to be constructed behind the crest of the first landward ridge that was not a foredune. If construction occurred within 100 feet measured landward from that crest, however, the use would have to meet all of the following requirements:

- The structure and access to it would have to be in accordance with plans prepared for the site by a registered

professional architect or a licensed professional engineer.

- The plans would have to provide for the disposal of storm water without serious soil erosion and without sedimentation of any stream or other body of water.
- Access to the structure would have to be from the landward side of the dune.
- The dune would have to be restabilized with indigenous vegetation.
- The crest of the dune could not be reduced in elevation.

#### Review of Local Ordinance

As soon as possible after a zoning ordinance is enacted under Part 353, the local unit of government must submit to the DEQ a copy of the ordinance that it determines meets the requirements of Part 353. If the local unit has an existing ordinance that it contends is "at least as restrictive as" the model zoning plan, the ordinance may be submitted to the DEQ at any time. The bill would refer to an existing ordinance that the local unit contends is "substantially equivalent to" the model zoning plan.

The DEQ must review zoning ordinances to assure compliance with Part 353. If the Department finds that an ordinance is not in compliance, it must work with the local unit to bring the ordinance into compliance and inform the local unit of the failure to comply and in what ways the submitted ordinance is deficient. Unless a local unit receives notice that the ordinance is not in compliance within 90 days after submitting it, the ordinance is considered approved by the DEQ. The bill would extend this deadline to 180 days.

#### Formal Hearing

If a person is aggrieved by a DEQ decision with regard to the issuance or denial of a permit or special exception, the person may request a formal hearing on the matter. The DEQ must conduct the hearing as a contested case hearing in the manner provided for in the APA. Under the bill, an applicant for a permit or a special exception or the owner of the property immediately adjacent to the proposed use could request a formal hearing.

#### Exemption from Part 353

Under the bill, a use needed to maintain, repair, or replace existing utility lines,

pipelines, or other utility facilities within a critical dune area that were in existence on July 5, 1989, or were constructed in accordance with a permit under Part 353, would be exempt for purposes for which the permit was issued from the operation of Part 353 or an approved local ordinance if the maintenance, repair, or replacement were completed in compliance with all of the following conditions:

- Vehicles could not be driven on slopes greater than one-foot vertical rise in a three-foot horizontal plane.
- All disturbed areas would have to be stabilized immediately and revegetated with native vegetation following completion of work to prevent erosion.
- Any removal of woody vegetation would have to be done in a manner to assure that any adverse effect on the dune would be minimized and would not significantly alter the dune's physical characteristics or stability.
- To replace a utility pole, the new pole would have to be placed adjacent to the existing one, and the existing one would have to be removed by cutting at ground level.
- In the case of repair or replacement of underground pipelines, direction boring would have to be used, and if excavation were necessary to gain access to and bore the pipeline, the excavation area would have to be located on slopes one-foot vertical rise in a four-foot horizontal plane or less.
- The repair of underground utility wires would have to be limited to the minimal excavation necessary to replace them by plowing, small trench excavation, or directional boring.
- Replacement of underground wires on slopes steeper than one-foot vertical rise in a four-foot horizontal plan would be limited to installation by plowing or directional boring only.

#### Remedy for Violation

Currently, at the request of the DEQ, or a person, the Attorney General may institute an action for a restraining order or injunction or other appropriate remedy to prevent or preclude a violation of the model zoning plan, if the DEQ is implementing the plan's provisions or involved in the modification or reversal of a decision regarding a special use. The bill would delete the reference to a person.

At the request of a member of the governing body of a local unit, or a person, the county prosecutor may institute an action for a restraining order or injunction or other proper remedy to prevent a violation of an approved zoning ordinance. The bill would refer to the governing body, rather than a member of the governing body, and would eliminate the reference to a person.

#### Review of Critical Dune Areas

Part 353 required the DEQ to appoint a team of qualified ecologists by May 23, 1995, to review the "Atlas of Critical Dune Areas", dated February 1989. The review team must evaluate the accuracy of the designations of critical dune areas within the atlas and recommend to the Legislature any changes or underlying criteria revisions that would provide more precise protection to the targeted resource. Under the bill, the Department would have to appoint the team of ecologists beginning with the bill's effective date and once every 10 years after that.

#### Driveways

Under the bill, notwithstanding prescribed prohibited uses or any other provision of Part 353, the construction, improvement, and maintenance of a driveway would have to be permitted for any dwelling or other permanent building allowed in a critical dune area, including one approved under Part 353 or a lawful nonconforming use, subject only to applicable permit requirements and all of the conditions described below.

A driveway would have to be permitted either to the principal building or, in the sole discretion of the applicant, to an accessory building. Additional driveways, if any, would have to meet the applicable requirements for any other use under Part 353. The bill provides that the development of a plan for a driveway should include consideration of the use of retaining walls, bridges, or other similar measures, if feasible, to minimize the impact of the driveway, parking, and turnaround areas, as well as the consideration of alternative locations on the same lot of record.

Driveways on slopes steeper than a one-foot vertical rise in a four-foot horizontal plane, but not steeper than a one-foot rise in a three-foot horizontal plane, would have to be in accordance with plans submitted with

the permit application and prepared for the site by a registered professional architect or licensed professional engineer. The plans would have to include the following:

- Storm water drainage that provided for disposal of storm water without serious erosion.
- Methods for controlling erosion from wind and water.
- Restabilization by design elements including vegetation, cut-and-fill, bridges, traverses, and other elements required in the architect's or engineer's judgment to meet these requirements.

Driveways on slopes steeper than a one-foot vertical rise in a three-foot horizontal plane would have to be in accordance with plans submitted with a permit application and prepared for the site by a licensed professional engineer. The plans would have to include the same elements as required for a less severe slope.

Temporary access for all construction, including new construction, renovation, repairs, rebuilding, or replacement, and repair, improvement, or replacement of septic tanks and systems, would have to be allowed for any use allowed in a critical dune area for which a driveway was not already installed by the owner, subject only to the requirements that the temporary access could not involve a contour change or vegetation removal that increased erosion or decreased stability except as could be restabilized upon completion of the construction. The temporary access would have to be maintained in stable condition, and restabilization would have to be commenced promptly upon completion of the construction.

"Driveway" would mean a privately owned, constructed, and maintained vehicular access from a road or easement serving the property to the principal building or accessory buildings, that is paved, graveled, or otherwise improved for vehicular access, 16 feet wide or narrower in the sole discretion of the applicant or owner. The term could include a shared driveway, in the applicant's or owner's sole discretion.

#### Accessibility Measures

Under the bill, notwithstanding prescribed prohibited uses or any other provision of Part 353, at the applicant's request, the

construction, improvement, and maintenance of accessibility measures would have to be permitted for any dwelling or other permanent building allowed in a critical dune area, including a dwelling or other permanent building approved under Part 353 or a lawful nonconforming use, subject only to applicable permit requirements and the conditions applicable to driveways on slopes steeper than a one-foot vertical rise in a four-foot or three-foot horizontal plane.

"Accessibility measures" would mean a circulation path and at least one entrance on the path complying with American National Standards Institute Chapter 4 Standards for accessible routes, from a road or easement serving the property, and, at the option of the applicant, from a sidewalk, driveway, or garage. The term would not include driveways.

#### Local Regulation of Critical Dunes

Under Part 353, after consulting with the local soil conservation district, a local unit of government that has at least one critical dune area within its jurisdiction may formulate a zoning ordinance pursuant to State statute. The bill would eliminate the requirement that the local unit consult with the soil conservation district.

Currently, a zoning ordinance must consist of all of the provisions of the model zoning plan or comparable provisions that are at least as protective of critical dune areas as the model zoning plan. The bill would refer to provisions that provided "substantially equivalent protection" of critical dune areas as the model plan. The ordinance could not be more restrictive than the model plan or the standard of review for permits or variances prescribed in the model plan.

A local unit of government may regulate additional land as critical dune areas under Part 353 as considered appropriate by the planning commission if the local unit determines that it is essential to the hydrology, ecology, topography, or integrity of a critical dune area. A local unit must provide within its zoning ordinance for the protection of land within 250 feet of a critical dune area, if it is determined to be essential. The bill specifies that an affirmative vote of the local unit's governing body following a public hearing would be required for the regulation of additional land in this manner.

If a local unit does not have an approved zoning ordinance, the DEQ may regulate additional land. This land, however, may not extend more than 250 feet from the landward boundary of a critical dune area, unless the local unit's governing body authorizes a further extension. The bill would refer to an affirmative vote of the governing body following a public hearing. In addition, if the DEQ Director determined that the mapping of a designated critical dune area in the Atlas was inaccurate, the DEQ could regulate additional land; however, this land could not extend more than 250 feet from the landward boundary of the critical dune area.

#### Permit Application

Part 353 requires a zoning ordinance to require all applications for permits for the use of a critical dune area to include certain elements, including assurances that the cutting and removal of trees and other vegetation will be performed according to the instructions or plans of the local soil conservation district. These instructions or plans may include all applicable silvicultural practices as described in the "Voluntary Forestry Management Guidelines for Michigan" prepared by the Society of American Foresters in 1987. The bill would eliminate the reference to the local soil conservation district, and would refer to the guidelines as revised in 2010.

In addition, an application must include a site plan that contains data required by the planning commission concerning the physical development of the site and the extent of its disruption by the proposed development. The bill would delete a provision allowing the planning commission to consult with the soil conservation district in determining the required data.

The application also must include an environmental assessment that comports with Section 35319 for a special use project. Additionally, an environmental impact statement pursuant to Section 35320 may be required if the additional information is considered necessary or helpful in reaching a decision on a permit application for a special use project. The bill would delete these provisions.

(Under Section 35319, a required environmental assessment must include specific documentation and information,

including a natural hazards review and an erosion review. Under Section 35320, an environmental impact statement must include more extensive documentation and information, such as an aerial photo and contour map, a soil review, a substrata review, and plans for compliance with prescribed standards.)

The bill would prohibit a local unit of government or the DEQ from requiring an environmental site assessment or environmental impact statement as part of a permit application except for a special use project.

Before issuing a permit allowing a special use project within a critical dune area, a local unit must submit the project application and plan and the local unit's proposed decision to the DEQ. The Department has 60 days to review the plan, and may affirm, modify, or reverse the local unit's proposed decision. The bill would reduce this time period to 30 days.

("Special use project" means any of the following:

- A proposed use in a critical dune area for an industrial or commercial purpose regardless of the size of the site.
- A multifamily use of more than three acres.
- A multifamily use of three acres or less if the density of use is greater than four individual residences per acre.
- A proposed use in a critical dune area, regardless of size, that the planning commission, or the DEQ if a local unit does not have an approved zoning ordinance, determines would damage or destroy features of archaeological or historical significance.)

#### Prohibited Uses

Under Part 353, a zoning ordinance may not permit certain uses in a critical dune area unless a variance is granted. These uses include a structure and access to it on a slope of a certain rise, unless the structure and access are in accordance with plans prepared by an architect or engineer and the plans provide for the disposal of storm water without serious soil erosion and without sedimentation of any stream or other body of water. The bill would delete a requirement that the planning commission

consult with the local soil conservation district before approving the plan.

The prohibited uses also include uses involving a contour change, silvicultural practices, and uses involving a vegetation removal that are likely to increase erosion or decrease stability, or are more extensive than required to implement a use for which a permit is requested. The bill would refer instead to these uses if the local unit or the DEQ determined that they were more likely than not to increase erosion or decrease stability.

Part 353 also prohibits a use that is not in the public interest without a variance, and requires a local unit to consider both of the following in determining whether a proposed use is in the public interest:

- The availability of feasible and prudent alternative locations and/or methods to accomplish the benefits expected from the use.
- The impact that is expected to occur to the critical dune area, and the extent to which the impact can be minimized.

The bill would delete these provisions.

A use that is a structure must be constructed behind the crest of the first landward ridge of a critical dune area that is not a foredune. If construction occurs within 100 feet measured landward of that crest, however, the applicant must demonstrate that the proposed use meets specific requirements. A zoning ordinance may not permit a use that is a structure that is not in compliance with these conditions unless a variance is granted. The bill would delete these provisions.

#### Variances & Special Exceptions

A local unit may issue variances under a zoning ordinance, or the DEQ may issue special exceptions under the model zoning plan if a local unit does not have an approved zoning ordinance, if a practical difficulty will occur to the property owner if the variance or special exception is not granted.

Under the bill, if a practical difficulty would occur, a variance or special exception would have to be granted unless the local unit or the DEQ determined that it was more likely than not that the actual harm to the

environment resulting from the use would significantly damage the public interest on the privately owned land, or, if the land were publicly owned, the public interest in that land, by significant and unreasonable depletion or degradation of the diversity, quality, or functions of the critical dune areas within the local unit.

The local unit's or DEQ's decision would have to be in writing and be based upon evidence that would meet the standards of the APA. A decision denying a variance or special exception would have to document, and any review upholding the decision would have to determine, the same factors as required for the denial of a permit.

A local unit or the DEQ could not require an environmental site assessment or environmental impact statement for a variance except for a special use project.

Currently, a variance or special exception may not be granted if it would authorize construction of a dwelling or other permanent building on the first lakeward facing slope of a critical dune area or a foredune. A variance or special exception, however, may be granted if the proposed construction is near the base of the lakeward facing slope of the dune on a slope of less than one-foot vertical rise in an eight-foot horizontal plane on a nonconforming lot of record that was recorded before July 5, 1989, that has borders that lie entirely on the first lakeward facing slope of the critical dune area that is not a foredune. The bill would delete these provisions.

Upon receiving an application for a special exception under the model zoning plan, the DEQ must forward a copy of the application and all supporting documentation to the applicable local unit of government. The local unit has 60 days to review the proposed special exception, or to waive its opportunity to review the application by notifying the Department. The bill would reduce this time period to 30 days, and also would allow the local unit to comment on the proposed special exception during that time period. The bill provides that the local unit would waive its opportunity to review the application if it failed to act within 30 days.

### Rebuilding or Replacement

A structure or use located in a critical dune area that is destroyed by fire, other than arson for which the owner is found to be responsible, or an act of nature, except for erosion, is exempt from the operation of Part 353 or an approved zoning ordinance for the purpose of rebuilding or replacing the structure or use, if the structure or use was lawful at the time it was constructed or commenced and the structure does not exceed the original one in size or scope and does not vary from its previous use.

Under the bill, a replacement structure and its use could differ from the one that was destroyed if it did not exceed the original one in size and scope.

### Appropriations

The bill would repeal Section 35326, which requires the Legislature to appropriate to the Michigan Department of Agriculture and Rural Development (MDARD), the Department of Natural Resources, and the Attorney General sufficient funds to assure the full implementation and enforcement of Part 353. This section also requires appropriations to MDARD to be sufficient to assure adequate funding for soil conservation districts to fulfill their responsibilities under Part 353.

### Purpose of Part 353

Part 353 contains several legislative findings, including the following:

- "Local units of government should have the opportunity to exercise the primary role in protecting and managing critical dune areas in accordance with this part."
- "The benefits derived from alteration, industrial, residential, commercial, agricultural, silvicultural, and the recreational use of critical dune areas shall occur only when the protection of the environment and the ecology of the critical dune areas for the benefit of the present and future generations is assured."

The bill would delete these two findings.

The bill states, "The purpose of this part is to balance the benefits of protecting, preserving, restoring, and enhancing the diversity, quality, functions, and values of

the state's critical dunes with the benefits of economic development and multiple human uses of the critical dunes and the benefits of public access to and enjoyment of the critical dunes. To accomplish this purpose, this part is intended to do all of the following:

- (i.) Ensure and enhance the diversity, quality, functions, and values of the critical dunes in a manner that is compatible with private property rights.
- (ii.) Ensure sound management of all critical dunes by allowing for compatible economic development and multiple human uses of the critical dunes.
- (iii.) Coordinate and streamline governmental decision-making affecting critical dunes through the use of the most comprehensive, accurate, and reliable information and scientific data available."

MCL 324.35301 et al.

Legislative Analyst: Julie Cassidy

### **FISCAL IMPACT**

The bill would have an indeterminate fiscal impact on State and local government. The bill would generally make it more difficult for the DEQ or local units to deny a permit under the critical dunes program by requiring that denials be subject to certain requirements detailed in the bill. These requirements could increase costs to the DEQ and local governments that issue critical dune permits. The bill also would require the DEQ to appoint a team to review and update the "Atlas of Critical Dune Areas" every 10 years. The cost of this review is unknown, but the annual cost would likely be fairly small since the review would happen only every 10 years.

Fiscal Analyst: Josh Sefton

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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.