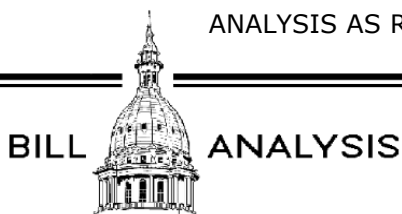




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Senate Bill 721 (as reported without amendment)
Sponsor: Senator Darwin L. Boohar
Committee: Natural Resources

Date Completed: 4-6-18

RATIONALE

Michigan statute designates certain shoreline areas as critical dune areas, which are protected under Part 353 (Sand Dune Protection and Management) of the Natural Resources and Environmental Protection Act. One dune subject to these provisions is in Onkama Township, Manistee County, where a portion of Langland Park was designated as a critical dune area in 1989. Since its designation, the sand dune in the critical dune area has built up and blocked the view of Lake Michigan from the Langland Park's parking lot. The Department of Environmental Quality (DEQ) has denied several requests for a permit that would allow the township to make modifications to the dune. Some people disagree with the DEQ's decision and believe that Part 353 should be amended to specify that in a situation with the same circumstances as those in Langland Park, the DEQ would be required to issue a permit to modify a critical dune area.

CONTENT

The bill would amend Part 353 of the Natural Resources and Environmental Protection Act (NREPA) to require the Department of Environmental Quality to issue a special exception to the model zoning plan if the applicant were a local unit of government and certain conditions were met.

Under Part 353, a local unit of government that has one or more critical dune areas within its jurisdiction may formulate a zoning ordinance pursuant to the Michigan Zoning Enabling Act. The zoning ordinance must consist of provisions contained in the model zoning plan described in Part 353 or comparable provisions that similarly protect critical dune areas.

A person may not initiate a use within a critical dune area unless the person obtains a permit from the local unit of government in which the critical dune area is located or from the DEQ, if the Department is implementing the model zoning plan in situations where the local unit of government does not elect to issue permits or does not receive the DEQ's approval of a zoning ordinance.

(Part 353 defines "use" as a developmental, landscaping, or recreational activity done or caused to be done by a person that significantly alters the physical characteristic of a critical dune area or a contour change done or caused to be done by a person. "Use" does not include the removal of sand from sand dune areas for commercial or industrial purposes.)

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

The bill would require the DEQ to issue a special exception if all of the following conditions were met:

- The applicant was a local unit of government and the application involved public land that was public land on July 5, 1989.
- The purpose of the application was to restore a use, including public viewing areas, that was lawful and in existence on July 5, 1989.
- The proposed project for which the special exception was sought would benefit the citizens and visitors of that local unit as evidenced by the adoption of a resolution in support of the special exception by the governing body of that local unit.

The bill would take effect 90 days after it is enacted.

MCL 324.35317

BACKGROUND

Legislative History of Sand Dune Protection in Michigan

Public Act 222 of 1976 enacted the Sand Dune Protection and Management Act to regulate the removal of sand within Great Lakes sand dunes. The Act dealt specifically with sand mining for industrial and commercial purposes. The law defined "sand dune area" as "that area designated by the department [of Natural Resources] which includes those geomorphic features composed primarily of sand, whether windblown or of other origin and which lies within 2 miles of the ordinary high-water mark on a Great Lake".¹

Public Acts 146 and 147 of 1989, amended the Sand Dune Protection and Management Act to address residential and commercial development on Michigan's dunes. The legislation amended the definition of "sand dune areas" to include critical dune areas, and defined "critical dune areas" as a geographic area designated in the Atlas of Critical Dune Areas (a Department-prepared map of Michigan marking dunes deemed critical).² The amendments added regulation of activities within the critical dune areas, including the construction of buildings, septic systems, water wells, and driveways; excavation and filling; and vegetation removal. The legislation also prohibited development on dune slopes greater than 25% without a special exception, and on the foredune (the first significant dune inland from the lake) features closest to the lakeshore in a critical dune area.

Public Act 146 also included the following legislative finding: "The critical dune areas of this state are a unique, irreplaceable, and fragile resource that provide significant recreational, economic, scientific, geological, scenic, botanical, educational, agricultural, and ecological benefits to the people of this state and to people from other states and countries who visit this resource."

In 1994, the Legislature recodified a number of statutes related to natural resources and the protection of the environment as NREPA. The sand dune mining portions of former Public Act 222 of 1976 became Part 637 (Sand Dune Mining) of NREPA. The portions of the statute dealing with development in dune areas, as enacted in 1989, became Part 353 (Sand Dune Protection and Management). With respect to sand dunes, the recodification included amendments to add an appeals process for critical dune property owners, provide more leeway for local jurisdictions to grant special variances, and increase the slope allowance to 33% (which allowed development on dunes with a steeper slope and thereby decreased the number of dunes protected).

¹ Evidently, the areas regulated by Public Act 222 in relation to mining were referred to as "designated dunes," which DNR staff defined as "a land mass which exhibits the physiographic features of a dune-type ecosystem".

² According to various sources, ecologists created the Atlas and designated critical dune areas based on some (but not all) locations where they found dunes that met certain criteria when surveyed in 1989. A critical dune area is a geographic space designated in the Atlas, not an individual sand dune or group of discrete sand dunes. Sand dunes, by definition, change shape, size, and number over a short period of time relative to other geologic formations.

At present, the DEQ's Oil, Gas, and Minerals Division administers Part 637, which principally regulates sand dune mines within designated areas up to two miles inland from Great Lake shorelines. The DEQ's Water Resources Division manages sand dunes and the protection of sand dunes under Part 353.

Subsequent Legislation

In 2012, the Legislature revisited the dunes legislation. Public Act 297 of 2012 amended Part 353 to do a number of things, including the following:

- Require a permit, or a variance or special exception to an ordinance, to be granted unless the use will significantly damage the public interest on, or deplete or degrade the diversity, quality, or functions of, the critical dune area.
- Remove language that specified that any alteration to a dune could 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".
- Add the ability to build on the lakeward facing slope of the first significant dune feature.
- Allow the DEQ to appoint a team of ecologists to review and update the Atlas of Critical Dune Areas every 10 years.

Under Public Act 297 of 2012, the decision of the local unit or the DEQ with respect to a permit to modify a critical dune must be in writing and be based upon evidence that meets the standards prescribed for a contested case under the Administrative Procedures Act. A decision denying a permit must document, and any review upholding the decision must determine, all of the following:

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

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. After reviewing the plan, the DEQ may affirm, modify, or reverse the local unit's proposed decision. Previously, the DEQ had 60 days to review the plan. Public Act 297 of 2012 reduced 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.)

If a practical difficulty will occur to the property owner if a variance or special exception is not granted, a variance or special exception must be granted unless the local unit or the DEQ determines the use will significantly damage the public interest on the privately owned land, or, if the land is 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.

In addition, Public Act 297 added legislative findings to state, "The purpose of this part is to balance for present and future generations 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."

Onekama Township Permit Application History

In 2002, Onekama Township applied to the DEQ for permission to reduce the height of a foredune within Langland Park, between the parking lot and Lake Michigan, to allow better physical and visual access to Lake Michigan. The DEQ denied the application. In a denial letter dated June 13, 2003, the DEQ suggested an alternative to the project proposed by Onekama Township that would use the nearby historical U.S. Army Corps of Engineers haul road to facilitate a viewing area. According to the DEQ, this alternative project would make modification of the dune unnecessary.

During the summer of 2016, a handicap accessible boardwalk was constructed within the haul road area and a sitting area was constructed in the northwest corner of the parking lot to facilitate a viewing area to the lake. In addition, the accumulated sand was removed around the existing gazebo on the south end of the park, which provides an unobstructed view.

In May 2016, in light of the legislative findings added to Part 353 by Public Act 297 of 2012, the township applied again for a permit and a special exemption to reduce the height of the dune in Langland Park. The DEQ denied this application, stating, in a letter of denial:

The proposed project will have significant adverse effects on the diversity, quality and function of natural resources associated with the designated critical dune features along this stretch of Lake Michigan shoreline. This project will eliminate 1.3 acres of foredunes within the township and convert it to a level beach area. The project will destabilize the shoreline and increase erosion by removing the existing dune buffer and by removing the existing dune vegetation.

The project does not meet the criteria for issuance of a special exception under Part 353 because it has not been demonstrated that a practical difficulty will occur if the special exception is not granted. Practical difficulty is a steep slope feature of the site that makes it difficult for the owner to comply with the criteria in the statute. The steep slopes on this site do not prevent the use of the park; therefore, there is not practical difficulty that would allow issuance of a special exception.

The DEQ also suggested that the township consider the northwest parking lot sitting area and the gazebo as feasible locations to view the lake, as an alternative to the project proposed by the township application. In addition, the DEQ stated that the township could appeal the Department's decision by filing a petition for a formal administration hearing.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Since the dune near Langland Park has built up, the view of Lake Michigan from most parking spaces in the park has diminished. The population of the township is aging and the walk from their cars, around the dune, is difficult for some. Reducing the dune to the size it was before it was designated a critical dune area would allow residents and visitors to view Lake Michigan from their cars while parked in the lot. In the 1990s, people would drive to this parking lot to watch the sunset. Those who did not want to walk down to the beach had the option to sit in their cars and enjoy the moment. Before the dune grass was planted and the dune grew, the space was maintained as a beach. Onekama Township has pledged to maintain the dune at beach level to preserve the viewshed that existed in the 1980s. Money from the township has already been allocated for this purpose.

The community relies heavily on the Lake Michigan beach access, and the tourism money it brings to the township is a critical component of the economic wellbeing of the area. The park is the most popular attraction for the residents of the township. In 1991, and decades prior, the view from Langland Park was sought out by local residents and visitors alike. Tourism is very important to the economy of Michigan and local communities. In Manistee County alone, visitors spent \$143.0 million in 2016, a 6.5% increase since 2012.³ Before the dune built up, the number-one attraction in Onkama Township for residents and tourists was the Lake Michigan access at Langland Park. The parking lot was the only public parking area in the entire township where people could view sunsets on the lake. It is the only view of its kind in Onkama Township. The bill would increase tourism and economic benefits while preserving visual access to Lake Michigan. Onkama Township is an economically depressed community that must be able to offer this special attraction. There are likely fewer visitors to the township as a result of the obstructed view.

In addition, allowing residents and visitors to regain the historical use of the parking lot in order to see Lake Michigan from their cars would seem to meet the purpose of compatible economic development and multiple human uses of the critical dunes, as described in the legislative findings. Because Public Act 297 of 2012 specifically states that the purpose of Part 353 is to *balance* the benefits of protecting the critical dunes with the benefits of economic development, the DEQ should take that as a directive to consider potential economic benefits when deciding whether to issue a permit or special exception. The Department's October 2016 denial letter, however, does not mention economic development or indicate that this factor was considered. The need to protect the dune in Onkama Township should have been balanced with the need to protect the local economy. The bill would make it clear that the DEQ should allow the dune in Langland Park to be reduced.

Response: The legislative findings added by Public Act 146 of 1989 and the findings added to Part 353 by Public Act 297 of 2012 both refer to the economic benefit of sand dunes and the positive impact they have on tourism. The legislative findings do not establish decision-making criteria for the DEQ, however, and the statute does not give the Department tools to measure economic value. On the other hand, Part 353 does spell out factors that must be considered in a determination of whether to grant a special exception, and those are what the DEQ based its decision on. Furthermore, although some people believe that altering or removing the dune would benefit the community economically, others contend that leaving the dune untouched is of economic benefit to the State. The dune in Langland Park is not preventing access to the beach, Lake Michigan, or any of Michigan's natural resources. The boardwalk and gazebo constructed in 2016 provide access to the beach and views of Lake Michigan for residents and visitors alike. Because modification of the dune would affect only the view from the parking lot and not from the beach, boardwalk, or gazebo, the modification would not be necessary to benefit tourism.

Supporting Argument

The natural phenomena that has occurred in Onkama Township has resulted in a change to the geologic features specifically designated and protected by the Atlas codified by Public Act 146 of 1989. The Act was drafted in accordance with a principle of not altering the dunes and not interfering with nature. The Act, however, has now, created a situation in which nature has taken

³ "Economic Impact of Travel in Michigan", Michigan Economic Development Corporation. 2018.

land from the people of Michigan. The situation in Onkama Township shows that nature itself does not leave things as they are. Proper conservation and custodianship would require the State to maintain the dune at the size it was in 1989.

Response: This area was designated as a critical dune area in 1989 to protect the dunes and to allow them to move and change, which is the nature of the specific ecosystem. The critical dune area itself has not changed; the dunes within the area have changed, as they were expected to. The dynamism of the dune is the most important characteristic that requires protection. Many organisms like the Marram Grass and the Piping Plover (an endangered shorebird) require the environment offered by Michigan's unique sand dunes. Leveling off the dune would include removing the vegetation, which would destroy the primary ecological functions of the dune that created the unique ecosystem there.

Opposing Argument

The bill would force the DEQ to approve a permit for a project based on reasons that are solely economic and not environmental. To ensure the quality of the environment, the DEQ needs the ability to account for environmental factors when deciding whether to issue an environment-related permit. In the case of Langeland Park, the dune is the only thing protecting the parking lot from an encroachment of sand. Without the dune, wind off the lake would push the sand inland such that the lot would be engulfed. The public area is more accessible with the dune as it currently is.

Moreover, the bill could lead to additional disagreements between the DEQ and local units of government. Part 353 of NREPA is designed to protect and manage sand dunes throughout the State of Michigan. It would be a mistake to consider only the experience of a single community when changing the law that governs all critical dunes across the State. Although the bill appears to apply to a specific situation, the proposed language is vague and the bill's impact could be broader than just one dune. The bill does not define "public viewing" and it is not clear whether this activity would be considered a "use" under the statute. Also, there is no standard for establishing whether a use was lawful and in existence in July 1989. In addition, the bill would not limit the special exception to a change in contour. As a result, the bill. This could set a precedent for the destruction or substantial modification of dunes throughout the State.

By following the provisions of the current statute that apply to all areas of the State, local units would benefit more from modifying development proposals to meet the existing standards of the law, or forego a project in favor of a different concept designed to be more appropriate to, respectful of, and in tune with, the diversity, quality, and function of the dune landscape.

Legislative Analyst: Nathan Leaman

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

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.