STATE OF MICHIGAN

DEPARTMENT OF ENVIRONMENTAL QUALITY

OFFICE OF ADMINISTRATIVE HEARINGS

SUBJECT: Part 353, Sand Dunes Protection and Management, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended.

Petition of Eugene and Judy Jankowski
File No. 98-OC-0394-C

FINAL DETERMINATION AND ORDER

The above captioned matter was the subject of a contested case hearing resulting in the issuance of a Proposal for Decision (PFD) dated February 22, 2001. Consistent with this Tribunal's filing schedule, Eugene and Judy Jankowski (Petitioners) and Land and Water Management Division of the Department of Environmental Quality (LWMD) filed written Exceptions to the Proposal for Decision. Oral Argument was held on April 17, 2001. The matter is now before the Director of the Department of Environmental Quality for a final agency decision pursuant to Executive Order 1995-18.

In their Exceptions the Parties raise three issues, the two arguments advanced by the Petitioners are addressed first, followed by the one asserted by LWMD.

I. Whether the Proposed Activity's Impact is Examined in Relation to the Entire Critical Dune Area or the Location on the Dune.

In addressing this issue the PFD looked to specific provisions of Part 353, and rejected the Petitioner's contention that the impact to the entire critical dune area, in this case some 1,000 acres, is the proper focus in reviewing a proposed use. The analysis utilized is sound, and I adopt the conclusion of law that Part 353 contemplates regulation of uses that impact any portion of the area, as opposed to the entire designated critical dune.

II. Whether Utilizing the Terminus of the Existing Driveway for a Building Site is a Feasible and Prudent Alternative to Extending the Driveway to Reach the Dune's Crest.

The PFD found the site at the terminus of the existing driveway could support a footprint for a building of 20 by 46 feet, or 920 square feet per level. Such a structure could be designed with a garage on the first level and living areas on the upper levels. Based on the topography of the site, its designation as a critical dune and the Petitioner's knowledge of the 1992 permit that allowed for the installation of the existing drive, the PFD found that location was a feasible and prudent alternative location for a homesite. Given that the finding is supported by both the facts of this case and the controlling law, it will not be disturbed.

III. The Level of Impact that a Use on a Critical Dune Must Reach to Constitute a Contour Change.

LWMD contends the term "contour change" is too narrowly construed, in a jurisdictional context, by the PFD. A review of the PFD reveals its focus is on the issue of whether the proposed activity is such that a special exception under § 35317 is required. The PFD made the factually and legally sound determination that a special exception is necessary because the proposed activity would result in a substantial alteration and a contour change to the dune as that term is defined in § 35301(a). The jurisdictional question raised in the LWMD exception does not challenge this finding. Thus, the contention of LWMD on this point raises a legal question that is not necessary to decide this case. However, in order to provide guidance to both the regulated community and staff, and to avoid any unfounded inferences being drawn from the PFD, clarification is necessary.

There is no question that to invoke the regulatory jurisdiction of Part 353 the level of impact of a use on a critical dune is less than that requiring a special exception under § 35317. For instance, § 35316(d) requires a special exception be obtained for "a contour

change that is likely to increase erosion, decrease stability, or is more extensive than required…." Under this provision, a use could cause a contour change but not necessarily result in any of the three enumerated conditions mandating a special exception analysis. However, the proposed use remains subject to the permitting provisions of § 35313.

The issue presented by LWMD is at what level of impact does a proposed activity become a use under the statute, and thus requiring an application and a permit. LWMD does not point to any statutory criteria establishing the level of impact required to invoke the Department's jurisdiction. Rather, it argues § 35301(a) does not define the term contour change, but merely provides the upper level of impact for such an activity.[1] Following this logic, the term must also cover any activity performed on a critical dune no matter how small the impact. This Tribunal is not prepared to adopt such an expansive reading of this statute. A more consistent approach, both legally and administratively, is to make the determination of jurisdiction on a case-by-case basis. This approach will provide LWMD the opportunity to review the proposed activity and determine whether a permit should be issued as a matter of course, or whether a special exception is required.

DETERMINATION AND ORDER

The Director of the Department of Environmental Quality ADOPTS AND INCORPORATES BY REFERENCE the Proposal For Decision including the Findings of Fact and Conclusions of Law. Based upon those Findings of Fact and Conclusions of Law, it is DETERMINED the Petitioner's application for a Special Exception be DENIED under the criteria of Part 353.

NOW, THEREFORE, IT IS ORDERED:

1. The Proposal for Decision of February 22, 2001, is ADOPTED and INCORPORATED by reference into this Final Determination and Order.

2. The application for a Special Exception submitted by Eugene Jankowski under File No.

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[1] "`Contour change' includes any grading, filling, digging, or excavating that significantly alters the physical characteristic of a critical dune area…." MCL 324.35301(a).

98-OC-0394-C is DENIED.

3. The Department of Environmental Quality does not retain jurisdiction in this matter.

Dated: _____

_____
Russell J. Harding, Director
Department of Environmental Quality

STATE OF MICHIGAN

DEPARTMENT OF ENVIRONMENTAL QUALITY

OFFICE OF ADMINISTRATIVE HEARINGS

SUBJECT: Part 353, Sand Dunes Protection and Management, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended.

Petition of Eugene Jankowski
File No. 98-OC-0394-C

PROPOSAL FOR DECISION

Dated: February 22, 2001

Richard A. Patterson
Administrative Law Judge

This contested case involves an application of Mr. Eugene Jankowski for a special exception to the requirements of Part 353, Sand Dunes Protection and Management, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (Part 353). MCL 324.35301 *et seq*. The special exception is sought in order to allow for the building of a driveway to the summit of a dune on property owned by Mr. Jankowski and his wife. The western two-thirds of the dune is within an area designated as a critical dune. MCL 324.35301(c).

The hearing in this matter was held on April 19 and 21, May 11, and June 12, 2000. A site view was conducted July 10, 2000. Subsequent to the close of the record, the Parties submitted written closing arguments and proposed Findings of Fact and Conclusions of Law culminating August 28, 2000.

JURISDICTION

Part 353 grants the right to a contested case hearing "[I]f a person is aggrieved by a decision of the department in regard to the ... denial of a ... special exception." MCL 324.35305(1). A timely request for a contested case hearing was filed by Mr. Jankowski on May 10, 1999. As mandated by § 35305(1), the hearing was conducted in the manner provided for in the Administrative Procedures Act, 1969 PA 306, as amended. MCL 24.201 *et seq*.

PROPERTY RIGHTS PRESERVATION ACT CONSIDERATION

Pursuant to the Property Rights Preservation Act, 1996 PA 101, MCL 24.421, *et seq*., in formulating this Proposal for Decision the undersigned has reviewed the Takings Assessment Guidelines and considered the issue of whether this government action constitutes a constitutional taking of property.

PARTIES

Mr. Eugene Jankowski (Petitioner) is represented by William C. Fulkerson, Esq. In addition to his own testimony, the Petitioner presented four witnesses in his case in chief: Mr. Robert Northrup, builder; Ms. Tracy Lynn Hutchinson, environmental and engineering

consultant; Mr. James Norlund, P.E.; and Mr. Michael Hayes, consulting coastal specialist. Additionally, the Petitioner offered the rebuttal testimony of Mr. Thomas Segall, a consultant who was formally the Assistant Supervisor of Wells and State Geologist.

The professional staff of the Michigan Department of Environmental Quality, Land and Water Management Division (LWMD) is charged with the day-to-day implementation of Part 353. Representing LWMD is Mr. James R. Piggush, AAG, Department of Attorney General. LWMD presented seven witnesses: Mr. Edward Steigerwaldt, real estate appraiser; Mr. Steven DeBrabander, forest land administrator, Michigan Department of Natural Resources (MDNR); Ms. Michelle Hohn, Field Representative, LWMD; Dr. Alan F. Arbogast, Ph.D., Associate Professor of Geography at Michigan State University; Mr. Luis Saldivia P.E., District Supervisor, LWMD, Grand Rapids Office; Ms. Christy Fox, formerly with the Coastal Programs Unit, LWMD; and Mr. Martin Jannereth, Chief, Great Lakes Shorelands Unit.

During the hearing the Petitioner introduced twenty five (25) exhibits, and the LWMD introduced fifteen (15). The Petitioner's exhibits are labelled "P" and the Department's exhibits are labelled "R". A list and description of the exhibits is attached to this Proposal for Decision.

STIPULATIONS ON THE RECORD

During the pre-hearing conference on December 9, 1999, the Parties entered into the following stipulations:

1. Mr. Eugene Jankowski is the proper applicant for a permit.

2. The processing of the application was procedurally correct.

While stipulations of law are not binding on courts, *In Re Finlay Estate*, 430 Mich 590, 595; 424 NW2d 272 (1988), stipulations of fact are sacrosanct. *Dana Corporation v Employment Security Commission,* 371 Mich 107, 110; 123 NW2d 277 (1963). See also *American National Fire Insurance Company v Frankenmuth Mutual Insurance Company*, 445 Mich 91, 93; 516 NW2d 52 (1994) (remand required where trial court apparently

refused to follow parties stipulation of facts). The Parties stipulations in this case are factual, and as such I find them legally correct and adopt them as findings. MCL 24.278

The Petitioner's Legal Argument on the Scope of Part 353

The Petitioner has filed an "application for alteration and construction in high risk erosion areas and/or critical dune areas." Exhibit P-1. That application was submitted under § 35316, which states, in pertinent part:

> (1) Unless a variance is granted pursuant to section 35317, a zoning ordinance shall not permit the following uses in a critical dune area:
>
> (b) A use on a slope within a critical dune area that has a slope steeper than a 1 foot vertical rise in a 3 foot horizontal plane.

As it applies in this case, the term "use" is defined in § 35301(j) as:

> [A] developmental...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.

The Petitioner does not dispute that the proposed activity will, in part, be conducted on slopes steeper than a 1 foot vertical rise in a 3 foot horizontal plane. However, he argues the proposed activity, or use, does not require a permit under § 35301(j) because the evidence indicates the critical dune area will not be subjected to either a significant alteration of its physical characteristic or a change of its contour. This argument is first premised on the use of the word "significant" in the statute. The Petitioner, noting an absence of a statutory definition of the term, contends the common and ordinary meaning, as ascertained from a dictionary, controls:

> 3. having or likely to have a major effect; important.
>
> 4. fairly large in amount or quantity.[2]

The second component of this argument is the statutory definition of the term "critical dune area":

[2] American Heritage College Dictionary, 3rd Edition.

> Critical dune area means a geographical area designated in the "Atlas of critical dune areas" dated February 1989 that was prepared by the department.
> MCL 324.35301 (c)

Coupling the terms "significant" and "critical dune area" together, the Petitioner contends Part 353 regulates only those uses that significantly alter or create a contour change to the critical dune area as a whole. That is, this Tribunal must look beyond the four corners of the Petitioner's property and consider the project's impact, or significance, to the entire critical dune. In so doing, according to the Petitioner's logic, a proposal impacting only a few thousand square feet of an area consisting of approximately 1,000 acres, or some 43,560,000 square feet, cannot be deemed significant. The Petitioner contends this interpretation is supported by the emphasis in Part 353 on control by local units of government, leaving only major projects subject to state regulation.[3]

Obviously, LWMD does not accept the Petitioner's interpretation, arguing it is nothing more than a pretext to "rewrite" the statute so that it can regulate only significant effects, as opposed to uses, on a critical dune. Further, LWMD asserts Part 353 regulates all uses in a critical dunes that either significantly alter the physical characteristics or constitute a contour change. In support, it points out that the same dictionary used by the Petitioner defines the term "contour" as:

> a) the outline of a figure, body or mass;
> b) a line that represents such an outline; or
> c) a surface, especially of a curving form.

[3] This argument is problematic when applied in this case because the Township of Pentwater, which does not object to the Petitioner's modified proposal (Exhibit P-15), has not enacted a zoning ordinance under the authority of § 35312.

The term "change" is defined as "the act, process, or result of altering or modifying."[4] In sum, LWMD argues any use that constitutes a contour change is regulated.

For a number of reasons the Petitioner's interpretation of the scope of Part 353 is contrary to the regulatory scheme set forth in that statute. First, the legislative findings state the regulation of these features are best suited to local control.[5] However, Part 353 requires the local unit of government must take an affirmative step, in the form of a zoning ordinance, before it can assume regulation. MCL 324.35303 and 324.35304. The breadth and scope of any such ordinance is strictly prescribed. MCL 324.35312 through 324.31321. The legislature also granted veto power to the Department over any special use project granted in a critical dune area by a local unit of government under its ordinance. MCL 324.35322. Therefore, the Petitioner's argument that Part 353 precludes the Department from regulating the activity at issue in this case is unfounded.

As to the main component of the Petitioner's argument, that the focus must be on the impact to the entire critical dune area, the provisions of Part 353 support a contrary interpretation. For instance, any ordinance must provide for lot size, width, density and front and side setbacks as well as provision for storm water drainage, methods for controlling erosion and restabilization. MCL 324.35314. These provisions are clearly site specific, as opposed to focusing on the entire critical dune area in which the activity happens to be proposed geographically. More to the point, § 35316(1)(b) requires a zoning ordinance prohibit "[A] use on a slope <u>within</u> a critical dune area that has a slope steeper than a 1-foot vertical rise in a 3-foot horizontal plane" unless a variance is granted.

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[4] LWMD's response to the Petitioner's argument is belied by the fact that the term "contour change" is defined in §35301(a).

[5] "Local units of governments should have the opportunity to exercise the primary role in protecting and managing critical dune areas in accordance with this part." MCL 324.35302(b).

Obviously, this use of the term "critical dune area" can only logically apply to that area immediately effected by the activity.

To adopt the Petitioner's argument and require that an activity significantly impact the entire designated critical dune area of more than a thousand acres defies logic. To do so would create an absurd result which would totally emasculate Part 353. When interpreting a statute, the result shall not be absurd. *Gardner* v *Van Buren Public Schools*, 445 Mich 23; 517 NW2d 1 (1994). Therefore, I conclude, as a Matter of Law, Part 353 contemplates regulation of uses that effect any portion of the area, as opposed to the entire designated critical dune.

The Legal Significance of Activity in Other Critical Dune Areas

Based on his observations of other drives in the area, Mr. Jankowski testified to his assumption that one would be allowed on this site. Petitioner was allowed to enter on this record a number of photographs of other drives taken by him as exemplars in support of his contention that steep drives are permitted on a regular basis. The first drive was permitted by Port Sheldon Township in Ottawa County in what he understands to be a critical dune area. Exhibits P-8 and P-9. The second drive is on property north of Pentwater owned by an acquaintance of the Petitioner. That project is an extension of an existing drive to gain access to two homesites. Exhibit P-10. The final drive is off of Montgomery Blvd., approximately 1/4 mile north from the subject parcel, on the front edge of a dune known locally as one of the "three sisters". Exhibit P-11.[6]

The evidence discussed above, which was quite general in nature, was allowed into this record over the objection of counsel for LWMD and with this writer's reservation as to its weight and value. The lack of any specifics on these projects and properties, such as the length and width of each drive, the dune's degree of slope, and the time frame in which

[6] The drive depicted in Exhibit P-10 was addressed by Mr. DeBrabander, who stated it was allowed under a special exception and provided the sole means of access on the parcel. He likened it to the special exception provided Mr. Sturr for the drive the Jankowski's now use. He did not comment on the other sites.

each installation was performed, makes the question of their relevance obvious. From what can be gleaned from the exhibits themselves, the Port Sheldon project appears to be unpaved and without retention facilities. Equally, the project exhibited in P-10 is unpaved, and while it has retaining walls they appear to be nowhere near 20 feet in height which Petitioner proposes. The last project depicted in Exhibit P-11 is paved and has retaining walls at a steeper grade than the other two, but the length and width cannot be ascertained.

While the projects identified by the Petitioner, and assumedly others of a similar nature, do in fact exist, they are immaterial to the issue in this contested case: whether this Petitioner is entitled to a permit under Part 353. In deciding that issue the inquiry must be confined to the specific proposal and parcel by factoring in all the exigent circumstances relevant under the statute. See *Petition of William and Carol Bogedain*, File No. 99-05-0111.

In addition to the evidence discussed above, Mr. Michael Hayes, a principal of Resource Management Group, Inc., testified specifically on four special exceptions granted under Part 353;

1) a permit issued on September 10, 1999, to Ms. Lois Bucel for a home and driveway in Saugatuck. Exhibit P-18;
2) a permit to the Geneva Camp and Retreat Center in Holland for installation of an entrance road and retaining walls issued December 3, 1999. Exhibit P-19;
3) a permit issued to Mr. Thomas Stokes on May 20, 1999 for a home and driveway in a critical dune area in Covert Township, Van Buren County. Exhibit P-20; and
4) a permit issued on September 24, 1992 to Ross Pope for a home and driveway in the City of Ferrysburg, Ottawa County. Exhibit P-21.

Mr. Hayes testified as to the specifics of each project. The drive at Camp Geneva traversed fairly steep slopes equal to or greater than those on the Jankowski property. As to the Stokes permit the drive is steeper than that proposed by Mr. Jankowski with comparable retained height. The Pope project involved some 1,000 cubic yards of fill and has been stable for eight years. Mr. Hayes also discussed his review of a proposal made by a Dr. Kuhnlein on behalf of Lincoln Township in which he concluded a driveway through grades greater than 33% could be stabilized.

Mr. Hayes' testimony was rebutted by Ms. Christie Fox and Mr. Luis Saldivia. Ms. Fox stated the Bucel permit allowed a driveway to the first buildable area available to the applicant. While the initial denial of the Bucel application was based upon a feasible and prudent alternative site at the base of the dune, that ultimately proved to not be available due to zoning restrictions. Thus she termed the Bucel permit as being consistent with the Jankowski denial under the feasible and prudent alternative criteria. The Pope permit is also similar, as no alternative access to a building site was available without a roadway that traversed a 25% grade. Further, that grade was the regulatory threshold in 1992. The Stokes permit facilitated the only way access could be gained to the first buildable area on the property. Finally, Mr. Saldivia testified the Camp Geneva project entailed considerable excavation, involving 100 to 150 feet through a critical dune, but the maximum slope impacted was 45 degrees.

As discussed above, even if the Petitioner's premise that the issuance of other permits is a sufficient legal basis to issue this permit, all of the support it provides can be readily distinguished. Given this, the analysis must now turn to the statutory criteria at issue in this case: whether the activity will significantly alter the physical characteristics or constitute a contour change to the critical dune area and, if so, whether Petitioner is entitled to a special exception.

FINDINGS OF FACT

Location and Nature of the Subject Property

The parcel is located north of the Village of Pentwater in Oceana County. The property consists of some 22 acres, the majority of which consists of a large steep dune with a flat area at its top. The degree of slopes in the area of the proposal vary from 35% to 80%. Approximately 6 acres at the rear (east) of the parcel are in the shape of a bowl and are not within the designated critical dune area.

The Petitioner applied for the drive to facilitate access to the flat summit or crest of the dune, where he desires to build a home. That area, consisting of 1.8 acres, would be utilized for homesites, along with ancillary structures and septic facilities. Mr. Jankowski's

original intent was to utilize this area as a site for a retirement home, perhaps with the additional sites utilized by some of his children. However, Mr. Jankowski testified he would be content with one home site, and if that were to happen he stated a willingness to agree that no further development would ever take place on the property. This proposed building site at the crest of the dune would provide a spectacular panoramic view of Lake Michigan.

The property is currently serviced by an existing drive from the east that only goes as far as the northwest corner. Exhibit R-1. The new drive, as originally applied for, would extend from the end of the existing drive easterly approximately 120 feet and then turn southwesterly to the crest of the dune. Exhibit P-1. The total length of that drive would be approximately 300 feet. As next discussed, that plan was revised with the latter project under review in this case.

The Proposed Activity

The original application contemplated a 12 foot wide drive, with shoulders 1.5 feet wide, constructed by cutting into the slope and backfilling. Exhibit P-1. The drive would extend and improve an existing drive installed by the Petitioner's predecessor in title, Thomas Sturr. The existing drive was allowed under a special exception granted in 1992 (Sturr Permit). The Petitioner's original proposal involved cutting and filling approximately 730 cubic yards and clearing an area approximately 80 feet wide. The application was received and processed by LWMD, with the end result being its denial by a letter dated March 30, 1999. Exhibit P-24. The Petitioner availed himself of an informal review of the denial by Mr. Luis Saldivia in his capacity as the Grand Rapids District Supervisor. However, that process did not result in a change of the initial agency denial. Exhibit P-25.

Subsequent to the denial of the application the engineering firm retained by the Petitioner, Norlund & Associates, Inc., modified the original proposal. See Exhibits P-16 and P-17.

Testifying as to the specifics of this modified proposal was principal of that firm, Mr. James T. Norland, a registered Professional Engineer and Surveyor, and an employee of his firm Ms. Tracy Hutchinson. In the revised plan the length of the drive is some 400 feet,

approximately 25% of which occurs on slopes greater than 1 to 3, while its width was reduced to 10 feet. The total area effected would be somewhere between 4,000 to 4,500 square feet. By lengthening the drive and relocating it to the east the grade in the original proposal, 22 to 23%, is reduced to 17 or 18%.

The modified plan, which is the subject of this contested case, involves the utilization of 900 cubic yards of fill brought in from off-site. It also incorporates retaining walls, where necessary, to hold the fill in place. Mr. Nordlund acknowledged that the maximum height of the retaining walls of 20 feet is higher than normal, but testified it is not a construction problem. Storm water control on the drive would be provided by asphalt spill ways terminating in a catch basin at its bottom. All of these features were intended to ensure the drive would be functional and would not cause or increase erosion of this dune. Ms. Hutchinson testified erosion is unlikely because rolled lip gutters will keep water on the drive where it will be conveyed to the catch basin. She opined that the revised proposal poses a significantly lesser impact on the dune. Mr. Norlund concurred with this assessment, stating he has "no qualms" with the project's stability as designed. In fact, in his opinion the project as modified would increase the stability of the dune.

Mr. Michael Hayes, who had not been on site but reviewed the pertinent material, also testified on behalf of Petitioner regarding the modified proposal. He is familiar with the Part 353 regulatory program, having performed "hundreds" of regulatory reviews on critical dune sites, as well as pre-purchase evaluations on the Lake Michigan coast from the Indiana border to Cross Village. The need for the drive is to gain access to the crest, which he estimated to be 100 feet above the existing drive terminus. This will facilitate construction and, ultimately, day to day access by vehicle.[7] He agrees with Ms. Hutchinson and Mr. Nordlund that the project will neither increase erosion nor de-stabilize the dune.

[7] This purpose is limited, as Mr. Jankowski testified that while cars and ambulances could use a 10 foot wide drive, fire trucks require a minimum of 14 feet.

Mr. Luis Saldivia, a professional engineer, testified regarding two impressions he came away with as a result of viewing the site. First, based on what he characterized as a very steep feature on this property, he believes the project would present a very difficult engineering perspective. Second, he is of the opinion the drive will involve more of an impact on the dune than Mr. Norlund perceives. Specifically, based on his calculations the area of the drive would cover some 10,000 square feet, or approximately one quarter of an acre, as opposed to Mr. Norlund's estimate of .07 acres. He also characterized an 18% grade as too steep on its face, but admitted there are no rules or design standards for drives, although a grade in excess of 8 to 9% cannot be dedicated. Given these factors, he is of the opinion the best compromise is to locate the homesite at the base of the feature, thus causing very little impact to the dune.

Ms. Michelle Hohn is the LWMD employee responsible for administering the critical dune and high risk erosion area program for the 6 counties between Oceana and Berrien. She estimates she has been on the Jankowski property 7 or 8 times, but was not involved in the Sturr Permit. She determined various slopes and noted them on a copy of a detail map of the site prepared by Nordlund and Associates. Exhibit R-5. In referring to that exhibit, she noted the following slopes of the areas where the drive would be located:

At the asphalt spillway:	35%
At station 11+72:	40%
At station 12:	35%
Between station 12 and 12+59:	55% to 65%
At station 12+59:	65%
At station 12+81:	65%
At station 13:	75% to 80%
At station 13+55:	25%

Based on the foregoing measurements she determined that the drive would alter the slopes from their natural state, as outlined above, to the 17% average grade of the drive. The dune's slope would be vertical in the area of the retaining walls.

Ms. Hohn testified to 24 photographs of the proposed routes for the drive entered on this record. Exhibit R-6. The route of the original proposal is marked by red flags and the

revised by blue on those photographs. She testified that any time trees are removed, the grade is changed, and the dune sand is covered by a hardened surface and retaining walls the risk of erosion is enhanced. Additionally, the removal of the tree canopy will, according to Ms. Hohn, change the underlying vegetation and alter wind patterns, both of which contribute to increased erosion. Finally on this point, she expressed concern regarding the effectiveness of the project's surface water control.

Mr. Martin Jannereth is Chief of the Great Lakes Shoreline Section for LWMD. He is also a member of the internal special exception review panel established to obtain consistency in Part 353 permitting decisions. The Jankowski proposal was referred to the panel by Ms. Hohn. Exhibit R-15. Mr. Jannereth testified the revised proposal is not consistent with LWMD practice in that: 1) there is no practical difficulty; 2) there are feasible and prudent alternatives; and 3) it is more extensive than necessary. He characterized the proposal as presenting a significant impact to the dune to an extent greater than 95% or more of the applications he has reviewed. To permit this would, in his term, "lower the bar on driveways."

The Nature of the Dune

Alan F. Arbogast, Ph.D., an assistant professor in the Department of Geography at Michigan State University, testified on behalf of the LWMD. Professor Arbogast received his doctorate from the University of Kansas in 1995. His area of specialty involves geomorphology, or the evolution of landscapes, and in this context for the past 10 years his concentration is the study of sand dunes. To that end he has studied coastal dunes in Michigan to discern their formation and physical processes. He has examined dunes in the area of Grand Haven, Holland, Muskegon and Ludington, as well as Naubinway Point in the Upper Peninsula.

From his work Professor Arbogast testified there is a body of emerging data that is significantly refining the basic understanding of dune formation. Historically, scientists assumed these dunes, referred to as Nipissing dunes, are on the order of 5,000 years old and have been largely stable during that period. A second assumption is that these dunes enlarge when lake levels decline. The emerging data is showing that the dunes are much

more dynamic than previously thought, and they probably actually build during high lake phases. These studies are based upon an examination of the stratigraphy of dunes, namely by locating and carbon dating organic layers within them. In so doing the age of the sand strata above those layers can then be extrapolated. In Dr. Arbogast's studies of organic layers at the base of dunes have indicated an age as recent as 3,000 years. Therefore, the sand lying on top of that layer must have been deposited more recently than 3,000 years ago.

When the data regarding the age of a dune is correlated to a lake level curve, the carbon dated organic levels fall in the middle of high lake level periods. The interpretation from those facts is the carbon dates represent times of soil burial by sand. Therefore, soils form in periods of low lake levels at which time the dunes are stable. In Professor Arbogast's opinion, the frequency of these intervals (in geologic time) underscores the sensitivity and dynamics of these dune features.

Professor Arbogast was on the Jankowski site in February, 2000, and hand excavated a soil pit on the dune crest. From observing the soils he found only an "A" horizon present that indicates the soil and the sand above it have been in place a "very short time", estimating it to be less than 500 years. The presence of blow outs north and south of the subject parcel are also further evidence of instability, in his opinion. He also opined that building at the crest of the dune, and particularly the construction activity and vegetation removal, will destablilize the dune.

The Petitioner offered Mr. Thomas Segall in rebuttal of Professor Arbogast's testimony. In his former capacity as Assistant Supervisor of Wells and State Geologist Mr. Segall stated he was instrumental the formulation of the applicable statutes and regulation of sand dune mining. He was also involved in developing criteria and field designations that were adopted into the critical dune program. He reviewed the Petitioner's application and associated documents, engineering plans, aerial and surface photographs, video and visited the site. He is generally familiar with the Pentwater area having kept a boat there for twelve years. He was also present during Dr. Arbogast's testimony.

Mr. Segall explained the history of Lake Michigan dune formation from the recession of Lake Algonquin to the Nippasing stage commencing some 20,000 years ago. At that

later point in time a large beach area was exposed when the lake stage was some 30 to 60 feet lower, with the westerly winds then creating the dunes in parabolic shapes. In many areas, including this one, the lake stage rose enough to allow the establishment of vegetation, which served to stabilize the dunes. Conversely, in the Silver Lake and Ludington areas that phenomena of vegetation on the dunes did not occur, and as a consequence those features remain unstable and subject to wind movement. As to erosion, he stated it is an insignificant concern because these dunes consist of 99% porous sand, meaning any runoff is minimal. Further, he posits that there is always erosion, but not all of it is destructive.

Mr. Segall characterized this project as similar to those on which he worked, or reviewed, involving stabilization and roads for mining activities. In any activity on a dune he is most concerned with the exposure of the area to wind. Here that concern is minimized because the project would be on the leeward side of the dune, and thus sheltered from wind influence. Another concern is the impact on the face of the dune, an area he termed its most sensitive. Again, this concern is alleviated by the fact the existing buildings below will help stabilize the face by retarding the wind. A structure on top of the dune would not be threatened by the leeward open face, and in any event the leeward face on this dune is in the process of vegetating. Even so, he would recommend the installation of a fence or planting additional vegetation to minimize any potential problems from these factors. However, he is of the opinion any impacts from the proposal will be minimal and will not cause a significant alteration of this critical dune.

Mr. Segall testified the first he has heard of the theory espoused by Professor Arbogast was during his testimony at this hearing. He attributes the dichotomy between his testimony and that of the Professor to the difference between the training and orientation of a geographer and a geologist. However, he termed Dr. Arbogast's theory as flawed because it is contrary to generally accepted science.

As set forth above, there exists a disparity in the opinions of Dr. Arbogast and Mr. Segall relative to their respective perceptions of the dune's stability. Essentially, the conflict can be narrowed, for the most part, to geologic time. Perhaps at the risk of oversimplification, Dr. Arbogast is of the opinion that the dune is "newer" than originally

thought. It then follows that the dune may not be as stable as conventual wisdom, embodied in the testimony of Mr. Segall. While this could potentially be important over geologic time, what must be evaluated in this case is the more immediate impacts under the criteria of Part 353.

PART 353 ANALYSIS

This statute contains a regulatory scheme for land features the Legislature has determined are of great importance. MCL 324.35302. While the statute contemplates certain uses on these resources, specific criteria must first be met. MCL 324.35312 through MCL 324.35317. As this statute is an exercise of the authority to regulate land use, a local unit of government has the discretion to assume the regulation of critical dunes within its jurisdiction. MCL 324.35304. However, if a local unit of government declines this legislative grant of authority, as is the situation in this case, the Department of Environmental Quality is charged with administering the statute. MCL 324.35304(3).

Here the Petitioner proposes a drive within the confines of what Part 353 identifies as a critical dune area. MCL 324.35301(c). This requires a determination of whether the proposal falls within the scope of following provision of Part 353:

> Unless a variance is granted pursuant to section 35317, a zoning ordinance shall not permit the following uses in a critical dune area: ***
> MCL 324.35316(1).

Under the foregoing the initial question is whether the proposed activity is a "use".[8] The term "use" is defined as "...a developmental...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." MCL 324.35301(j). Thus a "use" consists of a two-part disjunctive test. The first component of the test, significant alteration, is not defined in the statute. However, the second part, contour change, is defined as a specified activity that "significantly alters the physical characteristic of the critical dune area...." MCL 324.35301(a).

[8] "Unless a variance is granted pursuant to section 35317, a zoning ordinance shall not permit the following uses in a critical dune area...." MCL 324.35316(1).

To determine if a "use" is at issue the proposed activity and its effects to the natural feature must be examined. This project entails placing 900 cubic yards of fill on this dune, some of which is held in place by walls up to 20 feet in height and installed at virtually 90 degree angles, to install a drive with an average grade of 17 to 18 degrees that traverses natural grades of up to 75 degrees. In addition, the features current surface would be covered by an impervious surface. Such an activity can only be termed a significant alteration of the dune's physical characteristic. The same consideration equally constitutes a contour change. Therefore, based on the record in this case I find, as a Matter of Fact:

1. The project applied for is a significant alteration of the physical characteristic of the dune.

2. The proposal would constitute a contour change of the dune.

Given the findings that the proposed activity constitutes a use in a critical dune area, the inquiry turns to whether it falls under one of the seven categories in § 35316(1) that can only be performed under the authority of a special exception. The most applicable category involves "[A] use involving a contour change that is likely to increase erosion, decrease stability, or is more extensive than necessary...." MCL 324.35316(1)(d).[9] As to the first two factors, an increase of erosion or decrease in stability, the evidence is in conflict. Of the engineers who have reviewed the project, Ms. Hutchinson and Mr. Nordlund discounted the probability of these factors occurring, while Mr. Saldivia expressed valid concerns. Giving the Petitioner the benefit of the doubt, it appears possible with proper engineering these risks can be minimized, but there is no evidence that would constitute clear assurance on this point. However, it is not necessary to decide this issue because as is discussed below, the record is clear on the final factor of whether the proposed activity is more extensive than necessary to implement the use.

The extent of the project ties into another category that implicates the requirement of a special exception, § 35316(1)(g), mandating the use be in the "public interest", a term

[9] Another category, § 35316(1)(f), covers "vegetation removal" and includes the same criteria. The analysis used for § 35316(1)(d) applies equally to that provision.

utilized in the context of avoidance of an impact to the resource. MCL 324.35316(1)(g)(i)-(ii). Specifically, the existence of either a feasible and prudent alternative location or method that provides the benefit sought from the use, or a means to minimize the effect to the resource, renders a special exception necessary.

The Petitioner desires to build a residence at the crest of the dune. In order to facilitate that process a drive must be installed. However, LWMD argues a homesite is available on the property that negates the need for a drive, although a tram or walkway would be permitted to allow access to the crest. That potential homesite is building at the terminus of the existing drive installed under the Sturr Permit. While this alternative is discussed in greater detail below, for the purpose of this analysis it is sufficient to find, as a Matter of Fact, the proposed activity falls within the criteria of § 35316(1)(g). I further find, as a Matter of Fact, the proposed activity involves a contour change and vegetation removal, both of which are more extensive than required to implement the use, thereby invoking § 35316(1)(d) & (f). Finally, I find, as a Matter of Fact, the use is proposed on a slope stepper than a 1 foot vertical rise in a 3-foot horizontal plane and as such falls under the criteria of § 35316(1)(b).

Based on the foregoing findings, the ultimate issue is reached: whether the Petitioner is entitled to a special exception under § 35317(1).

PRACTICAL DIFFICULTY

Section 35317(1) provides, as applicable:

> [t]he department 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. In determining whether a practical difficulty will occur if a variance or special exception is not granted, primary consideration shall be given to assuring that human health and safety are protected by the determination and that the determination complies with applicable local zoning, other state laws, and federal law....

Part 353 utilizes both the terms "variance" and "special exception". However, it is clear from the language of §§ 35316 and 35317 that the term "variance" is applicable to actions of local units of government under a zoning ordinance. Furthermore, the term

"special exception" applies to an action of the Department in the absence of a local ordinance under the model zoning plan, which occurred here. However, the terms are used synonymously in this statute.

The Petitioner contends the special exception is necessary because if access to the crest of the dune was achieved by means of a walkway or tram, both he and his wife would encounter difficulty as they age. While that concern is understandable, the personal condition of the Petitioner or a family member is not a proper basis upon which to grant a variance or special exception. Rather, the consideration must be limited to conditions of the land itself. *Davenport v Grosse Pointe Farms*, 210 Mich App 400, 534 NW2d 143 (1995); *Pollard v DBA*, 186 Conn 32, 438 A2d 1186 (1992).

Other than mandating that primary consideration be given to human health and safety, and that the project comply with all other applicable laws, neither Part 353 nor any rule promulgated thereunder defines the term "practical difficulty". However, it is a legal term of art commonly utilized in zoning law and in *National Boatland, Inc. v Farmington Hills Zoning Board of Appeals*, 146 Mich App 380, 388; 380 NW2d 472 (1985), the Court of Appeals articulated three factors to consider:

1. Whether compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.

2. Whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than the applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.

3. Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

It is under these directions that the proposed activity will be examined relative to the Petitioner's alleged practical difficulty if the special exception is denied.

I. Reasonable Use of the Property

This consideration requires a balancing of the proposed activity against the unique features of the property. It also entails a determination of the conditions of the property evident at the time Petitioner purchased the property. As to the latter, there is no dispute that the Petitioner and his wife purchased the property with actual knowledge of the inherent limitations on constructing a residence. First, the Petitioner was aware that Mr. Sturr, his predecessor in title, received a special exception for the drive that presently exists. He was also provided with Exhibit R-1, a part of the special exception application submitted by Mr. Sturr, that identified potential homesites other than on the crest. In fact, the Petitioner stated Mr. Sturr advised him to consider tram access to get to the crest of the dune. It was only after he explored this alternative that the Petitioner realized its shortcomings, namely it was more expensive than originally thought and of limited utility.

The balancing test brings into consideration the alternative LWMD contends allows the Petitioner with a reasonable use of his property: locating the homesite at the terminus of the existing driveway. The alternative homesite was discussed by Mr. Steve DeBrabander in the context of his participation in the process that resulted in the issuance of the Sturr Permit in 1992. Exhibit R-3. Mr. DeBrabander is currently employed by the Forestry Division of the MDNR, but previously worked for 20 years in the regulation of sand dunes, 10 with LWMD's Sand Dune Protection Program, and another 10 with Geological Survey Division in the area sand dune mining and reclamation. The purpose of the application that culminated in the issuance of the Sturr Permit was to allow motor vehicle access to the property. Mr. DeBrabander noted the drive installed under the Sturr Permit came after extensive exploration of alternative locations for both a drive and homesite. Ultimately the Parties reached an agreement on the location that would ensure vehicular access to a buildable area. See Exhibit R-1. Mr. DeBrabander is of the opinion that the Petitioner's proposal disregards the utility that homesite, and the expansion of that drive poses the potential for greater impact on the dune.

Mr. Edward F. Steigerwalt testified on behalf of the LWMD regarding the alternative it advances. He is a consulting forester and real estate appraiser based in Tomahawk, Wisconsin, but has worked in Michigan since 1970. He believes the parcel is best suited

for residential use, but the severe topography would prevent subdivision. He opined the market would support a multi-story residence, with a garage on the first level, that afforded a view of Lake Michigan, situated at the terminus of the existing drive. He estimated the reasonable property value of the site if limited to a building site as proposed by LWMD to be $70,000.[10]

The Petitioner does not agree that a homesite at the end of the existing drive, an area he terms the "parking area", is reasonable. The basis for this contention is twofold. First, according to the Petitioner's measurements the area available for a homesite consists of some 1,056 square feet between steep unbuildable areas to the north and south. He asserts this is not sufficient area for a homesite, garage, parking area, well and septic system. The site would also be too small for a yard, and turning cars around would be difficult. The second factor is subjective, using the alternative site would render a view of Lake Michigan problematical because even with a structure of two or three stories the view would be obscured by trees, especially with summer foliage. As to other potential locations, the Petitioner stated the area to the west of the existing drive is unsuited for a homesite due to the steep drop to the roadway. Thus, the Petitioner takes the position that if he cannot utilize the crest as a homesite he will not build on the property.

[10] There is no evidence on this record as to the purchase price paid by the Petitioner and his wife for this property.

Perhaps utilizing a subjective standard the Petitioner's concern with the sites could support a finding that these sites are not suitable. The problem with such a standard is that the constraints imposed by this statute could easily be avoided by proposing a use of such dimension that any alternative would not be prudent. This Tribunal is not prepared to sanction such an occurrence. Rather, by looking at the entirety of the parcel objectively, it is evident that building sites other than at the crest of the dune are available. See Exhibit R-1. Specifically, the point at the terminus of the existing drive, while not precisely what the Petitioner desires, is suitable for a homesite. This site would allow for a structure with a dimension of some 20 by 46 feet, or 920 square feet per level, with a garage on the first level potentially incorporated into the design.[11] Additionally, the Petitioner could seek a permit or variance if some incidental activity was necessary. However, he will not even consider the potential for such a use.

[11] As noted above, the basis of the Petitioner's position that such a design could prove difficult as he and his wife age is not a valid consideration. See *Davenport v Grosse Pointe Farms, supra*.

The analysis of this prong of the practical difficulty test is limited to the 4 corners of the Petitioner's property.[12] While the LWMD makes a point that Petitioner has not obtained a building permit from the Township of Pentwater for a residence at the crest, there is no question that he intends to use the property as a single family dwelling and that the drive is ancillary to that use. It would make no sense for him to construct a drive that would go nowhere. Admittedly, anything short of a homesite on the crest of the dune will not give Petitioner the optimum use of the property. However, that does not equate to another location constituting an unreasonable use. The topography of the site, its designation as a critical dune and the Petitioner's knowledge of the Sturr Permit compels a conclusion that any residential use must minimize the impacts to the dune. The alternative homesite at the terminus of the drive serves that purpose. Therefore, I find, as a Matter of Fact, denying the special exception does not deprive the Petitioner a reasonable use of this property.

II. Substantial Justice Served

This standard requires a balancing of the Petitioner's desires against the interest of other property owners in the area. There was no evidence submitted applicable to direct impacts on other property owners. The Petitioner noted the drive and homesite would not be visible from adjoining properties. While an inference may be made that any alteration of the natural features might lower the aesthetic value of the property to other owners in the area, this does not elevate to a deprivation of substantial justice. For the reasons stated above under the reasonable use analysis, limiting building to that at the terminus of the drive will provide Petitioner substantial justice.

III. Relief within the Spirit of the Ordinance

The "spirit" of Part 353 is articulated in the legislative findings:

The legislature finds that:

(a) 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

[12] Part 353 utilizes similar logic: "[I]f a proposed use is 1 single family dwelling on a lot of record owned by the applicant, consideration of feasible and prudent alternative locations shall be limited to the lot of record on which the use is proposed." MCL 324.35316(g)(i)

to the people of this state and to people from other state and countries who visit this resource.
***
(c) The benefits derived from alteration, industrial, residential, commercial, agricultural, silvacultural, 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.
MCL 324.35302.

In the final analysis, based on this record there is no assurance that the environment and ecology of this critical dune area will be protected if the alteration is allowed. Therefore, to grant the special exception requested by Petitioner would neither comport to the "spirit" of Part 353 nor foster the public welfare.

CONCLUSIONS OF LAW

Based on the findings of fact set forth above, I conclude, as a Matter of Law:

1. Mr. Eugene Jankowski is the proper applicant for a permit and the processing of the application for a permit was procedurally correct.

2. The proposed activity is a use as the term is defined in Part 353. MCL 324.35301(j).

3. The proposed activity is a use on a slope within a critical dune area that has a slope greater than a 1-foot vertical rise in a 3-foot horizontal plane. MCL 324.35316(1)(b).

4. The proposed activity is a use involving a contour change that is more extensive than required to implement a use for which a permit is required. MCL 324.35316(1)(d).

5. The proposed activity is a use that involves vegetation removal that is more extensive than required to implement a use for which a permit is required. MCL 324.35316(1)(f).

6. Utilizing the area at the terminus of the existing drive for a homesite is both a feasible and prudent alternative location and means to minimize the impact to the dune. MCL 324.35316(1)(g)(i)(ii).

7. Age or personal health problems are not considered practical difficulties under the special exception provisions of Part 353. *Davenport v Grosse Pointe Farms*, 210 Mich App 400, 534 NW2d 143 (1995).

8. Mr. Eugene Jankowski has not demonstrated a practical difficulty sufficient to merit a special exception for a project of the dimensions for which he applied, or proposed during the hearing. MCL 324.35317(1). *National Boatland, Inc. v Farmington Hills Zoning Board of Appeals*, 146 Mich App 380; 380 NW2d 472 (1985)

PROPOSAL FOR DECISION

Based upon the above Findings of Fact and Conclusions of Law, it is proposed that a Final Order be entered that denies the application for a special exception as applied for by Mr. Eugene Jankowski under File No. 98-OC-0394-C.

Dated: February 22, 2001

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Richard A. Patterson
Administrative Law Judge