

# **Sampling of Historic and Current Court Cases Related to Michigan Dune Law**

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## *Foundational concepts in Michigan dunes case law*

Under Part 353, permitting of development follows a complicated but formulaic process to reach a decision. State statute stipulates that a zoning ordinance shall not permit a use (unless a variance is granted) “on a slope within a critical dune area that has a slope steeper than a 1 foot rise over a 3 foot horizontal plane” – the 33 percent slope rule. The statute defines a “use” as “a developmental. . . activity done or caused to be done by a person that significantly alters the physical characteristic of a critical dune areas or a contour change done or caused to be done by a person.”

The threshold for a Part 353 permit application is whether the applicant “significantly alters the physical characteristic of a critical dune area” or causes a contour change of the dune. If the contour change or alteration causes the likelihood of erosion to increase or decrease stability, then a 353 permit cannot be issued unless there is a special exception. In order to receive a special exception the applicant must show that there is a “practical difficulty” that arises from not having a permit.

A principal of zoning law has been utilized to address practical difficulty, and a three-factor test is used: 1) whether compliance with the strict letter of the restrictions would unreasonably prevent the owner from using the property for the permitted purpose or would be unnecessarily burdensome; 2) whether the special exception would do substantial justice for the owner; and 3) whether relief can be granted in such fashion that the spirit of the ordinance is observed and public safety and welfare secured. Additionally, within the “spirit of the ordinance” factor, environmental concerns are considered, as that is in the legislation as an announcement of purpose. Courts have found that these concerns must be concrete and not speculative.

The decision makers also must look at two other factors when deciding whether to grant a special exception: whether there are “feasible and prudent alternatives,” and whether the applicant created the problem. An objective standard is used to determine both of these factors. Additionally, the applicant’s subjective reasons are not by themselves sufficient to overcome the

feasible and prudent alternatives, but can be considered. If there are no feasible and prudent alternatives, the applicant did not create the problem, and the spirit of the ordinance can be followed, a special exception permit will be granted. This is a highly fact specific test, however, meaning that outcomes of special exception cases are not necessarily predictable due to the highly varied nature of Critical Dune areas in question in each case. Though the special exception test is generalized, the specific facts of a certain permit request can alter the result, even if it looks fairly similar to a previous case.

In reviewing case law on Michigan's dune law, it is also useful to review some case law on takings, which is conveniently summarized in a 2002 MSU Extension brochure available online at: <http://lu.msue.msu.edu/pamphlet/Blaw/AcrobatPamphletTakingsCaseLaw.PDF>

### *Sample Dunes Court Cases*

**Risko et. Al v. Grand Haven Charter Township Zoning Board of Appeals – Michigan Court of Appeals – 2009.** The court upheld the initial decision of the Zoning Board of Appeals. The critical dune caused the petitioner's designs for a garage to encroach past the zoning required setback. The court held that the Zoning Board's denial, which was based on an alternative design that would also avoid the critical dune, was sufficient as it did not deny the petitioner residential use and enjoyment, it only denied a preferred design. *Note: the first case (Risko et al. v Grand Haven) is the only "precedential" case summarized here. The remaining cases – circuit court, unpublished appellate court, and administrative court decisions – are not binding, but could be argued as supporting cases.*

**Jemal v. DEQ – Leelenau County Circuit Court – 2008.** This case addressed a denial of a special exception to build three cottages and an access road that would run through a critical dune area. The Director issued a final order that allowed Jemal to build the three cottages, but the special exception to construct the road was denied. The Sand Dune Protection and Management Act (SDPMA) states that a use that cannot be permitted may be allowed if a "practical difficulty will occur to the owner of the property." The court determined that Jemal would suffer a practical difficulty that was not outweighed by the Director's need for environmental assurances. The court considered the Director's decision to be supported only by speculative harm to the environment, especially when viewed in the light of the critical dunes around the entire state being the protected resource, not any singular dune. The court found Jemal's expert witnesses on the engineering aspects to be credible and therefore found in favor of Jemal and order the Director to grant the special exception.

**In re Buford – Proposed Final Decision – 2008.** Are additions to existing structures exempt from Part 353, which allows for existing non-conforming structures to be restored or extended upon reasonable terms? The ALJ determined that it is not the type of use that must pass muster (in this case the applicant wanted to change a basketball court into a pool) but whether that piece of land was used in a non-conforming matter. Since this land had been used in a non-conforming way, it could continue to be used in that way as long as it was not expanded to affect more of the critical dune. It should be noted that there is no final order in this case, so any arguments based on this are tenuous.

**Heaphy v. DEQ – Unpublished Court of Appeals Case – 2006.** William and Anne Heaphy owned a number of lots in Port Sheldon Township, in Ottawa County and in 2000 received an offer to purchase them, if development on the lots with critical dunes would be approved. Port Sheldon Township was administering the Act, and denied the permit as it violated their local critical dune ordinance. The Heaphys appealed the decision in Ottawa Circuit Court, which ruled that it was a “compensable regulatory taking.” The township rescinded its local ordinance and the DEQ subsequently denied a special exception permit under the Sand Dune Protection and Management Act (SPDMA). The Court of Appeals upheld the decision of the Court of Claims and awarded Plaintiffs \$1.74 million, as the court found that the DEQ deprived plaintiffs of all economically beneficial use of Lots 1-3. The court held that even though the DEQ had not finished looking into alternative possible sites for homes, the decision put forth by the hearing referee should be considered final by the courts and therefore eligible for judicial review. Since the SDPMA would bar all buildings on the property under the DEQ’s administrative decision, the court’s considered this a regulatory taking as it denied plaintiffs all economically beneficial use of the property. The court did not entertain other DEQ arguments, though it did acknowledge that if Wetlands Protection Act Language were incorporated into SPDMA the DEQ would gain title to the land, which was instead forfeited.

**Petition of Onekema Township – Administrative hearing – 2005.** Onekema Township owned a park on Lake Michigan and the facilities of the park became nearly unusable due to sand buildup, especially for the handicapped. Onekema proposed a project that would flatten a large portion of the critical dune to attempt to control this sand buildup. The decision ultimately came down to whether this project constituted a “use” of the critical dune area. The Administrative Law Judge (ALJ) determined that this was a use and also that it was not merely the continuance of a use from prior to the critical dune protection laws. Additionally, the ALJ looked to alternative sites and found that in this case a special exception was not called for, as there was no practical difficulty. The ALJ also considered that the proposed project would not provide a permanent solution to the problem in deciding against a permit.

**Petition of Dune Harbor Estates – Administrative hearing – 2004.** The owner of Dune Harbor Estates was in the business of sand mining on property along the shore of Lake Michigan under the name of Nugent Sand. Nugent Sand created two mining lakes as a part of this process, and Dune Harbor Estates took control of the land surrounding South Lake with plans for development. The water level of South Lake rose and cut into the development plans. Dune Harbor proposed installing a water control device under Part 301 and a pipeline through a dune under Part 353. The ALJ denied the Part 353 permits for the pipeline, determining that the proposed project constituted a contour change that was likely to increase erosion, decrease stability, or was more extensive that required and therefore would require a special exception. This decision rested on a two-factor test for a Part 353 determination in whether the project is in the public interest: 1) is there a feasible and prudent alternative; and 2) the impact to the dune and the extent it can be minimized. In this case there was determined a feasible and prudent alternative and that a special exception permit would be necessary. Further, the drain was determined to be a structure and though this is specifically barred, it still could meet the requirements for a special exception permit.

In order to receive a special exception the ALJ must find that a three-part test is met in regards to whether a “practical difficulty” will occur: 1) would compliance with strict letter of the law prevent the owner from using the property for a permitted purpose; 2) would a grant of the variance applied for do substantial justice to the applicant; and 3) is the relief granted in such fashion that the spirit of the ordinance is observed and public safety and welfare secured. The ALJ in this case expanded the spirit test to include the purpose of the legislation, which for Part 353 included protecting the environment and ecology of critical dune areas. The other two points the ALJ addressed were 1) whether alternatives exist, and 2) whether the problem was self-created. In this case, both applied as Dune Harbor could choose not to build the homes and lose some profit, and also Dune Harbor created both the problem of the mining lake and acted too quickly on predictions of future lake level. Lost profit was also not considered to be a practical difficulty under the statute. Ultimately, the drain would substantially change the structure of the dune, was not in the spirit of the statute, and there were feasible and prudent alternatives. The ALJ did permit the water control device under Part 301.

**Petition of Jankowski – Administrative Hearing – 2001.** The Jankowskis wished to build a driveway to a proposed homesite on the crest of a critical dune area. One argument the Jankowskis attempted to advance is that “significant” should relate to the whole dune area. The ALJ rejected this argument and considered the localized impact and whether it was significant. The ALJ articulated the use test (significant alteration plus a contour change) and determined this was a “use,” meaning there must be a special exception. In this case an alternate feasible solution was found – building the home at end of existing drive. Though this was not Jankowskis choice, and they stated they would not build if they could not build at the top of the crest, the ALJ determined that the subjective choice of the applicants does not matter, and instead the focus is on any reasonable alternatives. Due to the alternatives, Jankowskis permit was denied.

In addition to the historical cases summarized above, other legal issues and challenges are ongoing in several areas of Michigan today, including:

**White River Township Barrier Dunes Sanctuary.** In the mid-1980s, White River Township, in northern Muskegon County, established a lakeshore dunes preserve with Michigan Natural Resources Trust Fund support. The dunes in the preserve were subsequently designated as critical dunes in 1989, with the passage of the Act. However, the township was not able to purchase a two-acre parcel within the new preserve and attempted a number of times in the ensuing years to acquire it. During this time, there were numerous permit applications by the owners of the landlocked property to construct a road through the preserve to access and develop the property. After the DEQ denied the most recent permit application in 2013, the developers sued the township. In January of 2015, a court settlement was announced that required the developers to offer the property to the township for \$900,000. The township has applied for a grant from the Michigan Natural Resources Trust Fund and is currently working to raise local match funds. (Kloosterman, 2014)

**Singapore Dunes LLC, Saugatuck.** Critical dune development issues have been at the forefront in the Saugatuck area since 2006 when the owner of Singapore Dunes LLC, Aubrey

McClendon, of Oklahoma, purchased over 400 acres of Saugatuck Township land. In March 2014, the company was granted a variance and approved to construct a two-lane blacktop road through critical dunes to access 18 home sites north of Saugatuck on Lake Michigan, as well as a condominium and marina project. The permit was opposed by the Saugatuck Dunes Alliance and other environmental and conservation organizations. (Harger, 2014)

**Presbyterian Camp/Dune Ridge SA, Saugatuck.** In 2014, Dune Ridge SA, funded by Grand Rapids investor Paulus Heule and by developer David Barker, purchased the lakefront property south of Oval Beach at Saugatuck owned by the Presbytery of Chicago. The Presbytery sold the property for \$10 million to Dave Barker, over an offer of \$8 million from a preservation organization. In 2013, the city of Saugatuck approved a special-use permit for a road and eight homes on about 23 acres of the 130-acre camp property prior to the purchase of the property. There are several outstanding lawsuits associated with the permits for the property. In February of 2015, Dune Ridge SA announced it is seeking approval for six regular residential structures, three of which front Lake Michigan, and several which will need critical dune permits. (Biolchini, 2015)