

REVISION OF MICHIGAN'S SAND DUNE PROTECTION AND MANAGEMENT ACT BENEFITS PRIVATE INTERESTS AT THE EXPENSE OF LOCAL ZONING REGULATIONS

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I. INTRODUCTION

Coastal sand dunes are one of Michigan's most treasured and unique resources.¹ The dune sand itself is useful in foundries and manufacturing,² and property within a coastal dune area is valuable for development and recreation.³ The dunes are also an ecosystem housing many species of plants, birds, and other wildlife.⁴ In 1994, Michigan enacted legislation to protect its extensive coastal dunes through a comprehensive statute centered on a land use permitting system.⁵ The statute also included provisions for regular environmental studies monitoring the condition of the sand dune ecosystem.⁶ Further, it established a model zoning plan,⁷ although local units of government were able to enact ordinances providing at least the same degree of protection to the critical dunes as the model zoning plan.⁸ The amended statute still allows local units of government to enact zoning ordinances,

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1. STEVEN E. WILSON, MICH. DEP'T OF ENVTL. QUALITY, MICHIGAN'S SAND DUNES 2 (2001), available at http://www.michigan.gov/documents/deq/PA07_304669_7.pdf.

2. *Id.* at 8-9.

3. *Coastal Dunes*, MICH. DEP'T OF NAT. RESOURCES, http://www.michigan.gov/dnr/0,1607,7-153-10370_22664-61314--,00.html (last visited May 14, 2014).

4. *Id.*

5. MICH. COMP. LAWS ANN. § 324.35302 (West 2006) (amended 2012); *Coastal Dunes*, *supra* note 3.

6. MICH. COMP. LAWS ANN. § 324.35311 (West 2006) (amended 2012).

[T]he department shall appoint . . . qualified ecologists . . . who shall review the atlas of critical dune areas . . . and shall recommend to the legislature any changes to the atlas or underlying criteria revisions to the atlas that would provide more precise protection to the targeted resource.

Id. The section further required the ecologists to evaluate whether the slope criteria in other sections remained appropriate to protect the dunes. *Id.*

7. MICH. COMP. LAWS ANN. § 324.35301 (defining "model zoning plan" and referencing the sections of the Act where the provisions of the model zoning plan may be found); MICH. COMP. LAWS ANN. § 324.35326-.35338 (West 2006) (establishing the model zoning plan).

8. MICH. COMP. LAWS ANN. § 324.35304.

but only those providing “substantially equivalent” protection⁹ to the critical dunes as the model zoning plan¹⁰ will be approved. Thus, the state effectively determines both the floor and ceiling for regulation.

This Note proposes that a minimum standard established by the Sand Dune Protection and Management Act that still allows local units of government to enact local zoning ordinances best suited to that locality’s goals is a better way to balance the competing interests over Michigan’s sand dunes.

Part II of this Note discusses the history of the land use regulation of sand dunes in Michigan.¹¹ Next, it identifies the most significant changes rendered by the 2012 amendments.¹² Additionally, it describes similar statutes in other states.¹³

Part III analyzes the shift to a state-mandated level of regulation from one that allowed more restrictive local zoning ordinances.¹⁴ Further, the major changes to the Sand Dune Protection and Management Act and the resulting effect on land use regulation as an environmental protection mechanism is explored.¹⁵ This Note also considers what impacts, if any, the amendments will have on Michigan’s vulnerability to regulatory takings claims.¹⁶ Finally, the approaches taken by Maine and Virginia are compared to Michigan’s approach to land use regulation on sand dunes.¹⁷

II. BACKGROUND

A. History of Michigan Legislation Regulating Land Use on Sand Dunes

There are various competing interests on sand dune property.¹⁸ These areas are popular places for recreation and home sites.¹⁹ However, it is also a fragile ecosystem home to many species of plants and animals.²⁰

9. *Why Were SB 1130 & HB 5647 Introduced?*, MICH. HOUSE OF REPRESENTATIVES, <http://house.michigan.gov/sessiondocs/2011-2012/testimony/Committee22-6-12-2012-2.pdf> (last visited May 14, 2014).

10. MICH. COMP. LAWS ANN. § 324.35304 (West 2013).

11. *See infra* Part II.A.

12. *See infra* Part II.B.

13. *See infra* Part II.C.

14. *See infra* Part III.A.

15. *See infra* Part III.B.

16. *See infra* Part III.C.

17. *See infra* Part III.D.

18. *The Sand Dunes Program*, MICH. DEP’T OF ENVTL. QUALITY, http://www.michigan.gov/deq/0,4561,7-135-3311_4114_4236-9832--,00.html (last visited May 14, 2014).

19. *Id.*

20. *Id.*

To protect the critical dune area environment, the Michigan legislature passed the Sand Dune Protection and Management Act (Act) in 1996.²¹ In August of 2012, the Act was extensively amended.²² The new statute offers more protection of private property rights to insulate the state from costly lawsuits, according to Governor Rick Snyder.²³

The lawsuits Governor Snyder referred to are regulatory takings claims by property owners who are denied the ability to develop the sand dune properties as they might like.²⁴ In the most notable of these claims, the Michigan Court of Appeals awarded a \$1.74 million judgment against the Michigan Department of Environmental Quality in favor of a property owner in 2006.²⁵ The rights of private property owners sometimes directly conflict with environmental concerns, and the Michigan legislature sought to rebalance those competing interests through extensively amending the Act.²⁶ Environmental groups opposed the amendments and expressed concern that consequences to the dune ecosystem would be too great to justify increased protection of property ownership rights.²⁷ Nearly every section of the 1996 Sand Dune Protection and Management Act was changed in some way. This Note will focus on the most significant changes and the resulting implications.

B. The 2012 Amendments Extensively Altered the Sand Dune Protection and Management Act

There are four key changes to the Act.²⁸ Most significantly, there is now a greater degree of state preemption of local zoning ordinances.²⁹

21. MICH. COMP. LAWS ANN. § 324.35302 (West 2006) (amended 2012) (describing the purpose of the law and stating that local units of government should play a significant role and that the benefits of private uses must be carefully balanced against environmental protection).

22. *Critical Dune Area Statute*, *supra* note 9.

23. *Snyder Signs Bill Protecting Sand Dunes, Rights of Homeowners*, MICHIGAN.GOV (Aug. 7, 2012), <http://www.michigan.gov/snyder/0,4668,7-277-57577-283932--,00.html>.

24. *See, e.g.*, *Heaphy v. Dep't of Env'tl. Quality*, No. 257941, 2006 WL 1006442 (Mich. Ct. App. Apr. 18, 2006).

25. *Id.*

26. Jim Hayden, *Governor Signs New Critical Dunes Legislation*, HOLLAND SENTINEL (Aug. 7, 2012), <http://www.hollandsentinel.com/news/x132294286/Governor-signs-new-critical-dunes-legislation>.

27. Daniel Schoonmaker, *Despite Thousands of Asks Not To, Gov. Weakens Sand Dune Protections*, WMEAC BLOG (Aug. 7, 2012), <http://thewmeacblog.org/2012/08/07/despite-thousands-of-asks-not-to-gov-signs-dunes-bill/>.

28. MICH. COMP. LAWS ANN. §§ 324.35311-.35312 (West 2013).

29. MICH. COMP. LAWS ANN. § 324.35312(2) (allowing a zoning ordinance that provides “substantially equivalent protection” to the critical dune area as the model

The Act no longer allows zoning ordinances that provide greater protection than the model zoning plan.³⁰ In another section, the Act formerly provided for state assistance to local units of government to develop zoning ordinances.³¹ Post-amendment, this section allows a local unit of government to submit a zoning ordinance to the department for approval “based on the model zoning plan or an equivalent ordinance.”³² Additionally, this section also established the model zoning plan as the default zoning ordinance if the local unit of government does not receive approval for its own zoning ordinance.³³ The Act also now prohibits localities from using a different standard of review for permits than the model zoning plan. The Act formerly provided for a public hearing on a permit application at the written request of two or more persons that own real property or reside within the local unit of government or an adjacent local unit of government;³⁴ the amendments require the written request of persons that own real property within two miles of the project.³⁵ This

zoning plan). *Cf.* MICH. COMP. LAWS ANN. § 324.35312(2) (West 2006) (amended 2012) (allowing a zoning ordinance with provisions that are “at least as protective” as the model zoning plan). *But see* Scott Sullivan, *Developer Joins Foes Suing Township over Dunes*, ALLEGAN COUNTY NEWS (June 12, 2013, 11:38 AM), http://www.allegannews.com/articles/2013/06/13/cr_news/1.txt (reporting on a western Michigan township currently litigating this portion of the Act in an effort to enforce its local zoning ordinances).

30. MICH. COMP. LAWS ANN. § 324.35312(2) (allowing a zoning ordinance that provides “substantially equivalent protection” to the critical dune area as the model zoning plan).

31. “The department shall assist local units of government in developing ordinances that meet the requirements of this part.” MICH. COMP. LAWS ANN. § 324.35304(6) (West 2006) (amended 2012).

32. The amended text states,

A local unit of government may adopt, submit to the department, and obtain approval of a zoning ordinance based on the model zoning plan or an equivalent ordinance as provided in this section by June 30, 1990. If a local unit does not have an approved ordinance by June 30, 1990, the department shall implement the model zoning plan for that local unit of government in the same manner and under the same circumstances as provided in subsection (1). Notwithstanding any other provision of this part, a local unit of government may adopt a zoning ordinance at any time, and upon the approval of the department, that ordinance shall take the place of the model zoning plan implemented by the department.

MICH. COMP. LAWS ANN. § 324.35304(6) (West 2013).

33. MICH. COMP. LAWS ANN. § 324.35304(6).

34. MICH. COMP. LAWS ANN. § 324.35304(1)(c) (West 2006) (amended 2012) (allowing local units of government to issue permits for land use within critical dune areas).

35. MICH. COMP. LAWS ANN. § 324.35304(1)(c) (West 2013) (restricting the individuals that may request a public hearing to those that “own real property within 2 miles of the project”).

further restricts local involvement in permit decisions by limiting persons who may request a public hearing to those who live within two miles of the project site,³⁶ a much narrower and probably like-minded category as compared with the former local unit of government or adjacent local unit of government to the project site.³⁷

Another major change is mandatory permit approval with certain exceptions to be provided in writing;³⁸ thus, permits are easier for an applicant to obtain.³⁹ This effectively established a presumption in favor of permit approval. The Act now *requires* permit approval unless the local unit of government or department of environmental quality determines “that the use will significantly damage the public interest” in the land in at least one of three enumerated ways.⁴⁰ The amendments also removed express permission for a local unit of government zoning ordinance to be more restrictive in regulating critical dune use than the model zoning plan, even though a local unit of government may still pass

36. *Id.* The law describes one of the conditions that all permit requests are subject to as follows:

The notice shall state that unless a written request is filed with the local unit of government within 20 days after the notice is sent, the local unit of government may grant the application without a public hearing. Upon the written request of 2 or more persons who own real property within 2 miles of the project, the local unit of government shall hold a public hearing pertaining to a permit application.

Id. Additional conditions are enumerated in subsections (1)(a)-(g). *Id.*

37. MICH. COMP. LAWS ANN. § 324.35304(c) (West 2006) (amended 2012).

38. MICH. COMP. LAWS ANN. § 324.35304(1)(g) (West 2013). *Cf.* MICH. COMP. LAWS ANN. § 324.35304 (West 2006) (amended 2012).

39. MICH. COMP. LAWS ANN. § 324.35304(1)(a) (West 2006). *But see* MICH. COMP. LAWS ANN. § 324.35304(1)(a) (West 2013) (requiring that measures be necessary as opposed to only maybe necessary); MICH. COMP. LAWS ANN. § 324.35304(1)(b) (West 2006). *Cf.* MICH. COMP. LAWS ANN. § 324.35304(1)(c) (West 2013) (allowing notice to be “sent” rather than requiring mailing).

40. MICH. COMP. LAWS ANN. § 324.35304(1)(g) (West 2013).

[A] permit shall be approved unless the local unit of government or the department determines that the use will significantly damage the public interest on the privately owned land, or, if the land is publicly owned, the public interest in the publicly owned land, by significant and unreasonable depletion or degradation of any of the following:

- (i) The diversity of the critical dune areas within the local unit of government.
- (ii) The quality of the critical dune areas within the local unit of government.
- (iii) The functions of the critical dune areas within the local unit of government.

Id. The prohibited uses stated in MCLA section 324.35316 remain effective, and permits are not granted for those uses unless a variance is issued. *See* MICH. COMP. LAWS ANN. § 324.35304(1)(g); MICH. COMP. LAWS ANN. § 324.35316.

zoning ordinances after department approval.⁴¹ Local zoning ordinances must still include all provisions of the model zoning plan or provide “substantially equivalent” protection to the critical dune area. However, the amendments added a provision that local ordinances may not be more restrictive or use a different standard of review than that of the model zoning ordinance.⁴² The Act now mandates written permit decisions that include evidence.⁴³ Permit denials have additional requirements.⁴⁴

The final notable changes are greater state control in adjusting the land within the critical dune area,⁴⁵ and environmental research to ensure the continued health of the ecosystem is optional and less intensive.⁴⁶ The amendments require department approval prior to classifying additional land as a “critical dune area” and the additional land must be “essential to the hydrology, ecology, topography, or integrity of a critical dune area.”⁴⁷ The amendments changed a prior mandate that the

41. MICH. COMP. LAWS ANN. § 324.35304(2) (West 2006). *But see* MICH. COMP. LAWS ANN. § 324.35304(6) (West 2013) (narrowing the circumstances under which a local unit of government may adopt zoning ordinances that differ from the statewide model zoning ordinance).

42. MICH. COMP. LAWS ANN. § 324.35312(1)-(2) (West 2006). *But see* MICH. COMP. LAWS ANN. § 324.35312(1)-(2) (West 2013) (stating that local units of government may adopt local zoning ordinances that differ from the model zoning plan as long as the local ordinance provides “substantially equivalent” protection and is not more stringent than the model zoning plan).

43. The model zoning plan requires the following:

(2) The decision of the local unit of government or the department with respect to a permit shall be in writing and shall be based upon evidence that would meet the standards in section 75 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.275. A decision denying a permit shall document, and any review upholding the decision shall determine, all of the following:

(a) That the local unit of government or the department has met the burden of proof under subsection (1).
(b) That the decision is based upon sufficient facts or data.
(c) That the decision is the product of reliable scientific principles and methods.
(d) That the decision has applied the principles and methods reliably to the facts.
(e) That the facts or data upon which the decision is based are recorded in the file.

MICH. COMP. LAWS ANN. § 324.35304(2) (West 2013).

44. *Id.* § 324.35304(1)(g), (2) (listing the only reasons that a local unit of government may deny a permit application and the requirement that the reason for a permit denial be in writing).

45. *Id.* § 324.35301(c) (defining “critical dune area” as the “geographic area designated in the ‘atlas of critical dune areas’ dated February 1989 that was prepared by the department of natural resources”).

46. *Id.* § 324.35312.

47. *Id.* § 324.35311.

department decennially appoint a team of qualified ecologists to review the “atlas of critical dune areas” and ensure that the criteria “are appropriate and supported by the best available technical data” to an optional measure that might be considered.⁴⁸ Further, the amendments placed a limitation on distance that newly included land can be from land included in the 1989 “atlas of critical dune areas.”⁴⁹

The Act was amended in various less significant, yet still noteworthy, ways. The purpose section was expanded to expressly consider the importance of private property rights and economic development in addition to protecting the environment as goals of the statute.⁵⁰ Additionally, the public notice provision for a public hearing was modified.⁵¹

A subsection was added to provide for department issuance of permits and implementation of the model zoning plan if the local unit of government does not issue permits or obtain approval for a zoning ordinance regulating critical dune areas.⁵² Under the former statute, uses that had received necessary permits prior to July 5, 1989 were exempt from new permitting requirements.⁵³ The amendments added exemptions for maintenance or replacement of “existing utility lines, pipelines, or other utility facilities within a critical dune area that were in existence on July 5, 1989 or were constructed in accordance with a permit under this part”⁵⁴ with limitations on how the maintenance may be performed protecting the critical dune areas.⁵⁵ The Act now limits requests to

48. Compare MICH. COMP. LAWS ANN. § 324.35311 (West 2013), with MICH. COMP. LAWS ANN. § 324.35311 (West 2006) (adjusting when and how the atlas of critical dunes may be reevaluated in addition to reassessment of environmental impacts to the dunes).

49. MICH. COMP. LAWS ANN. § 324.35311 (West 2013).

50. Compare MICH. COMP. LAWS ANN. § 324.35302(b) (West 2006), with MICH. COMP. LAWS ANN. § 324.35302 (West 2013) (no longer including a role for local units of government and stating that private property rights and other economically beneficial uses are the primary considerations for uses of critical dune areas).

51. Compare MICH. COMP. LAWS ANN. § 324.35304(d) (West 2006), with MICH. COMP. LAWS ANN. § 324.35304 (West 2013) (no longer including additional publication requirements).

52. MICH. COMP. LAWS ANN. § 324.35304 (West 2013).

53. MICH. COMP. LAWS ANN. § 324.35317(1)(a)-(b) (West 2006) (amended 2012).

54. Compare MICH. COMP. LAWS ANN. § 324.35306 (West 2013), with MICH. COMP. LAWS ANN. § 324.35306(4) (West 2006) (providing more specific rules when previously local units of government had more discretion regarding permit applications).

55. The model zoning plan now provides an exception for structures that existed prior to 1989:

A permit shall not be granted that authorizes construction of a dwelling or other permanent building on the first lakeward facing slope of a critical dune area or foredune *except on a lot of record that was recorded prior to July 5, 1989* that does not have sufficient buildable area landward of the crest to construct the

institute an injunction or restraining order from the department or a local unit of government where previously an individual person could make such a request.⁵⁶ Also, the response time for local unit of government review was increased from thirty to sixty days.⁵⁷

Additional sections were added providing more specific direction regarding driveways, temporary construction access, and accessibility,⁵⁸ while ensuring protection of the critical dune areas through instructions for restabilization through design elements or indigenous vegetation and proper storm drainage and addressing concerns regarding soil erosion.⁵⁹

The Act now prohibits the department or a local unit of government from requiring a site assessment or environmental impact statement as part of the permit application process except for a special use project.⁶⁰ Examples of special use projects⁶¹ include commercial use, multi-family use covering more than three acres, or a use that is determined to damage features of archaeological or historical significance.⁶²

dwelling or other permanent building as proposed by the applicant. The proposed construction, to the greatest extent possible, shall be placed landward of the crest. The portion of the development that is lakeward of the crest shall be placed in the location that has the least impact on the critical dune area.

MICH. COMP. LAWS ANN. § 324.35304(3) (West 2013) (emphasis added).

56. Compare MICH. COMP. LAWS ANN. § 324.35310(2) (West 2012), with MICH. COMP. LAWS ANN. § 324.35310(2) (West 2006) (stating that an individual person may no longer request a restraining order or injunction through the state's attorney general for a violation of the model zoning plan).

57. Compare MICH. COMP. LAWS ANN. § 324.35310(3) (West 2006), with MICH. COMP. LAWS ANN. § 324.35310(3) (West 2013) (increasing response time for local government from thirty days to sixty days).

58. MICH. COMP. LAWS ANN. §§ 324.35311a-.35311b (West 2013).

59. *Id.*

60. MICH. COMP. LAWS ANN. §§ 324.35319-.35322 (West 2013).

61. A special use project is defined by the statute as any of the following:

- (i) A proposed use in a critical dune area for an industrial or commercial purpose regardless of the size of the site.
- (ii) A multifamily use of more than 3 acres.
- (iii) A multifamily use of 3 acres or less if the density of use is greater than 4 individual residences per acre.
- (iv) A proposed use in a critical dune area, regardless of size of the use, that the planning commission, or the department if a local unit of government does not have an approved zoning ordinance, determines would damage or destroy features of archaeological or historical significance.

MICH. COMP. LAWS ANN. § 324.35301(j) (West 2013). The 2012 statute did not alter this definition. See MICH. COMP. LAWS ANN. § 324.35301(j) (West 2006).

62. MICH. COMP. LAWS ANN. 324.35301(j) (West 2013).

C. Legislation in Other States Regulating Land Use on Sand Dunes

Several other states also have statutes regulating land use on sand dune property.⁶³ While all of these statutes are much less specific than Michigan's, the statutes in Maine and Virginia are the most similar to Michigan's statute and are thus appropriate for comparison. Maine's "Sand Dune Law" has an environmentally focused purpose, and the tone throughout places priority on protecting the coastal sand dune resources.⁶⁴ Virginia's "Coastal Primary Dune Act" purports to take a balanced approach that considers various interests on the sand dunes and enumerates the counties where these resources are located, delegating most of the responsibility for zoning to local units of government.⁶⁵

1. Maine's "Sand Dune Law"

Maine has coastal sand dune systems, which the statute protects as "resources of state significance."⁶⁶ The statute cautions about the "[c]umulative effect of frequent minor alterations and occasional major alterations of these resources" as "a substantial threat to the environment and economy of the State and its quality of life."⁶⁷ The Maine statute also

63. ME. REV. STAT. tit. 38, § 480-A (2012) (Maine's "Sand Dune Law"); VA. CODE ANN. § 28.2-1403 (West 2013) (Virginia's "Coastal Primary Dune Ordinance"); N.J. STAT. ANN. § 13:19-2 (2012) (New Jersey's "Coastal Protection" Act); BANDON, OR., MUN. CODE § 16.42.010 (2013).

64. The Maine "Sand Dune Law" states,

The Legislature further finds and declares that there is a need to facilitate research, develop management programs and establish sound environmental standards that will prevent the degradation of and encourage the enhancement of these resources. It is the intention of the Legislature that existing programs related to Maine's rivers and streams, great ponds, fragile mountain areas, freshwater wetlands, significant wildlife habitat, coastal wetlands and sand dunes systems continue and that the Department of Environmental Protection provide coordination and vigorous leadership to develop programs to achieve the purposes of this article.

ME. REV. STAT. tit. 38, § 480-A.

65. This section enumerates coastal counties, cities, and towns that may adopt the statewide zoning plan. However, if the locality has its own zoning ordinances, it may continue to administer those ordinances as long as the locality establishes a board pursuant to another section of the code. VA. CODE ANN. § 28.2-1403.

66. "The well-being of the citizens of this State requires the development and maintenance of an efficient system of administering this article to minimize delays and difficulties in evaluating alterations of these resource areas." ME. REV. STAT. tit. 38, § 480-A.

67. *Id.*

describes the importance of facilitating research regarding environmental standards to protect the resource.⁶⁸

Important in comparison with Michigan's amended Act, Maine municipalities are permitted to enact more stringent standards than the statewide standards.⁶⁹ Unless a municipality receives a delegation of authority from the state, the state issues all permits.⁷⁰ The Maine statute requires a permit for any activity within a protected area except for a list of enumerated activities that do not require a permit.⁷¹ The primary exception applicable to sand dunes is "minor expansions of structures in a coastal sand dune system."⁷² The statute defines what is considered "minor."⁷³ Municipalities and the Maine Land Use Regulation Commission retain discretion over which permits will be approved in accordance with some general guidelines.⁷⁴

68. *Id.*

69. "A municipality may apply to the board for authority to issue all permits under this article or for partial authority to process applications for permits involving activities in specified protected natural resources or for activities included in chapter 305 of the department's rules, addressing permit by rule." ME. REV. STAT. tit. 38, § 480-F(1). The statute provides conditions that municipalities must fulfill in order to enact their own ordinances, most of which describe an administrative body to manage the process.

70. ME. REV. STAT. tit. 38, § 480-F.

71. The activities not requiring a permit relevant to this Note are [m]inor expansions of structures in a coastal sand dune system. [An] [e]xpansion of an existing residential or commercial structure in a coastal sand dune system [does not require a permit] if:

- A. The footprint of the expansion is contained within an existing impervious area;
- B. The footprint of the expansion is no further seaward than the existing structure;
- C. The height of the expansion is within the height restriction of any applicable law or ordinance; and
- D. The expansion conforms to the standards for expansion of a structure contained in the municipal shoreland zoning ordinance adopted pursuant to article 2-B.

For purposes of this subsection, "structure" does not include a seawall, retaining wall, closed fence, or other structure used to stabilize the shoreline or to prevent the movement of sand or water. For purposes of this subsection, expansion of an existing structure does not include a change from one type of structure to another.

ME. REV. STAT. tit. 38, § 480-Q(31) (2012).

72. *Id.*

73. *Id.*

74. ME. REV. STAT. tit. 38, § 480-E (2012).

2. *Virginia's Statute Regulating Land Use on Primary Coastal Dunes*

The Virginia statute sets forth a statewide zoning ordinance for coastal sand dunes.⁷⁵ The list of activities that do not require a permit is slightly more permissive than the Michigan list.⁷⁶ When a permit is required, the relevant documents are available for public examination, and a public hearing always follows. Also, the board may consider the testimony of persons either in support of or in opposition to the permit application.⁷⁷ Further, permit applications shall be approved unless one or more of three criteria is present, in which case the board must deny the application.⁷⁸ There is a provision that the application can be modified and resubmitted.⁷⁹

Maine and Virginia have statutes that are far less comprehensive and specific than the Michigan statute. The Maine and Virginia approaches are more typical of similar statutes in other states with coastal dunes, such as New Jersey or Oregon.⁸⁰ It is possible that it is the very specificity of Michigan's statute that makes the state more vulnerable to "takings" claims, as permit decisions are less discretionary than under statutes in other states. It is also possible that Michigan has so much coastal dune property that a more specific regulatory statute is required to reduce the burden on the agency making permit decisions.

75. VA. CODE ANN. § 28.2-1403 (West 2012).

76. *Id.*; MICH. COMP. LAWS ANN. § 324.35306 (West 2013).

77. VA. CODE ANN. § 28.2-1403.

78. The statute was amended to provide the following:

Subject to section 35316, a permit shall be approved unless the local unit of government or the department determines that the use will significantly damage the public interest on the privately owned land, or, if the land is publicly owned, the public interest in the publicly owned land, by significant and unreasonable depletion or degradation of any of the following:

- (i) The diversity of the critical dune areas within the local unit of government.
- (ii) The quality of the critical dune areas within the local unit of government.
- (iii) The functions of the critical dune areas within the local unit of government.

MICH. COMP. LAWS ANN. § 324.35304(g).

79. VA. CODE ANN. § 28.2-1403.

80. ME. REV. STAT. tit. 38, § 480-A (2012) (Maine's "Sand Dune Law"); VA. CODE ANN. § 28.2-1403 (Virginia's "Coastal Primary Dune Ordinance"); N.J. STAT. ANN. § 13:19-2 (West 2012) (New Jersey's "Coastal Protection" Act); BANDON, OR., MUN. CODE § 16.42.010 (2012).

III. ANALYSIS

The change from allowing more restrictive local zoning ordinances to a state-mandated level of regulation is an important shift in the permitting program for land use on Michigan's sand dunes. Previously, the Sand Dune Protection and Management Act provided only minimum standards for land use permits.⁸¹ Now, the Act prevents local zoning ordinances that are more restrictive of private property rights and more protective of the environment.⁸² This change, coupled with other significant changes to the Act, undermines land use regulation as a tool to protect the environment.

Further, it is doubtful that amendments to the Act will reduce Michigan's vulnerability to regulatory takings claims, as Governor Snyder stated in signing the Act.⁸³ The amendments were enacted in response to a singular case.⁸⁴ The Michigan Court of Appeals decided *Heaphy v. Department of Environmental Quality* six years prior to the legislature's amendments to the Act without any other notable takings cases during that time.⁸⁵ Therefore, takings claims were unlikely to present a significant problem for Michigan before the Act was amended, and Governor Snyder's rationale does not justify the broad impact of the amendments.

In comparing the approaches to sand dune land use regulation employed in Maine and Virginia, many differences are apparent. Notably, the other states' statutes are far less specific than Michigan's. Although it might be reasonable for Michigan to take a different approach due to the unique character of its sand dunes, the specificity of Michigan's Act could actually increase vulnerability to takings claims.

A. The Legislative Choice Between Floor and Ceiling Preemption and the Resulting Impact on Local Interests

Preemption in environmental regulation primarily occurs when federal regulations preempt state regulations.⁸⁶ In Michigan, the state

81. MICH. COMP. LAWS ANN. § 324.35312(2) (West 2006). See *supra* note 29 and accompanying text.

82. MICH. COMP. LAWS ANN. § 324.35312(2) (West 2013).

83. *Snyder Signs Bill Protecting Sand Dunes, Rights of Homeowners*, *supra* note 23.

84. See *Heaphy v. Dep't of Env'tl. Quality*, No. 257941, 2006 WL 1006442 (Mich. Ct. App. Apr. 18, 2006).

85. *Id.*

86. Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. U. L. REV. 579, 581 (2008).

may preempt local ordinances,⁸⁷ and thus analogies can be drawn between federal preemption in environmental regulations and the less common state preemption of local ordinances. Federal preemption typically occurs in one of two ways, either “floor preemption,” in which the federal regulation sets a minimum requirement based on a desire to minimize risk,⁸⁸ or “ceiling preemption,” in which the regulation sets a maximum that cannot be exceeded based on concern over excessive regulation.⁸⁹ However, the issue with excessive regulation primarily stems from federalism concerns and preserving states’ autonomy wherever possible.⁹⁰ Such constitutional concerns do not apply to state preemption of local ordinances. Because the federal government has been unresponsive at times to environmental regulation, environmental groups often turned to state and local governments instead.⁹¹ In mandating that local ordinances must be approved by the state and that those ordinances must provide “substantially equivalent” protection as the model zoning plan,⁹² the state effectively preempted the field of sand dune use permits and thus created both a floor and a ceiling on regulation.⁹³ Because the “substantially equivalent” language is so new, there is no case law and little administrative guidance⁹⁴ defining the term. Other provisions of the statute as amended indicate that “substantially equivalent” means that local units of government may not enact zoning ordinances that are more restrictive of private property rights than the model zoning plan.⁹⁵ Also, the Michigan Department of

87. *People v. Llewellyn*, 257 N.W.2d 902, 904-06 (Mich. 1977).

88. William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1547 (2007).

89. *Id.*

90. *Id.* at 1585.

91. Glicksman & Levy, *supra* note 86, at 582.

92. MICH. COMP. LAWS ANN. § 324.35304 (West 2013).

93. Glicksman & Levy, *supra* note 86, at 583.

94. See *Questions and Answers on 2012 Public Act 297 Amending Part 353, Sand Dunes Protection & Management*, MICH. DEP’T OF ENVTL. QUALITY, http://www.michigan.gov/deq/0,4561,7-135-3311_4114_4236-292870--,00.html (last visited May 14, 2014) [hereinafter *Questions and Answers*] (stating that local governments may still administer Part 353, but “[t]he revision to Part 353 now requires that local Critical Dune ordinances may NOT be more restrictive than [s]tate law”). See also Sullivan, *supra* note 29.

95. See MICH. COMP. LAWS ANN. § 324.35302 (West 2013) (stating that sand dunes should be managed in a way that is compatible with economic development and that governmental decision-making affecting the dunes should be streamlined). See also *id.* § 324.35304(2) (stating that a permit “shall be approved unless . . . the use will significantly damage the public interest in the privately owned land”). See also *id.* § 324.35304(6) (“A local unit of government may adopt, submit to the department, and

Environmental Quality indicated that local governments are not allowed to enact more restrictive zoning ordinances.⁹⁶

Floor preemption is more common because without it, there would be no minimum level of regulation.⁹⁷ However, ceiling preemption is less justifiable because a more protective state or local law would not interfere with the minimum standards set by the preemptive regulation.⁹⁸

Frequently, localities set environmental regulations that go beyond a state or federal act in providing environmental protection.⁹⁹ *McNeil v. Charlevoix County*¹⁰⁰ involved a dispute over whether the Michigan Clean Air Act¹⁰¹ preempted the ability of a local health department to enforce or augment smoking restrictions.¹⁰² The Michigan Court of Appeals stated that the state statute at issue expressly provided for local enforcement of the law.¹⁰³ The court reasoned that state law preempts where there is a direct conflict between the local regulation and state statute and “where the statute completely occupies the field that the local regulation attempts to regulate.”¹⁰⁴ There are four criteria used in determining whether the state intends to “occupy the field” of regulation.¹⁰⁵

obtain approval of a zoning ordinance based on the model zoning plan or an equivalent ordinance.”).

96. *Questions and Answers*, *supra* note 94.

97. Glicksman & Levy, *supra* note 86, at 582.

98. *Id.*

99. *McNeil v. Charlevoix Cnty.*, 741 N.W.2d 27, 32 (Mich. Ct. App. 2007).

100. *Id.*

101. MICH. COMP. LAWS ANN. §§ 333.12613-.12617 (West 2012).

102. *McNeil*, 741 N.W.2d at 32.

103. *Id.*

104. *Id.* at 33-34.

105. The court described four factors that indicate field preemption:

First, where the state law expressly provides that the state’s authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is pre-empted.

Second, pre-emption of a field of regulation may be implied upon an examination of legislative history.

Third, the pervasiveness of the state regulatory scheme may support a finding of pre-emption. While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer pre-emption, it is a factor which should be considered as evidence of pre-emption.

Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state’s purpose or interest.

Id. at 35 (quoting *People v. Llewellyn*, 257 N.W.2d 902, 905 (Mich. 1977)) (internal quotation marks omitted).

B. Zoning Ordinances as Environmental Protection Devices

Zoning is the primary way in which land use is controlled and regulated,¹⁰⁶ but it may not be the best method to protect these areas.¹⁰⁷ One major issue with zoning as a mechanism for environmental protection is trans-jurisdictional problems, where one locality prefers to adopt different regulations from another.¹⁰⁸ The amendments to the Sand Dune Protection and Management Act seek to overcome this problem by limiting the ability of a local unit of government to adopt regulations that are different from the state's model zoning plan. The former Act was criticized for its broad definition of use, under which nearly any activity could have an impact on the dunes and thus required a permit.¹⁰⁹ The amendments failed to remedy this. Despite a greater likelihood of permit approval, the list of activities requiring a permit has not been significantly reduced.

Land use regulations are evaluated to consider whether the regulation "bear[s] a substantial relationship to the public safety, health, morals or general welfare."¹¹⁰ Zoning ordinances face additional exposure to constitutional challenges in the form of substantive due process.¹¹¹ However, because environmental protection is considered a valid use of the police powers under the Michigan constitution, local units of government are protected from these types of claims.¹¹² In addition, the Michigan Department of Natural Resources does not deny a significant number of permit applications.¹¹³ Therefore, it seems that the legislature's sweeping changes to the Sand Dune Protection and Management Act were unnecessary to protect the state from constitutional challenges.

106. Michael J. Hutchinson, *Land Use Regulations as a Means to Protect Fragile Environmental Areas: An Analysis of Michigan's Sand Dune Protection and Management Act*, 13 T.M. COOLEY L. REV. 177, 187 (1996).

107. *Id.*

108. *Id.*

109. *Id.* at 191.

110. *Id.* at 199.

111. *Id.* at 200.

112. Hutchinson, *supra* note 106, at 202.

113. *Id.* at 206 (stating that only 36 of 1,153 permit applications were denied between 1989 and 1993).

C. Response to Governor Snyder's Rationale for Amending the Sand Dune Protection and Management Act: Vulnerability to Takings Claims

Governor Snyder identified a major purpose of the amendments to the Act as an effort to “recognize private property rights and . . . responsibility to correct laws that put us at risk for potentially dozens of multimillion dollar lawsuits,” even though “Michigan’s sand dunes are environmental treasures that must be protected.”¹¹⁴ There has been only one multimillion-dollar lawsuit against the state since the enactment of the Sand Dune Management and Protection Act in 1996.¹¹⁵ *Heaphy v. Department of Environmental Quality*,¹¹⁶ a case decided in 2006, involved plaintiffs who were selling parcels of property located on a critical dune area.¹¹⁷ The buyers of the parcels included a contingency on the purchase that the township must approve their proposed building plan.¹¹⁸ The building plan was denied by the township and subsequently by the state as well.¹¹⁹ On appeal, the Heaphys claimed that the permit denials deprived them of all economically viable use of the parcels and thus constituted a compensable regulatory taking.¹²⁰ Ultimately, the Heaphys prevailed and were awarded a judgment in the amount of \$1.7 million.¹²¹ This case has not appeared to open the floodgates for regulatory takings claims, because there is no record of subsequent, similar cases, which calls into question the governor’s rationale for the extensive changes to the Act. Most of the cases concerning permit denials under the Sand Dune Management Protection Act involved mining operations.¹²²

Only one other prominent case regarding the prior version of the Act, *Risko v. Grand Haven Charter Township Zoning Board of Appeals*, was decided subsequent to *Heaphy*.¹²³ Based on the viability of the *Heaphy* theory, it was likely that the Riskos would have advanced the same one. The Riskos sought a zoning variance regarding a setback requirement

114. *Snyder Signs Bill Protecting Sand Dunes, Rights of Homeowners*, *supra* note 23.

115. *See, e.g.*, *Heaphy v. Dep’t of Env’tl. Quality*, No 257941, 2006 WL 1006442 (Mich. Ct. App. Apr. 18, 2006).

116. *Id.* at *1.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Heaphy*, 2006 WL 1006442, at *3.

122. *Preserve the Dunes, Inc. v. Dep’t of Env’tl. Quality*, 684 N.W.2d 847 (Mich. 2004); *K & K Constr., Inc. v. Dep’t of Env’tl. Quality*, 705 N.W.2d 365 (Mich. Ct. App. 2005).

123. *Risko v. Grand Haven Charter Twp. Zoning Bd. of Appeals*, 773 N.W.2d 730 (Mich. Ct. App. 2009).

because their property was located within a critical dune area.¹²⁴ The zoning board denied the permit application on the basis that there were design alternatives that would comply with the zoning ordinance requirements.¹²⁵ Despite the additional time and expense that the Riskos absorbed in altering their design plans, the zoning board prevailed and the Riskos were denied the requested variance.¹²⁶

It is notable that in both of these cases, the local unit of government had zoning boards that rendered permit decisions.¹²⁷ Under the amended Act, the statewide entity now acts as the decision-maker, and local units of government are no longer permitted to enact more stringent zoning ordinances.¹²⁸ This is so even if the local unit of government retains its own zoning board because the local zoning board has less discretion to enact ordinances that offer substantially more environmental protection than the model zoning plan.¹²⁹ Therefore, while the local zoning board continues to manage the permit process, its authority is effectively reduced to enforcing the statewide model zoning plan.

D. Comparison Between Michigan's Approach to Land Use Regulation on Sand Dunes Relative to the Approaches in Maine and Virginia

The post-amendment Act is more similar to the approach taken in Virginia, where there is a statewide zoning ordinance for sand dune property.¹³⁰ The Maine statute allows local units of government to adopt more stringent zoning ordinances similar to Michigan's former approach.¹³¹

Because sand dunes are so extensive and cover such a great deal of Michigan's coastline, allowing local units of government to make ordinances could be problematic and might be overly burdensome to property owners in complying. Having a unified, statewide approach will save property owners money because they will only need to conduct research on one set of zoning ordinances when seeking a permit. Further,

124. *Id.* at 732-33.

125. *Id.* at 733-34.

126. *Id.* at 739.

127. *Id.* at 733-34; *Heaphy v. Dep't of Env'tl. Quality*, No 257941, 2006 WL 1006442 (Mich. Ct. App. Apr. 18, 2006).

128. MICH. COMP. LAWS ANN. § 324.35312(2) (West 2013) (requiring that a zoning ordinance must provide "substantially equivalent protection" to the critical dune area as the model zoning plan).

129. *Id.* See also *supra* note 29 and accompanying text.

130. VA. CODE ANN. § 28.2-1403 (West 2012) (providing for state wide zoning ordinance).

131. ME. REV. STAT. tit. 38, § 480-A (2012) (providing that local governments may adopt different ordinances as long as they provide equal or greater protection).

the permit approval process will be more streamlined because there is one standard rather than various local ordinances.¹³² This will also save the state money and time both during the permit decision-making process and also if the property owner appeals a permit denial. The primary issue is whether the statewide ordinance appropriately considers the competing interests for coastal sand dunes. Considering all of the changes made by the amendments, it appears that Michigan has shifted its priorities too far in favor of private property owners at too great a cost to the environment.

A statewide statutory scheme can help protect the state from regulatory claims. Land-use regulations that equally benefit and burden property owners that are similarly situated are less vulnerable to compensable takings claims.¹³³ Further, if the property owner purchased the land with knowledge of the zoning ordinances, the value of the property likely incorporated the ordinance into the purchase price and thus would not be compensable.¹³⁴ The standard in Michigan for a regulatory taking to be compensable is not completely clear, but the diminution in value must closely approach 100% because even reductions in value of over 85% have been insufficient.¹³⁵

Moreover, the mode of analysis for regulatory takings claims is an ad hoc factual analysis.¹³⁶ This raises the issue of whether the high degree of specificity in the amendments, or even in the former Act, increases the state's exposure to regulatory takings claims. While the amendments to the Act greatly increased the likelihood of permit approvals by shifting the burden to the state,¹³⁷ the purported objective of reducing the state's vulnerability to takings claims might have been achieved simply by making the statute less specific, more like the statutes in Maine and Virginia.¹³⁸ A highly detailed state statute might increase the likelihood of categorical permit denials compared to a zoning board conducting a case-by-case analysis for each permit application.

In a 1985 case from Maine, the plaintiffs were denied a permit application under Maine's "Sand Dune Law."¹³⁹ The plaintiffs had begun

132. MICH. COMP. LAWS ANN. § 324.35304 (West 2013).

133. *K & K Constr., Inc. v. Dep't of Env'tl. Quality*, 705 N.W.2d 365, 368 (Mich. Ct. App. 2005) (discussing a compensable taking based on land-use ordinances).

134. *Id.*

135. *Id.* at 381 (holding that diminution in value of 87.5% was not a compensable taking).

136. *Id.* at 380.

137. MICH. COMP. LAWS ANN. § 324.35304(g) (describing conditions for permit denial).

138. ME. REV. STAT. tit. 38, §§ 480-A to 480-HH (2012); VA. CODE ANN. §§ 28.2-1403 to -1405 (2012).

139. *Hall v. Bd. of Env'tl. Prot.*, 498 A.2d 260, 262 (Me. 1985).

construction on an oceanfront lot when the Maine Department of Environmental Protection sent a letter stating that a permit was required prior to construction.¹⁴⁰ The plaintiffs then sent a permit application, which was denied under the requirements of the “Sand Dune Law,” and a board member suggested to the plaintiffs that they amend their application to better comply with one aspect of the law.¹⁴¹ The amended application was also denied.¹⁴² Later that year, the plaintiffs filed another permit application that was substantially different from the original application.¹⁴³ Even though conditional approval of this permit application was recommended to the board, following a fact finding and hearing regarding the project plans, the permit application was also denied.¹⁴⁴ The plaintiffs then challenged the board’s denial of the permit application as a violation of the “Sand Dune Law,” asserting that their building plans complied with the requirements of the law.¹⁴⁵

Additionally, the plaintiffs also challenged the board’s denial of the permit application as an unconstitutional and compensable regulatory taking because it deprived the plaintiffs of all economically viable use of their property.¹⁴⁶ While the Supreme Judicial Court of Maine expressed concern for the process used by the board in reaching its decision, the court held that the board’s decision was in compliance with the standards set forth in the “Sand Dune Law.”¹⁴⁷ However, regarding the plaintiff’s claim that the permit denial constituted a regulatory taking, the plaintiffs asserted that “the property is rendered substantially useless.”¹⁴⁸ The Supreme Judicial Court of Maine agreed with the plaintiffs.¹⁴⁹ It is important, however, that as a result of this decision, the Maine legislature did not amend the underlying zoning law to better protect the state from these claims in the future.

Michigan differs from both Maine and Virginia because Michigan’s coastal sand dune ecosystem is adjacent to freshwater, whereas other

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 263.

144. *Id.*

145. *Hall*, 498 A.2d at 264.

146. *Id.* at 266.

147. *Id.* (“Although we do not approve of the procedure by which the staff prepared the Board members to take action . . . the resulting bias or unfairness, if any . . . does not rise to the level that we censured.”).

148. *Id.* at 267.

149. *Id.*

states with a similar ecosystem are adjacent to oceans.¹⁵⁰ Even though other Great Lakes states, such as Indiana,¹⁵¹ contain part of a freshwater sand dune system, the amount of dune within the states is very small relative to Michigan's sand dunes, and much of it is regulated by federal law or is owned by the state in which the property lies.¹⁵² Although it is impractical and certainly not the most efficient economic use for all of Michigan's sand dune land to be owned by the state or federal government, such arrangements in other states exemplify the public value of the dunes.

Because Michigan's coastal dunes are so extensive, there is more property over which to compete for use of that land. Further, that competition has higher stakes because freshwater is much more valuable than salt water, and impacts to such a significant source of freshwater could have more dire consequences. Therefore, Michigan might have more reason to err on the side of environmental protection to protect such a necessary natural resource.

Coastal dunes on oceans also serve important protective purposes.¹⁵³ Sand dunes provide protection from flooding and soil erosion in addition to providing a habitat for wildlife that often cannot be found anywhere else.¹⁵⁴ In all states that have a coastal dune system, there are various interests to the property, and while the water body itself might be less valuable, the sand dunes themselves possess similar characteristics.¹⁵⁵

IV. CONCLUSION

Regulating land use on sand dunes is necessary to balance the competing interests for such an important natural resource. Because the character of Michigan's coastal dune system and the sand itself is different from that in other states, it is reasonable for Michigan to have a more detailed and comprehensive statute that regulates the permitting

150. See ME. REV. STAT. tit. 38, § 480-A (2012); VA. CODE ANN. § 28.2-1403 (West 2012); N.J. STAT. ANN. § 13:19-2 (West 2012); OR. STAT. REV. ANN. § 30.265 (West 2012).

151. See 16 U.S.C. § 1451 (2006) (Indiana Dunes National Lakeshore and state park).

152. *Id.*

153. VA. MARINE RES. COMM'N, COASTAL PRIMARY SAND DUNES/BEACHES GUIDELINES: GUIDELINES FOR THE PERMITTING OF ACTIVITIES WHICH ENCROACH INTO COASTAL PRIMARY SAND DUNES/BEACHES 6-8 (reprinted 1993), available at mrc.virginia.gov/regulations/dune_guidelines.pdf; *Coastal Dunes*, *supra* note 3.

154. *Coastal Dunes*, *supra* note 3.

155. See N.J. STAT. ANN. §§ 13:19-1 to -45 (West 2012); ME. REV. STAT. tit. 38, § 480-A (2012); *Rudell v. City of Bandon*, 275 P.3d 1010 (Or. Ct. App. 2012).

and land use process. However, the state legislature went too far in amending the statute to restrict the ability of local units of government to enact zoning ordinances that best serve the interests of each community. Such state preemption discourages environmental protection on a local scale without an identifiable and equally compelling state interest on the other side. Although Governor Snyder and the Michigan legislature stated that the goals of the legislation were to protect the state from costly takings claims and to appropriately balance the interests competing for sand dune use, the amendments to the Sand Dune Protection and Management Act merely tip the scale in favor of private interests.