**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, 1994 PA 451, as amended

Petition of Onekama Township
File No. 02-51- 0037-P

---

## FINAL DETERMINATION AND ORDER

This case was the subject of a contested case hearing resulting in the issuance of a Proposal for Decision (PFD) dated February 11, 2005. Both Onekama Township (Petitioner) and the Land and Water Management Division (LWMD) filed written Exceptions to the PFD. The matter is now before the Director of the Department of Environmental Quality for a final agency decision. MCL 324.99903(7); 2003 MR 2, R 324.74.

The Petitioner owns and operates a park on Lake Michigan that includes handicapped accessible facilities constructed in 1994. These facilities are subject to the build-up of wind driven sand, which must be periodically removed to allow access. To alleviate the necessity to remove the sand, the Petitioner seeks approval under Part 353 to essentially level the dune around the facilities. The PFD recommended the denial of the project. In its Exceptions, the Petitioner argues the PFD should be rejected, while the LWMD raises two substantive legal issues, but agrees in general with the recommendation.

The LWMD's first argument pertains to the PFD's finding that the project is a use that involves a contour change. Specifically, the LWMD takes issue with the PFD's characterization of § 35301(a) as a definition of the term "contour change." By its express terms, the provision provides a listing of activities that constitute a contour change if the result is a significant alteration of the physical characteristics of a dune. Thus, § 35301(a) is a definition of a contour change, albeit a partial one. In this case, the PFD held, and the LWMD impliedly agrees, leveling 57,832 square feet of the dune is a "monumental contour change." Given this, the LWMD's argument is essentially that there are activities beyond those

enumerated in § 35301(a) that may constitute a contour change. While this is accurate, it is speculative and immaterial in deciding this case.

The other component of this Exception takes issue with the citation in the PFD to the Final Determination and Order (FDO) in *Petition of Eugene Jankowski*, 2001 WL 467917, (Mich.Dept.Nat.Res.). Specifically, the holding that a property owner should submit an application so that the LWMD can determine, on a case-by-case basis, whether an activity is regulated. *Id.* at *2. The basis of this holding is the inherent difficulty in establishing a bright-line rule on what constitutes a contour change. *Id.* In challenging this approach, the LWMD does not claim that problems have ensued over the four years *Jankowski* has been in effect. Rather, it asserts the holding improperly transfers the initial determination of regulatory authority away from the Department. Quite simply, this is not accurate. *Jankowski* stands for the proposition that prior to undertaking an activity on a critical dune, it is advisable for a property owner to allow the LWMD the opportunity to determine whether it is a use, and thus regulated under Part 353. To hold otherwise, i.e., attempt to provide an exhaustive listing of regulated activities, would cause the uncertainty the LWMD attributes to *Jankowski*.

The LWMD's second argument centers on the fact that the Petitioner did not request a special exception after its permit application was denied. As a result, the LWMD contends it is improper to decide this issue. As a preface, some context is helpful in addressing this argument. Part 353 establishes two distinct regulatory schemes for activities on a critical dune. The first is a permitting program. See MCL 324.35304. The second, which arises if the project cannot be permitted, involves a special exception to the model zoning plan. See MCL 324.35317(3). Both schemes have separate processes and criterion. As a general proposition, the failure to apply for a special exception precludes a determination on entitlement to one in a contested case hearing. However, in this case a mechanical application of this principle would significantly delay a final agency decision on whether the Petitioner can undertake the project. In addition, the parties fully litigated the special exception criterion, despite the LWMD's contention to the contrary. Finally, there is no problem with the notice requirements of Part 353 because the only entity entitled to review and comment on an

application for a special exception is the local unit of government. *Id.* In this case, the applicant is the local unit of government. Based on these circumstances, the LWMD's argument on this point is rejected.[1]

The Petitioner's Exceptions raise a number of challenges to the PFD's factual findings and legal conclusions. After considering these arguments, they are rejected and the PFD is adopted, in its entirety.

The decision in this case is based solely on the PFD, the written Exceptions, exhibits, pleadings, and arguments. Upon the consideration of the entire record in this matter, the PFD, including its Findings of Fact and Conclusions of Law, is adopted and affirmed. Further, the PFD is incorporated into this FDO by reference. Based upon those Findings of Fact and Conclusions of Law, it is DETERMINED the application for a permit submitted by Onekama Township is DENIED.

**NOW, THEREFORE, IT IS ORDERED:**

1. The Proposal for Decision of February 11, 2005, is adopted and incorporated into this Final Order.

2. Onekama Township is not entitled to a permit or special exception under Part 353, and the application submitted under File No. 02-51-0037-P is DENIED.

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

Dated: 10-5-05

Steven E. Chester, Director
Department of Environmental Quality

[1] This holding is limited to the facts of this case. In the future, prior to opening the record this Tribunal will establish whether the hearing involves a final agency decision on an application for a permit and/or special exception. See MCL 324.35305(1)

**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, 1994 PA 451, as amended

Petition of Onekama Township
File No. 02-51- 0037-P

# PROPOSAL FOR DECISION

Dated: February 11, 2005

Richard A. Patterson
Administrative Law Judge

Onekama Township (Petitioner) owns and maintains a park on a critical dune adjacent to Lake Michigan. Included in the park are a handicapped accessible boardwalk and observation platform, picnic tables covered by gazebos on the observation platform, and two stairways to the beach. See Petitioner's Exhibit 7. Because of the deposition of wind-blown sand over the structures, the facility is presently not usable, especially for the handicapped, to the extent the Petitioner believes possible. To remedy the situation, the Petitioner applied for a permit under Part 353. MCL 324.35301 *et seq.* The application proposes to excavate and level 2,222 cubic yards of sand over an area of 57,832 square feet. After processing the application, the Land and Water Management Division (LWMD) denied it on June 12, 2003.[1]

## JURISDICTION

Part 353 grants the right to a contested case hearing to "a person...aggrieved by a decision of the department in regard to the...denial of a permit...under this part...." MCL 324.35305(1). The Petitioner exercised its right to a hearing by filing a petition for a contested case on August 6, 2003. 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

The Petitioner is represented by David J. Haywood and John Abbott of Haywood Harrison, P.C. During the hearing the Petitioner presented five witnesses: David A.

[1] In August 2004, the administration of Part 353 was transferred from the Geological and Land Management Division to LWMD

Meister, Onekama Township Supervisor; David L Schultz, Civil Engineer; Michael Hayes, Senior Ecologist and Coastal Regulatory Specialist; Catherine Cunningham Ballard, Chief, LWMD, Coastal Management Program; and Steven J. Debrabander, former employee of the LWMD, Coastal Management Program.

The professional staff of the LWMD is charged with the day-to-day implementation of Part 353 and is represented by James R. Piggush, Assistant Attorney General, Department of Attorney General. During the hearing, the LWMD offered its employee, Penny Holt, Environmental Quality Analyst, as its only witness during its case-in-chief.

The hearing was conducted on May 4 and 5, 2004, during which the Petitioner entered 18 exhibits and the LWMD entered 13. A site view was conducted by this Administrative Law Judge, with the consent of the Parties but in their absence, on May 13, 2004. Subsequent to the close of the record, the Parties submitted written closing arguments and proposed Findings of Fact and Conclusions of Law.

## PRELIMINARY ISSUES

In response to Motions for Summary Disposition filed by both Parties, this Tribunal entered an Opinion and Order on March 2, 2004. In denying the Petitioner's Motion, the Order held that genuine issues of fact remain, and rejected the legal argument raised (that the proper geographic scope of the analysis is the entire designated critical dune as opposed to the immediate area of impact). In its Closing Argument, the Petitioner revisits certain arguments from its Motion on the basis that the existence of genuine issues of material fact that precluded summary disposition have been resolved through uncontroverted testimony. Specifically, the Petitioner seeks a determination that the proposed project is not regulated because it is not a "use."

Part 353 defines a "use" as a "developmental, silvicultural, or recreational activity...that significantly alters the physical characteristic of a critical dune area or a contour change...." MCL 324.35301(j). A finding the activity is a "use" is a predicate to regulating it under § 35316. In support of its contention that the project is not a "use", the Petitioner relies on the testimony of Mr. Schultz, a licensed professional engineer with expertise in shoreline dynamics. In its essence, Mr. Schultz's testimony on this

point consists of parsing the § 35301(j) definition in order to reach legal conclusions. For instance, he testified the proposed activity is not developmental, but rather a form of restoration. Further, he stated it is not silviculture because no trees are involved. Finally, he conceded the project may serve to enhance recreation, but the act of grading is not, in and of itself, recreational.

In considering Mr. Schultz's testimony, his point that the activity is not silviculture is inescapable. However, the testimony concerning developmental and recreational activity cannot be accepted given the plain meaning of the terms and common sense. Whether the project is developmental in the sense of construction, enhancement or improvement, as opposed to restorative, is a distinction without meaning in this context. Because the term developmental is neither defined in Part 353 nor a term of art, it is appropriate to ascertain its meaning through a dictionary.[2] Development is defined as, among other things, "a significant event, occurrence, or change". The American Heritage College Dictionary, Third Ed. Further, it is a process "to bring from latency to or toward fulfillment". *Id.* Under these definitions, the word developmental encompasses activities much broader than those posited by Mr. Schultz. The activity proposed in this case constitutes a significant change to the area, and thus is properly considered as developmental. As for the recreational test, it is the end result of the proposal, not the means by which that will be achieved, that is relevant. For example, it would not be appropriate to consider fueling a boat non-recreational, as that is merely the means of enabling the boat to run for recreational activities such as water skiing. Because the proposed activity is to facilitate use of the subject facilities, including access to the beach, these are, in and of themselves, clearly recreational activities. Based on this record, I conclude, as a Matter of Law, the proposed activity constitutes both a developmental and recreational activity under § 35301(j). Whether the activity significantly alters the physical characteristic of the critical dune area or is a contour change is discussed below.

The second point the Petitioner reargues concerns the reference in § 35301(j) to a use having to significantly alter the physical dune area. Specifically, this argument asserts the project's impact must be significant to the entire designated critical dune

[2] See *Title Office, Inc v Van Buren County Treasurer*, 469 Mich 516, 522; 676 NW2d 207 (2004)

area as opposed to the immediate area. In denying that aspect of the Petitioner's Motion the Order this Tribunal relied on the holding in the *Petition of Eugene and Judy Jankowski,* File No. 98-OC-0394; 2001 WL 467917 (Mich.Dept.Nat.Res.). Clearly, this is a legal conclusion as opposed to a factual determination. Therefore, it cannot be altered by testimony.

Finally, the Petitioner argues the proposal is exempt under the following provision of Part 353:

> The lawful use of land or a structure, as existing and lawful within a critical dune area at the time the department implements the model zoning plan for a local unit of government, may be continued although the use of that land or structure does not conform to the model zoning plan. The continuance, completion, restoration, reconstruction, extension, or substitution of existing nonconforming uses of land or a structure may continue upon reasonable terms that are consistent, to the extent possible, with the applicable zoning provisions of the local unit of government in which the use is located.
> MCL 324.35306(1).

In support, the Petitioner recites the testimony of Ms. Ballard and Mr. Debrabander to the effect the structure was legally installed in 1994 under the aegis of a Coastal Zone Management Grant as permitted by the Department of Environmental Quality's (DEQ) predecessor, the Department of Natural Resources (DNR). According to the Petitioner, it follows that it should be allowed, and in fact is required, to maintain the structure.[3] The Petitioner's argument breaks down when considering that §35306(1) is an archetypical provision "grandfathering" existing uses or structures. The purpose of the provision is to allow the continued use of structures rendered non-compliant with regulations put in place after they are completed and used. In this case, the original installation was permitted with restrictions under the predecessor to Part 353.[4] As a result, the installation is not a pre-existing structure rendered non-compliant by a subsequent regulatory scheme. Rather, the installation is an activity permitted under and in compliance with the scheme. Therefore, I conclude, as a Matter of Law, the proposed activity is not merely a continuance of a nonconforming structure or use.

[3] Ms. Ballard testified, in her opinion as Chief of the Coastal Management Program, the Petitioner has an obligation to maintain the structure for at least 20 years. Mr. Meister acknowledged that duty and testified the site was built and maintained in line with the Township Board's philosophy of encouraging public access to Lake Michigan.
[4] The Sand Dune Protection and Management Act, 1976 PA 222, as amended. MCL 281.651 *et seq*

Further, assuming § 35306(1) does apply and the installation is a non-conforming use, the project at issue in this case, i.e. grading a substantial area of the critical dune, is well beyond the confines of the originally permitted activity. Given this, the project is not exempt under § 35306(1).

## FINDINGS OF FACT

### Location, Nature and History of Site

The subject parcel is within the Petitioner's jurisdiction, a short distance north of the connection between Lake Michigan and Portage Lake. The location and topography of the site are well depicted on a survey prepared by Nordlund & Associates and entered as Petitioner's Exhibit 5. See also Exhibit R-11, an aerial photograph. As noted, the Petitioner operates a park on the parcel. In 1994, the Petitioner availed itself of a Coastal Zone Management Grant to construct the handicapped accessible facilities. Exhibit P-13. These facilities were designed with input and a permit from the DNR, as predecessor to the DEQ in administering sand dune regulation. During the construction phase excavation was limited to an area of not more than four feet beyond the footprint of the facilities by permit condition. Exhibit R-2. Upon conclusion of construction the impacted area was replanted with vegetation. In the ensuing years, the facilities and surrounding area have become popular for tourists and local residents. According to Mr. Meister, Onekema Township Supervisor, it is one of few Lake Michigan public access sites in the Township, and the only one designed to be readily handicapped assessable. He testified it is not uncommon for 75 to 80 cars to be parked in the lot and on the road leading to it at any one time on summer weekends.

The physical state of the site at the time of the original installation of the structures in 1994 and its condition at the time of the hearing are demonstrated in Exhibit P-7 and 13, respectively. This evidence reveals a dramatic buildup of sand in and around the observation deck, gazebos, and boardwalk. This phenomenon has rendered these facilities essentially useless, especially to the handicapped. In addition, build up to the immediate west of the parking lot obstructs the previously existing view of Lake Michigan from parked vehicles. These conditions were observed by this writer at the time of the site view. To alleviate the build-up of sand the Petitioner has used

employees and volunteers to manually remove sand from the facilities, efforts Mr. Meister described as a "losing battle". T, Vol. 1, pg. 63.

The Proposed Activity

Concerned about the continuing costs and future availability of volunteers, the Petitioner now seeks a comprehensive solution to reestablish the viability of the structures as contemplated in the original permit. To that end, the application at issue in this case was submitted on July 12, 2003. Exhibit P-2. The application proposes to excavate and level 2,222 cubic yards of sand over an area of 57,832 square feet. Id. The application was denied by the LWMD in a June 12, 2003 letter, for the following reasons:

> After due consideration of the permit application, site conditions, and Part 353 regulations, the DEQ finds that the proposed project will have significant adverse impacts on the natural resources associated with the designated critical dune features along this stretch of Lake Michigan shoreline. This project would reduce the elevation of the crest by up to four and one-half feet in some locations and destabilize the dune by removing the existing stabilizing vegetation.
> Exhibit P-3.

As noted, the LWMD offers as an alternative the restoration of a nearby haul road to accommodate a viewing area. The road was built by the U.S. Army Corps of Engineers to access the beach and as a staging area for construction work on the pier to Lake Michigan. Essentially it was constructed by laying gravel over the natural beach, leaving a relatively low and flat area approximately 49 feet wide. See Exhibit R-9. It was suggested by Ms. Holt that the area could be filled up to one foot above existing grade, and then over that a boardwalk installed. According to the LWMD, that location provides additional access, and would also provide a viewing area, while at the same time minimizing the impact to the critical dune. Finally, the LWMD indicated a willingness to allow removal of sand from the existing structures and consistent with the 1994 permit, excavation of sand around the perimeter of up to four feet laterally.

As stated, the application contemplates excavation and leveling of an area of 57,832 square feet in, around, and predominantly in front of the structures. See Exhibit P-5, which depict the existing and proposed contours. The project entails

leveling the dune area from the parking area to the Lake Michigan shore, essentially lowering the elevation in the landward section of over four feet in some areas, with a gradual reduction as it progresses lakeward to the existing elevation. Mr. Meister, who has been in Township government since 1982 and Supervisor for the last eight years, testified to numerous complaints over the condition of these facilities. He characterized the Township's intent is to restore the facility, as opposed to any expansion.

As for the project itself, Mr. Meister noted there would be no removal of sand resulting in a loss, but merely moving it away from the existing structures and leveling the area lakeward. Mr. Meister described past efforts to remove sand from the structures as well as similar problems with portable toilet facilities originally that were installed and since removed. The efforts to remove sand by hand have proven to be cumbersome, and generally ineffective because it merely provides temporary results. An additional attempt to stem migration of sand consisted of construction of wooden walls on the side of the boardwalk. This too proved to be ineffective. The subject application was filed in order to provide a practical, long term solution and to eliminate the continued expense to these patch work efforts.[5] Regarding the alternatives offered by the LWMD, Mr. Meister opined that removal of sand in the immediate area did not work in the past, so he questions its effectiveness in the future. Further, limiting the additional access and viewing area to the remains of the haul road area would only allow a view for four vehicles, which is too limited to serve the public demand.

Mr. Schultz typically deals with sites experiencing problems from erosion. Thus, he characterized the site as atypical because the problem is deposition of sand, which he described as "too much of a good thing." T. Vol. 1, pg. 133. Mr. Schultz is of the opinion the Petitioner's proposal will serve to increase, as opposed to decrease, the stability of the critical dune. As for the characteristics of the dune, he considers the area of the project to be a foredune because there is no other significant feature between it and the water's edge. He also did not observe the presence of a crest, as that term is defined in § 35301(b). Should the project be completed, and assuming it is properly re-vegetated, he stated that there would be no long term significant alteration of the

[5] Mr. Meister estimated that, in addition to using unpaid volunteers, the Township has expended approximately $1,600 for these efforts over the last three years.

physical characteristics of the dune. Further, while the area will initially consist of a flat plain, he expects natural forces to recreate some of the irregular features over time. A benefit of the project will also occur when the level of Lake Michigan rises because that occurrence will slow the deposition process due to the reduced amount of exposed sand. Finally, he is unsure if the proposal will provide a permanent solution. Rather, it will defer the problem, and may well require future maintenance.

Mr. Hayes was qualified as an expert in the regulatory aspects of critical dune areas. As such, and being familiar with the site, he testified the Petitioner's proposal will not damage the resource, but rather is merely a process of leveling and re-vegetating it. However, he did suggest use of snow fences to further control sand movement. Mr. Hayes does not consider the area as fragile and irreplaceable, and agrees with Mr. Schultz that the project will improve stability. While he admitted that ecological considerations can be vague, the dune will remain and shoreline activity will continue. In sum, the basic components of flora and fauna of an ephemeral and variable topography will remain. As to the loss of vegetation, he stated beach grass can have rhizomes up to 36 feet long, which will, even if redistributed, re-establish surface plants. Even so, he agrees planting is appropriate for immediate effect. Finally, like Mr. Schultz, he did not observe a crest in the area of activity.

Ms. Holt was the sole witness on behalf of the LWMD. When the application was filed she was responsible for the administration of Part 353 in the area, and in that capacity reviewed the project. As part of that review, she was on site November 22, 2002, in the company of two other LWMD employees, Matt Warner and James Milne. She returned to the site on March 14, 2003, to address the alternatives. In contrast to the opinion of both Mr. Schultz and Mr. Hayes, she determined the presence of a crest, as opposed to a foredune, based on her measurement of an area of some 7,000 square feet bringing it within the statutory definition.[6] She admitted, however, that the area could be both a crest and foredune.

While on site she observed no evidence of snow fencing or any other form of erosion control, which along with increased vegetation would help to lower the rate of

[6] "Crest" is defined under § 35301(b) as "the line at which the first lakeward facing slope of a critical dune ridge breaks to a slope of less than 1-foot vertical rise in a 5 1/2-foot horizontal plane for a distance of at least 20 feet, if the aerial extent where this break occurs is greater than 1/10 acre in size." A tenth of an acre is 4,356 square feet

erosion/deposition. Ms. Holt opined that wind function is part of the natural process as demonstrated in a series of aerial photographs entered on a board as Exhibit R-10. She testified sand deposition is a common occurrence that the LWMD routinely addresses by issuing five year sand removal permits. She does not agree with Mr. Hayes regarding a purported lack of long term impact because the project will level the dune and denude the area of vegetation. She testified that while dune grass rhizomes may remain, they are subsurface and do not serve the same erosion control function as surface plants. In addition, plantings can take two to three growing seasons to perform that function. She opined the project will absolutely involve a significant removal of vegetation as well as a significant contour change. She described the result as essentially a ramp for wind deposition of sand to the southeast, assuming prevailing northwest winds. The project as proposed will result in the elimination of the dune by leveling up to 4 ½ feet over 230 feet of waterfront. In her assessment, the proposal cannot be permitted under § 35316(1)(f) since it will increase erosion, reduce stability, and is more extensive than necessary.

## 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 DEQ is charged with administering the statute. MCL 324.35304(3).

The initial question is whether the proposed activity is a "use". See MCL 324.35301(j). It has been determined the proposal falls under both the developmental and recreational test of the definition. Beyond that, the issue is whether the activity falls under a two-part disjunctive test, and hence is a "use". 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). Thus, to determine if the activity is a "use" its effects to the natural feature must be examined. Despite the conflict in testimony over the overall impact and the duration thereof, it cannot be denied that this project entails grading of 2,220 cubic yards of sand over an area of 57,832 square feet. The irregular topography would be "evened out" to form a declining grade lakeward, and in some instances mounds of up to 4 ½ feet would be eliminated. The existing surface vegetation would be severely impacted. An activity of this magnitude can only be termed a significant alteration of the dune's physical characteristic as well as a monumental contour change. Therefore, based on the record in this case I find, as a Matter of Fact the project would cause a significant alteration of the physical characteristic of the dune. I also find, as a Matter of Fact, the project 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).[7] As to the first two factors, an increase of erosion or decrease in stability, the evidence is in conflict and inconclusive. Mr. Schultz and Mr. Hayes testified erosion is not occurring, and in fact the opposite is true given that deposition is the problem. However, Ms. Holt points out that for deposition to occur the sand must come there by erosion upwind. Disregarding semantics, it is evident there is considerable movement of sand on the site into the area of the facilities driven by off-shore winds. There is no evidence to conclude the Petitioner's proposal will permanently solve the problem. In fact, there is agreement the site is ephemeral and that the process will continue. If, or more accurately when, the level of Lake Michigan rises, the beach area will be reduced and the process will, assumedly, be less dramatic. Conversely, when the lake level decreases, there will be more beach area and more sand movement as a consequence. The result of the proposal can be fairly

[7] 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

characterized as buying time, with the exact amount impossible to determine given the permutation of shore dynamics.

The foregoing considerations must be weighed against the project's impact to the resource. While the volume of sand would not be reduced, the extensive excavation will drastically alter the character of the critical dune area as it presently exists in a manner inconsistent with the natural occurrence of events. However, the issues of the effect on erosion and stability, and whether it would impact a crest or merely a foredune, are not dispositive given the next issue: 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 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 proposes to grade a large area in the critical dune. However, the LWMD argues the use of the existing haul road and grading in the immediate area of the boardwalk and observation deck could be permitted as an alternative. The impact of the alternative, as estimated from the site plan attached to the construction permit (Exhibit R-2) would be slightly less than 1,000 square feet in the immediate area of the facilities, and another approximate 8,000 square feet if the haul road is improved and maintained as proposed.[8] The Petitioner's proposal of what is tantamount to a total obliteration of the natural topography of over 57,000 square feet of a critical dune area computes to approximately 1.3 acres. This would be done absent any assurance the project will create a permanent or long standing solution. Given this, the project should not be sanctioned under these circumstances.

Regarding the portion of the alternative involving grading the immediate area of the boardwalk and deck, because it was done in the past, there is no doubt it is feasible in the sense it can be physically accomplished. Similarly, the utilization of the existing

[8] The haul road is 49 feet wide at the parking lot end and the distance from there to the water line at the date of the topographic survey (Petitioner's Exhibit 5) is 168 feet. This figure assumes that total area would be utilized.

haul road is physically possible. These activities are also prudent in the sense that, albeit with some difficulty, the use of the observation platform and walkway may be continued, and further access and viewing would be provided by use of the haul road, although in a more limited range than the Petitioner desires. It should be noted that it is not uncommon along the Lake Michigan shoreline for a direct view of the lake to be obstructed by natural features. This alternative would also minimize the effects on the resource to a considerable degree. Therefore, I find, as a Matter of fact, the alternative proposed by the LWMD is both feasible and prudent. As a consequence, I further find, the Petitioner's proposed activity is more extensive than necessary to implement or continue the use.

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:

> A local unit of government may issue variances under a local zoning ordinance or the 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.

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 the Petitioner installed the walkway and observation deck.

The unique features of the property are its inclusion in the designated critical dune area. As such, it is as a matter of law, a unique, irreplaceable, and fragile resource providing the benefits outlined in MCL 324.35302(1). The designation of the Onekama-Manistee sand dune area, in which the parcel is located, went into effect on March 17, 1981. Therefore, at the time of the construction of the subject structures in 1994 the designation and regulation had been in effect for a number of years. That fact was recognized by the Petitioner when it sought and obtained a permit to construct the facilities under 1976 PA 222, now codified as Part 353. As for that permit, Ms. Ballard testified she recommended against a woodchip or concrete walkway, and instead suggested use of a wooden walk on posts due to the topography and unstable nature of the area. T., Vol. II, pg. 69. That recommendation was ultimately included as a permit condition. Exhibit R-2. Although the elevation of the walk is indicated as rising

46 inches from the observation deck to the parking lot, the elevation above grade is not indicated in the aforementioned exhibit. Mr. Debrabander testified that, although the condition in the permit he issued required elevation, a specific dimension was not imposed. T., Vol. II, pg 153. However, Ms. Ballard testified she recommended installation at least two feet above grade. T, Vol. II, pg. 69. Photographs taken shortly after construction (Exhibit P-7), indicates an elevation Mr. Debrabander estimated to be more than two feet at the lakeward side of the observation platform. T, Vol. II, pg 155. From these photographs it is evident the elevation of the walkway and landward side of the observation platform appears to be considerably lower and even below the grade of some nearby areas. That this area, and in fact the shoreline in general, are ephemeral and in a continual state of change is an acknowledged fact on this record.

Based on the foregoing, it is appropriate to consider the Petitioner to have assumed the risk of encountering shifting and drifting sands resulting in areas of deposition. In hindsight, it may have been more prudent to increase the elevation of the facilities to better accommodate those known facts. Although, as stated, the feasible and prudent alternative found to exist is not an ideal solution and will involve continuing efforts, it will allow a reasonable use of the facilities while impacting only the haul road area and the immediate area of the existing boardwalk and observation deck.

II. Substantial Justice Served

This standard addresses a balancing of the Petitioner's desires against the interest of other property owners in the area. However, there is no evidence applicable to direct adverse impacts on other property owners. In fact, those respective interests may be inferred to be in harmony as the use of the area by the public, of which other property owners are a part, is at issue.

The second prong asks whether a lesser relaxation of the restrictions would give substantial relief to the owner of the property. For reasons similar to the analysis addressing the reasonable use of the property, the feasible and prudent alternative found to exist will provide substantial relief, and I so find, as a Matter of Fact.

One other aspect of this case lends itself to this substantial justice analysis. It is evident that the subject structures were designed to be handicapped assessable and

that a major concern of the Township is its ability to continue accommodating that need. While this concern is understandable and salutatory, the personal condition of an individual or the convenience or inconvenience of the general public are not proper bases upon which to grant a variance or special exception. Rather, the consideration must be limited to conditions of the land itself. See *Davenport v Grosse Pointe Farms*, 210 Mich App 400, 534 NW2d 143 (1995); *Farah v. Sachs,* 10 Mich App 198, 157 NW2d 9 (1968). Therefore, the fact the facilities were designed to be handicapped accessible cannot alter the analysis, and I so conclude, as a Matter of Law.

III. Relief within the Spirit of the Ordinance

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

> (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 to the people of this state and to people from other states and countries who visit this resource.
> ***
> (b) The benefits derived from alteration, industrial, residential, commercial, agricultural, silvicultural, and the recreational use of critical dune areas shall occur only when the protection of the environment and the ecology of the critical dune areas for the benefit of the present and future generations is assured.
> MCL 324.35302.

It has been found that the Petitioner's proposal cannot be permitted as it constitutes an inappropriate use under Part 353. Therefore, being literally noncompliant, it cannot be considered as within the spirit of the regulatory scheme. In the final analysis, while there is speculation as to the long term effects of the project, 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 the Petitioner would neither comport to the "spirit" of Part 353 nor foster the public welfare as articulated in the legislative findings.

## CONCLUSIONS OF LAW

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

1. Onekema Township 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 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).

4. 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).

5. Utilizing the area of the so called haul road and confining removal of sand from the walkway and gazebos and to not more than four feet around the footprint are a feasible and prudent alternative means to minimize the impact to the dune. MCL 324.35316(1)(g)(i)(ii).

6. Physical infirmities of personal health problems of individuals using the premises 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).

7. Onekama Township has not demonstrated a practical difficulty sufficient to merit a special exception for a project of the magnitude for which it applied. 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 denying the special exception for the activity proposed in the application. It is further proposed a special exception be granted for the feasible and prudent alternative found to exist.

Dated: February 11, 2005

Richard A. Patterson
Administrative Law Judge