

LEGAL ALERT

November 10, 2006

STATE ANNOUNCES NEW POLICY OF RESTRICTING SIZE OF HOMES AND DRIVEWAYS IN CRITICAL DUNE AREAS

By Jason R. Thompson, Attorney

The State Department of Environmental Quality has created a new “guidance document” that will restrict the size of homes and driveways located within Critical Dune Areas. The Sand Dune Protection and Management Act of 1989 contains language that prohibits permits for construction under specified conditions in Critical Dune Areas.

In the past, DEQ had not actively used the language in the Act to limit the size of homes or driveways. Instead, it had focused review on impact to steep slopes and the relationship to foredunes. These regulations were significant enough, in some cases, to prevent landowners from having any productive use of their land, as demonstrated in the recent case of *Heaphy v Department of Environmental Quality*, in which a landowner was awarded 1.7 million to compensate for the statute preventing any use of his property.

However, in response to legal challenges from landowners seeking variances from permit requirements, the DEQ has issued this guidance document that greatly expands the DEQ’s oversight and regulation of new construction within Critical Dune Areas. The guidance document instructs field staff to review plans to ensure the plan:

- Limits the length and width of the driveway and any turn-a-round
- Limits the home location as close to the access as possible (unless the design is a park and walk)
- Limits the foundation size of the home and any other buildings to a size of use that is not “more extensive than required”
- Minimizes the disturbance to areas outside the building envelope, usually to ten feet
- Locates the well and septic as close to the driveway or road as feasible
- Minimizes vegetation removal, usually to ten feet around the home and five feet around other disturbed areas.

The new oversight parameters may have a significant effect on the size of new homes constructed within Critical Dune Areas. In practice, there was no review of home size prior to this guidance document; only a review of the impact to steep slopes and/or foredunes. The guidance document, however, sets forth the minimum building envelope in the local zoning district as the appropriate size for any home in a Critical Dune Area that impacts steep slopes. Minimum building size in many zoning districts is 7-800 square feet. The guidance document states that homes which are not located on steep slopes may be larger than the minimum size, but are reviewed to determine if they are “more extensive than required.”

While the document does not establish concrete limitations on building envelopes not located on steep slopes, it appears likely that the building envelope of new lakefront homes, which are frequently much larger than the minimum size allowed under local zoning, will be curtailed under the new guidance document. It is unclear what type of analysis the DEQ will use to review foundation size. The guidance document instead directs field staff to “seek input from Lansing.” DEQ staff has only begun to utilize the guidance documents. One approach used by DEQ staff may be to review sizes of adjoining homes. Without established size limitations, or even a methodology to review building envelope, landowners who wish to use building envelopes greater than the township minimum are left without any basis to determine if their plans will be permitted.

While restricting the building envelope, the guidance document also prohibits many garages. In “park and walk” arrangements, separate garages, limited to 400 square feet, will be allowed. For those property owners who can drive up to their home, any garage will have to be installed on the ground floor of the home (within the restricted building envelope.)

The guidance document also places new restrictions on tennis courts, swimming pools, gardens, landscaped

lawns, and decking to homes. The limitation of length of driveways may also serve to push homes away from the lakefront on larger parcels.

Early indications are that the new standards in the guidance document will be applied to applications filed before the guidance document, as well as new applications. Those in the process of obtaining a permit, considering construction within a Critical Dune Area, or considering buying or selling property within a Critical Dune Area should be aware of new guidelines and their impact.

This new level of oversight will restrict the uses on

property within the Critical Dune Area. Landowners will face a more intense review process, and without clear guidelines, will not know the appropriate building envelope for their home until they begin the review process (which requires completed architectural or engineering plans). Local municipalities and the state risk the loss of tax revenue if the values of homes are negatively impacted by size restrictions.

Jason R. Thompson practices in the areas of business, business litigation, and real estate at Smith Haughey. He can be reached directly at jthompson@shrr.com or 231.486.4543.

**SMITH HAUGHEY RICE & ROEGGE'S
CONSTRUCTION LAW INDUSTRY TEAM**

Aileen M. Leipprandt, Chair 616.458.5298 aleipprandt@shrr.com	Charles F. Behler 616.458.6245 cbehler@shrr.com	Thomas M. Weibel 616.458.6244 tweibel@shrr.com
Michael J. Roberts 616.458.1212 mroberts@shrr.com	Craig R. Noland 616.458.9466 cnoland@shrr.com	T. J. Ackert 616.458.3638 tackert@shrr.com
Jeffrey R. Wonacott 231.486.4509 jwonacott@shrr.com	Robert W. Parker 231.929.4878 rparker@shrr.com	Rachel Brochert Roe 231.486.4503 rroe@shrr.com
Benjamin H. Hammond 616.458.4256 bhammond@shrr.com	Cara L. Nieboer 616.458.0437 cnieboer@shrr.com	Steven K. Stawski 616.458.4394 sstawski@shrr.com
Shawn C. Worden 231.486.4505 sworden@shrr.com	Scott D. Harvey 231.486.4545 sharvey@shrr.com	Jason Thompson 231.486.4543 jthompson@shrr.com