

LEGAL ALERT

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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.

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RECENT COMMERCIAL FOREST ACT AMENDMENTS MAKE CHANGES TO ELIGIBILITY REQUIREMENTS, TAX RATE, AND PENALTY PROVISIONS

By Daniel M. Morley, Attorney

The State of Michigan ranks fifth in the nation in terms of timberland acreage, with a total of 19 million acres in timber production. 2.2 million acres in Michigan are designated as commercial forest. The forest industry employs approximately 200,000 people and contributes roughly \$12 billion in economic activity annually. It is within this background that a series of eight Bills were sponsored in the Michigan Legislature over the past several months. Two of those Bills, which became Act Nos. 382 and 383 of Public Acts of 2006, amended several provisions of the Michigan Commercial Forest Act (CFA). These amendments include changes in eligibility criteria, modifications to the tax rates for commercial forest lands (correcting a potential problem in calculating the applicable tax rate for CFA lands across the state), and new penalties for withdrawing lands from CFA designation. These amendments are the first major revisions to the Commercial Forest Act since 1995, and became effective on September 27, 2006.

Changes in eligibility. Under the previous version of the CFA, any owner of forestland could apply to have forestland designated a commercial forest. The amendments require that the applicant submit at least 40 contiguous acres or a survey unit consisting of one-sixteenth of a section for CFA designation. (A section of land is one square mile, or 640 acres.) Under the amendments, "contiguous" means land that touches at any point. The existence of a public or private road, a railroad, or utility right-of-way that separates any part of the land does not make the land non-contiguous.

The application fee provisions have also been amended. An application for CFA designation must be postmarked or

delivered no later than April 1 to be eligible for the following year. The application fee is \$1 per acre (or fraction of an acre), but not less than \$200 and not more than \$1000.

The application must be accompanied by a legal description of the property and must set out the amount of acreage to be considered for designation as a commercial forest, and a statement certifying that a forest management plan has been prepared and is in effect. The application also requires a statement that the owner of the forestland owns the timber rights and documentation that the owner of the forestland will provide access to the general public for hunting and fishing.

The three major eligibility requirements for land to be determined "commercial forest" have not changed. Those requirements are that the land be capable of producing at least 20 cubic feet per acre per year of forest growth upon maturity; producing tree species that have economic or commercial value; and producing a commercial stand of timber within a reasonable period of time.

Tax rate modifications. Land designated commercial forest is not subject to the ad valorem general real property tax. Instead, commercial forest lands are taxed at the rate of \$1.10 per acre. The tax rate is in lieu of any other property tax. Under the Act, the State of Michigan also pays the county \$1.20 per acre of CFA lands.

Under a 1995 amendment, the tax provisions were to be recalculated in 2004 and every 10 years thereafter. The recalculation was to be determined, in part, by utilizing

timber cutover data. In 2003, it was discovered that not all counties had retained timber cutover data and that performing necessary recalculation of the annual tax was impossible. In fact, the Michigan Department of Treasury has no timber cutover data to support the recalculation. Tax projections became problematic, and the taxes on CFA land could have risen, according to some local units of government, to over \$4.00 per acre. In the absence of a change from the 1995 amendments, it was not clear what would happen in counties without timber cutover data. Through the budgeting process, an agreement was made to delay the new regulations.

During the delay, commercial forest lands are being taxed at a rate of \$1.10 per acre through December 31, 2006. The rate rises to \$1.20 per acre beginning January 1, 2007. Beginning January 1, 2012, and every five years thereafter, the annual tax under the Act is to be increased by five cents per acre.

Similarly, the amount to be transmitted by the state to the Treasurer of each County is set at \$1.20 per acre until December 31, 2011. Beginning on January 1, 2012, and every five years thereafter, the amount of the annual payment by the State is to be increased by five cents per acre.

Withdrawal penalties. There is no set time period during which property must remain under CFA designation. An application, along with the applicable fee, must be made to withdraw CFA property from the program. There is a penalty that applies when withdrawing property from CFA

designation. The formula for determining the penalty has been altered as a part of the recent amendments. Previously, commercial forestland could be withdrawn if the landowner paid the township treasurer a penalty per acre based on a formula utilizing timber cutover data.

Under the new provisions, the penalty per acre is equal to the sum of the ad valorem general property tax from which the forestland was exempted for the previous seven years, but not longer than the period for which the property had been designated as commercial forestland. There are special provisions for determining the penalty for withdrawing land from CFA designation within the first year of the amendments, which run through September 27, 2007.

Landowners may find submitting land to CFA designation under the recent amendments worth considering. There are substantial property tax advantages, provided the forestland meets eligibility requirements. Property owners should be advised, however, that, with few exceptions, property designated CFA must remain open to the general public for hunting and fishing purposes. Alternatively, those landowners that currently hold CFA property may consider whether withdrawing the property now, rather than when the new penalty provisions come into effect, is financially worthwhile.

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