STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LEELANAU

ALEX JEMAL,

Petitioner-Appellant,

v

File No. 08-7736-AA
HON. PHILIP E. RODGERS, JR.

MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Respondent-Appellee.
_____/

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DECISION AND ORDER ON APPEAL

Petitioner-Appellant Alex Jemal ("Jemal") applied for a permit and special exception under Part 353 of the Sand Dune Protection and Management Act, MCL 324.35301, *et seq.* (the "Act") in order to build three additional homes on his property in a critical dune area and to construct an access road system in part on steep slopes. The Department of Environmental Quality ("DEQ"), Land and Water Management Division ("LWMD") denied the permit on August 30, 2004, and the special exception on May 17, 2005. Jemal filed a petition for a contested case hearing challenging those denials on July 8, 2005.

On June 7, 2007, following the contested case hearing, the Administrative Law Judge ("ALJ") issued a Proposal for Decision ("PFD") and recommended that the permit be issued and that the application for a special exception be granted. Both sides filed exceptions which were heard by the Director of the DEQ ("Director") on October 23, 2007.

On February 8, 2008, the Director issued a Final Determination and Order ("FDO"). The FDO modified the PFD findings of fact and conclusions of law, issued Jemal a permit to

construct residences in a critical dune area, but denied his application for a special exception for construction of an access road system.

FACTUAL BACKGROUND

The facts are undisputed. Jemal's property consists of 59.06 acres located in Empire Township, Leelanau County. The western boundary is approximately 1,300 feet of frontage on Lake Michigan. The northern boundary is acreage once owned by Jemal's father that is now a part of the Sleeping Bear Dunes National Lakeshore. The property is located in a critical dune area and regulated by the Sand Dune Protection and Management Act, MCL 324.30301, *et seq.* (the "Act"). Jemal's father obtained his interest in the property in the 1930s and built a small cottage on top of a steep bluff on the southwest corner of the parcel, accessed by a driveway off Lake Michigan Drive. In 1970, Jemal's father conveyed the land to Jemal and his sister, who still own it as tenants in common. In the 1980s they investigated developing the property, but decided against it. They now wish to re-build the existing cottage and construct three additional lake view cottages between the existing cottage and the north property line for the use of their children. Use of the proposed building sites for residential development is permitted under Part 353.

The dispute is over the proposed road system. Jemal proposed to construct a road system over 1.54 acres in the critical dune portion of his property with 3,732 linear feet of 14-feet-wide asphalt driveway flanked with one-foot gravel shoulders. He would also build two bridges over steep slopes to connect dune crests (one 143 feet long and one 108 feet long) and install 948 feet of retaining walls through .23 acre of slopes greater than 1:3 to reach the residential sites.

The Issue

All agree that Jemal needs a special exception under Part 353 of the Act in order to build the proposed road system because it is, in part, built on steep slopes within a critical dune area. The Legislature's 1995 amendment of the Act, 1995 P.A. 262, changed the standard for obtaining a special exception allowing construction on a dune. While MCL 324.35317(1), formerly MCL 281.686(1), previously authorized the issuance of a special exception in cases of "unreasonable hardship," the amended statute now provides for the issuance of a special

exception if "a practical difficulty will occur to the owner of the property if the . . . special exception is not granted." Therefore, a use that cannot be permitted may be allowed under a special exception "if a practical difficulty will occur to the owner of the property . . ." MCL 324.35317(1). Unfortunately, "practical difficulty" is not defined in the Act.

While the parties agree that "practical difficulty" is the appropriate standard, they do not agree on the criteria to be used to determine when a landowner will suffer a practical difficulty. The Director claims that the analysis in the *Petition of Dune Harbor Estates, LLC*, 2005 WL 3451406 (Mich Dept Nat Res), which was affirmed by the Circuit Court for Ingham County, is controlling. Jemal claims that the authorities cited by the Director and relied on in the *Dune Harbor* case either employ the higher "undue hardship" standard or mix the two standards and, therefore, the Director improperly rejected the application because Jemal is not deprived of all use of his property as there are feasible and prudent alternatives.

In *National Boatland v Farmington Hills ZBA*, 146 Mich App 380, 387-389; 380 NW2d 472 (1986), the Court of Appeals noted:

> This state has not established criteria for determining when a landowner will suffer a practical difficulty from enforcement of a zoning ordinance. Some cases have suggested that, at the very least, the landowner must show that the problem is unique to his land, not shared by all others. *Tireman-Joy-Chicago Improvement Ass'n v Chernick*, 361 Mich 211, 216; 105 NW2d 57 (1960); *George v Harrison Twp*, 44 Mich App 357, 363; 205 NW2d 254 (1973), lv den 389 Mich 787 (1973). However, in cases where this Court found a zoning board of appeals to have abused its discretion in denying a variance, it does not appear this principle was rigidly followed. See *Indian Village Manor, supra*, and *Heritage Hill Ass'n, supra*.
>
> Other jurisdictions have set forth factors to be considered in determining whether a landowner has a practical difficulty warranting a variance from the ordinance. The factors which have been summarized in 2 Rathkopf, The Law of Zoning and Planning (3d ed., 1972), p 45-28-29, and adopted by other jurisdictions are
>
> > 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 that 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.

See also 3 Rathkopf, The Law of Zoning and Planning (4th ed, 1979), p 38-49, which refers to the third edition and cites the case of *McLean v Soley*, 270 Md 208; 310 A.2d 783 (1973), which incorporated the three factors cited by Rathkopf. See also *Board of Adjustment of New Castle County v Kwik-Check Realty, Inc*, 389 A2d 1289, 1291 (Del, 1978), and *Carliner v District of Columbia Board of Zoning & Adjustment*, 412 A2d 52, 53 (DC App, 1980). See also 3 Anderson, American Law of Zoning (2d ed., 1977), § 18.47, p 270.

Rhode Island uses a slightly different approach. It allows a variance from non-use restrictions when literal enforcement would have an effect so adverse as to preclude full enjoyment of the intended use. Thus, a showing of mere inconvenience is insufficient to justify a grant of relief. *Westminster Corp v Zoning Board of Review of the City of Providence*, 103 RI 381, 387-388; 238 A2d 353, 357 (1968); *Apostolou v Genovesi*, 120 RI 501; 388 A2d 821 (1978).

The Court then looked at each of the reasons that the landowner claimed it would suffer practical difficulties if it was not granted a variance and applied the Rathkopf factors to determine whether any of them constituted a practical difficulty. *Id* at 389-390.

The Director's analysis in the instant case, as in the *Dune Harbor* case, is based to some extent on the provisions of MCL 324.35317. Subsection (1) provides for the issuance of special exceptions "if a practical difficulty will occur to the owner of the property if the variance or special exception is not granted." The legislation also provides:

> 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.

The Director appropriately found that the "there is no contention that human health, safety, or federal laws are implicated in this case." He also appropriately found that "[r]egarding local zoning, Empire Township recommended granting the special exception."

The legislation continues as follows:

A variance or a special exception is also subject to the following limitations:

(a) A variance shall not be granted from a setback requirement provided for under the model zoning plan or an equivalent zoning ordinance enacted pursuant to this part unless the property for which the variance is requested is 1 of the following:

(i) A nonconforming lot of record that is recorded prior to July 5, 1989, and that becomes nonconforming due to the operation of this part or a zoning ordinance.

(ii) A lot legally created after July 5, 1989 that later becomes nonconforming due to natural shoreline erosion.

(iii) Property on which the base of the first landward critical dune of at least 20 feet in height that is not a foredune is located at least 500 feet inland from the first foredune crest or line of vegetation on the property. However, the setback shall be a minimum of 200 feet measured from the foredune crest or line of vegetation.

(b) A variance or special exception 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 a foredune. However, a variance or special exception may be granted if the proposed construction is near the base of the lakeward facing slope of the critical dune on a slope of less than 1-foot vertical rise in an 8-foot horizontal plane on a nonconforming lot of record that is recorded prior to July 5, 1989 that has borders that lie entirely on the first lakeward facing slope of the critical dune area that is not a foredune.

(2) Each local unit of government that has issued a variance for a use other than a special use project during the previous 12 months shall file an annual report with the department indicating variances that have been granted by the local unit of government during that period.

(3) Upon receipt of an application for a special exception under the model zoning plan, the department shall forward a copy of the application and all supporting documentation to the local unit of government having jurisdiction over the proposed location. The local unit of government shall have 60 days to review the proposed special exception. The department shall not make a decision on a special exception under the model zoning plan until either the local unit of government has commented on the proposed special exception or has waived its opportunity to review the special exception. The local unit of government may waive its opportunity to consider the application at any time within 60 days after receipt of the application and supporting documentation by notifying the department in writing. If the local unit of government waives its opportunity to review the application, or fails to act as authorized in this section within 60 days,

> the local unit of government also waives its opportunity to oppose the decision by the department to issue a special exception. If the local unit of government opposes the issuance of the special exception, the local unit of government shall notify the department, in writing, of its opposition within the 60-day notice period. If the local unit of government opposes the issuance of the special exception, the department shall not issue a special exception. The local unit of government may also consider whether a practical difficulty will occur to the owner of the property if the special exception is not granted by the department and may make a recommendation to the department within the 60-day notice period. The department shall base its determination of whether a practical difficulty exists on information provided by the local unit of government and other pertinent information.

None of these additional limitations applies in the case before the Court.

The Director did not end his analysis there, however. He turned to MCL §324.35302 which states:

> The legislature finds that:
>
> (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) Local units of government should have the opportunity to exercise the primary role in protecting and managing critical dune areas in accordance with this part.
>
> (c) 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.

Based on these Legislative findings, the Director claimed that the issue presented was "whether the protection of the environment and the ecology of the critical dunes is assured." He found that "the proposed road and bridge system will not assure protection of the natural scenic appearance of this dune or protection of its fragile environment and ecology."

In making this determination, the Director considered the "project's impact to the critical dune" and the "potential for erosion . . . both during and after construction of the proposed road and bridge system." He found that the project "will create conditions where the

potential for erosion is enhanced both during and after construction of the proposed road and bridge system." He also considered whether there were "feasible and prudent alternatives" - not to the design and construction of the road, but to the location of the homes. He found that there were alternative building sites that would not require the construction of an extensive road system. He claims that consideration of alternatives is embodied in MCL 324.35302(a) and (c) as applied in the *Dune Harbor* case and that Jemal's purpose was too "narrowly defined" because his purpose was to build additional lake view cottages. *Petition of Jankowski*, April 26, 2005, 2005 WL 1060860 (Mich Dept Nat Res). The Director took the position that the project purpose cannot be so narrowly defined as to preclude assessment of alternatives, so he redefined the project purpose, claiming it was to build three additional structures on the property.

The question for this Court to answer is whether the Director exceeded his authority or made a substantial and material error of law when he denied Jemal's application for a special exception. This case presents an issue of statutory construction involving the meaning of the phrase "practical difficulty." The interpretation of this particular statutory language does not require knowledge of sophisticated or technical terms or the exercise of expert judgment or discretion. No deference, then, is due to the Director's interpretation. Further, as a question of law, the review is de novo.

Standard of Review

Under the Administrative Procedures Act, MCL 24.306:

> . . . the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:
>
> (a) In violation of the constitution or a statute.
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> (b) In excess of the statutory authority or jurisdiction of the agency.
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> (c) Made upon unlawful procedure resulting in material prejudice to a party.
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> (d) Not supported by competent, material and substantial evidence on the whole record.

(e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.

(f) Affected by other substantial and material error of law.

(2) The court, as appropriate, may affirm, reverse or modify the decision or order or remand the case for further proceedings.

The DEQ is the State agency charged with enforcing the Act. MCL 324.35301(d). The Act arranges for a model zoning plan for local governments to implement and, in those local governments that do not implement the model plan, the DEQ administers it pursuant to § 35304(8). This is the case here.

Consideration of administrative agency decisions that "involve[] only statutory interpretation are a matter of law and subject to review de novo." *Ronan v Mich Pub Sch Employees Ret Sys*, 245 Mich App 645, 648; 629 NW2d 429 (2001). "A court may set aside an agency decision even if it is supported by substantial evidence if it is based on a substantial and material error of law." *O'Connor v Ins Comm'r*, 236 Mich App 665, 670; 601 NW2d 168 (1999), rev'd on other grounds 463 Mich 864 (2000). That said, "when there is sufficient evidence, a reviewing court may not substitute its discretion for that of the administrative tribunal even if the court might have reached a different result." *Kurzyniec v Dep't of Soc Servs*, 207 Mich App 531, 537; 526 NW2d 191 (1994). "Great deference should be given to an agency's choice between two reasonable differing views as a reflection of the exercise of administrative expertise." Id at 537. "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration." *Magreta v Ambassador Steel Co*, 380 Mich 513, 519; 158 NW2d 473 (1968), citing *Boyer-Campbell Co v Fry*, 271 Mich 282, 296; 260 NW 165 (1935).

Unless defined in the statute or possessing special technical meaning, we must accord every word or phrase of a statute its plain and ordinary meaning, considering the context of its placement and purpose in the statutory scheme. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999); *City of Kalamazoo v KTS Industries, Inc*, 263 Mich App 23, 33; 687 NW2d 319 (2004). Pertinent to this case, an administrative agency's longstanding, consistent interpretation of a statute within the agency's responsibility is entitled to great weight and should not be overruled unless that interpretation is clearly erroneous. *Schmaltz v Troy Metal Concepts, Inc*, 469 Mich 467, 471; 673 NW2d 95 (2003). Of course, an

administrative agency's interpretation of a statute cannot overcome the statute's plain meaning. *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13, 23-24; 678 NW2d 619 (2004), citing *Ludington Service Corp v Acting Comm'r of Ins*, 444 Mich 481, 505; 511 NW2d 661 (1994).

Analysis

First, it is important to put Jemal's project in perspective. The dunes in question are on Jemal's private property. The dunes on Jemal's property are a tiny fraction of all the critical dune areas in the state. It is Jemal's desire to construct three additional lakeview cottages for use by his children and to pass the land on to them. The cottages may be built as a matter of right. Without question, the road system to access the cottages will be a costly, "major undertaking" that will alter a small portion of the dune.

In *Preserve The Dunes, Inc v Dep't Of Environmental Quality and TechniSand, Inc*, 264 Mich App 257; 690 NW2d 487 (2004), a local citizens' group brought an action for declaratory and injunctive relief against a sand mine operator and the DEQ under the Michigan Environmental Protection Act ("MEPA"), challenging the DEQ's issuance of an amended permit which allowed the operator to expand its mining operation into an adjacent critical dune area. Discussing the Sand Dune Protection and Management Act, the Court said:

> Moreover, in MCL 324.35302(a), the Legislature refers collectively to the critical dune areas of Michigan as a natural resource. The individual dunes themselves are apparently not contemplated. Consequently, the trial court did not err in assessing the mining of the critical dune area on the site in relation to its effect on the total acreage of critical dune area in the state to determine the extent to which the natural resource, i.e., all the critical dune areas in the state, would be impaired or destroyed by TechniSand's mining of sand.

As noted above, the Court in *National Boatland* looked at each of the reasons that the landowner claimed it would suffer practical difficulties if it was not granted a variance and applied the Rathkopf factors to determine whether any of them constituted a practical difficulty. Similarly, in *Indian Village Manor Co v Detroit*, 5 Mich App 679; 147 NW2d 731 (1967), the Detroit board of zoning appeals granted the UAW a variance from the city zoning ordinance prohibiting the construction of an illuminated sign within the front set back. The owner of a neighboring apartment complex petitioned the circuit court for a writ of superintending control claiming that the sign was detrimental to its ownership interest in the apartment complex and

that there was no evidence to support the board's decision. The circuit court affirmed and the apartment complex appealed. The Court of Appeals affirmed the grant of the variance, saying:

> There was evidence received showing, and appellant does not deny, that appellee is a large international union, that it should be clearly identified for the convenience of its many visitors, and that the row of large elms located close to the lot line would obstruct the view of any sign placed behind them. **These facts are clearly established on the record and we agree that these constitute the 'special conditions' involving the 'practical difficulties' required under the ordinance to grant a variance. We hold that where, as in this case, the appellees did not request a change in the use of the property, there was no need to show, as claimed by appellant, unnecessary hardship in addition to practical difficulties.** Although there is no Michigan Supreme Court case directly on point, we find authority for this principle of law in the State of New York, which has a statute identical to ours, and we cite with approval the case of *In the Matter of Village of Bronxville v Francis*, 1 AD2d 236; 150 NYS2d 906, modifying 206 Misc 339; 134 NYS2d 59, and aff'd 1 NY2d 893; 153 NYS2d 220; 135 NE2d 724. There was ample evidence before the board to support its finding that the proposed sign would in no way injure or detract from the value and the character of the environs so that there can be no valid claim that this sign is contrary to the public interest. [*Indian Village* at 684-685.] [Emphasis added.]

An owner's right to use his property is subject to reasonable regulation, restriction and control by the state in a legitimate exercise of its police powers. *McKeighan v Grass Lake Township Supervisor*, 234 Mich App 194; 593 NW2d 605 (1999). The state has a legitimate interest in protecting the property rights of its citizens. *Id.* In protecting these rights, it sometimes becomes necessary to weigh and balance competing interests. *Id.* In an agency condemnation case, *City of Troy v Barnard*, 183 Mich App 565; 455 NW2d 378 (1990), the Court of Appeals recognized that an agency's power must be balanced against the need to protect the rights of the individual property owners.

This Court believes that the most sensible manner in which to resolve cases of this nature is to consider each case on its peculiar merits, look to the stated purpose behind the Act and then determine the impact of Jemal's proposed project on the achievement of that purpose, balancing his personal property rights against the stated purpose for the legislation.

The purpose of the Act is to protect the environment and the ecology of the critical dune areas. And, yet, all construction in the critical dune areas is not precluded by the legislation. The purpose of Jemal's project is to rebuild the existing cottage and build three additional lakeview homes with vehicular access for his children. The Director agrees that Jemal can

build on the sites that he has chosen, but he denied Jemal's request for a special exception for the access road because "the environment and ecology of the dune cannot be assured if the special exception is granted." In reaching this conclusion, the Director relied on the extent and nature of the road and its impact on the dune area as testified to by two LWMD staff witnesses. He wrote:

> The proposed road is a significant undertaking in that it will affect 1.54 acres of forested critical dune area, which includes .23 acres of slopes in excess of a one-foot vertical rise in a three-foot horizontal place (steep slopes). The asphalt roadbed is 3,732 feet long and at least 14 feet wide, and includes 928 feet of retaining wall and two bridges, one being 143 feet and the other 108 feet long. To construct this road a swath of vegetation over 3,700 feet long and 14 feet wide must be removed, including mature trees. It is necessary to level the road's grade to no more than 12 to 14 percent. Brumbaugh, Tr. Vol. II, pp 65-67; Burns, Tr Vol II, pp 124; See also Exhibit R-28. To construct the bridges, a crane would require a swing radius of between 10 and 40 feet beyond the roadbed, requiring even more vegetation removal at those locations. Staging areas would also have to be cleared to store equipment and construction materials. Burns, Tr Vol II, PP 87, 99, 102-104. Clearing this vegetation would remove the leafy canopy that serves to protect the dune from the elements. Further, cutting trees also removes their root system that would contribute to destabilizing the fragile dune soil. Schmidt, Tr Vol II, p 211; Jannereth Tr Vol III, pp 73-74, 81, 85-86. In Martin Jannereth's opinion, protection of the environment and ecology of the dune cannot be assured if the special exception is granted. Id. p 86.
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> Based on the foregoing, I find that the proposed road system through the Critical Dune Area is a major undertaking that will require a significant alternation of the dune. I find that the northern portion of this site consists of pristine forested dunes. I find that the extensive removal of vegetation, including large trees, will create conditions where the potential for erosion is enhanced both during and after construction of the proposed road and bridge system. I further find that the proposed road and bridge system will not assure protection of the natural scenic appearance of this dune or protection of its fragile environment and ecology.

The Director reached these conclusions without articulating any criteria that would allow an application to show the requisite "environmental assurance." Supported only by speculative potential harm the Director has leveraged his environmental concerns into a significant deprivation of a long time property owner's lawful use in a permitted location. The Director would put a band-aid over this deprivation of legitimate property rights by redefining the applicants' purpose and having him build elsewhere on his own property. No legal authority allows the Director to do this. Feasible and prudent alternatives must be assessed relative to

access to the applicant's lawful building sites. If, as is agreed, this road with bridges over critical dunes is the best available alternative, it should be approved absent a showing that the actual resultant environmental harm significantly damages the public benefit on this privately owned land.

The speculative limited harm described by the Director surely does not substantiate taking from this private landowner his lawful right to build homes for his children on lawful sites accessed by an expensive and environmentally sensitive private road system. While the LWMD witnesses presented material and competent evidence that increased erosion *might* occur because of the road, their testimony was speculative and no more than a mere scintilla of evidence compared to the substantial contradictory evidence from Jemal's witnesses.

The Construction Manager testified that the dunes preclude access to the northernmost portion of the property without encountering steep slopes. The revised plan only encounters .23 acres of steep slopes. He further testified that the proposed construction techniques, including parallel work by the crane constructing the bridges[1], will reduce environmental impact and the use of natural topography and bridging will reduce the impact to the critical dune area.

Engineer Martin Graf testified that he calculated the impact area of the entire project and that approximately 1.5 acres of the more than 59 acres will be impacted, with less than one-quarter of an acre being on steep slopes. He described the measures taken to minimize impact, including provisions for stormwater runoff, a narrow road width, and using expensive sheet piling. He offered his expert opinion that the roadway would be stable, minimize erosion and be conducive to human safety.

Engineer Chuck Brumbaugh testified as an expert in geotechnical engineering and soil testing operations. He worked on the Pierce Stocking Drive in the Sleeping Bear Dunes National Lakeshore. He testified that the road could be engineered and constructed to be structurally stable and that his recommendations would prevent or minimize erosion. He testified that the area could be restablized.[2]

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[1] Notice that the Director ignored this testimony about parallel crane work and improperly and inaccurately assumed that the crane would "require a swing radius of between 10 and 40 feet beyond the roadbed."

[2] "Restabilization" means restoration of the natural contours of a critical dune to the extent practicable, and the restoration of the protective vegetative cover of a critical dune through the establishment of indigenous vegetation,

Conclusion

The property in question has been privately owned by the Jemal family since the 1930s. The family are excellent environmental stewards of their land and have decided against developing the property. Instead they have chosen to rebuild the one existing cottage and construct three additional lakeview cottages for family members. Private, personal use will generate less vehicular and pedestrian traffic through the dunes than a commercial development.

Jemal needs neither a permit nor a variance to build on the sites that he has chosen on the northern portion of his property. However, because the property is characterized by four or five forested dunes that run both parallel and perpendicular to Lake Michigan, it is impossible to build a road to access the northern portion of the property without impacting the critical dune area. After Jemal's first proposed access road was rejected, Jemal proposed a more extensive road system that was designed to minimize the adverse impact on the dunes.

In light of the overwhelming competent, material and substantial evidence presented by Jemal's witnesses that the road will impact only 1.5 acres in the critical dune area, including less than one-quarter acre of steep slopes, and that the area can be restabilized, the Director's conclusion (based on speculative evidence regarding erosion) that the special exception required denial was erroneous.

In addition, the Director exceeded his authority and committed an error of law when he redefined Jemal's project purpose and considered "feasible and prudent" alternative building sites. Under the case law cited herein, the Director was required to accept Jemal's project purpose, apply the recognized factors for determining whether a practical difficulty would occur to Jemal if a special exception was not granted, and balance Jemal's personal property rights against the stated purpose for the Act.

Under the Director's analysis, no one who proposes a project that will impact a dune can receive a special exception. If environmental "assurance" can be defeated by limited and speculative evidence, no permit will ever issue. Yet, if the project does not impact a dune, it can be permitted and no special exception is needed. MCL §324.35317(1) does not expressly prohibit the granting of a special exception if the project might impact the dune or the steep

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and the placement of snow fencing or other temporary sand trapping measures for the purpose of preventing erosion, drifting, and slumping of sand. MCL 324.35301(h).

slopes of the dune. Certainly our Legislature could have expressly said any impact would preclude the granting of a special exception if that was what it intended, but it did not do so.

Therefore, the Director's decision to deny Jemal a special exception so that he can construct an access road to building sites upon which he is permitted to build should be and hereby is reversed.

IT IS SO ORDERED.

This decision and order resolves the last pending claim and closes the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 9/09/08