House
Legislative
Analysis
Section

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REVITALIZING MICH. CITIES

House Bill 4719 (Substitute H-2)
Sponsor: Rep. Jan Dolan

First Analysis (6-16-93)
Committee: Conservation, Environment and Great Lakes Affairs

THE APPARENT PROBLEM:

The consequences of state and federal efforts to force polluters to clean up property that contains contaminated soil or groundwater has resulted, in many cases, in the abandonment of these sites. In some situations, sites are abandoned because the property owner fears exorbitant cleanup costs. In addition, many commercial lending institutions are wary of risking capital by lending money to locate businesses at sites where contamination has occurred, for fear of being held responsible for future cleanup costs. In other situations, government policies actually encourage and subsidize the development of undeveloped suburban areas to the detriment of older urban areas. The result in many cities is urban sprawl. "Urban sprawl" has been defined by an environmental regulation task force that was created in May, 1992, by the Southeast Michigan Council of Governments (SEMCOG), as "sprawling, low-density growth at the suburban fringe, and concurrent disinvestment and abandonment of older/urbanized communities."

SEMCOG collaborated with a citizen advisory group appointed in April, 1992, to study the impact of state environmental laws and policies on urban sprawl. The advisory group's January, 1993, report, "Revitalizing Our Michigan Cities," recommended legislation that would assist older cities' efforts to redevelop idle contaminated industrial and commercial properties. A package of bills has been introduced to implement the group's recommendations, including House Bill 4718, which would permit an entity such as the state or a local governmental unit that is exempt from liability as an "operator" or "owner" of a contaminated site to transfer its exempt status to a subsequent purchaser or lessee; House Bill 4720, which would expand the types of projects and increase the amount of funds for contaminated properties owned by local governments that are eligible to receive funds under the Michigan Site Reclamation Program; and House Bill 4721, which would exclude some banks and lending institutions from liability for contamination on property on which they held a security interest. (For further information, see the analysis for House Bills 4718, 4720, and 4721 dated 6-10-93).

Another of the group's recommendations is to address the problem encountered by government entities seeking to exercise eminent domain through the use of condemnation authority: appraising a parcel of property as if it were not contaminated, without holding the property payment in escrow for later clean-up costs, could provide a windfall profit for a property owner or potentially responsible party (PRP) who has cleanup liability if the property is, in fact, contaminated. On the other hand, taking potential cleanup costs into consideration when appraising a property may generate a negative property value. Legislation has been introduced to take potential liability for cleanup costs into account by allowing a court to have a portion of the compensation amount offered for the property retained in escrow, and to allow a public agency to reserve its right to bring cost recovery actions when offering compensation for property it seeks to "take over."

THE CONTENT OF THE BILL:

The Uniform Condemnation Procedures Act outlines the procedures whereby public and private agencies may acquire property under the power of eminent domain when they have been given that power under another statute. Under the act, an agency must submit a good faith offer to acquire property for the amount established as just compensation when seeking to acquire property for public use. House Bill 4719 would amend the act to permit a court to order the retention of a portion of the compensation amount in escrow until the escrowee were ordered to pay it, and to specify that a public agency could elect or waive its right to bring cost recovery actions should it be discovered at a later date that the property was contaminated with hazardous substances.

Good Faith Offer. Under the bill, an agency that made a good faith offer for property under this provision would have to state whether it reserved or waived its rights to bring cost recovery actions for a release of hazardous substances at the property. The reservation or waiver would also have to be indicated on an agency's appraisal of just compensation for the property, and on a complaint that an agency filed for acquisition of the property in circuit court.

Motion to Reverse Agency's Election. Upon motion of an owner, the court could reverse an agency's election to reserve its rights to bring a cost recovery claim provided that the owner established, by affidavit, one or more of the following circumstances:

**By agreement with the owner, the agency waived its rights to bring a claim.

**The property had been used solely for single-family residential purposes.

**The property was "agricultural property" as defined under Michigan's Environmental Response Act (MERA), and the reservation of rights arose out of a release of hazardous substances caused by the application of a fertilizer soil conditioner, agronomically applied manure, or a pesticide.

**The owner was the only potentially responsible party identified; the extent of contamination and cost of remediation had been reasonably quantified; and the estimated cost of remediation did not exceed the agency's appraised value.

Should the court reverse an agency's election to reserve its rights, the agency would be required to submit a revised good faith offer to the owner within 14 days of the court's decision.

Vesting of Title and Possession. Currently, under the act, when no motion for review is made, a property title is vested in the agency from the date it filed a complaint. Title also vests in the agency when a motion is denied or when appeals are exhausted. To these provisions, the bill would add that vesting of title in an agency could not be delayed either by filing a motion challenging the agency's decision to reserve its rights to bring a claim, or by a motion challenging the agency's escrow. In addition, neither a motion filed to challenge an agency's decision to reserve its right to bring actions, nor a motion challenging the agency's escrow, could delay possession being vested in the agency.

Remediation Costs. Currently, when a motion for review challenging the necessity of an acquisition is not filed, the court must order an escrowee to pay the money deposited for just compensation or the amount awarded by a jury verdict. This provision also applies when such a motion is denied, when the right to appeal has terminated, or if interim possession is granted. The bill would amend the act to permit the court to allow any portion of the deposit to remain in escrow as security for remediation costs for environmental contamination, if an agency reserved its rights to bring a cost recovery claim against an owner under circumstances that the court considered just. Under the bill, the agency would have to present an affidavit and environmental report establishing that the funds placed on deposit would probably be needed for remediation of the property. The amount in escrow could not exceed the likely cost for remediation that would be required if the property were to be used for its highest and best use. These provisions could not be interpreted to limit or expand an owner's or agency's rights to bring federal or state cost recovery claims.

Release of Funds. Notwithstanding an order entered by the court requiring that money deposited remain in escrow for the payment of estimated remediation costs of contaminated property, the funds in escrow -- plus interest -- could be released to the just compensation claimants under circumstances that the court considered just, including any of the following circumstances:

**The court found that the applicable statutory remediation requirements had changed and the amount remaining in escrow was no longer required in full or in part to remedy the alleged environmental contamination.

**The court found that the anticipated need for remediation of the alleged environmental contamination was not required, or was not required to the extent of the funds remaining on deposit.

**Remediation of the property had not been initiated by the agency within two years of possession being surrendered, and the agency was unable to show good cause for the delay.

**The costs actually expended for remediation were less than the estimated costs of remediation, or less than the amount of money remaining in escrow.

**A court issued an order to apportion the responsibility for remediation.

MCL 213.55

BACKGROUND INFORMATION:

Public Act 307 of 1982, and, later, Public Act 234 of 1990, attempted to provide enforcement mechanisms and incentives to encourage polluters to pay for cleanup measures. Public Act 307 created the Environmental Response Act to eliminate environmental contamination at sites polluted by hazardous materials; to make those responsible for the contamination pay for the cleanup; and to create an environmental response fund, from which funds were to be disbursed for the state's remedial actions, including providing matching funds for federal "Superfund" cleanup activities. Public Act 234 of 1990, the "polluters pay" legislation, provided the Department of Natural Resources (DNR) with enforcement tools to order the cleanup of contaminated sites, and provided incentives -- such as loans to small businesses and exemption from liability for innocent victims who bought contaminated sites -- to help them do so. The act was designed to spur redevelopment by facilitating expeditious cleanup of contaminated sites. However, studies have shown that environmental regulations that were intended to protect the public health and the environment may, in fact, be discouraging reinvestment in cities, since decisions not to redevelop or to abandon urban sites usually result from the actual or perceived cost of removing contamination from the soil -- costs that may be higher than the value of the property.

FISCAL IMPLICATIONS:

The Department of Natural Resources (DNR) estimates that the bill would have no fiscal implications for the state. (6-15-93)

ARGUMENTS:

For:

The bill would complete a package of bills introduced to assist local governments' efforts to reinvest in contaminated urban areas. Local units of government are often faced with a dilemma when they seek to exercise eminent domain through condemnation procedures: under the condemnation act, the public agency is required to make a good faith offer to purchase the property and must then deposit the amount in escrow at the time it begins condemnation proceedings. However, there currently is no method under the act for assessing "just compensation" for property that is suspected of being contaminated. For example, if the property is contaminated, the extent of the contamination, and the total costs for cleanup, may not be known for some time. However, it is only fair that these costs be deducted from the market value of the property. House Bill 4719 would aid local governments by requiring that property owners place funds in escrow until the cost of cleaning up contaminated property is ascertained. It would also allow property owners to transfer property to a local government without fear of prosecution by the public entity in later years for cleanup costs. The bill would also give relief to property owners and "potentially responsible parties" (PRPs) by allowing a court to reverse a public agency's election to reserve its right to bring a claim in situations where the property probably had been exposed to a minimum level of contamination -- for example, agricultural or residential property.

POSITIONS:

The Michigan Bankers Association supports the bill. (6-15-93)

The Michigan Municipal League supports the bill. (6-16-93)

The Michigan Recreation and Park Association supports the bill. (6-16-93)

The Michigan United Conservation Clubs supports the bill. (6-16-93)

The Michigan Association of Counties would support the bill if it were amended to specify that when a court overrode a local government's election "not to waive" its right to bring cost recovery actions, that the decision would be based on a "preponderance of the evidence." (6-16-93)

The Department of Natural Resources (DNR) has no position on the bill. (6-15-93)

The Michigan Townships Association has no position on the bill. (6-16-93)

The Michigan Association of Homebuilders has no position on the bill. (6-16-93)