



**House  
Legislative  
Analysis  
Section**

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**PROPERTY RIGHTS ACT**

**House Bill 4433 (Substitute H-1)  
First Analysis (11-1-95)**

**Sponsor: Rep. Ken Sikkema  
Committee: Conservation,  
Environment, and Great Lakes**

***THE APPARENT PROBLEM:***

The sanctity of private property is guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution, and under Articles I and X of the State Constitution of 1963:

The Fifth Amendment to the U.S. Constitution states, in part, ". . . nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the U.S. Constitution states, in part, ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law;"

Article I, Section 23 of the State Constitution of 1963 states: "The enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Article X, Section 2 of the State Constitution of 1963 states: "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record."

In certain situations, however, government agencies may acquire private property or restrict the way in which it is used, the usual standard being when this is necessary "to achieve a compelling public need." Originally applying to the seizure of property in wartime or the acquisition of property to build roads, "takings" actions have been expanded in this century to include "regulatory takings," under circumstances where federal or state regulations, established to protect the environment or natural resources, restrict how private land may be used or developed. Property owners are not always compensated for these restrictions on their land. Generally, when courts find that a government regulation has rendered a person's property virtually worthless, "just compensation" is required. However, the courts do not consider regulations to be "takings" if they restrict but do not prohibit use of a property.

Recently, property rights advocates across the country have pressured state legislatures to enact "look before

you leap" laws that would require government agencies to assess the impact proposed regulations might have on property owners. This concept has been included in a proposal that would clarify which actions should be categorized as "takings," and that would require Michigan's attorney general to draw up guidelines that the Department of Natural Resources (DNR) and the Department of Environmental Quality (DEQ) would follow when reviewing regulatory actions that might result in a "taking" of property.

***THE CONTENT OF THE BILL:***

House Bill 4433 would create a new act, the Property Rights Preservation Act, to provide a process for evaluating whether government actions constitute a constitutional "taking" of private property under the Fifth or Fourteenth Amendments to the U.S. Constitution, or under Article I, Section 23 and Article X, Section 2 of the State Constitution of 1963.

Scope of act. The following would be categorized as a "government action", and thus subject to the proposed evaluation process:

- \*\* A decision on an application for a permit or license.
- \*\* Proposed rules that if promulgated or enforced could limit the use of private property.
- \*\* Required dedications or exactions of private property.
- \*\* The enforcement of a statute or rule, including the issuance of an order.

A government action would not include:

- \*\* The formal exercise of the power of eminent domain.
- \*\* The forfeiture or seizure of property by law enforcement agencies as evidence of a crime or for violations of law.
- \*\* The discontinuance of government programs.

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Role of the attorney general. The attorney general, in conjunction with the Department of Natural Resources (DNR) and the Department of Environmental Quality (DEQ), would be required to develop takings assessment guidelines under the Administrative Procedures Act to assist the DNR and the DEQ in identifying and evaluating government actions that could result in a constitutional taking. The guidelines would have to be based on current law, as articulated by the U.S. and Michigan Supreme Courts, and would have to be updated at least annually to take account of changes in the law.

Requirements for state agencies. Prior to taking a government[al] action[sic], the DNR and DEQ would be required to review the attorney general's takings assessment guidelines to assess the likelihood that the action would result in a constitutional taking.

Emergencies. In the case of an immediate threat to public health and safety that constituted an emergency and required an immediate response, the review of the takings assessment could be made after responding to the emergency.

### ***FISCAL IMPLICATIONS:***

According to the Department of Environmental Quality (DEQ), the bill would have a minimal impact on state funds as a result of the additional time that would be required for the proposed assessment procedures. (10-30-95)

### ***ARGUMENTS:***

#### ***For:***

There has been a groundswelling of support in recent years for laws to protect property owners from regulatory "takings" and other restrictions that have resulted in diminishing the value of private property. The October, 1995, issue of *Governing* magazine, relates some of the many instances in which government regulations have restricted how land is used and developed in order to promote a desired public goal or good. In North Carolina, for example, according to the magazine, a farmer was prevented from farming more than 300 acres because they were classified as wetlands, and a developer was unable to turn his cattle farm into a \$5 million golf course for the same reason. In the state of Washington, a property owner was unable to sell a parcel of property that she had owned since 1938 after prospective buyers were told that building on the property was prohibited because it had been designated as a national scenic area. In cases such as these, the government avoids paying "just compensation" because the land is not actually "taken," although the owners are

prevented from fully exercising control over their property. Consequently, there is a belief in some segments of the population that the government exercises control over private property without concern about the economic impact of its actions. The fact that government agencies have the resources of the public treasury at their disposal when challenged in court by property owners adds fuel to the argument that property owners' rights are being trampled upon. In response to beliefs that government regulators sometime go too far, House Bill 4433 would require that the Department of Natural Resources (DNR) and the Department of Environment Quality (DEQ) take "look before you leap" actions prior to imposing new laws that might negatively affect what property owners may do with their property. Specifically, the attorney general's assessment guidelines would permit these agencies to make better reasoned decisions that would be supported by administrative records. This might help prevent future cases like the expensive and controversial settlement agreement in the Nordhouse Dunes litigation, which has recently been before the legislature.

#### ***Against:***

The bill does not go far enough. The Fifth Amendment to the U.S. Constitution specifies ". . . nor shall private property be taken for public use, without just compensation." However, during the past few decades, the constitutional rights of individuals have slowly been eroded by regulations that restrict how private property is used. While most of these regulations are enacted for reasons which many acknowledge will benefit society, such as protection of endangered wildlife or fragile habitats, no compensation is offered to the property owners whose land has diminished in value. Many question why individual property owners must bear the entire cost of relinquishing control of their property for reasons that benefit everyone else. In order to assure that government agencies respect property rights, the bill should specify that property owners be compensated when government regulations devalue their land.

#### ***Response:***

The state constitution provides for the protection of private property from "taking" without just compensation. However, the constitution also specifies, in Article 4, Section 52, that the conservation and development of the state's natural resources are of paramount public concern in the interest of citizens' health, safety, and general welfare. Therefore, a balance must be preserved between the interests of property owners and that of public health and the environment. However, blanket legislation that would compensate property owners for regulations that affected their land could cost the state -- and, ultimately, the taxpayers -- millions of dollars. On the one hand, it could have a chilling effect on the passage of future environmental

regulations designed to protect the rights of all citizens; on the other hand, it could result in property owners being paid not to pollute! In any case, efforts to enact such measures have been soundly defeated in other states, where the voters have indicated that they prefer to have conflicts of interest in these matters resolved on a case by case basis by the courts.

***POSITIONS:***

A representative of the Department of the Attorney General testified in support the bill. (10-31-95)

The Michigan Oil and Gas Association supports the bill. (10-31-95)

The Department of Environmental Quality (DEQ) supports the bill. (10-31-95)

The Michigan Association of Realtors supports the bill. (10-31-95)

The Michigan United Conservation Clubs (MUCC) supports the bill. (10-31-95)

The National Federation of Independent Business (NFIB) supports the bill. (10-31-95)

The Michigan State Chamber of Commerce has no position on the bill. (10-31-95)

The Michigan Environmental Council (MEC) has no position on the bill. (10-31-95)

The Sierra Club - Mackinac Chapter does not actively oppose the bill, but doesn't believe that legislative action is needed on this issue. (10-31-95)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.