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BILL ANALYSIS



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Senate Bills 778 through 783 (as introduced 11-30-95)  
 Sponsor: Senator Mat J. Dunaskiss  
 Committee: Local, Urban and State Affairs

Date Completed: 9-17-96

**CONTENT**

**Senate Bill 778 would amend the Uniform Condemnation Procedures Act to:**

- Allow an agency to decline to take title to unwanted property that was a portion of an acquired parcel, but require it to pay compensation for the entire property.
- Allow an agency to apply for a variance, before or after acquisition, if acquiring a portion of a parcel would leave the remainder in nonconformity with a zoning ordinance.
- Allow an agency to request an owner to furnish financial documents and information on the impact of a taking, and provide for a show cause hearing if the owner failed to comply.
- Provide that vesting of title in an agency could not be delayed or denied for any reason except a challenge to the necessity of the taking.
- Require an agency and a property owner to exchange appraisal reports.
- Revise the calculation of interest.
- Limit the amount of attorney fees that an owner could recover, and limit reimbursable attorney fees to \$100 an hour.
- Permit an owner to recover fees for only one expert witness unless advance court approval was obtained, and limit allowable expert witness's fees to \$100 an hour.
- Provide that the general effects of a public project, experienced by the general public in varying degrees, could not be considered in a determination of just compensation.

**Senate Bills 779 to 783 would amend several laws governing zoning ordinances to allow an**

**agency to seek a variance under Section 4 of the Uniform Condemnation Procedures Act (which, under Senate Bill 778, would permit an agency to apply for a zoning variance for a portion of a parcel of property).** These bills are tie-barred to Senate Bill 778.

Senate Bill 779 would amend Part 305 of the Natural Resources and Environmental Protection Act, which provides for zoning to control uses along a designated natural river; the bill would allow a local unit of government, a landowner, or an agency acting under Section 4 of the Uniform Condemnation Procedures Act to apply for a change of boundaries or permitted uses. Senate Bill 780 would amend the Airport Zoning Act. Senate Bill 781 would amend the County Rural Zoning Enabling Act. Senate Bill 782 would amend the Township Rural Zoning Act. Senate Bill 783 would amend Public Act 191 of 1986, which provides for city and village zoning. Senate Bills 780 to 783 would allow an agency acting under Section 4 of the Uniform Act to apply for a variance.

A more detailed description of Senate Bill 778 follows.

Overview of Current Law

The Act prescribes the procedures that must be followed when property is acquired by a public or private agency (authorized by law to condemn property), and requires an agency first to attempt negotiation and, if unsuccessful, to commence a condemnation action when acquiring property through the exercise of eminent domain. Before negotiating for the purchase of property, an agency must make a good faith offer to the owner to acquire the property for the amount that the agency believes to be just compensation. If the agency and the property owner do not agree on

the purchase, the agency may file a circuit court complaint for the acquisition of the property, asking the court to determine just compensation. When a complaint is filed, the agency must deposit in escrow the amount estimated to be just compensation. The owner then may challenge the public necessity of the acquisition by filing a motion asking that necessity be reviewed. If such a motion is not filed or is denied, title to the property vests in the agency, the owner is entitled to just compensation, and the court must arrange surrender of possession and payment of the estimated just compensation.

#### Acquisition of a Portion of Property

Currently, if the acquisition of a portion of a parcel would destroy the practical value or utility of the remainder of the parcel, the agency must acquire the entire parcel. Under the bill, the agency still would have to pay just compensation for the whole parcel but could elect whether to receive title to and possession of the remainder.

If the acquisition of a portion of a parcel would leave the remainder in nonconformity with a zoning ordinance, the agency, before or after acquisition, could apply for a zoning variance for the remainder. In determining whether to grant the variance, the governmental entity having jurisdiction would have to consider the potential benefits of the public use for which the property would be acquired, in addition to those criteria applicable under the relevant zoning statute, ordinance, or regulation. The agency actually would have to acquire the property for the proposed public use in order for the variance to become effective for the remainder. The variance would remain in effect and could not be terminated as long as the nonconformity was not substantially increased, unless the governmental entity permitted the increase. An agency would have the same right as a property owner to appeal action on a zoning variance.

#### Provision of Financial and Impact Information

Under the bill, during the period in which an agency was establishing what it believed to be just compensation (before initiating negotiations for the purchase of property), the agency could request from the owner reproductions of tax returns, financial statements, and other existing financial documents relevant to the appraisal of the property for the five-year period preceding the request. The reproductions would have to be made pursuant to

the Records Media Act. The owner would have to provide the requested documents within 15 business days after receiving a written request from the agency. The agency would have to reimburse the owner for reasonable costs incurred in reproducing the documents. The agency also could request the owner to inform it of the impact that the taking would have on the remaining property, to the extent that the information was relevant to a determination of just compensation.

If the owner failed to provide all documents and information requested, the agency could file a complaint and proposed order to show cause in the circuit court. The court immediately would have to hold a hearing on the proposed order, and would have to order the owner to provide documents and information requested by the agency that the court found to be relevant to a determination of just compensation. The owner would be liable for all damages and expenses incurred by the agency as a result of the owner's failure to provide the requested information timely. These provisions would not affect any right a party could otherwise have to discovery upon commencement of an action under the Uniform Condemnation Procedures Act.

Currently, before initiating negotiations for the purchase of property and promptly after establishing an amount that it believes to be just compensation, the agency must submit to the owner a good faith offer to acquire the property for the full amount of just compensation established. The bill provides that if the owner failed to provide documents or information requested by the agency, the agency could base its good faith written offer on the information otherwise known to it whether or not the agency had sought a court order to show cause. If the agency and the owner were unable to agree on a purchase, the agency would have to make a final good faith offer before filing a condemnation lawsuit.

#### Delay or Denial of Vesting or Surrender

Under the Act, if a motion to review public necessity is not filed, title to the property vests in the agency as of the date the complaint was filed. Title also vests in the agency, as provided in the Act, if the motion to review necessity is denied after a hearing and after any right to appeal has terminated. Under the bill, in the latter case, title would vest as of the date on which the complaint was filed or on another date set by the court upon the agency's motion.

The Act provides that the vesting of title or possession may not be delayed by a motion challenging the agency's decision to reserve its rights to bring Federal or State cost recovery actions, or by a motion challenging the agency's escrow of money as security for remediation costs of environmental contamination. Under the bill, vesting of title or possession also could not be delayed or denied by an allegation that the agency should have offered a higher amount for the property or should have included additional property in its initial or final good faith written offer. In addition, vesting of title could not be delayed or denied by any other reason except a challenge to the necessity of the acquisition.

#### Exchange of Appraisal Reports

The bill would require that, within 180 days after a complaint was filed, each party complete its appraisals and provide to the opposing parties a full appraisal report from each appraisal expert on whom the party relied to determine must compensation. The agency could take additional time to appraise additional property, however, if the owner claimed that the agency was taking property other than that described in the final good faith written offer. Also, the court could extend the 180-day limit upon stipulation or good cause shown.

Notwithstanding any other provisions of this section, to allow a reasonable opportunity for review and preparation and for the deposition of appraisal expert witnesses, the parties would have to exchange appraisal reports and the identities of appraisal expert witnesses at least 30 days before any scheduled mediation and at least 60 days before trial.

An appraisal report would be required fairly and reasonably to describe the methodology and basis for the amount of the appraisal. If the testimony or opinion of a person relating to the value of real property would require a license under Article 26 of the Occupational Code (which governs real estate appraisers), the person could not be permitted to testify or otherwise render an opinion relating to the value of real property unless he or she were licensed under Article 26.

The court could issue orders to facilitate compliance with this section, including orders to require mutual simultaneous exchange of appraisal reports. If an appraisal report had not been provided pursuant to this section, a mediation panel could not consider the report

unless specifically authorized by court order. If an appraisal expert's report had not been provided, the court could bar the taking of appraisal testimony from the expert.

#### Interest

The Act requires the court to award interest on the judgment amount from the date of the filing of the complaint to the date of payment. The bill provides that interest could not be awarded on attorney fees, expert witness fees, or costs.

Currently, interest must be computed at the interest rate applicable to a Federal income tax deficiency or penalty. The bill, instead, provides that interest would be simple interest, calculated at six-month intervals from the date of filing at a rate equal to 1% plus the average interest rate paid at auctions of five-year United States Treasury notes during the six-month period ending on the June 30 or December 31 preceding the date of the six-month interval, as certified by the State Treasurer.

The court could toll the accrual of interest for any period of unreasonable delay attributable to the owner.

#### Attorney Fees/Expert Witness Fees

Attorney Fees. Under the Act, if the amount finally determined to be just compensation exceeds the amount of the agency's written offer, the court must order the agency to reimburse all or part of the owner's reasonable attorney fees, but not more than one-third of the amount by which the ultimate award exceeds the agency's written offer. The reasonableness of the attorney fees must be determined by the court.

Under the bill, the court would have to determine the reasonableness of the attorney fees after reviewing an itemized accounting of the legal services provided and such additional evidence and argument as presented to the court. The reasonable attorney fees could not exceed one-third of the amount by which the ultimate award exceeded the agency's final good faith written offer. Subject to this limit, the reasonable fees would be the product of the reasonable hours of legal services provided times a reasonable hourly rate, not to exceed \$100 per hour. If the property acquired were the owner's principal residence, however, the first \$25,000 of actual attorney fees would be presumed to be reasonable, subject to the one-third limit.

If the agency were ordered to pay attorney fees under another statute or court rule, as reimbursement, sanction, or otherwise, the attorney fees payable under this section of the Act would have to be reduced by a corresponding amount.

Expert Witness Fees. The Act provides that an ordinary or expert witness must receive from the agency the reasonable fees and compensation provided by law for similar services in ordinary civil actions in circuit court, including the reasonable expenses for preparation and trial. The bill would delete reference to preparation and trial expenses. Expert witness fees could be allowed only for the expert witness's arriving at an opinion and testifying about that opinion, and not for reviewing opinions of other experts or conferring with legal counsel.

The Act also requires that expert witness fees be allowed with respect to an expert whose services were reasonably necessary to allow the owner to prepare for trial. The bill would require that expert witness fees be allowed with respect to *one* expert. Fees could not be allowed for additional expert witnesses unless, before the owner incurred the fees, the court determined, upon a proper showing by the owner, that the additional experts were reasonably necessary to allow the owner to prepare for trial.

The reasonable expert witness fee would be the product of the reasonable hours spent times the reasonable hourly rate, not to exceed \$100 per hour.

Attorney or Expert Witness Fees. If the parties were unable to agree upon the amount of a reasonable attorney or expert witness fee, the agency would be entitled to a full evidentiary hearing on the amount of the fee and to full rights of discovery in advance of the hearing.

An agency would not have to reimburse attorney or expert witness fees that were attributable to an unsuccessful challenge to necessity or to the validity of the proceedings. Neither party would be entitled to recover the fees attributable to a dispute over the amount of attorney fees, expert witness fees, or costs to be awarded. The agency would not have to reimburse the owner for attorney fees, expert witness fees, or expenses incurred to address liability, damages, or remediation costs, for environmental contamination of the property.

If the agency settled a case before entry of a verdict or judgment, it could agree to pay

reasonable attorney and expert witness fees.

#### General Project Effects

The bill provides that the general effects of a public project for which property was taken, whether actual or anticipated, that in varying degrees were experienced by the general public, or property owners from whom no property was taken, could not be considered in a determination of just compensation. A special effect of the project on the owner's property that, standing alone, would constitute a taking of private property under Article 10, Section 2 of the State Constitution would have to be considered in a just compensation determination. To the extent that such detrimental effects of a project were considered, they could be offset by consideration of the beneficial effects of the project.

#### Other Provisions

A person would not be entitled to a payment in connection with the acquisition of all or part of the person's property under the Act if that payment would be duplicative of any grant or other payment received under any State or Federal statute or regulation.

As a rule, the Act requires the date of acquiring and of valuation to be the date of filing. The value of each parcel, and of a part of a parcel remaining after the acquisition of a part, must be determined with respect to the condition of the property and the state of the market on the date of valuation. Under the bill, however, if anticipated damages were avoided because of changes in the taking or project or changes in the actual effect of the taking or project on the remaining property, the property would have to be valued as if those damages had not been anticipated.

Under the bill, an owner would have a duty to take reasonable steps to mitigate the damages caused by a taking.

The bill would repeal two sections of the Act (MCL 213.76 and 213.77) that repealed other laws on April 1, 1983, and April 1, 1985, respectively.

MCL 213.54 et al. (S.B. 778)  
324.30510 & 324.30512 (S.B. 779)  
259.454 (S.B. 780)  
125.220 (S.B. 781)  
125.290 (S.B. 782)  
125.585 (S.B. 783)

Legislative Analyst: S. Margules

sb778-783/9596

## **FISCAL IMPACT**

The bills would result in savings to the State and local units of government. Savings would result from provisions in the bills that would allow governmental units to apply for zoning variances for partial takings, eliminate duplicative payments, change the interest rate on judgments, limit expert witness and attorney fees, toll interest for periods of unreasonable delays, and require access to appraisals and other information. Comprehensive Financial Reports for the Department of Transportation list right-of-way costs at \$88.4 million in FY 1991-92, \$75.1 million in FY 1992-93, \$68.9 million in FY 1993-94, and \$89.8 million in FY 1994-95. The Department reports that normally 80% of purchases are "friendly acquisitions".

Fiscal Analyst: B. Bowerman

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.