House
Legislative
Analysis
Section

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DRAINS: ALLOW RECORDING OF PRE-1956 EASEMENTS

House Bill 4608 (Substitute H-6)
First Analysis (10-14-03)

Sponsor: Rep. James Koetje
Committee: Agriculture and Resource Management

THE APPARENT PROBLEM:

The Drain Code of 1956 requires, among other things, that any easement obtained in connection with a proposed drain or drains be recorded in the office of the register of deeds "following the expiration of 30 days after the day of review" (of drain assessments) and whenever the drain is cleaned, relocated, deepened, widened, straightened, extended, tiled, or consolidated under law.

The above requirement is necessary for easements obtained after the enactment of the Drain Code of 1956. However, county drain commission offices throughout the state also contain records of easements entered prior to the enactment of the Drain Code that have gone largely unrecorded by the local register of deeds. For instance, in testimony before the House Committee on Agriculture and Resource Management, the Kent County Drain Commissioner stated that his office has records dating back well into the 1880's of county commission meetings that provide evidence of recorded easements. Apparently, these are valid easements just like others properly recorded with the register of deeds after the enactment of the Drain Code, although the records of these easements are, for the most part, only held by the county drain commission. [It should be noted, however, that some contend that these are not valid easements.]

The existence of these easements creates headaches because they do not show up on title searches for parcels of land. Thus, when an individual purchases a parcel of land, he or she is often unaware of the existence of such easements. However, these records remain unrecorded by the county register of deeds because they do not meet the standards set forth in Public Act 103 of 1937, which governs the receipt of documents by registers of deeds.

THE CONTENT OF THE BILL:

Public Act 103 of 1937, also known as the recording act, sets out certain requirements for the receipt by the register of deeds of "instruments" (that is, written documents) executed after October 29, 1937 that convey, assign, encumber, or otherwise dispose of the title to - or any interest in - real estate.

The bill would add a new section that provides that those requirements would not apply to an instrument submitted for recording by the county drain commissioner if the following are met:

- The instrument is accompanied and attached to an affidavit of the county drain commissioner, deputy drain commissioner, public works commissioner, or an authorized officer or employee of the body having jurisdiction in a county that does not have a drain commissioner.

- The affidavit states that the attached instrument is a copy of an instrument that is on file in the office of the person who submits the affidavit and that, to that person's best knowledge and belief, is a drain easement, right of way, or release of damages granted prior to March 28, 1956.

- The affidavit meets existing requirements in the act.

The appropriate drainage district would be responsible for any fees related to the recording of the instrument. The drain commissioner or other officer or body recording the instrument would be required to notify impacted landowners within 30 days after the instrument is recorded.

The added section would be repealed 10 years after the bill's effective date.

MCL 565.202a

BACKGROUND INFORMATION:

Public Act 208 of 1968 added section 6 of the Drain Code, which states, in part, that "all established drains regularly located and established in pursuance of law existing at the time of location and establishment and visibly in existence, which were established as drains, and all drains visibly in existence in written drain easements or rights of way on file in the office of the commissioner, shall be deemed public drains located in public easements or rights of way which are valid and binding against any owners of any property interest who became or hereafter become such owners after the location and establishment of the drain or the existence of the drain became visible or the written drain easement or right of way was executed, and the commissioner or drainage board may use, enter upon and preserve such easement or right of way for maintenance of the visible drain and any other lawful activity with respect to the same not requiring a larger or different easement or right of way and may exercise any rights granted in the written easement or right of way on file in the office of the commissioner."

In essence, the above section involves two types of drains: (1) those that are regularly located and established under the law existing at the time of location and establishment, and visibly in existence, and (2) those that are visibly in existence in written drain easements or rights-of-way on file in the office of the drain commissioner.

The above section of the Drain Code was the subject of a case before the Michigan Court of Appeals in 1986 that appears to be similar to the situation that prompted the introduction of this bill, though the bill is not a direct result of any litigation. At issue in *Kiesel Drainage Board v. Hooper* (148 Mich App 381) was a 1905 right-of-way through the property of the defendants. The defendants asserted that the right-of-way was not valid because it was not signed by the property owner in 1905 (rather, it was signed by the property owner's son), and that the right of way was not recorded or registered until 1974. The court noted that the drain at the heart of the case could be categorized as either type of drain described above, though in this particular case, the second type of drain was more fitting, as the court did not have a sufficient record on which to make a determination regarding the first type of drain.

To the second type of drain - that is, those that are visibly in existence in written drain easements or rights-of-way on file with the drain commissioner - the court noted that, "[w]hether valid or not, the 1905 release of right-of-way involved in this case was on file in the office of the Bay County Drain Commissioner and, thus…is deemed a valid public easement." The court further held that, "[w]e agree with the trial judge that this provision of the statute was intended to cure any defects and quiet title in rights-of-way on file with the drain commissioner. If, as the defendants argue, this provision only applies to already valid grants of rights-of-way, it would serve no purpose, since such grants would be valid without the statute. We refuse to interpret the statute in a way that causes it to serve no purpose."

To the last point that the right-of-way was invalid because it was not recorded until 1974, the court noted that such an argument is without merit because the Drain Code does not require the recordation of easements or rights-of-way entered prior to the enactment of the Drain Code (see also *Hodgeson v. Genesee County Drain Commissioner* - 52 Mich App 411).

FISCAL IMPLICATIONS:

The House Fiscal Agency reports that the bill would have no fiscal impact on state or local government. Fees charged by a register of deeds for the recordation of these easements would be the responsibility of the county drain district. (HFA floor analysis dated 10-09-03).

ARGUMENTS:

For:

The bill is necessary so that easements in existence prior to the enactment of the Drain Code of 1956 may be recorded with the register of deeds. The Drain Code requires easements, rights-of-way, and releases of damages entered after the enactment of the code to be recorded with the register of deeds. The code does not require easements, rights-of-way, or releases of damages that were in existence prior to the enactment of the Drain Code to be recorded with the register of deeds. Records of those actions were required under Public Act 316 of 1923, the predecessor to the 1956 law, to be recorded with the office of the county drain commissioner. An attorney general's opinion held that "the register of deeds is authorized to record releases of rights-of-way in connection with drains where the acknowledgement has been taken by the county drain commission, if other prerequisites to the

recording are satisfied". These easements are not recorded with the register of deeds because they do not comport with the requirements set forth in the recording act necessary for an instrument to be recorded with the register of deeds.

The larger problem, stated above, is that these easements do not come up in a title search, leaving property owners unaware of the existence of the easement on their land. Thus, when these property owners are confronted by a drain commissioner about the need to work on a drain running through their property, they are, quite understandably, upset. Legal challenges stemming from this can be quite costly for the drainage district and the property owner.

That being said, this bill provides for a mechanism by which these easements may be recorded with the register of deeds, which provides for public notification of the existence of these easements, and which allows these easements would turn up in a standard title search. The bill goes one step further in that it also requires that property owners be notified upon the recordation of an easement on their property. This, obviously, increases a property owner's awareness of the existence of the easement and should provide them with sufficient time to take any action regarding that easement. (A property owner who receives notice of an easement just prior to the drain commissioner working on a drain has very little time in which to act regarding that drain. This should provide property owners time in which they may review the validity of the easement.)

Finally, to the arguments against the bill, it is believed by some - namely the drain commissioners - that the bill, in itself, says nothing about the apparent validity or invalidity of the easements. Rather, it merely provides drain commissioners with the opportunity to record such easements with the register of deeds, and put people on notice that these records exist in the office of the drain commissioner.

Response:

There is still some concern that the bill, as currently written, fails to resolve the problem that these records don't show up on the title searches. Every instrument recorded by a register of deeds is entered into the Book of Deeds or the Book of Mortgages. The register of deeds maintains a general index, known as the grantor/grantee index, for each book. However, regardless of the form the information from the drain commissioner takes, they won't show up in the grantor/grantee index. These records from the drain commissioner are only metes and bounds descriptions, with no way to identify the grantor/grantee. Absent that identification, title searches will continue to be incomplete and the problem will go unresolved.

Against:

The purposes of the bill would be better achieved if the *Drain* Code was amended rather than the recording act. Section 11 of the Drain Code could be amended so as to require all *valid* easements, rights-of-way, and releases of damages be recorded with the register of deeds. That act already requires this of all easements, rights-of-way, and release of damages entered after the enactment of the code. The problem, which is stated above, is that such a requirement is not necessary for easements recorded in the office of the drain commissioner in accordance with previous drain laws. However, it should be noted that new legislation would have to be drafted. That bill would ensure the recordation of *valid* easements.

Against:

Those in opposition to the bill believe that the bill essentially amounts to an unconstitutional government "taking" of private property without just compensation, by allowing for the recording of certain invalid easements. They cite, among other provisions, Section 29 of Chapter 65 of the Revised Statutes of 1846, MCL 565.29. That provision provides that each conveyance of real estate within the state that is not properly recorded by the register of deeds "shall be void as against any subsequent purchaser in good faith…" This provision was the subject of a contested right-of-way in Saginaw County, see *Peaslee v. Saginaw County Drain Commissioner* (365 Mich 388). In that case, the plaintiff asserted that the release of right-of-way on their property was entered prior to their purchase of it, and that because the release was not filed with the register of deeds nor called to their attention prior to purchase, the release of right-of-way was not valid. The court held that "the record of the release of right-of-way in the office of the drain commissioner was not constructive notice to plaintiffs-appellees." Citing MCL 565.29, and finding similar decisions in other states to that point (because there were not similar decisions in Michigan), the court affirmed plaintiff's contention that that release of right-of-way was not properly recorded and, therefore, not applicable to the plaintiffs.

The court's decision in *Peaslee* was later confirmed by the state Court of Appeals in *Allen v. Bay County Drain Commissioner* - 10 Mich App 31 (1961). At issue there was the validity of a 1917 easement in Bay County that was recorded in the office of the drain commissioner, but not with the register of

deeds. The plaintiffs purchased the land in 1943 and, in 1963, the drain commissioner sought to relocate the drain onto land that was contained in the original easement, but claimed by the plaintiffs. The trial court found that the plaintiffs did not have actual notice of the easement. The Court of Appeals noted that the case was controlled by *Peaslee*, "which held that such an easement if not recorded by the register of deeds office is void against subsequent purchasers in good faith", and ruled in favor of the plaintiffs.

Based on the above citations, it appears that the records contained in the offices of the county drain commission do not meet the requirements provided in the *Peaslee* and *Allen* decisions, and as such, are not valid easements against the property of present-day landowners. Therefore, by providing for the recordation of these *invalid* easements, this bill amounts to an unconstitutional taking of private property.

Response:

Public Act 208 of 1968 added section 6 of the Drain Code, largely in response the to the *Peaslee* and *Allen* decisions. Again, the court held that section "creates a valid public easement for drains 'visibly in existence in written drain easements or rights of way on file in the office of the commissioner.'" The court further held that whether valid or not, the 1905 release of right-of-way constitutes a valid public easement by operation of section 6. This means any concerns that this constitutes a taking are unfounded.

Rebuttal:

In this regard, the problem becomes on what basis the drain commissioner determines a pre-1956 easement is valid or not. In many instances, these records include such things as maps and descriptions of properties, without any indication of an actual formal conveyance of land properly executed by the property owner. These books can very well contain descriptions and maps of proposed drains that were never formally developed. This bill lowers the standard of proof necessary to record an easement, and permits the recordation of presumptive easements - that is, easements where drain commissioners, property owners, local government officials, and concerned citizens cannot know, within any reasonable degree of certainty, the validity of these easements.

Further, this reliance on historical evidence would be advanced under this session's attempt to rewrite the Drain Code. Senate Bill 217 would amend section 6 of the Drain Code to provide that all drains regularly located and established under law in effect at the time of location and establishment and visibly in existence, or all drains visibly in existence in written drain easements, rights-of-way, orders, or other records such as maps, engineering plans, survey or construction records, or apportionment, assessment, or procedural records on file in the office of the drain commissioner, are public drains and shall be presumed to have been established under law.

However, this reliance on historical evidence to establish title was recently struck down by the state Court of Appeals in *Beulah Hoagland Appleton Qualified Personal Residence Trust v. Emmet County Road Commission* - 236 Mich App 546 (1999). Among other contested issues in the case, the Emmet County Road Commission relied on several historical documents to support its contention that a particular strip of land constituted a public highway and that the plaintiffs did not acquire title because the road commission had not relinquished jurisdiction or control over the road. The court noted that the road commission argued, "a novel theory that the trial court's grant of summary disposition was appropriate because the undisputed historical evidence . . . demonstrated that the disputed strip of property was a public highway. According to defendants, their provision of historical maps, surveys, affidavits, and photographs regarding the condition and use of the disputed strip of property to establish title to the disputed strip was sufficient because the historical documents were the only available evidence reflecting their claim to their property."

The court further held, "[b]y recognizing defendants' proposed new approach…we would undermine the right to hold property to the exclusion of others. Michigan courts have long recognized that a landowner should have free and exclusive enjoyment of his property … Moreover, our adoption of defendants' approach would result in the taking of private property without just compensation in derogation of the Michigan Constitution…We decline to undermine property rights by adopting defendants' proposal, and thus we reject historical evidence as an independent means of establishing rights in property."

Thus, in relying on purported historical evidence (an already suspect method to establish title), the recordation as a valid public easement of an invalid easement is clearly an impermissible taking of property, and that is what would likely occur here.

Against:

Opponents also argue that the bill is also a taking, in that it fundamentally changes the burden of proof necessary to challenge the validity of an easement.

By providing that the drain commissioner can simply file an affidavit with the register of deeds, the bill essentially provides that these are valid easements unless it can be proven otherwise. Thus, the onus to refute that validity is placed on the individual property owner, who will invariably pay a great deal in legal fees and expenses. Rather, it should be the drain commissioner who must present evidence indicating the existence of a valid easement, as a property owner has no way to prove otherwise. Further, given the suspect validity of many of these easements, before any work is done on these drains, the drain commissioner should be required to consult with the property owner about the exact specifics of the project.

POSITIONS:

The Michigan Association of Drain Commissioners indicated that it supports the bill. (10-7-03)

The Michigan Farm Bureau indicated that it supports the concept of the bill. (10-7-03)

The Michigan Homebuilders Association indicated that it supports the concept of the bill. (10-7-03)

The Michigan Drain Code Coalition opposes the bill. (10-8-03)

Analyst: M. Wolf

■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.