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BILL ANALYSIS

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Senate Bill 534 (as enacted) **PUBLIC ACT 204 of 2007**
Senate Bill 539 (as enacted) **PUBLIC ACT 203 of 2007**
House Bills 4711 and 4712 (as enacted) **PUBLIC ACTS 201 & 202 of 2007**
Sponsor: Senator Randy Richardville (S.B. 534)
Senator Alan Sanborn (S.B. 539)
Representative Bill Huizenga (H.B. 4711)
Representative Ed Clemente (H.B. 4712)
Senate Committee: Economic Development and Regulatory Reform
House Committee: New Economy and Quality of Life

Date Completed: 1-28-09

CONTENT

The bills amended the Brownfield Redevelopment Financing Act to do all of the following:

- **Revise the definitions of "eligible activities", "eligible property", and "blighted".**
- **Extend for five years the date by which the Department of Environmental Quality (DEQ) or the Michigan Economic Growth Authority (MEGA) must approve a work plan, if a brownfield development authority will use taxes levied for school operating purposes.**
- **Revise the factors the DEQ must consider when reviewing a work plan.**
- **Allow the DEQ to deny a work plan for certain reasons.**
- **Delete references to a remedial action plan.**
- **Revise and expand exceptions to the Act's limitations on the use of captured tax revenue, and increase the amount that may be used to cover an authority's administrative and operating expenses and certain other costs.**
- **Require the Auditor General to conduct a performance postaudit of the brownfield redevelopment program at least every three years.**
- **Require the State Tax Commission to include in its annual financial report information regarding the amount of tax increment revenue from school operating taxes used for certain purposes.**

The bills were tie-barred and took effect on December 27, 2007.

Senate Bill 534

Eligible Activities

The Act allows municipalities (cities, villages, townships, and counties) to establish brownfield redevelopment zones and brownfield redevelopment zone authorities, which may implement brownfield plans for the redevelopment of commercial or industrial property. The Act specifies financing sources for authority activities, including the capture of tax increment revenue (that is, revenue from the incremental increase in property values within a zone). The revenue may be used to pay the costs of eligible activities on eligible property within a zone.

"Eligible activities" or "eligible activity" means one or more of certain activities listed in the Act, e.g., baseline environmental assessment (BEA) activities;

due care activities; additional response activities; and, for property meeting various criteria, infrastructure improvements, demolition of structures that is not response activity under Section 20101 of the Natural Resources and Environmental Protection Act (NREPA), lead or asbestos abatement, or site preparation. ("Response activity" under Section 20101 means evaluation, interim response activity, remedial action, demolition, or the taking of other actions necessary to protect the public health, safety, or welfare, the environment, or natural resources.)

Under the bill, the list of eligible activities also includes reasonable costs of developing and preparing brownfield plans and work plans, as well as reasonable costs of environmental insurance (i.e., liability insurance for environmental contamination and cleanup that is not otherwise required by State or Federal law).

In addition, for eligible activities on eligible property that is not located in a qualified local governmental unit and that is a facility, functionally obsolete, or blighted, as determined by resolution of the governing body, the bill added to the list demolition of structures that is not response activity under Section 20101, and lead or asbestos abatement.

Also, for property that is not located in a qualified local governmental unit and that is a facility, functionally obsolete, or blighted, and that is a former mill that has not been used for industrial purposes for the preceding two years and that is located along a river that is a Federal Superfund site and in a city with a population of under 10,000, the bill includes the following additional activities:

-- Infrastructure improvements that will directly benefit the property.
-- Demolition of structures that is not response activity under NREPA.
-- Lead or asbestos abatement.
-- Site preparation that is not response activity under NREPA.

For eligible activities on eligible property that is located north of the 45th Parallel, that is a facility, functionally obsolete, or blighted, and whose owner or operator makes new capital investment of $250 million or more in Michigan, the bill includes demolition of structures that is not response activity under NREPA, and lead or asbestos abatement.

The Act's list of eligible activities includes relocation of public buildings or operations for economic development purposes, which previously required prior approval of MEGA. The bill deleted the prior approval requirement.

Under the Act, "blighted" means property that meets certain criteria indicating its nonuse. The bill includes property that has substantial subsurface demolition debris buried on site so that the property is unfit for its intended use.

Under the Act, "facility" means that term as defined in Section 20101 of NREPA (i.e., any area, place, or property where a hazardous substance in excess of the concentrations that satisfy cleanup criteria has been released, deposited, disposed of, or otherwise comes to be located).

"Functionally obsolete" means that the property cannot be used to perform adequately the function for which it was intended due to a substantial loss in value resulting from factors such as overcapacity, changes in technology, deficiencies or superadequacies in design, or other similar factors that affect the property itself or the property's relationship with other surrounding property.

"Qualified local governmental unit" means that term as defined in the Obsolete Property Rehabilitation Act.

Eligible Property

Under the Brownfield Redevelopment Financing Act, "eligible property" means property for which eligible activities are identified under a brownfield plan that was used or is currently used for commercial, industrial, or residential purposes, that is either in a qualified local governmental unit and is a facility, functionally obsolete, or blighted or is not in a qualified local governmental unit and is a facility, and includes parcels that are adjacent or contiguous to that property if the development of the adjacent and contiguous parcels is estimated to increase the captured taxable value of that property or tax reverted property owned or under the

control of a land bank fast track authority. Eligible property includes, to the extent included in the brownfield plan, personal property located on the property. Eligible property does not include qualified agricultural property exempt under Section 733 of the General Property Tax Act from the tax levied by a local school district for school operating purposes. (Section 733 provides for the exemption under specific circumstances, to the extent allowed under the Revised School Code.)

The bill revised the definition of "eligible property" to include property on which eligible activity may occur under the bill's expanded definition of "eligible activities" or "eligible activity". The bill also includes property used for public purposes, as well as commercial, industrial, or residential purposes.

Senate Bill 539

The Brownfield Redevelopment Financing Act requires a brownfield redevelopment authority to submit annually to the local governing body and the State Tax Commission a financial report on the authority's activities. The bill requires the report to include the amount of tax increment revenue attributable to taxes levied for school operating purposes used for the following:

-- Site investigation activities required to conduct a baseline environmental assessment and to evaluate compliance with Section 20107a of NREPA (described below).
-- Completing a report.
-- Preparing a plan for compliance with Section 20107a of NREPA.
-- Demolition of structures that is not response activity, or lead or asbestos abatement, on eligible property that is a facility, functionally obsolete, or blighted and is not located in a qualified local unit.

(Section 20107a requires a person who owns or operates property that he or she knows is a facility to take certain actions with respect to hazardous substances at the site.)

The Act requires the State Tax Commission to collect the financial reports submitted annually by each brownfield development authority, compile and analyze the information in them, and submit annually a report based on that information to various standing committees of the Legislature. In the Senate and the House of Representatives, the report must be submitted to the committees responsible for natural resource management, conservation, environmental protection, and taxation. The bill also requires the report to be submitted to the Senate committee responsible for economic development, and to the House committees responsible for commerce and economic development.

Under the bill, in addition to any other requirements of the Act, at least every three years beginning not later than June 30, 2008, the Auditor General must conduct and report a performance postaudit on the effectiveness, efficiency, and economy of the brownfield redevelopment program. As part of the performance postaudit, the Auditor General must assess the extent to which the implementation of the program by the DEQ and MEGA facilitated and affected the redevelopment or reuse of eligible property and identify any factors that inhibited the program's effectiveness. The performance postaudit also must assess the extent to which the interpretation of statutory language, the development of guidance or administrative rules, and the implementation of the program by the DEQ and MEGA are consistent with the fundamental objective of facilitating and supporting timely and efficient brownfield redevelopment of eligible property. Copies of the performance postaudits must be provided to the Governor, the Secretary of the Senate, the Clerk of the House, and the chairpersons of the Senate and House standing committees on commerce and economic development.

House Bill 4711

Under the bill, except as otherwise allowed with MEGA approval of a work plan (as described below in House Bill 4712), a brownfield development authority may not use taxes levied for school operating purposes captured from eligible property unless the eligible activities to be conducted on the eligible property are eligible activities under Part 201 (Environmental Remediation) of NREPA, consistent with a work plan approved by the DEQ after July 24, 1996, and before January 1, 2013. The Brownfield Redevelopment Financing Act previously contained this provision but required the

eligible activities to be consistent with a work plan or a remedial action plan, and required DEQ approval before January 1, 2008.

The bill also deleted references to a remedial action plan in provisions concerning the DEQ's review and approval of a plan, as discussed below.

Under the bill, as previously required, upon receiving a request for approval of a work plan that pertains to baseline environmental assessment activities or due care activities, or both, or a portion of work plan that pertains only to those activities, the DEQ must provide one of the following written responses to the requesting authority within 60 days:

-- An unconditional approval.
-- A conditional approval that delineates specific necessary modifications to the plan, including individual activities to be added to or deleted from the plan and revision of costs.
-- If the plan lacks sufficient information for the DEQ to respond, a letter stating with specificity the necessary additions or changes to the plan to be submitted before the DEQ will consider it.

The bill also allows a fourth written response: a denial, if the property is not eligible property under the Act, if the work plan contemplates the use of taxes levied for school operating purposes for response activities that benefit a party liable under Part 201, or for an eligible activity conducted before approval of the brownfield plan (uses that are prohibited under the Act). In addition, the DEQ may deny any activity in a work plan that does not meet the conditions for the approval of a work plan (listed below) only if the Department cannot respond with a conditional approval or a letter stating necessary additions or changes to the submitted plan. The DEQ must include with a denial a letter stating with specificity the reason for the denial. If the DEQ denies all or part of a work plan, the authority may subsequently resubmit the plan.

The bill deleted a provision that required the DEQ to consider all of the following in its review of a work plan or remedial action plan:

-- Whether the individual activities included in the plan were sufficient to complete the eligible activity.
-- Whether each individual activity included in the plan was required to complete the eligible activity.
-- Whether the cost for each individual activity was reasonable.

The bill, instead, allows the DEQ to approve a work plan if the following conditions have been met:

-- Some or all of the activities constitute due care activities or additional response activities other than activities that are exempt from the work plan approval process.
-- The due care activities and response activities, other than those exempt from the work plan approval process, are protective of the public health, safety, and welfare and the environment.
-- The estimated costs for the activities as a whole are reasonable for the stated purpose (which the DEQ may determine only after it determines that the other two conditions have been met).

Regarding the second condition listed above, the DEQ may approve additional response activities that are more protective than those required by Section 20107a of NREPA, if the additional activities provide public health or environmental benefit. In review of a work plan that includes more protective activities, the DEQ's consideration may include all of the following:

-- Proposed new land use and reliability of restrictions to prevent exposure to contamination.
-- Cost of implementation activities minimally necessary to achieve due care compliance, the incremental cost of all additional response activities relative to the cost of all response activities, and the total cost of all response activities.
-- Long-term obligations associated with leaving contamination in place and the value of reducing or eliminating those obligations.

As previously provided, if the DEQ fails to provide a written response within 60 days after receiving a request for approval of a work plan that pertains to BEA or due care activities, the authority may proceed with the activities as outlined in the plan. Also,

under the bill, within 45 days after receiving additional information requested from the authority for the consideration of a work plan, the DEQ must review that information and provide one of the required responses to the requesting authority for the specific activity. If the DEQ fails to respond within 45 days, the activity will be approved.

The Act previously specified that the DEQ's approval or rejection of a work plan or remedial action plan for additional response activities was final. The bill specifies, instead, that the DEQ's approval or denial of a work plan constitutes a final decision in regard to the use of taxes levied for school operating purposes but does not restrict an authority's use of tax increment revenue attributable to local taxes to pay for eligible activities under a brownfield plan. A person who is aggrieved by the final decision may appeal under the Revised Judicature Act (which provides for appeal to the circuit court of an order, decision, or opinion of any State board, commission, or agency).

The Brownfield Redevelopment Financing Act requires the DEQ and MEGA each to submit a report to every member of the Legislature by March 1 each year. The reports previously had to contain the amount of revenue the State and each local unit would have received if taxes levied for school operating purposes had not been captured under the Act for the previous calendar year. The bill, instead, requires the reports to include the amount of tax increment revenue approved by the DEQ in the immediately preceding calendar year, including taxes levied for school operating purposes, to conduct eligible activities.

The bill specifies that the DEQ's approval of a work plan does not imply an entitlement to reimbursement of the costs of the eligible activities if the work plan is not implemented as approved.

The bill allows an applicant and the DEQ, by mutual agreement, to extend the time period for any review. The agreement must be documented in writing.

House Bill 4712

Previously, if a brownfield plan included either the capture of taxes levied for school operating purposes or the use of tax increment revenue related to a brownfield plan for the cost of eligible activities attributable to more than one eligible property that was adjacent and contiguous to all other eligible property covered by a development agreement (whether or not the captured taxes were levied for school operating purposes), the Act required the approval of a work plan by MEGA before January 1, 2008, to use school operating taxes, and a development agreement between the municipality and an owner or developer of eligible property, if the revenue would have been used for any of the following:

-- Infrastructure improvements that directly benefited eligible property.
-- Demolition of structures that was not response activity under Part 201 of NREPA.
-- Lead or asbestos abatement.
-- Site preparation that was not response activity under Section 20101 of NREPA.

Under the bill, instead, if a brownfield plan includes the capture of taxes levied for school operating purposes, MEGA must approve a work plan before January 1, 2013, to use taxes levied for school operating purposes and a development agreement or reimbursement agreement between the municipality or authority and an owner or developer is required, if the revenue will be used for any of the purposes listed above or either of the following:

-- Relocation of public buildings or operations for economic development purposes.
-- Acquisition of property by a land bank fast track authority, if the acquisition is for economic development purposes.

The Act prohibits the use of captured tax increment revenue for certain purposes. Those limitations previously did not apply, however, to $75,000 in each fiscal year of an authority for the following purposes for tax increment revenue attributable to local taxes:

-- Reasonable and actual administrative and operating expenses of the authority.
-- Baseline environmental assessments, due care activities, and additional response activities related directly to work conducted on prospective eligible property before approval of the brownfield plan.

The bill retained this provision but deleted the $75,000 figure and refers instead to the amount in the schedule below. It also refers to BEAs, due care activities, and additional response activities, conducted by or on behalf of the authority, related directly to work conducted on prospective eligible property before approval of the brownfield plan.

Under the bill, in each fiscal year of a brownfield authority, the amount of tax increment revenue attributable to local taxes that an authority may use for administrative and operating expenses, and BEAs, due care activities, and additional response activities conducted before approval of the brownfield redevelopment plan, must be determined according to the number of an authority's active projects, as shown in Table 1.

Table 1

Active Projects	Limit
5 or fewer	$100,000
6 to 10	$125,000
11 to 15	$150,000
16 to 20	$175,000
21 to 25	$200,000
26 or more	$300,000

("Active projects" means a project in which the authority currently is capturing taxes under the Act.)

The limitations on the use of tax increment revenue also do not apply to reasonable costs of preparing a work plan or the cost of the review of a work plan for which tax increment revenue may be used. Previously, this also exempted the costs of preparing a remedial action plan.

In addition, under the bill, for tax increment revenue attributable to local taxes, the limitations do not apply to the reasonable costs of site investigations, BEAs, and due care activities, incurred by a person other than the brownfield authority, related directly to work conducted on eligible property or prospective eligible property before approval of the brownfield plan, if those costs and the eligible property are included in a brownfield plan approved by the authority.

Under the Act, a brownfield authority may reimburse advances, with or without interest, made by a municipality, a land bank fast track authority, or any other person or entity for costs of eligible activities with any source of revenue available for use of the brownfield authority. The bill specifies that, if an authority reimburses a person or entity for an advance for the payment or reimbursement of the cost of eligible activities and interest, the authority may capture local taxes for the payment of that interest. If an authority reimburses a person or entity for an advance for the payment or reimbursement of the cost of BEAs, due care, and additional response activities and interest included in a work plan approved by the Department, the authority may capture taxes levied for school operating purposes and local taxes for the payment of that interest. If an authority reimburses a person or entity for an advance for the payment or reimbursement of the cost of eligible activities that are not BEAs, due care, and additional response activities and interest included in a work plan approved by MEGA, the authority may capture taxes levied for school operating purposes and local taxes for the payment of that interest, with MEGA's approval.

The Act requires that each brownfield plan or amendment to a plan be approved by the governing body of the municipality, and specifies the information that must be contained in a plan or amendment, including the duration of the brownfield plan. Under the bill, that duration may not exceed 35 years following the date of the resolution approving the plan amendment related to particular eligible property.

Each plan amendment also must contain the duration of capture of tax increment revenue, including the beginning date of the capture, which may not be later than five years following the date of the resolution approving the plan amendment. The bill specifies that the beginning date may be amended by the authority but not to a date later than five years after the date of the resolution adopting the plan. Also, the authority may not amend the beginning date if it has begun to reimburse eligible activities from the capture of tax increment revenue. The authority may not amend the beginning date if that amendment would lead to the duration of capture of tax increment revenue longer than 30 years or the period authorized under the Act. If the beginning

date of capture is amended and that plan includes the capture of tax increment revenue for school operating purposes, the authority that amended the plan must notify the Department and MEGA within 30 days of the amendment's approval.

Under the Act, before approving a brownfield plan for eligible property, the governing body of the local unit must hold a public hearing on the plan. The bill specifies that, by resolution, the governing body may delegate the public hearing process to the authority or to a subcommittee of the governing body subject to final approval by the governing body. The Act requires that notice of the time and place of the hearing must be given by publication twice in a newspaper of general circulation. Previously, the first published notice had to be not less than 20 days or more than 40 days before the hearing. Under the bill, both published notices must be not less than 10 or more than 40 days before the hearing.

In addition, under the bill, at least 10 days before a hearing on a brownfield plan, the governing body must notify the DEQ and MEGA of the hearing, if the plan involves the use of taxes levied for school operating purposes to pay for eligible activities that require the approval of a work plan by the DEQ and MEGA.

MCL 125.2652 (S.B. 534)
125.2666 (S.B. 539)
125.2665 (H.B. 4711)
125.2663 (H.B. 4712)

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

The bills will reduce State and local unit revenue by an unknown amount and increase School Aid Fund expenditures by an unknown amount, depending upon the specific characteristics of the projects affected by the bills. By expanding the definitions of "eligible activities" and "eligible property", as well as increasing the costs not subject to limitations, the bills will increase the amount of taxes subject to capture. The broadened definitions also may increase the duration of any revenue capture. Delaying the sunset on the approval of work plans will increase the revenue loss due to additional projects approved after January 1, 2008. The expansion in the bills likely will result in a greater revenue loss than would occur from simply postponing the sunset.

As of July 2007, there were 270 brownfield redevelopment authorities. The Department of Treasury estimated that approximately $300.0 million in State and local property tax revenue would be captured under the law during FY 2007-08 by all authorities using tax increment capture (downtown development authorities, local development finance authorities, tax increment finance authorities, and brownfield redevelopment authorities). The portion of that amount attributable to brownfield projects is unknown. A 2006 report from the Department of Environmental Quality estimated approximately $2.6 million in captured State education tax revenue and $6.6 million in captured local school operating property tax revenue, up from $2.1 million and $5.2 million, respectively, in 2005.

School Aid Fund expenditures will be increased to maintain per-pupil funding guarantees for any captured school operating taxes and/or captured State education tax.

In addition, Senate Bill 539 necessitated a supplemental appropriation as specified in the annual appropriation language for the Legislative Auditor General. This language provides that any audits, reviews, or investigations requested of the Auditor General by the Legislature, legislative leadership, legislative committees, or individual legislators must include an estimate of the additional costs involved and, when those costs exceed $50,000, should provide supplemental funding. The Legislative Auditor General estimated that the performance postaudit required under this legislation would exceed $50,000 and thus a supplemental appropriation would be necessary before the audit could be performed. The exact cost of the audit is unknown.

House Bill 4711 might result in the collection of additional restricted revenue from baseline environmental assessment (BEA) fees. If an individual or entity wants a determination from the Department of Environmental Quality that the person or entity is exempt from liability after completion of a BEA, a fee of $750 is required. It is deposited into the Cleanup

and Redevelopment Fund and used to pay for the liability determination service. The amount of additional revenue will depend on the number of additional liability determination requests.

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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.