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BILL ANALYSIS

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Senate Bill 534 (Substitute S-1)
Senate Bill 539 (Substitute S-1)
House Bill 4711 (Substitute S-1)
House Bill 4712 (Substitute S-1)
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 (H.B. 4711 & 4712)

Date Completed: 11-2-07

CONTENT

The bills would amend 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.

All of the bills are tie-barred to each other.

Senate Bill 534 (S-1)

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 would include 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 list would include demolition of structures that was 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 list of eligible activities would include the following additional activities:

-- Infrastructure improvements that would directly benefit the property.
-- Demolition of structures that was not response activity under NREPA.
-- Lead or asbestos abatement.
-- Site preparation that was 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 list would include the following activities:

-- Demolition of structures that was not response activity under NREPA.
-- Lead or asbestos abatement.

The current list of eligible activities includes relocation of public buildings or operations for economic development purposes, with prior approval of MEGA. The bill would delete the prior approval requirement.

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

"Facility" means that term as defined in 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 is unable to be used adequately to perform 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 would revise the definition of "eligible property" to include property on which eligible activity could occur under the bill's expanded definition of "eligible activities" or "eligible activity".

Senate Bill 539 (S-1)

The 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 would require 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 would require the report to be submitted to the Senate committee responsible for economic development, and to the House committees responsible for commerce and economic development.

In addition to any other requirements of the Act, at least every three years beginning not later than June 30, 2008, the Auditor General would have to 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 would have to 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 would have to 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 were consistent with the fundamental objective of facilitating and supporting timely and efficient brownfield redevelopment of eligible property. Copies of the performance postaudits would have to 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 (S-1)

Under the Act, except as otherwise allowed with MEGA approval of a work plan (as described below in House Bill 4712 (S-1)), 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 or remedial action plan approved by the DEQ after July 24, 1996, and before January 1, 2008. The bill would delete reference to a remedial action plan and would extend the deadline for DEQ approval to January 1, 2013.

Upon receiving a request for approval of a work plan or remedial action plan that pertains to baseline environmental assessment activities or due care activities, or both, or a portion of work plan or remedial action 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 would delete reference to a remedial action plan from that provision and allow a fourth written response: a denial, if the property were not eligible property under the Act, if the work plan contemplated 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). The DEQ also could deny any activity in a work plan that did not meet the conditions for the approval of a work plan (listed below) only if the Department could not respond with a conditional approval or a letter stating necessary additions or changes to the submitted plan. The DEQ would have to include with a denial a letter stating with specificity the reason for the denial. If the DEQ denied all or part of a work plan, the authority could subsequently resubmit the plan.

The bill would delete a provision that requires 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 are sufficient to complete the eligible activity.
-- Whether each individual activity included in the plan is required to complete the eligible activity.
-- Whether the cost for each individual activity is reasonable.

The bill, instead, would allow the DEQ to approve a work plan if the following conditions had been met:

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

Regarding the requirement that the due care and response activities be protective of the public health, safety, and welfare and the environment, the DEQ could approve additional response activities that were more protective than those required by Section 20107a of NREPA, if the additional activities provided public health or environmental benefit. In review of a work plan that included activities that were more protective, the DEQ's consideration could 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.

The Act specifies that, if the DEQ fails to provide a written response within 60 days after receiving a request for approval of a work plan or remedial action plan that pertains to BEA or due care activities, the authority may proceed with the activities as outlined in the plan. The bill would delete reference to a remedial action 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 would have to review the

additional information and provide one of the required responses to the requesting authority for the specific activity. If the DEQ failed to respond within 45 days, the activity would be approved.

The Act specifies that the DEQ's approval or rejection of a work plan or remedial action plan for additional response activities is final. The bill specifies, instead, that the DEQ's approval or denial of a work plan would constitute a final decision in regard to the use of taxes levied for school operating purposes but would 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 was aggrieved by the final decision could 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 must 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, would require 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 would not imply an entitlement to reimbursement of the costs of the eligible activities if the work plan were not implemented as approved.

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

House Bill 4712 (S-1)

If a brownfield plan includes 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 is adjacent and contiguous to all other eligible property covered by a development agreement (whether or not the captured taxes are levied for school operating purposes), the Act requires 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 will be used for any of the following:

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

Under the bill, instead, if a brownfield plan included the capture of taxes levied for school operating purposes, MEGA would have to 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 would be required, if the revenue would 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 were for economic development purposes.

The Act prohibits the use of captured tax increment revenue for certain purposes. Those limitations do 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 would delete the $75,000 figure and refer instead to the amount in the schedule

below. It also would refer 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.

In each fiscal year of a brownfield authority, the amount of tax increment revenue attributable to local taxes that an authority could use for administrative and operating expenses, and BEAs, due care activities, and additional response activities conducted before approval of the brownfield redevelopment plan, would have to be determined as follows:

-- For authorities with five or fewer active projects, $100,000.
-- For authorities with six to 10 active projects, $125,000.
-- For authorities with 11 to 15 active projects, $150,000.
-- For authorities with 16 to 20 active projects, $175,000.
-- For authorities with 21 to 25 active projects, $200,000.
-- For authorities with 26 or more active projects, $300,000.

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

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

In addition, for tax increment revenue attributable to local taxes, the limitations would 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 were 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 reimbursed a person or entity for an eligible activity that included interest, the authority could capture local taxes and taxes levied for school operating purposes for eligible activities that were approved in a work plan and the interest on the eligible activity. If the authority desired to use taxes levied for school operating purposes to pay a person or entity interest on an eligible activity and the projected total amount of the interest payments exceeded 50% of the projected eligible activity costs, then the authority could do so only with the consent of MEGA, as to eligible activities contained in a work plan approved by MEGA, and the DEQ, as to eligible activities contained in a work plan approved by the Department.

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 could not exceed 35 years following the date of the resolution approving the plan amendment related to particular eligible property.

Before approving a brownfield plan for an 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 could delegate the public hearing process to the authority or to a subcommittee of the governing body subject to final approval by the governing body. Notice of the time and place of the hearing must be given by publication twice in a newspaper of general circulation. The first published notice must be not less than 20 days or more than 40 days before the hearing. Under the bill, both published notices would have to 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 would have to notify the DEQ and MEGA, if the plan involved the use of taxes levied for school operating purposes to pay for eligible activities.

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 would 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 would increase the amount of taxes subject to capture. The broadened definitions also could increase the duration of any revenue capture. Delaying the sunset on the approval of work plans would increase the revenue loss due to additional projects that would be approved after January 1, 2008. The expansion in the bills likely would result in a greater revenue loss than would occur from simply postponing the sunset under current law.

As of July 2007, there were 270 brownfield redevelopment authorities. According to the Department of Treasury, approximately $300.0 million in State and local property tax revenue will be captured under current law by all authorities using tax increment capture (downtown development authorities, local development finance authorities, tax increment finance authorities, and brownfield redevelopment authorities) during FY 2007-08. 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 would 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 (S-1) would necessitate 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. According to the Legislative Auditor General, the performance postaudit required under the proposed 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, but would certainly exceed $50,000 according to the Auditor General's office.

House Bill 4711 (S-1) could result in additional restricted revenue collected 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 would depend on the number of additional liability determination requests.

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