

Senate Bill 671 (as enacted)  
Sponsor: Senator Ken Horn  
Senate Committee: Economic and Small Business Development  
House Committee: Government Operations

**PUBLIC ACT 138 of 2021**

Date Completed: 12-1-22

**RATIONALE**

Public Acts 46 through 50 of 2017 amended the Brownfield Redevelopment Financing Act to allow for transformational brownfield plans. While brownfield and transformational brownfield plans focus on the development of blighted or obsolete properties, transformational brownfield plans differ from brownfield plans in the size and use requirements of the projects. Because of these distinctions, the Act allows transformational brownfield plans to capture a wider range of incremental tax revenues to offset the costs of the project (see **BACKGROUND**). Upon the passage and implementation of transformational brownfield plans in 2017, some people thought that certain provisions of the law placed undue burdens on potential development sites, preventing some developments from taking place. Accordingly, as the sunset established for transformational brownfield development plans neared, it was suggested that those provisions be made more flexible and that the sunset be extended.

**CONTENT**

**The bill amended the Brownfield Redevelopment Financing Act to do the following:**

- **Allow the owner or developer of a transformational brownfield project site to elect to use a safe harbor method of calculating income tax capture revenue and withholding tax capture revenue as prescribed in the bill, instead of the methods currently provided in the Act.**
- **Allow the Michigan Strategic Fund (MSF) to waive a requirement that a transformational brownfield plan be for mixed-use development if the plan results in certain levels of capital investment depending on the population size of the municipality in which the plan will be located.**
- **Delete a requirement that a governing body and the MSF consider whether, based on an economic and fiscal impact analysis, a transformational brownfield plan would have resulted in an overall positive fiscal impact to the State.**
- **Increase, from \$1.5 million to \$10 million, the amount in any year that a transformational brownfield plan proposes to use in withholding tax capture revenue and income tax capture revenue that serves as a threshold after which the MSF must require a third-party underwriting analysis to determine the plan's reasonableness.**
- **Allow the MSF to approve a transformational brownfield plan that proposes to use more than 50% of the income tax capture revenue if certain conditions are met.**
- **Extend, from December 31, 2022, to December 31, 2027, the sunset after which the MSF may not approve any new transformational brownfield plans.**

- **Specify that if the MSF approves a transformational brownfield plan and work plan, and amendments later are made to the Act, the MSF may amend the plans to make changes consistent with those amendments on an administrative basis, provided those changes do not increase the aggregate total amount of reimbursement authorized under the initial plan.**

The bill took effect December 27, 2021.

#### Mixed-Use Development Waiver

Under the Act, "transformational brownfield plan" means a brownfield plan that meets the requirements of a transformational brownfield plan and its approval by a governing body and the MSF as prescribed by the Act and, as designated by resolution of the governing body and approved by the MSF, will have a transformational impact on local economic development and community revitalization based on the extent of brownfield redevelopment and growth in population, commercial activity, and employment that will result from the plan. The Act specifies that a transformational brownfield plan, to be designated as such, must be for mixed-use development and must result in certain levels of capital investment depending on the population size of the municipality. Under the bill, to be designated as such, a transformational brownfield plan must be for mixed-use development unless waived by the MSF for a brownfield plan that results in \$15.0 million of capital investment in a municipality that is not a county and that has a population of less than 25,000.

#### Approval Requirements

The Act provides criteria by which the governing body and the MSF must determine whether to approve a transformational brownfield plan. The governing body must make an initial determination as to whether the transformational brownfield plan constitutes a public purpose in accordance with Act. If it does so, the governing body may approve or reject the transformational brownfield plan, or approve it with modification, by resolution based on certain considerations. Among other considerations, the Act required the governing body to consider whether, based on an economic and fiscal impact analysis, the transformation brownfield plan would have resulted in an overall positive fiscal impact to the State. The bill deleted this consideration.

The Act prohibits the MSF from approving a transformational brownfield plan under the consideration described above unless the MSF determines that the transformational brownfield plan would have resulted in an overall positive fiscal impact to the State. In making that determination, the MSF had to consider the potential displacement of tax revenue from other areas of the State and the effects of the transformational brownfield plan on economic development in the surrounding area. The bill deleted this language.

The Act requires the MSF to approve or reject a transformational brownfield plan, or approve it with modification, by resolution based on criteria prescribed by the Act within 90 days of the completion of an administratively complete application and certain analyses, including an analysis to determine that a transformational brownfield plan that would have resulted in an overall positive fiscal impact to the State as described above. The bill deleted the requirement that this analysis be completed.

Previously, the MSF had to require an independent, third-party underwriting analysis to determine whether the amount of captured taxable value and certain revenue estimated to result from adoption of the transformation brownfield plan were reasonable and an independent, third-party fiscal and economic impact analysis for the analysis to determine whether a transformational brownfield plan would have resulted in an overall positive fiscal impact to the State for any plan that proposed to use more than \$1.5 million in any year in withholding tax capture revenue and incomes tax capture revenue, as determined by the first full year of tax capture under the plan. Instead, under the bill, the MSF must require an independent, third-party underwriting analysis to determine whether the amount of captured taxable value and certain revenue estimated to result

from adoption of the transformational brownfield plan are reasonable for any plan that proposed to use more than \$10.0 million in any year in withholding tax capture revenue and income tax capture revenue, as determined by the first full year of tax capture under the plan. The bill requires the cost of the independent, third-party underwriting analysis to be paid by the owner or developer of the eligible property. The bill deleted a requirement that the State Treasurer concur that the plan would have resulted in an overall positive fiscal impact to the State for the plan to be approved.

#### Safe Harbor Calculation Methods

Previously, the Act defined "income tax capture revenue" as funds equal to the amount for each tax year by which the aggregate income tax from individuals residing within the eligible property subject to a transformational brownfield plan exceeds the initial income tax value. The bill specifies that the term means as described above in the context of each eligible property subject to a transformational brownfield plan. The Act also specifies that the State Treasurer must calculate annually the income tax capture revenue associated with each transformational brownfield plan. The bill subjects this provision to the bill's requirement that the owner or developer of an eligible property provide to the Department of Treasury its implementation of a safe harbor method for calculating income tax capture revenue as described below.

Under the bill, notwithstanding anything to the contrary, instead of the reporting and calculation methods otherwise provided for, the owner or developer of a transformational brownfield project site may elect to utilize a safe harbor method of calculating income tax capture revenues. Under this safe harbor method, the MSF must establish a safe harbor amount of annual income tax capture revenues for each eligible property at the time the MSF approves the transformational brownfield plan, and those amounts shall serve as the basis for the transmittal of income tax capture revenues to the owner or developer of the transformational project site. The MSF must establish the safe harbor amount for an eligible property by imputing a standard annual taxable income for households residing within the eligible property or portion of the eligible property. The safe harbor is effective only to the extent that the residential units within the eligible property or portion of the eligible property are actively leased or, in the case of units made available for sale, sold in an arms-length transaction. Imputations as to standard household taxable income may vary based on location and other relevant factors.

The MSF may adjust the safe harbor amount for an eligible property, or portion of the eligible property, after the time of transformational brownfield plan approval as required to reflect changes in the transformational brownfield plan for the transformational project site that may occur after approval of the transformational brownfield plan, provided that those changes may not result in an aggregate increase in the level of income tax capture revenues from the amount initially established. The owner or developer of the transformational project site may make the election to utilize the safe harbor method of accounting at any time prior to the first reimbursement of income tax capture revenues under the transformational brownfield plan, provided that an election, once made, cannot be rescinded.

The Act defines "withholding tax capture revenues" as the amount for each calendar year by which the income tax withheld under Part 3 of the Income Tax Act from individuals employed within the eligible property subject to a transformational brownfield plan exceeds the initial withholding tax value. The Act specifies that the State Treasurer or the MSF must do the following to calculate withholding tax capture revenues for a calendar year under a transformational brownfield plan:

- The State Treasurer must require the owner or developer of the eligible property to provide the Department of Treasury with notice within 10 days from the date an employer commences or terminates occupancy within the eligible property.
- The State Treasurer must develop methods and processes that are necessary for each employer occupying the eligible property to report the amount of withholding under Part 3 of the Income Tax Act from individuals employed within the eligible property.

- The MSF must include certain provisions in the development or reimbursement agreement for any transformational brownfield plan that uses withholding tax capture revenue.

In addition, notwithstanding anything to the contrary, instead of the reporting and calculation methods otherwise provided for, the owner or developer of a transformational project site may elect to utilize a safe harbor method of calculating withholding tax capture revenues. Under this safe harbor method, the MSF must establish a safe harbor amount of annual withholding tax capture revenues for each eligible property at the time the MSF approves the transformational brownfield plan, and those amounts must serve as the basis for the transmittal of withholding tax capture revenues to the owner or developer of the transformational project site. The MSF must establish the safe harbor amount for an eligible property by imputing a standard level of employee occupancy that corresponds to the size and use of the eligible property or portion of the eligible property and a safe harbor average annual taxable wage for the individuals employed within the eligible property or portion of the eligible property. The safe harbor must be effective only to the extent the eligible property or portion of the eligible property is actively occupied, as evidenced by the existence of a binding lease agreement or similar instrument. Imputations as to occupancy and wages may vary between projects based on location, the type and use of the eligible property, and other relevant factors.

The MSF may adjust the safe harbor amount for an eligible property, or portion of the eligible property, after the time of plan approval as required to reflect changes in the transformational brownfield plan for the transformational project site that may occur after approval of the transformational brownfield plan, provided that any of those changes may not result in an aggregate increase in the level of withholding tax capture revenues from the amount initially established. The owner or developer of the transformational project site may make the election to utilize the safe harbor method of accounting at any time prior to the first reimbursement of withholding tax capture revenues under the plan, provided that an election, once made, cannot be rescinded.

The Act prohibits the MSF from approving a transformational brownfield plan that proposes to use more than 50% of the withholding tax capture revenues or 50% of the income tax capture revenues, except under specified circumstances. The bill allows the MSF to approve a transformation brownfield plan that proposes to use more than 50% of the income tax capture revenue if the applicable eligible properties within the transformational brownfield plan are subject to a written, binding affordable housing agreement with the local governmental unit. This agreement must be provided to the MSF, and the MSF then may approve a transformational brownfield plan that proposes to use up to 100% of the income tax capture revenues, subject to the underwriting and financial analysis required by the Act.

Previously, the MSF could not provide community revitalization incentives under the Michigan Strategic Fund Act to any project included in a transformation brownfield plan that had or would have received reimbursement for certain eligible activities. Under the bill, if the MSF approves a transformational brownfield plan and work plan, and subsequent to that approval, amendments are made to the Act, the MSF may amend those plans to make conforming and consistent changes to the approved transformational brownfield plan and work plan on an administrative basis, provided that those changes do not result in any increase in the aggregate total amount of reimbursement authorized under the initial transformational brownfield plan. The authority of the MSF to administratively amend transformational brownfield plans and work plans also applies to transformational brownfield plans and work plans entered into before December 27, 2021.

#### Sunset

The Act prohibits the MSF from approving more than five transformational brownfield plans in a calendar year, except that if the MSF approves fewer than five plans in a calendar year, the unused approval authority may carry forward into future calendar years and may remain available until December 31, 2022. The MSF must ensure an equitable geographic distribution of plans, which

must achieve a balance between the needs of municipalities of differing sizes and differing geographic areas of the State. Subject to receiving qualified transformational brownfield plans that meet the criteria under the Act, the MSF must set a target that at least 35% of the total transformational brownfield plans approved under the Act before December 31, 2022, will be located in cities, villages, and townships with a population of less than 100,000. The MSF may not approve any new transformational brownfield plans after December 31, 2022. The bill modifies, from December 31, 2022, to December 31, 2027, the dates described above.

MCL 125.2652 et al.

## **BACKGROUND**

### **Size and Use Requirements**

Generally, municipalities may authorize brownfield plans and transformational brownfield plans (with MSF approval) for property considered eligible under the Act. Eligible property includes properties that are blighted, functionally obsolete, or in need of environmental remediation, among other things. The scale of the potential development determines which plan a municipality may authorize. A municipality may authorize a brownfield plan for any eligible property, but it can authorize a transformational brownfield plan only if the potential development is for mixed-use (some combination of retail, office, or residential space) and is expected to meet certain levels of capital investment. For example, a transformational brownfield plan in a municipality that is not a county and that has a population of at least 600,000 must be expected to result in \$500.0 million in capital investment.

### **Authorized Tax Capture**

The Act allows a brownfield development plan to capture tax increment revenue, which is any increase in a property's taxable value above the initial taxable value determined at the outset of a brownfield development plan. In addition to tax increment revenue, the Act allows a transformational brownfield plan to capture construction period tax capture revenue, withholding tax capture revenue, and income tax capture revenue. Construction period tax capture revenue is equal to the amount of income tax levied and imposed upon the wages paid of individuals working on the development. Withholding tax capture revenue is equal to the amount of income tax withheld from individuals employed within the eligible property. Income tax capture revenue is equal to the amount of income tax from individuals residing within the eligible property above the initial income tax of the eligible property as determined at the outset of the transformational brownfield plan.

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

Policymakers and developers have gained insights over the past five years into the success and challenges of the law authorizing transformational brownfield plans. According to testimony before the Senate Committee on Economic and Small Business Development, the inflexibility of certain calculations required for the Act's implementation limited the development and challenged the success of projects. For example, the original language of the Act required each project to undergo economic modeling to determine whether the project would have a positive fiscal impact on the State. This modeling limited project development because it failed to consider the secondary development, such as additional housing and retail, associated with developments as significant as transformational brownfield plans in municipalities.

Calculations for withholding tax capture revenue and income tax capture revenue also challenged development. The COVID-19 pandemic increased the regularity of working from home and the

presence of hybrid work policies, all of which made tracking where workers actually work challenging. These challenges made calculating the withholding and income tax capture revenue of transformational brownfield developments difficult, taxing the feasibility of their development altogether. Transformational brownfield plans provide municipalities the opportunity to significantly redevelop blighted or functionally obsolete properties. Extending the sunset to allow for more of this development will continue the opportunity and modifying the way in which the information described above is calculated will allow for more projects to come to fruition.

### **Opposing Argument**

According to testimony before the Senate Committee on Economic and Small Business Development, multi-family housing development continues to increase in the State. This development is driven by market forces and represents sustainable growth. The sustainable growth has the potential to promote other development in a community, such as retail and event space, and make all the development more likely to agree with the needs of that community in terms of what it can afford.

When projects are not market-driven, such as projects using transformational brownfield plans, it is a sign that developers consider them too risky. Projects that are too risky can benefit from tax increment financing (TIF) under a transformational brownfield plan, but that benefit does not change the underlying market conditions in the area. This means that the project may not agree with the needs of a community and that the project could take the place of a potential development that could have better met a community's needs without TIF assistance. The provisions related to transformational brownfield development in the Act should have been allowed to expire because the market is driving development of multi-family housing and associated retail in the State that agrees with communities' needs and what they can afford.

Legislative Analyst: Tyler P. VanHuyse

### **FISCAL IMPACT**

The bill will have no long-term fiscal impact on the State and will have an indeterminate fiscal impact for local governments. The bill will not increase the total cap for all awards under the Act, so it will not increase the total fiscal impact of the Act. The bill will make several changes that, overall, likely will make it easier for projects to be approved and may increase the size of awards to approved projects. That may change the timing of awards, and the projects awarded may be different than the ones that would have been approved previously. Also, by generally making it easier for projects to be approved and potentially increasing the size of awards, the bill will increase the likelihood that the aggregate limit will be reached. By extending the window for awards, the effects of the bill will extend farther into the future.

While the long-term fiscal impact for the State will remain unchanged, the fiscal impact for a local unit may be affected if the bill results in the approval of different projects compared to those approved under previous law. The safe harbor provisions for income tax and withholding tax revenue capture, if opted for by developers, will reduce variability in annual awards by reducing the effect of employment by people who live or work in the redevelopment zone on the amount of the award. Local revenue will be affected by the terms of a transformational brownfield plan, including the degree to which a plan reimburses a local unit for brownfield administrative expenditures and project advances, and the possible use of tax increment revenue for additional purposes under the bill, including construction, restoration, and renovation of buildings.

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