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BILL ANALYSIS

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Senate Bill 289 (Substitute S-1 as passed by the Senate)
Sponsor: Senator Jeremy Moss
Committee: Economic and Community Development

Date Completed: 6-9-23

RATIONALE

The transformational brownfield program is the sole program supporting often large economic redevelopment projects in cities and town centers. Many communities with a brownfield site could benefit from a transformational brownfield plan (TBP); however, these communities vary in size, geographic location, and need. Some are older, economically challenged, or diverse, like Detroit. Some are young and growing, such as Grand Rapids. Some are small and remote, like Munising. While the TBP program grants these communities an accessible way to utilize obsolete land, some argue that various TBPs require specific tools and that the program does not provide enough flexibility. Accordingly, it has been suggested that the program be modified to offer communities a greater range of assets and amenities that could be tailored to fit them and their TBP.

CONTENT

The bill would amend the Brownfield Redevelopment Act to do all the following:

- **Define "sales tax", "use tax", "initial sales and use tax value", and "sales and use tax capture revenues".**
- **Prescribe the process by which the State Treasurer would calculate sales and use tax capture revenues for a TBP.**
- **Require the Michigan Strategic Fund (MSF) to include certain provisions in any development or reimbursement agreement for a TBP that used sales and use tax capture revenues.**
- **Include sales and use tax capture revenues in provisions that allow for, and prescribe requirements for, the use of construction period tax capture revenues, withholding tax capture revenues, income tax capture revenues, and tax increment revenues.**
- **Add a provision allowing a brownfield redevelopment authority to amend the beginning date of capture of certain revenues for an eligible property included within a related program of investment to a date later than five years following the date of approval if the governing body and MSF determined that the developer had made progress in the implementation of the related program of investment.**
- **Increase the cap on total annual capture from $40.0 million to $80.0 million.**
- **Require that, if the amount of total annual tax capture committed or dispersed in a calendar year was less than the amount committed and scheduled to be dispersed for that year under approved TBPs, the undispersed amount for that year would be available to be dispersed in subsequent calendar years, in addition to annual limits otherwise applicable.**
- **Delete the $800.0 million cap on the total amount of income tax capture revenues and withholding tax captures revenues that the MSF and Department of Treasury could commit.**

-- **Delete a requirement that the State Treasurer take corrective action if the value of the actual sales and use tax exemptions and construction period tax capture revenues under all TBPs exceeded the limit of $200.0 million.**

-- **Require between 33% and 38% of the total TBPs approved before December 31, 2027 to be located in cities, villages, and townships with a population of less than 100,000 and between 33% and 38% to be located in cities, villages, and townships with a population between 100,000 and 225,000.**

<u>TBP Captured Revenues; Include Sales and Use Tax Capture Revenues</u>

Among other requirements, a TBP must be for mixed-use development (retail, office, residential) and must result in specified levels of capital investment based on the local municipality's population size, such as a capital investment of $15.0 million in a municipality that has a population size of less than 25,000. These requirements do not apply to other forms of brownfield plans; however, a TBP may use specified tax increment revenues in whole or in part for financing, in addition to the property tax revenue that other brownfield plans may utilize. These specified tax increment revenues include construction period tax capture revenues, withholding tax capture revenues, and income tax capture revenues.

Under the bill, a TBP also could use sales and use tax capture revenues. "Sales and use tax capture revenues" would mean, with respect to eligible property subject to a TBP, the amount for each calendar year by which the sales tax and use tax collected from persons within the eligible property exceeds the initial sales and use tax value. For persons with multiple business locations, the applicable amount of sales and use tax would be only the sales tax and use tax collections attributable to the business location within the eligible property.

"Initial sales and use tax value" would mean, with respect to eligible property subject to a TBP, the aggregate amount of sales tax and use tax collected from persons located within the eligible property for the tax year in which the resolution adding that eligible property in the TBP is adopted. For persons with multiple business locations, the applicable amount of sales tax and use tax would be only the sales tax and use tax collections attributable to the business location within the eligible property.

Under the bill, "sales tax" would mean the tax levied and imposed under the General Sales Tax Act. "Use tax" would mean the tax levied and imposed under the Use Tax Act, including both the local community stabilization tax and the State share as those terms are defined in the Use Tax Act.

Unless otherwise specified, the provisions of the Act described below also would apply to sales and use tax capture revenues.

<u>TBP Requirements</u>

A brownfield redevelopment authority is a public body corporate that manages an eligible property within its designated municipality. It is run by a board appointed by the governing body of the municipality in which the authority lies. The board may implement a TBP. A TBP may authorize the use of construction period tax capture revenues, withholding tax capture revenues, and income tax capture revenues to fund the authority and its eligible activities.

A TBP must contain all the following:

-- The basis for designating the plan as a TBP.

-- A description of the TBP's costs intended to be paid for with construction period tax capture revenues, withholding tax capture revenues, and income tax capture revenues.
-- An estimate of the amount of construction period tax capture revenues, withholding tax capture revenues, and income tax capture revenues expected to be generated for each year of the TBP from the eligible property.
-- The beginning date and duration of capture of construction period tax capture revenues, withholding tax capture revenues, and income tax capture revenues for each eligible property.

A brownfield redevelopment authority may not use construction period tax capture revenues, withholding tax capture revenues, and income tax capture revenues for the following purposes:

-- To pay for eligible activities conducted *before* approval of the TBP, unless those costs are incurred within 90 days of the plan's approval by the MSF and are subsequently included in a TBP approved by the governing body and the MSF, a combined brownfield plan or workplan approved by the MSF, and a written development or reimbursement agreement.
-- To pay for any expense other than the costs of eligible activities within the TBP to which the revenues are attributable, including the cost of principal of and interest on any obligation to pay the cost of the eligible activities, except for the reasonable costs for preparing a TBP and the additional administrative and operating expenses of the authority or municipality that are specifically associated with the implementation of a TBP, such as the cost of preparing an associated work plan, combined brownfield plan, and development or reimbursement agreement.

A TBP may provide for the use of part or all the tax increment revenues, construction period tax capture revenues, withholding tax capture revenues, and income tax capture revenues. The portion of these revenues to be used may vary over the duration of the TBP, but the portion intended to be used must be clearly stated in the plan.

If a TBP authorizes the use of construction period tax capture revenues, withholding tax capture revenues, or income tax capture revenues, the following are required:

-- Approval by the MSF of a combined brownfield plan or workplan.
-- A written development or reimbursement agreement between the owner or developer of the eligible property, the authority, and the MSF.

<u>TBP Approval</u>

In determining whether to approve a TBP, the MSF may conduct a financial and underwriting analysis of the developments included in the plan. The analysis must consider both projected rental rates at the time of project delivery and potential increases in rental rates over time. The MSF may not approve the use of construction period tax capture revenues, withholding tax capture revenues, and income tax capture revenues beyond the amount determined to be necessary for the project to be economically viable. To determine the viability of these revenues, the MSF must consider the impact of the sales and use tax exemptions under the General Tax Act and the Use Tax Act. The MSF requires an independent, third-party underwriting analysis for any plan that proposes to use more than $10.0 million in any year in withholding tax capture revenues and income tax capture revenues as determined by the first full year of tax capture under the plan.

If the governing body determines that a TBP constitutes a public purpose, the governing body may approve or reject the plan, or approve it with modification, by resolution. Among other

things, the governing body must consider whether the amount of captured taxable value, construction period tax capture revenues, withholding tax capture revenues, and income tax capture revenues estimated to result from adoption of the TBP are reasonable.
On approval of the TBP by the governing body and MSF, and the execution of the written development or reimbursement agreement, the transfer and distribution of tax increment revenues, construction period tax capture revenues, withholding tax capture revenues, or income tax capture revenues as specified in the Act and in the plan are binding on the State and the collection and transmission of the amount of tax increment revenues as specified in the Act and in the plan are binding on all taxing units levying ad valorem property taxes or specific taxes against property subject to the TBP.

On approval by the MSF, the amount of tax increment revenues, construction period tax capture revenues, withholding tax capture revenues, and income tax capture revenues authorized to be captured under a TBP may include amounts required for the payment of interest. A written development or reimbursement agreement must be entered into before any reimbursement or payment using tax increment revenues, construction period tax capture revenues, withholding tax capture revenues, or income tax capture revenues may commence.

The MSF requires the owner or developer of the eligible property to certify the actual capital investment on the completion of construction and before the commencement of reimbursement from withholding tax capture revenues, income tax capture revenues, or tax increment revenues, for the plan or the distinct phase or project within the plan for which reimbursement will be provided. If the actual level of capital investment does not meet applicable minimum investment requirements, the MSF may, for a plan that consists of distinct phases or projects and where the failure to meet the minimum investment threshold is the result of failure to undertake planned additional distinct phases or projects, permanently rescind the authorization to use tax increment revenues, construction period tax capture revenues, withholding tax capture revenues, and income tax capture revenues for the additional distinct phases or projects in the plan.

If a brownfield redevelopment authority seeks approval of a combined brownfield plan instead of a work plan, the authority must provide notice to the MSF if the combined brownfield plan involves the use of taxes levied for school operating purposes to pay for eligible activities, or the use of construction period tax capture revenues, withholding tax capture revenues, or income tax capture revenues, at least 30 days before the hearing on the combined brownfield plan and at least 60 days in the case of a TBP.

The brownfield authority and MSF 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 included within a TBP using tax increment revenues, construction period tax capture revenues, withholding tax capture revenues, or income tax capture revenues attributable to that plan.

Notice of amendments to a TBP are not required for revisions in the estimates of tax increment revenues, construction period tax capture revenues, withholding tax capture revenues, or income tax capture revenues. Unless modifications to the plan add one or more parcels of eligible property or increase the maximum amount of tax increment revenues or, in the case of a TBP, construction period tax capture revenues, withholding tax capture revenues, and income tax capture revenues, and if the MSF or Department of Environment, Great Lakes, and Energy (EGLE) issues a written response to a requesting authority, the governing body or its designee may approve administratively any modifications to a combined brownfield plan required by the written response without the need to follow the notice and approval process required under the Act.

The authority, EGLE, and the MSF must follow reporting requirements with respect to all approved TBPs and must provide information on the amount and use of construction period tax capture revenues, withholding tax capture revenues, and income tax capture revenues to the same extent required for tax increment revenues.

Calculating Sales and Use Tax Capture Revenues

To calculate sales and use tax capture revenues for a calendar year under a TBP, the State Treasurer would have to develop methods and processes that were necessary for each applicable person within the eligible property to report the amount of sales and use tax from that location. The MSF would have to include the following provisions in the development or reimbursement agreement for any TBP that utilized sales and use tax capture revenues:

-- That the owner or developer of the eligible property would require each applicable person occupying the eligible property to comply with the reporting requirements through a contract requirement, lease requirement, or other similar means.
-- That reimbursement of sales or use tax revenues was limited to amounts reported, and the State had no obligation with respect to sales and use tax captures revenues that were not reported or paid.

The Brownfield Redevelopment Fund

The Act authorizes the creation of the Brownfield Redevelopment Fund for specific purposes. Among other things, the Fund is used to distribute construction period tax capture revenues, withholding tax capture revenues, and income tax capture revenues in accordance with a TBP.

The Act requires the State Treasurer to deposit annually from the General Fund into the State Brownfield Redevelopment Fund an amount equal to the revenues due to be transmitted under all TBPs. The Department of Treasury must distribute these revenues to a brownfield redevelopment authority or to the owner or developer of the eligible property to which the revenues are attributable, in accordance with the requirements of the Act and the terms of the written development or reimbursement agreement for the TBP.

The State Treasurer must transfer to the Fund each fiscal year an amount equal to the construction period tax capture revenues, withholding tax capture revenues, and income tax capture revenues under all approved plans.

Transformational Brownfield Revenue Timeline

The beginning date for the capture of tax increment revenues, withholding tax capture revenues, and income tax capture revenues for an eligible property cannot be later than five years following the date the MSF approves the inclusion of the eligible property in a TBP. Subject to the approval of the governing body and the MSF, the authority may amend the beginning date of capture of tax increment revenues, withholding tax capture revenues, and income tax capture revenues to a date not later than five years following the date the MSF approved inclusion of the eligible property in the TBP if capture of the revenues under the plan has not yet commenced.

A TBP cannot authorize the capture or use of tax increment revenues, construction period tax capture revenues, withholding tax capture revenues, or income tax capture revenues after the year in which the total amount of the revenue captured under the plan equals the sum of the costs permitted to be funded with the revenue under the TBP. The duration of the capture of these revenues under a TBP for a particular eligible property cannot exceed the period after which the total amount of the captured revenue captured under the plan equals the sum of the costs permitted to be funded with the revenue under the plan or 20 years from the beginning date of the capture of withholding tax capture revenues and income tax capture revenues for that eligible property, whichever is less.

The bill would add a provision allowing, subject to the approval of the governing body and MSF, a brownfield redevelopment authority to amend the beginning date of capture of tax increment revenues, withholding tax capture revenues, income tax capture revenues, and sales and use tax capture revenues for an eligible property included within a related program of investment to a date later than five years following the date the MSF approved inclusion of the eligible property in the TBP if the governing body and MSF determined that the developer of the related program of investment had proceeded in good faith and made reasonable and substantial progress in the implementation of the related program of investment.

Total Annual Capture Cap

The Act caps the amount of money the MSF may commit, and the Department of Treasury may disperse, at $40.0 million in total annual capture. The bill would increase the cap to $80.0 million. (The Act defines "total annual capture" as the total annual amount of income in tax capture revenues and withholding tax capture revenues that may be reimbursed each calendar year under all TBPs. The bill would include sales and use tax capture revenues in the definition.)

Additionally, the Act specifies that if the amount of total annual capture in a calendar year is less than $40.0 million, the differences between that amount and the $40.0 million cap must be made available to be committed or dispersed in subsequent calendar years, in addition to the annual limit otherwise applicable. Instead, under the bill, if the amount of total annual tax capture committed or dispersed in a calendar year was less than the amount committed and scheduled to be dispersed for that year under approved TBPs, the undisbursed amount for that year would be available to be dispersed in subsequent calendar years, in addition to annual limits otherwise applicable.

The Act caps the total amount of income tax capture revenues and withholding tax capture revenues that the MSF may commit and the Department of Treasury may disperse at $800.0 million. Additionally, the MSF requires the owner or developer of an eligible property to report the actual value of the sales and use tax exemptions each tax year of the construction period and at the end of the construction period. If the value of the actual sales and use tax exemptions and construction period tax capture revenues under all TPBs exceeds the limit of $200.0 million by more than a minor amount, as determined by the State Treasurer, the State Treasurer must take corrective action and may reduce future disbursements to achieve compliance with the aggregate limitation. The corrective action cannot reduce the disbursement for an individual plan by an amount that is more than the amount by which the value of the sales and use tax exemptions for that plan exceeded the amount projected at the time of plan approval and included in the plan. The bill would delete these provisions.

Equitable Distribution of Projects

Among other things, the MSF must ensure an equitable geographic distribution of TBPs, balancing the needs of municipalities of differing sizes and differing geographic areas of the State. Accordingly, the bill would require the MSF to ensure that between 33% and 38% of all TBPs approved before December 31, 2027, were in cities, villages, and townships with a population of less than 100,000. Additionally, 33% to 38% would have to be in cities, villages, and townships with a population between 100,000 and 225,000.

MCL 125.2652 et al.

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

Expanding tax capture revenue to include sales and use tax captures would allow greater flexibility for TBPs. To qualify as a TBP, a project must serve multiple purposes. According to testimony before the Senate Committee on Economic and Community Development, before the pandemic, many TBPs included office space; however, the COVID-19 changed the way many prefer to work. According to a survey conducted by the Pew Research Center in 2022, 60% of workers with jobs that could be done from home said that, when the COVID-19 pandemic was over, they'd like to work from home all or most of the time if given the choice. Thus, with fewer people returning to the office to work, the priorities of TBPs have shifted. Instead of office space, which would generate revenue through income tax captures, developers are promoting entertainment and retail space. For these spaces, revenue would best be generated through sales and use tax captures, which current statute does not include. The law should be expanded to include this additional revenue capture and support greater flexibility for TBPs.

Response: By allowing TBPs to capture sales and use tax captures, the bill would increase costs to the State budget and schools. Some argue that TBP projects are beneficial because they create and tax economic activity in an area where it did not previously exist; however, sales and use tax captures would represent an actual loss of revenue. Purchases made and taxed in a TBP would take money away from other areas and reduce revenue to the School Aid Fund and the State, reducing its financial resources.

Supporting Argument

Raising the limit on total annual tax capture from $40.0 million to $80.0 million would make the TBP program workable. Total annual tax capture is the total annual amount of income tax capture revenues and withholding tax capture revenues that may be reimbursed for all TBPs. Under the bill, it would also include sales and use tax captures. According to testimony before the Senate Committee on Economic and Community Development, the current $40.0 million cap has been exhausted, preventing the approval of new TBPs. Additionally, the growing costs of construction have made TBPs more expensive. For the program to continue supporting TBPs across the State, and to include sales and use tax captures revenues in addition to income tax capture revenues and withholding tax capture revenues, the $40.0 million cap should be raised.

Supporting Argument

The bill would diffuse the benefits of the TBP program by requiring a portion of all TBPs approved before December 31, 2027, to be in areas with small populations. Between 33% and 38% of the approved TBPs would have to be in cities, villages, and townships with populations between 100,000 and 225,000 people. This would include Grand Rapids, Ann Arbor, Dearborn, and more. An additional 33% to 38% of approved projects would have to be in cities, villages, and townships with populations of less than 100,000. In effect, funds would be funneled away from Detroit so smaller areas, rural areas, and economically challenged areas could reap the benefits of the program. The bill would ensure a fairer distribution of TBP funding across the State.

Opposing Argument

In addition to raising the annual tax capture cap from $40.0 million to $80.0 million, the bill would eliminate the $800.0 million overall cap on income tax capture revenue. Both provisions would disempower the State by giving administrators and developers too much control over TBP funding, accompanied by little oversight. For example, because tax capture is variable, the amount of any capture during a fiscal year would not be known at the time the State enacted the budget for a fiscal year, nor could the amount be used to accurately forecast rates for the future. Funding for TBPs should be awarded based on evaluations of economic performance and funding oversight should not be reduced.

Legislative Analyst: Abby Schneider

FISCAL IMPACT

The initial fiscal analysis of the legislation was revised on May 19, 2023, based in part on guidance from the Department of Treasury. That guidance was subsequently altered in June 2023 and the analysis below reflects the estimated impact based on the most recent information.

The bills would reduce State General Fund revenue in fiscal years (FY) 2022-23 through at least FY 2052-53 by an unknown and significant amount that could total $1.6 billion or more. The actual amount of revenue loss could be lower depending on the degree of activity associated with transformational brownfield areas. The estimated $1.6 billion figure excludes: 1) the revenue loss from any sales and use tax exemptions that, when combined with construction period tax captures, would exceed the $200.0 million limit under current law for the combined value of construction period tax captures and the value of sales and use tax exemptions granted during the construction period; and 2) the impact of any potential delays to the year in which tax captures must begin. To the extent that either of these conditions occur, the total revenue loss under the bill could exceed $1.6 billion.

Under current law, the combined value of construction period tax captures and sales and use tax exemptions may not exceed $200.0 million. Under the bill, the $200.0 million limit would be retained but would only apply to construction period tax captures. As a result, the bill would provide an unlimited exemption for sales and use taxes during the construction period. While the exemption would be unlimited, sales and use tax revenue would only decline relative to current law if the value of the exemptions, plus the value of the construction period captures, were to exceed $200.0 million.

The bill would repeal the current aggregate limit of $800.0 million applied to captured individual income tax (IIT) and withholding revenue across all years. Currently, the State has approved commitments for IIT and withholding capture totaling $668.4 million, meaning that an additional $131.6 million in capture is available under current law. The $1.6 billion estimate above reflects new commitment authority granted under the bill.

For individual years, current law limits the amount of IIT and withholding revenue that can be approved for capture, or disbursed by the State, to $40.0 million per year. The bill would increase those limits to $80.0 million per year and expand the capture limit to apply to captured sales and use tax revenue. Under the provisions of both current law and the bill, if the amounts captured or disbursed in a given year are less than the relevant limits, the difference is rolled over and added to the allowed captures or disbursements for future years. Captured revenue will reduce revenue for the fiscal years in which a capture occurs (and is accrued), rather than the fiscal year in which the captured revenue is disbursed. Given the rollover provisions, the revenue reduction in any given year could thus exceed the $40.0 million (or $80.0 million under the bill) limit. For example, if after 4 years of allowable captures, if actual captures totaled $25.0 million, the allowable maximum capture for year 5 (under the bill) would be $375.0 million.

Under current law, transformational brownfields may be approved until December 31, 2027, and the capture periods for IIT and withholding (and under the bill, also sales and use tax capture) may run as long as 20 years. Revenue captures must begin within five years of a property's approved inclusion in a project, although the bill would allow the five-year period to be extended for any approved length of time. As a result, without any extensions as provided under the bill, captures could run until December 31, 2052 (in FY 2052-53): a project approved on December 31, 2027, would need to begin capturing revenue by December 31, 2032, and could then capture for a maximum of 20 years. The bill's annual limit of $80.0 million per year could thus apply through 2052, for a maximum capture across all years of $2.4 billion. (Because the existing approved projects are still in the construction period, no projects are currently capturing IIT or withholding revenue). If, under the bill, the beginning capture date were extended for any project such that captures would occur after 2052, the revenue loss from the bill would increase by as much as $80.0 million per year for any capture years after 2052.

The bill would be unlikely to affect local unit revenue. Although the bill would indicate that the local share of use tax revenue would be subject to capture, unless total use capture under the bill were to exceed the General Fund portion of the State share of the use tax, the mechanics of how revenue is directed to the Local Community Stabilization Authority would not be affected. Similarly, capturing sales tax revenue would not affect revenue directed to local units of government under constitutional revenue sharing provisions.

Several aspects of both current law and the bill make it impossible to forecast or budget for any potential revenue reduction. Neither the current statute nor the bill limits the impact of the capture on revenue in any given fiscal year should the rollover provisions increase the allowed annual limits. The actual amount of captured revenue under current law and the bill, will depend on the particular behavior and timing of those affected by the capture, rather than any economic factors. Furthermore, the State is notified of the relevant capture amounts at the end of each calendar year and neither statute nor the bill require periodic reporting of captured amounts. As a result, the magnitude of any capture during a fiscal year will not be known at the time the State enacts the budget for a fiscal year nor will it be an amount that could be accurately forecast. Even under current law, when the authorized capture is limited to $800.0 million, the $800.0 million of capture could be spread out in an unknown distribution between now and FY 2051-52, or could occur in a single fiscal year.

The timing of how revenue would be captured across fiscal years is known but could be affected by several circumstances that could occur under the bill. First, the bill does not indicate how captures should be handled if the economic activity subject to capture were to generate revenue in excess of the capture limits. Presumably, such "excess" revenue would not be captured, but the bill does not specify how to address the situation. Second, the bill would define the sales and use tax capture as the amount by which "sales and use tax collected from persons within the eligible property exceeds the initial sales and use tax value". For traditional sales circumstances, such as an apparel retailer or a restaurant, the relevant sales tax amounts would simply represent sales at those establishments; however, it is unclear how the capture would be affected if a firm such as a public utility or a merchandise wholesaler were to establish operations within the property. The definition makes it unclear if sales transactions by these entities would be included in computing the capture amounts because while the physical transactions would not occur within the property, the taxes would be collected from persons located within the property.

The structure of the tax capture, which would capture revenue over a baseline established in the year in which a project is adopted, would represent an actual revenue loss rather than foregone revenue. Not only do projects already exist under the statute, and under the bill those projects would be able to capture more revenue than under current law, but much of the activity subject to the capture is likely to trade-off with activity that would otherwise occur in an area not subject to capture. For example, if a hotel guest stays at a hotel within a project area; or a customer eats at a restaurant within a project area, that activity would trade-off with a hotel stay or a dining event that would otherwise occur in an area where revenue would not be subject to capture.

The Department of Treasury would incur additional expenses of an unknown magnitude in tracking revenue subject to capture. Under current law and practice, taxpayers do not report sales and use tax revenue by location. The bill would require the Department of Treasury to develop systems that could provide the tracking required to determine sales and use tax capture revenue.

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