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**BILL ANALYSIS**



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Senate Bill 778 (Substitute S-2 as passed by the Senate)  
 Sponsor: Senator Mat J. Dunaskiss  
 Committee: Local, Urban and State Affairs

Date Completed: 10-29-96

**RATIONALE**

Under the United States and Michigan Constitutions, the government is prohibited from taking private property for a public use without providing the owner with just compensation; that is, the government must pay the owner for the monetary equivalent of the property when the government actually acquires property or otherwise "takes" it by destroying the property's value or utility. In Michigan, when property is acquired by an agency (a public body or a private entity authorized by law to condemn property), the agency must comply with the Uniform Condemnation Procedures Act. Essentially, the Act requires an agency to make a good faith offer in the amount it believes to be just compensation, and provides for a circuit court determination when the parties disagree on the purchase. According to the Michigan Department of Transportation (DOT), which often must acquire private property for highway purposes, a lawsuit has not been necessary in 90% of its acquisitions for highway rights-of-way between fiscal years 1991-92 and 1995-96. The remaining 10%, however, accounted for 64% of the funds spent by the DOT to acquire land for right-of-way purposes (excluding professional fees) over that five-year period.

As the agency responsible for most of the State's condemnation activity, the DOT has identified several areas in which it believes the process could be improved. For example, an agency at times might not have access to the information it needs to determine a parcel's value, and if the owner does not willingly furnish the information, the agency cannot obtain it without filing a lawsuit. In some cases, after an agency makes what it believes to be a good faith offer and the parties cannot come to an agreement, the circuit court might dismiss the agency's complaint when the owner produces unexpected evidence of the property's worth. Other situations involve the requirement that an agency compensate a property owner for an entire parcel when the

agency's acquisition of a portion of the parcel destroys the value or utility of the remainder. This might apply if the acquisition would leave the remainder of the parcel (or a structure on it) in nonconformity with a zoning ordinance. Currently, it is up to the property owner to seek a zoning variance, but an uncooperative owner might refuse to do so and, instead, try to get compensation for the nonconforming property. At other times, an agency is willing to compensate an owner for an entire parcel but wishes to take title to only a portion of the property--perhaps because the remainder might be contaminated or the agency simply does not want the surplus. Under the Act, however, the agency must acquire the whole parcel. Various changes to address these and other situations have been suggested.

**CONTENT**

**The bill would amend the Uniform Condemnation Procedures Act to:**

- **Allow an agency to decline to take title to unwanted property that was a portion of an acquired parcel, but require it to pay compensation for the entire property.**
- **Allow an agency to apply for a variance, before or after acquisition, if acquiring a portion of a parcel would leave the remainder in nonconformity with a zoning ordinance.**
- **Allow an agency to request an owner to furnish financial information; require the agency to reimburse the owner for the costs of producing the information; and provide for a show cause hearing if the owner failed to comply.**
- **Allow an owner to file a claim with an agency if he or she believed that the agency's good faith written offer did not fully include compensable property or damage.**

- **Require a court, upon either party's motion, to issue an order to assure that the parties exchanged appraisal reports and had a reasonable opportunity for discovery.**
- **Permit a party to recover fees for only one expert witness on each element of compensation unless the court permitted additional experts.**
- **Provide that the general effects of a project, experienced by the general public in varying degrees, could not be considered in a determination of just compensation.**

### Overview of Current Law

When property is acquired by a public or private agency, the Act requires the agency first to attempt negotiation and, if unsuccessful, to commence a condemnation action when acquiring property through the exercise of eminent domain. Before negotiating for the purchase of property, the agency must make a good faith offer to the owner to acquire the property for the amount that the agency believes to be just compensation. If the agency and the property owner do not agree on the purchase, the agency may file a circuit court complaint for the acquisition of the property, asking the court to determine just compensation. When a complaint is filed, the agency must deposit in escrow the amount estimated to be just compensation. The owner then may challenge the public necessity of the acquisition by filing a motion asking that necessity be reviewed. If such a motion is not filed or is denied, title to the property vests in the agency, the owner is entitled to just compensation, and the court must arrange surrender of possession and payment of the estimated just compensation.

### Acquisition of a Portion of Property

Currently, if the acquisition of a portion of a parcel would destroy the practical value or utility of the remainder of the parcel, the agency must acquire the entire parcel. Under the bill, the agency still would have to pay just compensation for the whole parcel but could elect whether to receive title to and possession of the remainder.

If the acquisition of a portion of a parcel would leave the remainder in nonconformity with a zoning ordinance, the agency, before or after acquisition, could apply for a zoning variance for the remainder. In determining whether to grant the

variance, the governmental entity having jurisdiction would have to consider the potential benefits of the public use for which the property would be acquired, in addition to those criteria applicable under the relevant zoning statute, ordinance, or regulation. The agency actually would have to acquire the property for the proposed public use in order for the variance to become effective for the remainder. If a variance were granted under these provisions, the governmental unit would have to consider the property to be in conformity with the zoning ordinance for all future uses insofar as the nonconformity for which that variance was granted. If the property also were nonconforming for other reasons, however, the grant of that variance would have no effect on the status of those other preexisting nonconformities. An owner could not increase the nonconformity for which a variance was granted under these provisions without the governmental entity's consent. An agency would have the same right to appeal action on a zoning variance as a property owner seeking a variance would have. The bill specifies that these provisions would not deprive a governmental entity of its discretion to grant or deny a variance.

### Good Faith Offer/Provision of Information

Currently, before initiating negotiations for the purchase of property, the agency must establish an amount that it believes to be just compensation for the property, and promptly submit to the owner a good faith written offer to acquire the property for the full amount established by the agency. The bill specifies that, if there were more than one owner of a parcel, the agency could make a single, unitary good faith written offer. If the owner failed to provide documents or information as required in the bill (described below), the agency could base its good faith written offer on the information otherwise known to the agency whether or not it had sought a court order for the production of information.

During the period in which the agency was establishing just compensation for the owner's parcel, it would have the right to secure tax returns, financial statements, and other relevant financial information for a period of up to five years before the agency's request. The owner would have to produce the information within 21 business days after receiving the agency's written request. The agency would have to reimburse the owner for actual, reasonable costs incurred in reproducing any requested documents, plus up to \$1,000 in other actual, reasonable costs incurred to produce

the information. Within 45 days after producing the requested documents and other information, the owner would have to give the agency a detailed invoice for the costs of reproduction and other costs sought. The owner would not be entitled to a reimbursement of costs under these provisions if the reimbursement would duplicate any other reimbursement to the owner.

If the owner failed to produce all documents and other information requested, the agency could file a complaint and proposed order to show cause in the circuit court. The court immediately would have to hold a hearing on the agency's proposed order. The court would have to order the owner to provide documents and other requested information that the court found to be relevant to a determination of just compensation. If the owner unreasonably failed to produce the information and documents in a timely manner, the owner would be responsible for all expenses incurred by the agency in obtaining them. The bill specifies that these provisions would not affect any right a party otherwise could have to discovery or to require the production of documents and other information upon a commencement of an action under the Act. The agency would have to give the owner a copy of this section of the Act with its request.

#### Owner's Claim

If an owner believed that an agency's good faith written offer did not include or fully include one or more items of compensable property or damage for which the owner intended to claim a right to just compensation, the owner would be required, for each item, to file a written claim with the agency. The claim would have to provide sufficient information and detail to enable the agency to evaluate its validity and to determine its value. The owner would have to file all such claims within 90 days after the good faith written offer was made or 60 days after the complaint was filed, whichever was later. Within 60 days after the owner filed a written claim, the agency could ask the court to compel the owner to provide additional information to enable the agency to evaluate the claim's validity and determine its value. For good cause shown, the court would be required, upon motion filed by the owner, to extend the time in which the claim could be made, if the agency's rights were not prejudiced by the delay. Only one extension could be granted.

After receiving the owner's claim, the agency could provide written notice that it contested the compensability of the claim, establish an amount that it believed to be just compensation for the

item of property or damage, or reject the claim. If the agency established an amount it believed to be just compensation for the item, it would have to submit a good faith written offer for that item. The sum of the good faith written offer for all such items plus the original good faith written offer would constitute the good faith written offer for purposes of determining the maximum reimbursable attorney fees. If an owner failed to file a timely written claim under these provisions, the claim would be barred. If the owner filed a claim that was frivolous or in bad faith, the agency would be entitled to recover from the owner its actual and reasonable expenses incurred to evaluate the validity and determine the value of the claim.

#### Delay or Denial of Vesting or Surrender

Under the Act, if a motion to review public necessity is not filed, title to the property vests in the agency as of the date the complaint was filed. Title also vests in the agency, as provided in the Act, if the motion to review necessity is denied after a hearing and after any right to appeal has terminated. Under the bill, if the motion were denied and any right to appeal had terminated, title would vest as of the date on which the complaint was filed or on another date set by the court upon the agency's motion.

The Act provides that the vesting of title or possession may not be delayed by a motion challenging the agency's decision to reserve its rights to bring Federal or State cost recovery actions, or by a motion challenging the agency's escrow of money as security for remediation costs of environmental contamination. Under the bill, vesting of title or possession also could not be delayed or denied by an allegation that the agency should have offered a higher amount for the property or should have included additional property in its good faith written offer, or by any other reason except a challenge to the necessity of the acquisition.

#### Exchange of Appraisal Reports

Under the bill, upon either party's motion, the court would have to issue a scheduling order to assure that the appraisal reports were exchanged and the parties were afforded a reasonable opportunity for discovery before a case was submitted to mediation, alternative dispute resolution, or trial. (The bill would define "appraisal" as an expert opinion of the value of property taken or damaged, or other expert opinion pertaining to the amount of just compensation.)

An appraisal report would have to describe fairly and reasonably the methodology and basis for the amount of the appraisal. If the testimony or opinion of a person relating to the value of real property would require a license under Article 26 of the Occupational Code (which governs real estate appraisers), the appraisal would have to comply with Article 26 and the standards promulgated under it, and the person could not be permitted to testify or otherwise render an opinion relating to the value of real property unless he or she were licensed under Article 26. An owner would not have to be licensed in order to testify to the value of his or her property.

The court could issue orders to facilitate compliance with this section, including orders to require mutual simultaneous exchange of the agency's updated appraisal reports, if any, and the owner's appraisal report. If an appraisal report had not been provided pursuant to this section, the report could not be considered in mediation or alternative dispute resolution proceedings unless specifically authorized by court order. If an appraisal report had not been provided, the court could bar the taking of appraisal testimony from the expert, unless the court found good cause for the failure and found that the other party's interests and opportunity to prepare had not been prejudiced.

The bill would delete a requirement that, on the date of the hearing, the court set a date certain for the pretrial as to the parcels not previously disposed of.

#### Interest

The Act requires the court to award interest on the judgment amount from the date of the filing of the complaint to the date of payment, unless the owner surrenders possession after the complaint is filed or there is a de facto acquisition before the date of the filing. The bill provides that if a portion of the judgment were attributable to damages incurred after the date of surrender of possession, the court would have to award interest on that portion of the judgment from the date the damage was incurred.

The court could toll the accrual of interest for any period of unreasonable delay attributable to the owner.

#### Attorney Fees/Expert Witness Fees

Under the Act, if the amount finally determined to be just compensation exceeds the amount of the

agency's written offer, the court must order the agency to reimburse all or part of the owner's reasonable attorney fees, but not more than one-third of the amount by which the ultimate award exceeds the agency's written offer. The reasonableness of the attorney fees must be determined by the court. The bill also provides that, if the agency or owner were ordered to pay attorney fees as sanctions under Michigan Court Rule 2.403 or 2.405, those fee sanctions would have to be paid to the court as court costs and could not be paid to the opposing party unless the parties agreed otherwise. (Under the court rules, a party who rejects a mediation evaluation or an offer to stipulate to judgment may be required to pay the other party's costs if the verdict is less favorable to the rejecting party than the evaluation or offer would have been.)

The Act provides that an ordinary or expert witness must receive from the agency the reasonable fees and compensation provided by law for similar services in ordinary civil actions in circuit court, including the reasonable expenses for preparation and trial. The Act also requires that expert witness fees be allowed with respect to an expert whose services were reasonably necessary to allow the owner to prepare for trial. The bill specifies that, for the purpose of these provisions, for each element of compensation, each party would be limited to one expert witness to testify on that element unless, upon showing of good cause, the court permitted additional experts.

An agency would not have to reimburse attorney or expert witness fees that were attributable to an unsuccessful challenge to necessity or to the validity of the proceedings.

If the agency settled a case before entry of a verdict or judgment, it could stipulate to pay reasonable attorney and expert witness fees.

#### General Project Effects

The bill provides that the general effects of a project for which property was taken, whether actual or anticipated, that in varying degrees were experienced by the general public, or property owners from whom no property was taken, could not be considered in a determination of just compensation. A special effect of the project on the owner's property that, standing alone, would constitute a taking of private property under Article 10, Section 2 of the State Constitution would have to be considered in a just compensation determination. To the extent that such detrimental effects of a project were considered, they could be

offset by consideration of the beneficial effects of the project.

### Other Provisions

A person would not be entitled to a payment in connection with the acquisition of all or part of the person's property under the Act if that payment would be duplicative of any grant or other payment received under any State or Federal statute or regulation.

As a rule, the Act requires the date of acquiring and of valuation to be the date of filing. The value of each parcel, and of a part of a parcel remaining after the acquisition of a part, must be determined with respect to the condition of the property and the state of the market on the date of valuation. Under the bill, however, if anticipated damages were avoided because of changes in the taking or project or changes in the actual effect of the taking or project on the remaining property, the property would have to be valued as if those damages had not been anticipated.

The bill provides its amendments to the Act would apply to all good faith written offers made after the bill's effective date.

The bill would repeal two sections of the Act (MCL 213.76 and 213.77) that repealed other laws on April 1, 1983, and April 1, 1985, respectively.

MCL 213.51 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

The bill would expedite the condemnation process, reduce litigation, and save money for both the government and property owners. First, it would allow agencies to obtain financial information from an owner, before making an initial offer. If an offer omitted some item of damage or compensation, the owner would have to give the agency written notice of the omission, along with sufficient information for the agency to evaluate the claim. The agency then could make a supplemental offer for the omitted item. With this additional information, agencies would be able to make more accurate, often larger, good faith offers. An agency would no longer be surprised by new claims at trial, or be confronted with the owner's one-third attorney fee claim on items left out of the

offer due to mistake or lack of information. Both the property owner and the agency would benefit.

In addition, the bill would allow an agency to take steps to prevent avoidable damages. An agency could ask the local unit of government for a zoning variance, if the agency's taking of a portion of property would leave the remaining property in nonconformity with a zoning ordinance. Not only would the owner be saved the time and expense of personally seeking the variance, but there would no longer be uncertainty over whether a variance would be granted. Also, the agency could revise its taking or its project to reduce or avoid causing damage to the owner, and the just compensation would be determined without consideration of the avoided damage.

The bill would reduce windfall profits by requiring that all property owners be treated equally. Under the bill, an owner could not recover damages for project-related inconveniences that also were suffered by the general public. In addition, an owner could not claim damages based on the negative aspects of a project, while barring the jury from knowing the related project benefits. Compensation would be paid to place the owner in as good a position as if no property had been taken--but not in a better position than that of neighbors or competitors from whom no property was taken.

Since delay to a public project can be very costly and even can jeopardize funding, the bill provides that the transfer of possession could be delayed only by a challenge to the public necessity of the taking. Possession could not be delayed simply by a claim that the offer was inadequate. Disputes over the proper amount of just compensation would remain for the jury to decide, but the project could be built in the meantime.

The bill would make a number of other changes to reduce abuses of the condemnation process. Duplication of payments would be barred. If a court found that an owner was engaged in tactics to delay a case unreasonably, it could toll (suspend) the running of interest for that period. Interest would not run on items of damage before the time that the damage actually was suffered. As a rule, mediation or offer of judgment sanctions would be paid to the court, as court costs, rather than to the opposing party. Each side would be limited to one expert witness for each element of compensation, unless the court permitted additional experts. The bill would make it clear that an agency would not have to decide the dollar value of competing owners' interests (e.g., land

owner and tenant) in the just compensation; the agency would make one unitary offer and the court would, as under current law, apportion it among the claimants. To discourage the filing of necessity challenges simply to delay the proceedings, the bill would not permit an owner to recover professional fees spent on an unsuccessful challenge.

While the bill would retain the requirement that an agency pay for the entire parcel when a partial taking would destroy the value of the remainder, it would allow the agency to choose whether to take title to the remainder. For example, an agency might wish to avoid risking liability for an environmental problem caused by the owner.

In summary, the bill would lower the cost of acquiring property for public projects without compromising an owner's right to be fully compensated. Unnecessary professional fees and avoidable damages would be reduced. Public agencies would be better able to predict the cost of property acquisition and to make informed decisions at the planning and budgeting stage.

#### **Opposing Argument**

The Act specifies that, "...after making a good faith written offer to purchase the property, the agency may file a complaint for the acquisition of the property in the circuit court..." (emphasis added). According to the Michigan Court of Appeals, if an agency fails to make a good faith offer, the circuit court lacks jurisdiction and the complaint must be dismissed (*In the Matter of Acquisition of Land for the Central Industrial Park Project*, 177 Mich App 11 (1989)). Under the bill, however, an agency could submit an unreasonably low offer and the burden then would shift to the owner to make a claim for additional items and to demonstrate what was wrong with the agency's offer. If an owner failed to do so within the proposed time limits, his or her claim would be barred. The bill would make it easier for the government to take private property without providing just compensation.

**Response:** The bill would make no change in the current statutory language that conditions a circuit court's jurisdiction on the tendering of a good faith offer. Even if a condemnation complaint is challenged and later deemed to be defective, title vests in the condemning agency once the complaint is filed and does not revert to the condemnee when the complaint is dismissed. According to the Court of Appeals, "This reading does not destroy the condemnee's right to challenge the complaint or the validity of any offers received from the condemning authority. Instead, it holds in abeyance resolution of such challenges without causing undue delay in the transfer of title"

(*Goodwill Community Chapel v General Motors Corp.*, 200 Mich App 84 (1993)). Under the bill, courts still would enforce the requirement that an agency make a good faith offer, but agencies would have more information on which to base an accurate offer. The bill would not, and could not, impair an owner's constitutional right to just compensation.

#### **Opposing Argument**

The bill would allow an agency to apply for a zoning variance, but would require a zoning board, in deciding whether to grant the variance, to consider the "potential benefits of the public use for which the property would be acquired". By requiring the consideration of this additional, specific factor, the bill could lead to increased litigation and challenges to zoning board decisions.

**Response:** The bill would enable a zoning board to grant a variance to an agency based on potential public benefits, without setting precedent for future variance requests.

Legislative Analyst: S. Margules

#### **FISCAL IMPACT**

The bill would result in savings to the State and local units of government. Savings would result from provisions in the bill that would allow governmental units to apply for zoning variances for partial takings, eliminate duplicative payments, limit the number of expert witnesses, toll interest for periods of unreasonable delays, and require access to appraisals and other information. Reasonable and actual costs for production of information would have to be paid for by the agency requesting information. Comprehensive Financial Reports for the Department of Transportation list right-of-way costs at \$88.4 million in FY 1991-92, \$75.1 million in FY 1992-93, \$68.9 million in FY 1993-94, and \$89.8 million in FY 1994-95. The Department reports that normally 90% of purchases are "friendly acquisitions".

Fiscal Analyst: B. Bowerman

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