



Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

BILL ANALYSIS



Telephone: (517) 373-5383
Fax: (517) 373-1986

Senate Bill 778 (as enrolled)
 Sponsor: Senator Mat J. Dunaskiss
 Senate Committee: Local, Urban and State Affairs
 House Committee: Transportation

PUBLIC ACT 474 of 1996

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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 was not 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 identified several areas in which it believed the process could be improved. For example, if an agency did not have access to the information it needed to determine a parcel's value, and if the owner did not willingly furnish the information, the agency could not obtain it without filing a lawsuit. In some cases, after an agency made what it believed to be a good faith offer and the parties could not come to an agreement, the circuit court might have dismissed the agency's complaint when the owner produced unexpected evidence of the property's worth. Other situations involved a requirement

that an agency compensate a property owner for an entire parcel when the agency's acquisition of a portion of the parcel destroyed 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. Traditionally, it was up to the property owner to seek a zoning variance, but an uncooperative owner could 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 had to acquire the whole parcel. Various changes to address these and other situations were suggested.

CONTENT

The bill amended the Uniform Condemnation Procedures Act to:

- **Allow an agency to decline to take title to unwanted property that is 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 fails to comply.**

- **Allow an owner to file a claim with an agency if he or she believes 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 exchange appraisal reports and have a reasonable opportunity for discovery.**
- **Permit a party to recover fees for only one expert witness on each element of compensation unless the court permits additional experts.**
- **Provide that the general effects of a project, experienced by the general public in varying degrees, may not be considered in a determination of just compensation.**

Overview of the 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

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

The bill provides that, 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, may apply for a zoning variance for the remainder. In determining whether to grant the variance, the governmental entity having jurisdiction must 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 must acquire the property for the proposed public use in order for the variance to become effective for the remainder. If a variance is granted under these provisions, the governmental unit must 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 was nonconforming for other reasons, however, the grant of that variance has no effect on the status of those other preexisting nonconformities. An owner may not increase the nonconformity for which a variance is granted under these provisions without the governmental entity's consent. An agency has 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 do not deprive a governmental entity of its discretion to grant or deny a variance.

Good Faith Offer/Provision of Information

Under the Act, 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 is more than one owner of a parcel, the agency may make a single, unitary good faith written offer. If the owner fails to provide documents or information as required in the bill (described below), the agency may base its good faith written offer on the information otherwise known to the agency whether or not it has sought a court order for the production of information.

Under the bill, during the period in which the agency is establishing just compensation for the owner's parcel, it has 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 must produce the information within 21 business days

after receiving the agency's written request. The agency must 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 must give the agency a detailed invoice for the costs of reproduction and other costs sought. The owner is not entitled to a reimbursement of costs under these provisions if the reimbursement would duplicate any other reimbursement to the owner.

If the owner fails to produce all documents and other information requested, the agency may file a complaint and proposed order to show cause in the circuit court. The court immediately must hold a hearing on the agency's proposed order. The court must order the owner to provide documents and other requested information that the court finds to be relevant to a determination of just compensation. The agency must keep these documents and other information confidential, although the agency and its experts and representatives may use the documents and other information to determine just compensation, may use them in legal proceedings under the Act, and may use them as provided by court order. If the owner unreasonably fails to produce the information and documents in a timely manner, the owner will be responsible for all expenses incurred by the agency in obtaining them. The bill specifies that these provisions do not affect any right a party otherwise might have to discovery or to require the production of documents and other information upon a commencement of an action under the Act. The agency must give the owner a copy of this section of the Act with its request.

Owner's Claim

Under the bill, if an owner believes 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 intends to claim a right to just compensation, the owner is required, for each item, to file a written claim with the agency. The claim must provide sufficient information and detail to enable the agency to evaluate its validity and to determine its value. The owner must file all such claims within 90 days after the good faith written offer is made or 60 days after the complaint is filed, whichever is later. Within 60 days after the owner files a written claim, the agency may 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, upon

motion filed by the owner, the court must extend the time in which the claim may be made, if the agency's rights are not prejudiced by the delay. Only one extension may be granted.

After receiving the owner's claim, the agency may provide written notice that it contests the compensability of the claim, establish an amount that it believes to be just compensation for the item of property or damage, or reject the claim. If the agency establishes an amount it believes to be just compensation for the item, it must 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 constitute the good faith written offer for purposes of determining the maximum reimbursable attorney fees. If an owner fails to file a timely written claim under these provisions, the claim is barred. If the owner files a claim that is frivolous or in bad faith, the agency is 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 the necessity of an acquisition 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. The bill specifies that title vests 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 may 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 must issue a scheduling order to assure that the appraisal reports are exchanged and the parties are afforded a reasonable opportunity for discovery before a case is submitted to mediation,

alternative dispute resolution, or trial. (The bill defines "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 must 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 must comply with Article 26 and the standards promulgated under it, and the person may not be permitted to testify or otherwise render an opinion relating to the value of real property unless he or she is licensed under Article 26. An owner does not have to be licensed or comply with professional appraisal standards in order to testify to the value of his or her property.

The court may 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 has not been provided pursuant to this section, the report may not be considered in mediation or alternative dispute resolution proceedings unless specifically authorized by court order. If an appraisal report has not been provided, the court may bar the taking of appraisal testimony from the expert, unless the court finds good cause for the failure and finds that the other party's interests and opportunity to prepare have not been prejudiced.

The bill deleted 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 is attributable to damages incurred after the date of surrender of possession, the court must award interest on that portion of the judgment from the date the damage is incurred.

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 is ordered to pay attorney fees as sanctions under Michigan Court Rule 2.403 or 2.405, those fee sanctions must be paid to the court as court costs and may not be paid to the opposing party unless the parties agree 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 is limited to one expert witness to testify on that element unless, upon showing of good cause, the court permits additional experts.

The bill provides that an agency cannot be required to reimburse attorney or expert witness fees that are attributable to an unsuccessful challenge to necessity or to the validity of the proceedings.

If the agency settles a case before entry of a verdict or judgment, it may 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 is taken, whether actual or anticipated, that in varying degrees are experienced by the general public, or property owners from whom no property is taken, may 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 must be considered in a just compensation determination. To the extent that such detrimental effects of a

project are considered, they may be offset by consideration of the beneficial effects of the project.

Other Provisions

The bill provides a person is not 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 are 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 must be valued as if those damages had not been anticipated.

Under the Act, when a condemnation action has been filed, the property owner may challenge the necessity of acquisition by filing a motion requesting the necessity to be reviewed, and, the court must determine the public necessity of an acquisition by a private agency. The granting of a permanent or temporary certificate by the Public Service Commission constitutes a prima facie case that public convenience and necessity require the project for which the parcel would be acquired. The bill extends this provision to a permanent or temporary certificate by a Federal agency authorized by Federal law to make determinations of public convenience and necessity as to condemnation.

The Act provides that, when a condemnation action is filed, the agency must deposit the amount estimated to be just compensation with a bank, trust company, or title company in the business of handling real estate escrows, or with the State, municipal, or county treasurer. As a rule, if a motion for review of necessity is not filed or is denied and the right to appeal has terminated or if interim possession is granted, the court must order the escrowee to pay the money deposited for or on account of the just compensation that may be awarded. The bill specifically requires the court, within 30 days, to order the escrowee to pay the money if a motion for review of necessity is not filed.

The Act provides that an agency or employee of an agency, before filing an action, may enter upon property for the purpose of making surveys, measurements, tests, soundings, and borings; taking photographs or samplings; appraising the property; conducting an environmental inspection; or determining whether the property is suitable to take for public purposes. The bill also allows entry for the purpose of conducting archaeological studies pursuant to the National Historic Preservation Act.

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

The bill repealed 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 will expedite the condemnation process, reduce litigation, and save money for both the government and property owners. First, it allows 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 must give the agency written notice of the omission, along with sufficient information for the agency to evaluate the claim. The agency then may make a supplemental offer for the omitted item. With this additional information, agencies will be able to make more accurate, often larger, good faith offers. An agency will 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 will benefit.

In addition, the bill allows an agency to take steps to prevent avoidable damages. An agency may ask the local unit of government for a variance, if the agency's taking of a portion of property would leave the remaining property in nonconformity with a zoning ordinance. Not only will the owner be saved the time and expense of personally seeking the variance, but there will no longer be uncertainty

over whether a variance will be granted. Also, the agency can revise its taking or its project to reduce or avoid causing damage to the owner, and the just compensation will be determined without consideration of the avoided damage.

The bill will reduce windfall profits by requiring that all property owners be treated equally. Under the bill, an owner may not recover damages for project-related inconveniences that also are suffered by the general public. In addition, an owner may not claim damages based on the negative aspects of a project, while barring the jury from knowing the related project benefits. Compensation will 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 is taken.

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

The bill makes a number of other changes to reduce abuses of the condemnation process. Duplication of payments is barred. Interest will not run on items of damage before the time that the damage actually was suffered. As a rule, mediation or offer of judgment sanctions will be paid to the court, as court costs, rather than to the opposing party. Each side is limited to one expert witness for each element of compensation, unless the court permits additional experts. The bill makes it clear that an agency need not decide the dollar value of competing owners' interests (e.g., land owner and tenant) in the just compensation; the agency may make one unitary offer and the court, as under current law, will apportion it among the claimants. To discourage the filing of necessity challenges simply to delay the proceedings, the bill does not permit an owner to recover professional fees spent on an unsuccessful challenge.

While the bill retains the requirement that an agency pay for the entire parcel when a partial taking would destroy the value of the remainder, it also allows 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 will 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 will be reduced. Public agencies will 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 may submit an unreasonably low offer and the burden then will shift to the owner to make a claim for additional items and to demonstrate what is wrong with the agency's offer. If an owner fails to do so within the time limits, his or her claim is barred. The bill will make it easier for the government to take private property without providing just compensation.

Response: The bill makes no change in the 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 will enforce the requirement that an agency make a good faith offer, but agencies will have more information on which to base an accurate offer. The bill does not, and cannot, impair an owner's constitutional right to just compensation.

Opposing Argument

The bill allows an agency to apply for a zoning variance, but requires 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 might lead to increased litigation and challenges to zoning board decisions.

Response: The bill will 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 will result in savings to the State and local units of government. Savings will result from provisions in the bill that allow governmental units to apply for zoning variances for partial takings, eliminate duplicative payments, limit the number of expert witnesses, and require access to appraisals and other information. Reasonable and actual costs for production of information will 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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