

## STATE DEPARTMENTS TO PAY PROPERTY OWNER ATTNY FEES & COSTS FOR CONSTITUTIONAL TAKINGS

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**House Bill 4070 (reported from committee as H-1)**

**Sponsor: Rep. Klint Kesto**

**Committee: Agriculture**

**Complete to 3-23-17**

Analysis available at  
<http://www.legislature.mi.gov>

### ***SUMMARY:***

House Bill 4070 would amend the Property Rights Preservation Act (PRPA). PRPA regulates governmental actions that may result in constitutional takings of real private property. Under the bill, generally speaking, courts would order a state department or agency to pay attorney fees and court costs of private real property owners when "governmental actions" resulted in a "constitutional taking" and the department or agency failed to consult "taking assessment guidelines" developed by the state's attorney general. (This does not apply to the exercise of the power of eminent domain by a department or agency.)

#### ***Government action***

Under the Property Rights Preservation Act, the term "government action" means any of the following: (1) a decision on an application for a permit or license; (2) proposed rules that if promulgated or enforced may limit the use of private property; (3) required dedications or exactions of private property; and (4) the enforcement of a statute or rule, including the issuance of an order.

"Government action" does not include any of the following: (1) the formal exercise of the power of eminent domain; (2) the forfeiture or seizure of private property by law enforcement agencies as evidence of a crime or for violations of law; (3) the discontinuance of government programs.

#### ***Constitutional taking***

Section 2 defines a "constitutional taking" as the taking of private real property by government action, resulting in compensation to the owner of that property. This action can occur under the United States Constitution Amendments V or XIV, or under the Michigan Constitution of 1963 Section 23 of Article I or Section 2 of Article X.

#### ***Takings assessment guidelines requirement***

Under Section 4 of PRPA, before taking "governmental action," certain state departments must review the *takings assessment guidelines* and consider the likelihood that the governmental action may result in a constitutional taking. Currently, this applies to three departments: Natural Resources, Environmental Quality, and Transportation. House Bill 4070 would extend the obligation to all state departments and agencies. (As introduced, the bill would only have added the Department of Agriculture and Rural Development.)

Further, the act currently requires these guidelines to be updated annually. The bill would require a review of the guidelines every five years, with the review to produce updates if necessary.

***Attorney fees and court costs***

The bill would also add a new Section 6, specifying that if a court determines that a governmental action by a department or agency resulted in a constitutional taking of private real property and finds that the department did not comply with Section 4 (by consulting the guidelines), then the court would order the department to pay reasonable attorney fees and costs of the private property owner. However, this section will not apply if the government action was an immediate response to an immediate threat to public health and safety (as described in Section 5 of the act).

Under Section 3 of the act, the attorney general, in conjunction with the departments and agencies, must develop *takings assessment guidelines* to assist the departments and agencies in the identification and evaluation of government actions that may result in a constitutional taking. The attorney general and the departments and agencies must base the guidelines on current law by the United States Supreme Court and the Michigan Supreme Court of this state, and review and update the guidelines every five years to reflect changes in the law.

***BACKGROUND INFORMATION:***

Amendment V of the United States Constitution states, in part, "no person shall be... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Amendment XIV of the United States Constitution also states, in part, "nor shall any state deprive any person of life, liberty, or property, without due process of law." Article I, Section 23 of the Michigan Constitution of 1963 says, "the enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people." Article X, Section 2 of the Michigan Constitution of 1963 reads, in part, "private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law."

***FISCAL IMPACT:***

It is unclear the extent to which the new provision allowing for reasonable attorney fees and costs would affect the state departments and agencies. The provision could result in additional costs to these departments, although costs would vary by department and fiscal year based on specific cases that may come before the courts. It is not clear how the act's provisions are currently implemented by the DEQ, DNR, and MDOT.

***POSITIONS:***

A representative from the Mackinac Center indicated support for the bill. (3-8-17)

A representative from the Michigan Department of Agriculture and Rural Development indicated that MDARD is neutral on the bill. (3-8-17)

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.