



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

## BILL ANALYSIS



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

House Bill 4070 (Substitute H-1 as passed by the House)

Sponsor: Representative Klint Kesto

House Committee: Agriculture

Senate Committee: Oversight

Date Completed: 1-24-18

### **CONTENT**

**The bill would amend the Property Rights Preservation Act, which establishes a process for evaluating certain governmental actions that may result in constitutional takings of private property, to do the following:**

- **Require the Attorney General, in conjunction with State departments and agencies, to review and update, if necessary, takings assessment guidelines every five years.**
- **Require any department or State agency to review the guidelines before taking a government action.**
- **Require a department or agency to pay a private real property owner for his or her reasonable attorney fees and costs, if the department or agency did not review the guidelines before taking a governmental action that resulted in a constitutional taking of private real property.**
- **Extend the Act to all principal departments of the State.**

The Act requires the Attorney General, in conjunction with the departments, to develop takings assessment guidelines under the Administrative Procedures Act that will assist the departments in the identification and evaluation of government actions that may result in a constitutional taking. The Attorney General and the departments must base the guidelines on current law as articulated by the United States Supreme Court and the Michigan Supreme Court and must update the guidelines at least on an annual basis to reflect changes in the law.

The bill instead would require the Attorney General, in conjunction with departments and agencies that wished to participate, to develop takings assessment guidelines. Additionally, the Attorney General and the participating departments and agencies would have to review the guidelines every five years and, if necessary because of changes in the law or otherwise, update the guidelines.

The Act provides that, before taking a governmental action, the Department of Natural Resources, the Department of Environmental Quality, or the Department of Transportation, as appropriate, must review the taking assessment guidelines and consider the likelihood that the governmental action may result in a constitutional taking.

Under the bill, this would apply to any department or agency.

Additionally, under the bill, if a court determined that government action by a department or agency resulted in a constitutional taking of private real property and that the department or agency did not review the takings assessment guidelines before taking a governmental action

in regard to the real property, the court would have to order the department or agency to pay the private real property owner for his or her reasonable attorney fees and costs. This would not apply if the government action were an immediate response to an immediate threat to public health and safety. (In that case, the review of the takings assessment guidelines could be made when the response was completed.)

The Act defines "department" as the Departments of Natural Resources, Environmental Quality, and Transportation. Under the bill, "department" would mean a principal department of the State. The bill also would define "agency" as a commission, board, council, or other agency of the State, other than a department.

The Act defines "Government action" as any of the following: a decision on an application for a permit or license; proposed rules that if promulgated or enforced may limit the use of private property; required dedications or exactions of private property; or the enforcement of a statute or rule, including the issuance of an order. The term does not include any of the following: the formal exercise of the power of eminent domain; the forfeiture or seizure of private property by law enforcement agencies as evidence of a crime or for violations of law; or the discontinuance of government programs.

"Constitutional taking" or "taking" means the taking of private property by government action such that compensation to the owner of the property is required by any of the following:

- Amendment V or XIV of the Constitution of the United States.
- Section 23 of Article I and Section 2 of Article X of the Michigan Constitution of 1963.

(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 U.S. Constitution 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 states, "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 states, in part, "Private property shall not be taken for public use without just compensation...If private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking must be at least 125% of that property's fair market value, in addition to any other reimbursement allowed by law.")

The bill would take effect 90 days after enactment.

MCL 24.422 et al.

Legislative Analyst: Stephen Jackson

## **BACKGROUND**

The Takings Assessment Guidelines - 1998 Annual Update states in Guideline No. 3 that the intent of the guidelines is "to set forth general principles of takings law as articulated by the United States and Michigan Supreme Courts, which lend themselves to practical application by officers and employees of the Departments".

Guidelines No. 1, 2, and 4 indicate that the guidelines were adopted pursuant to the Property Rights Preservation Act, and articulate definitions and provisions that are outlined in the Act.

Guideline No. 5 describes general principles of takings law and substantive due process, and explains the difference between governmental acquisition of private property through a condemnation or eminent domain proceeding, and a taking that occurs through regulatory or other action. One type of regulatory taking is a physical taking, which may occur when a government issues a regulation that has the effect of allowing the occupation or destruction of private property. Another category involves "dedications" or "extractions", which the guideline defines as conditions imposed by the government that property or some interest in property (such as an easement) be conveyed to the government in exchange for a land use permit or approval. The guideline also discusses "confiscatory regulatory takings", which may occur when a governmental regulation deprives a property owner of all economically beneficial uses of the property or substantially reduces its economic value.

Guideline No. 5 goes on to discuss some of the significant U.S. and Michigan Supreme Court cases dealing with regulatory takings.

Finally, Guideline No. 6 outlines certain considerations a department should rely on to determine whether a government action may raise constitutional questions and require further review. The considerations are phrased in the form of questions and accompanying text. According to the guideline, an affirmative answer to the questions does not necessarily mean that a taking will occur, but indicates that the department should carefully review its proposed action with the Department of Attorney General.

The 2000-2001 Update to the Takings Assessment Guidelines includes additional analyses of recent U.S. Supreme Court opinions addressing the issue of regulatory takings.

### **FISCAL IMPACT**

The bill would have an indeterminate fiscal impact on State government. The scope of State actions that could be determined to be constitutional takings and the instances in which the State could be determined to be not in compliance with the Taking Assessment Guidelines in the future are speculative. Although guidelines were developed under the Act, implementation by the Department of Environmental Quality and the Department of Natural Resources is not documented. The Michigan Department of Transportation reports that it has incurred no costs regarding the Department's implementation of the guidelines and has not been a party to any litigation under the Property Rights Preservation Act.

Requiring all State departments and agencies to review the Takings Assessment Guidelines and consider the likelihood that the governmental action may result in a constitutional taking could potentially reduce the number of constitutional takings cases filed against the State in the future, and thereby result in savings to the State. Additional costs to the State could result from requiring a court to order a department or agency to pay a private real property owner his or her reasonable attorney fees and costs, to the extent that the department or agency would not have been required to pay those costs otherwise.

Requiring the guidelines to be updated every five years instead of on an annual basis, and then updated if necessary, should result in administrative savings. (It is not clear, however, whether the guidelines have been updated annually.)

The bill would have no fiscal impact on local government.

Fiscal Analyst: Bill Bowerman

SAS\S1718\s4070sa

This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.