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

BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986
TDD: (517) 373-0543

Senate Bill 1127 (Substitute S-1 as passed by the Senate)
Sponsor: Senator John J. Gleason
Committee: Agriculture

Date Completed: 8-12-08

RATIONALE

Under the Natural Resources and Environmental Protection Act, the owner of open space land or farmland may enter into an agreement with the State or a local unit of government under which the owner gives up, or relinquishes, the right to develop the property in exchange for certain tax abatements for a period of time. In the case of an open space development rights easement, the development rights are exempt from property taxes. If farmland is subject to a development rights agreement, the owner may claim an income or business tax credit. If an easement or agreement is terminated before its agreed-upon termination date, a lien for the unpaid taxes may be placed on the property. A lien becomes payable when the land is sold or, in the case of open space land, when it is converted to a use prohibited by the former easement. Some people believe that the owner of land subject to an open space easement should be permitted to terminate the easement, without penalty, if the owner entered into a farmland development rights agreement and produced crops that could be used to generate energy.

CONTENT

The bill would amend Part 361 (Farmland and Open Space Preservation) of the Natural Resources and Environmental Protection Act to do the following:

-- Require the State or a local governing body to relinquish an open space development rights easement if the land would be devoted to the production of perennial cellulosic ethanol crops for the generation of energy.
-- Provide that a lien for unpaid property taxes could not be recorded if the land would be subject to a farmland development rights agreement.

Under Sections 36105 and 36106 of the Act, the owner of open space land may apply for an open space development rights easement under which the owner relinquishes to the public, in perpetuity or for a term of years, the right to develop the land. The development rights are held by the State or a local governing body, depending on the type of land. (Sections 36105 and 36106 are described in **BACKGROUND**, below.)

An open space development rights easement must be relinquished by the State or the local governing body when it expires unless it is renewed with the landowner's consent. A development rights easement also may be relinquished before its termination date if the State or the local governing body determines that development is in the public interest and the landowner agrees, and if the landowner applies for relinquishment and the request is approved. If an easement is relinquished upon the owner's request, the land is subject to a lien for the property taxes not paid on the development rights, plus interest. The lien becomes payable when the land is sold or converted to a use prohibited by the former easement.

Under the bill, an open space development rights easement would have to be relinquished by the State or the local governing body, as applicable, before a

termination date contained in the instrument if the land would be devoted to the production of perennial crops for cellulosic ethanol crops for the generation of energy.

If a development rights easement were to be relinquished under the bill, the Michigan Department of Agriculture (MDA) or the local governing body would have to prepare and record a lien as currently provided. A lien could not be recorded, however, and the development rights would revert to the owner without penalty or interest if the land were enrolled in a farmland development rights easement under Section 36104. If the land became subject to a farmland development rights agreement after the lien was recorded, the lien would be released and the MDA or the local governing body would have to prepare and record a discharge of lien with the register of deeds in the county where the land was located.

(Under Section 36104, the owner of farmland may apply for a farmland development rights agreement under which the owner and the State jointly hold the right to undertake development, and that contains a covenant not to undertake development for a term of years. The agreement must be approved by the local governing body and the MDA. The jointly owned development rights are not exempt from property taxes, but the landowner may claim a credit for the amount by which the property taxes on the land subject to the agreement exceed 3.5% of the owner's household income or adjusted business income. A farmland development rights agreement must be for an initial term of at least 10 years, and may be renewed for a term of at least seven years if the landowner has complied with Part 361. When land is relinquished from the agreement, a lien in the amount of tax credits the owner received during the past seven years is placed on the property, and is payable when the land is sold.)

MCL 324.36110 et al.

BACKGROUND

Section 36105 of the Natural Resources and Environmental Protection Act applies to open space land that is one of the following:

-- Any undeveloped site included in a national registry of historic places or designated as a historic site pursuant to State or Federal law.
-- Riverfront ownership subject to designation under Part 305 (Natural Rivers), to the extent that full legal descriptions may be declared open space, if the undeveloped parcel or government lot parcel or portion of the parcel as assessed and owned is affected by Part 305 and lies within one-quarter mile of the river.
-- Undeveloped land designated as environmental areas under Part 323 (Shorelands Protection and Management), including unregulated portions of that land.

If the owner of this type of open space land applies for a development rights easement, the application must be submitted to the Michigan Department of Agriculture for approval or rejection. If the MDA approves the application, the Department must prepare an open space development rights easement that includes the following provisions:

-- A structure may not be built on the land without the MDA's approval.
-- Improvements to the land may not be made without the MDA's approval.
-- An interest in the land may not be sold, except for a scenic, access, or utility easement that does not hinder the character of the open space land.
-- Access to the land may be provided if the owner agrees and if access will not jeopardize the conditions of the land.

As agreed to by the parties, the easement also may include any other condition or restriction on the land that is considered necessary to preserve the land or appropriate portions of it as open space land.

Section 36106 applies to open space land that is any area other than that described above, approved by the local governing body, whose preservation in its present condition would conserve natural or scenic resources, including the promotion of conservation of soils, wetlands, and beaches; the enhancement of recreational opportunities; the preservation of historic sites; and idle potential farmland of at least 40 acres that is substantially undeveloped and because of its soil, terrain, and location

is capable of being devoted to agricultural uses as identified by the MDA.

An application for a development rights easement under Section 36106 must be filed with the local governing body, which must notify various local agencies and approve or reject the application. If the application is approved, the local governing body must prepare the easement (or the MDA must do so if it approves the application on appeal). The easement must contain the same provisions as described above, except that approval of the local governing body, rather than the MDA, is required for building a structure or making improvements.

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

As the price of oil continues to climb, the use of alternative energy can help ease supply constraints, reduce dependence on foreign oil, and offer environmental benefits. Alternative energy can take many forms, including cellulosic ethanol, which is a fuel that can be produced from the conversion of cellulosic biomass. Cellulose is a polymer composed of repeating units of glucose and is contained in the cell wall of plants. Cellulosic biomass can be produced from rapidly growing trees, such as hybrid poplar and silver maple, as well as large perennial grasses, such as switchgrass and miscanthus.

In Michigan, approximately 10,000 acres of land are subject to open space development rights easements, which prevent the property from being used for any purpose that would alter its character as open space land. Potentially, some of this land is suitable for agriculture and could be used to produce perennial crops for cellulosic ethanol. The landowner, however, may not farm the property without terminating the development rights easement and subjecting the property to a lien for taxes that were not paid while the easement was in effect.

Under the bill, a landowner could withdraw property from an open space development rights easement, without penalty, if the land became subject to a farmland development rights agreement and were devoted to the production of perennial cellulosic ethanol crops for energy generation. This would keep the land in agricultural use for at least 10 years, and would help promote the production of energy crops and lessen the use of petroleum-based fuel.

Opposing Argument

Land subject to an open space development rights easement may be ecologically fragile or environmentally valuable. Although the landowner receives a financial benefit from giving up his or her development rights, the easement serves to protect the land and, in turn, the interests of the public. In some cases, open space land functions as a buffer between riverfront or shoreline property and farmland. Allowing land to be removed from an open space easement and used for agricultural production would defeat these purposes. Although the land could not be used for residential or commercial development, plowing, fertilizing, and using pesticides could damage the land itself or harm the local ecosystem. Creating an easement to prevent development signifies that the land is worthy of preservation and protection. This land may include historic sites, riverfront property, shoreland, and property whose natural or scenic character should be conserved.

In addition, the bill does not address the issue of enforcement. Although the MDA could monitor the crops grown on the land, it would be impractical for the Department to oversee the destination of the crops in order to ensure that they were used for energy generation.

Furthermore, changing the terms of an easement—which amounts to a contract between the landowner and the State—would set an unwelcome precedent.

Response: A landowner still would have to go through the standard process for entering into a farmland development rights agreement, which requires local and State approval. Although much of the land subject to open space easements might not be suitable for growing crops, one category of open space land is idle farmland of at least 40 acres that is capable of being devoted to agricultural uses.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

It is not possible to estimate the fiscal impact of this bill, but it probably would be very small. Currently, there are approximately 4,000 acres of land in open space development rights easements granted by the State, and 6,000 acres in local open space development rights easements, and much of this land is probably not suitable for farming. This is particularly true for the land in State-granted open space development rights easements, which includes much wooded land along rivers. Under current law, a property owner granted an easement under either of these programs has to pay property taxes only on the value of the land excluding the value of any potential development; however, if the land is prematurely withdrawn from either of these programs, the landowner must pay the past property taxes on the value of the property's development rights that otherwise would have been assessed during the years the property was in the easement program. Under this bill, these penalties would be waived as long as: 1) the property would be used to produce perennial crops for cellulosic ethanol crops for the generation of energy, and 2) the land became subject to a farmland development rights agreement. There is no way to know how much, if any, of this land would be withdrawn from open space easement programs and meet these criteria.

Fiscal Analyst: Jay Wortley

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