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FISCAL IMPACT REPORT

SPONSOR: Burpo DATE TYPED: 02/24/01 HB 618
 SHORT TITLE: Private Property Protection Act SB _____
 ANALYST: Valenzuela

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY01	FY02	FY01	FY02		
	Tremendous Indeterminate	See Fiscal Implications Narrative		Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files
 Administrative Office of the Courts
 Office of the Attorney General
 Taxation and Revenue Department
 Energy, Minerals and Natural Resources Department
 State Highway and Transportation Department

SUMMARY

Synopsis of Bill

House Bill 618 would enact the “Private Property Protection Act.” The new statute would create legal remedies for private property owners or users to initiate when any governmental entity implements a regulation, with few exceptions, that in some way decreases the real property value by 25 percent, including land use and zoning actions. Additionally, the bill requires the governmental entity to pay the private property owner for their loss. The bill also outlines enforcement actions, statute of limitations for actions, procedures for legal challenges and property tax adjustments.

Significant Issues

The Constitutions of the United States and of New Mexico require the government to compensate private property owners when the government exerts its legal authority of eminent domain to condemn private property (“takings”) for a public use. Private property owners have attempted to apply this same “takings” principle to regulatory actions that severely restrict the property’s use, a process known as an inverse condemnation action.

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The debate over the appropriate role of the state government has focused attention on the government's regulatory actions. Private property owners have voiced their dissatisfaction with the current level of protection for private property rights, particularly rights associated with real property such as land. When these owners assert an infringement on their rights and pursue a remedy in the courts, the courts have applied constitutional takings jurisprudence (body of law spawned from Supreme Court decisions on the Fifth Amendment of the Constitution) to rule that the effect of a regulation on private property is not considered a "takings", therefore would not require compensation.

Private property owners have generally lost these court cases because an explicit "reduction-in-value" test to determine eligibility for compensation does not exist, though the courts do consider the "reduction-in-value" argument. House Bill 618 seeks to create this legal mechanism. Problematic with the structure of House Bill 618 is that the calculation would be completed specifically on the portion of the property affected by the regulation, instead of the entire property. As mentioned, courts do weigh the reduction in property values in making their decisions, but it also weighs other factors such as the harm that the regulation prevents, which House Bill 618 does not address. The courts also have ruled that a property owner, in many cases, is well aware of the potential that regulatory programs may inhibit their ability to use their property.

In effect, House Bill 618 seeks to create the statutory mechanisms to ensure that private property owners are successful in their "takings" lawsuits against governmental entities.

The Office of the Attorney General has identified a series of substantive and technical issues with the bill, which are outlined below:

Binding Arbitration. Requiring governmental units to enter into binding arbitration, in which arbitrators can require the unit to pay sums of money, along with "sharing" the costs of the arbitrations panel, some time in the future raises substantial questions under the debt clauses of the state constitution, which prevent governments from incurring debt and contingent liabilities beyond the current fiscal year. Similarly, to the extent this bill applies to executive agencies, it may also interfere with the legislature's powers of appropriation.

Government's Ability to Appeal. This bill also significantly limits the ability of a governmental entity to appeal any award - the grounds for appeal under the Uniform Arbitration Act (UAA) are very narrow, and does not allow a court challenge when the award is contrary to law. Further, because Section 6(D) requires the government to pay any award within thirty days of the award, it may well cut off the limited appeal that is available under the UAA.

Rescinding Regulations. Section 6 (E) of this bill offers the government unit, as an alternative to paying an award, the ability to rescind the regulatory program "without further public hearings, proceedings or environmental review." There are many statutes currently on the books that require public hearings or proceedings (including the Open Meetings Act) when a public body is proposing to rescind regulations. This proposed alternative conflicts with these statutory requirements. Further, public hearings and proceedings may also be required by the due process and equal protection provisions of both the state and federal constitutions, particularly where vested property rights may be at issue.

Aside from these statements, all state agencies that responded with their analyses of House Bill 618 state the definition of "regulatory program" in Section 2(F) of the bill is not well defined. According to the Office of the Attorney General, the "whichever is later" language in Section 3(A) of this bill implies that there might be a cause of action even where someone acquired the property after the regulatory program went into effect, which is contrary to the basic principles of takings law.

FISCAL IMPLICATIONS

House Bill 618 does not contain an appropriation. However, enactment of the bill would have huge fiscal impacts. Passage of the bill would require governmental agencies to compensate private property owners for the loss in market value. Where the courts have normally ruled against private property owners, the bill could give the owners legal standing in these cases. In effect, the bill could potentially allow compensation for almost any regulatory action.

The fiscal impact is indeterminable, but it is conservative to say that the state could face multi-millions of dollars of liability.

ADMINISTRATIVE IMPLICATIONS

House Bill 618 would have an equally large administrative impact on governmental entities.

MFV/njw