Department of Legislative Services

Maryland General Assembly
2011 Session

FISCAL AND POLICY NOTE

Senate Bill 873 (Senator Pipkin)
Judicial Proceedings

Private Property Rights - Regulatory Infringement - Compensation

This bill gives a cause of action to a private property owner against the State if the application of a regulation by the Maryland Department of the Environment (MDE), the Department of Natural Resources (DNR), or the Maryland Department of Planning (MDP) restricts, limits, or otherwise infringes on a right to the private property that would exist absent the application of the regulation. The cause of action applies to regulations adopted on or after October 1, 2011, but does not apply to regulations adopted by the applicable agencies to comply with federal law or protect public safety.

A case filed pursuant to this cause of action must be filed (1) within six years after the date on which the regulation is applied to the private property; and (2) in the circuit court of the county in which all or any portion of the private property is located.

Fiscal Summary

State Effect: Potentially significant increase in State expenditures for agencies to litigate cases generated by the bill and pay monetary damages awarded in these cases. Revenues are not affected.

Local Effect: Increase in circuit court workloads and expenditures to accommodate additional cases generated by the bill. Revenues are not affected.

Small Business Effect: Potentially meaningful impact on small businesses that own land impacted by applicable regulations.

Analysis

Bill Summary: Under this cause of action, a property owner may recover (1) a sum equal to the diminution in the fair market value of the private property affected by the application of the regulation that is the basis of the case; and (2) court costs, reasonable attorney's fees, and reasonable expenses. Any award or judgment granted in favor of a private property owner under this cause of action must be paid out of the budget of the agency responsible for adopting the regulation that is the basis of the lawsuit and may not be paid from the State's general fund.

Current Law: Under the U.S. Constitution and the Maryland Constitution, the government is prohibited from taking of private property for public use without just compensation. Whether governmental action constitutes a taking ordinarily depends on the balancing of three factors: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. A property owner alleging a taking must first establish a constitutionally protected property interest at stake.

In deciding takings claims, courts consider the extent of interference with the economically viable use of the entire property, not just the burdened portion of the property.

State Fiscal Effect: The liability of the State under this bill cannot be determined, but is potentially substantial. The State currently compensates landowners whose property is condemned, however, this bill requires the State to compensate property owners whose property is not condemned but loses value. Many State regulations adopted by the agencies specified in the bill affect private property. The types of regulations listed below are some of the regulations that may form the basis for lawsuits generated by the bill.

- **Endangered and Threatened Species Protection:** Natural Resources Article § 10-2A-04 authorizes DNR to declare animal or plant species as endangered or threatened due to certain factors. While the list of protected species includes species protected by the federal Endangered Species Act, it also includes animal or plant species deemed endangered by the State based on habitat and population factors. A private property owner would be able to sue the State if a State-designated species is the basis of the owner's claim. DNR revises the list of endangered and threatened species every two to three years.

  Protection of endangered or threatened species can result in reduced real property value by reducing the number of lots within a proposed subdivision, reducing the acreage within a proposed timber harvest, or expanding the buffer around a wetland to protect a given endangered or threatened species.

- **Forest Conservation:** The Forest Conservation Act and regulations require all jurisdictions to implement local Forest Conservation Programs that are at least as strict as the State standards. State regulations can affect the value of a property by limiting how much land is available for development. Limitations on forest clearing may reduce the number of building lots initially proposed in a subdivision, or otherwise allowed under local zoning, thereby reducing the value of the property.

- **Individual Well or Septic Permits:** Requirements regarding the issuance of these permits are contained in regulations. The denial of individual well or septic permits could reduce property values by limiting the development potential of affected areas.

The amount of any reduction in the value of real property as a result of State regulation cannot be determined, and thus the potential cost to the State cannot be estimated. This bill, however, would not necessarily lead to an immediate increase in expenditures. Since agencies would be required to pay any claims out of their budgeted appropriations, there would be no effect on the general fund in the first year a judgment against the State was rendered. The next year, the agency would presumably require a deficiency appropriation or a much larger appropriation to make up for the loss.

State expenditures could decline as a result of reduced or no activity from some programs which would be likely to reduce the value of private property. For instance, the Forest Conservation Act requires that developers obtain approval of a forest conservation plan before subdivision grading or sediment and erosion control approvals are granted if they are developing 40,000 square feet or more of land. If DNR determines that the potential liability to the State would be significantly greater than any benefits to be derived from this program, activity relating to this program could be curtailed. Any expenditure savings are assumed to be insignificant compared to the potential liability to the State.

Additional Comments: While the bill specifically applies to regulations adopted on or after the October 1, 2011 effective date, it is unclear if a court would determine that an existing regulation amended after October 1, 2011, was "readopted" on the date the amended regulation took effect.

Additional Information

Prior Introductions: SB 447 of 1996, a similar bill, received an unfavorable report from the Senate Judicial Proceedings Committee.

Cross File: None.

Information Source(s): Department of Budget and Management, Department of Natural Resources, Maryland Department of Planning, Maryland Department of the Environment, Judiciary (Administrative Office of the Courts), Department of Legislative Services

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mc/kdm

Analysis by: Amy A. Devadas

Direct Inquiries to:
(410) 946-5510
(301) 970-5510