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(As Passed by the House)

Reps. Seitz, Collier, Niehaus, McGregor, Aslanides, Schneider, Webster, Gilb, Wolpert, Schlichter, Sferra, Daniels, Flowers, Barrett, Bocchieri, Driehaus, C. Evans, Grendell, Otterman, Peterson, Raussen, Setzer, Ujvagi, Yates

BILL SUMMARY

- Grants statutory authority to a county, conservancy district, sanitary district, county sewer district, or regional water and sewer district to appropriate in a specified manner and to take possession of land needed for the construction of sewers without a prior jury assessment of compensation and damages to the residue, when the Director of Environmental Protection or a local board of health finds that unsanitary conditions compel the immediate construction of the sewers.
- Expands and revises the rulemaking authority of a board of county commissioners pertaining to erosion control, sediment control, and water management.
- Permits the issuance of stop work orders under certain conditions for the violation of those rules.
- Establishes an optional civil fine of not less than \$100 or more than \$500 for each day of violation of those rules or administrative orders issued with respect to them.
- Authorizes a board of county commissioners that has established a county sewer district to adopt rules governing the prevention of certain sewer back-ups and declares any sewer back-up required to be prevented under a rule to constitute a statutory nuisance.
- Exempts certain farm houses from required connection to a new public sewer constructed to reduce or eliminate an existing health problem or water pollution hazard.

- Requires health district licensing councils to meet at least annually rather than quarterly.

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CONTENT AND OPERATION

Certain "public exigency" eminent domain takings and associated appropriation proceedings

Background law

Eminent domain is the inherent power of a sovereign state to appropriate private property under certain circumstances or for certain purposes. The power of eminent domain reflects the principle that public necessity may result in private property becoming subservient to the public welfare without the owner's consent. The United States Constitution and the Ohio Constitution limit the exercise of this sovereign power; the United States Constitution does so by prohibiting a taking for public use "without just compensation," and the Ohio Constitution does so by generally prohibiting a taking of private property for a public use without compensation first being made in money or first being secured by a deposit of money, in the amount having been assessed by a jury. In Ohio, however, an exception to the first payment or deposit of jury-assessed compensation rule is allowed "[w]hen [property is] taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or

repairing roads which shall be open to the public, without charge."¹ (See COMMENT.)

Current statutory law provides *procedures* for eminent domain proceedings. Those procedures generally provide that the governmental agency must first attempt to reach an agreement with the owner and, if unable to reach an agreement, then file a petition for appropriation in the court of common pleas or probate division of that court that identifies the property, includes statements that it has attempted to come to an agreement with the owner and of the purpose for appropriating the property, and other specified averments. Notice of the filing of the petition must be given in a specified manner to the property owner, and the property owner then has a period of time to file an answer to the petition. A hearing may be had on any permissible challenges the owner has to the petition (perhaps, the right of the governmental agency to make the appropriation, its necessity, or the inability of the parties to agree), but once it is determined that the governmental agency has authority to proceed, the proceedings continue with a jury assessment of the "compensation" for the property to be appropriated and any damages to the residue, which must be paid to the owner. Once the governmental agency pays the owner that money or deposits it with the court, the agency may take possession of the property. (Secs. 163.04, 163.05, 163.07, 163.08, 163.10, 163.13, 163.14, and 163.15--not in the bill; sec. 163.09.)

Early taking of possession ("quick-take")

If the governmental agency is taking private property "in time of war or other public exigency, imperatively requiring its immediate seizure..." in compliance with the Ohio Constitution, current statutory procedural law provides that the agency may deposit with the court at the time of filing its petition the value of the property to be appropriated and any damages to the residue as determined by the agency, and then may take possession of that property (other than structures on it) (sec. 163.06(A)--not in the bill).²

The bill statutorily declares a "public exigency" to exist (1) when the Director of Environmental Protection finds that "a public health nuisance caused by an occasion of unavoidable urgency and suddenness due to unsanitary conditions" compels the immediate construction of sewers for the protection of the public health and welfare or (2) when a board of health of a health district issues

¹ *The Fifth Amendment to the United States Constitution and Section 19 of Article I and Section 5 of Article XIII of the Ohio Constitution.*

² *Other procedures are provided for "quicktakes" for the purpose of making or repairing roads--which also is covered by the Ohio Constitution (sec. 163.06(B)--not in the bill).*

an order to mitigate or abate "a public health nuisance that is caused by an occasion of unavoidable urgency and suddenness due to unsanitary conditions and compels the immediate construction of sewers for the protection of the public health and welfare." (See **COMMENT.**) Then, the bill permits the governing board of a county, conservancy district, sanitary district, county sewer district, or regional water and sewer district that is unable to purchase property (apparently other than by appropriation) for the purpose of the construction of sewers to mitigate or abate the public health nuisance that is the subject of the Director's finding or the board of health's order, to adopt a resolution finding that it is necessary for the protection of the public health and welfare to appropriate property that the governing board considers needed for that purpose. The resolution must contain a definite, accurate, and detailed description of the property to be appropriated; the name and place of residence, if known or with reasonable diligence ascertainable, of the owners of the property to be appropriated; and the amount the governing board considers to be the value of the property to be appropriated (which must be the governing board's determination of the "compensation" for the property and must be supported by an independent appraisal) and any damages to the residue. The compensation so determined plus an amount for the damages to the residue must be deposited with the probate court or the court of common pleas (whichever has jurisdiction) of the county in which the property (or part of it) is located. The governing board's resolution and a written copy of the independent appraisal must accompany the board's petition for appropriation of the property, but, otherwise the Appropriation Proceedings Law as it applies to appropriations in time of public exigency governs the procedures to be followed in an appropriation under the statutory definition of "public exigency." (Secs. 163.02(F), 307.08(B), 6101.181, 6115.221, 6117.39(B), and 6119.11(B).)

Related procedural changes

Burden of proof. Under the current Appropriation Proceedings Law, when an owner files an answer to the appropriating governmental agency's petition, the owner generally may specifically raise as issues the agency's right to make the appropriation, the inability of the parties to agree on compensation and any damages to the residue, and the necessity for the appropriation. An **exception** to the raising of those issues exists, however, when property is taken by eminent domain pursuant to Section 19 of Article I of the Ohio Constitution "in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge." An answer may not raise those issues in connection with such a taking. (Sec. 163.08--not in the bill.)

Current law provides that, when those issues are permitted to be raised, the court involved must resolve them in the agency's favor unless, in addition to the specific denial of the agency's right to make the appropriation, the inability of the parties to agree on compensation and any damages to the residue, or the necessity for the appropriation, the property owner sets forth in his or her answer the facts relied upon in support of each denial (sec. 163.08--not in the bill). The property owner has the *burden of proof* upon each of those permissibly raised issues in the appropriation proceedings (sec. 163.09(B)).

Finally, under current law, the property owner *always* can raise in his or her answer an issue as to the fair market value that the governmental agency has placed on the property to be appropriated, as that value relates directly to the compensation that the owner must be awarded for the taking of the property. Current law does not specifically place any burden of proof on the owner to establish the property's value in the appropriation proceedings, although the owner likely will present appraisal evidence to the jury in the proceedings as to the property's fair market value as the owner perceives it. (Sec. 163.08--not in the bill.)

The bill provides that, if an answer is filed challenging the value of property appropriated in eminent domain proceedings under the bill's "public exigency" provisions, the burden of proof with respect to that value is on the party or parties to the appropriation other than the property owners (apparently meaning the appropriating governmental agency) (sec. 163.09(F)).

Opening and closing the proceedings. Under the current Appropriation Proceedings Law, the owners of property sought to be appropriated must open and close the "case." The bill carves an exception to this requirement when property is appropriated in eminent domain proceedings under the bill's "public exigency" provisions--"the party or parties other than the owners" (apparently meaning the appropriating government agency) have that responsibility. (Sec. 163.12(B).)

Phase II of the Federal Water Pollution Control Act

Background law

In 1987, Congress amended the Clean Water Act to require the United States Environmental Protection Agency to establish phased-in requirements for storm water discharges--the National Pollutant Discharge Elimination System Storm Water Program. The Ohio EPA implements the federal storm water program. Phase I of the program, adopted in 1990, regulates industrial storm water discharges and "municipal" separate storm water systems serving a population of 100,000 or more. Phase II of the program, adopted in 1999, regulates "municipal" separate storm water systems serving populations of less



than 100,000, ends a Phase I exemption for publicly owned industrial facilities, and revises the industrial program. Phase II of the program created six minimum control measures that must be adopted by the smaller storm sewer systems: (1) a public education and outreach program on the impacts of storm water on and possible steps to reduce storm water pollution, (2) public involvement and participation in developing and implementing the Storm Water Management Plan, (3) illicit discharge detection and elimination, (4) construction site storm water runoff control, (5) post-construction storm water management in new development and redevelopment areas, and (6) pollution prevention and "good housekeeping" of public operations.

Coverage of Phase II by state law

Current state law permits the board of county commissioners to adopt rules to implement an areawide waste treatment management plan prepared in compliance with the Federal Water Pollution Control Act by establishing (1) technically feasible and economically reasonable standards to achieve a level of management and conservation practices that will abate wind or water erosion of the soil or abate the degradation of Ohio's waterways by soil sediment associated with excavating and other soil-disturbing activities on land used or being developed for nonfarm commercial, industrial, residential, or other purposes and (2) criteria for determination of the acceptability of those management and conservation practices. The bill adds the implementation of Phase II of the Storm Water Program of the National Pollutant Discharge Elimination System as another purpose for which the board must adopt rules establishing those standards and criteria. However, the Phase II rules cannot be inconsistent with, more stringent than, or broader in scope than the rules or regulations adopted by the Ohio EPA under federal law. (Sec. 307.79(A).)

Rules--in general

Currently, the board's rules may require persons to file plans governing sediment control and water management before beginning any excavating or other soil-disturbing activity involving *five* or more contiguous acres of land, where that land is owned by one person or operated as one development unit for the construction of nonfarm buildings, structures, utilities, recreational areas, or other similar nonfarm uses. The rules may impose reasonable filing fees for plan review. Areas of less than five contiguous acres, while exempt from the plan requirements, are not exempt from other water pollution rules adopted by the board. (Sec. 307.79.)

The bill amends those plan provisions (1) to allow the rules to require plans whenever *one* or more acres of the described contiguous land are involved, (2) to allow the rules to impose reasonable filing fees also for permit processing and

field inspections, (3) to specifically allow the rules to require persons to file plans governing erosion control, and (4) if the board adopts rules that require plans to be filed, to require those rules to do all of the following (sec. 307.79(A)(1) to (5)):

- Designate the board, board employees, or another agency or official to review and approve or disapprove the plans.
- Establish procedures and criteria for the review and approval or disapproval of the plans.
- Require the designated entity to issue a permit to a person for the clearing, grading, excavating, filling, or other project for which plans are approved and to deny a permit to a person whose plans have been disapproved.
- Establish procedures for the issuance of permits.
- Establish procedures under which a person may appeal the denial of a permit.

Violations of the rules

Under current law, if the board of county commissioners determines that there has been a violation of its rules, it may request the prosecuting attorney to seek an injunction or other appropriate relief to abate excessive erosion or sedimentation and secure compliance with the rules, which the prosecuting attorney must then do. As relief, the court can order the construction of sediment control improvements or implementation of other control measures. And, although a person is prohibited from violating any rule or order issued under this current law, there is no civil or criminal penalty for such a violation. (Sec. 307.79.)

The bill amends these violation provisions to add that a duly authorized representative of the board also may determine that a rule violation exists. If the board or its representative finds a rule violation, the bill requires them to authorize the issuance of a *notice of violation*. If the violation continues after a period of not less than 30 days following the issuance of that notice, the board or its representative must issue a *second notice of violation*. If the violation continues for another period of not less than 15 days, the board or its representative may issue a *stop work order* (unless an exception mentioned below applies) if the violator failed to get any federal, state, or local permit necessary for sediment and erosion control, earth movement, clearing, or cut and fill activities. Alternatively, at that point, if the board or its representative obtains the prior written approval of the prosecuting attorney based on the prosecuting attorney's opinion that the

violation is "egregious," the board or its representative (unless an exception mentioned below applies) may issue a stop work order.³ However no stop work order can be issued under the bill against any public highway, transportation, or drainage improvement or maintenance project undertaken by a government agency or political subdivision in accordance with a statement of its standard sediment control policies that is approved by the board or the Chief of Soil and Water Conservation in the Department of Natural Resources. (Sec. 307.79(E)(1) and (3).)

If a stop work order is issued, the board or its representative must then request, in writing, the prosecuting attorney to seek injunctive or other appropriate relief as described above in the court of common pleas; the bill removes current law's requirement, however, that the prosecuting attorney seek that relief when so requested. If the prosecuting attorney seeks that relief, the court in the action, in addition to ordering control measures, may assess a civil fine of not less than \$100 or more than \$500 for each day of a rule or stop work order violation. (Sec. 307.79(E)(1).)

Despite these notice of violation and stop work order provisions, whenever the board of county commissioners determines that a violation exists of any of its rules or orders issued with respect to them, it may request, in writing, that the prosecuting attorney seek an injunction or other appropriate relief in the court of common pleas to abate excessive erosion or sedimentation and secure compliance with the rules or administrative orders. If the prosecuting attorney seeks that relief, the court may order control measures and may assess a civil fine of not less than \$100 or more than \$500 for each day of violation of a rule or order. (Sec. 307.79(F).)

County sewer district rules

Current law

The board of county commissioners may create a sewer district in all or part of the county. The board may adopt rules requiring owners of property within the district served by a connection to sewers maintained and operated by the board, or to sewers connected to interceptor sewers maintained and operated by the board, to (1) disconnect stormwater inflows to board-operated sanitary sewers that are not operated as a combined sewer, (2) disconnect non-stormwater inflows to board-operated stormwater sewers that are not operated as a combined sewer,

³ *The person to whom a stop work order is issued may appeal the order to the court of common pleas of the county in which it was issued, seeking any equitable or other appropriate relief from that order (sec. 307.79(E)(2)).*

and (3) reconnect or relocate those disconnected inflows in compliance with board rules and other relevant codes. Any inflow required to be disconnected under these rules constitutes a nuisance subject to injunctive relief and abatement under the Nuisance Law. The county may pay for any portion of the cost of these required disconnections and reconnections or relocations that it determines, by resolution, to pay without reimbursement, but only if there is a relevant code, such as a building or health code, that applies to the property in question and prohibits in the future inflows on that property that are not allowed under the disconnect stormwater situation mentioned in (1) above. Property owners are responsible for maintaining any improvements made on private property to reconnect or relocate disconnected inflows unless a public easement exists for the county to maintain that improvement. (Sec. 6117.012(A), (B), (E), and (G).)

Changes proposed by the bill

The bill permits a board of county commissioners to adopt rules requiring owners of property within the district served by a connection to sewers maintained and operated by the board, or to sewers connected to interceptor sewers maintained and operated by the board, to *prevent sewer back-ups into properties* that have experienced one or more overflows of sanitary or combined sewers maintained and operated by the board (sec. 6117.012(A)(4)). "[A]ny sewer back-up required to be prevented under [such] a rule . . . constitutes a nuisance subject to injunctive relief and abatement . . ." (sec. 6117.012(B)). As with disconnections and reconnections or relocations pertaining to appropriate sewers, the board may determine, by resolution, to pay costs associated with preventing a sewer back-up without requiring reimbursement. But, the bill adds that the rules may allow the payment only when a relevant building, health, or other code, *or* a federally imposed or state-imposed consent decree filed or otherwise recorded in a court of competent jurisdiction, applies to the property in question and prohibits in the future any sewer back-ups that are not allowed under "the prevent sewer back-ups into properties" provision the bill enacts. (Sec. 6117.012(E).) Finally, property owners are responsible for maintaining any improvements on private property for sewer back-up prevention unless a public easement exists for the county to maintain that improvement (sec. 6117.012(G)).

Public sewer connections

Under current law, if the board of health of a health district within which a new public sewer construction project is proposed or located passes a resolution stating that the reason for the project is to reduce or eliminate an existing health problem or a hazard of water pollution, the board of county commissioners generally may order any premises in a sewer district in the county to be connected to the sewer for the purpose of discharging sewage or other waste originating on the premises, instead of using other outlets, such as a septic tank or privy.

However, this order authority does not apply to certain discharges and certain premises. These include, for discharges, animal waste and, for premises, premises with a foundation wall more than 200 feet from the right-of-way where the sewer is located (if served by a common sewage collection system, that system, too, must be more than 200 feet away). (Sec. 6117.51.)

The bill adds an additional exemption from such an order to connect to a public sewer: any dwelling house located on property listed on the county's agricultural land tax list as devoted exclusively to agricultural use, but only if all of the following apply (sec. 6117.51(E)):

(1) The foundation wall of the dwelling house is 200 feet or less from the nearest boundary of the right-of-way within which the sewer is located.

(2) The sewer right-of-way for the property on which the dwelling house is located was obtained by appropriation due to a public exigency under the bill's provisions (see "Early taking of possession ("quicktake")," above).

(3) The local health department has certified that the household sewage disposal system is functioning properly.

Health district licensing councils

Current law creates a health district licensing council in each city and general health district. It must consist of one representative of each of the business activities that the board of health licenses. The council must select one of its members to serve as a member of the board of health and also select another of its members to serve as an alternate member of the board of health if for any reason the original member is required to abstain from voting on a particular issue being considered by the board. These councils are currently required to meet at least quarterly, unless their by-laws require more frequent meetings. The bill reduces that requirement to at least annual meetings, unless their by-laws require more frequent meetings. (Sec. 3709.41.)

COMMENT

Section 19 of Article I of the Ohio Constitution provides that:

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the

owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Only a court can definitively determine what circumstances constitute a public exigency for purposes of this constitutional provision.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	02-19-04	pp. 1646-1647
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