

Legislative Analysis



EASEMENTS OVER STATE-OWNED LAND

Mitchell Bean, Director
Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 4981 (Substitute H-1)

Sponsor: Rep. Steven Lindberg

Committee: Tourism, Outdoor Recreation, and Natural Resources

First Analysis (3-10-08)

BRIEF SUMMARY: The bill would amend Part 21 (General Real Estate Powers), Subpart 8 (Easements Over State Owned Lands) of the Natural Resources and Environmental Protection Act (NREPA), concerning the grant of roadway easements over state-owned land to individuals owning nearby private land. Among other things, the bill would:

- *Require* the Department of Natural Resources (DNR) to grant roadway easements over state-owned land provided that specified conditions were met (and no disqualifying conditions were present). Currently, the DNR has discretion as to whether to grant such an easement.
- Revise the conditions that would qualify or disqualify property for such an easement.
- Allow an easement document to prohibit a parcel of land being served by the easement from being partitioned or split into parcels of less than 40 acres.
- Require the Department of Natural Resources (DNR) to provide a written notice and explanation when denying a request for an easement over state land.

FISCAL IMPACT: There would be no fiscal impact on the state or on local units of government.

THE APPARENT PROBLEM:

There are many landlocked parcels of land in the state to which the owner has no written, recorded roadway easement, and in some cases the landlocked parcel is surrounded by or adjacent to state-owned land. Sometimes the landowner purchased the land knowing that the parcel was landlocked. In other cases, the landowner may have created the situation by selling off part of the property without retaining a legal easement. In yet others, owners without legal easements have run into problems because of changed circumstances such as the DNR's closing of a forest road, or an informal arrangement otherwise coming to an end.

Some say the issue often comes to a head when the owner of a landlocked parcel seeks mortgage financing. Although the landowner may have no trouble reaching the property via a forest road or other arrangement, a lender may not make a loan in the amount sought if the property owner does not have a legal, recordable easement. In other cases, the issue arises because the DNR discovers an unauthorized driveway or other unauthorized use of state land and notifies the individual that they are trespassing.

Sections 2123 and 2124 NREPA provides landowners with a method of applying to the DNR for a grant of an official easement over state land. Land transactions, including the

purchase of private land, the exchange of state-owned land for private land, the sale of surplus state-owned land, and the granting of easements across state-owned land are handled by the DNR's Office of Land and Facilities, which operates in accordance with Sections 2123 and 2124 of NREPA as well as with Natural Resource Commission policies. The problem, according to some, is that the NREPA does not *require* the DNR to grant such an easement even if all of the requirements of the law are met but rather vests the DNR with the ability to make the final decision as to the appropriateness of the grant.

Many easement requests are first made informally to DNR field staff. Some say that the DNR field staff often discourages the landowner from applying for an easement by telling them it would be futile. Some easement requests, however, are forwarded to the Lansing office for a more thorough review. According to the DNR, it received 16 "formal" requests in 2005, and it approved 11 out of 16 requests that year. As with other DNR land transactions, easement requests are reviewed by field staff, Lansing staff, and an internal review committee for their impact on natural resources and benefits to the public before a determination by the department's director.

Some say that the current system of reviewing easements is problematic. Given that many requests are not formally made to the department, the department often does not fully review easement requests. Further, some say that easements have been denied without explanation, giving the appearance that the decision was made arbitrarily. House Bill 4981 would make the DNR's grant of an easement *mandatory* provided that all of the necessary conditions were present and no disqualifying condition existed. The bill would also codify procedures to a degree by requiring that the request be made on a DNR form and also requiring the DNR to issue easement denials in writing and with explanations.

THE CONTENT OF THE BILL:

The bill would amend Part 21 (General Real Estate Powers), Subpart 8 (Easements Over State Owned Lands) of the Natural Resources and Environmental Protection Act (NREPA), concerning the grant of roadway easements over state-owned land to individuals owning nearby private land. Following is a more detailed description of the bill.

Grant of easement would be mandatory if certain conditions are met (and certain disqualifying conditions not present). Existing Section 2123 of NREPA, MCL 324.2123, provides that the DNR *may* grant an easement over state owned land under the jurisdiction of the department to an individual only if all of the following conditions are met:

- The individual does not have other access to the individual's land.
- The easement does not conflict with an existing program or management plan of the department or a local ordinance.
- The roadway for which the easement is granted is open to public access and is not a public roadway for the exclusive use of the grantee.
- The easement provides the logical and most feasible access to the individual's land.

- The width of the roadway is restricted to the minimum consistent with the quality of the road required.
- The individual agrees to construct, if necessary, and maintain the road.
- The individual offers a similar roadway easement to the department across the land to which the easement is to provide access.

The bill would change the first sentence of Section 2123 to provide that, *subject to Section 2124* (the section setting forth disqualifying conditions), the department *shall grant or otherwise provide for* an easement for a *roadway* over state-owned land under the jurisdiction of the department to an individual *who requests it*, but only if all of the specified conditions were met. These changes would appear to (1) make the grant of the easement mandatory if all the specified conditions were met (and none of the disqualifying conditions in Section 2124 applied); (2) clarify that the provision applies to easements for *roadways*; and (3) require that an affirmative request be made for the easement.

Revisions to conditions for an easement over state-owned land. While most of the conditions in Section 2123 (set forth above) for an easement over state-owned land would remain the same, the bill would make the following changes:

- The roadway easement request would have to be made on a DNR form.
- The individual could not have other *legal* access to the individual's land. (The word "legal" is new.) [Note: The bill sponsor offered an amendment on March 5, 2008 that would require the individual's lack of legal access to be confirmed by a title insurance policy or an attorney's written opinion.]
- The roadway for which the easement is granted must be open to public access and not for the exclusive use of the grantee. (This provision already exists but the wording has been revised slightly.)
- The individual must offer a similar roadway easement to the department across the land to which the easement *granted by the department* is to provide access. (This provision already exists but the wording has been revised slightly.) Moreover, in the H-1 Substitute version of the bill, the DNR could not accept a roadway easement under this subdivision if the roadway easement would end at a body of water

Easement restriction barring the land from being split into parcels of less than 40 acres. In addition, the bill would allow, but not require, the document granting the easement to prohibit the parcel of land benefiting from the easement from being partitioned or split into parcels that are less than 40 acres in size.

[Note: Existing Section 2128(1) of NREPA, MCL 324.2128(1), provides that if land to which an easement is granted by the DNR is subsequently subdivided within the meaning of the Subdivision Control Act, the easement automatically terminates. Generally speaking, "subdivision" within the meaning of that statute means partitioning or splitting land (for sale, a lease of more than one year, or building development) resulting in one or more parcels of less than 40 acres and to which platting procedures apply. By contrast, if a partitioning or splitting is an allowed "division" of land, instead of a "subdivision," it is

exempted from platting requirements under Sections 108 and 109.¹ It would appear, then, that under current law, if an owner of the land benefiting from an easement over state land *subdivided* his or her land (which by definition would result in at least one parcel of less than 40 acres), the subdivision would terminate the easement. On the other hand, if the owner *divided* the land within the meaning of Sections 108 and 109 (which could also produce parcels of less than 40 acres in size), the division would not require platting, and would *not* terminate the easement.

In any event, if the bill were enacted, the easement document could explicitly prohibit partitions or splits of the land served by the easement that would result in lots less than 40 acres in size, regardless of whether the partition or split was characterized as a subdivision or a division for purposes of Section 2128(1). If the easement document explicitly prohibited partitions or splits resulting in lots less of less than 40 acres, existing Section 2128(2) would come into play. Under that section, if an individual who obtains an easement over state land violates the terms of the easement, the easement terminates, and any rights in the easement terminate, after an opportunity for a hearing.]

Written notice of denial with reasons. When denying a request for a roadway easement over state land, the DNR would have to provide written notice and the reasons for the denial.

Disqualifying conditions set forth in Section 2124. Existing Section 2124 sets forth the conditions that, if existing, would prevent the DNR from granting an easement:

- The proposed easement is over land designated as a wilderness area, wild area, or natural area under Part 351 (Wilderness and Natural Areas) of NREPA.
- The proposed easement is over land in an area closed to vehicular traffic under a management plan approved by the department.
- The construction or use of the new or existing roadway will result in unnecessary damage to or destruction of the surface, soil, animal life, fish or aquatic life, or property.

The bill would change the third disqualifying condition to read: The construction or use of the new or existing roadway will result in *unreasonable* (instead of unnecessary) damage to or destruction of the surface, soil, animal life, fish or *other* aquatic life, or property.

¹ The full definition found in MCL 560.102, is as follows: "'Subdivide' or 'subdivision' means the partitioning or splitting of a parcel or tract of land by the proprietor thereof or by his or her heirs, executors, administrators, legal representatives, successors, or assigns for the purpose of sale, or lease of more than 1 year, or of building development that results in 1 or more parcels of less than 40 acres or the equivalent, and that is not exempted from the platting requirements of this act by sections 108 and 109. 'Subdivide' or 'subdivision' does not include a property transfer between 2 or more adjacent parcels, if the property taken from 1 parcel is added to an adjacent parcel; and any resulting parcel shall not be considered a building site unless the parcel conforms to the requirements of this act or the requirements of an applicable local ordinance."

Sections 108 and 109, MCL 560.108 and 109, are complex provisions exempting certain "divisions"—as opposed to "subdivisions"—from platting requirements. In general, Section 108 describes the frequency and number of divisions allowed under the statute without following platting procedures; Section 109 specifies conditions that, if met, obligate a municipality to approve a proposed division.

BACKGROUND INFORMATION:

The Natural Resources Commission's Policy 4605 entitled "Easement for the Use of State Land," can be found at:

http://www.midnr.com/Publications/pdfs/InsideDNR/NRC/NRC_Policies/4605.htm

ARGUMENTS:

For:

Some say that the DNR has been unreasonable and unpredictable in its decisions on easement requests. The bill would put reasonable guidelines in place and would provide greater assurance to landowners that they will be able to enter on their property and that easements will be granted where necessary.

Against:

The bill would take away the DNR's flexibility and discretion regarding easement decisions. Given the variety of conditions and scenarios that may exist in various locations around the state, the DNR needs to be able to exercise discretion, within the guidelines of the law, to evaluate each application on its own merits with the overall goal of protecting Michigan's natural resources and the public interest rather requiring it to accede to demands made by private landowners.

This bill would create a sense of entitlement in private landowners who could force the DNR to allow a road or driveway to be built on public lands (provided that the conditions of the bill were met). Michigan citizens would be better served by allowing the agency to make determinations on a principled case-by-case basis taking into account the factors required by the statute.

In some, but not all, situations, landowners may have created their own "landlocked" status by selling off portions of their land. In other situations, landowners may have bought land at a discounted price because there was no recorded easement.

POSITIONS:

Michigan Forest Products Council indicated its support of the bill. (7-17-07)

The Department of Natural Resources testified in opposition to the bill. (7-24-07)

The Michigan Environmental Council indicated its opposition to the bill. (7-24-07)

The Michigan United Conservation Clubs indicated its opposition to the bill. (7-17-07)

Legislative Analyst: Shannan Kane
Fiscal Analyst: Kirk Lindquist

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.