

# MICHIGAN REAL PROPERTY REVIEW

Vol. 24, No. 3

Fall, 1997

## CURRENT ABUSES OF THE ANTI-RAIDING PROVISION OF ACT 198 AND PROPOSED REFORMS

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The Michigan Legislature enacted the Plant Rehabilitation and Industrial Development Districts Act ("Act 198") in 1974. The intent of this legislation was to stimulate the state's economy, maintain and increase the number of jobs in the manufacturing sector and increase the tax base of Michigan communities by making Michigan financially attractive to manufacturers. Act 198 provides economic incentives to manufacturing companies which rehabilitate or replace obsolete industrial property or acquire new industrial property for use within the state. This economic incentive is in the form of ad valorem property tax abatement. The maximum abatement for new projects under the Act is 50% of the manufacturer's ad valorem property taxes for a period of up to twelve years. The maximum abatement for "replacement" or "rehabilitation" projects is 100% of the manufacturer's ad valorem property taxes attributable to the increase in the project's state equalized valuation ("SEV") for a period of up to twelve years.

The abatement process is generally a three-step process. The site must first be designated as an "industrial development district" or "plant rehabilitation district." The governing body of the local municipality in which the district is located must then approve the applicant's tax abatement application. Finally, the State Tax Commission must approve the application and issue the industrial facilities exemption certificate which entitles the manufacturer to the tax abatement. When a manufacturer relocates within the state, an additional step is required - a consent resolution from the local governmental unit that the manufacturer is leaving.

When Act 198 was enacted, it did not distinguish between those manufacturers moving to Michigan from other states or countries and those manufacturers who, for a variety of reasons, wished to relocate their existing Michigan operations to new sites within the state. After the adoption of Act 198, many communities utilized tax abatement to induce in-state as well as out-of-state manufacturers to relocate. When tax abatement was added to other favorable conditions in the new community such as site availability, lower property tax rates, and lower land acquisition and development costs, the lure proved

irresistible to many manufacturers. A number of Michigan's domestic manufacturers were motivated to relocate within the state.

This relocation of Michigan's domestic manufacturers occurred at the expense of those communities who could not or would not match the economic inducements offered by the new community. While the new community benefitted by the increase in its tax base and the new jobs created, the community in which the facility was formerly located experienced a concomitant loss of tax base and jobs.

When Act 198 was adopted in 1974, the local Michigan unit that faced the loss of jobs by the relocating manufacturer had no input. Prior to 1984, the only local unit involved in the process was the local unit offering tax abatement to the manufacturer. Frequently, the unit where the existing domestic facility was located learned after the fact that an important part of its tax base and labor force were moving to a neighboring community.

In 1982, as a result of the lobbying by those municipalities affected by the "raiding" practices of neighboring communities, the legislature adopted the so-called "anti-raiding provision" of Act 198 (MCLA 207.559(2)(f)). The amendment introduced into the process the local Michigan governmental unit which the in-state manufacturer was leaving. It provided:

Completion of the facility shall not have the effect of transferring employment from 1 or more local governmental units of the state to the local governmental unit in which the facility is to be located, except that this restriction does not prevent the granting of a certificate if the legislative body of each local governmental unit from which the employment is to be transferred consents by resolution to the granting of the certificate. If the local governmental unit does not give its consent, a copy of the resolution of denial showing the reasons for the denial shall be filed within 20 days after adoption with the Department of Commerce.

This amendment prohibits tax abatement when the relocation has the effect of transferring employment from one local Michigan governmental unit to another unless the consent is obtained from the unit which would suffer the loss of jobs.

With adoption of this new provision, the local Michigan unit in which the facility is currently located has the opportunity to block tax abatement at the new location. This provision, however, fails to address a number of issues critical to the implementation of the state's policy.

Any number of valid business reasons may prompt a manufacturer to relocate. Relocating an existing facility is not a decision lightly reached. Relocation involves complex planning, significant additional costs to the manufacturer, business interruption and possible customer service problems, possible displacement of key personnel and a host of other potential economic disasters. Before making the decision to relocate, the manufacturer usually examines and exhausts all other cost-effective options. In some cases, the decision to transfer an operation to a different locale is influenced by the perception that the community where the existing facility is located has become a hostile environment. This perceived hostility can be overt or covert. A local unit's refusal to provide prompt and cost-effective municipal services can be as burdensome as high local taxes. Deteriorating or declining infrastructure can also contribute to this perception.

A manufacturer's ability to relocate within the state encourages local units to be competitive in the benefits they offer to manufacturers. When existing economic conditions become too onerous or burdensome, the manufacturer relocates. Regulations, ordinances, or statutes that restrict or impair the ability of a business to relocate may encourage local governmental units to be less responsive and less attentive than appropriate if the goal is to attract and maintain business in the manufacturing sector.

The departure of a number of key businesses can have a salutary effect on the local unit. To retain remaining businesses and attract new concerns, the local unit is motivated to identify its deficiencies and implement the appropriate remedies. These municipalities should compete with those locations which offer new and/or efficient infrastructures, attentive municipal officials and more favorable local tax treatment, including tax abatement.

The anti-raiding provision was never intended to discourage Michigan manufacturers from cost-effective consolidation or relocating within the state for valid business reasons. It was not intended to insulate unresponsive or indifferent local governmental units from the crucible of the marketplace.

As a result of the lack of guidance to local units from the state legislature for the exercise of the delegated authority in the anti-raiding provision, some local governmental units have used the "anti-raiding" provision as a license to indulge in parochial behavior. Like rejected suitors, some local governmental units have taken the position that they will not, as a matter of public policy, grant such consent resolutions or that such resolutions will be granted but only upon the most punitive terms and restrictive conditions that the traffic will bear. This abuse

frustrates the state's legitimate interests and the overall purpose of Act 198.

The legislature's failure to promulgate standardized criteria to direct the local unit's evaluation of these applications for consent resolutions has led some communities to assume that the local unit's grant or denial of a request for a consent resolution is wholly discretionary and that the local unit cannot be held accountable for an abuse of discretion. The language of the act, the rules of statutory construction, the state's policy and common sense do not support that interpretation.

A consent resolution is only required when the grant of tax abatement would have the effect of "a transfer of employment." Unfortunately, "Transfer of employment" is not defined in Act 198. There is no case precedent to assist local units or manufacturers and their counsel in determining what facts constitute a "transfer of employment." Whether consent resolutions are required in situations involving temporary transfers of employment, transfers of employment occasioned by mergers or acquisition, transfers which involve the consolidation of operations at a new Michigan site, transfers which involve small numbers of personnel from other locations within the state, or transfers of part-time personnel is unclear. Without legislative clarification, these matters will have to be decided by the courts.

It is a fair assumption that the legislature expected that the power delegated to local communities would be rationally exercised and in a manner consistent with the legislature's announced public policy. The statute requires that when the local unit withholds its consent, i.e., adopts a "resolution of denial," it must articulate on the record its reasons for denial. These reasons are forwarded to the State Department of Commerce. The word "reasons" implies that the local unit must have a rational basis for its denial. Requiring the local unit to report its action to a state agency also supports the view that the legislature intended that the local unit exercise this power in the context of and in a manner consistent with the state's policy. The text of the anti-raiding provision does not support the position that the legislature intended to confer on local units the ability to harry, obstruct or punish a manufacturer for implementing sound economic strategic planning.

Most local unit boards, commissions or councils are composed of citizens who volunteer their time and service to their communities. These citizen volunteers are expected to act in the context of furthering the state's policy. It is unfair and imprudent to ask these volunteers to implement state policy without guidance from the legislature.

Few municipalities have made the effort to codify standards or criteria for their legislative bodies to use when evaluating these consent resolutions. The adoption of standardized criteria for these applications will be a step in the right direction. Local governmental units will have a framework in which to exercise their discretion.

Legitimate areas of inquiry for the local unit are the number of jobs involved in the "transfer," whether the jobs are full-time or part-time, the kind of jobs involved (i.e., skilled, unskilled, high-tech, etc.), whether those jobs are critical to the

community, whether the community would be likely to retain those jobs in the future if the resolution is denied, whether employees living within that local unit currently hold the jobs that will be transferred and, if so, whether the relocation will necessarily result in the termination of the jobs for those employees, whether there are jobs available in the local unit at comparable pay rates for displaced employees, and the identifiable economic impact, if any, that the adoption of a consent resolution is likely to have on the local unit.

A number of other Michigan statutes which confer tax benefits on manufacturers or other businesses also have transfer-of-employment provisions. These statutes, however, exempt from the consent resolution process transfers-of-employment which involve a de minimis impact on the local unit. In some cases, a state agency is given superintending control over the situation with the ability to override the local unit's negative action. Transfer situations which are exempt in similar Michigan statutes usually reflect those transfers in which less than twenty full-time jobs are involved. Surprisingly, not even these minimal protections exist in the anti-raiding provision of Act 198.

A particularly base practice has gained a foothold in some local units. These local units are inured to the practice of selling consent resolutions like medieval indulgences. This practice has been euphemistically referred to as exacting "quittance" payments. When a manufacturer has received tax abatement benefits from that local unit, a strong argument can be made that it should repay that unit before a consent resolution is granted. The "quittance" payment practice more often occurs in situations in which the local unit has never granted a tax abatement benefit to the manufacturer. The local unit simply uses the occasion of the manufacturer's request for the consent resolution as an opportunity to extract from the departing manufacturer sums of money. There is no rhyme nor reason to the amount extracted. It is not authorized by the statute. It subverts the intent of the statute by imposing a greater burden on a manufacturer seeking tax abatement than the legislature ever anticipated. No right-minded person can argue there is inherent fairness in the practice of demanding quittance payments when there has been no tax abatement benefit conferred. Such a practice does not advance the state's scheme for a healthy and competitive manufacturing sector.

Approximately ten percent of all the Act 198 tax abatements which are granted involve consent resolutions by local units. These statistics do not reflect manufacturers whose transfer requests have been denied by local units. There are also no statistics to reflect those manufacturers who have tabled or abandoned their plans to relocate to a new community within this state because of a particular municipality's position vis-a-vis these resolutions. No statistics reflect whether the abuses of the anti-raiding provision by local units have encouraged manufacturers to remove themselves from the State of Michigan and relocate in other states where consent of the local Michigan unit is not a prerequisite for favorable tax treatment.

At present, the State of Michigan does not monitor resolutions of denial, nor does it exercise any supervisory control or

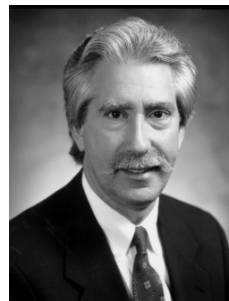
superintending control over local units which adopt resolutions of denial and report "reasons" for the denial which are inconsistent or incongruous with the state's policy of encouraging tax abatement. The statute provides no appeal of whimsical or abusive decisions by local units. It does not prohibit quittance payments.

It is in the best interest of both the state and the local units that the Michigan legislature reform the anti-raiding provision of Act 198. Standardized criteria should be developed and provided to the local units to evaluate these consent resolutions. The anti-raiding provision should be amended to eliminate from local unit consideration de minimis transfers of employment. The anti-raiding provision should be amended to strictly prohibit the request or receipt in any form of so-called "quittance" payments except to the extent of any tax abatement actually granted to the departing manufacturer by that local unit. Finally, the legislation should provide for superintending control and review for abuses of discretion by the appropriate state agency

These identifiable abuses need immediate correction in the current climate of intense global and national competition for manufacturing facilities. The failure to amend the anti-raiding provision will have the effect of encouraging the continued abuse of delegated authority by the local units. Reform will encourage efficiency and growth in not only the manufacturing sector but also the local governmental units. Local units will be discouraged from inefficiency and the imposition of burdensome or provincial practices on manufacturers. While these proposed reforms cannot insure in all cases that the power delegated to the local governmental unit will be properly exercised, they will eliminate some of the current practices which are counter-productive to the best interests and public policy of the state.

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