

Bill Exempting Developers From Cleanup Fees Passes Ohio House

By Alex Ebert

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- Bill would give affirmative defense against state cleanup cost suits
- Bill could help Ohio compete with states like Michigan and Indiana that have similar protections

A bill giving contaminated site developers immunity from state cleanup costs cleared the Ohio House as lawmakers looked for a way to kick-start the state's flagging brownfield redevelopment.

House Bill 168, which now heads to the Senate, would give companies an affirmative defense, shielding them from state lawsuits seeking compensation for pollution cleanup. That defense would apply so long as the company meets various requirements for a similar defense under the U.S. Comprehensive Environmental Response, Compensation, and Liability (Superfund) Act.

Land developers, attorneys, and consultants say the bill is necessary for Ohio to compete with other states, such as Michigan and Indiana, that have similar protections and are vying for the job- and tax revenue-generating redevelopment projects.

Enacting this affirmative defense would give businesses more security when considering investments in Ohio, especially smaller sites with lighter levels of contamination, said Joseph P. Koncelik, partner with Tucker Ellis LLP's Cleveland office. The current "gap" in protection between federal and state cleanup costs acts as a deterrent for Ohio developers, he said.

Falling Behind Michigan

Like federal law, the bill wouldn't let polluters off the hook. A company could assert an affirmative defense to a state lawsuit and get immunity only if it met a series of requirements for the similar federal protection of "bona fide prospective purchasers." Some requirements include that a developer properly inquired into pollution on the site and had hazardous materials disposed of before the land was purchased.

Businesses used a similar Michigan program more than 1,000 times annually between 1995 and 2015, said Aaron Clapper, project manager for Greater Ohio Policy Center, a nonpartisan group focused on development. In comparison, an Ohio program, in which developers get a pre-clearance agreement with Ohio EPA to not sue for cleanup costs, issued only 26 agreements annually over that same period.

"In Ohio, brownfields continue to be passed over for less-costly development projects, which get developed on green space and lead to sprawl," Clapper said. "The bill is going to be a really critical development for urban and rural renewal programs as developers look for development sites either from out of state or in-state."

Ohio environmental groups, normally quick to testify against legislation they see as harming the environment, sat this one out. No opposition testimony was filed against the bill.

Representatives for Gov. Mike DeWine (R) and Senate President Larry Obhof (R) didn't immediately respond to requests for comment.

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