House Legislative Analysis Section

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BUFFER ZONE FOR PRISON FACILITIES

House Bill 4762 as enrolled
Second Analysis (6-16-89)

Sponsor: Rep. Donald Van Singel
House Committee: Corrections
Senate Committee: Criminal Justice and Urrban Affairs

THE APPARENT PROBLEM:

Complaints have been received from neighbors of the new Carson City Regional Prison that one of facility's buildings that is now under construction is too close to a neighboring farmhouse. Of particular concern to the neighbors is the fact that the prison is approximately 100 feet from the farmhouse, which means that inmates on prison grounds are within sight of children playing in the farmhouse yard. In addition, the proximity of the prison to the house means that the high prison lights shine in windows at night. The prison loud speakers and siren also create an annoyance.

Original plans for the facility would have placed the prison building farther away from the farmhouse, with a "landscaped buffer area," behind the prison fence. The construction site proved unsuitable for construction, however, the site plans were altered, and the prison is now close to the fence, directly across the road from the farmhouse. There is very little that can be done at this point in construction to alter the Carson City site; however, it is felt that legislation should be introduced to make sure that future prison facilities don't cause these problems.

THE CONTENT OF THE BILL:

The bill would amend the Department of Corrections act to require a certain distance between Department of Corrections' correctional facilities and adjacent residential dwellings. The provisions would apply to facilities constructed after the effective date of the bill, and would not include halfway houses, community corrections centers, or community residential homes. Under the bill, a correctional facility would have to comply with at least one of the following requirements:

- A distance of not less than 300 feet existed between each adjacent residential dwelling and any part of the facility or grounds within the security perimeter.
- A buffer zone, designed to block sight and to block or reduce sound, was constructed between the correctional facility and all adjacent residential dwellings. The buffer zone could consist of an earth berm, trees, or other plants, or of materials that would have a substantially similar effect. A fence would not meet the requirements of the bill.

MCL 791.220F

FISCAL IMPLICATIONS:

According to the Senate Fiscal Agency, the bill would have an indeterminate fiscal impact on the state. Under current practice the Department of Corrections and the Department of Management and Budget coordinate efforts with local units relative to buffer zones at correctional facilities. To this degree, the proposed legislation would, in most cases, not have significant fiscal implications at any future facility. However, dependent on the site location and conditions of placement, it is possible that additional property and/or dwellings would need to be acquired in order to satisfy the requirements of the bill. Fair market values of such acquisitions are dependent on specific locations and therefore the fiscal impact is indeterminate. (6-16-89)

ARGUMENTS:

For:

Most prisons in Michigan have either been built in rural areas, or are so old that they and the surrounding community have grown up together. With the recent expansion in prison populations and the construction boom in prison facilities, it is important that care be taken to avoid conflicts with neighboring residential areas. The bill would require proper set backs or buffer zones to avoid future problems.

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HANDICAPPERS' CIVIL RIGHTS

House Bill 4764 (Substitute H-5)
First Analysis (4-4-90)

Sponsor: Rep. H. Lynn Jondahl
Committee: Mental Health

THE APPARENT PROBLEM:

In 1976, the legislature enacted the Michigan Handicappers' Civil Rights Act (Public Act 20 of 1976) to prohibit discrimination on the basis of handicap in the areas of employment, housing, public accommodations, public services, and education. However, disagreement has arisen over what exactly the handicappers' civil rights act (sometimes referred to as the "HCRA") protects: whether it protects only handicaps unrelated to a handicapper's ability to perform a job (use a service, etc.) or whether it protects handicaps, related to the job or not, which can be accommodated without "undue hardship" by an employer (or service provider, etc.).

The act defines "handicap" to mean "a determinable physical or mental characteristic of an individual or a history of the characteristic which may result from disease, injury, congenital condition of birth, or functional disorder which . . . for purposes of [employment] is unrelated to the individual's ability to perform the duties of a particular job of position, or is unrelated to the individual's qualifications for employment or promotion." Throughout the act, in fact, when describing prohibited practices the act stipulates that a "handicap" be "unrelated to ability to perform."

However, the act also contains an "accommodation" provision which originally applied only to employers (and not to the other areas of education, public accommodation, and so forth). This provision held that nothing in the section covering employment discrimination could be interpreted to exempt employers from the obligation to accommodate an employee (or person applying for a job) with a handicap unless the employer demonstrated that the accommodation would impose an "undue hardship" in the conduct of the business. A 1980 amendment to the act (Public Act 478 of 1980) changed this "accommodation provision," extending it beyond employment to include public accommodation, public service, education, and housing as well. The act does not define "undue hardship."

Disagreement over the interpretation of the act was spelled out in a series of court decisions over a case in which James Carr, an employee with the General Motors Corporation, charged that he had been discriminated against by General Motors due to a handicap and in violation of the handicappers' civil rights act. The facts of the case were not disputed. Carr began working for General Motors in 1963. In 1972 he underwent back surgery for a ruptured disk, and, as a result, both his physician and the General Motors' physician placed a fifty pound weight lifting restriction on him. In 1974, Carr was laid off due to a reduction in the work force, but continued to hold two different salaried positions at General Motors until 1976, when he was recalled to a regular salaried position as an associate analyst. He held this position for three years, and then requested a transfer to a job which required lifting in excess of his medical restriction. General Motors denied the transfer, and Carr sued, alleging discrimination under the HCRA.

General Motors argued that the HCRA did not protect everyone with handicaps, but only those with handicaps "unrelated to the individual's ability to perform the duties of a particular job or position" (as the definition of "handicap" in the act stipulates). Since Carr's back condition with the weight lifting restriction was clearly related to the particular job position in question, General Motors argued, Carr's condition was not a handicap under the HCRA. On April 22, 1983, the trial court agreed with General Motors and granted summary judgment in its favor.

However, upon appeal by Carr, the Wayne County Circuit Court reversed the trial court's decision, arguing that if no obligation on the part of an employer existed to accommodate a handicap unless the handicap was unrelated to the job, no accommodation would be needed at all. Quoting from another decision (Wardlow v. Great Lakes Express Co.), the court noted that if it ruled that an employer need not accommodate to a handicap whenever the handicap was related in any way to the job, it would be ruling that the employer need accommodate only if the handicap was not related to the work. But if a handicap is not related to the work, then no accommodation would be needed in the first place, with the paradoxical result that the HCRA would require accommodation only when no accommodation was needed.

General Motors successfully appealed the circuit court's decision to the Michigan Supreme Court, which reversed the circuit court's decision and held that Carr's disability, which admittedly was related to his ability to perform the duties of the position for which he requested a transfer, was not a "handicap" within the meaning of the handicappers' civil rights act, and therefore was not protected under the act.

Though the Carr decision applied specifically to job discrimination, many handicappers now feel that they have lost much of the protection that they thought they had been guaranteed under the handicappers' civil rights act. At their request, legislation has been introduced which would clarify under what circumstances handicappers' rights would be protected.

THE CONTENT OF THE BILL:

The bill would amend the Michigan Handicapper's Civil Rights Act to protect handicaps that required some accommodation in the areas of employment, education, housing, and public accommodations and services. The bill also would define "undue hardship" for employers by putting specific caps on the amounts that employers would be required to spend to accommodate a handicap and limit when an employer would have to restructure a job to accommodate a handicap.

Definitions. The bill would expand the definition of "handicap" (a) to include handicaps that did require some kind of accommodation, (b) to include in the definition the

OVER

perception of handicaps, and (c) to specifically exclude certain kinds of drug-related impairment.

Presently, "handicap" is defined in terms of "determinable" mental and physical characteristics (or a history of such a characteristic) unrelated to an individual's ability to perform a particular job (or to use and benefit from public accommodations or services, or education, or to acquire, rent, or maintain property). The act further defines "mental characteristic" to mean, basically, either mental retardation or "a mentally ill restored condition."

The bill would redefine "handicap" to mean:

(1) a determinable mental or physical characteristic which, with or without accommodation, would not prevent a handicapper from doing a particular job (using public accommodations and services, and so forth);

(2) a history of such a characteristic; or

(3) "being regarded as having" such a characteristic.

The bill also would:

- specify that, with regard to employment, the mental or physical characteristic would have to "substantially limit" one or more of the handicapper's "major life activities,"
- delete the definition of "mental characteristic,"
- define "unrelated to the individual's ability" to mean that peoples' handicaps, "with or without accommodation," would not prevent them from doing their job, using and benefiting from public accommodations, services, education, or housing; and
- specifically exclude from the definition of "handicap" impairment resulting either from using illegal drugs or, in the case of employment, from using alcohol.

Accommodation by employers. Presently the handicappers' civil rights act says only generally that people must "accommodate" a handicapper (for employment, housing, education, public accommodation or services) unless the person can demonstrate that the accommodation would impose an "undue hardship." The act does not define "undue hardship" or "accommodation," though the definition section of the employment part of the act does refer to "adaptive devices or aids." The act also applies only to employers with four or more employees.

The bill would redefine "employer" to include anyone who had one or more employees (retaining under the definition of "employee" the exemption of people who work in domestic service) and would define "undue hardship" by putting a cap (based on a formula involving the number of employees and the state average weekly wage) on the amount an employer would be required to spend on equipment, devices, readers, or interpreters. Accommodations in the form of job restructuring or altering work schedules would be limited to "minor or infrequent duties" and would not be required of employers with fewer than 15 employees. Public employers (state or local) and federally tax-exempt organizations would be exempted from the caps (so that undue hardship would continue to be decided on a case to case basis). For the purposes of the act, the bill would specify that a required accommodation could not be construed as preferential treatment or an employee benefit, and nothing in the bill could be construed to conflict with the state civil rights act (the Elliott-Larsen Civil Rights Act, Public Act 453 of 1976).

Basically, employers would be divided into those with fewer than 4 employees, those with between 4 and 14 employees, those with between 15 and 24 employees, and those with 25 or more employees. In the case of an accommodation requiring the hiring of a reader or interpreter, the cap on how much an employer would have to spend would be higher for the first year and lower for subsequent years. The bill also includes provisions that would tie the bill to the passage of federal legislation regarding handicappers (the so-called "Americans with Disabilities Act," or "ADA"). The costs of "reasonable routine maintenance or repair" of equipment or devices needed to accommodate a handicapper would not be part of the cap, and the accommodation caps for temporary employees (defined in the bill as those hired for less than 90 days) would be 50 percent of the caps for full-time employees.

In each class of employer, the cap would be figured as a multiple of the state average weekly wage (SAWW), and in each case the bill would specify that if the amount spent on accommodating a handicapper did not exceed the limitation set in the bill for that accommodation, the accommodation would not impose an undue hardship on the employer. In cases where a handicap would require readers or interpreters, the bill also would specify that if the cost exceeded the limitation established for that accommodation, then the accommodation would impose an undue hardship on the employer.

An employer with fewer than 4 employees would be required to spend no more than an amount equal to the state average weekly wage to buy equipment or devices and no more than seven times the state average weekly wage on readers or interpreters the first year a handicapper was hired, promoted, or transferred to that job (and five times the SAWW thereafter). Employers with 4 to 14 employees would be limited to 1.5, 7, and 5 times the state average weekly wage, respectively, while employers with 15 and more employees would be have to spend no more than 2.5, 15, and 10 times the state average weekly wage. Employers with 25 or more employees would have to spend at least 2.5, 15, and 10 times the state average weekly wage (that is, these levels would be a floor rather than a ceiling on the amount an employer would be required to spend).

Number of employees	Equipment or devices	Reader or interpreter
1-3	Up to the SAWW	7x SAWW, 5x SAWW
4-14	Up to 1.5x SAWW	10x SAWW, 7x SAWW
15-24	Up to 2.5x SAWW	15x SAWW, 10x SAWW
25 and up	At least 2.5x SAWW	15x SAWW, 10x SAWW

Employers' rights. The bill would explicitly allow employers to:

- regulate the use of alcohol or illegal drugs at the workplace;
- apply different standards of compensation (or terms of employment) under a seniority or merit system (or transfer system, scheduling system, etc.), so long as it was not just an attempt to avoid meeting the bill's accommodation requirements;

MORE

- require employees absent from work because of illness or injury to submit evidence of their ability to return to work (but employers could not single out only handicappers for this requirement); and
- either prohibit an employee receiving worker's disability compensation from returning to work in a restructured job or else require that employee to return to work if the employer provided an accommodation.

Legal action. The bill would put the burden of proof on handicappers who wished to sue an employer for failure to accommodate. If the handicapper proved a prima facie case, then the employer being sued would have to prove that an accommodation would impose an undue hardship. If the employer produced evidence that an accommodation would impose an undue hardship, the burden of proof would once again shift to the handicapper to show ("by a preponderance of evidence") that an accommodation would not impose an undue hardship on the employer.

Under the bill, there could be no civil action against an employer for failure to accommodate unless the handicapper had notified the employer in writing of the need for accommodation within 182 days after the handicapper knew that one was needed. Employers would be required to appropriately notify all employees and job applicants about the bill's requirement that written notice be given of the need for accommodation (and if they failed to do so, the prohibition against civil action without notification would be waived).

Presently under the handicappers' civil rights act, someone alleging a violation of the act can sue for both appropriate injunctive relief or damages for injury or loss (including reasonable attorney fees). The bill would specify that any amount of compensation awarded for lost wages would be reduced by the amount received for lost wages under the Worker's Disability Compensation Act (Public Act 317 of 1969).

Other provisions. The bill would require the Department of Civil Rights to offer educational and training programs to employers, labor organizations, and employment agencies to help them understand the requirements of the bill.

MCL 37.1102 et al.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill has no fiscal implications for the state. (4-3-90)

ARGUMENTS:

For:

Accommodation is a basic premise of handicapper civil rights legislation. The bill would reinstate this basic right and undo the devastating effects of the Carr decision.

From the time of its enactment in 1976 until the Carr decision in 1986, the handicappers' civil rights act operated to protect handicappers from discrimination in acquiring and keeping jobs. Employers had a responsibility to allow and provide for accommodations, including adaptive aids or devices which enabled handicappers to perform a job, provided that these accommodations did not pose an undue hardship for the employer.

Since the Carr decision, however, many handicapper organizations and their supporters believe that the civil rights of handicappers have been seriously eroded. Certain statistics seem to bear this belief out. For example, claims against employers under the Michigan Handicappers' Civil Rights Act have reportedly dropped 90 percent and there is anecdotal evidence that the decision has deterred many handicappers from filing complaints in the first place. The Michigan Department of Civil Rights reports an 11 percent drop in handicapper complaints filed since the Carr decision (from 486 in 1985 to 432 in 1986, the year following the ruling), while handicapper complaints in other states continue to rise (from 17 percent in California since 1985 to 67 percent in Minnesota during the same time). At the same time, the department reports that complaints of all types filed with the department have risen 2.5 percent during this same period.

The bill would restore to handicappers rights to reasonable accommodation that they lost under the Carr decision.

For:

By using language that parallels that in the proposed federal Americans with Disabilities Act, and by including effective dates that take the proposed federal act into consideration, the bill would put Michigan handicappers' civil rights' legislation into accord with nationally recognized trends in handicappers' civil rights.

For:

Presently, the handicappers' civil rights act actually allows people under treatment for mental or psychological disorders to be discriminated against because the act's definition of "handicap" includes a definition of "mental characteristic" that limits legally protected characteristics to mental retardation and a "mentally ill restored condition." Under present law, people currently under treatment for conditions such as organic brain syndrome, emotional illness, mental illness, or specific learning disability have no legal protections against discrimination since their situation is neither that of mental retardation nor that of a mentally ill restored condition. Yet like people with diabetes or epilepsy, whose physical condition can be controlled while under treatment, people who are undergoing treatment by a psychiatrist, psychologist, or therapist, or who are receiving medication to control a mental condition, can function as productive members of society. For too long, mentally ill people have been excluded from the protections of the handicappers' civil rights act. This exclusion was never based on any relevant policy considerations and it is time to extend the act's protections to all of our handicapped citizens. The bill, by striking the definition of mental characteristic, would ensure that the civil rights of all mentally ill people would be fully protected by the law.

For:

By tying the costs to businesses of providing accommodation to the state average weekly wage (which presently is about $470) and to the number of employees, the bill addresses the business community's worry about the possibility that the cost of accommodation would be prohibitively high. The caps include elements both of relative certainty of costs (without falling into the trap of setting flat rates) and of flexibility with regard to the relative size of the workplace. The exemption of public employers and charitable organizations leaves them with the flexibility of case by case determinations, while the qualifications put on job restructuring and altering work schedules clarify how and when this kind of accommodation can be applied.

OVER

POSITIONS:

The Department of Mental Health supports the bill. (4-2-90)

The Michigan Commission on Handicapper Concerns (in the Department of Labor) supports the bill. (4-2-90)

Michigan Protection and Advocacy Services strongly supports the bill. (4-3-90)

The Department of Social Services supports the bill. (4-3-90)

Michigan Trial Lawyers Association supports the bill. (4-3-90)

The Michigan Veteran's Trust Fund supports the bill. (4-3-90)

Paralyzed Veterans of America — Michigan Chapter supports the bill. (4-3-90)

The Michigan Manufacturers Association has no position on the bill. (4-2-90)

General Motors Corporation does not oppose the bill. (4-3-90)

The Michigan State Chamber of Commerce does not oppose the bill. (4-3-90)

The Greater Detroit Chamber of Commerce does not oppose the bill. (4-3-90)

The Michigan Retailers Association does not oppose the bill. (4-3-90)

The Small Business Association of Michigan does not oppose the bill. (4-3-90)