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FISCAL IMPACT REPORT

ORIGINAL DATE 2/08/17

SPONSOR McQueen LAST UPDATED _____ HB 246

SHORT TITLE Crimes in and Definition of Evacuation Zone SB _____

ANALYST Rogers

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	Minimal	Minimal	Minimal	Minimal	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Administrative Office of the District Attorney (AODA)

Department of Public Safety (DPS)

SUMMARY

Synopsis of Bill

HB 246 would allow officials to designate evacuation zones stemming from disasters and would greatly increase the penalties for property crimes committed within such zones. Criminal trespass would go from a misdemeanor to a fourth degree felony, breaking and entering would go from a fourth to a third degree felony, criminal damage to property would go from a petty misdemeanor to a third degree felony, larceny, burglary, aggravated burglary and unlawful taking of a motor vehicle would be increased one degree across the board.

FISCAL IMPLICATIONS

LOPD states it is difficult to predict the number of cases of this sort that would be brought in any given year since there is no way to predict disasters spurring evacuations nor the behavior of people in such disasters, although it does not appear there would be many such charged. The dramatic proposed increase in the penalty for many charges is concerning: higher-penalty cases are more likely to go to trial. If more higher-penalty trials result, LOPD may need to hire more trial attorneys with greater experience. These felonies would be handled by mid-level felony

capable attorneys (Associate Trial Attorneys). Depending on the volume of cases in the geographic location there may be a significant recurring increase in needed FTEs for the office and contract counsel compensation. The Associate Trial Attorney's mid-point salary including benefits is \$93.2 thousand. Assessment of the impact on the LOPD upon enactment of this bill would be necessary after the implementation of the proposed higher-penalty scheme.

Under the present statutory scheme, LOPD workload is so heavy in some offices that lawyers have been required to move to withdraw from new cases in order to provide effective assistance of counsel to their existing clients. Barring some other way to reduce indigent defense workload, any increase in the number of felony prosecutions would bring a concomitant need for an increase in indigent defense funding in order to keep this problem from spreading. Of course accurate prediction of the fiscal impact would be impossible to speculate; assessment of the required resources would be necessary after the implementation of the proposed statutory scheme.

SIGNIFICANT ISSUES

LOPD states “protection of the property of evacuees of fires and other disasters is a laudable goal, as people are more likely to follow evacuation orders if they have a feeling that their belongings will be safe (but for the disaster itself). The proposed legislation might have no cost whatsoever (if there are no evacuations and no associated alleged criminality) or it could cost tremendously - additional costs adhering to the DAs, counties, OAG, courts, LOPD and NMCD. The proposed legislation is likely to incur these additional costs when there are already additional disaster recovery costs being incurred by the state.” LOPD states the legislation could write a blank check that will have to be cashed at the worst possible time.

The AODA submits the following extensive analysis:

HB 246 would increase the penalties for seven different types of property crimes if they were “committed in an evacuation zone.” Nearly all the included offenses would have the punishment increased by one level if they were committed in an evacuation zone. Criminal damage to property—which can be either a petty misdemeanor or a fourth degree felony depending upon the amount of damage to the property—would be a third degree felony, no matter what the damage was. Criminal trespass would change from a misdemeanor to a fourth degree felony. Breaking and entering would be increased from a fourth degree felony to a third degree felony. The punishment for larceny—depending upon the value involved—could be increased from a petty misdemeanor to a misdemeanor, from a misdemeanor to a fourth degree felony, from a fourth degree felony to a third degree felony, and from a third degree felony to a second degree felony. Residential burglary punishments would be increased from a third degree felony to a second degree felony; other “simple” burglaries, e.g., vehicle, watercraft, other structures, would be changed from a fourth degree felony to a third degree felony. Aggravated burglary would be increased from a second degree felony to a first degree felony. Punishment for unlawful taking of a motor vehicle (“UTMV”) first offense would be increased from a fourth degree felony to a third degree felony and from a third degree felony to a second degree felony for second and subsequent UTMV offenses committed in an evacuation zone. A third or subsequent UTMV offense is now already a second degree felony.

HB 246 would define “evacuation zone” as “...an area designated as an evacuation zone by local or state officials in response to “a natural or industrial disaster that poses a significant threat to public safety or property.” No guidance is provided on which officials could designate an area as an evacuation zone, or what process they should undertake in doing so. It is conceivable that a single local law enforcement officer or other official might perceive a hazard and direct people to leave the area but another officer or, perhaps, his/her supervisor or the governing body might not consider the hazard severe enough to warrant an evacuation zone being designated. Frequently, when an evacuation zone is designated, it results in lawsuits from persons within the area seeking compensation for their lives and businesses being disrupted. Some officials and governing bodies may be cautious about making that designation and would overrule the designation previously issued and limit or even withdraw the directive. It is unclear if the official(s) designating an area as an evacuation zone would have absolute discretion, or if that designation could be challenged later as unwarranted because there was not “a significant threat to public safety or property.”

Notice that an area has been designated as an evacuation zone is also probably going to be litigated if HB 246 is adopted. Among the common methods that notification is made that people should evacuate is via news media, personal contact by officers contacting people in the affected area, and reverse 9-1-1 calls. Since the first notifications are usually made to persons within the zone, it seems likely that someone facing increased sanctions for committing property crimes in an evacuation zone will claim they, and perhaps not even the general population, knew that an evacuation zone designation had been made, or at least didn't know at the time of the offense for which they were charged, or didn't know the area where the offense took place was included.

There are also various directives that officials can issue regarding an evacuation zone ranging from people being ordered to physically vacate the area, to shelter in place, and to not be present during specific curfew hours. Even those can vary depending upon whether someone is a resident or business operator or owner or employee in the affected area. It is unclear if the bill would apply regardless of whether persons were directed to vacate the area, just shelter in place or were in an area under curfew restrictions, especially if the offense(s) occurred at some time other than when the curfew was in place. Proving an event happened when the evacuation zone order was in place could be a problem.

Since it's possible a defendant could be charged with committing crimes in an evacuation zone, which would have more severe sanctions than other similar crimes—up to a first degree felony (if, for example, they committed aggravated burglary by stealing a firearm from an “evacuation zone”) that would carry a mandatory prison sentence of no less than 12 years and 18 years presumptively, they are very likely to require strict proof of all facts relevant to that determination. Proof, beyond a reasonable doubt, that an area was properly designated an evacuation zone and that a defendant had knowledge of the same and committed one of the specified offenses in the zone during the applicable period will almost certainly be required any time a defendant is charged with committing a crime in an evacuation zone. See, *State v. Frawley*, 2001-NMSC-057, *Apprendi v. New Jersey*, 530 U.S. 466 (2000). (Other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be decided by a jury and proved beyond a reasonable doubt.)

HB 246 would also apply just to designations made by local or state officials. It is very possible that federal or tribal officials could designate an evacuation zone because of their concerns about public safety or property being threatened by a natural or industrial disaster. As drafted, local or state officials would have to adopt the federal declaration for the increased sanctions to be applicable.

PERFORMANCE IMPLICATIONS

Impact on LOPD's performance would depend on the vagaries of fate: what disasters require evacuation, how do people respond, what charges arise from that response. The likelihood is that nothing will require additional FTEs, but it is entirely possible that a bad moment in our state's history could result in a spike in trials would require a supplemental budgetary allowance in order to hire needed contractors to provide the effective assistance of counsel that is mandated by the state and federal constitutions.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

LOPD states crimes contained in this bill are already crimes and judges would continue to have the opportunity to "throw the book" at opportunists who take advantage of disasters to victimize their neighbors.

TR/sb/jle