

LFC Requester: \_\_\_\_\_

AGENCY BILL ANALYSIS  
2017 REGULAR SESSION

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[LFC@NMLEGIS.GOV](mailto:LFC@NMLEGIS.GOV)

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*{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}*

**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

Check all that apply:

Original  Amendment \_\_\_\_\_  
Correction \_\_\_\_\_ Substitute \_\_\_\_\_

Date Jan 26, 2017

Bill No: HB 246

Sponsor: Matthew McQueen  
Short Crimes In & Definition of  
Title: Evacuation Zone

Agency Code: 264  
Person Writing Gary Cade  
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**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY17	FY18		

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY17	FY18	FY19		

(Parenthesis ( ) Indicate Expenditure Decreases)

## **ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	<b>FY17</b>	<b>FY18</b>	<b>FY19</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:  
Duplicates/Relates to Appropriation in the General Appropriation Act

### **SECTION III: NARRATIVE**

#### **BILL SUMMARY**

Synopsis: HB 246 would add “evacuation zone” to the definitions listed in the Criminal Code, “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,” and would increase the regular penalties for most property crimes if they were, “committed in an evacuation zone.” In addition to those changes, which appear to target looters for increased penalties, the bill would make some grammatical changes to several property crimes to make the language gender-neutral.

#### **FISCAL IMPLICATIONS**

Unknown.

#### **SIGNIFICANT ISSUES**

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.” (Emphasis added)

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**

**ADMINISTRATIVE IMPLICATIONS**

**CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

**TECHNICAL ISSUES**

**OTHER SUBSTANTIVE ISSUES**

**ALTERNATIVES**

**WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Status quo

**AMENDMENTS**