

# Legislative Analysis



## **PUBLIC ACT 51 OF 1951 - HIGHWAY CONSTRUCTION WARRANTIES, RAIL GRADE CROSSINGS, AUTHORIZED USES OF MTF REVENUE BY CITIES**

Mary Ann Cleary, Director  
Phone: (517) 373-8080  
<http://www.house.mi.gov/hfa>

### **House Bill 5460 (Proposed Substitute H-5)**

**Sponsor: Rep. Dan Lauwers**

**House Committee: Transportation and Infrastructure**

**Senate Committee: Infrastructure Modernization**

**Complete to 12-18-14**

### **A SUMMARY OF HOUSE BILL 5460 (PROPOSED SUBSTITUTE H-5)**

House Bill 5460 (H-5) would amend five sections of Public Act 51 of 1951, the act that directs the distribution of state transportation revenue. The bill would establish new warranty provisions for the Michigan Department of Transportation (MDOT), county road commissions, and cities and villages for pavement and other construction and reconstruction projects. The bill would also establish new reporting requirements with respect to these warranty provisions. The bill would also amend a subdivision within Section 11 regarding the department's authority to enter into agreements with county road commissions, cities, and villages.

House Bill 5460 (H-5) would also amend Section 10 of 1951 PA 51 (Act 51) to create an earmark of up to \$3.0 million annually from the Michigan Transportation Fund (MTF) for a new grade crossing surface account within the State Trunkline Fund (STF). These provisions were not in either the House or Senate passed versions of House Bill 5460, but similar provisions were in House Bill 4757.

House Bill 5460 (H-5) would also amend Section 13 to authorize a city to use up to 20% of its MTF distribution for *public transit purposes*. The bill would require approval by the director of the Michigan Department of Transportation for this use. The provision would apply only if "*more than 10 million passengers used public transit within the city during the previous fiscal year.*" These provisions were not in either the House or Senate passed versions of House Bill 5460, but are similar to provisions of Senate Bill 281 (S-1).

House Bill 5460 (H-5) is a House substitute for the Senate substitute. House Bill 5460 was passed by the House on May 8, 2014, and was returned by the Senate as Substitute (S-3) on June 11, 2014. The Senate substitute included a tie-bar to House Bill 5477, a bill to amend the Motor Fuel Tax Act. The H-5 substitute is not tie barred to House Bill 5477. Instead, House Bill 5460 (H-5) is tie-barred to House Joint Resolution UU, which would amend the State Constitution to eliminate the sales and use tax on gasoline and diesel fuel after October 1, 2015, and to increase the sales and use tax by 1% (from 6% to 7%). The resolution would require voter approval at the May 12, 2015, regular election.

## BACKGROUND INFORMATION AND DETAILED ANALYSIS

### *MDOT Contracting Authority – Section 11(1)(g)*

Section 11 of 1951 PA 51 establishes the State Trunkline Fund (STF) and directs the priority order of appropriations from the STF. As provided in Section 11, the STF is appropriated for the construction and preservation of state trunkline roads and bridges and for MDOT administration.

Section 11 also contains provisions not directly related to STF appropriations: the section establishes a rail grade crossing program; authorizes the use of STF money and STF note or bond proceeds for loans to county road commissions, cities, and villages; and, in Subdivision (1)(g), authorizes the department to enter into agreements with county road commissions, cities, and villages "to perform work on a highway, road, or street." The subdivision authorizes such agreements to provide for "the performance by any of the contracting parties of any of the work contemplated by the contract including engineering services, and the acquisition of right of way [...]." Under provisions of this subdivision, these agreements may also provide for joint participation in costs.

It is our understanding that this subdivision currently provides authority for MDOT to enter into agreements with county road commissions, cities, and villages related to local federal aid projects and transportation economic development projects. Further, it is our understanding that this subdivision provides authority for the department to enter into cost-sharing agreements with road commissions, cities, and villages related state trunkline construction contracts.

House Bill 5460 (H-5) would substitute the term "local road agency" for county road commissions, cities, and villages, and would add "a private sector company" to the entities which whom the department could enter into agreements. The bill would also specifically include *maintenance* in the work for which the department may enter agreements. As a result, the proposed amendments to Section 11(1)(g) would authorize the department to enter into agreements with *a local road agency* or a *private sector company* to perform work on a highway, road, or street, including *maintenance*, engineering services, and the acquisition of right of way.

House Bill 5460 (H-5), in new Subsection 15, would define "local road agency" to mean what that term means under Section 9a of Act 51, i.e., "a county road commission or designated county road agency or city or village that is responsible for the construction or maintenance of public roads within the state under this act."

The above provisions are the same as the Senate-passed substitute.

### *Highway Construction Warranties: – Sections 11(2), 11(14), 12, 13, and 14*

Section 11, Subsection (2) currently includes provisions directing MDOT, where possible, to secure pavement warranties on certain state trunkline projects. House Bill 5460 (H-5) would amend this subsection to require MDOT, with respect to state trunkline projects, where possible, to "secure pavement warranties for full replacement or

appropriate repair for contracted construction work on pavement projects whose cost exceeds \$1 million and projects for new construction or reconstruction undertaken after the effective date [of the enacted bill]."

The bill would also add a new Subsection (14) to Section 11 to establish reporting requirements with respect to these warranty provisions. Specifically, the bill would require an annual report listing all warranties secured under Subsection (2), and indicating whether any of those warranties were redeemed. The subsection would also require the report to list pavement projects whose costs exceed \$1.0 million for which a warranty was not secured. The bill would require the report to be made available upon request and posted on the department's website. The report would include the following information: the type of project, the cost or estimated cost of the project, the expected lifespan of the project.

The bill would add similar requirements to Section 12 with regard to county road commission projects and to Section 13 with regard to city and village projects. However, the warranty provisions dealing with county road commissions and cities and villages would only apply if allowed by the federal highway administration and the department.

The amendments to Sections 12 and 13 would require county road commissions and cities and villages, respectively, to submit a proposed warranty program to the department no later than **February 1, 2016**. [This date had been September 30, 2015 in the S-3 substitute.] The bill indicates that if approved the proposed warranty program of a county road commission or city or village would be implemented no later than one year after approval.

The warranty reporting requirements for county road commissions, cities, and villages would be identical to those established under Section 11 for the department. However, the vehicle for the report would be the annual report already required of local road agencies under Section 14 of Act 51.

Section 14 currently requires separate accounting by local road agencies of Michigan Transportation Fund revenue, accurate and uniform records of all road and street work and funds, and annual reports by local road agencies of "the mileage of each road system under their jurisdiction and the receipts and disbursements of road and street funds." House Bill 5460 (H-5) would amend this section to require a local road agency to post its annual report on its website, if it has a website.

### ***Rail Grade Crossing Surface Account – Sections 10 and 12***

**House Bill 5460 (H-5)** would amend Section 10 of 1951 PA 51 (Act 51) to create an earmark of up to \$3.0 million annually from the Michigan Transportation Fund (MTF) for a new grade crossing surface account within the State Trunkline Fund (STF). The bill would also amend Section 12 of the act to establish and define the grade crossing surface account "for expenditure for rail grade crossing surface improvement purposes at rail grade crossing on public roads and streets under the jurisdiction of counties, cities, or villages."

These provisions were not in either the House or Senate passed versions of House Bill 5460, but are similar to provisions of House Bill 4757.

### ***Distribution of MTF Revenue to Cities and Villages***

Section 10 of Act 51 governs the distribution of MTF revenue, and directs the distribution of 28.1% of the MTF balance, after various statutory deductions, to cities and villages. Section 13 of Act 51 governs the distribution city/village MTF among the state's 533 cities and villages. Section 13 also provides directives on the use of MTF revenue by cities and villages. Generally speaking, Section 13 directs the city/village distribution of MTF revenue to city and village *Major Street* funds, and *Local Street* funds – the system of major and local streets are defined in Sections 6 through 9 of Act 51.

House Bill 5460 (H-5) would amend Section 13 to authorize a city to use of to 20% of its MTF distribution for *public transit purposes*. The bill would require approval by the director of the Michigan Department of Transportation for this use. The provision would apply only if "*more than 10 million passengers used public transit within the city during the previous fiscal year.*"

These provisions were not in either the House or Senate passed versions of House Bill 5460, but are similar to provisions of Senate Bill 281 (S-1).

### **ADDITIONAL BACKGROUND INFORMATION ON WARRANTIES:**

For additional background information on road construction warranties, see previous House Fiscal Agency analysis of House Bill 5460, as well as House Fiscal Agency publication: *Transportation: Road Construction Warranties*, March 2001, at: <http://www.house.mi.gov/hfa/Archives/PDF/warrant.pdf>

### **FISCAL IMPACT:**

House Bill 5460 (H-5) amendments to Section 11(1)(g) would authorize the department to enter into agreements with *a local road agency* or a *private sector company* to perform work on a highway, road, or street, including *maintenance*, engineering services and the acquisition of right of way. The fiscal impact of the proposed amendments to this subsection cannot be readily determined.

It is not clear how the inclusion of a "private sector company" among those entities with whom the department could enter into agreements, or the inclusion of "maintenance" in the work which could be contemplated by a contract, would affect the department's contracting authority. The department currently has broad authority to contract with both county road commissions, cities, and villages, as well as private contractors, for work on state trunkline roads and bridges under both 1964 PA 286 and 1925 PA 17.

The proposed amendments to Section 11, Subdivision 1(g) do not appear related to the apparent current intention of the subdivision to provide for state/local cost sharing agreements.

House Bill 5460 (H-5) would amend Section 11, Subsection (2), to require MDOT, with respect to state trunkline projects, where possible, to "secure pavement warranties for full replacement or appropriate repair guarantee for contracted construction work on pavement projects whose cost exceeds \$1 million and projects for new construction or reconstruction undertaken after the effective date [of the enacted bill]."

The bill would add almost identical language to Section 12 with respect to county road commissions, and to Section 13 with respect to cities and villages. [The proposed amending language for Sections 12 and 13 would establish the warranty requirement *if allowed by the federal highway administration and the department.*]

The bill would also establish reporting requirements for the department, county road commissions, and cities and villages with respect to these warranty provisions.

The impact of these provisions on the Michigan Department of Transportation and local road agencies would depend on the number and nature of the warranties required under terms of the bill and whether the bill would effectively require a *performance warranty* for construction or reconstruction projects.

Requiring *performance warranties* for construction and reconstruction work could increase the cost of construction and preservation work. In a performance warranty contract, the contractor may be forced to obtain a warranty bond to ensure that any corrective work will be performed during the warranty period. The warranty bond is a direct cost to the contractor which would likely be passed on to the owner in higher bid prices. How much bid prices would increase, and whether the owner receives additional value – e.g., increased assurance of a well-built road – for the increased cost is difficult to determine. The department's experience with full performance warranties on construction or reconstruction contracts has been limited.

In addition to possible direct cost increases, the bonding requirements of performance warranties may indirectly increase construction bid prices by limiting the number of bidders on some jobs and thus reducing competition. Under a performance warranty, contractors are generally required to secure a warranty bond for the warranty period – which may be as long as 10 years. If the contractor goes out of business, the bonding company guarantees that the warranty will be honored. As long as the warranty bond is outstanding, contractors have diminished bonding capacity. Contractors, particularly smaller contractors, may find it hard to obtain sufficient additional bonding to bid on new jobs. Some small contractors may simply be unable to obtain bonding needed to secure performance warranties.

Fiscal Analyst: William E. Hamilton

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