



Senate Fiscal Agency  
P. O. Box 30036  
Lansing, Michigan 48909-7536

BILL



ANALYSIS

Telephone: (517) 373-5383  
Fax: (517) 373-1986  
TDD: (517) 373-0543

House Bill 4961 (Substitute H-6 as passed by the House)  
House Bill 6128 (Substitute H-3 as passed by the House)  
Sponsor: Representative Lee Gonzales  
House Committee: Transportation  
Senate Committee: Transportation

Date Completed: 6-1-10

## **CONTENT**

**House Bill 4961 (H-6)** would amend Public Act 286 of 1964 (which deals with the organization of the Transportation Commission and the Department of Transportation) to do the following:

- Permit the Michigan Department of Transportation (MDOT) to enter into public-private agreements to design, construct, operate, or maintain a public transportation facility, with the approval of the Transportation Commission.
- Specify the conditions that any public-private agreement would have to meet, including that the State would not have any liability for the acts or omissions of the concessionaire or other party to a public-private agreement.
- Permit a public-private agreement to provide for user fees and ancillary charges, including fees to control or manage traffic flow or volume.
- Require the public transportation facility to revert from the concessionaire to MDOT at the end of a term specified in the agreement, if the agreement included an operations phase.
- Require a public-private agreement for a new international bridge project to specify the risk assumed by each party, and require MDOT to ensure that the agreement provided for the most economically beneficial way for the State to perform the

project while minimizing the State's liability for cost overruns and toll revenue shortfalls.

- Permit MDOT to solicit proposals or receive unsolicited proposals for a public-private agreement and require the Department to use a competitive selection process to the extent practicable.
- Permit MDOT to issue and sell bonds or notes to develop, acquire, construct, finance, maintain, or operate a public transportation facility under a public-private agreement.
- Provide that any bond or note would not constitute a pledge of the full faith and credit of the State or any political subdivision of the State.
- Establish a civil fine of \$50 for failure to pay a user fee for use of a public transportation facility, and require the violator to pay twice the amount of the user fee to the facility operator.

**House Bill 6128 (H-3)** would amend Public Act 286 of 1964 to do the following:

- Require MDOT to assist community representatives in entering into community benefits agreements with the State, contractors, developers, or concessionaires who were implementing a new international bridge crossing project.

- **Require MDOT, when issuing a request for proposals (RFP) for construction of the project, to include the requirements of a community benefits agreement applicable to the contractor, developer, or concessionaire.**
- **Require MDOT, during the RFP selection process, to consult with a nonprofit organization representing the host community and give the organization information on the proposals.**

House Bill 6128 (H-3) is tie-barred to House Bill 4961. The bills are described in detail below.

### **House Bill 4961 (H-6)**

#### **Public-Private Agreements**

The bill would permit the MDOT Director to enter into public-private partnerships, subject to the approval of the State Transportation Commission. The Director could not delegate that authority.

"Public-private agreement would mean an agreement between a private entity and MDOT or between a private entity, MDOT, and one or more other instrumentalities of government, that related to researching, planning, studying, designing, developing, financing, acquiring, constructing, charging user fees, operating, or maintaining a public transportation facility, or any combination of those activities.

"Instrumentality of government" would mean a public entity created or empowered to carry out functions commonly carried out by units of government, public agencies, or public authorities. The term also would mean the government of Canada or a public agency or authority created by that government or another state or a corporation without share capital created and empowered under the Canadian International Bridges and Tunnels Act to carry out functions commonly carried out by the government of Canada.

"Public transportation project" would mean any new or existing domestic or international highway, lane, road, bridge, tunnel, overpass, ramp, interchange, ferry, airport, vehicle parking facility, vehicle transportation facility, port facility, locks

facility, rail facility, intermodal or other public transit facility, or any other equipment, rolling stock, site, or facility used in the transportation of people, goods, vehicles, information, or matter of any kind, and any building, structure, parking area, or other property necessary or desirable for the facility.

The bill specifies terms and conditions that a public-private agreement would have to contain, including the following:

- Terms designed to protect the public interest and ensure that a concessionaire was accountable to MDOT or a public entity created under Michigan law for a public transportation facility in the State.
- Terms of the use and operation of a facility by a concessionaire for a period that MDOT determined was necessary for the development and financing of the facility and the economic feasibility of the agreement.

("Concessionaire" would mean a private entity that had entered into a public-private agreement under the bill.)

The State, including MDOT, would not have any liability for the acts or omissions of the concessionaire or other party to a public-private agreement.

A public-private agreement could permit the conduct of commercial activities at a public transportation facility if the activities were related to the transportation purposes of the facility and to the extent not restricted by applicable law.

Except as otherwise provided, a public-private agreement would have to impose on the concessionaire the same requirements of law that MDOT imposes when it contracts directly for the construction or operation of a public transportation facility.

For a public-private agreement that included an operations phase, the agreement would have to require that the public transportation facility revert from the concessionaire to MDOT at the end of the term of the agreement in a condition specified by MDOT.

The agreement would have to include provisions that addressed MDOT's rights to

share in refinancing gains received by the concessionaire under the agreement.

The agreement would have to specify the restrictions imposed on the concessionaire's ability to sell or transfer its interest in the public-private agreement without MDOT's consent.

A public-private agreement could not delegate the power to condemn property to the concessionaire. All rights-of-way acquired through condemnation that was used for a public transportation facility would remain publicly owned during the term of the public-private agreement.

A public transportation facility would have to be publicly owned and dedicated to the public use. The agreement could include a lease, license, right of entry, or other instrument for the facility as the Department determined was in the best interest of the public.

Subject to approval from the Transportation Commission and in compliance with applicable Federal laws, MDOT would have exclusive authority to determine where and whether to establish a public transportation facility authorized by a public-private agreement and the scope and nature of the facility.

#### User Fees

A public-private agreement could provide for the charging and collection of user fees and ancillary charges for the use of a public transportation facility. Except as otherwise provided, once user fees were established, the fees and ancillary charges could not be increased by more than the cumulative annual increase in the consumer price index without MDOT's written approval.

User fees and charges that applied to lanes and were used to control or manage traffic volume or flow could be increased by more than the consumer price index, as specified in the public-private agreement.

A user fee could be imposed only for the use of highways constructed after the bill's effective date, or the use of highways with expanded capacity beyond the capacity in place on that date.

User fees and ancillary charges imposed for the use of a public transportation facility would not be subject to regulation by any other governmental agency.

These provisions could not be construed to allow the conversion of any lanes existing on the bill's effective date into tolled or user-fee lanes, although MDOT could determine which lane of an existing highway would be designated for the imposition of user fees if the highway's capacity were expanded.

#### Oversight

In accordance with the terms of a public-private agreement, MDOT or an instrumentality of government would have to oversee the activities of a concessionaire carrying out the terms of the agreement. An agreement could provide for the use of arbitration, mediation, or other alternative dispute resolution mechanism for the resolution of disputes between MDOT and a concessionaire.

#### Proposals; Selection Process

The Department could solicit proposals or receive unsolicited proposals for a public-private agreement and could charge and use fees to offset the administrative costs of receiving and evaluating proposals. The Department would have the sole discretion whether and to what extent to consider an unsolicited proposal.

The Department would have to select a private entity or entities for participation in a public-private agreement using a competitive selection process to the extent practicable.

The bill specifies factors that MDOT would have to consider when evaluating and selecting a bid or proposal, including the cost of the proposed facility, the benefits to the public, the ability to increase Federal or other non-State revenue to the State.

The Department could select multiple private entities with which to enter into public-private agreements for a public transportation facility if it determined that doing so was in the public interest.

### Cost-Benefit Analysis

The Department would have to perform a cost-benefit analysis including a risk transfer or allocation assessment to determine whether a proposed public-private agreement was the most economically beneficial way for the State to perform the proposed project. The Department would have to follow specific requirements in conducting the cost-benefit analysis, and publish the results on its website. The Transportation Commission could not approve a public-private agreement unless it determined that the agreement was the most economically beneficial way for the State to perform the project.

### Financing; Funding Sources

The bill would permit MDOT to issue and sell bonds or notes for the purpose of providing funds to carry out the provisions of the Act with respect to the development, acquisition, construction, financing, maintenance, or operation of a public transportation facility provided for by a public-private agreement or the refunding of any bonds or notes, together with any transaction costs.

Any bond or note issued under that provision would not constitute a pledge of the faith and credit or indebtedness of the State or any political subdivision of the State. A bond or note would be payable solely from the following sources:

- Revenue generated from use of the public transportation facility.
- The proceeds of bonds or notes sold to finance the refunding of the outstanding bonds or notes, if any.
- Investment earnings on the proceeds of the bonds or notes.

For the purpose of financing a public transportation facility, the State, MDOT, the concessionaire, or to the extent permitted by law, an instrumentality of government, could apply for, obtain, issue, and use private activity bonds or other financial instruments available under any State or Federal law or program. An instrumentality of government could act as a conduit issuer and transfer the proceeds of private activity bonds or similar financial instruments to a concessionaire if authorized by the public-private agreement. The bonds or

instruments would not pledge the full faith and credit of the State or any political subdivision of the State, and would not be a debt of the State or a political subdivision.

The Department could apply for and accept from the United States or any of its agencies funds that were available to it for carrying out a public-private agreement, whether the funds were made available by grant, loan, line of credit, loan guarantee, or other financial assistance.

The Department could assent to any Federal requirements, conditions, or terms of any Federal funding accepted under those provisions, other than a pledge of the faith and credit of the State or any political subdivision of the State or another requirement prohibited by the State Constitution.

The Department could enter into agreements or other arrangements with the U.S. or any of its agencies as necessary for implementing a public-private agreement.

The Department could accept from any source, and use for supporting a public transportation facility authorized by a public-private agreement any grant, donation, gift, or other form of conveyance of land, money, real or personal property, or other item of value.

The Department could combine Federal, State, local, and private funds to finance a public transportation facility authorized by a public-private agreement.

### Use of Funds

Compensation paid to MDOT in connection with a public-private agreement would have to be used for transportation purposes.

Revenue attributable to a public transportation facility authorized by a public-private agreement that was payable to MDOT would have to be deposited into the State Trunk Line Fund, Comprehensive Transportation Fund, or Aeronautics Fund, as indicated by the nature of the facility and provided in the public-private agreement.

### Tax-Exempt Status

Whether the facility was used by MDOT, another instrumentality of government, or a

private entity under a public-private agreement, a public transportation facility that was owned by MDOT or another instrumentality of government would be exempt from all ad valorem property taxes and all property assessments levied by the State or any political subdivision of the State to the same extent that the property owned by MDOT or the instrumentality otherwise would be exempt from those property taxes or assessments.

No person would be exempt from or eligible for a refund of a motor fuel tax imposed by the State or a political subdivision of the State by reason of the use of motor fuel within the limits of a public transportation facility authorized by a public-private agreement.

#### International Bridge Agreement

A public-private agreement for an international bridge crossing that did not exist on the bill's effective date would have to include risk allocation provisions specifying the risk assumed by the concessionaire and each instrumentality of government that was party to the agreement, including the risk relating to construction cost overruns and toll revenue shortfalls. Before approving and entering into a public-private agreement for any such international bridge, MDOT would have to ensure that the risk allocation provisions provided for the most economically beneficial way for the State to perform the project, while minimizing the State's liability for construction cost overruns and toll revenue shortfalls. The Department would have to submit a report to the Governor explaining how that requirement was fulfilled.

For any international bridge crossing that did not exist as of the bill's effective date, before releasing an RFP for a public-private agreement, MDOT could only acquire property needed for the crossing in the State through voluntary acquisitions from willing sellers, although MDOT could exercise its power of eminent domain to acquire property if it gave at least 30 days' notice to the Legislature before filing condemnation proceedings.

#### Law Enforcement; Emergency Vehicles

All law enforcement officers of the State and local units of government in which all or a part of a public transportation facility authorized by a public-private agreement was located would have the same powers and jurisdiction within the limits of the public transportation facility as they have in their respective areas of jurisdiction to enforce traffic and motor vehicle laws.

Authorized emergency vehicles and their occupants would have to be given access to a public transportation facility while in the performance of an official duty without paying a user fee or other charge.

Violations of traffic and motor vehicle laws with the limits of a public transportation facility authorized by a public-private agreement would be punishable as generally prescribed by law.

#### Use of Customer Information

A public-private agreement would have to include provisions relating to the permitted retention and use by the concessionaire of collected data and customer information and would have to prohibit the sale or use of such data and information for commercial purposes unrelated to the use of the public transportation facility. Measures and devices to record users of public transportation facilities could be used to facilitate the collection of user fees. A recording of the use of a public transportation facility could not be used or disclose except for the following purposes:

- In enforcement and collection proceedings.
- By a police officer while lawfully enforcing his or her duties.
- To create statistical reports on use of the facility that did not disclose the identity of specific users.

#### Failure to Pay User Fee

A person who failed to pay a user fee imposed for use of a public transportation facility would be responsible for a civil infraction and would have to pay a civil fine of \$50. In addition, the person would have to pay the operator of the public transportation facility two times the amount of the user fee. If the fine remained unpaid

for 180 days, a civil action could be brought against the person to collect the unpaid charges. If the civil action resulted in a judgment for unpaid charges, the defendant also would have to reimburse the plaintiff for all filing fees plus \$500 in compensation for the costs of bringing the civil action.

While a person owed and had failed to pay charges, fees, and costs under those provisions, he or she and a motor vehicle the person owned could be barred from using the public transportation facility.

Except as provided in the Michigan Vehicle Code regarding leased vehicles, proof that a particular vehicle used a public transportation facility without payment of the user fee, together with proof from the Department of State of the name of the vehicle's registered owner, would create a presumption that the owner was the person who used the public transportation facility, failed to pay the fee, and was prima facie responsible for the unpaid charges.

#### Other Provisions

Upon approval by the Transportation Commission, MDOT could create public transportation authorities as separate legal entities within the Department that could exercise the powers of the Department regarding public-private agreements under the Act, to the extent authorized by an agreement between MDOT and a public transportation authority.

The bill would require the Transportation Commission to conduct a public hearing at least once every five years to receive public comment and input regarding then-existing public transportation facilities operated under a public-private agreement.

The Department could promise to keep trade secrets or proprietary commercial or financial information provided by a private entity confidential only for purposes of seeking or entering into a public-private agreement.

No action could lie against MDOT or another person acting in accordance with a public-private agreement for the use of ideas and information provided by a private entity for purposes of seeking or entering into a public-private agreement.

Notwithstanding any other provision of the Act, if Federal funds were used for a transportation facility, the applicable Federal law or rules would control in the event of a conflict with the Act.

#### **House Bill 6128 (H-3)**

The bill would require the Michigan Department of Transportation to provide, wherever possible, technical support, advice, and resources to assist community representatives in communities affected by an international bridge crossing that did not exist on the bill's effective date to enter into community benefits agreements with the State, contractors, developers, or concessionaires who were implementing the project.

If a contractor, developer, or concessionaire who entered into a community benefits agreement defaulted in the performance of its duties under that agreement, MDOT would have to perform those duties.

Whenever MDOT issued a request for proposals for construction of a new international bridge crossing project, the RFP would have to include the requirements of a community benefits agreement that would be required of the contractor, developer, or concessionaire.

During the selection process, MDOT would have to consult with the host community as represented by a nonprofit organization with members in the host community that had engaged residents and stakeholders and whose organizational purpose was to ensure that the interests of residents, businesses, and organizations near the host community were recognized and protected as related to the development of the project.

The Department would have to provide information to the nonprofit organization concerning the proposals it received. After receiving that information but before the selection of the winning proposal, the organization would have to give its advisory recommendations to the Department within a reasonable time frame set by MDOT and consistent with the timeline of the selection process.

A "community benefits agreement" would be a contract between the State or a contractor, developer, or concessionaire and the

nonprofit organization identified by MDOT (as described above). The agreement would have to implement sustainable benefits to the community in addition to any benefits required by existing Federal, State, or local laws, which could include any of the following:

- Preservation, restoration, or replacement of community resources directly affected by the project.
- Jobs, employment training, and related facilities.
- Modification or remedies for structures or equipment directly affected by the project.
- Economic development.
- Housing and home repair programs.
- Air quality programs.
- Green development initiatives.

"Host community" would encompass the boundaries of all construction in the State for an international bridge crossing project that did not exist on the bill's effective date, including the bridge, plaza, and direct access road changes.

MCL 247.801 et al. (H.B. 4961)  
Proposed MCL 247.806c (H.B. 6128)

Legislative Analyst: Curtis Walker

## **FISCAL IMPACT**

### **House Bill 4961 (H-6)**

The bill would have an indeterminate impact on State revenue and expenses and little or no impact on local revenue or expenditure. Presumably, the Department of Transportation would not enter into public-private agreements unless the overall net impact on the State was favorable. However, the term of any agreements likely would cover many years, so the impact in any given year could be higher or lower than under current law. Similarly, the operation of such agreements could alter the timing of activities associated with affected projects, in terms of costs, operations, and revenue.

The bill also would authorize the issuance of bonds and provide for tolls associated with a use of a transportation facility. As a result, the bill could increase both expenses and revenue for the State. In the long run, tolling revenue should result in a net increase in State transportation revenue. To

the extent that any affected project would increase transportation activity within the State, the bill also could increase expenses and revenue from other portion of the transportation system.

### **House Bill 6128 (H-3)**

The bill would have an indeterminate impact on State and local revenue and expenses. The bill would authorize the Department of Transportation to become involved in community benefits agreements between private entities and local governments. While the primary State obligation under the bill would be to provide support, advice and resources, the bill also would require the State to perform any duties required of a private entity if the private entity defaulted on an agreement. Because the bill would not compel an appropriation, such a default would not necessarily increase total State transportation expenses but could shift expenses from one use to fulfilling obligations under a defaulted community benefits agreement.

Fiscal Analyst: David Zin

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.