

Legislative Analysis



ALLOW LOCAL BUILDING DEPARTMENTS TO CONTRACT WITH PRIVATE ORGANIZATIONS

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

House Bill 5011 as enacted
Public Act 103 of 2011
Sponsor: Rep. Mark Ouimet
House Committee: Regulatory Reform
Senate Committee: Regulatory Reform

Second Analysis (7-25-12)

BRIEF SUMMARY: The bill would amend the State Construction Code Act (1970 PA 230) to allow a governmental subdivision to contract with a private organization to operate its building department. The bill would also expand the definition of building official to include individuals employed by a private organization.

FISCAL IMPACT: The bill would have a fiscal impact on the state and on local governments, although that impact is indeterminate. For a detailed discussion, see [Fiscal Information](#), later in the analysis.

THE APPARENT PROBLEM:

The State Construction Code Act requires the state, through the Bureau of Construction Codes, to administer and enforce the provisions of the act and the promulgated Construction Code. The act also allows local governmental subdivisions, by ordinance, to assume that responsibility and many communities have chosen to do so. However, the Bureau of Construction Services does exclusively administer and enforce the Code within a limited number of, mostly rural, governmental subdivisions and provides limited temporary services as necessary.

If a governmental subdivision decides to assume the responsibility of administering and enforcing the Code it must provide the services required by the act, including the issuing of permits and orders, conducting inspection services, performing plan reviews, and determining the safety of structures, among other things. For a variety of reasons many subdivisions have opted to privatize these services by contracting with a private organization. While this is a common practice the act does not appear to be clear on what responsibilities can be delegated to the private organization. According to a 1975 Attorney General's opinion on the issue, governmental subdivisions may contract with private organizations for inspection and technical services but the designated enforcing agency must be a public official and all final determinations must be made by the enforcing agency (see [Background Information](#)). This bill is an attempt to provide clarity on the functions private organizations can legally perform and who is legally considered a building official. Specifically, the bill would authorize governmental subdivisions to contract with private organizations for specific administrative and enforcement activities, including inspections and plan reviews. However, private organizations would not be

able to issue orders, notices, certificates, or permits, but could process and deliver the documents pending the approval of the building official.

THE CONTENT OF THE BILL:

The bill would amend the Stille-DeRossett-Hale-Single State Construction Code Act (MCL 125.1502a) to allow a governmental subdivision to contract with a private organization for specific administrative and enforcement activities related to the act.

Specifically, the bill would add Section 9 to allow a governmental subdivision to contract with a private organization to do any of the following on behalf of the enforcing agency:

- Receive applications for building permits.
- Receive payments of fees and fines on behalf of the governmental subdivision.
- Perform plan reviews using plan reviewers registered under the Building Officials and Inspectors Registration Act, 1986 PA 54 (MCL 338.2301 to 338.2312).
- Perform inspections using inspectors registered under the Building Officials and Inspectors Registration Act, 1986 PA 54 (MCL 338.2301 to 338.2312).
- Approve temporary service utilities.
- Make determinations that structures or equipment are unsafe.
- Process and deliver correction notices.
- Issue orders to connect or disconnect utility service in emergency situations.
- Issue orders to vacate premises in emergency situations.
- Process and deliver any of the following after its issuance has been approved by the building official:
 - Orders to connect or disconnect utility service in a non-emergency situation.
 - Orders to vacate premises in non-emergency situations.
 - Building permits.
 - Temporary or permanent certificates of use and occupancy.
 - Orders to suspend, revoke, or cancel a building permit or certificate of occupancy.
 - Violation of notices.
 - Notices to appear or show cause.
 - Stop work orders.
 - Orders to remedy noncompliance.

Governmental subdivisions would be required to include or incorporate by reference conflict of interest provisions for contracts entered into or renewed after the effective date of the bill, unless they already have a conflict of interest ordinance that applies to the above referenced contracts.

"Building Official" would be defined to mean a person who is employed by a governmental subdivision and is charged with the administration and enforcement of the code and who is registered in compliance with the Building Officials and Inspectors Registration Act, 1986 PA 54 (MCL 338.2301 - 338.2313). This person may also be an employee of a private organization.

BACKGROUND INFORMATION:

It appears local units of government have been contracting out their building department services to private organizations for many years. According to a 1975 Attorney General's opinion (#4885), *"governmental units may contract with private organizations for inspection or other technical assistance which serves to assist the enforcing agency in the administration and enforcement of the State Construction Code Act and the State Construction Code adopted pursuant thereto. However, the designated enforcing agency must be a public official or a governmental agency and all decisions and official actions based upon inspections by private organizations must be made by the enforcing agency."*

The opinion sought to answer the question of "whether a county, city, village, or township could utilize the services of a qualified private firm to provide construction inspection and other related functions, and what, if any guidelines must be established."

According to the opinion, the Construction Code requires the local legislative body that is responsible for its administration and enforcement to designate an enforcing agency. Subject to other provisions of the act, an enforcing agency may be any official or agent of a county, city, village, or township. As stated, *"The powers and duties imposed on the designated enforcing agency must be exercised and performed by a public official or governmental agency. For example, the power of the enforcing agency to suspend, revoke, or cancel a building permit under subsection 11(2) is a governmental function which is not properly delegable to private third parties."* Designated enforcing agencies have primary responsibility to administer the act and the State Construction Code. The opinion goes on to state *"the designated enforcing agency must be a public official or governmental agency and inspection functions or other technical assistance may be performed under contract with private organizations, but all decisions and official actions based on such inspections or technical advice must be made by the enforcing agency."*¹

FISCAL INFORMATION:

State Fiscal Impact

The bill would have an indeterminate impact on the state budget. Generally, local units of government ("governmental subdivisions") assume the administration and enforcement of the state Construction Code (see below). The state Bureau of Construction Codes (BCC) does exclusively administer and enforce the Code within a limited number of, mostly rural, local units of government and provides additional temporary, limited services to local units of government as requested.

At present, the BCC does not contract with private organizations throughout the state to perform inspections of construction projects in the local units of government for which the BCC administers and enforces the Code. Cost savings to the BCC could potentially occur *if* private organizations are able to perform these inspections at prices lower than

¹ The full text of the opinion can be read by accessing the following link.
<http://www.ag.state.mi.us/opinion/datafiles/1960s/op04156.pdf>.

the BCC's internal cost of inspecting projects; it is not known if private organizations would be able to perform these inspections at prices lower than BCC's internal costs.

Local Fiscal Impact

House Bill 5011 would have an indeterminate impact on the budgets of local units of government. The bill would authorize local units of government to privatize specific administrative and enforcement activities pertaining to the state Construction Code including inspections and, if registered under 1986 PA 54, plan reviews. However, private organizations would not be allowed to issue orders, notices, certificates, or permits, but could "process and deliver" these documents. It is reported that several local units of government are already contracting with private entities to conduct certain inspection activities.

Local units of government are empowered to set the fees to administer and enforce the Code. Aggregate data on the revenues and expenditures for local units of government to administer and enforce the state Construction Code do not exist. For a limited point of reference the following FY 2010² data for local units of government in the Capital Region are offered below. From this limited perspective, it is evident that the revenues generated from administering and enforcing the Code do not cover the expenditures to administer and enforce the Code. The recent national constriction of the construction industry may provide some explanation for the shortfall; as revenues would be expected to decrease with industry constriction (fewer fees for permits, plan reviews, inspections, etc.) while expenditures are generally long-term fixed costs (salaries, benefits, rent, personal property, etc.).

- City of Lansing: revenues were \$1,210,417 and expenditures were \$1,954,538 resulting in a shortfall of \$744,122.
- City of East Lansing: revenues were \$340,762 and expenditures were \$576,985 resulting in a shortfall of \$236,223.
- Meridian Charter Township: revenues were \$635,904 and expenditures were \$1,315,738 resulting in a shortfall of \$679,834.
- Delta Charter Township: revenues were \$295,424 and expenditures were \$770,205 resulting in a shortfall of \$474,781.
- Delhi Township: revenues were \$160,340 and expenditures were \$255,580 resulting in a shortfall of \$95,240.

By authorizing the privatization of specific administrative and enforcement activities, the bill would enable local units of government to seek proposals to assume these activities by private organizations. The administration of the proposal process would likely entail indeterminate costs. However, if a local unit of government found that it could reduce expenditures by contracting with private organizations, it would be permitted to do so. The bill does not require local units of government to privatize administration and enforcement activities.

² Local units of government determine what period of time is considered its fiscal year.

ARGUMENTS:

For:

According to testimony, there are many municipalities that are already contracting with private organizations to provide building services. Local units would be able to negotiate terms to a contract in an attempt to streamline services and reduce expenses. The bill would clarify local government's option to contract out building department services and specify what activities the private organization could legally perform. Many believe the bill encourages local units to find the best value and service available.

Against:

There is concern the bill could result in private organizations being able to enforce laws. Currently, local units are allowed to contract with private organizations but the private organization cannot be the enforcing agency (see Background Information). Some feel this bill would privatize the entire operation of a building department and the contracted inspectors would report to an executive team of the private organization and not to the local legislative body. There is concern that it is not appropriate for private organizations to enforce laws; that is the role of government.

Legislative Analyst: Jeff Stoutenburg
Fiscal Analyst: Paul Holland

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.