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PERMIT FEE LIMITS, CLARIFICATIONS, AND BONDS FOR WORK IN RIGHT-OF-WAY

House Bill 5097 as enacted
Public Act 97 of 2018
Sponsor: Rep. Beth Griffin
House Committee: Communications and Technology
Senate Committee: Energy and Technology
Complete to 8-17-18

BRIEF SUMMARY: House Bill 5097 would amend Public Act 283 of 1909 (the county road law) to set fee limits for projects within the right-of-way of a county road. The bill also would require either a security or right-of-way bond to secure the performance allowed in a permit authorizing the project in the right-of-way. Finally, the bill would require that a telecommunication or video service provider maintain general liability insurance of not less than $2.0 million for bodily injury and $2.0 million for property damage in connection with the provider's use and occupancy of a right-of-way under the jurisdiction of a county road commission.

FISCAL IMPACT: House Bill 5097 would have no fiscal impact on state government. The bill's impact would be limited to local government, specifically county road agencies (county road commissions and those county governments that have assumed the powers and duties of road commissions: Wayne, Macomb, Ingham, Calhoun and Jackson). See ***Fiscal Information***, below, for further discussion.

THE APPARENT PROBLEM:

It is often necessary for utilities, construction firms, and others to work within county road rights-of-way in order to lay pipelines, construct drains, or install or repair telecommunication equipment. Public Act 212 of 1980 added Section 19b to Public Act 283 of 1909 (the county road law) to require that private entities or public agencies working in a county road right-of-way first obtain a permit from the county road commission, as well as from the city, village, or township in which the road is located if those other governmental units require such a permit.[1]

Section 19b currently allows a county road commission, and a local unit of government, to establish reasonable permit requirements and "a schedule of fees to be charged sufficient to cover only the necessary and actual costs applied in a reasonable manner for issuing the permit and for review of the proposed activity, inspection, and related expenses."

[1] The provisions of Section 19b are consistent with Section 29 of Article VII of the State Constitution of 1963, which reserves to counties, townships, cities, and villages "the reasonable control of their highways, streets, alleys and public places." However, with some limited exceptions, county roads are generally outside of municipal borders. In addition, townships do not have jurisdiction over roads and streets. As a result, it would appear to be unusual for a person working in the county road right-of-way to be required to obtain a permit from a township, city, or village in addition to the required county road commission permit.

Section 19b(4) currently limits the permit fee that a county road agency can charge a "government entity" to $300 per permit or $1,000 total for all permits per project. This maximum permit fee for governmental entities has not been adjusted since Public Act 212 of 1980 took effect in early 1981 and does not include charging an internet service provider.

While Section 19b limits the amount that a county road commission can charge a "government entity," there have not been fixed limits on the amount county road commissions can charge other parties—other than the general directive quoted above, that the fees be "sufficient to cover only the necessary and actual costs..." Representatives of telecommunication providers and video service providers have indicated that some communities in Michigan have been charging the providers unreasonably large fees to obtain permits for work within county road rights-of-way.

House Bill 5097 would cap the fees a county road commission is allowed to charge a provider, as well as adding other mandates to help protect a county road commission from any harm that may arise within the right-of-way as a result of the provider's actions.

THE CONTENT OF THE BILL:

Current Provisions

Currently, a person, partnership, association, corporation, or governmental entity needs a permit from the appropriate county road commission before it can construct, operate, maintain, or remove a facility or perform any other work within a county road right-of-way. A county road commission and a local unit of government may set the permit requirements and fees. When a road commission adopts permit requirements and fee schedules, it must also set separate permit procedures and fees for annual and emergency permits. However, a county road commission cannot refuse a permit requested by a government entity that promises to restore the road, appurtenances, and adjacent right-of-way. Additionally, a county road commission is not allowed to require a permit for other lawful activities.

Civil Fines

In addition to permit fees, the bill would allow a county road commission and a local unit of government to adopt a schedule of civil fines that could be imposed on a provider that performs work in a right-of-way without obtaining a permit or that fails to maintain a security bond, right-of-way bond, or irrevocable letter of credit during construction work within the right-of-way. The civil fine imposed on a provider could not be more than $5,000 per violation and could not be imposed on a provider if the work is a required on an emergency basis to restore services impacting public safety.

Permit Fees

The bill would direct that a county road commission cannot charge a government entity ***or provider*** a permit fee of over $300 per permit, or $1,000 total for all permits per project. [Under current law, this limitation on permit fees only applies to permittees that are government agencies.] In a county with a population of more than 250,000, the road

commission could charge a provider a permit fee of not more than $600 per permit, or $2,000 total for all permits per project.[2]

Under the bill, ***provider*** would mean either of the following:

- A telecommunication provider as defined in MCL 484.2102(ee) (a person who provides one or more telecommunication services for compensation, but not including a provider of commercial mobile service defined in 47 USC 332(d)(1)).
- A video service provider as defined in MCL 484.3301 (a person authorized under the Uniform Video Services Local Franchise Act to provide video service).

The bill would add that a county road commission *cannot* require a provider to obtain a permit for performing routine maintenance or repair work, as defined in the permit, in a right-of-way *more than once per year*. The fee for the annual permit would be capped at $300 (or $600 in a county with a population of more than 250,000) and is separate from the above fee limitations.

The bill also would prohibit a county road commission from requiring a provider to perform or pay for any topographic, boundary, environmental, or other kind of survey, study, inspection, or analysis of a right-of-way as a condition of or in connection with issuing a permit. However, a county road commission could require a provider to submit detailed engineering plans relating to the work in the right-of-way.

Bonds

The bill would add that a county road commission cannot require a provider to have more than one security bond or right-of-way bond from a state or federally regulated entity licensed to do business in this state. However, if a claim is made against the bond, the provider would have to provide the county road commission with another security bond or right-of-way bond to continue working in that county. The bonds would act to secure the performance allowed in a permit authorizing the project in the right-of-way. A county road commission cannot require a cash bond, so the provider would determine whether the security bond or right-of-way bond is an insurance bond or a cash bond.

The amount of a security bond or right-of-way bond could not exceed $20,000 (or $40,000 in a county with a population of more than 250,000) and would have to be returned within 120 days after the provider completes the work in the right-of-way.

Instead of the bonds, a provider could provide an irrevocable letter of credit issued by a state or federally regulated financial institution licensed to do business in this state as alternative security.

Insurance

The bill would require a provider to maintain general liability insurance with minimum policy limits of $2.0 million per occurrence for property damage, and $2.0 million per

[2] The counties in the state with a 2010 Census population of greater than 250,000 are: Wayne, Oakland, Macomb, Kent, Genesee, Washtenaw, Ingham, Ottawa, and Kalamazoo.

occurrence for bodily injury, for all actions arising in connection with the right-of-way work.

Separate, Voluntary Agreement

A county road commission in a county with a population of more than 250,000 and a provider could still enter into a voluntary agreement regarding right-of-way access that includes different terms and conditions than those otherwise required.

Finally, the bill would make stylistic changes for clarity and to update references.

MCL 224.19b

FISCAL INFORMATION:

Section 19b(4) currently limits the permit fee that a county road agency can charge a "government entity" to $300 per permit or $1,000 total for all permits per project. House Bill 5097 would generally extend this limitation on permit fees to "providers," as defined in the bill, and would authorize road commissions in counties with populations of greater than 250,000 to charge providers up to $600 per permit or $2,000 total for all permits per project.

The bill would also prohibit a county road commission from requiring a provider to obtain a permit for performing routine maintenance or repair work in a right-of-way more than once per year. The fee for the annual permit would be capped at $300, or $600 in a county with a population of more than 250,000.

Section 19b(2) currently authorizes county road commissions and local units of government to adopt permit fees "sufficient to cover only the necessary and actual costs applied in a reasonable manner for the issuance of the permit ad for review of the proposed activity, inspection, and related expense." The subsection also requires that, after permit work has been completed, an itemization of all costs be provided, on request, to the permit holder.

In limiting the amount of permit fees that road commissions could charge providers, the bill could reduce local road commission revenue from permit fees and could increase unreimbursed costs.

The amount of the revenue loss would be localized and would occur in those instances in which the actual costs of road commission permit work exceeded the permit fee limits established in the bill. The bill's impact would likely be greatest in relation to large complex telecommunication or video service projects within the road commission right-of-way, and more particularly within urban environments—projects that potentially require higher levels of road commission review and oversight.

ARGUMENTS:

For:

Supporters of the bill argue that Michiganders are suffering because some local governments charge excessive fees to internet service providers. These localities make it impossible for providers to service these areas, usually leaving the residents without adequate, affordable, or even any, access to needed internet services. Additionally, uniform fees across the state will ensure that all providers are treated and charged equally.

Against:

Critics of the bill argue that most of the high fees charged to internet service providers are fair. This is because the fees are set at a certain rate to ensure that the local governments are able to recoup any costs related to fixing the right-of-way, especially if a different service line is damaged during the process. Without the ability to charge certain fees, the future risks and potential costs shift from the providers to the local governments. Local governments are less likely to have funds available to cover the expenses, which could ultimately result in putting the costs on the local residents.

Opponents of the bill also argue that the requirement to return a bond within 60 days of the completed work could harm local governments. Depending on the time of year, 60 days after a completed project could be in the middle of winter, when snow and ice make it impossible to see if the work was done sufficiently or if there was any damage to certain utilities or portions of the road. If local governments are required to return the bond before they have the ability to properly inspect the right-of-way, then they would have to pay for any necessary repairs once the snow thaws. Again, local governments are less likely to have the funds for such repairs, and these risks should stay with the provider, not the local governments.

Response:

Supporters respond by pointing out that local governments would still have legal remedies to require providers to pay for any damages within the right-of-way. Additionally, money is not required for a bond on the work done in the right-of-way under the current law or under the bill. Costs could be recouped in a lawsuit or through insurance payouts, and licensures could be revoked if providers are negligent.

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