

SESSION OF 2020

**SUPPLEMENTAL NOTE ON HOUSE SUBSTITUTE FOR
SENATE BILL NO. 173**

As Recommended by House Committee on
Appropriations

Brief*

House Sub. for SB 173 would authorize and direct the Secretary of Transportation (Secretary) to initiate a program to be called the Eisenhower Legacy Transportation Program (Program). The bill would specify the types of projects authorized, address local funding and new and continuing grant programs, authorize alternative procurement methods under certain circumstances, increase city connecting links payments, add reporting requirements, require at least \$8.0 million to be spent in each county through FY 2030, state 16.154 percent of sales tax shall be levied for the State Highway Fund (SHF), and make additional changes to law.

The bill would also make technical changes.

***Eisenhower Legacy Transportation Program (New
Section 1)***

The bill would state the Program shall provide for the construction, improvement, reconstruction, and maintenance of the state highway system and provide for selection of projects that will allow for the flexibility to meet emerging and economic needs. The bill would state program expenditures may include, but not be limited to, preservation, preservation plus, expansion and economic opportunity, and modernization projects, described below:

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

- *Preservation projects.* The bill would require the Secretary to establish targets for state highway system condition that reflect reasonable, realistic expectations and use reasonable, sound, and accepted methods to determine the annual preservation investment needed to achieve such state targets and long-term cost effectiveness. The bill would state it is the intent of the Legislature that the Secretary shall spend from the SHF an amount equal to or exceeding ten times the determined average annual preservation investment prior to completion of the program. The bill would require the Secretary to manage cash-flow and project lettings to provide reasonable assurance that preservation will be fully funded each year. For this purpose, the bill would specify “preservation projects” refers to maintenance, repairs, or replacement of existing infrastructure;
- *Preservation plus projects.* The bill would authorize safety or technology elements to be added in a preservation plus project. The bill would state such elements may include, but not be limited to, adding paved shoulders, passing lanes, traffic signals, or intelligent transportation system elements or laying broadband fiber or the conduit for broadband fiber. The bill would state it is the intent of the Legislature that the Secretary has the authority to enhance preservation plus projects by adding safety or technology improvements, or both;
- *Expansion and economic opportunity projects.* The bill would authorize expansion and economic opportunity projects, or that improve access, relieve congestion, and enhance economic development opportunities, to be selected using criteria determined by the Kansas Department of Transportation (KDOT) that include, but are not limited to, engineering and traffic data, local

consultation, geographic distribution, and an economic impact analysis evaluation; and

- *Modernization projects.* The bill would authorize modernization projects to improve safety, condition, or service of the highway system (e.g., widening lanes or shoulders and building rail grade separations). Those projects would be selected using KDOT criteria to include, but not be limited to, engineering data, local consultation, and geographic distribution.

The bill would require KDOT to develop criteria for the incorporation of practical improvements into project designs.

Previously Selected Projects

The bill would require the Program to provide for the completion of modernization and expansion projects selected for construction under the Transportation Works for Kansas Program (T-Works) [KSA 68-2314b] and that those projects be let prior to July 1, 2022. The bill would require the Secretary to let to construction contract the remaining T-Works projects before any modernization or expansion project, or both, under the Program is let to construction. The bill would allow completing a reconstruction of an interchange at I-135 and 36th Street in Harvey County to be optional. If that project is not constructed, the bill would require the estimated construction costs for that project to be used on other construction projects in KDOT's south central district.

Local Programs

The bill would require the Program to provide for assistance, including credit and credit enhancements, to cities and counties in meeting their responsibilities for transportation improvements. The bill would state such programs may use criteria developed by KDOT for the incorporation of practical improvements into project designs.

These expenditures could be made for purposes including, but not limited to, the following:

- Apportionment of the Special City and County Highway Fund to assist with their responsibilities for roads and bridges not on the state highway system;
- Sharing federal aid with cities and counties to assist with their responsibilities for roads and bridges not on the state highway system;
- Programs to assist cities with city connecting links and local partnership programs to resurface or geometrically improve city connecting links or to promote economic development;
- Programs similar to KDOT's local bridge improvement program, to replace or repair bridges not on the state highway system;
- Programs to assist cities and counties with railroad crossings of roads not on the state highway system; or
- Programs that allow local governments to exchange federal aid funds for state funds.

Transportation Other than Construction of Roads and Bridges

The bill would require the Program to provide for the following types of programs in accordance with new or continuing law:

- A railroad program for the preservation and revitalization of rail service in the state;
- An aviation program to provide assistance for the planning, constructing, reconstructing, or

rehabilitating the facilities of public use general aviation airports;

- Public transit programs to aid elderly persons, persons with disabilities, and the general public;
- A transportation technology program to provide for multimodal transportation-related projects that support innovative technology; and
- A multimodal program to provide improvement assistance for bike facilities, pedestrian facilities, or other transportation-sensitive economic opportunities on a local or a regional basis.

Project Delivery

The bill would state the program shall allow the Secretary to award certain state highway system projects using delivery procurement methods other than design-bid-build. [Note: Alternative project delivery is further discussed in Section 4.]

Broadband

The bill would state the Program shall provide for a broadband infrastructure construction program. [Note: Broadband construction is further discussed in Section 3.]

Uses of Certain Revenues

The bill would require SHF revenues, which include motor fuel taxes, vehicle registration fees, sales and compensating use taxes, and eligible federal aid, to be used in the following order of priority:

- To pay bond obligations;
- To pay for agency operations;

- To make city connecting link payments;
- To pay for needed preservation projects; and
- Pursuant to other purposes and authority given to the Secretary.

The bill would require new bonds issued for the purposes of the Program to be paid using sales or compensating use tax revenues.

Project Selection

The bill would require the Secretary to determine the projects to be selected, using KDOT selection methods and criteria. The bill would state consideration may be given to additional criteria that could include projects that remove transportation infrastructure from the state highway system, identify priority corridors, include local monetary participation, or reduce project size.

The bill would state legislative intent for the Secretary to develop a metric-driven process that determines a reasonable and fair minimum amount of SHF moneys to be spent on new modernization and expansion projects in each of the six KDOT districts over the duration of the Program. The bill would require the process for determining the minimum amount for each district to be subject to the following limits:

- The minimum amount for each district added together must total at least 50 percent of the estimated cost of constructing all modernization and expansion projects let to contract in the Program;
- If the estimated cost of constructing all Program modernization and expansion projects increases or decreases by more than 10 percent, the minimum amount must be adjusted;

- At least 40 percent of the minimum amount or adjusted minimum amount for each district must be let to construction contract by year 5 of the Program and 100 percent of the minimum amount by year 10; and
- T-Works projects are not to be considered when determining the minimum amounts.

The bill would require the Secretary to select projects for development every two years but would not require the Secretary to construct every project selected for development. The bill would require project selection after consultation with local jurisdictions.

The bill would state it is the intent of the Legislature that the Secretary take the actions necessary to have transportation improvement projects ready to let to construction as cash-flow management allows.

Long-range Planning

The bill would require the Secretary to develop a long-range transportation plan before June 30, 2030, to include recommendations for a new transportation program for the state. The bill would require the plan to examine, but not be limited to, project selection criteria and selection methods used in the Program, transportation funding sources, and Program project categories. The bill would state the plan shall be developed after consultation with the Governor and state and local elected officials.

Innovative Technologies Grants (New Section 2)

The bill would authorize the Secretary to participate in or make grants for projects to plan, assess, and field new capabilities and innovative technologies for modes of transportation including, but not limited to, aviation and highway transportation. The bill would state the new

capabilities should represent increased efficiency for state operations, public cost savings, increased safety, or economic development.

The bill would establish the Transportation Technology Development Fund, which the bill would require to be used to provide assistance with the planning, assessment, and fielding of new capabilities for all modes of transportation including, but not limited to, aviation and highway transportation. Expenditures from this fund would be made in accordance with the provisions of appropriations acts. The bill would state grants made by the Secretary from this fund would be upon such terms and conditions as the Secretary may deem appropriate.

The bill would require the Director of Accounts and Reports to transfer \$2.0 million from the SHF to the Transportation Technology Development Fund on July 1, 2020, and each July 1 thereafter, through July 1, 2030. The Secretary would be authorized to transfer additional moneys between the Transportation Technology Development Fund and the SHF.

Broadband Grants (New Section 3)

The bill would authorize the Secretary, working jointly with the Office of Broadband Development within the Department of Commerce, to make grants for construction projects that expand and improve broadband service in Kansas. The bill would require grants made by the Secretary to reimburse grant recipients for up to 50 percent of actual construction costs in expanding and improving broadband service. Such grant reimbursements would be upon the terms and conditions the Secretary deems appropriate, in coordination with the Secretary of Commerce.

The bill would establish the Broadband Infrastructure Construction Grant Fund, to be used to provide grants for the expansion of broadband service in Kansas. Expenditures

from this fund would be made in accordance with the provisions of appropriations acts. The bill would require the Director of Accounts and Reports to transfer \$5.0 million from the SHF to the Broadband Infrastructure Construction Grant Fund on July 1, 2020, 2021, and 2022. On July 1, 2023, and each July 1 thereafter, through July 1, 2030, the bill would require the transfer to be \$10.0 million. The bill would authorize the Secretary to notify the Director of Accounts and Reports to transfer all remaining and unencumbered funds from the Broadband Infrastructure Construction Grant Fund to the SHF at the end of each fiscal year.

Alternative Procurement (New Section 4)

The bill would authorize the Secretary to use procurement methods other than a design-bid-build contract to the lowest bidder if such methods are a condition of projects obtained through federal grants.

The bill would require KDOT to develop and utilize criteria for selecting whether alternative delivery or design-bid-build procurement is in the best interest of the state. The bill would require the selection criteria to include, but not be limited to, the need for an accelerated schedule, safety needs, project complexity, opportunity for innovation, and economic development. The bill would prohibit any project to be selected for alternative delivery without having been evaluated under the KDOT selection criteria.

The bill would require KDOT to develop and utilize procedures for advertising, receiving, and evaluating proposals; awarding contracts; and administering contracts in its alternative delivery procurement program. The bill would specify procurement procedures in continuing law (on topics including notification, letting to the lowest responsible bidder, negotiations with the contracting firm, and project descriptions) would not apply to alternative delivery projects.

The bill would require the alternative delivery procedures to include the following:

- A two-phase best value competitive selection or contracting process including a first-phase short list of no more than four proposers identified using a request for qualifications and a second phase of submission of price, technical proposals, or both in response to a request for proposals;
- Advertisement of requests for qualifications in the *Kansas Register* for at least three consecutive weeks;
- Prequalification of contractors by the Secretary in accordance with statutes, regulations, and KDOT procedures governing prequalification and licensing;
- A bond for performance and payment or alternative security guaranteeing contract performance and payment obligations for supplies, materials, and labor; and
- A requirement that firms and key personnel identified in the qualifications phase and scored to determine the short list may not be replaced during the project without KDOT's written approval.

The bill would state a contracting entity selected for an alternative delivery project shall not be in violation of laws governing technical professions and the contract shall not be void if such contractor obtains professional services by subcontracting with an entity or entities licensed or holding a certificate of authorization to perform professional services in accordance with laws governing technical professions.

The bill would state a contracting entity selected for an alternative delivery project that is responsible for preparing or furnishing design plans and specifications, through its own

organization or by subcontracting, shall be liable for damages arising from design defects in the plans and specifications that result in injury to persons or damage to property occurring after completion of the contract and KDOT acceptance of the project. The bill would state that would be the case if and to the extent such injury or damage arises from a failure to exercise the degree of learning and skill ordinarily possessed by a reputable contractor or by a technical professional practicing in Kansas in the same or similar locality and under similar circumstances.

Short Line Rail Improvement Fund (New Section 5)

The bill would establish the Short Line Rail Improvement Fund (SLRI Fund) to be administered by the Secretary. The SLRI Fund would be subject to appropriations acts, and expenditures would require the written approval of the Secretary. The bill would require expenditures from the SLRI Fund to be made for a qualified railroad track maintenance expenditure constructed by an eligible entity and to be matched on a basis of 70 percent state moneys to 30 percent eligible entity moneys.

The bill would require transfer of \$5.0 million from the SHF to the SLRI Fund on July 1, 2020, 2021, and 2022.

The bill would define an “eligible entity” as a class II or class III railroad as defined in federal regulations in effect as of January 1, 2020, or any owner or lessee industry track located on or adjacent to a class II or class III railroad in Kansas. The bill would define “qualified railroad track maintenance expenditure” as gross expenditures for maintenance, reconstruction, or replacement of railroad track and related structures in Kansas, if the track was owned or leased by an eligible entity as of January 1, 2020.

City Connecting Links (Section 6)

The bill would increase from \$3,000 to \$5,000 per year per lane per mile the amount the Secretary is required to annually distribute to cities for the maintenance of streets and highways in cities the Secretary has designated as city connecting links. Continuing law authorizes the Secretary to maintain such streets and pay for that maintenance from the SHF with the consent of the city governing body.

The bill would authorize the remainder of the SHF to be spent for any purpose specified in Section 1.

KDOT Annual Report (Section 7)

The bill would add requirements for the written report required under continuing law to be provided to the Governor and each member of the Legislature by the tenth day of the Legislative Session, to require the report:

- Be posted on the KDOT official website and require KDOT to notify all persons or entities who have requested notification of the posting;
- Include annual expenditures from and more detailed information about:
 - Anticipated annual payouts of construction projects already under contract and any proposed construction projects for the next three fiscal years, listing preservation projects separately from modernization and expansion projects;
 - Proposed construction projects to be let to contract in the current fiscal year and anticipated annual payouts for the next three fiscal years for those projects;

- Anticipated expenditures for the next three fiscal years on remaining agency debt service, programs, and operations; and
- Include a comparison of annual revenue expected into the SHF, including ending balance carryovers, for the next three fiscal years;
- For any Program construction project that is more than \$5 million, an explanation of all initial bids submitted and the actual final cost of construction for that project; and
- Include a detailed explanation of the methods or criteria used in selecting projects under Program highway or local programs, including an explanation of the amounts expended and projects selected for construction or development and when and where the next local consults are to take place.

For the report due in 2021, the bill would require the report include a detailed explanation of the methods or criteria used in selecting projects under T-Works and in the awarding of assistance to cities, counties, or other transportation providers and specific recommendations for any statutory changes necessary to successfully complete T-Works or for efficient and effective operation of KDOT.

The bill would add the Transportation Technology Development Fund and the Broadband Infrastructure Construction Grant Fund that would be created by the bill to the funds about which allocation and expenditure information is required in the annual report. The bill would require information about grants under those new funds and on funding shifts between the SHF and the Coordinated Public Transportation Assistance Fund, the Rail Service Improvement Fund, the Public Use General Aviation Airport Development Fund, the Transportation Technology Development Fund, and the Broadband Infrastructure Construction Grant Fund.

The bill would require the annual report to include information concerning the condition and performance of the state highway system.

“\$8 Million Promise” (Section 8)

The bill would require the Secretary to expend or commit to expend at least \$8 million in each county from the revenue provided under the provisions of the Program from July 1, 2020, through June 30, 2030.

Changes to Fund Transfers and Balances (Sections 9, 10, and 11)

The bill would authorize the Secretary to transfer moneys in addition to the \$11.0 million required each year from the SHF to the Coordinated Public Transportation Assistance Fund. The bill also would authorize the Secretary to transfer moneys from the Coordinated Public Transportation Assistance Fund to the SHF. The bill would require the amount remaining in the fund and the amount spent or dedicated for grants or projects for public transportation in each fiscal year to be not less than \$11 million.

The bill would require the amount remaining in the Rail Service Improvement Fund and the amount spent or dedicated for loans or grants in each fiscal year to be not less than \$5 million. Under continuing law, \$5.0 million is to be transferred each July 1 from the SHF to the Rail Service Improvement Fund.

The bill would authorize the Secretary to transfer moneys in addition to the \$5.0 million required each year from the SHF to the Public Use General Aviation Airport Development Fund. The bill also would authorize the Secretary to transfer moneys from the Public Use General Aviation Airport Development Fund to the SHF. The bill would

require the amount remaining in the fund and the amount spent or dedicated for grants in each fiscal year to be not less than \$5 million.

Retailer's Sales and Compensating Use Taxes (Sections 12 and 13)

The bill would amend law to state, starting July 1, 2021, 16.154 percent of the 6.5 percent retailer's sales tax and the same percentage of the compensating use tax shall be levied for the SHF and are to be deposited into the SHF for SHF purposes and for city connecting links.

Background

As introduced, SB 173 would have authorized the Board of Regents to sell certain property in Douglas County on behalf of the University of Kansas. Those provisions were enacted in 2019 House Sub. for SB 25 (the appropriations bill). On March 16, 2020, the House Committee on Appropriations (House Committee) removed the language of the bill, as introduced, and inserted contents of HB 2588, as amended by the House Committee.

HB 2588 (Eisenhower Legacy Transportation Program)

The bill was introduced by the House Committee at the request of the Secretary of Transportation.

In the House Committee hearing, representatives of AAA Kansas, Beachner Grain, CenturyLink, City of McPherson, Economic Lifelines, Greater Kansas City Chamber of Commerce, Heavy Constructors Association of Greater Kansas City, Highway 69 Association, Hodgeman County Economic Development, IdeaTek Telcom, Kansas Motor Carriers Association, Kansas Association of Counties, Kansas Department of Transportation, Kansas Farm Bureau, Kansas Public Transit Association, Kansas Society of Professional

Engineers and American Council of Engineering Companies of Kansas, League of Kansas Municipalities, Mid-American Regional Council, Northern Flyer Alliance, Pittsburg Area Chamber of Commerce, TransSystems, Wichita Regional Chamber of Commerce, and Wichita Public Works and Utilities, testified in support of a new transportation program. The CenturyLink representative suggested that a plan for the broadband grant program as envisioned in House Bill 2618 would help direct broadband funding within HB 2588. The Kansas Public Transit Association representative suggested further definition of the requirement holding the dedication of \$11.0 million be specifically designated as “for public transportation.”

Written-only testimony proponent was provided by representatives of AFL-CIO, City of Newton, City of Olathe, City of Topeka, City of Winfield, GBA, Johnson County Government, Kansas Cooperative Council, Kansas Grain and Feed Association / Kansas Agribusiness Retailers Association / Renew Kansas Biofuels Association, Kansas Rural Independent Telecommunications Coalition and State Independent Telephone Association, Olathe Chamber of Commerce, Overland Park Chamber of Commerce, Sedgwick County Board of County Commissioners, and The Chamber of Lawrence.

Neutral testimony was provided by representatives of CRH Americas Materials, Kansas Asphalt Pavement Association, Kansas Contractors Association, and Midwest Minerals. The representative of CRH Americas Materials suggested that not enough is done within the current bill to protect transportation funding streams, and that during a recession alternative delivery procurement would disproportionately favor larger projects over smaller projects. The representative of the Kansas Contractors Association suggested that alternative delivery usage should be used in limitation as it could further exclude small contractors, and that an automatic increase to motor fuels tax should be considered to protect funding if sales tax transfers are not eliminated.

Written-only neutral testimony was provided by representatives of Bridges Inc., Petroleum Marketers and Convenience Store Association of Kansas (PMCA), and Reece Construction. The representative of Bridges Inc. suggested that the current design-bid-build system is the most efficient procurement method, and allows for price competition, whereas allowing alternative delivery procurement could lead to less competition and favor larger contractors over smaller ones. The representative of PMCA suggested that any increases in motor fuels taxes would place retailers close to a border at a competitive disadvantage.

No further testimony was provided.

The House Committee amended the bill to require the Secretary to establish targets for highway condition; let to construction any remaining T-Works projects before any Program modernization, expansion, or both projects; require any new bonds issued for the Program to be paid using revenues from the state sales and compensating use taxes directed to the SHF; determine amounts for modernization and expansion projects in each KDOT district within certain parameters; manage cash-flow and projects lettings to fully fund preservation; and include in the annual report information on revenues available to the SHF, anticipated expenditures, remaining projects, SHF revenues, and bids for certain projects. The House Committee also amended the bill to define SHF revenues, describe legislative intent with regard to distributing projects geographically and having projects ready to let to construction, require any alternative delivery project to be used only when required for a federal grant, establish the SLRI Fund, and clarify transfers among funds.

Federal regulations (49 CFR §1201.1-1) define a “class II railroad” as a carrier having annual operating revenues of less than \$250 million but exceeding \$20 million and a class III railroad as a carrier having annual operating revenues of \$20 million or less.

According to the corrected fiscal note prepared by the Division of the Budget on February 18, 2020, on the bill as introduced, KDOT estimates total program expenditures from FY 2021 through FY 2030 to total \$9.9 billion. The agency provided the following breakdown by type of expenditure:

- Preservation - \$5.0 billion;
- Preservation Plus - \$300.0 million;
- Modernization and expansion (not including delayed T-Works projects) - \$2.3 billion;
- Economic growth projects - \$200.0 million;
- Modal programs - \$200.0 million;
- Cost share/strategic safety/local bridge programs - \$300.0 million; and
- Special City and County Highway Fund distributions - \$1.6 billion.

KDOT notes these estimates assume the phasing out of SHF transfers to the State General Fund by FY 2023, which would also allow for the issuance of approximately \$1.2 billion in bonds from the SHF over the course of the program. The Department of Revenue estimates expenditures of \$3,945, all from the SHF, to test agency systems and implement the provisions of the bill for FY 2021. Enactment of the bill would have a fiscal effect on local governments, but the League of Kansas Municipalities and the Kansas Association of Counties are unable to estimate that effect. Any fiscal effect associated with enactment of the bill is not reflected in *The FY 2021 Governor's Budget Report*.