HOUSE BILL REPORT
ESSB 5776

As Reported by House Committee On:
State Government

Title: An act relating to review of permit decisions by state agencies and local governments for economic development projects.

Brief Description: Providing an appeal process for state agency and local government permit decisions for economic development projects.

Sponsors: Senate Committee on Land Use & Planning (originally sponsored by Senators Doumit, Morton, Hargrove, Mulliken, Rasmussen, Swecker, Haugen, Zarelli, Reardon, Parlette, McAuliffe and Winsley).

Brief History:
Committee Activity:
State Government: 4/1/03, 4/3/03 [DP].

Brief Summary of Engrossed Substitute Bill

- Creates a new hearings board called the Environmental and Land Use Hearings Board (ELUHB).
- Permits for qualifying economic development projects issued by state and local regulatory agencies may only be appealed to the new ELUHB.

HOUSE COMMITTEE ON STATE GOVERNMENT

Majority Report: Do pass. Signed by 7 members: Representatives Haigh, Chair; Miloscia, Vice Chair; Armstrong, Ranking Minority Member; Shabro, Assistant Ranking Minority Member; Nixon, Tom and Wallace.

Minority Report: Do not pass. Signed by 2 members: Representatives Hunt and McDermott.

Staff: Katie Blinn (786-7114).

Background:

Environmental Hearings Office:

The state Environmental Hearings Office (EHO) contains four boards that hear appeals from decisions made by state and local regulatory agencies. The boards have powers and procedures typical of an adjudicative tribunal, such as the power to administer oaths, take depositions, issue subpoenas, and conduct investigations. The EHO boards conduct administrative hearings de novo and issue written decisions that outline the facts and relevant law for each case. The boards may overturn a permitting agency's decision if the appealing party proves its case by a preponderance of the evidence.

The EHO includes:

- The Pollution Control Hearings Board (PCHB), which hears appeals from orders and decisions made by the Department of Ecology (Ecology), local conservation districts, local air pollution control boards, and local health departments;
- The Shorelines Hearings Board (SHB), which hears appeals of permit decisions and shoreline penalties issued by local governments and Ecology, such as shoreline substantial development, conditional use, and variance permits. There are six members on the SHB, three of which are the three members on the PCHB. The chair of the SHB is also the chair of the PCHB;
- The Forest Practices Appeals Board (FPAB), which hears appeals of decisions made by the Department of Natural Resources, including the approval or denial of forest practices applications, civil penalties, stop work orders, and notices to comply; and
- The Hydraulic Appeals Board (HAB), which has exclusive jurisdiction to hear appeals of hydraulic permits issued by the Department of Fish and Wildlife for diverting water for agricultural irrigation, stock watering, stream bank stabilization, or off-site mitigation plans. The HAB also has jurisdiction to hear appeals of hydraulic permits pertaining to marine beach front bulkheads or rock walls.

Under the Administrative Procedure Act (APA), decisions of the EHO boards may be appealed to the Thurston County Superior Court, the county of the petitioner's residence or principal place of business, or any county where property owned by the petitioner and affected by the decision is located. The APA establishes the other requirements for judicial review of board decisions.

Land Use Petition Act:
The Land Use Petition Act (LUPA) is a uniform appeal process for land use decisions issued by local jurisdictions. The appeal process in LUPA is distinct from the appeal process under the four EHO boards. The LUPA provides an expedited appeal process directly to superior court for final decisions made by local jurisdictions on permit applications that are necessary to improve, develop, modify, sell, transfer, or use real property. The LUPA does not apply to local land use decisions that must be reviewed by a quasi-judicial body created in state law, such as one of the EHO boards.

Office of Permit Assistance:
The Permit Assistance Center was created in 1995 in Ecology to provide the public with information regarding environmental permitting laws, to provide assistance to businesses

and public agencies to comply with permitting laws, to develop and provide a coordinated state permitting procedure that project applicants can use at their option and expense. In 2002 the Permit Assistance Center was renamed the Office of Permit Assistance (OPA) and moved from Ecology to the Office of Financial Management.

Distressed Areas and Rural Natural Resource Impact Areas:
A "distressed area" is defined as:
- a rural county, which is a county with a population density of fewer than 100 persons per square mile;
- a county which has an unemployment rate 20 percent above the state average;
- a county that has a median household income that is less than 75 percent of the state median household income;
- a metropolitan statistical area in which the average unemployment level exceeds the average state unemployment level by 20 percent; or
- an area within a county which (i) is composed of contiguous census tracts; (ii) has a minimum population of 5,000 persons; (iii) has at least 75 percent of its families and unrelated individuals with incomes below 80 percent of the county's median income for families and unrelated individuals; and (iv) has an unemployment rate which is at least 40 percent higher than the county's unemployment rate.

A "rural natural resources impact area" is defined as:
- a nonmetropolitan county that meets three of the five criteria set forth below;
- a nonmetropolitan county with a population of less than 40,000 in the 1990 census that meets two of the five criteria set forth below; or
- a nonurbanized area that is located in a metropolitan county that meets three of the five criteria set forth below.

The following criteria are considered for designating an area as a rural natural resources impact area:
- a lumber and wood products employment location quotient at or above the state average;
- a commercial salmon fishing employment location quotient at or above the state average;
- projected or actual direct lumber and wood products job losses of 100 positions or more;
- projected or actual direct commercial salmon fishing job losses of 100 positions or more; and
- an unemployment rate 20 percent or more above the state average.

Summary of Bill:

A new appeal process is created in the form of a new appeals board, called the Environmental and Land Use Hearings Board (ELUHB), created within the EHO. The

six members on the ELUHB are the same six members on the SHB, and the chair of the ELUHB must be the chair of the SHB. The new appeal process is intended to supersede other existing administrative board and judicial permit appeal procedures. The ELUHB approaches permitting appeals from an umbrella perspective, handling most or all appeals for a particular project in one consolidated appeal before one board, as opposed to hearing separate appeals for each permit before separate boards.

Any state or local permit, license, certificate, approval, or other regulatory or management program document pertaining to the land, air, or water of the state must be appealed to the ELUHB if it is for a qualifying economic development project. A "qualifying project" is an economic development project that is:

- located within a county that entirely qualifies as both a distressed area and a rural natural resources impact area;
- designed to provide at least 30 full-time year-round jobs, and
- designated as a qualifying project by the OPA.

However, the timing and process by which the OPA designates a project as a "qualifying projects" is not established.

If a permit decision involved a factual determination, then the ELUHB review is limited to the record developed below and the hearing must be held within 60 days. If the permit decision involved no factual determinations, then the hearing must be held within 120 days and the ELUHB review is de novo, meaning that the ELUHB may review the decision as if it is the permitting agency and may supplement the record as it deems appropriate. The ELUHB may only grant the appealing party relief if the party establishes that:

- the body or officer that made the permit decision engaged in unlawful procedure or failed to follow a prescribed process;
- the permit decision is an erroneous interpretation of the law, after allowing for deference to the construction of law given an agency with expertise;
- the permit decision is not supported by substantial evidence;
- the permit decision is a clearly erroneous application of the law to the facts;
- the permit decision is outside the authority or jurisdiction of that body or officer; or
- the permit decision violates the constitutional rights of the party seeking relief.

Within 30 days of the hearing, the ELUHB must affirm or reverse each permit decision, or remand the decision for modification or further proceedings before the permitting agency. A party may seek judicial review of an ELUHB decision by filing a petition in Thurston County Superior Court or by seeking direct review in the Court of Appeals. This process of judicial review of ELUHB decisions is distinct from the existing APA judicial appeal process used for the EHO board decisions.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Testimony For: (In support) The bill has been the result of great negotiation between stakeholders. The bill is the result of the extensive permit appeal process experienced by developers who are trying to build a golf course along the shoreline in Grays Harbor County. The main thrust behind the bill is economic development. The bill will expedite the permit appeal process and allow for development that will provide more jobs in Grays Harbor County. The permit appeal process will always involve an aggrieved party since the process is inherently adversarial.

(In support with concerns) Collapsing four boards into one will eliminate the body of caselaw and expertise that has developed over the years, potentially creating bad law. Skipping superior court is a good idea but the shortened time lines are a bad idea. The Legislature should consider doing this as a pilot project, with a two-year termination date

Testimony Against: None.

Testified: (In support) Senator Doumit, prime sponsor; Chuck Maples, Mox Chehalis LLC; LeRoy Tipton, Grays Harbor Chamber of Commerce; Sue Mauermann, Department of Ecology; Gary Nelson, Port of Grays Harbor; and Dan Wood, Washington Farm Bureau.

(In support with concerns) Bruce Wishart, People for Puget Sound.