Washington State
House of Representatives
Office of Program Research

BILL ANALYSIS

Local Government Committee

HB 1662

Brief Description: Addressing appeal and permit procedures under the shoreline management act.

Sponsors: Representatives Takko, Rodne and Angel.

Brief Summary of Bill

- Modifies the Shoreline Management Act (SMA) to apply the Land Use Petition Act to appeals of permit decisions, thereby removing jurisdiction of such appeals from the Shorelines Hearings Board (SHB).
- Specifies circumstances under which work pursuant to a permit that is under appeal may be stayed, including requiring the requesting party to post an injunction bond.
- Removes exclusive jurisdiction of the SHB over appeals brought under both the State Environmental Policy Act and the SMA.

Hearing Date: 2/11/11

Staff: Heather Emery (786-7136).

Background:

Shoreline Management Act.

Policy.

The Shoreline Management Act of 1971 (SMA) governs uses of state shorelines. The SMA enunciates state policy to provide for shoreline management by planning for and fostering "all reasonable and appropriate uses." The SMA prioritizes public shoreline access and enjoyment and creates preference criteria listed in prioritized order that must be used by state and local governments in regulating shoreline uses.

Permits.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

The SMA requires a property owner or developer to obtain a substantial development permit for substantial developments within shorelines areas. "Substantial developments" are defined to include both developments with a total cost or fair market value exceeding $5,000 and developments materially interfering with normal public shoreline or water use. Certain exemptions to the substantial development permit requirement are specified in statute.

Master programs must allow for variances and conditional use permits to avoid creating unnecessary hardships or thwarting SMA policies. Variances and conditional uses must be based on "extraordinary circumstances," may not substantially impair the public interest, and must be approved by the Department of Ecology (DOE).

Each local government must establish a program for the administration and enforcement of a shoreline permit system. While the SMA specifies standards for local governments to review and approve permit applications, the administration of the permit system is performed exclusively by the local government. Local governments, however, must notify the DOE of all SMA permit decisions.

The permit review and approval standards generally specify that the local permit system must include provisions to assure that construction on a project may not begin or be authorized until 21 days from the 'date of receipt,' or until all review proceedings are terminated if the proceedings were initiated within 21 days from the date of receipt. "Date of receipt," for purposes of permit requirements under the SMA, means the date the applicant receives written notice from the DOE that the DOE has received the local government's permit decision. If the permit is for a variance or conditional use, "date of receipt" means the date a local government or applicant receives the written decision of the DOE rendered on the permit.

All shoreline permit decisions must, concurrently with the transmittal of the ruling to the applicant, be transmitted to the DOE and the Attorney General.

Appeals and Timing - Permits.

Appeals of substantial development permit decisions are reviewed by the Shorelines Hearings Board (SHB). Any person aggrieved by the granting, denying, or rescinding of a shorelines permit may seek review from the SHB by filing a petition for review within 21 days of the date of receipt of the decision. Additionally, the DOE or the Attorney General may obtain review of any final decision granting a permit, or granting or denying an application for a permit issued by a local government, by filing a written petition with the SHB and the appropriate local government within 21 days of the date of receipt.

In conducting its review, the SHB follows procedures set forth in the Administrative Procedures Act (APA). The APA provides for a discovery process, including the deposing of witnesses and the issuance of subpoenas and protective orders, and for a hearing at which all parties have the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence. The SHB must issue its decision within 180 days after the petition is filed with the board or a petition to intervene is filed by the DOE or the Attorney General, whichever is later.

Most final decisions of the SHB may be appealed to the superior court. However, direct appeal to the Court of Appeals may be available if the SHB finds that delay in obtaining a final and prompt decision of the issues would be detrimental to any party or the public interest, and either that fundamental and urgent statewide or regional issues are raised, or that the proceeding is likely to have significant precedential value.

Land Use Petition Act.

With limited exceptions, the Land Use Petition Act (LUPA) is the exclusive means of judicial review of land use decisions. However, LUPA does not accommodate judicial review of a land use decision that is subject to review by a quasi-judicial body created by state law. Specifically, the LUPA does not apply to decisions that are subject to review by the SHB.

Designed to provide consistent, predictable, and timely review of land use decisions made by local jurisdictions, the LUPA establishes expedited appeal procedures and uniform criteria for judicial review of these decisions. The Land Use Petition Act review is commenced with the timely filing of a petition for review in superior court. A petition is timely filed if it is filed and served on specified parties, including the local jurisdiction, within 21 days of the issuance of the land use decision by the local jurisdiction.

At an initial hearing occurring between 35 and 50 days after the petition is served on the parties, the court must set a date on which the record of the local decision must be submitted and a date for a hearing or trial on the merits. Generally, the matter must be set for an expedited hearing within 60 days of the date set for submitting the local jurisdiction's record.

With limited exceptions, when the decision being reviewed was made by quasi-judicial body or an officer who made factual determinations in support of the decision, and when the parties had an opportunity to make a record satisfying due process on the factual issues, judicial review may be confined to the record made by the quasi-judicial body or officer**.** Where discovery is allowed by the court, it is strictly limited to what is necessary for equitable and timely review of the issues raised.

On request of any party, the court may suspend an action to implement the land use decision under review. A stay may be granted only if the court finds that:

- the requesting party is likely to prevail on appeal;
- without the stay, the requesting party will suffer irreparable harm;
- the grant of a stay will not substantially harm other parties; and
- the request for the stay is timely, in light of the circumstances of the case.

The court may condition the granting of the stay on terms and conditions, including the filing of security, as are necessary to prevent harm to other parties of the stay.

The court may affirm or reverse the land use decision or remand it for modification or further proceedings. Judicial relief may be granted based on any one of the following grounds:

- the decision maker followed an unlawful procedure or failed to follow a required procedure;
- the land use decision is erroneous in its interpretation or application of the law;
- the land use decision is not supported by evidence;

- the land use decision is outside the authority or jurisdiction of the decision maker; or
- the land use decision violates the petitioner's constitutional rights.

State Environmental Policy Act.

With some exceptions, the State Environmental Policy Act (SEPA) requires local governments and state agencies to prepare an environmental impact statement if proposed legislation or other major action may have a probable significant, adverse impact on the environment. However, if it appears that the proposal is unlikely to have a significant adverse environmental impact, the agency will issue a determination of non-significance. If it appears that a probable significant adverse environmental impact may result, the proposal may be altered or its probable significant adverse impact mitigated. If this cannot be accomplished, a detailed statement or environmental impact statement is prepared.

Rather than creating an independent cause of action, the SEPA stipulates that appeals brought pursuant to its provisions must be linked to a specific government action. When a matter is the subject of a SEPA appeal and an appeal to the SHB, the SHB has exclusive jurisdiction over both matters and is required to issue a final order within 180 days after the petition is filed with the board or a petition to intervene is filed by the DOE or the Attorney General, whichever is later. In other circumstances, jurisdiction may be transferred to the SHB only if all parties agree.

Summary of Bill:

Rather than appealing to the SHB, persons aggrieved by the granting, denying, or rescinding of a permit by a local jurisdiction acting under color of the SMA may appeal to the superior court following the process and procedure set forth in the LUPA.

Construction pursuant to a shorelines permit may commence no sooner than 21 days from the date of receipt, except that work outside the shoreline jurisdiction may commence before issuance of the permit, if the local government finds that such work will not interfere with the goals of the SMA. Work pursuant to a permit that is under appeal may be stayed if the party requesting the stay posts a bond, and the court finds that:

- commencement of the work in advance of a decision on appeal would substantially interfere with the goals of the SMA;
- restoration or mitigation is not feasible; and
- there is a substantial likelihood of success on the merits of the appeal.

The requirement that matters subject to a SEPA appeal and an appeal to the SHB fall under the exclusive jurisdiction of the SHB is deleted. However, such a matter may be transferred, in whole or part, to the SHB if the parties agree to the transfer.

Appropriation: None.

Fiscal Note: Requested on February 8, 2011.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.