

HOUSE BILL REPORT

HB 2162

As Reported by House Committee On: Local Government

Title: An act relating to appeal and permit procedures under the shoreline management act.

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

Sponsors: Representatives Takko, Angel, Rivers, Blake, Springer and Dahlquist.

Brief History:

Committee Activity:

Local Government: 1/10/12, 1/27/12, 1/31/12 [DPS].

Brief Summary of Substitute Bill

- Amends provisions of the Shoreline Management Act governing whether construction on a project can be commenced in advance of a final decision on a permit by the Shorelines Hearings Board.

HOUSE COMMITTEE ON LOCAL GOVERNMENT

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Takko, Chair; Fitzgibbon, Vice Chair; Angel, Ranking Minority Member; Asay, Assistant Ranking Minority Member; Rodne, Smith, Springer and Tharinger.

Minority Report: Do not pass. Signed by 1 member: Representative Upthegrove.

Staff: Kelly Pfundheller (786-7289).

Background:

The Shoreline Management Act of 1971 (SMA) governs uses of state shorelines. The SMA involves a cooperative regulatory approach between local governments and the state. At the local level, the SMA regulations are developed in city and county shoreline master programs that regulate land use activities in shoreline areas of the state.

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.

Substantial Development Permits.

The SMA requires a property owner or developer to obtain a substantial development permit for substantial developments within shorelands. "Substantial developments" 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. "Shorelands" or "shoreland areas" refers to lands extending landward for 200 feet in all directions as measured on a horizontal plane from the ordinary high water mark. Certain exemptions to the substantial development permit requirement are specified in statute.

While the SMA specifies standards for local governments to review and approve permit applications, the administration and enforcement of permit systems are performed primarily at the local level. Local governments must notify the Department of Ecology (DOE) of all permit decisions, and variance and conditional use permits are subject to approval by the DOE.

Commencement of Construction During the Review Process.

Any person aggrieved by the granting, denying, or rescinding of a permit may file a petition for review with the Shorelines Hearings Board (SHB) within 21 days of the permit decision. In circumstances where a permit is granted and a petition for review is subsequently filed, commencement of construction on the project is prohibited until the SHB's review proceedings are terminated.

If the granting of a permit by a local government is sustained by the SHB and appealed to superior court, the appellant may request a hearing to determine whether construction pursuant to the permit should not commence. If the court finds that construction would involve significant, irreversible damage to the environment, the court must prohibit commencement of construction until all review proceedings are final. Absent such a judicial finding, construction may commence no sooner than 30 days after the SHB's decision is filed to superior court.

Summary of Substitute Bill:

If a permit is issued and an appeal of the permit decision is subsequently filed with the SHB, construction landward of the shoreland area may be commenced in advance of final action by the SHB, provided that the local government makes a written finding that such work is not inconsistent with any requirements of the applicable master program or the permit under appeal.

Construction occurring under these circumstances is at the proponent's risk with the project proponent being responsible for meeting the requirements of the final permit decision. During any judicial appeal of a permit decision, a reviewing court may not consider the following as factors favoring the project proponent: (1) the fact that construction landward

of the shoreland area was authorized; and (2) the cost or value of the construction landward of the shoreland area.

An intent section is included.

Substitute Bill Compared to Original Bill:

The substitute bill specifies that a written finding issued by a local government must include a statement that the work is not inconsistent with the permit under appeal. If an appeal involves a conditional use or variance permit, the DOE must also issue a written finding.

The substitute bill adds a provision pertaining to judicial appeals specifying that certain factors that a court may not consider when reviewing a permit decision.

References to areas "outside" shorelands are changed to "landward of" shorelands. The intent section is revised.

Appropriation: None.

Fiscal Note: Available.

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

Staff Summary of Public Testimony:

(In support) The automatic stay in current statute is problematic for businesses and real estate developers. The problem is not visible just by looking at the number of appeals filed with the SHB. When a landowner explores potential development ideas, he or she is faced with the prospect of a permitting process that takes multiple building seasons. This has a chilling effect.

The bill purposefully removes the automatic stay in current statute in order to allow a project to continue in the upland areas at the developer's own risk. This change would provide regulatory certainty, which is good for businesses. The bill will not roll back environmental projects because all shoreline work would remain subject to the SMA and all upland work would remain subject to the Land Use and Petition Act.

There are issues with referencing *Merkel v. Port of Brownsville, 8 Wn. App. 844, 509 P.2d 390 (1973)*, which is a very old case that occurred at the outset of changes resulting from the SMA and the State Environmental Policy Act. The bill should be amended by removing references to *Merkel*. The bill should also specify that the interest of a permit applicant should be considered while still ensuring that the intent of the SMA is not subverted.

(Opposed) It is unclear why this bill is necessary. There are only 15 or so appeals filed per year, and the SHB responds to each appeal within six months. Considering the quick

response time, there is no need to fix anything. Furthermore, a reviewing court might base a permit decision on the fact that upland construction was authorized rather than on the requirements of the SMA. The court can balance the interests of the parties, and in doing so, the court may find that the costs expended to finance upland construction justifies authorizing construction on the shoreline.

There are problems with considering a project in segments rather than as a whole. This is problematic in trying to decide whether or not a project should really move forward, especially when parties will make financial investments in upland construction before there has been a final decision on the shoreline permit.

If the bill does move forward, upland construction should be authorized only when it is not integral to or depend on construction on the shoreline.

Persons Testifying: (In support) Representative Takko, prime sponsor; Tom Clingman, Department of Ecology; Brandon Houskeeper, Association of Washington Bussines; and Heather Burgess, Phillips Wesch Burgess PLLC.

(Opposed) April Putney, Futurewise; Bruce Wishart, People for Puget Sound; and Miguel Perez-Gibson, Climate Solutions.

Persons Signed In To Testify But Not Testifying: None.