

HOUSE BILL REPORT

HB 2201

As Reported by House Committee On:
Local Government

Title: An act relating to the use and governance of hearing examiners.

Brief Description: Addressing the use and governance of hearing examiners.

Sponsors: Representatives Fitzgibbon, Springer and Upthegrove.

Brief History:

Committee Activity:

Local Government: 1/10/12, 1/25/12 [DPS].

Brief Summary of Substitute Bill

- Requires cities with 10,000 or more residents in certain western Washington counties to adopt a hearing examiner system for land-use permits, related appeals, and selected environmental appeals.
- Authorizes these same cities to collect reimbursements for hearing examiner costs from permit applicants or appellants, and to exempt themselves from hearing examiner system requirements.
- Establishes criteria for hearing examiner conduct and systems.
- Authorizes hearing examiners to delay the issuance of final decisions beyond a required 10-day period if specified requirements are met.

HOUSE COMMITTEE ON LOCAL GOVERNMENT

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 5 members: Representatives Takko, Chair; Fitzgibbon, Vice Chair; Springer, Tharinger and Upthegrove.

Minority Report: Do not pass. Signed by 4 members: Representatives Angel, Ranking Minority Member; Asay, Assistant Ranking Minority Member; Rodne and Smith.

Staff: Ethan Moreno (786-7386).

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.

Background:

Hearing Examiners.

Cities and counties may adopt a hearing examiner system under which a hired or contracted hearing examiner hears and determines land-use project applications, including applications pertaining to zoning ordinances and plat approvals, and appeals of administrative decisions. Minimum qualifications for hearing examiners are not established in statute.

Hearing examiners conduct quasi-judicial hearings in place of a planning commission or other decision-making body and must follow prescribed procedures of the applicable county or city. A hearing examiner's decision, as determined by the county or city adopting the hearing examiner system, can have the legal effect of being:

- a recommendation to the city or county legislative body;
- an administrative decision that is appealable to the legislative body; or
- a final decision of the legislative body.

With limited exceptions, the final decision of a hearing examiner must be rendered within 10 working days following the conclusion of all testimony and hearings.

Buildable Lands Program.

The Growth Management Act (GMA), Washington's comprehensive land-use and planning framework for counties and cities, requires six western Washington counties (*i.e.*, Clark, King, Kitsap, Pierce, Snohomish, and Thurston counties) and the cities within those counties, to establish a review and evaluation 'buildable lands' program. The purpose of the program is to determine whether a county and its cities are achieving urban densities and to identify reasonable measures, subject to statutory provisions, that will be taken to comply with the GMA requirements.

Summary of Substitute Bill:

Mandatory Hearing Examiner Systems – Selected Cities.

Cities with 10,000 or more residents that are located within counties subject to the 'buildable lands' requirements of the GMA must adopt an ordinance requiring hearing examiners to hear and decide specific land-use permits and appeals. The hearing examiner ordinance, which must be adopted by April 30, 2013, must generally require that all project permits, administrative appeals of project permit decisions, and environmental appeals that require an open record hearing, be decided by a hearing examiner. After March 31, 2013, cities subject to the hearing examiner ordinance requirement may elect to exempt themselves from the ordinance-related requirements.

The required hearing examiner ordinance may also permit subject cities to apply the clearly erroneous standard of review in appeals of administrative decisions that are heard and decided by hearing examiners.

Cities subject to the hearing examiner ordinance requirement may also require a project permit applicant, or the appellant of a project permit decision who is not an applicant, to

reimburse the city for the cost of using the hearing examiner, including hearing examiner time and associated administrative staff and notice costs. Failure by an appellant to pay the required fees, costs, and reimbursements must result in a default judgment against the appeal.

Hearing Examiners – Qualifications and Systems.

General hearing examiner qualifications and system requirements are established. For example:

- hearing examiners must be impartial and independent from the officials and departments who provide recommendations or whose decisions may be appealed to the hearing examiner; and
- hearing examiners must avoid conflicts of interest and ex parte communications, and must adhere to the appearance of fairness doctrine.

Additionally, ordinances establishing hearing examiners or hearing examiner systems must:

- specify the qualifications for hiring and the terms and conditions under which the hearing examiner will serve;
- authorize the hearing examiner to recuse himself or herself and include a process for assigning a different person to the matter; and
- establish rules of practice and procedure.

Delayed Issuance of Decisions.

A hearing examiner in a city subject to the hearing examiner ordinance requirement of the bill may delay the issuance of a decision beyond the generally required 10-working-day period if he or she has certified his or her costs to the applicable city or county, and if the city or county has, within the same 10-day period, billed the applicant or appellant for those costs. Failure by an appellant to pay required fees, costs, or reimbursements must result in a default judgment against the appeal.

Substitute Bill Compared to Original Bill:

The substitute bill makes the following changes to the original bill:

- changes the date by which a qualifying city must adopt an ordinance for the use of a hearing examiner system from March 31, 2013, to April 30, 2013;
- removes a provision that caps hearing examiner fees, costs, or reimbursements required of appellants who are not applicants at \$1,500;
- removes a provision that allows the \$1,500 cap to be annually increased;
- removes a provision specifying that hearing examiner contracts must have terms of at least two years and may be subject to cancellation only for cause;
- specifies that the provisions authorizing a hearing examiner to delay issuance of decision beyond the required 10-day period apply to cities subject to the hearing examiner requirements proposed in the underlying bill;
- specifies that failure by an appellant to pay authorized hearing examiner fees, costs, or reimbursements proposed in the underlying bill must result in a default judgment against the appeal; and
- makes technical changes.

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) When a quasi-judicial planning-related matter is brought before a city, it will be heard by a planning commission before it is heard by the city council. Planning commissions and councils, however, are not always as qualified to make these decisions as experienced planners. Also, quasi-judicial decisions of planning commissions and councils expose the city to legal risks. This bill is intended to make qualifying cities consider the use of a hearing examiner. Under the bill, these cities must use the examiner process, but they also have the authority to 'opt out' of the process. The goal of this bill is to make sure that land-use decisions are made by persons with land-use expertise and appropriate qualifications.

This bill is similar to Senate Bill 5013 of 2011, but is an attempt to improve upon concerns associated with that bill. The Washington chapter of the American Planning Association (APA) is interested in regulatory certainty and it wants timely, fair, and predictable decisions. The APA believes that permit appeals are best handled by hearing examiners. This bill allows legislative bodies to do what only they can do—legislate. As written, 52 cities qualify under the bill; 50 of those cities already use a hearing examiner, but not to make final decisions. The 'opt out' provisions in the bill are simple to follow.

(With concerns) This bill springs from the planning community. Section 2 of the bill specifies that a failure to pay fees must result in a default judgment against the appeal. Sections 4 through 7 of the bill authorize hearing examiners to delay their decisions if hearing examiner fees have not been paid. Unless amended, the bill might create a situation that allows someone wishing to delay a development project to do so by not paying a hearing examiner fee and thus preventing the issuance of a decision.

Hearing examiner systems limit the legal exposure of cities. Some cities are strong proponents of hearing examiner systems, as it makes sense to use and employ hearing examiners. The decision to use them, however, should be left to the local jurisdiction. In these economic times, this bill might not make sense. The cost cap provisions in the bill apply only to appellants of project permit decisions who are not applicants. This language belies an assumption that all businesses can easily pay hearing examiner fees, but this assumption is untrue, especially for small businesses.

(Opposed) None.

Persons Testifying: (In support) Joe Tovar, American Planning Association, Washington Chapter.

(With concerns) Scott Hildebrand, Master Builders Association of King and Snohomish Counties; Dave Williams, Association of Washington Cities; and Brandon Houskeeper, Association of Washington Business.

Persons Signed In To Testify But Not Testifying: None.