

# HOUSE BILL REPORT

## 2SHB 1662

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### As Amended by the Senate

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

**Brief Description:** Specifying circumstances under which work outside a shoreland area may commence in advance of the issuance of a shoreline permit.

**Sponsors:** House Committee on General Government Appropriations & Oversight (originally sponsored by Representatives Takko, Rodne and Angel).

#### **Brief History:**

##### **Committee Activity:**

Local Government: 2/11/11, 2/15/11 [DPS];

General Government Appropriations & Oversight: 2/18/11, 2/21/11 [DP2S(w/o sub LG)].

##### **Floor Activity:**

Passed House: 3/4/11, 97-0.

Senate Amended.

Passed Senate: 4/7/11, 45-2.

#### **Brief Summary of Second Substitute Bill**

- Modifies the Shoreline Management Act to allow for the commencement of work outside the shoreland area in advance of issuance of a shoreline permit, if the work outside the shoreland area does not depend on or require the work proposed within the shoreland area, and if the local government finds that such work will not interfere with the goals of the Shoreline Management Act.

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### HOUSE COMMITTEE ON LOCAL GOVERNMENT

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 6 members: Representatives Takko, Chair; Angel, Ranking Minority Member; Asay, Assistant Ranking Minority Member; Rodne, Smith and Springer.

**Minority Report:** Do not pass. Signed by 3 members: Representatives Tharinger, Vice Chair; Fitzgibbon and Upthegrove.

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*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.*

**Staff:** Heather Emery (786-7136).

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**HOUSE COMMITTEE ON GENERAL GOVERNMENT APPROPRIATIONS & OVERSIGHT**

**Majority Report:** The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Local Government. Signed by 8 members: Representatives Hudgins, Chair; Miloscia, Vice Chair; Blake, Fitzgibbon, Ladenburg, Moscoso, Pedersen and Van De Wege.

**Minority Report:** Do not pass. Signed by 5 members: Representatives McCune, Ranking Minority Member; Taylor, Assistant Ranking Minority Member; Ahern, Armstrong and Wilcox.

**Staff:** Owen Rowe (786-7391).

**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.*

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.

*Automatic Stay.*

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 statutorily defined date of receipt, or until all review proceedings are terminated if the proceedings were initiated within 21 days from the date of receipt. However, in certain circumstances, construction may be commenced while review proceedings are ongoing. If the granting of a permit by a local government is sustained by the Shorelines Hearings Board (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 subsequently finds that the construction would involve a significant, irreversible damaging of the environment, the court shall prohibit the permittee from commencing construction until all review proceedings are final. Absent such a judicial finding, however, construction may commence no sooner than 30 days after the date of the appeal of the SHB's decision is filed to superior court.

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

#### **Summary of Second Substitute Bill:**

Provisions of the underlying bill that would have applied the Land Use Petition Act (LUPA) to appeals of certain permit decisions under the SMA, thereby removing these appeals from the jurisdiction of the SHB, are deleted.

A provision of the underlying bill that would have removed matters jointly appealed under the State Environmental Policy Act (SEPA) and the SMA from the exclusive jurisdiction of the SHB is deleted.

A provision that would allow work outside a shoreland area to commence if that work is not dependent on work proposed inside the shoreland area, and if the local government finds that such work will not interfere with the goals of the SMA, is inserted.

#### **EFFECT OF SENATE AMENDMENT(S):**

The Senate amendment: (1) establishes that if an appeal is filed with the Shorelines Hearings Board, construction outside of the shoreland area may be commenced in advance of final action on the appeal, provided the local government makes a written finding that such work does not depend on or require work proposed within the shoreland area and is not inconsistent with any requirements of the applicable master program; and (2) establishes that project construction occurring under the authority of this provision is at the proponent's risk, with the project proponent being responsible for meeting the requirements of the final permit decision after appeal.

**Appropriation:** None.

**Fiscal Note:** Available.

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

**Staff Summary of Public Testimony (Local Government):**

(In support) As it currently exists, the SHB process stops projects. When the SHB was created, it was an important element of environmental protection. Now, it creates several costly problems. When work is stayed because a permit is under appeal, upland work is also stayed. Duplicate open record hearings are inefficient. The process is expensive for the building industry and can cause up to an 18-month delay in construction.

(With concerns) The SHB offers unique expertise and provides valuable services, including mediation, site visits, and technical assistance. It issues written findings of fact and conclusions of law, and may approve, reverse or remand a local government's permit decision. Over the last six years, the SHB has reviewed approximately 200 permit decisions, averaging 25 to 35 per year. Sixty percent of those pertain to residential permits, and the remaining 40 percent relate to permits for commercial development.

(Opposed) The expertise of the SHB contributes to the development of a consistent body of law that helps provide direction for other SMA matters around the state. More erratic decision making would lead to more appeals. Unlike the civil court system, the SHB operates under statutorily set timelines that guarantee a decision within 180 days. Obtaining a stay is difficult, and eliminating the stay would harm water quality. There may be room to compromise on whether work in upland areas should be stayed during the pendency of an appeal to the SHB.

**Staff Summary of Public Testimony (General Government Appropriations & Oversight):**

(In support) The automatic stay when a project is appealed to the SHB and the de novo review of a project are problematic. The intent of this bill is to create some efficiencies and to streamline the permit process, so that projects that have multiple permits within a shoreline jurisdiction are not held up. The fiscal note should consider the streamlining and efficiencies in this bill through the consolidation of permit appeals, not just the transfer of work from the SHB to the superior court system. There are portions of the environmental process that do need to be streamlined and are not as efficient as they could be. The Environmental Hearings Office (EHO) is a good example of an inefficient agency. The EHO does not fulfill functions that it needs to for either environmentalists or businesses, and people would be better off in court than going through the EHO. The Land Use Petition Act process should not be used in this bill; a normal SEPA appeal or a writ procedure would be more effective.

(Opposed) There is interest in working on this bill further to remove concerns at the policy and fiscal level. The SHB was created to be a cost effective and efficient forum for SMA appeals. The de novo review procedure has been effective because local planning permit processes and efforts vary. The fiscal note underestimates the burden to the state's court system, and this bill could cause a greater overall number of appeals. The SHB is able to coordinate a better review of appeals and is also able to conduct site visits as part of its review. The SHB has expertise in this area of law, while superior court judges could make more erratic decisions, which could lead to more litigation. The SHB is a forum where

appellants can argue pro se before the SHB without having to hire an attorney; this would not be the case in superior court. This bill increases costs to the state, local governments, and individual appellants.

**Persons Testifying** (Local Government): (In support) Representative Takko, prime sponsor; and Sandy Mackie, Perkins Coie/Land Use Committee Association.

(With concerns) Andrea McNamara Doyle, Shorelines Hearings Board.

(Opposed) Tom Clingman, Department of Ecology; April Putney, Futurewise; and Bruce Wishart, People for Puget Sound.

**Persons Testifying** (General Government Appropriations & Oversight): (In support) Chris McCabe, Association of Washington Business; and Arthur West.

(Opposed) Andrea McNamara Doyle, Shoreline Hearings Board; and Bruce Wishart, People for Puget Sound.

**Persons Signed In To Testify But Not Testifying** (Local Government): None.

**Persons Signed In To Testify But Not Testifying** (General Government Appropriations & Oversight): None.