



Oregon

Kate Brown, Governor

Department of Consumer and Business Services

Building Codes Division
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April 4, 2017

House Committee on Economic Development & Trade
Oregon House of Representatives
900 Court St. NE
Salem Oregon 97301

Re: HB 2153 (-2)

Dear Chair Lininger and members of the House Committee on Economic Development & Trade:

HB 2153 as proposed placed an interior design licensing program within the Oregon Business Development Department. HB 2153(-1) made several changes, including moving the program to Department of Consumer and Business Services (DCBS). DCBS submitted a fiscal impact statement on the HB 2153(-1) identifying issues that would need to be addressed in order to provide a more complete analysis, including concerns about delegating the interior design qualifying examination to a private entity and concerns that what the bill called a voluntary registry was actually a professional license. The majority of those concerns were not addressed by the (-2) amendment.


After submitting the fiscal impact statement for HB 2153(-1) and after receiving the (-2) amendment, DCBS received communication from its attorney at Department of Justice (DOJ) relating to concerns raised in the initial (-1) fiscal, as well as other concerns about the (-2) as drafted. That email from DOJ counsel is attached. The DOJ communication included a concern that the bill creates an unlawful delegation of state authority to private entities relative to the qualification and testing of interior designers. The email also states that HB 2153(-2) is a practice act, creating a professional license.

In order to address the concerns raised by our attorney related to HB 2153(-2), the bill would need to be further amended. Our office communicated two possible approaches to the proponent of the bill:

- 1) Align the interior design program with an existing program within BCD; or
- 2) Address the legal issues raised in order to establish this new licensure program.

The legal obstacles identified by DOJ are not addressed in the (-2) amendments. It is important for the Legislature and proponents to understand that the agency does not believe the bill can be legally implemented as drafted.

Sincerely,



Mark Long
Administrator



From: LOZANO Katharine M
Sent: Monday, March 27, 2017 8:47 AM
To: LONG Mark * DCBS
Cc: RABE Linda E * DCBS
Subject: HB 2153-2

Good morning. You have asked me to provide a legal analysis of HB 2153-2. Because you have emphasized the importance of a timely response, I am providing this analysis via electronic mail, rather than in a formal memorandum.

HB 2153-2 is a bill that appears to have three significant legal flaws, discussed below in descending order of gravity, and a requirement that the Division may be unable to implement.

First, the bill appears to provide an unconstitutional and unlawful delegation of state authority to private entities. As it is currently written, all determinations of qualification for state certification are made by private, third parties. Under Article III of the Oregon constitution and numerous court decisions, governmental power must be exercised by the government. Neither the legislature nor any agency may delegate governmental power to parties outside the government, particularly when the ultimate right to make the governmental decision (here, whether an individual qualifies for state certification) is given to the party outside the government.

Second, it is internally inconsistent. Although it purports to be a bill establishing "voluntary certification," it does not establish voluntary certification with respect to scope of work. It is unlike a title act, for example, where licensure or certification is not necessary to perform the relevant scope of work. Instead, it provides for "voluntary" certification only in the same sense that any professional licensing program is a component of voluntarily electing to pursue a profession. HB 2153-2 is a practice act (scope of work) because of the language that requires the DCBS Building Codes Division to accept plans and drawing submitted by holders of the certification it establishes, thereby including individuals who would be certified under it in a category of persons for whom, currently, other state professional licensure is required in order to be able to provide certain work.

Third, because, under Section 2(3) of this bill, municipalities that have assumed a building department on the approval and behalf of the Division are not required to verify the Division's certification established under HB 2153-2, it creates a regulatory structure under which: unlike all of the individuals engaged in the building trades and certified by the Division, completely uncertified individuals will easily be able to perform the scope of work currently reserved for qualified and licensed as architects or engineers without being detected and with the tacit approval of local governments who are carrying out duties on behalf of the state; and, the Division's ability to carry out its own statutory duties and authorities under ORS 455.148, 455.150, and 455.770 will be undermined because the Division will be prevented from assessing whether a municipality that has assumed a building department on behalf of the Division has followed the licensing laws and rules of the Division in this area.

Finally, qualification for an individual certified under HB 2153-2 to submit plans and drawings to a local building department or the Division includes the certified individual being an employee of a registered architect or registered professional engineer. I am not familiar with statutes or database of the Oregon Board of Architect Examiners, but neither the Division, nor the Oregon Board of Examiners for Engineering and Land Surveying has a mechanism or authority to require information from registered professional engineers, who are not involved in a disciplinary investigation, related to whether those registered professional engineers in their individual capacities have employees or, if so, who they employ. Moreover, engineering *firms* are not regulated as professional entities in Oregon at all, and the Secretary of State's business registry does not require or provide lists of employees, much less continuously updates ones.

Thank you for the opportunity to work with you. If you have any questions, concerns, or would like additional or more in-depth analysis of this legislation, please do not hesitate to contact us.

Katharine M. Lozano

Assistant Attorney General | Business Activities Section | General Counsel Division
Oregon Department of Justice
1162 Court St. NE, Salem, OR 97301-4096
503.947.4520

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This e-mail may contain information that is privileged, confidential, or otherwise exempt from disclosure under applicable law. If you are not the addressee or it appears from the context or otherwise that you have received this e-mail in error, please advise me immediately by reply e-mail, keep the contents confidential, and immediately delete the message and any attachments from your system.

2017 Legislative Session
AGENCY FISCAL IMPACT STATEMENT FORM
(See instructions for completing form)

Please complete this form, and return one copy each to the Legislative Fiscal Office (LFO) and the Budget and Management Division (BAM).

Agency Name: Department of Consumer and Business Services
Preparer Name/Title: Dawn Bass, Financial Operations Manager
Preparer Phone #: 503-378-3755
Date Submitted: 04/04/2017

Measure #: HB 2153 Version: -2

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| <input type="checkbox"/> No fiscal impact | The absence of an expenditure or revenue (non-tax) impact. |
| <input type="checkbox"/> Minimal Impact | A fiscal impact that can be absorbed with existing agency resources. |
| <input checked="" type="checkbox"/> Fiscal Impact | A fiscal impact determined to be greater than a minimal fiscal impact. |

The budgetary impact of this bill was reviewed and approved by the Interim Joint Committee on Ways and Means to be recommended to be included in the omnibus budget bill.

Yes _____ No X

Is the bill anticipated by the Governor's Recommended Budget as a Policy Option Package? If yes, please identify the Policy Option Package name and number in your written analysis.

Yes _____ No X

BILL DESCRIPTION

HB 2153-2 requires DCBS to establish a certification program for commercial interior designers who wish to perform work that would otherwise require licensure as an architect or engineer, and establishes standards for certification and continuing education. The bill allows DCBS to establish an application fee that is reasonably calculated to cover the costs of administering and enforcing the certification program. The bill allows certified commercial interior designers (CCID) to submit plans, drawings, designs, and specifications for single family residential and small commercial structures, or any structure when prepared as an employee or under the direction of a registered architect or registered professional engineer. The bill explicitly does not require any building inspection program to verify the certification of a CCID that submits plans, drawings, designs, and specifications.

AGENCY WRITTEN ANALYSIS:

HB 2153 as proposed placed an interior design licensing program within the Oregon Business Development Department. HB 2153(-1) made several changes, including moving the program to DCBS. DCBS submitted a fiscal impact statement on the HB 2153(-1) identifying several issues that would need to be addressed in order to provide a more complete analysis, including concerns about delegating the examination to a private entity and concerns that what the bill called a voluntary registry was actually a professional license. The majority of those concerns were not addressed by the (-2) amendment.

After submitting the fiscal impact statement for HB 2153(-1) and after receiving the (-2) amendment, DCBS received advice from its attorney at DOJ relating to concerns raised in the initial (-1) fiscal, as

well as other concerns about the (-2) as drafted. That DOJ advice is attached. The advice included a concern that the bill creates an unlawful delegation of state authority to private entities relative to the qualification and testing of interior designers. The advice also identifies that HB 2153(-2) is a practice act, creating a professional license. The analysis below reflects an updated fiscal impact statement, taking into account the changes to the bill in the (-2) and the advice received from DOJ.

HB 2153-2 makes registration with the department for CCIDs. However, the bill exempts only registered CCIDs from some statutory requirements related to design professionals and authorizes CCIDs to submit certain plans. As such, the -2 amendment functionally establishes a limited designer "license" and creates a new government program within DCBS to carry out the related regulatory responsibilities by the building codes division. Currently regulation of design professionals occurs at both the Oregon State Board of Examiners for Engineering and Land Surveying and the Oregon Board of Architect Examiners. These agencies have statutes, rules, budget, and staff to ensure oversight and accountability for registered design professionals. Establishing a new program in a third agency to regulate design professionals increases the regulatory cost and impacts our fiscal assessment.

There are various elements in establishing a new regulatory program that is not consistent with any of the division's existing programs. Therefore our assumptions are based largely on our experience as a regulatory agency adopting and enforcing a comprehensive regulatory program. We have been advised by counsel of the following issues, which may need additional clarification and possible amendment in order to provide a more accurate fiscal assessment.

1. The amendment provides that certified interior designers are qualified to submit certain plans, but also provides that a municipality administering a building inspection program is not required to verify whether a person is certified as an interior designer when accepting plans. It is unclear how these sections are intended to be read together.
2. Further, the -2 amendments require DCBS to rely on external examination and accreditation groups. Relying on an external examination creates an illegal delegation problem if not crafted to protect the due process rights of Oregonians. To overcome the delegation issue, the Department would need to create a proprietary CCID exam. The Department typically relies on statutory boards to develop and review licensing exams. A similar stakeholder process would be required to ensure the exam meets the intent of the CCID, and staff would be required to develop and maintain the examination.

Notwithstanding the issues cited above, the -2 amendment establishes a new government program that requires additional staff in order to adopt and administer standards, resolve disputes, process applications and enforce requirements. The division had more than 30 positions removed from the agency in the 2011 session and cannot absorb a new government program with existing resources.

The division estimates that the new program will require additional resources as follows. One additional limited duration position (0.50 FTE) policy staff to create a proprietary CCID exam. An additional 0.50 FTE policy staff to establish and update standards, coordinate the program generally, resolve disputes and coordinate issues with local government. An additional 0.50 FTE licensing staff to review and process applications, verify requirements, perform data entry, process renewals, including tracking of continuing education. An additional 0.50 FTE enforcement officer to enforce requirements against registrants for violations of the program.

The division is currently in the process of renegotiating the contract for a new software-as-a-service licensing database. There will likely be additional costs associated with establishing a new category of

registration within the licensing database. The contract is not yet complete so we cannot determine the cost at this time.

The bill does not establish a license fee but authorizes DCBS to establish a fee needed based on the costs associated with administering the program. Based on the costs described above, DCBS estimates a necessary fee of \$383 assuming 1,000 individuals in a renewal cycle. This would generate \$287,250 Other Funds revenue in 2017-19. Fees may need to be modified in the 2019-21 biennium to reflect the ending of the limited duration position.

AGENCY QUANTITATIVE ANALYSIS Provide a detail description of the proposed legislation's effect on expenditures, revenues, and full time equivalent (FTE) positions. The table below is an embedded Excel worksheet. To fill out the form, place your mouse on the table; right click; select Worksheet Object and Open. If your analysis is number intensive, you may want to use just the Excel version of this template.

	<u>General Fund</u>	<u>Lottery Funds</u>	<u>Other Funds</u>	<u>Federal Funds</u>	<u>NL Other Funds</u>	<u>NL Federal Funds</u>	<u>TOTAL FUNDS</u>
2017-19 Biennium							
Personal Services	\$ -	\$ -	\$ 258,710	\$ -	\$ -	\$ -	\$ 258,710
Services and Supplies	\$ -	\$ -	\$ 28,443	\$ -	\$ -	\$ -	\$ 28,443
Special Payments	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Capital Outlay	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Capital Construction	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Debt Service	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Total	\$ -	\$ -	\$ 287,153	\$ -	\$ -	\$ -	\$ 287,153
2019-21 Biennium							
Personal Services	\$ -	\$ -	\$ 224,361	\$ -	\$ -	\$ -	\$ 224,361
Services and Supplies	\$ -	\$ -	\$ 39,031	\$ -	\$ -	\$ -	\$ 39,031
Special Payments	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Capital Outlay	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Capital Construction	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Debt Service	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Total	\$ -	\$ -	\$ 263,392	\$ -	\$ -	\$ -	\$ 263,392
Effect on Revenues (by Fund):							
	<u>General Fund</u>	<u>Lottery Funds</u>	<u>Other Funds</u>	<u>Federal Funds</u>	<u>NL Other Funds</u>	<u>NL Federal Funds</u>	<u>TOTAL FUNDS</u>
2017-19 Biennium	\$ -	\$ -	\$ 287,250	\$ -	\$ -	\$ -	\$ 287,250
2019-21 Biennium	\$ -	\$ -	\$ 383,000	\$ -	\$ -	\$ -	\$ 383,000
Effect on Position(s) / FTE(s):							
	<u>Months of Impact</u>		<u>2017-19</u>	<u>2017-19</u>		<u>2019-21</u>	<u>2019-21</u>
	<u>2017-19</u>	<u>2019-21</u>	<u>Position Count</u>	<u>FTE</u>		<u>Position Count</u>	<u>FTE</u>
	15	24	4	1.64		3	1.50

Please complete detail Personal Services information using "PS Calculation" tab.

2017 Legislative Session
AGENCY FISCAL IMPACT STATEMENT FORM
(See instructions for completing form)

Please complete this form, and return one copy each to the Legislative Fiscal Office (LFO) and the Budget and Management Division (BAM).

Agency Name: Department of Consumer and Business Services
Preparer Name/Title: Carolina Marquette, Financial Business Services Manager
Preparer Phone #: 503-947-7381
Date Submitted: 03/09/2017

Measure #: HB 2153 Version: -1

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| <input type="checkbox"/> No fiscal impact | The absence of an expenditure or revenue (non-tax) impact. |
| <input type="checkbox"/> Minimal Impact | A fiscal impact that can be absorbed with existing agency resources. |
| <input checked="" type="checkbox"/> Fiscal Impact | A fiscal impact determined to be greater than a minimal fiscal impact. |

The budgetary impact of this bill was reviewed and approved by the Interim Joint Committee on Ways and Means to be recommended to be included in the omnibus budget bill.

Yes _____ No X

Is the bill anticipated by the Governor's Recommended Budget as a Policy Option Package? If yes, please identify the Policy Option Package name and number in your written analysis.

Yes _____ No X

BILL DESCRIPTION

HB 2153-1 requires DCBS to establish a certification program for commercial interior designers who wish to perform work that would otherwise require licensure as an architect or engineer, and establishes standards for certification and continuing education. The bill allows certified commercial interior designers (CCID) to submit plans, drawings, designs, and specifications for single family residential and small commercial structures, or any structure when prepared as an employee or under the direction of a registered architect or registered professional engineer. The bill prohibits any building inspection program from refusing to accept or imposing special conditions for the acceptance of plans, drawings, designs, and specifications submitted by a CCID and allows a CCID to supervise the carrying out of the work in specified structures, whether or not the CCID was the submitter of the plans, drawings, designs, and specifications for the work.

AGENCY WRITTEN ANALYSIS:

HB 2153-1 makes registration with the department voluntary for CCIDs. However, the bill exempts only registered CCIDs from some statutory requirements related to design professionals and authorizes CCIDs to submit work under a valid registration. As such, the -1 amendment functionally establishes a limited designer "license" and creates a new government program within DCBS to carry out the related regulatory responsibilities by the building codes division. Currently regulation of design professionals occurs at both the Oregon State Board of Examiners for Engineering and Land Surveying and the Oregon Board of Architect Examiners. These agencies have significant statutes, rules, budget, and staff to ensure oversight and accountability for registered design professionals. Establishing a new

program in a third agency to regulate design professionals increases the regulatory cost and impacts our fiscal assessment.

The division has not had the opportunity to discuss the amendment directly with the bill proponents and has had limited time to assess the proposal. There are various elements in establishing a new regulatory program that is not consistent with any of the division's existing programs. Therefore our assumptions are based largely on our experience as a regulatory agency adopting and enforcing a comprehensive regulatory program. The following issues may need additional clarification and possible amendment in order to provide a more accurate fiscal assessment.

1. The amendment requires the state or a local building inspection program to determine when plan are submitted by a CCID, the employment status of the CCID, the actual working arrangement of the CCID, or whether the plans qualify for submission by a CCID without a working relationship with an architect or engineer. The bill is unclear as to how this verification should take place. A continually updated electronic registry would be the most accurate and timely method of verifying the registration and employment status but would create an additional fiscal impact. Absent an electronic system, additional time will be required during plan review intake to determine whether the CCID is qualified to submit the specific plans.
2. Further the -1 amendments require DCBS to rely on external examination and accreditation groups. It is our experience that such a model can create an illegal delegation problem if not crafted to protect the due process rights of Oregonians. The Department of Justice may need to be consulted to determine whether the model proposed creates an unlawful delegation problem. If the Department had to create its own exam the fiscal would increase.

Notwithstanding the issues cited above, the -1 amendment establishes a new government program that requires additional staff in order to adopt and administer standards, resolve disputes, process applications and enforce requirements. The division had more than 30 positions removed from the agency in the 2011 session and cannot absorb a new government program with existing resources.

The division estimates that the new program will require additional resources as follows. An additional 0.50 FTE policy staff to establish and update standards, coordinate the program generally, resolve disputes and coordinate issues with local government. An additional 0.50 FTE licensing staff to review and process applications, verify requirements, perform data entry, process renewals, including tracking of continuing education. An additional 0.50 FTE enforcement officer to enforce requirements against registrants for violations of the program or against local governments for failure to accept documents submitted by legally registered individuals.

The division is currently in the process of renegotiating the contract for a new software-as-a-service licensing database. There will likely be additional costs associated with establishing a new category of registration within the licensing database. The contract is not yet complete so we cannot determine the cost at this time.

The bill does not establish a license fee but authorizes DCBS to establish a fee needed based on the costs associated with administering the program. Based on the costs described above, DCBS estimates a necessary fee of \$260 assuming 1,000 individuals in a renewal cycle. This would generate \$195,000 Other Funds revenue in 2017-19.

AGENCY QUANTITATIVE ANALYSIS Provide a detail description of the proposed legislation's effect on expenditures, revenues, and full time equivalent (FTE) positions. The table below is an embedded Excel worksheet. To fill out the form, place your mouse on the table; right click; select Worksheet Object and Open. If your analysis is number intensive, you may want to use just the Excel version of this template.

AGENCY NAME DCBS

Measure Number-Version HB 2153-1

No fiscal impact Preparer Name/Title: **Carolina Marquette, Financial Business Services Manager**
 Minimal impact Preparer Phone #: **503-947-7381**
 Fiscal Impact Date Submitted: **03/08/2017**

Effect on Expenditure (by Fund and Category):

	General Fund	Lottery Funds	Other Funds	Federal Funds	NL Other Funds	NL Federal Funds	TOTAL FUNDS
2017-19 Biennium							
Personal Services	\$ -	\$ -	\$ 170,514	\$ -	\$ -	\$ -	\$ 170,514
Services and Supplies	\$ -	\$ -	\$ 19,857	\$ -	\$ -	\$ -	\$ 19,857
Special Payments	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Capital Outlay	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Capital Construction	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Debt Service	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Total	\$ -	\$ -	\$ 190,371	\$ -	\$ -	\$ -	\$ 190,371

	General Fund	Lottery Funds	Other Funds	Federal Funds	NL Other Funds	NL Federal Funds	TOTAL FUNDS
2019-21 Biennium							
Personal Services	\$ -	\$ -	\$ 224,361	\$ -	\$ -	\$ -	\$ 224,361
Services and Supplies	\$ -	\$ -	\$ 30,445	\$ -	\$ -	\$ -	\$ 30,445
Special Payments	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Capital Outlay	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Capital Construction	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Debt Service	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Total	\$ -	\$ -	\$ 254,806	\$ -	\$ -	\$ -	\$ 254,806

Effect on Revenues (by Fund):

	General Fund	Lottery Funds	Other Funds	Federal Funds	NL Other Funds	NL Federal Funds	TOTAL FUNDS
2017-19 Biennium	\$ -	\$ -	\$ 195,000	\$ -	\$ -	\$ -	\$ 195,000
2019-21 Biennium	\$ -	\$ -	\$ 260,000	\$ -	\$ -	\$ -	\$ 260,000