CERTIFICATION OF ENROLLMENT

SUBSTITUTE SENATE BILL 6637

Chapter 325, Laws of 1996

(partial veto)

54th Legislature
1996 Regular Session

GROWTH MANAGEMENT HEARINGS BOARD--LIMITATIONS ON DISCRETION

EFFECTIVE DATE: 3/30/96

Passed by the Senate March 7, 1996
YEAS 41 NAYS 7

JOEL PRITCHARD
President of the Senate

Passed by the House March 7, 1996
YEAS 68 NAYS 30

CLYDE BALLARD
Speaker of the
House of Representatives

I, Marty Brown, Secretary of the Senate of the State of Washington, do hereby certify that the attached is SUBSTITUTE SENATE BILL 6637 as passed by the Senate and the House of Representatives on the dates hereon set forth.

MARTY BROWN
Secretary

Approved March 30, 1996, with the exception of sections 3 and 5, which are vetoed.

MIKE LOWRY
Governor of the State of Washington

FILED
March 30, 1996 - 11:39 p.m.

Secretary of State
State of Washington
AN ACT Relating to limitations on growth management hearings board discretion; and amending RCW 36.70A.270, 36.70A.280, 36.70A.300, 36.70.320; adding a new section to chapter 36.70A RCW; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 36.70A.270 and 1994 c 257 s 1 are each amended to read as follows:

Each growth management hearings board shall be governed by the following rules on conduct and procedure:

(1) Any board member may be removed for inefficiency, malfeasance, and misfeasance in office, under specific written charges filed by the governor. The governor shall transmit such written charges to the member accused and the chief justice of the supreme court. The chief justice shall thereupon designate a tribunal composed of three judges of the superior court to hear and adjudicate the charges. Removal of any member of a board by the tribunal shall disqualify such member for reappointment.

(2) Each board member shall receive reimbursement for travel expenses incurred in the discharge of his or her duties in accordance
with RCW 43.03.050 and 43.03.060. If it is determined that the review boards shall operate on a full-time basis, each member shall receive an annual salary to be determined by the governor pursuant to RCW 43.03.040. If it is determined that a review board shall operate on a part-time basis, each member shall receive compensation pursuant to RCW 43.03.250, provided such amount shall not exceed the amount that would be set if they were a full-time board member. The principal office of each board shall be located by the governor within the jurisdictional boundaries of each board. The boards shall operate on either a part-time or full-time basis, as determined by the governor.

(3) Each board member shall not: (a) Be a candidate for or hold any other public office or trust; (b) engage in any occupation or business interfering with or inconsistent with his or her duty as a board member; and (c) for a period of one year after the termination of his or her board membership, act in a representative capacity before the board on any matter.

(4) A majority of each board shall constitute a quorum for making orders or decisions, adopting rules necessary for the conduct of its powers and duties, or transacting other official business, and may act even though one position of the board is vacant. One or more members may hold hearings and take testimony to be reported for action by the board when authorized by rule or order of the board. The board shall perform all the powers and duties specified in this chapter or as otherwise provided by law.

(5) The board may appoint one or more hearing examiners to assist the board in its hearing function, to make conclusions of law and findings of fact and, if requested by the board, to make recommendations to the board for decisions in cases before the board. Such hearing examiners must have demonstrated knowledge of land use planning and law. The boards shall specify in their joint rules of practice and procedure, as required by subsection (7) of this section, the procedure and criteria to be employed for designating hearing examiners as a presiding officer. Hearing examiners selected by a board shall meet the requirements of subsection (3) of this section. The findings and conclusions of the hearing examiner shall not become final until they have been formally approved by the board. This authorization to use hearing examiners does not waive the requirement of RCW 36.70A.300 that final orders be issued within one hundred eighty days of board receipt of a petition.
(6) Each board shall make findings of fact and prepare a written
decision in each case decided by it, and such findings and decision
shall be effective upon being signed by two or more members of the
board and upon being filed at the board’s principal office, and shall
be open for public inspection at all reasonable times.

(7) All proceedings before the board, any of its members, or a
hearing examiner appointed by the board shall be conducted in
accordance with such administrative rules of practice and procedure as
the boards jointly prescribe. All three boards shall jointly meet to
develop and adopt joint rules of practice and procedure, including
rules regarding expeditious and summary disposition of appeals. The
boards shall publish such rules and decisions they render and arrange
for the reasonable distribution of the rules and decisions. Except as
it conflicts with provisions of this chapter, the administrative
procedure act, chapter 34.05 RCW, shall govern the ((administrative
rules of)) practice and procedure ((adopted by)) of the boards.

(8) A board member or hearing examiner is subject to
disqualification ((for bias, prejudice, interest, or any other cause
for which a judge is disqualified)) under chapter 34.05 RCW. The joint
rules of practice of the boards shall establish procedures by which a
party to a hearing conducted before the board may file with the board
a motion to disqualify, with supporting affidavit, against a board
member or hearing examiner assigned to preside at the hearing.

(9) The members of the boards shall meet jointly on at least an
annual basis with the objective of sharing information that promotes
the goals and purposes of this chapter.

Sec. 2. RCW 36.70A.280 and 1995 c 347 s 108 are each amended to
read as follows:

(1) A growth management hearings board shall hear and determine
only those petitions alleging either:

(a) That a state agency, county, or city planning under this
chapter is not in compliance with the requirements of this chapter,
chapter 90.58 RCW as it relates to the adoption of shoreline master
programs or amendments thereto, or chapter 43.21C RCW as it relates to
plans, development regulations, or amendments, adopted under RCW
36.70A.040 or chapter 90.58 RCW; or
(b) That the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted.

(2) A petition may be filed only by: (a) The state, or a county or city that plans under this chapter; (b) a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested; (c) a person who is certified by the governor within sixty days of filing the request with the board; or (d) a person qualified pursuant to RCW 34.05.530.

(3) For purposes of this section "person" means any individual, partnership, corporation, association, state agency, governmental subdivision or unit thereof, or public or private organization or entity of any character.

(4) When considering a possible adjustment to a growth management planning population projection prepared by the office of financial management, a board shall consider the implications of any such adjustment to the population forecast for the entire state. The rationale for any adjustment that is adopted by a board must be documented and filed with the office of financial management within ten working days after adoption.

If adjusted by a board, a county growth management planning population projection shall only be used for the planning purposes set forth in this chapter and shall be known as a "board adjusted population projection". None of these changes shall affect the official state and county population forecasts prepared by the office of financial management, which shall continue to be used for state budget and planning purposes.

*Sec. 3. RCW 36.70A.300 and 1995 c 347 s 110 are each amended to read as follows:

(1) The board shall issue a final order within one hundred eighty days of receipt of the petition for review, or, when multiple petitions are filed, within one hundred eighty days of receipt of the last petition that is consolidated. Such a final order shall be based exclusively on whether or not a state agency, county, or city is in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to adoption or amendment of shoreline master programs, or chapter 43.21C RCW as it relates to plans, development regulations, and
amendments thereto, adopted under RCW 36.70A.040 or chapter 90.58 RCW. In the final order, the board shall either: (a) Find that the state agency, county, or city is in compliance with the requirements of this chapter or chapter 90.58 RCW as it relates to the adoption or amendment of shoreline master programs; or (b) find that the state agency, county, or city is not in compliance with the requirements of this chapter or chapter 90.58 RCW as it relates to the adoption or amendment of shoreline master programs, in which case the board shall remand the matter to the affected state agency, county, or city and specify a reasonable time not in excess of one hundred eighty days within which the state agency, county, or city shall comply with the requirements of this chapter.

(2) A finding of noncompliance and an order of remand shall not affect the validity of comprehensive plans and development regulations during the period of remand (unless the board's). In addition, the board may issue a determination of invalidity as part of its final order (of noncompliance which shall:

(a) Include a determination, supported by findings of fact and conclusions of law, that the continued validity of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and

(b) Specify the particular part or parts of the plan or regulation that are determined to be invalid, the geographic area or areas where the determination of invalidity is applicable, if appropriate, and the reasons for their invalidity.

(3) A determination of invalidity shall not take effect until at least ninety days after the determination of invalidity was made, during which period the board shall review the progress of the county or city. If, after holding a hearing on the matter, the board finds that the county or city is making substantial progress toward adopting a plan or regulations or taking other actions under this chapter, relating to the order, that would not be determined to be invalid under subsection (2) of this section, the board shall extend the ninety-day period for a reasonable period and continue its jurisdiction over the matter. If, after holding a hearing on the matter, the board finds that substantial progress is not being made, the board shall enter an order effectuating the determination of invalidity. The hearing must be held prior to the ninetieth day. Another hearing shall be held prior to the end of any
extension granted by the board. Any order effectuating the
determination of invalidity shall be prospective in effect and shall
not extinguish rights that ((vested)) vest under state or local law
before or after the date of the board’s order((—and
(b) Subject)) effectuating the determination of invalidity. Any
order effectuating the determination of invalidity shall not affect the
validity of the comprehensive plan, development regulations, or other
actions taken under this chapter, except that any ((development))
application for the division of land under chapter 58.17 RCW, in any
geographic area or areas where the determination of invalidity is
applicable, that would otherwise vest after the date of the board’s
order effectuating the determination of invalidity, shall vest to the
local ordinance or resolution that ((both is enacted in response to the
order of remand and determined by the board pursuant to RCW 36.70A.330
to comply with the requirements of this chapter)) the county or city
adopts in response to the order effectuating the determination of
invalidity after the board determines that the response would not be
invalidated under subsection (2) of this section. Boundary line
adjustments that do not increase the number of lots are not affected by
an order effectuating a determination of invalidity. The board shall
hold a hearing before removing the order effectuating its determination
of invalidity.

(4) ((If the ordinance that adopts a plan or development regulation
under this chapter includes a savings clause intended to revive prior
policies or regulations in the event the new plan or regulations are
determined to be invalid, the board shall determine under subsection
(2) of this section whether the prior policies or regulations are valid
during the period of remand.)) A county or city for which a
determination of invalidity was made prior to the effective date of
this act may petition the board for a stay of the determination of
invalidity, based on a showing under the procedures of subsection (3)
of this section that it is making substantial progress toward adopting
a plan or development regulations, or taking other actions under this
chapter, relating to the order, that would not otherwise be declared
invalid under subsection (2) of this section. After holding a hearing,
the board shall enter an order rescinding, staying, modifying, or
continuing the prior determination of invalidity.

(5) Any party aggrieved by a final decision of the hearings board
may appeal the decision to superior court as provided in RCW 34.05.514
or 36.01.050 within thirty days of the final order of the board. The court shall conduct an independent review of the board’s legal conclusions.
*Sec. 3 was vetoed. See message at end of chapter.

NEW SECTION. Sec. 4. A new section is added to chapter 36.70A RCW to read as follows:
The court shall provide expedited review of a determination of invalidity or an order effectuating a determination of invalidity made or issued under RCW 36.70A.300. The matter must be set for hearing within sixty days of the date set for submitting the board’s record, absent a showing of good cause for a different date or a stipulation of the parties.

*Sec. 5. RCW 36.70A.320 and 1995 c 347 s 111 are each amended to read as follows:
(1)(a) Except as provided in subsection (2) of this section, designations, comprehensive plans ((and)), development regulations, and other actions required by this chapter, and amendments thereto, adopted under this chapter are presumed valid upon adoption. In any petition under this chapter, the board, after full consideration of the petition, shall determine whether there is compliance with the requirements of this chapter. In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the board shall not substitute its judgment for that of a county or city regarding the exercise of such discretion. In making its determination, the board shall consider the criteria adopted by the department under RCW 36.70A.190(4). The board has no discretion to prioritize, balance, or rank the goals set forth in RCW 36.70A.020, all of which shall be used by counties and cities as provided in RCW 36.70A.020.
(b) The burden of proof shall be on the petitioner. The board shall find compliance unless it finds ((by a preponderance of the evidence that the state agency, county, or city erroneously interpreted or applied this chapter)) that: (i) The state agency, county, or city erroneously interpreted this chapter; or (ii) the action of the state agency, county, or city is not supported by evidence that is substantial when reviewed in light of the whole record before the board.
(2) The shoreline element of a comprehensive plan and the applicable development regulations adopted by a county or city shall take effect as provided in chapter 90.58 RCW.

*Sec. 5 was vetoed. See message at end of chapter.

NEW SECTION. Sec. 6. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 7. This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately.

Passed the Senate March 7, 1996.
Passed the House March 7, 1996.
Approved by the Governor March 30, 1996, with the exception of certain items that were vetoed.
Filed in Office of Secretary of State March 30, 1996.

Note: Governor’s explanation of partial veto is as follows:

"I am returning herewith, without my approval as to sections 3 and 5, Substitute Senate Bill No. 6637 entitled:

"AN ACT Relating to limitations on growth management hearings board discretion;"

Substitute Senate Bill No. 6637 clarifies the statutes dealing with the Growth Management Hearings Boards.

Sections 1 and 2 of this bill are simple clarifications of current law governing board actions and are not controversial. Section 4 provides for expedited judicial review of board actions in cases in which a board issues a determination of invalidity and such a determination is appealed. While the authority of the legislature to direct the courts to expedite review is not clear, it is reasonable to encourage prompt consideration by the courts of such board actions within their civil dockets given the significant impacts that may be involved in the invalidation of local land use ordinances.

Section 3 of this bill has two major elements, one changing provisions regarding invalidity, the other addressing how courts should review board decisions.

The legislature acted in 1995 to respond to uncertainty regarding the vesting status of projects in jurisdictions in which boards had found comprehensive plans or development regulations out of compliance with the Growth Management Act. Prior to 1995, there was concern that the result might be an effective moratorium on development. The legislature provided that projects vest under a local land use statute, even if it has been found out of compliance, unless and until a board
issues a determination of invalidity. Such a determination must meet a
higher standard than is needed to find noncompliance. For a board to
issue a determination of invalidity, it must find that the continued
validity of the plan or regulation would "substantially interfere with
the fulfillment of the goals" of the act. After a determination of
invalidity, new projects vest under whatever ordinance is eventually
adopted in compliance with the act.

Since this change in 1995, there has been significant controversy
regarding the use of this authority by the boards. Some have argued
that boards have used the authority to respond to repeated refusal by
a small minority of local governments to pass statutes that complied
with the act. Others have argued that the use of this power has
created temporary chaos rather than greater certainty and that the use
of this power has altered the "bottom up" nature of growth planning.
The legislature responded by revisiting the 1995 sections in this bill.

Substitute Senate Bill No. 6637 requires that when a board makes a
determination of invalidity, it must specify the provisions to which
the determination would apply and must wait ninety days before
effectuating the order. Additional time must be granted to the local
government if it is making "substantial progress" toward adopting a
plan or regulations.

During this period, all projects vest to the local ordinance which
has been found to substantially interfere with fulfillment of the goals
of the act. After this period, the board may issue an order
effectuating the determination of invalidity. When such an order is
issued, it provides that divisions of land vest to new ordinances
ultimately found in compliance by the boards. Other development
continues to vest to the provisions which have been found invalid by
the boards, until new ordinances have been enacted. The concept that
projects should vest to provisions of law that substantially interfere
with fulfillment of the goals of the act is not wise.

This was an honest attempt to develop a compromise in a difficult
area of the law. I commend the legislature for its efforts, but as
drafted, Substitute Senate Bill No. 6637 is not without significant
flaws.

To permit vesting to a plan or regulation that has been found to
substantially interfere with fulfillment of the goals of the act is an
incentive for local governments to continue to remain out of compliance
with legitimate board orders. Despite the local nature of growth
planning, the act reflects statewide concerns. The boards are intended
to ensure that local solutions remain within the requirements and goals
of the act. If board determinations are ignored, the boards are
nothing more than a time-consuming annoyance on the way to court.
Meanwhile traffic congestion worsens, sprawl continues, air quality
degrades, habitat is lost, the public’s ability to pay for
infrastructure is strained and frustration mounts.

The section also provides that in appeals of Growth Management
Hearing Board decisions, the court is to conduct an independent review
of the board’s legal conclusions. It is unclear whether this merely
clarifies the current court practice of independently reviewing the
actions of quasi-judicial boards as to their legal conclusions or
whether it directs the courts to grant no deference to the board’s
specialized expertise. At best, this lack of clarity makes the court’s
task in reviewing board decisions more difficult than would already be the case. At worst, these provisions render the decisions of the boards meaningless and prolong the resolution of underlying dispute.

I am aware of criticism of a few board actions, but in the vast majority of the appeals brought to the boards, they have been successful in achieving prompt resolution of the issues in dispute. The boards were established to resolve difficult land use planning disputes, including those between local governments, to reflect regional differences, to bring more expertise to these issues, and to resolve issues more quickly than court action would require.

I believe that this provision is a message by the legislature to the boards directing them to use discretion in their authority to invalidate local ordinances. I echo this message. There are some situations in which local actions are so far out of compliance with the requirements and goals of the act that severe action is appropriate. However, overuse of this authority will only serve to weaken both the authority of the boards and the act itself.

I am requesting that the Land Use Study Commission, established in 1995, make recommendations to the 1997 Legislature and to the governor proposing how to clarify and simplify the law in this area. Such recommendations should propose how to establish greater certainty in local growth planning and encourage local planning and actions to comply with the requirements and goals of the Growth Management Act.

Section 5 of Substitute Senate Bill No. 6637 recognizes the broad range of discretion that may be exercised by local governments under the Growth Management Act. In the act, the legislature specified a set of goals and a related series of procedural and substantive requirements towards achieving them. While requiring compliance, the legislature recognized the diversity of the state and the power inherent in local land use decision-making. Consistent with these requirements, local governments retain broad discretion.

However, local discretion must be exercised in a manner that is consistent with the requirements of the act. The boards have the difficult responsibility of interpreting the legislative meaning of the act in specific local disputes without substituting their judgment for that of local governments. This is among the most difficult challenges facing the boards and local governments.

Section 5 of this bill states that the boards are not to prioritize, balance or rank the goals of the Growth Management Act. This provision appears to prevent the boards from evaluating whether local governments have been guided by the goals or whether, in meeting the requirements of the act, they have reflected the value content of the goals. Such a limitation would reduce the boards to a purely procedural role. If this provision were to become law, most local disputes would require court action for resolution. The boards can only function effectively if they have the authority, when resolving disputes, to ensure that local governments are complying with the requirements and not substantially interfering with fulfillment of the goals of the act.

This section also clarifies that in cases heard by Growth Management Hearings Boards, the burden of proof is on the petitioner. This principle was understood at the establishment of the boards. The boards have adopted rules which include this standard.
Section 5 of Substitute Senate Bill No. 6637 clarifies the standard of review to be used by the boards to judge cases. In matters of law, the bill directs the boards to find compliance unless they find that a state agency or local government erroneously interpreted the chapter. In issues of fact, compliance is to be found if the action of the state agency or local government is not supported by evidence that is substantial when reviewed in light of the whole record before the board.

In reviewing legal questions, the boards must determine whether local governments have been right or wrong in their legal interpretation of the provisions of the Growth Management Act as evidenced by their application of the act. The standard for reviewing questions of fact directs the boards to defer somewhat to local governments as long as they present enough evidence to allow a reasonable person to act. This is similar to the direction by the boards to local governments to "show your work", stating that local governments deserve deference if they establish a rational basis for making complex land use decisions.

I believe the boards should grant deference to local governments in how they plan for growth consistent with the requirements and goals of the act. Local comprehensive plans and development regulations require local governments to balance priorities and options for action in full consideration of local circumstances. While the act requires that local action take place within a state framework, the local land use process is not aimed at perfection but at allowing local communities to make choices about their future.

The legislature attempted to clarify the standard that boards must use to resolve disputes between local governments and affected parties. With one exception, I believe that they succeeded. However, the prohibition against board action regarding the goals of the act appears to prevent the boards from ensuring that the goals have their intended effect. I cannot approve this. After six years, implementation of the act is forcing us again to consider how to maintain local control within a framework of state goals and requirements. In many jurisdictions, plans have been adopted and many are fully involved in implementing their plans. In these jurisdictions, we can see the results of good planning. But in some jurisdictions, the distance between traditional development patterns and practices and the dramatic changes required by the act have divided communities and resulted in angry disputes between local governments and the boards.

People acting in good faith have come to very different conclusions about how best to manage growth. The state must revisit the issue of how to resolve these disputes. I am requesting that the Land Use Study Commission make recommendations to the legislature and to the governor regarding improvements to our dispute resolution structure.

For these reasons, I have vetoed sections 3 and 5 of Substitute Senate Bill No. 6637.

With the exception of sections 3 and 5, Substitute Senate Bill No. 6637 is approved."