
State Government Committee

ESSB 5776

Brief Description: Providing an appeal process for state agency and local government permit decisions for economic development projects.

Sponsors: Senate Committee on Land Use & Planning (originally sponsored by Senators Doumit, Morton, Hargrove, Mulliken, Rasmussen, Swecker, Haugen, Zarelli, Reardon, Parlette, McAuliffe and Winsley).

Brief Summary of Engrossed Substitute Bill

- Creates a new hearings board called the Environmental and Land Use Hearings Board (ELUHB).
- Permits for qualifying economic development projects that are issued by state and local regulatory agencies pertaining to the protection, conservation, use of, or interference with land, air, or water may only be appealed to the ELUHB.

Hearing Date: 4/1/03

Staff: Katie Blinn (786-7114).

Background:

The process by which land use and environmental permit applications are adjudicated and appealed is distinct from the rulemaking process. Although the requirements and application processes for land use and environmental permits are established in agency rules, the permits, orders and licenses are actually issued, granted, denied, or appealed through adjudicative processes.

The state Environmental Hearings Office (EHO) contains four boards that hear appeals from decisions made by state and local regulatory agencies. Each board has powers and procedures typical of an adjudicative tribunal, such as the power to administer oaths, take depositions, issue subpoenas, and conduct investigations. The EHO boards conduct administrative hearings and issue written decisions that outline the facts and relevant law for each case. The EHO includes the Pollution Control Hearings Board, the Shorelines Hearings Board, the Forest Practices Appeals Board, and the Hydraulic Appeals Board.

The Pollution Control Hearings Board (PCHB) hears appeals from orders and decisions made by the Department of Ecology (Ecology), local conservation districts, local air pollution control boards, and local health departments. There are three members on the PCHB, and the chair of the PCHB must also be the chair of the Shorelines Hearings Board.

The Shorelines Hearings Board (SHB) hears appeals of permit decisions and shoreline penalties issued by local governments and Ecology. The Shoreline Management Act provides for the management of development along the state shorelines. Local governments initiate the planning and administer a regulatory program consistent with the Shoreline Management Act, which includes administering and issuing shoreline substantial development, conditional use, and variance permits. Shoreline conditional use and variance permits granted by local governments must be reviewed by Ecology, which then issues the final decision. Local governments and Ecology may also issue fines under the Shoreline Management Act. The SHB hears appeals of shoreline-related permits and penalties. There are six members on the SHB, three of which must be the three members of the PCHB. The chair of the SHB must also be the chair of the PCHB.

The Forest Practices Appeals Board (FPAB) hears appeals of decisions made by the Department of Natural Resources (DNR), including the approval or denial of forest practices applications, civil penalties, stop work orders, and notices to comply.

The Hydraulic Appeals Board (HAB) has exclusive jurisdiction to hear appeals arising from the approval, denial, conditioning, or modification of a hydraulic permit issued by the Department of Fish and Wildlife for the diversion of water for agricultural irrigation or stock watering purposes, for streambank stabilization to protect farm and agricultural lands, or for off-site mitigation plans. The HAB also has jurisdiction to hear appeals of the approval, denial, conditioning, or modification of a hydraulic permit for the construction, replacement, or repair of a marine beach front bulkhead or rockwall.

Under the Administrative Procedures Act (APA), decisions by EHO boards may be appealed to the superior court for Thurston County, the county of the petitioner's residence or principal place of business, or any county where property owned by the petitioner and affected by the decision is located. The APA establishes the other requirements for judicial review of board decisions. The EHO is independent of state and local regulatory agencies.

Land Use Petition Act

In 1995, the Legislature passed the Land Use Petition Act (LUPA), which established a uniform, expedited appeal process for land use decisions made by local jurisdictions. The appeal process established under LUPA is distinct from the appeal process established for the four boards under the EHO. The LUPA provides an expedited appeal process directly to superior court for final determinations made by local jurisdictions on those permit applications that are necessary to improve, develop, modify, sell, transfer, or use real property. The LUPA does not apply to local land use decisions that must be reviewed by a quasi-judicial body created in state law, such as the SHB.

Office of Permit Assistance

The Permit Assistance Center was created in 1995 in Ecology to provide the public with information regarding environmental permitting laws, to provide assistance to businesses and public agencies to comply with permitting laws, to develop and provide a coordinated state permitting procedure that project applicants can use at their option and expense, and to recover costs for this coordinated permit process. In 2002, legislation was enacted to transfer the powers, duties, and functions of the Permit Assistance Center to a new Office of Permit Assistance (OPA) within the Office of Financial Management. The OPA provides information services and, upon request, facilitates permitting projects for a cost, or at the expense of OPA if it is in the public interest to do so.

Distressed Area

A "distressed area" is:

- a rural county, which is a county with a population density of fewer than 100 persons per square mile;
- a county which has an unemployment rate 20% above the state average;
- a county that has a median household income that is less than 75% of the state median household income;
- a metropolitan statistical area in which the average unemployment level exceeds the average state unemployment level by 20%; or
- an area within a county which (i) is composed of contiguous census tracts; (ii) has a minimum population of 5,000 persons; (iii) has at least 75% of its families and unrelated individuals with incomes below 80% of the county's median income for families and unrelated individuals; and (iv) has an unemployment rate which is at least 40% higher than the county's unemployment rate.

Rural Natural Resources Impact Area

A "rural natural resources impact area" is:

- a nonmetropolitan county that meets three of the five criteria set forth below;
- a nonmetropolitan county with a population of less than 40,000 in the 1990 census that meets two of the five criteria set forth below; or
- a nonurbanized area that is located in a metropolitan county that meets three of the five criteria set forth below.

The following criteria shall be considered when designating rural natural resources impact areas:

- a lumber and wood products employment location quotient at or above the state average;
- a commercial salmon fishing employment location quotient at or above the state average;
- projected or actual direct lumber and wood products job losses of 100 positions or more;
- projected or actual direct commercial salmon fishing job losses of 100 positions or more; and
- an unemployment rate 20% or more above the state average.

Summary of Bill:

A new appeal process is created in the form of a new appeals board, called the Environmental and Land Use Hearings Board (ELUHB). Similar to the PCHB, the SHB, the FPAB, and the HAB, the ELUHB is created within the EHO. The chair of the PCHB and the SHB must also be the chair of the ELUHB. The new appeal process is intended to supersede other existing administrative board and judicial appeal procedures.

Permits issued by state and local agencies for qualifying economic development projects may only be appealed to the new board. The new appeal process applies to any permit, license, certificate, certification, approval, compliance schedule, or other document pertaining to a regulatory or management program pertaining to the protection, conservation, use of, or interference with the land, air, or water of the state. A qualifying project is an economic development project that is:

- located within a county that entirely qualifies as both a distressed area and a rural natural resources impact area;
- designed to provide at least 30 full-time year-round jobs, and
- designated as a qualifying project by the OPA.

A process by which the OPA designates "qualifying projects" is not established.

The review of permit decisions that involved factual determinations is limited to a review of the record developed below. However, the review of permit decisions that did not involve any factual determinations is de novo, meaning that the ELUHB may review the decision as if it is the permitting agency and may supplement the record as it deems appropriate. The ELUHB may grant the petitioning party relief if the party establishes that:

- the body or officer that made the permit decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
- the permit decision is an erroneous interpretation of the law, after allowing for deference to the construction of law given an agency with expertise;
- the permit decision is not supported by substantial evidence;
- the permit decision is a clearly erroneous application of the law to the facts;
- the permit decision is outside the authority or jurisdiction of that body or officer; or
- the permit decision violates the constitutional rights of the party seeking relief.

The ELUHB may affirm or reverse each permit decision, or remand the decision for modification or further proceedings before the permitting agency. A party may seek judicial review of an ELUHB decision by filing a petition in Thurston County Superior Court or by seeking direct review in the Court of Appeals. This process of judicial review of ELUHB decisions is distinct from the existing APA judicial appeal process used for EHO board decisions.

Appropriation: None.

Fiscal Note: Requested on March 25, 2003.

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