
SUBSTITUTE HOUSE BILL 2152

State of Washington

53rd Legislature

1994 Regular Session

By House Committee on Environmental Affairs (originally sponsored by Representatives Rust, Horn, Sommers, Karahalios, Linville, L. Johnson, J. Kohl and Patterson)

Read first time 01/24/94.

1 AN ACT Relating to appeals involving boards within the
2 environmental hearings office; amending RCW 90.58.170, 90.58.180,
3 43.21C.075, 43.21B.180, 43.21B.190, 43.21B.230, and 76.09.230; adding
4 a new section to chapter 90.58 RCW; and adding a new section to chapter
5 43.21B RCW.

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

7 **Sec. 1.** RCW 90.58.170 and 1988 c 128 s 76 are each amended to read
8 as follows:

9 A shorelines hearings board sitting as a quasi judicial body is
10 hereby established within the environmental hearings office under RCW
11 43.21B.005. The shorelines hearings board shall be made up of six
12 members: Three members shall be members of the pollution control
13 hearings board; two members, one appointed by the association of
14 Washington cities and one appointed by the association of county
15 commissioners, both to serve at the pleasure of the associations; and
16 the commissioner of public lands or his or her designee. The chairman
17 of the pollution control hearings board shall be the chairman of the
18 shorelines hearings board. Except as provided in section 2 of this
19 act, a decision must be agreed to by at least four members of the board

1 to be final. The members of the shorelines ((~~appeals~~)) hearings board
2 shall receive the compensation, travel, and subsistence expenses as
3 provided in RCW 43.03.050 and 43.03.060.

4 NEW SECTION. Sec. 2. A new section is added to chapter 90.58 RCW
5 to read as follows:

6 (1) In the case of an appeal involving a single family residence or
7 appurtenance to a single family residence, including a dock or pier
8 designed to serve a single family residence, the request for review may
9 be heard by a panel of three board members, at least one and not more
10 than two of whom shall be members of the pollution control hearings
11 board. Two members of the three must agree to issue a final decision
12 of the board.

13 (2) The board shall define by rule alternative processes to
14 expedite appeals. These alternatives may include: Mediation, upon
15 agreement of all parties; submission of testimony by affidavit; or
16 other forms that may lead to less formal and faster resolution of
17 appeals.

18 **Sec. 3.** RCW 90.58.180 and 1989 c 175 s 183 are each amended to
19 read as follows:

20 (1) Any person aggrieved by the granting, denying, or rescinding of
21 a permit on shorelines of the state pursuant to RCW 90.58.140 may seek
22 review from the shorelines hearings board by filing a request for the
23 same within thirty days of the date of filing as defined in RCW
24 90.58.140(6).

25 Concurrently with the filing of any request for review with the
26 board as provided in this section pertaining to a final order of a
27 local government, the requestor shall file a copy of his or her request
28 with the department and the attorney general. If it appears to the
29 department or the attorney general that the requestor has valid reasons
30 to seek review, either the department or the attorney general may
31 certify the request within thirty days after its receipt to the
32 shorelines hearings board following which the board shall then, but not
33 otherwise, review the matter covered by the requestor(~~(:—PROVIDED,~~
34 ~~That)).~~ The failure to obtain such certification shall not preclude
35 the requestor from obtaining a review in the superior court under any
36 right to review otherwise available to the requestor. The department
37 and the attorney general may intervene to protect the public interest

1 and insure that the provisions of this chapter are complied with at any
2 time within fifteen days from the date of the receipt by the department
3 or the attorney general of a copy of the request for review filed
4 pursuant to this section. The shorelines hearings board shall
5 initially schedule review proceedings on such requests for review
6 without regard as to whether such requests have or have not been
7 certified or as to whether the period for the department or the
8 attorney general to intervene has or has not expired, unless such
9 review is to begin within thirty days of such scheduling. If at the
10 end of the thirty day period for certification neither the department
11 nor the attorney general has certified a request for review, the
12 hearings board shall remove the request from its review schedule.

13 (2) The department or the attorney general may obtain review of any
14 final order granting a permit, or granting or denying an application
15 for a permit issued by a local government by filing a written request
16 with the shorelines hearings board and the appropriate local government
17 within thirty days from the date the final order was filed as provided
18 in RCW 90.58.140(6).

19 (3) The review proceedings authorized in subsections (1) and (2) of
20 this section are subject to the provisions of chapter 34.05 RCW
21 pertaining to procedures in adjudicative proceedings. Judicial review
22 of such proceedings of the shorelines hearings board (~~may be had as~~
23 ~~provided in~~) is governed by chapter 34.05 RCW, except that the appeal
24 of a final decision of the shorelines hearings board shall be to the
25 division of the court of appeals for the county in which the case
26 arose.

27 (4) A local government may appeal to the shorelines hearings board
28 any rules, regulations, or guidelines adopted or approved by the
29 department within thirty days of the date of the adoption or approval.
30 The board shall make a final decision within sixty days following the
31 hearing held thereon.

32 If the board determines that the rule, regulation, or guideline:

33 (a) Is clearly erroneous in light of the policy of this chapter; or

34 (b) Constitutes an implementation of this chapter in violation of
35 constitutional or statutory provisions; or

36 (c) Is arbitrary and capricious; or

37 (d) Was developed without fully considering and evaluating all
38 material submitted to the department by the local government; or

39 (e) Was not adopted in accordance with required procedures;

1 the board shall enter a final decision declaring the rule, regulation,
2 or guideline invalid, remanding the rule, regulation, or guideline to
3 the department with a statement of the reasons in support of the
4 determination, and directing the department to adopt, after a thorough
5 consultation with the affected local government, a new rule,
6 regulation, or guideline. Unless the board makes one or more of the
7 determinations as hereinbefore provided, the board shall find the rule,
8 regulation, or guideline to be valid and enter a final decision to that
9 effect.

10 (5) Rules, regulations, and guidelines shall be subject to review
11 in superior court, if authorized pursuant to RCW ((34.05.538:
12 ~~PROVIDED, That~~)) 34.05.570(2). No review shall be granted by a
13 superior court on petition from a local government unless the local
14 government shall first have obtained review under subsection (4) of
15 this section and the petition for court review is filed within three
16 months after the date of final decision by the shorelines hearings
17 board.

18 **Sec. 4.** RCW 43.21C.075 and 1983 c 117 s 4 are each amended to read
19 as follows:

20 (1) Because a major purpose of this chapter is to combine
21 environmental considerations with public decisions, any appeal brought
22 under this chapter shall be linked to a specific governmental action.
23 The State Environmental Policy Act provides a basis for challenging
24 whether governmental action is in compliance with the substantive and
25 procedural provisions of this chapter. The State Environmental Policy
26 Act is not intended to create a cause of action unrelated to a specific
27 governmental action.

28 (2) Unless otherwise provided by this section:

29 (a) Appeals under this chapter shall be of the governmental action
30 together with its accompanying environmental determinations.

31 (b) Appeals of environmental determinations made (or lacking) under
32 this chapter shall be commenced within the time required to appeal the
33 governmental action which is subject to environmental review.

34 (3) If an agency has a procedure for appeals of agency
35 environmental determinations made under this chapter, such procedure:

36 (a) Shall not allow more than one agency appeal proceeding on a
37 procedural determination (the adequacy of a determination of
38 significance/nonsignificance or of a final environmental impact

1 statement), consistent with any state statutory requirements for
2 appeals to local legislative bodies. The appeal proceeding on a
3 determination of significance/nonsignificance may occur before the
4 agency's final decision on a proposed action. Such an appeal shall
5 also be allowed for a determination of significance/nonsignificance
6 which may be issued by the agency after supplemental review;

7 (b) Shall consolidate appeal of procedural issues and of
8 substantive determinations made under this chapter (such as a decision
9 to require particular mitigation measures or to deny a proposal) by
10 providing for simultaneous appeal of an agency decision on a proposal
11 and any environmental determinations made under this chapter, with the
12 exception of the threshold determination appeal as provided in (a) of
13 this subsection or an appeal to the local legislative authority under
14 RCW 43.21C.060 or other applicable state statutes;

15 (c) Shall provide for the preparation of a record for use in any
16 subsequent appeal proceedings, and shall provide for any subsequent
17 appeal proceedings to be conducted on the record, consistent with other
18 applicable law. An adequate record consists of findings and
19 conclusions, testimony under oath, and taped or written transcript. An
20 electronically recorded transcript will suffice for purposes of review
21 under this ((paragraph)) subsection; and

22 (d) Shall provide that procedural determinations made by the
23 responsible official shall be entitled to substantial weight.

24 (4) If a person aggrieved by an agency action has the right to
25 judicial appeal and if an agency has an appeal procedure, such person
26 shall, prior to seeking any judicial review, use such procedure if any
27 such procedure is available, unless expressly provided otherwise by
28 state statute.

29 (5) RCW 43.21C.080 establishes an optional "notice of action"
30 procedure which, if used, imposes a time period for appealing decisions
31 under this chapter. Some statutes and ordinances contain time periods
32 for challenging governmental actions which are subject to review under
33 this chapter, such as various local land use approvals (the "underlying
34 governmental action"). This section does not modify any such time
35 periods. This section governs when a judicial appeal must be brought
36 under this chapter where a "notice of action" is used, and/or where
37 there is another time period which is required by statute or ordinance
38 for challenging the underlying governmental action. In this
39 subsection, the term "appeal" refers to a judicial appeal only.

1 (a) If there is a time period for appealing the underlying
2 governmental action, appeals under this chapter shall be commenced
3 within thirty days. The agency shall give official notice stating the
4 date and place for commencing an appeal. If there is an agency
5 proceeding under subsection (3) of this section, the appellant shall,
6 prior to commencing a judicial appeal, submit to the responsible
7 official a notice of intent to commence a judicial appeal. This notice
8 of intent shall be given within the time period for commencing a
9 judicial appeal on the underlying governmental action.

10 (b) A notice of action under RCW 43.21C.080 may be used. If a
11 notice of action is used, judicial appeals shall be commenced within
12 the time period specified by RCW 43.21C.080, unless there is a time
13 period for appealing the underlying governmental action in which case
14 (a) of this subsection shall apply.

15 (c) Notwithstanding RCW 43.21C.080(1), if there is a time period
16 for appealing the underlying governmental action, a notice of action
17 may be published within such time period.

18 (6)(a) Judicial review of an appeal decision made by an agency
19 under RCW 43.21C.075(5) shall be on the record, consistent with other
20 applicable law.

21 (b) A taped or written transcript may be used. If a taped
22 transcript is to be reviewed, a record shall identify the location on
23 the taped transcript of testimony and evidence to be reviewed. Parties
24 are encouraged to designate only those portions of the testimony
25 necessary to present the issues raised on review, but if a party
26 alleges that a finding of fact is not supported by evidence, the party
27 should include in the record all evidence relevant to the disputed
28 finding. Any other party may designate additional portions of the
29 taped transcript relating to issues raised on review. A party may
30 provide a written transcript of portions of the testimony at the
31 party's own expense or apply to that court for an order requiring the
32 party seeking review to pay for additional portions of the written
33 transcript.

34 (c) Judicial review under this chapter shall without exception be
35 of the governmental action together with its accompanying environmental
36 determinations.

37 (7) Jurisdiction over the review of determinations under this
38 chapter in an appeal before an agency or superior court shall upon
39 consent of the parties be transferred in whole or part to the

1 shorelines hearings board. The shorelines hearings board shall hear
2 the matter and sign the final order expeditiously. The superior court
3 shall certify the final order of the shorelines hearings board and said
4 certified final order may only be appealed to an appellate court. In
5 the case of an appeal under this chapter regarding a project or other
6 matter that is also the subject of an appeal to the shorelines hearings
7 board under chapter 90.58 RCW, the shorelines hearings board shall have
8 sole jurisdiction over both the appeal under this section and the
9 appeal under chapter 90.58 RCW, shall consider them together, and shall
10 issue a final order, which may only be appealed to an appellate court.

11 (8) For purposes of this section and RCW 43.21C.080, the words
12 "action", "decision", and "determination" mean substantive agency
13 action including any accompanying procedural determinations under this
14 chapter (except where the word "action" means "appeal" in RCW
15 43.21C.080(2) and (3)). The word "action" in this section and RCW
16 43.21C.080 does not mean a procedural determination by itself made
17 under this chapter. The word "determination" includes any
18 environmental document required by this chapter and state or local
19 implementing rules. The word "agency" refers to any state or local
20 unit of government. The word "appeal" refers to administrative,
21 legislative, or judicial appeals.

22 (9) The court in its discretion may award reasonable attorney's
23 fees of up to one thousand dollars in the aggregate to the prevailing
24 party, including a governmental agency, on issues arising out of this
25 chapter if the court makes specific findings that the legal position of
26 a party is frivolous and without reasonable basis.

27 NEW SECTION. Sec. 5. A new section is added to chapter 43.21B RCW
28 to read as follows:

29 In an appeal that involves a penalty of five thousand dollars or
30 less, the appeal may be heard by one member of the board, whose
31 decision shall be the final decision of the board. The board shall
32 define by rule alternative procedures to expedite small appeals. These
33 alternatives may include: Mediation, upon agreement of all parties;
34 submission of testimony by affidavit; or other forms that may lead to
35 less formal and faster resolution of appeals.

36 **Sec. 6.** RCW 43.21B.180 and 1989 c 175 s 104 are each amended to
37 read as follows:

1 Judicial review of a decision of the hearings board (~~(shall be de~~
2 ~~novo except when the decision has been rendered pursuant to a formal~~
3 ~~hearing elected under the provisions of this chapter, in which event~~
4 ~~judicial review)) may be obtained only pursuant to RCW 34.05.510
5 through 34.05.598. The director shall have the same right of review
6 from a decision made pursuant to RCW 43.21B.110 as does any person.~~

7 **Sec. 7.** RCW 43.21B.190 and 1988 c 202 s 43 are each amended to
8 read as follows:

9 Within thirty days after the final decision and order of the
10 hearings board upon such an appeal has been communicated to the
11 interested parties, (~~(or within thirty days after an appeal has been~~
12 ~~denied after an informal hearing,)) such interested party aggrieved by
13 the decision and order of the hearings board may appeal to the superior
14 court. In all appeals involving a decision or an order of the hearings
15 board after an informal hearing, the petition shall be filed in the
16 superior court for the county of the petitioner's residence or
17 principal place of business, or in the absence of a residence or
18 principal place of business, for Thurston county. Such appeal may be
19 perfected by filing with the clerk of the superior court a notice of
20 appeal, and by serving a copy thereof by mail, or personally on the
21 director, the air pollution control boards or authorities, established
22 pursuant to chapter 70.94 RCW or on the board as the case may be. The
23 hearings board shall serve upon the appealing party, the director, the
24 air pollution control board or authorities established pursuant to
25 chapter 70.94 RCW, or the board, as the case may be, and on any other
26 party appearing at the hearings board's proceeding, and file with the
27 clerk of the court before trial, a certified copy of the hearings
28 board's decision and order. Appellate review of a decision of the
29 superior court may be sought as in other civil cases. No bond shall be
30 required on appeals to the superior court or on review by the supreme
31 court unless specifically required by the judge of the superior court.~~

32 **Sec. 8.** RCW 43.21B.230 and 1990 c 65 s 6 are each amended to read
33 as follows:

34 Any person having received notice of a denial of a petition, a
35 notice of determination, notice of or an order made by the department
36 may appeal, within thirty days from the date of the notice of such
37 denial, order, or determination to the hearings board. The appeal

1 shall be perfected by serving a copy of the notice of appeal upon the
2 department or air pollution authority established pursuant to chapter
3 70.94 RCW, as the case may be, within the time specified herein and by
4 filing the original thereof with proof of service with the clerk of the
5 hearings board. (~~((If the person intends that the hearing before the
6 hearings board be a formal one, the notice of appeal shall so state.
7 In the event that the notice of appeal does not so state, the hearing
8 shall be an informal one:— PROVIDED, HOWEVER, That nothing shall
9 prevent the department or the air pollution authority, as the case may
10 be, within ten days from the date of its receipt of the notice of
11 appeal, from filing with the clerk of the hearings board notice of its
12 intention that the hearing be a formal one.))~~)

13 **Sec. 9.** RCW 76.09.230 and 1992 c 52 s 23 are each amended to read
14 as follows:

15 (1) (~~((In all appeals over which the appeals board has jurisdiction,
16 a party taking an appeal may elect either a formal or an informal
17 hearing, unless such party has had an informal hearing with the
18 department.— Such election shall be made according to the rules of
19 practice and procedure to be promulgated by the appeals board.— In the
20 event that appeals are taken from the same decision, order, or
21 determination, as the case may be, by different parties and only one of
22 such parties elects a formal hearing, a formal hearing shall be
23 granted.~~

24 (2)) In all appeals over which the appeals board has jurisdiction,
25 upon request of one or more parties and with the consent of all
26 parties, the appeals board shall promptly schedule a conference for the
27 purpose of attempting to mediate the case. The mediation conference
28 shall be held prior to the hearing on not less than seven days' advance
29 written notice to all parties. All other proceedings pertaining to the
30 appeal shall be stayed until completion of mediation, which shall
31 continue so long as all parties consent: PROVIDED, That this shall not
32 prevent the appeals board from deciding motions filed by the parties
33 while mediation is ongoing: PROVIDED, FURTHER, That discovery may be
34 conducted while mediation is ongoing if agreed to by all parties.
35 Mediation shall be conducted by an administrative appeals judge or
36 other duly authorized agent of the appeals board who has received
37 training in dispute resolution techniques or has a demonstrated history
38 of successfully resolving disputes, as determined by the appeals board.

1 A person who mediates in a particular appeal shall not participate in
2 a hearing on that appeal or in writing the decision and order in the
3 appeal. Documentary and other physical evidence presented and evidence
4 of conduct or statements made during the course of mediation shall be
5 treated by the mediator and the parties in a confidential manner and
6 shall not be admissible in subsequent proceedings in the appeal except
7 in accordance with the provisions of the Washington rules of evidence
8 pertaining to compromise negotiations.

9 ~~((3))~~ (2) In all appeals the appeals board shall have all powers
10 relating to administration of oaths, issuance of subpoenas, and taking
11 of depositions, but such powers shall be exercised in conformity with
12 chapter 34.05 RCW.

13 ~~((4))~~ (3) In all appeals ~~((involving formal hearing))~~ the appeals
14 board, and each member thereof, shall be subject to all duties imposed
15 upon and shall have all powers granted to, an agency by those
16 provisions of chapter 34.05 RCW relating to adjudicative proceedings.

17 ~~((5))~~ (4) All proceedings~~((, including both formal and informal
18 hearings,))~~ before the appeals board or any of its members shall be
19 conducted in accordance with such rules of practice and procedure as
20 the board may prescribe. The appeals board shall publish such rules
21 and arrange for the reasonable distribution thereof.

22 ~~((6))~~ (5) Judicial review of a decision of the appeals board
23 ~~((shall be de novo except when the decision has been rendered pursuant
24 to the formal hearing, in which event judicial review))~~ may be obtained
25 only pursuant to RCW 34.05.510 through 34.05.598.

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