CERTIFICATION OF ENROLLMENT

ENGROSSED SUBSTITUTE SENATE BILL 6068

Chapter 253, Laws of 1994
(partial veto)
53rd Legislature
1994 Regular Session

ENVIRONMENTAL HEARINGS BOARDS--APPEALS

EFFECTIVE DATE: 6/9/94

Passed by the Senate March 9, 1994
YEAS 45   NAYS 0

JOEL PRITCHARD
President of the Senate

Passed by the House March 9, 1994
YEAS 97   NAYS 0

BRIAN EBERSOLE
Speaker of the House of Representatives

Approved April 1, 1994, with the exception of section 11, which is vetoed.

I, Marty Brown, Secretary of the Senate of the State of Washington, do hereby certify that the attached is ENGROSSED SUBSTITUTE SENATE BILL 6068 as passed by the Senate and the House of Representatives on the dates hereon set forth.

BRIAN EBERSOLE
Speaker of the House of Representatives

Passed by the Senate March 9, 1994
YEAS 45   NAYS 0

MIKE LOWRY
Governor of the State of Washington

MARTY BROWN
Secretary

FILED
April 1, 1994 - 11:15 a.m.

MIKE LOWRY
Governor of the State of Washington

SECRETARY OF STATE
State of Washington
AN ACT Relating to appeals involving boards within the environmental hearings office; amending RCW 90.58.170, 90.58.180, 43.21C.075, 43.21B.180, 43.21B.190, 43.21B.230, and 76.09.230; adding a new section to chapter 90.58 RCW; adding a new section to chapter 43.21B RCW; and creating new sections.

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

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

A shorelines hearings board sitting as a quasi judicial body is hereby established within the environmental hearings office under RCW 43.21B.005. The shorelines hearings board shall be made up of six members: Three members shall be members of the pollution control hearings board; two members, one appointed by the association of Washington cities and one appointed by the association of county commissioners, both to serve at the pleasure of the associations; and the commissioner of public lands or his or her designee. The chairman of the pollution control hearings board shall be the chairman of the shorelines hearings board. Except as provided in section 2 of this act, a decision must be agreed to by at least four members of the board.
to be final. The members of the shorelines (appeals) board shall receive the compensation, travel, and subsistence expenses as provided in RCW 43.03.050 and 43.03.060.

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

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

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

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

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

Concurrently with the filing of any request for review with the board as provided in this section pertaining to a final order of a local government, the requestor shall file a copy of his or her request with the department and the attorney general. If it appears to the department or the attorney general that the requestor has valid reasons to seek review, either the department or the attorney general may certify the request within thirty days after its receipt to the shorelines hearings board following which the board shall then, but not otherwise, review the matter covered by the requestor. The failure to obtain such certification shall not preclude the requestor from obtaining a review in the superior court under any right to review otherwise available to the requestor. The department and the attorney general may intervene to protect the public interest.
and insure that the provisions of this chapter are complied with at any
time within fifteen days from the date of the receipt by the department
or the attorney general of a copy of the request for review filed
pursuant to this section. The shorelines hearings board shall
initially schedule review proceedings on such requests for review
without regard as to whether such requests have or have not been
certified or as to whether the period for the department or the
attorney general to intervene has or has not expired, unless such
review is to begin within thirty days of such scheduling. If at the
end of the thirty day period for certification neither the department
nor the attorney general has certified a request for review, the
hearings board shall remove the request from its review schedule.

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

(3) The review proceedings authorized in subsections (1) and (2) of
this section are subject to the provisions of chapter 34.05 RCW
pertaining to procedures in adjudicative proceedings. Judicial review
of such proceedings of the shorelines hearings board ((may be had at
provided in)) is governed by chapter 34.05 RCW.

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

If the board determines that the rule, regulation, or guideline:
(a) Is clearly erroneous in light of the policy of this chapter; or
(b) Constitutes an implementation of this chapter in violation of
constitutional or statutory provisions; or
(c) Is arbitrary and capricious; or
(d) Was developed without fully considering and evaluating all
material submitted to the department by the local government; or
(e) Was not adopted in accordance with required procedures;
the board shall enter a final decision declaring the rule, regulation,
or guideline invalid, remanding the rule, regulation, or guideline to
the department with a statement of the reasons in support of the
determination, and directing the department to adopt, after a thorough
consultation with the affected local government, a new rule, regulation, or guideline. Unless the board makes one or more of the
determinations as hereinbefore provided, the board shall find the rule, regulation, or guideline to be valid and enter a final decision to that
effect.

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

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

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

(2) Unless otherwise provided by this section:

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

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

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

(a) Shall not allow more than one agency appeal proceeding on a
procedural determination (the adequacy of a determination of
significance/nonsignificance or of a final environmental impact
statement), consistent with any state statutory requirements for
appeals to local legislative bodies. The appeal proceeding on a
determination of significance/nonsignificance may occur before the
agency’s final decision on a proposed action. Such an appeal shall also be allowed for a determination of significance/nonsignificance which may be issued by the agency after supplemental review;

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

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

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

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

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

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

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

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

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

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

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

(7) Jurisdiction over the review of determinations under this chapter in an appeal before an agency or superior court shall upon consent of the parties be transferred in whole or part to the shorelines hearings board. The shorelines hearings board shall hear the matter and sign the final order expeditiously. The superior court shall certify the final order of the shorelines hearings board and said
certified final order may only be appealed to an appellate court. In the case of an appeal under this chapter regarding a project or other matter that is also the subject of an appeal to the shorelines hearings board under chapter 90.58 RCW, the shorelines hearings board shall have sole jurisdiction over both the appeal under this section and the appeal under chapter 90.58 RCW, shall consider them together, and shall issue a final order.

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

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

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

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

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

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

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

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

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

Any person having received notice of a denial of a petition, a notice of determination, notice of or an order made by the department may appeal, within thirty days from the date of the notice of such denial, order, or determination to the hearings board. The appeal shall be perfected by serving a copy of the notice of appeal upon the department or air pollution authority established pursuant to chapter 70.94 RCW, as the case may be, within the time specified herein and by
filing the original thereof with proof of service with the clerk of the
hearings board. ((If the person intends that the hearing before the
hearings board be a formal one, the notice of appeal shall so state.
In the event that the notice of appeal does not so state, the hearing
shall be an informal one: PROVIDED, HOWEVER, That nothing shall
prevent the department or the air pollution authority, as the case may
be, within ten days from the date of its receipt of the notice of
appeal, from filing with the clerk of the hearings board notice of its
intention that the hearing be a formal one.))

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

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

(2))) In all appeals over which the appeals board has jurisdiction,
upon request of one or more parties and with the consent of all
parties, the appeals board shall promptly schedule a conference for the
purpose of attempting to mediate the case. The mediation conference
shall be held prior to the hearing on not less than seven days’ advance
written notice to all parties. All other proceedings pertaining to the
appeal shall be stayed until completion of mediation, which shall
continue so long as all parties consent: PROVIDED, That this shall not
prevent the appeals board from deciding motions filed by the parties
while mediation is ongoing: PROVIDED, FURTHER, That discovery may be
conducted while mediation is ongoing if agreed to by all parties.
Mediation shall be conducted by an administrative appeals judge or
other duly authorized agent of the appeals board who has received
training in dispute resolution techniques or has a demonstrated history
of successfully resolving disputes, as determined by the appeals board.
A person who mediates in a particular appeal shall not participate in
a hearing on that appeal or in writing the decision and order in the
appeal. Documentary and other physical evidence presented and evidence
of conduct or statements made during the course of mediation shall be
treated by the mediator and the parties in a confidential manner and
shall not be admissible in subsequent proceedings in the appeal except
in accordance with the provisions of the Washington rules of evidence
pertaining to compromise negotiations.

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

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

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

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

NEW SECTION. Sec. 10. The office of the administrator for the
courts, under the direction of the appellate courts, shall conduct a
study to expedite appeals from administrative hearings. The study
shall be conducted in close cooperation with the environmental hearings
office. Recommendations from the study shall be made to the
appropriate standing committees of the legislature by September 1,
1994.

NEW SECTION. Sec. 11. (1) The environmental hearings office
shall review and make recommendations regarding the consolidation of
the following boards into a single board with jurisdiction over such
land use and environmental decisions as such boards collectively
exercise under current law:

(a) Pollution control hearings board;
(b) Growth planning hearings boards;
(c) Shorelines hearings board;
(d) Hydraulics appeals board; and
(e) Forest practices appeals board.

The office shall review the caseloads, staffing, and appeal procedures of such boards, as well as current and anticipated caseloads in view of future regulatory, planning or other requirements likely to impact the caseloads of such boards.

(2) The office shall include the results of its review in a report to the governor and the standing committees of the legislature on environmental and judiciary matters on or before December 1, 1994. The report shall include recommendations on whether such board consolidation may achieve administrative efficiencies while ensuring timely resolution of all matters which may be considered by such a board. The report shall also include recommendations on board size, staffing, and other considerations relevant to consolidation of the existing boards.

*Sec. 11 was vetoed, see message at end of chapter.

Passed the Senate March 9, 1994.
Passed the House March 9, 1994.
Approved by the Governor April 1, 1994, with the exception of certain items which were vetoed.
Filed in Office of Secretary of State April 1, 1994.

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

"I am returning herewith, without my approval as to section 11, Engrossed Substitute Senate Bill No. 6068 entitled: "AN ACT Relating to appeals involving boards within the Environmental Hearings Office;"

This is a thoughtful piece of legislation helping to reduce the time it takes for the Environmental Hearings Office and its constituent boards to resolve environmental disputes consistent with maintaining the quality of the state’s environment. It is a part of larger efforts at regulatory reform designed to maintain the state’s environmental quality and high standards while simplifying the regulatory and dispute resolution process.

Section 11 directs the Environmental Hearings Office to review and make recommendations as to whether the Pollution Control Hearings Board, the Growth Planning Hearings Boards, the Shorelines Hearings Boards, the Hydraulic Appeals Board, and the Forest Practices Appeals Board should be consolidated into a single board with jurisdiction over land use and environmental decisions.

While I am always interested in efforts to increase governmental efficiency, I do not agree with the provision as drafted. It is not clear why a study to consolidate state environmental boards should be conducted by the office managing some of the functions to be consolidated. Any such review should be undertaken independently if it is to achieve the desired results. It is also not clear to me that
consolidation of these boards, of itself, would reduce any backlogs or delays which are a function of workload and resources.

The Regulatory Reform Task Force is currently reviewing the relationship between the State Environmental Policy Act, the Growth Management Act, the Shoreline Management Act, and other statutes. The goal of its efforts is to provide recommendations for ways to integrate land use and environmental review statutes so that they will continue to protect the state’s environment and quality of life while simplifying and unifying regulations. I believe that it is better to allow this task force to complete its review and to make recommendations before approving an additional study of this topic.

For these reasons, I have vetoed section 11 of Engrossed Substitute Senate Bill No. 6068.

With the exception of section 11, Engrossed Substitute Senate Bill No. 6068 is approved."