
HOUSE BILL 3096

State of Washington 58th Legislature 2004 Regular Session

By Representative Schindler

Read first time 01/27/2004. Referred to Committee on State Government.

1 AN ACT Relating to appeals and reviews of permit decisions under
2 chapter 43.21L RCW; amending RCW 43.21L.010, 43.21L.050, 43.21L.060,
3 43.21L.070, 43.21L.080, 43.21L.090, 43.21L.100, 43.21L.110, 43.21L.120,
4 and 43.21L.130; creating a new section; and repealing RCW 43.21L.040,
5 43.21L.140, and 43.21L.901.

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

7 NEW SECTION. **Sec. 1.** The legislature finds that the superior
8 courts of Washington state can provide fair and unbiased review of land
9 use and other permit decisions reviewed under chapter 43.21L RCW. In
10 order to reduce redundant levels of review, the legislature intends
11 that all review under this chapter be conducted by the superior courts.

12 **Sec. 2.** RCW 43.21L.010 and 2003 c 393 s 2 are each amended to read
13 as follows:

14 The definitions in this section apply throughout this chapter
15 unless the context clearly requires otherwise.

16 (1) (~~"Board" means the environmental and land use hearings board~~
17 ~~established in this chapter~~) "Court" means the superior court of the
18 county in which the qualifying project is located.

1 (2) "Final decision" means the highest and last decision available
2 within the permit agency with respect to a permit application to the
3 agency, including but not limited to decisions resulting from internal
4 appeals available within the agency for the permit decision.

5 (3) "Participating permit agency" means any permit agency in which
6 the applicant for a qualifying project has filed an application for an
7 environmental or land use permit that is required for the qualifying
8 project.

9 (4) "Permit" means any license, permit, certificate, certification,
10 approval, compliance schedule, or other similar document pertaining to
11 any regulatory or management program related to the protection,
12 conservation, use of, or interference with the land, air, or water in
13 the state. This document must be required to be obtained from a state
14 agency or local government, including but not limited to counties,
15 cities, and air agencies, prior to constructing or operating a
16 qualifying project. Local government permits include, but are not
17 limited to, subdivisions, binding site plans, planned unit
18 developments, shoreline permits or other approvals under RCW 90.58.140,
19 master plan approvals, site plan approvals, permits or approvals
20 required by critical area ordinances, conditional use permits,
21 variances, and site-specific rezones authorized by a comprehensive plan
22 or subarea plan or other equivalent documents however titled or
23 denominated. Local government permits excluded under this definition
24 include the adoption or amendment of a comprehensive plan, subarea
25 plan, legislative actions on development regulations, certifications by
26 local health districts of water and sewer availability, and building,
27 grading, flood hazard, utility connection, and other nondiscretionary
28 construction permits.

29 (5) "Permit agency" means any state agency or local government,
30 including but not limited to air agencies, authorized by law to issue
31 permits.

32 (6) "Qualifying project" means an economic development project that
33 is (a) located within a county that in its entirety qualifies as a
34 distressed area as defined in RCW 43.168.020(3) and a rural natural
35 resources impact area as defined in RCW 43.160.020, (b) designed to
36 provide at least thirty full-time year-round jobs, and (c) designated
37 as a qualifying project by the office of permit assistance established

1 under chapter 43.42 RCW if a request for a determination of such
2 designation is made to the office by the project applicant as provided
3 under this chapter.

4 **Sec. 3.** RCW 43.21L.050 and 2003 c 393 s 6 are each amended to read
5 as follows:

6 (1) Proceedings for review under this chapter shall be commenced by
7 filing a petition with the (~~environmental and land use hearings board.~~
8 ~~The board may adopt by rule procedures for filing and service that are~~
9 ~~consistent with this chapter~~) superior court of the county in which
10 the qualifying project is located.

11 (2) Such petition is barred, and the (~~board~~) court may not grant
12 review, unless the petition is timely filed with the (~~board~~) court
13 and timely served on the following persons who shall be parties to the
14 review of the petition:

15 (a) The participating permit agencies, which for purposes of the
16 petition shall be (i) if a state agency, the director thereof, and (ii)
17 if a local government, the jurisdiction's corporate entity which shall
18 be served as provided in RCW 4.28.080; and

19 (b) Each of the following persons if the person is not the
20 petitioner:

21 (i) Each person identified by name and address as applicant in the
22 application to the participating permit agencies;

23 (ii) Each person identified in project application documents as an
24 owner of the property at issue or, if none, each person identified as
25 a taxpayer for the property at issue in the records of the county
26 assessor.

27 (3) The petition is timely if it is filed and served on all parties
28 listed in subsection (2) of this section within twenty-one days of the
29 issuance by the permit agency of the permit for the qualifying project.

30 (4) For the purposes of this section, the date on which a permit
31 decision is issued is:

32 (a) Three days after a written decision is mailed by the permit
33 agency to the project applicant or, if not mailed, the date on which
34 the permit agency provides notice that a written decision is publicly
35 available; or

36 (b) If (a) of this subsection does not apply, the date the decision
37 is entered into the public record.

1 (5) Service on all parties shall be by personal service or by mail.
2 Service by mail is effective on the date of mailing. Proof of service
3 shall be by affidavit or declaration under penalty of perjury.

4 **Sec. 4.** RCW 43.21L.060 and 2003 c 393 s 7 are each amended to read
5 as follows:

6 Standing to bring a petition under this chapter is limited to the
7 following persons:

8 (1) The applicant and the owner of the property to which the permit
9 decision is directed;

10 (2) Another person aggrieved or adversely affected by the permit
11 decision, or who would be aggrieved or adversely affected by a reversal
12 or modification of the permit decision. A person is aggrieved or
13 adversely affected within the meaning of this section only when all of
14 the following conditions are present:

15 (a) The permit decision has prejudiced or is likely to prejudice
16 that person;

17 (b) That person's asserted interests are among those that the
18 permit agency was required to consider when it made its permit
19 decision;

20 (c) A decision of the (~~board~~) court in favor of that person would
21 substantially eliminate or redress the prejudice to that person caused
22 or likely to be caused by the permit decision; and

23 (d) The petitioner has exhausted his or her administrative remedies
24 to the extent required by law;

25 (3) A participating permit agency under this chapter.

26 **Sec. 5.** RCW 43.21L.070 and 2003 c 393 s 8 are each amended to read
27 as follows:

28 A petition must set forth:

29 (1) The name and mailing address of the petitioner;

30 (2) The name and mailing address of the petitioner's attorney, if
31 any;

32 (3) The name and mailing address of the permit agency whose permit
33 is at issue, if any;

34 (4) A duplicate copy of the permit decision;

35 (5) Identification of each person to be made a party under this
36 chapter;

- 1 (6) Facts demonstrating that the petitioner has standing to seek
- 2 ((~~board~~)) court review under this chapter;
- 3 (7) A separate and concise statement of each error alleged to have
- 4 been committed;
- 5 (8) A concise statement of facts upon which the petitioner relies
- 6 to sustain the statement of error; and
- 7 (9) A request for relief, specifying the type and extent of relief
- 8 requested.

9 **Sec. 6.** RCW 43.21L.080 and 2003 c 393 s 9 are each amended to read
10 as follows:

11 (1) Within seven days after receipt of service of the petition
12 filed pursuant to RCW 43.21L.050, the project applicant shall file with
13 the ((~~board~~)) court and serve on all parties an affidavit certifying
14 all applications for permits that the project applicant has filed with
15 participating permit agencies for the qualifying project, provided,
16 however, that no permit may be included that has been issued and
17 appealed to an administrative hearings board or to court prior to the
18 date of service of the petition filed with the ((~~board~~)) court under
19 this chapter. The ((~~board~~)) court shall request verification from the
20 participating agencies of the permit applications certified in the
21 project applicant's affidavit and of the expected date for final
22 decision on the permit applications. Filing of the affidavit shall
23 toll the schedule for hearing by the ((~~board~~)) court until twenty-one
24 days after issuance of the final permit decision on the last permit
25 required for the qualifying project that has been certified in the
26 project applicant's affidavit and verified by a participating agency as
27 applied for, unless the petition filed and served by the petitioner
28 relates to the final permit decision.

29 (2) Within seven days after the expiration of the appeal period for
30 the final permit decision on the last permit required for the
31 qualifying project, the petitioner shall note an initial hearing on
32 jurisdictional and other preliminary matters, and, if applicable, on
33 other pretrial matters. This initial hearing shall be set no sooner
34 than thirty-five days and not later than fifty days after the
35 expiration of the appeal period for the final permit decision on the
36 last permit required for the qualifying project.

1 (3) If petitions for review of more than one permit issued by
2 participating permit agencies for a qualifying project are filed with
3 the ((~~board~~)) court, the ((~~board~~)) court shall contemporaneously
4 process all such petitions in accordance with the case schedule
5 requirements set forth in chapter 393, Laws of 2003.

6 (4) The parties shall note all motions on jurisdictional and
7 procedural issues for resolution at the initial hearing, except that a
8 motion to allow discovery may be brought sooner.

9 (5) The defenses of lack of standing, untimely filing or service of
10 the petition, lack of good faith or improper purpose in filing, and
11 failure to join persons needed for just adjudication are waived if not
12 raised by timely motion noted to be heard at the initial hearing,
13 unless the ((~~board~~)) court allows discovery on such issues.

14 (6) The petitioner shall move the ((~~board~~)) court for an order at
15 the initial hearing that sets the date on which the permit decision
16 record or records of the applicable permit agency or agencies, if any,
17 must be submitted, sets a briefing schedule, sets a discovery schedule
18 if discovery is to be allowed, and schedules a hearing or hearings on
19 the merits.

20 (7) The parties may waive the initial hearing by scheduling with
21 the ((~~board~~)) court a date for the hearing or hearings on the merits
22 and filing a stipulated order that resolves the jurisdictional and
23 procedural issues raised by the petition, including the issues
24 identified in subsections (5) and (6) of this section.

25 (8) A party need not file an answer to a petition for review filed
26 pursuant to RCW 43.21L.050.

27 **Sec. 7.** RCW 43.21L.090 and 2003 c 393 s 10 are each amended to
28 read as follows:

29 The ((~~board~~)) court shall provide expedited review of petitions
30 filed under this chapter. Any matter reviewed on the decision record
31 as provided in RCW 43.21L.120(1) must be set for hearing within sixty
32 days of the date set for submitting the decision record of all
33 participating permit agencies, absent a showing of good cause for a
34 different date or a stipulation of the parties. Any matter reviewed de
35 novo as provided in RCW 43.21L.120(3) must be set for hearing or trial
36 no later than one hundred twenty days after the initial hearing date.

1 The ((~~board~~)) court shall issue a final decision and order within
2 thirty days after the final hearing required in this section.

3 **Sec. 8.** RCW 43.21L.100 and 2003 c 393 s 11 are each amended to
4 read as follows:

5 (1) A petitioner or other party may request the ((~~board~~)) court to
6 stay or suspend an action by a participating permit agency or another
7 party to implement the decision under review. The request must set
8 forth a statement of grounds for the stay and the factual basis for the
9 request.

10 (2) The ((~~board~~)) court may grant a stay only if the ((~~board~~))
11 court finds that: (a) The party requesting the stay is likely to
12 prevail on the merits, (b) without the stay the party requesting it
13 will suffer irreparable harm, (c) the grant of a stay will not
14 substantially harm other parties to the proceedings, and (d) the
15 request for the stay is timely in light of the circumstances of the
16 case.

17 (3) The ((~~board~~)) court may grant the request for a stay upon such
18 terms and conditions, including the filing of security, as are
19 necessary to prevent harm to other parties by the stay.

20 **Sec. 9.** RCW 43.21L.110 and 2003 c 393 s 12 are each amended to
21 read as follows:

22 (1) Within forty-five days after entry of an order to submit the
23 decision record, where applicable, or within such a further time as the
24 ((~~board~~)) court allows or as the parties agree, each participating
25 agency shall submit to the ((~~board~~)) court a certified copy of the
26 decision record for ((~~board~~)) court review of the permit decision,
27 except that the petitioner shall prepare at the petitioner's expense
28 and submit a verbatim transcript of any hearings held on the matter.

29 (2) If the parties agree, or upon order of the ((~~board~~)) court, the
30 record shall be shortened or summarized to avoid reproduction and
31 transcription of portions of the record that are duplicative or not
32 relevant to the issues to be reviewed by the ((~~board~~)) court.

33 (3) The petitioner shall pay the participating agency the cost of
34 preparing the record before the participating agency submits the
35 decision record to the ((~~board~~)) court. Failure by the petitioner to

1 timely pay the participating agency relieves the participating agency
2 of responsibility to submit the record and is grounds for dismissal of
3 the petition.

4 (4) If the relief sought by the petitioner is granted in whole or
5 in part the ((~~board~~)) court shall equitably assess the cost of
6 preparing the record among the parties. In assessing costs the
7 ((~~board~~)) court shall take into account the extent to which each party
8 prevailed and the reasonableness of the parties' conduct in agreeing or
9 not agreeing to shorten or summarize the record under subsection (2) of
10 this section.

11 **Sec. 10.** RCW 43.21L.120 and 2003 c 393 s 13 are each amended to
12 read as follows:

13 (1) For all permit decisions being reviewed that were made by
14 quasi-judicial bodies or permit agency officers who made factual
15 determinations in support of the decisions, after the conduct of
16 proceedings in which the parties had an opportunity consistent with due
17 process to make records on the factual issues, ((~~board~~)) court review
18 of factual issues and the conclusions drawn from the factual issues
19 shall be confined to the records created by the quasi-judicial bodies
20 or permit agency officers, except as provided in subsections (2)
21 through (4) of this section.

22 (2) For decisions described in subsection (1) of this section, the
23 records may be supplemented by additional evidence only if the
24 additional evidence relates to:

25 (a) Grounds for disqualification of a member of the body or of the
26 officer that made the permit decision, when such grounds were unknown
27 by the petitioner at the time the record was created;

28 (b) Matters that were improperly excluded from the record after
29 being offered by a party to a permit decision proceeding; or

30 (c) Matters that were outside the jurisdiction of the body or
31 officer that made the permit decision.

32 (3) For permit decisions other than those described in subsection
33 (1) of this section, the ((~~board~~)) court review of the permit decision
34 shall be de novo on issues presented as error in the petition.

35 (4) The ((~~board~~)) court may require or permit corrections of
36 ministerial errors or inadvertent omissions in the preparation of the
37 record.

1 (5)(a) The parties may not conduct pretrial discovery except with
2 the prior permission of the ((~~board~~)) court, which may be sought by
3 motion, subject to any applicable rules adopted by the ((~~board~~)) court,
4 at any time after service of the petition. The ((~~board~~)) court shall
5 not grant permission unless the party requesting it makes a prima facie
6 showing of need. The ((~~board~~)) court shall strictly limit discovery to
7 what is necessary for equitable and timely review of the issues.

8 (b) If the ((~~board~~)) court allows the record to be supplemented, or
9 in any de novo proceeding under subsection (3) of this section, the
10 ((~~board~~)) court shall require the parties to disclose before the
11 hearing or trial on the merits the identity of witnesses and the
12 specific evidence they intend to offer.

13 (c) If any party, or anyone acting on behalf of any party, requests
14 records under chapter 42.17 RCW relating to the matters at issue, a
15 copy of the request shall simultaneously be given to all other parties,
16 and the ((~~board~~)) court shall take such request into account in
17 fashioning an equitable discovery order under this section.

18 **Sec. 11.** RCW 43.21L.130 and 2003 c 393 s 14 are each amended to
19 read as follows:

20 (1) The ((~~board~~)) court shall review the decision record and all
21 such evidence as is permitted to supplement the record for review
22 restricted to the decision record or is required for de novo review
23 under RCW 43.21L.120. The ((~~board~~)) court may grant relief only if the
24 party seeking relief has carried the burden of establishing that one of
25 the standards set forth in (a) through (f) of this subsection has been
26 met. The standards are:

27 (a) The body or officer that made the permit decision engaged in
28 unlawful procedure or failed to follow a prescribed process, unless the
29 error was harmless;

30 (b) The permit decision is an erroneous interpretation of the law,
31 after allowing for such deference as is due the construction of a law
32 by an agency with expertise;

33 (c) The permit decision is not supported by evidence that is
34 substantial when viewed in light of the whole record before the
35 ((~~board~~)) court;

36 (d) The permit decision is a clearly erroneous application of the
37 law to the facts;

1 (e) The permit decision is outside the authority or jurisdiction of
2 the body or officer making the decision; or

3 (f) The permit decision violates the constitutional rights of the
4 party seeking relief.

5 (2) The (~~board~~) court may affirm or reverse each and every permit
6 decision under review or remand the decision for modification or
7 further proceedings involving the permit agencies.

8 NEW SECTION. Sec. 12. The following acts or parts of acts are
9 each repealed:

10 (1) RCW 43.21L.040 (Environmental and land use hearings board) and
11 2003 c 393 s 5;

12 (2) RCW 43.21L.140 (Judicial review) and 2003 c 393 s 15; and

13 (3) RCW 43.21L.901 (Effective date--2003 c 393) and 2003 c 393 s
14 25.

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