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SENATE BILL 6693

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State of Washington

58th Legislature

2004 Regular Session

By Senator Mulliken

Read first time 01/30/2004. Referred to Committee on Land Use & Planning.

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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