
HOUSE BILL 1662

State of Washington 62nd Legislature 2011 Regular Session

By Representatives Takko, Rodne, and Angel

Read first time 01/28/11. Referred to Committee on Local Government.

1 AN ACT Relating to appeal and permit procedures under the shoreline
2 management act; and amending RCW 90.58.180, 36.70C.030, 90.58.140,
3 34.05.461, and 43.21C.075.

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

5 **Sec. 1.** RCW 90.58.180 and 2010 c 210 s 37 are each amended to read
6 as follows:

7 (1) Any person aggrieved by the granting, denying, or rescinding of
8 a permit on shorelines of the state pursuant to RCW 90.58.140 may(~~(7~~
9 ~~except as otherwise provided in chapter 43.21L RCW, seek review from~~
10 ~~the shorelines hearings board by filing a petition for review within~~
11 ~~twenty one days of the date of receipt of the decision as provided for~~
12 ~~in RCW 90.58.140(6).~~

13 ~~Within seven days of the filing of any petition for review with the~~
14 ~~board as provided in this section pertaining to a final decision of a~~
15 ~~local government, the petitioner shall serve copies of the petition on~~
16 ~~the department, the office of the attorney general, and the local~~
17 ~~government. The department and the attorney general may intervene to~~
18 ~~protect the public interest and ensure that the provisions of this~~
19 ~~chapter are complied with at any time within fifteen days from the date~~

1 of the receipt by the department or the attorney general of a copy of
2 the petition for review filed pursuant to this section. The shorelines
3 hearings board shall schedule review proceedings on the petition for
4 review without regard as to whether the period for the department or
5 the attorney general to intervene has or has not expired)) seek review
6 by following the procedures in chapter 36.70C RCW.

7 (2) The department or the attorney general may obtain review of any
8 final decision granting a permit, or granting or denying an application
9 for a permit issued by a local government by ~~((filing a written~~
10 ~~petition with the shorelines hearings board and the appropriate local~~
11 ~~government within twenty one days from the date of receipt as provided~~
12 ~~in RCW 90.58.140(6)).~~

13 ~~(3) The review proceedings authorized in subsections (1) and (2) of~~
14 ~~this section are subject to the provisions of chapter 34.05 RCW~~
15 ~~pertaining to procedures in adjudicative proceedings. Judicial review~~
16 ~~of such proceedings of the shorelines hearings board is governed by~~
17 ~~chapter 34.05 RCW. The board shall issue its decision on the appeal~~
18 ~~authorized under subsections (1) and (2) of this section within one~~
19 ~~hundred eighty days after the date the petition is filed with the board~~
20 ~~or a petition to intervene is filed by the department or the attorney~~
21 ~~general, whichever is later. The time period may be extended by the~~
22 ~~board for a period of thirty days upon a showing of good cause or may~~
23 ~~be waived by the parties)) following the procedures in chapter 36.70C~~
24 RCW.

25 ~~((+4))~~ (3) Any person may appeal any rules, regulations, or
26 guidelines adopted or approved by the department within thirty days of
27 the date of the adoption or approval. The board shall make a final
28 decision within sixty days following the hearing held thereon.

29 ~~((+5))~~ (4) The board shall find the rule, regulation, or guideline
30 to be valid and enter a final decision to that effect unless it
31 determines that the rule, regulation, or guideline:

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

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

35 (c) Is arbitrary and capricious; or

36 (d) Was developed without fully considering and evaluating all
37 material submitted to the department during public review and comment;

38 or

1 (e) Was not adopted in accordance with required procedures.

2 ((+6+)) (5) If the board makes a determination under subsection
3 ((+5+)) (4)(a) through (e) of this section, it shall enter a final
4 decision declaring the rule, regulation, or guideline invalid,
5 remanding the rule, regulation, or guideline to the department with a
6 statement of the reasons in support of the determination, and directing
7 the department to adopt, after a thorough consultation with the
8 affected local government and any other interested party, a new rule,
9 regulation, or guideline consistent with the board's decision.

10 ((+7+)) (6) A decision of the board on the validity of a rule,
11 regulation, or guideline shall be subject to review in superior court,
12 if authorized pursuant to chapter 34.05 RCW. A petition for review of
13 the decision of the shorelines hearings board on a rule, regulation, or
14 guideline shall be filed within thirty days after the date of final
15 decision by the shorelines hearings board.

16 **Sec. 2.** RCW 36.70C.030 and 2010 1st sp.s. c 7 s 38 are each
17 amended to read as follows:

18 (1) This chapter replaces the writ of certiorari for appeal of land
19 use decisions and shall be the exclusive means of judicial review of
20 land use decisions, except that this chapter does not apply to:

21 (a) Judicial review of:

22 (i) Land use decisions made by bodies that are not part of a local
23 jurisdiction;

24 (ii) Land use decisions of a local jurisdiction that are subject to
25 review by a quasi-judicial body created by state law, such as ((the
26 shorelines hearings board or)) the growth management hearings board;

27 (b) Judicial review of applications for a writ of mandamus or
28 prohibition; or

29 (c) Claims provided by any law for monetary damages or
30 compensation. If one or more claims for damages or compensation are
31 set forth in the same complaint with a land use petition brought under
32 this chapter, the claims are not subject to the procedures and
33 standards, including deadlines, provided in this chapter for review of
34 the petition. The judge who hears the land use petition may, if
35 appropriate, preside at a trial for damages or compensation.

36 (2) The superior court civil rules govern procedural matters under

1 this chapter to the extent that the rules are consistent with this
2 chapter.

3 **Sec. 3.** RCW 90.58.140 and 2010 c 210 s 36 are each amended to read
4 as follows:

5 (1) A development shall not be undertaken on the shorelines of the
6 state unless it is consistent with the policy of this chapter and,
7 after adoption or approval, as appropriate, the applicable guidelines,
8 rules, or master program.

9 (2) A substantial development shall not be undertaken on shorelines
10 of the state without first obtaining a permit from the government
11 entity having administrative jurisdiction under this chapter.

12 A permit shall be granted:

13 (a) From June 1, 1971, until such time as an applicable master
14 program has become effective, only when the development proposed is
15 consistent with: (i) The policy of RCW 90.58.020; and (ii) after their
16 adoption, the guidelines and rules of the department; and (iii) so far
17 as can be ascertained, the master program being developed for the area;

18 (b) After adoption or approval, as appropriate, by the department
19 of an applicable master program, only when the development proposed is
20 consistent with the applicable master program and this chapter.

21 (3) The local government shall establish a program, consistent with
22 rules adopted by the department, for the administration and enforcement
23 of the permit system provided in this section. The administration of
24 the system so established shall be performed exclusively by the local
25 government.

26 (4) Except as otherwise specifically provided in subsection (11) of
27 this section, the local government shall require notification of the
28 public of all applications for permits governed by any permit system
29 established pursuant to subsection (3) of this section by ensuring that
30 notice of the application is given by at least one of the following
31 methods:

32 (a) Mailing of the notice to the latest recorded real property
33 owners as shown by the records of the county assessor within at least
34 three hundred feet of the boundary of the property upon which the
35 substantial development is proposed;

36 (b) Posting of the notice in a conspicuous manner on the property
37 upon which the project is to be constructed; or

1 (c) Any other manner deemed appropriate by local authorities to
2 accomplish the objectives of reasonable notice to adjacent landowners
3 and the public.

4 The notices shall include a statement that any person desiring to
5 submit written comments concerning an application, or desiring to
6 receive notification of the final decision concerning an application as
7 expeditiously as possible after the issuance of the decision, may
8 submit the comments or requests for decisions to the local government
9 within thirty days of the last date the notice is to be published
10 pursuant to this subsection. The local government shall forward, in a
11 timely manner following the issuance of a decision, a copy of the
12 decision to each person who submits a request for the decision.

13 If a hearing is to be held on an application, notices of such a
14 hearing shall include a statement that any person may submit oral or
15 written comments on an application at the hearing.

16 (5) The system shall include provisions to assure that construction
17 pursuant to a permit (~~((will not begin or be authorized until))~~) may
18 commence no sooner than twenty-one days from the date of receipt as
19 (~~((provided))~~) defined in subsection (6) of this section(~~(; or until all~~
20 ~~review proceedings are terminated if the proceedings were initiated~~
21 ~~within twenty-one days from the date of receipt as defined in~~
22 ~~subsection (6) of this section))~~) except as follows:

23 (a) In the case of any permit issued to the state of Washington,
24 department of transportation, for the construction and modification of
25 SR 90 (I-90) on or adjacent to Lake Washington, the construction may
26 begin after thirty days from the date of filing, and the permits are
27 valid until December 31, 1995;

28 (b) (~~((Construction may be commenced no sooner than thirty days~~
29 ~~after the date of the appeal of the board's decision is filed if a~~
30 ~~permit is granted by the local government and (i) the granting of the~~
31 ~~permit is appealed to the shorelines hearings board within twenty-one~~
32 ~~days of the date of receipt, (ii) the hearings board approves the~~
33 ~~granting of the permit by the local government or approves a portion of~~
34 ~~the substantial development for which the local government issued the~~
35 ~~permit, and (iii) an appeal for judicial review of the hearings board~~
36 ~~decision is filed pursuant to chapter 34.05 RCW. The appellant may~~
37 ~~request, within ten days of the filing of the appeal with the court, a~~
38 ~~hearing before the court to determine whether construction pursuant to~~

1 ~~the permit approved by the hearings board or to a revised permit issued~~
2 ~~pursuant to the order of the hearings board should not commence. If,~~
3 ~~at the conclusion of the hearing, the court finds that construction~~
4 ~~pursuant to such a permit would involve a significant, irreversible~~
5 ~~damaging of the environment, the court shall prohibit the permittee~~
6 ~~from commencing the construction pursuant to the approved or revised~~
7 ~~permit until all review proceedings are final. Construction pursuant~~
8 ~~to a permit revised at the direction of the hearings board may begin~~
9 ~~only on that portion of the substantial development for which the local~~
10 ~~government had originally issued the permit, and construction pursuant~~
11 ~~to such a revised permit on other portions of the substantial~~
12 ~~development may not begin until after all review proceedings are~~
13 ~~terminated. In such a hearing before the court, the burden of proving~~
14 ~~whether the construction may involve significant irreversible damage to~~
15 ~~the environment and demonstrating whether such construction would or~~
16 ~~would not be appropriate is on the appellant)) Work outside of the~~
17 ~~shoreline jurisdiction may commence in advance of the issuance of the~~
18 ~~shoreline permit if the local government finds that such work will not~~
19 ~~interfere with the goals of the shoreline management act;~~

20 (c) In the event of a petition to superior court pursuant to RCW
21 90.58.180(1), a motion to stay is filed and granted in accordance with
22 the requirements of chapter 36.70C RCW; provided, however the court
23 must further find:

24 (i) Commencement of the work in advance of a decision on appeal is
25 found to substantially interfere with the goals of the shoreline
26 management act and restoration or mitigation is not feasible;

27 (ii) The reviewing court finds substantial likelihood of success on
28 the merits of the appeal; and

29 (iii) A bond is posted under conditions identified in chapter 7.16
30 RCW for injunctions;

31 (d) If the permit is for a substantial development meeting the
32 requirements of subsection (11) of this section, construction pursuant
33 to that permit may not begin or be authorized until twenty-one days
34 from the date of receipt as provided in subsection (6) of this section.

35 If a permittee begins construction pursuant to subsections (a),
36 (b), or ((+e)) (d) of this subsection, the construction is begun at
37 the permittee's own risk. If, as a result of judicial review, the
38 courts order the removal of any portion of the construction or the

1 restoration of any portion of the environment involved or require the
2 alteration of any portion of a substantial development constructed
3 pursuant to a permit, the permittee is barred from recovering damages
4 or costs involved in adhering to such requirements from the local
5 government that granted the permit, the hearings board, or any
6 appellant or intervener.

7 (6) Any decision on an application for a permit under the authority
8 of this section, whether it is an approval or a denial, shall,
9 concurrently with the transmittal of the ruling to the applicant, be
10 transmitted to the department and the attorney general. A petition for
11 review of such a decision must be commenced within twenty-one days from
12 the date of receipt of the decision. With regard to a permit other
13 than a permit governed by subsection (10) of this section, "date of
14 receipt" as used herein refers to the date that the applicant receives
15 written notice from the department that the department has received the
16 decision. With regard to a permit for a variance or a conditional use,
17 "date of receipt" means the date a local government or applicant
18 receives the written decision of the department rendered on the permit
19 pursuant to subsection (10) of this section. For the purposes of this
20 subsection, the term "date of receipt" has the same meaning as provided
21 in RCW 43.21B.001.

22 (7) Applicants for permits under this section have the burden of
23 proving that a proposed substantial development is consistent with the
24 criteria that must be met before a permit is granted. In any review of
25 the granting or denial of an application for a permit as provided in
26 RCW 90.58.180 (1) and (2), the person requesting the review has the
27 burden of proof.

28 (8) Any permit may, after a hearing with adequate notice to the
29 permittee and the public, be rescinded by the issuing authority upon
30 the finding that a permittee has not complied with conditions of a
31 permit. If the department is of the opinion that noncompliance exists,
32 the department shall provide written notice to the local government and
33 the permittee. If the department is of the opinion that the
34 noncompliance continues to exist thirty days after the date of the
35 notice, and the local government has taken no action to rescind the
36 permit, the department may petition the hearings board for a rescission
37 of the permit upon written notice of the petition to the local

1 government and the permittee if the request by the department is made
2 to the hearings board within fifteen days of the termination of the
3 thirty-day notice to the local government.

4 (9) The holder of a certification from the governor pursuant to
5 chapter 80.50 RCW shall not be required to obtain a permit under this
6 section.

7 (10) Any permit for a variance or a conditional use by local
8 government under approved master programs must be submitted to the
9 department for its approval or disapproval.

10 (11)(a) An application for a substantial development permit for a
11 limited utility extension or for the construction of a bulkhead or
12 other measures to protect a single family residence and its appurtenant
13 structures from shoreline erosion shall be subject to the following
14 procedures:

15 (i) The public comment period under subsection (4) of this section
16 shall be twenty days. The notice provided under subsection (4) of this
17 section shall state the manner in which the public may obtain a copy of
18 the local government decision on the application no later than two days
19 following its issuance;

20 (ii) The local government shall issue its decision to grant or deny
21 the permit within twenty-one days of the last day of the comment period
22 specified in (i) of this subsection; and

23 (iii) If there is an appeal of the decision to grant or deny the
24 permit to the local government legislative authority, the appeal shall
25 be finally determined by the legislative authority within thirty days.

26 (b) For purposes of this section, a limited utility extension means
27 the extension of a utility service that:

28 (i) Is categorically exempt under chapter 43.21C RCW for one or
29 more of the following: Natural gas, electricity, telephone, water, or
30 sewer;

31 (ii) Will serve an existing use in compliance with this chapter;
32 and

33 (iii) Will not extend more than twenty-five hundred linear feet
34 within the shorelines of the state.

35 **Sec. 4.** RCW 34.05.461 and 1995 c 347 s 312 are each amended to
36 read as follows:

37 (1) Except as provided in subsection (2) of this section:

1 (a) If the presiding officer is the agency head or one or more
2 members of the agency head, the presiding officer may enter an initial
3 order if further review is available within the agency, or a final
4 order if further review is not available;

5 (b) If the presiding officer is a person designated by the agency
6 to make the final decision and enter the final order, the presiding
7 officer shall enter a final order; and

8 (c) If the presiding officer is one or more administrative law
9 judges, the presiding officer shall enter an initial order.

10 (2) With respect to agencies exempt from chapter 34.12 RCW or an
11 institution of higher education, the presiding officer shall transmit
12 a full and complete record of the proceedings, including such comments
13 upon demeanor of witnesses as the presiding officer deems relevant, to
14 each agency official who is to enter a final or initial order after
15 considering the record and evidence so transmitted.

16 (3) Initial and final orders shall include a statement of findings
17 and conclusions, and the reasons and basis therefor, on all the
18 material issues of fact, law, or discretion presented on the record,
19 including the remedy or sanction and, if applicable, the action taken
20 on a petition for a stay of effectiveness. Any findings based
21 substantially on credibility of evidence or demeanor of witnesses shall
22 be so identified. Findings set forth in language that is essentially
23 a repetition or paraphrase of the relevant provision of law shall be
24 accompanied by a concise and explicit statement of the underlying
25 evidence of record to support the findings. The order shall also
26 include a statement of the available procedures and time limits for
27 seeking reconsideration or other administrative relief. An initial
28 order shall include a statement of any circumstances under which the
29 initial order, without further notice, may become a final order.

30 (4) Findings of fact shall be based exclusively on the evidence of
31 record in the adjudicative proceeding and on matters officially noticed
32 in that proceeding. Findings shall be based on the kind of evidence on
33 which reasonably prudent persons are accustomed to rely in the conduct
34 of their affairs. Findings may be based on such evidence even if it
35 would be inadmissible in a civil trial. However, the presiding officer
36 shall not base a finding exclusively on such inadmissible evidence
37 unless the presiding officer determines that doing so would not unduly

1 abridge the parties' opportunities to confront witnesses and rebut
2 evidence. The basis for this determination shall appear in the order.

3 (5) Where it bears on the issues presented, the agency's
4 experience, technical competency, and specialized knowledge may be used
5 in the evaluation of evidence.

6 (6) If a person serving or designated to serve as presiding officer
7 becomes unavailable for any reason before entry of the order, a
8 substitute presiding officer shall be appointed as provided in RCW
9 34.05.425. The substitute presiding officer shall use any existing
10 record and may conduct any further proceedings appropriate in the
11 interests of justice.

12 (7) The presiding officer may allow the parties a designated time
13 after conclusion of the hearing for the submission of memos, briefs, or
14 proposed findings.

15 ~~((a) Except as otherwise provided in (b) of this subsection,))~~
16 Initial or final orders shall be served in writing within ninety days
17 after conclusion of the hearing or after submission of memos, briefs,
18 or proposed findings in accordance with subsection (7) of this section
19 unless this period is waived or extended for good cause shown.

20 ~~((b) This subsection does not apply to the final order of the
21 shorelines hearings board on appeal under RCW 90.58.180(3).))~~

22 (9) The presiding officer shall cause copies of the order to be
23 served on each party and the agency.

24 **Sec. 5.** RCW 43.21C.075 and 1997 c 429 s 49 are each amended to
25 read as follows:

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

34 (2) Unless otherwise provided by this section:
35 (a) Appeals under this chapter shall be of the governmental action
36 together with its accompanying environmental determinations.

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

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

6 (a) Shall allow no more than one agency appeal proceeding on each
7 procedural determination (the adequacy of a determination of
8 significance/nonsignificance or of a final environmental impact
9 statement);

10 (b) Shall consolidate an appeal of procedural issues and of
11 substantive determinations made under this chapter (such as a decision
12 to require particular mitigation measures or to deny a proposal) with
13 a hearing or appeal on the underlying governmental action by providing
14 for a single simultaneous hearing before one hearing officer or body to
15 consider the agency decision or recommendation on a proposal and any
16 environmental determinations made under this chapter, with the
17 exception of:

18 (i) An appeal of a determination of significance;

19 (ii) An appeal of a procedural determination made by an agency when
20 the agency is a project proponent, or is funding a project, and chooses
21 to conduct its review under this chapter, including any appeals of its
22 procedural determinations, prior to submitting an application for a
23 project permit;

24 (iii) An appeal of a procedural determination made by an agency on
25 a nonproject action; or

26 (iv) An appeal to the local legislative authority under RCW
27 43.21C.060 or other applicable state statutes;

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

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

37 (4) If a person aggrieved by an agency action has the right to
38 judicial appeal and if an agency has an administrative appeal

1 procedure, such person shall, prior to seeking any judicial review, use
2 such agency procedure if any such procedure is available, unless
3 expressly provided otherwise by state statute.

4 (5) Some statutes and ordinances contain time periods for
5 challenging governmental actions which are subject to review under this
6 chapter, such as various local land use approvals (the "underlying
7 governmental action"). RCW 43.21C.080 establishes an optional "notice
8 of action" procedure which, if used, imposes a time period for
9 appealing decisions under this chapter. This subsection does not
10 modify any such time periods. In this subsection, the term "appeal"
11 refers to a judicial appeal only.

12 (a) If there is a time period for appealing the underlying
13 governmental action, appeals under this chapter shall be commenced
14 within such time period. The agency shall give official notice stating
15 the date and place for commencing an appeal.

16 (b) If there is no time period for appealing the underlying
17 governmental action, and a notice of action under RCW 43.21C.080 is
18 used, appeals shall be commenced within the time period specified by
19 RCW 43.21C.080.

20 (6)(a) Judicial review under subsection (5) of this section of an
21 appeal decision made by an agency under subsection (3) of this section
22 shall be on the record, consistent with other applicable law.

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

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

1 (7) Jurisdiction over the review of determinations under this
2 chapter in an appeal before an agency or superior court shall upon
3 consent of the parties be transferred in whole or part to the
4 shorelines hearings board. The shorelines hearings board shall hear
5 the matter and sign the final order expeditiously. The superior court
6 shall certify the final order of the shorelines hearings board and the
7 certified final order may only be appealed to an appellate court. (~~In~~
8 ~~the case of an appeal under this chapter regarding a project or other~~
9 ~~matter that is also the subject of an appeal to the shorelines hearings~~
10 ~~board under chapter 90.58 RCW, the shorelines hearings board shall have~~
11 ~~sole jurisdiction over both the appeal under this section and the~~
12 ~~appeal under chapter 90.58 RCW, shall consider them together, and shall~~
13 ~~issue a final order within one hundred eighty days as provided in RCW~~
14 ~~90.58.180.))~~)

15 (8) For purposes of this section and RCW 43.21C.080, the words
16 "action", "decision", and "determination" mean substantive agency
17 action including any accompanying procedural determinations under this
18 chapter (except where the word "action" means "appeal" in RCW
19 43.21C.080(2)). The word "action" in this section and RCW 43.21C.080
20 does not mean a procedural determination by itself made under this
21 chapter. The word "determination" includes any environmental document
22 required by this chapter and state or local implementing rules. The
23 word "agency" refers to any state or local unit of government. Except
24 as provided in subsection (5) of this section, the word "appeal" refers
25 to administrative, legislative, or judicial appeals.

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

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