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SENATE BILL 5766

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State of Washington

55th Legislature

1997 Regular Session

By Senators Benton, Hochstatter, Zarelli, Swecker, Anderson, Schow and Oke

Read first time 02/12/97. Referred to Committee on Government Operations.

1 AN ACT Relating to the protection of private property; amending RCW  
2 4.16.100; adding a new section to chapter 7.06 RCW; adding a new  
3 section to chapter 4.84 RCW; and adding a new chapter to Title 64 RCW.

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

5 NEW SECTION. **Sec. 1.** Unless the context clearly requires  
6 otherwise, the definitions in this section apply throughout this  
7 chapter.

8 (1) "Compensation" means remuneration which equals the reduction in  
9 the fair market value of private real property that is attributable to  
10 a restriction on the use of the property or any part thereof.

11 (2) "Existing use" means any use that does not constitute a  
12 nuisance and that is actually engaged on the property at any time  
13 within six years prior to the imposition of the subject restriction.  
14 Forest practices shall be considered an existing use for forest lands  
15 as those terms are defined in the forest practices act, chapter 76.09  
16 RCW.

17 (3) "Government entity" means Washington state, state agencies,  
18 agencies and commissions funded, in whole or in part, by the state,

1 counties, cities, towns, special districts, municipal corporations, or  
2 quasi-municipal corporations.

3 (4) "Impose" means for an official or employee of a government  
4 entity to apply a restriction on land use to all or any portion of  
5 private real property in response to the owner's use, proposed use, or  
6 permit application.

7 (5) "Local land use legislation" means any plan, ordinance,  
8 resolution, policy, or rule that has general application and that is  
9 adopted by a local government entity that restricts, or authorizes  
10 restrictions on the use of all or a portion of the private real  
11 property.

12 (6) "State land use legislation" means any rule, administrative  
13 procedure, policy guideline, or statute that has general application  
14 and that is adopted by the state legislature, any agency, or any board  
15 or commission that is funded, in whole or in part, by the state that  
16 restricts, or authorizes restrictions on, the use of all or a portion  
17 of the private real property.

18 (7) "Nuisances" include:

19 (a) Nuisances as defined by the laws of the state of Washington, as  
20 the same may be amended from time to time; and

21 (b) Nuisances under common law standards for determining nuisances,  
22 without regard to mere declarations that an activity constitutes a  
23 nuisance.

24 (8) "Real property" means any interest in real property recognized  
25 under Washington law, including water and natural resources such as  
26 crops, trees, and minerals, while such resources are attached to land.

27 (9) "Reasonable economically beneficial or productive uses" are  
28 economic uses of property that are more than nominal or passive, that  
29 are proportionate to and compatible with actual uses of property in the  
30 immediate area at the time of the imposition, and that do not  
31 constitute a nuisance.

32 (10) "Restriction" or "restricting" means a limitation,  
33 requirement, regulation, or restriction by a government entity that  
34 limits the use of real property, including those imposed by the  
35 application of ordinances, resolutions, rules, regulations, policies,  
36 statutes, and conditions of land use approval.

37 (11) "Emergency" means a situation that presents an immediate  
38 danger to the public peace, health, or safety.

1        NEW SECTION.    **Sec. 2.**    (1) Except in emergencies that require the  
2 imposition of moratoria or prohibitions on development, state or local  
3 land use legislation may be enacted after the effective date of this  
4 section only after the procedural requirements of this section have  
5 been followed.

6        (2) A government entity may not enact state or local land use  
7 legislation without holding a public hearing on the proposed state or  
8 local land use legislation. The required public hearing may be held by  
9 the governing body or a planning commission. Notice of the required  
10 public hearing shall be published at least thirty and not more than  
11 forty-five days in advance of the public hearing in any newspaper  
12 published in the jurisdiction of the government entity or having a  
13 general circulation therein, with the advertisement intentionally  
14 designed to attract public attention. The advertisement shall be of a  
15 size no smaller than four inches by four inches and shall be placed in  
16 a location other than with classified advertisements. The published  
17 notice must notify readers of the following:

18        (a) A general description of the proposed state or local land use  
19 legislation;

20        (b) The time, date, and location of the public hearing for  
21 consideration of the proposed state or local land use legislation;

22        (c) Where members of the public may inspect the text of the  
23 proposed state or local land use legislation;

24        (d) All of the purposes of the proposed state or local land use  
25 legislation;

26        (e) The right under subsection (4) of this section to propose  
27 alternatives to the proposed state or local land use legislation which  
28 must be submitted in writing prior to the public hearing; and

29        (f) The obligation of the government entity to respond to each  
30 alternative in writing.

31        (3) The requirement for published notice in subsection (2) of this  
32 section is not applicable when the government entity mails notice  
33 containing the same information to each person listed with the county  
34 assessor as a property owner subject to the proposed state or local  
35 land use legislation.

36        (4) Any resident or owner of any interest in real property,  
37 including leasehold interests, subject to the proposed state or local  
38 land use legislation or any resident or owner of any interest in real  
39 property, including leasehold interests, adjacent to property subject

1 to the proposed state or local land use legislation may offer  
2 alternatives to the proposed state or local land use legislation to  
3 fulfill the stated purposes. Alternatives must be submitted in writing  
4 prior to the public hearing required by subsection (2) of this section.  
5 The government entity may continue its hearing to a later date in order  
6 to provide time to consider alternatives. The date, time, and location  
7 of the continuation of the hearing must be announced at the public  
8 hearing and need not be published again under subsection (2) of this  
9 section. Prior to the adoption of the state or local land use  
10 legislation, the government entity must consider all proposed  
11 alternatives, summarize in writing all proposed alternatives, and  
12 respond to the alternatives by category or subject matter, indicating  
13 how the state or local land use legislation as proposed for final  
14 adoption reflects consideration of the alternatives. The government  
15 entity need not mail the responses to the proponents of alternatives,  
16 but must make the written summary of responses available to the public  
17 at the next public hearing at which the state or local land use  
18 legislation is considered for adoption.

19 (5) Any resident or owner of any interest in real property,  
20 including leasehold interests, subject to the proposed state or local  
21 land use legislation or any resident or owner of any interest in real  
22 property, including leasehold interests, adjacent to property subject  
23 to the proposed state or local land use legislation may enforce the  
24 requirements under this section in the superior court in the county  
25 where the government entity is located by filing a petition for a writ  
26 of prohibition pursuant to chapter 7.16 RCW, prohibiting the adoption,  
27 implementation, or enforcement of the state or local land use  
28 legislation without complying with the procedural requirements of this  
29 section. In enforcing this section, the superior court may only  
30 consider whether the government entity complied with the procedural  
31 requirements of this section, but may not substitute its judgment for  
32 the judgment of the government entity in deciding to enact the proposed  
33 state or local land use legislation or in deciding to reject or accept  
34 alternatives.

35 (6) Only the purposes identified under subsection (2)(d) of this  
36 section may be used by any party as the purpose for the state or local  
37 land use legislation in any proceeding where the validity or  
38 interpretation of the state or local land use legislation is at issue.

1 (7) This section does not preclude any action at law or equity that  
2 a real property owner would have had if this chapter had not been  
3 enacted.

4 NEW SECTION. **Sec. 3.** (1) A government entity may impose the  
5 following restrictions on land use without the obligation to provide  
6 mitigation or compensation under the provisions of this chapter:

7 (a) Traditional zoning restrictions that are only those  
8 restrictions in a zoning ordinance of a city, county, or town that:

9 (i) Limit the types of permitted uses and density or intensity of  
10 permitted uses throughout a zoning classification, as long as the  
11 restrictions do not directly or effectively preclude an existing use of  
12 real property or substantially all reasonable economically beneficial  
13 or productive uses of a portion of real property; or

14 (ii) Create property line setbacks, or height and bulk limitations  
15 applicable to all properties throughout a zoning classification to the  
16 same degree, increase the value of the properties restricted because  
17 all properties throughout the zoning classification are subject to the  
18 same restriction, and do not vary based on the natural environmental  
19 conditions of the restricted properties, such as restrictions to  
20 protect wetlands, wildlife habitat, and buffers for the same;

21 (b) Restrictions that only prevent, mitigate, or abate injuries to  
22 another person or property that the government entity is able to  
23 demonstrate are likely to be directly caused by a use of the real  
24 property that constitutes a nuisance; and

25 (c) Restrictions that merely require compliance with specified  
26 federal laws or regulations that apply to a use of the real property.  
27 When a government entity under this chapter chooses directly to enforce  
28 or to apply federal laws or regulations to a use of private property,  
29 the government entity must mitigate or pay compensation under  
30 subsection (2) of this section to the extent the imposition of the  
31 restriction exceeds the minimum requirements of the federal laws or  
32 regulations.

33 (2) With the exception of restrictions under subsection (1) of this  
34 section, when a government entity imposes a restriction on the use of  
35 any portion of real property that decreases by fifteen percent or  
36 greater the fair market value of the affected real property, either by  
37 precluding an existing use, by precluding uses permitted by the  
38 traditional zoning at the time of imposition of the restriction, or by

1 precluding substantially all economically beneficial or productive  
2 uses, then the government entity shall:

3 (a) Offer to mitigate the burden to the real property caused by the  
4 restriction by using methods of mitigation which include, but are not  
5 limited to, those recognized in RCW 36.70A.070(5) and 36.70A.090, such  
6 as:

7 (i) Adjusting land development or permit standards, such as  
8 clustering;

9 (ii) Increasing or modifying the density, intensity, or use of  
10 areas of development;

11 (iii) Allowing transfer of development rights; or

12 (iv) Exchanging surplus property owned by the government entity; or

13 (b) Pay compensation to the owner of a parcel of real property,  
14 together with interest at the maximum rate permitted under RCW  
15 19.52.020, compounded annually from the date of imposition of the  
16 restriction. A property may reject an offer of mitigation under (a) of  
17 this subsection and still seek compensation under section 4 of this  
18 act, but the amount of compensation due under this section shall be  
19 reduced by fair market value of the mitigation offered. A property  
20 owner may also accept mitigation and still seek compensation to the  
21 extent the mitigation fails to recover the loss in fair market value  
22 caused by the restriction.

23 (3)(a) Restrictions imposed by local government under a plan that  
24 is required by state law to be approved by a state agency and has been  
25 so approved shall render the state agency responsible for compensation  
26 and costs for restrictions required to be imposed under such a plan.  
27 Such plans include, but are not limited to, plans under RCW 90.58.090,  
28 chapter 400-12 WAC, and WAC 173-100-120. State agencies may issue  
29 interpretative rules under RCW 34.05.328(5)(c)(ii) identifying the  
30 extent to which local government plans approved by the state agency  
31 exceed the requirements of state law. Once such an interpretive rule  
32 is issued, local government will be responsible for compensation and  
33 costs for any restriction that the state agency has determined to  
34 exceed the requirements of state law.

35 (b) When a restriction appears to be otherwise mandated by state  
36 law and within the subject matter of a particular state agency's  
37 jurisdiction, the local government entity shall deliver a copy of the  
38 request for compensation under section 4(1) of this act to such a state  
39 agency within sixty days of receiving the property owner's request for

1 compensation. The state agency shall determine whether the restriction  
2 should continue to be imposed and, if so, shall provide compensation  
3 within sixty days after receipt of the request for compensation from  
4 the local government.

5 (4) Any easement granted by a property owner to a government entity  
6 remains in effect only for the duration of the life of the grantor.  
7 Any easement that remains in effect after the death of the grantor is  
8 prohibited and unenforceable.

9 (5) A government entity may not offer a property tax reduction or  
10 a property tax exemption to a property owner in exchange for the  
11 granting of an easement by a property owner to a government entity.

12 (6) In the event a state agency is ordered to pay or agrees to pay  
13 compensation and costs for a restriction mandated by state law or a  
14 state agency, payment of compensation shall be made by the treasurer  
15 from the tort claims revolving fund established under RCW 4.92.135.  
16 The state agency whose action resulted in the claim must reimburse the  
17 tort claims revolving fund from the funds appropriated to the agency  
18 for that purpose. Agencies against which claims for compensation have  
19 been made under this chapter shall report the status of all such claims  
20 to the office of financial management annually until they are resolved  
21 and the tort claims revolving fund has been reimbursed for any final  
22 judgment or settlement paid. State agencies must include in each  
23 budget request sufficient funds to reimburse the tort claims fund for  
24 any payments previously made in connection with its actions plus a  
25 reasonable estimate of amounts likely to be paid with respect to any  
26 unresolved claims then pending.

27 (7) An award or payment of compensation made by a government entity  
28 under this section shall operate to grant to and vest in the government  
29 entity the right, title, and interest in the property for which the  
30 compensation has been paid. Upon receipt of the compensation, the  
31 property owner shall deliver to the government entity a deed to the  
32 property interest taken by the restriction. If the real property owner  
33 and government entity cannot agree, the superior court shall determine  
34 the interest that accurately represents the real property interest  
35 which has been purchased by the government entity, such as a  
36 conservation easement or fee title, and determine the form of the deed  
37 to be delivered. Filing of the deed is at the government entity's  
38 expense and the government entity shall refund any property taxes the

1 owner pays for the property transferred after the date the restriction  
2 was imposed.

3 NEW SECTION. **Sec. 4.** (1) A real property owner seeking to enforce  
4 the requirements under section 3 of this act must request compensation  
5 from the government entity imposing the restriction by filing, with a  
6 person identified under RCW 4.28.080 or 4.92.020 when the request is  
7 made from the state or a state agency, a written request for  
8 compensation that identifies the restriction at issue and specifies the  
9 level of compensation or type of mitigation requested. A real property  
10 owner is not required to pursue a pending request for a permit to use  
11 the real property in any particular manner or any other administrative  
12 remedies relating to use to establish a justiciable claim under this  
13 chapter. The request shall be on a form available from the government  
14 entity. The form shall be substantially as follows:

15 REQUEST FOR COMPENSATION OR MITIGATION

16 UNDER THE PRIVATE PROPERTY PROTECTION ACT

17 Pursuant to the Private Property Protection Act,  
18 \_\_\_\_\_(name of property owner) requests  
19 compensation or mitigation from \_\_\_\_\_(name of  
20 government entity) for the imposition of a restriction on the use of  
21 real property. This restriction was imposed when  
22 \_\_\_\_\_(name of government official) on \_\_\_\_\_(date)  
23 applied \_\_\_\_\_(identification of the  
24 restriction) to the use of my property located at  
25 \_\_\_\_\_(location of property).

26 I believe that I am entitled to compensation under the Private  
27 Property Protection Act. I am requesting that \_\_\_\_\_(name  
28 of government entity) provide compensation in the amount of  
29 \_\_\_\_\_ or mitigation under the act as  
30 follows: \_\_\_\_\_  
31 \_\_\_\_\_.

32 (2) The government entity responsible for mandating the imposition  
33 of a restriction on the use of real property has sixty days, from the  
34 date of receipt, to reject or accept a real property owner's request  
35 for compensation under subsection (1) of this section. The responsible  
36 government entity may choose not to impose the restriction, to grant a



1 variance from the restriction, to pay compensation, to offer to  
2 mitigate the burden caused by the imposition of the restriction, or any  
3 combination of these options.

4 (3) The requirements under section 3 of this act may be enforced in  
5 superior court against a government entity by the owner of real  
6 property subject to the restriction within the time period established  
7 in RCW 4.16.100. Property owners may also raise any state or federal  
8 statutory or constitutional claims arising from the government entity's  
9 imposition of the restriction or the decision to reject in whole or in  
10 part the property owner's request for compensation. It is not  
11 necessary for the restriction to be challenged under any other basis or  
12 for a property owner to seek relief through any other process before a  
13 claim for compensation can be made.

14 (4) The superior court shall rule on all issues de novo. Property  
15 owners are entitled to a jury trial on the amount of compensation  
16 required under this chapter as in cases under eminent domain. In  
17 calculating the amount of compensation to be paid, the court shall  
18 consider the value of mitigation offered by the government entity under  
19 section 3(2)(a) of this act.

20 (5) In defending against a claim for compensation:

21 (a) A government entity that intends to rely on the exceptions set  
22 forth in section 3(1) of this act has the burden to prove by clear and  
23 convincing evidence that the restriction qualifies as an exception and  
24 is exempt from the compensation requirement of this chapter.

25 (b) A government entity has the burden to prove the value of any  
26 mitigation offered under section 3(2)(a) of this act.

27 (6) In defending against a claim for compensation filed in the  
28 superior court, a government entity that intends to rely on section  
29 3(3) of this act for liability by the state must join the state as a  
30 defendant within thirty days of the service of the original complaint  
31 seeking compensation under this chapter.

32 (7) At any time, the government entity may choose to no longer  
33 impose the restriction at issue in whole or in part and pay the owner  
34 for the temporary restriction of the property, by paying the interest  
35 due under section 3(2)(b) of this act.

36 (8) A prevailing plaintiff or petitioner is entitled to recover the  
37 costs incurred in enforcing this chapter as provided in section 8 of  
38 this act.

1        NEW SECTION.    **Sec. 5.**    A new section is added to chapter 7.06 RCW  
2 to read as follows:

3        Claims for compensation under the private property protection act  
4 are subject to mandatory arbitration under this chapter where the sole  
5 issue is the amount of compensation required under that act.

6        NEW SECTION.    **Sec. 6.**    This chapter does not apply to actions by  
7 government entities in their exercise of the power of eminent domain.

8        **Sec. 7.**    RCW 4.16.100 and Code 1881 s 29 are each amended to read  
9 as follows:

10        The following actions shall be commenced within two years:

11        (1) An action for libel, slander, assault, assault and battery, or  
12 false imprisonment.

13        (2) An action upon a statute for a forfeiture or penalty to the  
14 state.

15        (3) An action under the private property protection act, chapter  
16 64.-- RCW (sections 1 through 4, 6, 9, and 10 of this act).

17        NEW SECTION.    **Sec. 8.**    A new section is added to chapter 4.84 RCW  
18 to read as follows:

19        A prevailing plaintiff or petitioner is entitled to recover the  
20 costs incurred in enforcing chapter 64.-- RCW (sections 1 through 4, 6,  
21 9, and 10 of this act), including reasonable attorneys' fees. A real  
22 property owner prevails under section 3 of this act if he or she  
23 receives more compensation than offered by the government entity under  
24 section 4(2) of this act.

25        NEW SECTION.    **Sec. 9.**    This chapter may be known and cited as the  
26 private property protection act.

27        NEW SECTION.    **Sec. 10.**    If any provision of this act or its  
28 application to any person or circumstance is held invalid, the  
29 remainder of the act or the application of the provision to other  
30 persons or circumstances is not affected.

1        NEW SECTION.   **Sec. 11.**   Sections 1 through 4, 6, 9, and 10 of this  
2   act constitute a new chapter in Title 64 RCW.

--- **END** ---