

HOUSE BILL REPORT

SHB 1458

As Passed Legislature

Title: An act relating to adequate notice to property owners regarding acquisition of property for public purposes through the exercise of eminent domain.

Brief Description: Requiring notice to property owners before condemnation decisions.

Sponsors: By House Committee on Judiciary (originally sponsored by Representatives VanDeWege, Kessler, Rodne, Appleton, Ahern, Curtis, Kenney, Clibborn, Morrell, P. Sullivan, Eickmeyer, Armstrong, Buri, Chandler, Ericksen, Hinkle, Condotta, Anderson, Eddy, Goodman, Kelley, Haler, McCune, Kretz, Kagi, Ericks, Warnick, Pedersen, Bailey, Newhouse, McDonald, Priest, Roach, Strow, Green, Campbell, Hunter, Takko, Sells, Springer, McCoy, Upthegrove, Williams, Moeller, Ormsby, Pearson, Haigh, Linville, Conway, Dickerson, Dunn, Hasegawa, Rolfes, Ross and Lantz; by request of Governor Gregoire and Attorney General).

Brief History:

Committee Activity:

Judiciary: 2/2/07, 2/13/07 [DPS].

Floor Activity:

Passed House: 3/7/07, 96-0.

Passed Senate: 4/3/07, 49-0.

Passed Legislature.

Brief Summary of Substitute Bill

- Requires a condemnor of property to provide the property owner with mail or published notice at least 15 days before final action is to be taken to authorize condemnation or to select property for condemnation.
- Applies to state agencies, counties, cities, towns, school districts, corporations, and any other entity taking final action to select property for condemnation or to authorize condemnation.
- Provides that failure to meet notice requirements voids any subsequent condemnation proceedings, but allows condemnors to cure inadequate notices.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Lantz, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Warnick, Assistant Ranking Minority Member; Ahern, Flannigan, Kirby, Moeller, Pedersen, Ross and Williams.

Staff: Bill Perry (786-7123).

Background:

Eminent Domain

Eminent domain is the term used to describe the power of a government to take private property for public use. The power of eminent domain extends to all types of property, although it is most often associated with the taking of real property, such as acquiring property to build a highway. A "condemnation" is the judicial proceeding used for the exercise of eminent domain.

The state has the power of eminent domain inherently. Many other entities have been granted the power of eminent domain by the state Constitution or through state statutes. These entities range from individual state agencies to many different kinds of local governments and to some private corporations and individuals.

Individual Notice to Property Owners

A condemnation requires the initiation of a legal action. An entity seeking to acquire property through eminent domain must file a petition in superior court. As is the case with other civil lawsuits, part of the process of commencing a condemnation action includes notice to affected parties. State statutes and court rules prescribe generally the content, timing, and method of notices that must be given to initiate any lawsuit.

Various statutes also prescribe notices that must be given to individual property owners whose property is, or is about to become, the subject of a condemnation action. For instance, in the case of condemnations by the state, not less than 10 days before a condemnation petition is filed with the court, the condemning agency must serve notice on property owners informing them that the petition is going to be filed. The notice must briefly:

- state the purpose for which the owner's property is being sought;
- provide a description of the property; and
- indicate when and where the petition for condemnation will be filed.

The notice is to be served on the property owner in the same manner as service is made in civil suits generally. For example, notice may be made by personal service at an owner's usual place of residence. If a property owner's residence is unknown, notice may be made by publication once a week for two weeks in any newspaper published in the county.

There are dozens of separate statutes dealing with the various entities that have the power of eminent domain. Some of the statutes that apply to other entities have provisions relating to

procedural matters that either directly reference or roughly parallel the statute that applies to condemnations by the state.

General Notice to the Public, and the *Miller* Decision

General public notice may also be required, not with respect to eminent domain in particular, but as part of a public agency's general decision making process. With respect to some condemning authorities, statutes require notice to be given to the public regarding a scheduled public meeting at which the question of condemnation of property is to be considered. Such a meeting might include, for example, the adoption by the public agency of a resolution authorizing the agency to proceed with the filing of a condemnation action.

In *The Central Puget Sound Regional Transit Authority v. Miller*, 156 Wn.2d 403, (2006), the Washington Supreme Court addressed the question of whether a posting on a public website complied with a statutory requirement for public notice of a public meeting. The notice in question was regarding an upcoming public meeting at which the Transit Authority would consider potential sites for a project. The Transit Authority was also to consider the necessity of condemning property for the project.

One of the sites under consideration included property owned by Miller Building Enterprises, a construction company. Miller challenged the Transit Authority's use of eminent domain to acquire property and, among other things, asserted that the posting of a meeting notice on a public website was inadequate. In a five to four opinion, the court held that the public website posting met the statutory requirements for a public meeting notice.

The majority opinion in *Miller* is not about failure to provide required notice to a property owner. The property owner had apparently been in discussions with the Transit Authority for three years about the possible use of the property for a transit station. The property owner had also been served with a formal notice of intent to acquire property. The owner also received the required notice by personal service when the Transit Authority petitioned the court to begin condemnation proceedings. The majority opinion indicates that the property owner actually attended the public meeting in question.

The majority opinion is also not about due process or other constitutional claims regarding notice. With respect to notice of the Transit Authority's public meeting, the majority opinion addresses only the issue of whether the Transit Authority's use of a website posting was a statutorily permissible means of notifying the public of an upcoming public hearing. The court held that it was.

The dissent by Justices Alexander and Chambers in *Miller*, on the other hand, argues that the purpose of the statutory public notice requirement is to give notice to potentially affected members of the public. Even though Miller may have known about the Transit Authority's interest in the property, Miller was not given explicit notice that a resolution authorizing condemnation would be considered at the public meeting in question. The dissenters disagree with the majority that a website posting is an adequate means of giving notice and state that "due process demands that government err on the side of giving abundant notice when it seeks

to take property." Justice J.M. Johnson, in a separate dissent, argues that the Transit Authority also failed to follow its own internal policy on giving notice.

Summary of Substitute Bill:

Additional Individual Notice Required

A condemnor is required to give a property owner 15 days notice before holding a public meeting or taking final action that will select the owner's property for condemnation or that will authorize the use of condemnation to acquire the property.

Condemning Entities

Condemning entities that are required to give notice before final action include:

- state agencies;
- counties;
- cities and towns;
- school districts;
- corporations; and
- any other entity operating under the condemnation statutes that apply to the listed entities.

Definition of "Final Action"

For local governments, final action is defined by referencing the Open Meetings Act and means a collective decision, or an actual vote by a majority of the members of a governing body regarding a motion, proposal, resolution, order, or ordinance.

For state agencies, final action is to be defined by the Attorney General, who is directed to ensure that owners have an opportunity for comment before an agency makes a final decision to authorize the condemnation of a specific piece of property.

For all other entities, final action means a public meeting at which the entity decides whether to authorize condemnation of a specific piece of property.

Content of the Notice

A notice must:

- contain a general description of the property, such as street address, lot number, or parcel number;
- specify that condemnation of the property will be considered; and
- give the date, time, and location of the final action or public meeting.

Method of Notice

Notice must be mailed by certified letter to the property owner's address, if known or ascertainable. Notice must also be given by publication in the legal newspaper with the largest circulation in the jurisdiction in which the property is situated and, if different, in the newspaper regularly used by the condemning entity for notices.

Consequence of Failure to Give Notice

Failing to meet the notice requirements voids any subsequent proceedings as to persons not properly served with the required notice. However, an entity may cure the failure by giving notice in compliance with the act.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony:

(In support) It is shocking that current law does not require more in the way of notice before a person's property is considered for condemnation. It is important to give owners better notice, and doing so will increase public participation in the process. This is an issue of fundamental fairness. The bill addresses a real concern of the public.

The majority opinion in the *Miller* case is full of inaccuracies. Failure to get adequate notice is very upsetting to a property owner. It is stressful and challenging enough to learn that you may lose your property. It is even worse to hear about a decision authorizing condemnation after the fact. The current law does not speak clearly enough about the process of deciding to use condemnation. This bill is just a matter of basic civility.

(Opposed) None.

Persons Testifying: Representative Van De Wege, prime sponsor; Representative Kessler; Steven Miller; Alice Miller; Ken Miller; Sandra Romero, Futurewise; Keith Phillips, Governor's Executive Policy Office; Andrew Cook, Building Industry Association of Washington; and William Maurer, Institute for Justice.

Persons Signed In To Testify But Not Testifying: None.