
Judiciary Committee

HB 1035

Title: An act relating to prohibiting the use of eminent domain for economic development.

Brief Description: Prohibiting the use of eminent domain for economic development.

Sponsors: Representatives Springer, Shea, Goodman, Upthegrove, Eddy, Walsh, Parker, Warnick, Takko, Bailey, Angel, Dammeier, Condotta, Fagan, Nealey, Hargrove, Kagi, Clibborn, Blake, McCune, Rolfes, Dickerson, Hurst and Moeller; by request of Attorney General.

Brief Summary of Bill

- Explicitly states that private property may be taken only for public use and the taking of private property by any public entity for economic development does not constitute a public use.
- Defines "public use" and "economic development."

Hearing Date: 1/19/11

Staff: Trudes Tango (786-7384).

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 has been recognized by federal and state courts as inherent and necessary for the existence of government. The federal and state constitutions and statutes define, restrict, and delegate the power of eminent domain and provide a procedural framework for its exercise.

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.

The power of eminent domain applies 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 Fifth Amendment to the U.S. Constitution provides that:

". . . private property [shall not] be taken for public use, without just compensation."

Article I, section 16 of the state Constitution provides, in part:

"Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made . . . [T]he question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public . . ."

There are other constitutional provisions addressing eminent domain powers for specific entities (such as telephone companies) and for specific purposes (such as water irrigation and mining). In addition, there are hundreds of statutes in the Revised Code of Washington dealing with eminent domain powers. Some of these statutes establish the process for bringing condemnation actions, determining whether a project meets the public use requirement, and determining what constitutes "just compensation." Some of these statutes confer eminent domain powers on governmental entities, such as counties and special districts, as well as giving the power of eminent domain to corporations, such as railroads, electrical utilities, and pipeline companies.

The "Public Use" Requirement under State and Federal Law

The question of what is a "public use" has been answered differently by federal and state courts in construing the meaning of the federal and state constitutions.

In the recent U.S. Supreme Court decision of *Kelo v. City of New London*, the Court interpreted the Fifth Amendment's Taking Clause. In *Kelo*, the city of New London, Connecticut, planned to condemn property as part of an economic development plan to revitalize the area surrounding a large pharmaceutical company moving into the area. The condemnation of property for the development plan did not come from an area of blight. The plan called for the condemned property to be transferred to a private developer and the planned uses included offices, a hotel, parking, a conference center, and other commercial uses. Much of the property in the development was not to be made available for use by the general public. The plan was intended to, among other things, enhance the city's tax base and create jobs. The Court upheld the plan as meeting the "public use" requirement of the Fifth Amendment.

In Washington, in order for a proposed condemnation to satisfy Article I, section 16, a court must find (1) that the use is really public, (2) that the public interests require it, and (3) that the property acquired is necessary for the purpose. What constitutes "public use" in this state has evolved over the years.

In *Hogue v. Port of Seattle*, a 1959 decision, the Court declared unconstitutional a plan by a port district to condemn property and transfer it to private parties as part of the creation of an industrial development district. The Court required that the proponents of such a plan must show that the condemned property is to be put to what is "really" a public use. The Court noted that

simply wanting to put someone's property to a "higher and better economic use" is not sufficient grounds to condemn it.

On the other hand, in *Miller v. City of Tacoma*, a 1963 decision, the Court upheld the use of condemnation as part of an urban renewal plan. The property to be taken had been declared "blighted," which was an important factor in determining whether the taking was constitutional.

In *In re City of Seattle*, a 1981 decision, the Court struck down a plan to acquire property in order to enhance the Westlake shopping area of the city. Some of the condemned property was to be transferred to a private developer. The Court concluded that the planned use of the property was predominately private, and therefore violated the public use requirement. A few years later, however, in another *In re City of Seattle* decision, the Court held that Seattle had authority to condemn property strictly for park purposes regardless of the fact that the park created an economic benefit for an adjacent shopping center.

In *State ex rel. Washington State Convention and Trade Center v. Evans*, a 1998 decision, the Court allowed the condemnation of property as part of an expansion of the convention and trade center, even though a portion of the property was transferred to a private party for the construction of a private parking garage. The Court determined that the private use of the property below the fourth floor expansion of the center was merely "incidental" to the public use of the condemned property.

The case law suggests that in Washington, the public use requirement may not be met simply because the planned use would be a more productive use as part of an economic development project. However, some transfer of condemned property for private use may be permissible, such as when the private use is incidental to the planned public use.

Article I, section 16 requires any question of "public use" to be determined by the courts "without regard to any legislative assertion." Courts have acknowledged and given some deference to legislative declarations. It might be possible that a legislative declaration of what is *not* a public use would be viewed differently by the courts than a declaration of what *is* a public use. Presumably, the Legislature may limit government's constitutional eminent domain powers even if it cannot expand them.

Summary of Bill:

New provisions are added to the statutes governing eminent domain by public entities. Private property may be taken only for public use. Public use means:

- the possession, occupation, and enjoyment of the property by the general public or by public agencies;
- the use of property for the creation or functioning of public utilities, a publicly owned utility, or common carriers; or
- where the use of eminent domain: (1) eliminates a direct threat to public health and safety caused by the property in its current condition; and (2) removes a public nuisance or an uninhabitable structure, or acquires abandoned property.

No public entity, except for port districts, may take property for the purpose of economic development. The taking of private property by a public entity for economic development does not constitute public use.

"Economic development" means any activity to increase tax revenue, tax base, employment, or general economic health and that does not result in:

- The transfer of property to public possession, occupation, and enjoyment;
- The transfer of property to a private entity that is a public utility or common carrier;
- The transfer of property to private entities that occupy an incidental area within a publicly owned and occupied project; or
- The use of eminent domain to: (1) eliminate a direct threat to public health and safety caused by the property in its current condition and (2) remove a public nuisance or an uninhabitable structure, or acquires abandoned property.

Economic development does not include:

- the transfer of property to a public utility, a publicly owned utility, or a common carrier for the purpose of constructing, operating, or maintaining generation, transmission, or distribution facilities; and
- port districts' activities.

The public benefits of economic development, including an increase in tax base, tax revenues, employment, and general economic health, may not constitute a public use.

In an action to determine whether the government's claimed use is a public use, the court must find that the taking is for economic development if the court determines that economic development was a substantial factor in the government's decision to take the property.

Appropriation: None.

Fiscal Note: Available

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