

SENATE BILL REPORT

ESSB 5077

As Passed Senate, March 7, 2011

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: Senate Committee on Government Operations, Tribal Relations & Elections (originally sponsored by Senators Pflug, Shin, Carrell, Swecker, Sheldon, Becker, Honeyford, Benton, Schoesler, Stevens, Delvin, Keiser, Hewitt, Roach and Holmquist Newbry; by request of Attorney General).

Brief History:

Committee Activity: Government Operations, Tribal Relations & Elections: 1/20/11, 2/07/11 [DPS].

Passed Senate: 3/07/11, 45-4.

SENATE COMMITTEE ON GOVERNMENT OPERATIONS, TRIBAL RELATIONS & ELECTIONS

Majority Report: That Substitute Senate Bill No. 5077 be substituted therefor, and the substitute bill do pass.

Signed by Senators Pridemore, Chair; Prentice, Vice Chair; Swecker, Ranking Minority Member; Benton, Chase, Nelson and Roach.

Staff: Karen Epps (786-7424)

Background: 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. 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 . . . which compensation shall be ascertained by a jury . . . Whenever an attempt is made to take

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private property for a use alleged to be public, the 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..."

The U.S. Supreme Court construes the term "public use" under the Fifth Amendment more broadly than the Washington State Supreme Court construes this term under Article 1, Section 16. As a result, Washington State and its local governments may not acquire property by eminent domain for some public purposes that would be allowed in the federal Constitution. The Washington State Supreme Court has held that the proposed use for which private property may be condemned must be a public use, as distinguished from a use that is merely in the public interest or that will merely benefit the public.

Other constitutional provisions grant eminent domain powers to telephone companies, make the property of corporations subject to eminent domain to the same extent as the property of individuals, and declare the use of water for irrigation, mining, and manufacturing to be a public use. Additionally, there are more than 300 statutory sections in the Revised Code of Washington dealing with eminent domain powers. Some of the statutes confer eminent domain powers on governmental entities ranging from counties to mosquito control districts, and give the power of eminent domain to railroads, electrical utilities, and pipeline companies.

Summary of Engrossed Substitute Bill: 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. No public entity may take property for the purpose of economic development.

Economic development means any activity to increase tax revenue, tax base, employment, or general economic health, when that activity 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 service company, consumer-owned utility, or common carrier;
- the use of eminent domain to remove a public nuisance or to remove a structure that is beyond repair or unfit for human habitation or use or to acquire abandoned property and to eliminate a direct threat to public health and safety caused by the property in its current condition; or
- the transfer of property to private entities that occupy an incidental area within a publicly owned and occupied project.

Economic development does not include the transfer of property to a public service company, a consumer-owned utility, or a common carrier for the purpose of constructing, operating, or maintaining generation, transmission, or distribution facilities. Economic development also does not include port districts' activities or highway projects.

In a condemnation action, the taking is deemed to be for economic development if the court determines that the condemnation does not result in any of the exceptions to economic development and that economic development was a substantial factor in the governmental body's decision to take the property.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill: PRO: This issue came to the attention of the Attorney General's Office after the U.S. Supreme Court decision in *Kelo v. City of New London*. In that case, the city took Ms. Kelo's home and turned the property over to Pfizer drug company and a private developer. The neighborhood sits vacant and it still has not been developed. A taskforce came up with recommendations for reforms to eminent domain. A case in Bremerton occurred when houses were condemned for the purported public use of abating an odor nuisance from a sewage treatment plant, but the property was immediately sold to a car dealership. This bill gives some protection to prevent the taking of private property and selling it or developing it for retail and commercial use. This clarifies that economic development should not be the deciding factor when initiating a condemnation action. This bill will protect all Washingtonians from eminent domain abuse while preserving the ability of our local governments to condemn private property for legitimate public uses. At one time the Washington Constitution provided solid protection from properties being taken by a local government and sold to another individual or company for the purpose of increasing the tax base. Forty-three other states have reformed their eminent domain laws.

Persons Testifying: PRO: Senator Pflug, prime sponsor; Tim Ford, Attorney General's Office; Dan Heid, City of Auburn; Holli Johnson, Washington State Grange; Randy Bannecker, Washington Realtors Association; William Maurer, Institute for Justice; Denise Gloster, Craig Johnson, Ken Miller, Doris Cassan, citizens; Dan Wood, Washington Farm Bureau.