

# SENATE BILL REPORT

## SB 5267

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As of November 28, 2011

**Title:** An act relating to providing fairness in government regulation of property.

**Brief Description:** Providing fairness in government regulation of property.

**Sponsors:** Senator Swecker.

**Brief History:**

**Committee Activity:** Government Operations, Tribal Relations & Elections: 2/01/11.

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### SENATE COMMITTEE ON GOVERNMENT OPERATIONS, TRIBAL RELATIONS & ELECTIONS

**Staff:** Sam Thompson (786-7413)

**Background:** The state and local governments enact and enforce laws that affect the use of real property, including laws that impose restrictions on use or development of real property. These laws are subject to constitutional and statutory requirements that provide certain protections to private property owners.

Washington's Constitution requires state and local government to pay an owner of private property just compensation before taking or damaging private property for public use, and in general prohibits government from taking private property for private use. The federal Constitution provides similar protections.

The constitutional requirement to pay just compensation also applies under limited circumstances to laws that restrict the use of private property. If the restriction completely eliminates the owner's economic use of real property, or if the restriction involves a physical intrusion onto the private property, then just compensation is generally required.

Whether regulations or restrictions on use of real property otherwise amount to taking or damaging of private property under the constitution, thus require payment of just compensation, depends on the particular effects on property. A restriction on real property may require just compensation depending on the economic impact of the restriction on the property, how the restriction affects legitimate property uses and the property owner's reasonable investment-backed expectations, and whether the restriction reflects a reasonable means for achieving an important public objective.

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*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.*

Under the state and federal constitutions, a property owner may bring an action for just compensation to obtain the fair market value of property taken or damaged by the government, if the government has not paid compensation. Under the Washington Constitution, the property owner may also bring an action to invalidate government action that is taking or damaging private property when there is no public use, only a private use.

Under current state law, a property owner who has applied for a permit to use property may recover damages, attorney fees, and other costs where a state or local agency action on the permit application is arbitrary or capricious, or if the state or local agency does not act within time limits established by law.

Under a variety of laws, a property owner may challenge state or local government restrictions on the use of property and obtain an agency review or judicial remedy if a restriction is not allowed under state or local laws. These statutory protections for property owners are in addition to the constitutional right to just compensation.

Under current state law, state agencies and local governments are required to follow an orderly and consistent process using advice and education from the Attorney General's Office to evaluate proposed actions affecting the use of property and to avoid taking or damaging private property without just compensation. The process applies to all state agencies and to those local governments that plan and regulate land uses under the Growth Management Act.

**Summary of Bill:** A government is required to consider and document certain factors prior to enacting laws regulating private property. A government is required to pay compensation to private property owners to enforce restrictions damaging the use or value of private property, as defined. This compensation applies in circumstances in addition to those that require compensation under the state or federal constitutions. Development regulations could not prohibit legal uses pre-existing on a parcel of property.

State and local government agencies are required to consider and document certain matters prior to enacting an ordinance, regulation, or rule that may damage the use or value of private property.

Private property is defined to include all real and personal property interests protected by the state and federal constitutions, including and not limited to interests in land, buildings, crops, livestock, mineral and water rights. In general, real property refers to land, interests in land, and things attached to the land. Personal property includes all other property.

Governments are required to consider and document several factors, including (1) identifying the private property to be affected by a proposed action; (2) the purpose(s) to be served by the action and the connection between the action and its purpose(s); (3) the extent to which the action deprives property owners of uses of property, or interferes with a property owner's right to exclude others, to possess property, to enjoy property, or to dispose of property; (4) estimated compensation that would be required under the act for damaging the use or value of property; and (5) alternative less restrictive means of accomplishing the governmental purposes, including voluntary cooperation.

Damaging the use or value of property means to prohibit or restrict the use of private property to obtain benefit to the public, the cost of which in all fairness and justice should be borne by the public as a whole, triggering the requirement for compensation.

Examples of governmental action damaging the use or value of property and requiring compensation include enforcement of any ordinance, regulation, or rule to private property, as follows:

- prohibiting or restricting the use or size, scope, or intensity of any use legally existing or permitted as of the effective date of the act;
- regulating the use of tidegates, bulkheads, or structures reasonably necessary to protect private property, the operation and maintenance of irrigation structures, or how a private property owner responds to flooding, erosion, or fire conditions;
- requiring a portion of real property to be left in a natural state or with no beneficial use to the owner, unless necessary to prevent immediate harm to human health and safety; or
- prohibiting maintenance or removal of trees or vegetation.

Enforcement of restrictions that apply equally to all property subject to a state or local agency's jurisdiction would not damage the use or value of private property, and so would not require compensation. Examples include the following:

- restricting the use of property to prevent immediate threat to human health or safety;
- requiring compliance with structural standards like building or fire codes to prevent harm from natural disasters like fire, flood, or earthquake;
- limiting location of sex offender housing or adult entertainment;
- requiring compliance with federal laws restricting chemical uses, with worker health and safety laws, and with worker wage and hour laws; or
- requiring compliance with ordinances establishing setbacks from neighboring property lines, but only if the setbacks were set before January 1, 1996.

When a local or state agency enforces or applies an ordinance, regulation, or rule damaging the use or value of property, the agency must first pay the property owner compensation. An agency that chooses not to take the action is not liable for paying the property owner.

Compensation is the amount by which the fair market value of affected property is decreased by application or enforcement of the ordinance, regulation, or rule and the fair market value of any portion of the property required to be left in a natural state or without beneficial use. Compensation also would include the property owner's reasonable attorney fees to enforce compensation under the act.

Existing state or local government authority to waive or vary the requirements of existing laws is not limited. An agency is prohibited from charging a fee to consider whether to waive or vary a law to avoid paying compensation.

Development regulations can not prohibit uses legally existing on any parcel prior to their adoption. The term development regulations refers to controls placed on development or land use activities by a county or city such as zoning ordinances, critical areas ordinances,

shoreline master programs, planned unit development ordinances, and subdivision ordinances.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Committee/Commission/Task Force Created:** No.

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