
Judiciary Committee

SB 5445

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: Senators Padden, O'Ban, Sheldon, Chase and Fortunato.

Brief Summary of Bill

- Provides that private property may be taken only for public use, that taking for economic development does not constitute public use, and that no public entity may take property for the purpose of economic development.
- Specifies that condemnation of property in blighted areas for economic development is not a public use.

Hearing Date: 3/16/17

Staff: Cece Clynch (786-7195).

Background:

Eminent Domain.

Eminent domain is the term used to describe the inherent power of a government to take privately owned property and convert it to 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 exercise of eminent domain by a government.

The Fifth Amendment to the United States (U.S.) Constitution provides, in part, that "private property [shall not] be taken for public use, without just compensation."

Article I, section 16 of the Washington 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

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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"

In addition to the Washington Constitution, there are about 300 statutes dealing with eminent domain. Title 8 RCW contains provisions regarding the condemnation process.

"Public Use" under the Federal Constitution.

The U.S. Constitution requires that a taking be for a "public use." In *Kelo v. City of New London*, a 2005 decision, the U.S. Supreme Court considered the meaning of "public use." In that case, the city planned to condemn property as part of its economic development plan to revitalize the area surrounding the future site of a large pharmaceutical company. The property was condemned solely for development and not because it was blighted or otherwise in poor condition. The city planned to transfer some of the condemned property to a private developer, who would put the property to commercial use, including office and retail space, a hotel, and restaurants. Under the plan, very little of the property in the development would 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 U.S. Supreme Court upheld the plan as meeting the "public use" requirement of the Fifth Amendment.

"Public Use" under the Washington State Constitution.

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 interest requires it; and (3) that the property acquired is necessary for the purpose. A project may be in the public interest but not necessarily be public use.

In a 1959 decision, the Washington Supreme Court (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 show that the condemned property is really for a public use. The Court noted that simply wanting to put property to a higher and better economic use is not sufficient grounds to condemn it.

Subsequent case law suggests that transfers of condemned property for private use may be permissible in the following two situations:

- the private use is incidental to the planned public use; or
- the purpose of the condemnation is to cure blighted areas and the transfer is subject to use restrictions that prevent recurrence of the blighted condition.

Summary of Bill:

A new chapter is added to Title 8 RCW, providing: that a public entity may not take private property for the purpose of economic development; private property may only be taken for public use; and the taking of private property for economic development does not constitute a public use. In an action to establish or challenge the asserted public use of a taking of private property, the taking of private property shall be deemed for economic development, and not a proper basis for eminent domain, if the court determines that the taking does not result in any of

the exceptions to economic development, and economic development was a substantial factor in the governmental body's decision to take the property.

In addition to the new chapter, an amendment is made to a community renewal statute which currently declares that condemnation for community renewal of blighted areas is a public use, and allows condemnation by a municipality for community renewal of a blighted area. Pursuant to the amendment, condemnation of property in blighted areas for economic development is not a public use.

Definitions.

"Economic development" is defined as 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 (gas, electrical, telecommunications, wastewater, and water companies), consumer-owned utility (municipal electric utility, public utility district, irrigation district, cooperative, port district, or a water-sewer district that is engaged in the business of distributing electricity to one or more retail electric customers in the state), or common carrier;
- the use of eminent domain:
 - to remove a public nuisance, 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;
- port districts' activities, generally, and under laws related to aeronautics; or
- highway projects.

"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 service companies, a consumer-owned utility, or common carriers; or
- where the use of eminent domain:
 - removes a public nuisance or a structure that is beyond repair or unfit for human habitation or use, or is used to acquire abandoned property; and
 - eliminates a direct threat to public health and safety caused by the property in its current condition.

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

Appropriation: None.

Fiscal Note: Not requested.

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