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SENATE BILL 5369

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State of Washington                      53rd Legislature                      1993 Regular Session

By Senators Haugen, Oke, Owen, Winsley and McDonald

Read first time 01/26/93.      Referred to Committee on Government Operations.

1            AN ACT Relating to procedures for claims involving constitutional  
2 property rights; amending RCW 64.40.010; adding new sections to chapter  
3 64.40 RCW; creating a new section; and repealing RCW 64.40.020 and  
4 64.40.030.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6            NEW SECTION.    **Sec. 1.**    Recent state and federal supreme court  
7 decisions hold that state and local governments and their officials may  
8 be liable for financial compensation or other relief if landowners are  
9 deprived of constitutional rights by acts under statutes, rules, and  
10 ordinances regulating the use of land. The purpose of this act is to  
11 provide clear procedures to resolve these claims more promptly,  
12 efficiently, and fairly. This act does not address the underlying  
13 constitutional issues of whether landowners have been improperly  
14 deprived of constitutional rights.

15            **Sec. 2.**    RCW 64.40.010 and 1982 c 232 s 1 are each amended to read  
16 as follows:

17            As used in this chapter, the terms in this section shall have the  
18 meanings indicated unless the context clearly requires otherwise.

1 (1) "Agency" means the state of Washington, any of its political  
2 subdivisions, including any city, town, or county, and any other public  
3 body exercising regulatory authority or control over the use of real  
4 property in the state.

5 (2) "Permit" means any governmental approval required by law before  
6 an owner of a property interest may improve, sell, transfer, or  
7 otherwise put real property to use.

8 (3) "Property interest" means any interest or right in real  
9 property in the state.

10 (4) "Damages" means reasonable expenses and losses, other than  
11 speculative losses or profits, incurred between the time a cause of  
12 action arises and the time a holder of an interest in real property is  
13 granted relief (~~as provided in RCW 64.40.020~~). Damages must be  
14 caused by an act, necessarily incurred, and actually suffered,  
15 realized, or expended, but are not based upon diminution in value of or  
16 damage to real property, or litigation expenses.

17 (5) "Regulation" means any ordinance, resolution, or other rule or  
18 regulation adopted pursuant to the authority provided by state law,  
19 which imposes or alters restrictions, limitations, or conditions on the  
20 use of real property.

21 (6) "Act" means a final decision by an agency which places  
22 requirements, limitations, or conditions upon the use of real property  
23 in excess of those allowed by state or federal constitutional law or by  
24 applicable regulations in effect on the date an application for a  
25 permit is filed. "Act" also means the failure of an agency to act  
26 within time limits established by law in response to a property owner's  
27 application for a permit: PROVIDED, That there is no "act" within the  
28 meaning of this section when the owner of a property interest agrees in  
29 writing to extensions of time, or to the conditions or limitations  
30 imposed upon an application for a permit. "Act" shall not include  
31 lawful decisions of an agency which are designed to prevent a condition  
32 which would constitute a threat to the health, safety, welfare, or  
33 morals of residents in the area.

34 In any action brought pursuant to this chapter, a defense is  
35 available to a political subdivision of this state that its act was  
36 mandated by a change in statute or state rule or regulation and that  
37 such a change became effective subsequent to the filing of an  
38 application for a permit.

1        NEW SECTION.    **Sec. 3.** At least forty-five days before filing suit  
2 for relief from an act of an agency or its officials regulating the use  
3 of lands in which a complainant has a property interest, the  
4 complainant shall give the agency written notice of intent to sue,  
5 specifying the facts on which the claim is based and the relief sought.  
6 A subsequent suit must be limited to facts and theories disclosed in  
7 the notice or in a supplement delivered at least thirty days before  
8 suit is filed.

9        NEW SECTION.    **Sec. 4.** (1) Within forty-five days after receiving  
10 a notice of intent to sue under section 3 of this act or a supplement  
11 to the notice, the agency may notify the complainant that it:

12            (a) Has reversed or modified the act as requested;

13            (b) Will consider reversing or modifying the act within fifteen  
14 days after the complainant provides specified information or an  
15 explanation of why the specified information cannot be provided at a  
16 reasonable cost; or

17            (c) Offers an alternative solution to the apparent impasse or a  
18 mediated process to seek an alternative solution.

19            (2) If dissatisfied with the results of a reconsideration,  
20 settlement offer, or alternative dispute process under subsection (1)  
21 of this section, the complainant may file a supplement to the notice  
22 previously given under section 3 of this act or may file suit without  
23 further notice.

24        NEW SECTION.    **Sec. 5.** (1) If a claim is filed under section 3 of  
25 this act against a named individual agency official, within forty-five  
26 days the agency in which the official was serving may notify the  
27 complainant and the official that it:

28            (a) Has determined that the alleged act, if true, was or would have  
29 been taken by the official in his or her official capacity in  
30 accordance with applicable statute, regulation, or policy, and  
31 therefore the agency shall defend, indemnify, and hold harmless the  
32 official from liability for the act; or

33            (b) Refuses to ratify the act in question, has reconsidered it, and  
34 is responding to the complainant's concerns under section 4 of this  
35 act.

36            (2) If a notice under subsection (1) of this section is not  
37 delivered, in a subsequent suit it shall be presumed that the agency

1 was unable to determine whether the acts described in the complainant's  
2 original notice, if in fact taken by the named official, were taken in  
3 the official's official capacities in accordance with applicable  
4 statute, regulation, or policy, and, therefore, that there is not a  
5 presumption of validity and regularity for the act.

6 NEW SECTION. **Sec. 6.** If the agency determines that a complainant  
7 under section 3 of this act has not exhausted all available  
8 administrative remedies, within forty-five days after receiving notice  
9 of intent to sue it shall notify the complainant of the additional  
10 administrative remedies the agency believes are available. In a  
11 subsequent suit, a claim of the complainant may not be barred or  
12 impaired by failure to exhaust an administrative remedy described in a  
13 notice under this section. A complainant, believing that an  
14 administrative remedy described in a notice under this section is not  
15 available or should be waived because pursuing it would be futile under  
16 the circumstances, may notify the agency of the belief in a supplement  
17 to the notice previously given under section 3 of this act.

18 NEW SECTION. **Sec. 7.** (1) In a suit under a notice filed under  
19 section 3 of this act, the agency may elect to do one of the following:

20 (a) Await the court's decision. The court may declare the agency's  
21 act unlawful, issue injunctive relief, and award interim damages of up  
22 to one percent of the assessed value of the property in question for  
23 each month that the complainant was unlawfully deprived of its use,  
24 from the date notice of intent to sue was filed under section 3 of this  
25 act, plus attorneys' fees and other expenses incurred in pursuing  
26 claims described in the notice. If interim damages are awarded with  
27 respect to a permit application or other request for government action  
28 to which the landowner was entitled, interim damages begin to accrue  
29 forty-five days after the landowner filed a complete application or  
30 expiration of a shorter or longer deadline for the government to act;

31 (b) At any time during the proceedings the agency may elect to  
32 acquire the property by eminent domain as of the date it received  
33 notice of intent to sue under section 3 of this act. If there is a  
34 final judgment that the complainant was deprived of constitutional  
35 rights, the complainant may convey the property to the agency and  
36 recover compensation in the same manner as if the property had been  
37 taken by eminent domain on the date of the notice of intent to sue; or

1 (c) At any time during the proceedings the agency may elect to  
2 record a declaration of partial taking, in a form acceptable to the  
3 complainant or approved by the court, and the case shall then proceed  
4 as if the agency had acquired the rights described in the declaration  
5 by power of eminent domain on the date the declaration was recorded.  
6 If there is a final judgment that the complainant was deprived of  
7 constitutional rights and no other relief is agreed to within forty-  
8 five days, the complainant may record a declaration of partial taking,  
9 in a form acceptable to the agency or approved by the court, and the  
10 case shall then proceed as if the agency had acquired the rights  
11 described in the declaration by power of eminent domain on the date the  
12 declaration was recorded.

13 (2) If the agency fails to make an election under subsection (1) of  
14 this section in its answer or before its answer is filed, the court may  
15 award whatever form of relief it finds appropriate under the  
16 circumstances and may order the agency to reimburse the plaintiff for  
17 additional litigation costs reasonably attributable to uncertainty  
18 regarding the type of relief that might have been granted.

19 NEW SECTION. **Sec. 8.** If a political subdivision of the state  
20 receives a notice under section 3 of this act seeking relief from an  
21 act it took to implement state law or rule, it may notify the attorney  
22 general and the complainant that it believes the act was necessary to  
23 comply with or reasonably implement a state law or rule specified in  
24 the notice. If the state determines that the political subdivision's  
25 act was not required by and did not reasonably implement the state  
26 statute or rule cited, the state shall notify the complainant and the  
27 political subdivision of this within ninety days after receiving the  
28 notice from the political subdivision. The state shall assume full  
29 responsibility, or reimburse the political subdivision, for costs  
30 reasonably incurred to defend a regulatory action specifically required  
31 under state law or rule. The state shall reimburse the political  
32 subdivision for an equitable share of costs reasonably incurred to  
33 defend regulatory actions that reasonably implement state law or rule  
34 but is not directly required by the law or rule. Such defense costs  
35 shall be allocated in proportion to the state-wide and local benefits  
36 sought to be achieved by the regulatory program, as determined by  
37 agreement between the state and political subdivision. If the state  
38 and political subdivision are unable to agree to the allocation, it

1 shall be presumed that fifty percent of the costs must be borne by the  
2 state and fifty percent by the political subdivision, but either the  
3 state or political subdivision may apply to the court for a different  
4 allocation to distribute the costs more equitably in the circumstances.

5 NEW SECTION. **Sec. 9.** If a complainant ultimately prevails in a  
6 case in which defense costs are being paid or shared by the state under  
7 section 8 of this act, the state and political subdivision shall  
8 equitably share all the financial liabilities to the complainant. The  
9 liabilities must be allocated in proportion to the state-wide and local  
10 benefits sought to be achieved by the regulatory program, as determined  
11 by agreement between the state and political subdivision. If the state  
12 and political subdivision are unable to agree to the proportion, it  
13 must be presumed that fifty percent of the liabilities must be borne by  
14 the state and fifty percent by the political subdivision, but either  
15 may apply to the court for a different allocation to distribute the  
16 costs more equitably in the circumstances. If at any point in the  
17 proceedings either the state or political subdivision makes a  
18 settlement offer satisfactory to the complainant that cannot be  
19 implemented because of objections by the other governmental party, the  
20 state's or political subdivision's ultimate liability must be limited  
21 to its reasonable share of the settlement offer.

22 NEW SECTION. **Sec. 10.** The following acts or parts of acts are  
23 each repealed:

- 24 (1) RCW 64.40.020 and 1982 c 232 s 2; and  
25 (2) RCW 64.40.030 and 1982 c 232 s 3.

26 NEW SECTION. **Sec. 11.** Sections 3 through 9 of this act are each  
27 added to chapter 64.40 RCW.

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