
SENATE BILL 5765

State of Washington

55th Legislature

1997 Regular Session

By Senators Benton, Hochstatter, McCaslin, Zarelli, Swecker, Schow and Oke

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1 AN ACT Relating to the protection of private property; amending RCW
2 4.16.100; adding a new section to chapter 7.06 RCW; adding a new
3 section to chapter 4.84 RCW; and adding a new chapter to Title 64 RCW.

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

5 NEW SECTION. **Sec. 1.** The legislature finds and declares that:

6 (1) Article I, section 16 of the state Constitution promises
7 protection of the people's rights in their private property by
8 providing that "No private property shall be taken or damaged for
9 public or private use without just compensation having been first
10 made." This chapter is intended to avoid the taking and damaging of
11 private property by regulation and provide a practical remedy when
12 private property is taken or damaged by government restrictions on land
13 use;

14 (2) The fifth amendment to the United States Constitution provides
15 a similar guarantee. The supreme court has declared that the purpose
16 of the just compensation requirement is to bar government from forcing
17 some people alone to bear public burdens that in all fairness and
18 justice should be borne by the public as a whole;

1 (3) The right to own, possess, and use private property is a
2 fundamental civil right and an essential feature of living in a free
3 society. The supreme court has declared that the fifth amendment
4 requires government to pay just compensation when regulation prohibits
5 substantially all economically beneficial and productive use of an
6 entire parcel of property. Some courts throughout the country have
7 ruled that the same rule applies when regulation takes substantially
8 all economically beneficial and productive use of a portion of a parcel
9 of property. This chapter is intended to provide in statute that
10 compensation should be provided when regulation takes part of one's
11 property as it is when regulation takes all of one's property;

12 (4) The government has an obligation to prohibit nuisance uses of
13 property which injure the private property, health, and safety of
14 others. This chapter is not intended to hinder government entities'
15 efforts to prohibit nuisances;

16 (5) The public has legitimate interests in protecting natural,
17 environmental, and aesthetic resources. The public desire to provide
18 such public amenities should be supported by public funds;

19 (6) Many regulations of real property enhance the value of the
20 regulated private property. This chapter is not intended to limit
21 government regulations that enhance the values of regulated property;

22 (7) When property values are decreased by regulations, the
23 cumulative reduction in the value of private property limits the tax
24 base and drives up the property tax rates of others;

25 (8) Property regulations that leave property substantially without
26 economically beneficial or productive use harm the economy of
27 Washington state by reducing the net worth of privately held real
28 estate that could be used productively in creating businesses and jobs
29 for Washington citizens. When applied to land appropriate for
30 residential uses, such regulations also hinder the crucial goal of
31 making housing affordable by reducing the supply of viable building
32 sites by driving up the price of such sites and by increasing the costs
33 of using those sites for housing;

34 (9) Many restrictions on land use exist to protect environmental
35 values. These values have suffered negative cumulative impacts of land
36 use on the environment due to the lack of protection over the decades.
37 Fairness and justice require that the public, which cumulatively over
38 time has contributed to negative environmental impacts, pay the costs

1 of alleviating past harms to the environment, rather than forcing a few
2 members of society to pay for the necessary remedies; and

3 (10) This chapter is necessary to ensure that when the public
4 desires to create or preserve natural, environmental, scenic, or
5 aesthetic values on private property and seeks to obtain those goals
6 through restrictions that leave the owner of the private property with
7 no reasonable economically beneficial or productive use of the affected
8 property, the public will either mitigate the damage to the private
9 property owner or provide compensation.

10 NEW SECTION. **Sec. 2.** Unless the context clearly requires
11 otherwise, the definitions in this section apply throughout this
12 chapter.

13 (1) "Compensation" means remuneration which equals the reduction in
14 the fair market value of private real property that is attributable to
15 a restriction on the use of the property or any part thereof.

16 (2) "Existing use" means any use that does not constitute a
17 nuisance and that is actually engaged on the property at any time
18 within six years prior to the imposition of the subject restriction.
19 Forest practices shall be considered an existing use for forest lands
20 as those terms are defined in the forest practices act, chapter 76.09
21 RCW.

22 (3) "Government entity" means Washington state, state agencies,
23 agencies and commissions funded, in whole or in part, by the state,
24 counties, cities, towns, special districts, municipal corporations, or
25 quasi-municipal corporations.

26 (4) "Impose" means for an official or employee of a government
27 entity to apply a restriction on land use to all or any portion of
28 private real property in response to the owner's use, proposed use, or
29 permit application.

30 (5) "Local land use legislation" means any plan, ordinance,
31 resolution, policy, or rule that has general application and that is
32 adopted by a local government entity that restricts, or authorizes
33 restrictions on the use of all or a portion of the private real
34 property.

35 (6) "State land use legislation" means any rule, administrative
36 procedure, policy guideline, or statute that has general application
37 and that is adopted by the state legislature, any agency, or any board
38 or commission that is funded, in whole or in part, by the state that

1 restricts, or authorizes restrictions on, the use of all or a portion
2 of the private real property.

3 (7) "Nuisances" include:

4 (a) Nuisances as defined by the laws of the state of Washington, as
5 the same may be amended from time to time; and

6 (b) Nuisances under common law standards for determining nuisances,
7 without regard to mere declarations that an activity constitutes a
8 nuisance.

9 (8) "Real property" means any interest in real property recognized
10 under Washington law, including water and natural resources such as
11 crops, trees, and minerals, while such resources are attached to land.

12 (9) "Reasonable economically beneficial or productive uses" are
13 economic uses of property that are more than nominal or passive, that
14 are proportionate to and compatible with actual uses of property in the
15 immediate area at the time of the imposition, and that do not
16 constitute a nuisance.

17 (10) "Restriction" or "restricting" means a limitation,
18 requirement, regulation, or restriction by a government entity that
19 limits the use of real property, including those imposed by the
20 application of ordinances, resolutions, rules, regulations, policies,
21 statutes, and conditions of land use approval.

22 (11) "Emergency" means a situation that presents an immediate
23 danger to the public peace, health, or safety.

24 NEW SECTION. **Sec. 3.** (1) Except in emergencies that require the
25 imposition of moratoria or prohibitions on development that are
26 effective for a period not to exceed sixty days to protect life or
27 prevent physical damage to property, state or local land use
28 legislation may be enacted after the effective date of this section
29 only after the procedural requirements of this section have been
30 followed.

31 (2) A government entity may not enact state or local land use
32 legislation without holding a public hearing on the proposed state or
33 local land use legislation. The required public hearing may be held by
34 the governing body or a planning commission. Notice of the required
35 public hearing shall be published at least thirty and not more than
36 forty-five days in advance of the public hearing in any newspaper
37 published in the jurisdiction of the government entity or having a
38 general circulation therein, with the advertisement intentionally

1 designed to attract public attention. The advertisement shall be of a
2 size no smaller than four inches by four inches and shall be placed in
3 a location other than with classified advertisements. The published
4 notice must notify readers of the following:

5 (a) A general description of the proposed state or local land use
6 legislation;

7 (b) The time, date, and location of the public hearing for
8 consideration of the proposed state or local land use legislation;

9 (c) Where members of the public may inspect the text of the
10 proposed state or local land use legislation;

11 (d) All of the purposes of the proposed state or local land use
12 legislation;

13 (e) The right under subsection (4) of this section to propose
14 alternatives to the proposed state or local land use legislation which
15 must be submitted in writing prior to the public hearing; and

16 (f) The obligation of the government entity to respond to each
17 alternative in writing.

18 (3) The requirement for published notice in subsection (2) of this
19 section is not applicable when the government entity mails notice
20 containing the same information to each person listed with the county
21 assessor as a property owner subject to the proposed state or local
22 land use legislation.

23 (4) Any resident or owner of any interest in real property,
24 including leasehold interests, subject to the proposed state or local
25 land use legislation or any resident or owner of any interest in real
26 property, including leasehold interests, adjacent to property subject
27 to the proposed state or local land use legislation may offer
28 alternatives to the proposed state or local land use legislation to
29 fulfill the stated purposes. Alternatives must be submitted in writing
30 prior to the public hearing required by subsection (2) of this section.
31 The government entity may continue its hearing to a later date in order
32 to provide time to consider alternatives. The date, time, and location
33 of the continuation of the hearing must be announced at the public
34 hearing and need not be published again under subsection (2) of this
35 section. Prior to the adoption of the state or local land use
36 legislation, the government entity must consider all proposed
37 alternatives, summarize in writing all proposed alternatives, and
38 respond to the alternatives by category or subject matter, indicating
39 how the state or local land use legislation as proposed for final

1 adoption reflects consideration of the alternatives. The government
2 entity need not mail the responses to the proponents of alternatives,
3 but must make the written summary of responses available to the public
4 at the next public hearing at which the state or local land use
5 legislation is considered for adoption.

6 (5) Any resident or owner of any interest in real property,
7 including leasehold interests, subject to the proposed state or local
8 land use legislation or any resident or owner of any interest in real
9 property, including leasehold interests, adjacent to property subject
10 to the proposed state or local land use legislation may enforce the
11 requirements under this section in the superior court in the county
12 where the government entity is located by filing a petition for a writ
13 of prohibition pursuant to chapter 7.16 RCW, prohibiting the adoption,
14 implementation, or enforcement of the state or local land use
15 legislation without complying with the procedural requirements of this
16 section. In enforcing this section, the superior court may only
17 consider whether the government entity complied with the procedural
18 requirements of this section, but may not substitute its judgment for
19 the judgment of the government entity in deciding to enact the proposed
20 state or local land use legislation or in deciding to reject or accept
21 alternatives.

22 (6) Only the purposes identified under subsection (2)(d) of this
23 section may be used by any party as the purpose for the state or local
24 land use legislation in any proceeding where the validity or
25 interpretation of the state or local land use legislation is at issue.

26 (7) This section does not preclude any action at law or equity that
27 a real property owner would have had if this chapter had not been
28 enacted.

29 NEW SECTION. **Sec. 4.** (1) A government entity may impose the
30 following restrictions on land use without the obligation to provide
31 mitigation or compensation under the provisions of this chapter:

32 (a) Traditional zoning restrictions that are only those
33 restrictions in a zoning ordinance of a city, county, or town that:

34 (i) Limit the types of permitted uses and density or intensity of
35 permitted uses throughout a zoning classification, as long as the
36 restrictions do not directly or effectively preclude an existing use of
37 real property or substantially all reasonable economically beneficial
38 or productive uses of a portion of real property; or

1 (ii) Create property line setbacks, or height and bulk limitations
2 applicable to all properties throughout a zoning classification to the
3 same degree, increase the value of the properties restricted because
4 all properties throughout the zoning classification are subject to the
5 same restriction, and do not vary based on the natural environmental
6 conditions of the restricted properties, such as restrictions to
7 protect wetlands, wildlife habitat, and buffers for the same;

8 (b) Restrictions that only prevent, mitigate, or abate injuries to
9 another person or property that the government entity is able to
10 demonstrate are likely to be directly caused by a use of the real
11 property that constitutes a nuisance; and

12 (c) Restrictions that merely require compliance with specified
13 federal laws or regulations that apply to a use of the real property.
14 When a government entity under this chapter chooses directly to enforce
15 or to apply federal laws or regulations to a use of private property,
16 the government entity must mitigate or pay compensation under
17 subsection (2) of this section to the extent the imposition of the
18 restriction exceeds the minimum requirements of the federal laws or
19 regulations.

20 (2) With the exception of restrictions under subsection (1) of this
21 section, when a government entity imposes a restriction on the use of
22 any portion of real property that decreases the fair market value of
23 the affected real property, either by precluding an existing use, by
24 precluding uses permitted by the traditional zoning at the time of
25 imposition of the restriction, or by precluding substantially all
26 economically beneficial or productive uses, then the government entity
27 shall:

28 (a) Offer to mitigate the burden to the real property caused by the
29 restriction by using methods of mitigation which include, but are not
30 limited to, those recognized in RCW 36.70A.070(5) and 36.70A.090, such
31 as:

32 (i) Adjusting land development or permit standards, such as
33 clustering;

34 (ii) Increasing or modifying the density, intensity, or use of
35 areas of development;

36 (iii) Allowing transfer of development rights;

37 (iv) Exchanging surplus property owned by the government entity; or

38 (v) Granting a variance from the restriction under subsection
39 (3)(b) of this section; or

1 (b) Pay compensation to the owner of a parcel of real property,
2 together with interest at the maximum rate permitted under RCW
3 19.52.020, compounded annually from the date of imposition of the
4 restriction. A property may reject an offer of mitigation under (a) of
5 this subsection and still seek compensation under section 5 of this
6 act, but the amount of compensation due under this section shall be
7 reduced by fair market value of the mitigation offered. A property
8 owner may also accept mitigation and still seek compensation to the
9 extent the mitigation fails to recover the loss in fair market value
10 caused by the restriction.

11 (3)(a) Restrictions imposed by local government under a plan that
12 is required by state law to be approved by a state agency and has been
13 so approved shall render the state agency responsible for compensation
14 and costs for restrictions required to be imposed under such a plan.
15 Such plans include, but are not limited to, plans under RCW 90.58.090,
16 chapter 400-12 WAC, and WAC 173-100-120. State agencies may issue
17 interpretative rules under RCW 34.05.328(5)(c)(ii) identifying the
18 extent to which local government plans approved by the state agency
19 exceed the requirements of state law. Once such an interpretive rule
20 is issued, local government will be responsible for compensation and
21 costs for any restriction that the state agency has determined to
22 exceed the requirements of state law.

23 (b) Because local governments are in a better position than state
24 agencies to determine what is truly in the public interest for their
25 citizens, local governments may grant a variance from any restrictions,
26 notwithstanding any other provision of law, when the following findings
27 are made by the local government:

28 (i) There is a probable likelihood of liability to pay compensation
29 under this chapter;

30 (ii) No mitigation under subsection (2)(a) of this section is
31 feasible or effective to avoid the compensation liability under this
32 chapter;

33 (iii) The restriction is not exempt from compensation under
34 subsection (1) of this section;

35 (iv) The public interest being served by the restriction is
36 insufficient in the case at issue to justify continuation of the
37 imposition of the restriction and payment of compensation; and

1 (v) If applicable under (c) of this subsection, the state agency
2 with jurisdiction over the subject area has chosen not to pay
3 compensation to enable the restriction to continue to be imposed.

4 (c) When a restriction appears to be otherwise mandated by state
5 law and within the subject matter of a particular state agency's
6 jurisdiction, a local government entity may not grant a variance under
7 (b) of this subsection unless it has delivered a copy of the request
8 for compensation under section 5(1) of this act to such a state agency
9 within thirty days of receiving the property owner's request for
10 compensation. The state agency shall determine whether the restriction
11 should continue to be imposed and, if so, shall provide compensation
12 within twenty days after receipt of the request for compensation from
13 the local government.

14 (4) Any easement granted by a property owner to a government entity
15 remains in effect only for the duration of the life of the grantor.
16 Any easement that remains in effect after the death of the grantor is
17 prohibited and unenforceable.

18 (5) A government entity may not offer a property tax reduction or
19 a property tax exemption to a property owner in exchange for the
20 granting of an easement by a property owner to a government entity.

21 (6) In the event a state agency is ordered to pay or agrees to pay
22 compensation and costs for a restriction mandated by state law or a
23 state agency, payment of compensation shall be made by the treasurer
24 from the tort claims revolving fund established under RCW 4.92.135.
25 The state agency whose action resulted in the claim must reimburse the
26 tort claims revolving fund from the funds appropriated to the agency
27 for that purpose. Agencies against which claims for compensation have
28 been made under this chapter shall report the status of all such claims
29 to the office of financial management and the legislature at least
30 every six months until they are resolved and the tort claims revolving
31 fund has been reimbursed for any final judgment or settlement paid.
32 State agencies must include in each budget request sufficient funds to
33 reimburse the tort claims fund for any payments previously made in
34 connection with its actions plus a reasonable estimate of amounts
35 likely to be paid with respect to any unresolved claims then pending.

36 (7) An award or payment of compensation made by a government entity
37 under this section shall operate to grant to and vest in the government
38 entity the right, title, and interest in the property for which the
39 compensation has been paid. Upon receipt of the compensation, the

1 property owner shall deliver to the government entity a deed to the
2 property interest taken by the restriction. If the real property owner
3 and government entity cannot agree, the superior court shall determine
4 the interest that accurately represents the real property interest
5 which has been purchased by the government entity, such as a
6 conservation easement or fee title, and determine the form of the deed
7 to be delivered. Filing of the deed is at the government entity's
8 expense and the government entity shall refund any property taxes the
9 owner pays for the property transferred after the date the restriction
10 was imposed.

11 NEW SECTION. **Sec. 5.** (1) A real property owner seeking to enforce
12 the requirements under section 4 of this act must request compensation
13 from the government entity imposing the restriction by filing, with a
14 person identified under RCW 4.28.080 or 4.92.020 when the request is
15 made from the state or a state agency, a written request for
16 compensation that identifies the restriction at issue and specifies the
17 level of compensation or type of mitigation requested. A real property
18 owner is not required to pursue a pending request for a permit to use
19 the real property in any particular manner or any other administrative
20 remedies relating to use to establish a justiciable claim under this
21 chapter. The request shall be on a form available from the government
22 entity. The form shall be substantially as follows:

23 REQUEST FOR COMPENSATION OR MITIGATION
24 UNDER THE PRIVATE PROPERTY PROTECTION ACT

25 Pursuant to the Private Property Protection Act,
26 _____(name of property owner) requests
27 compensation or mitigation from _____(name of
28 government entity) for the imposition of a restriction on the use of
29 real property. This restriction was imposed when
30 _____(name of government official) on _____(date)
31 applied _____(identification of the
32 restriction) to the use of my property located at
33 _____(location of property).

34 I believe that I am entitled to compensation under the Private
35 Property Protection Act. I am requesting that _____(name
36 of government entity) provide compensation in the amount of
37 _____ or mitigation under the act as

1 follows: _____
2 _____.

3 (2) The government entity has sixty days to reject or accept a real
4 property owner's request for compensation under subsection (1) of this
5 section. The government entity may choose not to impose the
6 restriction, to grant a variance from the restriction, to pay
7 compensation, to offer to mitigate the burden caused by the imposition
8 of the restriction, or any combination of these options.

9 (3) The requirements under section 4 of this act may be enforced in
10 superior court against a government entity by the owner of real
11 property subject to the restriction within the time period established
12 in RCW 4.16.100. Property owners may also raise any state or federal
13 statutory or constitutional claims arising from the government entity's
14 imposition of the restriction or the decision to reject in whole or in
15 part the property owner's request for compensation. It is not
16 necessary for the restriction to be challenged under any other basis or
17 for a property owner to seek relief through any other process before a
18 claim for compensation can be made.

19 (4) The superior court shall rule on all issues de novo. Property
20 owners are entitled to a jury trial on the amount of compensation
21 required under this chapter as in cases under eminent domain. In
22 calculating the amount of compensation to be paid, the court shall
23 consider the value of mitigation offered by the government entity under
24 section 4(2)(a) of this act.

25 (5) In defending against a claim for compensation:

26 (a) A government entity that intends to rely on the exceptions set
27 forth in section 4(1) of this act has the burden to prove by clear and
28 convincing evidence that the restriction qualifies as an exception and
29 is exempt from the compensation requirement of this chapter.

30 (b) A government entity has the burden to prove the value of any
31 mitigation offered under section 4(2)(a) of this act.

32 (6) In defending against a claim for compensation filed in the
33 superior court, a government entity that intends to rely on section
34 4(3) of this act for liability by the state must join the state as a
35 defendant within thirty days of the service of the original complaint
36 seeking compensation under this chapter.

37 (7) At any time, the government entity may choose to no longer
38 impose the restriction at issue in whole or in part and pay the owner

1 for the temporary restriction of the property, by paying the interest
2 due under section 4(2)(b) of this act.

3 (8) A prevailing plaintiff or petitioner is entitled to recover the
4 costs incurred in enforcing this chapter as provided in section 9 of
5 this act.

6 NEW SECTION. **Sec. 6.** A new section is added to chapter 7.06 RCW
7 to read as follows:

8 Claims for compensation under the private property protection act
9 are subject to mandatory arbitration under this chapter where the sole
10 issue is the amount of compensation required under that act.

11 NEW SECTION. **Sec. 7.** This chapter does not apply to actions by
12 government entities in their exercise of the power of eminent domain.

13 **Sec. 8.** RCW 4.16.100 and Code 1881 s 29 are each amended to read
14 as follows:

15 The following actions shall be commenced within two years:

16 (1) An action for libel, slander, assault, assault and battery, or
17 false imprisonment.

18 (2) An action upon a statute for a forfeiture or penalty to the
19 state.

20 (3) An action under the private property protection act, chapter
21 64.-- RCW (sections 1 through 5, 7, 10, and 11 of this act).

22 NEW SECTION. **Sec. 9.** A new section is added to chapter 4.84 RCW
23 to read as follows:

24 A prevailing plaintiff or petitioner is entitled to recover the
25 costs incurred in enforcing chapter 64.-- RCW (sections 1 through 5, 7,
26 10, and 11 of this act), including reasonable attorneys' fees. A real
27 property owner prevails under section 4 of this act if he or she
28 receives more compensation than offered by the government entity under
29 section 5(2) of this act.

30 NEW SECTION. **Sec. 10.** This chapter may be known and cited as the
31 private property protection act.

32 NEW SECTION. **Sec. 11.** If any provision of this act or its
33 application to any person or circumstance is held invalid, the

1 remainder of the act or the application of the provision to other
2 persons or circumstances is not affected.

3 NEW SECTION. **Sec. 12.** Sections 1 through 5, 7, 10, and 11 of this
4 act constitute a new chapter in Title 64 RCW.

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