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**SUBSTITUTE HOUSE BILL 2223**

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**State of Washington**

**54th Legislature**

**1996 Regular Session**

**By** House Committee on Government Operations (originally sponsored by Representatives Foreman, Schoesler, Mastin, Mulliken, Sheldon, Grant, D. Sommers, Honeyford, Koster, Robertson, Campbell, Smith, Huff, L. Thomas, Sheahan, Fuhrman, Thompson, McMorris, Stevens, Boldt, Backlund, Hargrove, Benton and McMahan)

Read first time 02/02/96.

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; adding a new chapter to Title 64 RCW; and  
4 providing an effective date.

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

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

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

15 (2) The fifth amendment to the United States Constitution provides  
16 a similar guarantee. The supreme court has declared that the purpose  
17 of the just compensation requirement is to bar government from forcing  
18 some people alone to bear public burdens that in all fairness and  
19 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 harms 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) "Nuisances" include:

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

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

4 (7) "Real property" means any interest in real property recognized  
5 under Washington law, including water and natural resources such as  
6 crops, trees, and minerals, while such resources are attached to land.

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

12 (9) "Restriction" or "restricting" means a limitation, requirement,  
13 regulation, or restriction by a government entity that limits the use  
14 of real property, including those imposed by the application of  
15 ordinances, resolutions, rules, regulations, policies, statutes, and  
16 conditions of land use approval.

17 NEW SECTION. **Sec. 3.** (1) Except in emergencies that require the  
18 imposition of moratoria or prohibitions on development that are  
19 effective for a period not to exceed sixty days to protect life or  
20 prevent physical damage to property, land use legislation may be  
21 enacted after the effective date of this section only after the  
22 procedural requirements of this section have been followed.

23 (2) A government entity may not enact land use legislation without  
24 holding a public hearing on the proposed land use legislation. The  
25 required public hearing may be held by the governing body or a planning  
26 commission. Notice of the required public hearing shall be published  
27 at least thirty and not more than forty-five days in advance of the  
28 public hearing in any newspaper published in the jurisdiction of the  
29 government entity or having a general circulation therein, with the  
30 advertisement intentionally designed to attract public attention. The  
31 advertisement shall be of a size no smaller than four inches by four  
32 inches and shall be placed in a location other than with classified  
33 advertisements. The published notice must notify readers of the  
34 following:

35 (a) A general description of the proposed land use legislation;

36 (b) The time, date, and location of the public hearing for  
37 consideration of the proposed land use legislation;

1 (c) Where members of the public may inspect the text of the  
2 proposed land use legislation;

3 (d) All of the purposes of the proposed land use legislation;

4 (e) The right under subsection (4) of this section to propose  
5 alternatives to the proposed land use legislation which must be  
6 submitted in writing prior to the public hearing; and

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

9 (3) The requirement for published notice in subsection (2) of this  
10 section is not applicable when the government entity mails notice  
11 containing the same information to each person listed with the county  
12 assessor as a property owner subject to the proposed land use  
13 legislation.

14 (4) Any resident or owner of any interest, including leasehold  
15 interests, in real property subject to the proposed land use  
16 legislation or in property adjacent to property subject to the proposed  
17 land use legislation may offer alternatives to the proposed legislation  
18 to fulfill the stated purposes. Alternatives must be submitted in  
19 writing prior to the public hearing required by subsection (2) of this  
20 section. The government entity may continue its hearing to a later  
21 date in order to provide time to consider alternatives. The date,  
22 time, and location of the continuation of the hearing must be announced  
23 at the public hearing and need not be published again under subsection  
24 (2) of this section. Prior to the adoption of the land use  
25 legislation, the government entity must consider all proposed  
26 alternatives, summarize in writing all proposed alternatives, and  
27 respond to the alternatives by category or subject matter, indicating  
28 how the land use legislation as proposed for final adoption reflects  
29 consideration of the alternatives. The government entity need not mail  
30 the responses to the proponents of alternatives, but must make the  
31 written summary of responses available to the public at the next public  
32 hearing at which the land use legislation is considered for adoption.

33 (5) Any resident or owner of any interest, including leasehold  
34 interests, in real property subject to the proposed land use  
35 legislation or in property adjacent to property subject to the proposed  
36 land use legislation may enforce the requirements under this section in  
37 the superior court in the county where the government entity is located  
38 by filing a petition for a writ of prohibition pursuant to chapter 7.16  
39 RCW, prohibiting the adoption, implementation, or enforcement of the

1 land use legislation without complying with the procedural requirements  
2 of this section. In enforcing this section, the superior court may  
3 only consider whether the government entity complied with the  
4 procedural requirements of this section, but may not substitute its  
5 judgment for the judgment of the government entity in deciding to enact  
6 the proposed land use legislation or in deciding to reject or accept  
7 alternatives.

8 (6) Only the purposes identified under subsection (2)(d) of this  
9 section may be used by any party as the purpose for the land use  
10 legislation in any proceeding where the validity or interpretation of  
11 the land use legislation is at issue.

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

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

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

20 (i) Limit the types of permitted uses and density or intensity of  
21 permitted uses throughout a zoning classification, as long as the  
22 restrictions do not directly or effectively preclude an existing use of  
23 real property or substantially all reasonable economically beneficial  
24 or productive uses of a portion of real property; or

25 (ii) Create property line setbacks, or height and bulk limitations  
26 applicable to all properties throughout a zoning classification to the  
27 same degree, increase the value of the properties restricted because  
28 all properties throughout the zoning classification are subject to the  
29 same restriction, and do not vary based on the natural environmental  
30 conditions of the restricted properties, such as restrictions to  
31 protect wetlands, wildlife habitat, and buffers for the same;

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

36 (c) Restrictions that merely require compliance with specified  
37 federal laws or regulations that apply to a use of the real property.  
38 When a government entity under this chapter chooses directly to enforce

1 or to apply federal laws or regulations to a use of private property,  
2 the government entity must mitigate or pay compensation under  
3 subsection (2) of this section to the extent the imposition of the  
4 restriction exceeds the minimum requirements of the federal laws or  
5 regulations.

6 (2) With the exception of restrictions under subsection (1) of this  
7 section, when a government entity imposes a restriction on the use of  
8 any portion of real property that decreases the fair market value of  
9 the affected real property, either by precluding an existing use, by  
10 precluding uses permitted by the traditional zoning at the time of  
11 imposition of the restriction, or by precluding substantially all  
12 economically beneficial or productive uses, then the government entity  
13 shall:

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

18 (i) Adjusting land development or permit standards, such as  
19 clustering;

20 (ii) Increasing or modifying the density, intensity, or use of  
21 areas of development;

22 (iii) Allowing transfer of development rights;

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

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

26 (b) Pay compensation to the owner of a parcel of real property,  
27 together with interest at the maximum rate permitted under RCW  
28 19.52.020, compounded annually from the date of imposition of the  
29 restriction. A property may reject an offer of mitigation under (a) of  
30 this subsection and still seek compensation under section 5 of this  
31 act, but the amount of compensation due under this section shall be  
32 reduced by fair market value of the mitigation offered. A property  
33 owner may also accept mitigation and still seek compensation to the  
34 extent the mitigation fails to recover the loss in fair market value  
35 caused by the restriction.

36 (3)(a) Restrictions imposed by local government under a plan that  
37 is required by state law to be approved by a state agency and has been  
38 so approved shall render the state agency responsible for compensation  
39 and costs for restrictions required to be imposed under such a plan.

1 Such plans include, but are not limited to, plans under RCW 90.58.090,  
2 chapter 400-12 WAC, and WAC 173-100-120. State agencies may issue  
3 interpretative rules under RCW 34.05.328(5)(c)(ii) identifying the  
4 extent to which local government plans approved by the state agency  
5 exceed the requirements of state law. Once such an interpretive rule  
6 is issued, local government will be responsible for compensation and  
7 costs for any restriction that the state agency has determined to  
8 exceed the requirements of state law.

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

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

16 (ii) No mitigation under subsection (2)(a) of this section is  
17 feasible or effective to avoid the compensation liability under this  
18 chapter;

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

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

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

27 (c) When a restriction appears to be otherwise mandated by state  
28 law and within the subject matter of a particular state agency's  
29 jurisdiction, a local government entity may not grant a variance under  
30 (b) of this subsection unless it has delivered a copy of the request  
31 for compensation under section 5(1) of this act to such a state agency  
32 within thirty days of receiving the property owner's request for  
33 compensation. The state agency shall determine whether the restriction  
34 should continue to be imposed and, if so, shall provide compensation  
35 within twenty days after receipt of the request for compensation from  
36 the local government.

37 (4) In the event a state agency is ordered to pay or agrees to pay  
38 compensation and costs for a restriction mandated by state law or a  
39 state agency, payment of compensation shall be made by the treasurer



1 from the tort claims revolving fund established under RCW 4.92.135.  
2 The state agency whose action resulted in the claim must reimburse the  
3 tort claims revolving fund from the funds appropriated to the agency  
4 for that purpose. Agencies against which claims for compensation have  
5 been made under this chapter shall report the status of all such claims  
6 to the office of financial management and the legislature at least  
7 every six months until they are resolved and the tort claims revolving  
8 fund has been reimbursed for any final judgment or settlement paid.  
9 State agencies must include in each budget request sufficient funds to  
10 reimburse the tort claims fund for any payments previously made in  
11 connection with its actions plus a reasonable estimate of amounts  
12 likely to be paid with respect to any unresolved claims then pending.

13 (5) An award or payment of compensation made by a government entity  
14 under this section shall operate to grant to and vest in the government  
15 entity the right, title, and interest in the property for which the  
16 compensation has been paid. Upon receipt of the compensation, the  
17 property owner shall deliver to the government entity a deed to the  
18 property interest taken by the restriction. If the real property owner  
19 and government entity cannot agree, the superior court shall determine  
20 the interest that accurately represents the real property interest  
21 which has been purchased by the government entity, such as a  
22 conservation easement or fee title, and determine the form of the deed  
23 to be delivered. Filing of the deed is at the government entity's  
24 expense and the government entity shall refund any property taxes the  
25 owner pays for the property transferred after the date the restriction  
26 was imposed.

27 NEW SECTION. **Sec. 5.** (1) A real property owner seeking to enforce  
28 the requirements under section 4 of this act must request compensation  
29 from the government entity imposing the restriction by filing, with a  
30 person identified under RCW 4.28.080 or 4.92.020 when the request is  
31 made from the state or a state agency, a written request for  
32 compensation that identifies the restriction at issue and specifies the  
33 level of compensation or type of mitigation requested. A real property  
34 owner is not required to pursue a pending request for a permit to use  
35 the real property in any particular manner or any other administrative  
36 remedies relating to use to establish a justiciable claim under this  
37 chapter. The request shall be on a form available from the government  
38 entity. The form shall be substantially as follows:

1                   REQUEST FOR COMPENSATION OR MITIGATION  
2                   UNDER THE PRIVATE PROPERTY PROTECTION ACT

3           Pursuant     to     the     Private     Property     Protection     Act,  
4     \_\_\_\_\_ (name     of     property     owner)     requests  
5     compensation or mitigation from \_\_\_\_\_ (name of  
6     government entity) for the imposition of a restriction on the use of  
7     real     property.           This     restriction     was     imposed     when  
8     \_\_\_\_\_ (name of government official) on \_\_\_\_\_ (date)  
9     applied \_\_\_\_\_ (identification of the  
10    restriction) to the use of my property located at  
11    \_\_\_\_\_ (location of property).

12           I believe that I am entitled to compensation under the Private  
13    Property Protection Act. I am requesting that \_\_\_\_\_ (name  
14    of government entity) provide compensation in the amount of  
15    \_\_\_\_\_ or mitigation under the act as  
16    follows: \_\_\_\_\_  
17    \_\_\_\_\_.

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

24           (3) The requirements under section 4 of this act may be enforced in  
25    superior court against a government entity by the owner of real  
26    property subject to the restriction within the time period established  
27    in RCW 4.16.100. Property owners may also raise any state or federal  
28    statutory or constitutional claims arising from the government entity's  
29    imposition of the restriction or the decision to reject in whole or in  
30    part the property owner's request for compensation. It is not  
31    necessary for the restriction to be challenged under any other basis or  
32    for a property owner to seek relief through any other process before a  
33    claim for compensation can be made.

34           (4) The superior court shall rule on all issues de novo. Property  
35    owners are entitled to a jury trial on the amount of compensation  
36    required under this chapter as in cases under eminent domain. In  
37    calculating the amount of compensation to be paid, the court shall

1 consider the value of mitigation offered by the government entity under  
2 section 4(2)(a) of this act.

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

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

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

10 (6) In defending against a claim for compensation filed in the  
11 superior court, a government entity that intends to rely on section  
12 4(3) of this act for liability by the state must join the state as a  
13 defendant within thirty days of the service of the original complaint  
14 seeking compensation under this chapter.

15 (7) At any time, the government entity may choose to no longer  
16 impose the restriction at issue in whole or in part and pay the owner  
17 for the temporary restriction of the property, by paying the interest  
18 due under section 4(2)(b) of this act.

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

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

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

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

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

31 The following actions shall be commenced within two years:

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

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

1       (3) An action under the private property protection act, chapter  
2 64.-- RCW (sections 1 through 5, 7, and 10 through 12 of this act).

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

5       A prevailing plaintiff or petitioner is entitled to recover the  
6 costs incurred in enforcing chapter 64.-- RCW (sections 1 through 5, 7,  
7 and 10 through 12 of this act), including reasonable attorneys' fees.  
8 A real property owner prevails under section 4 of this act if he or she  
9 receives more compensation than offered by the government entity under  
10 section 5(2) of this act.

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

13       NEW SECTION.   **Sec. 11.**   If any provision of this act or its  
14 application to any person or circumstance is held invalid, the  
15 remainder of the act or the application of the provision to other  
16 persons or circumstances is not affected.

17       NEW SECTION.   **Sec. 12.**   This act shall take effect June 15, 1996,  
18 and apply prospectively to restrictions imposed after that date.

19       NEW SECTION.   **Sec. 13.**   Sections 1 through 5, 7, and 10 through 12  
20 of this act shall constitute a new chapter in Title 64 RCW.

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