

HOUSE BILL REPORT

SB 5363

As Reported by House Committee On:
Judiciary

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, Dandel, Pearson, Roach, Rivers, Angel, Schoesler, Braun, Dammeier, Honeyford and Hewitt.

Brief History:

Committee Activity:

Judiciary: 3/25/15, 2/23/16, 2/26/16 [DPA].

Brief Summary of Bill
(As Amended by Committee)

- Explicitly states that private property may be taken only for public use and the taking of private property by any public entity for economic development does not constitute a public use.
- Defines "economic development" and "public use."

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended. Signed by 13 members: Representatives Jinkins, Chair; Kilduff, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Goodman, Haler, Hansen, Kirby, Klippert, Kuderer, Muri, Orwall and Stokesbary.

Staff: Omeara Harrington (786-7136).

Background:

Eminent Domain.

"Eminent domain" is the term used to describe the power of a government to take private property for 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

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property to build a highway. A "condemnation" is the judicial proceeding used for the exercise of eminent domain.

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

Article 1, 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 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 . . ."

"Public Use" under the Federal Constitution.

The U.S. Constitution requires that a taking be for a "public use." In 2005 the U.S. Supreme Court considered what "public use" means in *Kelo v. City of New London*. In *Kelo*, the city of New London, Connecticut, planned to condemn property as part of an economic development plan to revitalize the area surrounding a large pharmaceutical company moving into the area. The condemnation of property for the development plan did not come from an area of blight. The plan called for the condemned property to be transferred to a private developer, and the planned uses included offices, a hotel, parking, a conference center, and other commercial uses. Much of the property in the development was not to 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 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 interests require it; and (3) that the property acquired is necessary for the purpose. What constitutes "public use" in this state has evolved over the years.

In *Hogue v. Port of Seattle*, a 1959 decision, the Washington Supreme 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 must show that the condemned property is to be put to what is "really" a public use. The Court noted that simply wanting to put someone's property to a "higher and better economic use" is not sufficient grounds to condemn it.

Subsequent case law suggests that, while the public use requirement cannot be met simply because the planned use would be a more productive use as part of an economic development project, some limited transfers of condemned property for private use may be permissible, such as when the private use is incidental to the planned public use.

Though the Washington Supreme Court has explicitly said that economic development alone does not constitute a public use, it has allowed takings to cure "blighted areas." Blighted areas are areas "which constitute a serious and growing menace, injurious to the public

health, safety, morals and welfare of the residents of the state." Property acquired with public funds to remove blight may be resold to private persons, subject to use restrictions that prevent recurrence of the blighted condition.

Summary of Amended Bill:

It is the intent of the Legislature to recognize, reaffirm, and support existing Washington law, in accordance with the state Constitution, that prohibits the condemnation of private property other than for certain public purposes pursuant to law.

New provisions are added to the statutes regarding the use of eminent domain by public entities.

Private property may only be taken for public use. "Public use" is defined to include:

- 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
- the use of eminent domain to: (1) remove a public nuisance or an uninhabitable structure, or to acquire abandoned property; and (2) eliminate a direct threat to public health and safety caused by the property in its current condition.

The taking of private property by any public entity for economic development does not constitute a public use, and property cannot be taken for the purpose of economic development. The prohibition against taking property for economic development extends to the condemnation of property in blighted areas.

"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 a public use 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; or
- highway projects.

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

In an action to establish or challenge the asserted public use of a taking of private property, the taking must be deemed for economic development, and is not a proper basis for eminent domain, if the court determines that: (1) the taking does not result in any of the listed

exceptions to economic development; and (2) economic development was a substantial factor in the decision to take the property.

Amended Bill Compared to Original Bill:

All underlying provisions of the bill remain, and an intent section is added recognizing and reaffirming existing Washington law relating to the use of eminent domain by state and local governments.

Appropriation: None.

Fiscal Note: Not requested.

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

Staff Summary of Public Testimony:

(In support) This legislation brings us into the majority of states that have made reforms protecting private property rights since the *Kelo* decision. People, regardless of party affiliation, have a value for private property. In this state there is extra constitutional protection around this. There is a growing movement to support private property rights. Economic development is, at times, disproportionately affecting the poor and low-income housing areas. Property owners cannot fight developers, and some lower-income people cannot live in the community they once lived in. Incentivizing lower income housing is a better use of state law. A 2009 Attorney General task force revealed that abuse happens. As an example, homes have been taken and given to a car dealership. That is not the role of government; government should be protecting people's rights.

(Opposed) The underlying concept is not a bad one, but there are problems with the bill. The state Constitution already prohibits taking private property for private purposes. The federal Constitution is not written the same way, which is what led to the *Kelo* decision. This bill adds definitions and exemptions that will create confusion over an area of case law that has been building for 50 years. It is not clear how certain terms would be interpreted, and the case law is relatively well established at this point.

Persons Testifying: (In support) Senator Padden, prime sponsor; and Cindy Alia and Glen Morgan, Citizens Alliance for Property Rights.

(Opposed) Carl Schroeder, Association of Washington Cities.

Persons Signed In To Testify But Not Testifying: None.