

**SENATE BILL REPORT**

**ESB 6201**

**AS PASSED SENATE, FEBRUARY 17, 1992**

**Brief Description:** Controlling the regulatory taking of private property.

**SPONSORS:** Senators Amondson, L. Smith, Snyder, Hayner, Owen, Oke, McCaslin, Sutherland, Metcalf, Rasmussen, Barr, Nelson, Newhouse, Thorsness, Saling, Conner, Patterson, Stratton, Erwin, Bailey, Anderson, Johnson, Craswell, Roach, von Reichbauer, McDonald, West, Cantu and Bauer

**SENATE COMMITTEE ON GOVERNMENTAL OPERATIONS**

**Majority Report:** Do pass.

Signed by Senators McCaslin, Chairman; Roach, Vice Chairman; and Matson.

**Minority Report:** Do not pass.

Signed by Senator Sutherland.

**Staff:** Rod McAulay (786-7754)

**Hearing Dates:** February 4, 1992; February 6, 1992

**SENATE COMMITTEE ON WAYS & MEANS**

**Majority Report:** Do pass.

Signed by Senators McDonald, Chairman; Craswell, Vice Chairman; Amondson, Bailey, Bauer, Bluechel, Cantu, Gaspard, Matson, Metcalf, Newhouse, L. Smith, and West.

**Staff:** Terry Wilson (786-7715)

**Hearing Dates:** February 11, 1992

**BACKGROUND:**

Both the U.S. Constitution and the Washington State Constitution contain provisions which prohibit the taking of private property for public use without just compensation to the owner. In some cases, a "taking" of property may be deemed to have occurred as a result of the implementation of a government regulatory program. In determining whether such a regulatory "taking" has occurred the state and federal courts have looked to a variety of criteria including whether the regulation advances a legitimate state interest, whether a fundamental attribute of ownership has been denied the owner, the economic impact of the regulation and whether the regulation denies all economically viable use of the property.

Under the criteria articulated by the courts, the reduction in fair market value of a parcel of real estate by 50 percent or

more as a direct result of the implementation of a regulatory program would not necessarily result in a finding that a "taking" had occurred absent other factors. In fact, under current decisional law, it is possible that a near total reduction of value could occur without triggering a "taking" if other criteria are not met.

The remedies available to compensate for a "taking" of property include, the actual transfer of the property to the public and payment of the fair market value to the owner, payment of damages to the owner, and/or the modification or repeal of the regulation.

It is asserted that the current judicial standards for determining when a "taking" has occurred do not adequately protect property owners from much of government regulation which has a negative impact on property values. The result is that private property owners are required to absorb much of the cost of new growth restrictions and environmental policies which benefit all citizens.

#### **SUMMARY:**

A "taking" of private property for public use occurs whenever the state or a local governmental entity implements a scheme regulating the use of land which causes the assessed value or the fair market value immediately prior to implementation of the scheme.

When a "taking" occurs under this act, the implementing government shall be liable to the property owner for compensation in the amount of the decrease in fair market value. Owners who prevail in legal actions to recover compensation are also entitled to costs, attorney's fees and costs of expert witnesses.

There is no "taking" under this act if:

- \* The scheme regulating the use of land is implemented or mandated by the federal government;
- \* The scheme is an exercise of police power to prevent or abate a public nuisance as defined by common law; or
- \* The scheme is repealed (except that a claim may be made for diminution in fair market rental value during the time the scheme was in effect); or
- \* The scheme was implemented more than 10 years prior to the enactment of this act.

Governmental units shall not make waiver of the provisions of this chapter a condition for approval of a use or permit. Plaintiffs, however, must expressly reserve their rights under the act when accepting an approval of use or permit.

The statute of limitation on actions to recover under this act begins to run when a scheme is actually applied to property

and is the same duration as for actions for recovery of real property.

A governmental unit must compensate an owner for damages from a natural event or condition, not the fault of the owner, if the governmental unit wrongfully denies or fails to act in a timely fashion to grant a waiver of regulations which prohibit the owner from taking action which would have prevented the loss. An owner may take prohibited actions to protect property from damage from a natural event without seeking permission of the regulating governmental unit, but may be subjected to penalties if it is determined that the owner would not have otherwise qualified for any available waiver of the prohibition.

If the state or its political subdivisions imposes, changes or implements any scheme which causes any reduction in fair market value of property, the county assessor shall adjust the assessed valuation downward by the full amount of the decrease in fair market value prior to the ensuing April 1.

It is the policy of the state that:

- \* When wetlands are purchased for public use, they shall be appraised at their highest and best use for purposes of setting the purchase price;
- \* Wetlands which remain private be taxed as open space;
- \* Wetlands shall not be acquired by condemnation; and
- \* Historical private hunting areas in wetlands owned by private property owners be preserved for their use.

When compensation has been paid for a "taking" under this act and the regulatory scheme which triggered the "taking" is amended or repealed resulting in an enhancement in the value of the property, the owner must repay the compensation received or the amount of enhanced value, whichever is lower, to the governmental unit, if and when the owner sells the property. A notice of compensation will be recorded at the time of initial payment, which notice shall become a lien upon the property if the circumstances requiring repayment occur.

**Appropriation:** none

**Revenue:** none

**Fiscal Note:** available

**TESTIMONY FOR (Governmental Operations):**

This bill will assure compensation to owners when government regulations cause loss of value of their real property. It will establish a clear standard for determining when a "taking" occurs. It will chill excessive government regulation and place the cost of environmental protection on the public rather than the individual landowner.

**TESTIMONY AGAINST (Governmental Operations):**

This bill will result in a tremendous increase in claims against and cost to state and local government. It will chill basic governmental functions. It could give rise to claims for zoning actions taken in the past.

**TESTIFIED (Governmental Operations):** Senator Amondson, prime sponsor; William Stoebuck, Roger Lemon, David Fields, Barbara Mossman, Pat Young, Mae Heinrich, George Heinrich, Richard Peacock, Tom Bjorgen, WAPA; Darrell Turner, Farm Bureau; Jeff Parson, Audubon Society; Bruce Wishart, Sierra Club; Bob Mack, AWC; Herb Tollefson, Glen Aldrich, Jeanette Bourage

**TESTIMONY FOR (Ways & Means):**

You can't sell property that is classified as wetlands. Public regulation costs the private sector and the public should pay the cost.

**TESTIMONY AGAINST (Ways & Means):**

The bill is ambiguous. A lot of local regulation is required by the state. The fiscal note is inadequate.

**TESTIFIED (Ways & Means):** Senator Neil Amondson, prime sponsor; Harvey LaBoran; Rev. Randy Ticer, Harvest Time Church; Glenn Aldrich, Bob Nix, Lewis County Farm Bureau; Ted Cowan, King County Property Rights Alliance; Darrell Harting, Snohomish County Property Rights Alliance; Ingrid Wachtler, nurseries; Ken Braget, Walter O. Braget Trust; Paul Parker, Washington Association of Counties; Bob Mack, Association of Washington Cities