

# HOUSE BILL REPORT

## HB 3017

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### As Reported by House Committee On: Judiciary

**Title:** An act relating to restrictions on condemnation and sale of condemned property by state and local governments.

**Brief Description:** Reaffirming Washington state's eminent domain laws with a right of first refusal.

**Sponsors:** Representatives Springer and P. Sullivan; by request of Governor Gregoire and Commissioner of Public Lands.

#### **Brief History:**

##### **Committee Activity:**

Judiciary: 1/20/06, 2/2/06 [DPS].

#### **Brief Summary of Substitute Bill**

- Recognizes, reaffirms, and supports state law restrictions on taking private property for private use and prohibits state and local government taking solely for economic development purposes.
- Gives a prior owner the right to repurchase condemned property if the state, a county, or a city or town decides within seven years that it is no longer needed for a public purpose and should be sold.
- Provides a July 1, 2007, effective date and directs the Office of Financial Management to conduct a study with recommendations to Legislature by December 1, 2006.

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#### **HOUSE COMMITTEE ON JUDICIARY**

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 6 members: Representatives Lantz, Chair; Flannigan, Vice Chair; Williams, Vice Chair; Kirby, Springer and Wood.

**Minority Report:** Do not pass. Signed by 4 members: Representatives Priest, Ranking Minority Member; Rodne, Assistant Ranking Minority Member; Campbell and Serben.

**Staff:** Bill Perry (786-7123).

## **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 has been recognized by federal and state courts as inherent and necessary for the existence of government. Because it is an inherent power, express constitutional or statutory authority is not necessary to create it. Rather, constitutions and statutes define, restrict, and delegate the power of eminent domain and provide a procedural framework for its exercise. 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 property to build a highway. A "condemnation" is the judicial proceeding used for the exercise of eminent domain.

The Fifth Amendment to the U.S. Constitution provides simply that:

". . . private property [shall not] be taken for public use, without just compensation."

Article I, section 16 of the state constitution is more detailed. It 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 . . . which compensation shall be ascertained by a jury . . . Whenever an attempt is made to take private property for a use alleged to be public, the 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 . . ." (emphasis added)

Other constitutional provisions grant eminent domain powers to telephone companies, make the property of corporations subject to eminent domain to the same extent as the property of individuals, declare the use of water for irrigation, mining and manufacturing to be a "public use," and prohibit the exercise of eminent domain in conjunction with non-recourse revenue bond financing of industrial development projects. In addition there are in excess of 300 statutory sections in the Revised Code of Washington dealing with eminent domain powers. Some of these statutes prescribe the process for bringing condemnation actions, for determining whether a project meets the public use requirement, and for determining what constitutes the "just compensation" that must be paid to the owner of condemned property. Some of these statutes confer eminent domain powers on governmental entities ranging from counties to mosquito control districts, as well as giving the power of eminent domain to corporations such as railroads, electrical utilities and pipeline companies.

### The "Public Use" Requirement under State and Federal Law.

The question of what is a "public use" has been answered differently by the federal and state courts in construing the meaning of the respective constitutions. One obvious difference between the two constitutions is that Article I, section 16 explicitly prohibits taking property

"for private use" (with limited exceptions), and the Fifth Amendment has no such explicit prohibition.

The recent U.S. Supreme Court decision in *Kelo v. City of New London* is the Court's latest interpretation of the Fifth Amendment's Taking Clause. The decision has caused a great deal of comment and speculation across the country about the future use of the power of eminent domain for economic development purposes. However, because of the restrictions on the use of eminent domain found in the state's Constitution, statutes, and court decisions, it appears unlikely that the use of eminent domain upheld in *Kelo* would be permitted in this state.

In *Kelo*, the city of New London, Connecticut, planned to condemn property as part of an economic development plan. 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. When completed, much of the property in the development was not to be made available for use by the general public. The plan was intended to enhance the city's tax base and to create jobs, among other things. The Court upheld the plan as meeting the "public use" requirement of the Fifth Amendment.

By contrast, plans in this state involving condemnation for economic development or plans that allow transfer of property to private parties have received much more critical scrutiny by the State Supreme Court. In *Hogue v. Port of Seattle*, a 1959 decision, the 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, as the State Constitution does, that the proponents of such a plan must show that the condemned property is to be put to what is "really" a public use. Simply wanting to put someone's property to a better use is not sufficient grounds to condemn it. On the other hand, in *Miller v. City of Tacoma*, a 1963 decision, the court upheld the use of condemnation as part of an urban renewal plan. The less than compelling argument that the use contemplated in *Miller* was "really" public was apparently compensated for by the fact that the property to be taken had been declared to be "blighted." In *In re City of Seattle*, a 1973 decision, the court struck down a plan to acquire property in order to enhance the Westlake retail area of the city. Some of the condemned property was to be transferred to a private developer. The court concluded that the planned use of the property was predominately private, and therefore violated the public use requirement of Article I, Section 16. Finally, in *State ex rel. Washington State Convention and Trade Center v. Evans*, a 1998 decision, the court allowed the condemnation of property as part of an expansion of the convention and trade center, even though a portion of the property was transferred to a private party for the construction of a private parking garage. The Court determined that the private use of the property below the fourth floor expansion of the center was merely "incidental" to the public use of the condemned property.

It appears that in Washington the public use requirement cannot be met by a plan to condemn property simply to put it to a more productive use as part of an economic development project. It also appears that while some transfer of condemned property for private use may be permissible, such a transfer must be only incidental to a public use.

It is not clear how much weight the Court will give to a legislative declaration of "public use." Notwithstanding that Article I, Section 16 requires any question of "public use" to be determined by the courts "without regard to any legislative assertion," the Legislature has frequently made just such assertions. For example, the statute dealing with the eminent domain power of counties declares a condemnation to be for the public use "when it is directly or indirectly, approximately or remotely for the general benefit or welfare of the county or of the inhabitants thereof." While the courts do acknowledge and give some deference to legislative declarations, ultimately the Constitution explicitly vests authority to decide the question with the courts. It may be, however, that a legislative declaration of what is not a public use would be viewed differently by the courts than a declaration of what is, since government presumably can limit its constitutional powers legislatively even if it cannot expand them.

#### Actual Use of Condemned Property.

Once property has been acquired through eminent domain, a question may arise as to when, if ever, or for what duration, the property is to be put to the stated use for which it was condemned. Neither statutes nor case law appear to provide for or require transfer of condemned property back to the original owner if the property is not used for the stated use.

#### **Summary of Substitute Bill:**

##### Intent.

Legislative intent is declared to recognize, reaffirm, and support Washington state constitutional, statutory, and decisional restrictions on the taking of private property for private use. An intent is also expressed to prohibit the state and local governments from taking real property for the "primary purpose of economic development."

##### Taking for "Economic Development."

The state, counties, cities and towns are prohibited from taking property "solely for the purpose of economic development." For purposes of this prohibition, "economic development" is defined to include the use of property to increase tax revenue, tax base, employment or economic health. Prohibited economic development, however, specifically does not include the transfer of land for public use or the transfer of land to a private owner for:

- the use of a common carrier;
- removing a threat to public health or safety;
- removing unsanitary, unsafe, or dangerous conditions constituting a menace to public health, safety, welfare and morals;
- acquiring abandoned property; or
- leasing property within a public project.

##### Right of Repurchase.

The prior owner of property that has been condemned, or that has been acquired under a threat of condemnation, is given a right to repurchase the property. This repurchase right accrues if, within seven years of the acquisition, a state, county, city or town determines that the property is no longer needed for a "public purpose" and that it should be sold. This right also extends to the successors and assigns of the prior owner of the property. Notice to a prior owner is required at least 90 days before the property is to be sold through an auction or negotiated sale. A prior owner who responds to the notice and delivers earnest money in the amount of 5 percent of the appraised value of the property may repurchase the property by paying the lesser of:

- the current appraised value of the property; or
- the amount of compensation paid at the time of the condemnation, plus market rate interest.

The appraised value is to be determined by an independent appraisal paid for by the condemning authority. Both the appraised value and the amount of compensation are to be adjusted to reflect the value of any physical changes to the property since the condemnation.

Recommendations by the Office of Financial Management.

The Office of Financial Management (OFM) is directed to provide recommendations regarding the definition of "economic development" and regarding the right of repurchase. The OFM is to present its recommendations to the Legislature by December 1, 2006.

**Substitute Bill Compared to Original Bill:**

The substitute bill adds the provisions dealing with prohibiting acquisition of property solely for the purpose of economic development. The substitute's provision for a seven year repurchase right replaces the original bill's provision for a 10 year right of first refusal. The original bill's right of first refusal allowed the prior owner to purchase the property at fair market value, unadjusted for any changes to the property; did not apply to property acquired under threat of condemnation; did not extend the right to successors and assigns; and did not contain the notice and response provisions of the substitute. The substitute bill adds the requirement for recommendations from the OFM.

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**Appropriation:** None.

**Fiscal Note:** Requested on February 3, 2006.

**Effective Date of Substitute Bill:** Section 1, the intent section, and section 9, the study section, take effect 90 days after adjournment of the session in which bill is passed. The remainder of the bill takes effect July 1, 2007.

**Testimony For:** Many citizens are concerned and feeling insecure about their property rights. One of their concerns is that government is taking more property than it needs and is taking it for improper uses, such as economic development. Eminent domain should not be

used to transfer property from one private owner to another. The Kelo decision represents a change in the U.S. Supreme Court's thinking about property rights. Even though the State Constitution has more restrictive provisions, the State Supreme Court is not enforcing the Constitution properly. The Legislature should put a statement of intent in the law.

Another concern is that property is being taken for a stated use and then converted to some other use or sold. If government takes property and does not put it to the stated public use, the prior owner should have the right to get the property back.

Eminent domain is an essential tool of government and it is important to remind and reassure the public that in this state the power of eminent domain is restricted by our constitution and court decisions.

**Testimony Against:** Washington is a non-Kelo state. For 50 years, this state has held with the dissenters in Kelo that it is not a "public use" to flip ownership from one private owner to another just to promote economic development. Washington is one of the most conservative states in the country with respect to the exercise of the power of eminent domain. A Kelo outcome could not happen in this state. This bill is ill-advised and could well have serious unintended consequences. The Legislature should think carefully about how the bill might work in individual cases. The bill is unnecessary and dangerous.

Merely codifying this state's judicial interpretation of the public use requirement is a mistake. The State's Supreme Court has not properly interpreted the State Constitution. The bill will not protect property rights.

**Persons Testifying:** (In support) Representative Springer, prime sponsor; Gerald Steel; Keith Phillips, and Craig Partridge, Governor's Office; Pat Jones, and Terry Heller Washington Public Ports Association; Eric Johnson, Washington Association of Counties; Michael Shaw, Washington Chapter of American Planners Association; Don Whiting, Washington State Grange; and Carolyn Logue, National Federation of Independent Businesses.

(Concerns) Dave Williams, Association of Washington Cities; and Hugh Spitzer, Foster Pepper PLLC.

(No position indicated) Kaleen Cottingham, Futurewise.

(Opposed) William Maurer, Institute for Justice; Chris McCabe, Association of Washington Business; and Dan Wood, Farm Bureau.

**Persons Signed In To Testify But Not Testifying:** None.