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## Judiciary Committee

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### HB 2854

**Title:** An act relating to limiting the power of eminent domain.

**Brief Description:** Limiting the power of eminent domain.

**Sponsors:** Representatives Nixon, Bailey, Rodne, Serben, Sump, Newhouse, Crouse, Haler, Woods, Priest, Condotta, Shabro, Kristiansen, Strow, Ericksen, Walsh, Skinner, Roach, Buck, Holmquist, Ahern, McCune, Tom, Kretz, Talcott, Orcutt, Dunn, Anderson, McDonald, Armstrong, Chandler, Campbell, Wallace, Pearson and Hinkle.

#### Brief Summary of Bill

- Rejects the application of the holding in the Kelo decision to condemnations in this state;
- Requires "strict construction" of the power of eminent domain which must be exercised only for a stated public use;
- Defines allowable "public uses," specifically excluding economic development and prohibiting incidental private use of condemned property;
- Allows prior owners to void condemnations and reacquire property that is not used for the stated purpose; and
- Applies to property condemnations by the state, a county, a city, town or other municipality, or by a corporation.

**Hearing Date:** 1/20/06

**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. 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. These statutes also 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 compelling argument that the use contemplated in Miller was "really" public was apparently offset because 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 Bill:**

The U.S. Supreme Court holding in Kelo is rejected with respect to the meaning of "public use" in condemnations in this state, and the term "public use" is specifically defined. Prior owners of condemned property are given the right to reacquire property that is not put to public use. These changes apply to condemnations by the state, a county, a city, town, or other municipality, or by a corporation.

Powers of eminent domain are to be strictly construed.

"Public use" means only:

- actual possession, occupation, or enjoyment of property by the general public or the condemning entity; or
- use of property for public utilities or common carriers.

"Public use" does not include economic development, and public use may not be equated with any public interest, purpose, or benefit to be found in building private retail, commercial, industrial, or residential establishments in order to:

- promote economic development;
- improve the tax base; or
- enhance tax revenues.

No greater interest in property than is necessary for a stated public use may be condemned.

Condemned property may be used only for the "contemplated and actual public use described in the final order of condemnation." If property is ever used otherwise, or if at least 10 years after the condemnation the property has not been used at all, then the prior owner may go to court and get the condemnation voided. By paying back the compensation received for the condemned property, plus interest, the prior owner may reacquire the property. A prior owner who prevails in such an action is entitled to recover reasonable attorney fees and costs. In addition, a prior owner or a beneficiary has a first right to reacquire condemned property if it ever ceases to be used for the stated public use, by paying the lesser of the fair market value of the property or the amount of compensation received, plus interest.

**Appropriation:** None.

**Fiscal Note:** Requested on January 19, 2006.

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