



EMINENT DOMAIN TASK FORCE

**2009
FINAL
REPORT**



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CHAIR**

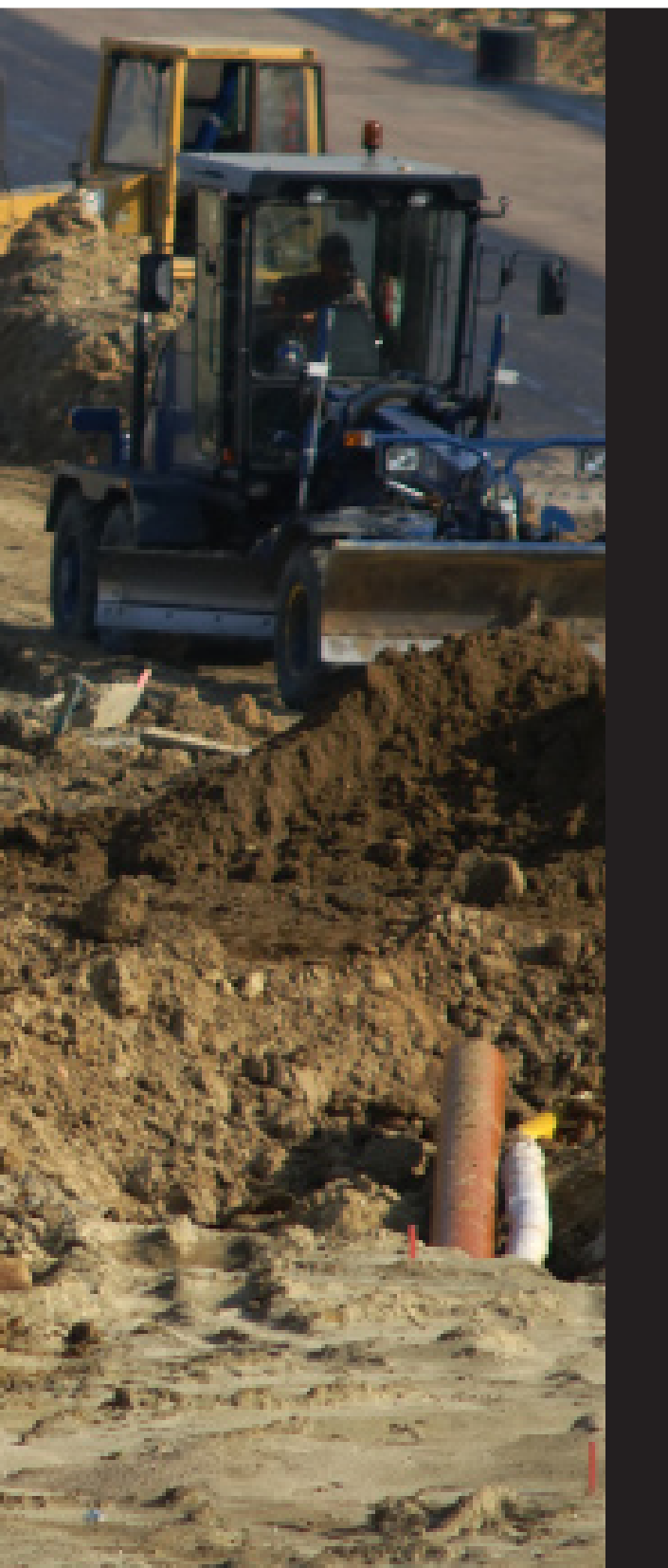
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PREFACE



MESSAGE FROM THE ATTORNEY GENERAL

In July 2007, I created a Task Force on Eminent Domain to examine the critical issues surrounding the exercise of condemnation power, and particularly the issues surrounding economic development takings and public use constitutional limitations. United States Supreme Court Justice Sandra Day O'Connor, in her dissent in the recent *Kelo v. City of New London* decision, quoted founding father Alexander Hamilton in recognizing that constitutional public use limitations protect the security of property, which Hamilton described at the Philadelphia Constitutional Convention as one of the great objects of government. A nationally respected legal expert on eminent domain, Professor Ilya Somin, testified that "the legal situation in Washington is comparable to that in many other states, where the law's definition of 'blight' goes far beyond anything that a lay person would consider blighted." The citizens of Washington deserve to be secure in their homes and property, and Washington's laws should be reformed to guarantee that their property cannot be condemned because the government believes it could be put to a more economically beneficial use.


I personally thank the members of the Task Force for their time and effort in critically examining the exercise of eminent domain powers in Washington. I am hopeful that this final report, the product of their keen examination and debate, will provide a roadmap for legislative reforms to assure the citizens of Washington State that their property will be secure from all attempts to condemn it and redistribute the property to other private entities.



Rob McKenna

Washington State Attorney General

I. EXECUTIVE SUMMARY



Attorney General Rob McKenna created the Eminent Domain Task Force following the 2007 legislative session to study eminent domain in Washington, identify problems, and suggest legislative reforms. The Task Force was created in response to the United States Supreme Court case, *Kelo v. City of New London*, to several recent Washington State Supreme Court decisions, and to general public awareness and concern regarding the use and potential for abuse of the power of eminent domain in Washington State.² The concern with economic development takings has filtered up from the local government level, as embodied by the decisions of several counties governed by home-rule charters to amend their county charters to include specific bans on the use of eminent domain for economic development.³

The potential impact of *Kelo* is best described in Justice O'Connor's dissent:

Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result. '[T]hat alone is a *just* government,' wrote James Madison, 'which *impartially* secures to every man, whatever is his *own*.' For the National Gazette, Property (Mar. 27, 1792), reprinted in 14 Papers of James Madison 266 (R. Rutland, et al. eds.1983).

Kelo v. City of New London, 545 U.S. 469, 504 (2005).

The Task Force was composed of community leaders from all levels of the state of Washington. The Task Force included both Republican and Democrat members of the State Senate and the State House of Representatives, representatives of local governments, representatives from public interest groups, and a representative of the general public.

2. The Task Force notes that Washington State evinces a long history of concern over abusive eminent domain practices. See, e.g. *Abusive Exercises of the Power of Eminent Domain – Taking a Look at What the Taker Took*, Wm. Ronald Hulén, 44 Washington Law Review 200 (1968).

3. Pierce County, the second largest county in Washington State, adopted an amendment to its county home-rule charter barring condemnations for economic



The Task Force held 11 meetings over the course of a two-year period. They heard public testimony from individuals and their legal counsel who had their land taken for purportedly public uses in connection with private economic development purposes or who had been threatened with such condemnations, from individuals and legal counsel representing condemning public agencies and local governments, and from local and national legal experts on eminent domain. Oppressive threats of condemnation and abuse of power were consistent themes in testimony before the Task Force. The Task Force heard testimony regarding condemnation done under an alleged pretext, which Washington's courts declined to set aside, testimony on public agencies which planned to finance public improvements in part by selling off "excess" condemned property, and testimony regarding properties targeted for condemnation because current or proposed uses didn't fit within a local government's "vision" for the area.

The Task Force received legal analysis of the current state of the law on the use of eminent domain for economic development and on the existing "blight" statute, now known as the Community Renewal Law. The Task Force received testimony on a study recently conducted by the Washington State Chapter of the Institute for Justice on the use of the blight statutes in Washington.

Professor Ilya Somin, a nationally known legal expert on the use of eminent domain, analyzed the state of the law in Washington, examined Washington's blight statutes, and reported to the Task Force. Professor Somin testified that "Economic development takings tend to victimize the politically weak for the benefit of the strong, and often generate economic costs that outweigh their claimed benefits." His review of the blight statutes led him to conclude that: "It is hard to imagine that any local government with even moderately competent legal staff will fail to obtain a blight designation for whatever property it might wish to condemn." Finally, Professor Somin urged the Task Force to recommend reforms that would alleviate the potential for economic development takings to be imposed under the pretext of condemning property meeting the overly broad "blight" definition in the Community Renewal Law.

The Task Force makes the following recommendations as a result of having heard the extensive testimony presented and having given serious consideration to the issues presented by the use of eminent domain in Washington:

- 1) The Washington State Legislature should enact legislation barring the use of eminent domain for "economic development."**
- 2) The Washington State Legislature should reform Washington's Community Renewal Law, Chapter 35.81 of the Revised Code of Washington.**
- 3) The Attorney General's Office should adopt model rules governing best practices for the exercise of eminent domain.**

development. *See* Pierce County Charter, § 9.80. The Task Force notes that this charter amendment, adopted at the November, 2006 general election, garnered the greatest public support of any of the proposed amendments that year. The voters passed the amendment with 70.12% approval. Pierce County submitted a letter to the Task Force dated November 3, 2008, stating that the "eminent domain amendment has had no discernible effect on the county's operations." Clallam County amended its home-rule charter in 2007 to bar condemnations for economic development. *See* Clallam County Charter §12.40. The voters of Clallam County passed the charter amendment with 86.55% approval.

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A. ATTORNEY GENERAL ROB MCKENNA'S DIRECTIVE

The Task Force was created by a directive of Attorney General Rob McKenna in June of 2007. Initially, Attorney General McKenna asked the Task Force to “review eminent domain laws, identify abuse of eminent domain powers, and determine what legislative reforms would be appropriate.”⁴

In July 2008, Attorney General McKenna issued a letter narrowing the focus of the Task Force, stating “I believe the task force is well situated to focus its efforts more narrowly and address the question of whether legal protections are needed in Washington to limit or prohibit the use of eminent domain for economic development purposes.”⁵

B. MEMBERSHIP

The Task Force was comprised of state and local elected officials, representatives of industries affected by the use of eminent domain, and public interest groups who have worked extensively on the issue. The Task Force was chaired by Attorney General McKenna and co-chaired by Assistant Attorney General Tim Ford. The members appointed by the Attorney General included:

Attorney General Rob McKenna (Chair)
Assistant Attorney General Tim Ford (Co-Chair)
Senator Adam Kline
Senator Mike Carrell
Representative Jay Rodne
Representative Lynn Kessler
Representative Larry Springer
William Maurer, Institute of Justice
Bryce Brown, Senior Assistant Attorney General
Mark Lamb, Mayor of Bothell
John Chelminiak, Deputy Mayor of Bellevue
Paul Guppy, Washington Policy Center
Randy Bannecker, Seattle-King County Association of REALTORS
Barbara Lindsay, One Nation United
Craig Johnson, Rancher
Dan Wood, Washington Farm Bureau
Mary Lou Powers, MS, Founder/Director, Citizens' Health Advocacy Group
Jim Irish, Appraiser
Tom Stowe, Stowe Appraisal, Inc.
Steve Hammond, Citizens' Alliance for Property Rights
Shawn Bunney, Pierce County Council
Trent England, Evergreen Freedom Foundation

The Task Force was staffed by Assistant Attorney General Geoffrey W. Hymans, Executive Assistant Elaine Ganga, and Legal Secretary Danielle French.

4. Attorney General Rob McKenna Appointment Letter dated July 9, 2007.

5. Attorney General Rob McKenna letter to the Task Force dated July 9, 2008.

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C. METHODOLOGY

1. Recommendations were adopted by majority vote.
2. Dissenting members were given the opportunity to present a minority recommendation.
3. Meetings where testimony was taken were open to the public and members of the public who attended provided comments to the Task Force.
4. The Task Force consulted outside experts and its own members with expertise to gather information on Washington's historical use of eminent domain, model reform legislation, practices in other states, and the susceptibility of Washington's statutory scheme to interpretations that could authorize the use of eminent domain for purported public uses in connection with private economic development in Washington.

D. TASK FORCE ADOPTED PRINCIPLES AND DEFINITIONS

At its November 7, 2008 meeting, the Task Force members in attendance adopted the following principles to guide future deliberations:

1. Government has the right of eminent domain.
2. Eminent domain shall not be used for economic development.

At the March 20, 2009 meeting, the Task Force members in attendance adopted definitions of "public use" and "economic development" to guide future recommendations.

Those definitions are:

1. Public Use:

The term "public use" shall only mean (1) the possession, occupation, and enjoyment of the property by the general public, or by public agencies; (2) the use of property for the creation or functioning of public utilities or common carriers; or (3) where the use of eminent domain (a)(i) removes a public nuisance; (ii) removes a structure that is beyond repair or unfit for human habitation or use; or (iii) is used to acquire abandoned property and (b) eliminates a direct threat to public health and safety caused by the property in its current condition. The public benefits of economic development, including an increase in tax base, tax revenues, employment, and general economic health, shall not constitute a public use.

2. Economic Development:

The term "economic development" means any activity to increase tax revenue, tax base, employment, or general economic health, when that activity does not result in (1) the transfer of property to public possession, occupation, and enjoyment; (2) the transfer of property to a private entity that is a public utility or common carrier; (3) the use of eminent domain (a)(i) to remove a public nuisance; (ii) to remove a structure that is beyond repair or unfit for human habitation or use; or (iii) to acquire abandoned property and (b) to eliminate a direct threat to public health and safety caused by the property in its current condition; or (4) the transfer of property to private entities that occupy an incidental area within a publicly owned and occupied project.

These adopted definitions are used throughout the Task Force’s report and recommendations, and are incorporated into its suggested legislation.

E. THE KELO DECISION

As Attorney General Rob McKenna identified in his July 9, 2008 letter to the Task Force, the concerns regarding the exercise of eminent domain powers in Washington that led to the formation of the Task Force included the effect of the United States Supreme Court case *Kelo v. City of New London*, as well as related issues raised in several Washington State cases. The Task Force believes inclusion of a short summary of the *Kelo* decision will be helpful for readers of this Final Report, but the Task Force believes it cannot improve upon the summary set forth in the Final Report of New Mexico Governor Richardson’s Task Force on the Responsible Use of Eminent Domain by State and Local Governments (November 14, 2006), and therefore sets forth its summary in full:

In 2005, the United States Supreme Court ruled that local governments may use eminent domain to foster economic development, and that such use is a “public use” under the 5th Amendment of the United States Constitution.⁶ The case stemmed from a redevelopment plan, adopted by New London, Connecticut, which was intended to reduce the City’s unemployment rate and increase the City’s population in light of the closure of a military facility.⁷ As part of the redevelopment process, the City designated a redevelopment area, devised a redevelopment plan, and created an agency to oversee the redevelopment plan; the State of Connecticut contributed approximately \$15 million in bond proceeds; and a pharmaceutical manufacturer announced that it would build a \$300 million research facility in the redevelopment area.⁸

The redevelopment plan, which called for a hotel, restaurants, shopping centers, a riverwalk, new residences, a museum, and research and development office space, impacted approximately 115 privately owned properties.⁹ Ten of the property owners, led by Susette Kelo and Wilhelmina Dery, filed suit over the City’s condemnation of fifteen different properties, the vast majority of which were occupied and used as homes.¹⁰

Ms. Dery had in fact lived in her home since 1918, and Ms. Kelo had purchased her home in 1997 and had substantially renovated the property.¹¹ Prior to condemning the properties, the City had not designated the properties “blighted or otherwise in poor condition; rather, they were condemned only because they happen[ed] to be located in the development area.”¹²

In challenging the condemnation, the property owners argued that the City’s condemnation of private property as part of a redevelopment plan did not constitute a valid “public use” as required under the 5th Amendment.¹³ The City, however, argued that Connecticut law gave municipalities the express authority to condemn private property, including private residences, as part of its redevelopment plan.¹⁴

The United States Supreme Court ruled in favor of the City. Justice Stevens, in delivering the opinion of the Court, reasoned that the Connecticut legislature had made a legislative determination that economic development constituted a legitimate public use, and that the Supreme Court had historically been deferential to judgments of state

6. 125 S.Ct. 2655 (2005).

7. *Id.* at 2658.

8. *Id.* at 2659.

9. *Id.*

10. *Id.* at 2660.

11 - 13. *Id.*

14. *Id.*, see also Conn. Gen. Stat. Ann. § 8-186 et. seq. (Under Connecticut law, a municipality may create a development agency to oversee and manage a redevelopment area. The redevelopment agency has express authority to use eminent domain to condemn private property and may transfer that private property to another private person so long as the use of the property is consistent with the redevelopment plan. At no time must a municipality declare a redevelopment area blighted before condemning property.).

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legislatures in eminent domain matters.¹⁵ Based on this rationale, the Court ruled in favor of the City and permitted it to condemn the property and move forward with its redevelopment plan. The majority opinion was not without dissent, however.

Four Justices disagreed with the majority decision, led by Justice O'Connor.¹⁶ In her dissent, Justice O'Connor argued that the majority opinion expanded the traditional definition of "public use," consequently jeopardizing the rights of property owners irrespective of whether the properties presented health, safety or welfare hazards.¹⁷

In its ruling, however, the Supreme Court acknowledged that States were free to adopt legislation to prohibit governments from using eminent domain for economic development purposes.¹⁸ In fact, over half the States have considered various proposals to limit or restrict eminent domain that is used in this manner.

State responses have varied, but according to research materials prepared by the National Conference of State Legislatures, the Institute for Justice and the American Planners Association, it appears that substantive legislative proposals generally fall into four categories:

1. Defining the phrase "public use" in statute or constitution to prohibit condemnation for economic development purposes;
2. Requiring that properties present a health, safety or welfare hazard (sometimes referred to as "blighted") before being eligible for condemnation;
3. Increasing hearing and notice requirements to property owners potentially impacted by redevelopment projects; and
4. Increasing compensation to property owners displaced by eminent domain as part of an economic development plan.

15. *Id.* at 2664-65 ("Those who govern the City were not confronted with the need to remove blight..., but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including-but by no means limited to-new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment. ").

16. *Id.* at 2671.

17. *Id.* at 2675 ("New London does not claim that Susette Kelo's and Wilhelmina Dery's well-maintained homes are the source of any social harm. Indeed, it could not so claim without adopting the absurd argument that any single-family home that might be razed to make way for an apartment building, or any church that might be replaced with a retail store, or any small business that might be more lucrative if it were instead part of a national franchise, is inherently harmful to society and thus within the government's power to condemn. In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public such as increased tax revenue, more jobs, maybe even aesthetic pleasure. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words 'for public use' do not realistically exclude any takings, and thus do not exert any constraint on the eminent domain power.").

18. *Id.* at 2668 ("We emphasize that nothing in our opinion precludes any state from placing further restrictions on its exercise of the takings power. Indeed, many states already impose 'public use' requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.").

F. SUMMARY OF TASK FORCE MEETINGS

The Task Force held a total of 11 public meetings in 2007, 2008, and 2009. The summaries of these meetings are chronological. Meeting agendas, materials, notes, audio recordings, and minutes are available on the Attorney General's website. The purpose of the meeting summaries in this report is to provide a brief overview of the meeting topics, discussions, and recommendations.

1. August 14, 2007 Meeting

The Task Force reviewed and discussed the *Kelo v. City of New London* case, the Washington State Constitution, Washington State law, the Attorney General's summary of significant cases, and other relevant materials. The Task Force discussion highlighted that while the Washington State Constitution is one of the strongest in the nation in terms of protecting against eminent domain abuse, there are a number of vehicles by which the problems of *Kelo* could be replicated. The Task Force recommended using future meetings to review potential legislative reform ideas and considered tightening and clarifying definitions such as "public use", "necessity", "blight", and "compensation" to prevent abuses.

2. October 19, 2007 and November 8, 2007 Meetings

The October and November meetings concerned ongoing efforts of the Task Force to address proposed legislative reforms. The co-chair provided a written memo to the Task Force giving suggestions for short-term goals for the upcoming legislative session. The suggested goals included reviewing and providing guidance on Rep. Springer's eminent domain bill, HB 2016; a bill to reform the Community Renewal Law, RCW 35.81, and a bill requiring agencies initiating eminent domain to provide property owners with a pamphlet in plain English which explains eminent domain and the process for property owners. The Task Force listened to testimony on HB 2016, reviewed a scholarly article entitled "Demographics on Eminent Domain Abuse", listened to a presentation on blight and the Community Renewal Law, and reviewed the New Mexico Eminent Domain Task Force report and other materials.

The Task Force supported HB 2016 and offered questions and proposed revisions for improving the language. The proposed revisions would 1) clarify the timing and process for a proposed due diligence requirement for condemning agencies to provide a statement of alternatives to condemnation considered; 2) increase a reimbursement allowance for property owners to evaluate the purchase/condemnation offer of an agency; 3) clarify the process for exercising a repurchase option provided to the former owner of condemned property; and 4) strengthen language prohibiting the use of eminent domain for economic development.

The Task Force offered three goals for proposed revisions to the Community Renewal Law: 1) Retain statutory authority to address blight through condemnation of specific properties and not aggregate properties in a general area; 2) narrow the definition of blight and encourage the use of existing police powers to address concerns with blight prior to the use of eminent domain; and 3) change the use of the Community Renewal Law to prevent racist effects on diverse communities.

3. June 12, 2008 Meeting

The Task Force reviewed testimony by Rep. Springer on HB 2016 during the 2008 legislative session, and testimony on other eminent domain bills. The Task Force invited former New Mexico Lt. Governor Walter Bradley to provide testimony regarding New Mexico's Eminent Domain Task Force and its report. The testimony of Lt. Governor Bradley specifically mentioned both "parks", "ports", and "economic development" as prohibited under New Mexico eminent domain reform as a result of the task force work and report. This definition would also preclude "mixed use" or "condominiums and retail". The New Mexico Task Force report generated four separate legislative reform proposals including the repeal of New Mexico's urban renewal law which was re-enacted as the Metropolitan Redevelopment Act without any eminent domain authority. The Washington Task Force agreed that the New Mexico model is successful and should be emulated. The Washington Task Force concluded its meeting by discussing next steps for 2008.

4. August 15, 2008 Meeting

The Task Force reviewed a letter from Attorney General McKenna providing focus for the Task Force work through 2008 and 2009. The letter requested that the Task Force focus its work on holding hearings and taking testimony on whether legal protections are necessary to limit or prohibit the use of eminent domain for economic development. The Task Force discussed the letter and decided to hold hearings, and receive testimony on several specific past

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condemnations or threats of condemnations to examine where abuses and problems occurred. Based on past Task Force meetings and future hearings, the Task Force would draft a report with recommendations to be modeled after the New Mexico report. The Task Force also discussed adopting guiding principles at a future meeting to assist their work.

The Task Force also heard testimony from Mark Quehrn, an attorney with Perkins Coie with experience litigating eminent domain cases. Mr. Quehrn discussed litigation practices and several cases where courts give judicial deference to legislative determinations of public use and necessity for condemnation. Mr. Quehrn testified that “necessity” is construed too broadly and that legislative determinations of necessity will not be overturned in the absence of actual fraud or arbitrary and capricious action. Included in the discussion was the recent Washington State Supreme Court ruling in the case of PUD No. 2 of Grant County v. NAFTZI, 159 Wn.2d 555 (2007). In that case, four dissenting justices held that a due process right exists under either state or federal constitutions to provide adequate notice “reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests” and that the PUD violated due process by not providing adequate notice of the legislative determination for condemnation. A member of the Task Force, Mary Lou Powers, submitted proposed changes to eminent domain laws for consideration, including a change that would require the courts to determine “public use” without deference to legislative determinations.

5. October 24, 2008 Meeting

The Task Force received testimony from attorney George Kresovich who represented a property owner challenging a condemnation by the Seattle Monorail Agency. The Monorail case, HTK Management, LLC, v. Seattle Popular Monorail Authority, 155 Wn.2d 612 (2005), went to the Washington State Supreme Court and Mr. Kresovich argued that the Monorail Agency condemned more of a property interest than was necessary. Public records show that the Monorail Agency also had a program for “associated development” to resell surplus property for private redevelopment. Public records show that prior to the condemnation, the agency spent public money to consider several potential redevelopment uses including a potential hotel and retail uses for part of the targeted property. The Washington State Supreme Court upheld the condemnation for the purported temporary public use of staging construction equipment on part of the property. Mr. Kresovich testified that the judicial standard for reviewing public use and necessity is too deferential to local government and that because courts do not make an adequate inquiry, the standard needs to be reformed.

The Task Force discussed several potential principles to guide their work but did not take a vote. Those principles are: 1) government has the right of eminent domain; 2) eminent domain for economic development shall be limited; and 3) eminent domain shall not be used for economic development. The Task Force received a short presentation from attorney Diana Kirchheim regarding the case of Sound Transit v. Miller, 156 Wn.2d 403 (2006). The Miller case resulted in a change in state law, which now requires individualized notice to property owners prior to a legislative determination for condemnation.

The Task Force received testimony from Assistant Attorney General Amanda Phily on the practice of condemnation by the Washington State Department of Transportation (Department). The presentation included the procedures governing the Department’s actions contained in its “Right of Way” manual, its

policy of meeting with the property owner, mediation, internal review, notice to owners for a hearing, and full disclosure of appraisals. A few Task Force members suggested these practices be adopted as models for other agencies.

6. November 7, 2008 Meeting

The Task Force received testimony from attorney Catherine Clark regarding an appeal in a current eminent domain case, *City of Seattle v. Heglund*. Public records show that the City will receive close to \$36 million in private funding for the project. Ms. Clark argued that her client has a right to know the details of private participation in the project before the court can determine whether the condemnation is necessary for public use. The case has been accepted for review by the Washington State Supreme Court. Ms. Clark discussed other eminent domain cases.



The Task Force also received testimony from citizens Ray Akers and Pat Murakami regarding the potential use of eminent domain by the City of Seattle in southeast Seattle, one of the most diverse areas in the United States. Public records show that the city considered designating a substantial portion of southeast Seattle for redevelopment under a potential community renewal authority. Public records show the city conducted a study, considered the use of a blight designation, and considered the potential use of eminent domain. The testimony addressed concerns that the city can manufacture blight by failing to use its police powers to provide services and enforce the laws for police protection, property maintenance, sign ordinances, and road maintenance. Mr. Akers stated, “blight is failure of government to serve community” and believes the eminent domain powers available to local government under the Community Renewal Law are abusive.

The Task Force received a letter from Pierce County. Pierce County adopted a charter amendment in 2006, which in part restricts takings for private economic development. The letter stated that the amendment has had no discernable effects on the operations of Pierce County.

The Task Force members in attendance voted and approved the following principles to guide the Task Force: 1) government has the right of eminent domain; and 2) eminent domain shall not be used for economic development.


7. January 20, 2009 Meeting

The Task Force reviewed and discussed Rep. Springer’s proposed bill HB 1392 (a revised version of HB 2016 from the 2007-2008 legislative sessions). The Task Force approved conceptually of the bill and its intended purpose, and offered a few suggestions.

The Task Force received verbal testimony and materials from the Highlands Community Association representatives Terry Persson and Howard McOmber, and written testimony from Inez Peterson regarding the City of Renton’s redevelopment initiative. Public records show the City proposed a broad rezone of the Renton Highlands’ subarea for private redevelopment purposes. Public records show the City characterized the area as blighted and considered making a legislative declaration of blight to trigger the Community Renewal Law. Public records show the City contemplated use of the Community Renewal Law to create a partnership with one or more private developers to stimulate private redevelopment, including the use of friendly condemnation. The City commissioned a study for a residential market analysis, which included a recommendation for using all available legal tools including the use of the City’s condemnation authority. Efforts by the Highlands Community Association and others convinced the City that use of the Community Renewal Law would not be successful, and ultimately the City did not make a declaration of blight or create a community renewal authority.

The Task Force received testimony and materials from attorney Peter Buck who successfully represented Inez Peterson. Public records show Mr. Buck defended Ms. Peterson in a lawsuit filed by private parties attempting to

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silence her criticism of the City of Renton redevelopment initiative. In addition to seeking damages, the plaintiffs attempted to judicially procure Ms. Peterson's personal computer used to blog on the redevelopment initiative. The case was voluntarily dismissed with prejudice and Mr. Buck won a motion for over \$75,000 in sanctions pursuant to CR 11. Peter Buck also assisted with successfully challenging the City's Environmental Impact Statement in a separate lawsuit related to the redevelopment initiative.

8. February 18, 2009 Meeting

The Task Force heard testimony from attorney Warren Daheim and his client Bruce Reikow, a developer, regarding the City of University Place's \$250 million Town Center project. Public records show the Town Center was intended for economic revitalization including job creation and revenue generation estimated at over \$7.6 million in annual revenues from retail sales and property taxes. The City envisioned a public/private partnership for a mixed-use development and solicited bids for private developers. Public records show the City authorized condemnation for approximately 13 separate parcels of property for the Town Center project in May 2003. Most properties were acquired without judicial condemnation.

The City proposed using the Reikow's property, zoned commercial, for a roadway and parking, and the Reikows unsuccessfully opposed judicial condemnation. Mr. Reikow stated that the entire parcel was not needed for public use and that as a developer his plan would have provided a roadway at no cost to the City and allowed him to build a mixed development on the remainder of the property. Mr. Reikow testified that the City up-zoned the property subsequent to the condemnation and he questioned why it would be necessary to include his property in an up-zone if the only use is for a road and parking lot as claimed in court. Mr. Reikow testified that almost five years after the City authorized condemnation of his property, the City still has not made any improvements or initiated any construction for the stated public uses on his former property.

The City initiated and paid for an audit by a private consultant of the entire Town Center project. The audit was both critical of the City for incurring substantial debt and complementary of the plan for being well thought out and designed. Mr. Daheim and Mr. Reikow both felt that the City did not use a fair process and changed their offer of compensation just prior to trial; that the stated public use is likely a pretext because he was not the preferred developer, and that the judicial condemnation action was precipitated after Mr. Reikow submitted conceptual building plans to develop a mid-rise office and residential condominium building on the property to provide for the Reikow's retirement.

The Task Force heard testimony from Mike Bindas from the Institute of Justice regarding the condemnation of the Strobel sisters' property by the City of Burien. The Strobel Family owned property which it leased to "Meal Makers" for a popular family restaurant. The City wanted to create a town square project featuring upscale condos, retail stores, restaurants, and offices. The original site plan used only a small corner of the Strobel property for a public road, but not the building on the property. Public records show that the City Manager instructed his staff to "make damn sure" that the road went through the Strobel building. The City revised its site plan for a greater impact on the Strobel property, and authorized condemnation. At trial, the judge found that the condemnation might be "oppressive" and an "abuse of power" but concluded that current case law required a holding that the condemnation was necessary for the City's public use. In an unpublished opinion, the Court of Appeals upheld the condemnation.

The Task Force further discussed the proposed definition of economic development.

9. March 20, 2009 Meeting

The Task Force received public testimony from Lawrence Warren, attorney for the City of Renton regarding the City's redevelopment initiative for the Highlands. Mr. Warren stated that the City was many steps away from using the power of eminent domain under the Community Renewal Law. More than 4,000 housing units were created in the Highlands area in 1942 to house Boeing workers supporting the war effort. The City had started to study the Highlands area for the purposes of evaluating a potential blight designation when the council decided to form a Highlands Task Force and no further steps on a blight designation were taken. In the face of public criticism and lack of support of the council, the administration decided against the redevelopment initiative.

The Task Force received public testimony from Jay Reich, an attorney with K & L Gates in Seattle representing the City of University Place. Mr. Reich discussed the nature of the Town Center project and that its design includes a city hall, public library, public parking and plaza with public sidewalks and roads, and also includes commercial uses for an urban focal point with dense civic and private development. The City distinguished between public use and public purpose and understood that condemnation may only be used for a public use. The City does not view the Kelo case as relevant to any City decision making because: 1) the state constitution is more restrictive than Kelo; and 2) the City made its decision in accordance with state law prior to Kelo. Mr. Reich stated that Mr. Reikow came to the City and asked if the City would be interested in buying his property, and also that there are certain tax advantages for a seller of property under the threat of condemnation. Mr. Reich stated that the court gave consideration to Mr. Reikow's arguments and found there to be "no fraud, actual or constructive, no abuse of power, bad faith or arbitrary or capricious conduct by the City". Mr. Reich stated it is his experience that elected officials are very reluctant to pursue condemnation, and that the task force should be cautious in recommending policy changes based on complicated and emotionally laden fact patterns that may not always be fairly characterized.

The Task Force received public testimony from Ron Templeton, an attorney who represented Lovie Nichols in a condemnation case by the City of Bremerton. Mr. Templeton testified that in the early 1990's the City of Bremerton was sued as a result of noxious odors emanating from its Charleston Beach Sewer Treatment Plant. Court records show the City later settled the litigation with monetary payments and a binding agreement to install odor control facilities. The City then initiated condemnation proceedings against 53 owners of property (including Lovie Nichols) on 13 acres of land abutting the sewer treatment plant for the purported public use of an odor easement. The owners, including Lovie Nichols, accepted a monetary settlement without challenging the public use. Within days after the entry of final condemnation, the City surplused the land, rezoned it, and sold it to a car dealership to recoup its losses. Lovie Nichols filed a motion to vacate the condemnation order alleging the City condemned her property for an unconstitutional private use. The City instituted an eviction action against Lovie Nichols. Court records filed by the City at trial show the City claimed the resale price for the 13 acres was \$1,993,305 and alleged the City would lose monthly revenues of \$71,855 if the resale of only 11 acres was delayed.


The trial court dismissed Lovie Nichols's motion and the Court of Appeals affirmed finding the motion was untimely without ever reaching the constitutional issue of public use. Mr. Templeton stated that the City had been advised by outside counsel that the resale may be illegal. Mr. Templeton also stated that the public records showed the City never obtained an odor easement which is inconsistent with its claimed public use in court. The City only obtained a release of liability from the car dealership which it could have obtained from the prior owners as well without the use of condemnation. Mr. Templeton states that there is no effective way to challenge a pre-textual public use where the government's substantial purpose for condemnation is a future private use. The court's civil rules require motions and appeals to be filed in a timely manner, and a government agency does not have to show its actual plans until after the deadline for an appeal has passed. Mr. Templeton concluded that the courts give too much deference to government even where the court record shows a clear abuse of eminent domain powers.

The Task Force discussed definitions on "economic development" and "public use" and unanimously adopted the definitions proposed by the Institute for Justice with a few changes.

10. June 12, 2009 Meeting

The Task Force received testimony from Jeanette Peterson of the Institute for Justice regarding its survey to Washington State municipalities that used or considered using eminent domain under the Community Renewal Law. Their research focused on several cities – specifically Auburn, Bremerton, Renton, Seattle, Tukwila, and Walla Walla – that took significant steps to utilize the Community Renewal Law for the primary purpose of economic

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redevelopment. The research relied on public records. The data compared populations within condemnation projects to surrounding cities and counties. The comparative research showed that condemnations under the Community Renewal Law disproportionately impacted communities with minorities, children, persons with only a high school education or less, below the median income, and below poverty. The executive summary of the Institute for Justice report concludes that the Community Renewal Law is a “powerful tool that often tempts municipalities into large scale blight designations for the purpose of land assembly and economic redevelopment.” The Institute for Justice report concludes the Community Renewal Law is a significant vehicle for abuse in Washington. A member of the Task Force noted that the Institute for Justice’s research supports the conclusion that use of condemnation under the Community Renewal Law leads to a racist effect because minorities are disproportionately impacted, even where no racism is intended.

The Task Force received public testimony from Professor Ilya Somin from George Mason School of Law. Professor Somin has studied and published articles on eminent domain for economic benefit, the effects of the Kelo case and subsequent attempts by various states to reform eminent domain laws. Professor Somin submitted two scholarly articles for review by the Task Force and presented his analysis and comments via video conference. His articles and analysis show that economic development condemnations transfer property from the politically weak to the politically powerful. Professor Somin testified that condemnations for economic development destroy existing businesses, homes, churches, and schools, and inflict economic damage on communities which outweighs whatever benefits they create. There is no legal duty to actually produce promised economic benefits and therefore there is an incentive for excessive claims. Professor Somin testified that 43 states have enacted legislative reforms which purportedly constrain eminent domain for economic development but have little or no effect because they allow economic development condemnations to continue under blight laws. Professor Somin stated Washington State is not a state that enacted any type of post-Kelo reform restricting economic takings, and that state law defines blight “extremely broadly, so much so that almost any area can probably be declared blighted if a local government wants it to be.” Professor Somin reviewed Washington State law and his analysis is that a blight designation requires only minimal procedural safeguards, and that such a declaration makes an area eligible for condemnation, including condemnation for the transfer of private property to other private parties for economic development under RCW 35.81.080. Professor Somin concluded that substantive restrictions on condemnation authority are more effective than procedural safeguards to ensure that eminent domain is not used for economic development.

The Task Force reviewed public records concerning the corporation named Riverwalk on the Columbia, LLC (Riverwalk) project considered by the Port of Camas-Washougal. The Port had signed an option agreement with Riverwalk, to create a mixed-use project including a marina, hotel, offices, restaurants, retail, recreational, and residential developments. Public records show that part of the purpose of the project was to “generate sales tax, property tax, and other revenues for the City of Washougal and the Port.” The option agreement outlined a community renewal area process for acquiring property under the Community Renewal Law including properties owned by private parties that may be condemned. The processes stated that the City could make a designation of blight, approve a community renewal plan, and may enter into a contract with the Port for exercising the powers of a community renewal agency, including condemnation of private property which may be sold or leased to Riverwalk for redevelopment. Public records show that a memo prepared for Riverwalk proposed the mixed-use

project and characterized certain private property, the Hambleton Mill, as a “Brownfield”. The term “Brownfield” is generally used to describe land which may be contaminated with toxins and is either abandoned or underused. The Hambleton Mill is a profitable business, gainfully employs almost 90 persons, and has not been found to be contaminated. The owner of the Hambleton Mill was contacted and stated that the developers for the Riverwalk project entered the mill property without permission and were told to leave the premises.

The agreement between the Port and Riverwalk ended in litigation regarding costs submitted to the Port. The State Auditor conducted an audit of the Port for its agreement with the developer and found that there were inadequate controls. Public records show the audit found that the Port allowed the developer to negotiate a \$145,675 land purchase on its behalf without monitoring or control over the transaction. There was no evidence that the Port authorized the land purchase negotiations or agreed to a source of funds for its purchase. The Port took control of the transaction after the purchase price had been agreed and down payment made. The audit noted that Riverwalk did not fully cooperate with the State Auditor. The Riverwalk project has been abandoned.



11. July 14, 2009 Meeting

The Task Force reviewed, discussed, and voted on the adoption of the Task Force report with recommended changes. Members present approved the first recommendation with two dissenting votes and unanimously approved the remaining recommendations. Members present voted and unanimously approved the final report.¹⁹

G. TASK FORCE ANALYSIS AND CONCLUSIONS ON EXISTING LAW IN WASHINGTON REGARDING THE POTENTIAL USE OF EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT

1. Washington State Constitution, Article 1, Section 16

The Washington State Constitution contains a provision that, on its face, appears to provide strong protection against the use of eminent domain for economic development. Indeed, some commentators have argued that the citizens of Washington have nothing to fear from the *Kelo* decision, because Washington State’s Constitution would protect them against similar abuses.²⁰ However, the Task Force has reviewed the mixed results of Washington courts’ interpretation of the Washington State Constitution’s eminent domain limitation, and has reviewed legislation that specifically allows local governments to exercise the power of eminent domain for economic development purposes.

The Task Force believes that the existing law in Washington does not adequately protect individuals from the use of eminent domain for economic development purposes. Indeed, the Task Force concludes that existing statutes specifically provide for such economic development condemnations, and provide such a broad definition of “blight” so that a local government may exercise eminent domain for economic development under the pretext of removing “blight”. It also provides a legislative scheme that can both confuse and tempt local governments into a belief that exercising the power of eminent domain for economic development comports with the Washington State Constitution.

19. Representative Springer abstained from voting on the report and its recommendations.

20. See, e.g., Hugh Spitzer, “State’s constitution, high court shields us from improper condemnation of property,” *The Tacoma News Tribune*, March 19, 2006, at Insight 1; Alan D. Copsey, *The Effect of Kelo v. City of New London in Washington State: Much Ado About Almost Nothing*, *Envtl. & Land Use Law J* 3 (Nov. 2005).

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As noted above, the Washington State Constitution contains a specific limitation on the use of eminent domain:

SECTION 16 EMINENT DOMAIN. 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, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefore be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. 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. Provided, That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use. [AMENDMENT 9, 1919 p 385 Section 1. Approved November, 1920.]

Washington State Constitution, Article I, § 16 (emphasis added).

On its face, this provision would appear to prevent governments in Washington from taking private property from one individual and conveying it to another for economic development purposes. Several older cases adhered to the plain meaning of this provision.²¹

However, a number of relatively recent cases have weakened the intended protection of the Washington State Constitution.²² In *State ex rel. Washington State Convention and Trade Center v. Evans*,²³ the Washington State Supreme Court approved of a condemnation where the government envisioned selling a significant portion of the condemned property to a private developer, who was providing partial funding of the condemnation. The Court distinguished early Washington cases, which had held that if private use is combined with public use in such a way, that the two could not be separated, then eminent domain could not be invoked to aid the enterprise.²⁴ More recently, the Court approved a government agency's condemnation of a fee interest²⁵ in an entire parcel where the agency would only permanently use part of the parcel, and in fact had developed plans to sell the remainder to private developers as part of its financing and signed an agreement setting such development as a "priority."²⁶

21. See, e.g., *In re the Westlake Project*, 96 Wn.2d 616, 638 P.2d 549 (1981)(City may not condemn land to erect retail shopping facility). *Westlake* is often cited as an example of the "high-water mark" in Washington State's protection against economic development takings. Yet it must be noted that *Westlake*, while discussing Washington's constitutional eminent domain protection, was really decided on the basis that the City of Seattle did not have statutory authority to engage in condemnations for urban shopping centers or facilities to be leased for private use as retail establishments, restaurants, or theaters. *Id.* at 634-35. Further, the reasoning of *Westlake*, discussed below, might actually support application of Washington's Community Renewal Law for economic development takings. *Id.* at 630-33.

The true "high water mark" of court protection from government's taking of private property from one private person to sell to another was *Hogue v. Port of Seattle*, 54 Wn.2d 799, 341 P.2d 171 (1959). This case barred, on state constitutional grounds, the Port of Seattle's attempt to condemn agricultural lands for the purpose of reselling to other private entities that would redevelop the lands for "industrial development." While *Hogue* was a watershed case for its time, it has been narrowed by subsequent cases and much of its precedential force has been lost. See, e.g., *In re Port of Seattle*, 80 Wn.2d 392, 495 P.2d 327 (1972). Of historical interest is that both *Westlake* and *Hogue* were cited by Suzette Kelo's attorneys when that case was

The Task Force believes the Court in its recent cases has provided a roadmap for governments to evade the strong protections embodied in the Washington State Constitution, Article 1, Section 16. So long as government staff can conceive of a temporary public use for private property, it may condemn however much property it chooses to resell later to a private party. Further, as the *Monorail* court noted, there is no reversion to the private property owner where a government has taken a fee interest in property for a particular public use but then “decides” that the public use ceases or that the property is no longer necessary for the claimed use. The Court noted that in such instances “the property may, by authority of the state, be disposed of for either public or private uses.”²⁷ Given the Court’s unwillingness to partake of searching inquiries or require particularity with regard to longer-term uses of condemned property, a government entity that is sufficiently vague in its long-term plans – even if those long-term plans explicitly envision possible resale to private developers – can condemn whatever property it wishes so long as it can conceive of a temporary public use of the property.

The Task Force does not believe that this comports with either the text or the spirit of Article 1, Section 16 of the Washington State Constitution. The Task Force believes that legislation should be adopted that would prevent the use of eminent domain if economic development, as reflected in the adopted Task Force definition, would be even a substantial factor in a taking that was otherwise for a public use.

2. Washington’s Community Renewal Law

Washington’s “blight” statute is set forth in RCW 35.81, the “Community Renewal Law.”²⁸ The Task Force heard expert legal testimony that this statutory chapter provides a legislative “blank check” for the exercise of eminent domain, including for the kind of economic development takings that are at least nominally barred by the Washington State Constitution.

RCW 35.81 was originally enacted in 1957, a mere three years after the United States Supreme Court’s affirmation of “blight” removal as a public use under the Fifth Amendment to the United States Constitution.²⁹ *Berman v. Parker*, 348 U.S. 26 (1954). The Chapter contains a “declaration of purpose and necessity,” which the Task Force hereby sets forth in full:

It is hereby found and declared that blighted areas which constitute a serious and growing menace, injurious to the public health, safety, morals and welfare of the residents of the state exist in municipalities of the state; that the existence of such areas contributes substantially and increasingly to the spread of disease and crime and depreciation of property values, constitutes an economic and social liability, substantially impairs or arrests the sound growth of municipalities, retards the provision of housing accommodations, hinders job creation and economic growth, aggravates traffic problems and substantially impairs or arrests the elimination of traffic hazards and the improvement of traffic facilities; and that the prevention and elimination of such areas is a matter of state policy and state concern in order that the state and its municipalities shall not continue to be endangered by areas which are focal centers of disease, promote juvenile delinquency, are conducive to fires, are difficult to police and to provide police protection for, and, while contributing little to the tax income of the state and its municipalities, consume an excessive proportion of its revenues because of the extra services required for police, fire, accident, hospitalization and other forms of public protection, services, and facilities.

before the Connecticut Supreme Court, and the Connecticut Supreme Court did not find them persuasive. See *Kelo v. City of New London*, 843 A.2d 500, 533, 268 Conn. 1 (2004).

22. A full recitation of the case law on eminent domain in Washington is beyond the scope of this Final Report. However, the Task Force reviewed many of the most prominent recent cases related to eminent domain and received presentations from state and national experts on eminent domain which discussed Washington precedent.

23. 136 Wn.2d 811, 966 P.2d 1252 (1998).

24. See, e.g., *State ex rel. Puget Sound Power & Light Co.*, 133 Wash. 308, 233 P. 651 (1925).

25. A fee interest is the ownership of the entire property interest, as opposed to an easement (an ownership interest in the use of all or part of a property for a specific purpose) or a leasehold (a temporary interest in the property).

26. In re Petition of the Seattle Popular Monorail Authority, 155 Wn.2d 612, 121 P.3d 1166 (2005).

27. Id. at 634.

28. This chapter was formerly known as the “urban renewal law,” and is discussed as such in several of the important cases from the Washington courts.

29. The term “urban renewal” was introduced in a 1954 amendment to the Housing Act of 1949. The Housing Act was federal legislation that provided federal funding to cities to cover the cost of acquiring areas of cities perceived to be slums. See http://en.wikipedia.org/wiki/Urban_renewal.

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It is further found and declared that certain of such areas, or portions thereof, may require acquisition, clearance, and disposition subject to use restrictions, as provided in this chapter, since the prevailing condition of decay may make impracticable the reclamation of the area by rehabilitation; that other areas or portions thereof may, through the means provided in this chapter, be susceptible of rehabilitation in such a manner that the conditions and evils hereinbefore enumerated may be eliminated, remedied or prevented; and that to the extent feasible salvable blighted areas should be rehabilitated through voluntary action and the regulatory process.

It is further found and declared that there is an urgent need to enhance the ability of municipalities to act effectively and expeditiously to revive blighted areas and to prevent further blight due to shocks to the economy of the state and their actual and threatened effects on unemployment, poverty, and the availability of private capital for businesses and projects in the area.

It is further found and declared that the powers conferred by this chapter are for public uses and purposes for which public money may be expended and the power of eminent domain exercised; and that the necessity in the public interest for the provisions herein enacted is hereby declared as a matter of legislative determination.

RCW 35.81.005 (emphasis added).

The Chapter then sets forth a definition of a “blighted area”:

“Blighted area” means an area which, by reason of the substantial physical dilapidation, deterioration, defective construction, material, and arrangement and/or age or obsolescence of buildings or improvements, whether residential or nonresidential, inadequate provision for ventilation, light, proper sanitary facilities, or open spaces as determined by competent appraisers on the basis of an examination of the building standards of the municipality; inappropriate uses of land or buildings; existence of overcrowding of buildings or structures; defective or inadequate street layout; faulty lot layout in relation to size, adequacy, accessibility or usefulness; excessive land coverage; insanitary or unsafe conditions; deterioration of site; existence of hazardous soils, substances, or materials; diversity of ownership; tax or special assessment delinquency exceeding the fair value of the land; defective or unusual conditions of title; improper subdivision or obsolete platting; existence of persistent and high levels of unemployment or poverty within the area; or the existence of conditions that endanger life or property by fire or other causes, or any combination of such factors, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency or crime; substantially impairs or arrests the sound growth of the municipality or its environs, or retards the provision of housing accommodations; constitutes an economic or social liability; and/or is detrimental, or constitutes a menace, to the public health, safety, welfare, or morals in its present condition and use.

RCW 35.81.015(2)(emphasis added).

30. See RCW 35.81.050, .060, .070, .080, .090, .150, and .160.

31. RCW 35.81.090(2).

32. Memorandum prepared by Professor Ilya Somin to the Task Force dated June 2, 2009 at 5-6.

33. The Task Force is only examining the “public use” aspect of these cases, as that is the determination our state constitution reserves specifically to the judiciary. However, the Task Force notes that the “necessity” determination – typically the determination of whether a specific parcel of property is really needed to fulfill

If a municipality has designated an area as blighted by ordinance, the municipality or a “community renewal agency” created by the municipality may develop a “community renewal plan,” hold a public hearing, and then undertake “community renewal projects.”³⁰ A “community renewal project includes one or more undertakings or activities of a municipality in a community renewal area: (a) For the elimination and the prevention of the development or spread of blight; (b) for encouraging economic growth through job creation or retention; (c) for redevelopment or rehabilitation in a community renewal area; or (d) any combination or part thereof in accordance with a community renewal plan.” RCW 35.81.015(7)(emphasis added).

Further, the Chapter explicitly contemplates that a municipality “may sell, lease, or otherwise transfer real property or any interest therein acquired by it for a community renewal project, in a community renewal area for residential, recreational, commercial, industrial, or other uses or for public use, and may enter into contracts with respect thereto.”³¹



The Task Force heard the testimony of nationally respected expert on eminent domain, Professor Ilya Somin of the George Mason University School of Law. Professor Somin reviewed Washington’s Community Redevelopment Law and Washington legal precedent interpreting this statute, and Professor Somin stated: “In sum, Washington’s broad definition of blight is essentially a blank check for local governments to declare any area blighted. Such a declaration then makes the area in question eligible for condemnation, including condemnations that transfer property to other private properties. . . . It is hard to imagine that any local government with even moderately competent legal staff will fail to obtain a blight designation for whatever property it might wish to condemn.”³²

As further noted by Professor Somin, judicial interpretation of Washington’s Community Renewal Law has been very deferential.³³ In fact, the precursor to the current statute was upheld against a direct constitutional attack on the basis that residential property which was not actually blighted would be condemned and resold to another private entity to “redevelop” the property for “light industrial” use.

This case, *Miller v. City of Tacoma*,³⁴ stands as the low point of economic development takings in Washington. Under an area-wide blight designation, the Washington State Supreme Court approved, by a 5-4 margin, the condemnation of “real property improved and enhanced with a valuable house which is a good, sound, sanitary, modern, and well-kept building.” Miller’s house was taken, while others in the project area were not, because “appellant’s property is needed for a site for future industrial and commercial use, and . . . the other houses were not.”

Miller specifically argued that the power to sell property taken under the blight statute “later to private persons make[s] the use a private one.” Following examination of United States Supreme Court and out-of-state case law, the Washington State Supreme Court upheld the statute.

Similarly, in *City of Seattle v. Loutsis Investment Co.*,³⁵ the Court of Appeals approved Seattle’s condemnation of a hotel

the public use – is exceedingly deferential:

A legislative body’s declaration of necessity is conclusive in the absence of proof of actual fraud or such arbitrary and capricious conduct as would constitute constructive fraud. In the condemnation context, necessary means reasonable necessity under the circumstances. It does not mean immediate, absolute, or indispensable need.

Central Puget Sound Regional Transit Authority v. Miller, 156 Wn.2d 403, 411, 128 P.3d 588 (2006).

34. 61 Wn.2d 374, 378 P.2d 464 (1963).

35. 16 Wn. App. 158, 554 P.2d 379 (1976).

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for the purpose of having it torn down and a different hotel built in its place by another private entity. The court upheld this action in spite of the hotel owner's willingness to rehabilitate the property.³⁶

Finally, in *Apostle v. City of Seattle*, 77 Wn.2d 59, 459 P.2d 792 (1969) the Washington State Supreme Court examined the deference owed the legislative determination that an area was blighted under RCW 35.81. The Court concluded that great deference was owed a legislative determination that an area is blighted (meaning it meets the overly broad definition of "blighted area" in the statute), and the courts would only review the legislative decision to determine if it was arbitrary and capricious.³⁷ The *Apostle* court stated "[t]he trial court may not overrule the city council's determination of blight merely because it believes the area is not blighted." *Apostle*, 77 Wn.2d 59, 459 P.2d 792 (1969).

Together, these cases create an almost insurmountable hurdle for an individual to challenge an economic development taking conducted under RCW 35.81.³⁸ The Task Force believes that there can be no better rejoinder to the Courts than the eloquent statement by dissenting Justice Rosellini in *Miller*:

One man's land should not be seized by the government and sold to another man so that the purchaser may build a better house, or enhance the beauty or aesthetic value according to the ideas of an artist or planner whose tastes have the sanction of the government. In essence, the basic idea of this project is that government knows best what use a person's property should be put to, and it will insist that it be put to that use by condemning it and selling it to another private individual who will agree to abide by the government's plan. Under our constitution, the government does not have this power. It is violative of the right of an individual to own property and use it as he pleases, so long as he does not interfere unreasonably with his neighbors' use and enjoyment of their property. Of course, the owner must abide by reasonable regulations of the use of the land, enacted by the legislature in the exercise of the police power. The state may condemn his land for public use, but it may not take it from him and transfer it to another private individual.

The Task Force believes the Community Renewal Law, RCW 35.81, is overly broad. The Task Force concludes that on its face, and under its stated purpose, the law could be used to effectuate economic development takings. The courts' deferential interpretation of RCW 35.81 creates legal precedent that is inconsistent with the eminent domain protections embodied by the Washington State Constitution, and the Task Force believes the precedent opens the door to judicial approval of economic development takings.³⁹

Further, even if the courts gave full force to the state constitutional eminent domain protections, the Task Force finds that the very existence of RCW 35.81 could lead

36. The owner renewed the argument that "it is improper, on various legal and constitutional principles, for the City to condemn [the owner's] property for the avowed purpose of leasing or selling it to somebody else to rehabilitate or redevelop." The Court rejected the argument that such a use was not a "public use" – and therefore unconstitutional – with a simple citation to *Miller*.

37. This is the highest level of deference a court may give a prior determination, requiring that a determination be upheld unless it is willful and unreasoning action, without consideration and in disregard of facts and circumstances.

38. Further, although Article 1, Section 16 of the Washington State Constitution reserves the issue of whether a certain use is truly "public" to the judiciary, the Courts have repeatedly stated that a legislative determination that a use is public is entitled to "great weight." See, e.g., *Miller*, 61 Wn.2d at 384. The Courts have never explained exactly what weight should actually be accorded legislative declarations of public use, nor explained why such determinations are entitled to any deference when the Washington State Constitution

municipalities to erroneously conclude that their actions were lawful, because they would be in compliance with the statute.⁴⁰ The Task Force strongly concludes that the current formulation of Chapter 35.81 RCW can lead to confusion on the part of municipalities, can tempt even well-meaning municipalities into erroneously concluding that their actions are lawful, and can – in the most pernicious cases – serve as a pretext by which economic development takings are effectuated through the device of “blight removal.” The Task Force concludes that RCW 35.81 should be reformed.

H. TASK FORCE RECOMMENDATIONS

1. Enact Legislation Barring Economic Development Takings

The Task Force recommends that the Legislature proactively enact legislation that would bar any entity in Washington covered by Title 8, RCW, from engaging in the exercise of the power of eminent domain for economic development, as the Task Force has defined that term. The Task Force has adopted a draft of suggested legislation to accomplish this purpose, attached to this report as Appendix A.⁴¹

The Task Force believes that, in addition to a straightforward bar to economic development takings, there must be a mechanism for a court reviewing whether a use is public to determine whether a claimed use is a pretext for an economic development taking. The Task Force has turned to employment discrimination law, a very well-developed body of law in Washington State, to suggest adoption of a “substantial factor” test in order to determine whether a taking was actually for economic development purposes.

The Task Force has modeled this legislation on the successful and popular amendment to the home-rule Charter of Pierce County, the second-largest county in Washington State. The Task Force believes enacting this legislation will buttress the intended strong protections against the exercise of eminent domain for private uses set forth in the text of the Washington State Constitution.

2. Reform Washington’s Community Renewal Law

Based on its studies, the Task Force believes the text and judicial interpretation of RCW 35.81, the Community Renewal Law, authorize economic development takings in Washington. In order to prevent RCW 35.81 from serving as the vehicle through which property is taken from one private party and transferred to another private party for economic development purposes, the law should be significantly rewritten.

House Bill 2921 was introduced by the Attorney General’s Office during the 2008 legislative session. The Task Force recommends enactment of similar legislation upon its reintroduction during the 2010 legislative session. A copy of this legislation is attached to this report as Appendix B.

3. The Attorney General’s Office Should Adopt Model Rules Governing Best Practices For The Exercise Of Eminent Domain

In 2006, the Attorney General’s Office adopted a set of advisory model rules for state and local agencies on public records.⁴² The Office believes these model rules have been very successful in advising local governments on “best practices” for compliance with the requirements of the Public Records Act.⁴³

reserves the question for the judiciary “without regard to any legislative assertion that the use is public.” Washington State Constitution, Article 1, § 16.

39. Further, general legal doctrines like the requirement to prove the unconstitutionality of a statute, such as RCW 35.81, beyond a reasonable doubt add another layer of deference which would have to be overcome by the property owner.


40. It would take subtle legal analysis, and principled legal counsel, to advise a municipality that is contemplating a course of redevelopment including economic-development takings that the municipality’s course of conduct, while it complied with and was authorized by RCW 35.81 and with prior case law, could still be unconstitutional under Article 1, Section 16 of the Washington State Constitution. The Task Force is far more convinced that municipal counsel will generally attempt to provide option-based legal advice to effectuate the municipality’s plans. The Task Force reviewed a legal memorandum regarding the “Riverwalk on the Columbia” proposed project in the City of Washougal which specifically proposed use of the Community Renewal Law to transfer real property from one private entity to another for economic development purposes.

41. The Task Force’s first recommendation will not affect the operation of WAC 458-61A-206.

42. See WAC 44-14.

43. RCW 42.56.

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The Task Force recommends that the Attorney General's Office adopt a similar set of model rules to provide guidance to local governments on best practices for compliance with statutory and constitutional requirements for the exercise of eminent domain powers. The Task Force believes that such model rules could provide a great benefit to both the citizens of Washington and to local governments intending to exercise their eminent domain authority. By providing a centralized resource for best procedural practices, the Attorney General's Office could aid many small cities and towns, prevent costly litigation, and conserve important local government resources.

4. Additional Recommendations

The Task Force has examined and supports several additional reforms regarding the exercise of eminent domain in Washington. The Task Force is not specifically proposing legislation on these issues, but notes that legislation on many of these items has been introduced in recent legislative sessions.⁴⁴

The Task force supports and recommends an increase in the amount provided in RCW 8.25.020 for a condemnee to evaluate a condemnor's offer from \$750 to \$5,000. The Task Force notes that this statute, when originally enacted in 1965, provided for \$200, which was increased to \$750 in 1999. The Task Force notes that according to the Federal Bureau of Labor Statistics inflation calculator,⁴⁵ \$200 in 1965 would be equivalent to \$1,357 in 2009. However, the Task Force also believes that the state and local regulatory regime regarding real property has increased significantly in both extent and complexity since 1965, that the use of various professionals (including appraisers, attorneys, architects, engineers, environmental consultants, and others) is necessary to accurately evaluate a condemnor's offer, and that \$5,000 is therefore a reasonable limit to the amount provided to evaluate a condemnor's offer today.

The Task Force supports and recommends requiring a condemnor to timely consider options other than condemnation provided by a potential condemnee before acting to condemn property. The Task Force believes the consideration and, if applicable, the reasons for rejection of such alternatives should be provided in writing to the condemnee.

The Task Force supports and recommends a repurchase, or right-of-first-refusal, option for a person whose property was taken for a specific public use, but whose property becomes no longer necessary for that public use or where the public use is subsequently abandoned. The Task Force believes that such a right should continue for at least seven years after the property was acquired by condemnation.

44. Many of these reforms have been included in legislation introduced in the Washington State House of Representatives by a member of the Task Force, Representative Larry Springer. Representative Springer sponsored ESHB 2016 in the 2007-2008 legislative sessions, a bill that was supported by the Task Force, and HB 1392, a revised version of the proposed legislation introduced in the 2009 legislative session.

45. http://www.bls.gov/data/inflation_calculator.htm.



III. CONCLUSION



The Task Force concludes that a significant danger of economic development takings exists under existing Washington statutes and case law. The Task Force strongly believes that the legislature should act to fully safeguard the citizens of Washington from the spectre of having their land taken in order to be reconveyed to another private party. In closing, the Task Force cannot improve upon the words of former Washington State Supreme Court Justice Rosellini, “Unless the people are willing to change the constitution so as to permit it, one man’s property should not be taken by the government and turned over to another to aid in the fulfillment of a utopian ideal of the state.”⁴⁶

46. Miller, 61 Wn.2d at 403 (Rosellini, J., dissenting).

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APPENDIX A

AN ACT Relating to prohibiting the use of eminent domain for economic development, adding a new chapter to Title 8, RCW:

NEW SECTION. Sec. 1. A new section is added to read as follows:

Within Title 8 of the Revised Code of Washington, the following terms shall have the following definitions with regard to the exercise of eminent domain:

(1) “Public use” shall only mean (1) the possession, occupation, and enjoyment of the property by the general public, or by public agencies; (2) the use of property for the creation or functioning of public utilities, a publicly owned utility, or common carriers; or (3) where the use of eminent domain (a)(i) removes a public nuisance; (ii) removes a structure that is beyond repair or unfit for human habitation or use; or (iii) is used to acquire abandoned property and (b) eliminates a direct threat to public health and safety caused by the property in its current condition. The public benefits of economic development, including an increase in tax base, tax revenues, employment, and general economic health shall not constitute a public use.

(2) “Economic development” means any activity to increase tax revenue, tax base, employment, or general economic health, when that activity does not result in (1) the transfer of property to public possession, occupation, and enjoyment; (2) the transfer of property to a private entity that is a public utility or common carrier; (3) the use of eminent domain (a)(i) to remove a public nuisance; (ii) to remove a structure that is beyond repair or unfit for human habitation or use; or (iii) to acquire abandoned property and (b) to eliminate a direct threat to public health and safety caused by the property in its current condition; or (4) the transfer of property to private entities that occupy an incidental area within a publicly owned and occupied project.

NEW SECTION. Sec. 2. A new section is added to read as follows:

Private property shall 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. No public entity shall take property for the purpose of economic development.

NEW SECTION. Sec. 3. A new section is added to read as follows:

In an action to determine whether a claimed use by a governmental body is a public use, the taking of private property shall be found to be for economic development if a court determines that economic development, as defined in Section 1 of this act, was a substantial factor in the governmental body’s decision to take the property.

NEW SECTION. Sec. 4. Sections 1-3 of this Act shall constitute a new chapter in Title 8 RCW.

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APPENDIX B

AN ACT Relating to the community renewal law; amending RCW 35.81.005, 35.81.015, 35.81.040, 35.81.050, 35.81.060, 35.81.070, 35.81.080, and 35.81.090; and repealing RCW 35.81.030.

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

Sec. 1. RCW 35.81.005 and 2002 c 218 s 2 are each amended to read as follows:

It is hereby found and declared that blighted ~~((areas which))~~ properties constitute a serious and growing menace, injurious to the public health~~((;))~~ and safety~~((; morals and welfare))~~ of the residents of the state, and exist in municipalities of the state~~((; that the existence of such areas contributes substantially and increasingly to the spread of disease and crime and depreciation of property values, constitutes an economic and social liability, substantially impairs or arrests the sound growth of municipalities, retards the provision of housing accommodations, hinders job creation and economic growth, aggravates traffic problems and substantially impairs or arrests the elimination of traffic hazards and the improvement of traffic facilities; and that))~~. The prevention and elimination of such ~~((areas))~~ properties is a matter of state policy and state concern that the state and its municipalities shall not continue to be endangered by ~~((areas))~~ properties which are focal centers of disease, promote juvenile delinquency, are conducive to fires, and are difficult to police and to provide police protection for~~((; and, while contributing little to the tax income of the state and its municipalities, consume an excessive proportion of its revenues because of the extra services required for police, fire, accident, hospitalization and other forms of public protection, services, and facilities))~~.

It is further found and declared that certain of such ~~((areas))~~ properties, or portions thereof, may require acquisition, clearance, and disposition subject to use restrictions, as provided in this chapter, since the prevailing condition of decay may make impracticable the reclamation of the ~~((area))~~ properties by rehabilitation; that other ~~((areas))~~ properties or portions thereof may, through the means provided in this chapter, be susceptible of rehabilitation in such a manner that the conditions and evils hereinbefore enumerated may be eliminated, remedied, or prevented; and that to the extent feasible salvable blighted ~~((areas))~~ properties should be rehabilitated through voluntary action and the regulatory process.

~~((It is further found and declared that there is an urgent need to enhance the ability of municipalities to act effectively and expeditiously to revive blighted areas and to prevent further blight due to shocks to the economy of the state and their actual and threatened effects on unemployment, poverty, and the availability of private capital for businesses and projects in the area.))~~

It is further found and declared that the powers conferred by this chapter are for public uses and purposes for which public money may be expended and the power of eminent domain exercised~~((; and that the necessity in the public interest for the provisions herein enacted is hereby declared as a matter of legislative determination))~~.

Sec. 2. RCW 35.81.015 and 2002 c 218 s 1 are each amended to read as follows:

The following terms wherever used or referred to in this chapter, shall have the following meanings, unless a different meaning is clearly indicated by the context:

(1) "Agency" or "community renewal agency" means a public agency created under RCW 35.81.160 or otherwise authorized to serve as a community renewal agency under this chapter.

(2) "Blighted ~~((area))~~ property" means ~~((a ((an area which)) specific property, by reason of the substantial physical dilapidation, deterioration, defective construction, and material ((; and arrangement and/or age or obsolescence)) of buildings or improvements, whether residential or nonresidential, inadequate provision for ventilation, light, proper sanitary facilities, or open spaces as determined by competent appraisers on the basis of an examination of the building standards of the municipality; ((inappropriate uses of land or buildings; existence of overcrowding of buildings or structures; defective or inadequate street layout; faulty lot layout in relation to size, adequacy, accessibility or usefulness; excessive land coverage; insanitary)) unsanitary or unsafe conditions; deterioration of site; existence of hazardous soils, substances, or materials; ((diversity of ownership;)) tax or special assessment delinquency exceeding the fair value of the land; defective or unusual conditions of title; ((improper subdivision or obsolete platting; existence of persistent and high levels of unemployment or poverty~~

~~within the area;))~~ or the existence of conditions that endanger life or property by fire or other causes, or any combination of such factors, is conducive to ill health, transmission of disease, or infant mortality(~~(;-juvenile delinquency or crime; substantially impairs or arrests the sound growth of the25 municipality or its environs, or retards the provision of housing accommodations; constitutes an economic or social liability));~~ and/or ~~((is detrimental, or))~~ constitutes a menace(~~(;))~~) to the public health(~~(;))~~) and safety(~~(;-welfare, or morals))~~) in its present condition and use.

(3) “Bonds” means any bonds, notes, or debentures (including refunding obligations) herein authorized to be issued.

(4) “Clerk” means the clerk or other official of the municipality who is the custodian of the official records of such municipality.

(5) “Community renewal area” means ~~((a blighted))~~ an area in which one or more blighted properties, and only such blighted properties, are located, and which the local governing body designates as appropriate for a community renewal project or projects.

(6) “Community renewal plan” means a plan, as it exists from time to time, for a community renewal project or projects, which plan (a) shall be consistent with the comprehensive plan or parts thereof for the municipality as a whole; (b) shall be sufficiently complete to indicate such land acquisition, demolition, and removal of structures, redevelopment, improvements, and rehabilitation as may be proposed to be carried out in the community renewal area; zoning and planning changes, if any, which may include, among other things, changes related to land uses, densities, and building requirements; and the plan’s relationship to definite local objectives respecting appropriate land uses, improved traffic, public transportation, public utilities, recreational and community facilities, and other public improvements; (c) shall address the need for replacement housing, within the municipality, where existing housing is lost as a result of the community renewal project undertaken by the municipality under this chapter; and (d) may include a plan to address any persistent high levels of unemployment or poverty in the community renewal area.

(7) “Community renewal project” includes one or more undertakings or activities of a municipality in a community renewal area: (a) For the elimination ~~((and the prevention of the development or spread))~~ of blight; (b) for encouraging economic growth through job creation or retention; (c) for redevelopment or rehabilitation in a community renewal area; or (d) any combination or part thereof in accordance with a community renewal plan.

(8) “Federal government” includes the United States of America or any agency or instrumentality, corporate or otherwise, of the United States of America.

(9) “Local governing body” means the council or other legislative body charged with governing the municipality.

(10) “Mayor” means the chief executive of a city or town, or the elected executive, if any, of any county operating under a charter, or the county legislative authority of any other county.

(11) “Municipality” means any incorporated city or town, or any county, in the state.

(12) “Obligee” includes any bondholder, agent, or trustees for any bondholders, any lessor demising to the municipality property used in connection with a community renewal project, or any assignee or assignees of such lessor’s interest or any part thereof, and the federal government when it is a party to any contract with the municipality.

(13) “Person” means any individual, firm, partnership, corporation, company, association, joint stock association, or school district; and shall include any trustee, receiver, assignee, or other person acting in a similar representative capacity.

(14) “Persons of low income” means an individual with an annual income, at the time of hiring or at the time assistance is provided under this chapter, that does not exceed the higher of either: (a) Eighty percent of the statewide median family income, adjusted for family size; or (b) eighty percent of the median family income for the county or standard metropolitan statistical area, adjusted for family size, where the community renewal area is located.

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(15) “Public body” means the state or any municipality, board, commission, district, or any other subdivision or public body of the state or of a municipality.

(16) “Public officer” means any officer who is in charge of any department or branch of the government of the municipality relating to health, fire, building regulations, or to other activities concerning dwellings in the municipality.

(17) “Real property” includes all lands, including improvements and fixtures thereon, and property of any nature appurtenant thereto, or used in connection therewith, and every estate, interest, right and use, legal or equitable, therein, including terms for years and liens by way of judgment, mortgage or otherwise.

(18) “Redevelopment” includes (a) acquisition of ((a)) blighted ((area)) properties or portions thereof; (b) demolition and removal of buildings and improvements; (c) installation, construction, or reconstruction of streets, utilities, parks, playgrounds, and other improvements necessary for carrying out in the area the community renewal provisions of this chapter in accordance with the community renewal plan; (d) making the land available for development or redevelopment by private enterprise or public bodies (including sale, initial leasing, or retention by the municipality itself) at its fair value for uses in accordance with the community renewal plan; and (e) making loans or grants to a person or public body for the purpose of p. 5 HB 2921 creating or retaining jobs, a substantial portion of which, as determined by the municipality, shall be for persons of low income.

(19) “Rehabilitation” includes the restoration and renewal of ((a)) blighted ((area)) properties or portions thereof, in accordance with a community renewal plan, by (a) carrying out plans for a program of voluntary or compulsory repair and rehabilitation of buildings or other improvements; (b) acquisition of real property and demolition or removal of buildings and improvements thereon where necessary to eliminate unhealthful, ((insanitary)) unsanitary, or unsafe conditions(~~(,lessen density, reduce traffic hazards, eliminate obsolete or other uses detrimental to the public welfare, or otherwise to remove or prevent the spread of blight or deterioration))~~), or to provide land for needed public facilities; (c) installation, construction, or reconstruction of streets, utilities, parks, playgrounds, and other improvements necessary for carrying out in the area the community renewal provisions of this chapter; and (d) the disposition of any property acquired in such community renewal area for uses in accordance with such community renewal plan.

Sec. 3. RCW 35.81.040 and 2002 c 218 s 4 are each amended to read as follows:

A municipality for the purposes of this chapter may formulate a workable program for using appropriate private and public resources to eliminate(~~(, and prevent the development or spread of,)~~) blighted ((areas)) properties, to encourage needed community rehabilitation, to provide for the redevelopment of such ((areas)) properties, or to undertake the activities, or other feasible municipal activities as may be suitably employed to achieve the objectives of the workable program. The workable program may include, without limitation, provision for: The ~~((prevention of the spread of blight into areas of the municipality which are free from blight through))~~ diligent enforcement of housing, zoning, and occupancy controls and standards; the rehabilitation of blighted ((areas)) properties or portions thereof by replanning, removing congestion, providing parks, playgrounds, and other public improvements, by encouraging voluntary rehabilitation and by compelling the repair and rehabilitation of deteriorated or deteriorating structures; the replacement of housing that is lost as a result of community renewal activities within a community renewal area; the clearance and redevelopment of blighted ((areas)) properties or portions thereof; and the reduction of unemployment and poverty within the community renewal area by providing financial or technical assistance to a person or public body that is used to create or retain jobs, a substantial portion of which, as determined by the municipality, shall be for persons of low income.

Sec. 4. RCW 35.81.050 and 2002 c 218 s 5 are each amended to read as follows:

(1) No municipality shall exercise any of the powers hereafter conferred upon municipalities by this chapter until after its local governing body shall have adopted an ordinance or resolution finding that: (a) One or more blighted ((areas)) properties exist in such municipality; and (b) the rehabilitation, redevelopment, or a combination thereof, of such ((area or areas)) property or properties is necessary in the interest of the public health(~~(,) and safety((, morals, or welfare))~~) of the residents of such municipality.

(2) After adoption of the ordinance or resolution making the findings described in subsection (1) of this section, the local governing body of the municipality may elect to have the powers of a community renewal agency under this chapter exercised in one of the following ways:

- (a) By appointing a board or commission composed of not less than five members, which board or commission shall ~~((include municipal officials and))~~ be comprised of elected officials from such municipality, selected by the mayor, with approval of the local governing body of the municipality; or
- (b) By the local governing body of the municipality directly~~((; or~~
- ~~(c) By the board of a public corporation, commission, or authority under chapter 35.21 RCW, or a public facilities district created under chapter 35.57 or 36.100 RCW, or a public port district created under chapter 53.04 RCW, or a housing authority created under chapter 35.8232 RCW, that is authorized to conduct activities as a community renewal agency under this chapter)).~~

Sec. 5. RCW 35.81.060 and 2002 c 218 c 218 s 6 are each amended to read as follows:

(1) A municipality shall not approve a community renewal project for a community renewal area unless the local governing body has, by ordinance or resolution, determined ~~((such an area to be a blighted))~~ that one or more blighted properties are located in the area and designated the area as appropriate for a community renewal project. The local governing body shall not approve a community renewal plan until a comprehensive plan or parts of the plan for an area which would include a community renewal area for the municipality have been prepared as provided in chapter 36.70A RCW. For municipalities not subject to the planning requirements of chapter 36.70A RCW, any proposed comprehensive plan must be consistent with a local comprehensive plan adopted under chapter 35.63 or 36.70 RCW, or any other applicable law. A municipality shall not acquire real property for a community renewal project unless the local governing body has approved the community renewal project plan in accordance with subsection (4) of this section.

(2) The municipality may itself prepare or cause to be prepared a community renewal plan, or any person or agency, public or private, may submit such a plan to the municipality. Prior to its approval of a community renewal project, the local governing body shall review and determine the conformity of the community renewal plan with the comprehensive plan or parts thereof for the development of the municipality as a whole. If the community renewal plan is not consistent with the existing comprehensive plan, the local governing body may amend its comprehensive plan or community renewal plan.

(3) Prior to adoption, the local governing body shall hold a public hearing on a community renewal plan after providing public notice under RCW 8.25.290. ~~((The notice shall be given by publication once each week for two consecutive weeks not less than ten nor more than thirty days prior to the date of the hearing in a newspaper having a general circulation in the community renewal area of the municipality and by mailing a notice of the hearing not less than ten days prior to the date of the hearing to the persons whose names appear on the county treasurer's tax roll as the owner or reputed owner of the property, at the address shown on the tax roll.))~~ In addition to the information required to be provided under RCW 8.25.290, the notice shall describe the time, date, place, and purpose of the hearing, shall generally identify the community renewal area affected, and shall outline the general scope of the community renewal plan under consideration.

(4) Following the hearing, the local governing body may approve a community renewal project if it finds that (a) a feasible plan exists for making available adequate housing for the residents who may be displaced by the project; (b) the community renewal plan conforms to the comprehensive plan for the municipality; (c) ~~((the community renewal plan will afford maximum opportunity, consistent with the needs of the municipality, for the rehabilitation or redevelopment of the community renewal area by private enterprise; (d)))~~ a sound and adequate financial program exists for the financing of the project; and ~~((e)))~~ (d) the community renewal project area ((is a blighted area)) contains one or more blighted properties as defined in RCW 12 35.81.015(2).

(5) A community renewal project plan may be modified at any time by the local governing body as long as the local governing body provides notice of the proposed modification as described under subsection (3) of this section. However, if modified after the lease or sale by the municipality of real property in the community renewal project area, the modification shall be subject to the rights at law or in equity as a lessee or purchaser, or the successor or successors in interest may be entitled to assert.

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(6) Unless otherwise expressly stated in an ordinance or resolution of the governing body of the municipality, a community renewal plan shall not be considered a subarea plan or part of a comprehensive plan for purposes of chapter 36.70A RCW. However, a municipality that has adopted a comprehensive plan under chapter 36.70A RCW may adopt all or part of a community renewal plan at any time as a new or amended subarea plan, whether or not any subarea plan has previously been adopted for all or part of the community renewal area. Any community renewal plan so adopted, unless otherwise determined by the growth management hearings board with jurisdiction under a timely appeal in RCW 36.70A.280, shall be conclusively presumed to comply with the requirements in this chapter for consistency with the comprehensive plan.

Sec. 6. RCW 35.81.070 and 2002 c 218 s 7 are each amended to read as follows:

Every municipality shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this chapter, including the following powers in addition to others granted under this chapter:

(1) To undertake and carry out community renewal projects within the municipality, to make and execute contracts and other instruments necessary or convenient to the exercise of its powers under this chapter, and to disseminate blight clearance and community renewal information.

(2) To provide or to arrange or contract for the furnishing or repair by any person or agency, public or private, of services, privileges, works, streets, roads, public utilities or other facilities for, or in connection with, a community renewal project; to install, construct, and reconstruct streets, utilities, parks, playgrounds, and other public improvements; and to agree to any conditions that it may deem reasonable and appropriate attached to federal financial assistance and imposed pursuant to federal law relating to the determination of prevailing salaries or wages or compliance with labor standards, in the undertaking or carrying out of a community renewal project, and to include in any contract in connection with such a project, provisions to fulfill such of said conditions as it may deem reasonable and appropriate.

(3) To provide financial or technical assistance, using available public or private funds, to a person or public body for the purpose of creating or retaining jobs, a substantial portion of which, as determined by the municipality, shall be for persons of low income.

(4) To make payments, loans, or grants to, provide assistance to, and contract with existing or new owners and tenants of property in the community renewal areas as compensation for any adverse impacts, such as relocation or interruption of business, that may be caused by the implementation of a community renewal project, and/or consideration for commitments to develop, expand, or retain land uses that contribute to the success of the project or plan, including without limitation businesses that will create or retain jobs, a substantial portion of which, as determined by the municipality, shall be for persons of low income.

(5) To contract with a person or public body to provide financial assistance, authorized under this section, to property owners and tenants impacted by the implementation of the community renewal plan and to provide incentives to property owners and tenants to encourage them to locate in the community renewal area after adoption of the community renewal plan.

(6) Within the municipality, to enter upon any building or property in any community renewal area, in order to make surveys and appraisals, provided that such entries shall be made in such a manner as to cause the least possible inconvenience to the persons in possession ~~(-and to obtain))~~ and only pursuant to an order for this purpose from a court of competent jurisdiction in the event entry is denied or resisted; to acquire by purchase, lease, option, gift, grant, bequest, devise, eminent domain, or otherwise, any real property and such personal property as may be necessary for the administration of the provisions herein contained, together with any improvements thereon; to hold, improve, clear, or prepare for redevelopment any such property; to dispose of any real property; to insure or provide for the insurance of any real or personal property or operations of the municipality against any risks or hazards, including the power to pay premiums on any such insurance ~~((- PROVIDED, That no statutory provision with respect to the acquisition, clearance, or disposition of property by public bodies shall restrict a municipality in the exercise of such functions with respect to a community renewal project))~~.

(7) To invest any community renewal project funds held in reserves or sinking funds or any such funds which are not required for immediate disbursement, in property or securities in which mutual savings banks may legally invest funds subject to their control; to redeem such bonds as have been issued pursuant to RCW 35.81.100 at the redemption price established therein or to purchase such bonds at less than redemption price, all such bonds so redeemed or purchased to be canceled.

(8) To borrow money and to apply for, and accept, advances, loans, grants, contributions and any other form of financial assistance from the federal government, the state, county, or other public body, or from any sources, public or private, for the purposes of this chapter, and to enter into and carry out contracts in connection therewith. A municipality may include in any application or contract for financial assistance with the federal government for a community renewal project such conditions imposed pursuant to federal laws as the municipality may deem reasonable and appropriate and which are not inconsistent with the purposes of this chapter.

(9) Within the municipality, to make or have made all plans necessary to the carrying out of the purposes of this chapter and to contract with any person, public or private, in making and carrying out such plans and to adopt or approve, modify, and amend such plans. Such plans may include, without limitation: (a) A comprehensive plan or parts thereof for the locality as a whole, (b) community renewal plans, (c) plans for carrying out a program of voluntary or compulsory repair and rehabilitation of buildings and improvements, (d) plans for the enforcement of state and local laws, codes, and regulations relating to the use of land and the use and occupancy of buildings and improvements and to the compulsory repair, rehabilitation, demolition, or removal of buildings and improvements, (e) appraisals, title searches, surveys, studies, and other preliminary plans and work necessary to prepare for the undertaking of community renewal projects, and (f) plans to provide financial or technical assistance to a person or public body for the purpose of creating or retaining jobs, a substantial portion of which, as determined by the municipality, shall be for persons of low income. The municipality is authorized to develop, test, and report methods and techniques, and carry out demonstrations and other activities, for the prevention and the elimination of blight, for job creation or retention activities, and to apply for, accept, and utilize grants of, and funds from the federal government for such purposes.

(10) To prepare plans for the relocation of families displaced from a community renewal area, and to coordinate public and private agencies in such relocation, including requesting such assistance for this purpose as is available from other private and governmental agencies, both for the municipality and other parties.

(11) To appropriate such funds and make such expenditures as may be necessary to carry out the purposes of this chapter, and in accordance with state law: (a) Levy taxes and assessments for such purposes; (b) acquire land either by negotiation or eminent domain, or both; (c) close, vacate, plan, or replan streets, roads, sidewalks, ways, or other places; (d) plan or replan, zone or rezone any part of the municipality; (e) adopt annual budgets for the operation of a community renewal agency, department, or offices vested with community renewal project powers under RCW 35.81.150; and (f) enter into agreements with such agencies or departments (which agreements may extend over any period) respecting action to be taken by such municipality pursuant to any of the powers granted by this chapter.

(12) Within the municipality, to organize, coordinate, and direct the administration of the provisions of this chapter as they apply to such municipality in order that the objective of remedying blighted ~~((areas))~~ properties and preventing the causes thereof within such municipality may be most effectively promoted and achieved, and to establish such new office or offices of the municipality or to reorganize existing offices in order to carry out such purpose most effectively.

(13) To contract with a person or public body to assist in carrying out the purposes of this chapter.

(14) To exercise all or any part or combination of powers herein granted.

Sec. 7. RCW 35.81.080 and 2002 c 218 s 8 are each amended to read as follows:

A municipality shall have the right to acquire by condemnation, in accordance with the procedure provided for condemnation by such municipality for other purposes, any interest in real property, which it may deem necessary

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for a community renewal project under this chapter after the adoption by the local governing body of a resolution declaring that the acquisition of the real property described therein is necessary for such purpose. Condemnation for community renewal of blighted ~~((areas))~~ properties is declared to be a public use, and property already devoted to any other public use or acquired by the owner or a predecessor in interest by eminent domain may be condemned for the purposes of this chapter.

~~((The award of compensation for real property taken for such a project shall not be increased by reason of any increase in the value of the real property caused by the assembly, clearance, or reconstruction, or proposed assembly, clearance, or reconstruction in the project area. No allowance shall be made for the improvements begun on real property after notice to the owner of such property of the institution of proceedings to condemn such property. Evidence shall be admissible bearing upon the insanitary, unsafe, or substandard condition of the premises, or the unlawful use thereof.))~~

Sec. 8. RCW 35.81.090 and 2002 c 218 s 9 are each amended to read as follows:

(1) A municipality, with approval of its legislative authority, may acquire real property, or any interest therein, for the purposes of a community renewal project (a) prior to the selection of one or more persons interested in undertaking to redevelop or rehabilitate the real property, or (b) after the selection of one or more persons interested in undertaking to redevelop or rehabilitate such real property. In either case the municipality may select a redeveloper through a competitive bidding process consistent with this section or through a process consistent with RCW 35.81.095.

(2) A municipality, with approval of its legislative authority, may sell, lease, or otherwise transfer real property or any interest therein acquired by it for a community renewal project, in a community renewal area for residential, recreational, commercial, industrial, or other uses or for public use, and may enter into contracts with respect thereto, or may retain such a property or interest only for parks and recreation, education, public utilities, public transportation, public safety, health, highways, streets, and alleys, administrative buildings, or civic centers, in accordance with the community renewal project plan, subject to such covenants, conditions, and restrictions, including covenants running with the land, as it may deem to be necessary or desirable to ~~((assist in preventing the development or spread of blighted areas or otherwise to))~~ carry out the purposes of this chapter. However, such a sale, lease, other transfer, or retention, and any agreement relating thereto, may be made only after the approval of the community renewal plan by the local governing body. The purchasers or lessees and their successors and assigns shall be obligated to devote the real property only to the uses specified in the community renewal plan, and may be obligated to comply with any other requirements as the municipality may determine to be in the public interest, including the obligation to begin and complete, within a reasonable time, any improvements on the real property required by the community renewal plan or promised by the transferee. The real property or interest shall be sold, leased, or otherwise transferred for the consideration the municipality determines adequate. In determining the adequacy of consideration, a municipality may take into account the uses permitted under the community renewal plan; the restrictions upon, and the covenants, conditions, and obligations assumed by, the transferee; and the public benefits to be realized, including furthering of the objectives of the plan for the prevention of the recurrence of blighted ~~((areas))~~ properties.

(3) The municipality in any instrument of conveyance to a private purchaser or lessee may provide that the purchaser or lessee shall be without power to sell, lease, or otherwise transfer the real property, or to permit changes in ownership or control of a purchaser or lessee that is not a natural person, in each case without the prior written consent of the municipality until the purchaser or lessee has completed the construction of all improvements that it has obligated itself to construct thereon. The municipality may also retain the right, upon any earlier transfer or change in ownership or control without consent; or any failure or change in ownership or control without consent; or any failure to complete the improvements within the time agreed terminate the transferee's interest in the property; or to retain or collect on any deposit or instrument provided as security, or both. The enforcement of these restrictions and remedies is declared to be consistent with the public policy of this state. Real property acquired by a municipality that, in accordance with the provisions of the community renewal plan, is to be transferred, shall be transferred as rapidly as feasible, in the public interest, consistent with the carrying out of the provisions of the community renewal plan. The inclusion in any contract or conveyance to a purchaser or lessee of any covenants, restrictions, or conditions (including the incorporation by reference therein of the provisions of a community renewal plan or any part thereof) shall not prevent the recording of such a contract or conveyance in the land records of the auditor or the county in

which the city or town is located, in a manner that affords actual or constructive notice thereof.

(4)(a)(i) A municipality may dispose of real property in a community renewal area, acquired by the municipality under this chapter, to any private persons only under those reasonable competitive bidding procedures as it shall prescribe, or by competitive bidding as provided in this subsection, through direct negotiation where authorized under (c) of this subsection, or by a process authorized in RCW 35.81.095.

(ii) A competitive bidding process may occur (A) prior to the purchase of the real property by the municipality, or (B) after the purchase of the real property by the municipality.

(b)(i) A municipality may, by public notice by publication once each week for three consecutive weeks in a newspaper having a general circulation in the community, prior to the execution of any contract or deed to sell, lease, or otherwise transfer real property and prior to the delivery of any instrument of conveyance with respect thereto under the provisions of this section, invite bids from, and make available all pertinent information to, private redevelopers or any persons interested in undertaking to redevelop or rehabilitate a community renewal area, or any part thereof. This notice shall identify the area, or portion thereof, and shall state that further information as is available may be obtained at the office as shall be designated in the notice.

(ii) The municipality shall consider all responsive redevelopment or rehabilitation bids and the financial and legal ability of the persons making the bids to carry them out. The municipality may accept the bids as it deems to be in the public interest and in furtherance of the purposes of this chapter. Thereafter, the municipality may execute, in accordance with the provisions of subsection (2) of this section, and deliver contracts, deeds, leases, and other instruments of transfer.

(c) If the legislative authority of the municipality determines that the sale of real property to a specific person is necessary to the success of a neighborhood revitalization or community renewal project for which the municipality is providing assistance to a nonprofit organization from federal community development block grant funds under 42 U.S.C. Sec. 5305(a)(15), or successor provision, under a plan or grant application approved by the United States Department of Housing and Urban Development, or successor agency, then the municipality may sell or lease that property to that person through direct negotiation, for consideration determined by the municipality to be adequate consistent with subsection (2) of this section. This direct negotiation may occur, and the municipality may enter into an agreement for sale or lease, either before or after the acquisition of the property by the municipality. Unless the municipality has provided notice to the public of the intent to sell or lease the property by direct negotiation, as part of a citizen participation process adopted under federal regulations for the plan or grant application under which the federal community development block grant funds have been awarded, the municipality shall publish notice of the sale at least fifteen days prior to the conveyance of the property.

(5) A municipality may operate and maintain real property acquired in a community renewal area for a period of three years pending the disposition of the property for redevelopment, without regard to the provisions of subsection (2) of this section, for such uses and purposes as may be deemed desirable even though not in conformity with the community renewal plan. However, the municipality may, after a public hearing, extend the time for a period not to exceed three years.

(6) Any covenants, restrictions, promises, undertakings, releases, or waivers in favor of a municipality contained in any deed or other instrument accepted by any transferee of property from the municipality or community renewal agency under this chapter, or contained in any document executed by any owner of property in a community renewal area, shall run with the land to the extent provided in the deed, instrument, or other document, so as to bind, and be enforceable by the municipality against, the person accepting or making the deed, instrument, or other document and that person's heirs, successors in interest, or assigns having actual or constructive notice thereof.

NEW SECTION. Sec. 9. RCW 35.81.030 (Encouragement of private enterprise) and 2002 c 218 s 3 & 1965 c 7 s 35.81.030 are each repealed.

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