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House BILL NO. *597*
Wells D.M.P. *SENATOR* *Wm E BoharSKI*
Knox Forest *Emilia* *Neuberger*

A BILL FOR AN ACT ENTITLED: "AN ACT RELATING TO TAKING OF PRIVATE PROPERTY BY GOVERNMENTAL AGENCIES; PROVIDING FOR COMPENSATION AND ALTERNATIVE DISPUTE RESOLUTION; PROHIBITING USE OF THE PUBLIC TRUST DOCTRINE AS A DEFENSE OF TAKING OF PRIVATE PROPERTY; AND PROVIDING AN APPROPRIATION."

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

NEW SECTION. **Section 1. Short title.** [Sections 1 through 5] may be cited as the "Private Property Protection Act".

NEW SECTION. **Section 2. Definitions.** As used in [sections 1 through 5], the following definitions apply:

- (1) "Agency" means a state agency and any agency or commission funded fully or partially by the state or by a county, city, or other political subdivision.
- (2) "Agency action" means an action or decision taken by an agency that:
 - (a) takes a property right; or
 - (b) unreasonably impedes the use of property or the exercise of property interests or significantly interferes with investment-backed expectations.
- (3) "Just compensation" means:
 - (a) compensation equal to the full extent of a property owner's loss, including the fair market value of the private property taken and business losses arising from a taking, whether the taking is by physical occupation or through regulation, exaction, or other means; and
 - (b) compounded interest calculated from the date of the taking until the date on which the agency tenders payment.
- (4) "Owner" means the owner or possessor of property or rights in property at the time that the taking occurs, including when:
 - (a) the statute, regulation, rule, order, ordinance, guideline, policy, or action is passed or

- 1 promulgated; or
- 2 (b) the permit, license, authorization, or governmental permission is denied or suspended.
- 3 (5) "Private property" or "real property" means all property protected under the state and United
- 4 States constitutions and includes:
- 5 (a) vested or unvested real property including:
- 6 (i) estates in fee, life estates, estates for years, or otherwise;
- 7 (ii) inchoate interests in real property, such as remainders and future interest;
- 8 (iii) personal property that is affixed to or appurtenant to real property;
- 9 (iv) easements;
- 10 (v) leaseholds;
- 11 (vi) recorded liens; and
- 12 (vii) contracts or other security interests in or related to real property;
- 13 (b) the right to use water or the right to receive water;
- 14 (c) rents, issues, or profits of land, including minerals, timber, fodder, crops, oil, gas, coal, or
- 15 geothermal energy;
- 16 (d) property rights provided by or memorialized in a contract, except that the rights may not be
- 17 construed under this title to prevent the state from prohibiting the formation of contracts considered to
- 18 harm the public welfare or to prevent the execution of contracts for exigencies that present immediate or
- 19 reasonably foreseeable threats of injuries to life and property;
- 20 (e) any interest understood to be property based on custom, usage, common law, or mutually
- 21 reinforcing understandings that are sufficiently well grounded in law to back a claim of interest.
- 22 (6) (a) "Taking of private property" means any agency action in which private property is directly
- 23 taken in a manner that requires compensation under the fifth amendment to the United States constitution,
- 24 under the state constitution, or under [sections 1 through 5], including by physical invasion, regulation,
- 25 exaction, condition, or other means.
- 26 (b) The term does not include:
- 27 (i) a condemnation action filed by the state in an applicable court; or
- 28 (ii) an action relating to criminal forfeiture that is filed by the state or its political subdivisions.
- 29
- 30 NEW SECTION. **Section 3. Compensation for taken property -- burden of proof -- exception --**

1 **transfer of interest -- source of compensation -- attorney fees and costs -- prohibition on conditional**
2 **waivers.** (1) An agency may not take private property except for public purpose and with just

3 compensation to the property owner. A property owner must receive just compensation if:

4 (a) as a consequence of a decision by any agency, private property, wholly or in part, is physically
5 invaded or taken for public use without the consent of the owner; and

6 (b) (i) the invasion or taking of private property does not substantially advance the stated
7 governmental interest to be achieved by the legislation or regulation on which the invasion or taking of
8 private property is based;

9 (ii) the action exacts the owner's constitutional or otherwise lawful right to use the property or a
10 portion of the property as a condition for the granting of a permit, license, variance, or any other agency
11 action without a rough proportionality between the stated need for the required dedication and the impact
12 of the proposed use of the property;

13 (iii) the action results in the property owner being deprived, either temporarily or permanently, of
14 all or substantially all economically beneficial or productive use of the property affected by the agency
15 action without a showing that the deprivation inheres in the title itself; or

16 (iv) the action diminishes the fair market value of the affected portion of the property that is the
17 subject of action by the lesser of:

18 (A) 10% or more with respect to the value immediately prior to the governmental action; or

19 (B) \$10,000 or more with respect to the value immediately prior to the governmental action.

20 (2)(a) The agency bears the burden of proof in any action described under:

21 (i) subsection (1)(b)(i), with regard to showing the nexus between the stated governmental purpose
22 of the governmental interest and the impact on the proposed use of the private property;

23 (ii) subsection (1)(b)(ii), with regard to showing the proportionality between the exaction and the
24 impact of the proposed use of the property; and

25 (iii) subsection (1)(b)(iii), with regard to showing that the deprivation of value inheres in the title
26 to the property.

27 (b) The property owner has the burden of proof in any action described under subsection (1)(b)(iv),
28 with regard to establishing the diminution of value of property.

29 (3) (a) Compensation may not be required by [sections 1 through 5] if the owner's use or proposed
30 use of the property is a nuisance as commonly understood and defined by background principles of

1 nuisance and property law. Compensation does not bar an award of damages under [sections 1 through
2 5]. The agency has the burden of proof to establish that the use or proposed use of the property is a
3 nuisance.

4 (b) Subject to subsection (3)(a), if an agency action directly takes property or a portion of property
5 under subsection (1), compensation to the owner of the property that is affected by the action is the
6 greater of an amount equal to either:

7 (i) the difference between:

8 (A) the fair market value of the property or portion of the property affected by agency action before
9 the property became the subject of the specific agency action; and

10 (B) the fair market value of the property or portion of the property when the property becomes
11 subject to the agency action; or

12 (ii) business losses.

13 (4) The agency that provides just compensation for a permanent taking shall take title to the
14 property interest.

15 (5) All awards or judgments for a plaintiff, including the recovery for court costs, attorney fees,
16 and reasonable expenses, must be paid out of the funds of the agency responsible for the agency action.
17 When more than one agency is involved, the court shall determine the proportion that each agency is
18 required to contribute to the compensation.

19 (6) The court, in issuing any final order in an action brought under [sections 1 through 5], shall
20 award costs of litigation, including court costs, attorney fees, and expert witness fees, to any prevailing
21 plaintiff.

22 (7) Agencies subject to the provisions of [sections 1 through 5] may not make the waiver of the
23 provisions of [sections 1 through 5] a condition for approval of the use of real property or the issuance of
24 any permit or other entitlement.

25 (8) The legislature declares that [sections 1 through 5] may not be used to assert the public trust
26 doctrine in this state. The public trust doctrine is specifically excluded as a defense of any taking of private
27 property or real property by private persons or public agencies.

28
29 **NEW SECTION. Section 4. Statute of limitations.** The statute of limitations for actions brought
30 under [sections 1 through 5] is the statute of limitations for ordinary actions brought for injuries to real

1 property. The statute of limitations begins to run upon the final administrative decision implementing the
2 agency action that affects the owner's property.

3

4 **NEW SECTION. Section 5. Alternative dispute resolution -- compensation.** (1) Either party to a
5 dispute to a taking of private property or litigation commenced under [sections 1 through 5] may elect to
6 resolve the dispute through settlement or arbitration. In the administration of this section:

7 (a) the alternative dispute resolution may be effectuated only by the consent of all parties;

8 (b) arbitration procedures must be in accordance with the alternative dispute resolution procedures
9 established by the American arbitration association; and

10 (c) arbitration may not be a condition precedent and an administrative procedure must be
11 exhausted before the filing of a civil action under [sections 1 through 5].

12 (2) The funds used for compensation to the owner must be taken from the responsible agency's
13 budget for that fiscal year.

14

15 **NEW SECTION. Section 6. Appropriation.** There is appropriated \$25,000 from the general fund
16 to the department of commerce for the biennium to be used as grants to counties that incur expenses
17 because of the provisions of [sections 1 through 5].

18

19 **NEW SECTION. Section 7. Severability.** If a part of [this act] is invalid, all valid parts that are
20 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its
21 applications, the part remains in effect in all valid applications that are severable from the invalid
22 applications.

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