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FISCAL IMPACT REPORT

ORIGINAL DATE 02/24/15
 SPONSOR McQueen/Griego LAST UPDATED 03/10/15 HB 365
 SHORT TITLE Protection from Eminent Domain SB _____
 ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Potentially Significant	Potentially Significant	Potentially Significant	Recurring	General Fund, Other State Funds, Local Government Funds

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Transportation (DOT)
 Administrative Office of the Courts (AOC)
 Attorney General’s Office (AGO)
 Department of Finance & Administration (DFA)
 Department of Game and Fish (DGF)
 General Services Department (GSD)
 Municipal League (ML)

SUMMARY

Synopsis of Bill

House Bill 365 amends several sections of the existing Eminent Domain Code to:

- Define good faith effort as a good-faith, final and best offer delivered in writing by the condemnor to the condemnee (Section 1);
- Prevent condemnation proceedings from being instituted until after all regulatory approvals, other than local building permits, have been obtained by the condemnor (Section 1);
- Require that where a property’s value decreases as a result of the threat of condemnation or the intended use of the property after condemnation, the value to be paid for the

property shall reflect its market value in the absence of the threat of condemnation or the intended use of the property after condemnation (Section 2);

- Require an award of litigation expenses to a condemnee if the condemnor is a non-governmental entity and the final award is more than the good-faith, final and best offer made by the condemnor, while barring a court from awarding any condemnor's litigation expenses (Section 3);
- Repeal existing language concerning certain elements that could be considered in determining remainder damages in partial takings cases, including elements that enhance or benefit the remainder property for the purpose of offsetting damages, and authorize consideration only of those elements that diminish the fair market value of the property before and after the taking, including any depression of market value as a result of the threat of condemnation or the intended use of the property after condemnation (Section 4);
- Allow a condemnee to require the condemnor acquire the entire tract at its full market value if the damages from a partial taking equal or exceed 50 per cent of the market value of the property. In that circumstance, the condemnor may abandon the condemnation proceeding (rather than acquire the entire tract) (Section 4); and
- Provide that an easement taken by eminent domain shall be extinguished, and possession of the property revert to the owner or the owner's successor, when the intended public use of the easement has not been implemented within five years from the date the condemnor is authorized to take possession of the property (Section 5).

The effective date of this bill is July 1, 2015.

FISCAL IMPLICATIONS

DOT reports that HB 365 potentially may lead to greater costs. Those costs may include: increased project costs due to delays caused by the need to obtain all necessary regulatory approvals for the intended use prior to initiating condemnation proceedings; inability to recover litigation expenses when condemnor is the prevailing party; inability to offset remainder damages due to the bar against considering elements that enhance or benefit the remainder property; and additional right-of-way costs where condemnee requires acquisition of the entire tract in partial taking situations (or the condemnee's litigation expenses in the event the condemnor then abandons the condemnation). Additionally, increased costs may arise due to the loss of an acquired easement because the intended public use was not implemented within five years, which may include reacquisition at a later time, purchase of a substitute easement, or acquisition of properties in fee simple rather than by easement. DOT also expresses concern that Section 5's bar against the award of litigation expenses to a prevailing condemnor may encourage property owners to litigate for additional compensation, knowing the condemnor would have to bear its own litigation expenses even if it prevails at trial. If the number of condemnation cases on the courts' dockets increase, there likely will be increases in the courts' operating budget as well.

In addition, ML asserts that the provision requiring property be valued based on the fair market value absent a threat of condemnation or the proposed use of the property introduces a completely unknown and uncontrollable variable that could increase costs dramatically

SIGNIFICANT ISSUES

DOT points out that requiring a final and best offer before a condemnation proceeding may be instituted may make the condemnor reluctant to continue negotiating with a condemnee (property owner) after the condemnation proceeding is filed for fear the court may determine it failed to act in good faith if it continues to make offers after the date of its statutorily required “final and best” offer. Condemnees often retain their own appraisers after a condemnation case has been filed and that appraisal report is then submitted to the condemnor for its consideration, which consideration can sometimes lead to settlements. Requiring a final and best offer be made before a condemnation case can be filed, however, works against this negotiation process and would probably result in longer and more protracted litigation.

Further, DFA points out that the condemnor may foot the entire legal bill for the litigation if the condemnee is a nongovernmental entity, and the final award is more than the good faith, final and best offer made to the condemnee; however, the reverse does not apply. DFA comments that condemnors may be reluctant to pursue condemnation, even if appropriate to do so, when forced to go to litigation and pay a condemnee’s expenses when the court award is greater than the good faith offer made to the condemnee.

Although local ordinances do not apply to state-owned property, DOT comments that, in addition to the increased costs discussed above, the requirement to secure all regulatory approvals could also impact its ability to certify to the Federal Highway Administration that all right-of-way needed for the project has been, or will be, acquired by a certain date, which failure would have an adverse impact on project deadlines and could jeopardize federal participation in projects. ML also comments that this requirement could delay public projects that require condemnation of land.

DFA adds that condemnors may be reluctant to proceed if required to obtain all regulatory approvals for the post condemnation use of the property prior to pursuing condemnation, particularly when the outcome is uncertain, and so much time may elapse to final award or the outcome of any appeals that the regulatory approvals may no longer be valid and must be pursued again. Further, with the costs of obtaining regulatory approvals varying depending on the entities involved, DFA suggests the condemnor may not want to assume the risk of the loss of these expenses along with its own litigation expenses and the possible payment of the litigation expenses for the condemnee.

In addition, DOT raises two concerns relating to new provisions governing valuation:

Under Section 2, a decrease in market value resulting from the threat of condemnation or the intended use of the property after condemnation is not to be considered. However, an increase in market value resulting from knowledge of the project or the intended use of the property after condemnation, which currently is not typically considered in eminent domain valuation, continues to be an improper subject for consideration. As a result, owners are to be compensated for an increase in the market value of the subject property when that increase results from the threat of condemnation, even though a decrease in market value for the same reasons cannot be considered.

Similarly, Section 4 allows consideration of the impact of the threat of condemnation or the intended use of the property after condemnation when valuing remainder property in

partial takings cases, but only when it causes the market value of the property to be depressed. This provision could result in the proliferation of condemnation blight claims, in addition to claims for severance damages. The bill also removes the existing provision allowing consideration of elements that enhance or benefit remainder property, which may be used to offset remainder or severance damages, reducing the amount of compensation owed by the condemning authority.

Both DOT and DFA comment on Section 4's requirement that a condemnor acquire the entire tract of property affected by a partial taking if the damages resulting from the taking equal or exceed 50 per cent of the market value of the property and the condemnee requires that acquisition (even if the condemnor does not need the entire tract). DFA points out that this provision in particular could increase costs to condemnors. DOT advises that, although the condemnor has the option to abandon the condemnation, that likely will require a redesign of at least a part of the project, plus additional costs related to the redesign and the possible acquisition of substitute properties. Additionally, if the condemnation is abandoned, existing law directs the court to award the condemnee's litigation expenses. Finally, the condemnor may not learn until a verdict is rendered at trial that the damages equal or exceed 50 per cent of the property's market value, at which point it may be too late to abandon the condemnation.

Finally, DOT advises that the requirement in Section 5 that easements shall revert to the property owner or the property owner's successors if the intended public use of the acquired easement has not been implemented within five years likely would eliminate a condemnor's ability to acquire properties for future use. It may also cause condemnors to acquire properties in fee simple—which does not require public use within any set time--instead of by easement, even where the condemnee (property owner) would prefer to retain fee simple ownership of the property. As a result, right-of-way acquisition costs would increase and more cases would be litigated. This provision also may result in disputes over whether an easement has been put to a public use.

OTHER SUBSTANTIVE ISSUES

AOC advises that in 2005, the United States Supreme Court decided *Kelo v. City of New London*, allowing local governments to force property owners to sell their property to permit private economic development when officials determine the condemnation would benefit the public, even if the property is not blighted and the new project's success is not guaranteed. In the final paragraph of the majority's opinion in the *Kelo* case, Justice Stevens wrote,

In affirming the City's authority to take petitioners' properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. 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 (emphasis added).

AMENDMENTS

DFA suggests that including a definition of "good faith" may be helpful, as the absence of a definition may invite more litigation based on this arguably ambiguous standard alone, and costs could be prohibitive, particularly when hiring experts to testify about a "good faith" offer. In addition, without legislative guidance, there may not be uniformity in determining a good faith offer, leaving it to appellate courts to define the standard

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