

Proposition 90 – Government Acquisition, Regulation of Private Property

Board Recommendation (10/13/06):

OPPOSE

Rationale:

While the intent of Proposition 90 is a step in the right direction to regulate eminent domain, the measure goes too far, and would significantly increase government net costs and result in either higher taxes or budget deficits.

The measure requires governments to provide more compensation than the California Constitution presently prescribes. Just compensation is currently defined as “Fair Market Value” for the property. This measure would change just compensation to mean that the person be in the “same position monetarily” as if the property had never been taken. However, the measure does not define what “same position monetarily” means and therefore could lead to increased government costs for payment beyond the “Fair Market Value” of the property. The measure also requires that if a public use is determined, the property shall be valued at its highest and best use. If the property is taken for a proprietary purpose, the government must compensate the owner for the value at which the government intends to use the property. This could lead to the preposterous result that property owners could get paid for the government using their land in ways that they could not have. This will also lead to increased government cost, as essentially they have to pay double for developing land.

Finally, the measure requires compensation to be paid for any future “regulatory taking”. The only laws exempt from this are public health and safety laws, laws passed during a declared state of emergency, or laws passed as part of rate regulation by the California Public Utilities Commission. The ambiguity that exists here is what constitutes a public health and safety law. This opens the doors for many challenges to laws as whether they are indeed health and safety laws.

Because of the numerous ambiguities in the measure, as well as the opportunities for increased costs and taxes, the measure should be opposed. It is a noble effort to curb the eminent domain power of the government but its broadness and overreaching seriously injures taxpayers.

Background:

Amendment 5 of the *United States Constitution* states that “nor shall private property be taken for public use, without just compensation.”¹ Article 1, Section 19 of the *California Constitution* states that “private property may be taken or damaged for public use only when just compensation...has first been paid...to the owner”.² These principles controlled the government’s use of eminent domain until the Supreme Court redefined “public use” in *Kelo v. New London*³. This case allowed for governments to condemn private land, not only for previously accepted public use such as roads, schools, and other publicly owned property, but also to sell to private parties for “public” benefits such as economic revitalization. This has caused great outrage across the nations as many

¹ United States Constitution

² California Constitution

³ *Kelo v. New London*, 126 S. Ct. 326 (2005)

groups, wishing to check the growing power of the government, cried out against the ruling and called upon their local governments to remedy the Court's ruling by passing legislation of their own to limit the type of takings the government can do.⁴

Governments have the power to make laws and rules that affect the value of the private property of their citizens. When a person's property has been reduced in value by a law or other government action, it may be deemed a "regulatory taking". A "regulatory taking" is when a government law or rule hampers a person's property so vastly that it appears to be a taking, even though the person still has ownership of it. As provided in Amendment 5 to the *US Constitution* and Article 1, Section 19 of the *California Constitution*, if there is indeed deemed a regulatory "taking" the government would have to pay just compensation to the owner. However, courts nationwide and in California have made the threshold to claim a "regulatory" taking very high and claims sufficient to meet a regulatory taking have been rare. Groups nationwide and in California have been outraged at what they perceive as the governments' "taking" of property by laws and regulation and them not being compensated for those takings.⁵

In response to these types of "takings" by the government, "takings" which people believe are beyond the scope of the Constitution, groups have lobbied their state/local governments for restrictions on eminent domain or they have initiated ballot measures themselves. In California, Proposition 90 was proposed to be on the November 2006 ballot as one of these efforts to restrict the power of eminent domain⁶. These groups claim that the government has increasingly used the *Kelo* case and that this power needs to be curbed. On May 15th, 2006, the Protect Our Homes Coalition was able to submit the necessary signatures to get it on the November ballot.⁷

Proposal:

The ballot label that will be put before the voters of San Diego County reads as follows:

GOVERNMENT ACQUISITION, REGULATION OF PRIVATE PROPERTY INITIATIVE CONSTITUTIONAL AMENDMENT.

- Bars state and local governments from condemning or damaging private property to promote other private projects or uses.
- Limits government's authority to adopt certain land use, housing, consumer, environmental and workplace laws and regulations, except when necessary to preserve public health or safety.
- Voids unpublished eminent domain court decisions.
- Defines "just compensation."
- Government must occupy condemned property or lease property for public use.
- Condemned private property must be offered for resale to prior owner or owner's heir at current fair market value if government abandons condemnation's objective.
- Exempts certain governmental actions.⁸

Currently the California Constitution, in Article 1, Section 19 states that:

⁴ From Protect Out Homes Coalition Press Release, 5/15/06

⁵ Argument in Favor of Proposition 90

⁶ Article: A shield from Community Land Grabs, Steven Greenhut, Orange County Register, 8/20/06

⁷ From Protect Out Homes Coalition Press Release, 5/15/06

⁸ Ballot Label for November 2006 ballot

“Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.”

This proposition would amend this section of the California Constitution.

Section 19(a)(1): Private property can only be taken or damaged for a stated public use. Private property may not be taken or damaged for private use.

Section 19(a)(2): Property acquired by eminent domain shall be owned and occupied by the government and must be utilized only for the stated public purpose. The property may be leased to other parties for the public use project.

Section 19(a)(3): If the property ceases to be used for the stated public use, the former owner shall have the right to reacquire the property from the government for fair market value.

Section 19(b)(1): Narrows the meaning of public use. Prohibits takings expected to result in transfers to non-governmental owners on economic development or tax revenue enhancement grounds, or for any other actual uses that are not public in fact, even though those uses may serve otherwise legitimate purposes.

Section 19(b)(2): Public use shall not include the direct or indirect transfer of property taken by eminent domain from one private party to another private party unless it is a government approved transfer for public use purposes. The government has the burden to prove public use.

Section 19(b)(3): Unpublished eminent domain decisions become null and void.

Section 19(b)(4): In Eminent Domain actions, the government must submit appraisals to the property owners. The property owners are entitled to a separate and distinct determination by a jury as to whether the taking is really for a public use.

Section 19(b)(5): If a public use is determined, the taken or damaged property shall be valued at its highest and best use without considering any future dedication requirements imposed by the government. If private property is taken for any proprietary governmental purpose, then the property shall be valued at the use to which the government intends to put the property, if such use results in a higher value for the land taken.

Section 19(b)(6): Just compensation” is defined as that sum of money necessary to place the property owner in the same position monetarily as if the property had never been taken. This includes, but is not limited to, compounded interest and all reasonable costs and expenses.

Section 19(b)(8): “Damage” to private property includes government actions that result in substantial economic loss to private property. Exempts laws passed for the protection of public health and safety.

Section 19(d): Does not restrict government action in declared states of emergencies

Section 19(e): Does not restrict government’s condemnations powers to abate nuisances

This Proposition is self-executing and will become effective immediately the day following the election if it receives a majority of votes. It does not affect any law or rule already in effect.

The sections of the Proposition are severable. If one section is declared invalid it is severed from the body and all other sections, which do not require the severed section, are still valid.

The section may not be amended except by a vote of the people of California pursuant to Article II or Article XVIII of the California Constitution.⁹

Fiscal Effect:

Increased annual state and local government costs to pay property owners for (1) losses to their property associated with certain new laws and rules, and (2) property acquisitions. The amount of such costs is unknown, but potentially significant on a statewide basis.¹⁰

Arguments of the Proponents:

- *Proposition 90 stops eminent domain abuse!*
- Local governments can take homes, businesses, and churches through unfair use of eminent domain. They can also take away your property value with the stroke of a pen.
- It's wrong for senior citizens, small business owners, or anyone who can't fight back to be forced to give up their property so wealthy developers can build giant retail stores, shopping malls, and upscale housing developments.
- *Government can also take property without compensating property owners.*
- When governments pass regulations that reduce the value of your property, it's called regulatory taking. When this happens you should be compensated by the government for your lost value.
- Government should not be able to take your home—outright or through regulations that reduce the value of your property—without it being for a legitimate PUBLIC use and without paying for what it takes.
- Proposition 90 will:
 - restore homeowners' rights that were gutted last year by the Supreme Court's outrageous *Kelo* decision.
 - return eminent domain to legitimate public uses, such as building roads, schools, firehouses, and other needs that serve the public and not the financial interests of the government and powerful developers.
 - restrict government's ability to take away people's use of their property without compensating them.
- The Protect Our Homes Act protects *all of us*—and helps families for future generations—while stopping government from taking your property simply to boost tax revenue.¹¹

⁹ Text of Proposed Proposition 90

¹⁰ Analysis of LAO

¹¹ Arguments in Favor of Proposition 90

Signors for the Arguments in Support of Prop. 90:

MIMI WALTERS, Honorary Chair, California Protect Our Homes Coalition

MARTYN B. HOPPER, California Director, National Federation of Independent Business (NFIB)

JOHN M. REVELLI, Eminent Domain Abuse Victim

Arguments of the Opponents:

- Prop. 90 would change California’s constitution to enable large landowners and corporations to demand huge payouts from state and local taxpayers just by *claiming* a law has harmed the value of their property or business—no matter how important the law may be or far-fetched the claim.
- According to William G. Hamm, formerly California’s nonpartisan legislative analyst, “PROP. 90 could require BILLIONS OF DOLLARS IN NEW TAXPAYER COSTS”
- EACH YEAR, if communities and the state continue to pass or enforce basic laws to protect neighborhoods, limit unwanted development, protect the environment, restrict unsavory businesses, and protect consumers.”
- Here’s an example of how the “taxpayer trap” works: If local voters pass a measure to limit a new development to 500 houses—instead of 2,000 houses that a developer *wants* to build—under Prop. 90, the developer could demand a payment for the value of the remaining 1,500 houses. Even if local community services and infrastructure would be strained by the larger development, Prop. 90 would put taxpayers at risk for payment.
- Prop. 90 is not just limited to land-use laws. Read the official analysis. Statewide consumer protection laws, restrictions on telemarketing, and worker protections would all trigger new demands for payouts.
- As a result, Prop. 90 would lead to thousands of expensive lawsuits that would tie up our courts and result in added bureaucracy and red tape.
- The cost of these lawsuits and payouts would rob local communities of billions of dollars.
- If communities act to protect their quality of life, taxpayers could be forced to make huge payouts. Or, if communities couldn’t afford the payouts, basic quality of-life protections simply couldn’t be enacted.¹²

Signors for the Arguments in Opposition to Prop. G:

CHIEF MICHAEL L. WARREN, President, California Fire Chiefs Association

CHIEF STEVE KRULL, President, California Police Chiefs Association

EDWARD THOMPSON, JR., California Director, American Farmland Trust

¹² Arguments in opposition of Proposition 90