

*Competing Eminent Domain Measures: Proposition 98 (California Property Owners and Farmland Protection Act) and Proposition 99 (Homeowners and Private Property Protection Act (HPPPA))*

**Board Recommendation:**

**OPPOSE Proposition 98 & 99**

**Rationale**

The SDCTA staff supports effective eminent domain reform that allows small businesses, farmers and homeowners to be compensated for the true value of their property in the event of a takeover, however rent control and eminent domain are separable issues and should be dealt with as separate initiatives. The inclusion of rent control in the measure leads us to oppose Prop 98. Opposition to Prop 99 hinges on the LAO analysis concluding that the eminent domain protection afforded by Prop 99 does not represent any effective change to eminent domain practices, and may preclude future reform efforts.

**Background:**

The United States Constitution grants government the power to seize private property for public use by declaring the property eminent domain and justly compensating the owner. Many states have since adopted caveats and more specific definitions of “public use” and “just compensation.” The California Constitution requires that just compensation, if challenged, be determined by jury, but remains relatively vague with regard to other aspects of the use of eminent domain. This allows local governments to creatively interpret when eminent domain can be used. The Castle Coalition describes California as “one of the most active states in condemning properties for the benefit of other private parties.”<sup>1</sup> The author found 223 individual properties condemned between 1998 and 2003 for the benefit of private parties and another 635 that were threatened.<sup>2</sup> (California ranked 13<sup>th</sup> among states in per-household condemnations).

In the same five years, Californian property owners have collectively challenged the designation of 125,000 acres as blighted.<sup>3</sup> For example, several Diamond City property owners sued their city after the City Council approved a redevelopment plan declaring the existing property in the proposed project area “a serious physical and economic burden to the community.” The California Appellate Court ruled in favor of the property owners, declaring it “did not perceive anything remotely resembling blight.”<sup>4</sup> Property owners have won similar lawsuits in Mammoth Lakes, Murrieta, and Upland because of deficient evidence of blight.<sup>5</sup>

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<sup>1</sup> Berliner, Dana. Public Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain. Castle Coalition. April 2003.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

Historically, California courts have protected private property from the use of eminent domain for redevelopment projects in sufficiently maintained areas. However, the freedom of judges to interpret public use as they have traditionally done was challenged in the 2005 United States Supreme Court case *Kelo v. City of New London (Kelo)*. In a 5-4 decision, the Court held that private property might be taken and transferred from one private party to another, if doing so provides significant benefit to the public as a whole. The public benefit, in contrast with public use, could be an increase in projected tax revenue. Dissenting opinions to the ruling maintain that since private companies can often use private property in a more lucrative way, *Kelo* sets a precedent for the unrestrained use of eminent domain to condemn private property.<sup>6</sup>

Critics of the ruling claimed that large firms with political influence would benefit from government property seizures at the expense of individual property owners. In response, many states have responded with more restrictive eminent domain legislation.<sup>7</sup>

Many opponents of restrictive eminent domain legislation argue that such legislation impedes economic growth opportunities available through redevelopment, although recent findings suggest that states with restricted eminent domain use have not experienced a significant decrease in development activity relative to those states without restrictions.<sup>8</sup> The report anecdotally cites the tremendous success Anaheim, California's *A-town* development project achieved by consciously avoiding the use of eminent domain.<sup>9,10</sup>

### **Resulting Issues from the *Kelo* Decision**

Directly following the controversial ruling of the *Kelo* case, states were encouraged to counter the ramifications of the ruling with their own legislation, and were clearly instructed that the Supreme Court would “defer to state legislatures in their determination of what constitutes a public use in the area of eminent domain.”<sup>11</sup>

Ultimately, the debate over eminent domain restrictions brought about by these two competing ballot measures centers around the interpretation of the phrase “public use.” Prop 98 narrowly defines this clause as “use and ownership by a public agency or a regulated public utility for the public use stated at the time of the taking.”

Conversely, Prop 99 allows a much more broad implementation of eminent domain, restricting the acquisition of property through eminent domain “of an owner occupied residence for the purpose of conveying it to a private person.” Prop 99 justifies eminent

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<sup>6</sup> Mikkelsen, Scott. Eminent Domain After *Kelo v. City of New London*: Compensating for the Supreme Court's Refusal to Enforce the Fifth Amendment.

<http://www.law.duke.edu/journals/djclpp/?action=showitem&id=36>. 1/25/07.

<sup>7</sup> Castle Coalition. Enacted Legislation Since *Kelo*.

[http://www.castlecoalition.org/index.php?option=com\\_content&task=view&id=510&Itemid=107](http://www.castlecoalition.org/index.php?option=com_content&task=view&id=510&Itemid=107). 3/7/08.

<sup>8</sup> Carpenter II, Dick and Ross, John. *Doomsday? No way: Economic Trends & Post-Kelo Eminent Domain Reform*. Institute for Justice. January 2008.

<sup>9</sup> *Ibid.*

<sup>10</sup> Greenhut, Steven. *The Anti-Kelo: A heavy government hand isn't necessary for economic development*. Wall Street Journal. <http://www.opinionjournal.com/cc/?id=110008189>. 4/6/06.

<sup>11</sup> Mikkelsen, Scott.

domain for a “public work or improvement,” defined as “facilities or infrastructure for the delivery of public services...and private uses incidental to, or necessary for, the Public work or improvement.”

### **California Property Owners and Farmland Protection Act (CPOFPA) – Prop 98:**

The CPOFPA amends the California Constitution to forbid seizure of private property such as housing, small businesses, farmlands, and places of worship for transfer to private use under almost any circumstances. Property may still be condemned when it is determined to house a nuisance or criminal activity, but the surrounding properties are protected from liberal interpretations of “blight” under CPOFPA. The proposition also disallows the taking of private property for the same public use (e.g., redeveloping private apartments into government housing) and protects family farms and open space from seizure for the purpose of selling natural resources on the property.

The proposition provides for the use of eminent domain for direct public purposes, such as the construction of roads and schools, but forbids the government from seizing more property than necessary and selling any excess to finance construction. If eminent domain is exercised, the evicted individuals would be entitled to both the property’s market value, defined by a jury, and compensation for temporary business losses, relocation costs, and other reasonable expenses. The payment must be released promptly, while the individual still retains the right to challenge the amount’s sufficiency. This gives homeowners the right to receive necessary funds, while retaining the right to demand fair reparations.

If a public agency abandons its plans for the property after seizure, it must offer to sell the property back to the former owner for the originally assessed cost and property tax at which the public agency purchased the property. This protects the former owner from having to pay for rising land prices that occurred while the land was publicly owned.

Additionally, the proposition phases out rent control laws throughout the state by restricting governments from setting the sale or lease prices of private property. However, property agreements enacted before January 1, 2007 would be honored until the owner or tenant vacated. While critics of Prop 98 declare this clause as hidden and unnecessary, it addresses a potential loophole described in the next section.

The proposed ballot measure will not affect environmental safeguards, health and public safety protections, workplace laws, voter authority over land use and planning decisions, or governmental regulatory authority over public nuisances and criminal activity.

### **Howard Jarvis (Prop 98 Proponents) Summary<sup>12</sup>**

Below is a direct citation of the Proponents’ description of Prop 98:

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<sup>12</sup> Howard Jarvis Taxpayers Association. <http://www.yesonpropertyrights.com>

- Private property may not be taken by eminent domain for private use under any circumstances (i.e. to build a shopping center, auto mall or industrial park).
- Property may be taken by eminent domain only for public use (i.e. freeway construction, parks, schools).
- Property may not be taken by government and used for the same purposes (i.e. residential housing cannot be used for government housing).
- Family farms and open space are protected from seizures by government for the purpose of selling the natural resources.
- If a public agency takes property under false pretenses, or abandons its plans, the property must be offered for sale to the original owner at the original price and the property tax would be assessed at the value of the property when it was originally condemned.
- If farmers or business owners are evicted by eminent domain, they would be entitled to compensation for temporary business losses, relocation expenses, business reestablishment costs and other reasonable expenses.
- Government may not set the price at which property owners sell or lease their property.

### **LAO Analysis of Prop 98:**

The State Legislative Analyst's Office estimates that because of the eminent domain reform, "many governments would have net increased costs to acquire property, but that the net statewide fiscal effect probably would not be significant."<sup>13</sup>

With respect to the rent control provisions, the State Legislative Analyst's Office concludes, "the fiscal effect on state and local governments associated with these changes in rent control and other policies is not possible to determine, but there probably would be increased costs to many governments. The net statewide fiscal effect, however, probably would not be significant."<sup>14</sup> The increased costs faced by some municipalities may occur if they choose to respond to the elimination of rent control by publicly subsidizing additional for low-income residents.

### **Rent Control Restrictions<sup>15</sup>**

The imposition of rent control by local governments equates to setting a price ceiling below the market value of a property to a given portion of the market. The market effects of rent control are briefly discussed below, however, an eventual decrease in a property's market value represents the economic impact on rent-controlled properties that are most relevant to Proposition 98 and 99.<sup>16</sup>

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<sup>13</sup> California Legislative Analyst's Office. *Proposition 98: Government Acquisition, Regulation of Private Property*. [http://www.lao.ca.gov/ballot/2008/98\\_06\\_2008.aspx](http://www.lao.ca.gov/ballot/2008/98_06_2008.aspx). 2/14/08.

<sup>14</sup> Ibid.

<sup>15</sup> Tucker, William. "How Rent Control Drives Out Affordable Housing." *Individual Liberty, Free Markets, and Peace*. The CATO Institute, Policy Analysis 274. 1997.  
<http://www.cato.org/pubs/pas/pa-274.html>

<sup>16</sup> Block, Walter. Rent Control. <http://www.econlib.org/Library/Enc/RentControl.html>. 2/29/2008.

The imposition of rent control policies immediately causes a shortage for mandated low-price housing. If the revenue gained by renting out a price-controlled unit does not exceed the cost of maintenance, a rational owner may let the property deteriorate. Even with restrictions placed on government eminent domain seizures, local governments may declare sufficiently neglected and deteriorated properties blighted, enabling a takeover for redevelopment. Another party may then obtain the property at a below market rate caused by the imposition of rent controls, and upon their removal, experience skyrocketing property values.

Additionally, for the housing market as a whole, rent control has been shown to create “shadow economies” that arise to absorb the shortage of low-priced housing caused by imposed rent controls. The prices in the shadow economies are driven upwards to compensate for the excess number of individuals remaining in the market (increased demand) resulting from the imposition of rent control. The overall result achieved by rent control is the subsidization of a small number of individuals at the expense of the vast majority of the housing market. The control distorts market prices and causes the number of units available in the market that fall above the median price to increase substantially.

### **Homeowners and Private Property Protection Act (HPPPA) – Prop 99:**

The State Legislative Analyst’s Office states that Prop 99 “would not change significantly current government land acquisition practices,”<sup>17,18</sup> in that the protections included in the HPPPA only apply to owner-occupied homes that have been the individual’s primary residence for at least one year. The LAO points out that “[u]nder current law and practice, government seldom uses eminent domain to acquire single-family homes,” and that when it does so, providing public goods (i.e. permissible circumstances for eminent domain use) represents the rationale behind the exercise of eminent domain.

As opposed to the CPOFPA, Prop 99 does not include protections for small businesses, farmland, or places of worship, and would allow government seizure of private property for its current use. For example, the HPPPA would not protect Conaway Ranch from seizure by Yolo County for use of its resources. In comparison, the COPFPA protects all homeowners, businesses, farmlands, and places of worship from government seizure for private transfer or similar usage.

In the situation of a “quick-take” government seizure, the HPPPA does not require that the government promptly release funds to the owner, nor does it allow the owner to challenge the sufficiency of the amount without surrendering the right to a prompt release of funds. The owner would not be entitled to reimbursement of other costs, such as compensation for temporary business losses and relocation expenses. In contrast, the COPFPA entitles the owner to a prompt release of the money offered, while still allowing the individual to retain

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<sup>17</sup> California Legislative Analyst’s Office. *Proposition 99: Eminent Domain. Acquisition of Owner-Occupied Residence*. [http://www.lao.ca.gov/ballot/2008/99\\_06\\_2008.aspx](http://www.lao.ca.gov/ballot/2008/99_06_2008.aspx). 2/14/08.

<sup>18</sup> California Legislative Analyst’s Office. 2007 Initiative Analysis: Homeowners and Private Property Protection Act. June 19, 2007.

the right to challenge the amount of money paid; it also reimburses owners for indirect seizure costs.

One significant loophole in the HPPPA allows private property to be taken and transferred for incidental use in a public improvement project, if the relevant governmental agency deems doing so is necessary for project feasibility. For example, an agency could take more land than necessary to build a freeway and then sell off the excess to finance the construction. The COPFPA has no such loophole; it only permits government seizure of property on land that will actually be utilized for the relevant public project(s).

**Prop 99 Proponents' Arguments Against Prop 98<sup>19</sup>:**

- Prop 98 will likely eliminate tenant protection laws, including: laws governing return of rental deposits, tenant notice periods, and protections from termination of tenancy.
- Particularly object to the section of Prop 98 that states: “regulation of the ownership, occupancy or use of privately owned real property or associated property rights in order to transfer economic benefit to one or more private person at the expense of the property owner.” They go on to state “nearly all regulation provides a benefit to some private person” further explaining that “a court could interpret it to restrict a host of environmental and land-use regulations.”
- Prop 98 contains a clause prohibiting “transfer of ownership, occupancy, or use of private property or associated property rights to a public agency for the consumption of natural resources or for the same or a substantially similar use as that made by the private owner.” Prop 99 proponents state, “Since virtually all elements of a public water project involve the “consumption of natural resources”, Prop 98 would prohibit property acquisitions for public water projects.”

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<sup>19</sup> “Comparison of Prop 98 and Prop 99.” No 98/Yes99. [www.EminentDomainReform.com](http://www.EminentDomainReform.com)

### Fiscal Impact of Prop 99:

The State Legislative Analyst's Office states, "The net fiscal effect ... would not be significant."<sup>20</sup>

<b>Figure 1: Comparison between CPOFPA and HPPPA</b>		
	CPOFPA (98)	HPPPA (99)
Constitutional amendment?	Yes	Yes
Protects most single-family homes from transfer to private developers?	Yes	Yes
Significant fiscal impact on state or local governments?	No	No
Restricts health and safety regulation?	No	No
Protects all property owners from redevelopment projects unrelated to "blight" or public works?	Yes	No
Phases out rent control?	Yes	No
Guarantees compensation to small business owners for temporary business losses and relocation expenses?	Yes	No
Protects property owners from fundraising-related incidental land seizures?	Yes	No
Abandonment price protection for previous owner?	Yes	No
Prevents "same use" government seizures?	Yes	No
If both approved, nullifies protections from competing proposition?	No	Yes

### Proponents for CPOFPA

Californians for Property Rights Protection is a coalition including:

- Howard Jarvis Taxpayers Association
- California Farm Bureau Federation
- California Alliance to Protect Private Property Rights

### Proponents for HPPPA

Eminent Domain Reform is a coalition including:

- League of California Cities
- League of California Homeowners
- California League of Conservation Voters

<sup>20</sup> California Legislative Analyst's Office. *Proposition 99: Eminent Domain. Acquisition of Owner-Occupied Residence*. [http://www.lao.ca.gov/ballot/2008/99\\_06\\_2008.aspx](http://www.lao.ca.gov/ballot/2008/99_06_2008.aspx). 2/14/08.