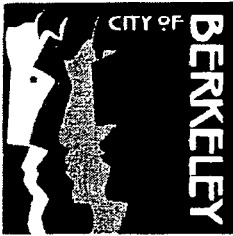


Office of the City Manager

TO BE DELIVERED AGENDA MATERIAL

Meeting Date: September 19, 2006
Item Number: 29
Item Description: Impacts of Proposition 90



Office of the City Manager

INFORMATION CALENDAR
September 19, 2006

To: Honorable Mayor and
Members of the City Council

From: *PK* Phil Kamlarz, City Manager

Submitted by: Dan Marks, AICP, Director, Planning and Development Department

Subject: Proposition 90 – November Ballot Initiative

INTRODUCTION

Proposition 90 would amend the state's Constitution to limit the use of eminent domain, set a new standard for the price governments must pay for property obtained through eminent domain, and require public agencies to compensate property owners for losses attributable to new laws and regulations. The measure applies to all types of property, not just real estate, and to all state and local governments, including schools.

As you may be aware, Proposition 90 has qualified for the state ballot in November. The proposition is titled the "Protect Our Homes" Act. This proposition responds to some public sentiment after the overturning a couple of year's ago of Oregon's 1970's Urban Growth Boundary laws, and last year's Supreme Court eminent domain decision in *Kelo v. New London* (Connecticut), that affirmed a government agency's taking of land for economic development purposes. If passed, the legislation would become effective the day after the election, or November 8, 2006.

On its face it is a proposal to significantly limit public agencies power of eminent domain. However, a careful reading of the text indicates that it may also significantly reduce a local jurisdiction's ability to manage and determine land use through zoning and other controls. Cities will likely not be able to modify or create regulations (land use or otherwise) without compensating property owners for possible "damages that result in substantial loss of value." In other words, a jurisdiction would have to pay damages to property owners who successfully argue that the adoption or modification of a particular regulation has effectively reduced the value of a property (such as new discretionary limitations and/or "downzoning"). The language isn't just limited to legislation such as zoning. More broadly interpreted, the legislation would apply to any law, rule, or decision that affected private property value, and even intellectual property.

CURRENT SITUATION AND ITS EFFECTS

There are several policy initiatives currently underway that would likely be subject to Prop 90 constraints. They include the proposed density bonus subcommittee's reductions in building envelopes and new discretionary requirements, and also the recommendations relevant to Major

Residential Additions. Legislation for these two items is being brought to Council as quickly as possible so those subcommittee's are not in vain (if Prop 90 passes), and the Council has an opportunity to at least consider these issues. In addition, the Southside Plan could also be affected. Staff is not able to bring that plan and legislation to bear more quickly because an EIR is in progress.

BACKGROUND

As noted above, this proposition responds to some public sentiment after the overturning a couple of year's ago of Oregon's 1970's Urban Growth Boundary laws, and last year's Supreme Court eminent domain decision in *Kelo v. New London* (Connecticut), that affirmed a government agency's taking of land for economic development purposes.

POSSIBLE FUTURE ACTION

The Council could agendaize this item for future action. Future action could include a statement of either opposition or support for the proposed proposition.

FISCAL IMPACTS OF POSSIBLE FUTURE ACTION

Fiscal impacts are unknown, but likely significant given the sweeping nature of the proposed legislation. In addition, the City would likely need to create a "filtering" process that would identify potential damages to private property that might result from any piece of proposed legislation that the Council might consider in the future.

CONTACT PERSON

Mark Rhoades, AICP, Land Use Planning Manager – 981-7411

Attachments:

- 1: Proposition 90 Legislation
- 2: State LAO's Analysis
- 3: California Budget Project Analysis

ITEM #29

Impacts of Proposition 90

Attachments

- 1: Proposition 90 Legislation
- 2: State LAO's Analysis
- 3: California Budget Project Analysis

Proposition 90 Initiative Text

Government Acquisition, Regulation of Private Property. Initiative Constitutional Amendment.

Summary Date: 02/16/06 Circulation Deadline: 07/17/06 Signatures Required: 598,105

Proponent: Anita S. Anderson

Bars state and local governments from condemning or damaging private property to promote other private projects, 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. Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local governments: Unknown, but potentially significant major future costs for state and local governments to pay damages and/or modify regulatory or other policies to conform to the measure's provisions. Unknown, potentially major changes in governmental costs to acquire property for public purposes. (SA2005RF0146.)

Initiative Language

Section 1. STATEMENT OF FINDINGS

- (a) The California Constitution provides that no person shall be deprived of property without due process of law and allows government to take or damage private property only for a public use and only after payment to the property owner of just compensation.
- (b) Despite these constitutional protections, state and local governments have undermined private property rights through an excessive use of eminent domain power and the regulation of private property for purposes unrelated to public health and safety.
- (c) Neither the federal nor the California courts have protected the full scope of private property rights found in the state constitution. The courts have allowed local governments to exercise eminent domain powers to advance private economic interests in the face of protests from affected homeowners and neighborhood groups. The courts have not required government to pay compensation to property owners when enacting statutes, charter provisions, ordinances, resolutions, laws, rules or regulations not related to public health and safety that reduce the value of private property.
- (d) As currently structured, the judicial process in California available to property owners to pursue property rights claims is cumbersome and costly.

Section 2. STATEMENT OF PURPOSE

- (a) The power of eminent domain available to government in California shall be limited to projects of public use. Examples of public use projects include, but are not limited to, road construction, the creation of public parks, the creation of public facilities, land-use planning, property zoning, and actions to preserve the public health and safety.
- (b) Public use projects that the government assigns, contracts or otherwise arranges for private entities to perform shall retain the power of eminent domain. Examples of public

use projects that private entities perform include, but are not limited to, the construction and operation of private toll roads and privately-owned prison facilities. (c) Whenever government takes or damages private property for a public use, the owner of any affected property shall receive just compensation for the property taken or damaged. Just compensation shall be set at fair market value for property taken and diminution of fair market value for property damaged. Whenever a property owner and the government can not agree on fair compensation, the California courts shall provide through a jury trial a fair and timely process for the settlement of disputes. (d) This constitutional amendment shall apply prospectively. Its terms shall apply to any eminent domain proceeding brought by a public agency not yet subject to a final adjudication. No statute, charter provision, ordinance, resolution, law, rule or regulation in effect on the date of enactment that results or has resulted in a substantial loss to the value of private property shall be subject to the new provisions of Section 19 of Article 1. (e) Therefore, the people of the state of California hereby enact "The Protect Our Homes Act."

Section 3. AMENDMENT TO THE CALIFORNIA CONSTITUTION

Section 19 of Article I of the state constitution is amended to read:

SEC. 19. (a)(1) Private property may be taken or damaged only for a stated public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. Private property may not be taken or damaged for private use.

(2) Property taken by eminent domain shall be owned and occupied by the condemnor, or another governmental agency utilizing the property for the stated public use by agreement with the condemnor, or may be leased to entities that are regulated by the Public Utilities Commission or any other entity that the government assigns, contracts or arranges with to perform a public use project. All property that is taken by eminent domain shall be used only for the stated public use.

(3) If any property taken through eminent domain after the effective date of this subdivision ceases to be used for the stated public use, the former owner of the property or a beneficiary or an heir, if a beneficiary or heir has been designated for this purpose, shall have the right to reacquire the property for the fair market value of the property before the property may be otherwise sold or transferred. Notwithstanding subdivision (a) of Section 2 of Article XIII A, upon reacquisition the property shall be appraised by the assessor for purposes of property taxation at its base year value, with any authorized adjustments, as had been last determined in accordance with Article XIII A at the time the property was acquired by the condemnor. (4) The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

(b) For purposes of applying this section:

1. "Public use" shall have a distinct and more narrow meaning than the term "public purpose;" its limiting effect 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 these uses may serve otherwise legitimate public purposes.

2. Public use shall not include the direct or indirect transfer of any possessory interest in property taken in an eminent domain proceeding from one private party to another private party unless that transfer proceeds pursuant to a government assignment, contract or arrangement with a private entity whereby the private entity performs a public use project. In all eminent domain actions, the government shall have the burden to prove public use.

3. Unpublished eminent domain judicial opinions or orders shall be null and void.

4. In all eminent domain actions, prior to the government's occupancy, a property owner shall be given copies of all appraisals by the government and shall be entitled, at the property owner's election, to a separate and distinct determination by a superior court jury, as to whether the taking is actually for a public use.

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.

6. In all eminent domain actions, just compensation shall be defined as that sum of money necessary to place the property owner in the same position monetarily, without any governmental offsets, as if the property had never been taken. Just compensation shall include, but is not limited to, compounded interest and all reasonable costs and expenses actually incurred.

7. In all eminent domain actions, fair market value shall be defined as the highest price the property would bring on the open market.

8. Except when taken to protect public health and safety, "damage" to private property includes government actions that result in substantial economic loss to private property. Examples of substantial economic loss include, but are not limited to, the down zoning of private property, the elimination of any access to private property, and limitations on the use of private air space. "Government action" shall mean any statute, charter provision, ordinance, resolution, law, rule or regulation.

9. A property owner shall not be liable to the government for attorney fees or costs in any eminent domain action.

10. For all provisions contained in this section, government shall be defined as the State of California, its political subdivisions, agencies, any public or private agent acting on their behalf, and any public or private entity that has the power of eminent domain.

(c) Nothing in this section shall prohibit the California Public Utilities Commission from regulating public utility rates. (d) Nothing in this section shall restrict administrative powers to take or damage private property under a declared state of emergency. (e) Nothing in this section shall prohibit the use of condemnation powers to abate nuisances such as blight, obscenity, pornography, hazardous substances or environmental conditions provided those condemnations are limited to abatement of specific conditions on specific parcels.

Section 4. IMPLEMENTATION AND AMENDMENT

This section shall be self-executing. The Legislature may adopt laws to further the purposes of this section and aid in its implementation. No amendment to this section may be made except by a vote of the people pursuant to Article II or Article XVIII.

Section 5. SEVERABILITY

The provisions of this section are severable. If any provision of this section or its application is held invalid, that finding shall not affect other provisions or applications that can be given effect without the invalid provision or application.

Section 6. EFFECTIVE DATE

This section shall become effective on the day following the election pursuant to section 10(a) of Article II. The provisions of this section shall apply immediately to any eminent domain proceeding by a public agency in which there has been no final adjudication. Other than eminent domain powers, the provisions added to this section shall not apply to any statute, charter provision, ordinance, resolution, law, rule or regulation in effect on the date of enactment that results in substantial economic loss to private property. Any statute, charter provision, ordinance, resolution, law, rule or regulation in effect on the date of enactment that is amended after the date of enactment shall continue to be exempt from the provisions added to this section provided that the amendment both serves to promote the original policy of the statute, charter provision, ordinance, resolution, law, rule or regulation and does not significantly broaden the scope of application of the statute, charter provision, ordinance, resolution, law, rule or regulation being amended. The governmental entity making the amendment shall make a declaration contemporaneously with enactment of the amendment that the amendment promotes the original policy of the statute, charter provision, ordinance, resolution, law, rule or regulation and does not significantly broaden its scope of application. The question of whether an amendment significantly broadens the scope of application is subject to judicial review.

Proposition 90
Government Acquisition, Regulation of Private Property.
Initiative Constitutional Amendment.

SUMMARY

This measure amends the California Constitution to:

- Require government to pay property owners for substantial economic losses resulting from some new laws and rules.
- Limit government authority to take ownership of private property.

This measure applies to all types of private property, including homes, buildings, land, cars, and "intangible" property (such as ownership of a business or patent). The measure's requirements apply to all state and local governmental agencies.

PAYING PROPERTY OWNERS FOR ECONOMIC LOSSES

State and local governments pass laws and other rules to benefit the overall public health, safety, or welfare of the community, including its long-term economy. (In this analysis, we use the term "laws and rules" to cover a variety of government requirements, including statutes, ordinances, and regulations.)

In some cases, government requirements can reduce the value of private property. This can be the case, for example, with laws and rules that (1) limit development on a homeowner's property, (2) require industries to change their operations to reduce pollution, or (3) restrict apartment rents.

Proposal

This measure requires government to pay property owners if it passes certain new laws or rules that result in substantial economic losses to their property. Below, we discuss the types of laws and rules that would be exempt from the measure's requirements and those that might require government compensation.

What Laws and Rules *Would Not* Require Compensation?

All *existing* laws and rules would be exempt from the measure's compensation requirement. New laws and rules also would be exempt from this requirement if government enacted them: (1) to protect public health and safety, (2) under a declared state of emergency, or (3) as part of rate regulation by the California Public Utilities Commission.

What Laws and Rules *Could* Require Compensation?

While the terms of the measure are not clear, the measure provides three examples of the types of new laws and rules that could require compensation. These examples relate to land use and development and are summarized below.

- ***Downzoning Property.*** This term refers to decisions by government to reduce the amount of development permitted on a parcel. For example, a government action to allow construction of three homes on an acre where five homes previously had been permitted commonly is called "downzoning."
- ***Limitations on the Use of Private Air Space.*** This term generally refers to actions by government that limit the height of a building. For example, a government rule limiting how tall a building may be to preserve views or maintain historical character often is called a limitation of "air space."
- ***Eliminating Any Access to Private Property.*** This term could include actions such as closing the only public road leading to a parcel.

In addition to the examples cited above, the broad language of the measure suggests that its provisions could apply to a variety of future governmental requirements that impose economic losses on property owners. These laws and rules could include requirements relating, for example, to employment conditions, apartment prices, endangered species, historical preservation, and consumer financial protection.

Would Government Pay Property Owners for All Losses?

Under current law and court rulings, government usually is required to compensate property owners for losses resulting from laws or rules if government's action deprives the owners of virtually all beneficial use of the property.

This measure specifies that government must pay property owners if a new law or rule imposes "substantial economic losses" on the owners. While the measure does not define this term, dictionaries define "substantial" to be a level that is fairly large or considerable. Thus, the measure appears to require government to pay property owners for the costs of many more laws and rules than it does today, but would not require government to pay for smaller (or less than substantial) losses.

Effects on State and Local Governments

The measure's provisions regarding economic losses could have a major effect on future state and local government policymaking and costs. The amount and nature of these effects, however, is difficult to determine as it would depend on how the courts interpreted the measure's provisions and how the Legislature implemented it. Most notably:

- ***How Many Laws and Rules Would Be Exempt From the Requirement That Government Pay Property Owners for Losses?*** The measure does not require government to compensate property owners under certain circumstances

(such as actions to protect public health and safety). If these exemptions were interpreted broadly (rather than narrowly), fewer new laws and rules could require compensation.

- ***How Big Is a Substantial Economic Loss?*** If relatively small losses (say, less than a 10 percent reduction in fair market value) to a property owner required compensation, government could be required to pay many property owners for costs resulting from new laws and rules. On the other hand, if courts ruled that a loss must exceed 50 percent of fair market value to be a substantial economic loss, government would be required to pay fewer property owners.

Under the measure, state and local governments probably would modify their policymaking practices to try to avoid the costs of compensating property owners for losses. In some cases, government might decide not to create laws and rules because of these costs. In other cases, government might take alternative approaches to achieving its goals. For example, government could:

- Give property owners incentives to voluntarily carry out public objectives.
- Reduce the scope of government requirements so that any property owners' losses were not substantial.
- Link the new law or rule directly to a public health and safety (or other exempt) purpose.

There probably would be many cases, however, where government would incur additional costs as a result of the measure. These would include situations where government anticipated costs to compensate property owners at the time it passed a law—as well as cases when government did not expect to incur these costs. The total amount of these payments by government to property owners cannot be determined, but could be significant on a statewide basis.

LIMITING GOVERNMENT AUTHORITY TO TAKE PROPERTY

Eminent domain (also called "condemnation") is the power of local, state, and federal governments to take private property for a public use so long as government compensates the property owner. (In some cases, government has given the power of eminent domain to private entities, including telephone and energy companies and nonprofit hospitals. In this analysis, these private entities are included within the meaning of "government.")

Over the years, government has taken private property to build roads, schools, parks, and other public facilities. In addition to these uses of eminent domain, government also has taken property for public purposes that do not include construction of public facilities. For example, government has taken property to: help develop higher value businesses in an area, correct environmental problems, enhance

tax revenues, and address "public nuisances" (such as hazardous buildings, blight, and criminal activity).

Proposal

This measure makes significant changes to government authority to take property, including:

- Restricting the purposes for which government may take property.
- Increasing the amount that government must pay property owners.
- Requiring government to sell property back to its original owners under certain circumstances.

Below, we discuss the major changes proposed by the measure, beginning with the situations under which government could—and could not—take property.

Under What Circumstance Could Government Take Property?

Under the measure, government could take private property to build public roads, schools, parks, and other government-owned public facilities. Government also could take property and lease it to a private entity to provide a public service (such as the construction and operation of a toll road). If a public nuisance existed on a specific parcel of land, government could take that parcel to correct the public nuisance. Finally, government could take property as needed to respond to a declared state of emergency.

What Property Takings Would Be Prohibited?

Before taking property, the measure requires government to state a "public use" for the property. The measure narrows the definition of public use in a way that generally would prevent government from taking a property:

- *To Transfer it to Private Use.* The measure specifies that government must maintain ownership of the property and use it only for the public use it specified when it took the property.
- *To Address a Public Nuisance, Unless the Public Nuisance Existed on That Particular Property.* For example, government could not take *all* the parcels in a run-down area unless it showed that each and every parcel was blighted.
- *As Part of a Plan to Change the Type of Businesses in an Area or Increase Tax Revenues.* For example, government could not take property to promote development of a new retail or tourist destination area.

In any legal challenge regarding a property taking, government would be required to prove to a jury that the taking is for a public use as defined by this measure. In addition, courts could not hold property owners liable to pay government's attorney fees or other legal costs if the property owner loses a legal challenge.

How Much Would Government Have to Pay Property Owners?

Current law requires government to pay "just compensation" to the owner before taking property. Just compensation includes money to reimburse the owner for the property's "fair market value" (what the property and its improvements would sell for on an open market), plus any reduction in the value of remaining portions of the parcel that government did not take. State law also requires government to compensate property owners and renters for moving costs and some business costs and losses.

The measure appears to increase the amount of money government must pay when it takes property. Under the measure, for example, government would be required to pay more than a property's fair market value if a greater sum were necessary to place the property owner "in the same position monetarily" as if the property had never been taken. The measure also appears to make property owners eligible for reimbursement for a wider range of costs and expenses associated with the property taking than is currently the case.

When Would Government Sell Properties to Former Owners?

If government stopped using property for the purpose it stated at the time it took the property, the former owner of the property (or an heir) would have the right to buy back the property. The property would be assessed for property tax purposes as if the former owner had owned the property continuously.

Effects on State and Local Governments

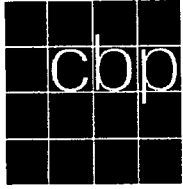
Government buys many hundreds of millions of dollars of property from private owners annually. Relatively few properties are acquired using government's eminent domain power. Instead, government buys most of this property from *willing* sellers. (Property owners often are aware, however, that government could take the property by eminent domain if they did not negotiate a mutually agreeable sale.)

A substantial amount of the property that government acquires is used for roads, schools, or other purposes that meet the public use requirements of this measure—or is acquired to address specific public nuisances. In these cases, the measure would not reduce government's authority to take property. The measure, however, likely would increase somewhat the amount that government must pay property owners to take their property. In addition, the measure could result in willing sellers increasing their asking prices. (This is because sellers could demand the amount that they would have received if the property were taken by eminent domain.) The resulting increase in government's costs to acquire property cannot be determined, but could be significant.

The rest of the property government acquires is used for purposes that do not meet the requirements of this measure. In these cases, government could not use eminent domain and could acquire property only by negotiating with property owners on a voluntary basis. If property owners demanded selling prices that were more than the amount government previously would have paid, government's spending to acquire

property would increase. Alternatively, if property owners did not wish to sell their property and no other suitable property was available for government to purchase, government's spending to acquire property would decrease.

Overall, the net impact of the limits on government's authority to take property is unknown. We estimate, however, that it is likely to result in significant net costs on a statewide basis.



MORE THAN MEETS THE EYE: WHAT WOULD PROPOSITION 90 MEAN FOR CALIFORNIA?

Proposition 90, which will appear on the November 2006 ballot, would make a number of changes to the state's Constitution. These changes would limit the circumstances under which government agencies can use eminent domain to obtain property, increase the amount governments pay for property when they use eminent domain, and require the state and local governments to pay property owners if changes in laws, rules, or regulations substantially diminish the value of property. Proposition 90 is sponsored by Anita Anderson with significant financial backing from the New York-based Fund for Democracy, led by the founder of US Term Limits and Chairman of Americans for Limited Government Howard Rich, and a Montana-based political group, Montanans in Action.¹ The California Budget Project neither supports nor opposes Proposition 90.

What Does Proposition 90 Do?

Proposition 90 would amend the state's Constitution to limit the use of eminent domain, set a new standard for the price governments must pay for property obtained through eminent domain, and require public agencies to compensate property owners for losses attributable to new laws and regulations. The measure applies to all types of property, not just real estate, and to all state and local governments, including schools. The major provisions of Proposition 90 are described below.

Require the State or Local Governments to Compensate Property Owners if New Laws or Regulations Diminish Property Values

Proposition 90 would require the state or local governments to compensate a property owners for any "substantial economic loss" attributable to new laws, rules, or regulations. This provision would apply to any change in public policy, unless the action is required to protect public health and safety or occurs during a declared state of emergency. However, the term "public health and safety" is not defined and thus its meaning would likely be established through court decisions. Proposition 90

specifically states that compensation would be required in the event of changes in zoning, public access rules, or limits on the use of airspace.² Proposition 90 would apply to all types of property, including land, cars, buildings, and "intangible" property, such as ownership of a business or a patent.

Restrict the Use of Eminent Domain

Proposition 90 would:

- Specify that eminent domain could only be used by a public agency to acquire property for a "stated public use" and states that this provision is intended to exclude transactions that might serve a "public purpose," without involving actual "public use." Proposition 90 states that eminent domain could not be used to acquire property that would be transferred to private owners for "economic development or tax revenue enhancement grounds."
- Require a "stated use" in order for any privately owned property to be taken for a public purpose. Under current law, the state and local governments are not required to disclose how they use property acquired through eminent domain.

Public Purpose, Public Use, Stated Purpose: What's the Difference?

Proposition 90 would restrict the use of eminent domain to projects with a "public use." It would also require that public agencies state the specific purpose that property obtained through eminent domain would be used for.

- **Public Purpose.** The 5th Amendment of the US Constitution states that private property cannot be taken for a public purpose without just compensation. Over time, courts have debated what constitutes a "public purpose" and "just compensation." Generally speaking, courts have allowed public agencies to obtain property from unwilling sellers using eminent domain as long as the result has a benefit to the public. This interpretation, for example, has allowed public agencies to use eminent domain to obtain property from one private owner that is then transferred to another private owner with the goal of economic development citing the benefits of added jobs and/or tax revenues.
- **Public Use.** Proposition 90 restricts the use of eminent domain to acquisition of property that will be used for a project that has a distinctly governmental use, such as a school, jail, road, or other public facility. It would ban the use of eminent domain to obtain property that is subsequently transferred to another private owner for economic development or other tax revenue enhancement purposes. The measure's text and statement of purpose note that eminent domain could be used to obtain property that is then transferred or leased to private owners if that property is used for a function typically fulfilled by government, such as a privately-owned prison or toll road. It could not be leased or transferred to a private owner for purpose that is not typically governmental, such as a shopping center or factory.
- **Stated Purpose.** Proposition 90 requires public agencies to identify the purpose that property obtained by eminent domain would be used for, such as a school, park, or highway. If a public agency decides not to use property for that purpose, or uses it for that purpose for some number of years and later decides that it is no longer needed for that purpose, the former owner would have the right to purchase the property at fair market value.

- Prohibit public agencies from acquiring privately-owned property for private use. Public agencies would be allowed to lease acquired property to a private entity or to a utility regulated by the Public Utilities Commission. Public agencies would be allowed to use eminent domain to obtain property that is then used by a private contractor to provide services that are traditionally performed by government. The measure's statement of purpose, for example, notes that eminent domain could be used to obtain property that would be used for private toll roads or privately-owned prison facilities.
- Give the former landowner the first right to purchase property at fair market value if a public agency ceases to use property that is acquired through eminent domain.
- State that unpublished court rulings addressing the issue of eminent domain have no standing.
- Allow a property owner to request a jury trial to determine whether the acquisition or damage of property through eminent domain is truly for a public use.
- Not apply to the use of eminent domain to condemn property that is damaged due to a declared state of emergency or to property condemned to abate specified nuisances.

Increase the Price That State and Local Governments Pay When They Acquire Property

Proposition 90 would require public agencies using eminent domain to pay property owners the highest price that the sale of the property would bring on the open market plus the cost of any legal fees and other expenses incurred by the property owner. The value of property acquired through eminent domain would be based on "highest and best use." For property taken for a proprietary purpose, the value would depend on "the use to which the government intends to put the property, if such use results in a higher value for the land taken." For example, if a vacant parcel is condemned to build a school or hospital, the value of the land would be based on the use of the property once it is developed. Similarly, if a parcel of vacant land is acquired for use as a toll road, the price of the property would be based on the value of the property assuming the toll road is in place.

What Types of Public Actions Might Require Compensation if Proposition 90 Is Enacted?

The most potentially far-reaching provisions of Proposition 90 are those that require local governments or the state to compensate property owners due to changes in laws, rules, or regulations that

What Is Eminent Domain?

The power of eminent domain allows local, state, or the federal government to purchase – or condemn – property for public use if it compensates the owner for the value of the property. Typically, eminent domain is used to obtain property that an owner is not willing to sell voluntarily. Public agencies use eminent domain to acquire property for schools, roads, parks, and other public facilities. Public agencies have also used eminent domain to acquire private property that is then transferred to a different owner for private purposes, for example, when a redevelopment agency purchases property owned by a private business for use as part of a higher value economic development effort.

Much of the current controversy over eminent domain results from its use for economic development purposes. In 2005, the US Supreme Court allowed, in *Kelo v. City of New London* (125 S. Ct. 2655, June 23, 2005), a city to use eminent domain to acquire the property of a landowner who did not wish to sell in order to allow the property to be used by another private business. The *Kelo* decision found that a “public purpose” was served by the use of eminent domain. In this instance, the city argued, and the court agreed, that acquisition of the property would lead to job creation and higher tax revenues and that these outcomes served a valid public purpose.

result in substantial economic losses. The measure identifies three circumstances – down zoning of property, elimination of access to property, or limits on the use of air space – that might require a government to pay for “damage” done to a property owner.³ However, Proposition 90 also states the types of government actions that could require payment would include “any statute, charter provision, ordinance, resolution, law, rule, or regulation.”

Unlike similar measures in other states, the scope of Proposition 90 extends beyond the regulation of land use. The Legislative Analyst’s Office (LAO) notes, “These laws and rules could include requirements relating, for example, to employment conditions, apartment prices, endangered species, historical preservation, and consumer financial protection.”⁴ Proposition 90 would apply to economic losses attributable to “damage” to intangible, as well as tangible, property – such as the value of a business or patent – as well as that to land, building, vehicles, and other goods. For example, banks could argue that a law that limited the fees that could be charged for automatic teller machine (ATM) transactions diminished the value of ATM machines and the property where they are located, thus requiring compensation. Similarly, the owner of a fast food restaurant could claim that an increase in the state’s minimum wage increased his or her cost of doing business and the owner of a childcare center could argue that new laws increasing teacher to child staffing ratios led to substantial economic losses. The state could then be required to reimburse the property owner for her or his loss.

Payment would be required under all circumstances except those “taken to protect public health and safety” or “during a declared state of emergency.”⁵ It is unclear, however, how broadly this exception might be applied since the term public health and safety is not defined. Would, for example, a zoning change that prohibits certain types of development on flood-prone land be

considered an action that protects health and safety? How flood-prone would land have to be to qualify for the exception? Similarly, the owner of an apartment building close to a park or school could contend that a ballot measure that limits his or her ability to rent to a registered sex offender could result in a significant economic loss if the property owner believed that such an individual would pay substantially higher rent than the owner could obtain on the open market. Again, it is unclear whether such an action would be considered in the interest of public health and safety.

How Large Would a Loss Have to Be to Require Payment?

Proposition 90 requires property owners to be paid for any change in a law or regulation that results in “substantial economic loss.” The measure does not define how large a loss must be to be “substantial.” For example, it isn’t clear whether a large percentage loss of value would be required to initiate payment or whether a small percentage loss of a very valuable property would be sufficient. Would, for example, a one percent reduction in the value of a \$100 million property be sufficient to require reimbursement? In the absence of a definition, the meaning of “substantial” would likely be determined by litigation resulting from lawsuits filed by property owners claiming losses from a range of public actions. The LAO notes that, “The total amount of these payments by government to property owners cannot be determined, but could be significant on a statewide basis.”⁶

How Would Proposition 90 Affect Eminent Domain?

Proposition 90 would require that public agencies use property acquired through eminent domain for a “stated public use.”

Oregon's Measure 37

In 2004, Oregon approved a ballot measure with provisions similar to, but narrower than, those in Proposition 90 requiring public agencies to compensate landowners for economic losses. The Oregon measure applies only to changes in land-use laws and regulations, whereas Proposition 90 applies to any change in laws, regulations, or rules.⁷ Between December 2004 and August 4, 2006, landowners filed 2,940 claims covering 168,058 acres of property.⁸ Research conducted by Portland State University concluded, "Measure 37 has disabled the tools used over the past four decades to prevent sprawl and preserve agricultural and forest land in Oregon."⁹ The case studies reviewed typically involved properties that had been zoned exclusively for agricultural use that landowners wished to use for residential purposes noting, "Residential development in an agricultural area is likely to cause conflicts between residential and agricultural use and thereby affect the farmers' ability to earn a profit." Study authors concluded, "In the short run, Measure 37 claims may offer an opportunity to increase the availability of housing. But a closer look at the plans reveals a pattern: almost all of the residential development is for low-density residential development, and much of it will probably command prices that will be out of reach for low- or even middle-income residents."¹⁰

This represents a shift from current law in two respects. First, public agencies are not currently required to state how property acquired through eminent domain will be used. Second, and more importantly, Proposition 90 would restrict the use of eminent domain to a "public use." Currently, governments can use eminent domain to fulfill a "public purpose." (See the "Public Purpose, Public Use, Stated Purpose: What's the Difference?" box for details.) The measure specifically states that public use "shall have a distinct and more narrow meaning than the term 'public purpose' and that the use of eminent domain for economic development or tax revenue enhancement purposes would be prohibited. Specifically, Proposition 90 states that eminent domain could not be used to obtain property for subsequent transfer to a non-governmental owner even if the intended use "may serve otherwise legitimate public purposes." Proposition 90 also prohibits the use of eminent domain to obtain property that is later transferred or leased to a private entity, unless that entity is providing services to a public agency under contract or another arrangement. Thus, a city could not use eminent domain to obtain property that would be transferred to a developer for use as a shopping center; however, it could use eminent domain to obtain property that would be leased to a private contractor for use as a jail under contract to the city.

Proposition 90 also requires property acquired through eminent domain to be used for a "stated purpose." Thus, property acquired for a school could only be used for a school. It could not, for example, be used for another public purpose, such as a park or community center.

The measure would allow public agencies to use eminent domain to acquire property that is blighted, or to abate certain nuisances, including environmental hazards. However, as discussed below, Proposition 90 would likely raise the price that governments would have to pay to acquire blighted properties.¹¹ The measure would also prohibit courts from requiring a property owner that

unsuccessfully challenges the use of eminent domain from paying the attorneys' fees and costs incurred by a government agency. Analysts traditionally view the threat of having to pay attorneys' fees as a disincentive to the filing of "frivolous" lawsuits.

Much of the controversy over the use of eminent domain for economic development purposes stems from a US Supreme Court decision in *Kelo v. City of New London*.¹² (See the "What is Eminent Domain?" box for details.) While many observers argue that it is inappropriate to use eminent domain to take property from one private owner in order to give it to another, there is less agreement over where to draw the line between permissible and prohibited uses of eminent domain. Examples of controversy include, for example, the extent of distress that must be present in order for a property or area to be considered blighted and whether proximity of incompatible uses – such as an adult entertainment venue in proximity to a school site – constitutes sufficient grounds to allow the use of eminent domain.

Proposition 90 Would Increase the Price Governments Pay to Acquire Property Through Eminent Domain

Current law requires governments using eminent domain to pay "just compensation" to property owners. As noted above, Proposition 90 would require public agencies to pay property owners for land acquired through eminent domain based on the "highest and best use" of a piece of property, rather than the property's current use. For example, the value of a vacant parcel of land that could be used for a commercial office building would be based on the value of land if the development occurred, not the value of the land in its vacant state. The price would also be based on the "highest price the property would bring in the open market," rather than the fair market value. These two provisions would require governments to pay the highest possible price when they acquire property through eminent domain. Finally, Proposition 90 requires public agencies to pay a price that places

a property owner in the "same position monetarily" and that the price should include any transaction costs borne by the property owner.

Taken together these provisions would likely, and appear to be intended to, increase governments' cost for property acquired by eminent domain. The LAO notes, for example, that Proposition 90 would require governments to reimburse property owners for a broader array of costs and expenses than is required by current law.¹³

How Would Proposition 90 Affect the Budget?

The LAO finds that Proposition 90 could increase somewhat the amount that public agencies pay to acquire property through eminent domain and potentially increase the price willing sellers ask for property they sell to public agencies, resulting in an unknown but possibly significant increase in public agencies' costs.

On the one hand, Proposition 90 could reduce public costs by limiting governments' ability to purchase property. More likely, the measure would increase public agencies' costs for the purchase of property by requiring property to be purchased at the "highest price" that it might bring on the open market; by requiring public agencies to compensate property owners for any expenses they incurred, including costs related to unsuccessful litigation; by increasing public agencies' legal and other costs involved with the acquisition of property; and by delaying the acquisition of property.

Finally, Proposition 90 could require public agencies to pay a significant amount to reimburse property owners for significant losses related to the impact of new laws, rules, and regulations. These costs cannot be estimated, since the breadth of the measure's impact is unclear due to the lack of a definition of

"substantial economic loss" and "public health and safety," among other factors. The LAO concludes that Proposition 90 is "likely to result in significant net costs on a statewide basis."¹⁴

Proponents Argue


Proponents of Proposition 90 argue that the measure is needed to stop abuses in the use of eminent domain, particularly public agencies' use of eminent domain to acquire property that is then transferred to private interests for economic development or related purposes.

Opponents Argue

Opponents argue that Proposition 90 would have far-reaching effects that extend beyond preventing possible abuses of eminent domain. Proposition 90, they note, could require the state and local governments to compensate landowners for changes in laws and regulations that have nothing to do with land use, such as employment laws, consumer financial protection laws, or environmental standards. While changes in eminent domain laws may be warranted, opponents argue, Proposition 90 goes too far.

Conclusion

If enacted, Proposition 90 would have a significant impact on the state and local governments that extends beyond regulation of the use of eminent domain. Proposition 90 would require the state and local governments to use property obtained through eminent domain for a public use, rather than simply a public purpose. It would also significantly change the standard for compensating property owners for a wide range of losses that can be linked to changes in laws and regulations. While it is unclear how broadly courts might apply this requirement, it would likely lead to a significant increase in costs for the state and local governments.



Jean Ross prepared this Budget Brief. The California Budget Project (CBP) was founded in 1994 to provide Californians with a source of timely, objective, and accessible expertise on state fiscal and economic policy issues. The CBP engages in independent fiscal and policy analysis and public education with the goal of improving public policies affecting the economic and social well-being of low- and middle-income Californians. General operating support for the CBP is provided by foundation grants, individual donations, and subscriptions. Please visit the CBP's website at www.cbp.org.

ENDNOTES

- ¹ Secretary of State, *Campaign Finance: Protect Our Homes Coalition, In Support Of Protection Of Private Property From Government Acquisition, Sponsored By The Fund For Democracy, With Support Of Advocates For Private Property Rights*, downloaded from <http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1283731&session=2005&view=received> and <http://www.getliberty.org/people/hrich.php> on August 28, 2006.
- ² Limits on the use of airspace can include measures that restrict the size or density of development that can occur on a parcel of land or regulations that require setbacks or other design features to limit the size or shape of a building.
- ³ Down zoning refers to laws or regulations that, for example, reduce the size or density of development that can occur on a parcel of property. Restrictions on the use of air space typically include reducing the height and/or size of a building that can be built on a particular parcel.
- ⁴ Legislative Analyst's Office, *Proposition 90 Government Acquisition, Regulation of Private Property. Initiative Constitutional Amendment*. (July 20, 2006).
- ⁵ There is also an exception that states, "Nothing...shall prohibit the California Public Utilities Commission from regulating public utility rates."
- ⁶ Legislative Analyst's Office, *Proposition 90 Government Acquisition, Regulation of Private Property. Initiative Constitutional Amendment*. (July 20, 2006).
- ⁷ Measure 37 applied to land use regulations enacted after the effective date of the ballot measure or to pre-existing regulations enforced subsequent to the measure's effective date.
- ⁸ Institute of Portland Metropolitan Studies, Portland State University, *Measure 37: Database Development and Analysis Project*, downloaded from <http://www.pdx.edu/ims/m37database.htm#claimssummary> on August 10, 2006. The database does not include information on the amount of compensation claimed or paid in response to claims that have been filed.
- ⁹ Sheila A. Martin and Katie Shriver, *Documenting the Impact of Measure 37: Selected Case Studies* (Institute of Portland Metropolitan Studies, Portland State University: January 2006), p. 1, downloaded from http://www.pdx.edu/media/i/m/ims_M37brainerdreport.pdf on August 10, 2006.
- ¹⁰ Sheila A. Martin and Katie Shriver, *Documenting the Impact of Measure 37: Selected Case Studies* (Institute of Portland Metropolitan Studies, Portland State University: January 2006), p. 1, downloaded from http://www.pdx.edu/media/i/m/ims_M37brainerdreport.pdf on August 10, 2006.
- ¹¹ This is because governments could use eminent domain to obtain the property, but the value of the property would remain subject to the provisions of the proposition.
- ¹² See, for example, Art Rolnick and Phil Davies, "The Cost of Kelo," *The Region* (Federal Reserve Bank of Minneapolis: June 2006).
- ¹³ Legislative Analyst's Office, *Proposition 90 Government Acquisition, Regulation of Private Property. Initiative Constitutional Amendment*. (July 20, 2006).
- ¹⁴ Legislative Analyst's Office, *Proposition 90 Government Acquisition, Regulation of Private Property. Initiative Constitutional Amendment*. (July 20, 2006).