



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.cbpp.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.html#claimsummary> 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).