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**CONFIDENTIAL AND PRIVILEGED**  
**ATTORNEY-CLIENT COMMUNICATION**

TO: Eminent Domain Reform Now – Protect Our Homes

FROM: Cathy Christian and Richard Martland

RE: Review of the California Property Owners and Farmland Protection Act  
("CPOFPA")

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**I. OVERVIEW.**

You have asked our firm to review the CPOFPA initiative Constitutional amendment as referenced above.

While proponents' literature suggests that this initiative simply provides new restrictions on the use of eminent domain, the provisions of the actual measure reveal a much broader agenda. For instance, this initiative unambiguously eliminates future rent control ordinances.

Additionally, like Proposition 90, this initiative also has dramatic restrictions on zoning and other traditional land use regulations to protect property owners not mentioned in the statements of Findings and Purpose but hidden in a definitional subparagraph. Unlike Proposition 90, which would have required the payment of compensation for a wide array of land use regulations and ordinances, this initiative addresses land use regulations and ordinances in a much more severe way and, in effect, phases out current law over time. It flatly prohibits them without providing any exemption for those intended to protect the public health and safety. This prohibition will fundamentally alter and diminish the role of state and local governments in the regulation of land use, and paralyze land-use decision making that benefits residents and local economies. However, the initiative explicitly retains the right to sue for damages. Public entities will be subject to both actions to set aside decisions and for financial losses.

The initiative also contains a component, in a definitional subparagraph, also not mentioned in the statements of Findings and Purpose, which under ordinary rules of statutory interpretation would prohibit the exercise of eminent domain for the construction of public water projects.

Thus, the CPOFPA goes far beyond limiting eminent domain for private uses. The key prohibition added to the Constitution by the initiative is its insertion of an express provision stating that private property may not be taken or damaged by the government for a private use. On its face, this prohibition merely states what is current law; i.e., private property may only be taken or damaged for a public use, and compensation is required in all cases. It is the initiative's definitions of "taken," "public use" and "private use" that dramatically change the scope of the prohibition and render it more than just a restatement of existing law.

The proposed measure utilizes three new definitions to accomplish substantive changes to the law of eminent domain.

#### **A. NEW DEFINITION OF "PRIVATE USE."**

There is no doubt that this new definition of private use would have the farthest reaching and potentially devastating impact on local communities.

"Private Use" – Section 19(c)(3). "Private use" is defined in three distinct ways:

- (i) "Private use" means the transfer of the ownership of private property to a person or entity other than a public agency or regulated public utility. Under this new definition, the government may not use the power of eminent domain to acquire property for a school and then transfer it to a private non-profit organization that will operate the school under a charter.
- (ii) "Private use" means the transfer of ownership to a public agency for consumption of natural resources or for the same or a substantially similar use as that made by the private owner. This means, for example, that a public agency may not exercise the power of eminent domain to acquire property for public water projects, open space or for the protection of endangered species or other habitat.
- (iii) "Private use" means "regulation" of the ownership, occupancy or use of privately owned property in order to transfer an economic benefit to one or more private persons at the expense of the private owner.

The consequences of this new definition of "private use" are manifold. Just to mention a few examples, the sweep of this definition could prohibit the construction of public water projects, the enactment of land use regulations enacted to protect the environment, stop the approval of new economic and housing developments, and even invalidate regulations intended to protect the public's health, safety and welfare. Some examples are:

## **1. Construction of state and local water projects will be precluded.**

By first prohibiting the taking of private property for a private use and then defining “private use” to include the taking by a public agency of private property “for the consumption of natural resources,” the initiative effectively precludes the use of eminent domain for the development of public projects for the delivery of water for irrigation, domestic, commercial and industrial purposes. There can be little doubt that water is considered a “natural resource.” (*Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 701-02 – “The conservation of other natural resources is of importance, but the conservation of the waters of the state is of transcendent importance.”) And there can be little doubt that the construction of projects to deliver water for domestic use, such as drinking water, irrigation, commercial or industrial uses, reasonably involve the consumption of water. (*Deetz v. Carter* (1965) 2323 Cal.App.2d 851, 854 - domestic use of water includes “consumption for the sustenance of human beings, for household convenience, and the care of livestock.”)

The basic elements of a water project include the acquisition of land for reservoir and pumping sites, borrow areas, right-of-way for pipelines and canals, and in some cases acquisition of riparian water rights. Water simply cannot be made available for “consumption” unless all these elements are present. Thus, defining the term “private property” as the taking by a public agency of private property for the “consumption of natural resources” effectively precludes the use of eminent domain for reservoir sites, canals and other elements of a water project whether it is a state project or local project.

## **2. Land use regulations and zoning decisions that preserve the environment and protect the public interest are at risk.**

Land use zoning and land use regulations have historically been the means by which communities seek to achieve a balance among potentially competing interests such as commercial and residential development, environmental and aesthetic concerns, cultural/historic preservation and adequate/affordable housing. There is not one person in any community that is not affected by zoning and land use regulations.

Through the definition of the term “private use,” the initiative seeks to prohibit the control of land use by the state, cities and counties. In particular, the definition of a prohibited private use includes the “regulation” of private property in order to “transfer the economic benefit” to another private person. The effect of this prohibition would be to invalidate much of the land use planning and environmental protection effort undertaken by communities across the state. The impact is greatly exacerbated by the fact that there is no public health, safety and welfare exception to the general prohibition so local governments would face liability in restricting the use of property in order to protect the public health, safety and welfare.<sup>1</sup>

Virtually every zoning and land use regulation balances the needs of one private group versus another. The breadth of this new definition of “private use” potentially includes all zoning regulations since it is widely recognized that all “traditional zoning regulations can

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<sup>1</sup> Only actions by the Governor during a declared state of emergency use are exempted.

transfer wealth from those whose activities are prohibited to their neighbors.”(Yee et al. v. City of Escondido, 224 Cal.App.3d 1349 (1990).)

### **3. New project approvals will be paralyzed or subject to endless lawsuits.**

The clause in the definitions section that would prohibit laws and regulations that “*transfer an economic benefit to one or more private persons at the expense of the private owner*” also opens the door to the possibility of a lawsuit over every land use proposal. Because the courts have ruled that virtually all land use decisions can transfer economic benefit from one party to another, the CPOFPA would lead to countless lawsuits that will tie up project approvals for years. Those opposed to development would use this as a “hook” to sue to block new residential or commercial projects, claiming that the proposed project “transfers economic benefit” from one party to another.

One possible consequence of this measure is to preclude re-zoning of property in order to plan for growth consistent with community interests. For example, if land now zoned for residential purposes is re-zoned for commercial purposes, the surrounding homeowners could argue that the re-zoning decision caused a transfer of an economic benefit from them - who will have the potential decrease in their home values caused by nearby commercial development – to the businesses. Developers of new multi-family or owner-occupied properties could be facing the same problem with securing land use approvals for proposals for such housing as some adjacent owners, because they are opposed to further development in their neighborhood, typically argue that such use bring traffic congestion and activities that devalue their property.

Likewise, zoning laws intended to prevent inner city decay through zoning restrictions would also be at risk. Many communities have enacted regulations to protect “downtown businesses” and locally-owned essential businesses such as grocery and hardware stores by limiting the size of “super-stores” whose volume and size give them a competitive edge that ultimately forces the existing facilities to close. Just this June, the California Supreme Court reaffirmed prior court decisions finding these purposes to be legitimate under current law. (Hernandez v. City of Hanford (June 2007) 41 Cal.4<sup>th</sup> 279, 291.) In rendering its decision the court stated: “... planning and zoning ordinances traditionally seek to maintain property values, protect tax revenues, provide neighborhood social and economic stability, attract business and industry and encourage conditions which make a community a pleasant place to live and work.”

At a minimum, it is clear that this provision could paralyze local land-use planning, or result in endless lawsuits by both those promoting new projects and those opposing new economic or housing developments.

### **4. Regulations intended to protect the environment will be eliminated.**

The initiative will have a severe impact on environmental regulation. The list of environmental protections put at risk by this measure is quite broad, but following are just a few examples of laws and regulations that protect the environment that will be prohibited:

- Regulations requiring compliance with a stream set-back regulation in order to protect the water supply and quality of the down-stream owners;
- Regulations prohibiting mining of land in a residential area; and
- Regulations controlling noise and light pollution that affect neighborhoods and protect wildlife habitat.

**5. The enforcement of regulations intended to protect the public's health, safety and welfare are threatened.**

This measure even goes so far as to prohibit local government regulations intended to protect the public's health, safety and welfare because there is no exception for these purposes to the new definition of private use. This means that any number of regulations at the local level could be successfully challenged. These include:

- Regulation of the operating hours of liquor stores, or bars and nightclubs in residential areas, even if the bar or nightclub had a history of noise, litter and loitering.
- Ordinances limiting types of businesses (factories, industrial) that are permitted near homes and that produce noise and traffic congestion that can reduce home values.
- Height limitations on new developments in order to protect the views and value of adjacent residential properties.

The public safety implications of this measure are dramatic. Recently, a California trial court held that it was permissible for a city to block development of down-slope property for residential uses because of the unstable nature of the soil. The surrounding property owners benefited from the city's effort to preclude dangerous disturbance of the soil and thus, under the proposed measure's ban on "transferring economic benefits," the city's ban would have been unconstitutional. Under the initiative's definition of private use the City would have been barred from restricting development of the hazardous site.

**6. Taxpayer implications: the State, Cities and Counties would be financially at risk for most land use decisions.**

Although the initiative, unlike Proposition 90, does not address compensation, it expands the potential for liability under existing law. Pursuant to this measure, a governmental entity that undertakes a broad array of official land use actions can be deemed to have "taken" property constitutionally, requiring taxpayers to compensate the property owner whose property is affected. Moreover, while an unconstitutional taking of real property is compensable under existing law at fair market value, the initiative provides no standard for valuing "damage" to property. Instead, the initiative merely states that just compensation for the damage to property will be the value fixed by a jury or the court.

If this initiative is approved, land use decisions that would have otherwise been permissible will have to be reconsidered or the deciding agency risks the fiscal peril of guessing wrong about whether “an economic benefit is transferred ... at the expense of the property owner.” Cash-strapped cities and counties will be faced with great uncertainty in assessing their choices to fairly balance land use concerns in their communities. Potential fiscal liability can be a significant factor contributing to gridlock in the decision-making process. Furthermore, communities may require property owners or developers to assume the financial risk of changes to existing land use regulations through indemnity agreements as a condition of approval of any new land use changes.

**7. The measure would impact a wide-variety of tenant protection laws.**

There are currently many statutes that seek to provide some certainty and balance with regard to landlord/tenant relations. These include things like noticing tenants about rent increases, terminating tenancy, and other changes to the lease agreement. Under the initiative, these statutes could all be construed as transferring economic benefit and invalidated.

**B. NEW DEFINITION OF “TAKEN.”**

“Taken” – Section 19(b)(1). The proposed measure defines this term to now include (1) transferring the ownership of private property to a public agency or to any person or entity other than a public agency; and (2) limiting the price a private owner may charge another person to purchase, occupy or use his or her real property. There are some significant consequences to this new definition. Some examples are:

**1. The measure expressly eliminates rent control and affordable housing ordinances.**

The initiative unambiguously targets rent control ordinances. In its definition of "taken," the initiative includes "limiting the price a private owner may charge another person to purchase, occupy or use his or her real property." While the initiative would grandfather units or mobile home spaces occupied by tenants on January 1, 2007 until the tenants vacated their units or spaces, rent control would thereafter no longer be permissible. Current tenants who live in rent controlled housing units or mobile home spaces must either remain in the units they occupied on January 1, 2007 or lose the protection of rent control.

This could have devastating consequences for seniors, who often live on a fixed income which is further reduced after the death of a spouse. For example, if a woman who lived in a three bedroom, rent-control protected unit with her husband is forced to move into a smaller unit after his death, this measure would mean that the widow would lose her rent control protections and face further financial hardship.

Similarly, the measure would eliminate affordable housing ordinances to the detriment of seniors on fixed income and others of limited financial means. In order to provide a balance of housing types affordable to different income levels, many communities have adopted ordinances

requiring certain percentages of new housing units to be affordable by low and moderate income families. These ordinances would be unconstitutional under the measure.

**2. The measure will transfer to taxpayers the development costs of new roads, streets and parks.**

Neither the federal nor state constitutions define "taken." Its meaning has been developed over decades through judicial interpretation. The initiative expressly defines "taken" to include, without qualification, any transfer of private property to a public agency. New development is typically conditioned upon the "transfer of private property" to a public agency for streets, parks and other public improvements. Under both the federal and state constitutions, these types of conditions do not constitute "takings."

This new, expansive definition of "taken" could mean that the government will have to pay a developer to acquire the property needed to provide streets, parks and other public improvements that are only needed because of its development. The new definition of "taken" could shift to the taxpayers the costs associated with the public's acquisition of property for, and the construction of, the miles of roads, streets, curbs and gutters, sewers, flood control improvements, traffic signals, street lights, parks and other public improvements necessitated by new development.

**3. The measure imposes severe restrictions on urban revitalization projects.**

The effect of this definition will be to preclude the use of eminent domain to revitalize areas of urban decay. By prohibiting transfer of condemned property to a private person, urban revitalization projects such as the Gaslamp District in San Diego or the Franklin Villa Area of South Sacramento would become impossible. In the Franklin Villa project eminent domain was used as a last resort to transform a slumlord-owned property into privately built affordable housing and a community that residents are proud of.

**C. NEW DEFINITION OF "PUBLIC USE."**

"Public use" – Section 19(b)(2). The term public use is limited to use and ownership by a public agency or regulated public utility, including public facilities, public transportation, and public utilities. This definition, like that of "taken," would effectively preclude private participation in efforts to eliminate urban decay or public/private partnerships.

**II. CONCLUSION**

Without a doubt, CPOFPA is even more deceptive and draconian than Proposition 90. With the exception of the rent control feature, the regulatory prohibitions concerning land use decisions and the prohibition against the use of eminent domain for the acquisition of private property for the consumption of natural resources are buried in the definition of private use. But the impact is nonetheless dramatic. Those obscure provisions are the only reference in the initiative to any form of "regulation" or prohibition against taking property for the "consumption of natural resources." Because of the prohibitory nature of the regulatory and eminent domain

provisions, the initiative appears to be designed to eliminate much of what government does to protect the public health, safety and welfare through the control of land use and the provision of water. If there is any doubt on that point, the initiative Constitutional amendment provides the express right to seek injunctive relief against any action that violates its terms.

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