

Summary of California Property Owners and Farmland Protection Act, Proposition 98

The Howard Jarvis Taxpayers Association, the California Farm Bureau Federation and the California Alliance to Protect Private Property Rights are sponsoring Proposition 98 on the June 2008 ballot, which would make major changes to laws governing use of property, including use of eminent domain and regulation of land use.

Governmental Regulations Affecting the Price of Private Property

The initiative provides that a government regulation that limits the price a private owner may charge another person to purchase, occupy or use his or her real property requires the payment of just compensation. This includes rent control ordinances¹ and inclusionary housing ordinances.

Limitation on Use of Eminent Domain for Consumption of Natural Resources

The initiative would prohibit the use of eminent domain to “transfer the ownership, occupancy or use of private property...to a public agency for the consumption of natural resources...” This provision can be read, for example, to prohibit the use of eminent domain by a city to acquire new drinking water resources. The initiative would also prohibit the use of eminent domain if the public agency would use the property for “the same or substantially similar use as that made by the private owner.” This provision would likely eliminate eminent domain as a tool to acquire conservation and open space easements.

Land Use Regulations

The initiative prohibits a public agency from regulating the use of private property if the regulation transfers an economic benefit from the regulated property owner to another private property owner. Nearly all traditional land use regulations economically benefit some properties while burdening others. Read literally, this provision would make unconstitutional virtually all regulation of land use.

Changes to the use of Eminent Domain

- **Property may not be taken and then transferred to a private party.** This would end the use of eminent domain by redevelopment agencies except for public works projects and prevent its use by other public agencies that wish to establish a public-private partnership for facilities such as toll roads and prisons.
- **The definition of “just compensation” is changed.** The existing law provides reasonable certainty to both the public agency and the private property owner thereby reducing the need to go to court to determine “just compensation.” The initiative will likely require more frequent recourse to the courts to understand how to apply the new definition. In addition, the initiative requires a public agency to pay the property owner’s attorney’s fees if the jury awards one dollar more than the amount offered by the public agency. It also includes

¹ Rent controlled units as of January 1, 2007, would be grandfathered, but only for so long as at least one of the tenants continues to live in the unit as their principal place of residence.

elements not currently recognized such as temporary business losses in the calculation of “just compensation.”

- **Acquiring immediate possession of property made more complicated.** Under existing law, a public agency may deposit the estimated just compensation and gain immediate possession of the property. The property owner is limited to challenging what constitutes “just compensation” if the deposit is withdrawn. Under the initiative, the property owner will also be able to challenge whether the public agency has a right to take the property. This means that it would be possible for a public agency to take immediate possession of the property and for a court to subsequently rule that the public agency had no underlying right to acquire the property at all.
- **Balance of power shifted to courts.** When a public agency makes findings explaining the need to exercise eminent domain, those findings are entitled to a strong presumption of validity when challenged in court. In addition, the court is limited to reviewing the administrative record that was before the public agency. The initiative changes this balance of power between the legislative and judicial branches of government by removing the presumption of validity and allowing the property owner to introduce evidence to the court that was not previously a part of the administrative record before the public agency.

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The Howard Jarvis Taxpayers Association, the California Farm Bureau Federation and the California Alliance to Protect Private Property are sponsoring Proposition 98 on the June 2008 ballot, which would make major changes to laws governing use of property, including use of eminent domain and regulation of land use. The initiative would make the following changes to existing law:

Governmental Regulations Affecting Price

The initiative would define a regulation of property that limits the price a private owner may charge another person to purchase, occupy or use his or her real property as a prohibited taking for a private use. This would prohibit rent control ordinances¹ and make unconstitutional inclusionary housing ordinances adopted in many California communities which require new housing development to include units affordable by low- and moderate-income buyers or renters. The effect of this provision on the inclusionary housing provisions of the Community Redevelopment Law is difficult to predict. Redevelopment agencies might still be able to bargain for the provision of affordable units as a condition of agency assistance, but they would not be able to impose such requirements as a matter of law.

Limitation on Use of Eminent Domain for Consumption of Natural Resources

In one of its provisions, the initiative would prohibit the use of eminent domain to “transfer the ownership, occupancy or use of private property...to a public agency for the consumption of natural resources...” This provision can be read, for example, to prohibit the use of eminent domain by a city to acquire new drinking water resources. The initiative would also prohibit the use of eminent domain if the public agency would use the property for “the same or substantially similar use as that made by the private owner.” This provision would likely eliminate eminent domain as a tool to acquire conservation and open space easements.

Regulation of Land Use

The initiative requires a public agency to pay “just compensation” when it regulates the use of land if the regulation transfers an economic benefit from the person who owns the land to another person. Under existing law, public agencies use their police power to enact regulations governing the use of privately owned real property. These regulations range from traditional zoning to nuisance regulations and include conditions imposed on the new development of property. Nearly all of these regulations have an economic impact. Some properties are benefited while others are burdened. Read literally, this provision would make unconstitutional virtually all regulation of land use unless just compensation is paid.

Restrictions on the Use of Eminent Domain

1. Property may not be taken and then transferred to a private party. For over 50 years, State and Federal Courts have held that the use of eminent domain by redevelopment agencies to eliminate conditions of blight is a public use. The initiative’s definitions of “taken” and “private use” reverse those cases and prohibit the use of eminent domain where the ownership, occupancy or use of the property acquired is transferred to a private person or entity. This would end the use of eminent domain by redevelopment agencies except for

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public works projects. It would also prevent the use of eminent domain by other public agencies in public/private partnerships for facilities such as toll roads and privately-run prisons.

2. **New definition of “just compensation.”** Existing law requires the payment of just compensation to the owner of property taken by eminent domain. “Just compensation” is defined in the Eminent Domain Law (a statute) as “fair market value.” A body of well-established law interpreting the meaning of “just compensation” allows both public agencies and property owners to be reasonably certain about the value of property to be acquired. In large part because the value of the property is predictable, an acquisition usually does not require the use of eminent domain and rarely will an eminent domain case actually go to trial. The initiative would add a constitutional definition of “just compensation” that would prevail over this settled body of law. This will probably result in the need to have more frequent recourse to the courts to settle disputes over the meaning of “just compensation.” Among the other changes that the initiative would make are the following:
 - a. **Just compensation would include an award of the property owner's attorney's fees if the jury awards one dollar more than the amount offered by the public agency. It is unclear which offer to purchase this provision refers to.**
 - b. **Just compensation would include elements not currently recognized such as temporary business losses. Relocation and other business re-establishment costs would also be elevated to constitutional status, thereby perhaps abrogating existing statutes which place limits on the type and amount of such expenses for which compensation must be paid.**
3. **Acquiring “immediate possession” of property made more complicated.** Under existing law, after depositing with the court the estimated just compensation, a public agency can obtain possession of property prior to a final judgment based on a showing of an overriding need for the condemnor to take possession prior to final judgment. If the property owner withdraws the deposit, he or she waives their right to contest whether the taking is for a public use but may still contest the amount of just compensation. The initiative would change this approach to prejudgment possession by permitting the property owner to contest both public use and just compensation after withdrawing the deposit. This would make the use of prejudgment possession more problematic for public agencies since they would still be at risk of being prohibited from taking the property (if they lose the right to take issue) rather than simply paying more for it.
4. **Balance of power shifts.** Under existing law, when a public agency makes findings in connection with the taking of property by eminent domain, those findings are entitled to strong presumptions of validity. Courts will overturn those findings only where the property owner is able to demonstrate a gross abuse of discretion, such as bribery or fraud. Courts are also limited to reviewing the administrative record before the public agency. These rules are rooted in concepts of separation of powers—the respect that co-equal branches of government have for the other's proceedings. The initiative would provide that a court must exercise its independent judgment and give no deference to the findings of the public agency. The court's inquiry would also not be limited to the administrative record, and so the property owner could introduce evidence of value and other matters not before the condemning agency at the time the decision to condemn was made.