

Commentary

Regulatory Takings Initiatives: The Stories Behind the November 2006 Election

Eight regulatory takings initiatives similar to Oregon's Measure 37 were promoted during the November 2006 election; four remained after the others were either stripped from the ballot by the courts or withdrawn. Voters in California, Idaho, and Washington rejected these measures; Arizonans passed Proposition 207. We've invited planners and attorneys in Arizona, California, Montana, and Washington to share their perspectives about these measures. The writers from each state have different stories to share. For more information, see www.propertyfairness.org.

Arizona Has the Distinction of Being the Only State to Pass a Regulatory Takings Ballot Initiative in November 2006

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INTRODUCTION

On November 7, Arizona became the second state to pass a voter initiative intended to restrict the ability of government to regulate private property. Fashioned after Measure 37, which Oregon voters passed two years earlier by a 61 percent to 39 percent margin, Proposition 207 ("Prop. 207") includes provisions addressing eminent domain as well as regulatory takings (see Sullivan, Edward J., Oregon's Measure 37: Crisis and Opportunity for Planning, *PLANNING & ENVIRONMENTAL LAW*, Vol. 57, No. 3 (2005)) With a well-funded campaign by out-of-state interests, supporters of Prop. 207 were able to convince voters that its passage would stop perceived eminent domain abuses.

Now that Prop. 207 is a reality, cities and counties, as well as some members of the development community, are beginning to sort through

the language and develop policies and processes to deal with the realities of implementation. One thing is certain: The judicial branch will play a central role in helping to shape and define the legacy of Prop. 207. Planners and attorneys from other states should keep a close eye on Arizona as a possible precursor to similar measures in their states.

THE NUTS AND BOLTS OF PROPOSITION 207

Proposition 207 is a statutory amendment proposed in response to the much-maligned *Kelo* decision from the U.S. Supreme Court last year. (*Kelo, et al v. City of New London*, 125 S. Ct. 2655 (2005)) The measure requires that eminent domain be used for slum clearance and redevelopment; restricts the definition of "public use" to the possession, occupation, and enjoyment of the land by the

general public or agency or to eliminate a direct threat to public health or safety; and requires that slum or blight conditions be present on each and every parcel being condemned. Proposition 207 is spelled out in its entirety on the following pages. These changes to the eminent domain powers in Arizona are largely symbolic because the ability of jurisdictions to use eminent domain for public purposes has already been severely restricted by recent statutory changes.

The more onerous provisions of Prop 207 relate to regulatory takings. Specifically, Prop. 207 requires the payment of just compensation if a new "land use law" is enacted that reduces the existing right to use, divide, sell, or possess private real property and such action reduces the fair market value of the property. There are several exclusions included

While Prop. 207 is similar to Oregon's Measure 37 in that it requires compensation for diminution in value as a result of land use regulations, it is also different in several ways.

PROPOSITION 207

AMENDING Title 12, Chapter 8, Arizona Revised Statutes, by adding Article 2.1; relating to the Private Property Rights Protection Act.

Be it enacted by the People of the State of Arizona:

Section 1. Short title

This act may be cited as the "Private Property Rights Protection Act."

Sec. 2. Findings and declarations

A. The people of Arizona find and declare:

1. Article 2, section 17 of our State Constitution declares in no uncertain terms that private property shall not be taken for private use.
2. Our Constitution further provides that no person shall be deprived of property without due process of law.
3. Finally, our Constitution does not permit property to be taken or damaged without just compensation having first been made.
4. Notwithstanding these clear constitutional rights, the state and municipal governments of Arizona consistently encroach on the rights of private citizens to own and use their property, requiring the people of this State to seek redress in our state and federal courts which have not always adequately protected private property rights as demanded by the State and Federal Constitutions. For example:
 - (a) A recent United States Supreme Court ruling, *Kelo v. City of New London*, allowed a city to exercise its power of eminent domain to take a citizen's home for the purpose of transferring control of the land to a private commercial developer.
 - (b) The City of Mesa used eminent domain to acquire and bulldoze homes for a redevelopment project that included a hotel and water park. After the developer's financing fell through the project was abandoned and the property left vacant.
 - (c) The City of Mesa filed condemnation actions against Randy Bailey, to take his family-owned brake shop, and Patrick Dennis, to take his auto-body shop, so that local business owners could relocate and expand a hardware store and an appliance store.
 - (d) The City of Tempe instituted an eminent domain action to condemn the home of Kenneth and Mary Ann Pillow in order to transfer their property to a private developer who planned to build upscale town homes.
 - (e) The City of Chandler filed a condemnation action against a fast food restaurant in order to replace the fast-food restaurant with upscale dining and retail uses.
 - (f) In the wake of the *Kelo* ruling, the City of Tempe recently sought to condemn property in an industrial park in order to make way for an enormous retail shopping mall.
 - (g) The City of Tempe told the owners of an Apache Boulevard bowling alley that the City intended to condemn their property and specifically instructed them not to make further improvements to the land. Heeding Tempe's advice, the owners made no further improvements and ultimately lost bowling league contracts and went out of business. The Arizona Court of Appeals refused the owners' request for just compensation.
 - (h) Courts have also allowed state and local governments to impose significant prohibitions and restrictions on the use of private property without compensating the owner for the economic loss of value to that property.
5. For home owners in designated slum or blighted areas, the compensation received when a primary residence is seized is not truly just as required by our state constitution.
6. Furthermore, even when property is taken for a valid public use, the judicial processes available to property owners to obtain just compensation are burdensome, costly and unfair.

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in Prop. 207: for public health and safety purposes, public nuisances (common law only), regulations concerning illegal drugs or pornography, and regulations which do not directly regulate an owner's land.

While Prop. 207 is similar to Oregon's Measure 37 in that it requires compensation for diminution in value as a result of land use regulations, it is also different in several ways. Measure 37 is applicable to land use regulations that were enacted prior to the effective date of the Measure, while Prop. 207 applies only to changes in land use regulations adopted after the effective date (December 4, 2006). Prop. 207 also does not apply to laws that were enacted prior to purchase of the parcel. Another important distinction between the two is that Prop. 207 applies to a broader scope of regulatory actions while Measure 37 is more clearly defined to include land use laws such as the administrative rules and goals of the Land Conservation and Development Commission, local government comprehensive plans, zoning ordinances, land division and transportation ordinances, and metropolitan service district regional framework plans, functional plans, planning goals, and objectives.

While both measures exclude regulations adopted for public health and safety purposes, Measure 37 does not exclude regulations that do not directly regulate property. This provision is intended to disallow the filing of Prop. 207 claims from owners of property who are adjacent to a property that has been rezoned and who are not directly impacted by a land use change. For example, if a jurisdiction approves a zoning request that allows the construction of a 90-foot-tall building, the adjacent property owner cannot file a Prop. 207 claim because the value of their property has not been diminished as defined by Prop. 207. Additionally, provisions regarding filing of claims in Arizona are procedurally different from Oregon.

Proposition 207, one of 19 measures on the ballot in Arizona, passed overwhelmingly—65 percent to 35 percent.

WHAT POSSESSED ARIZONA VOTERS TO PASS PROPOSITION 207?

Arizona was not the only state with a regulatory takings measure on the ballot in November, but we do have the distinction of being the only state to pass such a measure this year. Similar measures were under consideration in California (Prop. 90), Washington (Prop. 933), Idaho (Prop. 2), Nevada (Question 2), and Montana. See the commentaries that follow.

A pre-election lawsuit was filed by the League of Arizona Cities and Towns and the Arizona Planning Association challenging the validity of Prop. 207 on the basis that it violated the “Revenue Source Rule” in the Arizona Constitution because it did not identify a source of funding to pay the “immediate and future costs of the proposal” (Ariz. Const. art. 9, § 23). On August 31, the Arizona Supreme Court, sitting en banc, affirmed the superior court’s decision to allow Proposition 207 to remain on the ballot. The Court issued its reasons on November 8. (*League of Arizona Cities and Towns et al. v. Brewer et al.*, 146 P.3d 58 (Az. 2006)) The court concluded that violation of the Revenue Source Rule was not the type of defect that would be subject to pre-election judicial review, and that the Separation of Powers Clause requires the court to exercise restraint in reviewing initiatives pre-election in order to respect the legislative process and the right of people in Arizona to offer legislation through the initiative. However, the court vacated a portion of the lower court’s ruling, which had concluded that Prop. 207 violated the Revenue Source Rule. The court concluded it was premature for the lower court to have addressed that issue before the election. The opinion leaves open the possibility that review might be possible after the election.

Proposition 207, one of 19 measures on the ballot in Arizona, passed overwhelmingly—65 percent to 35 percent. The proponents had a well-funded

PROPOSITION 207 (continued)

B. Having made the above findings, the people of Arizona declare that all property rights are fundamental rights and that all people have inalienable rights including the right to acquire, possess, control and protect property. Therefore the citizens of the State of Arizona hereby adopt the Private Property Rights Protection Act to ensure that Arizona citizens do not lose their home or property or lose the value of their home or property without just compensation. Whenever state and local governments take or diminish the value of private property, it is the intent of this act that the owner will receive just compensation, either by negotiation or by an efficient and fair judicial process.

Sec. 3. Title 12, chapter 8, Arizona Revised Statutes, is amended by adding article 2.1, to read:

Article 2.1. Private Property Rights Protection Act

12-1131. Property may be taken only for public use consistent with this article. Eminent domain may be exercised only if the use of eminent domain is authorized by this state, whether by statute or otherwise, and for a public use as defined by this article.

12-1132. Burden of proof

A. In all eminent domain actions the judiciary shall comply with the state constitution’s mandate that whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

B. In any eminent domain action for the purpose of slum clearance and redevelopment, this state or a political subdivision of this state shall establish by clear and convincing evidence that each parcel is necessary to eliminate a direct threat to public health or safety caused by the property in its current condition, including the removal of structures that are beyond repair or unfit for human habitation or use, or to acquire abandoned property and that no reasonable alternative to condemnation exists.

12-1133. Just compensation; slum clearance and redevelopment

In any eminent domain action for the purpose of slum clearance and redevelopment, if private property consisting of an individual’s principal residence is taken, the occupants shall be provided a comparable replacement dwelling that is decent, safe, and sanitary as defined in the state and federal relocation laws, section 11-961 et seq. and 42 USC 4601 et seq., and the regulations promulgated thereunder. At the owner’s election, if monetary compensation is desired in lieu of a replacement dwelling, the amount of just compensation that is made and determined for that taking shall not be less than the sum of money that would be necessary to purchase a comparable replacement dwelling that is decent, safe, and sanitary as defined in the state and federal relocation laws and regulations.

12-1134. Diminution in value; just compensation

A. If the existing rights to use, divide, sell or possess private real property are reduced by the enactment or applicability of any land use law enacted after the date the property is transferred to the owner and such action reduces the fair market value of the property, the owner is entitled to just compensation from this state or the political subdivision of this state that enacted the land use law.

B. This section does not apply to land use laws that:

1. Limit or prohibit a use or division of real property for the protection of the public’s health and safety, including rules and regulations relating to fire and building codes, health and sanitation, transportation or traffic control, solid or hazardous waste, and pollution control;
2. Limit or prohibit the use or division of real property commonly and historically recognized as a public nuisance under common law;
3. Are required by federal law;

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The opposition campaign was successful in gaining endorsements in opposition to Prop. 207 from the major newspapers and a significant amount of editorials in opposition were also submitted.

PROPOSITION 207 *(continued)*

4. Limit or prohibit the use or division of a property for the purpose of housing sex offenders, selling illegal drugs, liquor control, or pornography, obscenity, nude or topless dancing, and other adult oriented businesses if the land use laws are consistent with the constitutions of this state and the United States;
5. Establish locations for utility facilities;
6. Do not directly regulate an owner's land; or
7. Were enacted before the effective date of this section.

C. This state or the political subdivision of this state that enacted the land use law has the burden of demonstrating that the land use law is exempt pursuant to subsection b.

D. The owner shall not be required to first submit a land use application to remove, modify, vary or otherwise alter the application of the land use law to the owner's property as a prerequisite to demanding or receiving just compensation pursuant to this section.

E. If a land use law continues to apply to private real property more than ninety days after the owner of the property makes a written demand in a specific amount for just compensation to this state or the political subdivision of this state that enacted the land use law, the owner has a cause of action for just compensation in a court in the county in which the property is located, unless this state or political subdivision of this state and the owner reach an agreement on the amount of just compensation to be paid, or unless this state or political subdivision of this state amends, repeals, or issues to the landowner a binding waiver of enforcement of the land use law on the owner's specific parcel.

F. Any demand for landowner relief or any waiver that is granted in lieu of compensation runs with the land.

G. An action for just compensation based on diminution in value must be made or forever barred within three years of the effective date of the land use law, or of the first date the reduction of the existing rights to use, divide, sell or possess property applies to the owner's parcel, whichever is later.

H. The remedy created by this section is in addition to any other remedy that is provided by the laws and constitution of this state or the United States and is not intended to modify or replace any other remedy.

I. Nothing in this section prohibits this state or any political subdivision of this state from reaching an agreement with a private property owner to waive a claim for diminution in value regarding any proposed action by this state or a political subdivision of this state or action requested by the property owner.

12-1135. Attorney fees and costs

A. A property owner is not liable to this state or any political subdivision of this state for attorney fees or costs in any eminent domain action or in any action for diminution in value.

B. A property owner shall be awarded reasonable attorney fees, costs and expenses in every eminent domain action in which the taking is found to be not for a public use.

C. In any eminent domain action for the purpose of slum clearance and redevelopment, a property owner shall be awarded reasonable attorney fees in every case in which the final amount offered by the municipality was less than the amount ascertained by a jury or the court if a jury is waived by the property owner.

D. A prevailing plaintiff in an action for just compensation that is based on diminution in value pursuant to section 12-1134 may be awarded costs, expenses and reasonable attorney fees.

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campaign with out-of-state organizations funneling more than \$1.5 million into the campaign. Television and radio ads highlighted the abuses of government and the threat that government would take private properties, especially from disadvantaged populations including the elderly, minorities, and women. The Pro-207 campaign focused on eminent domain and rarely mentioned anything about regulatory takings in their campaign literature. Furthermore, two competing propositions concerning reforms of the Arizona State Land Department were on the ballot, each supported by different segments of the business community. These campaigns captured a significant amount of the financial resources from the business community that otherwise might have been available to help defeat Prop. 207.

The campaign committee organized to oppose Prop. 207 was formed late in the campaign and was unable to raise significant amounts of money (approximately \$350,000) to run an effective campaign compared to the \$1.84 million raised by the Pro-207 campaign. While the opposition consisted of a broad coalition of environmental organizations, neighborhood groups, unions, and the business community, it was difficult to raise the level of interest among the business community and elected officials to the extent necessary to turn voter sentiment because of the lack of resources for television and radio advertising. The opposition campaign was successful in gaining endorsements in opposition to Prop. 207 from the major newspapers and a significant amount of editorials in opposition were also submitted. Several press conferences highlighted the negative impacts on state military bases, but were not enough to sway voters.

IS THERE A FUTURE FOR PLANNING AND LAND USE REGULATIONS IN ARIZONA FOLLOWING PASSAGE OF PROP. 207?
Proposition 207 will impact regulatory efforts on two fronts: Adoption or amendment of land use regulations such

Prior to the consideration of any new ordinance, a jurisdiction will need to carefully analyze the proposal in light of Prop. 207 provisions.

as amendments to zoning ordinances and subdivision regulations and changes in General Plan designations or zoning on private property, whether initiated by the property owner or the municipality. Some jurisdictions are contemplating six-month moratoria for rezoning in order to provide the necessary time to evaluate the impact of implementing Prop. 207.

The League of Arizona Cities and Towns, with help from members of the Arizona Chapter of the American Planning Association, prepared an Implementation Guide to assist cities and towns in processing land use applications, zoning and subdivision ordinances, other land use regulations, and any claims that may arise as a result of Prop 207. Portions of the implementation guide follow.

Changes to the Text Amendment Process

When considering new land use regulations and amendments to existing regulations and resolutions, if changes result in new regulations that will arguably diminish the right to use, divide, sell, or possess the property, they will have to fall within one of the exempt categories intended to address public health and safety considerations, such as fire and building codes, sanitation, and transportation; public nuisance (common law only); federal laws; adult businesses; utility facilities; and regulations that do not directly regulate an owner's land. The municipality has the burden of proof to demonstrate that a land use change falls under one of the above noted exemptions. It is likely that municipalities will have to conduct studies and provide evidence to substantiate the relationship between a proposed regulation and the exempt category, such as public health and safety as a precedent to ordinance adoption. The exempt categories will surely be adjudicated by the courts in the future, as well.

We anticipate that changes to regulations, policies relating to commercial and residential design, and changes related to aesthetics and historic preser-

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12-1136. Definitions
In this article, unless the context otherwise requires:

1. "Fair market value" means the most likely price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all the uses and purposes to which it is adapted and for which it is capable.
2. "Just compensation," for purposes of an action for diminution in value, means the sum of money that is equal to the reduction in fair market value of the property resulting from the enactment of the land use law as of the date of enactment of the land use law.
3. "Land use law" means any statute, rule, ordinance, resolution or law enacted by this state or a political subdivision of this state that regulates the use or division of land or any interest in land or that regulates accepted farming or forestry practices.
4. "Owner" means the holder of fee title to the subject real property.
5. "Public use":
 - (a) Means any of the following:
 - (i) The possession, occupation, and enjoyment of the land by the general public, or by public agencies;
 - (ii) The use of land for the creation or functioning of utilities;
 - (iii) The acquisition of property to eliminate a direct threat to public health or safety caused by the property in its current condition, including the removal of a structure that is beyond repair or unfit for human habitation or use; or
 - (iv) The acquisition of abandoned property.
 - (b) Does not include the public benefits of economic development, including an increase in tax base, tax revenues, employment or general economic health.
6. "Taken" and "Taking" mean the transfer of ownership or use from a private property owner to this state or a political subdivision of this state or to any person other than this state or a political subdivision of this state.

12-1137. Applicability
If a conflict between this article and any other law arises, this article controls.

12-1138. Severability
If any provision of this act or its application to any person or circumstance is held invalid, that invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

vation will likely be subject to claims unless they can be reasonably tied to one of the exemptions or if impacted property owners file a waiver of any Prop. 207 claims. Other regulations, such as development impact fees, do not appear to be affected because they do not limit the use, division, or possession of property. Prior to the consideration of any new ordinance, a jurisdiction will need to carefully analyze the proposal in light of Prop. 207 provisions. Text amendment changes that arguably affect the value of a parcel will likely only be allowed if a waiver is

signed by all affected property owners. Prop. 207 will limit the evolution of development standards for developed communities and areas, while new development standards can be imposed on new, essentially "unzoned" suburban areas because a jurisdiction can create a new district with standards and require future rezoning to that district. The end result will likely be that older developed portions of the community will be forced to live with less development standards than new suburban areas and will likely suffer from a diminished appearance.

Prop. 207 will likely impact the quality of life for years to come in Arizona and may be a precursor to new regulatory takings laws across the United States.

Changes to the General Plan and Rezoning Process

Changes in zoning or subdivision actions on specific properties, whether initiated by the property owner or the jurisdiction, will also be subject to Prop. 207 provisions. While it is generally acknowledged that “upzonings” typically allow new uses that were not previously permitted, in some situations, the imposition of stipulations could give rise to a Prop. 207 claim. Prop. 207 provides an opportunity for a jurisdiction to reach an agreement with a property owner to waive a diminution in value claim. The League suggests that cities require a property owner to sign a waiver of any Prop. 207 claims prior to taking action to rezone or subdivide a property, particularly if the landowner requests a zoning change. It has been suggested that a jurisdiction work with a property owner on a Prop. 207 waiver as part of the application process, during the process or at the public hearing. It is recommended that the legislative body confer with legal counsel if a landowner refuses to waive a claim.

The substance and form of Prop. 207 waivers have not yet been decided. The League, and many local jurisdic-

tions, is working to develop this information. Waivers will likely cover all the relevant conditions of approval that may be eligible for a Prop. 207 claim. Waivers could also be incorporated with larger development agreements that address other issues. Some private land use attorneys have indicated they will advise clients to use a development agreement to formalize a Prop. 207 waiver, but also request additional value benefits to them as part of the agreement.

Processing a Prop. 207 Claim

Prop. 207 identifies parameters for filing a Prop. 207 claim, though it does not require the adoption of a procedure by a jurisdiction. The burden of proof is on a jurisdiction to demonstrate that a proposed regulation or land use change does not violate Prop. 207. On the other hand, it is not clear how a property owner demonstrates a claim for compensation or how a regulation has reduced the fair market value of the property. While such guidance has not been developed, it is likely political subdivisions will develop uniform procedures for landowners to use in the process and that some evidence of reduction of fair

market value will be necessary, though it is unclear what standard of proof the courts will apply before awarding any compensation.

Prop. 207 also allows a political subdivision to amend, repeal, or issue to the landowner a binding waiver of enforcement of a land use law on a specific parcel rather than paying just compensation. Use of such waivers will likely incur the risk of violating the uniformity clause of state statute or the filing of an equal protection claim.

CONCLUSION

Arizona is embarking on a path that will take land use planning into uncharted waters. It is unclear at this juncture how local governments and property owners will respond. However, it is expected the judicial, not legislative, branch of government will provide the necessary implementation direction for Prop. 207 as further lawsuits define the ambiguous language. Prop. 207 will likely impact the quality of life for years to come in Arizona and may be a precursor to new regulatory takings laws across the United States.

California's Proposition 90: The *Kelo*-Plus Strategy Fails

Kendall H. MacVey and Marco A. Martinez, AICP

INTRODUCTION

Fueled by the controversial *Kelo* decision, approximately one million California voters signed a petition to place the self-titled “Protect Our Homes Act” on the November ballot. More popularly known as Prop. 90, it proposed sweeping changes to the California Constitution in the name of

eminent domain reform. California voters rejected Prop. 90 by a margin of 52.5 percent to 47.5 percent.

THE CAMPAIGN

Prop. 90 was part of an organized effort by certain groups to employ what they called a “*Kelo*-Plus strategy.”¹ The goal was to use the *Kelo* controversy to place

measures on the ballot in different states that would address regulatory issues going beyond those litigated in the *Kelo* case. The drive to put Prop. 90 on the ballot in large part was funded directly or indirectly by Howie Rich, a millionaire developer who has been active in the Libertarian Party in New York.² Over 90 percent of the funding

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1. See, e.g., Leonard Gilroy, *Statewide Regulatory Takings Reform: Exporting Oregon's Measure 37 to Other States*. REASON FOUNDATION, 24-25 (April 2006) (discussing the advantages of combining eminent domain

reform measures with regulatory taking reforms.)
2. See, e.g., Christopher Cooper, *How Mr. Rich Spreads the Republican Word*, WALL ST. J., Nov. 7, 2006, at A4.

If Prop. 90 had been passed, it would have undoubtedly been challenged in court.

for the “Yes on Prop. 90” campaign came from outside of California. In fact, a measure containing almost identical language to Prop. 90 initially qualified for the Nevada ballot through similar funding efforts. The Nevada Supreme Court, however, found that some provisions in that state’s measure, including a regulatory taking provision that was virtually identical to a provision in Prop. 90, violated the requirement that a state proposition be limited to a single subject. (*Nevadans for the Protection of Property Rights v. Heller*, 141 P. 3d 1235 (2006))

There were strong legal arguments that Prop. 90 also violated the single subject rule under California law. If Prop. 90 had been passed, it would have undoubtedly been challenged in court. Interestingly, one attorney with the Pacific Legal Foundation, which did not officially endorse Prop. 90, but was clearly sympathetic toward it, acknowledged on his Internet blog two days after the election that Prop. 90 was contradictory and judicially unenforceable.³

The campaign on both sides had limited media exposure compared to other propositions on the ballot. Nevertheless, the “No on Prop. 90” campaign assembled a large and diverse coalition. Over 400 groups of all persuasions took official positions opposing Prop. 90, including the California Chamber of Commerce, the California Taxpayers Association, the Sierra Club, the California Fire and Police Chief’s Associations, the League of Women Voters, the California Chapter of the American Society of Civil Engineers, and the California Chapter of the American Planning Association. The “Yes on Prop. 90” campaign had much more limited official support. Its most significant endorsement came from the California Republican Party. Conversely, the California Democratic Party and

Republican Gov. Arnold Schwarzenegger came out in opposition to the measure. In addition, the vast majority of newspaper editorials were opposed to Prop. 90.

THE CONUNDRUM OF PROP. 90

The proposition proposed significant changes to the use of eminent domain in California. For example, it prohibited using eminent domain for “private use.” It made the issue of whether there was a “public use” a jury question; and it redefined “just compensation” and “fair market value” in ways that were generally favorable to property owners.

However, Prop. 90 did more than propose eminent domain reform. It also redefined “regulatory takings” in California. In fine print at the end of the ballot measure was a provision that would have required the payment of “just compensation” for any governmental action that resulted in “substantial economic loss to private property.” This redefinition of regulatory takings terms was both radical and sweeping. It applied to every level of government, from state to local. It applied to any governmental action (defined as statutes, ordinances, rules, regulations, and resolutions that became effective after Prop. 90 was approved). Most significantly, it applied to all private property—not just real property.

The potential implications of Prop. 90 were far-reaching. It essentially meant that the exercise of police power at all levels of government would be subject to just compensation claims. The measure had a limited exception for “health and safety,” but that term was left undefined. All other government actions would be subject to claims no matter how needed, reasonable, or beneficial the governmental action might be. Thus, if a governmental action resulted in “substantial eco-

nomical loss to private property,” payment would be mandatory, regardless of the action’s purpose or need.

Further, the traditional factors analysis established by the United States Supreme Court in *Penn Central Transp. Co. v. N.Y. City*, 438 U.S. 104 (1978), which has been used to determine whether there has been a regulatory taking, would no longer have had bearing as a matter of California law.⁴ Prop. 90 would also have abolished the “denial of all economic viable use” test that had been required for courts to find that a regulatory taking based solely on economic impact had occurred.

Making matters more confusing, the phrase “substantial economic loss” was also undefined. It was unknown, for example, whether it involved a 10 percent, 20 percent, or 30 percent diminution in value or whether it meant any large economic loss (e.g., a one percent diminution of a \$1 billion property). The phrase was so unclear that the official Prop. 90 ballot analysis prepared by the California Legislative Analyst’s Office (LAO) noted its vagueness and quoted the dictionary definition of “substantial” to provide guidance to voters. Moreover, the phrase “substantial economic loss” is virtually nonexistent in case law, thereby making it even more difficult to interpret. One California case used the phrase in the context of certificates of need for hospital equipment. That court found a 13 percent loss of net economic income constituted a “significant economic loss.”

The redefinition of regulatory taking applied to all private property. As noted by the LAO in its ballot analysis, it would have applied to real, personal, and intangible business property. The LAO also noted that the definition of regulatory taking would have applied to environmental, land use, and business

3. Posting of Timothy Sandefur to PLF on Eminent Domain, http://eminentdomain.typepad.com/my_weblog/2006/week45/index.html (Nov. 9, 2006, 6:38 PST) (agreeing that Proposition 90’s “self-contradictory definition of ‘just

compensation,’ for example, was literally unenforceable.”)

4. Regulatory takings law in California parallels federal law. See, e.g., *Buckley v. Cal. Coastal Comm’n*, 68 Cal.App.4th 178 (1998).

One of the harsh dilemmas that cities and counties had to factor in their planning and redevelopment activities leading up to the election was the unknown financial exposure they faced concerning the regulatory actions they were about to take.

regulation whenever it was deemed to result in “substantial economic loss” to private property. Potentially, then, Prop. 90 could have applied to animal welfare protection measures, city and county adoption of general and specific plans, zoning, environmental protection measures, historic preservation laws, minimum wage and worker regulations, consumer protection laws, rent control laws, gambling prohibitions, adult entertainment restrictions, securities and accounting fraud measures, antitrust and unfair competition laws, and more. It could even have applied to criminal laws. In this respect, Prop. 90 went further than any other purported eminent domain reform measure on other state ballots, including Oregon’s Measure 37, which passed in 2004.

One of the harsh dilemmas that cities and counties had to factor in their planning and redevelopment activities leading up to the election was the unknown financial exposure they faced concerning the regulatory actions they were about to take. For instance, Prop. 90 specifically cited governmental actions restricting air space as an example of “substantial economic loss” to private property. If a governmental action resulted in height limitations, those who owned property under those restrictions could claim a taking had occurred. On the other hand, if the height restrictions were lessened, adjoining property owners could potentially argue that the resulting loss of their view and light was a taking. Local governments and taxpayers faced being caught in the crosshairs of lawyers and claimants in either scenario.

Because of the obscure placement of the regulatory taking provision in

Prop. 90, it took some time for cities, counties, and other governmental agencies to realize the potential impact Prop. 90 would have on their governance in matters that had nothing to do with eminent domain. Once Prop. 90’s regulatory taking provision was known and understood, some cities rushed to enact governmental actions before the election.⁵

The eminent domain reform components of Prop. 90 also had serious implications. The impact would have been immediate on the building of schools, roads, and other infrastructure. The redefinition of “just compensation” would have included associated expenses incurred by the owner, including, presumably, all appraisal, legal, and moving expenses. Project benefits could not have been used as offsets to any claims for severance damages. Public use was redefined. One particularly odd provision stated that any unpublished eminent domain opinion or order would be considered null and void. Because these provisions would apply to all pending, and not just future, eminent domain cases, projects that were premised on compliance with existing eminent domain cases had the potential of being undermined literally overnight.

CONCLUSION

One of the ironies of Prop. 90 is that it did not do what most of its proponents and opponents thought it would. Prop. 90 capitalized on the *Kelo* controversy, but did not absolutely prohibit the forcible transfer of private property from one private party to another by eminent domain. Rather, Prop. 90 specifically stated that eminent domain could be used for projects owned and

operated by private parties, such as toll roads and privately owned prisons. A fair reading of Prop. 90, then, was that it still allowed for the use of eminent domain to transfer property to a private developer for redevelopment so long as the property in question was blighted. Another irony is that the United States Supreme Court specifically noted that the situation in *Kelo* could not exist under California law.

Prop. 90 was ultimately defeated by a five percent margin. It is not clear to what extent those who voted for Prop. 90 understood its implications. Many who voted for Prop. 90 also likely voted for bond infrastructure propositions that overwhelmingly passed, but could have been undercut by Prop. 90. Although Prop. 90 failed, it may not be dead. Proponents are promising that they will be back for the 2008 election.

For government planners and land use attorneys, regulatory measures and decisions, especially land use decisions, must continue to be carefully thought through and grounded in well-reasoned studies and findings. The “Yes on Prop. 90” campaign emphasized the *Kelo* case and cited anecdotes of alleged eminent domain abuse. What this campaign demonstrated is that anecdotes of governmental regulatory abuse are a powerful image for voters (whether or not they may be considered exaggerated or taken out of context). This is all the more imperative that planners and attorneys take particular care in making sure that land use decisions (1) are supported with appropriate findings; (2) do not go so far as to constitute a taking; (3) clearly demonstrate a public purpose; and (4) appropriately consider impacts on affected property owners.

5. Proposition 90’s regulatory taking provision would have applied to any governmental action that took effect after Proposition 90 was approved. Before the election, the California Legislature passed many new laws concerning such subjects as

raising minimum wages or addressing global warming that would take effect after November 7, 2006. In passing these laws, the Legislature never considered and probably never understood the potential exposure Proposition 90

imposed on the State of California for such legislation.

Montana Supreme Court Declares 'Foul Play'

Greg Sullivan

INTRODUCTION

Montanans both delight in and curse the relationship between two inextricably linked realities: the diverse landscapes that define us as individuals and communities, and an increasingly archaic and suspect legal paradigm for land use planning.

Planning is one of the most important methods available to Montanans to define the connection between their landscape and the law. As it is everywhere, planning in Montana is limited by the underlying legal structure; but because our land use laws place the rights of developers and landowners above the rights of the community and the ecological health of the landscape, the relationship between Montana's landscape and law is out of balance. Undeniably, one of our state's biggest challenges for the future will be to find a more appropriate balance between the physical and ecological constraints the landscape places upon development and the ability of our local governments to ensure new development fits appropriately in the landscape.

The law can and should ensure Montana stays the unique and special place it has always been. The state must permit local governments to require the development of compact and efficient communities that protect open space, wildlife habitat, and agricultural lands. The law must also require the wise use of local economic resources and ensure that development supports critical civic institutions such as schools, and even jails. Our land use laws should provide greater flexibility for local govern-

ments to regulate for the general welfare.

Many Montanans think our land use laws, or at least the way they have been applied, have gone too far in protecting the community's general welfare above the rights of individual property owners. This is anathema, they claim, to a land use ethic imbedded in Montana's culture of individualism and self-sufficiency. That's where I-154 fits in: It is an inevitable showdown between those who espouse a regulatorily limited, small-government Montana and those who call for more flexible laws and better planning tools to address the uncontrolled impacts that speculative development is having on Montana's rapidly urbanizing communities.

THE SHOWDOWN THAT WASN'T

Unlike other states' experiences this past November, the Montana property rights showdown never happened. Opponents of I-154 challenged the proponents' signature-gathering practices in court. On September 13, the district court issued a 46-page order invalidating the secretary of state's certifications for I-154 and two other initiatives, concluding that there were three significant defects: (1) proponents' out-of-state signature-gatherers routinely attested that they personally gathered or assisted in gathering signatures which, in fact, were gathered by other persons outside of their presence and without direct assistance from them; (2) proponents' out-of-state signature-gatherers used false addresses on their certification affidavits; and (3) at least some of these

same signature-gatherers employed a deceitful "bait and switch" tactic.

On October 26, the state's highest court affirmed and held the signatures obtained by out-of-state signature-gatherers were invalid and the signature-gathering process was "permeated by fraud and procedural non-compliance." I-154 was removed from the ballot. (*Montanans for Justice v. State*, 2006 WL 3030653 (Mont. 2006))

The Montana Supreme Court's decision has merely prolonged this inevitable democratic showdown over property rights, eminent domain, and regulatory takings. With high voter turnout this past election and the narrow victory of Democrat John Tester to replace incumbent Republican Sen. Conrad Burns, it appears likely that enough Montanans with some common sense would have defeated I-154 if it had been on the ballot. Certainly, the proponents of I-154 will be back unless the 2007 Montana Legislature passes some kind of I-154-type legislation, which is doubtful given the near 50/50 party tie in both the Montana House and Senate. Next time, the extremists will have the 2008 presidential election to bring voters to the polls.

Even though statutory initiatives in Montana are constitutionally limited to one subject, I-154 had two. First, it would have defined what types of uses were public for purposes of eminent domain, rather unnecessary as Montana already has its own constitutional standard for eminent domain. At the same time, I-154 would have created a new legal theory in Montana

Passage of I-154 would have guaranteed Montana's return to the dark ages before planning.

regarding regulatory takings, a contrived theory similar to that of Oregon's Measure 37 and the other recent takings initiatives.

Foremost, I-154 would have tied the figurative hands of local governments in Montana to regulate land use for the general welfare. Enforcement of such regulations would have required the government to compensate the property owner for loss of property value or waive enforcement of the land use regulation. Passage of I-154 would have guaranteed Montana's return to the dark ages before planning.

Montana doesn't need a *Kelo* fix, the signature-gatherers' bait for I-154. The Montana Supreme Court held in 1995 that the Bozeman Area Chamber of Commerce could not occupy part of a visitor center constructed on land condemned by the City of Bozeman for a new highway interchange. (*City of Bozeman v Vaniman*, 898 P.2d 1208 (Mont. 1995)) The Court found the chamber's use of the land was not a "public use" and noted that the chamber received more than just an incidental benefit from the condemnation because its corporate offices would be located in the building. "The use for which the land is taken must be that of the State" and not of a private entity. The result is that had the taking of Suzette Kelo's home been in Montana, and even if it was part of an otherwise legitimate economic development program, the Montana courts would most certainly determine the taking was not for a "public use" and would not have allowed it under the Montana Constitution.

I-154 is wrong for Montana for other reasons. Removing the general welfare as a basis for zoning and other planning tools would force local gov-

ernments to abandon attempts to protect the very amenities that make our communities prosperous and attractive to businesses and residents, including open space, agricultural operations, and wildlife habitat. And while there is undeniably more than a little uncertainty regarding regulatory takings law in Montana, I-154 would have only exacerbated that uncertainty.

The proponents drafted the initiative in a way that would guarantee the courts would have to participate in all regulatory takings. Montanans would surely see litigation regarding applicability and retroactivity as the courts would inevitably be forced to decide whether I-154 applied only to regulations adopted after the initiative became law or also to future application of existing regulations. Furthermore, the courts would be involved with almost every I-154 claim, not necessarily for claims made by landowners seeking to capitalize on the initiative, but by the neighbors who depend upon the protections that existing land use regulations provide. In fact, the trend in Montana land use litigation is that claims are brought less by landowners denied development privileges and more by neighbors opposed to significant changes in their neighborhoods and communities.

PICTURE THIS

To illustrate how I-154 would play a role in defining the relationship between landscape and law, picture Bridger Canyon, just north of Bozeman on the east side of the spectacular Bridger Mountains. Back in the early 1970s, farsighted residents of this canyon realized zoning could protect their property rights, so they convinced Gallatin County to adopt the Bridger Canyon Zoning District

Development Plan and Zoning Regulation. This zoning regime is the oldest in Montana. Because of I-154's retroactivity language, this regulation would be subject to the regulatory takings components of I-154, just as new zoning regulations would be.

Imagine this: Montanans pass I-154, or similar legislation. An out-of-state developer eyes this spectacular landscape. He knows that within the Bridger Canyon Zoning District lies Bridger Bowl Ski Area and the Bohart Ranch Nordic Ski Center. The close proximity to town, abundant snow, acres of high-quality terrain, and loads of sunshine are amenities Bozeman residents cherish, as do the neighbors living in the Bridger Canyon Zoning District.

Now this fictitious developer buys 200 acres in relatively close proximity to the Bridger Bowl Base Area. While the plan and regulation recognize some future expansion of the Bridger Bowl Base Area, the parcels that make up this project are not part of the expansion area. Rather, the zoning limits development to one residential right per 20 acres, about 10 homes.

The developer, after the passage of I-154, proposes a large resort with trail and chair lift links to Bridger Bowl, 250 condominiums, 50 single-family homes, and a lodge. Does the county change the plan and regulation to accommodate this project? Absent I-154, the planning and zoning commission, in the face of certain and considerable community opposition, would most likely not.

However, if Montanans had passed I-154, the long history of careful planning in the Bridger Canyon Zoning District would be on the chopping block. In its place, a complete paradigm shift occurs in the relationship between the land use law and the

While I-154 is similar to takings initiatives in other states, its application in Montana would likely change landscapes with national significance.

Bridger Canyon landscape. Now, the rights of the landowner nearly always trump the rights of his neighbors. Zoning is no longer a tool to protect property rights but a tool to line the pockets of speculative developers.

So how do county officials deal with the project under an I-154 scenario? It is unlikely elected officials would compensate the developer for the difference between the profit the resort would generate and that which he would make with 10 single-family houses. The most likely reality? The county waives the density and use regulations and allows the development to proceed. The result is that folks who purchased property decades ago and have 30 years of expectations that the zoning regulation would protect their property rights and values would be cast, like those who live in the vast unzoned portions of Montana, into a void of land use uncertainty.

While I-154 is similar to takings initiatives in other states, its application in Montana would likely change landscapes with national significance. The majority of Montana's fastest growing regions lie either directly adjacent to or within close proximity to the Greater Yellowstone ecosystem and the Northern Continent Divide ecosystem (Glacier National Park). Unabated development in areas adjacent to these wild places throughout Montana will not only affect Montanans, but will have a marked impact on all Americans.

CONCLUSION

Montana has always been defined in opposing ways: East and west. Plains and mountains. Now, though, the nature of our traditional dichotomy is changing. On the one hand, we are increasingly becoming a Montana of rural communities; on the other we are becoming a Montana that looks

and feels like other highly urbanized areas of the Rocky Mountain West, such as parts of the Colorado front range, the Salt Lake Valley, and even Las Vegas. The result is that urbanizing counties face increasing traffic and congestion, higher than necessary real estate values, rising crime rates, and a changing sense of community.

There is no doubt Montanans will be forced to settle this showdown over regulatory takings, thus clarifying, for a while at least, the landscape and law relationship. If it settles in favor of progressive planning accompanied by sensible changes to our land use planning statutes, we may have a chance to not only make sure the Montana landscape continues to look and survive like the Montana we respect and value but also, perhaps for the first time, to create land use regulatory certainty. But if this relationship gets settled with solutions similar to I-154, we may very well lose that which we cherish the most.

'Goes Far Enough, Costs Just Right': The Morning After Election Day in Washington

Joseph W. Tovar, FAICP, and Charles R. Wolfe

INTRODUCTION

Eleven years after the defeat of the last property rights ballot measure in Washington State,¹ voters dramatically embraced the anti-"Property Fairness Act" war cry of "Goes too Far, Costs too Much," and once again preserved the integrity of the state's innovative land use system. Vocal critics of the ballot measure—including respected regulatory professionals, land use and environmental

attorneys, and a well-financed coalition (including the Washington Chapter of the American Planning Association)²—learned from the recent Oregon experience about the importance of countering the direct, visceral messages of proponents. The Communities Protection Coalition (CPC) effectively orchestrated the sound rejection of Initiative 933 (I-933) by 59 percent of Washington's voters on November 7.³ The coalition included

over 100 organizations, including the League of Women Voters, the Washington State Council of Fire Fighters, Seattle and Spokane Chambers of Commerce, the American Lung Association, United Farmworkers, the Washington Association of Churches, and dozens of labor and environmental groups.

In Washington State, the post-election landscape will feature a 2007 legisla-

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1. Settle, Washburn and Wolfe, "Jekyll & Hyde '95—Regulatory Reform in Washington," LULZD, Vol. 47 No.9, 1995.

2. The American Planning Association's Washington Chapter was represented on the Executive Committee of the CPC, and both the Chapter and its members contributed financially to the

"No on 933" campaign. Members also collectively donated thousands of hours of their own time ringing doorbells, working on phone banks, e-mailing, posting yard signs, speaking at a variety of events, and writing letters and articles.

3. One of the Committee's most effective contributions to the campaign was an

analysis posted to the Chapter website (www.washington-apa.org/analysis_I-933.shtml), explaining in lay terms the key features of the 1,500-word initiative and its likely consequences for Washington's economy, environment, communities, and taxpayers. Chapter members also spent their own time working on and disseminating a model resolution to dozens

of city councils across the state, which resulted in anti-Initiative 933 resolutions in over 40 municipalities.

It is significant to note that, in contrast to the 1995 campaign, I-933 received no active support from statewide business associations, notably the real estate industry, the forestry industry, and Seattle-area builders

tive session that will attempt to bring balance, clarity, and fairness to the issues which drove the I-933 debate. In coming months, decision makers will discuss how to best preserve vested property rights while protecting the state's critical areas, and clarify appropriate urban densities within the general ambit of fairly administered permits and approvals. While heeding the 13 legislative goals of the state's Growth Management Act (particularly Goal 6 to protect property rights and Goal 7 to assure a timely, fair, and predictable permit process), interested parties hope to effectively define what "goes far enough and costs just right."

THE NUTS AND BOLTS OF I-933

One of the unique aspects of Washington's measure was that, unlike ballot measures in other states, it only addressed compensation for "regulatory damages" and personal property, not eminent domain. I-933 contained the predicate that "government decision makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected rights in property." Ironically, this predicate is already reflected in Washington's Growth Management Act.⁴

I-933 borrowed heavily from Measure 37, Oregon's property rights law, which voters passed in 2004 and the state's highest court upheld. (*MacPherson v. Dept. of Administrative Services*, 130 P.3d 308 (Or. 2006)). The two measures shared a "pay or waive" scheme, with certain limited exceptions addressing structural safety standards in building and fire codes; "immediate threats to human health and safety" such as sex offender hous-

ing and adult entertainment uses; certain EPA-listed hazardous chemicals; worker health and safety laws; wage and hour laws; daily nutrient management restrictions; and "setbacks from property lines"—provided the setbacks were required prior to January 1, 1996. Under such "pay or waive" schemes, state and local government agencies are forced to choose between paying a property owner to achieve compliance, or waiving the requirements of the law or regulation for that property owner.

Specifically, I-933 featured 10 sections in four pages of text. Much of Sections 1 and 2 included references to "fairness" and the need to comply with the federal and state constitutions. The key "pay or waive" provision was as follows: "An agency that decides to enforce or apply any ordinance, regulation or rule to private property that would result in damaging the use or value of private property shall first pay the property owner compensation as defined in Section 2 of this Act."

Under I-933, it was estimated that city taxpayers could have paid out between \$3.5 billion and \$4.5 billion for actions taken since 1996, the stated I-933 retroactivity date,⁵ while statewide, city and county taxpayers faced paying out between \$7.2 billion and \$8.99 billion⁶ for actions taken by or before 2012. The assumed alternative was to waive land use and environmental regulations upon a claimant successfully showing that the regulation devalued his property.⁷ The "No on 933" campaign successfully argued that the cumulative effect of such waivers would be to increase tax burdens, lower municipal levels of service, inject uncertainty into the real estate market, dampen Washington's improving busi-

ness climate, and lower the state's overall quality of life.

WASHINGTON VOTERS REJECT I-933

The 59 percent to 41 percent margin by which voters rejected I-933 is almost identical to the results in 1995. In both elections, opponents effectively painted those proposed laws as radical and prohibitively expensive policies. Both campaigns successfully appealed to voters' instincts for moderation and preserving the status quo with the slogan "Goes too far, costs too much." I-933 was most soundly defeated in the state's urban regions of Puget Sound and Spokane, but was even rejected in several rural counties on both sides of the Cascade Mountains, the theoretical "blue/red" dividing line between western and eastern Washington. It did pass in more conservative rural counties where discontent with environmental protection mandates has chafed since the adoption of the Growth Management Act in the early 1990s.

It is significant to note that, in contrast to the 1995 campaign, I-933 received no active support from statewide business associations, notably the real estate industry, the forestry industry, and Seattle-area builders in particular. Not only did this deprive I-933's supporters of the credibility of a broad coalition of interests, it also starved their campaign of the funds to mount an aggressive media campaign. I-933's sponsor, the Washington State Farm Bureau, did succeed in tapping the anger of some rural and agricultural interests and attracted infusions of cash from out-of-state libertarian groups to run its campaign. However, with its earlier allies sitting on the sidelines and with active opposition from a number

4. See rcw 36.70A.020(6), the property rights goal of the Growth Management Act, and rcw 36.70A.370 which directs the state attorney general to provide guidance to local governments to help them to avoid constitutionally prohibited "takings" of private property.5. AWC I-933 Fiscal Impact Estimates, posted online at: www.awcnet.org

6. On September 20, 2006, the Washington State Office of Financial Management issued a more comprehensive analysis of the prospective costs of I-933 to cities, counties, and state agencies. OFM estimated that the costs for the next six years will be between \$3.8 billion to \$5.3 billion for cities; between \$1.49 billion to \$1.51 billion for counties; and between \$2

billion and \$2.18 billion to counties. Cumulatively, OFM estimated that the cost of I-933 to all three levels of government for the next six years to be between \$7.29 and \$8.99 billion. The OFM analysis posted online at www.ofm.wa.gov/initiatives/933.asp.

7. By its terms, I-933 stated that its provisions are to be "liberally construed" (Sec. 6)

and its exemptions are to be "narrowly construed" (Sec. 2). I-933 sponsors inconsistently described the reach of the measure during the campaign, and opponents assumed that virtually all land use protections adopted and enforced by any state or local government agency would be subject to the "pay or waive" provisions of the Initiative.

Not surprisingly, I-933's sponsors and supporters wasted no time after I-933's defeat to turn their eyes toward the upcoming 2007 legislative session.

of in-state farming organizations, the Farm Bureau's campaign was logistically overmatched and the credibility of its message was undercut.

An interesting question to ponder is why the Farm Bureau's allies from 1995 chose to sit out the I-933 campaign. One likely answer is that, despite its flaws, the state's existing system for managing growth presents a far more predictable and business-friendly decision-making environment than would the chaotic I-933 regime. Some development and resource industry interests have gone so far as to say that they have made their peace with the basic principles of land management law in Washington and prefer to work within that framework and with the legislature to make appropriate incremental adjustments.⁸

THE MORNING AFTER

In the wake of I-933's defeat, legislators, regulatory professionals, land use and environmental attorneys, and I-933 opponents are carrying on the effort to address the questions of regulatory fairness and forestall a repeat of an initiative which the majority of the voters found overreaching. Washington's legislature is likely to address issues of balance and fairness in a manner consistent with the Growth Management Act as noted above (including principles of sprawl avoidance, concurrency, and achieving appropriate urban densities, and designation and protection of critical areas) and the state's system of environmental regulation and review, which includes the State Environmental Policy Act (SEPA) and the Shoreline Management Act (SMA).

Fortunately, the post I-933 landscape need not address certain prob-

lematic aspects of Oregon law which spawned Measure 37. In contrast to Oregon, the Growth Management Act does not constrain municipalities to adopt agricultural zones that prohibit subdivision of lands to create new residential parcels, which fueled Measure 37's focus on home sites to allow farming families to remain on their land. In fact, the Washington state legislature recently increased the flexibility of agricultural property owners to put portions of their properties into nontraditional agricultural use.

In addition, several municipal governments in Washington have adopted or developed pilot programs for "transfer of development rights" (TDR) programs as ways to further address concerns about an imbalance of urban and rural development potential. King County and the City of Seattle resolved an urban growth boundary dispute with a program centered on Seattle's Denny Triangle. The City of Black Diamond and King County, working in conjunction with the Cascade Land Conservancy, recently consummated a three-way deal to direct development potential into the urban growth area while setting aside thousands of acres of forestry lands nearby. The City of Arlington and Snohomish County have been engaged in crafting a TDR program to help sustain farming in the Stillaguamish River Valley. The 2006 legislature signaled its support for such innovative programs by earmarking in the state budget \$250,000 for pilot programs in Pierce and Snohomish counties.

The possibilities for further legislative reform are wide-ranging. For ex-

ample, in 2005, the state Legislature created the Farmland Preservation Program to provide incentives to help maintain working farms and enhance the environmental benefits provided by farmland. However, the program is underfunded. Additional state funding would help protect working farms by giving farmers a way to benefit from increasing property values while still farming and provide relief for agricultural property owners whose land is heavily affected by environmental regulation.

Even without further legislation, traditional existing land use authority allows local governments to grant variances and "reasonable use exceptions" from zoning standards for property owners with demonstrable hardship cases. A key Growth Management Act provision also encourages a variety of other innovative regulatory tools and programs to provide regulatory relief such as density bonuses, cluster housing, planned unit developments, and the transfer of development rights. (RCW 36.70A.090.)⁹

CONCLUSION

The debate surrounding I-933 clearly left a silver lining of motivation for decision makers. The governor's office and the legislature must use the reprieve of November 7 to continue to broaden both the reality and the perception of regulatory fairness in Washington. Their objectives must be sensible and effective methods to achieve greater fairness, not simply to forestall another property rights initiative. Not surprisingly, I-933's sponsors and supporters wasted no time after I-933's defeat to turn their eyes toward the upcoming 2007 legislative session.

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8. *Support for I-933 Luke-warm* appeared in the SEATTLE TIMES in August 2006: <http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=pro-prights27m&date=20060827&query=Pryne>

9. The Municipal Research and Services Center provides several examples of "Flexible Regulatory and Non-

Regulatory Incentive Tools" often discussed in Washington state. See www.mrsc.org/subjects/planning/FlexIncentives/Environ.aspx.