November, 2006

Proposition 90

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

Summary

This measure amends the California Constitution to:

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

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

Paying Property Owners for Economic Losses

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

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

Proposal

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

What Laws and Rules *Would Not* Require Compensation?

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

What Laws and Rules *Could* Require Compensation?

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

- ***Downzoning Property.*** This term refers to decisions by government to reduce the amount of development permitted on a parcel. For example, a government action to allow construction of three homes on an acre where five homes previously had been permitted commonly is called "downzoning."

- ***Limitations on the Use of Private Air Space.*** This term generally refers to actions by government that limit the height of a building. For example, a government rule limiting how tall a building may be to preserve views or maintain historical character often is called a limitation of "air space."

- ***Eliminating Any Access to Private Property.*** This term could include actions such as closing the only public road leading to a parcel.

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

Would Government Pay Property Owners for All Losses?

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

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

Effects on State and Local Governments

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

- ***How Many Laws and Rules Would Be Exempt From the Requirement That Government Pay Property Owners for Losses?*** The measure does not require government to compensate property owners under certain circumstances (such as actions to protect public health and safety). If these exemptions were interpreted broadly (rather than narrowly), fewer new laws and rules could require compensation.

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

value to be a substantial economic loss, government would be required to pay fewer property owners.

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

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

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

Limiting Government Authority to Take Property

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

Over the years, government has taken private property to build roads, schools, parks, and other public facilities. In addition to these uses of eminent domain, government also has taken property for public purposes that do not include construction of public facilities. For example, government has taken property to: help develop higher value businesses in an area, correct environmental problems, enhance tax revenues, and address "public nuisances" (such as hazardous buildings, blight, and criminal activity).

Proposal

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

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

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

Under What Circumstance Could Government Take Property?

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

What Property Takings Would Be Prohibited?

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

- ***To Transfer it to Private Use.*** The measure specifies that government must maintain ownership of the property and use it only for the public use it specified when it took the property.

- ***To Address a Public Nuisance, Unless the Public Nuisance Existed on That Particular Property.*** For example, government could not take *all* the parcels in a run-down area unless it showed that each and every parcel was blighted.

- ***As Part of a Plan to Change the Type of Businesses in an Area or Increase Tax Revenues.*** For example, government could not take property to promote development of a new retail or tourist destination area.

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

How Much Would Government Have to Pay Property Owners?

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

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

When Would Government Sell Properties to Former Owners?

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

Effects on State and Local Governments

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

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

The rest of the property government acquires is used for purposes that do not meet the requirements of this measure. In these cases, government could not use eminent domain and could acquire property only by negotiating with property owners on a voluntary basis. If property owners demanded selling prices that were more than the amount government previously would have paid, government's spending to acquire property would increase. Alternatively, if property owners did not wish to sell their property and no other suitable property was available for government to purchase, government's spending to acquire property would decrease.

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

Return to Propositions

Return to Legislative Analyst's Office Home Page