Proposition 90:
Government Acquisition and Regulation of Private Property

Background Paper

Prepared by the Staffs of the Assembly Judiciary, Local Government, and Housing and Community Development Committees

I. INTRODUCTION:

This joint hearing of the Assembly Judiciary, Housing and Community Development, and Local Government Committees is being held on October 4, 2006, in accordance with Elections Code Section 9034.[1]

In June of 2005, the United States Supreme Court handed down one its most controversial eminent domain opinions in *Kelo v. The City of New London.*[2] The Court upheld the use of eminent domain to condemn the property of seven homeowners and eventually transfer the property to private developers as part of a comprehensive urban redevelopment plan. Although this was not the first time the Court upheld a private-to-private transfer in support of an economic redevelopment plan, in prior cases the condemning entities had always justified such takings as necessary to achieve the eradication of "blight."[3] In *Kelo*, the City of New London did not claim that the property had been taken to eradicate blight, but instead justified the exercise of eminent domain on the grounds that the development would benefit the public by creating jobs and increasing tax revenue.

Perhaps more than any other Supreme Court case in recent memory, the *Kelo* decision produced a nationwide political response and calls for restricting the use of eminent domain. Indeed, in the fall of 2005, the California State Legislature held at least three hearings on *Kelo*, eminent domain, and redevelopment law. Many other hearings were held around the state. Legislators in California and across the nation introduced bills to reform eminent domain.[4] In addition, well-financed groups managed to put initiatives on the upcoming Fall 2006 elections in at least six states. In California, this effort takes the form of Proposition 90, or the "Protect Our Homes" initiative.

In May of 2006 sufficient signatures were filed to qualify for the November 2006 ballot a sweeping statewide initiative that, if approved, would most experts agree substantially change California land use law—and potentially dramatically curtail future government law and regulation powers. The sponsors, wealthy individuals from New York and Montana, have successfully qualified similar measures in a number of states.[5]

In its less publicized but arguably more profound part, Proposition 90 seeks, by Constitutional amendment, to substantially diminish the authority of local planning

agencies. It does this by limiting the types of regulatory provisions which apply to property, and to require compensation be paid to an owner by the public entity. Regulations that would be prohibited, or would be subject to compensation by the taxpayers, include shade tree ordinances, building height ordinances, historic building preservation ordinances, "adult business" ordinances, environmental protection laws and farmland protection laws, to name only a few. Some experts contend that in reality, many and perhaps even most laws and regulations designed to protect the public's health and safety may be curtailed by the measure's potentially onerous compensation requirements.

Proposition 90 also seeks, again by Constitutional amendment, to prohibit the use of eminent domain to instances in which the condemned property shall be owned and occupied by the condemning agency or by a public utility. Proposition 90 expressly prohibits the use of eminent domain for "economic development" or "tax revenue enhancement." This is clearly intended to prohibit some current uses of eminent domain for a variety of reasons related to land-use planning and redevelopment. The proposition would also make other changes in existing law, which are discussed in greater length in the analysis prepared by the Legislative Analyst Office and included here as Appendix A.

Given the statutory requirement, this hearing will be for testimony only. No vote will be taken. The sole purpose of the hearing is for the Legislature and the public to better understand the potential impacts of the proposed changes in state law. To that end, the hearing will focus solely on the various potential changes to California law, and what impact such changes may or may not potentially have on California public policy.

II. BRIEF SUMMARY OF PROPOSITION 90

Proposition 90 amends and expands the "eminent domain" provisions in Article I Section 19 of the California Constitution. Briefly, these changes would limit the use of eminent domain by restricting what constitutes a "public use"; increase the amount of "just compensation" that governments must pay to property owners; and, under its less publicized "regulatory takings" provisions, require public entities to compensate property owners whenever a government regulation causes a "substantial" reduction in the value of the property. Specifically, Proposition 90 would do the following:

- Require governments to pay "just compensation" for any regulations that results in "substantial economic loss" to a property owner, unless those regulations were necessary to preserve public health or safety.
- Declare that examples of "substantial economic loss" would include, but are not limited to, "down-zoning," limitations on access to private property, and limitations on use of private air space.
- Define "just compensation" as the sum necessary to place the property owner in the same position monetarily as if the property had never been taken.
- Define "fair market value" as "the highest price the property would bring on the open market."

- Bar state and local governments from condemning of damaging private property to promote other private projects or uses.
- Narrow the definition of "public use" so as to expressly exclude "economic development" or "tax revenue enhancement."
- Require that property be used for its "stated use." If the property ever ceases to be used for its stated use, then it must be offered for resale to the prior owner or an heir.
- Exempt certain government actions, such as public utility rate regulation, nuisance abatement, and actions taken under a declared state of emergency.
- Provide that the provisions added by this proposition shall not apply to any statute, charter provision, ordinance, resolution, law, rule or regulation in effect at the date of enactment, unless any of those actions are amended in a manner that significantly broadens the scope of application.

III. SUMMARY OF ARGUMENTS FOR AND AGAINST PROPOSITION 90

According to the official "Protect Our Homes" website, Proposition 90 is supported by a handful taxpayer rights groups, the National Federation of Independent Business, the California Republican Party, and the Black Chamber of Commerce.

Proposition 90 is opposed by dozens of major organizations representing business and commerce, education, labor, taxpayers, financial institutions, civil rights advocates, the elderly, health care workers, agriculture, homeowners, and consumer, public interest, and environmental groups. It is also opposed by most public agencies and the various groups that represent them, such as the California League of Cities and the California State Association of Counties.

A. Arguments in Support

Proponents argue that Proposition 90 will end the kinds of eminent domain "abuses" exemplified by the *Kelo* decision. A sampling of the arguments provided on the "Protect Our Homes" website[6] make the following claims:

- There are "hundreds" of instances in which private property has been taken from a homeowner or small business only to be given to private developers who build shopping centers, auto lots, and office complexes in the name of "economic development" or revenue enhancement. (However, the website cites only five examples from California.)

- The traditional meaning of "public use" restricted the use of eminent domain to instances in which the property was actually occupied by the condemning government entity or transferred to a private party who performed an essential public service, such as a private public utility company.

- Modern court rulings have expanded the definition of "public use" so broadly as to justify almost any condemnation that forcefully transfers property from one

private party to another, so long as the condemning entity alleges some "public benefit."

- In *Kelo v. New London*, "the Supreme Court essentially declared American property rights null and void."
- Proposition 90 "stops the government from taking your home simply because they [sic] want higher tax revenues."
- Proposition 90 will provide "protection from regulatory takings, ensuring just compensation if the government devalues your property through regulatory actions."

Of the major newspapers who have thus far taken a position, most oppose Proposition 90; however, the *Orange County Register* and *Long Beach Press Telegram* have editorialized in support of the measure. At the time of this writing, they were the only major urban newspapers formally to support the measure. The *Orange County Register* stresses that Proposition 90 will eliminate eminent domain "abuses" by restoring the original meaning of "public use." The *Register's* editorial also claims that "the initiative will force governments to pay for the property they do take at its highest and best use" and "insist that property owners who lose their property to eminent domain be made whole." The *Register* editorial points out that property owners lose more than their property; they incur legal, moving, and other expenses that make that "fair market price" of the property less than "just" compensation. Finally, the *Register* argues that the "regulatory takings" provision is one the "most laudable parts of the initiative." According to the *Register*, this will end the practice of "downzoning" – for example, when a city rezones an area in a way that reduces the number or kinds of structures that can be built. According to the *Register*, if someone buys property based on existing zoning laws that permit housing development, but then the city changes the zoning to exclude housing development, the buyer should be compensated for his "now worthless land."[7]

The *Long Beach Press Telegram* is much more equivocal in its support of Proposition 90, conceding that its editorial board was "split on the issue of eminent domain in general" and acknowledged "some of the sound arguments made by opponents of this sweeping proposal to amend the state Constitution." The *Press Telegram* mainly opposes the "abuses" of eminent domain that result in taking homes and small businesses only to "hand it to a private developer simply to spark economic activity and take in the tax revenue." The *Press Telegram* agreed with some opponents who claim that Proposition 90 is "likely to invite lawsuits because of some vague wording," but nonetheless felt compelled to "stand by the principle of protecting property owners' rights and government's obligation to do everything it can to negotiate a real estate transaction that benefits both it and the land owner." "When a buyer meets the seller's price," the *Press Telegram* concludes, "there is not need for force."[8]

B. Arguments in Opposition

Opponents of Proposition 90 are by no means unqualified supporters of eminent domain. Indeed, many groups who have officially taken a position of oppose include staunch defenders of property rights – such as Senator Dick Ackerman, the California Farm Bureau, the California Business Properties Association, and the California Chamber of Commerce, to name a few.[9] However, opponents stress that Proposition 90 does much more than address admittedly real abuses of the eminent domain power; it also attempts to codify a radical understanding of "regulatory takings" that would compel compensation for regulations that result in "substantial economic loss," even though this term is nowhere defined in the initiative. As noted in the brief history of eminent domain and regulatory takings below, whatever "substantial economic loss" may mean, it is a far lesser standard than the current standard, established by Justice Scalia in the *Lucas* decision (see below), which held that regulations only amount to a compensable "taking" when they preclude *all viable economically beneficial or productive uses* of the property.

In an editorial entitled "Radical Plan Goes Beyond Eminent Domain," the *San Diego Union Tribune* condemns the *Kelo* ruling for most of the same reasons as those offered by the proponents of Proposition 90. While the *Union Tribune* suggests that it would support the measure if it only sought to limit eminent domain, it believes that the measure goes far beyond eminent domain and "veers into radical territory in two ways." First, Proposition 90 redefines "just compensation" to require that compensation reflect the value of the project to be built, rather than compensation necessary to make the condemned property owner whole. Second, the *Union Tribune* argues that the "vagueness" of the regulatory takings provisions will encourage challenges to the most mundane regulations and create "an atmosphere in which local officials contemplating basic questions of governance see legal peril and costly lawsuits at every turn." Proposition 90, the *Union Tribune* concludes, "is a radical overreach that would create vastly more problems than it would correct."[10]

Several other editorials and public statements against Proposition 90 similarly stress the "hidden" or "stealth" nature of the "regulatory takings" provisions. Overwhelmingly, opponents of Proposition 90 concede that the *Kelo* decision demonstrates the potential abuses of eminent domain.[11] However, opponents make three responses to *Kelo*: First, California is not Connecticut. Most notably, the taking in *Kelo* would not have been valid in California because the City of New London made no attempt to show that the property was "blighted," which is an essential prerequisite of California law (as discussed below). Second, opponents of Proposition 90 point out that the *Kelo* decision expressly stated that states were free to enact requirements that are stricter than what it constitutionally required by the takings clause of the Fifth Amendment. They point out that the California Legislature has already acted on this signal from the Court and passed nine bills dealing with eminent domain and/or redevelopment reform (see Legislative Summary, below). Third, and most importantly, most opponents argue that Proposition 90 goes far beyond eminent domain and attempts to incorporate "a radical stealth agenda" of regulatory takings. According to the *Sacramento Bee*, the proponents of Proposition 90 stress the eminent domain provisions and claim that it will protect homeowners and

small business people from "developers" and suggesting that it is the developers who will benefit from maintaining the status quo. Yet, as a number of editorials and commentators argue, the "regulatory takings" provisions will primarily benefit those same developers by making regulations on them either prohibitively expensive (by requiring compensation) or subject to legal challenges. These expenses – whether to pay the heightened measure of compensation or to defend inevitable lawsuits – will eventually be paid by the taxpayer.[12]

The *Bee* concludes that the proponents of Proposition 90 are using eminent domain as "a hook," since almost everyone agrees that eminent domain is in need of reform. But Proposition 90 is actually, the *Bee* claims, "a sweeping agenda to freeze land use and other regulations."[13]

The "No on 90" website also stresses the "hidden" and stealth-like aspects of Proposition 90. By attempting to curtail land use regulation rather than eminent domain takings, the real threat of Proposition 90, opponents contend, will be to stymie land-use planning, frustrate the ability of redevelopment agencies to jump start economically stagnant neighborhoods and build affordable housing, and eviscerate many necessary environmental regulations. In the process, the "No on 90" campaign contends, the initiative will hurt economic growth, drive up the costs of building new infrastructure, and lead to frivolous lawsuits.[14]

IV. BRIEF HISTORY OF "EMINENT DOMAIN" AND "REGULATORY TAKINGS"

As noted above, Proposition 90 seeks to substantially amend existing law relative to both eminent domain *and* regulatory takings law. The following brief historical sketch therefore treats eminent domain and regulatory takings separately. Even though these areas of law sometimes intersect (insofar as both implicate the "takings" clause of the Fifth Amendment to the U.S. Constitution), they are nonetheless historically and analytically distinct. The proposed changes in Proposition 90 pertaining to eminent domain and regulatory takings therefore should be reviewed for their distinctly different implications.

A. "Regulatory Takings"

Although the *Kelo* decision and other eminent domain "abuses" prompted Proposition 90 in California (see eminent domain discussion starting on page 8), Proposition 90 deals with both eminent domain *and* so-called "regulatory takings." Given that many commentators are suggesting the biggest impact of Proposition 90 may in fact be caused by its "regulatory takings" proposed restrictions, let us first turn to a review of that issue.

Although both Proposition 90's "takings" and eminent domain provisions implicate the Fifth Amendment takings clause, 20th century cases on "regulatory takings" should be clearly distinguished from "eminent domain" cases. Eminent domain is a fairly specific procedure whereby a government entity (or some other entity endowed by the government with the power of eminent domain) initiates a condemnation proceeding. It

entails the physical appropriation of real property. "Regulatory takings," on the other hand, are alleged when a government entity – by statute, ordinance, or agency regulation – imposes a regulation on property that greatly diminishes the value of that property. It does not involve an eminent domain, or condemnation, proceeding at all. However, the rationale behind regulatory takings – and its link to the takings clause of the Fifth Amendment – is that a regulation may have such a severe negative impact on the value of property that it works an effective "taking" of that property.

1. *Mahon* and the Invention of "Regulatory Takings"

While historians may debate what the term "public use" meant to the drafters of the Fifth Amendment, there is no evidence that the drafters meant the "takings" clause to apply to anything other than government appropriations of real property, not to regulations that might diminish the value of property.[15] Indeed, the concept of "regulatory takings" was essentially invented in 1922 by Justice Oliver Wendell Holmes, Jr. in *Pennsylvania Coal Co. v. Mahon*.[16] In that case, the Pennsylvania Coal Company contended that a state statute forbidding coal mining operations that caused subsidence effectively negated deeds that gave the company property rights not only in the surface of the land, but in the coal underneath. The company claimed that the act therefore destroyed its previously existing property rights and thereby amounted to a taking, even if it did not entail the physical appropriation of the land. Justice Holmes recognized that in applying the Fifth Amendment to a regulation, as opposed to a taking through eminent domain, that he was charting new waters. But he held that "while property may be regulated to a certain extent, if regulation *goes too far* it will be recognized as a taking." (Emphasis added.) For Holmes and the majority, passing a law that essentially put the coal mining company out of business, at least as to that particular piece of land, went "too far."

2. *Penn Central* and *Lucas*

In subsequent years, the courts struggled to determine when a regulation "goes too far," and becomes the effective equivalent of a "taking." In *Penn Central v. City of New York*,[17] the court considered whether a city may, as part of a comprehensive program to preserve historic districts, place restrictions on the development of individual historical landmarks -- in this case New York's Grand Central Terminal. In lieu of asking whether the regulation went "too far," the court in *Penn Central* asked to what extent the regulation interfered with the owner's "distinct investment-backed expectations." However, "courts and commentators alike have puzzled over the meaning of this phrase," and have essentially "given up" attempting to interpret it.[18]

The current prevailing view of the courts, both California state courts and federal courts, generally follows the approach set out by Justice Scalia in *Lucas v. South Carolina Coastal Control*[19]. Justice Scalia identified two "categorical" situations in which a regulation would constitute a "taking" within the meaning of the 5th Amendment, and therefore would require just compensation. The first category would be any regulation that compelled the property owner to suffer a physical "invasion" of the property, no matter how slight. The second category would be a regulation that "denies all

economically beneficial or productive use of land."[20] Also, any such regulation "must substantially advance a legitimate state interest."[21]

3. California Cases on "Regulatory Takings"

The California case law has closely followed the Scalia's test in *Lucas.* For example, in two cases where property owners alleged that a local rent control ordinance amounted to a "taking" by substantially diminishing the value of property, the court unequivocally upheld the constitutionality of rent control measures, even where such measures may fail to achieve the desired policy objective of making more affordable housing available. As in the eminent domain cases, the court deferred to legislative determination as to the wisdom or effectiveness of the policy. However, the court also directly addressed the question of when a regulation "goes too far" and becomes a taking. In *Santa Monica Beach, Ltd. v Superior Court of Los Angeles,* the California Supreme court, citing *Lucas,* held that a regulation that serves a legitimate state interest becomes a "taking" only if the regulation results in (1) a physical invasion of the property, or (2) precludes all viable economically beneficial or productive uses of the property. In short, the courts at both the federal and state level have rejected any so-called "diminution in value" test which would compensate the property owner in direct proportion to the value lost.[22] Such a court-rejected test is nevertheless seemingly contained in modified form in Proposition 90.

A critical provision of the measure would greatly modify existing definitions of what constitutes a regulatory taking. Proposition 90 would require compensation for any regulation that results in "substantial economic loss" to the property owner. This term "substantial economic loss" is not defined in the text of the proposition. However, one thing seems certain: "substantial economic loss" would create a much lower standard than existing law, which provides that a regulation is a compensable taking only when it precludes *all* economically beneficial or productive uses of the property.

B. Eminent Domain

Eminent domain generally refers to the power of government to require the sale of privately held property, so long as the property is needed for a "public use" and the property owner is given "just compensation" for the property. Although the exact origins of eminent domain are debatable, the doctrine clearly has deep roots in both English common law and Roman civil law. Historically the exercise of eminent domain did not require express statutory or constitutional authority, but was rather assumed to be an inherent attribute of sovereignty.[23]

It is important to note that the so-called "takings clause" of the Fifth Amendment did not grant the power of eminent domain; rather, it *presumed* a pre-existing power and created a constitutional requirement that property could be taken for a public use *only* with just compensation.[24] Although the history of the Fifth Amendment suggests that its drafters were primarily concerned with creating a "just compensation" requirement, modern courts now hold that the Fifth Amendment creates a two prong test: the property must be

taken (1) for a public use and (2) just compensation must be given to the property owner.[25]

The United States Supreme Court did not weigh in on the constitutionality of eminent domain actions and the limitations created by the Fifth Amendment until the late 1800's. It was not until 1897 that the United States Supreme Court held that the Fifth Amendment could be applied to the actions of a state. Since that time, state actions must comply both with any state statutory and constitutional provisions as well as the requirements created by the Fifth Amendment.[26]

1. Twentieth Century Case Law and the "Public Use" Question

Although "just compensation" is still an essential constitutional requirement, the most controversial cases of the past 50 years or so – including last year's controversial *Kelo v. City of New London* which largely spurred the effort behind Proposition 90 to curtail government use of eminent domain– have addressed the meaning of "public use." While the founders left few words concerning their view of eminent domain, the actions of their contemporaries provides some insight into what the term "public use" might have meant to them. Throughout the colonial era and into the post-Revolutionary period, American governments used the power of eminent domain for a wide variety of purposes. Some of these uses – such as to create public roads – suggested a narrow meaning of the term. On the other hand, other exercises of eminent domain suggested a much broader reading. For example, most colonial and early state governments passed so-called "Mill Dam Acts" which appropriated – or sometimes allowed the flooding of – private lands for the construction of water-powered grist mills. These mills were privately-owned enterprises, and served a "public use" only to the extent that the public purportedly benefited from the economic advantages of having a mill in the community.[27]

According to Professor Lawrence Berger, who has studied the "public use" requirement in some depth, the courts have vacillated over time between a "narrow" and "broad" reading of the public use requirement. The broad view generally interprets "public use" as a use primarily for the "public benefit" or "public interest," while the narrow view means something more akin to "public ownership," except that the narrow view could permit the transfer of property to a privately-owned entity (such as a public utility), so long as it performed a function or service traditionally performed by government. However, despite these shifts in meaning, courts have generally taken a very deferential stand toward legislative determinations of what constitutes a public use without entirely giving up their power to review those determinations.[28]

2. The "Modern" View: The Key Cases Before *Kelo*

As the courts have vacillated as to what constitutes a valid public use, the most controversial decisions have necessarily involved cases in which the power of eminent domain was used to transfer property from one private owner to another private owner. (Indeed it is this factual scenario that has spurred the reform movement spearheading Proposition 90-type measures across the country.) To be sure, the earliest eminent

domain cases also involved private-to-private transfers, as in the cases of railroad and canal construction. However, railroad and canal construction seemed consistent with "traditional" uses of eminent domain and a narrow reading of "public use," insofar as those services could be used by all members of the public – assuming they had need of them and could afford the fares or shipping rates.

However, in the second half of the twentieth century, state and local governments began to use the power of eminent domain as part of comprehensive plans of "urban renewal" and "economic development." Although the context of eminent domain may have been changing, the courts continued their long-standing precedent of defining "public use" flexibly, and generally showing deference to legislative determinations.

In *Berman v. Parker* (1954) a unanimous United States Supreme Court upheld the use of eminent domain as authorized by Congress for redevelopment in the District of Columbia. In this important case, the Court determined redevelopment to be a public purpose for which Congress could exercise its power of eminent domain, even as to properties within a redevelopment area that were themselves not blighted.[29]

Following the long-standing trend of deference to legislators, the Court concluded that what constitutes a valid public use or public benefit is "essentially the product of legislative determinations . . . . Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well nigh conclusive." In that case, the legitimate benefit derived from the exercise of eminent domain was the eradication of "blight" through programs of "urban renewal." Whether or not such policies were wise, or whether they would in fact achieve the desired policy goals, was not, according to the Court, a justiciable question.

This broad reading of public use and deference to legislative determinations was reaffirmed and expanded thirty years later in *Hawaii Housing Authority v. Midkiff*.[30] Relying heavily on the *Berman* case, Justice O'Connor's majority opinion in this case held that a state can use its power of eminent domain to pass property from one private party to another private party so long as there was some "justifying public purpose." The question, according to the Court, is not whether the legislative determinations will accomplish its goals, but whether there is any rational basis for the policy. Here, the Court found that correcting the social and economic problems created by Hawaii's skewed land tenure system was a justifiable public purpose.

Again following a long-standing trend of judicial deference, Justice O'Conner wrote that while the courts have a role to play in reviewing the legislature's determination of what constitutes a "public use," the *Berman* Court made it clear that the Court's role is "an extremely narrow" one.[31] In short, the Court should show deference to legislative determinations of public use "until it is shown to involve an impossibility." The Court agreed that use of eminent domain to transfer property from one private party to another would clearly violate the constitutional requirement if the primary purpose was to benefit the private recipient with only incidental benefits for the public. In short, the courts now hold that a private-to-private transfer is permissible where the Legislature has made a

determination that the transfer will primarily serve a legitimate public purpose, even though there may an incidental benefit to a private recipient.

3. *Kelo v. City of New London*

About two decades after the Court's holding in the *Hawaii* case upholding private-to-private transfers under the power of eminent domain, on June 23, 2005, the U.S. Supreme Court ruled that the taking of private property unrelated to a blighted condition for the purpose of economic development is a "public use" within the meaning of the Fifth Amendment.[32] Unlike the *Berman* case, the City of New London did not contend that the condemned properties were "blighted." Rather, the city used its power of eminent domain to take a number of modest homes for the purpose of developing a waterfront neighborhood that would feature a Pfizer pharmaceutical complex and adjacent offices, hotels, residences, shops, and services. The city contended that this development project would create a significant public benefit by reviving an economically stagnant neighborhood, creating jobs, and generating increased tax revenues that could be used to fund needed public services. A slim majority of the Court voted to uphold the city's use of eminent domain for this development project and, in so doing, used a broad definition of "public use" and showed great deference to legislative determinations by state and local policy-makers. In that sense, the *Kelo* decision was not so different from prior cases.

However, as was made clear in Justice O'Connor's dissent – recalling that Justice O'Conner authored the majority opinion in *Midkiff* – *Kelo* departed from *Berman* in that it did not require a finding of "blight" and departed from *Midkiff* in that it did not seek to address some historical peculiarity, like Hawaii's near-feudal land tenure system.[33] However, Justice Stevens' majority opinion assumed that the blight finding in *Berman* was not essential to finding that the urban renewal project served a legitimate public purpose. Rather, the clear conclusions to be drawn from *Berman* and *Midkiff*, Stevens contended, was that an eminent domain action that transferred property from one private party to another only needed to be justified by a legislatively determined public purpose.

Significantly, Justice Stevens also stressed that the Fifth Amendment only establishes minimum requirements and that "nothing in our opinion precludes any state from placing further restrictions on its exercise of the takings power."[34] He cited as an example California redevelopment law, which expressly requires a finding of blight.[35]

4. Redevelopment and Eminent Domain Law in California

It is important to emphasize that, as opponents of Proposition 90 notes, "California is not Connecticut." The California Legislature has long recognized the controversial nature of eminent domain, and has over the years added statutory restrictions on its use, particularly with respect to redevelopment and the eradication of blight. Unlike other states, California redevelopment agencies derive their authority to exercise the power of eminent domain from an express grant in the Community Redevelopment Law.[36] The

Legislature has specifically found that redevelopment of blighted areas cannot be accomplished by private enterprise alone.[37]

In addition, California redevelopment agencies are only authorized to exercise eminent domain within the boundaries of a designated redevelopment project area.[38] In order to adopt a redevelopment plan, the local legislative body must find that the area is blighted.[39] Blight is defined in state law as the presence of enumerated physical and economic factors which are "so prevalent and so substantial that they cause a reduction of, or lack of, proper utilization of the area to such an extent that it constitutes a serious physical and economic burden on the community which cannot be expected to be reversed or alleviated by private enterprise or government action, or both, without redevelopment".[40] Key to the debate over Proposition 90, land in California may not be characterized as "blighted" merely because it is not being put to its optimum use or may be more valuable for other uses.[41]

In California, before adopting a redevelopment plan, the redevelopment agency must comply with specific statutory procedures designed to ensure that the decision of the legislative body is based on substantial evidence of the existence of blight and that the interests of property owners are protected.[42] Specific findings of blight must be documented in the required report, and the report may not simply recite generalized conclusions.[43] Furthermore, the report and redevelopment plan must be considered at public hearings of the agency and legislative body, which may be held jointly.[44]

The entire plan adoption process typically takes a year or more. After the redevelopment plan is adopted, the agency must record, with the county recorder of the county in which the redevelopment project is situated, a description of the land within the project area and a statement that proceedings for the redevelopment of the project area have been instituted.[45] Purchasers of property in the redevelopment project area after the redevelopment plan has been adopted are thereby given notice that the property they are acquiring may be subject to acquisition by eminent domain for redevelopment purposes.

In short, exercising the power of eminent domain in California is subject to the same procedures and safeguards that govern the use of eminent domain by all public agencies in California. In addition, California's definition of blight was significantly tightened in 1993. Eminent domain is used by a redevelopment agency only after a lengthy redevelopment plan adoption process (9-12 months minimum) and after exhausting reasonable efforts to acquire the property voluntarily.

V. RECENT LEGISLATIVE HISTORY

As noted above, California law is already more restrictive than Connecticut law insofar as it requires findings and documentation of blight in the context of the *Kelo* decision and state limits on the use of eminent domain.

In addition to state limits already placed on the use of eminent domain in California, during the recently concluded legislative session, the California Legislature approved

nine bills addressing various concerns arising over eminent domain. All of these bills received strong bi-partisan support and are awaiting consideration by the Governor.

Thus, any evaluation of Proposition 90 should take into account the substantial recent bipartisan work of the Legislature to further tighten the use of eminent domain in California. During the 2006 Legislative Session, the Assembly and Senate passed the following measures that make important changes to both eminent domain and redevelopment laws:

AB 773 (Mullin) - Requires redevelopment referendum petitions in all cities and counties to be submitted within 90 days after the ordinance's adoption. - *Chapter 161, Statues of 2006*

AB 782 (Mullin) - Repeals the antiquated subdivision exception [which is defined as subdivided lots with irregular shapes and inadequate sizes for proper development] to the statutory definition of blighted areas. This bill also eliminates antiquated subdivisions from the definition of a predominantly urbanized area. -*Chapter 113, Statues of 2006*

AB 1893 (Salinas) - Clarifies that the ban on spending tax increment funds on the construction of city halls or county administration buildings includes spending for land acquisition, related site clearance, and design costs. – *Chapter 98, Statutes of 2006*

AB 2922 (Jones) - Requires redevelopment agencies, in cases where agencies are already required to record affordability covenants or restrictions on a property, to also record a document that specifies the date on which the affordability restrictions will expire and describes the property that is subject to the restrictions. The bill also specifies that interested parties, including any person or family of low or moderate income that is eligible to reside at, or is displaced or threatened with displacement from, a property subject to affordability covenants or restrictions, may sue to enforce those covenants or restrictions against the property owner. The bill clarifies that existing statutes requiring redevelopment agencies to rehabilitate or construct specified percentages of affordable housing units are not met until an agency has recorded the required affordability covenants or restrictions against the relevant properties. The bill would also expand requirements for what a redevelopment agency must disclose under an implementation plan adopted every five years, requiring agencies to identify the affordability level of affordable housing units, to verify that required affordability covenants or restrictions were recorded, and to state the expiration date for covenants or restrictions. – *To Enrollment*

SB 53 (Kehoe) - Requires a redevelopment agency to place a description of the agency's program for acquiring real property by eminent domain in its redevelopment plan and prohibits a redevelopment agency from amending its plan to extend the timeline to use blight unless the redevelopment agency can make a new finding of blight. – *To Enrollment*

SB 1206 (Kehoe) - Provides three major reforms to California Redevelopment Law: 1) narrows the statutory "blight" definition; 2) increases state oversight by involving the Attorney General, Department of Finance and the Department of Housing and Community Development; and 3) makes it easier to challenge redevelopment decisions. Additionally SB 1206 reinforces the requirement that agencies make clear and well articulated findings as to the necessity of engaging in redevelopment activities. – *To Enrollment*

SB 1210 (Torlakson) - Changes certain processes that relate to the taking of property by eminent domain. It prevents issuance of a pre-judgment order of possession without prior notice and an opportunity to respond for the property owner or occupants. It requires an entity seeking to take property by eminent domain to offer to pay the property owner's reasonable costs in ordering an independent appraisal of the property. It defines litigation expenses to include reasonable attorney's fees and reasonable expert witness and appraiser fees. The bill also changes certain laws that relate to redevelopment plans. Specifically, the bill requires a finding of continuing "substantial blight" prior to any exercise of eminent domain pursuant to a redevelopment plan longer than 12 years after the adoption of the plan, and would enact a new conflict-of-interest prohibition applicable to board members of public entities. – *To Enrollment*

SB 1650 (Kehoe) - Prohibits a public entity from using a property for any use other than the public use stated in its resolution of necessity, unless the entity first adopts a new resolution that finds the public interest and necessity of using the property for a new stated public use. Also requires a public entity to adopt a new resolution finding the continued public interest and necessity of using a property for its original stated public use if the property was not put to use within ten years of adoption of the applicable resolution of necessity. – *To Enrollment*

SB 1809 (Machado) - Amends current requirements that local legislative bodies record a statement upon the adoption of a redevelopment plan, to reflect that property is located within a redevelopment project area, by adding a requirement that such recordation take place within 60 days, as well as adding a statement of whether the plan authorizes use of eminent domain and what, if any, limitations are imposed on the use of eminent domain. – *To Enrollment*

In addition to the above measures, a number of constitutional amendments were introduced during the 2005-2006 session that would have amended the eminent domain provisions of the California Constitution. Like Proposition 90, these proposed amendments were largely in response to the *Kelo* decision and sought to restrict the use of eminent domain. Of the handful of amendments introduced only ACA 22 (La Malfa) and SCA 15 (McClintock) were heard by a policy committee. Both died in their respective house of origin. SCA 15 and ACA 22 proposed the following:

ACA 22 (La Malfa) - This bill would have prohibited state and local governments from taking property under eminent domain unless it was needed for public uses such roads, schools, parks, and public facilities. It would have expressly prohibited private-to-private

transfers for purposes of "economic development" or "increasing tax revenue." ACA 22 would also have redefined "just compensation" to include both the market value of the property as well as any additional costs incurred. Finally ACA 22 would have made it easier for a property owner to challenge an eminent domain proceeding.

SCA 15 (McClintock) - This bill would have amended the state Constitution to preclude public entities from taking private property by eminent domain for any "private use." All takings would be considered "private use" unless the property was to be owned and occupied by the condemning agency or by an entity regulated by the Public Utilities Commission. In addition, SCA 15 would have specified that private property could only be taken by eminent domain for a "stated public use." If the property ever ceased to be used for the stated public use then the former owner or heir could reacquire the property at fair market value.

While ACA 22 and SCA 15 were quite similar to the *eminent domain* provisions of Proposition 90, it is important to note that neither of these proposed amendments contained the *regulatory takings* provisions that are now contained in Proposition 90.

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[1] According to Elections Code Section 9034: "Upon the certification of an initiative measure for the ballot, the Secretary of State shall transmit copies of the initiative measure, together with the ballot title as prepared by the Attorney General pursuant to Section 9050, to the Senate and Assembly. Each house shall assign the initiative measure to its appropriate committees. The appropriate committees shall hold joint public hearings on the subject of such measure prior to the date of the election at which the measure is to be voted upon. However, no hearing may be held within 30 days prior to the date of the election… Nothing in this section shall be construed as authority for the Legislature to alter the initiative measure or prevent it from appearing on the ballot."

[2] 125 U.S. S. Ct. 2655 (2005).

[3] *See e.g. Berman v. Parker,* 348 U.S. 26 (1954) (upholding Congress' use of eminent domain as part of an urban renewal project in the District of Columbia.)

[4] *See e.g. Kelo-Related Bills Pass N.Y. Senate Judiciary Body*, New York Law Journal, May 2006.

[5] Peter Shrag, *Howie Rich's "Protect Our Homes" Trojan Horse* (noting New Yorker Howie Rich's role in financing campaigns in California and Montana.)

[6] http://www.90yes.com

[7] *Orange County Register*, September 1, 2006.

[8] *Long Beach Press Telegram*, August 28, 2006.

[9] *Los Angeles Business Journal*, September 4, 2006 (noting the opposition of many traditionally "conservative" and self-described "property rights" groups, such as the California Business Properties Association.)

[10] *San Diego Union Tribune*, August 22, 2006.

[11] *See e.g. San Francisco Chronicle*, August 20, 2006; *Id.,* September 13, 2006; *Los Angeles Times*, September 23, 2006; *Sacramento Bee,* September 26, 2006; *Los Angeles Business Journal,* September 4, 2006;

[12] *Sacramento Bee*, September 16, 2006; *see also* articles cited in n. 10, *supra*, and position statements posted on the "No on 90" website, http://www.noprop90.com

[13] *Sacramento Bee*, September 26, 2006.

[14] http://www.noprop90.com

[15] *See* Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L. J. 694 (1985).

[16] 260 U.S. 393 (1922).

[17] 438 U.S. 104 (1978).

[18] Dukeminier, *supra* at 1168.

[19] 505 U.S. 1003 (1992)

[20] *Id.* at 1015-1016.
[21] *Id.* quoting *Agins v. Tiburon* (1980) 447 U.S. 255, 260.
[22] 19 Cal. 4th 952 at 964; *see also Kavanu v. Santa Monica Rent Control Board* (1997) 16 Cal. 4th 761 at 774.
[23] P. Nicholas, The Law of Eminent Domain (1950) 7-34 (providing a brief history of eminent domain); *see also* E. Vattel, The Law of Nations (trans. J. Chitty, 1852) 112 (claiming that eminent domain is an inherent right of the sovereign.)
[24] Dukeminier and Kier, Property, 5th Ed. 1093-1094. However, *cf.* Black's Law Dictionary, 5th Ed., asserting, incorrectly it would seem, that "in the United States the power of eminent domain *is founded in federal (Fifth Amend.) and state constitutions."* (Emphasis added.)
[25] *See* Treanor, *supra,* (pointing that the primary concern of the drafters was "just compensation," since English law at the time allowed, but generally did not require, compensation).
[26] *Chicago, Burlington, & Quincy RR v. Chicago* (1897) 166 U.S. 226 (holding that the Fifth Amendment "just compensation" clause applied to the states through Fourteenth Amendment due process clause).
[27] *See generally* H. Schieber, *supra* 362-373; P. Nichols, *The Meaning of Public Use in the Law of Eminent Domain* (1940) 20 Boston Univ. L. Rev. 615-624.
[28] Berger, *The Public Use Requirement in Eminent Domain,* 57 Or. L. Rev. 203 (1978).
[29] *Berman v. Parker* (1954) 348 U.S. 26.
[30] 467 U.S. 229 (1984)
[31] *Kelo, supra,* citing *Berman,* 348 U.S. at 32.
[32] *Kelo v. City of New London* (2005) 125 S. Ct. 2655.
[33] *Id.* at 2671f.
[34] *Id.* at 2668.
[35] *Id.* at 2668, footnote 23.
[36] Health & Safety Code section 33391.
[37] Health & Safety Code section 33037(b).
[38] Health & Safety Code sections 33037, 33320.2, and 33300; *see also Gonzales v. City of Santa Ana* (1993) 12 Cal. App. 4th 1335, 1341.
[39] Health & Safety Code section 33320.1; *Regus v. City of Baldwin Park* (1977) 70 Cal. App. 3d 968, 977.
[40] Health & Safety Code section 33030.
[41] *Sweetwater Valley Civic Assn. v. National City* (1976) 18 Cal. 3d 270, 277.
[42] See, for example, Health & Safety Code sections 33339, 33345, and 33352(b).
[43] *Barbara Beach-Courchesne v. City of Diamond Bar* (2000) 80 Cal. App. 4th 388, 400-401.
[44] Health & Safety Code sections 33348 and 33355.
[45] Health & Safety Code section 33373.