

CALIFORNIA COASTAL COMMISSION

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**BILL ANALYSIS
PROPOSITION 98****SUMMARY**

Proposition 98 would amend the California Constitution to limit governments' use of eminent domain and greatly expand the circumstances under which government regulatory actions could be considered to damage or take private property (regulatory takings), requiring just compensation. Any take of private property could only be for a stated public use, which is re-defined narrowly. The initiative is broadly worded and in many instances its provisions are vague, leaving a great deal of uncertainty as to how the initiative would be interpreted if it were enacted. There will likely be numerous lawsuits filed to clarify the meaning of its various provisions. This analysis identifies ways in which the initiative might affect the California Coastal Commission, but it is not intended to present the best interpretation of its provisions or to constitute a definitive statement of how the Commission should interpret the initiative if enacted.

PURPOSE OF THE INITIATIVE

The stated purpose of this initiative is to:

- Prohibit public agencies from taking or damaging private property unless the agency's action is for a public use as defined by the initiative.
- Prohibit public agencies from taking private property for the same use as that made by the private owner.
- Eliminate rent control and mandatory affordable housing programs.¹

EXISTING LAW

The United States and California Constitutions require public agencies to provide just compensation when taking private property for public use. Property may be obtained in title through an eminent domain proceeding, during which the proper compensation is determined and the government pays and takes title to the property. The owner then has no further claim on the property. "Public use" is not currently defined in the United States or California constitution, but courts have interpreted the term to include a broad range of public purposes, such as redevelopment. Under existing law, a public agency may convey property acquired through eminent domain to another private entity so long as the conveyance is for a public purpose. In addition, if a public agency imposes restrictions on the use of private property so that the owner is deprived of all economic use of the property, the restrictions are considered a "regulatory taking," which also

¹ This analysis does not consider the effects of the provisions of the initiative that eliminate rent control and affordable housing programs, as these issues are not directly related to the Commission's programs.

requires compensation. Diminution in the value of property by itself is not sufficient to establish a regulatory taking.

ANALYSIS

Proposition 98, entitled by proponents as the “California Property Owners and Farmland Protection Act,” seeks to accomplish three primary goals: (1) prohibiting public agencies from taking or damaging private property unless it is for a stated public use, where public use is re-defined narrowly; (2) broadening the definition of a “take” of private property; and (3) eliminating rent control and mandatory affordable housing regulations.

Proposition 98 is the successor initiative to Proposition 90, another initiative aimed at limiting government’s power of eminent domain, which failed to win approval in November 2006. A 2005 United States Supreme Court decision, *Kelo v. City of New London, Conn.*, spawned these two initiatives, as well as many others nationwide, as property rights activists try to limit government’s authority to take private property in California and other states.

The *Kelo* Decision: In 2005, the U.S. Supreme Court reaffirmed that public agencies may acquire private property through eminent domain and then convey the property to another private party if the conveyance serves some public purpose, such as economic revitalization of a depressed community. The Court cautioned that public agencies may not take private property simply to confer a private benefit on a particular private party. The Court, however, rejected the property owners’ argument that it should adopt a narrow definition of what constitutes a public use or purpose. The Court was concerned that a narrow, judicially enforced rule would be inconsistent with prior precedent and would inappropriately entangle the judiciary in policy disputes about when to exercise eminent domain. The Court concluded by observing that States retain the authority to adopt stricter limits on the power of eminent domain than are required by the federal constitution.

The *Kelo* decision attracted considerable media attention. Reports often characterized the decision as a novel expansion of the power of eminent domain despite prior court decisions that had reached similar conclusions. The decision also prompted a considerable amount of legislative activity to restrict the power of eminent domain, including in California. Proposition 98 proponents state that the initiative is in part a response to the *Kelo* decision. However, the broad provisions of Proposition 98 go significantly beyond the issue in *Kelo*.

Proposition 90:

Proposition 90 essentially sought to accomplish two goals: (1) require government to compensate private property owners when governmental regulatory action reduced the value of private property and (2) prohibit the use of eminent domain to facilitate private

economic development. This initiative was narrowly defeated in the November 2006 election.

Proposition 98:

Like Proposition 90, Proposition 98 seeks to limit the circumstances under which governments may exercise their powers of eminent domain. The broad provisions of Proposition 98, however, such as the expansive definitions of “taken” and “private use,” will likely have a more significant impact on public agencies’ authority than Proposition 90 would have had.

Article 1, Section 19 of the California Constitution currently provides that “[p]rivate property may be taken or damaged for public use” only when just compensation has been paid to the owner. As noted above, “public use” is not currently defined in the constitution, but the term has been interpreted broadly by courts. Proposition 98 would amend Section 19 by specifying that:

- 1) private property may be taken or damaged only for a “stated” public use;
- 2) “public use” does not include transfers of property to non-governmental owners, nor may the public use change over time;
- 3) public agencies are prohibited from taking or damaging property for private use;
- 4) “taken” includes the governmental transfer of ownership, occupancy or use of property from a private owner to a public agency or any other person or entity; and
- 5) “private use” includes: (a) transfer of ownership, occupancy or use of private property or associated property rights to any entity other than a public agency; (b) transfer of ownership, occupancy or use of private property to a public agency for the consumption of natural resources or for the same or substantially similar use as that made by the private owner; or (c) regulation that transfers an economic benefit to one or more private persons at the expense of the property owner.

The initiative establishes new rules that increase the likelihood that property owners will sue public agencies for takings. In a case challenging a taking, a court is required to consider all relevant evidence, not just the evidence that was in the administrative record, and it must exercise its independent judgment, without deference to the findings of the public agency. Currently, courts give deference to a public agency’s determination of the type of projects that constitute a public use, which includes redevelopment efforts, even when the condemned property is conveyed to a private entity. If the court finds that the agency’s actions were not in compliance with the constitutional provisions relating to eminent domain, the property owner would be entitled to attorneys’ fees and costs in addition to any other damages awarded by the judge or jury.

In addition, the initiative would make it easier for property owners to recover their attorneys fees and costs in eminent domain proceedings. If Proposition 98 is enacted, property owners would be entitled to their reasonable costs and attorneys fees in every case in which they obtained a judgment of “fair market value” exceeding that offered by the condemning agency, rather than only being eligible to recover these costs under a limited number of circumstances, as is currently the case. Therefore, Proposition 98 would not only engender a great deal of litigation to establish the appropriate interpretation of its provisions, but it will also likely increase the number of lawsuits filed to establish the compensation due to a private owner whose property has been damaged or taken by a public agency and increase the amount of the payment by governmental agencies in these cases.

Potential Impact on Implementation of the Coastal Act:

If enacted, this measure will likely have a substantial impact on implementation of the Coastal Act. The definition of “taken” includes actions that transfer the use of property from a private owner to a public agency. Applicants for coastal development permits may argue that any condition requiring an offer to dedicate an easement over their property or a deed restriction affecting use of their property constitutes the transfer of the use of their property to a public agency. If this argument is accepted, the private owner would then be entitled to just compensation, as determined by a jury, for the loss of the use of his or her property. Likewise, if this argument is accepted, it is unclear who would be liable for compensating the private owner, the Commission or the entity accepting the OTD. However, this type of ambiguity will result in clarifying litigation. In addition, because such requirements could be interpreted as a taking, and the initiative prohibits transfers of the use of property to private entities, the Commission could be prohibited from allowing non-profit entities to accept offers of dedication. Entities may also be deterred from accepting OTDs.

Not only would the initiative broaden the definition of “taken,” it also includes a vague and broad definition of private use. Because taking or damaging property for private use is prohibited by the initiative, this broad definition could prohibit outright many different types of government actions, rather than simply requiring just compensation for those actions. This broad language leaves significant questions as to how the initiative should be interpreted, which means the terms will only be fully defined through litigation. One example of the potentially far reaching consequences of Proposition 98 is that it might prohibit regulation of private property that transfers an economic benefit from a private owner to one or more private parties. Many land use regulations can be construed to transfer an economic benefit from one property owner to another. For instance, regulations that limit the height of buildings confer a benefit on neighboring properties at the expense of an owner who wishes to build a taller building. Any such regulations that could be interpreted as a “taking,” therefore, may be prohibited if the initiative were enacted.

Private use is also defined to include transfers of private property or associated property rights to a public agency for the consumption of natural resources. This provision has

the potential to have a large impact on water resources in California. Public agencies could be prohibited from condemning property or associated property rights in order to use those resources for a public purpose, like ensuring a stable drinking water supply for the state. While this provision is quite vague, it could potentially prohibit the condemnation of private property for the purpose of building reservoirs, canals, or other water conveyance or storage devices on such land. This may result in increased pressure on the state's water supply and could have impacts on marine resources in the Coastal Zone. The Commission may see an increased number of applications for desalination plants, which could result in greater industrialization of the coast and a significant increase in entrainment of marine life. Marine resources could also be impacted by the government's reduced ability to maintain in-stream water uses, threatening water quality and ecosystems throughout the Coastal Zone.

The broad definition of private use could also impact the Commission's efforts to protect open space. The initiative would prohibit taking private property by a public agency if the agency put the land to the same or substantially similar use as that made by the private owner. For property that is currently undeveloped, a private owner could argue that public agencies are prohibited from acquiring their property, or even requiring offers to dedicate or deed restrictions on their property if the purpose of these acquisitions or restrictions is to protect and maintain the land as open space because these restrictions would effectively maintain the property in its undeveloped, or "open space," state.

Unlike Proposition 90, Proposition 98 does not include a general "grandfather" clause that would apply its provisions only to regulations and public agency actions taken after the enactment of the initiative. It does limit the retroactive effect of the rent control provisions, but the initiative includes no other clause that would specify how statutes and regulations that are in effect as of the date the initiative is enacted would be affected by the initiative.² In the absence of specific guidance, we do not know whether a court would apply the initiative retroactively. If it did have retroactive effect, however, it could result in applicants claiming that existing recorded OTDs or deed restrictions constitute takings that require invalidation or just compensation. Public agencies could also be sued by individuals trying to invalidate various existing land use ordinances and regulations based on a claim that they constitute prohibited "private uses," as described above. Thus, much of the coastal zone land currently protected by open space easements or deed restrictions could lose that protection.

Regardless of whether a court was to apply the initiative retroactively, it would apply to future changes in the law. Therefore, if Proposition 98 were enacted, local governments would probably become more reluctant to amend LCPs, as any new LCP provisions would be subject to the more onerous provisions of the initiative. Erroneous and outdated LCP provisions would thus become more difficult to correct, and LCPs might not be able to respond to changing conditions and new knowledge about threats to coastal resources.

² The rent control provisions of the initiative would not apply to existing residential units protected by rent control until the tenant living in the unit as of the effective date of the initiative vacated the unit.

In summary, Proposition 98 is intended to restrict public agencies' use of their eminent domain powers and their ability to regulate the use of private property. It is likely to accomplish both of those purposes, at least in part, though ambiguities in the initiative prevent any confident predictions about exactly how far reaching its consequences will be. These same ambiguities will generate a great deal of litigation to determine the appropriate interpretation of the provisions of the initiative. Property owners may obtain a greater ability to develop their own property as they prefer, but at the cost of less effective implementation of the Coastal Act.

FISCAL IMPACT

The Legislative Analyst's Office (LAO) estimates that the initiative would increase governments' costs to acquire property through eminent domain but that governments might buy fewer properties. The LAO therefore estimates that the "net statewide fiscal effect would not be significant." (See, www.lao.ca.gov/ballot/2008/98_06_2008.aspx). This analysis does not consider, however, the effect of the regulatory takings provisions of the initiative that would significantly increase the cost of implementation of environmental and land use regulations statewide.

RECOMMENDATION

Staff recommends that the Commission **OPPOSE PROPOSITION 98**.

ADDITIONAL INFORMATION

More information regarding this initiative and the initiative process is available on the website of the California Secretary of State.
(http://www.sos.ca.gov/elections/vig_06032008_public_display.htm).

The opponents of Proposition 98, the "No on 98/Yes on 99 Campaign" maintain a website in opposition of the initiative (www.eminentdomainreform.com) and the proponents, "Californians for Property Rights Protection," maintain a website in favor of the initiative (www.yesonpropertyrights.com).