

**Office of
The City Attorney
City of San Diego**

MEMORANDUM

DATE: October 27, 2006
TO: Michael J. Aguirre
FROM: John H. Serrano
SUBJECT: California Attorney General's Review of Proposition 90

INTRODUCTION

Proposition 90 on the November 2006 ballot is a proposed amendment to California Constitution, Article 1 §19, dealing with eminent domain and regulatory takings.

The existing and proposed versions are set forth as an attachment to this memorandum. .

QUESTION PRESENTED

Does the San Diego City Attorney's Office disagree with the evaluation of Proposition 90 performed by the California Attorney General?

SHORT ANSWER

No. This office's appraisal of Proposition 90 coincides with the analysis prepared by the California Attorney General, a copy of which is included with this memorandum.

BACKGROUND

EMINENT DOMAIN:

The current power of eminent domain is established by the Constitution of the State of California and supplemented heavily by statute. California Code of Civil Procedure [CCP] §1230.010, *et seq.*, sets forth the framework for the employment of this important tool.

The existing law requires that eminent domain be used for public purposes. CCP §1240.010 provides:

The power of eminent domain may be exercised to acquire property only for a public use. Where the Legislature provides by statute that a use, purpose, object, or function is one for which the power of eminent domain may be exercised, such action is deemed to be a declaration by the Legislature that such use, purpose, object, or function is a public use.

Currently, judicial review is available to resolve whether the “claimed” public use is actually a public use. This review is a judicial determination that the legislative body followed the proper procedure in deciding that a public use exists. The legislative body’s declaration of what is a public use is generally upheld if supported by foundational evidence and not clearly erroneous (*People v. Superior Court* 68 Cal. 2d. 206, 210 (1968)). Doubts are resolved in favor of the public nature of the use (*University of So. Cal. v. Robbins* (1934) 1 Cal. App. 2d. 523, 525). Pursuant to CCP §1245.250, the resolution of necessity by a public agency conclusively establishes that:

1. The public interest and necessity require the project;
2. The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury; and
3. The property sought to be acquired is necessary for the project.

Pursuant to this provision, California public agencies have acquired private property for public use both for occupation by the entity (e.g., parks, schools, roads, and facilities) and for public purposes (e.g., blight, nuisance, and redevelopment). Suits are rarely won by landowners on the question of the necessity for public use. The successful fights by landowners are generally on the questions of valuation and damages for such things as severance and goodwill.

Current statutory and case law sets forth a definition of what constitutes a “public use” for property. The application of this concept has permitted the use of eminent domain to eliminate blight. The furor ignited by the taking of private property for redevelopment, including ultimate sale to private parties, is predicated on the recent United States Supreme Court case of *Kelo v. City of New London*, 545 U.S. 469 (2005). There, the Supreme Court determined that the use of the public power of eminent domain to take private property for redevelopment did not violate the “takings” clause of the Fifth Amendment to the United States Constitution.

REGULATORY TAKINGS:

The City of San Diego and other public agencies exist to protect the public health, safety and welfare. Pursuant to law, the city enacts zoning laws, density laws, park dedication requirements, street dedication laws, environmental regulations, waste disposal laws, etc. All of

these are meant to improve the quality of life of our citizenry, yet they increase the cost of developing private property.

The Fifth Amendment of the U.S. Constitution and the current version of California's Constitution require government to compensate citizens for the taking of private property. Under existing law, these constitutional protections require government agencies to pay compensation to property owners for regulations that go too far in depriving owners of the full economic benefit of their property. The law permits property owners to seek compensation from government for regulations as well as for exactions imposed on them as a condition of approval for development projects.

The doctrine of regulatory takings places a limit on the government's police power, one rooted in the Fifth Amendment, which states, "nor shall private property be taken for public use, without just compensation." In the 1922 *Pennsylvania Coal Co. v. Mahon* decision, the U.S. Supreme Court ruled that this "takings clause" could be applied not only to physical seizure of property, but also to land use regulation, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

The power to regulate property is subject to the control of the courts. The three key principles established by case law are:

1. **Monetary damages:** The government must pay monetary compensation for an unlawful taking, even a temporary one. Simply removing the offending regulation is not sufficient redress;
2. **Nexus requirement:** In imposing exactions or other conditions on the approval of a development project, the government must show there is an "essential nexus" that relates the public burden imposed by the development to the exaction or conditions imposed; and
3. **Rough Proportionality requirement:** The magnitude of exactions imposed on a development project must be "roughly proportional" to the size of the public impact that the exactions are intended to mitigate.

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ANALYSIS & CONCLUSION

Proposition 90 has been accurately evaluated by the California Attorney General. If the proposition should pass, additional analysis of the effects of the constitutional amendments would have to be made on a case-by-case basis.

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By

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