

January 13, 2006

Hon. Bill Lockyer
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Attention: Ms. Tricia Knight
Initiative Coordinator

Dear Attorney General Lockyer:

Pursuant to Elections Code Section 9005, we have reviewed the proposed initiative entitled the "California Property Owners Protection Act" (File No. SA2005RF133). This measure makes changes to the California Constitution related to public actions to acquire private property through the eminent domain process and public actions that deny or "damage" the economic value of property.

BACKGROUND

To build public transportation and other facilities, promote economic development, and/or carry out other public policies, California state and local agencies sometimes buy private property or take actions that reduce the economic value of private property. Most of these property purchases and payments do not involve court action, but are negotiated between private property owners and public agencies. In some cases, however, a public agency and owner cannot agree upon the value of the property or the owner does not want to sell the property. In these cases, the matter may be resolved in court.

Under the United States and California Constitutions and other statutes, public agencies may use eminent domain power to (1) acquire private property (real, business, personal, tangible, or intangible property) or (2) reduce the economic value of property for a public purpose (these are referred to as "damages") if they pay "just compensation" to the owner. Just compensation includes (1) the fair market value of the real property and its improvements and (2) any diminution in value of the remaining property when property taken is part of a larger parcel. California statutes also require public agencies to compensate property owners (including, in some cases, lessees) for the loss of business goodwill and relocation costs associated with eminent domain activities. Under current statutes and case law (1) public agencies may use eminent

domain for a broad array of uses and (2) courts give deference to a public agency's eminent domain findings and usually limit their review to the information in the administrative record.

If a public agency uses its eminent domain power to acquire the property, the public agency pays the costs of the action, but the property owner pays his or her own attorneys fees. Under some circumstances, when the court determines that the public agency's pretrial offer of just compensation was unreasonable and the property owner's demand was reasonable, the court may order the public agency to pay all or part of the property owner's attorneys fees and litigation costs.

Current law does not require the agency to return the property to its previous owner if it no longer uses the property for its originally intended purpose.

PROPOSAL

This measure constrains public agency authority to (1) use eminent domain powers, (2) enact new or continue existing policies that reduce the economic value of property, and (3) use property acquired through the eminent domain process. The measure defines "public agency" to include all state and local agencies.

Provisions Related to Eminent Domain Authority

This measure requires public agencies to adopt a resolution of necessity specifying a public use for property before it is taken or damaged. The measure broadly defines the term "private use" (for which public agencies may *not* use eminent domain) to include:

- Property ownership transfers to a person or entity other than the public agency.
- Use of property for purposes similar to the use that was made of the property when it was under private ownership.
- Use of property that benefits some private persons at the expense of others.

In addition, the measure amends the definition of just compensation to include attorneys' fees in cases when property owners obtain a determination from a court that the amount the public agency offered before commencing a court action was low.

Provisions Related to Damages

The measure expands the definition of "damaged" in the California Constitution. Specifically, the measure broadly defines the term as applied to actions by a public agency that result in the denial, in whole or in part, of the economic or productive use of property by the owner or lessee. While the terms of the measure are not clear, the expanded definition appears to include:

- Public actions that limit how much a property owner may charge others to purchase or use his or her property, with the exception of utility rate restrictions by the Public Utilities Commission.
- Actions taken for purposes other than preserving human health and safety.
- Some public land use actions that do not substantially advance a public interest and/or that reduce an owner's reasonable investment-backed expectations.

Provisions Related to Long-Term Use of Property Acquired by Eminent Domain

If a public agency determines after five years that it no longer intends to use property acquired through eminent domain for the purposes specified in its resolution, the public agency must offer the property for sale to the original property owner at the current fair market value. If the former owner reacquires the property, the measure specifies that the property shall be taxed at its precondemnation value.

The measure is not clear as to whether it imposes limitations on public agency use of property (1) after this five-year period has expired or (2) if the former owner does not choose to reacquire the property.

Other Provisions

The measure specifies that in any challenge of the validity of an eminent domain action, courts cannot (1) grant deference to a public agency's findings or (2) limit its review to the information in the administrative record.

The measure specifies that any previously enacted public actions that result in "continuing damage to a private property for private use" shall be null and void beginning July 1, 2007.

FISCAL IMPACT

The measure's fiscal effect is subject to considerable uncertainty and would depend on (1) how the courts interpret its provisions (particularly the range of regulatory and other policies that would become invalid and/or for which compensatory damages payments would be required) and (2) future actions taken by governments to modify existing policies, enact new ones, and buy land.

Regulatory and Other Policies. In the near term, there would be significant uncertainty regarding the range of governmental policies that might become invalid on July 1, 2007. Depending on how broadly the courts interpreted the measure, it could invalidate a variety of government policies (such as rent control; inclusionary housing requirements, such as policies that require developers to set aside some housing units

for lower income individuals; and certain business and environmental regulations). Over the longer term, the measure would reduce government's ability to enact certain regulatory and other policies that decrease the value of private property. Because enactment of these policies would require state and local governments to pay compensatory damages, governments might choose not to enact these policies or enact alternative ones where the fiscal burdens shifted from property owners to government. The fiscal impact of these provisions is unknown but could result in potentially major costs to state and local governments. These costs could result from having to pay more damages and from modifying regulatory and other policies to conform to the measure's provisions.

Land Acquisition. The measure also would make it more difficult for government to acquire property through the eminent domain process. Because government would have an increased incentive to acquire property from *willing* sellers, property owners might charge government more for their properties and/or government might buy less land than otherwise would be the case. Overall, the net fiscal effect on state and local governments cannot be determined, but could be major.

Summary of Fiscal Effects

The measure would have the following major fiscal impacts:

- Unknown, but potentially major costs for state and local governments to modify regulatory and other policies to conform to the measure's provisions.
- Unknown, potentially major changes in governmental costs to acquire property for public purposes.

Sincerely,

Elizabeth G. Hill
Legislative Analyst

Michael C. Genest
Director of Finance