

February 1, 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 Protect Our Homes Act" (File No. SA2005RF0146). 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 reduce 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 damages 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 acquire private property (real, business, personal, tangible, or intangible property) or reduce the economic value of property for a public purpose 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 the 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 public

purposes 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.

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 policies that reduce the economic value of property, and (3) use property acquired through the eminent domain process.

Provisions Related to Eminent Domain Authority

This measure requires public agencies to (1) specify a "public use" for property before it is taken or damaged, (2) own the property taken by eminent domain, and (3) make sure the property is used for the stated public use. The measure's statement of purposes provides these examples of public use projects: road construction, the creation of public parks, land use planning, property zoning, and actions to preserve the public health and safety. The measure defines the term public use to *exclude* taking private property to transfer it to a nongovernmental owner for economic development, tax revenue enhancement, or other purposes that are not public use projects.

The measure specifies that in any challenge of the validity of an eminent domain action, government has the burden to prove public use and the court must issue a *published* judicial opinion or order for the court ruling to be valid.

Finally, the measure amends the definition of just compensation and fair market value. While the measure is not clear, it appears to broaden the definition of just compensation and might increase the amount that would be considered fair market value.

Provisions Related to Damages

The measure expands the definition of damaged in the Constitution to include laws and actions by a public agency—other than those taken to protect public health and safety—that result in substantial economic loss to private property. The measure cites down zoning of private property, the elimination of any access to private property, and limitation on the use of private air space as examples of governmental actions that impose a substantial economic loss to property owners. In addition, under the terms of the measure, certain business, environmental, land use, and other regulatory actions might be viewed as resulting in compensable damages.

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

If a public agency ceases to use property taken by eminent domain for the stated public use, the public agency must offer the property to the former property owner (or his/her heir) 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 or sale of the property if the former owner chooses not to reacquire the property.

Exemptions

The measure specifies that its provisions do not:

- Prohibit the use of condemnation powers to abate nuisances such as blight, obscenity, pornography, hazardous substances or environmental conditions, provided the condemnations are limited to abatement of specific conditions on specific parcels.
- Prohibit the California Public Utilities Commission from regulating public utility rates.
- Restrict administrative powers to take or damage private property under a declared state of emergency.

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 policies for which compensatory damages payments would be required) and (2) future actions taken by governments to enact regulatory and other policies and buy property.

Regulatory and Other Policies. By broadening the definition of damages, the measure reduces government's ability to enact certain business, environmental, land use and other regulatory actions and policies that can decrease private property values. 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 burden is 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 government. These costs could result from having to pay more damages and from modifying regulatory and other policies to conform to the measure's provisions.

Property Acquisition. The measure would have various effects on government's costs to acquire property. On the one hand, by limiting the situations where eminent domain could be used, the measure could reduce public spending. On the

other hand, the measure: (1) would increase the amount of money government must pay a property owner for just compensation, and (2) could increase the costs that government must pay to acquire property from *willing* sellers. Overall, the net fiscal effect on state and local government associated with these provisions cannot be determined, but could be major.

Summary of Fiscal Effects

The measure would have the following major fiscal impacts:

- Unknown, but potentially major future costs for state and local governments to pay damages and/or modify regulatory or 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

Mike Genest
Director of Finance