

June 8, 2007

Hon. Edmund G. Brown Jr.  
Attorney General  
1300 I Street, 17<sup>th</sup> Floor  
Sacramento, California 95814

Attention: Ms. Toni Melton  
Initiative Secretary

Dear Attorney General Brown:

Pursuant to Elections Code Section 9005, we have reviewed the proposed initiative (A.G. File No. 0007-15) related to (1) the eminent domain process and (2) certain government actions that reduce the value of property.

## **BACKGROUND**

To build roads, parks, and other public facilities; promote economic development and the construction of affordable housing; and/or carry out other public policies, California state and local agencies sometime (1) acquire private property by various means and (2) take actions that have the effect of reducing the value of property.

### **Property Acquisition by State and Local Agencies**

Most property acquisitions are negotiated between private property owners and public agencies. Sometimes, however, a public agency and owner cannot agree upon the value of the property or the owner does not want to sell the property. Under these circumstances, government may acquire the property through eminent domain. In such cases, government must pay "just compensation," including (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.

Under current statutes and case law, (1) public agencies may use their eminent domain authority to take property for a variety 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 restrict how a public agency may use property acquired through the eminent domain process or require the agency to return the property to its previous owner if it no longer uses the property for its originally intended purpose.

### **Polices That Reduce Property Value**

Statutes and case law give state and local government wide discretion to act to promote policy objectives, even if the action may—directly or indirectly—reduce property values and transfer economic benefits among private parties. To promote affordable housing, for example, some local governments (1) limit the price an apartment or mobile home park owner may charge tenants (“rent control”) and/or (2) require housing developers to construct affordable housing on part of their land or contribute funds to develop affordable housing (“inclusionary housing.”) Other government policies—such as land use or certain business regulations—also could be viewed as potentially transferring economic benefits among private parties.

Government frequently promotes multiple objectives when it enacts policies. For example, cities and counties often consider environmental, economic, public safety, and community objectives when regulating land use. In addition, over time, the economic and policy effect of a governmental regulation can change. For these reasons, determining the purpose or outcome of a specific governmental policy can be difficult.

### **PROPOSAL**

This measure constrains public agency authority to (1) use eminent domain to acquire property and (2) take actions that reduce the economic value of property. The measure defines “public agency” to include all state and local agencies. The measure provides four exemptions from its requirements:

- Eminent domain actions taken to reduce public nuisances or criminal activity.
- Actions related to a voluntary agreement between a public agency and a property owner to develop or rehabilitate affordable housing.
- Public utility rate regulation by the California Public Utilities Commission.
- Actions taken by the Governor during a state of emergency.

### **Provisions Related to Eminent Domain Authority**

The measure requires government to specify a public use for any private property it acquires through the eminent domain process and prohibits government from using eminent domain for a private use. The measure defines the terms public and private use so as to narrow the purposes for which government may use eminent domain. Under the measure, for example, government could not use eminent domain to acquire property to (1) transfer it to a person, business, nonprofit organization, or other private entity or (2) use the property for a purpose similar to how it was used when it was under private ownership.

If a public agency wanted to put property acquired under eminent domain to a use different from its stated public use, the measure requires the public agency to offer to sell the property to the original property owner at the price the agency paid for the property, adjusted for the fair market value of changes to the property after it was acquired. If the former owner reacquires the property, the measure specifies that it shall be taxed based on its preacquisition value, adjusted for the market value of changes to the property, plus annual inflationary adjustments of up to 2 percent.

### **Provisions Related to Policies That Affect Property Value**

The measure constrains government authority to implement policies that reduce property value for “a private use.” The definition of private use includes “regulation of the ownership, occupancy, or use of privately owned real property or associated property rights in order to transfer an economic benefit to one or more private persons at the expense of the property owner.”

Based on this definition and other references in the measure, we assume that the measure’s provisions would affect government’s authority to enforce rent control ordinances and could affect other governmental policies. Specifically, the measure would prohibit government from enacting new rent control ordinances and enforcing existing rent control ordinances (except during a transition period described below). The measure also would prohibit government from enforcing inclusionary housing ordinances *if* the ordinances (1) were mandatory and (2) found to “transfer an economic benefit” at the expense of the property owner. (Any voluntary inclusionary housing agreement between public agencies and developers would be exempt from the measure’s provisions.) Beyond these regulatory activities, the extent to which this measure would constrain government’s authority is not clear. The range of policies that would be affected would depend on court interpretation of many of its provisions.

### **Other Major Provisions**

*Court Challenges.* The measure specifies that in any property owner challenge regarding the validity of a taking or reductions in value concerning his or her property, courts shall not grant deference to a public agency’s findings or limit its review to the information in the administrative record. In addition, the property owner is entitled to attorney fees if the court finds that the public agency’s actions are not consistent with this measure.

*Effective Date.* The measure specifies that its provisions would not apply to any housing unit currently covered by a rent control ordinance until the housing unit becomes vacant. All other provisions of the measure would become effective the day after the measure was approved by the state's voters.

## **FISCAL IMPACT**

The measure's fiscal effect is subject to considerable uncertainty and would depend on (1) how the courts interpret its provisions and (2) future actions by governments to modify existing policies, enact new ones, and buy property.

The measure would limit government's ability 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 property than otherwise would be the case.

The measure also would constrain government's authority to implement certain policies. The range of government policies that would be affected by the measure is not clear, but could include policies in addition to rent control, such as certain inclusionary housing and other land use regulations. To conform to the measure's restrictions, governments might choose to change their policies in ways that did not increase their costs. For example, a government might repeal a mandatory inclusionary housing ordinance and not enact a replacement policy, or repeal the ordinance and enact land-use regulations that encourage the construction of lower-cost housing.

In other cases, conforming to the measure's provisions could result in some costs. For example, a government could respond to the elimination of rent control and inclusionary housing programs by creating publicly funded programs to subsidize affordable housing. Some governments also might inadvertently incur one-time costs if they were unaware that a policy conflicted with the measure's provisions and had to pay damages to property owners.

The fiscal effect on state and local governments associated with the measure's provisions is not possible to determine, but probably would be net increased costs to many governments. For most governments, the net increased costs probably would not be significant.

**Summary of Fiscal Effects**

The measure would have the following fiscal impact:

- Increased costs to many governments due to the measure's restrictions. The fiscal effect on most governments probably would not be significant.

Sincerely,

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Elizabeth G. Hill  
Legislative Analyst

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Michael C. Genest  
Director of Finance