

STATE OF CALIFORNIA

Public Utilities Commission  
San Francisco

**M e m o r a n d u m**

**Date:** September 14, 2006

**To:** The Commission  
(Meeting of September 21, 2006)

**From:** Fred Harris  
Legal Division

**Subject:** **Proposition 90 - Government Acquisition, Regulation of Private Property. Initiative Constitutional Amendment**

**Legislative Subcommittee Recommendation:** Oppose

**Summary:** Proposition 90 would amend California Constitution Article 1, § 19 to: 1) limit government authority to take ownership of private property by barring government from using the power of eminent domain to acquire property for use by private businesses for nongovernmental purposes; and 2) greatly expand the circumstances in which government must compensate property owners for real or hypothetical reduction in property value due to governmental actions by requiring government to pay property owners for substantial economic losses resulting from most new laws and rules.

Proposition 90 defines “government” broadly to encompass both government agencies and other entities with eminent domain power, and may substantially affect both the Commission itself and Commission regulated utilities with the power of eminent domain. By expanding the circumstances in which an entity exercising eminent domain power or taking other action that may affect property value must pay compensation to property owners, and by giving property owners a number of tools for extracting higher compensation from the “government,” Proposition 90 creates new uncertainties and threatens higher costs for the Commission and utilities.

**Background**

A recent United States Supreme Court decision upheld the power of government to exercise its power of eminent domain to acquire property which is to be used by private developers in economic redevelopment zones or other situations. Proposition 90 is supported in the voters’ pamphlet by property owners who were affected by or threatened with eminent domain action to acquire their property for such purposes.

On a more long term basis, property owners have often been unhappy when zoning restrictions, or other governmental action, has prevented them from exploiting their

property to the maximum extent possible, even when the zoning is based on concerns that excess development will overload local infrastructure, create more traffic, harm the environment, and so on.

Proposition 90 highlights the apparent indignity or inequity of allowing the government to take one person's property to benefit other private property owners and developers. Its greater impact would be to in large measure reverse the basic presumption that most governmental actions affecting property are reasonable and that sometimes one person's desires regarding their property must yield to the greater good – without compensation – unless the governmental actions eliminated or severely reduced property values.

Specifically, Proposition 90 provides in part that:

- 1) Private property may be taken or damaged only for a stated public use and only when just compensation, ascertained by a jury unless waived, has been paid to, or into court for, the owner. Private property may not be taken or damaged for private use. (Sec. 3, amending California Constitution Article 1, § 19 (a)(1).)
2. If property taken through eminent domain is no longer used for the stated public use, the former owner shall have the right to buy the property back for fair market value, and shall have a tax valuation reflecting the pre-condemnation cost plus normal adjustments. (§ 19 (a)(3).)
3. "Public Use" is narrowly defined, and precludes takings expected to result in transfers to nongovernmental owners for economic development or revenue enhancement. (§ 19 (b)(1)- (b)(2).)
4. Property owners can insist on a superior court jury determination whether the taking is for a public use. (§ 19 (b)(4).)
5. Property owners can't be liable to the government for attorney fees and costs in an eminent domain proceeding. (§ 19 (b)(9).)
6. Taken or damaged property shall be valued at the greater of its highest and best use, or, if the property is taken for proprietary government purposes, the use to which the government intends to put the property. (§ 19 (b)(5).)
7. Just compensation is defined as the sum of money needed to place the property owner in the same monetary position as if the property had not been taken. (§ 19 (b)(6).)
8. Except when taken to protect public health and safety, "damage" is defined to include government actions that result in substantial economic loss. Examples include: 1) downzoning of property; 2) elimination of access; and 3) limits on use of air space (height restrictions, etc.). (§ 19 (b)(8).)
9. Government action means any statute, charter, provision, ordinance,

- resolution, law, rule, or regulation. (§ 19 (b)(8).)
10. Government is defined to include the State of California, its political subdivisions and agencies, and any public or private entity that has the power of eminent domain. (§ 19 (b)(10).)
  11. Nothing in this section shall prohibit the Commission from regulating public utilities rates. (§ 19 (c).)

### **Proponents' Arguments**

Proponents of Proposition 90 argue that the proposition is needed to counter current abuses of the eminent domain process through which property owners have been subject to eminent domain, or threatened with eminent domain, in situations where the government itself does not plan to use the property, but wants the property to be available for specific business development purposes. They cite a recent United States Supreme Court decision that allowed eminent domain to be used to take homes and businesses and turn them over to private developers. Proponents also claim a need to require government to pay for the economic consequences of actions that reduce the value of property.

### **Opponents' Arguments**

Opponents of Proposition 90 characterize the proposition as a classic “bait and switch” trick to dupe Californians into requiring taxpayers to pay huge new costs to large landowners and corporations who claim that a new law or rule has harmed the value of their property, no matter how important the new law or how far fetched the claim of economic damage. They cite as an example a new zoning restriction that limits a new development to 500 houses, instead of the 2,000 houses proposed by the developer. Under Proposition 90, taxpayers would have to compensate the landowner for the lost value of the 1,500 houses he or she was not permitted to build. Even if the zoning restriction were imposed because the 2,000 house development would strain local infrastructure, taxpayers would be at risk for payment. The California Fire Chiefs Association, California Police Chiefs Association, California School Boards Association, League of Conservation Voters, and Planning and Conservation League all oppose the measure.

### **Proponents' Rebuttal**

Proponents respond that opponents distort the proposition and the proposition maintains current state and local environmental consumer protection and public safety law and regulation, has nothing to do with fire and police funding, and is needed to protect: “YOU from politicians who reward their campaign contributors by taking your private property and giving it to someone else,” and from “greedy government bureaucrats who want higher taxes and mega-developer campaign contributors who make millions using agricultural land, residential neighborhoods, businesses, and churches seized through eminent domain to develop strip malls and other projects.”

## **STAFF ANALYSIS**

### **Commission specific issues**

The Commission falls within Proposition 90's definition of government, and thus certain Commission actions could potentially trigger the compensation provisions of the proposition. The Constitutional amendments in Proposition 90 will apply prospectively, and provide that "nothing in this section shall prohibit the Commission from regulating utility rates." Further, compensation is not required where a governmental entity is acting to protect health and safety. Thus, for example, if the CPUC is enforcing "any statute, charter provision, ordinance, resolution, law, rule or regulation in effect on the date of enactment" of Prop 90, acting to protect health and safety, or adjusting rates, it may not be subject to compensation claims. If Commission action, or a provision of law, imposes a downward adjustment on a utility's authorized rate of return, and this has the effect of decreasing the fair market value of the utility's plant, it also appears that the Commission would not be subject to a claim for compensation. Nonetheless, since the "regulation of utility rates" is not defined, it is possible that Proposition 90 could be interpreted in a manner that could require the Commission to pay compensation whenever it adopted a new resolution, law, rule, or regulation that caused "substantial economic loss" to a property owner. It is hard to say when such a requirement might apply, as it is unclear how Prop 90's definition of "government action" will be interpreted.

In addition, as the Commission is responsible for holding hearings regarding certain types of condemnation proceedings – where a utility seeks to condemn property in order to better serve a competitive market (Public Utilities Code § 625), the Proposition 90 right of property owners to seek a superior court determination regarding an eminent domain effort could result in the need for two proceedings, in separate forums, for a single condemnation action.

### **Utility Specific Issues**

Roughly a dozen classes of utilities have the power of eminent domain, and thus fall within Proposition 90's definition of "government." (Public Utilities Code §§ 611-625.) Utilities with eminent domain powers contributed to the following list of concerns regarding Proposition 90:

The provision giving property owners the right to insist on a jury trial on the question of whether a proposed eminent domain action seeks to acquire property for a "public use," authorized by the Proposition could delay and increase the cost of utility acquisition of property through the eminent domain process. The mere threat of a prolonged jury trial may extort a higher offer from a utility desiring to acquire property. Even though the government and property owners would still be able to negotiate property transactions without an actual court proceeding, property owners would most likely be able to extract higher prices since everyone would know the more generous compensation rules that

would accompany court action.

The provision exempting property owners from any liability to the government for attorney fees and costs means that a utility cannot recover such costs even where the insistence on a trial regarding public use is clearly spurious.

The provision requiring that the value of property taken for any proprietary government use be based on the higher of either the highest and best use the landowner could make of the property or the value of the property based on a utility's intended use of the property could increase acquisition costs (assuming that a utility's acquisition of the property would be considered a taking for a proprietary governmental purpose within the meaning of Proposition 90.) Thus, for example, if a utility intends to use acquired property to build a transmission line, and expects to receive significant revenue as a result of the line's construction, it could be this valuation, rather than the perhaps lesser valuation that would be placed on the owner's original "best" use of the property as a pasture or other similar use that would control the compensation process.

The provisions requiring government to pay property owners whose property suffers substantial economic loss [an undefined term] as a result of a government action [any statute, charter provision, ordinance, resolution, law, rule, or regulation] could affect both the Commission and a utility, unless the action is to protect public health or welfare. Utilities adopt rules and regulations [tariffs] that should be considered governmental action within the meaning of Proposition 90, often at the Commission's request, or with the Commission's authorization. It is possible that most actions by the Commission and utilities would be considered actions to protect the public health and welfare, but it is not certain that this interpretation would prevail.

The provisions precluding the consideration of an owner's land dedication requirements when valuing an owner's property could result in an excessively high and unrealistic property valuation. If, for example, a property owner claims he or she intended to build a large housing development, the value for Proposition 90 purposes would not be reduced to reflect the fact that housing development owners typically are required by local authorities to "dedicate" money, land, or both, to public infrastructure needs such as roads, sewer systems, etc.

The provisions requiring that all unpublished eminent domain judicial opinions or orders shall be null and void eliminates a large body of existing law governing eminent domain issues.

The provisions that allow former owners to reacquire property that "ceases to be used for the stated public purpose" creates the risk that, if a utility acquires property through eminent domain for one initially stated purpose, such as a transmission line, and then years later finds the transmission line unnecessary but finds instead that some other utility facility is necessary, the utility might not be able to maintain control over the property without again undergoing the eminent domain procedure.

The “prospective” nature of the amendments that would be effected by Proposition 90 provide little comfort, since new tariffs, rules, and other regulations are continually adopted.

### **Conclusion**

Proposition 90 will almost certainly inhibit and significantly increase the costs of traditional governmental activities. While some property owners may benefit from restrictions on the government’s ability to take property for use by private companies, almost all Californians are in the long run likely to be adversely affected by the vast expansion of circumstances in which governments must pay compensation to property owners alleging that government action – however important - affected their property values.

The Commission and regulated utilities with eminent domain power may be subject to an obligation to pay compensation to private property owners for certain economic losses that may arguably result from normal activities, although the extent of this potential liability is uncertain, due to the ambiguity in the language of Proposition 90. (Staff has asked the proponents for clarification of the proposed language but to date has not received a response to its questions.)

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