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NEW STATE INITIATIVE AIMS TO UNDO KELO

By Ronald A. Zumbun*

Proposition 90 was narrowly defeated in California's November 2006 election. Proponents hailed it as the solution to the United States Supreme Court's un-American decision in *Kelo v. Town of New London, Connecticut* in June 2005. The *Kelo* Court held that the government's power of eminent domain was so great that it could take one person's private property for another's private economic development. Rather than limit this power to public use (highways, parks, schools, etc.), the Court chose to rewrite our nation's Constitution and substitute public "purpose" for public "use." Its purpose would be to improve the tax base by economic development. This seems to be a desirable purpose and is now the sole purpose required to exercise the power of eminent domain. One of the main distinctions between our country and so many others has disappeared.

Proposition 90 received enormous publicity, some of which was misleading. Yes, Proposition 90 would undo *Kelo* and return the law to what it has been (with a few exceptions) since our Constitution was first debated and then adopted. Not effectively presented by proponents was the fact that Proposition 90 addressed more than just the eminent domain issue in *Kelo*. It also attempted to reform inverse condemnation to create a fair playing field for property owners. Eminent domain is when government takes property for a public

use and pays just compensation to the property owner. Inverse condemnation is when government takes private property, physically or by regulation, but without compensation. Examples of inverse condemnation are freeway culverts directed at your home, which eventually destroy it when a big storm hits, or a regulation that rezones your property from residential to open space making your property valueless. An inverse condemnation action challenging a physical or regulatory taking means a private individual must sue government with all of its resources and legal advantages.

The weakness in Proposition 90 was not its *Kelo* eminent domain language. It was the language regarding inverse condemnation that was attacked by opponents. Proponents felt that if government, by regulation, is acting for the benefit of the public at large, why should an individual private property owner bear all the cost?

On April 30, 2007, the Howard Jarvis Taxpayers Association presented a new *Kelo* initiative to the Attorney General's Office entitled the "California Property Owners and Farmland Protection Act." It is aimed to be voted on at the June 2008 election. It will reverse the *Kelo* case for Californians by specifically defining "public use" as meaning use and ownership by a public agency for the public use stated at the time of the taking, such

as roads, parks and public facilities. Private use is defined as a use for any person or entity other than a public agency. If the public agency later chooses to use the property for a different public use or to convey the property to another person, it must first offer the property to the original owner at the price the agency originally paid plus the fair market value of improvements added by the public agency. The initiative also specifies that it applies to "limiting the price a private owner may charge another person to purchase, occupy or use his or her real property."

The initiative also includes protective language to assure that it would not apply to a declared state of emergency or the abatement of public nuisance or criminal activity. It also provides that any statute or regulation enacted prior to January 1, 2007 that limits the price a rental property owner may charge a tenant to occupy a reconstructed rental unit may remain in effect as long as one of the tenants remains.

Cities, unions and environmental groups put a ton of money into opposing Proposition 90. The Sacramento Bee and other newspapers claimed there was no need for Proposition 90 because the California Legislature had already resolved the *Kelo* issues with corrective language. This was untrue. While the California Legislature tinkered with *Kelo* in passing SB 53, SB 1210, SB 1650, and SB 1809, these bills made no significant change to *Kelo*.

Meanwhile, voters in many states have passed new restrictions on eminent domain to prevent the *Kelo* abuse. The question remains: What will happen in California? Since *Kelo*, California's government agencies have taken over 50 properties for transfer to private developers and were preparing to condemn 296 more. In recent years, there have been over 10,000 instances of private property being threatened with condemnation or actually condemned by government for private use, according to the Institute for Justice. The group represents the New London residents who filed the *Kelo* case. Throughout the

country, including California, conservative legislators pushed bills that would curb any such seizures, but the Democrat-controlled California Legislature, while acknowledging the furor generated by the *Kelo* decision, torpedoed major changes at the behest of local governments.

The most important outcome of *Kelo* is the realization that major groups from across the political spectrum have criticized this decision. It has affected many property owners across the country, causing outrage at this decision. The most common criticism is that the costs of unlimited powers of condemnation fall mainly on the poor. In fact, the property owners in *Kelo* were joined by friends of the court from the entire political spectrum, including Pacific Legal Foundation, Mountain States Legal Foundation, the Claremont Institute for Constitutional Jurisprudence, as well as the National Association for the Advancement of Colored People (NAACP), American Association of Retired Persons (AARP), Hispanic Alliance of Atlantic County, Inc., and the Southern Christian Leadership Conference among others.

Having come so close to prevailing on California's Proposition 90, it is clear that an initiative related solely to the *Kelo* case would pass overwhelmingly. If clearer solutions to regulatory takings and inverse condemnation that clarify the fairness issue are drafted, a combined bill also may pass. It remains to be seen as to how the new Howard Jarvis initiative will be received by the public. It is understood that the cities and other opponents of Proposition 90 will be presenting their own initiatives.

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