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# Measure 37 and a Spoonful of *Kelo*: A Recipe for Property Rights Activists at the Ballot Box

Patricia E. Salkin  
Amy Lavine\*

## I. Introduction

ON NOV. 2, 2004, OREGON VOTERS PASSED Ballot Measure 37 by a margin of 61 percent to 39 percent.<sup>1</sup> The initiative entitles property owners to compensation for decreases in fair market property values due to land use regulations passed after their acquisition of the subject property. In the alternative, the government agency responsible for a contested regulation may choose to waive its application to the claimant's property.<sup>2</sup> Although Oregon, with its progressive land use regulation system,<sup>3</sup> seemed an unlikely place for such an initiative to succeed,

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1. Oregon Department of Land Conservation and Development, Measure 37 Information, [http://www.oregon.gov/LCD/MEASURE37/legal\\_information.shtml#Information\\_About\\_the\\_Election](http://www.oregon.gov/LCD/MEASURE37/legal_information.shtml#Information_About_the_Election) (last visited Sept. 25, 2006).

2. Measure 37 is codified at OR. REV. STAT. § 197.352 and provides that:

(1) If a public entity enacts or enforces a new land use regulation or enforces a land use regulation . . . that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.

(2) Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation. . . .

(8) [I]n lieu of payment of just compensation under this section, the governing body responsible for enacting the land use regulation may modify, remove, or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.

OR. REV. STAT. § 197.352 (1), (2), (8) (2006).

3. See Oregon Department of Land Conservation and Development, Goals, <http://www.oregon.gov/LCD/goals.shtml> (last visited Sept. 26, 2006).

voters were persuaded by depictions of the Measure as protecting property rights and ensuring fairness.<sup>4</sup>

The impact of the Measure, however, has been to effectively paralyze the state, local, and regional land use authorities. Aside from the several narrow exceptions, which except certain types of regulations from the Measure's scope,<sup>5</sup> the Measure overwhelmingly favors claimants. For example, the Measure does not require claimants to prove a minimum percentage of value loss or to submit detailed information relating to their claims,<sup>6</sup> which places a heavy burden on agencies tasked with investigating property owners' demands.<sup>7</sup> The Measure is also retroactive in application, permitting claims related to regulations that are decades old. In addition, Measure 37 does not provide a source of funding for paying claimants, placing the government in the difficult position of having to either draw funds from the public purse or waive contested regulations. With more than \$5 billion in claimed property loss to date, however, regulating agencies have little choice but to waive the contested land use restrictions.<sup>8</sup>

Importantly, the Measure also fails to address exactly how decreases in property values should be determined. The Measure does not explain, for example, whether previous tax breaks and subsidies tied to resource uses like farming and ranching may be incorporated into the determination of lost value.<sup>9</sup> Nor does the Measure contemplate that

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4. See Margaret H. Clune, *Government Hardly Could Go on: Oregon's Measure 37, Implications for Land Use Planning and a More Rational Means of Compensation*, 38 URB. LAW. 275, 295 (2006). Advertisements supporting Measure 37 featured, among others, a ninety-four year old widow who was unable to subdivide her land to give to her children and a family whose house burned down and was then sued by an environmental group when she tried to rebuild. *Id.*

5. OR. REV. STAT. § 197.352(3). The five types of land use regulations not subject to Measure 37 are those that restrict common law public nuisances, those designed to protect public health and safety, regulations necessary to comply with federal law, restrictions related to pornography and nude dancing, and those enacted prior to the date that a parcel was obtained by the current owner. *Id.*

6. The Department of Administrative Services has developed guidelines for materials to be submitted with claims. See Risk Management, Measure 37, <http://www.das.state.or.us/DAS/SSD/Risk/M37Claims.shtml> (last visited Sept. 26, 2006).

7. The estimated annual costs of implementing Measure 37 (not including any payments of just compensation) were estimated to run to between \$18 and \$44 million for state administrative agencies and \$46 to \$300 million for local governments. Oregon Secretary of State, Measure 37, Proposed Initiative Petition, [http://www.sos.state.or.us/elections/nov22004/m37\\_bt.pdf](http://www.sos.state.or.us/elections/nov22004/m37_bt.pdf) (last visited Sept. 26, 2006).

8. To date, Measure 37 had produced 2,205 claims amounting to \$5,011,724,449. DLCD Measure 37, Summaries of Claims, [http://www.oregon.gov/LCD/MEASURE37/summaries\\_of\\_claims.shtml#Summaries\\_of\\_Claims\\_Filed\\_in\\_the\\_State](http://www.oregon.gov/LCD/MEASURE37/summaries_of_claims.shtml#Summaries_of_Claims_Filed_in_the_State) (last visited Sept. 25, 2006) [hereinafter Summaries of Claims].

9. Edward J. Sullivan, *Year Zero: The Aftermath of Measure 37*, 38 URB. LAW. 237, 246-47 (2006).

property values may arguably be *increased* by some land use restrictions.<sup>10</sup> Furthermore, it is questionable whether the loss in fair market value should be determined by the “windfall gain” that an owner would receive through a restriction’s waiver, but this is the approach most commonly taken in Measure 37 claims.<sup>11</sup>

Determining fair market values also raises a host of related problems with regard to lands neighboring Measure 37 properties, as their values will often decrease in the wake of restriction waivers. The Measure neither provides a process for involving such neighbors in the claims process<sup>12</sup> nor does it address the overall decrease in property values that is likely to be caused by the fragmentation of comprehensive development plans.<sup>13</sup> Another issue left unresolved by the legislation is whether waivers granted under the Measure are specific to the property owner who files the claim, or whether such waivers run with the land.<sup>14</sup>

#### A. Oregon Supreme Court Upholds Constitutionality of Measure 37

After a county court struck down Measure 37 on a variety of state and federal constitutional grounds,<sup>15</sup> opponents of the Measure held out hope

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10. *Id.* at 247–48 (noting that “it is by no means a certainty that land use regulations reduce market land values. . . . Restricting landowners from actions that would increase their individual property value at the expense of their neighbors’ may also increase the value of surrounding affected parcels of land”).

11. *Id.* at 248–49.

12. It is quite clear that neighbors do want to be involved in the claims process; as of June, 2006, the Department of Land Conservation and Development had received more than 27,000 neighbor letters in relation to 1,169 claims. Summaries of Claims, *supra* note 8.

13. See Clune, *supra* note 4, at 284–88.

14. In the event that waivers cannot be transferred to successive owners, as the Oregon Attorney General has construed the Measure, owners who develop their land under waivers will only be able to transfer nonconforming uses, which implicate further problems under Oregon law. On the other hand, if waivers are eventually found to run with the land, then the patchwork effect thereby created will be rendered permanent. Sullivan, *supra* note 9, at 254; Letter from Hardy Myers, Oregon Attorney General, to Mr. Lane Shetterly, Oregon Department of Land Conservation and Development, Oregon Ballot Measure 37 (Feb. 24, 2005), available at <http://www.oregon.gov/LCD/docs/measure37/m37dojadvice.pdf>.

15. *MacPherson v. Dep’t of Admin. Serv.*, No. 05C1044 (Or. Cir. Ct., Oct. 14, 2005) (opinion and order on motions for summary judgment), available at [http://www.ojd.state.or.us/mar/documents/Measure37\\_000.pdf](http://www.ojd.state.or.us/mar/documents/Measure37_000.pdf). The circuit court invalidated Measure 37 on the grounds that (1) it impermissibly intruded on the legislature’s police power by requiring it to “pay to govern”; (2) it violated the Oregon Constitution’s Equal Privileges and Immunities Clause by differentiating between those owners who bought lands before and after the enactment of regulations that negatively affected their values; (3) it violated the Oregon Constitution by authorizing the suspension of laws pertaining to claimants’ properties; (4) it constituted an impermissible delegation of legislative authority; and (5) it did not provide adequate substantive or procedural due process under the Fourteenth Amendment. The court rejected plaintiffs’ argument that the Measure violated principles of sovereign immunity.

that Oregon's land use planning and development infrastructure would be restored. However, the Oregon Supreme Court upheld the Measure on appeal,<sup>16</sup> setting a basis for extensive litigation in the coming years to delineate the contours of the Measure and its related problems. Whether Oregon can find a way to incorporate Measure 37 into its land use and planning system such that it is workable and sustainable remains to be seen. Regardless, though, Measure 37's success, with voters and in the courts, has led to a flurry of similar initiatives around the country. Efforts to enact similar provisions have been attempted in twelve states, and more are likely to follow suit.

## II. Ballot Measure Basics

Ballot measures dealing with property rights and regulatory takings come in several forms. The legislative referendum process, available in all states, allows the general public to vote on previously approved legislative or constitutional actions. In contrast, citizen-petitioned initiatives (also known as popular referenda) permit citizens to put legislation or state constitutional measures directly onto the ballot, without previous legislative deliberation. Popular referenda processes are available in twenty-four states and in many cities and localities.<sup>17</sup> In fact, more than an estimated 70 percent of the U.S. population has access to some form of citizen-initiated ballot measure.<sup>18</sup>

Initiative and referenda mechanisms have been in place in the United States for more than one hundred years. Originally, these mechanisms were conceived of as a tool of direct democracy—giving the power back

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16. *MacPherson v. Dep't of Admin. Servs.*, 130 P.3d 308 (Or. 2006). In rejecting the trial court's interpretation of the law, on February 21, 2006, the Supreme Court held that (1) the Measure was not a limit on the government's plenary power because it neither prevented the government from enacting and enforcing land use regulations nor precluded future repeal or amendment of the Measure; (2) it did not make an impermissible distinction among property owners based on when they bought their land because the classification had no significance other than that accorded to it by Measure 37 itself; (3) it did not authorize a "suspension" of land use laws but rather permitted amendments to these laws; (4) it did not constitute an impermissible delegation of authority insofar as the trial court's determination was based on its finding that the law was unconstitutional in other respects; (5) plaintiffs did not meet their burden of showing a facial violation of procedural due process rights because the Measure did not prevent the creation of procedures to accommodate neighboring landowners affected by waivers; and (6) the Measure did not offend the plaintiffs' substantive due process rights because it implicated no fundamental rights and passed rational basis review.

17. See Lora A. Lucero, *Ballot-Box Zoning: Good Planning or Vigilantism?*, ZONING NEWS 1 (May 2003), available at <http://www.planning.org/zoningpractice/pdf/ZNewsMay03.pdf>.

18. John G. Matsusaka, *Subversion of the Many by the Few: Some Scientific Evidence on the Initiative Process* 3 (May 2003), available at <http://law.usc.edu/academics/centers/cslp/papers/cslp-wp-019.pdf>.

to the people and providing a method of educating voters and encouraging civic involvement.<sup>19</sup> While these values remain part of the initiative process today, ballot measures have come to be recognized as much for their ability to circumvent the safeguards of the legislative process as for their democratic ideals.<sup>20</sup>

#### A. *Regulatory Takings Ballot Measures*

Property rights supporters have long been thwarted in their attempts to restrict governments' powers to enact land use regulations that amount to "takings." Ample judicial precedent clearly illustrates that the Fifth Amendment requires just compensation for only very limited types of land use regulations.<sup>21</sup> Legislatures, also, are understandably hesitant to confine their powers to enact such vital zoning and land use laws. Legislators, moreover, are aware that the public generally supports efforts to ensure responsible, economically advantageous, and environmentally sustainable development through land use regulations.<sup>22</sup>

The U.S. Supreme Court's 2005 *Kelo* decision,<sup>23</sup> however, ignited public debate over eminent domain laws. Marked by the sympathetic plight of homeowners whose property had been condemned so that it could be used by private developers, *Kelo* aroused an emotional and broadly bipartisan sentiment that just compensation was not a proper reaction to the situation. And given Justice Steven's suggestion that the states could choose to restrict the types of public uses for which eminent domain could be exercised,<sup>24</sup> it has hardly been surprising that such legislation has appeared around the country.<sup>25</sup> Property rights activists, however, have seen an opportunity in the *Kelo* backlash to convince the

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19. See Lucero, *supra* note 17.

20. Matsusaka, *supra* note 18, at 2–3 (noting that this criticism of the initiative process is nearly as old as the initiative system itself).

21. See Clune, *supra* note 4, at 277–82.

22. See Clune, *supra* note 4, at 292. This was made ironically clear in Oregon; while Measure 37 passed by a margin of 61 percent to 39 percent, contemporaneous polls also showed that Oregonians favored government planning to ensure sustainable development by about the same margin. *Id.* at 292; Oregon Department of Land Conservation and Development, Measure 37 Information, available at [http://www.oregon.gov/LCD/MEASURE37/legal\\_information.shtml#Information\\_About\\_the\\_Election](http://www.oregon.gov/LCD/MEASURE37/legal_information.shtml#Information_About_the_Election) (last visited Sept. 25, 2006).

23. *Kelo v. City of New London*, 545 U.S. 469 (2005).

24. *Id.* at 2668 ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.").

25. See Patricia E. Salkin, *Eminent Domain Legislation Post-Kelo: A State of the States*, ALI-ABA Land Use Institute (Aug. 17–19, 2006); see also American Planning Ass'n, *Eminent Domain: Eminent Domain 2006 State Legislation*, available at <http://www.planning.org/legislation/eminentdomain/edlegislation.htm#1> (last visited Sept. 25, 2006).

public to go farther. When attached to eminent domain reforms, the idea that property owners should be compensated when regulations diminish the value of their land appears to many voters to be eminently fair and sensible. The image conjured by such provisions is not one of regulatory paralysis and uninhibited sprawl, but rather that of grandmothers and small business owners who are prevented by bureaucratic nitpicking from dividing land among their grandchildren or opening new mom and pops on empty lots that were downzoned just after purchase.<sup>26</sup>

The initiative process provides an ideal format for proponents of immoderate measures of all types. Accordingly, the combined effect of *Kelo* and Measure 37's success has been to create a legal and emotional backdrop ripe for the propagation of regulatory takings initiatives. Ballot measures provide a nonpartisan forum where proponents can characterize their measures in as positive a light as possible, excise the deliberation of elected officials, and voters rarely live up to the expectation that they will educate themselves as to the full import of ballot proposals.<sup>27</sup> Moreover, the lax campaign finance laws often associated with initiative processes, despite their air of grassroots activism, provide an opening for the dimly disclosed flow of dollars from powerful national interest groups.<sup>28</sup>

The overall result is that regulatory takings laws are presented to an electorate unequipped with the legal education or motivation to truly understand them amid a barrage of positive depictions. Often, this presentation is accomplished through highly financed media campaigns that drown out a disorganized opposition relying on complicated and emotionally unappealing policy arguments. Furthermore, the task of responding to property rights activists with opposing public policy arguments often falls on state and local governments, which are simply ill-equipped and lack the resources to do so.

### III. Regulatory Takings Initiatives:

#### A National Overview

As the growing number of regulatory takings ballot measures are principally supported by a handful of national interest groups, it is not surprising that they tend to be remarkably similar.<sup>29</sup> The typical ballot measure

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26. See Ray Ring, *Taking Liberties*, MISSOULA INDEPENDENT (Aug. 10, 2006), available at <http://www.missoulanews.com/News/News.asp?no=5895>.

27. See Lucero, *supra* note 17, at 4.

28. *Id.*

29. Some of the similarities are rather blatant; "Protect Our Homes" initiatives have been pushed in California, Oklahoma, Montana, and Missouri, and the Oregonians in Action group that hatched Measure 37 has spawned Montanans in Action and Oklahomans in Action. See Alyssa Work, *Following the Money*, MISSOULA INDEPENDENT (Aug. 10, 2006), available at <http://www.missoulanews.com/News/News.asp?no=5864>.

in 2006 revolves around a “pay or waive” provision similar to that included in Measure 37, although several initiatives lack waiver clauses and instead call for the compensation of all regulatory takings.<sup>30</sup>

Most do not include minimum value loss requirements, but some include thresholds of loss or require that the decrease in value be “substantial.”<sup>31</sup> Regardless, value losses tend to be broadly defined encompassing many types of regulations, such as zoning laws, development limits, and usage restrictions.<sup>32</sup> Nearly all of the regulatory takings initiatives require government action on claims within a short period of time. After this short time period, claimants are entitled to private causes of action for which they may be awarded court costs and attorney’s fees if they are successful. Other variables include whether regulatory takings laws will apply retroactively<sup>33</sup> and whether claims will be subject to a statute of limitations tolled from the enactment of the contested regulation.<sup>34</sup> Many of the recent initiatives have been hybrid proposals, with sponsors downplaying the significance of regulatory takings components

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30. The initiatives in Arizona, Washington, Montana, Colorado, Missouri, and the Matanuska-Susitna Borough of Alaska specifically include waiver provisions, whereas those in California, Idaho, and Oklahoma do not. The constitutional amendments proposed in Nevada, Georgia, and South Carolina do not include mention of waiver, but might permit conforming legislation that would. It is unclear whether the initiatives that do not include explicit waiver provisions would actually *prevent* the granting of waivers in lieu of just compensation, as most of these initiatives only provide a cause of action for claimants when a land use regulation continues to “apply” after a certain period following the claim’s filing.

31. The California and Nevada initiatives would condition just compensation on a showing of “substantial” property loss, and both of the failed Colorado initiatives would have required a decrease of 20 percent or more. The other initiatives, however, do not contain minimum loss requirements.

32. *See, e.g.*, Arizona Secretary of State, Private Property Protection Act, *available at* [http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20\(I-21-2006\).pdf](http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20(I-21-2006).pdf) [hereinafter Private Property Protection Act]. The Arizona Private Property Protection Act, for example, defines “land use law” as “any statute, rule, ordinance, resolution or law . . . that regulates the use or division of land . . . or that regulates accepted farming or forestry practices.” *Id.*

33. The measures proposed in Arizona, California, Idaho, Montana, Missouri, and Oklahoma were prospective in nature. The Matanuska-Susitna initiative would apply to “new” laws, but the initiative does not clearly state that it would not apply retroactively. Washington’s I-933 applies to land use regulations enacted after January 1, 1996, and the Colorado initiatives would have applied to laws enacted after 1970. The South Carolina initiative appears to be completely retroactive, and the constitutional measures in Nevada and Georgia do not give any indication as to whether they would apply retroactively or not.

34. *See, e.g.*, OR. REV. STAT. § 197.352(5) (2006). Measure 37 itself included a requirement that retrospective claims be made within two years of the Measure’s enactment and that all other claims be made “within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.” The initiatives in Arizona, Montana, Colorado, Missouri, and the Matanuska-Susitna Borough contain similar language, with the limitations periods ranging from two to five years.



while emphasizing eminent domain reforms.<sup>35</sup> Those that are more akin to Measure 37 are likely similar only because many states require ballot measures to address no more than a single topic.<sup>36</sup>

Regulatory takings initiatives have qualified for the 2006 elections in six states and one regional proposal is currently pending certification.<sup>37</sup> Statewide initiatives were attempted but have failed to qualify in at least another five states. In three of these states, initiative attempts failed due to technicalities, while attempts in the other two states were blocked by the state legislatures.<sup>38</sup> One county initiative was rejected by voters.<sup>39</sup>

### A. *Qualified Initiatives*

#### 1. ARIZONA

Petitions for the Arizona “Private Property Rights Protection Act”<sup>40</sup> were submitted on July 6, 2006, and although it has not been officially approved for addition to the ballot,<sup>41</sup> the measure appears to have enough signatures to qualify.<sup>42</sup> The initiative follows an attempt to enact eminent domain legislation, which was vetoed on June 6.<sup>43</sup> According to Governor Napolitano, the bill would have created “inappropriate

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35. Eminent domain reforms and regulatory takings measures are combined in the initiatives in Arizona, California, Idaho, Nevada, Montana, Missouri, Oklahoma, and South Carolina.

36. Of the three states in which regulatory takings initiatives were not accompanied by eminent domain provisions, Colorado and Georgia both have single subject requirements. GA. CONST. art. III, § V, ¶ III (2006); COLO. REV. STAT. § 1-40-106.5 (2006). The Washington Farm Bureau can be commended for not clouding its intentions by including eminent domain reforms in I-933, although the initiative’s preamble does state that government “should not take property which is unnecessary for public use or is primarily for private use. . . .” Washington Secretary of State, Initiative 933, *available at* <http://www.secstate.wa.gov/elections/initiatives/text/i933.pdf> [hereinafter I-933].

37. Regulatory takings initiatives have qualified in Arizona, California, Washington, Idaho, Nevada, and Montana. Another initiative is pending qualification for the 2007 ballot in the Matanuska-Susitna Borough of Alaska.

38. Regulatory takings initiatives failed to qualify due to technicalities in Colorado, Missouri, and Oklahoma, and they were blocked due to a lack of legislative approval in Georgia and South Carolina.

39. Voters in Napa County, California, rejected a regulatory takings initiative in June by a margin of 63.6%. American Planning Ass’n, *Regulatory Takings Ballot Measures Across America: Attack of the Measure 37 Clones*, <http://www.planning.org/legislation/measure37/> (last visited Sept. 21, 2006).

40. Private Property Protection Act, *supra* note 32.

41. Arizona Secretary of State, 2006 General Election Ballot Measures, <http://www.azsos.gov/election/2006/General/BallotMeasures.htm> (last updated Sept. 21, 2006). The Private Property Protection Act is ballot number 207.

42. *Regulatory Takings Ballot Measures Across America*, *supra* note 39.

43. H.B. 2675, 47th Leg., 2nd Reg. Sess., (Ariz. 2006), *available at* <http://www.azleg.state.az.us/legtext/47leg/2r/bills/hb2675h.pdf>.

impediments to communities looking to make their neighborhoods safe and productive.”<sup>44</sup>

The Private Property Rights Protection Act is a statutory proposal that attaches its regulatory takings provision to an eminent domain measure that defines “public use” to exclude economic development.<sup>45</sup> The regulatory takings section of the initiative differs in several respects from Oregon’s Measure 37. The section includes a three-year statute of limitations that runs from the enactment of the contested regulation.<sup>46</sup> This section would not apply to regulations enacted prior to its passage<sup>47</sup> or laws that only indirectly regulate property.<sup>48</sup> However, the Private Property Protection Act does specify that waivers granted under it would run with the land,<sup>49</sup> which would permanently fix the patchwork effect of land use regulations likely to follow in its wake.

The campaign supporting the Private Property Protection Act is being run by an organization called Arizona Home Owners Protection Effort (AZ HOPE).<sup>50</sup> Following the strategy used in Oregon, the initiative’s supporters fail to mention that the Act will affect a host of land use regulations that have negligible effects on property values but that are vital to planning and development systems. Instead, the strategy has emphasized the Act as a measure that will ensure fairness when regulations significantly lower the value of land while failing to mention that it will also affect a host of land use regulations that have negligible effects on property values but that are vital to planning and development systems.

AZ HOPE includes the following description of the measure on its website:

Physically taking someone’s property is not the only way that government can “take” someone’s land. The government can regulate land to the point where someone may still hold the title to the land, but have lost all of the land’s value.

Citizens resoundingly believe that these types of regulatory takings need to be compensated. . . .

The initiative will give property owners an opportunity to seek compensation when government changes the rules of the game, decreasing their property’s fair market value.<sup>51</sup>

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44. Carrie Watters, *Eminent-Domain Bill Vetoed; Too Restrictive, Governor Says*, ARIZ. REPUBLIC, June 7, 2006, available at <http://www.azcentral.com/specials/special12/articles/0607eminentdomain0607.html>.

45. Private Property Protection Act, *supra* note 32, § 12-1136 (5)(b).

46. Private Property Protection Act, *supra* note 32, § 12-1134(G).

47. Private Property Protection Act, *supra* note 32, § 12-1134(B)(7).

48. Private Property Protection Act, *supra* note 32, § 12-1134(B)(6).

49. Private Property Protection Act, *supra* note 32, § 12-1134(F).

50. Arizona HOPE, AZ Homeowners Protection Effort, <http://www.hopeforarizona.com/index.html> (last visited Sept. 21, 2006).

51. Arizona HOPE Initiative, The Facts About Arizona Hope, [http://www.hopeforarizona.com/about\\_azhope1.html](http://www.hopeforarizona.com/about_azhope1.html) (last visited Sept. 21, 2006).

The Arizona League of Cities and Towns is currently challenging the constitutionality of the initiative on the basis of its nondisclosure of this funding source.<sup>52</sup> AZ HOPE also portrays itself as a grassroots campaign, supported by “the generosity of volunteers and donations” and trying to protect the “property rights [of] *all* Arizonans[.]”<sup>53</sup> In fact, the organization receives most of its funding from the Illinois-based libertarian group Americans for Limited Government (ALG).<sup>54</sup> The Arizona League of Cities and Towns is currently challenging the constitutionality of the initiative on the basis of its nondisclosure of this funding source.<sup>55</sup>

## 2. CALIFORNIA

As California is the home of more initiative and referenda activity than any other state, it is not surprising that voters may see various regulatory takings measures on the ballot in 2006. A Napa County initiative that was “virtually identical to Measure 37” was firmly defeated by voters in June, after a strong opposition to the measure was led by various industry, environmental, and local groups.<sup>56</sup> However, the issue will be played out on a statewide basis in November, when voters will be confronted with Proposition 90,<sup>57</sup> popularly known as the “Anderson Initiative.”<sup>58</sup>

The Anderson Initiative proposes a constitutional amendment that, on its face, seems to deal primarily with the limitation of the State’s

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52. Karissa Marcum, *Prop. 207 Reflects National Movement: Proposal Limits Eminent Domain*, ARIZ. REPUBLIC, Aug. 7, 2006, available at <http://www.azcentral.com/news/articles/0807propertyrights0807.html>.

53. *Id.*; Arizona HOPE Initiative, Contact the Arizona Home Owners Protection Effort, <http://www.hopeforarizona.com/contact1.html> (last visited Sept. 26, 2006) (emphasis in original).

54. Tim Vanderpool, *Taking Liberties: One Ballot Initiative Uses the Back-Door Approach*, TUCSON WEEKLY, July 27, 2006, available at <http://www.tucsonweekly.com/gbase/Tools/PrintFriendly?url=%2Fgbase%2FCurrents%2FContent%3Foid%3Doid%253A84537>. See Arizona Secretary of State, Notifications of Contributions to Ballot Measures Committees, AZ HOPE, <http://www.azsos.gov/election/2006/Info/ballotmeasurenotifications.htm> (last visited Sept. 26, 2006), for a detailed list of contributions to AZ HOPE’s campaign. For information about ALG, see <http://www.getliberty.org/campaigns/propertyrights/index.php> (last visited Sept. 21, 2006).

55. Karissa Marcum, *Prop. 207 Reflects National Movement: Proposal Limits Eminent Domain*, ARIZ. REPUBLIC, Aug. 7, 2006, available at <http://www.azcentral.com/news/articles/0807propertyrights0807.html>.

56. Regulatory Takings Ballot Measures Across America, *supra* note 39.

57. California Secretary of State, Proposition 90, available at <http://www.caag.state.ca.us/initiatives/pdf/sa2005rf0146.pdf> [hereinafter Proposition 90].

58. *Id.* A variety of other eminent domain and regulatory takings initiatives and proposed constitutional amendments have failed to qualify for the 2006 ballot. See California Secretary of State, Initiative Update as of August 11, 2006, Failed Initiatives, [http://www.ss.ca.gov/elections/elections\\_j.htm#failed](http://www.ss.ca.gov/elections/elections_j.htm#failed) (last visited Sept. 26, 2006); see also State and Local Regulatory Takings Ballot Measures, available at <http://www.planning.org/legislation/measure37/>.

eminent domain power. A regulatory takings provision, however, is buried in the definition of “‘damage’ to private property[,]” which states that “[e]xcept when taken to protect public health and safety, ‘damage’ to private property includes government actions that result in substantial economic loss to private property.”<sup>59</sup>

Combined with the requirement that “[p]rivate property may be taken or damaged . . . only when just compensation . . . has first been paid to . . . the owner[,]” the initiative encompasses a regulatory takings law that is just as potent, if not more threatening to legitimate land use regulations than other “pay or waive” provisions in other states. Although somewhat softened by the requirement that the “damage” to property be substantial and by the fact that the provision would not be retroactive. However, the Proposition’s lack of a waiver provision for contested regulations that “damage” property will almost certainly have a huge economic impact on the state in the event of passage.

Proposition 90 is supported by the Protect Our Homes Coalition, which has raised more than \$2 million for its campaign.<sup>60</sup> Like AZ HOPE, however, \$1.5 million of this money was received from a national libertarian organization, the Fund for Democracy,<sup>61</sup> which was created by the chairman of ALG for the purpose of providing seed money to initiative campaigns.<sup>62</sup>

The good news about Proposition 90, though, is that dozens of groups and individuals have joined forces to create the Coalition to Protect California for the exclusive purpose of opposing the initiative. Made up of community leaders and an incredibly diverse collection of interest groups,<sup>63</sup> the Coalition has developed a response to balance

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59. Proposition 90, *supra* note 57, § 19(b)(8).

60. California Secretary of State, Campaign Finance: Protect Our Homes Coalition, <http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1283731&session=2005> (last visited Sept. 21, 2006).

61. California Secretary of State, Campaign Finance: Protect Our Homes Coalition, <http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1283731&session=2005&view=received> (last visited Sept. 21, 2006) [hereinafter Proposition 90 Campaign Finance Report].

62. Americans for Limited Government, *Almost Four Million Strong: ALG’S Partner Groups Turn in Signatures Across the Country*, July 11, 2006, [http://www.getliberty.org/pressroom/PR\\_071106\\_fourmill.php](http://www.getliberty.org/pressroom/PR_071106_fourmill.php) (last visited Sept. 26, 2006).

63. Californians Against the Taxpayer Trap, *Who Opposes Proposition 90*, <http://noprop90.com/facts/taxpayerimpacts.php> (last visited Sept. 21, 2006). The coalition includes public safety groups, educational organizations, labor groups, business/economic interest groups, a transportation coalition, ethnic organizations, an agricultural group, homeowner/housing groups, consumer/public interest organizations, community groups, environmental groups, government groups, and water groups, in addition to mayors and council members from all over the state.

the rhetoric coming from the Proposition's supporters; the initiative is variously referred to as the "Taxpayer Trap,"<sup>64</sup> a "takings booby trap," a "trojan horse,"<sup>65</sup> or a "classic 'bait and switch.'"<sup>66</sup> According to initial research compiled by the League of California Cities, the broad based and well-funded educational campaign stands a good chance to persuade voters to defeat the measure.<sup>67</sup>

### 3. WASHINGTON

Measure I-933,<sup>68</sup> referred to as the "Property Fairness Initiative" by its proponent, the Washington Farm Bureau, has qualified for the November ballot in Washington State.<sup>69</sup> Opponents challenged the ballot title's language as being misleading and deceptive before the initiative qualified. The county court, however, approved language that was nearly identical to the original title.<sup>70</sup> Several months later, the initiative's sponsors submitted nearly 100,000 more signatures than necessary in order to qualify it for the 2006 election.<sup>71</sup>

The initiative is similar to Oregon's Measure 37, and does not tack the proposed regulatory takings legislation onto eminent domain restrictions. However, the initiative differs from Measure 37 in that it includes a requirement that government agencies must thoroughly analyze the

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64. Californians Against the Taxpayer Trap, *No on Proposition 90*, <http://noprop90.com/> (last visited Sept. 21, 2006).

65. Peter Schrag, *Howie Rich's Protect Our Homes' Trojan Horse*, SACRAMENTO BEE, July 19, 2006, available at <http://www.sacbee.com/content/politics/columns/schrag/story/14279427p-15088062c.html>.

66. California Progress Report, *Prop. 90 is Classic Bait and Switch: Why It Must Be Defeated to Protect California's Environment, Public Safety, and Consumers*, [http://www.californiaprogressreport.com/2006/08/prop\\_90\\_is\\_clas.html](http://www.californiaprogressreport.com/2006/08/prop_90_is_clas.html) (last visited Sept. 22, 2006); see League of California Cities, *Campaign to Beat Prop. 90—The Taxpayer Trap—Gets Into Full Swing*, [http://www.cacities.org/index.jsp?displaytype=11&story=25403&zone=locc&section=front&sub\\_sec=front\\_page](http://www.cacities.org/index.jsp?displaytype=11&story=25403&zone=locc&section=front&sub_sec=front_page) (last updated Sept. 21, 2006).

67. *Id.*

68. I-933, *supra* note 36.

69. *Regulatory Takings Ballot Measures Across America*, *supra* note 39.

70. Eric Pryne, *Big Victory in the War of the Words*, THE SEATTLE TIMES, Mar. 16, 2006, available at <http://archives.seattletimes.nwsource.com/cgi-bin/taxis.cgi/web/vortex/display?slug=ballottitle16m&date=20060316>. The approved caption reads: "This measure would require compensation when government regulation damages the use or value of private property, would forbid regulations that prohibit existing legal uses of private property, and would provide exceptions or payments." *Id.* Whether or not the language is deceptive seems to depend on one's view of whether the initiative itself is deceptive, as opponents argued not that the title did not describe the contents of the initiative, but that it did not fully inform voters of the impact of the initiative. *Id.*

71. Rachel La Corte, *Property Rights Initiative Qualifies for November Vote*, SEATTLE TIMES, Aug. 4, 2006, available at <http://archives.seattletimes.nwsource.com/cgi-bin/taxis.cgi/web/vortex/display?slug=property04&date=20060804>.

purposes and impacts of land use regulations before their enactment,<sup>72</sup> and it applies only to regulations enacted after January 1, 1996.<sup>73</sup>

The Washington Farm Bureau and the Property Fairness Coalition, a group made up of mostly farmers and local property protection groups,<sup>74</sup> has in its campaign, also taken the approach of describing the initiative under a rubric of fairness. The campaign depicts land use restrictions as rampantly decreasing property values and playing up the campaign as a grassroots movement to protect homeowners and “basic property rights.”<sup>75</sup> In addition, the campaign has chided the government for not making more attempts to accomplish its land use planning and development goals through “voluntary, cooperative programs.”<sup>76</sup> As in Arizona and California, the initiative’s sponsors have received the bulk of their campaign contributions from ALG.<sup>77</sup>

On the other side of the debate, a broad-based and well-funded coalition has been created to oppose the initiative.<sup>78</sup> The “No on 933” campaign has emphasized the ambiguity of the initiative and the high costs it will likely generate.<sup>79</sup> It has also engaged in extensive early opposition to the initiative, including events held around the state<sup>80</sup> and paid

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72. Specifically, agencies must evaluate:

(a) The private property that will be affected by the action; (b) The existence and extent of any legitimate governmental purpose for the action; (c) The existence and extent of any nexus or link between any legitimate government interest and the action; (d) The extent to which the regulation’s restrictions are proportional to any impact of a particular property . . . ; (e) The extent to which the action deprives property owners of economically viable uses of the property; (f) The extent to which the action derogates or takes away a fundamental attribute of property ownership . . . ; (g) The extent to which the action enhances or creates a publicly owned right in property; (h) Estimated compensation that may need to be paid under this act; and (i) Alternative means which are less restrictive on private property. . . .

I-933, *supra* note 36, § 2(1)(a)(i).

73. *Id.* § 2(2)(b)(i).

74. Eric Pryne, *Expect to See I-933 on the November Ballot*, SEATTLE TIMES, Jul. 7, 2006, available at <http://archives.seattletimes.nwsourc.com/cgi-bin/taxis.cgi/web/vortex/display?slug=proprihts07m&date=20060707>.

75. Washington Farm Bureau, *Farm Bureau Submits Signatures to Put I-933 on Ballot*, July 6, 2006, <http://www.wsfb.com/PublicRelations/July%20releases.htm#July%206,%202006>.

76. *Id.*

77. Pryne, *supra* note 74.

78. The No on 933 campaign is made up of “a diverse group of organizations and individuals across Washington state[.]” including “civic organizations and farming groups to neighborhood associations and groups representing working families and taxpayers.” No on 933 Initiative, About Us: Endorsers, <http://noon933.org/about/endorsers.php> (last visited Sept. 21, 2006).

79. See *No on 933*, <http://www.NoOn933.org> (last visited Sept. 21, 2006).

80. No on 933 Initiative, *No on 933 Campaign Has Early Momentum Across the State: Hundreds Gather in King County to Defeat 933*, July 14, 2006, [http://noon933.org/media\\_center/release060714.php](http://noon933.org/media_center/release060714.php) (last visited Sept. 16, 1006).

advertisements. As the campaign's "933 Questions Left Unanswered" advertisement explains:

**Initiative 933 is a vague, poorly written, loophole-ridden law** that leaves hundreds of questions unanswered about how it will affect our quality of life. The only thing you can be sure of is that 933's "pay or waive" scheme forces taxpayers to either pay out billions of dollars . . . or stand back while critical safeguards against irresponsible development are wiped off the books. . . .

As an example of some of the questions raised by the initiative, it goes on to ask:

Who really benefits from 933's loopholes?  
How come 933 actually increases traffic?  
Why did they make 933 so unfair to taxpayers?  
Why does it threaten farms with development?  
What about 933's endless lawsuits?<sup>81</sup>

#### 4. IDAHO

Idaho's Proposition 2 is certified to appear on the November ballot under the title "Initiative limiting eminent domain when used for economic development; defining land use law; and permitting just compensation for regulatory takings."<sup>82</sup> As suggested by its title, the measure combines a regulatory takings statute with modifications to the state's eminent domain powers. The proposed regulatory takings legislation would not be retroactive or apply to regulations that only indirectly affect property values. However, as in California's Proposition 90, the Idaho initiative provides no waiver provision for contested regulations, requiring the state to pay just compensation for any regulation that reduces a property's fair market value.<sup>83</sup>

The initiative's sponsor, a group called This House is My Home, uses the slogan "Protecting your home and property from government abuse," and engages in the rhetoric being employed in other states.<sup>84</sup> As in California, supporters of the Proposition are emphasizing its eminent domain provisions while not clearly explaining the import of the regulatory takings language.<sup>85</sup> This is especially deceptive given

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81. No on 933 Initiative, *933 Questions Left Unanswered Advertisement*, available at [http://noon933.org/media\\_center/933questions\\_fpo.pdf](http://noon933.org/media_center/933questions_fpo.pdf) (last visited Sept. 21, 2006) (emphasis in original).

82. Idaho Secretary of State, 2006 General Election Proposed Ballot Initiatives, <http://www.idsos.state.id.us/ELECT/INITS/06init08.htm> (last visited Sept. 21, 2006).

83. *Id.*

84. See *This House is My Home.com, Protecting Your Home and Property from Government Abuse*, <http://www.thishouseismyhome.com> (last visited Sept. 21, 2006).

85. *Prop. 2: Chaos for Your Town*, IDAHO MOUNTAIN EXPRESS, July 14, 2006, available at <http://www.mtexpress.com/index2.php?ID=2005111388>.

the fact that the Idaho legislature has recently enacted similar eminent domain legislation, making the regulatory takings legislation the only truly meaningful part of the initiative.<sup>86</sup> And, as in California, the proposition has been supported by large campaign contributions from the Fund for Democracy.<sup>87</sup> Although there is some opposition to the Proposition, broad efforts such as those made in California and Washington are absent in Idaho.

#### 5. NEVADA

Election Day ballots for 2006 in Nevada will include the Nevada Property Owners' Bill of Rights Initiative, a constitutional amendment that addresses both eminent domain and regulatory takings.<sup>88</sup> The relevant language states simply that "Government actions which result in substantial economic loss to private property shall require the payment of just compensation."<sup>89</sup> The amendment does not specify whether it would be retro-active or whether any types of regulations would be excepted from its scope. But it does seem to indicate that waiver would not be available. If the measure passes, it will need approval again in 2008 before becoming law.<sup>90</sup> In the mean time, a legal challenge has been filed by Nevadans for the Protection of Property Rights, asserting that the proposed amendment contains more than one issue in violation of Nevada law.<sup>91</sup>

#### 6. MONTANA

Two regulatory takings initiatives were proposed for the November ballot in Montana. Although the constitutional amendment failed,<sup>92</sup> the

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86. Gregory Hahn, *Land Use Initiative Makes November Ballot*, IDAHO STATESMAN, June 29, 2006, <http://www.idahostatesman.com/apps/pbcs.dll/article?AID=/20060629/NEWS01/606290338/1002> (last visited Sept. 24, 2006).

87. Idaho Secretary of State, *This House is My Home.com*, Campaign Financial Disclosure Report, <http://www.idsos.state.id.us/ELECT/Finance/2006/PostPrimary/PAC/ThisHouseIsMyHome.pdf> (last visited Sept. 24, 2006); see also Shea Anderson, *Maxwell: We're in the Money*, BOISE WEEKLY, Aug. 9, 2006, available at <http://www.boiseweekly.com/gyrobase/Content?oid=184035>.

88. Nevada Secretary of State, *Questions that Have Qualified for the 2006 Ballot* (as of Aug. 4, 2006), [http://www.sos.state.nv.us/nvelection/int\\_ref/2006BallotQuestionsList.pdf](http://www.sos.state.nv.us/nvelection/int_ref/2006BallotQuestionsList.pdf) (last visited Sept. 26, 2006).

89. Nevada Property Owners' Bill of Rights, § 8, [http://www.propertybillofrights.com/your\\_rights.html](http://www.propertybillofrights.com/your_rights.html) (last visited Sept. 21, 2006).

90. Nevada Secretary of State, *2005–2006 Initiative Petition to Amend the Constitution*, [http://www.sos.state.nv.us/nvelection/int\\_ref/Int\\_AmendCont.htm](http://www.sos.state.nv.us/nvelection/int_ref/Int_AmendCont.htm) (last visited Sept. 21, 2006).

91. *Suit Seeks to Bar Property Rights Vote*, PAHRUMP VALLEY TIMES, July 21, 2006, available at <http://www.pahrumpvalleytimes.com/2006/Jul-21-Fri-2006/news/8619316.html>. Section 259.009 of the Nevada Revised Statutes provides that "Each petition for initiative or referendum must . . . [e]mbrace but one subject and matters necessarily connected therewith and pertaining thereto[.]"

92. *Regulatory Takings Ballot Measures Across America*, *supra* note 39.



statutory measure, I-154<sup>93</sup> qualified for addition to the ballot on July 21, 2006.<sup>94</sup> Combining eminent domain reforms and a regulatory taking section, the "Protect Our Homes Montana" initiative includes a two year statute of limitations and would not apply to regulations adopted prior to its enactment. The Montana initiative also clarifies, unlike Measure 37, that any waivers granted under it would be permanent and run with the land.<sup>95</sup>

I-154's sponsor, Montanans in Action, has recently come under fire due to its dubious accounting practices and refusals to disclose its funding sources.<sup>96</sup> Four complaints were filed with the Montana's Commissioner on Political Practices against the organization on July 17. Particularly, concerns have been raised over Montanans in Action's \$600,000 donation to the sponsors of California's Proposition 90.<sup>97</sup> Montanans for Fair Initiatives, the group that filed the complaints, has raised questions regarding whether the money was actually laundered through Montanans in Action by ALG or its sister organization, the Fund for Democracy.<sup>98</sup> The Commissioner on Political Practices has also received a host of informal complaints about Montanans in Action's deceptive signature gathering tactics. The sponsor of I-154 himself filed a complaint against a police detective alleging that he had engaged in "a personal, politically-motivated investigation while on official duty."<sup>99</sup>

Although there is strong, organized opposition to Montanans in Action's Taxpayers Bill of Rights initiative,<sup>100</sup> information concerning the likely impact of Protect Our Homes is being distributed mostly by the

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93. Montana Secretary of State, 2006 Ballot Issues: I-154, available at <http://sos.mt.gov/ELB/archives/2006/I/I-154.asp> (last visited Sept. 21, 2006) [hereinafter I-154].

94. Work, *supra* note 29.

95. I-154, *supra* note 93, at § 6(3).

96. Work, *supra* note 29.

97. See Proposition 90 Campaign Finance Report, *supra* note 61.

98. Work, *supra* note 29.

99. David Crisp, *New Initiative Complaint Filed*, BILLINGS OUTPOST, Jul. 27, 2006, available at <http://www.billingsnews.com/story?storyid=20206&issue=338>.

100. Not in Montana, *Vote No on CI-97*, <http://www.notinmontana.org/index.php> (last visited Sept. 21, 2006); Taxpayers Bill of Rights (TABOR) initiatives are constitutional amendments that seek to limit revenue sources by tying tax increases to population growth and inflation rates. Any excess taxes received under a TABOR scheme must be refunded unless voters choose to allow the legislature to keep them. See Americans for Limited Government, "The Sky is Falling!": Debunking the Myths About State Spending Caps, [http://www.getliberty.org/campaigns/taxandspendingreform/tsr\\_truth.php](http://www.getliberty.org/campaigns/taxandspendingreform/tsr_truth.php) (last visited Sept. 26, 2006). Cf. Nat'l Conference of State Legislatures, Talking Points on TABOR, <http://www.ncsl.org/programs/fiscal/taborppts.htm> (last visited Sept. 21, 2006) (expressing opposing viewpoint).

media. The scandal surrounding the initiatives' funding, however, has cast a shadow over the propriety of its signature gathering practices, and challenges are likely to be made before November.<sup>101</sup>

### B. *Initiative Pending Qualification*

#### 1. ALASKA'S MATANUSKA-SUSITNA BOROUGH LOCAL INITIATIVE

The Matanuska-Susitna area, often referred to as Mat-Su, is about the size of West Virginia and is the fastest growing region in Alaska.<sup>102</sup> A regulatory takings initiative known as the Property Rights Act<sup>103</sup> is currently pending addition to the 2007 ballot.<sup>104</sup> Sponsored by the Mat-Su Taxpayers Association and the Last Frontier Foundation, the Property Rights Act would enact legislation nearly identical to Oregon's Measure 37.<sup>105</sup>

### C. *Failed Initiatives*

#### 1. COLORADO

At least two Colorado regulatory takings initiatives failed to make the 2006 ballot. Initiative 86, the "Compensation for Land Use Regulations that Diminish Value" proposed a constitutional amendment that would have required compensation for land use regulations that decreased property values by 20 percent or more.<sup>106</sup> The sponsors of Initiative 86 agreed to withdraw the proposed amendment after negotiating with legislators and opponents of the provision.<sup>107</sup>

Initiative 126, similarly titled "Compensation for Land Use Regs that Diminish Value," proposed a constitutional amendment similar to

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101. Al Smith, Montana Trial Lawyers Ass'n, *Who's the Money From?*, Montana Public Radio Commentaries, Aug. 8, 2006, available at <http://www.mtpr.net/commentaries/250>.

102. Matanuska-Susitna Borough, Visiting the Mat-Su Borough, <http://www.matsugov.us/visitor.cfm> (last visited Sept. 21, 2006).

103. Mat-Su Taxpayers Ass'n, Property Rights Act, available at <http://www.taxcap.org/document2.html> (last visited Sept. 26, 2006).

104. Personal communication from Michelle McGehee, Borough Clerk, Matanuska-Susitna Borough (Aug. 16, 2006) (on file with author).

105. Mat-Su Taxpayers Ass'n, *supra* note 103; Daily News Staff, *In Brief*, ANCHORAGE DAILY NEWS, May 17, 2006, at G4.

106. Colorado Secretary of State, Proposed Initiative 2005-2006 #86, <http://www.elections.colorado.gov/DDefault.aspx?tid=274&vmid=534> (last visited Sept. 24, 2006).

107. Regulatory Takings Ballot Measures Across America, *supra* note 39.

Oregon's Measure 37. Interestingly, however, the initiative would not have applied to:

[P]roperty that, if exempted from said land use regulation, would:

- (i) Decrease the fair market value of any portion of surrounding real properties;
- (ii) Threaten commonly-held community values. . . . Examples include, but are not limited to: the reduction of open space, loss of recreational opportunities, or a degradation or change in the neighborhood aesthetic; or
- (iii) Threaten the natural or built environment including, but not limited to, any reduction in air or water quality, the fragmentation or reduction of wildlife habitats, or significant impact on a resource including, but not limited to, water that would impact current uses or rights.<sup>108</sup>

The Colorado Title Setting Board denied Initiative 126, explaining that “[t]he initiative violates the single-subject requirement because the initiative creates a new property interest for owners of surrounding properties.”<sup>109</sup>

## 2. GEORGIA

An inverse condemnation<sup>110</sup> initiative failed to qualify for Georgia's 2006 elections due to a lack of approval by the state legislature. The proposed constitutional amendment was sparked by stream buffer set-back regulations and would have authorized the General Assembly to enact provisions for the compensation of regulatory takings.<sup>111</sup> A related Senate bill, which also failed to become law, would have clarified

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108. Colorado Elections, Initiative 126 (original text), § 15(2)(b)(i)-(iii), *available at* <http://www.elections.colorado.gov/WWW/default/Initiatives/Title%20Board%20Filings/Original%20Text%20126.pdf>.

109. Colorado Title Setting Board, *In re* Title and Ballot Title and Submission Clause for Initiative 2005–2006 #86 (May 24, 2006), *available at* <http://www.elections.colorado.gov/WWW/default/Initiatives/Title%20Board%20Filings/Motion%20for%20Rehearing%20126%20-%20Gessler.pdf>.

110. As Justice Brennan explained:

The phrase “inverse condemnation” generally describes a cause of action against a government defendant in which a landowner may recover just compensation for a “taking” of his property under the Fifth Amendment, even though formal condemnation proceedings in exercise of the sovereign's power of eminent domain have not been instituted by the government entity. In the typical condemnation proceeding, the government brings a judicial or administrative action against the property owner to “take” the fee simple or an interest in his property; the judicial or administrative body enters a decree of condemnation and just compensation is awarded. In an “inverse condemnation” action, the condemnation is “inverse” because it is the landowner, not the government entity, who institutes the proceeding.

*San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 638 (1981) (internal citations removed).

111. H.R. 1054, 2005–2006 Gen. Assemb. (Ga. 2006), *available at* [http://www.legis.state.ga.us/legis/2005\\_06/versions/hr1054\\_LC\\_18\\_4678\\_a\\_2.htm](http://www.legis.state.ga.us/legis/2005_06/versions/hr1054_LC_18_4678_a_2.htm); General Economic Developers Ass'n, 2006 Georgia General Assembly: Legislation of Interest to Economic Developers (Apr. 13, 2006), <http://www.geda.org/legislation/2006/2006LegislativeUpdate.pdf>.

condemnation procedures to provide for the award of just compensation in inverse condemnation proceedings not involving full takings.<sup>112</sup>

### 3. SOUTH CAROLINA

A constitutional amendment concerning eminent domain reform will be referred to South Carolina voters this November.<sup>113</sup> Although the bill, as introduced, included a regulatory takings provision,<sup>114</sup> the House Judiciary Committee approved the bill only after a Senate amendment removed the regulatory takings language.<sup>115</sup> However, a joint resolution was also passed to create a study committee to review eminent domain reforms and the effects of regulatory takings provisions.<sup>116</sup> Proponents of the regulatory takings measure have indicated that they will likely raise the issue in the next session.<sup>117</sup>

### 4. MISSOURI

The Missouri Protect Our Homes Initiative<sup>118</sup> was prevented from appearing on the 2006 ballot due to technical problems with the petitions.<sup>119</sup> The initiative was a hybrid eminent domain and regulatory takings law that would have applied to prospective land use regulations. The initiative included a four-year statute of limitations and specified

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112. S.B. 30, 2005–2006 Gen. Assemb. (Ga. 2006), available at [http://www.legis.ga.gov/legis/2005\\_06/fulltext/sb30.htm](http://www.legis.ga.gov/legis/2005_06/fulltext/sb30.htm) (last visited Sept. 21, 2006). This bill would not have been referred to the public as an initiative.

113. S. 1031, 116th Gen. Assemb. (S.C. 2006), available at [http://www.scstatehouse.net/cgi-bin/query.exe?first=DOC&querytext=1031&category=Legislation&session=116&conid=2029538&result\\_pos=0&keyval=1161031](http://www.scstatehouse.net/cgi-bin/query.exe?first=DOC&querytext=1031&category=Legislation&session=116&conid=2029538&result_pos=0&keyval=1161031) (last visited Sept. 21, 2006).

114. H. 4502, 116th Gen. Assemb. (S.C. 2006) (original version), available at [http://www.scstatehouse.net/sess116\\_2005-2006/prever/4502\\_20060124.htm](http://www.scstatehouse.net/sess116_2005-2006/prever/4502_20060124.htm) (last updated Sept. 25, 2006). The relevant language stated that:

[I]f the use or division of private real property is reduced by the enactment or enforcement of a land use law after the date of acquisition by the owner of the property in a manner that reduces the fair market value of the property, except a law to protect the public's health and safety, the owner is entitled to just compensation, and is not required to first submit a land use application to remove, modify, vary, or otherwise alter the application of the land use law to the owner's property as a prerequisite to demanding or receiving just compensation pursuant to this section.

115. Municipal Ass'n of South Carolina, Weekly Legislative Report: May 19, 2006, <http://www.masc.sc/Legislative/weeklyreport051906.htm>.

116. S. 1029, 116th Gen. Assemb. (S.C. 2006), available at [http://www.scstatehouse.net/cgi-bin/query.exe?first=DOC&querytext=1029&category=Legislation&session=116&conid=2138889&result\\_pos=0&keyval=1161029](http://www.scstatehouse.net/cgi-bin/query.exe?first=DOC&querytext=1029&category=Legislation&session=116&conid=2138889&result_pos=0&keyval=1161029) (last visited Sept. 25, 2006).

117. Regulatory Takings Ballot Measures Across America, *supra* note 39.

118. Missouri Secretary of State, Elections: 2006 Approved Initiative Petitions, <http://www.sos.mo.gov/elections/2006petitions/ipEminentDomainI-34.asp> (last visited Sept. 21, 2006).

119. Missouri Secretary of State, Certificate of Insufficiency of Petition, May 25, 2006, available at <http://www.missouriansincharge.com/legal/POHinsuff.pdf>. The denial was due to defects in the signature pages and the lack of fiscal impact figures.

that any waivers granted to claimants would be permanent. The initiative's sponsor, Missourians in Charge, has filed a lawsuit challenging the initiative's denial,<sup>120</sup> and it is likely that attempts will be made to get the proposed constitutional amendment on the 2008 ballot.

#### 5. OKLAHOMA

Oklahomans in Action, another group linked to ALG, pushed another Protect Our Homes initiative for the 2006 election.<sup>121</sup> The initiative would not have been retroactively applicable and it did not contain a waiver provision or statute of limitations.

The Oklahoma initiative faced difficulties throughout the petition process. After submitting signatures, a variety of technical deficiencies were recorded by the Secretary of State: a statement describing problems with signature gatherers was submitted to the Secretary, the ballot title was rejected, and the petition was challenged by several organizations.<sup>122</sup> Eventually, the Oklahoma Supreme Court struck the measure from the ballot after finding that it violated the single issue rule by dealing with both eminent domain and regulatory takings.<sup>123</sup> This decision may have an important influence on other courts faced with the question of whether hybrid eminent domain and regulatory takings initiatives address more than one subject.

#### IV. Important Lessons

The experiences of the eleven states and two regional areas in which regulatory takings ballot measures have been attempted this year provide important lessons for future encounters of similar types. Perhaps most importantly, opponents to regulatory takings initiatives must recognize that sponsors of such measures do not play fairly; they engage in heavy rhetoric, disseminated by paid advertisements and signature gatherers; they represent the nature of their groups and positions deceptively; and it seems likely that they sometimes use dubious techniques of campaign financing.

Although opponents should not stoop to this level in order to defeat regulatory takings initiatives, they should understand that these

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120. Missourians in Charge, Legal News, <http://www.missouriansincharge.com/lawnews.html> (last visited Sept. 21, 2006).

121. See Oklahomans in Action!, <http://www.oklahomansinaction.com/> (last visited Sept. 21, 2006).

122. A detailed record of the initiative's history is available online at <http://www.sos.state.ok.us/documents/Questions/729.pdf> (last visited Sept. 21, 2006).

123. *In re Initiative Petition No. 382, 2006 Okla. 45* (June 20, 2006).

campaign tactics must be counterbalanced. Whether called rhetoric or voter education, opponents need to find methods to appeal to voter sensibilities in the face of sponsors' emotionally laden campaigns. As seen in California and Washington, where broadly based and well funded coalitions stand a good chance of winning the regulatory takings issue in November, advertising opposing positions and using simplified arguments can help sway voters. The debate must be shifted away from depictions of government as abusive; rather, opponents need to emphasize aspects of "good government" and the benefits associated with smart development. In addition, opponents should counterbalance sponsors' emphasis on the economic loss associated with land use regulations with arguments that regulatory takings legislation will actually cost voters, due to increased government outlays to deal with such measures and by lowering their own property values when their neighbors receive waivers.

Highlighting the deception involved in many regulatory takings campaigns is another tactic that may prove to be extremely useful. The appeal of regulatory takings measures is due in no small part to their appearance as grassroots efforts to protect the "little guy" from the system. Opponents need to point out to voters that these initiatives receive most of their funding from large, out-of-state anti-government organizations, not from local people who have a personal interest in the land at stake. Similarly, opponents should make clear that the campaign finance practices of many property rights groups are less than transparent. In addition, when takings initiatives are piggybacked onto eminent domain reforms, opponents need to explain the difference between the two issues to voters, and they should also explain that by attempting to deceive voters in this manner, property rights groups are actually endangering the enactment of eminent domain reforms that many voters favor.

Another route to defeating regulatory takings initiatives is through aggressive legal challenges to initiatives before they are qualified. Deceptive titling, petitioning, and campaign finance practices are often grounds for such challenges, as are more technical deficiencies in the petition process. Challenges, moreover, often attract media attention that places property rights groups in a negative light.

## V. Conclusion

To date, regulatory takings initiatives have reached the polls in only Oregon and Napa County, California. With one gaining approval and the other having failed, few sure predictions can be made about the six

initiatives that voters will face this November. What does seem likely is that more regulatory takings initiatives will follow in their wake.

In the mean time, Oregonians will continue to grapple with the impact of Measure 37. The state, hopefully, will find a way to incorporate the Measure while preserving its land use regulation system. The difficulties Oregon faces in doing so will hopefully encourage other voters to avoid falling prey to the deceptive tactics of property rights activists in their states.