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The journal of growth management issues

PROPERTY RIGHTS REPORT

U.S. Property Rights On the Move

In 2005 the Supreme Court ignited a firestorm when it upheld eminent domain for private development in the now infamous "Kelo" case.

The Kelo decision confirmed that the U.S. Constitution does not provide an adequate check on local government's power to determine when confiscating property serves a "public purpose."

The ruling reinvigorated public debate on property rights, prompting many states to pass laws that curb eminent domain. By 2007, 42 states had passed some type of eminent domain reform in response.

Since Kelo, the U.S. Supreme Court has declined other "takings" casing, indicating the court may see the issue of eminent domain as a settled matter.

Jeffrey Finkle, president of the nonprofit International Economic Development Council based in Washington DC, told *G/NG* it's unclear if the "Roberts Court," under the leadership of Chief Justice John Roberts, will revisit eminent domain in the near future.

"(Chief Justice) Roberts talked about settled law in his Senate testimony," Finkle noted. "We hope that he views the Kelo case as settled law on the issue of eminent domain for economic development. There may be other issues around eminent domain such as 'just compensation,' but I cannot imagine the court taking any more cases in this vein."

Finkle claimed the corresponding legislation from the majority of states in the wake of the Kelo decision served to weaken eminent domain as public tool.

"In many states, they have clearly altered the landscape for the use of eminent domain," Finkle commented to *G/NG*. "In some of these places, they are going to have to consider what they have done, as they will have ruined their ability to undertake redevelopment. They will have put individual rights ahead of communities' rights. These states have empowered certain individuals with the right to block redevelopment efforts. Communities may lose the ability to develop additional tax base to pay for needed public services, lose the ability to develop property for jobs for their residents, and lose the ability to clean up slum influences."

In the first challenge of property rights laws to reach a state high court since the U.S. Supreme Court's Kelo decision in 2005, the Ohio Supreme Court ruled unanimously in 2006 that economic development alone does not justify taking homes. The decision halted a \$125 million project of offices, retail and restaurants in a Cincinnati suburb that officials claimed would create jobs and add tax revenue.

"For the individual property owner, the appropriation is not simply the seizure of a house," Justice Maureen O'Connor wrote. "It is the taking of a home - the place where ancestors toiled, where families were raised, where

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memories were made."

The city of Norwood wanted to use eminent domain to seize properties holding out against development in an area considered to be deteriorating.

O'Connor said that while cities may consider economic benefits, courts must "apply heightened scrutiny" to assure private property rights.

The court also ruled that targeting property because it is in a deteriorating area also is unconstitutional because the term is too vague.

In the three years since the Kelo decision was handed down, the city in which the case arose - New London, CT - has had trouble completing its revitalization project.

New London reportedly faces a deficit and barren property in a place it had hoped would revive the community by spurring economic growth.

"The city of New London won in court, but it has lost on the ground," according to a *St. Paul Pioneer Press* editorial. "Where charming Victorian houses like Susette Kelo's pink cottage once stood, today there are only barren tracts of land. Development plans have foundered, and officials are trying to rebuild the area by attracting the same working-class people it originally evicted."

Measure 37 Spurs PR Movement

When Oregon voters passed Measure 37 in 2004, it caught planners and other responsible land-use advocates by surprise, most notably because it occurred in Oregon - long admired for its progressive regulations on land use. If the property rights movement could dismantle planning efforts in Oregon, suddenly it appeared that states trying to implement tougher restrictions would have a tougher fight on their hands.

Harvey Jacobs, a professor of urban planning at the University of Wisconsin, told *G/NG* that Measure 37 was "very precisely designed to have the impact it did."

"There was a certain amount of 'it can't happen here' attitude among land-use advocates," Jacobs noted.

What Measure 37 opponents failed to grasp was the sheer number of voters who had moved into Oregon in the last two decades. Many of these voters were initially swayed by the seemingly benign argument that local governments should compensate landowners for any restrictions placed on their land.

The property rights movement tried to capitalize on their success in Oregon by placing similar measures on the ballot in California, Washington, Idaho and Wyoming. All four states defeated the measures, however.

Organizers against those ballot efforts in Idaho and Wyoming successfully demonized the funding source of the measures, namely, corporate funds, by saying "who are these outsiders trying to tell us what to do," according to Jacobs.

Ultimately, Oregon voters, who were shocked by the monetary and acreage claims made under Measure 37, passed Measure 49 in 2007. The passage of Measure 49, which reduced many of the development rights granted under Measure 37, brought such relief to planning advocates that one land-use activist in Oregon declared the property rights movement had "peaked."

But Jacobs disagreed, saying the movement has a "very good self-learning curve."

"This is a movement which has been very systematically building" over the years," Jacobs told *G/NG*.

The Measure 37 campaign demonstrated how the property rights movement works, Jacobs said.

"It's very easy for the property rights movement to package their argument in a couple of simple state-

ments."

Even Measure 49 can be seen a victory of sorts for property rights advocates, in Jacobs' opinion, because it represents concessions to property owners that hadn't been made in 30 years.

"49 is a victory for land-use advocates, but I don't view it as a major defeat for the property rights movement," Jacobs asserted.

Likewise, property rights advocates don't necessarily view the defeat of land-use initiatives in other states during 2006 as a rejection of the argument.

"The property rights movement was shocked they got so close in California," Jacobs emphasized. "They are not folding up their tents and going home."

One of the movement's successes has been to elevate property rights to a "national conversation," and so far they've shaped the tenor of that discussion.

"We are having the conversation on the terms they set," Jacobs said.

Those terms include oversimplifying the issues involved in the debate, a technique that Jacobs terms "the Rush Limbaugh problem."

"(Limbaugh) says something is 'simple,' so he has people convinced" that other arguments are convoluted and, therefore, misinformed.

For more on the fallout from Measure 37, see WEST COAST on page 6.

Ballot Measures Gaining Ground Across U.S.

Twenty-four states currently allow voter initiatives, and the use of those measures to determine property rights, taxes, transportation, land-use decisions is growing.

Ballot measures are growing in use primarily because the legislative process isn't addressing issues arising today.

Ballot measures also provide political cover for elected officials because voters determine outcome. In

some cases it's a political strategy to counterbalance other measures.

While the rise of "ballot box zoning" is considered a new front in the long battle over property rights, there are benefits for planners in this trend, including increased funding for infrastructure and land conservation.

Downsides include tax caps, takings and eminent domain initiatives.

Ballot measures allow an end-run on legislative stalemate. Likewise it brings the debate directly to voters.

Perils from this trend include an over-reliance on sales and property taxes, along with an escalation in ideology wars, which are both costly and resource intensive, and ultimately put planners in the political arena.

Dealing with Ballot Measures

It's crucial to frame the issue first. Whoever reaches voters and defines what the measure would do has an advantage.

Successful themes for planners include criticism of the measure as "deceptive, extreme and flawed"; that it's costly to taxpayers; and that it will allow irresponsible development.

The single most important part of a campaign is the actual ballot text.

Voters tend to be more receptive to conserving land, water and wildlife.

Another strategy is to highlight the history of the initiative's funding to focus on "outsiders" role in the effort. Likewise, alert the media and create an aggressive campaign.

Agree on a message and find the right messengers; emphasize the extreme nature of the measure, as well as the uncertainty and costs associated with the initiative.

Other recommendations included keeping the coalition going; reframe the debate; build allies; monitor media coverage; conduct research; watch public opinion; and pursue your version of reform.

Planners play an important role in property fairness advocacy by serving as a consensus builder and a source of knowledge.

Liabilities include the reality that planners are seen as agents of government, which gives the appearance of self-interest. That's why it's important to avoid being portrayed as defenders of the process. Simply set the record straight, but don't "educate."

The rise in ballot measures over the last decade demonstrates public dissent with how cities are handling growth, according to Prof. Mai Nguyen of the University of North Carolina - Chapel Hill.

Nguyen claims communities use the ballot box for reasons that might surprise some planners. Based on her study of the issues, she says it's not rapid

growth or the rise of wealthy white suburbs that drive voters to the polls.

The primary reason is that neighboring jurisdictions have growth controls already in place, according to Nguyen.

"If their neighbors adopt growth control, (voters) are more likely to do the same."

As part of her research in housing and community

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GROWTH/NOGROWTH (ISSN #1529-4226) is published 12 times a year by Evans Publishing. Subscription (payable in US funds): US & Canada: \$195 per year for full-text articles online at GrowthNoGrowth.com; \$225 per year for 12 issues by mail; \$245 for both mailed issues and online access. To order a subscription or change your mailing address, call 503 335-0183.

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development, Nguyen examined results from more than 600 local ballot box growth initiatives across the U.S.

Her study revealed more ballot measures are organized during general election years, prompted by special interest groups who think higher voter participation will help their cause.

Nguyen says that voter growth controls often slow growth, which tends to boost the white population and median income while decreasing the Hispanic population in those areas.

Ballot measures concerning growth tend to have exclusionary consequences, Nguyen finds. She says they shift development to more rural areas, while decreasing the number of rental units in cities and reducing total housing units.

Public Confusion Hurts Planners

Prof. Eric Freyfogle of the University of Illinois said public confusion is a considerable part of the problem.

It's a dilemma of law vs. culture: private property is defined by law, but the idea remains a symbol of our country, according to Freyfogle.

"Sorting out these two forms of property is central to move forward in the debate," he said.

Freyfogle said the "takings" approach inherently assumes that property exists without government, a concept he disagreed with.

"It's completely untrue that land owners want government to leave them alone. What they want is government at their beck and call."

He said they use police and the courts -- both inherently public powers -- to protect their "rights."

Freyfogle agreed that there is a "yearning" for a new vocabulary to approach the issue in the public realm.

Planners need to redefine the argument in order to make successful arguments in favor of regulation.

"Private property is an important institution in our society. We need to give it more nuanced debate than what we do," Freyfogle stated.

With the help of deep-pocketed corporations (mining, timber, etc.), the property rights movement has morphed into a national effort with think-tanks in Washington DC and well-organized advocacy groups throughout the country.

Jacobs said the movement has divisions within itself. One branch is more radical, thinking "no regulation is justified." Another school of thought views health and safety regulations as reasonable, but reject larger limits

on land use.

These divisions go largely unnoticed because advocates are united in their current approach to defeating land-use planning.

"They feel they're so far from winning, they can brush over differences," Jacobs explained.

The debate over property rights is heated because supporters couch the argument in terms of socialism, he said. Property rights advocates read U.S. history deeply, and they view property rights as central to a strong democracy.

"They say that if there is a substantial erosion of property rights, democracy is imperiled," Jacobs stated. "From their point of view, this becomes proxy for a debate about the future of our democracy."

Currently, the property rights movement is in a period of assessing the best way to keep the debate on a national level, Jacobs noted. But the lack of national news coverage should not be confused with a diminished movement.

"They are a dog on a bone here," Jacobs argued. "They're not going away."

O'Toole: Form Coalitions to Fight

"Coercive Land-Use Planning"

So what is the state of property rights in the U.S.?

Not good, according to Randal O'Toole, an economist with the Cato Institute, a conservative think tank.

"I'd say it's pretty precarious right now," O'Toole told G/NG.

O'Toole acknowledged that most states passed Kelo-response legislation, but he not convinced it did much to strengthen property rights.

"I think growth management is pure evil," O'Toole claimed.

As far as he's concerned, there is little chance both growth management and true property rights can co-exist.

"If property rights can be redefined on a whim, it doesn't say much about other rights in this country."

O'Toole said the failure of states surrounding Oregon to pass legislation similar to Measure 37 is discouraging.

"That says to me that people in America don't understand property rights."

O'Toole disagrees with the idea that the eventual passage of Measure 49 in Oregon was a moderate success for property owners.

"It's like someone stabs you in the back, then pulls the knife out a quarter-inch and says, 'Look, we've made progress.'"

In his opinion the property rights movement has stagnated.

"I'm afraid it's mainly rural people whose rights have been taken away by regulations," he explained.

That's why he's called for a bigger push to reach urbanites to broaden the movement's base. To do that successfully, he said the movement's message would have to change.

"To really be successful we have to build coalitions in urban areas."

O'Toole is founder of the American Dream Coalition, which strongly opposes growth management is taking a stand against smart growth.

The concept of smart growth, which the group defines on its website as "coercive land-use planning that attempts to increase urban densities and discourage auto driving," was criticized at the group's "Preserving the American Dream" conference in Houston.

O'Toole, an economist who calls himself "the anti-planner," told conference attendees that planners are succeeding in their efforts to push an agenda that involves increased density.

"The other side is really good at branding (smart growth)," O'Toole noted. "They're trying to change how we live and move in America."

O'Toole is critical of smart growth because of what he sees as its limiting effect on mobility.

"Despite its attractive name, smart growth is one of the greatest threats to American mobility, affordable housing, and freedom today," he wrote on ADC's website.

But O'Toole argued that smart growth is only a symptom of a larger problem.

"Smart growth isn't the problem. The problem is planning, in particular government planning. It's inflexible."

Noting that no one can predict the future, O'Toole argues "long-term plans are guaranteed to be wrong."

O'Toole, author of *The Vanishing Automobile and Other Urban Myths*, founded ADC in 2002.

Mobility is central to his campaign against planning.

"To protect everyone's American dream, the American Dream Coalition supports giving people freedom of choice in how they use their land and what forms of transportation they use, provided only that people pay the full costs of their choices," according to its website.

"We do not advocate that people drive everywhere or live in low-density suburbs, but we believe these are legitimate choices. We do not oppose high-density housing or public transit, but we do oppose planning efforts that attempt to force high-density housing on people or to build wildly expensive rail transit lines that few people will ride."

O'Toole remains a strong supporter of automotive transportation, calling rail transit "an idea that's totally obsolete, that makes no sense."

O'Toole said planners are focused on reducing VMTs at the cost of freedom.

"Not a single city in the U.S. has been able to get 1% of their population out of cars and onto transit" despite having spent \$100 billion on transit in the U.S. over the past 15 years, he asserted.

O'Toole conceded that some government agencies are capable of "short-term, mission-specific" planning, but that doesn't include urban growth, in his opinion.

"Solve today's problems today. The future will take care of itself."

While calling ADC a "fledgling organization," he urged members to build stronger coalitions of builders, car dealers, petroleum providers and other suppliers to wage a campaign against urban planning.

"Once you've got that coalition, you need to put a human face on it. That's the way we're going to win."

Rights Groups: Know What You Stand For

The following are summaries of presentations given at the Preserving the American Dream Conference in Houston on May 16-18, 2008.

Michael Sullivan, CEO of Empower Texans in Austin, TX, has taught classes on effective communication for conservative leaders.

"Places do better when people are free to succeed and fail on their own," he claims.

Sullivan said there are three conditions to communicate successfully.

First, you have to know what we want to achieve.

"Many people are against something, but they don't really know what they are for."

He says it's essential to have a good idea of what we want the world to look like tomorrow in order to succeed.

Secondly, you need to know who matters. He advised against wasting effort on people who aren't voters or donors (the politician's constituents and donors).

"At the end of the day I don't care what politicians believe, I care about how they act."

You also must have a realistic plan of what it takes to achieve success.

"We can't over-promise results to those who support us," he urged.

That's why it's important to communicate in a way that cuts through the clutter.

"The best way to cut through it is to be more personal," he said.

And don't worry about the media, in his opinion.

"The solutions we want may take a generation or more to achieve, but we can't give up."

THE WEST COAST

Measure 49 Shows "Movement Has Peaked"

Oregon voters rethought Measure 37 and amended the original law by a margin as wide as it originally passed with in 2006.

The Oregon results combined with 2006 defeats of property rights initiatives in three Western states indicate "the so-called 'property rights movement' has peaked," a Measure 49 advocate declared.

With proponents calling it an "overwhelming mandate," voters in Oregon passed Measure 49 by 61.5%, amending property development rights granted to residents in 2004 by Measure 37.

The American Planning Association applauded Oregon voters for "correcting the excesses and loopholes left after the passage in 2004 of the ill-fated and poorly understood Measure 37."

"Voters recognized that property fairness should not come at the expense of destroying farms, forests and clean water," stated Phil Farrington, president of the APA Oregon chapter.

In the three years since Measure 37 passed, voters in California, Washington and Idaho defeated similar ballot measures.

"You're not going to see any land-use ballot measures for a while," Eric Stachon, communications director for 1,000 Friends of Oregon, noted in his opinion that the movement has "peaked."

Stachon credited the passage of Measure 37 to a shrewd campaign and "a killer ballot title."

But by the time Measure 49 was put on the ballot,

"voters had a greater awareness of what was at stake," Stachon told G/NG.

Opponents of Measure 49 waged a strong campaign to protect the victory they achieved in 2004. The group Oregonians in Action, which authored Measure 37, argued against 49 and other "draconian land use regulations" by labeling the effort "a direct attempt to repeal Measure 37."

"If approved, Measure 49 will ... eliminate all protection from future regulations," OIA claimed on its website. "Your home and property will not be safe if Measure 49 passes."

OIA also argued "nearly every Measure 37 claimant will have their claim wiped out, even if the claim has already been approved."

However, it's estimated that about 3,000 of the 7,500 claims approved under Measure 37 could continue to be developed under Measure 49.

"The outcome drastically scales back development allowed under Measure 37, approved by voters in 2004, according to the Oregonian. "Under the new law, landowners will be allowed to build one to 10 houses under various scenarios. The measure prohibits larger subdivisions and commercial and industrial development, however."

Opponents used extreme arguments in their attempt to defeat Measure 49.

"If the government wants your property for open space, a scenic view, wildlife habitat, or some other government use, M49 allows them to take your property for free," the website Stop49.com claimed.

Stop49.com adopted the slogan "M49 - A wolf in sheep's clothing" and placed it on yard signs around the state.

"M49 wipes out property rights that state and local governments have already approved, even if the property owner has spent thousands of dollars to follow all the rules," Stop49.com continued. "M49 radically changes Oregon law."

That interpretation is not what a strong majority of voters see as the intent of the legislation.

"Some claims filed under Measure 37 remain in limbo. If property owners are legally vested --meaning they've spent enough money or done enough construction -- they might be able to finish projects that are beyond the scope of what's allowed under Measure 49," the Oregonian reported following the vote.

Measure 49 supporters insist that their victory did

not roll back the clock to the days before Measure 37.

"It's hardly a repeal of 37," Stachon explained to G/NG. "Measure 49 simply created the 37 people thought they were voting for."

Stachon also dismissed opponents' contention that the state legislature was meddling with the will of the people, saying public outcry forced the legislature to act in order to clarify Measure 37.

"The legislature would just as soon not have touched this issue."

Stachon said polls consistently show strong support for planning throughout Oregon.

In all, proponents reportedly spent more than \$4 million in support of Measure 49, while critics spent an estimated \$2 million, much of which was contributed by the timber industry.

One key difference was the participation of the state Farm Bureau in support of 49, Stachon noted.

"The Farm Bureau, which sat out (during the Measure 37 vote), got involved in 49," Stachon stated.

Over the past two years 1,000 Friends of Oregon has conducted a series of townhall forums across the state to gain a greater understanding of what Oregon residents

would like to see addressed.

Stachon downplayed the urban/rural split often highlighted in land use discussions. He said Oregon residents are most concerned about farmland protection, integration transportation with better land uses, and reducing the state's carbon footprint in order to combat global warming.

"In Oregon, what unites us is greater than what divides us," Stachon concluded.

In addition to some much-needed clarification, Measure 49 also gave residents a boost in morale about the state they love, according to Stachon.

"It restored some of the pride people feel about Oregon and the importance of protecting the land."

Planning Regs Upheld in Three States

Three of the 11 states with ballot measures limiting eminent domain seizures or stifling land use regulations rejected limits on governmental influence in land planning.

Voters in California, Washington and Idaho voted

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down efforts to curtail land planning.

The margin was slimmest in California, where voters defeated Prop. 90 by 52.5%.

In contrast, Idaho overwhelmingly rejected Prop. 2 by 76%, snatching victory from the jaws of what many saw as certain defeat.

Voters in Florida, Georgia, Michigan, North Dakota, New Hampshire, Nevada, South Carolina and Oregon all established limits on eminent domain.

Arizona was the only state to pass an "anti-takings" measure. Proposition 207, approved by 65% of voters, restricts governments from seizing property for their own use, and also stipulates landowners be paid if a governmental decision lowers their property values.

Idaho Upset Big Surprise

The most surprising outcome was the sound defeat suffered by a property rights ballot measure in Idaho, where many assumed its passage was nearly a foregone conclusion. Roughly 76% of voters rejected the proposal.

"I was surprised it got such a thumping," stated Dr. Stephanie Witt, director of Boise State University's Public Policy Center. "I've never seen anything like it."

Dubbing the outcome "amazing," Witt pointed out that only eight or nine counties registered "yes" votes approaching 30% on Proposition 2.

"This thing lost in every county," Witt explained to *G/NG* during a phone interview.

The key to victory in Idaho was a "very effective coalition" of ranching, business and conservation groups that strongly opposed Prop. 2, Witt explained.

In contrast to Oregon's Measure 37, where strong opposition to "robust" land regulations successfully overturned similar rules in 2004, Idaho voters did not view planning as a rampant problem throughout the state.

Measure 37 passed with 61% of the vote. Its success was credited in part to its "poster children" who told stories of how Oregon's growth-management laws had blocked their modest plans for their property.

Prop. 2 was spearheaded by a few proponents who did not convincingly spread their message supporting a measure that Witt said was "poorly written," seeming to contradict itself in places.

"(Prop. 2) was a disaster on wheels," Witt noted.

Public records show supporters collected about

\$715,000 through donations, including \$475,000 from a Kalispell, MT-based libertarian group named America At Its Best.

Witt agreed that such an overwhelming victory sends a clear message in Idaho.

"I would assume no one would try this again anytime soon. I don't see how it would turn out any better."

Washington Rejects I-933

Voters in Washington rejected a property rights initiative that closely resembled Oregon's Measure 37.

"We got outspent six to one," said Dan Wood, director of government relations for the state Farm Bureau, which wrote the measure. But he said that the campaign had made lawmakers aware that unfair regulations are hurting people, the *Seattle Times* reported.

"We have moved the ball forward and we will hold the opposition and the governor accountable to deliver on their promises," Wood claimed.

I-933's opponents raised \$3.7 million and spent \$2.2 million of that on television advertising, according to the state Public Disclosure Commission. The initiative's supporters spent less than \$220,000.

Times reporter Eric Pryne told *G/NG* that the I-933 campaign was sparked by the success of Measure 37.

"The Farm Bureau and others held their first organizational meeting to talk about drafting a property rights measure just a month after Measure 37 took effect," Pryne noted. "Futurewise (called 1000 Friends of Washington at the time) began organizing an opposition campaign shortly thereafter."

Pryne said opponents ran 3 TV spots -- one highlighting farmer opposition to 933, another hitting the "cost/confusion/litigation" angle, and a third on Oregon's experience.

"I think the ability of opponents to blanket the Seattle market with those spots ... probably turned the tide," Pryne explained.

According to Pryne, I-933's defeat came months before the election, when "the big interest groups that had bankrolled a property-rights initiative campaign in 1995 -- builders, realtors, timber -- pretty much decided to stay away from 933."

"Measure 37's supporters had timber money to get their message out. In Washington, the only message many voters got was the anti-933 message."