COUNCIL AGENDA: 02-26-08
ITEM: 03.07

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL

FROM: Lee Price, MMC
City Clerk

SUBJECT: **OPPOSE PROPOSITION 98 AND SUPPORT PROPOSITION 99**

DATE: 02-21-08

RECOMMENDATION

As recommended by the Rules and Open Government Committee on February 20, 2008, adopt an oppose position to Proposition 98 and a support position for Proposition 99 – Constitutional Amendments Dealing with Government Acquisition Regulation of Private Property as outlined in the attached memo previously submitted to and approved by the Rules and Open Government Committee.

RULES COMMITTEE: 02-20-08
ITEM: C1a

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: RULES AND OPEN GOVERNMENT COMMITTEE

FROM: Debra Figone
Harry S. Mavrogenes

SUBJECT: SEE BELOW

DATE: February 14, 2008

SUBJECT: OPPOSE PROPOSITION 98 AND SUPPORT PROPOSITION 99 – CONSTITUTIONAL AMENDMENTS DEALING WITH GOVERNMENT ACQUISITION REGULATION OF PRIVATE PROPERTY

RECOMMENDATION

The City Administration and the San Jose Redevelopment Agency (SJRDA) recommend that:

1. The Mayor and City Council oppose Proposition 98 and support Proposition 99.
2. The Committee provide a one-week turn around for Mayor and City Council review.

OUTCOME

If the Rules and Open Government Committee and the Mayor and City Council accept the Administration and the SJRDA recommendation, this report may be useful in addressing community concerns.

BACKGROUND

Propositions 98 and 99 come on the heels of Proposition 90, which failed on the Statewide ballot in 2006, and was in direct response to the *Kelo v. City of New London* case decided by the US Supreme Court in 2005. In *Kelo*, the Supreme Court ruled that acquiring property by eminent domain for the purpose of economic development qualifies as a "public use" and was therefore constitutional. This case had little or no effect in California, which has higher standards than Connecticut with regard to eminent domain cases involving economic development. However, the *Kelo* case set off much of the current controversy over the use of eminent domain throughout the nation. Proposition 90 from 2006 would have restricted the use of eminent domain as well as planning policies and determinations. The City opposed Proposition 90 in 2006 and the initiative failed at the ballot. Analyses of Propositions 98 and 99 are attached. Given the overly prescriptive application of Proposition 98, the City Administration and SJRDA recommend opposing Proposition 98 and supporting Proposition 99.

ANALYSIS

Fact sheets and analyses of the two measures are attached.

PUBLIC OUTREACH/INTEREST

☐ **Criteria 1**: Requires Council action on the use of public funds equal to $1 million or greater. **(Required: Website Posting)**

☐ **Criteria 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**

☐ **Criteria 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

This legislative item does not meet any of the above criteria.

COORDINATION

This memorandum was coordinated with the City Attorney's Office, Housing Department, Planning, Building and Code Enforcement, Public Works, the Intergovernmental Relations Director in the City Manager's Office, and the City's Legislative Representative in Sacramento.

POLICY ALIGNMENT

The attached fact sheets and analyses are consistent with the Council-adopted 2008 Legislative Guiding Principles, and the Council-adopted 2008 Legislative Priorities.

CEQA

Not a project

DEBRA FIGONE
City Manager

HARRY S. MAVROGENES
Executive Director

Attachments (2)

Proposition 98 - Government Acquisition, Regulation of Private Property. Constitutional Amendment

What's the issue the proposition is trying to resolve?

Proposition 98 seeks to severely limit the application and use of condemnation by government entities for public and private purposes. Proposition 98 comes on the heels of Proposition 90, which failed on the Statewide ballot in 2006, and is in direct response to the *Kelo v. City of New London* case decided by the US Supreme Court in 2005. In *Kelo*, the Supreme Court ruled that acquiring property by eminent domain for the purpose of economic development qualifies as a "public use" and was therefore constitutional. This case had little or no effect in California, which has higher standards than Connecticut with regard to eminent domain cases involving economic development. However, the *Kelo* case set off much of the current controversy over the use of eminent domain throughout the nation.

Under existing law, public agencies use their police power to enact regulations governing the use of privately-owned real property. These include regulations ranging from traditional zoning to nuisance regulations and conditions imposed on the new development of property.

The Howard Jarvis Taxpayers Association, the California Farm Bureau Federation and the California Alliance to Protect Private Property Rights have placed Proposition 98 on the June 2008 ballot to amend the California Constitution to limit a public agency's ability to exercise certain types of land use decisions. Specifically, the initiative requires the following:

- Prohibits Property Transfers to a Private Party. For over 50 years, State and Federal Courts have held that the use of eminent domain by redevelopment agencies to eliminate conditions of blight is a public use. The initiative's definitions of "taken" and "private use" reverse those cases and prohibit the use of eminent domain where the ownership, occupancy or use of the property acquired is transferred to a private person or entity. This initiative would end the use of eminent domain by redevelopment agencies except for public works projects. It would prevent the use of eminent domain by other public agencies in public/private partnerships for facilities such as toll roads, affordable housing development, and privately-run prisons.

- Limitation on Public Policies and Land Use Decisions - The initiative constrains government authority to implement policies that reduce property value for "a private use." The definition of private use includes "regulation of the ownership, occupancy, or use of privately owned real property or associated property rights in order to transfer an economic benefit to one or more private persons at the expense of the property owner." Based on this definition and other references in the initiative, it could be interpreted that the initiative's provisions would affect government's authority to enforce rent control ordinances and could affect other governmental policies. Specifically, the measure could prohibit government from enacting new rent control ordinances and enforcing existing rent control ordinances (except during a transition period described below). The initiative also could prohibit government from enforcing inclusionary housing ordinances *if* the ordinances (1) were mandatory and (2) were found to "transfer an economic benefit" at the expense of the property owner. Beyond these regulatory activities, the extent to which this initiative would constrain government's authority is not clear. The range of

policies that would be affected would depend on court interpretation of many of its provisions.

- New definition of "just compensation." Existing law requires the payment of just compensation to the owner of property taken by eminent domain. "Just compensation" is defined in the eminent domain provisions of the California Code of Civil Procedure as "fair market value." A body of well-established law exists interpreting the meaning of "just compensation" and basically amounts to the highest price on the date of valuation that would be agreed to by a willing seller and a willing buyer, as determined by appraisal experts. The initiative would add a constitutional definition of "just compensation." Among the other changes that the initiative would make include an award of the property owner's attorney's fees if the jury awards one dollar more than the amount offered by the public agency. Currently, attorney's fees can only be awarded to the property owner if it is found that the public entity's final offer was unreasonable. Just compensation would also include elements not necessarily compensable under existing law such as temporary business losses. Relocation and other business re-establishment costs would also be elevated to constitutional status, thereby perhaps calling into doubt existing statutes which place limits on the type and amount of such expenses for which compensation must be paid.

- Acquiring "immediate possession" of property. Under existing law, after depositing with the court the estimated just compensation, a public agency can obtain possession of property prior to a final judgment based on a showing of an overriding need for the public agency to take possession prior to final judgment. If the property owner withdraws the deposit, he or she waives the right to contest whether the use of eminent domain has been used appropriately, including whether it is being used for a "public use." The property owner may still contest the amount of just compensation. This initiative would change this approach to prejudgment possession by permitting the property owner, after withdrawal of the deposit, to contest both the amount of just compensation and the public entity's public use determination. This would make the use of prejudgment possession more problematic for public agencies since, after withdrawal of the deposit, they would still be at risk of being prohibited from using eminent domain to acquire the property rather than simply paying more for it. Moreover, if the property owner has withdrawn the deposit and the public agency loses the public use challenge, the public agency would then have to pursue the property owner to recover the amount of the withdrawn deposit.

- Lower Standard of Review of Agency Determinations. Under existing law, when a public agency makes findings in connection with the acquisition of property by eminent domain, those findings are entitled to strong presumptions of validity. Courts will overturn those findings only where the property owner is able to demonstrate that the findings are not supported by some evidence in the record. Courts are also limited to reviewing the administrative record before the public agency. These rules are rooted in concepts of separation of powers—the respect that co-equal branches of government have for the other's proceedings. This initiative would provide that a court must exercise its independent judgment and give no deference to the findings of the public agency. The court's inquiry would also not be limited to the administrative record, and so the property owner could introduce evidence of value and other matters not before the public agency at the time the decision to use eminent domain was made. This creates a situation where

a court could invalidate an eminent domain action based on information that was not presented to the public agency that authorized the use of eminent domain.

- Reversionary Rights. The initiative also provides that if property acquired through eminent domain is to be used for a substantially different use from the original stated public use, the public entity must make a good faith effort to locate the prior property owner. If the prior property owner is located, the public entity must make a written offer to sell the property to the prior owner at the price paid by the public entity increased only by the fair market value of any improvements and reduced by the value attributable to the removal or destruction of any improvements that were acquired with the property. This provision does not allow a public entity to respond to changed circumstances or effectively manage its properties. The provision also does not address how to handle property assembled from multiple property owners and would create substantial uncertainty for large public projects.

How would the passage of this proposition affect San José?

The Administration is concerned that Proposition 98, if approved, will adversely impact a large portion of the City's work, by raising the price of public construction projects and hindering the ability to carry out development based on our community's need. The full extent and cost this proposition poses to the City of San José is unclear, but it is anticipated to be large given that nearly every project, service, or decision could have a larger price tag. Proposition 98 could significantly increase the cost and amount of litigation related to many of the City's land use decisions and public purpose projects like transportation, affordable housing, parks, community centers, and other like projects. This initiative will also have an adverse impact on the cost of school construction and could hinder the construction of new schools in San Jose.

One of the most far-reaching provisions in Proposition 98 is the requirement that local governments or the State compensate property owners when changes in laws, rules, or regulations result in an economic loss to a property owner. Compensation could potentially be required as a result of: down-zoning, elimination of access to property, limits on the use of air space, or the approval of affordable housing projects. These actions might open the City up to claims for "damage" in the form of real or perceived loss in property values any time a law or regulation is passed to protect our neighborhoods, to protect our air and water quality, protect natural resources like wildlife and habitat, ensure adequate water supplies, or regulate development. It could lead to lawsuits that will cost the taxpayers of California and residents of San José millions of dollars. Following the adoption of a similar law in Oregon in 2004, Measure 37, there were more than 2,200 claims filed, seeking over $5 billion in payments that taxpayers of that state could ultimately have had to pay. However, on November 6, 2007, over 60% of Oregon's voters overturned significant portions of Measure 37.

Proposition 98 could potentially make unconstitutional virtually all regulation of land use unless just compensation is paid. Given the broad prohibitions under Proposition 98, the City Administration concludes that this initiative could effectively eliminate such things as rent control ordinances[1] (the City has a rent control ordinance for rental properties built before 1976

[1] Rent controlled units as of January 1, 2007, would be grandfathered, but only for so long as at least one of the tenants continues to live in the unit as their principal place of residence.

and mobilehomes) and inclusionary housing ordinances, which require new housing development to include units affordable by low- and moderate-income buyers or renters. The effect on the inclusionary housing provisions of the Community Redevelopment Law is difficult to predict. Redevelopment agencies might still be able to bargain for the provision of affordable units as a condition of agency assistance, but they may not be able to impose such requirements as a matter of law.

What is staff's Proposed Position?

This initiative is much like Proposition 90 from 2006, which would have restricted the use of eminent domain as well as planning policies and determinations. The City opposed Proposition 90 in 2006 and the initiative failed at the ballot. Given the overly prescriptive application of this initiative , the City Administration recommends opposing Proposition 98.

Who are the proposition's supporters and opponents?[2]

The initiative is being sponsored by the Howard Jarvis Taxpayers Association and the California Farm Bureau Federation and is supported by the California Alliance to Protect Private Property Rights, the Property Rights Alliance, the California Republican Taxpayers Association, California Taxpayer Protection Committee, National Tax Limitation Committee, National Taxpayers Union, Silicon Valley Taxpayers Association, California Canning Peach Association, California Dairies, Inc., Capitol Resource Family Impact, California Black Chamber of Commerce, California Hispanic Chambers of Commerce, National Federation of Independent Business , the Small Business & Entrepreneurship Council, Apartment Owner Association of California (AOA), the California Mobilehome Parkowners Alliance, Western Manufactured Housing Communities Association, and the California Republican Party.

The initiative is being opposed by the League of California Homeowners, Golden State Manufactured-Home Owners League, Inc. (GSMOL), California Mobile Homes Resource and Action Association, Resident Owned Parks, Inc. (ROP), California Alliance for Retired Americans, Gray Panthers California, the State Building and Construction Trades Council, International Brotherhood of Electrical Workers, California Redevelopment Association, California State Association of Counties, California Chapter of the American Planning Association, California Special Districts Association, California League of Conservation Voters, Natural Resources Defense Council, Planning and Conservation League, Defenders of Wildlife Greenbelt Alliance, Housing California, California Housing Consortium, the Western Center on Law and Poverty, Consumer Federation of California the Mobile Home Owners Coalition, Western Growers Association, League of California Cities, Association of California Water Agencies, California Police Chiefs Association, California School Boards Association, and Environmental Defense.

What is the current status of the measure?

Proposition 98 will appear on the June 3, 2008, Statewide Direct Primary Election Ballot.

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2 The following list was derived from the www.yesonpropertyrights.com and www.eminentdomainreform.com and is only a partial list.

Proposition 99 - Eminent Domain. Acquisition of Owner-Occupied Residence. Constitutional Amendment

What's the issue the proposition is trying to resolve?

Also called the *"Homeowners and Private Property Protection Act,"* Proposition 99 is a measure on the June 3, 2008, ballot that seeks to amend the State Constitution to restrict the use of eminent domain under certain limited circumstances.

Under existing law, redevelopment agencies may acquire privately-owned real property, including single-family homes, located in redevelopment project areas adopted under the Community Redevelopment Law. A redevelopment area is formed based on findings of blight as defined in the Community Development Law. Property acquired may be resold to private developers for redevelopment in order to eliminate blight. The ability of public entities in California, other than a redevelopment agency, to use eminent domain to acquire property for resale to private parties is untested and unknown. In California, the only existing, explicit statutory delegation of the power of eminent domain to acquire property for resale to private parties is found in the Community Redevelopment Law. This distinguishes California from a state such as Connecticut--where the 2005 *Kelo vs. the City of New London* case was decided--that has specific statutory authorization enabling units of government to use eminent domain for economic development purposes regardless of blight findings. California has no comparable enabling statute.

The initiative would amend the California Constitution to prohibit the use of eminent domain by the State or a local government to acquire an owner-occupied, single-family residence for transfer to a private person. "Owner-occupied residence" is defined as real property improved with a single family residence (including a condominium or townhouse) that is the owner's principal place of residence for at least one year prior to the State or local government's initial written offer to purchase the property. This restriction would apply to the State and all units of local government, including redevelopment agencies.

The prohibition on the use of eminent domain to acquire single family, owner-occupied residences for resale to private parties would not apply to acquisitions for a public work or improvement. A public work or improvement is defined to include what have been traditionally viewed as public facilities that may be constructed or operated as public/private partnerships (e.g., toll roads). The limitations of the initiative would also be inapplicable when the State or local government exercises the power of eminent domain to abate a nuisance, protect public health and safety from building, zoning or other code violations, prevent serious, repeated criminal activity, respond to an emergency, or remediate hazardous materials.

Additionally, this initiative contains a provision that if both Proposition 98 (the Jarvis Initiative) and Proposition 99 pass, the latter will prevail if it receives more votes. In such event, the provisions of Proposition 98 will be null and void.

If Proposition 99 passes, the measure would take effect the day following the election. Property acquisitions could be completed where both: (1) the initial written offer to purchase the property

is made on or before January 1, 2008, and (2) a resolution of necessity to acquire the property by eminent domain is adopted on or before December 31, 2008.

How would the passage of this proposition affect San José?

Staff anticipates that passage of Proposition 99 would pose little financial impact to San José or curtail development activity. Since Proposition 99 only restricts a government agency's ability to acquire single-family residences for private use and this is not a common practice in San José, staff foresees very little, if any, adverse impacts. However, it could impact the use of eminent domain to acquire property for affordable housing purposes. Overall, staff believes that Proposition 99 will only provide another level of protection to homeowners in San José.

What is staff's proposed position?

The City should support Proposition 99 as it affords a clear and reasonable effort to protect California's homeowners from displacement, while not applying overly broad or financially irresponsible restrictions on governments' police powers including land use policy and planning and economic development activities.

Who are the proposition's supporters and opponents?[1]

The initiative is being sponsored by the League of California Cities and supported by some of the following organizations (partial list): League of California Homeowners, Golden State Manufactured-Home Owners League, Inc. (GSMOL), California Mobile Homes Resource and Action Association, Resident Owned Parks, Inc. (ROP), California Alliance for Retired Americans, Gray Panthers California, the State Building and Construction Trades Council, International Brotherhood of Electrical Workers, California Redevelopment Association, California State Association of Counties, California Chapter of the American Planning Association, California Special Districts Association, California League of Conservation Voters, Natural Resources Defense Council, Planning and Conservation League, Defenders of Wildlife Greenbelt Alliance, Housing California, California Housing Consortium, the Western Center on Law and Poverty, Consumer Federation of California

The opposition to Proposition 99 is not known at this time. However, it is likely to be many of the organizations supporting Proposition 98, given that this is a competing initiative.

What is the current status of the measure?

Proposition 99 will appear on the June 3, 2008, Statewide Direct Primary Election Ballot.

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1 The following list was derived from the www.yesonpropertyrights.com and www.eminentdomainreform.com and is only a partial list.