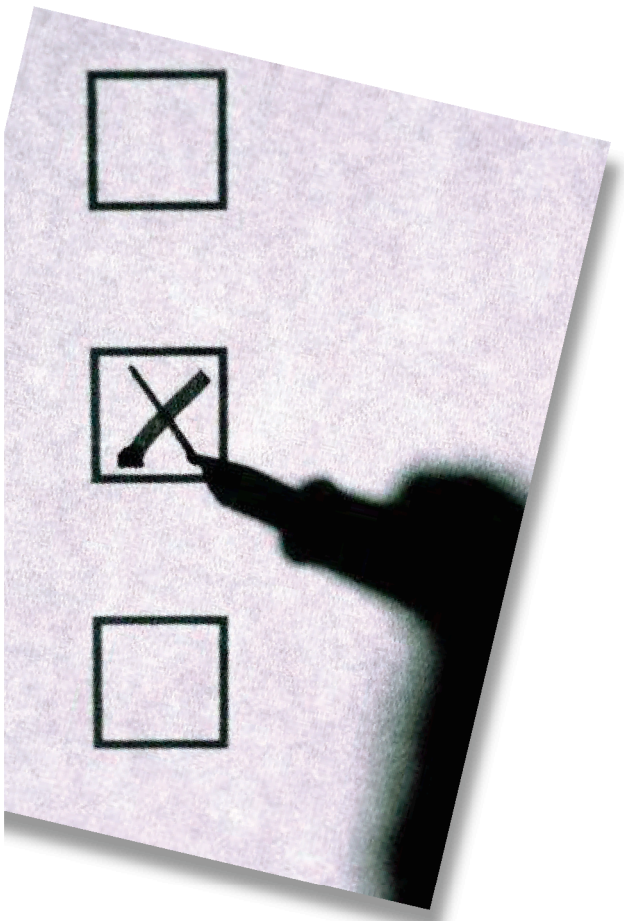

REFORM, Not Revolt

California Voters Pass on Eminent Domain—Again

BY DAVID B. COSGROVE

Everything has its limits—including just how far California voters' distaste for government seizures of property can be used to reshape the state's legal landscape regarding private property rights. The election of June 3, 2008 was the second opportunity for Californians to harness recent political backlash against perceived eminent domain abuses and reverse longstanding rules on governments' powers to regulate private property. For the second time, the electorate politely declined.

During that election, two rival eminent domain measures squared off – Proposition 98 and Proposition 99. Proposition 98, whose sponsors included the Howard Jarvis Taxpayers Association, proposed sweeping changes, not only to how and when a government entity could condemn property, but also to how far it could regulate property without paying compensation for injury caused. Proposition 99, a counterpart measure proposed by the California League of Cities, California Redevelopment Association, and related entities, was essentially a defensive proposal. It sought to restrict only a government entity's ability to condemn owner-occupied residences, and then only for the purposes of conveying them to another private party. Proposition 98 was defeated handily, 61% to 39%. Proposition 99 passed by a slightly wider margin, 62.5% to 37.5%.

The difference between the two measures was a question of reach. Proposition 98 tried to tap into dissatisfaction with government use of condemnation power to reshape private economics, known as "redevelopment," and use it to roll back government regulations affecting the value of private property. California courts have traditionally taken a permissive view of such measures, finding that they fit within the government's legitimate exercise of police powers. Proposition 98 sought to make government answer for all economic damage caused by regulations that shifted the benefits of property ownership from one person to another. This included, most notably, rent control, but also called into question requirements on developers for providing habitat mitigation, street or park dedications, and the like.

Proposition 99 was much more modest, and merely prohibited government from taking one's primary residence, and conveying it to another private property. This will prevent the displacement of seniors or low income individuals to make way for warehouse stores or auto malls. It left traditional deference to government regulation of private property alone, however.

On the one side of the election were those who thought the public's disgust with the way government had taken private property for perceived public good was strong enough to support a backlash against decades of judicially sanctioned encroachment on private property rights. And on the other side were those who wanted to give a nod to the need for restrictions on eminent domain, but to trim that power with a scalpel, instead of a meat cleaver. The finer cut prevailed.

The seeds of this conflict trace back to the summer of 2005, when the United States Supreme Court decided the case of Kelo v. City of New London. There, the Court upheld a Connecticut city's condemnation of private residences, to transfer the property to Pfizer for their

corporate headquarters, as part of an overall redevelopment plan. In a five-to-four decision, the Supreme Court upheld this use of eminent domain power, relying on a judicial tradition of deferring to legislative bodies to decide exactly when and where the eminent domain power should be exercised. A sharply critical dissent pointed out, however, that taking one private party's property to convey it to another, on the government's hopes of it being put to better economic use, raised frightening prospects for fundamental property rights.

The light that the Supreme Court shed on this topic generated significant political energy. In California, it produced a series of technical reforms to the eminent domain law by the California Legislature, but culminated in Proposition 90, a ballot measure placed before the voters in November 2006. Proposition 90 would have eliminated condemnation for redevelopment purposes or government intermediary, "private-to-private" transfers of property, for perceived economic betterment. Proposition 90 contained a significant additional provision, however, that stipulated that governments would have to pay just compensation for actions that resulted in "substantial economic loss to private property." Under current law, an owner must show that the government action deprives it of all economic use before a claim for such regulatory takings can succeed. Proposition 90 proposed to broaden that range to any government regulation that resulted in substantial economic loss.

Proposition 90 failed, but narrowly. Most analysts concluded that while the electorate was amenable to eminent domain reform, certain segments were leery of sweeping restrictions on government police power regulations and the fiscal consequences of requiring compensation for a broader range of government activities.

Proposition 98 resulted from the simmering discontent with perceived abuses of the eminent domain power. Proposition 98 carried forward the earlier proposition's prohibition on condemnation for "private-to-private" transfers, but also expanded it to include any regulation that transferred economic benefit from a property to one or more private persons, at the expense of the property owner. In this sense, it proposed to go further than Proposition 90, because Proposition 98 did not require the regulation to create "substantial economic loss."

Proposition 98 would have effectively ended rent control in California, by including within the definition of a government "taking" any limitation on the price an owner could charge another to occupy his or her property. If Proposition 98 had passed, existing rent-controlled units could have stayed so only as long as one of the unit's existing tenants remained.

Proposition 99 was essentially the public sector's "counter-reformation" proposal. It included findings that acknowledged the desire for eminent domain control, but postulated that the California electorate rejected Proposition 90 because it went too far in restricting government powers exercised for public health and safety. As such, Proposition 99 only limits the government from taking owner occupied residences for the purposes of conveying it to private persons. Such residences include a detached home, condominium or townhouse, and must have served as the owner's principal place of residence for at least a year before the government proposes acquisition.

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The California Secretary of State is reporting that this election had near historically low turnout. This made the Proposition 98 advocates' choice of when to put their measure forward—in a non-primary ballot during a presidential election year—an interesting one. Perhaps they were counting on a motivated turnout of core supporters to swing an otherwise disinterested electorate, but that was not the case.

Still, this election has those of us who work in the field wondering if we have seen the last of eminent domain reform. State legislators are notorious poll watchers, and the weak showing on Proposition 98 may signal the end of the recent trend to gather broad public attention and political approval by proposing restrictive, technical reforms to governments condemnation powers. Proposition 99 does little to roll back redevelopment, however, since businesses, investment properties, and the like can still be taken for transfer to other private uses that agencies believe will generate more economic heat. Whether Proposition 99 is the limit of reform, or viewed as a mere token measure that falls short of effecting any real change, remains to be seen.

What seems certain, however, is that the immediacy of the electorate's reaction against eminent domain has lost some steam, and certainly in California, it is simply not strong enough to serve as the wedge to create wholesale changes in the balance of power between private property rights holders, and public entities that regulate them. This broader revolt has been tried twice, and twice it has failed, this last time quite convincingly. It is unlikely to rise again soon.