The Fairness Debate
Spawned by *Kelo* and Oregon Measure 37

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Oregon Measure 37

- Creates a new entitlement to financial compensation, or waiver of a regulatory restriction, when “a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date of this amendment 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,” subject to various exceptions.

- “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 as of the date the owner makes written demand for compensation under this act.”
Oregon Measure 37 In Action

- 2970 claims filed.
- Claims covering 161,000 acres.
- Claims seeking $3,975,000,000 in "compensation."
- Not a dime has been paid to anyone; nothing but waivers.
- Entire land use system is hanging by the thin, temporary (?) thread of "non-transferability."

Source: Portland State University
         The Institute for Portland Metropolitan Studies (9/06)
Economically depressed city used eminent domain to acquire land for comprehensive redevelopment project.

Majority of owners agreed to sell, but several homeowners and investors challenged the taking.

Issue: Was the taking for a public use? Answer: Yes, in large part because the taking was pursuant to a comprehensive development plan.

5 to 4 ruling a source of heated public and political debate.

But was decision a model of judicial restraint?
Basic Policy Questions  
*In Debate Over Eminent Domain*

- Is Eminent Domain Necessary to Accomplish Valuable Urban Redevelopment?  
- Does Payment of Just Compensation (and Relocation Assistance) Mitigate Effectively For Taking Property?  
- Does the Use of Eminent Domain Improperly Promote Private Interests?  
- Do Exercises of Eminent Domain Target Vulnerable Populations and Properties?  
- Does Planning Help?
Life Without ED for ED?

- Ignore/Build Around the (Relatively Few??) Holdouts.
- John Norquist’s Secret Negotiation “Solution.”
- More Money/Let the Market Rule!
- But What Are the Opportunity Costs?
  - Lost jobs, lost housing, lost taxes, lost community improvements, more sprawl development, more urban decay?
The Political Response to Measure 37 and *Kelo*

- Measure 37 fanned the dying embers of the regulatory takings agenda.
- Legislators compared *Kelo* to the *Dred Scott* decision; House passed nearly unanimous resolution condemning *Kelo*.
- **Emergence of “the *Kelo* plus strategy.”**
- Republican GOTV Strategy
- Homeowner argument turned on its head
The Federal Response to *Kelo*

- 2005 Bond Appropriations Rider
- “Private Property Rights Protection Act of 2005,” HR 4128, passed House by a vote of 376 to 38.
- Bush 2006 Executive Order: “Protecting the Property Rights of the American People.”
- Senate legislative prospects dim – Mayor Michael Bloomberg rocks!
The Federal Response to Measure 37

- 2005 Pombo ESA Reform Bill, HR 3824, passed by a vote of 229 to 193
  -- Measure 37-type “pay or waive” provision
- “Private Property Rights Implementation Act of 2006,” HR 4772, passed by a vote of 231 to 181
  -- Sue local government early and often
  -- “Contract on America” takings provisions
- Prospects for both bills very dim in the U.S. Senate
The State Response

- In 2005, four states (Alabama, Delaware, Ohio, and Texas) passed some type of ED legislation; Michigan passed a constitutional amendment that will go to voters in November 2006.
- In 2006, all 44 legislatures in session considered the ED issue.
- 24 states passed some type of bill.
- Pacific Legal Foundation list of states that have adopted "real" reforms (FL, GA, IND, SD, PA, MN).
Types of State Responses

- “Prohibiting eminent domain for economic development purposes, to generate tax revenue, or to transfer private property to another private entity.
- Defining what constitutes "public use," generally the possession, occupation or enjoyment of the property by the public at large, public agencies or public utilities.
- Restricting eminent domain to blighted properties and redefining what constitutes blight to emphasize detriment to public health or safety.
- Requiring greater public notice, more public hearings, negotiation in good faith with landowners and approval by elected governing bodies.
- Requiring compensation greater than fair market value where property condemned is the principal residence.
- Placing a moratorium on eminent domain for economic development.
- Establishing legislative study committees or stakeholder task forces to study and report back to legislature with findings.”

Source: National Conference of State Legislatures
The State Response (continued)

- November 2006 Ballot Measures.
- *Kelo* Ballot Measures:
  - Florida, Georgia, Louisiana, Michigan, New Hampshire, Nevada, North Dakota, Oregon, South Carolina
- "*Kelo*-Plus" Ballot Measures:
  - Arizona, California, Idaho, Montana
  - Sham ED Reform?
- Pure Takings Measure: Washington.
Thinking About How Government Action Affects Property Value

The Usual, Mistaken Approach: What Would the Value of a Parcel Be If the Regulation Were Lifted as to this Property?

-- Easy for appraisers to measure.
-- Almost always shows a “loss.”
-- Hopelessly wrong and misleading because it ignores the positive (1) amenity, (2) conflict avoidance, (3) scarcity, and (4) certainty effects of regulations.

-- In practice, the Measure 37 “compensation” standard has been interpreted to measure the positive value of an exception from regulation, not the negative effect of imposing the regulation.
Thinking About How Government Action Affects Property Value (2)

- **The Analytically Sound Approach**: What Would the Value of a Parcel Be If the Challenged Regulation Applied to No One in the Community/Had Never Been Enacted?
  -- Very difficult for appraisers to measure (but not necessarily economists).
  -- Represents a balanced approach because it accounts for both the positive and negative effects of regulation on property values – provided (1) the regulation applies broadly, and (2) the owner retains some development use options.
The Courts Get It!

Agins v. City of Tiburon, 447 U.S. 255 (1980): “The zoning ordinances benefit the [land owners] as well as the public by serving the city’s interest in assuring careful and orderly development of residential property with provision for open-space areas. There is no indication that the appellants’ 5-acre tract is the only property affected by the ordinances. [The land owners] therefore will share with other owners the benefits and burdens of the city’s exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the appellants might suffer.”
Coast Range Conifers v. State of Oregon, 117 P.2d 990 (Or. 2005): “In the area of land use government may impose height or size restrictions on buildings, prohibit or impose limitations on industrial and commercial uses in certain areas, or impose setback requirements that prevent property owners from building within a specified distance of their property lines. In each of these instances, government limits in one way or another the uses to which an owner may put his or her land, and it does so to advance broader public goals. We note that those regulations may, depending upon a myriad of economic and other factors, increase or decrease the affected property’s value.”
Economists Get It!
Trends in Agricultural Land Values
(USDA Census of Agriculture)
Other Economic Studies of Regulatory Effects

- Bernstein et al. (2003) – downing of agricultural lands in Dorchester, Kent, Calvert & Talbot Counties, Md.
- Spalatro & Provencher (2001) – Lakefront development restrictions in Wisconsin
Economic Studies of Givings Effect

- Classic Economic Theory Says that a Reliable Stream of Future Monetary Payments Will be “Capitalized” into the Value of the Land.
- Effects of Ag. Use Assessment Programs
  - Anderson & Bunch (2001) – raised land values in Michigan “by just under 10 percent.”
- Effects of Agricultural Subsidy Programs
  - Ryan, Barnard & Collender (2001) – subsidies account for as much as 70% of agricultural land value in some locations.
What Are the Implications for Understanding Measure 37?

- The “problem” that Measure 37 was drafted to address -- government action systematically reducing property values -- almost certainly does NOT exist as a general problem.

- It is no answer to say that Measure 37 is only supposed to be available to address actual “reductions” in property values caused by government action; the measure includes no mechanism for verifying claims; because the net effect of regulatory (and other government actions) is almost certainly incalculable on a property-by-property basis, appraisers are measuring the value of an “exception” instead.

- Therefore, Measure 37 is not a compensation measure but a windfall measure, whether the compensation is awarded through a financial payment or by granting an “exception.”
What Are the Implications for Councilman Liberty’s Proposal?

- Foregoing analysis suggests that “wipeouts” from regulatory actions in agricultural areas may be modest to nonexistent, while “windfalls” to those inside UGB’s may be very real.

- Would purchase of development rights in the exclusive agricultural zone simply change the identity of the recipients of windfalls? --especially because most of agricultural lands remain highly regulated?

- Would institutionalizing voluntary protections unduly weaken the land use program? Even if the goal of improved fairness would be served, why not continue to mandate compliance (i.e. use eminent domain)?
Where Is the Beef?

Perhaps the property rights “fairness” issue is ultimately not about land values and money -- Susette Kelo; Dorothy English.

If regulation (and other government action) does not typically reduce property values, broad “compensation” solutions cannot be the answer.

Perhaps the ultimate issues have more to do with human dignity and autonomy, especially relating to keeping and getting a home.

Do the real policy solutions to the real problems lie in (1) more and better planning processes, (2) understandable regulations, (3) tailored protections for the individual homeowner and/or “homesteader?”
The End

Thank You

Questions?