



Initiative 933

Protecting Private Property Rights in Washington

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“Has Anyone Seen My Property Rights?”



- Steady erosion of private property rights
 - Progressive Era expansion of regulatory state: elevated majoritarian rule at the expense of democracy, individual civil liberties, and private property rights.
 - Shift away from common-law, nuisance-based regulation focused on tangible harm
 - Shift towards highly prescriptive & restrictive regulation
 - *Euclid v. Ambler* (1926): Upheld comprehensive zoning
 - Expanded use of fed/state/local permitting regimes; exactions; special district regulations
 - Modern land use regulation: using public policy to mandate the private provision of public amenities

Expanding Government Power Eroding Property Rights



- Eminent domain power:
 - Intent: to allow taking of private property for “public use” (i.e., roads, infrastructure) with just compensation
 - **Reality:** “public use” morphed into vague “public purpose”
- Police power:
 - Intent: to secure rights by prohibiting harms (i.e., nuisance)
 - **Reality:** routinely used to restrict property rights, conduct that doesn’t violate others’ rights (i.e., zoning, growth boundaries, habitat conservation)



The Tide Turns: Two Key Events

- *Kelo v. New London* decision (2005)
 - Upheld use of eminent domain to seize private property for economic development purposes
 - Spawned legislation/proposed constitutional amendments in 30 states aimed at curbing the abuse of eminent domain for private uses
- Oregon's Measure 37 (2004)
 - Protected property owners from regulatory takings



What are Regulatory Takings?

Enacting regulations that prohibit owners from using their property in otherwise legitimate ways without just compensation:

- Misuse of the police power
 - Using regulation to “protect the community” from conduct that does not violate the rights of any of its individual members
- More correctly viewed as eminent domain
 - Regulations intended to create a public good that benefits society as a whole
 - Impacted property owners deserve compensation

Examples of Regulatory Takings



- Land use restrictions
 - Zoning, habitat/open space preservation, historic district ordinances, stream setbacks, etc.
- Public access requirements
 - Development exactions for beach access easements, sidewalk easements, bicycle paths, etc.
- Denial of permit applications
 - Wetlands, mineral exaction, etc.

Oregon's Measure 37



- Response to decades of highly aggressive state & local land use regulation (Oregon = “Smart Growth”)
- Requires that the state or local gov'ts either compensate landowners when land use restrictions reduce the value of their property or waive the restrictions.
- Exempts nuisance laws, health and safety regs, federally-mandated regulations
- Goal: to reinstate the rights owners had when they bought their land.

Moving the Ball Forward: 2006 Ballot Initiatives



- Initiative 933: WA's regulatory takings initiative
- “*Kelo-Plus*”: Eminent domain + Measure 37
 - Combined eminent domain reform and protection from regulatory takings
 - Ballot initiatives in AZ, CA, and ID
- Opposition to regulatory takings reform
 - Threat to the “sacred cow”: ability to achieve urban planning and environmental goals through regulation
 - The end of the free lunch?



Initiative 933: Key Provisions

- Requires governments to evaluate the impact of new regulations on private property
- Requires governments to compensate landowners for any reduction in the FMV of private property caused by regulations, or waive the rules
- Exempts a range of reasonable, common-sense regulations from its provisions
- Protects landowners from both partial and complete regulatory takings

Initiative 933 Key Provisions: Regulatory Impact Assessment



- For new regulations, would require government to document:
 - affected private property
 - the legitimate governmental purpose of the regulation and how the regulation would achieve it
 - the extent to which the regulation takes away economically viable land uses or other attributes of property ownership
 - the extent to which the action creates a public good
 - estimated compensation to property owners
 - alternative means of achieving policy goals which are less restrictive on private property

Initiative 933 Key Provisions: Compensation for Regulatory Takings



- Requires compensation, or waivers, to landowners for reductions of FMV of private property resulting from the adoption of laws and regulations that confer public benefits
- Grandfathers laws adopted before January 1, 1996
- Leaves the bulk of land use and environmental regulations in place
- Covers regulations that affect owner's ability to protect their property (i.e., tidegates, bulkheads, other infrastructure)
- Covers regulations mandating owners to leave land in natural state & prohibitions on tree removal

Initiative 933 Key Provisions: Exemptions



- Exempts restrictions that apply equally to all property subject to an agency's jurisdiction, including:
 - immediate threats to human health and safety
 - building/fire code structural standards
 - limitations on sex offender housing or adult entertainment
 - US EPA chemical use restrictions
 - worker health and safety laws
 - wage and hour laws
 - dairy nutrient management restrictions & regulations in 90.64 RCW (maintaining water quality around dairy farms)
 - pre-1996 property line setbacks

Initiative 933 Key Provisions: Definitions



- “Compensation”
 - Equal to the decrease in fair market value of the affected property caused by the regulation
 - Addresses “partial” takings: compensation due when any portion of property is required to be left in its natural state or without beneficial use by its owner
 - Includes attorney’s fees
- “Private property”
 - Covers real and personal property (i.e., land, mineral & water rights, buildings, crops, livestock)



Myths & Facts on Initiative 933

- *Myth: I-933 would roll back land use & environmental protection*
 - Would address egregious post-1996 regulations
 - Exemptions for public health & safety, building codes, chemical use restrictions, water quality regs, etc.
 - Governments can still regulate, but may have to pay
- *Myth: I-933 would be costly*
 - Oregon: Gov'ts have waived regulations, not paid
 - Waivers would reinstate rights without compensation
 - “Doom & gloom” impact studies assumed no waivers



Myths & Facts on Initiative 933

- Myth: *I-933 would hamper affordable housing*
 - I-933 would place a check on the ability of governments to pass the types of regulation (i.e., smart growth laws) that downzone property, constraining the supply of developable land
- Myth: *I-933 will bring countless lawsuits*
 - Courts likely to interpret I-933
- Myth: *I-933 is designed to benefit developers*
 - I-933 benefits small landowners, not developers

Initiative 933 Would Protect Private Property Rights



Advances critical principles:

- Private landowners should not bear the costs of providing public goods that benefit all; they deserve compensation.
- Landowners should get the benefit of their bargain:
 - They paid FMV for their property based on a set of expectations (i.e., existing zoning) regarding use.
 - Government shouldn't change the rules of the game without compensating them.

Initiative 933 Would Promote Fiscal Discipline & Accountability



- Government obliged to consider a wider range of financial impacts associated with future regulations.
- New decision tree:
 - Forego/modify the new regulation
 - Account for new costs in budget process
 - Seek alternative means to achieve policy goals (i.e., incentive-based programs, voluntary approaches)
- Could facilitate efficiency efforts: streamlining, eliminating duplicative/wasteful programs, adopting performance-based budgeting, etc.

Initiative 933 Would Promote Transparency in Government



Current costs of regulation are hidden:

- No accountability, no transparency

Costs of new regulations would be visible & explicit:

- Would facilitate more efficient decision making
- Would facilitate more informed public debate

Goal: To require state and local governments to adequately weigh the costs and benefits of public action.

Initiative 933: Looking at the Big Picture



Initiative 933 would:

- Establish reasonable and fair property rights protections in state law
- Impose fiscal discipline on government, requiring it to adequately account for and weigh the costs and benefits of public action
- Reinforce the notion that the fundamental purpose of government is to protect our rights, not selectively undermine them

Questions?



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