

# *The Regulatory Takings Agenda*

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# What is the Regulatory Takings Agenda?

An argument designed to force the public to **regulate less** by forcing the public to **pay** virtually every time it regulates – or **not regulate** at all.



“Nor shall private property be taken for public use, without just compensation.”

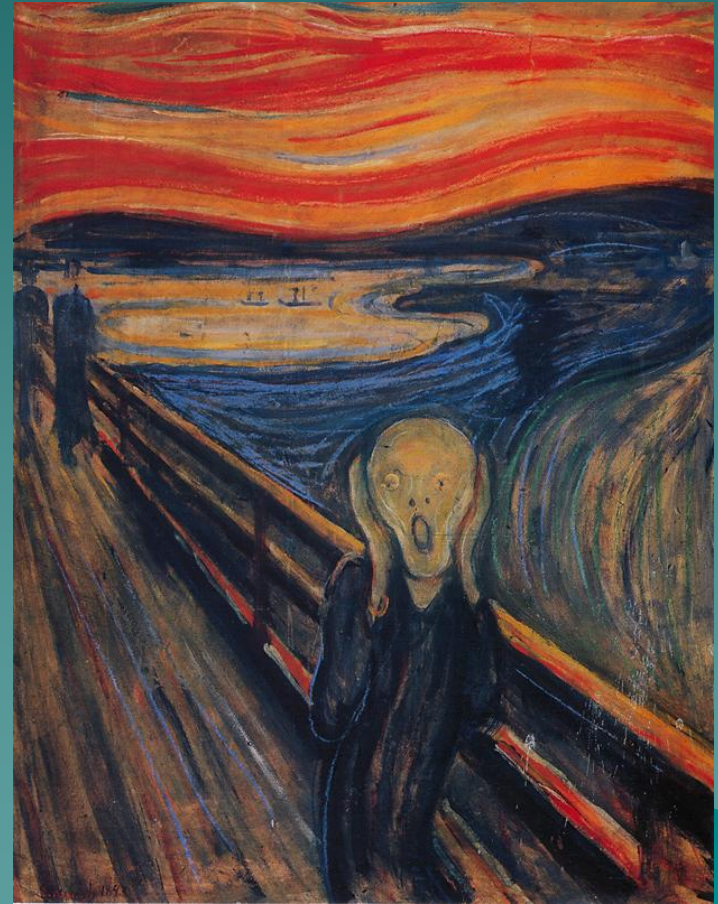
But the **whole point** of the regulatory takings agenda is to impose financial liability on the public even when the Constitution does not require it.

# Where Did the Regulatory Takings Agenda Come From?



# The Short and Surprisingly Happy History of the Regulatory Takings Issue in the Courts

Lucas v. South Carolina Coastal Council (1992)



# The Short and Surprisingly Happy History of the Regulatory Takings Issue in the Courts (II)

Tahoe Sierra Preservation Council  
v. Tahoe Regional Planning Agency  
(2002)



# The Political Debate Over Takings in the 1990's

Unsuccessful Takings Bills in Congress: (1) Contract with America takings bill; (2) Sue local government early and often in federal court bill.

-- BUT, takings advocates changed the terms of the debate, derailing ESA and CWA reauthorizations

Half the states adopted some type of bill, usually largely symbolic.

The few substantive takings laws – e.g. Florida, Texas – did not have much on the ground impact.

Arizona takings measure defeated 60% to 40% in 1994, and Washington takings measure defeated 60% to 40% in 1995

And then... nothing... for a while... until....

# Oregon Measure 37

Measure 7 constitutional amendment adopted by Oregon voters by narrow margin in November 2000; invalidated by Oregon Supreme Court.

Measure 37 adopted by voters 60 to 40 in November 2004, as a statutory measure.

Adopts novel “pay or waive” approach.

Applies to any “land use regulation” that “restricts the use of real property... and has the effect of reducing the fair market value of the property.” No threshold.

Subject to various exceptions, including if the regulation was enacted prior to the owner’s acquisition, regulation required by federal law, regulation of nuisances or nude dancing, etc.

# Measure 37 on the Ground

As of January 2007,

6350 legal claims filed

515,000 acres affected

\$10,500,000,00 in demands for compensation

State and local governments always waive; never pay.

Numerous eye-popping claims, pitting neighbor against neighbor.

Saving grace: major question about transferability of Measure 37 rights.

# Measure 37 On the Ground

Explosion in claims to meet soft December 1 deadline.

Plum Creek Timber filed claims covering 32,000 acres

Stimson Timber filed over 100 claims covering 3200 acres

RY Timber has filed claims on 1600 acres

October 2006 poll shows that voters now think 60-40 that Measure 37 was Oregon's Iraq – a big mistake!

# How in the World Did Measure 37 Pass?

A regulatory program with real teeth/something to fight about.

Oregonians in Action – smart and effective.

The proponents had a simple, compelling message – fairness.

The proponents had an effective messenger, Dorothy English, who was never rebutted.

Opponents had no clear message:

- awkward reverse spin on fairness
- no traction on land protection

Opponents failed to identify who was behind it.



# Kelo Decision

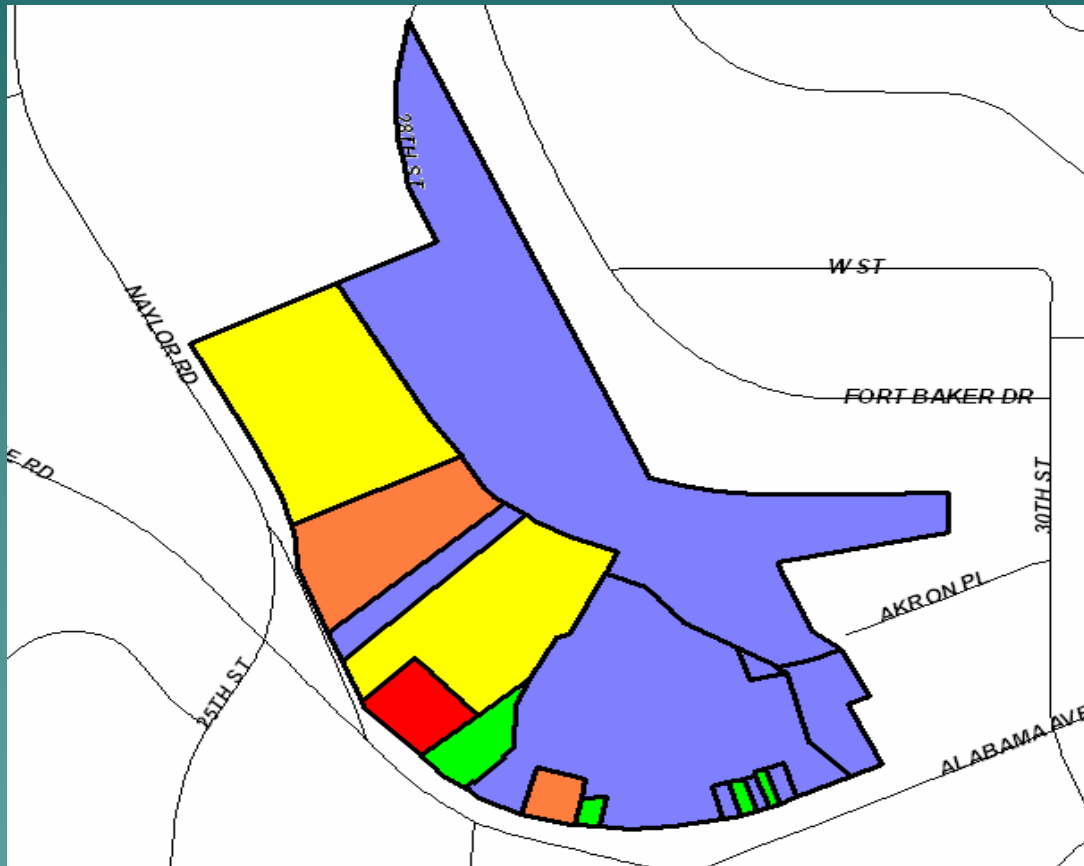
Decision in *Kelo v. City of New London*, June 23, 2005, decision upholding use of eminent domain to bring economic development to economically depressed city.

Ruling was consistent with unbroken line of U.S. Supreme Court precedent stretching back more than a century, making 5 to 4 vote surprising.

Effective campaign surrounding case led by the Institute for Justice  
Sympathetic facts.



# *Kelo* – The Holdout Problem



# 2006 Takings Perfect Storm

*Kelo* and Measure 37 = *Kelo*-plus strategy.

Every state legislature took up the eminent domain issue in the aftermath of *Kelo*, with two thirds of the states adopting some type of ED reform.

Howie Rich, Americans for Limited Government, [www.howierichexposed.org](http://www.howierichexposed.org)

# Federal Takings Legislation in the 109<sup>th</sup> Congress

House eminent domain bill (HR 4128)

- would deny federal funds to communities that use ED for ED
- passed 376 to 38

Pombo "ESA Reform Bill" (HR 3824)

- Measure 37-type "pay or waive" provision
- passed 229 to 193.

"Private Property Rights Implementation Act of 2006" (H.R. 4772)

- Sue local government early-and-often plus "Contract on America" provisions
- passed 231 to 181.

Everything died in the Senate in Fall 2006.

# Fall 2006 State Ballot Measures

--Freestanding eminent domain measures PASSED in 9 states

-- FL, GA, LA, MI, NH, ND, NV, OR, SC),

-- Freestanding Measure 37 clone DEFEATED (41 to 59) in Washington State

-- *Kelo* plus" measures PROPOSED in 5 states (AZ, CA, ID, MT, NV)

-- DEFEATED in court in Montana and Nevada.

-- DEFEATED at the polls in California (48 to 52) and Idaho (24 to 76)

-- PASSED in Arizona (65 to 35)

# Why So Much Good News on Regulatory Takings?

Voters in most states successfully distinguished between eminent domain reform and the regulatory takings issue.

Timely intervention by several key donors, the Nature Conservancy, and others.

Effective national-level coordination and information sharing by coalition led by Smart Growth America.

Generally effective state campaigns – very, very broad opposition coalitions, helpful partnerships with farmers, effective spokespeople.

# What Happened in Arizona?

## What?

- Measure is prospective only
- No explicit waiver authority --- \$\$!!!
- Somewhat broader exceptions than in Measure 37 (OK to regulate topless dancing as well as nude dancing!)
- Rights “run with the land” – no transferability problem.

## Why?

- Eminent domain was a highly visible, controversial issue.
- Governor had vetoed ED legislation; took no position on ballot measure.
- Campaign got going late.
- Campaign was seriously underfunded

# Prospects for 2007 and Beyond

## In Congress

- Pro-active property rights agenda is probably dead, including eminent domain legislation
- Takings could reemerge as a “spoiler” issue... wetlands...

## In the States

- California, California, California
  - At least two proposed constitutional amendments on ED
  - new Jarvis *Kelo*-plus initiative
- Georgia?
- South Carolina?
- Washington?
- Oregon – proposals to repeal or significantly modify M 37?

Like death and taxes, the issue will never go away.

Smart Growth America – website; e-mail list; clearinghouse.

# A Recap: Why Do Good People Oppose the Bad Regulatory Takings Agenda

- A Back Door Assault on the Democratic Process.
- A Threat to the Property Rights of Every American Homeowner.
- An Attack on Community and Environmental Protections.
- An Irresponsible Budget Buster.
- A Prescription for Endless Litigation.
- An Unfair Special interest Grab for Profit at the Expense of the Rest of Us.