



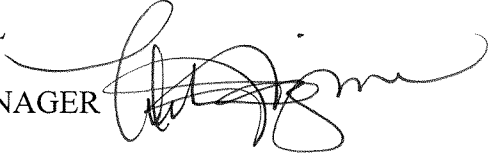
MEETING DATE: 10/16/06

ITEM NO: 12b  
DESK ITEM

## COUNCIL AGENDA REPORT

DATE: OCTOBER 16, 2006

TO: MAYOR AND TOWN COUNCIL

FROM: DEBRA J. FIGONE, TOWN MANAGER 

SUBJECT: CONSIDER ADOPTION OF A RESOLUTION SUPPORTING MEASURE A  
(THE SANTA CLARA LAND CONSERVATIVE INITIATIVE)

### DISCUSSION:

Attached is a letter from the Silicon Valley Association of Realtors requesting that the Council refrain from supporting Measure A, the Santa Clara Land Conservation Initiative.

### Attachment:

Letter dated October 16, 2006 from the Silicon Valley Association of Realtors

PREPARED BY:

  
**JENNY HARUYAMA**  
Administrative Programs Manager

N:\MGR\JHaruyama\Staff Reports\DeskItemMeasureA.doc

Reviewed by: PSJ Assistant Town Manager \_\_\_\_\_ Town Attorney  
\_\_\_\_\_ Clerk Administrator \_\_\_\_\_ Finance \_\_\_\_\_ Community Development





Silicon Valley  
Association of REALTORS®

October 16, 2006

Honorable Diane McNutt  
Los Gatos Town Council  
110 East Main Street  
Los Gatos, CA 95030

Dear Mayor McNutt and Councilmembers,

The Silicon Valley Association of REALTORS® represents 4,000 real estate professionals in Santa Clara and San Mateo Counties and would like to comment on Measure A, the proposed Santa Clara County land use initiative (*10/16/06 agenda item 12b*). We respectfully ask that the Council refrain from endorsing this initiative. Open space is an important component of the quality of life for any community. There are mechanisms for encouraging the appropriate preservation of unincorporated county lands without significantly impacting the rights of the people who own the property or endangering the economic vitality of these areas. The proposed initiative, which you are considering for endorsement, is not the most appropriate or effective way to create open space and may have many unintended consequences that can and will cause harm to unincorporated Santa Clara County.

Before making any decision on an initiative, which will cause dramatic changes to land use policy, we ask you to consider some of the potential consequences that will arise as a result. Attached to this letter is a fact sheet from NO on Measure A, a coalition of farmers, ranchers, Realtors, and hillside property owners that highlights some of the potential consequences of the passage of this initiative. Each of the points has been researched and cited by land use attorneys with extensive experience in Santa Clara County land use policy. Also included are the ballot arguments filed with the Registrar of Voters in opposition to Measure A.

On June 20, the Santa Clara County Board of Supervisors certified the initiative for the November 2006 ballot, but declined to seek a study on how it would impact the county's economy and taxpayers or an analysis of exposure to the county from litigation, should the initiative become law. However, a memorandum reviewing the issues, impact, and implications of the initiative prepared by the County of Santa Clara Planning Office found the initiative includes myriad complex changes and would have a significant impact on current land use policies in some areas. Furthermore, the memorandum indicates certain sections could expose the county to "an almost continuing threat of litigation" over interpretation and implementation of the initiative. We would ask that these potential consequences be taken into account as the Council considers an endorsement.

19400 Stevens Creek Blvd., Suite 100 • Cupertino, CA 95014  
Phone: 408.200.0100 • Fax: 408.200.0101 • [www.silvar.org](http://www.silvar.org)

It is important to note that while Measure A is intended to downzone property and increase restrictions on over 400,000 acres of unincorporated county land in the southern and eastern parts of Santa Clara County, the economic impact of the initiative will be borne by all county residents. In a memo to the Supervisors, County Counsel Ann Miller Ravel outlined the consequences should Measure A and Proposition 90 pass on November 7. Ms. Ravel wrote, "If Proposition 90 and Measure A, the land use initiative, both pass, there would likely be numerous claims for compensation filed by property owners who contend that their property has been substantially damaged as a result of the restrictions on property contained in Measure A." A copy of the County Counsel's memo is also attached.

Thank you for your attention to our concerns on this matter. I would request that you leave the endorsement or rejection of Measure A in the hands of the voters. Should you have any questions or would like further clarification of the potential consequences of this initiative, please feel free to contact our office.

Sincerely,



Paul Cardus  
Government Affairs Director  
Silicon Valley Association of Realtors  
408-200-0100 Phone  
408-200-0101 Fax

## **NO ON MEASURE A**

### ***What is Measure A?***

Measure A is an initiative placed on this November's ballot that claims to protect open space. In actuality the initiative is poorly written and if passed Santa Clara County's future would be jeopardized.

### ***Why Measure A puts Santa Clara County's future at risk:***

- It was written behind closed doors, without public input or review. Created by a former Stanford University professor, it conveniently exempts one of the largest private landowners in the county – Stanford University – permitting the university to develop sensitive rural lands without the same restrictions applied to other rural properties.
- The initiative encourages premature annexation of rural lands into incorporated cities, leading to more sprawl, and placing a potential strain on existing city facilities and services.

*Source: Measure A, Section 25*

- Instead of providing more open space for public use, Measure A breaks open spaces up into a jigsaw puzzle of hundreds of disconnected private parcels with no public access.

*Source Measure A, Section 25*

- If Measure A is approved, its provisions will be locked into the County General Plan. Correcting mistakes will be extremely difficult. A change as small as providing for construction of a granny-flat on a single-family residence would require an expensive countywide election.

*Source: Measure A, Section 22*

- Because Measure A restricts farmers' ability to construct processing and other facilities, obtain financing for improvements, and adjust to changing market conditions, it threatens their survival. And its restriction on a farmer's ability to provide housing for adult children threatens businesses that depend on family participation, the foundation of much of the county's agriculture. It could prohibit farmers' markets in rural areas, and even block construction of wineries and tasting rooms.

*Source: Measure A, Sections 7(a), 7(b), 10(b)(2), 11(b), 12(b)(2) and 25*

- Measure A threatens our local economy by blocking construction of the county's proposed wireless communications network, designed to provide high-speed internet access everywhere in the valley. This network is central to our county's economic development strategy.

*Source: Measure A, Section 10(b)(19)*

- Measure A restricts critical facilities like landfills and quarries in unincorporated areas, greatly increasing transportation costs for consumers. Constraints on these resources could cost our local economy billions of dollars and strangle economic growth.

*Source: Measure A, Sections 10(b)(12) and (19), and 12(b)(13)*

- By reducing county revenues from property taxes and impact fees, the initiative threatens funding for basic services like the Sheriff and fire protection, and limits the county's ability to fund needed road and water improvements.

*Source: Measure A, Sections 7(a), 7(b), and 25*

- There's a better way to protect our hillsides, ranchlands and sensitive habitats, without risking our county's future. The county's tough new View Shed Ordinance is scheduled for approval this fall, but it would be wiped out by Measure A, replacing it with the initiative's poorly-written, untested provisions.

**Information: [www.VoteNoOnMeasureA.com](http://www.VoteNoOnMeasureA.com)**

ARGUMENT AGAINST MEASURE A	ARGUMENT AGAINST MEASURE A - Continued
<p><b>RISKS OUR COUNTY'S FUTURE</b></p> <p>Written behind closed doors, without public hearings or environmental review, Measure A locks hundreds of complex changes into our County's General Plan.</p> <p>So poorly written it could lead to years of expensive lawsuits, with taxpayers liable for millions of dollars in damage claims.</p> <p>Correcting mistakes will be difficult. Changes as small as constructing a granny-flat could require an expensive <u>countywide</u> election.</p> <p><b>THREATENS FARMING</b></p> <p>Family farmers have been stewards of our agricultural heritage for generations. Measure A threatens their survival, requiring minimum parcels of 40 - 160 acres on hillsides and 160 acres on ranchlands. Since 40% of county farms are less than 10 acres, "A" could make it impossible for farmers to get started, expand, construct processing facilities, or adjust to changing markets.</p> <p>It could even prohibit farmers' markets and block construction of wineries and tasting rooms. That's why the County Farm Bureau and agricultural organizations oppose "A."</p> <p><b>UNDERMINES GOOD PLANNING, PUBLIC OPEN SPACE AND WILDLIFE HABITAT</b></p> <p>Measure A encourages premature annexation of rural lands into incorporated cities, leading to more sprawl, more traffic on already congested roads, and strain on city facilities and services.</p> <p>It breaks open space into hundreds of disconnected private parcels with no public access, and fragments wildlife habitat corridors.</p> <p><b>HURTS OUR ECONOMY</b></p> <p>Measure A could block construction of the county's wireless communications network, designed to provide high-speed Internet access everywhere in the valley, and worsen the "digital divide."</p> <p>It restricts critical facilities like landfills and quarries in unincorporated areas, increasing transportation costs and strangling economic growth.</p> <p><b>THERE'S A BETTER ALTERNATIVE</b></p> <p>Residents, environmentalists, and county planners have invested thousands of hours developing tough new ordinances to safeguard hillsides, viewsheds, waterways and agricultural lands. Measure "A" wipes out these efforts, substituting a poorly-written measure that could make things much worse.</p>	<p>Information: <a href="http://www.VoteNoOnMeasureA.com">www.VoteNoOnMeasureA.com</a></p> <p>/s/ Donald F. Gage Supervisor, Santa Clara County</p> <p>/s/ Laurie Smith Santa Clara County Sheriff</p> <p>/s/ Jenny Derry Executive Director, Santa Clara County Farm Bureau</p> <p>/s/ Douglas A. McNea President, Silicon Valley Taxpayers' Association</p> <p>/s/ Clarence C. Stone Chairman, Santa Clara County Hillside Association</p>

PR-7401-17e

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REBUTTAL TO ARGUMENT IN FAVOR OF MEASURE A	REBUTTAL TO ARGUMENT IN FAVOR OF MEASURE A - Continued
<p><b>MEASURE A: A SOLUTION IN SEARCH OF A PROBLEM</b></p> <p>Promoters claim Measure A is needed to meet the threat of "thousands of houses and industrial and commercial developments."</p> <p>But commercial and industrial developments are already prohibited on hillsides or ranchlands in Santa Clara County, the areas covered by Measure A.</p> <p>Most sprawl development in the county has occurred within incorporated cities. <u>Measure A does nothing to stop this.</u></p> <p><b>MEASURE A ENCOURAGES LAWSUITS, NOT GOOD PLANNING</b></p> <p>Promoters claim "...it would not violate any person's property rights."</p> <p>Untrue! Under Measure A, property owners seeking even minor modifications to their property could be required to file lawsuits or fund expensive countywide campaigns to "protect" their rights. [Measure A, Section 22]</p> <p><b>MEASURE A HURTS FAMILY FARMING</b></p> <p>Contrary to promoters' deceptive claims, Measure A restricts construction of agricultural processing and other related facilities, requiring they be used substantially for products grown within limited areas designated by the initiative. [Sections 10-12]</p> <p><u>That's not how real farms and ranches operate.</u> By undermining the financial viability of agriculture, Measure A could force farmers to close or relocate, and accelerate loss of farm and ranch lands.</p> <p><b>MEASURE A COULD COST TAXPAYERS MILLIONS</b></p> <p>In addition to exposing taxpayers to millions of dollars in lawsuits, Measure A wipes out millions more in existing and potential property tax revenue and impact fees, forcing taxpayers to choose between reduced public safety services and road improvements or higher taxes. [Sections 7 and 9-16]</p>	<p><b>DON'T RISK OUR FUTURE. VOTE "NO" ON MEASURE A</b></p> <p>/s/ Pete McHugh County Supervisor</p> <p>/s/ Debra J. Giordano Milpitas Councilmember</p> <p>/s/ Michael N. Miller President, Santa Clara County Cattleman's Association</p> <p>/s/ Dennis Wan President, Chinese-American Chamber of Commerce</p> <p>/s/ George E. Guglielmo President Emilio Guglielmo Winery</p>



OFFICE OF THE COUNTY COUNSEL  
COUNTY OF SANTA CLARA

70 West Hedding Street  
9th Floor, East Wing  
San Jose, California 95110-1770  
(408) 299-5900  
(408) 292-7240 (FAX)



Ann Miller Ravel  
COUNTY COUNSEL

Winifred Botha  
Robert C. Campbell  
Nancy J. Clark  
Laurie F. Faulkner  
ASSISTANT COUNTY COUNSEL

October 3, 2006

Professor Girard  
People For Land and Nature  
3921 East Bayshore Road  
Belo Alto, CA 94303

Re: Analysis of Proposition 90

Dear Professor Girard:

This letter is in response to your letter to me dated September 27, 2006 concerning the analysis of Proposition 90 prepared by this Office for the Board of Supervisors' Legislative Committee. You assert that the statement in that analysis concerning Measure A is wrong and you ask that we correct what you perceive to be an error.

We have taken another look at the provisions of Proposition 90 and Measure A and reviewed the statement in our analysis of Proposition 90. For the reasons set forth below, we continue to believe the statement is accurate.

The statement to which you refer is a brief paragraph in a 5 page analysis of Proposition 90 which would amend provisions of the California Constitution concerning government actions to acquire or regulate private property. A key part of Proposition 90 would require that government agencies provide compensation to owners when private property is "damaged" as a result of government actions which restrict the use of property. The statement was not intended to be a detailed analysis of Measure A. The purpose of the paragraph as well as the paragraph preceding it was to alert the Committee to the potential scope and impact of Proposition 90 on regulatory and other actions which may be taken by the Board. Specific mention was made concerning the potential impact of Proposition 90 on Measure A, because, if the measure passes, it will have a significant impact on County land use policies and practices. It is appropriate for the Committee to be aware of the legal issues and questions concerning Proposition 90, including the interaction with Measure A, even though many of the answers are as yet uncertain.

Professor Girard  
Re: Analysis of Proposition 90  
October 3, 2006  
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The statement to which you object reads as follows:

If Proposition 90 and Measure A, the land use initiative, both pass, there would likely be numerous claims for compensation filed by property owners who contend that their property has been substantially damaged as a result of the restrictions on property contained in Measure A. These claims would have to be individually evaluated, and potentially litigated, to determine whether Proposition 90 applies and, if it does, the compensation, if any, to which the property owner is entitled.

Although the statement did not conclude that Proposition 90 would apply or that compensation would be required even if it did apply, you believe that the statement is wrong based on the language in Section 5 of the measure. You state in your letter:

If both 90 and A pass, the provisions of A, by Section 5, would not apply, would not be applicable, would not be operative, to the extent that they were contrary to, inconsistent with, in any way, Proposition 90 (assuming 90's validity). And the County would not be subject to any liability. By the way it is written, Measure A cannot subject the County to liability. The issue in every instance is applicability of the measure, not validity. If it would violate anyone's rights [Measure A] is not applicable. (Emphasis yours)

We disagree with your statement that "By the way it is written, Measure A cannot subject the County to liability". A careful reading of the language of Proposition 90 and Measure A leads us to conclude that if application of Measure A to a particular parcel results in "damage" to that parcel as defined under Proposition 90, Measure A would still apply and payment of compensation to the property owner would be required by Proposition 90.

Subdivision (a) of Section 5 provides:

Notwithstanding their literal terms, the provisions of the Initiative are not applicable to the extent courts determine that if they were applied they would deprive any persons of rights or privileges under the United States or State constitutions or laws, including "taking" property without requisite compensation, or would be contrary in any respect to the constitutions or law. These explicit limitations on applicability of the Initiative are to make certain that its provisions do not infringe legal rights or violate the law in any way, or subject the County to any legal liability. (Emphasis added)

Section 5 requires a determination by the courts that application of Measure A would be contrary to law before the County would be relieved of the obligation to apply its provisions. That means the County would have to implement and apply Measure A and could not make its own determination that Measure A did not apply to a parcel because of the provisions of Section 5. As a result, many owners whose property is impacted by the County's implementation of Measure A, or by any other regulation imposed on the use of property by the County, are likely

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to file claims for compensation under Proposition 90, particularly since the measure provides that property owners are not liable to the government for attorneys fees and costs in any such action. The County would have to apply Measure A to every affected parcel, and would have to do so until a court determines under Section 5 that the measure need not be applied.

Further, as explained below, it is our view that when analyzed with respect to the provisions of Proposition 90, the courts will not find that implementation of Measure A "would deprive any persons of rights or privileges under the United States or State constitutions or laws, including 'taking' property without requisite compensation, or would be contrary in any respect to the constitutions or law".

Proposition 90 does not prohibit land use regulation by government agencies, including regulation of the type provided for in Measure A. Rather, Proposition 90 imposes, on a prospective basis, a constitutional requirement that a property owner be compensated if the application of a government regulation results in damage to that property. Because owners whose property is damaged by implementation of Measure A would receive the compensation to which the law entitled them, the application of Measure A would not deprive any property owner of any rights or privileges under, nor would it be contrary to, either the United States or California constitutions.

Very truly yours,



ANN MILLER RAVEL  
County Counsel

cc: Board of Supervisors  
Peter Kutas, Jr., County Executive  
Jane Decker, Deputy County Executive



OFFICE OF THE COUNTY COUNSEL  
COUNTY OF SANTA CLARA

70 West Hedding Street  
9<sup>th</sup> Floor, East Wing  
San Jose, California 95110-1770  
(408) 299-5900  
(408) 292-7240 (FAX)



Ann Miller Ravel  
COUNTY COUNSEL

Winifred Botha  
Robert C. Campbell  
Nancy J. Clark  
Laurie F. Faulkner  
ASSISTANT COUNTY COUNSEL

MEMORANDUM

TO: Supervisor Liz Kniss, Chairperson  
Supervisor James T. Beall, Jr., Vice-Chair  
Legislative Committee  
Peter Kutras, Jr., County Executive

FROM: *Ann M. Ravel*  
Ann Miller Ravel, County Counsel  
Robert C. Campbell, Assistant County Counsel *RCC*

RE: Analysis of Proposition 90

DATE: September 5, 2006

The purpose of this memo is to provide the Legislative Committee with an analysis of Proposition 90 which has qualified for the November ballot. This initiative is also referred to as the "Anderson Initiative" and "The Protect Our Homes Act".

Proposition 90 would amend the California Constitution to prohibit the taking of private property for private use. The proponents of Proposition 90 were no doubt motivated, at least in part, by the decision of the United States Supreme Court in *Kelo v. City of New London* (2005) 125 S. Ct. 2655, which upheld the authority of local government to use eminent domain for private development. However, this proposition goes beyond just restricting the use of eminent domain. This measure would also require government agencies to provide compensation when private property is "damaged" as a result of government actions which restrict the use of the property, such as land use, environmental, building and traffic regulations. Government agencies are generally not required under current law to pay such compensation.

Because of the vague and ambiguous language of the proposition, the specific impact on government agencies and this County cannot be measured. However, the fiscal and policy impacts could be significant. Regulatory actions by government agencies could lead to compensable damages even though the action reflects sound public policy.

Because key provisions and terms of the initiative are ambiguous or not defined, should the measure pass, there will likely be a significant amount of litigation by opponents of the

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measure including property owners affected by the restrictions. It will be the courts that will ultimately determine the scope, application and constitutionality of the provisions of the proposition.

#### SUMMARY OF KEY PROVISIONS OF PROPOSITION 90

- Prohibits the use of eminent domain unless the property taken will be owned and occupied by a governmental agency and the property used only for a stated public use.
- Specifically prohibits the taking of private property for private use.
- Provides that unpublished eminent domain judicial opinions or orders shall be null and void.
- Requires that the "value" of taken or damaged property shall be the highest and best use.
- Defines "just compensation" to be "that sum of money necessary to place the property owner in the same position monetarily, without any governmental offsets, as if the property had never been taken."
- "Damage" to private property includes government actions that result in substantial economic loss to private property.
- A property owner shall not be liable to the government for attorney fees or costs in any eminent domain action.
- Government powers to take or damage property under a declared state of emergency is not restricted by the proposition.
- Condemnation powers may be used to abate nuisances such as blight, obscenity, pornography, hazardous substances or environmental conditions.
- The provisions of Proposition 90 are to be applied prospectively and shall apply to any eminent domain proceeding that is not yet final. No law, rule or regulation in effect on the date of enactment of the proposition shall be subject to its provisions.

#### DISCUSSION

##### Eminent Domain:

In direct response to the *Kelo* decision, Proposition 90 would prohibit the taking or damaging of private property for private use. It must be for a "stated" public use and then used only for that use. It also defines "public use" as more narrow than a "public purpose" and public use does not include takings expected to result in a transfer of property to private ownership for the purpose of economic development or tax revenue enhancements.

Proposition 90 does not prohibit a government agency from taking private property for

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uses which are clearly public such as building roads, schools, parks and other government-owned public facilities. However, if the value of property adjacent to the taking is "damaged" under the new provisions of the proposition, those owners may be entitled to compensation. See the discussion on damages, below.

Private property can also be taken to abate a nuisance, including blight, but only as to specific conditions on specific parcels. A government agency could not take all of the parcels in an area, for example for redevelopment purposes, unless it could show that each parcel was blighted.

Although "public use" is generally defined, it is not clearly defined. The proposition does not prohibit the taking of property for the transfer from one private party to another if the transfer results from a government arrangement whereby the private party performs a public use. There will likely be much litigation over the question of the definition of "public use".

The proposition provides that "unpublished eminent domain judicial opinions or orders shall be null and void". The effect of that provision is unclear. Does it refer only to opinions and orders issued before the effective date of the proposition? If it also applies prospectively, it could mean that only eminent domain decisions that receive a published court of appeal decision will be effective since superior court decisions are not published. Also, if it applies to past decisions, that may call into question the validity of those decisions and orders. This provision, too, will likely need the courts to ultimately determine its meaning.

#### Valuation of Property and Just Compensation

Proposition 90 would significantly change the way in which the value of property and the amount of compensation due property owners is calculated. Current law generally requires that a property owner be reimbursed at the "fair market value" of the property.

Under Proposition 90, property is to be valued at the "highest and best use" without regard to governmental offsets. Currently, in determining the value of the property, required dedication of property for zoning purposes is taken into account and often reduces the value of the property for eminent domain purposes. If the property is to be used for government proprietary purposes, then it shall be valued at the use to which the government will put the property if that is a higher value even if that is not a use to which the private owner could have put the property. Both of these requirements will increase the amount a property owner would be compensated.

Once again, though, the language in these provisions is ambiguous and certain terms unclear. This will make it even more difficult than the current procedures for determining the amount of compensation due.

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#### "Damage" and the Impact on Regulatory Takings

Perhaps the most significant provision of Proposition 90 in terms of its impact on the County is the extension of the right to compensation for damage to property by "regulatory takings". Under current law, there generally is no right to compensation as a result of restriction on the use of property through land use or other regulatory action unless the owner is deprived of virtually all beneficial use of the property.

Under Proposition 90, damage to private property includes "government actions that result in substantial economic loss to private property". The measure does not define substantial. It includes as examples of government actions "the downsizing of private property, the elimination of any access to private property, and limitations on the use of private air space". This is not an exclusive list. "Government action" is defined as "any statute, charter provision, ordinance, resolution, law rule or regulation".

This provision is extremely broad in its potential impact. It clearly would apply to land use and environmental regulations. The Legislative Analyst has also stated that it could apply to actions regulating or affecting such things as employment conditions, apartment prices, endangered species, and historical preservation.

If Proposition 90 and Measure A, the land use initiative, both pass, there would likely be numerous claims for compensation filed by property owners who contend that their property has been substantially damaged as a result of the restrictions on property contained in Measure A. These claims would have to be individually evaluated, and potentially litigated, to determine whether Proposition 90 applies and, if it does, the compensation, if any, to which the property owner is entitled.

#### Attorneys Fees

The proposition provides that a property owner shall not be liable to the government for attorneys fees or costs in any eminent domain action. This could result in many meritless claims being filed as a property owner would have no concern about having to pay the government agency's costs should he or she lose the case.

#### Impact on Current Laws and Regulations

The Statement of Purpose in the proposition provides:

This constitutional amendment shall apply prospectively. Its terms shall apply to any eminent domain proceeding brought by a public agency not yet subject to a final adjudication. No statute, charter provision, ordinance, resolution, law, rule or regulation



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in effect on the date of enactment that results or has resulted in a substantial loss to the value of private property shall be subject to the new provisions..."

In addition, the proposition provides that amendments to existing provisions continue to be exempt if the amendment serves to promote the original policy and does not significantly broaden the scope of the provision. This appears to say that existing laws, rules and regulations can still be applied without being subject to Proposition 90, including the new damage and compensation provisions. The question of whether subsequent amendments to existing provisions promote the original policy and doesn't expand its scope is likely to be answered in court on a case by case basis meaning uncertainty, delay and increased cost to the County.

If Measure A passes in November, it will not be "in effect on the date of enactment" of Proposition 90. This is because Proposition 90 goes into effect the day after the election and Measure A, by its terms, would become effective 10 days after the Board of Supervisors declares the result of the vote.

#### CONCLUSION

Proposition 90 will make significant changes to the law of eminent domain and regulatory takings. It will have a significant, but unknown, fiscal impact on the County and other government agencies. Because of the potential fiscal impact, government agencies may feel it necessary to alter, or not go forward with, changes in law or regulation that affect the use of property even when such changes might reflect good public policy.

c: Jane Docker  
Katie Brown  
Michael Rattigan