POLICY
brief

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BRIEFLY

If voters approve Initiative 933, litigation and additional legislation would certainly ensue, marking a period of regulatory uncertainty.

The multi-billion dollar cost estimates made by some analysts for the initiative substantially overstate the likely outcome. It is likely that the Legislature would revisit the state's major land use laws to avoid either a "stymied decision" or skyrocketing, unaffordable costs.

I-933: REGULATING REGULATORY TAKINGS

Initiative 933, the Property Fairness Initiative, would fundamentally transform land use regulation in our state. Simply, the initiative would require government to compensate property owners for "damaging the use or value of private property" by regulation.

If the government decides it cannot or will not pay compensation, the alternative would be to waive the regulation. Thus, I-933 puts in place what is commonly referred to as a "pay or waive" policy.

It is, unsurprisingly, not that simple.

WHAT I-933 REQUIRES

The initiative sets out procedures that government must follow prior to adopting rules, regulations or ordinances that might reduce the use or value of property. Government agencies must "consider and document" the following: affected properties, the public purpose supporting the action, the extent of the damage, the estimated compensation required under the initiative, and alternative actions that might accomplish the desired objective, including voluntary action by property owners.

I-933 defines private property to include "all real and personal property interests protected by the fifth amendment to the United States Constitution or Article I, section 16 of the state constitution. The extension to personal property is unusual and appears to extend the initiative's reach far beyond land use and real estate, possibly including intangible property as well as tangible personal property. The Washington Farm Bureau, sponsor of the initiative, says the broader scope is necessary to protect water rights and agricultural infrastructure.

According to Section 2 of the initiative, "'damaging use or value' means to prohibit or restrict the use of private property to obtain benefit to the public the cost of which in all fairness and justice should be borne by the public as a whole . . ." A number of specific examples of damage are listed—the list is not exclusive—including prohibiting or restricting use or size of any use legally existing or permitted as of January 1, 1996. Other examples refer to regulations that would negatively affect irrigation facilities, require property to be left in its natural state, prohibit removal of trees or vegetation, and interfere with ongoing operation of bulkheads and similar infrastructure required to protect property value or use.

Restrictions that apply equally to all property within a government's jurisdiction would not constitute damage. Again, examples are provided, including: regulations that are "necessary to prevent an immediate threat to human health and safety," building standards and fire codes, and similar

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safety and health regulations. Somewhat oddly, the initiative also exempts regulations "limiting the location and operation of sex offender housing and adult entertainment" and "requiring compliance with wage and hour laws."

The initiative says that when government decides to enforce a regulation that results in damage to the use or value of property, it must first pay compensation. In the same paragraph, the initiative states: "This section shall not be construed to limit agencies' ability to waive, or issue variances from, other legal requirements." Further, if the government "chooses not to take action" damaging property, it does not need to pay compensation.

Compensation is defined as "remuneration equal to the amount the fair market value of the affected property has been decreased" by regulation. Compensation also includes recovery of "any costs and attorney's fees reasonably incurred by the property owner" in pursuit of his claim.

IMPLICATIONS

Little about I-933 is as straightforward and unambiguous as the words "pay or waive" imply. To begin with, real estate markets are not static things. There will be challenges associated with determining damages and calculating appropriate compensation. On the "waive" side, deciding how a governmental agency waives regulation, assuming it is even within the agency's power to grant waivers, comes with its own challenges. Critical provisions of the initiative are, at best, ambiguous, inviting legal challenges. And further legislative action may be required before local governments will be able to waive regulations required by state law.

I-933 would inaugurate a massive reassessment of a complex regulatory regime, one which has evolved over several decades. Within that complexity, however, there is a degree of predictability and certainty that I-933 would upset. Over time, many businesses, property owners, environmentalists, and regulators have developed systems that seem to work for them, most of the time. Others, often those lacking political clout, find themselves with limited ability to contest successfully regulatory excesses. Proponents would contend that today's primary regulatory certainty is this: When property owners are pitted against agencies of state and local government, the property owners are certain to lose.

LEGAL CONSIDERATIONS

Attorneys reviewing the initiative for the Northwest Center for Livable Communities (NWCLC), associated with the College of Architecture and Urban Planning at the University of Washington, believe the initiative will shift the locus of regulatory control from state and local officials to the courts and, in some instances, the federal government. The attorneys are prominent specialists in municipal and land-use law, known for representing both public and private sector clients. In their consensus view, "Whatever degree of certainty that is enjoyed now will be replaced by a highly uncertain regulatory environment."

Although the NWCLC study received substantial support from foundations opposing I-933, the legal analysts reflect a range of political orientations and their analysis should be considered credible.

In particular, NWCLC cites three major state land-use laws whose application would be affected by I-933. The Growth Management Act (GMA),

the Shoreline Management Act (SMA), and the State Environmental Policy Act (SEPA). Noting that laws cannot be amended implicitly, they contend that I-933 cannot itself grant agencies the power to waive existing regulations unless the specific law itself makes such provision. SEPA, GMA, and SMA do not provide for waivers to avoid compensation claims—although SEPA and SMA provide for some specified variances and exemptions—so the "right to waive their requirements would have to be determined through court decisions or created by legislative amendment." Without amendments, the attorneys contend, the only option is to pay compensation or face the charge that the agency is not complying with the law. If the government cannot afford to pay and lacks the ability to waive, "the result will be a stymied decision." The courts may then be left to determine the permissibility of waivers on a case by case basis.

Richard Stephens, an attorney who has worked with the Farm Bureau on the initiative, says that while "I-933 does not grant any waver authority, [it] recognizes that, where waiver authority does exist or will be created in the future, government is not forced to pay compensation when a waiver is the better public policy choice." Stephens notes that local governments often grant variances under the Shoreline Management Act, subject to state approval. Similarly, regulations adopted under the Growth Management Act often have variances or "reasonable use exceptions," though such waivers are not specifically authorized by the GMA.

He further writes, "there is no reason to assume that the GMA currently requires local government to damage the use and value of private property . . . I-933's recognition of waiver authority is consistent with the GMA's emphasis "on local control and flexibility."

The NCLC analysis considered the application of reasonable use exceptions. While such procedures, they say, "appear to be too narrow in scope" to permit waivers under I-933, they leave open the possibility: ". . . it is not clear whether these procedures can be broadened legally to address compensation requests . . ." Their final conclusion: ". . . neither existing zoning variance rules nor reasonable use procedures provide the authority to grant the waivers . . . Likewise, the amendment to the GMA proposed by the Initiative would not serve as a legal basis to allow GMA requirements to be waived."

Most analysts anticipate the dispute would have to be resolved in court.

The Associated General Contractors of Washington asked several attorneys to assess the initiative individually. Although their analyses emphasized different factors, all expressed concern that the initiative suffered from ambiguity and would be likely to trigger substantial litigation.

One writes that "I-933 would subject almost every state and local land use and environmental regulation to a vague challenge that the regulation is 'damaging' to private property. I-933 provides no meaningful standards and no procedural safeguards."

Another says: "its adoption is likely to stimulate significant and aggressive litigation to test its ambiguous but very extensive scope and reach and to resolve disputes among property owners about the nature and extent of permissible uses under I-933."

One area of concern surrounds the seemingly clear matter of the January 1, 1996 cut-off date for regulations. The Association of Washington Cities issued an August advisory noting that the eight cities incorporating after

January 1, 1996 "will be impacted differently than other cities. ". . . to the extent that those cities' regulations are more restrictive than their counties' regulations that were in effect on that date, they cannot be enforced or applied without compensation."

Although some analysts contend that the initiative is worded in such a way as to allow claims for damages occurring as a result of earlier regulatory action, the Farm Bureau says I-933 "would not affect land-use planning adopted prior to 1996. The NWCLC analysis agrees that the initiative "principally affects restrictions adopted" after 1996, but then argues that exceptions may apply.

The initiative's exemption for restrictions applying equally to all property within a government's jurisdiction also raises concern.

COST CONSIDERATIONS

Several groups have attempted to estimate the cost of I-933 to state and local taxpayers. These estimates, which typically run into the billions, must be viewed with caution. All assume that I-933 would likely force additional legislation and legal action in order to permit governments to waive regulations to avoid extraordinary costs. The reported costs of the initiative assume that the pay-or-waive option is, in effect, no option at all and that government's only choice will be to pay compensation. That assumption allows analysts to justify a highly improbable, worst-case cost scenario.

The state Office of Financial Management estimated the cost of compensation for the next six years. They peg the cost to state agencies at $2 billion to $2.18 billion; to cities, $3.8 billion to $5.3 billion; and to counties, $1.49 billion to $1.51. OFM analysts note that the calculation is difficult because of the number of jurisdictions involved, the lack of parcel level information, and "the number of landowners/parcels that have had a change in land use designations since 1996." More important, they acknowledge that the estimates assume that "state agencies and local governments will be unable to waive any current restrictions that may reduce the use or value of private property."

The NWCLC study similarly suffers from the same limitations. NWCLC researchers begin their analysis with an exhaustive examination of the pattern of claims filed in Oregon after that state passed its "pay or waive" initiative, Measure 37. Then, they offer an elaborate geographic assessment of land use changes in our state and, drawing on the Oregon experience, calculate a range of expected compensation claims. Their estimates are necessarily hedged by such cautions as "property owners would likely argue . . . would likely use highest and best use values . . . claims could be lower than estimated here, depending . . . if Washington farm and forestland owners follow the pattern of Oregon landowners . . ." NWCLC also briefly looks at administrative costs associated with claims and the costs of infrastructure extensions. These costs appear to be relatively minor, at least in comparison to the multi-billion dollar estimated liability.

Inevitably, even the sophisticated modeling used by NWCLC results in estimates determined by the underlying assumptions. And, again, NWCLC accepts the condition that "[b]ecause waivers will likely not be permitted, the only option available to state or local government may be to pay compensation claims." Clearly, however, the objective of I-933 proponents is not simply to line up to accept checks for lost property value, they want to

change governmental behavior and lighten the regulatory burden. Hence, the NWCLC estimate of $7.8 billion must be seen as a considerable overstatement of the actual burden, a point indirectly acknowledged by NWCLC researchers as they conclude, “It is . . . unlikely that local governments or the state government have the resources to pay these claims with existing revenue sources.” While they speculate that there will “either be sharp increases in some mix of sales taxes, B&O taxes, property taxes, and other types of taxes or major cutbacks in state and local government programs,” changing the regulatory regime is at least as likely an outcome.

The Association of Washington Cities surveyed cities and towns to provide an estimated fiscal impact for the OFM analysis. Their estimate: $3.5 billion to $4.5 billion for land use actions taken between 1996 and 2006, plus an annual estimate of $60 to $76 million for administrative costs associated with the initiative. The estimates are total-statewide projections; cities were free to use their own methods to calculate their estimates, and were asked to “assume current state requirements and regulations would remain in place, reflect costs for past city regulatory actions, and assume cities may only ‘waive’ regulations if expressly authorized to do so in statute.” So, again, changes in regulatory behavior were not an option: “pay or waive” means pay.

COMMENTS

As a general rule, things that cannot happen will not happen. If the unintended policy consequences of a statutory change impose too great a burden on the public, the public will accept amendments necessary to offset the adverse effects while preserving the policy intent. That said, initiatives should not be confused with telegrams or “IMs” (instant messages). I-933 does more than simply “send Olympia a message.” It would lead to manifold changes in the way state and local governments regulate real and personal property.

It would also necessarily alter regulatory practice. Much of the support for I-933 and similar measures in other states stems from the increased and legitimate perception that government too often has taken too much. One example that comes up repeatedly: the King County Critical Areas Ordinance requiring owners of parcels as small as five acres to leave 65 percent in its natural state; smaller parcels must keep 50 percent natural. How much protection is necessary? How much was taken just because it could be taken without compensation?

With Sound Transit and the Seattle monorail, urban property owners experienced the regulatory overreach that had already shaken many rural property owners. Land was taken and re-sold at a profit by the monorail authority. A Tacoma property owner had property taken for a Sound Transit station, with notice of the crucial hearing simply posted on the agency website. When the taking was upheld, the agency sought to get the property on the cheap. I-933 doesn’t touch on eminent domain, other than in the intent statement. But these eminent domain cases clearly play into public fears that property rights have eroded in recent years.

The multi-billion dollar cost estimates substantially overstate the likely outcome. Even if the analysts are correct in contending that governments’ lack the ability to waive, it is likely that the Legislature would revisit the major land use laws to avoid either a “stymied decision” or skyrocketing, unaffordable costs. Litigation and additional legislation would certainly ensue, marking a period of regulatory uncertainty.

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