Washington
Research Council

Policy
Brief

PB 95:15
October 16, 1995

Property Rights Law Goes to Voters

On Tuesday, November 7, the voters of Washington state will have the opportunity to cast their ballots for or against Referendum 48 (R-48). If the voters approve R-48, The Private Property Regulatory Fairness Act *will become law. The Act promises to bring significant changes to the process of land use regulation within the state. Government will be forced to analyze the economic impacts of land use regulations and restraints before their imposition. And the range of cases in which property owners will be entitled to compensation from the government for losses experienced due to regulation will expand.*

This report provides an overview for voters of R-48. It is based, in part, on a Washington Research Council sponsored public dialogue between House Majority Leader Dale Foreman, a prominent supporter of the measure and Pierce County Executive Doug Sutherland, a prominent opponent, which was held in Seattle on September 21. Foreman and Sutherland were questioned by Snohomish County Prosecutor James Krider and Attorney Thomas A. Goeltz of Davis Wright Tremaine. The afternoon's program began with an overview of R-48's features by Attorney G. Richard Hill of Foster Pepper & Shefelman.

Supporters of R-48 contend that the measure will improve the quality of government decision making. The government will be forced to calculate the costs and benefits of any new land use regulation and to pay for any property taken. In addition, supporters contend fully compensating property owners for the loss of their property will increase the fairness of the government finance system. Opponents on the other hand feel that the measure will unjustly impoverish the general taxpayers, create unwieldy new bureaucracies, and thwart essential regulatory processes.

Opponents argue that the measure is worded so vaguely that it will take years for the courts to untangle its meaning. Proponents counter that all laws require interpretation by courts, and that the process of judicial and legislative elaboration of the Act will not be unduly disruptive.

The first section that follows presents background on R-48 and the property rights movement. The second section describes the important features of the Act. The third section explains some of the major uncertainties in interpretation associated with the language of R-48. The final section of this policy brief discusses the difficulty of estimating the cost of the Act.

Voters will want to ask themselves: Is the current system of land use regulation efficient or just? Would stronger, well defined property rights represent an improvement, and does R-48 accomplish this task? And are the flaws in the current system so great as to justify the uncertainty of the transition to a new law?

Background

The last thirty years have seen tremendous changes in the extent and manner of government regulation. On the one hand, we have seen a vast expansion of the regulatory enterprise into such areas as environmental protection, energy utilization, automobile safety, and, for a brief period of time, the direct control of prices. On the other hand, there has been an increasing appreciation that the unintended consequences of regulation can be great. We have seen the deregulation of the airline and trucking industries bring lower prices to customers. In telecommunications, competition has been encouraged for

long distance and cellular service. There are now markets in which pollution rights are traded. And every president since Jimmy Carter has urged that the government apply explicit cost/benefit analysis to weed out bad regulation.

The regulation of land use is perhaps the most pervasive aspect of the regulatory enterprise. Real estate represents a substantial fraction of the wealth of the United States. Owner occupied real estate alone represents 36% of the national net worth.[1] The market value of taxable real property in Washington state in 1994 was $306 billion. The property rights movement aims to reduce and rationalize the regulation of land. Pierce County Executive Doug Sutherland agrees with these broad goals. "I believe that there needs to be substantial regulatory reform. ... The issues that are raised by [the proponents of R-48] ... are real." But he thinks that serious flaws argue for the measure's defeat. House Majority Leader Dale Foreman, on the other hand, says that it is this measure or nothing. "I do believe that it is a much better situation to have this passed than not to have it passed. ...If it does not pass then we are going to be confronted by the same roadblocks that we have [faced] for the past five years."

Both the U.S. and Washington State Constitutions explicitly protect private property. The fifth amendment to the U.S. Constitution ends "nor shall private property be taken for public use without just compensation." Article I, Section 16 of the Washington State Constitution begins "private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner ... ."

Property is often described as a bundle of rights. Arguably when the burden of regulation lightens this package, the owner has lost some property. So long as the regulation advances a legitimate public purpose, however, and does not deprive the owner of all beneficial use, the courts will generally not find a taking. The property rights movement believes the constitutional protection of property properly extends to these partial takings. Recent decisions by the United States Supreme Court, such as Nollan v. California Coastal Commission and Lucas v. South Carolina Coastal Council, have moved in this direction.

There are at least two broad arguments favoring compensation. The first is fairness, and this is reflected in the title of the measure before the voters: *The Private Property Regulatory Fairness Act.* An uncompensated taking may be viewed, in effect, as a tax on the specific owner and, therefore, a violation of the principle of horizontal equity. As Dale Foreman said at the WRC dialogue, "If it is to benefit all of us, then we should all pay the price." This same principle underlies the uniformity clause in the state constitution: "All taxes shall be uniform upon the same class of property ... ."[2]

Economic efficiency is the second argument for compensation. A market economy is built upon a foundation of property rights. If these rights are not secure, the structural integrity of the whole private economy is compromised. Moreover, as Professor Richard A. Epstein of the University of Chicago noted at a 1992 Washington Research Council conference, the weakened private property rights lead the government to misallocate resources:

> When the Supreme Court says that the government can regulate land use without compensation, government occupies a position which is far superior to that of any private land owner. Not only does it have the undeniable privilege to force the surrender of the land use by paying for it, but it can force it *without* payment.
>
> What is the set of incentives that are going to be created by this situation? Well, first, government bureaucrats, looking at their budgets, will essentially overclaim private resources. That is, an ounce of public benefit will justify a thousand pounds of private loss, because those losses never come back on the public register. But more important, when you are dealing with governments, it is very difficult for them, for a whole variety of reasons, to renegotiate any original allocative mistakes they made.[3]

The Act

The Private Property Regulatory Fairness Act began as an initiative presented to the 1995 session of the Washington Legislature, Initiative 164.

The Constitution of the State of Washington reserves for the people the power by petition to propose laws through the initiative and to approve or reject legislation through the referendum. Under an initiative to the people, the proposed law is presented directly to the voters to be enacted or rejected. Alternately, under an initiative to the legislature the proposal is first presented to a regular session of the legislature. If enacted by the legislature unamended, the measure becomes law without being subject to veto by the governor. Otherwise, the proposal goes to the voters at the next general election. As with most legislative acts, initiatives to the legislature are subject to referendum by petition of the people within 90 days of the adjournment of the session.

The property rights initiative was filed with the Secretary of State in 1994 and was assigned the serial number 164. Supporters then gathered enough signatures to qualify. The initiative was considered in the 1995 regular session and was enacted on April 18. Opponents filed for a referendum and were assigned serial number 48. They, in turn, gathered sufficient signatures, and so the Act will go to the voters on November 7.

The text of R-48 appears on page 8. The substantive core of the measure is contained in Sections 3, 4, and 5.

Section 3 would establish a new procedural requirement on state and local government. Before imposing a new "regulation of private property or restraint of land use" government must prepare an Economic Impact Statement (EcIS) explaining how the proposed action "will substantially advance the purpose of protecting public health or safety ... and analyze the economic impact of all reasonable alternatives to the regulation or restraint." It then can only adopt a regulation or restraint that has "the least possible impact on private property and still accomplishes the necessary public purpose."

Section 4 significantly expands the class of situations in which owners of property will be entitled to compensation for "takings" by government. Certain regulations or restraints of land use, those which are imposed for "public benefit" but do not seek to prevent a "public nuisance," will now be recognized as takings. The property owner must be fully compensated for the reduction in value that results from the taking. The government is not allowed to extract from the owner a waiver of compensation in exchange for permits or approvals that would otherwise be forthcoming. Nor is government allowed to reduce the compensation it pays by first imposing (or even threatening) land use designations that decrease the market value of the property being taken.

When the government imposes a restriction on the use of public or private property which has the effect of denying another owner access to his or her land, the government must provide alternate access or purchase the property. This element is apparently intended to aid the owners of timber rights, who often find government environmental restrictions blocking the access to their resources. In addition, Section 4 makes the state liable for the takings of subordinate governments when the local regulations or restraints are required by state law.

Section 5 shields the property owner from the costs of studies for use in deciding whether to restrict "the use of private property for public use."

What Does It Mean?

We have relied primarily on four analyses in attempting to understand the Act. These were prepared respectively by Pacific Legal Foundation[4], by James Krider, Chuck Maduell, Eileen McKain and Barnett Kalikow for the Washington Association of Prosecuting Attorneys (WAPA)[5], by Markham A. Quehrn and R. Gerald Lutz for the Association of Washington Business (AWB),[6] and Ellen Conedera Dial for the University of Washington's Institute for Public Policy and Management (IPPM).[7] In general, the Pacific Legal Foundation's interpretation is the most narrow of the four; the IPPM's, the most

broad. (For example, the IPPM analysis holds that the requirement to compensate for lack of access would apply to "the road closures just prior to the Mount St. Helens eruption."[8] Williams Jarvis, the Chief Civil Deputy Prosecutor for Snohomish County, terms this reading "extreme," however.[9])

Among the criticisms leveled by opponents of R-48 is that the meaning of the Act is unclear. For example, in a letter written to certain leaders of the Legislature, the executive committee of the Environmental and Land Use Law Section of the Washington State Bar Association opines: "There is so much ambiguity and vagueness in the initiative that its meaning and effect cannot be predicted with confidence and would have to be determined by expensive and time consuming litigation."[10]

In part, the Act's supporters in the Legislature tried to reduce the ambiguity by means of a Colloquy on February 15, 1995 on the floor of the House of Representatives in which Representative Dale Foreman asked a number of questions about the meaning of the Act to Representative Mike Padden. The purpose was to provide a record of legislative intent to aid the courts in interpreting the Act. The WAPA memorandum states that while some believe "that this colloquy is not binding on a court, because it is an initiative, a court probably would look to it as the basis upon which the statute was enacted into law."[11]

At the WRC board meeting, Tom Goeltz asked Representative Foreman whether he felt the Act is well drafted. Foreman replied:

> If I had drafted this as a bill it would be probably longer. It would probably be tighter in the definitions, ... and it would have clarified ... questions that we attempted to clarify with the colloquy. ... It's not perfect, but there are very few things that we do in Olympia that are perfect.

At the WRC dialogue, G. Richard Hill set forth a number of questions of interpretation regarding the Act which the courts or the Legislature will have to clarify. What are the substantive and procedural requirements for economic impact statements, and will they be required for all permitting decisions? Will zoning fall under the Act? Building codes? Design review or Landmarks? Setback requirements or height limitations?

Much of the uncertainty concerning the meaning of the Act adheres to two critical terms, "public benefit" and "public nuisance." Section 4.1 says that a taking has occurred when

> (a) a government entity regulates or imposes a restraint of land use on such portion or parcel of property for public benefit including wetlands, fish or wildlife habitat, buffer zone, or other public benefit designations; and
>
> (b) no public nuisance will be created absent the regulation[.]

A broad definition of public benefit paired with a narrow definition of public nuisance would result in a broad definition of taking, and, conversely, a narrow definition of benefit with a broad definition of nuisance would result in a narrow definition of taking.

The Act does not explicitly define public benefit. There are three broad interpretations that have been given to (a). At the most expansive, any action the government takes must be for the public benefit and so any regulation or restraint must fall under (a).

A narrower interpretation distinguishes between providing public benefit and preventing public harm as two separate purposes to which the state applies its police power. For example, courts have held that environmental regulations are intended to prevent a public harm rather than provide a public benefit.[12]

The third alternative is that the court will extract a narrow definition of public benefit from the context of the Act. In the WRC dialogue Jim Krider asked Dale Foreman how the courts would interpret public benefit. Foreman answered:

> [P]ublic benefit [is defined in context by] the three things that were specifically enumerated before [the phrase "other public benefit designations."] ... So that other public benefits would be of the nature and character of wetlands, fish or wildlife habitat, or buffer zones. ... I believe, as a lawyer with twenty years of environmental law experience, that is where the court is most likely to settle on this issue.

In the colloquy, Foreman asked Padden how zoning would be affected by the Act. Padden, in part, replied:

> Property is taken for public use under Section 4(1) when property is designated for public benefit, such as for wetlands, wildlife habitat or buffers. Most zoning does not designate property for public uses, but merely regulates the intensity and/or type of private use of the property. Exceptions which would require compensation include zoning that designates property for public uses such as for parks or open space.

Nuisance is a venerable concept of the common law and relates to cases where the rights of different property owners interfere. Black's defines nuisance as

> That activity which arises from unreasonable, unwarranted or unlawful use of his own property, working obstruction or injury to right of another, or to the public, and producing such material annoyance, inconvenience and discomfort that law will presume resulting damage. That which annoys and disturbs one in possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. An offensive, annoying, unpleasant, or obnoxious thing or practice; a cause or source of annoyance, especially a continuing or repeated invasion or disturbance of another's right, or anything that works a hurt, inconvenience or damage.[13]

The common law recognizes that the right of an owner to use property is limited by an obligation not to infringe on the rights of others. In Washington state, nuisance is defined by statute. The WAPA memorandum notes that courts "have concluded that the statutory definition is broader than the common law concept of nuisance." The revised code of Washington defines nuisance and public nuisance:

> Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay stream, canal or basin, or in any way renders other persons insecure in life, or in the use of property.[14]

> A public nuisance is one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal.[15]

Following these definitions, the code enumerates nine specific public nuisances. Three of these are environmental.

> (1) To cause or suffer the carcass of any animal or any offal, filth, or noisome substance to be collected or to remain in any place to the prejudice of others;
>
> (2) To throw or deposit an offal or offensive matter, or the carcass of any dead animal, in any water course, stream, lake, pond, spring, well, or common sewer, street or public highway, or in any manner to corrupt or render unwholesome or impure the water of any such spring, stream, pond, lake, or well, to the injury or prejudice of others;
>
> ....
>
> (7) To erect, continue, or use any building, or other place, for the exercise of any trade, employment, or manufacture, which by occasioning obnoxious exhalations, offensive smells, or otherwise is offensive or dangerous to the health of individuals or of the public[.][16]

These statutes date from 1881. The WAPA memo concludes that "the definitions ... are sufficiently broadly worded ... to make them arguably applicable to a broad cross section of activities that the County regulates."[17] In contrast, the IPPM legal analysis concludes that public nuisance has "a very narrow meaning" in Washington state.[18]

The public nuisance exemption has particular bite as it relates to wildlife and water. For example the state supreme court has observed:

> To the layman, and even to the lawyer who has not had occasion to deal with the subject, the extent of the power of the states with reference to fish, game, and all wild life within their borders is perfectly astounding. The laws of practically all of our states are founded upon the common law of England by virtue of which all property rights in *ferae natutae* were in the sovereign. The killing, taking, and regulation of game and other wild life were subject to absolute governmental control for the common good. This absolute power to control and regulate passed with the title to the game and wildlife to the several states, subject only to the applicable provisions of the federal constitution.[19]

The rights of the state towards water are somewhat similar.

The public nuisance exemption will allow a great deal of regulation to continue without compensation, as long as it is carried out carefully with a balancing of the interests of the conflicting property owners. As one expert notes, "stream buffers as for esthetic purposes or as a bright line rule to avoid stream siltation without site-specific analysis would be [a taking]. But stream buffers in an area of likely erosion to protect a fish-bearing stream likely would be proper even under I-164."[20]

COST

The purpose in making government pay compensation for takings is to force it to recognize the cost of the resources that it is seizing for public use. Doug Sutherland reminded those in attendance at the WRC dialogue that the burden of paying compensation must eventually fall on the taxpayers:

> Government is not somebody else. Government is you, because it is your tax dollars, and my tax dollars, that provides the revenue for government.

There are no definitive estimates of the cost to the government of R-48. The recent effort by the University of Washington's Institute for Public Policy and Management to provide such calculations[21] is methodologically flawed and unsatisfactory as a guide to policymakers and voters, a fact virtually conceded in the study's methodological notes.[22]

IPPM attempted to estimate the annual costs to local governments under R-48 both of paying compensation and of conducting Economic Impact Studies. (At the time of this writing, an associated IPPM study estimating the costs to state government had not been released.) These estimates were prepared by Ken Dolbeare of The Evergreen State College. Dolbeare's estimates of annual compensation costs range from $3.8 billion to $11 billion with a "best guess" of $6 billion. In the paper which details his calculations, Dolbeare describes the task of estimating takings cost as "Mission Impossible," admits that "[a]dequate data do not exist with which to make precise estimates," and describes the estimates as "clearly speculative." Unfortunately these qualifications have been missing from the public discussion of the estimates.

There are several steps that seem to be essential to any estimation of the cost of takings under R-48. First there should be a careful examination of actual land use actions and appraisals of the costs to associated property owners; next would be a careful determination of the extent to which the public nuisance exemption would obviate compensation. Further, it would be important to distinguish between one time land use actions, such as the designation of critical areas under GMA, and recurring actions. And, finally, since the requirement to pay compensation would change government behavior, the estimates should account for this. The IPPM study fails to address any of these concerns. The task indeed may have been

"Mission Impossible." But, accordingly, it would have been better for the analysts to have presented no estimates.

The IPPM estimates the annual cost to local governments of preparing Economic Impact Statements under three different legal interpretations; the results range from $305 million to $986 million with a best guess of $486 million. IPPM believes that these estimates, based on their inventory of regulatory actions in eight cities and four counties in 1994, are subject to smaller error than the preceding estimates of compensation cost. This is probably true. However, there are still several reasons to believe that the estimates are pessimistic. First, the year that they examine, 1994, is one that saw a number of major one time regulatory actions relating to GMA. Second, the substantive and procedural requirements for an EcIS are not specified in the Act. One of the great uncertainties is how extensive and expensive an EcIS will be required for any particular regulation or restraint. The IPPM assumption that EcIS costs will substantially exceed the costs currently experienced in preparing environmental impact statements seems pessimistic. And, in fact, the state's Department of Community, Trade, and Economic Development estimates a lower cost per study.[23] Finally, of course, if the voters approve the measure, the government may well regulate less, and this would reduce the number of studies required.

[1] *Economic Report of the President*, February 1995, p. 404, Table B-114.

[2] Article VII, Section 1.

[3] Epstein, Richard A., "Private Property and the Politics of Distrust," in John S. Archer (ed.), *Drawing the Line: Property Rights and Environmental Protection*, Olympia: Washington Research Council 1992, pp. 73-74.

[4] Pacific Legal Foundation, "Questions About the Private Property Fairness Act I-164," undated.

[5] Krider, James, Chuck Maduell, Eileen McKain, and Barnett Kalikow, "Draft Washington Association of Prosecuting Attorneys I-164 Analysis," Undated.

[6] Quehrn, Markham A. and R. Gerald Lutz, "The Private Property Regulatory Fairness Act (Initiative 164)," Chapter 20 in *The AWB Environmental Law Desk Book*, (draft).

[7] Dial, Ellen Conedera, "Initiative 164: Issues of Legal Interpretation," undated.

[8] Dial, p. 2.

[9] Personal communication.

[10] Letter to Marc Gaspard et al, from T. Ryan Durkan et al, dated Feb. 8, 1995.

[11] p. 3.

[12] Krider et al, p. 10.

[13] Black's Law Dictionary.

[14] RCW 7.48.120.

[15] RCW 7.48.130.

[16] RCW 7.48.140.

[17] WAPA I-164 Analysis, p. 18.

[18] Dial, p. 4.

[19] *Cook v. State*, 192 Wash. 602, 607-08 (1937), cited in WAPA I-164 Analysis p. 25.

[20] Attorney Albert Gidari, Perkins Coie, personal communication.

[21] Institute for Public Policy and Management, "Referendum 48: Economic Impact Study of the Property Rights Initiative," September 28, 1995.

[22] Institute for Public Policy and Management, "Background on Local Government Costs," undated.

[23] "Background on Local Government Costs," p. 5.

Referendum 48: Private Property Regulatory Fairness Act

AN ACT Relating to regulation of private property; adding a new chapter to Title 64 RCW.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

NEW SECTION, Sec. 1. This act is intended to provide remedies to property owners in addition to any constitutional rights under the state and/or federal constitutions and is not intended to restrict or replace any constitutional rights.

NEW SECTION, Sec. 2. This act shall be known as the private property regulatory fairness act.

NEW SECTION, Sec. 3. A regulation of private property or restraint of land use by a governmental entity is prohibited unless a statement containing a full analysis of the total economic impact on private property of such regulation or restraint is prepared by the entity and made available to the public at least thirty days prior to adoption of the regulation or imposition of the restraint. Such statement shall identify the manner in which the proposed action will substantially advance the purpose of protecting public health and safety against identified public health or safety risks created by the use of private property, and analyze the economic impact of all reasonable alternatives to the regulation or restraint. Should the governmental entity choose to adopt a proposed regulation or restraint on the use private property, the governmental entity shall adopt the regulation or restraint that has the least possible impact on private property and still accomplishes the necessary public purpose.

NEW SECTION. Sec. 4. (1) A portion or parcel of private property shall be considered to have been taken for general public use when:

(a) a governmental entity regulates or imposes a restraint of land use on such portion or parcel of property for public benefit including wetlands, fish or wildlife habitat, buffer zone, or other public benefit designations; and

(b) no public nuisance will be created absent the regulation; and

(2) When private property is taken for general public use, the regulating agency or jurisdiction shall pay full compensation of reduction in value to the owner, or the use of the land by the owner may not be restricted because of the regulation or restraint. The jurisdiction may not require waiving this compensation as a condition of approval of use or another permit, nor as a condition for subdivision of land.

(3) Compensation must be paid to the owner of a private property within three months of the adoption of a regulation or restraint which results in a taking for general public use.

(4) A governmental entity may not deflate the value of property by suggesting or threatening a designation to avoid full compensation to the owner.

(5) A governmental entity that places restriction on the use of public or private property which deprive a land-owner of access to his or her property must also provide alternative access to the property at the governmental entity's expense, or purchase the inaccessible property.

(6) The assessor shall adjust property valuation for tax purposes and notify the owner of the new tax valuation, which must be reflected and identified in the next tax assessment notice.

(7) The state is responsible for the compensation liability of other governmental entities for any action which restricts the use of property when such action is mandated by state law or any state agency.

(8) Claims for compensation as a result of a taking of private property under this act must be brought within the time period specified in RCW 4.16.020.

NEW SECTION. Sec. 5. No governmental entity may require any private property owner to provide or pay for any studies, maps, plans, or reports used in decisions to consider restricting the use of private property for public use.

NEW SECTION. Sec. 6. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Full compensation" means the reduction in the fair market value of the portion or parcel or property taken for general public use which is attributable to the regulation or restraint. Such reduction shall be measured as of the date of adoption of the regulation or imposition of restraint on the use of private property.

(2) "Governmental entity" means Washington state, state agencies, agencies and commissions funded fully or partially by the state, counties, cities, and other political subdivisions.

(3) "Private property" means

(a) land;

(b) any interest in land or improvements thereon;

(c) any proprietary water right;

(d) any crops, forest products, or resources capable of being harvested or extracted that is owned by a nongovernmental entity and is protected by either the Fifth or Fourteenth Amendment to the U.S. Constitution or the Washington State Constitution.

(4) "Restraint of land use: means any action, requirement or restriction by a governmental entity, other than actions to prevent or abate public nuisances, that limits the use or development of private property.

NEW SECTION. Sec. 7. This act may be enforced in Superior Court against any governmental entity which fails to comply with the provisions of this act by any owner of property subject to the jurisdiction of such entity. Any prevailing plaintiff is entitled to recover the costs of litigation, including reasonable attorney's fees.

NEW SECTION. Sec. 8. If any provision of this act or its application to any person or circumstance is held invalid, the remainder act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 9. Sections 1 through 8 of this act shall constitute a new chapter in Title 64 RCW.