



August 25, 2006

SUMMARY OF INITIATIVE 933 TO THE PEOPLE
Concerning government regulation of private property.

*This summary has been prepared in response to specific questions about the provisions and effects of I-933 and is provided for legislative purposes only; it is **not** provided as an expression for or against the ballot measure. Please remember that it is inappropriate to use public resources to support or oppose a ballot measure. Please refer to pages 22-25 of the 2005-06 Legislative Ethics Manual or contact Senate Counsel for further guidance on when and how comment on ballot measures is appropriate.*

BRIEF SUMMARY

Initiative 933 (I-933) would require that before adopting a land use regulation, a state agency or local government first determine whether the regulation provides a public benefit for which the public should pay and whether the regulation will prohibit or restrict the use of private property.

In order to implement a land use regulation that provides a public benefit for which the public should pay or that prohibits or restricts the use of private property, a state agency or local government must compensate the property owner for any resulting decrease in fair market value.

BACKGROUND

A land use regulation is generally presumed by the courts to be valid. Before challenging a land use regulation in court, a property owner must first pursue the applicable administrative appeals and remedies and any regulatory alternatives. In court, the burden is on the property owner to prove that the regulation is unconstitutional. A regulation can be held unconstitutional if it restricts the use of land in a manner or to a degree that amounts to a "regulatory taking," or, it deprives the property owner of due process of law because it creates a public benefit as opposed to preventing a public harm, is not reasonably necessary to achieve its purpose, and is unduly oppressive on the property owner (substantive due process). If the regulation is found to cause a "regulatory taking," the property owner must be compensated or the regulation must be withdrawn. If the regulation is found to be a violation of substantive due process, it is invalid.

To determine whether land use regulations require that the property owner be compensated or are invalid, courts ask the following questions: Do the regulations result in permanent or temporary physical occupation of private property? Do they deprive the owner of all economically viable uses of the property? Do they deny or substantially diminish a fundamental attribute of property ownership, such as the right to possess or transfer the property and to exclude others? Do they severely impact the property owner's economic interest? Do they require the property owner to dedicate a portion of the property or to grant an easement?

As a result of the constitutional limitations on land use regulations, protection of property rights

is included among the goals of the Growth Management Act (GMA). The GMA also directs the Office of the Attorney General to provide state agencies and local governments with an orderly, consistent process for evaluating proposed GMA regulations and actions to assure that the regulations and actions do not result in takings of private property. State agencies and local governments are required to use the process provided by the Attorney General but are protected by attorney-client privilege, and private parties are not given a cause of action against an agency or government that fails to use it. Under a different chapter of Washington law regarding property rights, property owners who have applied for land use permits are allowed to maintain a cause of action for damages, if government actions are arbitrary, capricious, knowingly exceed lawful authority, or exceed time limits established by law.

SUMMARY OF I-933

Initiative 933 would require that a property owner be compensated for any decrease in the fair market value of their property caused by a land use regulation, with specified exceptions, and would forbid regulations that prohibit existing legal uses of private property. I-933 removes the presumption in existing law that a land use regulation is valid, until it is challenged in court and found to be a "regulatory taking". I-933 requires a state agency or local government to determine, before adopting a proposed regulation, whether it prohibits or restricts the use of private property and whether it provides a public benefit for which the public should pay. If so, in order to implement it, the state agency or local government must first compensate the property owner in an amount equal to any decrease in fair market value that results from the regulation.

Under I-933, a regulation that provides a public benefit and prohibits or restricts the use of private property is deemed to be damaging the use or value of private property, and a state agency or local government must address a number of factors before adopting such a regulation. These factors include the following: what private property the proposed regulation affects and what legitimate governmental purpose it serves; what kind of connection the regulation has to a legitimate government interest and how much it restricts the property compared to the impact caused by the regulated property and other properties; and how much the regulation eliminates economically viable uses of the property and fundamental attributes of property ownership like the right to exclude others, possess, use, enjoy, or dispose of the property.

Regulations that are deemed to damage the use or value of private property include those that either prohibit or restrict any of the following: a use or the size, scope, or intensity of a use that legally existed or was permitted as of January 1, 1996; infrastructure like tide gates or bulkheads that is reasonably necessary to protect the use or value of private property; irrigation facilities; maintenance or removal of trees or vegetation, specifically including requirements that property be left in a natural state or without beneficial use, except to prevent immediate harm to human health and safety; and any activity that is reasonably necessary to protect the use or value of private property from natural occurrences like fires or floods.

Regulations that are not deemed to damage the use or value of private property are those that apply equally to all property, such as restrictions necessary to prevent an immediate threat to human health and safety, structural standards in building and fire codes, limitations on sex offender housing or adult entertainment, EPA restrictions on chemicals, worker health and safety or wage and hour laws, the state's dairy nutrient management statute, or setbacks established before January 1, 1996.

Property to which I-933 applies includes all real and personal property protected by the fifth amendment to the United States Constitution or Article 1, section 16 of the Washington Constitution that is not owned by a government entity and may include an interest in land, buildings, crops, livestock, and mineral and water rights.

Development regulations adopted under the Growth Management Act cannot prohibit any uses legally existing before adoption of the regulations.

For further information please contact:
Genevieve Pisarski, 786-7488
Senate Government Operations and Elections Committee

This summary should not be considered legislative history for purposes of interpreting I-933.