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## 2006 Ballot Measure Report Measure 39

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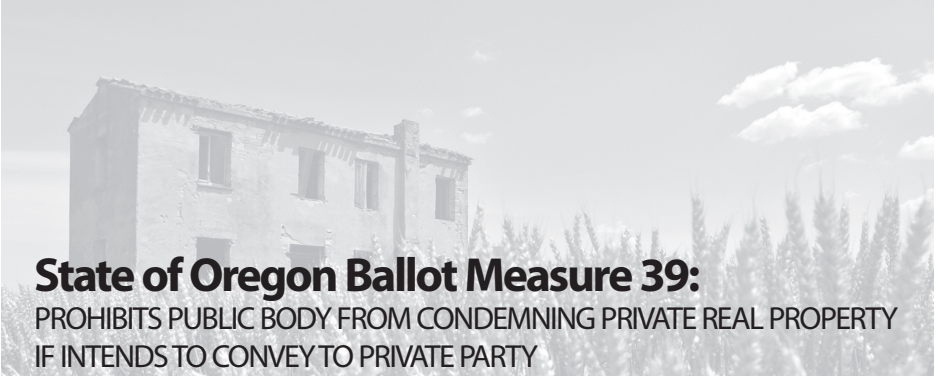
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# 2006 Ballot Measure Report Measure 39

Published in the City Club of Portland Bulletin, Vol. 88, No. 18, Friday, September 29, 2006



## State of Oregon Ballot Measure 39:

PROHIBITS PUBLIC BODY FROM CONDEMNING PRIVATE REAL PROPERTY IF INTENDS TO CONVEY TO PRIVATE PARTY

Measure 39 is a citizen initiative proposed in response to a 2005 United States Supreme Court decision that addressed a city's use of its condemnation authority to transfer private property to a private developer in order to achieve a public purpose. The case became a catalyst for property rights activists and triggered nationwide legislative and initiative activity intended to curtail government use of eminent domain power.

Measure 39 would prohibit public bodies in Oregon from condemning private real property if the public body intends to transfer any part of the real property to a private party, such as a developer. Proponents of Measure 39 view it as a necessary preventative measure to avoid improper alliances between public agencies and developers and to protect private property owners from unfair and unnecessary government seizure of their property. Opponents of the measure see an important role for government in guiding development of real property for urban renewal and economic development. They fear that Measure 39 would significantly curtail the ability of public agencies to enter into public-private partnerships for economic development purposes.

Your committee found that, with several notable exceptions in the early years of urban renewal, government agencies in Oregon have generally been judicious when exercising their right to convey property from one private party to another in furtherance of a public purpose. Your committee further concluded that economic development should be a paramount concern in Oregon, and that taking away the power of eminent domain for private development will hamper state and local governments' abilities to enter into public-private partnerships and execute urban renewal projects.

**Therefore, your committee unanimously recommends a NO vote.**

*City Club membership will vote on this report on Friday, September 29, 2006. Until the membership vote, City Club of Portland does not have an official position on this report. The outcome of this vote will be reported in the City Club Bulletin dated October 13, 2006 and online at [www.pdxcityclub.org](http://www.pdxcityclub.org).*

## I. INTRODUCTION

Ballot Measure 39 will appear on the ballot as follows:

### **PROHIBITS PUBLIC BODY FROM CONDEMNING PRIVATE REAL PROPERTY IF INTENDS TO CONVEY TO PRIVATE PROPERTY**

#### **Result of "Yes" Vote:**

"Yes" vote prohibits public body from condemning certain private real property if it intends to convey all or part to a private party, with exceptions.

#### **Result of "No" Vote:**

"No" vote would retain current law, allowing government to acquire private real property required for an authorized public purpose that involves transferring property to private party.

#### **Summary:**

The Oregon Constitution allows public bodies to condemn real property required for a public purpose, requires compensation to property owner. Statutes permit owner to challenge amount of compensation in court. Measure prohibits public bodies from condemning private residence, business establishment, farm, or forest operation if government intends to convey all or part of the property to another private party. Measure excludes property condemned as dangerous to health or safety, or for transportation or utility services; allows government to lease condemned property for accessory retail uses. Requires court to decide whether public body unlawfully intended to convey the property to another private person. Expands rights to attorney fees and costs if court prohibits condemnation or if compensation awarded is more than government's initial offer. Other provisions.

*(The language of the caption, question and summary was certified by the Oregon Secretary of State.)*

Ballot Measure 39 was placed on the November 2006 ballot by initiative petition. Ross Day and David Hunnicutt from Oregonians in Action, an association of property owners defending property rights in Oregon, are chief petitioners. If approved, Measure 39 would prevent a public body from condemning private real property if it intends to convey the property to a private party.

City Club convened a committee of six Club members to analyze the measure and issue a voting recommendation. Committee members were screened to ensure that no member had an economic interest in the outcome of the study or had taken a public position on the subject of the measure. The study was conducted between July 26 and September 14, 2006. Your committee interviewed proponents and opponents of the measure and other interested individuals, and reviewed relevant articles, reports and other material.

## II. BACKGROUND

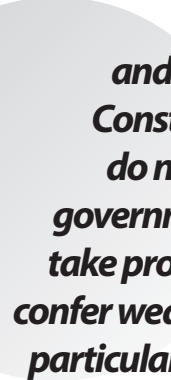
Measure 39 is a local response to a 2005 U.S. Supreme Court decision, *Kelo v. City of New London*, which addressed the city of New London, Connecticut's use of its eminent domain power in furtherance of private development that promoted public purposes.

### **Use of Eminent Domain Power for a "Public Purpose"\***

Eminent domain is the power of government to take private property for public use. The United States and Oregon constitutions allow public bodies to condemn private real property for a public use and require compensation be paid to the property owner. Oregon statutes permit the owner to challenge the amount of compensation in court. Generally, the compensation paid must reflect the actual fair market value of the property at the time of condemnation.

Conversely, the U.S. and Oregon Constitutions do not allow governments to take property to confer wealth on a particular private party. A purely private taking could not withstand the scrutiny of the public use requirement. Because it would serve no legitimate purpose of government, it would be void.

Traditionally, eminent domain has been used to acquire land for such direct public uses as roads, public buildings (e.g., courthouses) and parks. While there has been debate over whether the methodology for determining "just compensation" adequately compensates property owners in these situations, few people question the government's power to acquire private property for these direct public uses.



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party.***

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\* The terms "public purpose" and "public use" have been used frequently in discussions regarding government's eminent domain power. **Public use** describes a situation where government condemns property to carry out a traditional governmental function, for example, where the property is used for a public building (e.g., school, library or courthouse), a highway or a public park. **Public purpose** is broader. The term is used to describe a situation where government condemns the property under its eminent domain power not because it intends to use the property for a direct governmental function but to achieve some other public policy goal. For example, in the *Kelo* case, government condemned private property so a private developer could build an office complex on the site as part of an urban renewal project. The stated public purpose was to increase the economic value of the site and to create jobs for city residents. The city did not condemn the property to allow the city to construct a facility related to a traditional governmental function.

Governments often rely on their ability to invoke eminent domain as a tool for redeveloping blighted areas.\* For example, a government might erect a publicly owned facility in an economically depressed area to serve as a catalyst for private development.

In some instances, however rather than acquiring land for a specific public works project, governments have used eminent domain power to take land from one private owner and give it to a different private owner who agrees to develop the land in a specified way. The rationale is that the new development will be beneficial to the residents of the community, even if it is a private development. An increasing amount of this work is being done through public-private partnerships. In this context, a public-private partnership means that a public entity obtains and conveys property to a private entity, conditioned on the private entity's agreement to develop the property in a certain way. The public entity may offer financial incentives (e.g., tax abatements) to the private entity to encourage development.

In *Kelo v. City of New London*, 125 S.Ct. 2655 (2005), the U.S. Supreme Court considered whether the anticipated "public benefits" of privately-owned developments can be considered a "public use" justifying government's use of the eminent domain power. Specifically, the city of New London, Connecticut hoped to revitalize a depressed area of the city by developing a 90-acre area into an office complex in conjunction with a private party. To make the plan work, the city needed to acquire over 100 separate parcels. Some property owners sold willingly, but others refused to sell. The city used its eminent domain power to force the unwilling parties to sell. Susette Kelo, the owner of a well-maintained home within the targeted area, was an unwilling seller who contended that this use of eminent domain power exceeded the city's authority under the U.S. Constitution.

In a 5-4 decision, the court ruled in favor of the city. The majority held that promoting economic development is a traditional and long-accepted government function, and there is no principled way of distinguishing it from other public uses the court has recognized as justifying the use of eminent domain power.<sup>†</sup> In other words, the U.S. Constitution's provision allowing governments to take property for "public use" also allows governments to take land for a legitimate "public purpose."

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\* Blight typically is used to describe a deteriorating urban area. However, in the urban renewal context, blight has a broader connotation. For example, Oregon urban renewal statutes identify a number of factors that are used to determine whether an area is blighted. While the Oregon definition includes buildings that are unfit or unsafe for occupancy it also extends to areas that have "inadequate streets and other rights of way, open spaces and utilities." ORS 457.010. Therefore in the urban renewal context, it is helpful to think of blight as a condition of property, developed or undeveloped, that hinders it from being put to its highest and best economic use.

<sup>†</sup> The majority identified new jobs for city residents and increased tax collections as economic development anticipated to result from this project.

## **Reaction to the Kelo Decision**

While the *Kelo* court held that the city's action did not violate the U.S. Constitution, it also recognized the power of states to adopt statutes or constitutional amendments restricting the government's eminent domain power, either by defining "public use" narrowly in their states or by granting property owners more rights. Though it is too soon after the *Kelo* decision to fully assess whether it has resulted in an increased use of eminent domain, it certainly has galvanized the efforts of property-rights advocates. The decision set off a wave of activity in state legislatures, with lawmakers in virtually every state in the country considering laws limiting governments' use of eminent domain to purposes more traditionally associated with the authority: roads, utility lines and public buildings.

In fact, the Oregon House of Representatives considered in the 2005 legislative session a bill (House Bill 3505) that would have allowed a public body to condemn property only if the public body's primary purpose was to allow the property to be "owned and used by the public." The bill passed the House 40-19 but was not voted on in the Senate.

Measure 39 is an outgrowth of House Bill 3505. Oregonians in Action, the sponsor of Measure 39, decided to sponsor this ballot measure after House Bill 3505 died in the Senate.

## **Use of Eminent Domain for Public Purposes in Oregon**

Because the use of eminent domain for economic development purposes is the main point of contention between proponents and opponents of Measure 39, your committee focused on the power of condemnation for public purposes in this realm. In Oregon, eminent domain for economic development is most frequently used in urban renewal districts. Urban renewal is a plan for the redevelopment of blighted areas through a program of cooperation between government and private enterprise. In many cases, government relies on the power of eminent domain to assemble parcels of land. It may provide a subsidy (frequently based on the difference between the present value of the land and the value of the land following the realization of the urban renewal plan) to a developer, in order to encourage private enterprise to undertake the redevelopment. Urban renewal attempts to prevent neighborhoods from deteriorating through broad plans incorporating transportation, parks, zoning, site assembly, and encouragement of private redevelopment.

***Oregonians in Action,  
the sponsor of  
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measure after  
House Bill 35 died in  
the Senate.***

The power of eminent domain has been crucial to completion of highly visible economic development projects in Portland, including Pioneer Place mall and office tower, RiverPlace (a primarily residential and retail development) and the Belmont Dairy (another mixed-use development). The availability of eminent domain was also a critical factor in obtaining the land to build the Portland Classical Chinese Garden.

In the early years of urban renewal and economic development projects, public agencies tended to be more assertive in their use of eminent domain. In Portland's first urban renewal district (the South Auditorium area in the early 1960s), the Portland Development Commission used the threat of condemnation to displace 1,500 residents and acquire at least 349 separate parcels, despite widespread protests from the residents of the area. In retrospect, many people (including some who support government involvement in urban renewal) view the South Auditorium project as an example of excessive use of the condemnation power.

***Criticism has been leveled against the use of eminent domain in certain areas of North and Northeast Portland, which resulted in disproportionate numbers of African American and low-income residents being displaced from their properties.***

Similarly, criticism has been leveled against the use of eminent domain in certain areas of North and Northeast Portland, which resulted in disproportionate numbers of African American and low-income residents being displaced from their properties. Lingering resentment from these urban renewal projects, which included the construction of Emanuel Hospital, Memorial Coliseum and Interstate 5 in the 1950s, '60s and '70s contributed to modern-day suspicions of projects that involve the use of condemnation.

As a result, some urban renewal agencies in Oregon have chosen to limit their use of the eminent domain power in specific areas. For example, in the Lents Town Center and Interstate Corridor urban renewal districts, the right of condemnation was excluded from the Portland Development Commission's plans at the insistence of area residents.<sup>1</sup>

Witnesses told your committee that it is uncommon for a public body in Oregon to bring a condemnation action in court. Nevertheless, the fact that public bodies have the *power* to condemn allows public bodies to compel property owners to negotiate and reduces the ability of a few "holdouts" to scuttle an entire project.

## **A View of Condemnation for Economic Development Purposes**

### **Ronler Acres**

The Ronler Acres development in Hillsboro is a frequently cited example of economic development through eminent domain. In 1959, the land was platted into 850 lots intended for single-family homes. However, the developer never put in the infrastructure (i.e., streets and utilities) that would support construction. Therefore, in 30 years, only one house and one duplex had been developed. Although several private interests attempted to develop Ronler Acres, they all failed—thwarted by diverse ownership, outdated codes, covenants and restrictions, no infrastructure, and new zoning. As a consequence, the area became something of a wasteland surrounded by new high technology industry investments. The potential existed to use Ronler Acres for industrial development that would provide a significant number of jobs.

In 1988, Hillsboro decided to create an urban renewal plan for Ronler Acres. By the fall of 1994, all of the lots were acquired by the Hillsboro Economic Development Council, Hillsboro's urban renewal agency. Although the city did not have to actually invoke eminent domain, the availability of the condemnation power was effective in bringing property owners to the negotiating table and enabled the city to assemble the land in an efficient way. In 1994, Intel purchased 250 acres for two fabrication plants with an estimated value of over \$2.5 billion. Intel also loaned the Hillsboro Economic Development Council \$5.2 million.

Remaining parcels were sold to PacTrust, a real estate developer and investment property owner, which constructed a mixed-use neighborhood integrated with light rail transit. The Hillsboro Economic Development Council also partnered with Washington County, the Oregon Department of Transportation and others to develop infrastructure. Other Ronler Acres developments include a PGE substation, fire station, city park and sports complex. Orenco Station, the mixed-use neighborhood in Ronler Acres, has won numerous design awards.

The city of Hillsboro estimates that in 1989 Ronler Acres was worth \$39 million; it is worth roughly \$1 billion today.

Condemnation also can allow property owners to realize certain tax advantages that are not available in a voluntary sale, resulting in what is informally called “friendly condemnation.”

According to witnesses who support the use of eminent domain for public purposes, the knowledge that condemnation power is available keeps value discussions

within reasonable parameters. Witnesses who oppose the use of eminent domain view these forced sales as an abuse of government power.

Supporters of the right of condemnation view it as a crucial tool to form public-private partnerships to carry out public policy objectives.



## Another View of Condemnation for Economic Development Purposes

### Lowery Property

Eminent domain is used outside of urban renewal projects as well. The city of Keizer's purchase of Robert and Marilyn Lowery's property is cited by the proponents of Measure 39 as the type of abuse the measure is intended to prevent.

In 1946, the Lowerys moved to a six-acre property north of Salem in a then unincorporated area known as Keizer. They spent the next 15 years building a home, raising their family, and running a nursery business on the family's land.

By the early 1950s, Interstate 5 was being built. By 1979 developers started to gather parcels of land to build a commercial and industrial development at the I-5 and Chemawa Road interchange. The Lowerys' property was immediately adjacent to the interchange.

The city of Salem expressed interest in annexing the land, prompting Keizer to incorporate as a city in 1982. Keizer then began looking for a developer for the project. In September 2004, construction on the development began. Twenty-six homes were affected—14 of them were moved and the rest were demolished. It took some time to negotiate with all the owners. Bob Lowery was the last holdout. The *Statesman Journal* reported that one parcel sold for \$400,000, but Lowery asked for \$6 million, half of which he would donate back to the Keizer community. The developers were trying to negotiate a lower price. The developers and the city were adamant that the Lowerys' refusal to sell not hold up the project. They noted that the city had the power to condemn some or all of the Lowerys' land and transfer it to a private developer.

Oregonians in Action (the sponsor of Measure 39) assisted the Lowerys in fighting Keizer's "illegal use of its condemnation authority." According to Oregonians in Action, "Condemnation abuse is the new tool used by local governments to victimize the property owners. The city of Keizer wants the Keizer Station development so badly that it is willing to violate the civil rights of the [Lowerys] no matter what."<sup>2</sup>

The threat of condemnation was enough to force the family to sell its land, and the city of Keizer eventually negotiated a deal with the Lowerys. Large-format retail stores now sit on the property.

According to Chip Lazenby, former legal counsel for the Portland Development Commission, if Measure 39 passes, government agencies' role in planning development will be curtailed, and development decisions, when left to the "tyranny of the free market," will result in less value to the community as a whole.

### Effects of Measure 39

Measure 39 would prohibit public bodies from condemning most real property if they intended to transfer any part of the real property to a private party, such as a developer. The measure applies to real property used as a residence, a business, a farm or a forest operation.

The measure's prohibitions *do not* apply to:

1. condemned property that presents a danger to the health and safety of the community because the property is contaminated, contains a dilapidated structure or has insufficient water or sewer access.
2. timber, crops, top soil and fixtures on the real property being condemned. (For example, if the public agency condemns property for a highway and the property has standing timber, the condemning authority is permitted to sell the timber to a private party to harvest before the highway is built. Otherwise, the condemning authority would have to let the timber go to waste.)
3. condemnations for construction, maintenance or improvement of transportation facilities or systems or utility facilities or transmission systems.
4. the lease of a part of a public building to a private party to primarily serve the patrons of the public facility. (For example, a private party can operate a coffee shop in a city hall.)

Witnesses pointed out a number of ambiguities in interpreting the exceptions under the measure. For example, because the measure appears to apply only to property in active use, it is unclear whether it would apply to abandoned or vacant property, i.e., land that is not currently being "used." Your committee also heard conflicting testimony on whether Measure 39 would prevent the use of pri-

vately owned toll roads or bridges used to finance transportation projects.

A second provision of the measure would change existing law regarding the award of attorney fees in condemnation actions. Under current law, the *first* offer by the government to the property owner must be a good faith evaluation of the amount of just compensation. If a condemnation case goes to court, and the property owner is awarded more than the government's *highest* offer (made at least 30 days before trial), the former owner can recover its attorney fees incurred in the lawsuit.

Under the measure, the property owner would recover attorney fees if the final compensation award is more than the government agency's *initial* offer. This provision would put more pressure on the public body to make higher first offers or risk paying the property owner's attorney fees.

### III. ARGUMENTS PRO & CON

#### Arguments Advanced in Favor of Measure 39

Proponents of Measure 39 make the following arguments in support of the measure:

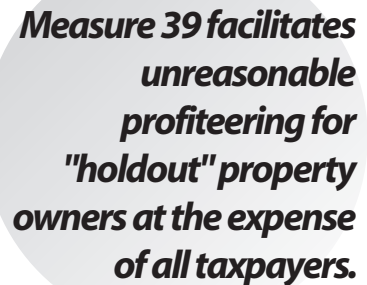
1. The right of property owners to maintain ownership of their property, in nearly every case, should supersede the right of government agencies to seize that property.
2. The right of government agencies to condemn private property must be strictly limited to projects intended for “public use” and should not include projects intended for “public purpose.”
3. Measure 39 is a preventive measure, carefully worded to reasonably curtail the power of eminent domain.
4. Without Measure 39, private property owners have been and will continue to be victimized by government agencies’ unfair seizure of private property.
5. Measure 39 would assure that private property owners are treated fairly when government agencies attempt to acquire property for public-private partnerships.
6. Government-sponsored economic development projects are not a legitimate reason to invoke government’s power to seize private property.
7. Blight is a highly subjective and difficult-to-define term which has led to unfair and inconsistent application of the power of eminent domain.

***Measure 39 is a preventative measure, carefully worded to reasonably curtail the power of eminent domain.***

## **Arguments Advanced Against Measure 39**

Opponents of Measure 39 make the following arguments in opposition to the measure:

1. Measure 39 is unnecessary. The rights of property owners already are reasonably protected; condemnation is an act of last resort and seemingly inappropriate condemnation proceedings in Oregon are extremely rare and are largely historical.
2. The right of property owners to maintain ownership of their property should not be absolute and must be balanced with government agencies' duty to provide for the common good.
3. The right of eminent domain currently allows, and should continue to allow, government to condemn private property both for publicly owned facilities and for privately owned facilities that provide significant public benefits.
4. Measure 39 would unreasonably curtail the power of eminent domain and limit government agencies' ability to execute projects that provide jobs and stimulate economic activity.
5. Measure 39 facilitates unreasonable profiteering for "holdout" property owners at the expense of all taxpayers.
6. Measure 39 could greatly increase the cost to taxpayers for public-private partnerships that are intended to benefit the public at large, thereby potentially redirecting funds away from other public services.



***Measure 39 facilitates unreasonable profiteering for "holdout" property owners at the expense of all taxpayers.***

## IV. DISCUSSION

### **Is there a problem with condemnation in Oregon that needs to be addressed?**

While both opponents and proponents agree that condemnation proceedings are rare in the state of Oregon, proponents say that Measure 39 is a necessary preventative move to limit government's ability to condemn real property for an ostensibly public purpose, but with the actual intent to benefit a private party. Proponents also say they want to dissuade well-connected private developers from enlisting government agencies' help to secure private property for commercial development.

Your committee found little evidence of systemic abuse in Oregon. There is, in fact, evidence that agencies in Oregon have been judicious in using eminent domain authority. The city of Sandy's urban renewal plan states that its urban renewal agencies cannot acquire land via eminent domain unless the project to be built is specifically identified in the plan. Portland requires a City Council resolution to condemn land, and the Portland Development Commission, which has used condemnation in just 18 of its 510 property acquisitions since 1980, has never taken a condemnation proceeding to court.

To be sure, as discussed earlier in this report, Oregon has had its share of condemnation controversies over the years, but these appear to be the result of projects that, in retrospect, may have been ill-advised but not corrupt. Oregon has also had its share of successes, and many parts of the state would look far different—and less economically viable—than they do today if the option to use eminent domain had not been available for economic development purposes.

***Your committee found little evidence of systemic abuse in Oregon.***

***There is, in fact, evidence that agencies in Oregon have been judicious in using eminent domain authority.***

**Are Measure 39's restrictions on government-sponsored economic development activities wise?**

For voters, a decision on an issue such as Measure 39 can lend itself to an emotional reaction. In fact, the proponents of Measure 39 promote a visceral response, referring to their initiative as the "Government Can't Steal My Property And Give It To A Developer Act." Your committee notes that under current law the owner of condemned property is entitled to compensation based on the property's current market value, which is difficult to view as "stealing."

The right of private property has long been cherished in the United States. Even before the Revolutionary War, American colonists clung to John Locke's idea that "Life, Liberty and Property" were three inalienable rights. Government's use of eminent domain is similarly established in our history. This inherent power of the sovereign dates back to feudal times, and is established in the Fifth Amendment. Under federal case law and the Oregon Constitution, "public use" is understood to include the more broadly defined "public purpose."

Economic development is a long-standing and broadly accepted function of government, the benefits of which include rising income levels, advancements in education and health care, and environmental protection. Urban renewal, often through commercial and residential redevelopment, is one of the chief ways that governments facilitate economic growth. Your committee concludes that economic development is a legitimate and impor-

tant power, and eminent domain is a critical tool for government to have in order to facilitate such development. Economic development through public-private partnerships is desirable because such partnerships allow governments to participate and assist in development decisions, while shifting responsibility for constructing and operating the developments to private parties who are in the best position to operate them profitably. During economic slowdowns in the late 1970s and early 1980s, urban renewal projects were some of the few economic development efforts in many Oregon communities. The city of Newport, for example, was able to assuage some of the effects of a lagging fishing industry by using urban renewal improvements to promote tourism.

***Under federal case law and the Oregon Constitution, "public use" is understood to include the more broadly defined "public purpose."***

Critics of using the eminent domain power for economic development argue that, if Measure 39 passes, government agencies could still enter into public-private partnerships for economic development purposes. It simply would need to purchase property in voluntary, arms-length transactions rather than using the coercive power of eminent domain.

However, witnesses testified that, in some situations, the option to use condemnation is the only way to make a development work. First, provisions in loan documents sometimes prohibit “unbundling” parcels, and these provisions can be overcome by the condemnation of only a portion of a bundled group of properties. Second, once word circulates among property owners that a particular area is targeted for a development, there is a strong and increasing incentive for property owners to “hold out” until just a few parcels need to be acquired. In the absence of the eminent domain power, these final “holdouts” can hold a project hostage with demands for compensation that far exceed the pre-development fair market value of their property. Your committee is concerned that, if Measure 39 passes, public-private partnerships for economic development would become prohibitively expensive due to a shift in economic power to these holdouts.

Finally, the federal tax code contains a significant tax advantage to property owners whose property is condemned. Specifically, Section 1033 of the code allows sellers to avoid gain on property sold “under threat or imminence” of condemnation, as long as they re-invest the proceeds no more than two years after

the year in which the sale is made. In theory, the seller could arrange for similar tax results using a Section 1031 “like-kind exchange.” However, a “like-kind exchange” is more difficult to achieve because there is only a six-month window to reinvest proceeds, and the transaction must comply with a long list of technical requirements. The condemnation tax advantage, which may be critical to the success of a project, likely would be eliminated if Measure 39 passes.

Your committee is concerned that this measure would severely hamper governments' abilities to foster economic development to address a potential problem that may never materialize.

### **Would Measure 39 fix perceived shortcomings in Oregon's condemnation process?**

Your committee heard testimony—even from supporters of condemnation for economic development—about problems with the current system of compensating property owners whose land has been condemned. For example, current law does not require governments to fully inform property owners of their rights in condemnation cases.

Your committee also heard that less affluent and less informed property owners are often disproportionately affected by condemnation, because they often do not have the means to hire an attorney and challenge the government agencies' offer. Also, the condemning body is currently not required to pay for business damages (e.g., lost profits or relocation expenses when a business is forced to move). In

practice, some condemning bodies may pay these expenses to avoid a fight over condemnation, but in the absence of a legal mandate, the property owner has no power to compel payment of business damages.

Measure 39 would address one issue identified by some members of your committee as a shortcoming of current law. Currently, it is difficult for a property owner to recover attorney fees and costs in a condemnation case. The property owner can only recover attorney fees and costs if the owner obtains a higher judgment in court than the highest offer made by the condemning public agency at least 30 days before trial. This structure can encourage the condemning public agency to “low ball” early offers in the hope that the property owner will accept. If the property owner holds out, the government can make its “real” offer 31 days before trial and avoid having to pay attorney fees.

Under Measure 39, the property owner would be entitled to attorney fees if it received more in court than the condemning body’s *initial* offer. This change would put more pressure on the condemning body to make a “fair” first offer. Even if this change in the negotiating leverage in favor of property owners would have beneficial aspects (a point on which your committee reached no consensus), those benefits would not outweigh the adverse impacts of the measure noted above.

### **A philosophical divide separates Measure 39's proponents and opponents.**

Your committee was impressed by the fundamental differences in philosophy between proponents and opponents of Measure 39. Proponents of the measure tend to be inherently suspicious of the power of government and dubious of governments’ abilities to plan better communities than market forces will create. Opponents of the measure tend to view government as a benign force that plays a necessary role in guiding development more productively than would market forces left to their own devices.

Your committee believes that government has a positive role to play in economic development decisions and that an unrestrained free market is not likely to lead to optimum development of communities. In short, if opponents of condemnation believe that governments are making bad planning decisions, the answer to bad planning should be better planning, not the absence of planning.

Moreover, your committee believes that most public agencies in Oregon have been restrained in their use of condemnation, at least in recent decades, due both to a genuine concern for the impacts of their actions and knowledge that their actions are subject to public scrutiny.



## V. CONCLUSIONS

While the existing eminent domain process in Oregon appears to have some shortcomings, your committee concludes that Measure 39 is not a reasonable solution. Addressing the shortcomings requires a more targeted approach than Measure 39's nearly complete prohibition on the use of eminent domain to transfer property to a private party.

While Measure 39 would undoubtedly put land-owners on a better footing for dealing with public agencies interested in their property, it reaches too far in limiting government agencies' condemnation power. Measure 39 would have consequences that impede the legitimate interests of a larger society. A better approach would be to reform Oregon law to ensure that compensation paid to property owners whose land is taken is fair. This should be done in the Oregon Legislature, where a bill can be carefully crafted to address the complexities of the issue.

***While the existing eminent domain process in Oregon appears to have some shortcomings, your committee concludes that Measure 39 is not a reasonable solution.***

## VI. RECOMMENDATION

**Your committee unanimously recommends a NO vote on Measure 39.**

Respectfully submitted,

Pamela Clark

Joel Fowlks

Bob Geary

Laura Graser

Lisa Humes-Schulz

Scott Seibert, chair

Jeff Knapp, research adviser

Wade Fickler, policy director

## ACKNOWLEDGEMENTS

Your committee would like to offer specific thanks to research adviser Jeff Knapp, who contributed much more than just his insight and guidance, and helped us navigate a complicated subject and organize this report.

## CITATIONS

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## VII. APPENDICES

### Witnesses

Jill Gelineau, attorney at law, Schwabe, Williamson & Wyatt  
Mayor Tom Hughes, City of Hillsboro  
David Hunnicutt; chief petitioner for Measure 39; president, Oregonians in Action  
Marge Kafoury, former lobbyist, City of Portland  
David Lawrence, former planner, City of Hillsboro and City of Portland  
Chip Lazenby, former legal counsel to the Portland Development Commission  
Karen Williams, attorney at law, Lane Powell PC; former general counsel to the Portland Development Commission

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