In 2006, voters shunned extreme anti-planning measures, while rewarding forward-looking vision.

By David Goldberg

The November 2006 election, watershed that it was in national politics, also was pivotal in the progress toward better planning and more livable neighborhoods, cities and metro areas. But, it was as important for what did not happen as for what voters actually approved.

When the dust settled, the voters had approved a great deal from the perspective of Smart Growth practices and policies. At least 13 governors were elected or re-elected after advocating strongly for policies such as focusing public investment in older towns and cities; fixing existing infrastructure before expanding into undeveloped land; creating more affordable housing near job centers; investing in complete transportation systems that include roads, transit and safe streets for people on foot or bike; and protecting critical farmland, forests and other natural areas. Voters approved 78 percent of the ballot measures supporting public transportation, voting to spend $40 billion in new transit-related investments, at the local, regional and state levels. The November vote was the strongest ever for land conservation measures, with voters in 23 states approving nearly 100 ballot measures totaling $5.73 billion in new funding, surpassing the record of $5.68 billion set in 1998.
Nevertheless, that progress may well have been eclipsed had voters across the West embraced extreme measures that sought to dramatically curtail communities’ right to use planning and zoning to shape their growth and development. These so-called “regulatory takings” initiatives, part of a coordinated campaign by antigovernment groups, would require taxpayers to pay landowners any time a rezoning or other regulation reduced the speculative value of their property. In effect, this would have forced communities to pay certain landowners or developers to obey zoning and land-use laws. Under most of the measures, communities that couldn’t pay would have to waive their planning rules or environmental protections, exclusively for those landowners. After making it to the ballot in four states (others were disqualified for various reasons), these “takings” initiatives were rejected by voters in California, Washington and Idaho. Only Arizona adopted such a measure.

The Oregon bombshell

These were copycats, to one degree or another, of Oregon’s Measure 37, which voters approved in a statewide referendum in 2004. Measure 37 was the first major win for extreme property rights advocates in more than a decade.
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in more than a decade, and they had hoped to replicate it many times over in 2006. The initiative was presented to voters with an appealingly worded ballot title that read: “Governments must pay owners, or forgo enforcement, when certain land-use restrictions reduce property value.” It was sold through a slick marketing campaign that featured a nonagenarian widow, Dorothy English, who told a story of how a 30-year-old zoning change had prevented her and her now-deceased husband from realizing their dream of developing their rural property and living off the proceeds. Measure 37, supporters said, would allow English to demand that local and state governments pay her the windfall that would have come had she been allowed to build a subdivision on her property.

What the “pro” campaign did not explain to voters was that Measure 37 would throw into chaos 30 years worth of planning, zoning and protection of farm and forest land. Most localities don’t have millions of tax dollars lying around to pay claims for long-ago downzonings, meaning that governments would have to “forgo enforcement” of zoning and land protections—but only for landowners who had owned land long enough to make a claim. Everyone else had to abide by the laws, and watch as farms and forests gave way to subdivisions, gravel pits, strip centers or other unexpected development.

Capitalizing on the eminent domain backlash

Even as Oregonians were trying to sort through the implications of Measure 37, anti-regulation activists were looking to duplicate it in other states. However, because Oregon is nearly alone in having a comprehensive system of land planning, there were fewer obvious hooks to excite voter interest in other states. That seemed to change in June 2005, when the U.S. Supreme Court ruled that the city of New London, Conn., had the right to condemn the homes of Susette Kelo and six others to make room for “economic development”—in this case, a 100-acre drug manufacturing complex. The court did not expand the use of eminent domain, but rather declared that limiting it in this instance was a state, not a federal function. Still, the notion that government might condemn someone’s home simply to enhance the local tax base, rather than for...
a public use such as a school or a road, provoked a firestorm of outrage.

Although the idea of paying people who are affected by regulations is a different matter from a government compelling someone to sell their property for economic development, the anti-regulation advocates saw a chance to wrap the two together under measures touted as protecting “property rights,” notes Bob McNamara, policy representative for the NATIONAL ASSOCIATION OF REALTORS®. “They considered eminent domain reform a sure thing, so there was an attempt made to pair the regulatory compensation measures with eminent domain,” said McNamara, who followed the measures nationally.

In April 2006, the Reason Foundation, a libertarian think tank based in Los Angeles, published a 58-page guide to “exporting” Measure 37 to other states, using the Kelo decision as a wedge. Later that spring, a wealthy New York real estate investor named Howard Rich—longtime supporter of antigovernment causes—took up the challenge and began channeling funds to signature-gathering companies in at least six states, in order to get these “Kelo plus” measures on the ballot. That effort initially appeared to garner enough signatures to put the initiative up for a vote in California, Idaho, Arizona, Montana, Nevada and Missouri. Court decisions and apparent signature-gathering fraud knocked measures off the ballot in Missouri, Montana and Nevada. That left three states—California, Idaho and Arizona—where “regulatory takings” was riding under the banner of eminent domain reform.

In Washington, where the Farm Bureau had been championing a Measure 37 copycat before the Kelo decision, voters considered a “takings” only measure.

A radical departure

Libertarian theorists have been advancing the notion of regulatory takings for a generation, says Larry Morandi, who tracks “property rights” legislation as the director of state policy research at the National Council of State Legislatures. The concept has been most heavily promoted by the extractive industries—timber, mining, etc.—affected by environmental legislation, such as the Endangered Species Act. They argued that restrictions on the development of wetlands or the extraction of old growth timber, as examples, constituted a “taking” of some of the economic value of their property. Taxpayers therefore should compensate them for the “benefit” of environmental protection. “The idea found its way into the Contract for America,” the legislative agenda of the Republicans who took control of Congress in 1994, Morandi recalls. “They didn’t succeed in passing much at the federal level, but in the early to mid-1990s property rights issues were big in the states. Approximately 20 states from 1991 to 1996 passed legislation addressing regulatory takings to some degree.” Most were “mild,” Morandi says, requiring a state attorney general to issue a “takings” assessment on new regulations, to see whether they resulted in a reduction in value that should be compensated. Others set a threshold in
the reduction of value—usually 50 percent or more—above which an owner might have to be compensated to some degree. The effects, ultimately, were limited.

“What they were pushing last fall was dramatically different from what we saw in the 1990s,” Morandi says. The first major difference is the notion that taxpayers should pay for every dollar of claimed reduction in the speculative value resulting from a zoning decision or environmental measure. Here’s how it works: Say you bought 100 acres of farmland in 1985 that had a “rural-agricultural” zoning of one house per acre and a healthy chunk of granite beneath it. You farm it for 20 years, during which time urban development encroaches and the county begins to worry that it can’t afford to extend urban services across an entire county covered with one-acre lots. To avoid that prospect, and preserve the viability of farming for future generations, the county changes the zoning to allow only one house per 20 acres, and to disallow gravel mines in that area. Under a Measure 37-style regime, you could demand that the county pay you for the 15 house lots and the gravel mine that you “lost.”

That brings up the second radical innovation of Measure 37: If taxpayers can’t cough up that amount of money, the community must waive its zoning, but only for you. Everyone else around you, who thought they were living in a rural environment, has to abide by the zoning, while you build a subdivision and a gravel mine in their midst.

That’s precisely what has happened in Oregon, according to numerous published reports and observers in the state. To date, more than 7,500 claims for over $4 billion have been filed, covering more than a half-million acres, according to data compiled by the Portland State University Institute of Metropolitan Studies. The largest number of claims by far is in the Willamette Valley, the rich agricultural zone that also happens to surround the state’s largest cities, such as Portland and Eugene.

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Sixty-one percent of Oregonians want the Oregon Legislature to either fix or repeal Measure 37.

In almost every case settled to date, local governments, lacking taxpayer cash, have felt compelled to waive the rules. To this point, a series of unresolved legal questions has prevented most of the development from going forward.

“My sense is that most folks ... were probably thinking more of the right of a farmer to build a house on his farm, which sounds reasonable,” Lane Shetterly, director of the Oregon Department of Land Conservation and Development, told an interviewer late last year. “I don’t know that most voters expected the extent of claims that we are seeing for subdivisions and major partitions of farm and forest lands.” Indeed, there appears to be a growing sense of buyer’s remorse among voters: In a statewide survey in late January, 52 percent of respondents said they would vote against the measure, while only 37 percent would support it. In addition, 61 percent of Oregonians want the Oregon Legislature to either fix or repeal Measure 37.

REALTORS® weigh in

The confusion in Oregon played a large role in the decision-making for REALTOR® associations in the states facing “takings” ballot measures, McNamara says.

“Normally, REALTORS® are very friendly with conservative legislators who protect property rights. They themselves place a high value on private property rights,” notes McNamara. “It’s difficult when they see the pendulum swinging kind of far in this situation. Most probably don’t think it’s a good idea to compensate for down-zoning, and they saw what happened in Oregon, but they wouldn’t want to alienate the legislators who are usually friendly. So their instinct was to tell their membership to vote their own conscience.”
People want a balance, and most voters recognized that these measures went to an extreme.

But that wasn’t enough in this case, said Alex Creel, government affairs director for the California Association of REALTORS®. “We formed a task force to look at Proposition 90, and we concluded we had to oppose it,” Creel said. “There were a number of aspects of it that were troubling. We already have good eminent domain law in California, and the additional restrictions would have just eliminated redevelopment in the state. Any zoning change would have created a taking that had to be compensated, and I don’t know how local government could have functioned with that limitation, or paid for it.”

The Idaho Association of REALTORS® came to a similar conclusion and joined a broad array of organizations and prominent individuals opposing Proposition 2. The Washington REALTORS® declared itself “neutral,” even after noting that, should Initiative 933 pass, homeowners’ expectations regarding their neighborhood no longer would be predictable.” The Arizona Association also declared itself neutral on the state’s Proposition 207.

In the end only Arizona’s initiative passed, with 65 percent of the vote. In Idaho, by contrast, the measure was crushed, rejected by 76 percent of the voters in a state with a strong libertarian streak. Observers there say voters resented the infusion of outside money and pressure from activists such as Howard Rich, and were eager to maintain the ability to manage growth and protect natural resources. The “takings” measure was soundly defeated in Washington with 58 percent voting “no.” 10 years after a somewhat similar measure was rejected in like fashion, California’s vote was more of a squeaker, 52 to 48 percent. Campaign officials there noted that the voters faced a crowded ballot and a number of high-profile, high-dollar races claming for attention.

In the states where the measures went down, voters’ decisions seemed to turn on the likely regulatory confusion and steep costs of paying for—or waiving—every zoning change or environmental protection, McNamara said. “People asked themselves, ‘Who’s to compensate these folks?’ Well, the taxpayers, and that’s everybody. And if the government has to back off the regulations, does that mean everything gets developed?”

Don Chen, executive director of Smart Growth America, says that voters want the regulations that help them shape urban growth and protect the environment to be fair for individual property owners. “But that doesn’t mean surrendering the right to determine their community’s future or abandoning their desire to leave a legacy worthy of their children. People want a balance, and most voters recognized that these measures went to an extreme that would benefit a few, special interests, but at a high cost to everyone else.”

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