Property Rights and Public Values
COMPASS
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Thank you for inviting me here this evening. The last time I was in Idaho was in the fall of 2006, 10 days before the election where Proposition 2 was on the ballot. It is a great statement about the commitment of Idaho citizens to both the quality of life you enjoy here and fiscal responsibility that Prop 2 was defeated

What I would like to do this evening is talk about property rights – specifically real estate property rights – in terms of American history, political philosophy, real estate economics, and fundamental fairness.

And it's only fair that I fully disclose the perspectives from which my comments will come. Professionally I am a consultant in real estate and economic development, advising communities how to be economically competitive in the 21st century economy. My technical training is in real estate appraising and my background in real estate management and development.

On the political side I am a lifelong crass, unrepentant, real estate capitalist Republican type and unapologetic about it. So if you came here hoping to hear someone cast real estate developers, ranchers, or Republicans as evil demons you came to the wrong place. Likewise if you're hoping to hear a passionate description of environmentalists or city planners as divinely sanctified maybe you should skip out now.

I also early on want to make a clear distinction between the issue of Eminent Domain and the issues of planning, zoning, and land use regulations. The proponents of initiatives like Proposition 2 around the country have consciously tried to blur the distinction. And this is a very clever political ploy. There is, in my judgment, very legitimate anger at the over-reaching use of Eminent Domain and in the Supreme Court decision on Kelo. For what it's worth, I think the Supreme Court did us all a great disservice in not narrowing the definition of "public benefit" as it applies to the use of Eminent Domain. The Court did say, however, that the States were welcome to more strictly limit the use of Eminent Domain and many states, including Idaho, have done just that. While on a professional level I would regret limiting Eminent Domain to nothing but highways and school sites, there's no question in my mind that there have been abuses. And I will tell you that over the last twenty years I've probably had 1000 different clients, and not once, not once have I ever recommended the use of Eminent Domain for economic development or for that matter any other purposes.

I'm disappointed in the Supreme Court decision and I absolutely understand the anger that it has engendered. But I'm not going to fall for the bait of accepting the spurious extension that because Eminent Domain has occasionally been abused that

land use protections need to be gutted. And as one who believes in the wisdom of informed voters, I don't think they will either and the vote here in Idaho on Proposition 2 confirmed that.

But I also don't want to be guilty of overstressing the link between the Kelo decision and measures such as Proposition 2. After all, Oregon's Measure 37, which we'll hear about shortly, was passed before Kelo. But Kelo has provided new impetus to a broader movement which goes back 15 or 20 years – the so called "property rights" movement.

So I'd like to do begin through the examination of the arguments made by the property rights movement and then suggest to you why these arguments aren't very valid.

So let's begin with the most commonly heard argument: *It's my property and I have the right to do with it as I please.* Well is there a right to own property? Absolutely. Is there a right to use property? Absolutely. Is either the right to own or the right to use absolute? Absolutely not!

One could certainly make the case that of the rights specified in the Bill of Rights the right of free speech is first among equals. In fact, without the right of free speech the rest of the rights become largely meaningless. But is the right of free speech unlimited? Certainly not. There are limits to free speech and those limits are established by the impact your speech has on others.

The Second Amendment gives us the right to bear arms. But again that right is severely restricted, again based on how the use of those arms affects others.

In fact there is an old principle of law that says "My right to swing my fist ends where your nose begins." But that principle applies to the right of real estate ownership and use as well.

Where did the concept of rights come from originally? Well, in America it came from a variety of sources – Greek and Roman law, English common law, and in some cases Spanish and French law. Every one of those philosophical and legal precedents recognized the peculiarity of the nature of real estate. Real estate is unlike any other asset on a number of grounds: every parcel is unique; it is fixed in place; it is finite in quantity; it will outlast any of its possessors; and it is necessary for virtually every human activity. Because of these characteristics real estate has always been treated differently than any other asset in law, lending, political perspective and taxation.

But there are two economic reasons why real estate has been treated differently as well: 1) the impact of land use on surrounding property values, and 2) the primary source of value in real estate being largely external to the property lines.

If that doesn't immediately make sense, think about that old real estate cliché "The three most important things in real estate are location, location, location." Notice it doesn't say, "The three most important things are roof, walls, and floor." It is a property's location which provides most of its economic value – that is the context within which the property exists – and it is the protection of that context that virtually all land use ordinances are about whether they are zoning laws, historic districts, or ordinances to maintain viewsheds.

Real estate has economic value, but that value doesn't magically emerge from within the four lot lines. It comes from elsewhere. In real estate economics are recognized four "Forces of Value". These are the factors in the marketplace that move the value of a particular parcel both up and down. These forces are: social, political, economic, and physical. Let me give you a quick example of each.

In many communities there will be a belief that, for example, the Jefferson Elementary School is better than Lincoln Elementary. That belief may or may not be factual. But whether or not it is true buyers pay a premium for the identical house in the school district deemed to be the better. This is an example of the social force of value – economic value being affected by the attitudes of potential buyers and sellers.

We are in the midst of a real estate recession that is a direct outgrowth of sub-prime lending – adversely affecting property values on houses even with no mortgage at all. At the same time interest rates for real estate mortgages are still relatively low. But what would happen if tomorrow the Federal Reserve Bank would raise the Discount Rate? Banks would raise their interest rates, including home mortgage rates, and very simply the value of houses would go down. Both the sub-prime lending effect on values and a huge jump in interest rates are examples of the economic force of value at work.

In 1979 the Russians sent troops into Afghanistan. Jimmy Carter, who was President at the time said, "We'll show them. We'll quit selling wheat to the Russians." I have no idea if that was a good or bad response. But I was living in South Dakota at the time, making my living as a real estate appraiser, and I can tell you that virtually overnight the value of wheat land in western South Dakota went down. The land didn't change, rainfall didn't change, the bushels per acre that could be produced didn't change. But the value of the land changed. Because of some stupid war 10,000 miles away and some goofy political decision 2000 miles away, the land in South Dakota declined in value. That's the political force of value.

So there are three examples of the social, the economic, and the political forces of value. Now could the residents of the Lincoln Elementary School District sue the School Board because their property values are less because the school is considered inferior? Of course not. Could all the people hoping to sell their homes collect from the Federal Reserve because they allowed sub-prime lending or that their raising interest rates caused a decline in property value? Of course not. Did wheat farmers in South Dakota start a lawsuit against Jimmy Carter because the value of their wheat fields went down? Of course not. In each of those examples a public body makes decisions deemed to be in the public interest. In each of those cases there was an adverse affect on property values. In each of those cases not even the most litigious property owner would imagine he was entitled to some compensation because of those public actions.

Every day hundreds of decisions are made by public bodies at every level that impacts someone's property value. In virtually no instance is the property owner entitled to be compensated for that action.

I said there were four forces of value – the fourth being the physical force of value and it is the only one of the four created within the property lines at all. Suppose there were two houses, side-by-side, the same size, built by the same builder in the same year. One is in excellent physical condition, the other falling down. Which will sell for more in the marketplace? Obviously the one in better physical condition. And that's an example of the physical force of value. But even the physical force is not confined entirely within the lot lines. Views, infrastructure, transportation systems, access, are all components of the physical force of value but are again external to the property line and are neither created nor exclusively paid for by the individual property owner.

So this concept of "It's mine and I can do whatever I want" is both historically incorrect and economically unsupported. But let's move on to some of the other arguments.

The next argument often made by the property rights advocates is *"It's unconstitutional to regulate my land like that."* Well I'm not a lawyer, but:

A) There is a 150 year constitutional precedence supporting the public regulation of private land.

B) If there is a constitutional issue there is an entire judicial system to which the issue can be appealed.

C) The sheer fact that the "property rights" advocates' initiatives are primarily legislative and not judicial is recognition that current land use legislation <u>is</u> constitutional

But if we really want to explore the constitutionality of land use legislation let's take a brief detour into the intellectual and political groundings upon which the American system is based. Probably no one influenced the drafters of the U.S. Constitution more than the English political philosopher John Locke – especially on property rights. If there is a single individual who has most affected American political traditions on property rights it is Locke. He was a vociferous property rights advocate. It is Locke that is usually cited in the more historical of the property rights arguments.

But four understandings of Locke and property rights are important:

1) When he spoke of "property" he was talking about one's own self as well as one's assets. So he was so adamant about rights because of his resistance to tyranny over human rights – one's self was one's "property" of which one could not be arbitrarily deprived.
2) When Locke wrote about property rights and was referring exclusively to assets, however, his ultimate test was the impact of the exercise of that property right on the community – the very basis of land use regulation.
3) One cannot hope to understand Locke by citing an out of context quotation. Fundamental to Lockean philosophy is the extraordinary sense of obligation, which was grounded in his religious perspective. Locke held as a basic assumption that free men would never exercise their rights without recognizing the obligations that the exercise of those rights implied.
4) Finally, for Locke the reason societies are created in the first place is for the protection of property. What is the reason land use controls are created in the first place? For the protection of property.

Well, when the "it's unconstitutional" argument is weakened, the property rights advocates will default to "*It's un-American to tell someone what they can or cannot do with their own property.*"

Well, I don't know what constitutes "un-American." But if limiting what you can do with your land is un-American then high on the list of un-Americans would be:

1) The Pilgrims
2) The Congress that passed the Homestead Act (I'll come back to that one shortly)
3) The Mormon Church
4) The New York City real estate community who got the first city zoning law passed (to protect their property values, by the way)
5) John Oglethorpe and the settlement of Savannah.

Let alone the Native American concept of land ownership. If the regulation of land use is un-American, it's time to reestablish the House Un-American Activities Committee because we have history books full of guilty parties.

But let's look to a more recent example. I live in downtown Washington, DC. A couple of years ago there were *Washington Post* headlines about a proposal for a nude bar to move into a building on F Street, about a block from where I live.

Two things struck me about those articles. First, the argument against granting the licenses and use approvals wasn't about morality. No one was quoted saying that naked women were immoral. The entire case against the proposal was about the adverse impact clubs of that sort would have on nearby property values – the heart of what most land use regulation is about.

And secondly, nowhere in the article was a statement from the chairman of the Wise Use Movement, the Virginia Property Rights Committee, or This House is My Home about how un-American it would be to prevent nude bars from operating.

The "property rights" movement is the most selectively aggrieved political force in America. Those who loudly proclaim, "It's my land and you can't tell me what to do with it" are quick to appear before City Council when a homeless shelter is moving in next door or a sanitary land fill is proposed next to their cottage. And their argument won't be "I'm against the homeless" or "Waste shouldn't be disposed of" but rather, "That action will have an adverse affect on my property value, and you, City Council members, need to prevent that."

The next of the property rights arguments is: "*Land use regulations constitute a "taking" which entitles me to compensation for any loss in value.*"

Let's sort this argument out. First, if one's property is taken by a unit of government for public use the person is entitled to compensation under an eminent domain procedure.

But then comes this concept of "takings". In a great Tom Robbins book, Skinny Legs and All, one of the characters is an extremely erudite can of pork and beans. At one point Can o' Beans remarks, "imprecise speech is one of the major causes of mental illness in human beings. The inability to correctly perceive reality is often responsible for humans' insane behavior. And every time they substitute a...sloppy slang word for the words that would accurately describe a...situation, it lowers their reality orientations, pushes them farther from shore, out onto the foggy waters of alienation and confusion."

The use of the term "takings" has become that "imprecise speech". I don't know if it's causing mental illness, but is causing great confusion, and purposefully so.

There is a conscious attempt to redefine "takings" as any diminution of value as a result of land use ordinances.

It is well established that when an owner loses all effective use of his property through regulation he/she must be compensated. That's a taking. And when local authorities overstep the line into a taking, the Supreme Court has consistently overruled them, as they have done in recent years in the Lucas case, the Tigard case, the Dolan case and others.

But what about those instances where a land use regulation simply reduces the value of the land – is the owner entitled to compensation? And this is what is being proposed in most of the "property rights" and "takings" legislation.

Well, do land use provisions sometimes affect the value of individual properties? Absolutely! Not only land use legislation but public decisions of all kinds affect individual assets – in both directions!

We've already talked about the school that's deemed inferior – impacting your property value, and you aren't entitled to compensation.

Or the crisis caused by sub prime lending lowering the value of your home and you aren't entitled to compensation.

Or Jimmy Carter's affect on western South Dakota wheat land, and not one of them got compensation.

The common denominators among the school board, the Federal Reserve and Jimmy Carter is in each instance a public body was acting in what it saw as the public good and in each instance somebody's property was adversely affected and yet uncompensated. Land use controls are exactly the same.

But let's turn it around for a minute. Adam Smith, the father of *laissez faire* economics wrote:

> Good roads, canals, and navigable rivers, by diminishing the expense of carriage, put the remote parts of the country more nearly upon a level with those in the neighborhood of the town. They are upon that account the greatest of all improvements.

Yet today, "roads, canals" and their contemporary infrastructure counterparts remain the "greatest of all improvements.

I said I live in downtown Washington, a building called the Landsburgh – a wonderful property with great management – we love our apartment. The Landsburgh

is undoubtedly worth millions and millions of dollars. But what would it be worth if there were no water – which the taxpayers paid for – or no sewage disposal – which the taxpayers paid for – or no cops – which the taxpayers pay for – or no Metro – that the taxpayers paid for. What would the Landsburgh be worth then? Approaching $0.

I live in Washington, but grew up in Rapid City, South Dakota, a town about a fourth the size of Boise. But while we lived in town, my dad spent about a third of his time at his ranch in southeastern Montana which he bought in 1954. Dad sold the ranch some years ago but still lives in Rapid City and I went to visit him a while ago. And I asked him if there was electricity on the ranch when he bought it. "No" he said. And I asked how much he paid for the ranch, and he said, "Just over $20 per acre". When did the REA finally run power lines past the place? In 1956. What was the value of the land after electricity arrived? Between $80 and $100 per acre.

Now my dad was a good rancher, and raised good cattle. But it wasn't his investment that caused the land to quadruple in value...it was the investment by the REA funded by taxpayers.

Most of the value of an individual parcel of real estate comes from beyond the property lines from the investments others – usually taxpayers – have made. And land use controls are an appropriate recompense for having publicly created that value.

But we still hear, "If a government action causes the value of my property to go down, I'm entitled to be fully compensated."

Let me ask you, when was the last time you heard an owner say, "Because of the new highway my land went from being worth $10,000 to being worth $100,000. But since it was the action of the highway department and not some investment I made that increased the value, I'm writing a check to the city for $90,000."? No "property rights" advocate ever said that, nor should they have. Public decisions affect the value of real estate in both directions – it is one of the risks and potential rewards of ownership.

As I said earlier, I was here just before the vote on Prop 2, and mayors were legitimately concerned about where they would get the money to pay for every real or imagined diminution of value from land use controls had Proposition 2 passed. But I told them, "Mayor, not to worry. I have the solution." I have a way to come up with all the money not only to pay for any value declines but pay for your new library and whatever else is on your agenda. We'll have a 100% tax on all of the value enhancement of properties as a result of governmental actions. So when you build a new park and adjacent property owners see their values go up, we'll take as just public compensation that increment. When you add a new exit off I-84 so someone can build a Super-8 Motel, will capture that value increase for the city's coffers.

Here's where I do agree with the property rights proponents – this should be about fairness. So if it is fair that every property owner is fully compensated for any diminution of values based on public actions let's have the public compensated for every increase in value based on public actions. That's fair. If the "property rights" movement will accept that equitable trade off, I'm all for it.

But back to history for a moment. "Property rights" advocates often hearken back to the days of the Western expansion and the homesteaders as the time when men and women were really free to do as they pleased with their land.

In fact certainly the most severe and limiting land use restrictions ever enacted by the Federal government were those placed on the homesteaders of the western frontier. To be able to lay claim to their 160 acres, the men and women of the western expansion had to clear, cultivate and live on their land for five years. Almost no current land use control is that demanding. It wasn't for money that the Homestead Act placed those restrictions. The Federal government paid less than 3¢ an acre for each of those 160 acre parcels – an amount most homesteaders could have afforded to pay. A homesteader was not allowed the option of paying $4.80 instead of abiding by the land use controls. The actions were required because of the recognition of the interrelationship and the interdependence of the properties and the desire to meet the social, political, and economic needs of the sum of the landowners, and the nation as a whole, even if it meant restricting the "freedom" of the individual landowner.

Where did the ownership right to land come from originally, anyway?

There's the wonderful story about the New Orleans lawyer working on a real estate loan from a New York bank for a client. He was told the loan would be granted if he could prove satisfactory title to the property being offered as collateral. The lawyer dutifully tracked the chain of title back to 1803 and sent the abstract to the New York bank. A few weeks later the attorney received a letter from the bank which read as follows:

"We have received the Abstract of Title prepared in regard to your client's loan application. However, we must point out that you have only cleared title to the proposed property back to 1803. Before final approval can be given, it will be necessary to clear the title back to its origin."

So the attorney wrote back saying, "Your letter regarding my client's loan application has been received. I note that you wish to have title extended further than the 203 years covered by the Abstract we have provided. I am happy to send you this additional information. As you know my client's property is located in the City of New Orleans, Parish of Orleans, State of Louisiana. The present State of Louisiana was part and parcel of a larger area known as the Louisiana Purchase which was acquired by the government of the United States on payment of good and valuable

consideration to the nation of France in 1803, the year of origin identified in our Abstract.

France had acquired the subject area from Spain through Right of Conquest. The land came into the possession of Spain by Right of Discovery made in the year 1492 by a sea captain named Christopher Columbus, who had been granted the privilege of seeking a new route to India by the Spanish monarch, Isabella. The good queen, Isabella, being a pious woman, took the precaution of securing the blessing of the Pope before she sold her jewels to finance Columbus' expedition. Now the Pope, as I'm sure you know, is the emissary of Jesus Christ, the Son of God, and God, it is commonly accepted, created this world. Therefore, I believe it is safe to presume that God also made that part of the world called Louisiana.

God, therefore, would be the owner of origin and His origins date back, to before the beginning of time of the world as we know it. I hope you find God's original claim to be satisfactory. Now, may we have our damn loan?"

Well, even if you don't go back as far as God, if you trace a deed back to the earliest entry it will be a conveyance from the government – as representative of the people – to the first private landowner. Where did the government get it? Through conquest, purchase, cession, or negotiation. The government – and that means all of us – is a prior owner to all subsequent deed holders. And that original conveyance reserved for the government four rights: the right of eminent domain, the right of taxation, escheat (the right to reclaim title if there are no heirs and no will) and the right of regulation (the police power). These four are prior rights held by the people through the government prior to any subsequent owner's individual rights.

Now you'll often hear from developers or their lawyers, "*I'm entitled to develop my property to its **highest and best use.***" Well, highest and best use is a real estate appraisal concept with a very specific meaning. "Highest and best use is that use which, at the time of the appraisal, is the most profitable likely use to which the property may be placed." But the key word is *likely* and the first constraint on likelihood is that use which is legally permitted. If a property is currently zoned General Agricultural, for example, someone who claims their highest and best use is as a resort hotel is either, a) woefully ignorant of the basic concept of what highest and best use is, or, more likely b) is trying to badger public decision makers into a change by distorting the meaning of highest and best use.

Highest and best use does **not** mean most profitable use imaginable. If it did we would have topless bars, hog rendering plants, and hazardous waste disposal plants in every residential neighborhood in America.

I read about the dispute between the proponent and opponents about the claim that Proposition 2 could turn any Idaho property including farm land into junk yards,

power plants or high rises. I want to make a third case. Look, we need power plants and we need junk yards. What land use regulations, zoning, and comprehensive plans do it protect the owner of the power plant and the junk yard from law suits claiming their activity is diminishing the value of abutting properties. That's not robbing them of rights; it is giving them the specific right to carry out their legitimate and necessary activities.

I began the presentation saying I was a Republican. I remain a Republican because I really do believe in three principles that historically have been the basis of Republican philosophy: 1) elected officials ought to be prudent with taxpayers dollars; 2) as many decisions as possible ought to be made at the level closest to the people as possible; and 3) a sense of public and individual responsibility. The property rights movement is an abrogation of all three of those principles.

As we're all painfully aware, this is an election year. And every candidate for every office is supported by dozens of advocacy movements. Most of them are "rights" movements: animal rights, abortion rights, right to life, right to die, states rights, gun rights, gay rights, property rights, women's' rights, and on and on and on. And I'm for all of those things – rights are good. But any claim for rights that is not balanced with responsibilities removes the civility from civilization, and gives us an entitlement mentality as a nation of mere consumers of public services rather than a nation of citizens. A consumer has rights; a citizen has responsibilities that accompany those rights.

As a crass unrepentant capitalist real estate Republican type I am certainly all for property rights. But who is talking about property responsibilities? This surreal concept that the right to own real estate somehow exempts one from having to balance rights with responsibilities, this Larry Flint attitude of "I can do what the hell I please and the rest of you be damned" is not only alien to 300 years of American political history, antithetical to how the west was developed, and the most blatant renunciation of fiscal responsibility today, but it is the ultimate gimmick to pass on bankrupt cities to our kids 20 years from now.

Those who are strong proponents of so called "property rights" movement tend to be politically those who also claim to be for fiscal responsibility. We have reached a point where those two concepts are mutually exclusive. Either we are going to be responsible with taxpayers' dollars and have reasonable land use controls or we are going to have a "do whatever you please" land use policy at the expense of fiscal responsibility. And it will be hellishly expensive for taxpayers.

I began by telling you that I was in the business of economic development. A while ago I went to every economic development website in Idaho that I could find. There was one common denominator in every one – they stressed the quality of life

that their part of Idaho provides. And that only demonstrates that the economic development proponents in this state understand what they are doing. Even though the phrase may be over used, "Quality of Life" is the most important economic development variable in the 21st Century. The towns and cities that will be economically competitive in the 21st will pay attention to quality of life criteria. One of the best lines I saw was this, "The lifestyle in Northern Idaho is uncompromised. You're not far from paradise when you can see the mountains from the office window and walk to the lake on your lunch break." But you're not going to maintain those valuable amenities without sensible land use controls.

Now I'll accept that the property rights people are responsible citizens and wouldn't do anything that would adverse affect the property values of their neighbors. My experience is that people who become politically active, regardless of what side of what issue, do tend to be responsible citizens. But let me ask you a question – if there were no laws whatsoever against bank robbery, how many of you would go out and rob a bank? No one? Then why do we have laws against bank robbery? Because it isn't that the vast majority of us wouldn't rob a bank one way or the other. It's that all of us suffer when even one person does. I will accept that property rights people are responsible citizens. But everybody isn't – even in Idaho. And because of the inordinate economic impact that one property has on nearby properties, sensible land use controls are the only way to protect us all from irresponsible actions.

The sociologist E.V. Walter wrote, "For the first time in human history, people are systematically building meaningless places." The meaningless place will not be the economically competitive place. John Locke, although writing about a slightly different subject, had an even better phrase – "The undistinguishable inane." Without sensible land use controls we won't have the view of the mountains; we will only have the undistinguishable inane.

Land use controls are, in fact, a capitalist plot to optimize the property values of the majority of owners, not some communist conspiracy to deprive individuals of some imaginary "property rights".

Adam Smith perceptively observed that, "As soon as the land of any country has all become private property, the landlords, like all other men, love to reap where they never sowed." That doesn't mean we are depriving them of rights when we tell them no.

Thank you very much.

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