

MEMORANDUM

Analysis and Impact of Washington State Proposed Initiative-933

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Background on I-933

As is the case in many parts of the country, farming in Washington state increasingly can be a struggle. Globalization, consolidation in the food industry, increased American consumption of processed foods and other factors have opened up farm product markets to new, increasingly bitter, international competition. At the same time, property costs have soared, leaving land ownership out of reach for most farm businesses that truly hope to be economically sustainable over the long term. The cost of other farm inputs like labor, pest management and energy continue to rise, driven by a mostly urban economy. And the lack of financial support to help farmers cope with the rising costs of environmental compliance is making it ever-more expensive for them to do business. Initiative-933, which is led by our Washington State Farm Bureau, is a product of the legitimate frustration that these developments are creating within our agriculture community.

As the local American Farmland Trust representative in Washington, I made an analysis of this initiative for local agriculture groups, and I am providing this report on my perspectives to the organization. After a close examination of the language and likely impact of Initiative-933, I strongly believe this measure is the wrong approach to addressing the above concerns. Consistent with AFT's long-standing role of working closely with agriculture on such issues, this memo will respond to several sets of related questions that have been posed by farmers and farm groups about the impact of the measure on agriculture. I-933 may be read in its entirety at:

<http://www.secstate.wa.gov/elections/initiatives/text/i933.pdf>.

Answers to Questions Posed by Washington Agriculture Groups

Questions – Impacts on laws prior to and after 1996:

What is the actual effect of this initiative on zoning laws set prior to 1996? The proponents claim no effect, while the opposition claims that these laws would likely be rendered useless. Who is correct? Farmers need to know if this initiative allows their neighbors to build houses or retail establishments immediately adjacent to dairy fields. Is the 1996 date for retroactive effect firmly ensconced in the initiative? The Washington State Planning Association believes that the initiative actually contains language that creates doubt about how firm the 1996 date is. What is the impact of the 1996 cut-off date on later decisions of the Washington Growth Management

Hearings Boards? Will subsequent decisions of the GMHB that have the effect of increasing a regulatory burden be invalidated by this measure?

Answers:

While the January 1, 1996 date is quite clearly stated in this initiative, there is also clear modifying language that says, if “fairness and justice” require it, even laws going into force prior to that date will be affected by the initiative. The Washington State Planning Association suggestion probably arises out of the language in the “definitions” contained in Section 2(2) as it relates to Section 2(2)(b)(i) which reads:

“Damaging the use or value” means to prohibit or restrict the use of private property to obtain benefit of the public the cost of which in all fairness and justice should be borne by the public as a whole, and includes, but is not limited to:

- a. Prohibiting or restricting any use or size, scope or intensity of any use legally existing or permitted as of January 1, 1996.” (Emphasis added.)

This language will probably lead to court litigation over what is meant by “all fairness and justice.” We are not likely to know exactly what this language means until it is, some day, interpreted by the courts. But it is quite evident that this clause will lead to considerable inconsistency in how land use laws are applied to neighboring properties that have varied histories; the owners of which might be determined to have been treated “fairly or justly” or not given their individual circumstances.

For example, what a court might find as “fair” or “just” could easily turn on whether the petitioning property owner had already owned the property at the time the law in question went into effect. If this is how it is interpreted, the impact would seem to create a patchwork of differing treatments that could result in exactly the feared outcome the question implies: two neighboring property owners would be treated differently based on how long they’d owned the property (or based on some other, as yet unknowable, circumstance) with the result that we could quite easily have residential development allowed right next to an active, agriculture-zoned and large-parcel-restricted dairy farm as suggested—certainly a bad outcome for agriculture.

Apparently the proponents of this initiative suggest that there will be no impact on pre-1996 laws, while the opponents say it will render them useless. This is probably one of those instances where the proponents and opponents might well reverse their respective positions if the initiative passes. But one must ask: who knows what pre-1996 laws could be, “in all fairness and justice,” invalidated as burdens that “should be borne by the public as a whole”? Answering those questions is likely to keep lawyers busy for many years to come. But the language certainly means something, and the courts are certain to give it some effect. To whatever extent they do give it consequence, there will be possible differences in the treatment of adjoining properties as suggested.

Except for the above inconsistent treatment outcome, one might conclude that an “all fairness and justice” standard would seem to be a pretty logical one. But keep in mind that, insofar as post-1996 laws are concerned, this standard is not applied in the initiative. The “all fairness and justice” test would only apply to pre-1996 laws. ALL laws adopted after January 1, 1996 are

deemed, in this initiative, by definition, not to meet the “all fairness and justice” standard. If a law took effect after January 1, 1996 and restricted the use of property, it is simply defined automatically as “damaging the use or value.” So this test is simply not relevant for those post-1996 laws. Again, the I-933 definition language states specifically that (Section 2(2)(b):

“(b) “Damaging the use or value” . . . includes, but is not limited to:

(i) Prohibiting or restricting any use or size, scope or intensity of any use legally existing or permitted as of January 1, 1996.” (Emphasis added.)

This section needs a very careful read—it is tricky. The effect of the language is simply to say that any prohibition of use that has occurred after January 1, 1996, is “included,” by definition, as one that should have been borne by the public as a whole. Prohibitions that occurred before that need to be evaluated against the “all fairness and justice” test. Those that occurred afterward do not. This is a critical point to understand about this measure.

Beyond the “all fairness and justice” issue, of course, a state law that authorized or required implementation by local jurisdictions, but that had not yet been implemented by ordinance at the local level by the 1996 cut-off, would also be largely worthless under the initiative. Much of the Growth Management Law is a prime example. There may also be other circumstances, where later actions either at the state or local level have been taken since 1996 to correct inconsistencies, remedy unfairness, or address other problems with previous common law or previous legislative enactment. Those later actions would also be made invalid by I-933, no matter how beneficial in other regards, if they have the effect of restricting property use. This could lead to political leaders being unable to enforce or continue the law that had previously been passed, having to give up entirely whatever public objective the law was designed to meet or be compelled to pay a substantial price out of limited tax coffers—views of which outcome could of course be mixed depending on the law involved.

With respect to the impact of I-933 on pre- and post-1996 rulings of the Growth Management Hearings Board (GHMB), the most likely outcome would seem to be based on the usual way such rulings, as well as court rulings, are treated in law. As a general matter, rulings by the courts are viewed as “finding” or “interpreting” existing law rather than as “making” new law. It seems likely that, at least generally, this is also how GMHB decisions are likely to be treated. If this is true, it would mean that the body of legal precedent (court and GMHB) that interprets laws passed before January 1, 1996, would be unaffected by this initiative regardless of when the ruling was made (before or after), unless, of course, the decision was influenced by subsequent legislation. (Again, whether this is true is probably among the many things lawyers and the courts will need to address if I-933 passes.) Such rulings might, presumably, be seen as only an interpretation of the law as (and when) it was adopted, not the creation of new law as of the date of the ruling. This conclusion would, of course, still be subject to the “all fairness and justice” exception discussed above since that standard applies to all laws, no matter when or by what agency or level of government they were adopted.

Questions – Effects in counties where Critical Areas Ordinance agreements have been agreed to by farm and environmental groups:

The Growth Management Law required counties to identify and protect resource lands, critical areas, shorelines, etc. Each county has done so, but each of these actions post-date 1996. Does this initiative invalidate all of these local ordinances? What would be the effect? Since each county has taken a different approach to these ordinances, it would seem that the effect would differ from county to county. The initiative may be a good resource for farmers in counties where draconian restrictions have been imposed on farmers. However, in counties where these ordinances have recognized farmers' concerns and dealt reasonably fairly with them, a different scenario exists. Can the review be done county by county?

Answers:

From the above discussion, it is clear that any environmental laws implemented after the January 1, 1996 cut-off are affected by this initiative, as are pre-1996 laws that meet the "all fairness and justice" standard. This will apply to the state and to all local jurisdictions, regardless of whether there have been local agreements or accommodations made with the agriculture community by that jurisdiction. So we will NOT get a county-by-county review. Instead, any property owner in any county would have the right under I-933 to challenge the law or regulation involved regardless of how engaged the agriculture community had been in its development and regardless of how happy or unhappy most of the farmers there might be with it.

As you may know, in Washington the adoption of Critical Areas Ordinances (CAOs) is required of local jurisdictions as a part of local growth planning. This has been done or is underway in most parts of the state. The very real concern that needs to be carefully considered by agriculture is that most of these CAOs were not adopted in the ether. Most of them reflect what may be a minimum local government response to what is believed to be requirements of federal environmental laws like the Clean Water Act, the Endangered Species Act, tribal treaty rights, the Clean Air Act, and other similar federal legislation.

As you know, a state initiative can have no impact whatsoever on any federal law. So by invalidating CAOs adopted by local communities under GMA authority that were designed to implement local agreements or political understandings as to how to comply with those federal laws, I-933 would then leave those communities back at square one. It leaves their farm and forest landowners and local governments highly vulnerable to enforcement actions by federal authorities or to citizen lawsuits brought by private interest groups. And, of course, it leaves their local environment highly vulnerable, which, in turn, almost assures that such litigation and enforcement actions will occur. There hasn't yet been much ESA litigation, though the risks are there—and the collapse of the CAO process could greatly stimulate it.

There have been a number of Clean Water Act suits that have been quite successful. This is something that should be of considerable concern to landowners and local governments should this measure pass. Just for perspective, it's worth taking a look at the 1999 citizen lawsuit in the United States District Court for the Eastern District of Washington, CARE v. Bosma Dairy, where the landowner was hit very hard under the Clean Water Act. This is a case most Washington dairy farmers are very familiar with. While dairy farmers have bought some insulation through the Washington Dairy Nutrient Management Act, the loss of CAO ordinances at the local level could easily lead to a renewal of this kind of litigation throughout the state and against all of agriculture.

Questions – Impacts on purchase and transfer of development rights programs:

Many urbanizing counties are wrestling with ways to protect a critical amount of remaining farmland to insure an active agriculture economy through such tools as purchase of development rights, transfer of development rights, farmland mitigation policies, etc. Would this initiative render such efforts entirely moot? How could the counties, the state, or the federal government justify using public funds for such measures if the initiative is adopted?

Answers:

Purchase of Development Rights (PDR): If the initiative takes zoning restrictions off of a farm property, presumably (although this isn't universally certain) the market value would go up. That would mean that the difference between agricultural value and market value would be greater, and the resulting price of a purchased agricultural easement would be higher. It seems likely, therefore, that passage of the initiative would greatly increase the need for and urgency of PDR programs, but it would also significantly increase their cost. Thus this "farmer friendly" farmland protection tool could be rendered much less effective.

Transfer of Development Rights (TDR): For TDR, the impact of I-933 would presumably be to expand the availability of parcels upon which development was possible, hence reducing the "demand" or need on the part of developers to pay to acquire development rights in a TDR program. This would seem to reduce the availability of TDR funding. So, at the same time as it is reducing the TDR funding for development rights, the initiative would also (for the reasons mentioned above) be increasing the cost of purchasing them. Thus the initiative reduces the effectiveness of TDR from either perspective.

On the other hand, the actual immediate, on-the-ground TDR impact may be limited. King County does have an effective TDR program, largely because the county tries hard to hold to its zoning decisions and has, accordingly, created demand pressure and a motivation for developers to purchase development rights. But even in King County, TDR funds do not seem to be much used for protection of agricultural lands—they are mostly used for forest lands protection. And this is about the only place that I'm aware of currently around the state where there is much or any such TDR demand. As a result, while passage of the initiative would put future use of TDR programs further out of reach for most communities, its immediate TDR impact, other than potentially in King County, might be pretty limited since it is not much used in other places even where it has been authorized locally.

Questions – Costs of implementation and administration of I-933:

What will be the actual cost to administer the program? Estimates out of Oregon for program administration alone are varied. We need some credible estimate of how much the taxpayers will have to spend to simply respond to the claims made under this initiative. Recognize that there is both an administrative and a claim payment cost. The administrative cost is real no matter what decision is made. Even if all claims are waived, as in Oregon to date, the public bears these costs. In addition, it appears the I-933 would have the public bear the legal costs of those making the claims. Is this accurate?

Answers:

It is quite difficult to estimate the government administrative costs for this initiative, but I'd think the high and low estimates for Oregon would at least provide a starting point. Their GMA is much more rigorous than ours, but we are a more populous and faster growing state. One should, however, keep in mind the differences between Washington's I-933 and Oregon's M-37. In Oregon, M-37 was limited to lands that had been in the same ownership since adoption of the applicable law—and the most relevant law was their State Growth Management Program which originally became effective in the mid-1970s. In Washington, this law applies to ALL land (and other property) owners, at least for post-1996 regulations. For those landowners who qualify under the “all fairness and justice” test, it also applies to pre-1996 laws going back indefinitely. The number of eligible applicants would seem to be quite large, so the amount of administrative cost seems potentially much higher.

Administrative cost may also depend, in part, on how much litigation is involved in administering the initiative—still an open question in both states. In any case, the local government would have to pay its own legal costs. But also the initiative clearly requires, under its definition of “compensation” contained in Section 2(2)(d) as follows:

“. . . “Compensation” also includes any costs and attorneys’ fees reasonably incurred by the property owner in seeking to enforce this act.”

There have been similar provisions included in other statutes and there is every reason to believe that this would be a fully enforceable provision of I-933 should it pass.

Should a jurisdiction not wish to waive the law, of course, the cost of paying claims could be tremendous—clearly prohibitive. The assumption, therefore, has to be that jurisdictions would simply (aside from rare circumstances) provide the waiver and allow the property owner to proceed with whatever use activities were now valid under the initiative. So the principal impact of the initiative is probably the impact on the public losing the protection of the laws that would be waived, not (outside of the administrative cost discussed above) on the cost of actually paying claims.

Question – Impacts on local planning departments:

Another cost to consider is the effect on local land use planning departments. How do already stressed land use divisions of local government propose to deal with the claims filed under this initiative? Would this slow down the already long wait for land divisions, building permits, etc.?

Answers:

Again, this is hard to assess, but Oregon experience could be a guide. As mentioned above, there are a number of differences between the two initiatives. The Oregon measure doesn't have the added “all fairness and justice” provision applying to older laws, so this will add cost here in Washington. Also, other than the “all fairness and justice” issue discussed under Question 1 above, application of the Washington initiative doesn't seem to depend on when a property owner acquired the property. So, for post-1996 claims, at least, it would appear that ALL landowners would be eligible to petition. This could dramatically increase the number of claims.

It might be added that a flood of new properties on the development marketplace could probably diminish the market value of any one of them—a matter that might be of concern for property owners whose properties are already developable and who are NOT going to be claimants under the initiative. For them, it would seem the initiative could easily have the effect of greatly reducing the market value of their land.

Keep in mind, the principal land use laws in Oregon were adopted in 1974. Even though there are still a great many agricultural landowners (and their families) who owned properties there prior to adoption of Oregon's Growth Management program, this very significantly reduced the number of potential GMA-related claims that could be made under M-37. This limitation does not seem to apply in Washington, at least to laws adopted after January 1, 1996. With ALL Washington landowners eligible to petition, the administrative burdens could be considerably larger.

Conclusion

Initiative-933 will have considerable impact on land and other properties in Washington, and much of that impact will be very much to the long-term detriment of the agriculture industry. If it fails, we fear it will at a minimum leave a heritage of bitterness between groups within agriculture and between agriculture and the mainstream environmental community that will make future relationships even more difficult to create and sustain. If it succeeds, it will make it much more difficult to protect the future of agricultural lands, and it will invalidate many years of public process and agreements reached on conservation stewardship through that process that may be quite favorable to agriculture. And, of course, it will leave much of that future in the hands of lawyers and the courts.

My conclusion is that we need to oppose I-933 and to use the occasion it provides to vigorously support alternative, less destructive and more positive measures in dealing with what are, in many cases, the legitimate concerns of the agriculture community.

Respectfully submitted,

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