April 19, 2013

The Honorable Bob Wieckowski
Chair, Assembly Judiciary Committee
1020 N Street, Room 104
Sacramento, CA 95814

RE: AB 436 (Jones-Sawyer)
POSITION: OPPOSE

Dear Chair Wieckowski,

The California Alliance to Protect Private Property Rights, originally founded in 2005, is California's leading private property rights organization committed to fighting eminent domain abuse and protecting property owners.

It is with our mission in mind that we write to inform you of our opposition to Assembly Bill 436 by Assembly Member Reggie Jones-Sawyer. AB 436 would unfairly force residents who are under threat of a regulatory taking to pay for all government legal expenses if they lose their court case.

AB 436 provides that if a person is made a lowball offer by a government agency, and the property owner rejects that offer, sues and then loses, the property owner can be made to pay for all costs of the lawsuit, including attorney and expert witness fees.

Furthermore, the bill does not condition the court cost requirement on the reasonableness of the government's initial offer. For example, if the government were to offer a property owner $1,000, and the property owner were to reject that offer, sue and lose, the property owner would be responsible for all costs associated with the post-offer legal costs.

In other types of lawsuits, specifically when an individual brings a dubious lawsuit against a small business and loses, the defendant rarely gets compensated for its legal fees. When bills are proposed to change this system, opponents claim that forcing petitioners to cover the legal fees of a defendant would dissuade people from filing lawsuits. We find the double standard inherent with this provision in AB 436 hypocritical.

In regulatory taking cases, the government is, by far, in a dominant position legally. By forcing a single individual property owner in a regulatory taking case to also foot the bill

for the government's defense is cruel and unnecessary. This risk of additional burden increases the pressure on property owners to just give in to the government's initial offer without going through the legal due process allowed to them by law.

In short, this bill further erodes property owners' abilities to both protect their private property from gross government overreach, and to receive just compensation, as guaranteed by both the U.S. and State Constitutions.

For the above stated reasons, the Alliance must strongly oppose AB 436. If you have any questions, please do not hesitate to contact me at 916.552.0335. In addition, please see the attached bill analysis we have developed.

Sincerely,

Marko Mlikotin
President

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CA Alliance Bill Analysis
AB 436 (Jones-Sawyer)

1) AB 436 would violate the state and federal constitutions' promises of just compensation

This bill would apply a "comparative fault" rule in cases where property owners seek just compensation for the taking of their property. This would allow the government to reduce the just compensation that the Constitution promises by saying that the property owner was in some sense responsible for the decrease of the value. To the extent that this ensures that the property owner does not get a windfall when legitimate environmental restrictions lead to the taking of the property, that concern is already addressed under the existing law of just compensation—a property owner can only get what a property is actually worth. Unfortunately, there have been many cases in which government has acted in ways that reduced property value so that they could acquire it for less later on.[1]

To import the idea of "comparative fault" from tort law into property law—which, so far as we have been able to discern, has not been done in any other state—would only increase the pressure against a property owner in a case where the government has damaged the owner's property values. Note, for instance, that **this rule would *only* "reduce the compensation" to be paid to a property owner—it would never *increase* the award, no matter how wrongful the *government's* actions may have been**.[2] That unequal treatment is fundamentally unfair.

The idea of "comparative fault" does not belong in eminent domain in any event, because just compensation is not meant to be a form of punishment for wrongful government behavior. Instead, it simply requires the government to pay for the things that it takes. "Fault" or wrongful behavior is not normally part of the analysis.

2) AB 436 would encourage unfair "low-ball" offers by government

This bill would amend the Code of Civil Procedure to provide that in an inverse condemnation case, the government may make an offer of compensation to the property owner, and that if the owner rejects that offer and fails to obtain a judgment or award, the owner "shall not recover his or her post offer costs and shall pay the defendant's costs from the time of the offer." **This requirement is not conditioned on whether that original offer was an appropriate or reasonable amount**. Because it is extremely difficult for property owners to win inverse condemnation cases in California courts in the first place,[3] this provision would add to the already powerful incentives for government to make unreasonably low settlement offers, knowing that if the owner ultimately does not obtain a judgment, for whatever reason, the owner will be forced to pay the government's costs from the time of the offer—even if the case has taken years and gone all the way to the Supreme Court. Note that this provision allows a *reduction* of an award if the plaintiff rejects the initial offer and loses, but does not provide for an *increased* award in cases

where the plaintiff rejects an offer and later *wins*. This inequality increases the incentive for the government to make a "low-ball" award, because there is no penalty for doing so.

3) AB 436 would unfairly treat victims of eminent domain and victims of regulatory takings differently

It sometimes makes sense to treat property owners differently in eminent domain cases and in inverse condemnation cases. But that is not the case here. If forcing a property owner to pay the cost of the government's expert witness makes sense in regulatory takings cases, there is no reason why it would not also make sense in eminent domain cases. The only reason for this distinction appears to be that the unfairness which this bill would establish if it were to become law would be more obvious in eminent domain cases—which are politically controversial—than in regulatory takings cases, which get less attention in the media. That sort of gamesmanship should not take place in our Code of Civil Procedure.[4] Eminent domain and regulatory takings should be treated similarly unless good reason exists for doing otherwise.

4) AB 436 would unjustly bias the system against property owners

For many years, lawyers and judges have written extensively about the problem of "unequal bargaining power."[5] This applies not just in cases involving contracts, but across the board—it's why the government provides criminal defendants with a public defender, for example.

In property rights cases against the government, property owners are very much in a position of unequal bargaining power. The government has practically unlimited time and overwhelming resources. It can seize land or deprive owners of their right to develop or use their land, for a wide variety of reasons. Under powers like "Quick Take,"[6] it can make it practically impossible for property owners to defend themselves. The only recourse owners have is to the courts. Sadly, AB 436 would sharply limit even this meager protection by forcing property owners to pay for the government's lawyers and experts when the government chooses to take away a Californian's property rights.

Section 1 provides that "in any action or proceeding other than an eminent domain action," the judge "may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses…actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant." Since the plaintiff in a case "other than an eminent domain action" is *always a private citizen* who says his or her property rights have been taken away, **this provision is clearly designed to force property owners to pay the government in cases in which the government has deprived a Californian of his or her property rights**. That is fundamentally unfair, given the extreme imbalance of power between a citizen and the government in these cases. The government has plenty of resources to pay expert witnesses if necessary—and typically does not need them, since the courts already presume against the property owner and since the property owning plaintiff bears the burden of proof in any lawsuit anyway. And because this section is not limited to cases in

which the property owner *loses*, but applies to *any* case, the property owner runs the risk of being forced to pay for the case against him.

Note that this provision would *not* require the property owner to pay the *actual* cost of the expert witness, but a "reasonable sum to cover th[os]e costs." Since a "reasonable sum" can be a lot more than what the expert actually costs—which itself can be a large amount—this provision again increases the risk if a person chooses to defend her property rights in court.

These provisions of AB 436 are not intended to prevent property owners from bringing frivolous lawsuits—that is already against the rules. Instead, the bill will simply increase the pressure for property owners to give up rather than seek judicial protection when the government takes away their property rights. If a homeowner discovers that the government has destroyed her property value, her attorney would be forced to advise her that bringing a lawsuit runs the risks of ruinous costs and fees, and that it is simply not worthwhile to defend her rights. Thus this bill would drastically undermine the constitutional protections for the rights of Californians.

Some decades ago, the U.S. Supreme Court ruled that in discrimination cases, the government should only rarely be able to force a losing plaintiff to pay the government's attorneys fees because the law should "encourage[e] victims to make the wrongdoers pay at law." The Court said that "the incentive to [bring] such suits [should] not be reduced by the prospect of attorney's fees that consume the recovery."[7] Sadly, AB 436 would implement the opposite rule when it comes to home- and business-owners trying to vindicate their rights against government interference.

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[1] *See, e.g.,* United States v. Virginia Elec. & Power Co., 365 U.S. 624, 636 (1961); City of New York v. Sage, 239 U.S. 57, 61 (1915); Wash. Mkt. Enters. v. City of Trenton, 343 A.2d 408, 414-15 (N.J. 1975):Kissinger v. City of Los Angeles, 161 Cal. App. 2d 454 (1958), Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966); City of Toledo v. Kim's Auto & Truck Serv., Inc., 2003 WL 22390102 (Ohio Ct. App. Oct. 17, 2003); Merkur Steel Supply, Inc. v. City of Detroit, 680 N.W.2d 485, 494 (Mich. Ct. App. 2004); Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency, 561 F.2d 1327, 1331 (9th Cir. 1977); Madison Realty Co. v. City of Detroit, 315 F. Supp. 367, 371 (E.D. Mich. 1970); Amen v. City of Dearborn, 718 F.2d 789, 795 (6th Cir. 1983).

[2] Gideon Kanner, *What to Do Until the Bulldozers Come? Precondemnation Planning for Landowners*, 27 REAL EST. L.J. 47, 60 (1998) ("cities have been known to withhold trash pickup and police protection from the targeted areas…[or cause] the targeted properties to fall into disrepair, so that cities can acquire them cheaply. Or, zoning may be changed so as to lower property values in anticipation of condemnation.").

[3] 1 NORMAN WILLIAMS, AMERICAN PLANNING LAW 184 (1974) ("the striking feature of California law is that the courts in that state have quite consistently been far rougher on the property rights of developers than those in any other state."); DENNIS COYLE, PROPERTY RIGHTS AND THE CONSTITUTION 11 (1995) (national survey of land-use experts concluded that California was the state least likely to protect property owner' rights).

[4] William C. Leigh & Bruce W. Burton, *Predatory Governmental Zoning Practices and the Supreme Court's New Takings Clause Formulation: Timing, Value, and R.I.B.E.,* 1993 B.Y.U. L. REV. 827, 829 (1993) ("Because of severe municipal budgetary restraints, coupled with heightened demands for increased public services and public capital amenities, the temptation to engage in value-destroying gamesmanship confronts municipal offices around the country.").

[5] Vu v. Prudential Property & Casualty Ins. Co., 26 Cal. 4th 1142, 1151 (2001).

[6] See Mt. San Jacinto Community College Dist. v. Superior Court, 40 Cal. 4th 648 (2007).

[7] Independent Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, 761 (1989).

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