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STUDY COMMISSION ON PROPERTY RIGHTS AND THE PUBLIC HEALTH, SAFETY AND WELFARE

Final Report
December, 1995

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Final Report

EXECUTIVE SUMMARY

The Study Commission on Property Rights and the Public Health, Safety and Welfare was created during the First Regular Session of the 117th Legislature after extensive public hearings and discussion by the Joint Standing Committee on Judiciary on two bills relating to property rights and "takings." Rather than act on the substance of those bills during the session, the Legislature chose to create a 24 member Commission with a broad charge to study the issues raised by those bills and report back to the Second Regular Session.

Public hearings on an initial draft of the Study Commission's report were held on Tuesday, November 21, 1995, in the town of Lee and the City of Portland. The comments received by the Commission at those public hearings, along with many other comments and materials received by the Commission, were considered by the Commission as it prepared this final report.

This report summarizes the Commission's meetings and presents a legal analysis of federal and state law pertaining to the takings issue. The report also presents the Commission's proposals and includes legislation necessary to implement those proposals. The two proposals in this report received the unanimous support of all members of the Commission who participated in the study process. Commission member Gregory Fowler was not able to attend any Commission meetings.

The proposals of the Commission are:

First, to provide a "takings" review of proposed rules by the Attorney General and the appropriate committee of the Legislature. This proposal requires the Attorney General to review all proposed rules for takings issues and requires legislative committees, during their review of major substantive rules, to review major substantive rules for issues related to the effect of the rule on property values. This proposal combines concepts enacted in other states such as Kansas, Indiana and Delaware and builds upon recent changes in Maine law that provide legislative committees with a direct role in the review and approval of agency rules. The purpose of the review by the Attorney General is to ensure, before a rule takes effect, that sufficient "safety valves" exist to prevent the unintended result of depriving a landowner of all economically beneficial or productive use of that land. The rules review by the legislative committees provides an opportunity to balance the economic impact of the rule with the public benefit derived from the rule's proposed application.

Second, to establish a forum for mediating land use disputes before they end up in court. This proposal establishes a "Land Use Mediation Program" that provides landowners who have been harmed by governmental land use regulations a forum, as an alternative to court, in which to discuss the problem with the town or state agency and try to achieve a solution. The program would be operated through the Court Mediation Service and would be funded by fees paid by those who are seeking mediation.

The Study Commission wishes to thank all those who have contributed to this process.

STUDY PROCESS

The Study Commission on Property Rights and the Public Health, Safety and Welfare was established by Resolves 1995, Chapter 45. The issue of "taking" of private property by governmental regulation was introduced into the First Regular Session of the 117th Maine Legislature in the form of two bills: **LD 170, An Act to Require the State and Political Subdivisions to Pay Property Owners When Regulations Lower the Value of Property by More Than 50%**, and **LD 1217, An Act to Protect Constitutional Property Rights and to Provide Just Compensation**. Both bills proposed statutory standards, different from current Constitutional standards, for determining when compensation is due a landowner because of the effect of regulations -- including State laws and rules and local government ordinances and land use decisions -- on the value of that person's property. Instead of passing the bills as written, the Legislature chose to create the Study Commission to determine if such a state standard was necessary. The Study Commission was also charged with the task of determining if changes are needed in the procedure landowners must follow to express concern about or challenge regulations affecting the value of their property and to seek compensation for any losses. The specifics of the responsibilities of the Study Commission are found in the Appendices of this Report, Resolve 1995, Chapter 45, particularly Section 4, Section 5 and Section 6.

The Study Commission consists of 24 members, appointed to represent a wide range of interests. Thirteen members are legislators, chosen on the basis of their membership on pertinent joint standing committees of the Legislature: Five from Judiciary, two from Agriculture, Conservation and Forestry, two from Inland Fisheries and Wildlife, two from Natural Resources and two from State and Local Government. The Governor and the Attorney General each designated a representative to the Study Commission to act on their behalf. The other members of the Study Commission represent municipal government (two members), conservation interests (three members), private property owners (three members), and the business community (one member). A list of the names and the appointing authorities of the members is included in the Appendices.

The Resolve establishing the Study Commission required the five Judiciary Committee members to elect the chair from among those five members. Senator S. Peter Mills III of Somerset County was chosen as chair, and Representative Sharon Anglin Treat of Gardiner was selected as vice-chair. A preliminary schedule was developed, and the Study Commission began collecting information at the first meeting. All meetings of the Study Commission were open to the public.

Commission member Gregory Fowler was unable to attend any Commission meetings.

First meeting, September 13, 1995

The Study Commission met for the first time on September 13, 1995 in the State House in Augusta. Two panels of presenters were invited to provide the starting point for discussions. The first panel, focusing on the Constitutional provisions, the laws and the cases about "takings" and "takings" laws in other states, consisted of:

- Dean Donald N. Zillman, University of Maine School of Law;
- Professor Merle W. Loper, University of Maine School of Law; and
- Larry Morandi, Senior Fellow, National Conference of State Legislatures.

The second panel was devoted to regulation from the perspectives of the regulators and those who are regulated. The panel members were:

- John Williams, Director, Maine Land Use Regulation Commission;
- Martha Kirkpatrick, Director, Bureau of Land and Water Resources, Maine Department of Regulation;
- Erik M. Stumpfel, City Solicitor, City of Bangor, Maine;
- Sarah Medina, Forester, Seven Islands Land Company;
- Alan Sterns, Director of Regulator Affairs, Maine Alliance; and
- Carol Drake, private landowner, Kennebunk and Sanford.

The Study Commission used the remaining time at the first meeting to set the dates for future meetings, identify additional sources of information and determine the direction of the study.

Second meeting, September 27, 1995

The second meeting of the Study Commission was held on September 27, 1995. Again, the panel format was used to provide information and lead discussion. Members of the first panel, providing information about specific programs, the economic costs and benefits of regulation, and anecdotal information about the effects of regulation, were:

- Kevin Boyle, Associate Professor, Department of Resource Economics and Policy, University of Maine;
- Peter Lawrence, Past president, Small Woodland Owners Association of Maine (SWOAM);
- Linda Gifford, Legal Counsel, Maine Association of REALTORS;

- Alan Clark, Wildlife planner, Maine Department of Inland Fisheries and Wildlife; and

- Lloyd Irland, Forestry consultant, The Irland Group.

The second panel provided information from the municipal perspective. The panelists were:

- Edward I. Heath, Town Manager, Town of Winthrop, Maine;

- Chris Huck, Planner, Kennebec Valley Council of Governments;

- Joseph Downey, Assessor, City of Auburn, Maine; and

- Kenneth Young, Director, State and Federal Relations, Maine Municipal Association.

The Study Commission also took time to identify current problems with land use regulation and the processes and remedies available to property owners. The members outlined possible options for the Study Commission to recommend.

Third meeting, October 13, 1995

The third meeting was held October 13, 1995. The morning was devoted to a diverse panel of presenters.

- Catherine R. Connors, an attorney with Pierce, Atwood, Scribner, Allen, Smith & Lancaster in Portland, Maine, was invited to address the concept of "ripeness" and the practical problems dealing with ripeness requirements.

- David Guernsey of Kingfield, Maine, provided testimony as a private property owner and former real estate developer, and discussed the tension between individual property rights and collective controls on land use.

- Jon Olsen, from the Maine Farm Bureau, provided information about the effects of land use regulation, taxation and other policies on farmers.

- Jonathan Reisman, Associate Professor of Economics and Public Policy at the University of Maine at Machias proposed the use of a Property Impact Statement, modeled on the Environmental Impact Statement required under federal law, to identify both public and private benefits and costs, including the effect on land values, of any regulatory action affecting land use.

- Dr. Rutherford H. Platt, Professor of Geography and Planning Law at the University of Massachusetts at Amherst spoke about the underlying purposes of regulations, the burdens and benefits that all property owners share and the analysis of takings under the Constitution.

The remainder of the meeting was used to identify draft proposals to be developed for public comment and to schedule the two public hearings.

Fourth meeting, November 3, 1995
Subcommittee-of-the-whole, November 9, 1995

The Study Commission met for the fourth time on November 3, 1995, to review the draft report prepared by the Study Commission's staff. At that meeting, the Commission called for a subcommittee meeting on the following Thursday, November 9, 1995, to review changes in the draft report. The "subcommittee" was made up of any members who were able to attend.

Public Hearings, November 21, 1995

The Study Commission was required to hold two public hearings in different geographic areas of the State. Half the Study Commission held a public hearing at Lee Academy in Lee, Maine, and the other half held a hearing at the Portland Arts and Technology High School, in Portland, Maine. The hearings were held simultaneously on Tuesday, November 21, 1995, starting at 4:00 p.m., breaking for dinner, then reconvening at 7:00 p.m. The locations attracted a broad range of perspectives and testimony, which was a goal of the Study Commission.

Final meeting, November 27, 1995

The Study Commission met for a final time on November 27, 1995, to discuss the public comments received and to finalize its findings and proposals to be provided to the Legislature. The participating members, at the end of the day-long work session, achieved consensus on the legislative recommendations.

MAJOR TAKINGS LEGISLATION SUBMITTED IN THE FIRST REGULAR SESSION OF THE 117th LEGISLATURE

LD 170, An Act to Require the State and Political Subdivisions to Pay Property Owners When Regulations Lower the Value of Property by More Than 50%

This bill consisted of two main provisions. First, it defined a "regulatory taking" as occurring when the implementation of a state or local regulation reduces the value of real property to less than 50 percent of the value of the property before the regulation was in effect. Second, the bill provided a cause of action for the landowner whose property was the subject of a "regulatory taking" to require the governmental entity to either purchase the property at its preregulatory fair market value or pay compensation in the amount of the reduction in property value.

LD 1217, An Act to Protect Constitutional Property Rights and to Provide Just Compensation

This bill defined a "regulatory taking" as the implementation of a state or local regulation that reduces the fair market value of real property to less than 50 percent of its preregulatory fair market value. It required payment of compensation for the reduction in value or allowed the governmental entity to rescind the regulation as it applied to that property owner and pay compensation for the temporary taking. It established a process to address the cumulative effect of multiple governmental agencies regulating the same property. It also allowed a property owner to file an action in court without exhausting all administrative remedies, as long as the property owner first submitted at least one reasonable application for a variance, special use permit or special exception. Attorney's fees were available for the successful property owner. The bill would have applied retroactively by providing that the process would apply when any restriction is enacted or becomes applicable after the effective date of the bill. The bill would not have required compensation for abatement of nuisances.

ANALYSIS OF TAKINGS LAW

About this analysis

"Takings" law is a work in progress. Each case decided by the United States Supreme Court provides more information about when a "taking" occurs and what is the appropriate process to establish, determine and remedy a "takings" claim. Just as people with varying depths of experience in takings law, including lawyers and judges, especially those on the Supreme Court, do not agree on many aspects of takings law, the members of this Study Commission have varying interpretations of what a "taking" is. This discussion of takings law is an attempt by the Commission's staff to consolidate information about "takings" in general and to make this information accessible to the general public. It is not a statement of law or necessarily the position of members of the Commission, individually or collectively.

Introduction

A property owner may have a "takings" claim if the government subjects his or her property to public use. This can result from the government exercising its eminent domain, or condemnation, power and actually purchasing the land for a public use, such as the construction of a road. Assuming the use is truly for a public use, the property owner has no choice but to sell the property to the government. The only source of controversy may be the amount of compensation that is "just."

A takings claim may also result from government regulation of property. A "regulatory taking" occurs when the regulations affecting the land deprive the owner of Constitutionally-protected property rights. A property owner who believes his or her land is the subject of a regulatory taking may bring an "inverse condemnation" action in court, seeking compensation for the loss.

When does the regulatory burden become so great so as to result in a taking? This has been the subject of public debate and an ever-increasing line of court cases. Although the line between permissible police power regulation by the government and government regulation which goes too far has not been precisely drawn, each United States Supreme Court decision provides more guidance in determining what regulatory actions will result in a taking.

What is the source of a takings claim?

The Fifth Amendment to the United States Constitution provides "nor shall private property be taken for public use, without just compensation." This right to be free from the government seizure of land without compensation has its roots in 17th and 18th Century English law which protected property owners from the unchecked acquisition of their land by the king.

In addition to the U.S. Constitution's provisions on takings, made applicable to the States through the operation of the 14th Amendment,[1] Maine's Constitution contains a separate "takings clause." Article I, Section 21, provides: "Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." The Maine Supreme Judicial Court's analysis of the Maine language treats the federal and state provisions as having the same effect.[2]

These constitutional provisions do not prohibit the government from taking private property. On the contrary, the government clearly has the Constitutional authority to take property, as long as the appropriate process is followed, it is for a public use and just compensation is paid to the owner.

What is a taking?

Before 1922, the Supreme Court had clearly stated that the Fifth Amendment's "Takings" Clause did not apply to regulatory actions, other than those that involved the physical invasion of property. The Due Process Clause of the Fourteenth Amendment, however, did apply, and the remedy for overreaching regulations was the nullification of the regulations, not the payment of compensation.[3]

In 1922, the Supreme Court revisited the issue and found that the Fifth Amendment did apply to the exercise of the police power. In striking down a Pennsylvania statute that the Court found effectively erased the value of mining interests specifically reserved before the state statute was enacted, Justice Oliver Wendell Holmes wrote:

> The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.[4]

Since 1922, land use planners, property owners, lawyers and courts have been trying to determine what is "too far."

Analysis

The United States Supreme Court has stated that it avoids any set formula for determining what is "too far."[5] Instead, the Court has provided basic boundaries within which regulations must remain to avoid causing a taking. A regulation that requires the property owner to suffer a physical invasion of the property effects a taking, except in the case of legal exactions, described later. A regulation that leaves the owner with no economically beneficial or productive use of the property also results in a taking, unless the regulation merely reflects preexisting concepts of nuisance law. An exaction constitutes a taking if it is not closely related to the nature and purpose of the regulation and the projected effects of the proposed use.

1. *Physical invasion*

When a regulation requires the physical invasion of a property owner's private property, the Court has found a taking to occur.[6] The reason the Court has given for this result focuses on one of the rights in the "bundle" of rights that make up property ownership. The right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[7] In general, no matter how small the physical intrusion and no matter how weighty the public purpose behind the invasion, compensation is required.[8] Although the Court in other cases refused to elevate one of the "sticks" in the bundle of rights above the others, the most recent holdings do require this treatment of the "right to exclude," leading to the conclusion that when a physical invasion of private property is required, the requirement effects a taking. Compensation must be paid for the requirement to be constitutional. The exception to this treatment involves otherwise-Constitutional exactions.

2. *Deprivation of all economically beneficial or productive use*

The Supreme Court has also stated that a taking occurs, and compensation is due, if the regulation deprives the property owner of "all economically beneficial or productive use of land."[9] Whether the regulation furthers a legitimate public purpose is irrelevant, because the purpose of the Fifth Amendment's takings clause is to prohibit the government from "'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[10] The Court has noted an exception, often referred to as the "nuisance exception," which lets stand a regulation that prohibits all economically beneficial use of land if the regulation merely mirrors principles already existing in the State's law of property and nuisance. The Court has described these background principles of property broadly.[11]

When has the property owner been deprived of all economically beneficial or productive use of the land? The Court has provided some guidance in making this determination. The Court has recognized that, by definition, governmental regulation involves adjusting private rights for the public good. This adjustment often curtails some potential economic or other use of private property.[12] In determining whether a particular regulation violates the Fifth Amendment, the inquiry focuses on the severity of the impact of the regulation on the particular property, including the degree of interference with the property owner's distinct investment-backed expectations.[13]

Although the purpose behind the Takings Clause is to compensate economic injuries caused by public actions that disproportionately affect a few persons, the fact that a regulation has a more severe impact on some property owners than it does on others does not of itself mean that the law effects a taking.[14] The value that has been removed from the property must be compared with the value that remains in the property; which uses are curtailed and which are still permitted?[15]

Segmentation or parcelization. Supreme Court analysis prohibits the segmentation or parcelization of the property into the rights retained by the owner and the rights impaired or extinguished by the regulation. The owner's interest as a whole must be considered; the individual "sticks" in the bundle of rights that are impaired or removed by the regulation cannot be the viewed as separate from the rights remaining with the owner.

The Supreme Court cases have established the following guidelines in determining what value the property has retained.

- Mere diminution in value, standing alone, does not establish a taking,[16] although a regulation that deprives the owner of all economically beneficial or productive use of the property requires the payment of compensation.[17]

- Except when the property right infringed is the right to exclude others in situations other than legal exactions (discussed in 3) denial of a traditional property right or of the ability to exploit a property interest the owner has up to now believed to be available for development is not necessarily a taking. This is because the aggregate of property rights must be viewed as a whole.[18]

- A requirement that a person obtain a permit before engaging in certain uses of his or her property does not itself "take" the property. Denial of a permit does not amount to a regulatory taking if other viable uses are available to the owner.[19]

- A zoning ordinance is not invalid on its face if it substantially advances legitimate governmental interests and does not deny the owner economically viable use of his or her land. The property owner shares with other owners the benefits and burdens of the government's exercise of the police power. The Court has stated in the past that these benefits must be taken into account along with any diminution in value when assessing the fairness of the regulation.[20]

- The fact that the owners of the Penn Central Rail Terminal could not develop the airspace above the terminal was not a taking because, in part, the property as a whole still had viable uses that provided a reasonable return.[21]

- The fact that the owners of subsurface coal were not permitted under state law to remove certain portions of the coal providing support to the land above was not a taking because the owners retained the right to mine virtually all the coal they owned. The owners could continue to profitably mine the coal without violating the state law and causing damage to surface structures.[22]

- The fact that federal law prohibits commercial transactions in preexisting avian artifacts was not a taking because the owners could still earn a profit based on possession of the artifacts without selling, trading or bartering them.[23]

- The fact that an employer had to pay out an estimated 46% of shareholder equity to satisfy its withdrawal liability obligation to a multiemployer pension plan was not a taking because the employer retained the remaining equity.[24]

The Lucas opinion contains a footnote[25] reflecting uncertainty about the "non-segmentation" analysis. The discussion, because not necessary to the decision in Lucas, is not an adjudication on that issue. Relying on that footnote, however, at least one lower court has not ruled out the possibility of "partial takings."[26]

Since Lucas, the Court has reaffirmed its previous holdings, stating that "the relevant question ... is whether the property taken is all, or only a portion of the parcel in question."[27]

3. Exactions

An exaction is involved when the regulatory agency requires the owner to provide or give up something of value in exchange for the permission to develop the property in a proposed manner. The property owner may have to dedicate some of the property for roads, sidewalks, bikepaths and park and recreation areas. He or she may be required to help pay for the upgrading of road, sewer lines and water treatment facilities.

The key to the Constitutionality of an exaction is how closely it is related to both the purposes of the regulation and the projected impacts of the proposal. The exaction must meet two requirements. First, there must be an "essential nexus" between the purpose of the regulation and the exaction. The exaction is not constitutional if it "utterly fails to further the end advanced as the justification" of the limits in the regulation.[28] Second, there must be a "rough proportionality" between the burden of the exaction and the impact of the proposed use. The governmental regulator must make an individualized determination that the condition is reasonably related both in nature and extent to the projected effects of the proposed land use.[29] Although no "precise mathematical calculations" are required, this determination is very fact-specific and requires the regulator to estimate impacts and how well the exaction will mitigate those impacts.

An exaction that meets these two requirements, even if it requires the physical invasion of the owner's property, can avoid a taking.

Maine law

Because the Maine Supreme Judicial Court treats the U.S. Takings Clause and the Maine Constitution Takings provision as protecting the same rights and requiring the same analysis of facts, the decisions of the

United States Supreme Court are directly applicable to cases in Maine. The only exception is that the Maine provision mandates that "the public exigencies require" the taking for a public use; such requirement is not explicitly contained in the Fifth Amendment. Determination of whether the taking of the property is for a public use is a judicial question, but the question of necessity is one for the Legislature to decide without judicial review.[30]

There are a handful of leading Maine cases. They echo the proposition that there is a taking only if the regulation has rendered the land "substantially useless."[31] And, as in the United States Supreme Court decisions, actual invasion of property is considered compensable.[32]

Ripeness

A procedural requirement that must be satisfied before a property owner can pursue a "takings" claim in court is that of "ripeness." Article III of the U.S. Constitution gives the federal courts jurisdiction over "cases" and "controversies." This requires that a case must have "matured" or "ripened" into a controversy in which the legal interests are defined and adverse, and that requires adjudication to settle the issues. In addition to being constitutionally required, the ripeness doctrine is also reasonable and prudent from the court's perspective. It furthers "judicial economy" in that the courts do not devote scarce judicial resources to situations in which administrative resolution is still possible. Waiting until administrative action is final keeps the courts from entangling themselves in abstract disagreements over administrative policy, and protects agencies from premature judicial interference. If there is still an opportunity for the governmental regulator to allow the property owner to carry out the proposed activity, the case is not ripe for the courts to determine.

If the property owner chooses to challenge a zoning ordinance, rather than the denial of a permit, the case may be ripe for the court to decide, but it is usually more difficult for the property owner to prove the elements of a taking because the loss of value to that particular property owner is usually harder to quantify from a general application of the ordinance.[33]

The leading United States Supreme Court decision on ripeness in the takings area requires completion of a state claim before the federal claim may proceed. A property owner must pursue compensation for a taking under the state procedure, if one exists, and be denied compensation under that procedure before the property owner can claim a violation of the "Just Compensation Clause" of the Fifth Amendment of the United States Constitution.[34] The most recent Maine case in this area based dismissal of the federal compensation claim on the same grounds.[35]

END NOTES

1 Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226,239, 17 S.Ct. 581,585, 41 L.Ed. 979 (1897).

2 Bell v. Town of Wells, 557 A.2d 168, 177 (1989).

3 Mugler v. Kansas, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887). Kansas law not only prohibited the manufacture and sale of intoxicating liquors, but declared that places in which those activities occurred were common nuisances. The facilities were to be closed to abate the nuisance. The owners of a brewery built before the law was enacted complained that closing their brewery would deprive that land of most of the value, and that the law was in effect a taking for which the owners should receive compensation. The Supreme Court discussed police powers generally, and stated that challenges of the exercise of police powers must be pursued under the Due Process Clause of the 14th Amendment. The 14th Amendment provides no remedy of compensation.

4 Pennsylvania Coal Company v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). The Pennsylvania Coal Company, a mining company, challenged the Pennsylvania law that prohibited the mining of coal that caused houses on the surface of the land to be damaged. The ban effectively reduced to zero the value of the mining rights in certain areas. The Supreme Court invalidated the law as it applied to the mining of coal under streets and cities in places where the right to mine the coal was reserved. Before the law was enacted, the purchasers of the surface rights bought the land, but not the mining rights, knowing there was a risk that subsurface mining would cause subsidence. The Court held that the Pennsylvania Legislature could not diminish the value of the mining rights so drastically without paying compensation to the holders of those mining rights.

Note that although the facts of Pennsylvania Coal are similar to the facts in Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987), the Court reached a different result, choosing instead to look at the greater public benefit achieved through the limitation on mining subsurface coal, while ensuring that the company was not deprived of the entire value of the mineral interest.

Before Pennsylvania Coal, regulations negatively affecting property values were regularly upheld without need for compensation. If the regulation promoted a legitimate public purpose, and the property owner could still use the property, no compensation was required. For example, in Hadachek v. Sebastian, 239 U.S. 394 (1915), the Court upheld a Los Angeles prohibition on brickmaking in certain areas of the city. The purpose was to protect the persons residing near the brickyards from the dirt and fumes released into the air. The prohibition applied even though the brickyard was built prior to the surrounding area being settled as a residential neighborhood. The Supreme Court upheld the ban and provided for no compensation even though the owner claimed a reduction in property value from $800,000 to $60,000.

5 Lucas v. South Carolina Coastal Council, __ U.S. __, 112 S.Ct. 2886, 2893 (1992), internal quotes omitted.

6 Dolan v. City of Tigard, __ U.S. __, 114 S.Ct. 2309 (1994) and Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979).

7 Dolan v. City of Tigard, __ U.S. __, 114 S.Ct. 2309, 2320 (1994), quoting Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979).

8 Lucas v. South Carolina Coastal Council, __ U.S. __, 112 S.Ct. 2886, 2893 (1992). See also, Loretto v. Teleprompter Manhattan CATV Corp, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (required landlords to accept the physical location of cable facilities on their property, each facility taking up at most one and one-half cubic feet of space); United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946) (physical invasions of airspace); and Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979).

9 Lucas v. South Carolina Coastal Council, __ U.S. __, 112 S.Ct. 2886, 2893 (1992). See also Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980): "The application of a general zoning ordinance to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests, ... or denies an owner economically viable use of his land." (internal citations omitted)

[10] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles , California, 482 U.S 384, 107 S.Ct. 2378, 2388, 96 L.Ed.2d 250 (1987), quoting Armstrong V. United States, 364 U.S.40, 49, 80 S.Ct. 1563, 1569 (1960).

[11] Lucas v. South Carolina Coastal Council, __ U.S. __, 112 S.Ct. 2886, 2900 and footnote 16 (1992). The court listed these background principals as public nuisance, private nuisance and "otherwise." "Otherwise" is intended to include situations when destruction of property, in cases of "actual necessity," is pursued to forestall "grave threats to the lives and property of others," quoting Bowditch v. Boston, 101 U.S. 16, 18-19, 25 L.Ed. 980 (1890).

[12] Andrus v. Allard, 444 U.S. 51, 100 S.Ct. 318, 326, 62 L.Ed.2d 210 (1979). "To require compensation in all such circumstances would effectively compel the government to regulate by *purchase*." (emphasis in original) See also Pennsylvania Coal, cited in Andrus at 326: "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in general law." 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922).

A regulation can "even include a concession of property rights" without necessarily effecting a taking. Nollan v. California Coastal Commission, 483 U.S 825, 107 S.Ct. 3141, 3148, 97 L.Ed.2d 677 (1987).

[13] Penn Central Transportation Company v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 2661, 57 L.Ed.2d 631 (1978).

[14] Penn Central Transportation Company v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 2664, 57 L.Ed.2d 631 (1978). "Legislation designed to promote the general welfare commonly burdens some more than others."

[15] Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 107 S.Ct. 1232, 1248, 94 L.Ed.2d 472 (1987).

The actual effect on the property is a question of degree that cannot be disposed of by general propositions. Pennsylvania Coal Company v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922)

[16] Penn Central Transportation Company v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 2663, 57 L.Ed.2d 631 (1978), citing Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) (75% diminution in value caused by zoning law); and Hadachek v. Sebastian, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (87.5% diminution in value). Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, __ U.S. __, 113 S.Ct. 2264, 2291 (1993).

[17] Lucas v. South Carolina Coastal Council, __ U.S. __, 112 S.Ct. 2886, 2893 (1992).

[18] Penn Central Transportation Company v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 2662, 57 L.Ed.2d 631 (1978); and Andrus v. Allard, 444 U.S. 51, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979).

[19] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 106 S.Ct. 455, 459 88 L.Ed.2d 419 (1985).

[20] Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 2142, 65 L.Ed.2d 106 (1980).

[21] "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. ... [T]he Court focuses rather on both the character of the of the action and the nature and extent of the interference with rights in the parcel as a whole ... ." Penn Central Transportation Company v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 2662, 57 L.Ed.2d 631 (1978).

[22] Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 107 S.Ct. 1232, 1250, 94 L.Ed.2d 472 (1987).

[23] Andrus v. Allard, 444 U.S. 51, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979).

[24] Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, __ U.S. __, 113 S.Ct. 2264 (1993).

[25] Lucas v. South Carolina Coastal Council, __ U.S. __, 112 S.Ct. 2886, footnote 8 at 2894 (1992).

[26] Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994), cert. denied, 115 S.Ct. 898 (1995). (The Federal Circuit Court remanded the case to the Federal Court of Claims to determine whether a 60% diminution of value is sufficient to constitute a taking.)

[27] Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, __ U.S. __, 113 S.Ct. 2264, 2290 (1993).

[28] Nollan v. California Coastal Commission, 483 U.S 825, 107 S.Ct. 3141, 3148, 97 L.Ed.2d 677 (1987). A requirement that the property owner provide lateral beach access across his or her property does not bear a close enough relation to a regulation adopted to protect and maintain visual access of the ocean.

[29] Dolan v. City of Tigard, __ U.S. __, 114 S.Ct. 2309, 2319-2320 (1994). The City of Tigard did not carry its burden of showing that a *public* greenway served the legitimate purpose of flood control along a creek any better than a private one. The City also did not show that the dedication of the pedestrian/bikeway would reduce the additional traffic created by the development.

[30] Ace Ambulance Service, Inc. v. City of Augusta, 337 A.2d 661 (Me. 1975).

[31] Seven Islands Land Co. v. Maine Land Use Regulation Commission, 450 A.2d 475, 482 (Me. 1982) (denial of permission to land management company to cut any trees other than dead or dying fir on 432 acres of a 25,000 acre parcel, and a temporary prohibition on cutting on another 118 acres of the same parcel did not render it substantially useless). See also State v. Johnson, 265 A.2d 711 (Me. 1970) (prohibition on filling of wetlands which left the property owner's land with "no commercial value" was "both an unreasonable exercise of the police power and equivalent to taking within constitutional considerations"); Hall v. Board of Environmental Protection, 528 A.2d 453 (Me. 1987) (denial of a permit to build on sand dune was not a taking because "beneficial and valuable uses" of the property remain to the property owners).

[32] Foss v. Maine Turnpike Authority, 309 A.2d 339, 344 (Me. 1973) (damage caused to abutting property owners by salting operations of Turnpike Authority could be considered a taking as an "interest in the property, or in its use or enjoyment, [was] seriously impaired"); Bell v. Town of Wells, 557 A.2d 168 (Me. 1989) (State statute defining public trust in intertidal land was unconstitutional because it required a public easement across private property without providing compensation).

[33] See Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).

[34] Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

[35] Drake v. Town of Sanford, 643 A.2d 367 (Me. 1994).

TAKINGS LAWS IN OTHER STATES

Larry Morandi of the National Conference of State Legislatures provided summaries of existing and new legislation in other states related to "takings." These laws can be categorized into three basic groups; some states' laws fall into more than one group.

Attorney General review. Two states (Indiana and Delaware) require the Attorney General to review proposed agency regulations to ensure that they do not result in a taking requiring compensation.

State agency assessment. Twelve states (Arizona, Idaho, Kansas, Missouri, Montana, North Dakota, Tennessee, Utah, Virginia, Washington, West Virginia and Wyoming) require agencies themselves, with the help of guidelines prepared by the Attorney General, to assess the potential effect of proposed regulations on the use of private property in order to avoid a compensable taking.

Compensation. Five states (Florida, Louisiana, Mississippi, North Dakota and Texas) have adopted legislation that creates a statutory definition of a "taking" that requires the payment of compensation even when no compensation would be due under the Constitution.

- Florida's standard for when compensation is due is when a regulation imposes an "inordinate burden" on the property.
- Louisiana has set the threshold for relief at the reduction of value by 20 percent or more. This applies to only agricultural and forest land.
- Mississippi requires compensation when state or local government restrictions reduce the value of land by 40 percent or more. This applies to only land devoted to agricultural or timber harvesting activities.
- North Dakota defines "regulatory takings" to be the reduction in value of private real property by more than 50 percent. Although the new law does not specifically state that compensation is available for a regulatory taking, such an interpretation is possible. Exempted are regulatory actions that substantially advance legitimate state interests, do not deny an owner economically viable use of land, or comply with applicable state or federal laws.
- Texas redefines a "taking" to include a reduction in value of private real property of 25 percent or more caused by a state or local government action.

- The Washington Legislature enacted a citizen-initiated measure that required a state or local governmental entity to pay full compensation for any reduction in value of private property resulting from a regulation of private property or restraint of land use for public benefit. Before the law became effective, opponents collected sufficient citizen signatures to delay the effective date and put the measure on the ballot for the next election. The compensation measure was defeated 60% to 40% in the election held on November 7, 1995, and never went into effect.

PROPOSAL #1

That the Attorney General be prohibited from approving any proposed rule if that rule is reasonably expected to result in a taking of private property under the Constitution, unless such a result is directed by statute or sufficient procedures exist in law or in the proposed rule to allow for a variance designed to avoid such a taking; and

That each legislative committee, during its review of major substantive rules, review the rule to determine whether sufficient variance provisions exist in law or in the rule to avoid an unconstitutional taking, and whether, as a matter of policy, the reduction is necessary or appropriate for the protections of the public health, safety and welfare advanced by the rule.

Discussion

Current law requires that the Attorney General's Office approve all rules "as to form and legality" before the rule can take effect. This proposal prohibits the Attorney General from approving any rule that is reasonably expected to result in an unconstitutional taking of private property, unless that taking is either expressly authorized by the Legislature or there are sufficient variance procedures in law or in the proposed rule to avoid such a taking.

Existing law also requires that certain rules, called "major substantive" rules, be reviewed by the appropriate legislative committee prior to final adoption. The law currently requires the committee's review to include, but not be limited to, review for consistency with its statutory authority, conformity with legislative intent, potential conflicts with other laws, necessity, reasonableness and complexity. This proposal add to those review criteria the requirement that the committee also review those rules that are reasonably expected to result in a significant reduction in property values to ensure that sufficient "safety valves" exist to avoid an unconstitutional taking and whether, as a matter of policy, the expected reduction is necessary or appropriate for the protections of the public health, safety and welfare advance by the rule.

Draft legislation implementing this proposal is attached as Sections 7 and 8 in Appendix D.

PROPOSAL #2

That a Land Use Mediation Program be created to provide private landowners with a prompt, independent, inexpensive and local forum for mediating land use problems

Discussion

This proposed legislation creates a land use mediation program to provide private landowners with a prompt, independent, inexpensive and local forum for mediating a land use problem as an alternative to court.

Currently, a landowner who believes he or she has suffered harm from a local or state land use decision may appeal the final administrative action to the Superior Court under Rule 80B of the Maine Rules of Civil Procedure. If the landowner was denied a permit or variance by either a municipal Code Enforcement Officer or Planning Board, the landowner must first appeal that denial to the Zoning Board of Appeals of that municipality. If the Zoning Board of Appeals also denies the landowner's request, that denial is a final administrative action that the landowner may then appeal to the Superior Court within 30 days. A landowner denied a permit or variance by a State agency, such as the Land Use Regulation Commission or the Department of Environmental Protection, must pursue the appeal procedures available within the particular agency before the decision is a final administrative action appealable to the Superior Court within 30 days. The Court can uphold the administrative decision, remand the decision back to the agency for further proceedings, or reverse or modify the administrative decision in certain situations. The Court can order that compensation be paid to the landowner, but only if the facts of the case rise to the level of a taking under the Constitution.

This proposal establishes a land use mediation program that allows a person who has suffered significant harm as a result of a local or state land use decision, and who has tried but failed to obtain relief using existing administrative appeal procedures, to apply for mediation services from the Court Mediation Service. Once that application is filed, the time established by law or by rules of the court for that person to seek judicial review of that governmental action is stayed for 120 days. The purpose of that stay is to allow time for mediation to occur without affecting the person's rights to judicial review if a mediated settlement can not be achieved.

The program is self-funded through fees paid by the person requesting the mediation. The Court Mediation Service may establish fees, except that the fees may not exceed $150 for each 4 hours of mediation. The applicant is required to pay all costs associated with public notice of the mediation sessions. Fees collected by the Court Mediation Service are deposited in a nonlapsing account within the Administrative Office of the Courts and must be used to cover the costs of mediation associated with the land use mediation program.

The existing Land and Water Resources Council is required to report to the Legislature, the Governor and Courts and the Executive Director of the Court Mediation service on the functioning of the mediation program in December of 1998 and again in December of 2000. The program is sunset on October 1, 2001.

Draft legislation implementing this recommendation is attached as Sections 1 through 6 of Appendix D.

APPENDIX A

APPROVED

JUL 3 '95

BY GOVERNOR

CHAPTER

45

RESOLVES

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND NINETY-FIVE

H.P. 867 - L.D. 1217

Resolve, Establishing the Study Commission on Property Rights and the Public Health, Safety and Welfare

Emergency preamble. Whereas, Acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, Article 1, Section 21 of the Constitution of Maine and the Fifth Amendment of the Constitution of the United States provide that private property may not be taken for public use without just compensation; and

Whereas, every property owner holds property with the responsibility that it not be used to injure the health, safety, welfare, communities and environment of the people of the State; and

Whereas, Maine and United States Supreme Court decisions state that governmental actions including rules, that do not formally invoke the condemnation power, may result in a taking for which compensation is required; and

Whereas, under the Constitution of Maine and the Constitution of the United States, courts currently determine whether a law or regulation amounts to an unconstitutional "taking" of property requiring government compensation based on the facts of each case; and

Whereas, any change in the takings laws of the State may have far reaching effects on the public treasury of the State and municipalities; and

Whereas, there is an issue regarding resolution of claims for property owners seeking compensation under the Constitution of Maine and the Constitution of the United States; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore, be it

Sec. 1. Commission established. Resolved: That the Study Commission on Property Rights and the Public Health, Safety and Welfare, referred to as the commission, is established; and be it further

Sec. 2. Membership. Resolved: That the commission consists of 24 members appointed as follows:

1. The Governor or the Governor's designee;

2. The Attorney General, or the Attorney General's designee;

3. Two representatives of municipal government, appointed by the Governor. The Governor shall consider recommendations made by the Maine Municipal Association;

4. Three representatives of conservation interests, appointed by the Speaker of the House of Representatives. The Speaker of the House of Representatives may consider recommendations made by conservation commissions and organizations, lake associations and watershed districts;

5. Three members representing private property owners, appointed by the President of the Senate. The President of the Senate may consider recommendations made by the Maine Farm Bureau Association, the Maine Forest Products Council and the Maine Association of Realtors;

6. One member representing the business community, appointed by the Governor. The Governor may consider recommendations made by the Maine Alliance and the Maine Chamber of Commerce and Industry.

7. Five members of the Joint Standing Committee on Judiciary, appointed jointly by the Senate Chair and the House Chair. The 5 members of the Judiciary Committee shall choose from one of its members to serve as chair of the commission; and

8. Two members of the Joint Standing Committee on Natural Resources, 2 members of the Joint Standing Committee on

Agriculture, Conservation and Forestry, 2 members of the Joint Standing Committee on State and Local Government and 2 members of the Joint Standing Committee on Inland Fisheries and Wildlife, appointed jointly by the President of the Senate and the Speaker of the House of Representatives; and be it further

Sec. 3. Appointments. Resolved: That all appointments must be made no later than 10 days following the effective date of this resolve. The appointing authorities shall notify the Executive Director of the Legislative Council upon making their appointments. When the appointment of all members is complete, the chair of the commission shall call and convene the first meeting of the commission no later than August 15, 1995; and be it further

Sec. 4. Duties. Resolved: That the commission shall study constitutional private property rights protections and examine the following questions and issues:

1. Is there credible evidence that state and municipal governments have engaged in takings in a manner that violates the Constitution of Maine or the Constitution of the United States;

2. Do specific state or local laws, rules or regulations pose an unconstitutional burden on property owners in the context of the government's responsibility to protect public health, safety and welfare;

3. Do issues of ripeness, exhaustion of administrative remedies and statutes of limitations unreasonably delay the adjudication of legitimate claims for compensation;

4. Should a statutory cause of action, beyond the requirements of current statutory and constitutional law, be created for property owners who are subject to diminution in property value as the result of governmental action;

5. Can pursuit of takings claims under the Constitution of Maine and the Constitution of the United States be made less costly and more expeditious for property owners by establishing an alternative dispute resolution or other procedure that may resolve property owners' claims without having to file an action in court in the first instance;

6. Do the original legislative documents 170 and 1217 from the First Regular Session of the 117th Legislature violate the constitutional principle of equal protection due to enforcement of a law against one property owner while not enforcing the same law against a similarly situated property owner. If constitutional, would the proposed bills violate principles of sound and just public policy because of the disparate treatment;

7. If the State is to create a cause of action for property owners against governmental entities that incrementally decrease property values, should the law, as a matter of sound and just public policy, also create an identical cause of action for property owners against nongovernmental entities that incrementally decrease property values. If not, why not; and

8. How would the proposed takings laws affect the court system and delivery of justice to our citizens; and be it further

Sec. 5. Public participation; activities. Resolved: That the commission shall hold at least 2 public hearings in different geographic areas of the State and give public notice of the hearings in order to solicit public participation and comment. The commission may undertake other hearings, presentations or analyses it determines useful; and be it further

Sec. 6. Recommendations. Resolved: That the commission shall submit a report of its findings and recommendations with accompanying legislation, if any, to the Second Regular Session of the 117th Legislature and to the Joint Standing Committee on Judiciary by December 1, 1995. The commission's report must represent the consensus of the members to the greatest extent possible. The report must include:

1. An explanation of the current process in the State that property owners must follow to make a claim for compensation based on the Constitution of Maine and of the Constitution of the United States;

2. An explanation of any recommendation for legislation or further examination of specific laws, rules or regulations;

3. The fiscal impact on the State and its municipalities of any proposed legislation; and

4. An explanation of why legislation or further examination of specific laws, rules and regulations is not needed, if that recommendation is made; and be it further

Sec. 7. Staff assistance. Resolved: That the commission shall request staffing and clerical assistance from the Legislative Council; and be it further

Sec. 8. Compensation; funding. Resolved: That the members of the commission who are Legislators are entitled to receive the legislative per diem for each day's attendance at meetings of the commission. The commission may seek, receive and expend funds from sources other than the General Fund. The Executive Director

of the Legislative Council shall administer the commission's budget; and be it further

Sec. 9. Appropriation. Resolved: That the following funds are appropriated from the General Fund to carry out the purposes of this resolve.

Sec. 9. Appropriation. Resolved: That the following funds are appropriated from the General Fund to carry out the purposes of this resolve.

1995-96

LEGISLATURE

Study Commission on Property Rights and the Public Health, Safety and Welfare

Personal Services	$2,860
All Other	3,140
TOTAL	$6,000

Provides funds for the per diem and expenses of legislative members and public hearing and miscellaneous costs of the Study Commission on Property Rights and the Public Health, Safety and Welfare.

; and be it further

Sec. 10. Allocation. Resolved: That the following funds are allocated from Other Special Revenue funds to carry out the purposes of this resolve.

1995-96

LEGISLATURE

Study Commission on Property Rights and the Public Health, Safety and Welfare

All Other	$500

Allocates funds to authorize expenditures if private or public funds are received to support the activities of the Study Commission on Property Rights and the Public Health, Safety and Welfare.

Emergency clause. In view of the emergency cited in the preamble, this resolve takes effect when approved.

APPENDIX B

STUDY COMMISSION ON PROPERTY RIGHTS AND THE PUBLIC HEALTH, SAFETY AND WELFARE (Chapter 45, RESOLVES 1995)

MEMBERSHIP

Appointments by the Governor

Rocko Graziano
74 Old Kents Hill Road
Readfield, Maine 04355

Gloria DeGrandpre
45 Wolfe's Neck Road
Freeport, Maine 04032

Steve Kasprzak
P.O. Box 26
North Waterboro, Maine 04061

Joint Appointments by the President and Speaker

Representative Edward L. Dexter
RR 1, Box 470
Kingfield, Maine 04947

Representative Thomas M. Tyler
9 Deerfield Drive
Windham, Maine 04062

Representative Ernest C. Greenlaw
P.O. Box 331
Sebago Lake, Maine 04075

Representative Richard A. Gould
HCR 76, Box 260
Greenville, Maine 04441

Senator Michael H. Michaud
111 Main Street
East Millinocket, Maine 04430

Representative Royce W. Perkins
RR1, Box 22-C
Penobscot, Maine 04476

Representative Jane W. Saxl
37 Pond Street
Bangor, Maine 04401

Representative Julie-Marie Robichaud
8 Home Farm Road
Caribou, Maine 04736

Appointments by the President

William Vail
Maine Forest Products Council
146 State Street
Augusta, ME 04330

Gregory W. Fowler
168 Greely Road
Cumberland, Maine 04021

Edward B. Getty
28 Woodcrest Road
Windham, Maine 04062

Appointments by the Speaker

Beth Nagusky
Natural Resources Council of Maine
271 State Street
Augusta, Maine 04330-6900

Sandra Neilly
Maine Audubon
P.O. Box 6009
Falmouth, Maine 04105-6009

Benjamin Lund
Brann & Isaacson
P.O. Box 3070
Lewiston, Maine 04243-3070

Appointments by the Judiciary Committee Chairs

Senator S. Peter Mills
Chair of Commission
P.O. Box 9
Skowhegan, Maine 04976

Representative Sharon Anglin Treat
P.O. Box 12
Gardiner, Maine 04345

Representative Robert R. Hartnett
5 Bishop Farm Road
Freeport, Maine 04032

Representative Richard A. Nass
P.O. Box 174
Acton, Maine 04001

Representative Elizabeth Watson
138 Maine Avenue
Farmingdale, Maine 04344

Ex Officio

Evan Richert (Governor's designee)
State Planning Office
38 State House Station
Augusta, Maine 04333

Jeff Pidot
(Attorney General's designee)
6 State House Station
Augusta, Maine 04333-0006

8240LHS
Revised 11/13/95

APPENDIX C

MATERIALS DISTRIBUTED TO THE STUDY COMMISSION

"Protecting Lake Water Quality Means Protecting Your Property Values," provided by Kevin Boyle

Testimony to the Joint Standing Committee on Judiciary on LD 1217 and LD 170 by Elizabeth Butler, counsel to Gov. King, dated May 8, 1995, provided by OPLA

The Maine Endangered Species Act, State of Maine, Inland Fisheries and Wildlife Laws, provided by Alan Clark

Takings Law in Plain English, by Christopher J. Duerksen and Richard J. Roddewig, provided by the American Resources Information Network

Dan Fleishman, Senior Planner, Southern Maine Regional Planning Commission, letter to Study Commission, dated September 13, 1995

Dan Fleishman, Senior Planner, Southern Maine Regional Planning Commission, letter to Study Commission, dated September 28, 1995

Florida "takings" statute, Enrolled CS/HB 863: The Bert J. Harris, Jr., Private Property Rights Protection Act and the Florida Land Use and Environmental Dispute Resolution Act

David W. Guernsey, Testimony before Commission on Property Rights and the Public Health, Safety and Welfare, October 13, 1995

Comments before the Study Commission on Property Rights and the Public Health, Safety and Welfare, provided by Ed Heath

Statement by Peter Lawrence, Past-president, Small Woodland Owners Association of Maine

Larry Morandi, "Takings for Granted," State Legislatures, June, 1995

State "Takings" Legislation Updates, June 23, 1995 and September 1, 1995, Larry Morandi, National Conference of State Legislatures

Testimony of Dr. Rutherford H. Platt to the Maine Special Legislative Study Commission on Property Rights and Regulatory Takings, October 13, 1995

Statement of Jonathan Reisman, October 13, 1995, before the "Takings" Commission: Property Rights Protection Act

Testimony before the Board of Environmental Protection on Proposed Amendments to Chapter 355, Section 4(I), October 25, 1995, Alison Reiser, Professor of Law and Director, Marine Law Institute, University of Maine School of Law

Dean Donald Zillman and Professor Merle Loper, University of Maine School of Law, The Takings Clause

Shoreland zoning law (Maine Revised Statutes, Title 38) changes and general zoning laws (Title 30-A), provided by OPLA

Side by Side: Possible Actions and Questions/Issues, prepared by OPLA

Draft Report, mailed for November 3, 1995 meeting, prepared by OPLA

Background Materials, Land Use Regulatory Reform Study Committee, September 15, 1993, excerpts from final report and updated summaries, provided by OPLA

Draft Report for Subcommittee Review, November 9, 1995, prepared by OPLA

Resolves 1995, Chapter 45

LD 1217, Committee Amendment "B" (Minority Report)

7755NRG

APPENDIX D

APPENDIX D

AN ACT to Implement the Recommendations of the Study Commission on Property Rights and the Public Health, Safety and Welfare Establishing a Land Use Mediation Program and Providing for Further Review of Rules

Sec. 1. 2 MRSA §8 is enacted to read:

§8. Land use mediation; obligation to participate

Agencies within the Executive Branch shall participate in mediation under Title 5, chapter 314, subchapter II, when requested to participate by the Court Mediation Service. This section is repealed on October 1, 2001.

Sec. 2. 4 MRSA §18, sub-§6-B is enacted to read:

6-B. Land use mediation. The Land Use Mediation Program is administered and funded as follows.

A. The Director of the Court Mediation Service shall administer the land use mediation program established in Title 5, chapter 314, subchapter II.

B. A land use mediation fund is established as a nonlapsing, dedicated fund within the Administrative Office of the Courts. Fees collected for mediation services pursuant to Title 5, chapter 314, subchapter II must be deposited in the fund. The Administrative Office of the Courts shall use the resources in the fund to cover the costs of providing mediation service as required under that law.

This subsection is repealed on October 1, 2001. Any balances remaining in the fund must be transferred to a nonlapsing account within the Judicial Department to be used to defray mediation expenses.

Sec. 3. 5 MRSA c. 314, chapter headnote, is amended to read:

COORDINATION OF LAND USE AND NATURAL RESOURCE MANAGEMENT

SUBCHAPTER I
LAND AND WATER RESOURCES COUNCIL

Sec. 4. 5 MRSA §3331, sub-§5 is enacted to read:

5. Reporting on the land use mediation program. The Council shall report by December 1, 1998 and December 1, 2000, to the Governor, the Administrative Office of the Courts, the Executive Director of the Legislative Council and the Director of the Court Mediation Service on the operation and effectiveness of the land use mediation program established under subchapter II. The reports must

list the number and type of mediation requests received, the number of mediation sessions conducted, the number of signed mediation agreements, a summary of the final disposition of mediation agreements, a narrative discussion of the effectiveness of the program as determined by the Council, a summary of deposits and expenditures from the land use mediation fund created in Title 4, section 18, subsection 6-B and any proposals by the Council with respect to the operation, improvement or continuation of the mediation program. This subsection is repealed on October 1, 2001.

Sec. 5. 5 MRSA c. 314, sub-c. II, is enacted to read:

SUBCHAPTER II
LAND USE MEDIATION PROGRAM

§3341. Land use mediation program

1. Program established. The land use mediation program is established to provide eligible private landowners with a prompt, independent, inexpensive and local forum for mediation of governmental land use actions as an alternative to court action.

2. Provision of mediation services; forms, filing and fees. The Court Mediation Service as created in Title 4, section 18, shall provide mediation services under this subchapter. The Court Mediation Service shall:

A. Assign mediators under this subchapter who are knowledgeable in land use regulatory issues and environmental law;

B. Establish a simple and expedient application process. Not later than February 1st of each year, the Court Mediation Service shall send to the Chair of the Land and Water Resources Council a copy of each completed intake form received and each agreement signed during the previous calendar year; and.

C. Establish a fee for its services in an amount not to exceed $150 for every 4 hours of service provided plus costs required for notice under subsection 5.

3. Application; eligibility. A person may apply for mediation under this subchapter if that person:

A. Has suffered significant harm as a result of a governmental action regulating land use;

B. Applies for mediation within the time allowed under law or rules of the court for that person to file for judicial review of that governmental action;

C. Has:

(1) For mediation of municipal governmental land use action, sought and failed to obtain a permit, variance or special exception and has pursued all reasonable avenues of administrative appeal; or

(2) For mediation of state governmental land use action, has a right to judicial review under section 11001 either due to a final agency action or the failure or refusal of an agency to act; and

D. Submits to the Court Mediation Service all necessary fees at the time of application.

4. Stay of filing period. Notwithstanding any other provision of law, the period of time allowed by law or by rules of court for a person to file for judicial review of the governmental action for which mediation is requested under this subsection is stayed for 120 days from the date the application for mediation is submitted to the Court Mediation Service.

5. Purpose; conduct of meetings; notice. The purpose of a mediation under this subchapter is to facilitate, within existing land use laws, ordinances and regulations, a mutually acceptable solution to a conflict between a land owner and a governmental entity regulating land use. The mediator shall, whenever possible and appropriate, conduct the mediation in the county in which the land which is the subject of the conflict is located. When mediating that solution, the mediator shall balance the public's right to know with the flexibility, discretion and private caucus techniques required for effective mediation. To ensure an open process, the mediator shall provide appropriate notice of a mediation session to each person who was a party or an intervenor in the governmental action being mediated and any other person whose participation is necessary or appropriate for a fair, full and open determination of the issues.

6. Parties to mediation. A mediator shall include in the mediation process any person necessary for effective mediation, including persons representing municipal, county or state agencies and abutters, parties, intervenors or other persons significantly involved in the underlying regulatory action. A mediator may exclude or limit a person's participation in mediation when the mediator determines that exclusion or limitation necessary for effective mediation.

7. Admissibility. The admissibility in court of conduct or statements made during mediation is governed by Rule 408 of the Maine Rules of Evidence for matters subsequently heard in a state court and Rule 408 of the Federal Rules of Evidence for matters subsequently heard in a federal court.

8. Agreements. Mediated agreements must be in writing and must be signed by the mediator and all participants in the mediation. An agreement that requires any additional governmental action is not self executing. If any additional governmental action is required, the person who requested the mediation is responsible for initiating that action and providing any additional information reasonably required by the governmental entity to implement the agreement. Notwithstanding any procedural restriction that would otherwise prevent reconsideration of the governmental action, a governmental entity may reconsider its decision in the underlying regulatory action in accordance with the mediated agreement as long as that reconsideration does not violate any substantive application or review requirement.

9. Application. This subchapter applies to all permit or variance denials on or after the effective date of this section.

10. Sunset. This subchapter is repealed on October 1, 2001.

Sec. 6. 5 MRSA §8056, sub-§ 6 is amended to read:

6. Attorney General review and approval. The review required in subsection 1 shall not be performed by any person involved in the formulation or drafting of the proposed rule. The Attorney General may not approve a rule if it is reasonably expected to result in a taking of private property under the Constitution unless such a result is directed by statute or sufficient procedures exist in law or in the proposed rule to allow for a variance designed to avoid such a taking.

Sec. 7. 5 MRSA §8072, sub-§4 is amended to read:

4. Committee review. The committee shall review each provisionally adopted rule and, in its discretion, may hold public hearings on that rule. A public hearing under this subsection must be advertised in the same manner as required by legislative rules then in effect for advertisement of public hearings on proposed legislation. The committee's review must include, but is not limited to, a determination of:

A. Whether the agency has exceeded the scope of its statutory authority in approving the provisionally adopted rule;

B. Whether the provisionally adopted rule is in conformity with the legislative intent of the statute the rule is intended to implement, extend, apply, interpret or make specific;

C. Whether the provisionally adopted rule conflicts with any other provision of law or with any other rule adopted by the same or a different agency;

D. Whether the provisionally adopted rule is necessary to fully accomplish the objectives of the statute under which the rule was proposed;

E. Whether the provisionally adopted rule is reasonable, especially as it affects the convenience of the general public or of persons particularly affected by it;

F. Whether the provisionally adopted rule could be made less complex or more readily understandable for the general public; ~~and~~

G. Whether the provisionally adopted rule was proposed in compliance with the requirements of this chapter and with requirements imposed by any other provision of law~~.~~; and

H. For a rule that is reasonably expected to result in a significant reduction in property values, whether sufficient variance provisions exist in law or in the rule to avoid an unconstitutional taking, and whether, as a matter of policy, the expected reduction is necessary or appropriate for the protections of the public health, safety and welfare advanced by the rule.

STATEMENT OF FACT

Landowner mediation program. This bill establishes a mediation program for landowners aggrieved by government regulation. The purpose of the bill is to provide landowners with a prompt, independent, inexpensive and local forum in which to resolve land use disputes without going to court. Mediation is made available to any property owner who has suffered significant harm and who has failed to obtain relief through administrative appeal. It is not necessary for the landowner to calim a "taking."

Once an application is filed with the Court Mediation Service, the time for further appeal is stayed for a period of 120 days while the attempt is made to achieve a mediated settlement.

The program is self-funded through fees established by the Court Mediation Service. Fees may not exceed $150 for each four hours of mediation provided plus the expenses for any necessary notice. Fees are paid by the party requesting mediation.

Although mediation will include all parties who may have a stake in the dispute, the mediator retains flexibility to meet separately in private caucus with each interest group as is customary in a mediation setting.

The existing Land and Water Resources COuncil is required to report on the functioning of the program in December of 1998 and in December of 2000. The program is repealed under a sunset date of October 1, 2001.

Attorney General review. Under Maine's Administrative Procedure Act, the Attorney General approves all agency rules for "form and legality" before they take effect. This bill requires that the Attorney General disapprove any rule that is reasonably expected to result in an unconstitutional taking of private property unless the taking is expressly authorized by the Legislature or unless there are sufficient variance provisions to avoid a taking.

Legislative review. Under current law, before adoption of any "major substantive"rule, the issuing department must submit the rule for review by the legislative committee which oversees that department. The committee ensures that the rule is consistent with statutory authority, that it conforms with legislative intent, that it does not conflict with other laws and that it is necessary, reasonable and not overly complex. This bill would add two more criteria for those rules that may cause significant reductions in property values:

1. Are there variances available to avoid an unconstitutional taking of private property?

2. Regardless of whether a taking might result, is the expected reduction in property values necessary or appropriate for the public protections advanced by the rule?

The second criterion is based on public policy judgments and is not limited to any constitutional standard.