

MAINE STATE LEGISLATURE

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May 3, 1995

Representative Lloyd P. LaFountain, III
House of Representatives
State House Station #2
Augusta, Maine 04333-0002

Re: L.D. 1217, the Takings Bill

Dear Representative LaFountain:

Your letter to me of April 27 raises important questions regarding the meaning of L.D. 1217, "An Act to Protect Constitutional Property Rights and to Provide Just Compensation." Your questions are essentially (1) whether this bill would simply implement Constitutional protections of private property, as its title and statement of fact suggest, and (2) whether the bill by its terms would have potentially retroactive application to laws, ordinances and regulations in effect prior to its enactment.

Because of the significance and broad implications of this bill, my office has undertaken a thorough legal analysis of all of its provisions and, in doing so, has compared it to background principles of Constitutional law. For your convenience, I am attaching a copy of our analysis, which deals with both of the issues raised in your letter, among others. Accordingly, I will summarize below this office's views concerning your two issues, and refer you to the attachment for a fuller analysis.

The purpose of L.D. 1217, as reflected in its title and its statement of fact, is ostensibly to provide a statutory scheme by which Constitutional private property rights are protected and compensation is paid when there has been an unconstitutional taking of property by state or local government. However, the bill's actual provisions depart markedly from the principles of Constitutional takings law and Constitutionally protected property rights, as these have been construed over a long history of court decisions at both the federal and state levels. Although the bill's scheme is complex, subject to certain exceptions it essentially

provides for the payment of compensation to landowners from state and municipal treasuries when the aggregate effect of laws, ordinances and regulations is to reduce a property's value for unrestricted and most profitable use by 50% or more.

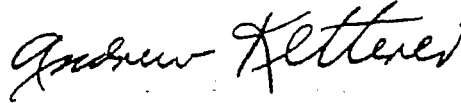
By contrast to L.D. 1217, the general thrust of the many Constitutional precedents in both federal and state courts is that a taking of private property occurs (1) when a government action results in a physical invasion or public occupation of private land, or (2) when a regulatory action deprives the owner of all economic use of the landowner's entire parcel of property. While the history of court decisions interpreting Constitutionally protected property rights has evolved over many decades, we are aware of no Constitutional provision, nor any judicial interpretation of any Constitutional provision, that contemplates the scheme set forth in L.D. 1217. In short, this bill would create a statutory program that provides landowner compensation from the public treasury, far in excess of any that is Constitutionally mandated. In an array of areas detailed in the attached analysis, this bill's program of landowner compensation significantly departs from the fine Constitutional lines demarcated by our courts in their efforts to balance the public's need for protection of the general welfare with the rights of private property owners to continue to enjoy the essential attributes of ownership.

With respect to the retroactivity issue you raise, subsection 8 of the bill, though somewhat confusing, seems to contain two essential concepts: first, as of the moment of enactment, L.D. 1217 would appear to apply retroactively only to laws, ordinances and regulations that became applicable after January 1, 1995; second, over time, as federal, state and local regulatory laws inevitably change, new landowner claims may arise in the future from a reduction in property value caused by the aggregate of preexisting laws, ordinances and regulations when supplemented by any new or replacement law, ordinance or regulation. In sum, as we understand L.D. 1217, over time the bill would clearly present a multitude of opportunities for retroactive application. For a more complete understanding of this issue as well, I suggest that you examine the attached analysis.

The only other point that bears emphasis here is that L.D. 1217 presents many issues that would become matters of extensive controversy and debate, including in litigation initiated by landowners asserting their new statutory rights to public compensation. I anticipate that such a law would spawn extraordinary, even unprecedented, amounts of litigation involving potentially staggering fiscal impacts. At this point, on the many issues that the bill raises, including the retroactivity issue, we can only form a view of its meaning based upon our reading of the language in the bill, since there are no Constitutional or other judicial precedents upon which to draw in interpreting this new scheme. Accordingly, it is difficult to speak with certainty regarding the ultimate legal interpretations and implications of this bill were it to be enacted.

We do plan to attend the public hearing and work session on this bill, and look forward to answering any further questions that you or other members of the Judiciary Committee have at that time.

Sincerely,

A handwritten signature in cursive script that reads "Andrew Ketterer".

ANDREW KETTERER
Attorney General

AK/tt

Attachment

cc: Senator Peter Mills, Senate Chair, Judiciary Committee
Representative Sharon Treat, House Chair, Judiciary Committee
Senator Joan Pendexter
Representative Edward Dexter