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ANDREW KETTERER
ATTORNEY GENERAL

REGIONAL OFFICES:

96 HARLOW ST., SUITE A
BANGOR, MAINE 04401
TEL: (207) 941-3070

59 PREBLE STREET
PORTLAND, MAINE 04101-3014
TEL: (207) 822-0260

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

Telephone: (207) 626-8800
FAX: (207) 287-3145

May 15, 1995

Senator S. Peter Mills, Jr.
Representative Sharon Anglin Treat
Co-Chairs, Joint Standing Committee on Judiciary
State House Station #115
Augusta, ME 04333

Dear Senator Mills and Representative Treat:

I am writing in response to your inquiry of May 9, 1995, concerning whether two bills currently pending before your Committee, Legislative Document 170, "AN ACT to Require State and Political Subdivisions to Pay Property Owners when Regulations Lower the Value of Property by More Than 50%," and Legislative Document 1217, "AN ACT to Protect Constitutional Property Rights and to Provide Just Compensation," would, if enacted, constitute "mandates" within the meaning of Article IX, Section 21 of the Maine Constitution. For the reasons which follow, it is the Opinion of this Department that either bill, if enacted in its current form, would, in several respects, constitute such a mandate.

Article IX, Section 21 of the Maine Constitution provides, in pertinent part

... the State may not require a local unit of government to expand or modify that unit's activities so as to necessitate additional expenditures from local revenues [unless the State provides annually 90 percent of the cost of the expenditures or the Legislature approves the legislation in question by a 2/3 vote].

Thus, in order to qualify as a "mandate" under this provision, an action of the Legislature must both have the effect of requiring a local unit of government to modify its activities and that modification must "necessitate" additional expenditures from local revenues to occur.

Of the two bills pending before your Committee, L.D. 1217 is the more comprehensive. Consequently, this Department will focus its analysis upon that bill. The provisions of L.D. 1217 were extensively described by this Department in recent correspondence with your Committee. See the letter of this Department to Representative Lloyd P. LaFountain, III, a member of the Committee, of May 3, 1995 as well as the document entitled Legal Analysis of L.D. 1217, the Takings Bill, dated May 8, 1995, copies of which are attached. Broadly speaking, the purpose of L.D. 1217 is to require that when State or local regulation causes the value of a parcel of real property to diminish by more than 50 percent, the unit of government imposing the regulation must either desist from that regulation or compensate the landowner to the full extent of the diminution. The bill also provides that even if the unit of government elects to desist in regulating, it must compensate the landowner for the temporary diminution in the value of his land during the time when the regulation was in effect.

The question presented, therefore, is whether these provisions, to the extent that they apply to local units of government, constitute a "mandate" within the meaning of the constitutional provision. In the Opinion of this Department, they do. While it is true that government action is already subject to certain constitutional limitations as to the extent to which it can devalue property without compensation, deriving from the so-called "Takings Clause" of the Fifth Amendment of the United States Constitution, for the reasons set forth more fully in the attached documents, L.D. 1217 would require compensation to be paid in a wide array of situations beyond those requiring compensation in the Constitution. Thus, if the bill were to become law, local units of government in Maine would be exposed to a greater level of financial liability for their regulatory activities than currently exists.

If all that L.D. 1217 did was to require local government to desist from certain regulatory activities, that requirement would not necessitate additional expenditures from local revenues, and thus would not constitute a mandate. However, L.D. 1217 must be considered as imposing a mandate on local units of government in at least three respects. First, as indicated above, it requires that if, taken together with the actions of other governments, a regulatory action of a local unit of government has caused a diminution of value of property of more than 50 percent, even if the governmental unit agrees to refrain from regulating further, it must nevertheless pay compensation to the landowner for the loss of value during the period in which the regulation applied. In this circumstance, therefore, a local unit of government would be required to expend additional revenues pursuant to the direction of the Legislature.

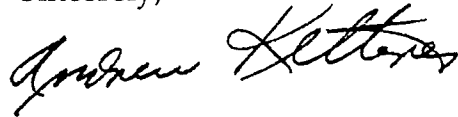
The second respect in which L.D. 1217 would constitute a "mandate" involves its provisions concerning its retroactive effect. As described more fully in the attached documents, the bill contains a provision that would extend its applicability

to certain acts of government occurring prior to the effective date of the legislation. See proposed 1 M.R.S.A. § 815(8), contained in L.D. 1217. Thus, the bill would expose a local unit of government to liability for compensation for acts which it has already undertaken, thus adding to the amount of compensation which it would be required to pay for a temporary diminution of value even if it were to elect to desist from regulating following the passage of the bill.

Finally, the bill provides that a landowner successfully pursuing a claim under it would be entitled to his attorney's fees and costs, to be paid by the unit of government in question. This additional requirement, therefore, could lead to the expenditure of local revenues in a manner which is not now required by law.

I hope the foregoing answers your question. Please feel free to reinquire if further clarification is necessary.

Sincerely,



ANDREW KETTERER
Attorney General

AK:sw
Attachments

cc: Senator Dana C. Hanley
Sponsor, Legislative Document 170
Representative Edward L. Dexter
Sponsor, Legislative Document 1217



ANDREW KETTERER
ATTORNEY GENERAL

Telephone: (207) 626-8800
FAX: (207) 287-3145

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TEL: (207) 822-0260

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.

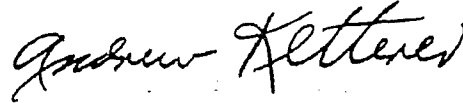
By contrast to L.D. 1217, the general thrust of the many Constitutional precedents in both federal and state courts is that a taking of private property occurs (1) when a government action results in a physical invasion or public occupation of private land, or (2) when a regulatory action deprives the 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

Legal Analysis of L.D. 1217, the Takings Bill

Summary

The purpose of L.D. 1217, as reflected in its title and statement of fact, is to provide a statutory scheme by which Constitutional property rights are protected, and compensation is required when there has been an unconstitutional taking of property by the government. However, the bill's terms depart markedly from the Constitution's Fifth Amendment protection of private property, as this has been construed over the history of court decisions at both the federal and state levels. Although the bill's scheme is complex, it essentially provides for the payment of compensation by state and municipal governments when the aggregate effect of laws and regulations applied to any property is to reduce its otherwise unrestricted value by 50% or more. The bill contains complicated provisions, to be applied in court actions by juries, by which the proportionate burden of compensation is established among different state and local government units when the aggregate effect of multiple laws and regulations causes a cumulative reduction in property value of 50% or more. The bill applies to all laws and regulations, whether imposed by statute, ordinance or rule, having an effect on private property. The bill retroactively applies to existing laws and regulations where these are supplemented by any laws or regulations enacted or applied after January 1, 1995. The bill allows for the recovery of attorney's fees and other costs by successful claimants.

There are exceptions from the coverage of the bill for regulations of air and water pollution, solid and hazardous waste, and prohibitions on "intense development of property incompatible with the surrounding area." While this last exception has an unclear meaning and application, among the many laws that would be potentially affected by the bill are the following: most zoning and land use laws and ordinances, including many shoreland zoning and subdivision control requirements; drinking water and groundwater protection laws; the plumbing code and other laws regarding septic systems; pesticide laws; the Site Location of Development Law; the Natural Resources Protection Act; the Endangered Species Act; the LURC law; the Forest Practices Act and other forestry laws; agriculture laws; landlord-tenant laws; and fishing and hunting laws. Finally, the bill allows a government to escape the obligation to pay for the full value of property where it

* Although the focal point of this analysis is L.D. 1217, at the end we also provide an analysis of L.D. 170, a separate takings bill entitled "An Act to Require the State and Political Subdivisions to Pay Property Owners When Regulations Lower the Value of Property by More Than 50%."

decides not to apply the offending law(s) or regulation(s), but payment must still be made for temporarily depriving the owner of a property's unrestricted use; and issues remain concerning the legal authority as well as equal protection Constitutional implications of agency decisions not to apply their enabling statutes. The bill does not provide for how state and local governments will fund the future costs of paying the compensation to landowners that the bill mandates.

Background on Takings Law

The great body of takings cases throughout the United States has evolved from the Fifth Amendment's proscription on the government's taking of private property without payment of just compensation. Originally directed at the government's exercise of eminent domain authority, during this century the takings clause has been construed to apply when the government exercises its regulatory, or police power, authority. Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922). In recent years, the balance of takings decisions in the U.S. Supreme Court has shifted to those favoring the more conservative views of the new majority of the Court. Even so, there is an essential set of takings principles recognized by courts throughout the land.

Constitutional takings jurisprudence is premised upon a balancing of the public's need for providing protection of the general welfare and community, against the rights of owners of property to continue to enjoy the essential attributes of that ownership, including the right to derive some economic benefit from it. As currently construed by our courts,¹ a regulatory taking of private property occurs in the following situations:

1. When the regulation results in a physical invasion or public occupation of private land;
2. When the regulation deprives the owner of all economic use of the property, taken as a whole, as evaluated within the context of the reasonable expectations of the owner at the time of property acquisition; or
3. In at least certain situations, when the regulation fails to substantially advance a legitimate governmental interest.

¹ Concrete Pipe and Products of California v. Construction Laborers Pension Trust, 113 S.Ct. 2264 (1993); Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992); Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Keystone Bituminous v. DiBenedictis, 480 U.S. 470 (1987); Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978); Hall v. BEP, 528 A.2d 453 (Me. 1987); Curtis v. Main, 482 A.2d 1253 (Me. 1984); Seven Islands Land Co. v. LURC, 450 A.2d 475 (Me. 1982); State v. Johnson, 265 A.2d 711 (Me. 1970).

Under these principles, regulatory takings ordinarily involve either a physical occupation of private property by the government or the deprivation of all economic use of the property taken as a whole. A Constitutional taking does not occur when the effect of the regulation is to merely reduce, even significantly, the value of private property in order to protect community values. A Constitutional taking does not occur when a regulation affects the use of a portion of a property, so long as economic use remains in the entire property. For example, a Constitutional taking does not occur where a building setback requirement prevents structural use of a portion of a property, so long as residential or other economic use remains at another location on the property. Further, a Constitutional takings claim is not ripe for adjudication until the property owner has pursued the administrative remedies available (i.e., seeking a building permit, a zoning variance where available, and appealing to the appropriate appeals board). In the long history of takings cases throughout the nation, we are aware of no court that has construed a 50% reduction in the maximized value of a parcel of land, caused by otherwise valid laws and regulations, as furnishing the basis for a Constitutional takings claim.

Section by Section Analysis of L.D. 1217

Section 815, Subsection 1. The most noteworthy feature of the definitions section is that the term "regulation," which may trigger the obligation of the public treasury to pay compensation to a private property owner, is broadly defined to include any law (including any statute, ordinance or rule) that directly or indirectly affects the value of property. While the term "property" in the definitions section is undefined, and therefore could be construed as including personal and intangible property, subsection 2 of the bill appears to limit its scope to real estate.

Section 815, Subsection 2. This short paragraph provides the essential ingredient of the bill: notwithstanding the judiciary's interpretation of the takings clause of the Constitution, a compensatory taking of private property under L.D. 1217 occurs when the effect of any laws and regulations of state and local government reduces a property's fair market value to less than 50% of its pre-regulatory (unrestricted) value. It isn't clear whether this rule is to extend to regulatory laws imposed upon land prior to its acquisition by the claimant.

Section 815, Subsection 3. This subsection spells out the property owner's right to file a lawsuit in Superior Court to require any state or local government(s) that imposed the offending law(s) or regulation(s) to purchase the property at the pre-regulatory (unrestricted) fair market value. Any party may demand trial by jury on the issue of compensation.

Section 815, Subsection 4. This section provides the calculus by which a 50% reduction in property value is to be determined. The "pre-regulatory" value is the property's "highest use" (this means most profitable use) "when acquired or thereafter." From this, it is difficult to pinpoint the time when the pre-regulatory value is to be determined, but presumably it is that moment in time when the

property would achieve its greatest value in a legally unrestricted state. This will give rise to more, more successful and more costly claims under the bill. Further, this section contradicts the rulings of many courts (including Maine's Supreme Court) that a regulatory takings claim requires evaluation of the economic impact of a regulation on the property taken as a whole. To the contrary, this section appears to allow the segmentation of the property for purposes of claiming a taking. Translation: even a large landowner may assert a taking of the 100-foot building setback area around a lake, since it can argue, under this provision, that that particular area has been subject to a very significant reduction in value from its unrestricted state.

Section 815, Subsection 5. Also contrary to the Constitutional rulings of virtually all courts, this section allows a takings claim for compensation to be asserted without exhaustion of administrative remedies. The property owner need only submit and have rejected "one reasonable application," without need for administrative or judicial appeal. This section further states that the factual findings of the state agency or local government, in rejecting the application, are not admissible in the takings proceeding. This section also provides that an application to the state or local government for a building permit is "deemed rejected" if the agency "unreasonably delays review" or "imposes burdensome conditions." Issues concerning whether an unreasonable delay or burdensome condition have occurred are decided by the trier of fact, presumably a jury. Failure by the government agency to clearly articulate to the permit applicant "the scope or size of the uses that would be allowed" may constitute the type of rejection or burdensomeness that gives rise to the property owner's right of compensation. Finally, this section provides that, where multiple regulations cumulatively cause a 50% reduction in value of the property from its otherwise unrestricted state, the property owner need only pursue one administrative application under one of those regulations before asserting a compensable taking under all.

Section 815, Subsection 6. This subsection provides a complex system to determine which government unit is responsible for paying each portion of the compensation due a landowner when multiple laws and regulations from governmental units reduce the value of property by 50% or more. Where all of the cumulative regulations derive from state government, each regulatory agency bears a proportionate share of the cost of compensation, except that there is a "rebuttable presumption" that the agency imposing "the last" regulation should bear the greatest proportion of responsibility.² (Note again that these provisions apply to legislative enactments, not just agency rules.) When the reduction in property value requiring compensation is caused by laws and/or regulations of both state and federal governments, but the state regulations alone (as determined by the trier of fact) would not have reduced the property value by 50%, the state nonetheless is

² Notwithstanding what this section of the bill suggests, most if not all the cost of compensation owed by state agencies under the bill will be payable by the general fund.

obliged to pay to the owner damages for the percentage of reduction in property value caused by state laws. Where a local government imposes regulations that may be implicated, the state is obliged to also pay for that compensation if the local government is acting pursuant to a state law mandate. While L.D. 1217 does not speak to the issue, the application of the "municipal mandates" amendment of Maine's Constitution may give rise to local government claims against the state's general fund for reimbursement of any costs incurred by local government under any of the provisions of the bill.

Section 815, Subsection 7. This section enables a governmental unit to seek to avoid payment of full compensation for an otherwise compensable taking by simply not applying the regulation to the property in question. It is unclear whether this provision constitutes a de facto amendment to all state regulatory statutes, thereby enabling state agencies and municipalities to forego implementation of those laws despite what their statutory mandates require. This could give rise to citizen suits to force the government to apply these statutory mandates as well as to Constitutional equal protection arguments if they do so unevenly. The bill provides that governmental units may not avoid paying compensation for a temporary taking, this being the loss of use and value of the property during the time when the regulation was in effect. Where a reduction in property value is caused by multiple laws or regulations, this section further provides that all the agencies responsible for administering those programs must agree not to apply the law, in order to avoid paying compensation.

Section 815, Subsection 8. This section deals with the retroactive application of the bill to regulations existing before January 1, 1995. While the language creates the appearance that the bill does not apply to preexisting laws and regulations, as a practical matter it will likely do so over time; this is because of the bill's provision that, should any new law or regulation (or any replacement even if not more burdensome) be applied to a property after January 1, 1995, then all preexisting laws and regulations affecting the same property also become subject to the compensation requirements of the bill.

Section 815, Subsection 9. This section describes certain types of regulations that are not subject to the 50% property value reduction standard for determining when compensation is required. It is not clear whether this is tantamount to a full exemption from the bill for these types of regulations. Regulations affected by this section are (i) those that prohibit nuisances, (ii) those that regulate "air emissions," "wastewater discharges," "solid wastes or hazardous wastes" (terms which by law do not include biomedical waste, waste oil, or septage), and (iii) those that "preclude the intense development of property incompatible with the surrounding area, as determined by a jury." While the meaning of this last exception is unclear, this section provides that its application to a particular circumstance requires a jury trial. There are no exceptions from the bill's application for regulatory programs mandated or delegated by the federal government and implemented by the State.

Section 815, Subsection 10. This section essentially imposes a six-year statute of limitations for filing claims under the bill.

Section 815, Subsection 12. This section enables a successful claimant under the bill to recover from state and/or local government treasuries all attorney's fees and costs of asserting the claim. These costs include any expenses of applying for a permit or other relief as well as appraisal experts employed to help substantiate the claimant's case in court. These costs would have to be paid by the government even if it agreed to eliminate the offending regulation(s) in lieu of buying the property.

Statement of Fact. The Statement of Fact says that the bill's purpose is to provide a fair and predictable procedure for adjudicating Constitutional rights. In fact, the bill establishes a statutory compensation program, that will be funded substantially if not entirely out of the state's general fund, and which is not founded in Constitutional law or Constitutional rights. The bill does not include a fiscal note.

Analysis of L.D. 170

Although the focus of attention is on L.D. 1217, the most comprehensive takings bill introduced in the Maine Legislature, a brief comparative analysis is presented here of L.D. 170, another takings bill before the Legislature. In large part, L.D. 170 is a simplified version of L.D. 1217. Many of the same issues exist in both bills. However, L.D. 170 does not include the exemptions, as described above, contained in subsection 9 of L.D. 1217, but rather contains exemptions for exercises of the police power to prevent noxious uses or demonstrable harm, exemptions that would also require court adjudication on a case-by-case basis. While L.D. 1217 is potentially and indirectly retroactive (see the analysis of subsection 8 above), L.D. 170 is explicitly retroactive to existing laws, ordinances and regulations. Unlike L.D. 1217, L.D. 170 does not appear to allow the aggregation of State, municipal and federal regulations for purposes of determining when a property's unrestricted-use value has been diminished by 50% or more. Finally, L.D. 170 does not contain L.D. 1217's provision allowing a governmental entity to avoid paying compensation for the full value of a property when all government agencies having jurisdiction agree not to apply their regulations. Like L.D. 1217, L.D. 170 does not include a fiscal note or other mechanism by which the costs of landowner compensation will be financed.