

MAINE STATE LEGISLATURE

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Ads

L.D. 1217

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STATE OF MAINE
HOUSE OF REPRESENTATIVES
117TH LEGISLATURE
FIRST REGULAR SESSION

COMMITTEE AMENDMENT "B" to H.P. 867, L.D. 1217, Bill, "An Act to Protect Constitutional Property Rights and to Provide Just Compensation"

Amend the bill by striking out everything after the enacting clause and before the statement of fact and inserting in its place the following:

PART A

Sec. A-1. 1 MRSA §815 is enacted to read:

§815. Inverse condemnation

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings:

A. "Implementation of a regulation" means an imposition of a regulation to a piece of property.

B. "Inverse condemnation" means the process by which property owners pursue their rights to just compensation in a situation in which the government has not formally condemned the property of the owners.

C. "Nuisance" means a use restriction inhering in the title of the property or existing in background principles of the law of property on the effective date of this section.

D. "Preregulatory fair market value" means the fair market value of a piece of property without the regulation or regulations adopted, enacted or applied since the owner acquired the property. The preregulatory fair market value

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2 includes the effect of all regulations adopted, enacted and
3 applied to the property before the owner acquired the
4 property.

6 E. "Regulation" means a law enacted by the State or a rule
7 adopted or applied by a state agency that directly or
8 indirectly affects the value of property. "Regulation"
9 includes a regulation or ordinance adopted by a municipality
10 if the regulation or ordinance is required by state law.

12 2. Regulatory takings. For the purposes of this section,
13 when implementation of a regulation by the State reduces the fair
14 market value of real property to 50% or less of its preregulatory
15 fair market value, the property is deemed to be taken for the use
16 of the public.

18 3. Mandated regulation. For the purposes of this section,
19 if state law requires a municipality to adopt a regulation or
20 ordinance, the State is deemed to have adopted or applied the
21 regulation or ordinance and the State is responsible for the
22 payment of compensation or damages as required under this section.

24 4. Purchase or damages required. The owner of property
25 deemed to be taken under subsection 2 may file an action for
26 inverse condemnation in Superior Court in the district in which
27 the property is located to require the State:

28 A. To pay damages reflecting the reduction in value caused
29 by the regulation; or

32 B. To purchase the property at its preregulatory fair
33 market value. The property owner or the State may elect to
34 have the issue of compensation decided by a jury.

36 In determining the amount of the compensation or damages due the
37 owner, the trier of fact may, but is not required to, consider
38 whether the regulation increases the value of any other property
39 owned by the claimant.

40 5. Calculation of reduction. In determining whether a
41 regulatory taking has occurred, the trier of fact shall compare
42 the fair market value of the property, as regulated, with the
43 preregulatory fair market value of the property. When
44 calculating the reduction in value of the property the owner
45 claims has been taken, other property in which the owner holds an
46 interest, whether or not contiguous to the property the owner
47 claims has been taken, may not be included in the calculation.

48 6. Ripeness. An inverse condemnation claim is ripe for
49 adjudication when the regulation allegedly causing the taking is
50 in effect.

2 enacted and first applied to the property. If the regulation
3 provides an opportunity to obtain a variance, special exception
4 or conditional use permit affecting the application of the
5 regulation reducing the value of that property, the owner need
6 submit and have rejected only one reasonable application for the
7 variance, special exception or permit before the inverse
8 condemnation claim is deemed ripe for adjudication.

9
10 A. An owner need not appeal the application determination,
11 and multiple applications need not be filed, before the
12 inverse condemnation claim is deemed ripe for adjudication.

13
14 B. An application is deemed rejected if the reviewing
15 entity unreasonably delays a final decision on the
16 application or imposes burdensome conditions on approval of
17 the application. The determination whether a delay has been
18 unreasonable or a condition burdensome is ordinarily a
19 question of fact for the trier of fact in the inverse
20 condemnation action. In determining whether a delay has
21 been unreasonable or a condition burdensome, the trier of
22 fact may consider whether the reviewing entity clearly
23 articulated to the applicant the size or scope of the uses
24 that would be allowed and that failure to so articulate may
25 be viewed as suggesting rejection or burdensomeness.

26 C. Factual findings of the regulator in the proceeding
27 rejecting the application are not binding in the inverse
28 condemnation proceeding.

29
30 D. If the property owner claims that multiple regulations
31 are cumulatively causing the reduction in value to the
32 property at issue, the owner need pursue only one variance,
33 special exception, permit or other means of avoiding
34 application of one regulation causing reduction in value.

35
36 7. Alternate relief. Instead of paying the compensation
37 awarded in an inverse condemnation action, the State may choose
38 not to apply the regulation reducing the value of the owner's
39 property.

40
41 8. Limited retroactivity: pending applications. The 50%
42 standard for determining when private property has been taken for
43 public use applies when any regulation or an amendment to a
44 regulation contributing to the reduction in the value of the
45 property at issue is enacted or becomes applicable to the
46 property after the effective date of this section. If multiple
47 regulations or amendments to the regulations reduce the value of
48 the property, only one of those regulations or amendments to the
49 regulations contributing 10% or more to the reduction need be
50 enacted or become applicable to the property after the effective

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2 date of this section for the 50% standard to apply.
3 Notwithstanding Title 1, section 302, this section applies to all
4 applications pending before a reviewing entity on the effective
5 date of this section.

6 **9. Exceptions.** The 50% standard for determining when
7 private property is taken for public use does not apply:

8
9 A. When the only use of the claimant's property that the
10 regulation at issue precludes constitutes a nuisance; and

11 B. To regulations:

12
13 (1) Adopted pursuant to Title 38, sections 581 to
14 608-A concerning air quality;

15
16 (2) Adopted pursuant to Title 38, sections 401 to 424,
17 451 to 452, 464-470 or section 571 concerning
18 wastewater;

19
20 (3) Adopted pursuant to Title 38, sections 1301 to
21 1319-X or sections 1361 to 1371 concerning solid and
22 hazardous wastes; or

23
24 (4) That preclude the intense development of property
25 incompatible with the surrounding area as determined by
26 a jury.

27
28 **10. Statute of limitations.** The statute of limitations for
29 asserting an inverse condemnation claim is 6 years after the date
30 the claim becomes ripe for adjudication.

31
32 **11. Nonexclusivity.** This section may not be construed to
33 create an exclusive remedy or to diminish the rights of property
34 owners under existing statutory, constitutional or common law.

35
36 **12. Attorney's fees.** If a property owner prevails in an
37 inverse condemnation action, the State is liable to the owner for
38 the reasonable costs of the action, including the owner's
39 reasonable attorney's fees and costs of experts, but excluding
40 costs incurred by the one reasonable application and rejection
41 required in subsection 6.

42
43 **13. Arbitration.** A property owner may choose to have the
44 inverse condemnation claim arbitrated. If the owner chooses to
45 arbitrate, the owner and the State shall select a 3-person panel
46 of arbitrators from a list submitted by the American Arbitration
47 Association. The arbitration must be conducted in accordance
48 with the real estate valuation arbitration rules of the American
49 Arbitration Association. The arbitration is binding on the owner
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and the State, with judicial review limited to that available under the Uniform Arbitration Act.

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PART B

Sec. B-1. Commission established. The Study Commission on Constitutional Property Rights and the Public Interests, referred to as the commission, is established.

Sec. B-2. Membership. The commission consists of 9 members appointed as follows:

A. Five members from the Joint Standing Committee on Judiciary; appointed by the Senate Chair and the House Chair of that committee; one member of the Joint Standing Committee on Natural Resources; and one member from the Joint Standing Committee on Inland Fisheries and Wildlife, appointed by the President of the Senate; and one member from the Joint Standing Committee on State and Local Government and one member from the Joint Standing Committee on Agriculture, Conservation and Forestry, appointed by the Speaker of the House of Representatives.

Sec. B-3. Appointments. All appointments must be made no later than 10 days following the effective date of this Act. 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 October 1st, 1995. The commission shall select a chair from among its members.

Sec. B-4. Duties. The commission shall study United States and State constitutional private property rights and examine the following questions and issues and any other issues concerning property rights that may arise:

- A. Is there evidence that the State and other governmental entities have violated the rights protected by the Fifth Amendment of the Constitution of the United States by taking property through regulations?
- B. Do state or other governmental entities' laws, rules, regulations or ordinances infringe on private property rights as the laws, rules, regulations and ordinances interrelate to a government's responsibility for public health, safety and welfare?
- C. Is access of private property owners to the constitutional right to compensation unreasonably delayed in

- 2 the current adjudicatory process because of issues such as
3 ripeness, exhaustion of remedies and statute of limitations?
- 4 D. Should a statutory cause of action and a statutory
5 process be created for property owners who are subject to
6 diminution in property value as the result of governmental
7 action? Should it state standards that have not yet been
8 delineated by court decisions?
- 10 E. Should an alternative dispute resolution system or other
11 procedure be offered in a takings claim if it provides a
12 cost efficient and expeditious mechanism for property owners?
- 14 F. Is there an equal protection issue due to a governmental
15 unit's action of exempting a property owner from application
16 of a specific regulation on that property, because it may
17 result in a takings by the government of property for a
18 public purpose, but not exempting other property owners that
19 do not suffer a takings? Regardless of the constitutional
20 right, does the ability of a government to avoid
21 compensating a landowner for a takings contradict public
22 policy on grounds of fairness or justice?
- 24 G. If a statutory process is enacted for private property
25 owners to pursue the constitutional right to just
26 compensation for property taken for public use, should a
27 statutory process be created for property owners against
28 nongovernmental entities that decrease property values?
- 30 H. What will be the impact on the state judicial branch and
31 its service, if a statutory process for private property
32 owners to pursue a takings claim be enacted? Will the
33 effect of its enactment be any different than similar new
34 laws that increase burdens on the state judicial branch?
- 36 I. Should the statutory process apply only to state actions
37 or should it also include municipalities and local
38 governments?
- 40 J. Should private property owners be given the option of
41 choosing inverse condemnation or damages?
- 42 K. Should the property owner be compensated the fair market
43 value or highest and best use for the property taken?
- 44 L. Should a threshold be included in a statutory process
45 that addresses the issue of self-definition of property lot
46 size, such as a minimum reduction of \$10,000 by the
47 implementation of a regulation?
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2 M. Should multiple regulations be considered in an inverse
4 condemnation claim, so that federal regulations are included
in the consideration of a takings claim assessment in the
diminution of value in the property?

6 N. Should attorney's fees for establishing a ripe claim
8 beginning at the application for a variance, special
exception or exemption be provided?

10 O. What have other states done to address the issue of
12 inverse condemnation and regulatory takings? Have other
states taken further steps to protect the rights of the
14 Fifth Amendment of the Constitution of the United States?

16 P. Should a trigger of less than 50%, similar to the
federal proposals, also be considered for the State?

18 Q. If other governmental entities are included with the
20 State, is there an issue with the unfunded mandate provision
requiring a 2/3 vote?

22 R. Should the laws be broadened to include other property,
24 such as personal property, or be confined to real property?

26 S. Should a private landowner be paid for temporary takings?

28 **Sec. B-5. Public participation; activities.** The commission shall
hold at least 3 public hearings in different geographic areas of
the State and shall give public notice of the hearings to solicit
30 public participation and comment. The commission may undertake
other hearings, presentations or analyses it determines useful.

32 **Sec. B-6. Recommendations.** The commission shall submit a
34 report of its findings and recommendations with accompanying
legislation to the Second Regular Session of the 117th
36 Legislature and to the Joint Standing Committee on Judiciary by
December 15, 1995. The commission report must represent the
38 consensus of the members to the greatest extent possible. The
report must include:

40 A. An explanation of the current situation in Maine for
42 property owners who make a claim for compensation based on
the Constitution of Maine and the Constitution of the United
44 States;

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

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- 2 C. The fiscal impact on the State or its municipalities of any proposed legislation;
- 4 D. The fiscal impact on landowners because of current laws, rules or regulations that reduce the value of their land; and
- 6
- 8 E. An explanation of whether legislation or further examination of specific laws, rules and regulations is needed or not needed.

10 **Sec. B-7. Staff assistance.** The commission shall request
12 staffing and clerical assistance from the Legislative Council.

14 **Sec. B-8. Compensation; funding.** The commission members who
16 are Legislators are not entitled to receive the legislative per
18 diem for each day's attendance at meetings of the commission.
20 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.

22 **Sec. B-9. Appropriation.** The following funds are appropriated
from the General Fund to carry out the purposes of this Part.

24 1995-96

26 **LEGISLATURE**

28 **Study Commission on Constitutional
Property Rights and the Public Interests**

30 All Other \$4,250

32 Provides funds for the expenses of members
34 and for public hearing and miscellaneous
36 costs of the Study Commission on
Constitutional Property Rights and the
Public Interests.

38 **Sec. B-10. Allocation.** The following funds are allocated from
40 Other Special Revenue funds to carry out the purposes of this
Part.

42 1995-96

44 **LEGISLATURE**

46 **Study Commission on Constitutional Property
48 Rights and the Public Interests**

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2 All Other \$500

4 Allocates funds to authorize expenditures if
6 private or public funds are received to
8 support the activities of the Study
Commission on Constitutional Property Rights
and the Public Interests.'

10 Further amend the bill by inserting at the end before the
12 statement of fact the following:

14 FISCAL NOTE

16 1995-96

18 APPROPRIATIONS/ALLOCATIONS

20 General Fund \$4,250
22 Other Funds 500

24 This bill will significantly increase the number of civil
26 cases filed in the court system. Additional General Fund
appropriations will be required to cover the costs associated
28 with these additional cases. The amount and timing of the
appropriations can not be determined at this time. The
30 collection of additional filing fees will also increase General
Fund revenue. These amounts also can not be estimated at this
32 time.

34 The Department of the Attorney General will also incur
significant additional costs to defend the State in these cases.
36 The department has requested phased-in General Fund
appropriations of \$181,883 in fiscal year 1995-96 and \$470,462 in
38 fiscal year 1996-97 to fund a new unit within the department. It
can not be determined whether this level of funding is justified
40 at this time.

42 The State may also incur significant additional costs to
reimburse property owners for reductions in property values
44 caused by state regulations. The amount and time of any
reimbursements will depend on the timing and outcome of suits
46 filed in the court system. The State Planning Office has
requested General Fund appropriations of \$5,000,000 in fiscal
48 year 1995-96 and \$10,000,000 in fiscal year 1996-97 to set aside
funding in a compensation trust fund for these contingent

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liabilities. At this time, there is insufficient data or experience to determine whether these amounts are appropriate.

The bill also provides a General Fund appropriation of \$4,250 in fiscal year 1995-96 for the Legislature for the expenses of members and a public hearing and miscellaneous costs of the Study Commission on Constitutional Property Rights and the Public Interests.

The bill additionally provides an allocation of Other Special Revenue funds of \$500 in fiscal year 1995-96 to the Legislature to provide expenditure authority if public or private funds are received to support activities of the commission.

The additional costs to provide staff and clerical assistance to the commission can be absorbed by the Legislature utilizing existing budgeted resources.'

STATEMENT OF FACT

This is the minority report of the Joint Standing Committee on Judiciary.

This amendment replaces the bill. It has 2 parts. Part A revises the original bill, creating statutory procedures for inverse condemnation actions. Part B establishes a study commission to examine takings issues. The amendment also adds an appropriation section, an allocation section and a fiscal note.

Part A

The Maine and United States Constitutions create a constitutional right to just compensation when an owner's property is taken by the government for public use. This part of the amendment establishes a new standard by which to measure when a state regulation affecting property value constitutes a "taking" and requires that relief be provided to the property owner. The relief may be in the form of the State not applying that regulation to that particular property owner, paying damages to the owner for the loss in property value or purchasing the owner's property by paying the landowner the fair market value of the land before the state regulation was applied to that property.

This amendment reduces the scope of the original bill so that it applies just to state laws and rules that directly or indirectly affect the value of property. Although it includes municipal regulations and ordinances required by state law, the

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2 State is the governmental entity responsible for payment of compensation or damages.

4 As in the original bill, a regulatory taking is defined as the situation in which the implementation of a state regulation reduces the value of real property to 50% or less of its fair market value before regulation. When calculating the amount of the reduction in value, the only land to be considered is the land regulated. The value of other land the owner owns, whether or not contiguous with the segment of land regulated, may not be used in determining whether there has been a 50% diminution in value. The fact that the owner's surrounding lands have increased in value may be taken into account in determining the appropriate level of compensation or damages.

16 The owner of the property may choose to have the State purchase the regulated land and provide just compensation or the owner may choose to keep the land and accept damages from the State because of the reduction in land value. The State may choose not to apply a regulation to that particular piece of property.

22 An inverse condemnation claim is ripe for adjudication when the regulation is first applied to the property. If there is provision for a variance, waiver or special exemption in the regulation, the property owner must make one reasonable application. Unreasonable delay or burdensome conditions are deemed rejection of the application.

30 Part A applies to new impositions of regulations in effect before the effective date of this Act if they were not imposed before the effective date of this Act. For example, if wetlands on a person's property are not mapped until after this Act becomes effective, that regulation is included in this Act.

36 This amendment applies to regulations already applicable to the property only if a new regulation or new application of an existing regulation reduces the value of the property by at least 10% and the property value is reduced by a total of at least 50% when all regulations applicable since acquisition of the property are combined.

42 These standards and procedures apply to all applications pending before a reviewing authority on the effective date of this Act.

46 Part A does not apply to regulations that preclude nuisances. It also does not apply to air regulations, wastewater regulations, solid and hazardous waste regulations and

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2 regulations precluding the intense development of property
incompatible with the surrounding area as determined by a jury.

4 Attorney's fees and other costs may be awarded to a
prevailing landowner.

6 A property owner may choose to have the inverse condemnation
8 claim arbitrated.

10

Part B

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14 Part B establishes a Study Commission on Constitutional
Property Rights and the Public Interests. The commission
16 consists of 9 Legislators from the different committees of
jurisdiction to study the issues regarding private property
rights protection afforded under the Maine and United States
18 Constitutions and propose legislation that addresses the need to
protect private property rights while considering the public's
20 interest in health, safety and welfare. The commission shall
hold at least 3 public hearings to afford full public
22 participation.

24 The commission shall convene by October 1, 1995 and submit
its report, including findings, recommendations and any proposed
26 legislation, to the Joint Standing Committee on Judiciary and to
the Legislature by December 15, 1995.

28

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