

MAINE STATE LEGISLATURE

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37
R. 98

L.D. 1629

DATE: 2/15/96

(Filing No. H- 711)

JUDICIARY

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

COMMITTEE AMENDMENT "A" to H.P. 1188, L.D. 1629, Bill, "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"

Amend the bill in section 2 in subsection 6-B by striking out all of the first 2 lines (page 1, lines 14 and 15 in L.D) and inserting in their place the following:

'6-B. Land use mediation. The land use mediation program is a program within the Court Mediation Service.'

Further amend the bill in section 2 in subsection 6-B in paragraph B in the 7th line (page 1, line 27 in L.D.) by striking out the following: "service" and inserting in its place the following: 'services'

Further amend the bill in section 5 in that part designated "§3341." in subsection 2, in paragraph B in the 4th line (page 2, line 41 in L.D.) by striking out the following: "intake form" and inserting in its place the following: 'application'

Further amend the bill in section 5 in that part designated "§3341." in subsection 2 by striking out all of paragraph C and inserting in its place the following:

'C. Establish a fee for services in an amount not to exceed \$175 for every 4 hours of mediation services provided. In addition, the landowner is responsible for the costs of providing notice as required under subsection 7.'

COMMITTEE AMENDMENT

Further amend the bill in section 5 in that part designated "~~§3341.~~" in subsection 3 by striking out all of the first 2 lines (page 2, lines 49 and 50 in L.D.) and inserting in its place the following:

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

Further amend the bill in section 5 in that part designated "~~§3341.~~" in subsection 3 in paragraph B in the first line (page 3, line 5 in L.D.) by inserting after the following: "mediation" the following: 'under subsection 4'

Further amend the bill in section 5 in that part designated "~~§3341.~~" in subsection 3 in paragraph C in subparagraph (2) in the 2nd line (page 3, line 17 in L.D.) by inserting after the following: "action." the following: 'sought and failed to obtain governmental approval for a land use of that landowner's land and has'

Further amend the bill in section 5 in that part designated "~~§3341.~~" in subsection 3 in paragraph D in the first line (page 3, line 21 in L.D.) by striking out the following: "Court Mediation Service" and inserting in its place the following: 'Superior Court clerk'

Further amend the bill in section 5 in that part designated "~~§3341.~~" by striking out all of subsections 4 to 6 and inserting in their place the following:

'4. Submission of application for mediation. A landowner may apply for mediation under this subchapter by filing an application for mediation with the Superior Court clerk in the county in which the land that is the subject of the conflict is located. The Superior Court clerk shall forward the application to the Court Mediation Service.

5. Stay of filing period. Notwithstanding any other provision of law, the period of time allowed by law or by rules of the court for any person to file for judicial review of the governmental action for which mediation is requested under this subchapter is stayed for 30 days beyond the date the mediator files the report required under subsection 12 with the Superior Court clerk, but in no case longer than 120 days from the date the landowner files the application for mediation with the Superior Court clerk.

6. Purpose; conduct of mediation. The purpose of a mediation under this subchapter is to facilitate, within existing

2 land use laws, ordinances and regulations, a mutually acceptable
4 solution to a conflict between a landowner and a governmental
6 entity regulating land use. The mediator, whenever possible and
8 appropriate, shall conduct the mediation in the county in which
10 the land that is the subject of the conflict is located. When
12 mediating that solution, the mediator shall balance the need for
14 public access to proceedings with the flexibility, discretion and
16 private caucus techniques required for effective mediation.

10 7. Schedule; notice; participants. The mediator is
12 responsible for scheduling all mediation sessions. The mediator
14 shall provide a list of the names and addresses and a copy of the
16 notice of the mediation schedule to the Superior Court clerk, who
18 shall mail the notices. The mediator shall include on the list
20 person identified in the following ways.

18 A. The landowner and the governmental entity shall provide
20 to the mediator the names and addresses of the parties,
22 intervenor and other persons who significantly participated
24 in the underlying governmental land use action proceedings.

22 B. Any other person who believes that that person's
24 participation in the mediation is necessary may file a
26 request with the mediator to be included in the mediation.

26 C. The mediator shall determine if any other person's
28 participation is necessary for effective mediation.

28 8. Parties to mediation. A mediator shall include in the
30 mediation process any person the mediator determines is necessary
32 for effective mediation, including persons representing
34 municipal, county or state agencies and abutters, parties,
36 intervenor or other persons significantly involved in the
38 underlying governmental land use action. A mediator may exclude
40 or limit a person's participation in mediation when the mediator
42 determines that exclusion or limitation necessary for effective
44 mediation. This subsection does not require a municipality to
46 participate in mediation under this subchapter.

40 9. Sharing of costs. Participants in the mediation may
42 share the cost of mediation after the initial 4 hours of
44 mediation services have been provided.'

44 Further amend the bill in section 5 in that part designated
46 "§3341." in subsection 7 in the 2nd line (page 4, line 7 in L.D.)
48 by inserting after the following: "mediation" the following: 'including offers of settlement,'

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Further amend the bill in section 5 in that part designated
2 "**§3341.**" in subsection 7 in the 3rd line (page 4, line 8 in L.D.)
by striking out the following: "408" and inserting in its place
4 the following: '408(a)'

6 Further amend the bill in section 5 in that part designated
"**§3341.**" by striking out all of subsections 8 and 9 and inserting
8 in their place the following:

10 '8. Agreements. A mediated agreement must be in writing.
The landowner, the governmental entity and all other participants
12 who agree must sign the agreement as participants and the
mediator must sign as the mediator.

14
16 A. An agreement that requires any additional governmental
action is not self-executing. If any additional
18 governmental action is required, the landowner is
responsible for initiating that action and providing any
20 additional information reasonably required by the
governmental entity to implement the agreement. The
22 landowner must notify the governmental entity in writing
within 30 days, after the mediator files the mediator's
24 report under subsection 12, that the landowner will be
taking action in accordance with the agreement.

26 B. Notwithstanding any procedural restriction that would
otherwise prevent reconsideration of the governmental
28 action, a governmental entity may reconsider its decision in
the underlying governmental land use action in accordance
30 with the agreement as long as that reconsideration does not
violate any substantive application or review requirement.

32
34 9. Mediator's report. Within 90 days after the landowner
files an application for mediation, the mediator shall file a
36 report with the Superior Court clerk. The mediator shall file
the report as soon as possible if the mediator determines that a
mediated agreement is not possible. The report must contain:

38
40 A. The names of the mediation participants, including the
landowner, the governmental entity and any other persons;

42 B. The nature of any agreements reached during the course
of mediation, which mediation participants were parties to
44 the agreements and what further action is required of any
person;

2 C. The nature of any issues remaining unresolved and the
3 mediation participants involved in those unresolved issues;
4 and

6 D. A copy of any written agreement under subsection 11.

8 10. Application. This subchapter applies to final agency
9 actions and failures and refusals to act occurring after the
10 effective date of this subchapter.'

12 Further amend the bill in section 5 in that part designated
13 "§3341." by renumbering the subsections to read consecutively.

14 Further amend the bill by inserting after section 8 the
15 following:

16 'Sec. 9. Allocation. The following funds are allocated from
17 Other Special Revenue funds to carry out the purposes of this Act.

20 1996-97

22 **JUDICIAL DEPARTMENT**

24 **Land Use Mediation Fund**

26 All Other \$5,000

28 Allocates funds to cover the cost of
30 providing mediation services.'

32 Further amend the bill by inserting before the statement of
33 fact the following:

36 **'FISCAL NOTE**

38 1996-97

40 **APPROPRIATIONS/ALLOCATIONS**

42 Other Funds \$5,000

44 **REVENUES**

46 Other Funds \$5,000
48

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2 The Judicial Department will require an Other Special
3 Revenue allocation in fiscal year 1996-97 for notification
4 costs, per diem fees and travel expenses for mediators in the
5 land use mediation program. A base allocation of \$5,000 is
6 included for fiscal year 1996-97 to authorize expenditures of
7 this new dedicated revenue from fees collected for the mediation
8 services. The actual caseload and the amounts of dedicated
9 revenue and the costs involved can not be determined at this time.

10 The Department of the Attorney General will incur some minor
11 additional costs and increases in workload associated with
12 representing state departments and agencies involved in the land
13 use mediation program. These costs can be absorbed within the
14 Department of the Attorney General's existing budgeted resources.

16 State departments and agencies involved in the land use
17 mediation program will also incur some minor additional costs.
18 These costs also can be absorbed within the existing budgeted
19 resources of the agencies involved.

20 The member agencies of the Land and Water Resources Council
21 will incur some minor additional costs to report on the land use
22 mediation program. These costs can be absorbed within the
23 agencies' existing budgeted resources.'

26 **STATEMENT OF FACT**

28 This amendment clarifies that the land use mediation program
29 is a program within the Court Mediation Service, ensuring that
30 the existing immunity provisions that apply to all mediators
31 currently providing mediation services under contract with the
32 Court Mediation Service as independent contractors also apply to
33 mediators providing mediation services under this program.

36 The fee a landowner pays when requesting mediation is \$175
37 for 4 hours of mediation. The landowner is also responsible for
38 paying the costs of notice of the mediation to participants.
39 After the initial 4 hours of mediation, the parties are free to
40 share the costs of additional mediation.

42 A landowner requesting mediation must file an application
43 with the Superior Court within the time period the landowner has
44 to file an action in court appealing the final agency action,
45 such as a zoning board of appeals permit denial. This time
46 period is usually 30 days. The application for mediation must be
47 filed in the Superior Court for the county in which the land is
48 located. The Superior Court clerk will forward the application
49 to the Court Mediation Service.

50

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2 This amendment clarifies that the only person who can apply
for mediation is the landowner whose permit or other request for
governmental land use approval has been denied.

4
6 This amendment clarifies that filing an application for
mediation stays the appeal period within which the landowner must
appeal the governmental action in court. The stay lasts 30 days
8 beyond the date the mediator files a report on the mediation, but
the stay in all cases ends no longer than 120 days after the
10 landowner files the application for mediation.

12 This amendment clarifies that one of the responsibilities of
the mediator is to balance the need for public access to
14 proceedings involving a governmental entity with the appropriate
alternative dispute resolution techniques necessary for effective
16 mediation of the conflict.

18 The mediator is responsible for scheduling the mediation
sessions and providing all the information necessary for the
20 Superior Court clerk to mail notice of the schedule to
participants. The landowner and the governmental entity must
22 provide to the mediator the names and addresses of the parties,
intervenor and other people who significantly participated in
24 the underlying land use action. In addition, any person who
believes that that person's participation in the mediation is
26 necessary may request to be included in the mediation. The
mediator shall determine if anyone else is necessary to the
28 mediation. The mediator is required to have the Superior Court
clerk notify all these persons about the scheduled mediation
30 sessions.

32 The mediator has the power to determine who is necessary for
effective mediation and include them in the process. This
34 authority includes the power to limit or exclude a person's
participation when that exclusion or limitation is necessary, in
36 the mediator's opinion, for effective mediation.

38 Although state agencies are required to participate when
determined by the mediator to be necessary to the mediation,
40 municipal participation is voluntary.

42 This amendment clarifies that the Maine and federal rules of
evidence govern the admissibility in court of conduct or
44 statements, including offers of settlement, made during the
course of the mediation.

46
48 A major benefit of achieving a signed mediation agreement is
that, if the agreement provides for reconsideration of the
landowner's proposal, either with or without modification, the
50 landowner is not required to make a new application to the

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2 governmental entity. Who is required to sign the mediated
3 agreement is very important. This amendment requires that the
4 landowner, the governmental entity and all other participants who
5 agree must sign the agreement. The mediator must also sign as
6 the mediator of the agreement, rather than as a participant.

8 If the agreement calls for the landowner to take action,
9 before additional governmental action takes place, the landowner
10 is required to notify the governmental entity in writing within
11 30 days after the mediator files the mediation report that the
12 landowner will be taking action in accordance with the agreement.

14 This amendment requires the mediator to file a report with
15 the Superior Court clerk within 90 days after the landowner
16 applies for mediation. The report must be filed as soon as
17 possible if the mediator determines a mediated agreement is not
18 possible. The report must contain the names of the participants,
19 the nature of any agreements and what further action is
20 anticipated, the nature of unresolved issues and a copy of the
21 signed mediation agreement.

22 The amendment clarifies that mediation is available under
23 the program for governmental land use actions, including failure
24 and refusal to act, that occur after the effective date of the
25 bill as amended. It is not limited to governmental land use
26 actions in which the landowner's original or amended proposal was
27 submitted to the governmental entity after the effective date of
28 the bill as amended.

30 No changes are made to the rules review by the Attorney
31 General or the Legislature contained in the original bill.
32