

MAINE STATE LEGISLATURE

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117th MAINE LEGISLATURE

SECOND REGULAR SESSION-1995

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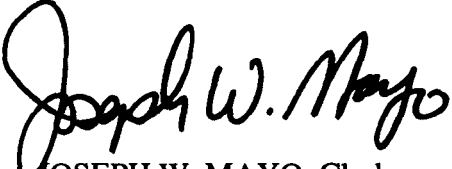
H.P. 1188

House of Representatives, December 22, 1995

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.

Reported by Representative TREAT for the Study Commission on Property Rights and the Public Health, Safety and Welfare pursuant to Resolve 1995, chapter 45.

Reference to the Joint Standing Committee on Judiciary suggested and printing ordered under Joint Rule 20.


JOSEPH W. MAYO, Clerk

2 **Be it enacted by the People of the State of Maine as follows:**

4 **Sec. 1. 2 MRSA §8** is enacted to read: .

6 **§8. Land use mediation; obligation to participate**

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section is repealed October 1, 2001.

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

14 **6-B. Land use mediation.** The land use mediation program is
administered and funded as follows.

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

22 B. A land use mediation fund is established as a
nonlapsing, dedicated fund within the Administrative Office
24 of the Courts. Fees collected for mediation services
26 pursuant to Title 5, chapter 314, subchapter II must be
28 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 Title
5, chapter 314, subchapter II.

30 This subsection is repealed October 1, 2001.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

36 **Sec. 3. 5 MRSA c. 314** is amended by repealing the chapter
headnote and enacting the following in its place:

38 **CHAPTER 314**

40 **COORDINATION OF LAND USE AND NATURAL**
42 **RESOURCE MANAGEMENT**

44 **SUBCHAPTER I**

46 **LAND AND WATER RESOURCES COUNCIL**

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

50 **5. Reporting on the land use mediation program.** The
council shall report by December 1, 1998 and December 1, 2000 to

2 the Governor, the Administrative Office of the Courts, the
4 Executive Director of the Legislative Council and the Director of
6 the Court Mediation Service on the operation and effectiveness of
8 the land use mediation program established under subchapter II.
10 The reports must list the number and type of mediation requests
12 received, the number of mediation sessions conducted, the number
14 of signed mediation agreements, a summary of the final
16 disposition of mediation agreements, a narrative discussion of
18 the effectiveness of the program as determined by the council, a
20 summary of deposits and expenditures from the land use mediation
22 fund created in Title 4, section 18, subsection 6-B and any
24 proposals by the council with respect to the operation,
26 improvement or continuation of the mediation program. This
28 subsection is repealed October 1, 2001.

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

18 **SUBCHAPTER II**

20 **LAND USE MEDIATION PROGRAM**

22 **§3341. Land use mediation program**

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

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

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

46 **B. Establish a simple and expedient application process.**
48 **Not later than February 1st of each year, the Court**
50 **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:

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

4
5 B. Applies for mediation within the time allowed under law
6 or rules of the court for filing for judicial review of that
7 governmental action;

8
9 C. Has:

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

14
15 (2) For mediation of state governmental land use
16 action, a right to judicial review under section 11001
17 either due to a final agency action or the failure or
18 refusal of an agency to act; and

19
20 D. Submits to the Court Mediation Service all necessary
21 fees at the time of application.

22
23 4. Stay of filing period. Notwithstanding any other
24 provision of law, the period of time allowed by law or by rules
25 of the court for a person to file for judicial review of the
26 governmental action for which mediation is requested under this
27 subchapter is stayed for 120 days from the date the application
28 for mediation is submitted to the Court Mediation Service.

29
30 5. Purpose; conduct of meetings; notice. The purpose of a
31 mediation under this subchapter is to facilitate, within existing
32 land use laws, ordinances and regulations, a mutually acceptable
33 solution to a conflict between a landowner and a governmental
34 entity regulating land use. The mediator shall, whenever
35 possible and appropriate, conduct the mediation in the county in
36 which the land that is the subject of the conflict is located.
37 When mediating that solution, the mediator shall balance the
38 public's right to know with the flexibility, discretion and
39 private caucus techniques required for effective mediation. To
40 ensure an open process, the mediator shall provide appropriate
41 notice of a mediation session to each person who was a party or
42 an intervenor in the governmental action being mediated and any
43 other person whose participation is necessary or appropriate for
44 a fair, full and open determination of the issues.

45
46 6. Parties to mediation. A mediator shall include in the
47 mediation process any person necessary for effective mediation,
48 including persons representing municipal, county or state
49 agencies and abutters, parties, intervenors or other persons
50

2 significantly involved in the underlying regulatory action. A
3 mediator may exclude or limit a person's participation in
4 mediation when the mediator determines that exclusion or
5 limitation necessary for effective mediation.

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

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

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

27 10. Repeal. This subchapter is repealed October 1, 2001.

28 Sec. 6. 5 MRSA §8056, sub-§6, as enacted by PL 1981, c. 524,
29 §13, is amended to read:

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

38 Sec. 7. 5 MRSA §8072, sub-§4, ¶¶F and G, as enacted by PL 1995,
39 c. 463, §2, are amended to read:

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

43

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

6 **Sec. 8. 5 MRSA §8072, sub-§4, ¶H** is enacted to read:

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

16 STATEMENT OF FACT

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

26 Once an application is filed with the Court Mediation
27 Service, the time for further appeal is stayed for a period of
28 120 days while the attempt is made to achieve a mediated
29 settlement.

32 The program is self-funded through fees established by the
33 Court Mediation Service. Fees may not exceed \$150 for each 4
34 hours of mediation provided plus the expenses for any necessary
35 notice. Fees are paid by the party requesting mediation.

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

42 The existing Land and Water Resources Council is required to
43 report on the functioning of the program in December 1998 and in
44 December 2000. The program is repealed October 1, 2001.

46 Under the Maine Administrative Procedure Act, the Attorney
47 General approves all agency rules for "form and legality" before
48 they take effect. This bill requires that the Attorney General
49 disapprove any rule that is reasonably expected to result in an
50 unconstitutional taking of private property unless the taking is

2 expressly authorized by the Legislature or unless there are
sufficient variance provisions to avoid a taking.

4 Under current law, before adoption of any "major
substantive" rule, the issuing department must submit the rule
6 for review by the appropriate legislative committee of
jurisdiction that oversees that department. The committee
8 ensures that the rule is consistent with statutory authority,
that it conforms with legislative intent, that it does not
10 conflict with other laws and that it is necessary, reasonable and
not overly complex. This bill adds the following 2 criteria for
12 those rules that may cause significant reductions in property
values.

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

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

22 The 2nd criterion is based on public policy judgments and is not
limited to any constitutional standard.

24