

# MAINE STATE LEGISLATURE

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# 125th MAINE LEGISLATURE

## FIRST REGULAR SESSION-2011

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**Legislative Document**

**No. 1477**

H.P. 1086

House of Representatives, April 13, 2011

### **An Act To Protect Owners of Real Property**

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Reference to the Committee on Judiciary suggested and ordered printed.

A handwritten signature in cursive script, reading "Heather J.R. Priest".

HEATHER J.R. PRIEST  
Clerk

Presented by Representative CUSHING of Hampden.  
Cosponsored by Senator PLOWMAN of Penobscot and  
Representatives: GIFFORD of Lincoln, Speaker NUTTING of Oakland, WATERHOUSE of  
Bridgton, WINSOR of Norway, Senators: ROSEN of Hancock, SHERMAN of Aroostook,  
THIBODEAU of Waldo.

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

2               **Sec. 1. 1 MRSA c. 22** is enacted to read:

3                               **CHAPTER 22**

4                               **THE REAL PROPERTY PROTECTION ACT**

5       **§851. Short title**

6               This chapter may be known and cited as "the Real Property Protection Act."

7       **§852. Legislative findings and intent**

8               **1. Findings.** The Legislature finds that some laws, regulations, rules and ordinances  
9 of the State and its political subdivisions may, as applied to a specific piece of property,  
10 inordinately burden, restrict or limit private property rights without necessarily  
11 amounting to a taking of property under the Constitution of Maine or the United States  
12 Constitution. The Legislature determines that there is an important state interest in  
13 protecting the interests of private property owners from such inordinate burdens.

14 The Legislature further finds that the judicial processes currently available to property  
15 owners to seek relief from inordinate burdens on the use of their real property are  
16 complicated, costly and unfair.

17               **2. Intent.** It is the intent of the Legislature that a cause of action be provided for  
18 relief separate and distinct from the law of takings when, as applied to a particular parcel  
19 of real property, a law, rule, regulation or ordinance of the State or its political  
20 subdivisions imposes an unfair burden, and that the procedures for this cause of action be  
21 efficient and fair.

22       **§853. Definitions**

23               As used in this chapter, unless the context otherwise indicates, the following terms  
24 have the following meanings.

25               **1. Approval.** "Approval" means any permit, license, special exception, variance or  
26 other governmental authorization required by the State or a political subdivision of the  
27 State affecting the use of real property.

28               **2. Compensation.** "Compensation" means an award of money to compensate a  
29 property owner for a regulatory taking of real property, upon the receipt of which title in  
30 the property owner's interest in the affected parcel is transferred to the State or the  
31 political subdivision of the State effecting the regulatory taking.

32               **3. Damages.** "Damages" means an award of money reflecting the diminution of  
33 value of real property caused by regulation effecting the regulatory taking, the payment of  
34 which permits the State or a political subdivision of the State to continue to impose the  
35 regulation.

1       **4. Excluded regulations.** "Excluded regulations" means regulations excluded from  
2 the applicability of this chapter pursuant to section 856.

3       **5. Fact finder.** "Fact finder" means a jury or, if the right to a jury is waived, a court.

4       **6. Parcel.** "Parcel" means the area of real property owned by a property owner upon  
5 which a regulation imposes limitations. A parcel may be a subset of a larger ownership.  
6 For the purposes of calculating the threshold diminution in value caused by regulation to  
7 present prima facie evidence of a regulatory taking under this chapter, such diminution is  
8 calculated as to the parcel at issue, without consideration of any additional property the  
9 property owner may own.

10       **7. Property owner.** "Property owner" means the holder of legal or equitable title in  
11 an interest in real property. "Property owner" does not include the State or a political  
12 subdivision of the State.

13       **8. Real property.** "Real property" means land and any appurtenances and  
14 improvements to the land.

15       **9. Regulation.** "Regulation" means any state, municipal or local law, regulation,  
16 rule, ordinance or other governmental limitation, or a combination thereof, on the use of  
17 real property, other than excluded regulations.

18       **10. Regulator.** "Regulator" means an agency, board, commission, council or other  
19 administrative body of the State or a political subdivision of the State. "Regulator" does  
20 not include the United States or an agency of the United States.

21       **11. Regulatory taking.** "Regulatory taking" means an inordinate burden caused by  
22 regulation imposed on a property owner's use of real property.

23       **§854. Right to jury trial**

24       There is a right to trial by jury in any action brought under this chapter.

25       **§855. Regulatory taking**

26       If the right to use, divide, sell, occupy or possess private real property is reduced by  
27 the enactment or application of any regulation, a property owner may seek relief in  
28 accordance with the provisions of this chapter.

29       **1. Determination.** A property owner is entitled to a determination by a fact finder  
30 as to whether a regulatory taking of a parcel has occurred upon the submission of prima  
31 facie evidence of a diminution in the market value of the parcel of 50% or greater caused  
32 by regulation.

33       **2. Factors to be weighed.** After a prima facie showing under subsection 1, at trial,  
34 in determining whether a regulatory taking has in fact occurred, the fact finder may weigh  
35 3 factors:

36       A. The extent of the diminution in value of the parcel caused by the regulation;

1        B. The reasonable investment-backed expectations of the property owner when the  
2        parcel was acquired; and

3        C. The value, if any, remaining in any real property owned by the property owner  
4        contiguous to the parcel.

5        **3. Cause of action cumulative.** This section provides a cause of action for  
6        governmental actions that may not rise to the level of a taking under the Constitution of  
7        Maine or the United States Constitution. The provisions of this section are cumulative,  
8        and do not abrogate any other remedy lawfully available, including any remedy lawfully  
9        available for governmental actions that rise to the level of a taking under the Constitution  
10       of Maine or the United States Constitution.

11       **§856. Excluded regulations**

12       The cause of action established under section 855 does not apply to the following  
13       excluded regulations:

14       **1. Nuisance.** Regulations restricting or prohibiting activities commonly and  
15       historically recognized as public nuisances under common law. This subsection must be  
16       construed narrowly in favor of a finding of compensation or damages under this chapter;

17       **2. Public health and safety.** Regulations restricting or prohibiting activities for the  
18       protection of public health and safety, narrowly construed, including but not limited to  
19       fire and building codes and health and sanitation regulations;

20       **3. Compliance with federal law.** Regulations required to comply with federal law;  
21       or

22       **4. Regulations preceding ownership.** Regulations adopted and applied to the  
23       parcel prior to the date of acquisition of the parcel by the property owner or a family  
24       member of the property owner whether by inheritance or otherwise.

25       **§857. Available relief**

26       **1. Property owner choice.** A property owner may choose either compensation or  
27       damages as relief for a regulatory taking.

28       **2. Compensation.** If a property owner chooses compensation under subsection 1,  
29       the fact finder shall award the property owner the fair market value of the parcel, and the  
30       property owner's rights, title and interest in the parcel must be transferred to the State or  
31       political subdivision of the State, unless the regulator chooses not to apply the regulation,  
32       as allowed in section 859.

33       **3. Damages.** If the property owner chooses damages under subsection 1, the fact  
34       finder shall award an amount comprising the diminution in value caused by the  
35       regulation, and title in the parcel must remain with the property owner, unless the  
36       regulator chooses not to apply the regulation, as allowed in section 859.

37       **4. Effect of payment of damages.** An award or payment of damages pursuant to  
38       this section permits the State or a political subdivision of the State that pays the damages

1 to enforce the regulation, and the enforcement right may be held, transferred or otherwise  
2 disposed of by the State or political subdivision of the State.

3 **§858. Multiple defendants**

4 When the value of property is being diminished due to limitations on use imposed by  
5 multiple regulations of both the State and political subdivisions of the State, any award of  
6 compensation or damages for a regulatory taking must be allocated proportionately  
7 among the defendants by the fact finder.

8 **§859. Regulator choice**

9 At any time before final judgment is entered, a defendant may choose, based on the  
10 individual circumstances presented in that case and the affected parcel, instead of paying  
11 compensation or damages, not to impose upon the parcel the regulation causing the  
12 regulatory taking. If the defendant chooses this option, a declaratory judgment must be  
13 entered relieving the parcel of the application of that regulation.

14 **§860. Ripeness**

15 **1. Rejection of approval.** If the scope of the diminution in the value of a parcel  
16 depends upon whether an approval can be obtained from a regulator, and the property  
17 owner applies for such an approval, if the regulator rejects the application for approval,  
18 the regulator must identify in writing the scope of use, if any, that would be approved on  
19 the parcel. If the regulator approves an application with conditions, that approval and the  
20 conditions it contains constitute the scope of use allowed for the purposes of this chapter.

21 **2. When claim may be brought.** The issuance of one identification of the scope of  
22 use that a regulator would approve is the only prerequisite needed to make a claim under  
23 this chapter for a regulatory taking procedurally ripe. A property owner need not submit  
24 multiple applications before a cause of action is ripe under this chapter.

25 **3. Effect of good faith identification of scope of use.** A good faith identification of  
26 the scope of use that a regulator would approve is not binding upon the regulator for any  
27 purpose except to identify the diminution in value of a parcel in a suit under this chapter.

28 **§861. Sovereign immunity**

29 **1. Sovereign immunity waived.** Sovereign immunity to suit and liability is waived  
30 and abolished to the extent of liability created under this chapter.

31 **2. Maine Tort Claims Act.** The requirements of the Maine Torts Claims Act do not  
32 apply to suits brought under this chapter.

33 **§862. Informal resolution**

34 **1. Request for informal determination.** Prior to filing suit pursuant to section 855,  
35 a property owner may file a request in writing with the appropriate regulator to seek the  
36 regulator's position as to whether its regulation is effecting a regulatory taking of the

1 property owner's parcel. The property owner may include with its request any  
2 information the property owner believes relevant.

3 **2. Regulator's response.** Within 60 days of receipt of a request under subsection 1,  
4 the regulator receiving the request shall respond to the property owner in writing,  
5 explaining its position as to whether the parcel has suffered a regulatory taking; if so,  
6 whether the regulator chooses to continue to apply the regulation at issue, or would prefer  
7 that either compensation or damages be awarded; and the amount that the regulator is  
8 willing voluntarily to provide as compensation or damages if applicable.

9 **3. Admissibility of request and response.** Neither the property owner's request  
10 under subsection 1 nor the regulator's response under subsection 2 is admissible as  
11 evidence in an action under section 855 or otherwise binding upon the property owner or  
12 regulator.

## 13 SUMMARY

14 The purpose of this bill is to establish a cause of action for property owners when the  
15 impact of government regulation on real property imposes an undue burden on the value  
16 of private property and to streamline the process for seeking relief in court. At any time  
17 before a judgment is entered, the government regulator may choose either to pay damages  
18 or compensation to the affected property owner or not to impose the regulation on that  
19 parcel.