

MAINE STATE LEGISLATURE

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Date: 4/6/12

(Filing No. H-922)

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STATE OF MAINE
HOUSE OF REPRESENTATIVES
125TH LEGISLATURE
SECOND REGULAR SESSION

COMMITTEE AMENDMENT "B" to H.P. 1334, L.D. 1810, Bill, "An Act To Implement Recommendations of the Committee To Review Issues Dealing with Regulatory Takings"

Amend the bill by striking out everything after the enacting clause and before the summary and inserting the following:

'PART A

Sec. A-1. 1 MRSA c. 22-A is enacted to read:

CHAPTER 22-A

REGULATORY TAKINGS

§851. Definitions

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

1. Affiliate. "Affiliate" means a legal person that is related to another corporation by one owning shares of the other, by common ownership or by other means of control.

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

3. Property owner. "Property owner" means the holder of legal or equitable title to an interest in real property. "Property owner" does not include a governmental entity.

4. Real property. "Real property" means land and any appurtenances or improvements to the land.

5. Regulation. "Regulation" means any law, rule, ordinance or other governmental limitation imposed by the State or a state agency on the use of real property.

1 **6. Regulatory taking.** "Regulatory taking" means a burden caused by regulation
 2 imposed on a property owner's use of the property owner's real property resulting in a
 3 diminution in fair market value of 50% or greater.

4 **7. Takings variance.** "Takings variance" means a decision by the State to permit
 5 departure from the requirements of a regulation that imposes a regulatory taking.

6 **8. Underlying governmental land use action.** "Underlying governmental land use
 7 action" means a regulatory proceeding preceding mediation pursuant to section 831 in
 8 which a property owner seeks and fails to obtain governmental approval for a use of that
 9 property owner's real property and in which the property owner has a right to judicial
 10 review under Title 5, section 1101 due to either a final agency action or the failure or
 11 refusal of an agency to act.

12 **§852. Right to jury trial**

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

14 **§853. When a regulatory taking occurs**

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

18 **1. Determination.** A property owner is entitled to a determination by the fact finder
 19 as to whether a regulatory taking has occurred upon the submission of prima facie
 20 evidence, supported by a professional appraisal, of a diminution in the fair market value
 21 of real property of 50% or greater caused by regulation.

22 **2. Factors to be weighed.** After a prima facie showing has been made under
 23 subsection 1, in determining whether a regulatory taking has in fact occurred, the fact
 24 finder shall weigh 3 factors:

25 A. The extent of the diminution in fair market value of the real property caused by
 26 the regulation;

27 B. The reasonable investment-backed expectations of the property owner at the time
 28 of acquisition or immediately prior to the implementation of the regulation at issue,
 29 whichever is later, under the regulations then in effect and under common law; and

30 C. The character of the use regulated.

31 **3. Cause of action cumulative.** This section provides a cause of action for
 32 governmental actions that do not rise to the level of a taking under the Constitution of
 33 Maine or the United States Constitution. The remedies provided under this section are
 34 cumulative and do not abrogate any other remedy lawfully available, including any
 35 remedy lawfully available for governmental actions that rise to the level of a taking under
 36 the Constitution of Maine or the United States Constitution.

37 **§854. Entire parcel**

38 For the purposes of this chapter, the diminution of fair market value of real property
 39 caused by a regulation must be measured by the diminution of the fair market value of the
 40 entire contiguous parcel owned in whole or in part by the property owner and its affiliates

1 and not merely the portion of any such parcel to which the regulation directly applies. A
2 property owner whose entire contiguous parcel, along with that of its affiliates, has not
3 been diminished by at least 50% is not entitled to relief under this chapter.

4 **§855. Excluded regulations**

5 The cause of action established under section 853 does not apply to the following
6 regulations, narrowly construed:

7 1. Nuisance. Regulations restricting or prohibiting activities recognized as public
8 nuisances under common law;

9 2. Public health and safety. Regulations restricting or prohibiting activities for the
10 protection of public health and safety, such as fire and building codes and health and
11 sanitation regulations;

12 3. Compliance with federal law. Regulations required to comply with federal law;
13 and

14 4. Prospective application. Regulations enacted prior to August 1, 2013.

15 **§856. Relief**

16 Damages or a takings variance is available as relief for a regulatory taking, at the
17 option of the State.

18 1. Damages. If the State chooses to pay damages, the fact finder shall award the
19 property owner an amount it determines comprises the diminution in fair market value
20 caused by regulation, and title in the real property remains with the property owner.
21 Payment of damages pursuant to this section operates to grant to and vest in the State the
22 right to enforce the regulation as to the real property. Damages are limited to damages
23 pursuant to Title 14, section 8105, subsection 1.

24 2. Takings variance. If the State chooses to grant a takings variance, the regulation
25 causing the regulatory taking may not be applied to the real property upon which a
26 regulatory taking would otherwise occur.

27 **§857. Limitations**

28 1. Time period to sue. An action or proceeding may not be brought or maintained
29 under section 853 unless commenced within 3 years after the cause of action first accrues.

30 2. Accrual. A cause of action accrues on the date that regulation first limits the use
31 of the real property that a property owner claims has been subject to a regulatory taking.

32 3. Multiple regulations. If an action under section 853 is based on the cumulative
33 impact of multiple regulations, each regulation must have been enacted after the effective
34 date of this chapter.

35 4. Tolling. The limitations period is tolled during the period of mandatory mediation
36 under section 859 and during the period of any relevant underlying governmental land
37 use action and appeal thereof pursuant to Title 5, section 11001. If a settlement does not
38 result from mandatory mediation under section 859, the limitations period is tolled for the
39 period ending on the March 15th first occurring after the Attorney General submits the
40 report required under section 859, subsection 8.

1 **§858. Municipal mandates**

2 **1. Municipal regulation required by State.** If a state regulation requires a
3 municipality to enact regulation, the municipality may not be held liable under this
4 chapter for any regulation it enacts pursuant to that regulation. Such regulation must
5 instead be deemed state regulation for which only the State may be held liable. If the
6 municipality expressly provides in its enactment of the mandated regulation that it
7 endorses the regulation, the regulation must be considered municipal regulation and not
8 actionable as state regulation under this chapter.

9 **2. Municipal immunity.** A municipality is immune from any liability under this
10 chapter for any application of a regulation, state mandated or otherwise, and may not be
11 considered a necessary or proper party in any mediation or action under this chapter,
12 although the municipality may participate in mediation or an action under section 853, if
13 and only to the degree it chooses.

14 **3. Appearance costs.** Any party in an action under this chapter who for whatever
15 reason calls a municipal officer, employee or representative as a witness or deponent, or
16 otherwise seeks action from the municipality, such as the production of documents, shall
17 compensate the municipality for its actual costs in responding, as determined by the
18 court.

19 **§859. Mandatory mediation**

20 **1. Commencement.** Prior to filing an action pursuant to section 853, a property
21 owner must pursue relief under the land use mediation program established under section
22 831, except as provided in this section.

23 **2. Application.** The application of the property owner for mediation must include a
24 professional appraisal indicating a 50% or greater diminution in value of real property
25 caused by a regulation or regulations enacted after the effective date of this chapter. By
26 applying for mediation, the property owner consents to grant the mediator and the State
27 reasonable access to the real property with advance notice at a time and in a manner
28 acceptable to the property owner.

29 **3. Ripeness.** Unless the impact of a regulation on the real property clearly and
30 unequivocally in its terms acts as a 50% diminution in value of the real property, a
31 property owner must seek a formal denial of a written request for development or
32 variance in an underlying governmental land use action before the property owner may
33 commence mediation. The findings made in such an underlying governmental land use
34 action are not admissible and have no estoppel effect in an action pursuant to section 853.
35 The property owner may, but need not, appeal the underlying governmental action under
36 Title 5, section 11001 in order to make either the application for mediation or an action
37 pursuant to section 853 ripe, and mediation must be tolled during the period any such
38 appeal is pending.

39 A property owner may only seek to mediate and thereafter pursue a claim under section
40 853 when a regulation affects a use existing on the real property at the time the regulation
41 is enacted or a reasonably foreseeable, nonspeculative use that is suitable for the subject
42 real property and is compatible with adjacent land uses. A use is reasonably foreseeable

1 if there is evidence that the property owner intended in fact to develop that use or a
 2 similar use of similar intensity.

3 **4. Notice.** All abutters to the property that the property owner claims has been taken,
 4 as well as any participant in any relevant underlying governmental land use action must
 5 be notified by the property owner of the commencement of mediation under section 831,
 6 subsection 8. Notice must be made by sending a copy of the mediation application by
 7 United States mail or hand delivery at the address on the latest property tax roll.

8 **5. Identification of allowed uses; settlement offer.** If the State has not previously
 9 identified in any preceding underlying governmental land use action what land uses, if
 10 any, it will permit the owner to carry out on the real property that the property owner
 11 claims has been taken, the State shall do so in the mediation. Additionally, the State may
 12 present a written settlement offer to:

13 A. Adjust permit standards or other provisions controlling the development or use of
 14 the real property;

15 B. Increase or modify the density, intensity or uses of the real property;

16 C. Swap or exchange real property;

17 D. Accept mitigation, including payments in lieu of on-site mitigation;

18 E. Accept location of development on the least sensitive portion of the regulated real
 19 property;

20 F. Condition the amount of development or use permitted;

21 G. Issue a variance, special exception or other extraordinary relief; or

22 H. Purchase the real property, or an interest in the real property or a portion of the
 23 real property, or pay compensation.

24 If the State chooses, it may submit in an action under section 853 the list of identified
 25 allowed uses it previously provided the property owner and the content of any settlement
 26 offer previously proposed by the State, and it may ask the fact finder to determine
 27 whether a regulatory taking would be averted by the allowance of such previously
 28 identified uses or the terms of the settlement offer. If the jury so finds, the State may, if it
 29 chooses, allow the previously identified uses or terms of the settlement offer in lieu of
 30 damages or a takings variance as relief.

31 **6. Timing.** The schedule to be followed in the mediation must be set by the
 32 mediator, but mediation must be completed no later than one year after the property
 33 owner applies for mediation, unless the State and the property owner agree to an
 34 extension.

35 **7. Execution of settlement.** A settlement reached pursuant to mediation must be
 36 formalized in writing and self-executing, and sovereign immunity to enforce a settlement
 37 against the State is waived.

38 **8. Failure to reach settlement.** If a property owner and the State fail to agree to a
 39 settlement during the mandatory mediation process, the property owner shall notify the
 40 Office of the Attorney General. The Office of the Attorney General shall catalog this
 41 information and present it to the joint legislative committee created to review

1 effectiveness and fairness of land use laws and rules under Title 3, chapter 39 by January
2 15th of each year. If mediation fails to produce a settlement, the property owner may file
3 an action against the State under section 853 beginning on the March 15th after the
4 Attorney General has reported the failure under this subsection. If during mediation the
5 State makes a bona fide settlement offer and the owner rejects that offer and proceeds to
6 file a claim under section 853, the property owner is liable for the costs and fees of the
7 State from the point in time of rejection of the State's bona fide settlement offer until
8 resolution of the claim under section 853 as long as the resolution of the claim under
9 section 853 is either a finding of no taking or the damages awarded under the claim under
10 section 853 are of a smaller dollar value than that contained in the State's bona fide
11 settlement offer.

12 9. Fees. The cost of the mediation is as set forth in section 831, supplemented by an
13 administrative fee to be determined by the judicial branch.

14 **§860. Attorney's fees and costs**

15 In an action brought under section 853, the prevailing party is, at the discretion of the
16 court, entitled to reasonable attorney's fees and costs. The court may at its discretion also
17 award to either party attorney's fees and costs for the mediation if it concludes that the
18 State did not make or the property owner did not accept a bona fide settlement offer in the
19 mediation.

20 **Sec. A-2. Judicial branch report on case load.** The judicial branch shall
21 compile information regarding the number of cases filed in state courts pursuant to the
22 Maine Revised Statutes, Title 1, section 853. This information must include whether the
23 cases at issue involve only a cause of action under Title 1, section 853 or whether these
24 cases involve multiple causes of action, including a cause of action under Title 1, section
25 853. The judicial branch shall submit this information to the joint standing committee of
26 the Legislature having jurisdiction over judiciary matters no later than February 1, 2014
27 and every 2 years thereafter.

28 **PART B**

29 **Sec. B-1. 1 MRSA c. 22** is enacted to read:

30 **CHAPTER 22**

31 **LAND USE MEDIATION PROGRAM**

32 **§831. Land use mediation program**

33 **1. Program established.** The land use mediation program is established to provide
34 eligible private landowners with a prompt, independent, inexpensive and local forum for
35 mediation of governmental land use actions as an alternative to court action. State
36 agencies with responsibilities for land use laws shall assist in promoting awareness of the
37 program.

38 **2. Provision of mediation services; forms, filing and fees.** The Court Alternative
39 Dispute Resolution Service created in Title 4, section 18-B shall provide mediation
40 services under this chapter. The Court Alternative Dispute Resolution Service shall:

1 A. Assign mediators under this chapter who are knowledgeable in land use
2 regulatory issues and environmental law;

3 B. Establish a simple and expedient application process. Not later than January 10th
4 of each year, the Court Alternative Dispute Resolution Service shall send a copy of
5 each completed application received and each agreement signed during the previous
6 calendar year to the chairs of the joint legislative committee created to review
7 effectiveness and fairness of land use laws and rules under Title 3, chapter 39; and

8 C. Establish a fee for services in an amount not to exceed \$175 for every 4 hours of
9 mediation services provided. In addition, the landowner is responsible for the costs of
10 providing notice as required under subsection 8.

11 **3. Application; eligibility.** A landowner may apply for mediation under this chapter
12 if that landowner:

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

15 B. Applies for mediation under subsection 4 within the time allowed under law or
16 rules of the court for filing for judicial review of that governmental action;

17 C. Has:

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

21 (2) For mediation of state governmental land use action, sought and failed to
22 obtain governmental approval for a land use of that landowner's land and has a
23 right to judicial review under Title 5, section 11001 either due to a final agency
24 action or the failure or refusal of an agency to act; and

25 D. Submits to the Superior Court clerk all necessary fees at the time of application.

26 **4. Submission of application for mediation.** A landowner may apply for mediation
27 under this chapter by filing an application for mediation with the Superior Court clerk in
28 the county in which the land that is the subject of the conflict is located. The Superior
29 Court clerk shall forward the application to the Court Alternative Dispute Resolution
30 Service. The Court Alternative Dispute Resolution Service shall make available online
31 brochures about the land use mediation program and applications for landowner
32 participation in the land use mediation program.

33 **5. Agency responsibilities; publicity.** State agencies that administer land use laws
34 shall provide information about the land use mediation program, along with the right of
35 appeal, when making regulatory decisions, including any decisions that deny approval of
36 a permit application or license. The special advocate appointed by the Secretary of State
37 pursuant to Title 5, section 90-P shall provide the land use mediation program brochure to
38 businesses that are pursuing permit applications with state agencies. State agencies that
39 administer land use laws and the Court Alternative Dispute Resolution Service shall
40 ensure that information about the land use mediation program is available in an electronic
41 format on agency publicly accessible websites.

1 6. Stay of filing period. Notwithstanding any other provision of law, the period of
2 time allowed by law or by rules of the court for any person to file for judicial review of
3 the governmental action for which mediation is requested under this chapter is stayed for
4 30 days beyond the date the mediator files the report required under subsection 13 with
5 the Superior Court clerk, but in no case longer than 120 days from the date the landowner
6 files the application for mediation with the Superior Court clerk.

7 7. Purpose; conduct of mediation. The purpose of a mediation under this chapter is
8 to facilitate, within existing land use laws, ordinances and rules, a mutually acceptable
9 solution to a conflict between a landowner and a governmental entity regulating land use.
10 The mediator, whenever possible and appropriate, shall conduct the mediation in the
11 county in which the land that is the subject of the conflict is located. When mediating that
12 solution, the mediator shall balance the need for public access to proceedings with the
13 flexibility, discretion and private caucus techniques required for effective mediation.

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

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

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

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

26 9. Parties to mediation. A mediator shall include in the mediation process any
27 person the mediator determines is necessary for effective mediation, including persons
28 representing municipal, county or state agencies and abutters, parties, intervenors or other
29 persons significantly involved in the underlying governmental land use action. A
30 mediator may exclude or limit a person's participation in mediation when the mediator
31 determines that exclusion or limitation necessary for effective mediation. This subsection
32 does not require a municipality to participate in mediation under this chapter.

33 10. Sharing of costs. Participants in the mediation may share the cost of mediation
34 after the initial 4 hours of mediation services have been provided.

35 11. Admissibility. The admissibility in court of conduct or statements made during
36 mediation, including offers of settlement, is governed by the Maine Rules of Evidence,
37 Rule 408(a) for matters subsequently heard in a state court and Federal Rules of
38 Evidence, Rule 408 for matters subsequently heard in a federal court.

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

42 A. An agreement that requires any additional governmental action is not self-
43 executing. If any additional governmental action is required, the landowner is

1 responsible for initiating that action and providing any additional information
2 reasonably required by the governmental entity to implement the agreement. The
3 landowner must notify the governmental entity in writing within 30 days, after the
4 mediator files the mediator's report under subsection 13, that the landowner will be
5 taking action in accordance with the agreement.

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

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

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

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

20 C. The nature of any issues remaining unresolved and the mediation participants
21 involved in those unresolved issues; and

22 D. A copy of any written agreement under subsection 12.

23 **Sec. B-2. 2 MRSA §8,** as amended by PL 2001, c. 184, §1, is further amended to
24 read:

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

26 Agencies within the executive branch shall participate in mediation under Title 5,
27 ~~chapter 314, subchapter H 1, chapter 22,~~ when requested to participate by the Court
28 Alternative Dispute Resolution Service.

29 **Sec. B-3. 3 MRSA c. 39** is enacted to read:

30 **CHAPTER 39**

31 **REGULATORY FAIRNESS REVIEW**

32 **§1101. Committee on regulatory fairness**

33 **1. Committee defined.** "Committee" means a joint legislative committee
34 established by joint rule of the Legislature to provide a forum for ongoing legislative
35 review of the effectiveness and fairness of land use laws and rules.

36 **2. Membership.** The membership of the committee and the selection of chairs are
37 established by joint rule of the Legislature. The President of the Senate and the Speaker
38 of the House may use the following as guidance for appointing members to the
39 committee:

1 A. The Senate chair, the House chair, the ranking minority Senate member and the
 2 ranking minority House member of the joint standing committee of the Legislature
 3 having jurisdiction over environment and natural resources matters;

4 B. The Senate chair, the House chair, the ranking minority Senate member and the
 5 ranking minority House member of the joint standing committee of the Legislature
 6 having jurisdiction over agriculture, conservation and forestry matters;

7 C. The Senate chair, the House chair, the ranking minority Senate member and the
 8 ranking minority House member of the joint standing committee of the Legislature
 9 having jurisdiction over judiciary matters;

10 D. One additional member of the Senate, appointed by the President of the Senate;
 11 and

12 E. One additional member of the House, appointed by the Speaker of the House.

13 **3. Meetings.** The committee shall meet at least 2 times a year and as needed to
 14 fulfill its responsibilities. A meeting may be called by the chairs or by any 4 members.

15 **4. Duties and powers.** The committee:

16 A. Shall conduct public meetings to obtain information concerning the effectiveness
 17 and efficiency of rules affecting land use, including specific information on laws and
 18 rules that may have resulted in more than a minor reduction in the economically
 19 beneficial or productive uses of land. The primary focus of such review must be on
 20 laws and rules that have been adopted within the previous 3 years;

21 B. Shall request from relevant state agencies the purpose and background
 22 surrounding any law or rule alleged to have resulted in more than a minor reduction
 23 in the economically beneficial or productive uses of land, including but not limited to
 24 any major substantive rule to be submitted to the Legislature pursuant to Title 5,
 25 section 8072, and any information the agency has about the specific application of the
 26 law or rule in question, including any benefit-cost analysis conducted by the agency
 27 pursuant to Title 5, section 8063-A, and any other data that would assist the
 28 committee in reviewing the benefits and costs of the law or rule;

29 C. Shall receive and review information from the Office of the Attorney General
 30 regarding activities of the Attorney General, pursuant to Title 5, section 8056,
 31 subsection 6, to review proposed rules to determine whether they may reasonably be
 32 expected to result in a taking of private property under the Constitution of Maine,
 33 including whether the rules provide sufficient variance provisions to avoid such a
 34 taking;

35 D. Shall review information about the land use mediation program pursuant to Title
 36 1, chapter 22, including information about completed applications received and each
 37 agreement signed during the previous calendar year;

38 E. Shall solicit input from organizations that may be interested in providing input to
 39 the committee, including but not limited to organizations that represent small farmers
 40 and woodlot owners;

41 F. May develop recommendations for changes in land use laws and rules and refer
 42 such recommendations, with supporting documentation, to the joint standing

1 committee of the Legislature with appropriate jurisdiction, including any
2 recommendations that further analysis of benefits and costs, pursuant to Title 5,
3 section 8063-A, be conducted by the relevant state agency. A joint standing
4 committee of the Legislature that receives a recommendation from the committee
5 may submit a bill for subsequent reference and public hearing;

6 G. May make recommendations to the joint standing committee of the Legislature
7 with appropriate jurisdiction regarding major substantive rules, pursuant to Title 5,
8 section 8072, as appropriate;

9 H. Shall receive and review information from the Office of the Attorney General
10 regarding claims in the past year that were not successfully resolved pursuant to Title
11 1, section 859 and whose claimants are allowed to proceed to litigation pursuant to
12 Title 1, section 859, subsection 8. Upon receipt of this information, the committee
13 may report out legislation to amend the underlying law or to direct the relevant
14 agency to amend the underlying rule in such a way that the complaining property
15 owner no longer suffers a 50% diminution in real property value. If a new law or
16 resolve takes effect that ensures that the complaining property owner no longer
17 suffers a 50% diminution in real property value, that property owner no longer has a
18 valid claim under Title 1, section 853;

19 I. Shall undertake a review of Title 1, chapter 22 by February 15, 2017 and every 5
20 years thereafter. The review must include an assessment of the number of mediations
21 entered into by the State, the number of claims filed in court, the number of variances
22 granted to property owners and the costs of the land use mediation program under
23 Title 1, chapter 22 to the State in terms of both administration and damages awarded
24 to property owners. Based upon this review, the committee may recommend
25 legislation that amends or repeals Title 1, chapter 22 to the joint standing committee
26 of the Legislature having jurisdiction over judiciary matters, which may report out
27 legislation based on the committee's recommendations; and

28 J. May undertake other activities consistent with its listed responsibilities under this
29 subsection.

30 **5. Information protocol.** The committee shall develop a user-friendly form that
31 may be used by members of the public to assist the committee in understanding the
32 history, land use issues, regulatory impacts and agency interactions associated with cases
33 presented to the committee. Completed forms and associated documents submitted to the
34 committee are public records.

35 **6. Staffing.** Based on available resources, the Legislative Council shall provide staff
36 support for the committee.

37 **Sec. B-4.** **4 MRSA §18-B, sub-§10,** as amended by PL 2001, c. 184, §2, is
38 further amended to read:

39 **10. Land use mediation.** The land use mediation program is a program within the
40 Court Alternative Dispute Resolution Service.

41 A. The Director of the Court Alternative Dispute Resolution Service shall administer
42 the land use mediation program established in Title 5, ~~chapter 314, subchapter II 1,~~
43 chapter 22.

1 B. A land use mediation fund is established as a nonlapsing, dedicated fund within
2 the Administrative Office of the Courts. Fees collected for mediation services
3 pursuant to Title 5, ~~chapter 314, subchapter H 1, chapter 22~~ must be deposited in the
4 fund. The Administrative Office of the Courts shall use the resources in the fund to
5 cover the costs of providing mediation services as required under Title 5, ~~chapter 314,~~
6 ~~subchapter H 1, chapter 22.~~

7 **Sec. B-5. 5 MRSA c. 314, sub-c. 2,** as amended, is repealed.

8 **Sec. B-6. 5 MRSA §8056, sub-§6,** as amended by PL 1995, c. 537, §6, is further
9 amended to read:

10 **6. Attorney General review and approval.** The review required in subsection 1
11 may not be performed by any person involved in the formulation or drafting of the
12 proposed rule. The Attorney General may not approve a rule if it is reasonably expected
13 to result in a taking of private property under the Constitution of Maine unless such a
14 result is directed by law or sufficient procedures exist in law or in the proposed rule to
15 allow for a variance designed to avoid such a taking. By December 15th of each year, the
16 Attorney General shall provide to the joint legislative committee created to review
17 effectiveness and fairness of land use laws and rules under Title 3, chapter 39 a copy of
18 each proposed rule reviewed under this subsection that was the subject of public
19 comment suggesting either that the rule might result in a potential taking of real property
20 under the Constitution of Maine or that a variance was necessary to avoid such a taking.

21 **PART C**

22 **Sec. C-1. Appropriations and allocations.** The following appropriations and
23 allocations are made.

24 **ATTORNEY GENERAL, DEPARTMENT OF THE**

25 **Administration - Attorney General 0310**

26 Initiative: Provides funds for one full-time Assistant Attorney General position and
27 related costs to address an anticipated increase in workload as a result of regulatory
28 takings.

29	GENERAL FUND	2011-12	2012-13
30	POSITIONS - LEGISLATIVE COUNT	0.000	1.000
31	Personal Services	\$0	\$78,101
32	All Other	\$0	\$5,178
33			
34	GENERAL FUND TOTAL	\$0	\$83,279

1	ATTORNEY GENERAL, DEPARTMENT OF		
2	THE		
3	DEPARTMENT TOTALS	2011-12	2012-13
4			
5	GENERAL FUND	\$0	\$83,279
6			
7	DEPARTMENT TOTAL - ALL FUNDS	\$0	\$83,279

8 **LEGISLATURE**

9 **Legislature 0081**

10 Initiative: Provides funding to increase one Legislative Analyst position from part-time to
11 full-time to provide staff assistance to the committee on regulatory fairness.

12	GENERAL FUND	2011-12	2012-13
13	POSITIONS - LEGISLATIVE COUNT	0.000	0.500
14	Personal Services	\$0	\$20,693
15			
16	GENERAL FUND TOTAL	\$0	\$20,693

17	LEGISLATURE		
18	DEPARTMENT TOTALS	2011-12	2012-13
19			
20	GENERAL FUND	\$0	\$20,693
21			
22	DEPARTMENT TOTAL - ALL FUNDS	\$0	\$20,693

23	SECTION TOTALS	2011-12	2012-13
24			
25	GENERAL FUND	\$0	\$103,972
26			
27	SECTION TOTAL - ALL FUNDS	\$0	\$103,972
28			

29 **SUMMARY**

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

31 This amendment replaces the bill, making changes by:

32 1. Adding a definition of "affiliate," which is used to prevent the dividing of property
33 to circumvent the provision in the bill regarding measuring diminution of value against
34 the entire parcel;

35 2. Adding a definition of "underlying governmental land use action," which is used
36 to help determine ripeness of a claim;

1 3. Clarifying that a property owner must obtain a professional appraisal, and not
2 simply an appraisal, as part of making a claim;

3 4. Clarifying the description of "reasonable investment-backed expectations" by
4 adding a temporal reference found in Florida statute;

5 5. Clarifying that property cannot be divided to circumvent the provision in the bill
6 regarding measuring diminution of value against the entire parcel and clarifying that an
7 entire contiguous parcel's failure to meet the diminution threshold of 50% precludes
8 recovery under this legislation;

9 6. Limiting recovery to either damages, capped at \$400,000, as established in the
10 Maine Tort Claims Act, or a takings variance. Compensation for the entire fair market
11 value of a parcel as an option for relief is eliminated; it is always an available avenue for
12 the State to exercise if it chooses under the Constitution of Maine;

13 7. Adjusting tolling provisions to account for the inclusion of a mandatory mediation
14 program and the opportunity for the Legislature to direct changes in the land use laws and
15 rules that cause the diminution of property values;

16 8. Clarifying that municipalities are exempt from this legislation and are not subject
17 to costs as a result of this legislation;

18 9. Rewriting the alternative dispute resolution section proposed in the bill in order to
19 create a mandatory mediation program, which:

20 A. Requires that before a takings claim can be filed in court, a property owner must
21 pursue relief under the land use mediation program, subject to enhanced
22 requirements;

23 B. Requires that a property owner applying for relief under mandatory mediation
24 must also include a professional appraisal indicating 50% or greater diminution in
25 property value with the application. By applying for mediation, the property owner
26 consents to grant the mediator and the State access to the property owner's land for
27 purposes of resolving a dispute;

28 C. Describes ripeness for purposes of seeking mandatory mediation, requiring the
29 property owner, before mediation, to apply for and be denied a land use unless a
30 regulation on its face would clearly cause a 50% diminution in property value;

31 D. Limits recovery from speculative uses of the property;

32 E. Requires that abutting property owners be notified when a property owner
33 initiates mandatory mediation;

34 F. Provides that as part of mediation the State must identify what land uses are
35 permitted on the property in question. The State may also present a written
36 settlement offer as part of mediation that may include various proposals in order to
37 reach a settlement agreement. This settlement offer may then later be used as a
38 defense in the event a claim is filed in court;

39 G. Provides that the property owner and the State have up to one year to complete
40 the mediation process;

41 H. Provides that any settlement agreement reached in mediation must be formalized
42 in writing and be self-executing;

1 I. Specifies that only after a failed mediation is a property owner allowed to proceed
2 to court and creates financial incentives for a property owner to accept a bona fide
3 offer from the State during mediation;

4 J. Provides that, when mediation fails to produce a settlement, the property owner
5 shall report the failure to produce a settlement to the Office of the Attorney General,
6 who is required to report that information to the joint legislative committee created to
7 review effectiveness and fairness of land use laws and rules. In order to give the
8 committee time and opportunity to address the underlying land use laws and rules,
9 the property owner must delay filing a claim in court until March 15th after the failed
10 mediation is reported by the Attorney General to the committee; and

11 K. Provides flexibility to the courts in determining administrative fees for mandatory
12 mediation;

13 10. Expanding the provisions about attorney's fees to include that either the State or a
14 property owner could be liable for attorney's fees in the event that either party does not
15 make a bona fide attempt at settlement during the mediation process;

16 11. Requiring that the judicial branch provide regular reports to the joint standing
17 committee of the Legislature having jurisdiction over judiciary matters on the number of
18 cases pursued in court under this legislation so that future Legislatures can assess the
19 impact of this legislation on court dockets;

20 12. Enabling the establishment by the Legislature of a joint legislative committee
21 created to review effectiveness and fairness of land use laws and rules. The committee
22 must be established by joint rule of the Legislature. Its duties include hearing and
23 investigating complaints of property owners about land use laws and rules, receiving
24 information collected and cataloged by the Attorney General regarding land use
25 mediations in which settlement was not reached and recommending legislation to adjust
26 land use laws and rules;

27 13. Delaying the implementation of the new regulatory takings program by
28 excluding land use regulations enacted prior to August 1, 2013; and

29 14. Adding an appropriations and allocations section.

30 **FISCAL NOTE REQUIRED**

31 **(See attached)**



125th MAINE LEGISLATURE

LD 1810

LR 2684(03)

An Act To Provide Ongoing Review of the Effectiveness and Fairness of Land Use Laws and Rules

Fiscal Note for Bill as Amended by Committee Amendment "B" (H-922)
Committee: Judiciary
Fiscal Note Required: Yes

Fiscal Note

Legislative Cost/Study

Potential current biennium cost increase - General Fund
Potential current biennium cost increase - Highway Fund

	FY 2011-12	FY 2012-13	Projections FY 2013-14	Projections FY 2014-15
Net Cost (Savings)				
General Fund	\$0	\$103,972	\$541,739	\$531,807
Appropriations/Allocations				
General Fund	\$0	\$103,972	\$541,739	\$531,807

Legislative Cost/Study

The estimated cost for 2 interim meetings of this committee is projected to be \$5,000 annually beginning in fiscal year 2012-13. If additional meetings are held the estimated cost for each additional meeting is \$2,500. The Legislature's proposed budget includes \$10,000 in fiscal year 2012-13 for legislative studies. Whether this amount is sufficient to fund all studies will depend on the number of studies authorized by the Legislative Council and the Legislature.

This bill includes a General Fund appropriation of \$20,693 in fiscal year 2012-13 to increase a part-time Legislative Analyst position to full-time effective January 1, 2013 in order to provide the required staffing to the new legislative committee. The General Fund costs for the position change increase to \$43,474 in fiscal year 2013-14 and \$45,632 in fiscal year 2014-15.

Fiscal Detail and Notes

This legislation creates a process for landowner relief related to regulatory takings. Depending upon the number or extent of any lawsuits filed, both General Fund and Highway Fund costs could be increased as a result of any payments to landowners. State agencies may also experience increased appraisal and witness costs. The amounts, by agency and fiscal year, cannot be estimated at this time.

CB(H-922)

This bill also includes a General Fund appropriation of \$83,279 in fiscal year 2012-13 for the Department of the Attorney General to support the additional workload that results from regulatory takings. The Department of the Attorney General has identified the need for one part-time Assistant Attorney General position and one part-time Research Assistant position beginning in fiscal year 2013-14. The Judicial Department has also identified the need for additional staff beginning in fiscal year 2013-14; one Judge position, one Deputy Marshal position and one Law Clerk position. The Judicial Department will also require additional General Fund appropriations beginning in fiscal year 2013-14 for additional jury trial costs. The Judicial Department may experience an increase in Other Special Revenue Funds collections from an administrative fee that has yet to be determined.