

MAINE STATE LEGISLATURE

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125th MAINE LEGISLATURE

SECOND REGULAR SESSION-2012

Legislative Document

No. 1810

H.P. 1334

House of Representatives, February 7, 2012

An Act To Implement Recommendations of the Committee To Review Issues Dealing with Regulatory Takings

Reported by Representative NASS of Acton for the Joint Standing Committee on Judiciary pursuant to Resolve 2011, chapter 111, section 9.

Reference to the Committee on Judiciary suggested and ordered printed pursuant to Joint Rule 218.

A handwritten signature in cursive script that reads "Heather J.R. Priest".

HEATHER J.R. PRIEST
Clerk

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 **REGULATORY TAKINGS**

5 **§851. Definitions**

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

8 **1. Fact finder.** "Fact finder" means a jury or, if the right to a jury is waived, the
9 court.

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

12 **3. Real property.** "Real property" means land and any appurtenances or
13 improvements to the land.

14 **4. Regulation.** "Regulation" means any law, rule, ordinance or other governmental
15 limitation imposed by the State or a state agency on the use of real property.
16 "Regulation" does not include a municipal regulation, except that "regulation" includes an
17 action by a municipality in conformance with a state regulation that imposes a mandate
18 on the municipality.

19 **5. Regulator.** "Regulator" means the State, any state agency or any other
20 administrative body of the State.

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

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

26 **§852. Right to jury trial**

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

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

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

32 **1. Determination.** A property owner is entitled to a determination by the fact finder
33 as to whether a regulatory taking has occurred upon the submission of prima facie

1 evidence, supported by an appraisal, of a diminution in the fair market value of real
2 property of 50% or greater caused by regulation.

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

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

8 B. The reasonable investment-backed expectations of the property owner; and

9 C. The character of the use regulated.

10 **3. Cause of action cumulative.** This section provides a cause of action for
11 governmental actions that do not rise to the level of a taking under the Constitution of
12 Maine or the United States Constitution. The remedies provided under this section are
13 cumulative and do not abrogate any other remedy lawfully available, including any
14 remedy lawfully available for governmental actions that rise to the level of a taking under
15 the Constitution of Maine or the United States Constitution.

16 **§854. Entire parcel**

17 For the purposes of this chapter, the diminution of fair market value of real property
18 caused by a regulation must be measured by the diminution of the fair market value of the
19 entire parcel owned by the property owner and not merely the portion of any such parcel
20 to which the regulation directly applies.

21 **§855. Excluded regulations**

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

24 **1. Nuisance.** Regulations restricting or prohibiting activities recognized as public
25 nuisances under common law;

26 **2. Public health and safety.** Regulations restricting or prohibiting activities for the
27 protection of public health and safety, such as fire and building codes and health and
28 sanitation regulations;

29 **3. Compliance with federal law.** Regulations required to comply with federal law;
30 and

31 **4. Prospective application.** Regulations enacted prior to the effective date of this
32 section.

33 **§856. Relief**

34 Compensation, damages or a takings variance are available as relief for a regulatory
35 taking, at the option of the State.

1 **1. Compensation.** If the State chooses to pay compensation, the fact finder shall
2 award the property owner the fair market value of the real property taken, and the
3 property owner's rights, title and interest in that real property must be transferred to the
4 State or a political subdivision of the State.

5 **2. Damages.** If the State chooses to pay damages, the fact finder shall award the
6 property owner an amount it determines comprises the diminution in fair market value
7 caused by regulation, and title in the real property remains with the property owner.
8 Payment of damages pursuant to this section operates to grant to and vest in the State the
9 right to enforce the regulation as to the real property.

10 **3. Takings variance.** If the State chooses to grant a takings variance, the regulation
11 causing the regulatory taking may not be applied to the real property upon which a
12 regulatory taking would otherwise occur.

13 **§857. Limitations**

14 **1. Time period to sue.** An action or proceeding may not be brought or maintained
15 under section 853 unless commenced within 3 years after the cause of action first
16 accrued.

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

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

22 **4. Tolling.** The limitations period is tolled during a period of informal dispute
23 resolution under section 858 or Title 5, section 3341.

24 **§858. Informal dispute resolution**

25 **1. Commencement of process.** Prior to filing an action pursuant to section 853, a
26 property owner may, in the property owner's discretion, file a request with the appropriate
27 regulator to remedy a claimed regulatory taking. The property owner may include with
28 the request any information the property owner believes relevant, such as an appraisal.

29 **2. Response.** Within 60 days of receipt of a request under subsection 1, the regulator
30 shall respond to the property owner in writing, explaining the regulator's position as to
31 whether the property owner has suffered a regulatory taking.

32 **3. Choice of relief.** If the regulator in the response made pursuant to subsection 2
33 concludes that there has been a regulatory taking, the regulator shall indicate in the
34 response that the State chooses not to continue to apply the regulation at issue or that
35 either compensation or damages be awarded and, if the latter, the amount that the State is
36 willing to provide as compensation or damages.

37 **4. Identification of allowed uses.** If the regulator in the response made pursuant to
38 subsection 2 concludes that the question of whether the property owner has suffered a

1 regulatory taking depends upon whether the property owner could obtain approval for
2 uses of the property under existing state regulatory avenues, the regulator must identify
3 the scope of uses of the property that the regulator concludes the property owner would
4 reasonably be granted under those avenues.

5 **5. Inadmissibility of request and response.** Neither the property owner's request
6 under subsection 1 nor the regulator's response under subsections 2 to 4 are admissible as
7 evidence proving or refuting liability in an action under section 853 or otherwise binding
8 upon the property owner or regulator.

9 **§859. Attorney's fees and costs**

10 In an action brought under section 853, the prevailing party is, at the discretion of the
11 court, entitled to reasonable attorney's fees and costs.

12 **§860. Land use mediation program**

13 This chapter does not preclude use of the land use mediation program under Title 5,
14 section 3341.

15 **SUMMARY**

16 This bill is reported out by the Joint Standing Committee on Judiciary pursuant to
17 Resolve 2011, chapter 111, section 9. This bill incorporates the recommendations of the
18 majority of the Committee to Review Issues Dealing with Regulatory Takings.

19 The Joint Standing Committee on Judiciary has not taken a position on the substance
20 of the recommendations or the bill, and by reporting out this bill the committee is not
21 suggesting and does not intend to suggest that it agrees or disagrees with any aspect of the
22 study committee's recommendations or this bill. The Joint Standing Committee on
23 Judiciary is reporting the bill out for the sole purpose of turning the study committee's
24 majority proposal into a printed bill that can be referred to the Joint Standing Committee
25 on Judiciary for an appropriate public hearing and subsequent processing in the normal
26 course. The Joint Standing Committee on Judiciary is taking this action to ensure clarity
27 and transparency in the legislative review of the study committee's majority proposal.

28 The purpose of this bill is to establish standards for relief when state regulation
29 imposes an inordinate burden on an individual property owner, as well as efficient
30 mechanisms for pursuit of such relief.

31 To eliminate any fiscal impact from the establishment of these new standards and
32 mechanisms, they will apply prospectively: that is, only to burdens from regulations
33 enacted in the future. The bill provides mechanisms designed to achieve fair results and
34 to resolve disputes efficiently, including the ability, at the State's option, to grant
35 variances, which is an option consistent with general land use principles; the
36 encouragement of the use of informal dispute resolution avenues reducing and potentially
37 eliminating any litigation costs; and, when regulatory impact on fair market value
38 depends upon other regulatory avenues, the ability of a property owner to obtain a
39 nonbinding identification of the uses the state will allow on the affected property.

1 Claims of diminution of fair market value based on speculative uses are precluded by
2 the requirement that the property owner provide an appraisal reflecting a diminution of
3 50% or more in actual fair market value of the owner's entire parcel as well as by the
4 limitation of relief to the reasonable investment-backed expectations of the owner.