

MAINE STATE LEGISLATURE

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127th MAINE LEGISLATURE

FIRST REGULAR SESSION-2015

Legislative Document

No. 309

S.P. 124

In Senate, February 10, 2015

An Act To Connect the Citizens of the State to the State's Natural Resources by Establishing Standards for Relief from Regulatory Burdens

Reference to the Committee on Judiciary suggested and ordered printed.

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

HEATHER J.R. PRIEST
Secretary of the Senate

Presented by Senator COLLINS of York.
Cosponsored by Representative NADEAU of Winslow and
Senators: BURNS of Washington, CUSHING of Penobscot, DAVIS of Piscataquis,
EDGECOMB of Aroostook, HAMPER of Oxford, LANGLEY of Hancock, MASON of
Androscoggin, WHITTEMORE of Somerset.

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

2 **PART A**

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

4 **CHAPTER 22-A**

5 **REGULATORY TAKINGS**

6 **§851. Definitions**

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

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

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

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

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

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

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

22 **7. Underlying governmental land use action.** "Underlying governmental land use
23 action" means a regulatory proceeding preceding mediation pursuant to section 831 in
24 which a property owner seeks and fails to obtain governmental approval for a use of that
25 property owner's real property and in which the property owner has a right to judicial
26 review under Title 5, section 11001 due to either a final agency action or the failure or
27 refusal of an agency to act.

28 **§852. Right to jury trial**

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

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

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

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

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

8 **A. The extent of the diminution in fair market value of the real property caused by**
9 **the regulation;**

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

13 **C. The character of the use regulated.**

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

20 **§854. Entire parcel**

21 For the purposes of this chapter, the diminution of fair market value of real property
22 caused by a regulation must be measured by the diminution of the fair market value of the
23 entire contiguous parcel owned in whole or in part by the property owner and its affiliates
24 and not merely the portion of any such parcel to which the regulation directly applies. A
25 property owner whose entire contiguous parcel, along with that of its affiliates, has not
26 been diminished by at least 50% is not entitled to relief under this chapter.

27 **§855. Excluded regulations**

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

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

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

35 **3. Compliance with federal law.** Regulations required to comply with federal law;
36 and

37 **4. Prospective application.** Regulations enacted prior to August 1, 2016.

1 **§856. Relief**

2 Damages are available as relief for a regulatory taking. The fact finder shall award
3 the property owner an amount it determines comprises the diminution in fair market value
4 caused by regulation, and title in the real property remains with the property owner.
5 Payment of damages pursuant to this section operates to grant to and vest in the State the
6 right to enforce the regulation as to the real property. Damages are limited to damages
7 pursuant to Title 14, section 8105, subsection 1.

8 **§857. Limitations**

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

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

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

16 **4. Tolling.** The limitations period is tolled during the period of mandatory mediation
17 under section 859 and during the period of any relevant underlying governmental land
18 use action and appeal thereof pursuant to Title 5, section 11001.

19 **§858. Municipal mandates**

20 **1. Municipal regulation required by State.** If a state regulation requires a
21 municipality to enact regulation, the municipality may not be held liable under this
22 chapter for any regulation it enacts pursuant to that regulation. Such regulation must
23 instead be deemed state regulation for which only the State may be held liable. If the
24 municipality expressly provides in its enactment of the mandated regulation that it
25 endorses the regulation, the regulation must be considered municipal regulation and not
26 actionable as state regulation under this chapter.

27 **2. Municipal immunity.** A municipality is immune from any liability under this
28 chapter for any application of a regulation, state mandated or otherwise, and may not be
29 considered a necessary or proper party in any mediation or action under this chapter,
30 although the municipality may participate in mediation or an action under section 853 to
31 the degree it chooses.

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

1 **§859. Mandatory mediation**

2 **1. Commencement.** Prior to filing an action pursuant to section 853, a property
3 owner shall pursue relief under the land use mediation program established under section
4 831, except as provided in this section.

5 **2. Application.** The application of the property owner for mediation under section
6 831 must include a professional appraisal indicating a 50% or greater diminution in value
7 of real property caused by a regulation or regulations enacted after the effective date of
8 this chapter. By applying for mediation, the property owner consents to grant the
9 mediator and the State reasonable access to the real property with advance notice at a
10 time and in a manner acceptable to the property owner.

11 **3. Ripeness.** Unless the impact of a regulation on the real property clearly and
12 unequivocally in its terms acts as a 50% diminution in value of the real property, a
13 property owner must seek a formal denial of a written request for development or
14 variance in an underlying governmental land use action before the property owner may
15 commence mediation under section 831. The findings made in such an underlying
16 governmental land use action are not admissible and have no estoppel effect in an action
17 pursuant to section 853. The property owner may, but need not, appeal the underlying
18 governmental action under Title 5, section 11001 in order to make either the application
19 for mediation or an action pursuant to section 853 ripe, and mediation must be tolled
20 during the period any such appeal is pending.

21 A property owner may seek to mediate and thereafter pursue a claim under section 853
22 only when a regulation affects a use existing on the real property at the time the
23 regulation is enacted or a reasonably foreseeable, nonspeculative use that is suitable for
24 the subject real property and is compatible with adjacent land uses. A use is reasonably
25 foreseeable if there is evidence that the property owner intended in fact to develop that
26 use or a similar use of similar intensity.

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

32 **5. Identification of allowed uses; settlement offer.** If the State has not previously
33 identified in any preceding underlying governmental land use action what land uses, if
34 any, it will permit the owner to carry out on the real property that the property owner
35 claims has been taken, the State shall do so in the mediation under section 831.
36 Additionally, the State may present a written settlement offer to:

37 A. Swap or exchange real property;

38 B. Accept mitigation, including payments in lieu of on-site mitigation;

39 C. Accept location of development on the least sensitive portion of the regulated real
40 property; or

1 D. Purchase the real property, or an interest in the real property or a portion of the
2 real property, or pay compensation.

3 If the State chooses, it may submit in an action under section 853 the list of identified
4 allowed uses it previously provided the property owner and the content of any settlement
5 offer previously proposed by the State, and it may ask the fact finder to determine
6 whether a regulatory taking would be averted by the allowance of such previously
7 identified uses or the terms of the settlement offer. If the jury so finds, the State may, if it
8 chooses, allow the previously identified uses or terms of the settlement offer in lieu of
9 damages as relief.

10 **6. Timing.** The schedule to be followed in the mediation under section 831 must be
11 set by the mediator, but mediation must be completed no later than one year after the
12 property owner applies for mediation, unless the State and the property owner agree to an
13 extension.

14 **7. Execution of settlement.** A settlement reached pursuant to mediation under
15 section 831 must be formalized in writing and self-executing, and sovereign immunity to
16 enforce a settlement against the State is waived.

17 **8. Failure to reach settlement.** If a property owner and the State fail to agree to a
18 settlement during the mandatory mediation process under this section, the property owner
19 may file an action against the State under section 853. If during mediation the State
20 makes a bona fide settlement offer and the owner rejects that offer and proceeds to file a
21 claim under section 853, the property owner is liable for the costs and fees of the State
22 from the point in time of rejection of the State's bona fide settlement offer until resolution
23 of the claim under section 853 as long as the resolution of the claim under section 853
24 is either a finding of no taking or the damages awarded under the claim under section 853
25 are of a smaller dollar value than that contained in the State's bona fide settlement offer.

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

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

29 In an action brought under section 853, the prevailing party is, at the discretion of the
30 court, entitled to reasonable attorney's fees and costs. The court may at its discretion also
31 award to either party attorney's fees and costs for the mediation under section 831 if it
32 concludes that the State did not make or the property owner did not accept a bona fide
33 settlement offer in the mediation.

34 **Sec. A-2. Judicial branch report on case load.** The judicial branch shall
35 compile information regarding the number of cases filed in state courts pursuant to the
36 Maine Revised Statutes, Title 1, section 853. This information must include whether the
37 cases at issue involve only a cause of action under Title 1, section 853 or whether these
38 cases involve multiple causes of action, including a cause of action under Title 1, section
39 853. The judicial branch shall submit this information to the joint standing committee of
40 the Legislature having jurisdiction over judiciary matters no later than February 1, 2017
41 and every 2 years thereafter.

1 **PART B**

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

3 **CHAPTER 22**

4 **LAND USE MEDIATION PROGRAM**

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

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

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

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

16 B. Establish a simple and expedient application process; and

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

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

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

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

26 C. Has:

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

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

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

35 **4. Submission of application for mediation.** A landowner may apply for mediation
36 under this chapter by filing an application for mediation with the Superior Court clerk in
37 the county in which the land that is the subject of the conflict is located. The Superior

1 Court clerk shall forward the application to the Court Alternative Dispute Resolution
2 Service. The Court Alternative Dispute Resolution Service shall make available online
3 brochures about the land use mediation program and applications for landowner
4 participation in the land use mediation program.

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

14 **6. Stay of filing period.** Notwithstanding any other provision of law, the period of
15 time allowed by law or by rules of the court for any person to file for judicial review of
16 the governmental action for which mediation is requested under this chapter is stayed for
17 30 days beyond the date the mediator files the report required under subsection 13 with
18 the Superior Court clerk, but in no case longer than 120 days from the date the landowner
19 files the application for mediation with the Superior Court clerk.

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

27 **8. Schedule; notice; participants.** The mediator is responsible for scheduling all
28 mediation sessions under this chapter. The mediator shall provide a list of the names and
29 addresses and a copy of the notice of the mediation schedule to the Superior Court clerk,
30 who shall mail the notices. The mediator shall include on the list persons identified in the
31 following ways.

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

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

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

39 **9. Parties to mediation.** A mediator shall include in the mediation process under
40 this chapter any person the mediator determines is necessary for effective mediation,
41 including persons representing municipal, county or state agencies and abutters, parties,
42 intervenors or other persons significantly involved in the underlying governmental land

1 use action. A mediator may exclude or limit a person's participation in mediation when
2 the mediator determines that exclusion or limitation necessary for effective mediation.
3 This subsection does not require a municipality to participate in mediation under this
4 chapter.

5 **10. Sharing of costs.** Participants in the mediation under this chapter may share the
6 cost of mediation after the initial 4 hours of mediation services have been provided.

7 **11. Admissibility.** The admissibility in court of conduct or statements made during
8 mediation under this chapter, including offers of settlement, is governed by the Maine
9 Rules of Evidence, Rule 408(a) for matters subsequently heard in a state court and
10 Federal Rules of Evidence, Rule 408 for matters subsequently heard in a federal court.

11 **12. Agreements.** A mediated agreement under this chapter must be in writing. The
12 landowner, the governmental entity and all other participants who agree shall sign the
13 agreement as participants and the mediator shall sign as the mediator.

14 A. An agreement that requires any additional governmental action is not self-
15 executing. If any additional governmental action is required, the landowner is
16 responsible for initiating that action and providing any additional information
17 reasonably required by the governmental entity to implement the agreement. The
18 landowner shall notify the governmental entity in writing within 30 days after the
19 mediator files the mediator's report under subsection 13 that the landowner will be
20 taking action in accordance with the agreement.

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

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

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

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

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

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

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

