

MINORITY REPORT

Sponsored by Representative Les Fossel

Rep. Fossel additions in purple, on top of red/yellow changes from Pierce-Atwood

COMMITTEE AMENDMENT “.” To LD 1810, 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 inserting in its place the following;

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

CHAPTER 22

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. **“Regulation” does not include a municipal regulation, except that “regulation” includes an action by a municipality in conformance with a state regulation that imposes a mandate on the municipality.**

6. Regulator. "Regulator" means the State, any state agency or any other administrative body of the State.

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

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

9. Underlying governmental land use action. A regulatory proceeding preceding mediation pursuant to Title 5, section 3341 in which a property owner seeks and fails to obtain governmental approval for a use of that property owner's real property, and which the property owner has a right to judicial review under section 11001 either due to a final agency action or the failure or refusal of an agency to act.

§ 852. Right to jury trial

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

§ 853. When a regulatory taking occurs

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

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

2. Factors to be weighed. After a prima facie showing has been made under subsection

1, in determining whether a regulatory taking has in fact occurred, the fact finder shall weigh 3 factors:

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

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

C. The character of the use regulated.

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

§ 854. Entire parcel

For the purposes of this chapter, the diminution of fair market value of real property caused by a regulation must be measured by the diminution of the fair market value of the entire **contiguous** parcel owned **in whole or in part** by the property owner **and/or its affiliates** and not merely the portion of any such parcel to which the regulation directly applies. **A landowner whose whole contiguous parcel, along with that of its affiliates, has not been diminished at least 50 percent shall not be entitled to recover under this chapter.**

§ 855. Excluded regulations

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

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

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

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

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

§ 856. Relief

~~Compensation, d~~Damages or a takings variance are available as relief for a regulatory taking, at the option of the State.

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

21. Damages. If the State chooses to pay damages, the fact finder shall award the property owner an amount it determines comprises the diminution in fair market value caused by regulation, and title in the real property remains with the property owner. Payment of damages pursuant to this section operates to grant to and vest in the State the right to enforce the regulation as to the real property. *Damages under this provision shall not exceed \$950,000.00.—Damages are limited to damages set pursuant to the Maine Tort Claims Act, Title 14, section 8105, subsection 1.*

32. Takings variance. If the State chooses to grant a takings variance, the regulation causing the regulatory taking may not be applied to the real property upon which a regulatory

taking would otherwise occur.

§ 857. Limitations

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

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

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

4. Tolling. The limitations period is tolled during ~~a the period of informal dispute resolution mandatory mediation~~ under section 859 ~~or Title 5, section 3341~~, and during the period of any relevant underlying governmental land use action and appeal thereof pursuant to Title 5, section 11001.

§ 858. Municipal mandates

1. When regulation is deemed municipal or state regulation. If a state regulation requires a municipality to enact regulation, the municipality shall not be held liable under this chapter for any regulation it enacts pursuant to that regulation. Such regulation will instead be deemed state regulation for which only the state may be held liable. If the municipality expressly provides in its enactment of the mandated regulation that it endorses the regulation, the regulation shall be deemed municipal regulation and not actionable as state regulation under this chapter.

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

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

§ 859. ~~Informal dispute resolution~~ Mandatory mediation

1. Commencement of process. ~~Prior to filing an action pursuant to section 853, a property owner may, in the property owner's discretion, file a request with the appropriate regulator to remedy a claimed regulatory taking. The property owner may include with the request any information the property owner believes relevant, such as an appraisal. must pursue relief under the land use mediation program established under title 5, section 3341, adjusted as follows.~~

2. Response. ~~Within 60 days of receipt of a request under subsection 1, the regulator shall respond to the property owner in writing, explaining the regulator's position as to whether the property owner has suffered a regulatory taking.~~ **Application.** ~~The application of the property owner for mediation shall include a professional appraisal indicating a 50 % or more diminution in value of real property caused by a regulation or regulations enacted after the effective date of this chapter. By applying for mediation, the owner consents to grant the mediator and the State reasonable access to the real property with advance notice at the time and in a manner acceptable to the property owner.~~

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

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

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

4. Notice. Those notified of the commencement of mediation under title 5, section 3341(7) shall include all abutters to the property that the property owner claims has been taken, as well as any participant in any relevant underlying governmental land use action. Notice shall be made by sending a copy of the mediation application by United States mail or hand delivery at the address on the latest property tax roll.

45. Identification of allowed uses. If the regulator in the response made pursuant to subsection 2 concludes that the question of whether the property owner has suffered a regulatory taking depends upon whether the property owner could obtain approval for uses of the property under existing state regulatory avenues, the regulator must identify the scope of uses of the property that the regulator concludes the property owner would reasonably be granted under those avenues. If the State has not previously identified in any preceding underlying governmental land use action what land uses, if any, it will permit the owner to carry out on the real property which the property owner claims has been taken, the State shall do so in the mediation. Additionally, the State may present a written settlement offer to:

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

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

- C. Swap or exchange real property;
- D. Accept mitigation, including payments in lieu of onsite mitigation;
- E. Accept location of development on the least sensitive portion of the regulated real property;
- F. Condition the amount of development or use permitted;
- G. Issue a variance, special exception or other extraordinary relief; or\
- H. Purchase the real property, or an interest therein, or a portion thereof, or pay compensation.

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

5. Inadmissibility of request and response.— Neither the property owner's request under subsection 1 nor the regulator's response under subsections 2 to 4 are admissible as evidence proving or refuting liability in an action under section 853 or otherwise binding upon the property owner or regulator. **Timing.** The schedule to be followed in the mediation shall be set by the mediator, but mediation must be completed no later than one year after the property owner applies for mediation, unless the State and the property owner agree to an extension.

6. Execution of settlement. A settlement reached pursuant to mediation shall be formalized in writing and self-executing, and sovereign immunity to enforce a settlement against the State is waived.

7. Failure to reach settlement. Should a property owner and the State fail to agree to a settlement during the mandatory mediation process, *then the property owner shall notify the*

Office of the Attorney General. The Office of the Attorney General shall catalogue this information and present it to the joint legislative committee created to review effectiveness and fairness of land use laws and rules under Title 3, chapter 39 by January 15th of each year. The property owner may file an action against the State under section 853 if mediation fails to reach a settlement and the Legislature fails to address the underlying law or rule within the period of one legislative session then the property owner is authorized to file an action against the State under section 853. If during mediation, the State makes a bona fide settlement offer and the owner rejects that offer and proceeds to file a section 853 claim, the property owner shall be liable for the costs and fees of the State from the point in time of rejection of the State's bona fide settlement offer until resolution of the section 853 claim, provided the resolution of the section 853 claim is either a finding of no taking or the damages awarded under the 853 claim is a smaller dollar value than contained in the State's bona fide settlement offer.

8. Fees. The cost of the mediation shall be as set forth in title 5, section 3341, supplemented by an administrative fee to be determined by the judicial branch.

§ 859. Attorney's fees and costs

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

§ 860. Land use mediation program

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

Sec. 2. Judicial branch report on case load. The judicial branch shall compile information regarding the number of cases filed in Maine courts pursuant to Title 1, section 853. This information shall indicate whether the cases at issue involve only a Title 1, section 853, cause of action or whether these cases involve multiple causes of action, including a Title 1,

section 853 cause of action. The judicial branch shall submit this information to the Joint Standing Committee on Judiciary no later than February 1, 2014 and every two years thereafter.

Sec. 2. 3 MRSA c. 39 is enacted to read:

CHAPTER 39
REGULATORY FAIRNESS REVIEW

§1101. Committee on regulatory fairness

1. Committee, defined. “Committee” means a joint legislative committee established to provide a forum for ongoing legislative review of the effectiveness and fairness of land use laws and rules.

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

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

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

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

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

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

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

4. Duties and powers. The committee:

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

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

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

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

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

F. May develop recommendations for changes in land use laws and rules and refer such recommendations, with supporting documentation, to the joint standing committee with appropriate jurisdiction, including any recommendations that further analysis of benefits and costs, pursuant to Title 5, section 8063-A, be conducted by the agency. Any committee of jurisdiction that receives a recommendation from the committee may submit a bill for subsequent reference and public hearing.

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

H. Shall receive and review information from the Office of the Attorney General regarding claims in the past year that were not successfully resolved pursuant to Title 1, section 859 and may proceed to litigation pursuant to Title 1, section 859, subsection 7. Upon receipt of this information, the committee may report out legislation to amend the underlying law or to direct the relevant agency to amend the underlying rule in such a way that the complaining landowner no longer suffers a 50 percent diminution in real property value. If a new law or resolve takes effect that ensures that the complaining landowner no longer suffers a 50 percent diminution in real property value, then that landowner no longer has a valid claim under Title 1, section 853. If a law or rule is not amended to result in the landowner no longer suffering a 50 percent diminution in real property value, then the complaining landowner can proceed with a claim under Title 1, section 853;

I. Shall undertake a review of Title 1, chapter 22 by February 15, 2017 and every 5 years thereafter. The review must assess the number of mediations entered into by the State, the number of claims filed in court, the number of variances granted to landowners and the costs of this chapter to the State in terms of both administration and damages awarded to landowners. Based upon this review, the committee may recommend legislation that amends or repeals Title 1, chapter 22 to the joint standing committee of

the Legislature having jurisdiction over judiciary matters, which may report out legislation based on the committee's recommendations; and

7. May undertake other activities consistent with its listed responsibilities.

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

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

Sec. 4. 5 MRSA §8056, sub-§6 is amended to read:

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

SUMMARY

Still to come . . .