

Prepared for  
Rep. Cushing

PROPOSED COMMITTEE AMENDMENT “\_\_\_” 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:

**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 a 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.~~

**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 858 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. 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.

**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.** If the property owner and the State agree to a settlement in mediation, it shall be enforced by the filing of an action in Superior Court to approve the settlement. Any participant in the mediation may object to the settlement in the Superior Court action. The court shall approve the settlement if it deems that the settlement potentially avoids a regulatory taking as defined in this chapter and is otherwise in the best interests of the public. If the court rejects the settlement, the court shall indicate what settlement terms it would find acceptable, if any. After a final judgment conditioning or rejecting a settlement, the property owner may file an action under section 853, and the finding of the court in an action under this section shall not be admissible and shall have no estoppel effect in the action under section 853.

**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 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.

### **§ 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.

## SUMMARY

This amendment would replace the entire bill, making a number of changes to this legislation. Amendments are the following:

1. Adding the new definition of "affiliate," which is used to prevent the dividing of property to circumvent the whole parcel rule.
2. Adding the new definition of "underlying governmental land use action," which is used to help determine ripeness of a claim.
3. Clarifying that a landowner must obtain a professional appraisal, and not simply an appraisal, as part of making a claim.
4. Clarifying the definition of "reasonable investment-backed expectations" by adding a temporal reference found in Florida statute.
5. Clarifying that property cannot be divided to circumvent the whole parcel rule and clarifying that a whole, contiguous parcel's failure to meet the diminution threshold of 50 percent precludes recovery under this chapter.

6. Limiting recovery to either damages, capped at \$950,000, or a takings variance. This is accomplished by eliminating compensation for the entire fair market value of a parcel as an option for relief, which is always an available avenue for the state to exercise if it chooses under the Maine Constitution.
7. Adjusting tolling provisions to account for the inclusion of a mandatory mediation program.
8. Rewriting § 858 in order to create a mandatory mediation program, which operates as follows:
  - a. Requires that before a takings claim can be filed in court, a property owner must pursue relief under the Land Use Mediation Program, subject to enhanced requirements.
  - b. Requires that a landowner applying for relief under this section must also include a professional appraisal indicating 50 % or more diminution in property value with their application. This application is also deemed consent for the mediator and the State to access the property owner's land for purposes of resolving a dispute.
  - c. Defines ripeness for purposes of seeking mandatory mediation, requiring the property owner, before mediation, to apply and be denied an application for a land use unless a regulation on its face would clearly cause a 50% diminution in property value. Further limits recovery from speculative uses.
  - d. Requires that abutting property owners be notified when a property owner initiates mandatory mediation under this chapter.
  - e. Provides that as part of mediation, the State will identify what land uses are permitted on the property in question. The State may also present a written settlement offer as part of mediation that can include various proposals in order to reach a settlement agreement.
  - f. Provides that the property owner and the State have up to one year to complete the mediation process.
  - g. Requires that any settlement agreement reached in mediation must be approved in Superior Court, providing a chance for abutting landowners and other interested parties a chance to object to the final agreement between a property owner and the State.
  - h. Specifies that only after a failed mediation is a property owner allowed to proceed to court and creates financial incentives for a landowner to accept a bona fide offer from the State during mediation.

9. Clarifying attorneys fees so that either the State or a property owner could be liable for attorney's fees in the event that they do not make a bona fide attempt at settlement during the mediation process.
10. Requiring that the Judicial Branch provide regular reports to the Judiciary Committee of the number of cases pursued in court under this new chapter so that future legislatures can assess the impact of this chapter on court dockets.