Severe Legal Problems in LD 1810

a Section-by-Section Analysis

Attachment to Testimony by Jeff Pidot

LD 1810 would constitute a radical departure from well-settled principles of Constitutional takings law. The bill is riddled with provisions that are confusing, untested and extreme, all to the public's detriment. LD 1810 would be a lawyers' paradise, since it would create a boundless array of new opportunities for creative attorney's to file cases for compensation from the State Treasury.

Many of LD 1810's provisions would give rise to highly debatable interpretations requiring court litigation or agency waivers of regulatory laws the Legislature has enacted. Under the bill, agency waivers provide no opportunity for public comment, due process or appellate review, even as they may result in damage to neighboring properties, communities and the environment. The State would be given the impossible choice of attempting to defend the State Treasury and the integrity of Maine's regulatory laws, or to pay out unappropriated funds to satisfy legions of claims that could be filed. Meanwhile, by enacting LD 1810 the Legislature would potentially render itself powerless to enact new laws, or even amend existing laws, that it finds necessary to protect Maine citizens and their communities. The effect could be to prevent the Legislature from enacting laws to regulate unanticipated, extraordinary development proposals and future land uses that we cannot imagine today.

While it is impossible to predict all of LD 1810's potential impacts on the State Treasury and the ability of the Legislature to regulate in the future, described below are some of the bill's most severe, legally troublesome provisions.

1. **§ 851(4). 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."

   Analysis: This definition would sweepingly embrace all future property-related enactments of the Legislature and regulations of agencies, including those necessary to respond to major commercial and industrial development proposals, as well as many other laws that may have some effect on property use. It is impossible to predict the implications, and intended and unintended consequences of this bill, which applies to all new legislation and amendments of existing regulation into the indefinite future.

   The attempt in this section at a municipal exemption is problematic, since many State laws delegate responsibilities to the municipal level (e.g., the plumbing code and shoreland zoning among others), and these laws and decisions made under them are in this section expressly subject to the bill's compensation and other requirements. Where municipalities are implicated, let's say regarding an amendment to a shoreland zoning ordinance or map, would the State or municipality be the defendant and liable for damages? Does the State have the right to waive the regulation under the bill, even though it is the municipality that adopted it? In sum, there is no assurance that municipalities will receive the exemption that the bill promises, and they may well be subject to compensation claims under this bill.

2. **§ 851(6). 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."

   Analysis: The standard of 50% diminution of pre-regulatory property value has no foundation in Constitutional takings law, has never been embraced by the U.S. Supreme Court or any other court in their thousands of takings cases, and will be subject to unbridled case-by-case debate and litigation. The assignment of property value impacts resulting from particular regulatory laws (indeed, from multiple regulatory laws) is rife with imprecision. Costly experts representing both claimants and their government would have much to argue about. A jury would be left to resolve whether the public treasury owes compensation in unpredictable ways; again, devoid of any direction from the courts' extensive Constitutional takings jurisprudence.

3. **§ 851(7). Takings variance (see also § 856, first paragraph and subsection 3)).** " 'Takings variance' means a decision by the State to permit departure from the requirements of a regulation that imposes a regulatory taking."

   Analysis: (see also analysis in paragraphs 11 and 13 below) This section allows discretionary waivers (which the bill calls variances) of the State's laws for some land owners but not others, leading to gross unfairness pitting the interests of claimants against their neighbors. The property rights and values of neighbors will invariably be diminished when significant waivers of laws are directed at benefitting just claimant landowners, allowing them to engage in land uses that are prohibited as destructive to the community. The impact on a neighbor from a waiver might easily be sufficient to result in a compensatory cause of action by the neighbor against the State for issuing the waiver.

4. **§851(6). Regulatory taking (see also §853).** " 'Regulatory taking' means a burden caused by a 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."

   Analysis: (see also analysis in paragraphs 6 and 7 below). As stated above, this standard for the finding of a regulatory taking is nowhere found in any court decisions dealing with takings under the Constitution. It will open an entirely new Pandora's box of litigation and expensive debate. The biggest beneficiaries of this scheme would be the lawyers, whose fees also may be subject to recovery from the State Treasury. See analysis in section 19 below.

5. **§ 853, first paragraph. 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."

   Analysis: The term "enactment *or* application of any regulation" creates legal confusion as to when a compensable taking may occur and when the statute of limitations begins to run. For example, if an agency develops new maps of habitat pursuant to the Natural Resources Protection Act, or a municipality amends a shoreland zoning map, or either level of government takes a permitting action under a new law or ordinance, compensatory claims could be triggered under this bill.

6. **§ 853(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 appraisal of a diminution in the fair market value of real property of 50% or greater caused by regulation."

   Analysis: What does this determination entail and how would the process work? A claimant files an action in court, supported by his own affidavit, which makes for "prima facie evidence," but this is no meaningful threshold to bringing an action. Moreover, the required "appraisal" does not have any legal meaning. One can get an appraisal to say many things. The fact finder thus will be confronted with a self-serving assessment prepared for the claimant. Claims will thus be legion, based upon factual assertions of reductions in property value that are nearly always debatable.

7. **§ 853(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; and

   C. The character of the use regulated."

   Analysis: This section adds to the legal confusion of the bill. What do these factors, which are a simplified formulation of what courts consider in determining Constitutional takings claims, have to do with the standard for finding a taking in LD 1810? In the definitions (section 851(6)), a regulatory taking under the bill exists whenever there is a purported 50% reduction in value, which has no relationship to Constitutional law. Thus, the additional, Constitutionally-derived factors in the above quoted section (§853(2)) appear to be irrelevant to the statutory scheme and may not be considered in any legally meaningful way.

8. **§ 853(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."

   Analysis: This language makes crystal clear that the statutory right provided in LD 1810 is totally divorced from the Constitution's takings clause interpreted and applied by thousands of court decisions in state and federal courts, which thus are rendered meaningless. All contested interpretations of the provisions in LD 1810 would thus need to be argued and litigated anew. But since these decisions will be made by juries and not courts, each case will be decided on its own and there will be no track record of precedents on which to base these decisions.

9. **§ 855. Excluded regulations.** "The cause of action established under section 853 does not apply to the following regulations, narrowly construed:"

Analysis: This language instructs that the exceptions from the bill's compensation requirements must be narrowly construed. These 'narrowly construed' exceptions deal with regulations based upon compelling pubic interests such as nuisance, health, and safety. The 'narrow construction' of these exceptions further limits the Legislature's ability to fashion new laws based upon its determinations of compelling public needs. This language alone will generate additional mountains of litigation costly to the State Treasury.

10. **§ 855(4). Prospective application.** "Regulations enacted prior to the effective date of this section."

Analysis: This provision purports to exclude from the bill's compensation requirements those laws made prior to the bill's effective date. However, amendments of laws or regulations of any kind, including recodifications of existing laws, together with any new laws designed to meet new issues and needs as determined by the Legislature, would all be subject to the bill's statutory right to compensation. If an existing regulation were repealed or expired, if even for a brief period, then it its re-enactment would be considered a new restriction under this definition. The combined effect would be that the Legislature (and municipalities, in the context of shoreland zoning) would be seriously restricted from making necessary changes to legal requirements.

11. **§ 856. Relief, first paragraph.** "Compensation, damages or a takings variance are available as relief for a regulatory taking, at the option of the State."

Analysis: Under the bill, there is no process for making variance decisions waiving the State's laws, and no opportunity for public input including by affected neighbors whose property may well be devalued by variances. Note also that, in the State agency's sole discretion, compensation and damages will be paid with unappropriated money, while variances will authorize violation of laws enacted to protect the public, its communities and environment. All this would be done without so much as a public comment period. [See also the analysis in paragraphs 13 and 15 below.]

12. **§ 856(2). 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."

Analysis: Tantamount to a general grant of condemnation power to all regulatory agencies, this provision gives the agency the discretion to compensate the property owner and thereby take ownership of the property even if the property owner is not interested in forfeiting ownership.

13. **§ 856(3). Takings variance.** "If the State chooses to grant a takings variance, the regulation causing a taking may not be applied to the real property upon which a regulatory taking would otherwise occur."

Analysis: Because the State in many instances may not wish to create a raid on the public Treasury, a "takings variance" (or waiver) may become the primary avenue for relief selected by the agency. [See the discussions in paragraph 11 above and 15 below of the serious problems in this discretionary election.] Note that this new discretionary waiver is separate from, and in addition to, traditional variances found in many land use laws, which require a rigorous process, strict application of legal criteria and a public proceeding. By contrast, if the agency decides to waive laws in favor of a

claimant, it would do so in its sole discretion, even if the result is the loss in property value of neighbors and the community.

Note that, since there is no exemption in the bill for federally mandated or delegated laws, the State might find that it cannot lawfully waive them, so the result would be payment of compensation by the State for simply following a federal mandate that is entirely Constitutional.

14. **§ 857(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."

Analysis: Where claims are made involving multiple laws, determining which regulations apply and how to ascribe individualized property diminution impacts to each, as well as which agencies or local governments are liable, will be a further legal quagmire. An additional issue is whether *increases* in property value caused by regulatory laws can also be considered within the mix of cumulative impacts. The report of the regulatory takings study committee states that "property value increases resulting from land use regulations" would be taken into account, but the bill's language is unclear at best.

15. **§ 858. Informal dispute resolution. 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."

Analysis: Despite the heading "Commencement of process," there is no process here. Waiver of the state law is left to the unfettered discretion of the agency without any process, public participation, legal criteria or appellate review, even when the waiver will have significant effects on the community and the environment. [See the analysis in paragraphs 11 and 13 above.]

16. **§ 858 (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."

Analysis: Based upon the skeletal information submitted by the claimant, which does not even have to include an appraisal, the agency cannot possibly know whether the regulation in fact causes a 50% diminution of the claimant's property value. In order to have an informed view, the agency would need to hire its own appraiser and conduct site visits, but the costs of doing so every time a claim is filed would be unthinkable. Even if the money could be found to make an evaluation, the agency could not do so within the 60 day time period allowed.. The result would be that the agency would likely provide relief to many claims filed since there would be no other information to go on. Granting waivers would be highly destructive of the integrity of the State's laws, while granting compensation would open the State Treasury to pay unappropriated funds.

17. **§ 858 (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."

Analysis: As discussed above, this concept grants the most extraordinary powers to state agencies to spend unappropriated money, to waive the application of Maine law and even to condemn property, all without any procedure. Any of these actions likely will give rise to disputes and litigation by adversely affected parties, whether they be claimants, neighbors or the affected community. If the law is under a federal mandate or delegation of federal authority, there may be no power to waive it, in which case the State would have no choice but to pay compensation for enforcing the law since it cannot waive it.

18. **§ 858 (4). 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."

Analysis: This section requires the agency to speculate about which uses might be permitted that offer a lesser diminution in property value. Can the agency identify uses that the landowner has no interest in pursuing? Analyzing every possible alternative use of a property, especially within the 60 day time period allowed, would be infeasible for the agency to perform, since each situation likely would require site assessments and interaction with other agencies (and municipalities) that have information pertaining to the scope of legally possible uses and the prospects of being granted approvals for such uses. Remember that this conjectural assessment would be done in the absence of so much as a permit application from the claimant.

19. **§ 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."

Analysis: Recognizing that the outcome of jury verdicts in cases brought under this entirely extra-Constitutional landowner entitlement program would not be predictable in outcome, this provision alone could impose a heavy impact on the State Treasury, since it means that substantial private legal fees of claimants may be recovered from the State, again without any legislative appropriation. LD 1810 is, if nothing else, the ultimate lawyer's bill.