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

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

PART A

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

CHAPTER 22-A

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.
- 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.
- 7. Underlying governmental land use action.** "Underlying governmental land use action" means a regulatory proceeding preceding mediation pursuant to section 831 in which a property owner seeks and fails to obtain governmental approval for a use of that property owner's real property and in which the property owner has a right to judicial review under Title 5, section 11001 due to either 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 its affiliates and not merely the portion of any such parcel to which the regulation directly applies. A property owner whose entire contiguous parcel, along with that of its affiliates, has not been diminished by at least 50% is not entitled to relief 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 August 1, 2014.

§ 856. Relief

Damages are available as relief for a regulatory taking. 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 are limited to damages pursuant to Title 14, section 8105, subsection 1.

§ 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 accrues.

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 the period of mandatory mediation under section 859 and during the period of any relevant underlying governmental land use action and appeal thereof pursuant to Title 5, section 11001. If a settlement does not result from mandatory mediation under section 859, the limitations period is tolled for the period ending on the March 15th first occurring after the Attorney General submits the report required under section 859, subsection 8.

§ 858. Municipal mandates

1. Municipal regulation required by State. If a state regulation requires a municipality to enact regulation, the municipality may not be held liable under this chapter for any regulation it enacts pursuant to that regulation. Such regulation must 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 must be considered 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 may not be considered 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. Mandatory mediation

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

2. Application. The application of the property owner for mediation must include a professional appraisal indicating a 50% or greater 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 property owner consents to grant the mediator and the State reasonable access to the real property with advance notice at a 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 may commence mediation. The findings made in such an underlying governmental land use action are not admissible and 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 must 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, nonspeculative 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.

4. Notice. 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 must be notified by the property owner of the commencement of mediation under section 831, subsection 8. Notice must 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.

5. Identification of allowed uses; settlement offer. 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 that 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. Swap or exchange real property;

- B. Accept mitigation, including payments in lieu of on-site mitigation;
- C. Accept location of development on the least sensitive portion of the regulated real property; or
- D. Purchase the real property, or an interest in the real property or a portion of the real property, 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 the content of any settlement offer previously proposed by the State, and it may ask the fact finder 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, the State may, if it chooses, allow the previously identified uses or terms of the settlement offer in lieu of damages as relief.

6. Timing. The schedule to be followed in the mediation must 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.

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

8. Failure to reach settlement. If a property owner and the State fail to agree to a settlement during the mandatory mediation process, the property owner shall notify the Office of the Attorney General. The Office of the Attorney General shall catalog 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. If mediation fails to produce a settlement, the property owner may file an action against the State under section 853 beginning on the March 15th after the Attorney General has reported the failure under this subsection. If during mediation the State makes a bona fide settlement offer and the owner rejects that offer and proceeds to file a claim under section 853, the property owner is 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 claim under section 853 as long as the resolution of the claim under section 853 is either a finding of no taking or the damages awarded under the claim under section 853 are of a smaller dollar value than that contained in the State's bona fide settlement offer.

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

§ 860. 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 to either party attorney's fees and costs for 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.

Sec. A-2. Judicial branch report on case load. The judicial branch shall compile information regarding the number of cases filed in state courts pursuant to the Maine Revised Statutes, Title 1, section 853. This information must include whether the cases at issue involve only a cause of action under Title 1, section 853 or whether these cases involve multiple causes of action, including a cause of action under Title 1, section 853. The judicial branch shall submit this information to the joint standing committee of the Legislature having jurisdiction over judiciary matters no later than February 1, 2015 and every 2 years thereafter.

PART B

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

CHAPTER 22

LAND USE MEDIATION PROGRAM

§ 831. Land use mediation program

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

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

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

B. Establish a simple and expedient application process. Not later than January 10th of each year, the Court Alternative Dispute Resolution Service shall send a copy of each completed application received and each agreement signed during the previous calendar year to the chairs of the joint legislative committee created to review effectiveness and fairness of land use laws and rules under Title 3, chapter 39; and

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

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

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

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

C. Has:

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

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

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

4. Submission of application for mediation. A landowner may apply for mediation under this chapter by filing an application for mediation with the Superior Court clerk in the county in which the land that is the subject of the conflict is located. The Superior Court clerk shall forward the application to the Court Alternative Dispute Resolution Service. The Court Alternative Dispute Resolution Service shall make available online brochures about the land use mediation program and applications for landowner participation in the land use mediation program.

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

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

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

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

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

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

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

9. Parties to mediation. A mediator shall include in the mediation process any person the mediator determines is necessary for effective mediation, including persons representing municipal, county or state agencies and abutters, parties, intervenors or other persons significantly involved in the underlying governmental land use action. A mediator may exclude or limit a person's participation in mediation when the mediator determines that exclusion or limitation necessary for effective mediation. This subsection does not require a municipality to participate in mediation under this chapter.

10. Sharing of costs. Participants in the mediation may share the cost of mediation after the initial 4 hours of mediation services have been provided.

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

12. Agreements. A mediated agreement must be in writing. The landowner, the governmental entity and all other participants who agree must sign the agreement as participants and the mediator must sign as the mediator.

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

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

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

- A. The names of the mediation participants, including the landowner, the governmental entity and any other persons;
- B. The nature of any agreements reached during the course of mediation, which mediation participants were parties to the agreements and what further action is required of any person;
- C. The nature of any issues remaining unresolved and the mediation participants involved in those unresolved issues; and
- D. A copy of any written agreement under subsection 12.

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

§ 8.Land use mediation; obligation to participate

Agencies within the executive branch shall participate in mediation under Title 5, ~~chapter 314,~~ subchapter H1, chapter 22, when requested to participate by the Court Alternative Dispute Resolution Service.

Sec. B-3. 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 by joint rule of the Legislature 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 President of the Senate; 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 must 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 of the Legislature with appropriate jurisdiction, including any recommendations that further analysis of benefits and costs, pursuant to Title 5, section 8063-A, be conducted by the relevant state agency. A joint standing committee of the Legislature 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 of the Legislature 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 whose claimants are allowed to proceed to litigation pursuant to Title 1, section 859, subsection 8. 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 property owner no longer suffers a 50% diminution in real property value. If a new law or resolve takes effect that ensures that the complaining property owner no longer suffers a 50% diminution in real property value, that property owner no longer has a valid claim under Title 1, section 853;

I. Shall undertake a review of Title 1, chapter 22 by February 15, 2018 and every 5 years thereafter. The review must include an assessment of the number of mediations entered into by the State, the number of claims filed in court and the costs of the land use mediation program under Title 1, chapter 22 to the State in terms of both administration and damages awarded to property owners. 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

J. May undertake other activities consistent with its listed responsibilities under this subsection.

5. Information protocol. The committee shall develop a user-friendly form that may be used 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. B-4. 4 MRSA §18-B, sub-§10, as amended by PL 2001, c. 184, §2, is further amended to read:

10. Land use mediation. The land use mediation program is a program within the Court Alternative Dispute Resolution Service.

A. The Director of the Court Alternative Dispute Resolution Service shall administer the land use mediation program established in Title 5, ~~chapter 314, subchapter H1,~~ chapter 22.

B. A land use mediation fund is established as a nonlapsing, dedicated fund within the Administrative Office of the Courts. Fees collected for mediation services pursuant to Title 5, ~~chapter 314, subchapter H1,~~ chapter 22 must be deposited in the fund. The Administrative Office of the Courts shall use the resources in the fund to cover the costs of providing mediation services as required under Title 5, ~~chapter 314, subchapter H1,~~ chapter 22.

Sec. B-5. 5 MRSA c. 314, sub-c. 2, as amended, is repealed.

Sec. B-6. 5 MRSA §8056, sub-§6, as amended by PL 1995, c. 537, §6, is further 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 Constitution of Maine or that a variance was necessary to avoid such a taking.

SUMMARY

This bill establishes standards for relief when state regulation imposes an inordinate burden on an individual property owner, as well as efficient mechanisms for pursuit of such relief. The bill provides that, if a property owner's right to use, divide, sell, occupy or possess real property is reduced by the enactment or application of a government regulation, the property owner may seek and obtain relief. Under the provisions of the bill, prior to filing an action, the property owner must pursue relief under a land use mediation program.