

## Regulatory Takings Subcommittee Summary

October 17, 2011

\*The following summary includes some of the comments made at the subcommittee meeting and with the possible exception of the enumerated items under section 1, does not reflect a consensus of the subcommittee. The sections follow the agenda outline.

Present – Rep. Nass, Rep. Priest, Don White, Peggy Bensinger, Catherine Connors, Cathy Johnson, Clark Granger and Bucket Davis

1. Improve current land use mediation program. The program is underutilized and the following could be considered to improve awareness of the program:

- A. State agencies promote the mediation program on websites;
- B. Direct CADRES to provide municipalities with copies of brochures about the mediation program;
- C. CADRES promote the program on its web site;
- D. Have the Governor’s small business advocate provide brochures on the program;
- E. Require agencies to send out information on mediation along with right of appeal when make regulatory decisions;
- F. Require mediation before go to court; and
- G. Include mediation option in licensing process.

Comment made that mediation is not being used currently because there is little to be mediated until a change is made regarding regulatory takings.

2. Whether to expand AG’s considerations when reviewing proposed rules.

- The AG representative reported that the office is involved in regulatory drafting process before the posting of proposed rules and has asked agencies to write in variances (not waivers) in rules that the AG is concerned about from a constitutional taking stand point.
- Very few permits have been denied; NRPA projects over past 10 years – 4,448 applications, 32 denied (0.72% denied); Site Law permits over past 10 years – 2,647 applications, 3 denied (0.001% denied).
- If want a better standard than a constitution takings standard a variance, a “safety valve,” may work.
- Variances are not a solution because they apply the same standard currently applied for takings and add process without result.
- Variances might not extend to a buyer.
- A remedy of compensation or waiver of the regulation on the taken property is needed.

3. How to ensure Legislature is more aware of regulatory takings.

- Propose a bill.
- Both negative and positive economic impacts need to be taken into account; we don’t require landowners to compensate the state when property values go up due to regulation.
- Does the fair market value reflect the positive economic impacts from a regulation that would be lost for properties adjacent to a parcel where the regulation has been waived.
- The fair market value does take both positive and negative impacts into account.

- Taking laws are intended to help property owners that are found to be bearing a disproportional share of the burden imposed by a regulation.

#### 4. Should changes to regulatory takings provisions apply to state law only or municipalities too.

- If require municipalities to pay compensation it will be a mandate.
- Allow municipalities to waive the regulation so no cost to them.
- The Maine Municipal Association should be invited to the next committee meeting.
- It would be more productive to wait until a concrete proposal for a change was made before bringing in MMA.

#### 5. Retroactive or prospective only.

- Other states' regulatory takings laws apply prospectively from enactment of new regulation only.
- Prospective application has the effect of freezing regulations and agencies won't adopt or change regulations that may be subject to regulatory takings claim because of costs associated with those claims.
- Retroactively is just but too costly.
- If don't go prospectively municipalities have no incentive to grant waivers.
- Prospectively application will make governments look harder at proposed rules and limit it to those the regulator is willing to pay for.
- Current regulations do not capture all social values; question is whether those values should be paid for when it constitutes a taking of a specific property.
- Prospective takings law would not involve the constitutional standard for takings but would create a new, lower standard for determining whether a regulatory taking has occurred and a landowner is entitled to compensation.

#### 6. Options that don't impose costs on state or local governments.

- Allow government to waive the regulation for a particular piece of property.
- There will be an increase in litigation if allow the government to waive regulations on an ad hoc basis.
- Suggested that a 50% diminution in value threshold be established so regulators will pause before moving forward with a regulation.
- A 50% standard may be too high; a 25% standard for agricultural and forestry lands would be appropriate because their land is their 401K.
- The percentage of diminution of value is fact-based, parcel by parcel and won't know that amount until trial goes through so need to set aside money for litigations on an unknown number of cases.
- Appraisers generally approach the same value so the amount of diminution will be predictable.

#### 7. Options that do not involve waivers.

- The government could do an analysis that focuses just on properties that are at risk of being taken before moving forward with a regulation affecting those properties.
- Options without compensation or waivers are toothless.