

MAINE STATE LEGISLATURE

The following document is provided by the
LAW AND LEGISLATIVE DIGITAL LIBRARY
at the Maine State Law and Legislative Reference Library
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied
(searchable text may contain some errors and/or omissions)

LEGISLATIVE RECORD

OF THE

***One Hundred and Tenth
Legislature***

OF THE

STATE OF MAINE

Volume II

FIRST REGULAR SESSION

MAY 4, 1981 to JUNE 19, 1981

INDEX

FIRST SPECIAL SESSION

AUGUST 3, 1981

INDEX

FIRST CONFIRMATION SESSION

AUGUST 28, 1981

INDEX

SECOND SPECIAL SESSION

SEPTEMBER 25, 1981

INDEX

THIRD SPECIAL SESSION

DECEMBER 9, 1981

INDEX

Thereupon, the Bill was passed to be engrossed as amended by House Amendment "D" in non-concurrence and sent up for concurrence.

By unanimous consent, ordered sent forthwith to the Senate.

(Off Record Remarks)

On motion of Mrs. Mitchell of Vassalboro, Recessed until four o'clock in the afternoon.

**After Recess
4:00 P.M.**

The House was called to order by the Speaker.

The following papers appearing on Supplement No. 13 were taken up out of order by unanimous consent:

**Second Reader
Later Today Assigned**

Bill "An Act to Amend the Maine Securities Act" (H. P. 1541) (L. D. 1656)

Was reported by the Committee on Bills in the Second Reading and read a second time.

The SPEAKER: The Chair recognizes the gentleman from Madawaska, Mr. McHenry.

Mr. McHENRY: Mr. Speaker, I would like to have someone table this until later today. I have an amendment as chairman of Bills in the Second Reader being prepared.

On motion of Mrs. Mitchell of Vassalboro, tabled pending passage to be engrossed and later today assigned.

Passed to Be Engrossed

Bill "An Act to Amend the Rule-making and Review Process of the Maine Administrative Procedure Act" (H. P. 1542) (L. D. 1657)

Was reported by the Committee on Bills in the Second Reading and read the second time.

Mr. Diamond of Bangor offered House Amendment "B" and moved its adoption.

House Amendment "B" (H-494) was read by the Clerk.

The SPEAKER: The Chair recognizes the gentleman from Bangor, Mr. Diamond.

Mr. DIAMOND: Mr. Speaker, Members of the House: This amendment is one presented dealing with a major bill that the Committee on State Government has been working on for a good part of the session, that being one that deals with the state's rulemaking procedures. There is a lot of concern over the great amount of flexibility that Maine's rulemaking agencies have had in establishing Maine's rules. One particular section that this amendment deals with is what I consider a technical amendment to a problem in the new draft of the bill that the committee reported out.

The bill attempts to make it clear that an agency, in promulgating a rule, is specific in the reasons why it makes changes to the original proposed rule. Agencies hold hearings such as we hold on their rules, proposals are made, public hearings are held where testimony is brought forth in favor and in opposition to the proposal, and following that, the agency then may make a final proposal or make an amendment or amend the proposal in order to respond to the problems or concerns that are raised at the hearing and through other information brought forth, in a manner similar to that which we deal with our legislation.

In the bill, the proposal in Section 6 on Page 2 refers to the procedures and says that the agency may not stray from the proposed rule that it presents, unless it documents and makes specific findings supporting the changes that it makes.

That sounds good on the surface, but in discussions with the people who will have to defend those changes or that section of the law, members of the Attorney General's Office, lawyers who will be dealing with this, both defending it and arguing against the rules, they say that that particular wording that makes

specific findings is one that is really what some have called a lawyer's paradise, that would enable persons representing people with complaints with the state's rulemaking procedure to use that as a vehicle to get at the rule regardless if their problems deal with that particular part of the proposal or with the rule.

My amendment clarifies that by doing away with the language that says, "makes specific findings" and instead, and I believe in layman's terms, makes it clear. It says, "In adopting rules, the agency shall only make changes that are consistent with the proposed rule, except when the change is in response to a concern raised in comments," meaning that they have to justify their action, which is the intent of the section which I hope to amend, although in reality it is, I believe, a clearer wording.

Also, the second sentence in my amendment says that changes from the proposed rule shall be explained in the basis statement of the final rule that has been proposed. In other words, not only do they have to justify making a change, but they also have to document it. That was the intent of the committee, I believe, and I feel that my amendment is much clearer in dealing with the problem that we all need to address.

I think it is a common feeling that agencies have tended to get out of hand in their implementation or their adoption of rules. I feel that my amendment is a clear and concise manner to restrict that flexibility, and I would hope that you would adopt this House Amendment.

The SPEAKER: The Chair recognizes the gentleman from Waterville, Mrs. Kany.

Mrs. KANY: Mr. Speaker, Members of the House: I move indefinite postponement of this amendment.

L. D. 1657 is a refinement of the Administrative Procedures Act. Many of you have had constituents who have complained about rule-making, and many of you had bills in on this topic to refine the process. I believe one of the reasons we have so many proposed changes in this law before us is that, on occasion, our agencies are required by law to put a notice in the paper regarding the contents of a proposed rule, have done so, and then, on occasion, errantly perhaps, have changed the wording in that proposed rule so that when a rule is adopted it is different than that which has been proposed.

The language that our committee went with and, by the way, it was not quite a unanimous report, Representative Diamond did as the committee wished and offered a House Amendment, really, instead of going with the divided report and I do appreciate that and he is entitled to his opinion, but I think that the House and the Legislature would really rather see an agency, once it has decided and has advertised to the public, to the citizens of Maine, what a proposed rule should be, should have to stick with it unless there are specific findings from public comments, either in writing or at a public hearing, that would indicate the rule should be changed from that which is proposed.

I do hope that you do not go with Representative Diamond's amendment, because it would do away with that in which specific findings would have to be found. I hope you will go along with indefinite postponement of this amendment.

The SPEAKER: The Chair recognizes the gentleman from Bangor, Mr. Diamond.

Mr. DIAMOND: Mr. Speaker, Members of the House: Both Mrs. Kany, my good, good, good friend Mrs. Kany, and I are in agreement that something has to be done about the way in which agencies are putting together their rules, but, unfortunately, we disagree as to whether or not my amendment is better than the language already in the bill. There are other members of the committee who support my amendment. I agreed in committee that I would not put out a divided report because of

the complexity of the bill and instead address the problem through a House Amendment, which makes a lot more sense in my opinion.

I feel that she is wrong in saying that this takes away the restrictions that we are trying to place on these agencies. We are trying to put some reins on them, and I believe that my amendment does just as much and in a more defensible manner than does the original committee bill.

I would like to give you an example. There is an agency who proposes a rule and holds a public hearing on it. A number of people come to the hearing and say, we understand your intent but we have a better way to go about it. The issue may be a controversial one, so there will be people there opposing not only the rule but any regulation of that particular industry, concern or whatever it may be. The rule, if it isn't the opinion of the legislature, which has empowered the agency to make or establish rules on this concern, and the agency decides it wants to go along with some of the recommendations made at the public hearing, they would have the ability to do so in either bill but they would also have to document their reasons for going along with that.

Under my amendment, it would be clear that they would have to document that and the intent of the agency and the parameters that the legislature has established will be met in the basis statement that has to be provided when the final version of the proposal is issued.

In the proposal that is contained in the bill, there is a great amount of flexibility in those words, again, "make specific findings," that would enable that concern, that lobbyist or whoever it may be who has a problem with rule-making or whose employer has a problem with that particular rulemaking agency or whatever, it would provide him with the vehicle and the excuse to challenge it in court, because, as we all know, how specific is specific? What may be specific to me may not be specific to you, and for that reason alone, the courts will have to take a narrow view of what is specific and will have a hard time, or the state will have a hard time defending it because of that loose language.

Again, the Attorney General's Office has a great amount of concern over that, and a number of the agencies have as well, a number of people who have to deal with it have as well. I talked with some lobbyists who have looked at that and some have said, "off the record, I could have all kinds of fun with that. If I didn't like the rule, I would go after it and I would use that as a vehicle, I would use that statement, specific statement, or specific findings, because in legal terms, that is accepted as facts beyond a doubt and full facts." That would be something, again, that we would have a hard time agreeing on, what is specific.

They feel that the language in the amendment is more defensible, meets the exact same concerns, puts a clamp on them and will accomplish the goals that we want.

Without this, if we don't go with the amendment, we will be forcing agencies to go to a couple of extremes, at least, in order to promulgate the rules that we have empowered them to take on. They will either risk going to court altogether, they will go to court and take on this challenge and, by the way, there is no limit on when that can take place, it can be immediately after the rule is issued or it can be years down the road when somebody feels like challenging it, or they could go to the other extreme which is extremely dangerous, and that is, they could have the hearing, they could listen to the legitimate arguments of people who have problems and have to deal with the rules and ignore those rules because they are afraid to test this language in court. They would rather adhere to something they know addresses the problem somewhat than amend it to a version that is acceptable to all.

We want rules that are fair to everybody, fair

and reasonable rules. Let's not force the agencies into taking a position that cannot be defended or is not fair to the people that is applied to in order to get something across. I think the amendment deals with all of our concerns. The Attorney General's Office feels so, the majority leader from the other end of the hall believes so. A number of people in the legal community have said that the amendment is wise and is the right route to go if we want to deal with our problem, and again I would ask you to vote against the motion to indefinitely postpone.

The SPEAKER: The Chair recognizes the gentleman from Bangor, Mr. Kelleher.

Mr. KELLEHER: Mr. Speaker, I would like to pose a question through the Chair to the gentleman from Bangor, Mr. Diamond.

There was an Assistant District Attorney that worked with the committee a couple of years ago in creating the APA rules, his name was Simpler or Sampler, I am not really sure what his name is, but was he involved in the drafting of this amendment that is being offered today?

The SPEAKER: The gentleman from Bangor, Mr. Kelleher, has posed a question through the Chair to anyone who may respond if they so desire.

The Chair recognizes the gentleman from Bangor, Mr. Diamond.

Mr. DIAMOND: Mr. Speaker, Members of the House: To answer my good friend from Bangor's question, he certainly was. I would be afraid to go to others for that answer, since he was one of the people who originally put together the Administrative Procedures Act. The gentleman that we are talking about knows more about it than anybody I can think of, and I felt very confident that if he had concerns about this, then, indeed, my fears were justified.

The SPEAKER: The Chair recognizes the gentleman from Bangor, Mr. Kelleher.

Mr. KELLEHER: Mr. Speaker, Ladies and Gentlemen of the House: I was one of four or five members who put a bill in this session dealing with the Administrative Procedures Act purely out of frustration with departments writing rules and regulations that are absolutely different in spirit and character from laws that we pass in this House. And as Mrs. Kany well knows, we had a go-around with this particular item a couple of years ago. At the hearing when my bill was heard, I had an opportunity to meet this gentleman from downstairs, and just my old fashion country suspicion is, we should kill this amendment. I agree with Mrs. Kany 100 percent.

Mr. Diamond made the observation that the departments and the agencies may have a problem in going to court and defending their rules because they might not win. Well, if that is the case, based on what he said, they shouldn't win, and I urge this House to indefinitely postpone this amendment and I ask for the yeas and nays.

The SPEAKER: The Chair recognizes the gentleman from Bangor, Mr. Diamond.

Mr. DIAMOND: Mr. Speaker, Ladies and Gentlemen of the House: I don't want to belabor this any longer. My friend and pal from Bangor, Mr. Kelleher, is right. This particular rule that is in the bill now came out of a proposal that he presented to the committee along with a number of other ones. The final version comes under a bill which I am cosponsoring, and we incorporated a number of these things in a new draft that kept in that language. When the person drafted this language that is in the bill now, who is involved in dealing with this and who prepared the portion of the bill that Mr. Kelleher has in this, agrees with my amendment. He agrees with my amendment. He is willing to go along with the amendment, and he understands the concerns and they are justified.

I hope you understand that I am not trying to defend the agencies or the bureaucrats or any-

thing. We are creating more red tape by not accepting this amendment. It will cause so many problems the agencies will not be able to implement laws that we have asked them to implement. We are doing ourselves a favor and the people who deal with these rules a favor by going with my process, because it is going to complicate the system tremendously by sticking with the language in the bill.

Again, please vote against the motion to indefinitely postpone.

The SPEAKER: The Chair recognizes the gentleman from Waterville, Mrs. Kany.

Mrs. KANY: Mr. Speaker and Members of the House: I would like the House to know that the agencies have never liked the Administrative Procedures Act. Naturally, why should they? A lot of requirements for them, public hearings even, if five individuals so call.

I do hope that you defeat this amendment. It has been well thought through. I think you will be very pleased and the citizens of Maine will be pleased with the refinements in the Administrative Procedures Act.

The SPEAKER: The Chair recognizes the gentleman from Cumberland, Mr. Dillenback.

Mr. DILLENBACK: Mr. Speaker, Ladies and Gentlemen of the House: I wasn't going to speak on this but it comes from my committee and it is really a tempest in a teapot here. If you read both amendments, there isn't enough difference between the two of them in the wording so you can understand the difference. So it would probably be just as simple to defeat this and go on with the original intent of the first L.D. that we had.

The SPEAKER: A roll call has been requested. For the Chair to order a roll call, it must have the expressed desire of one-fifth of the members present and voting. All those desiring a roll call vote will vote yes; those opposed will vote no.

A vote of the House was taken, and more than one-fifth of the members present having expressed a desire for a roll call, a roll call was ordered.

The SPEAKER: The pending question is on the motion of the gentlewoman from Waterville, Mrs. Kany, that House Amendment "B" be indefinitely postponed. All those in favor will vote yes; those opposed will vote no.

ROLL CALL

YEA — Alopis, Armstrong, Austin, Bell, Berube, Bordeaux, Boyce, Brodeur, Brown, A.; Brown, D.; Brown, K.L.; Cahill, Callahan, Carrier, Carroll, Carter, Conary, Cox, Curtis, Davis, Day, Dexter, Dillenback, Drinkwater, Dudley, Fitzgerald, Foster, Gavett, Gillis, Gowen, Hanson, Hayden, Hickey, Higgins, L.M.; Holloway, Huber, Hunter, Hutchings, Ingraham, Jackson, Jacques, Jordan, Joyce, Kany, Kelleher, Ketover, Kilcoyne, Lancaster, Lewis, Lund, MacBride, Mahany, Martin, A.; Masterman, Masterton, Matthews, McKean, McSweeney, Moholland, Murphy, Nelson, A.; Norton, O'Rourke, Paul, Perkins, Perry, Randall, Reeves, J.; Ridley, Roberts, Salsbury, Sherburne, Small, Smith, C.W.; Soulas, Soule, Stevenson, Stover, Strout, Studley, Treadwell, Walker, Webster, Wentworth, Weymouth.

NAY — Baker, Beaulieu, Benoit, Boisvert, Brannigan, Brenerman, Chonko, Clark, Connolly, Crowley, Davies, Diamond, G.W.; Diamond, J.N.; Fowlie, Gwadosky, Hall, Higgins, H.C.; Hobbins, Kane, Kiesman, LaPlante, Lisnik, Locke, Macomber, Manning, McCollister, McGowan, McHenry, Michaud, Mitchell, E.H.; Mitchell, J.; Nadeau, Nelson, M.; Paradis, E.; Paradis, P.; Pearson, Pouliot, Prescott, Racine, Reeves, P.; Richard, Rolde, Smith, C.B.; Swazey, Telow, Theriault, Thompson, Tuttle, The Speaker.

ABSENT — Connors, Cunningham, Damren, Erwin, Jalbert, Laverriere, Livesay, MacEachern, Martin, H.C.; McPherson, Michael, Peterson, Post, Tarbell, Twitchell, Vose.

Yes, 85; No, 49; Absent, 16; Vacant, 1.

The SPEAKER: Eight-five having voted in

the affirmative and forty-nine in the negative with sixteen being absent, the motion does prevail.

Thereupon, the Bill was passed to be engrossed and sent up for concurrence.

Bill "An Act to Phase Down the Inheritance Tax and to Replace the Inheritance Tax with an Estate Tax Equal to the Federal Credit for State Death Tax" (H. P. 1544) (L. D. 1658)

Was reported by the Committee on Bills in the Second Reading and read the second time, passed to be engrossed and sent up for concurrence.

Amended Bill

Bill "An Act to Protect Persons with Children against Discrimination in Fair Housing" (S. P. 620) (L. D. 1625) (S "A" S-279)

Was reported by the Committee on Bills in the Second Reading and read the second time.

The SPEAKER: The Chair recognizes the gentleman from West Bath, Mr. Stover.

Mr. STOVER: Mr. Speaker, I move the indefinite postponement of this Bill and all its accompanying papers and I would ask for a roll call.

The SPEAKER: A roll call has been requested. For the Chair to order a roll call, it must have the expressed desire of one fifth of the members present and voting. All those desiring a roll call vote will vote yes; those opposed will vote no.

A vote of the House was taken, and more than one fifth of the members present having expressed a desire for a roll call, a roll call was ordered.

The SPEAKER: The Chair recognizes the gentlewoman from South Portland, Ms. Benoit.

Ms. BENOIT: Mr. Speaker, Men and Women of the House: Before we vote on this, I want you to know that we are voting on Supplement No. 13, Item 9-4, which is An Act to Protect Persons with Children Against Discrimination in Fair Housing. We debated this for a long time this morning. I will be brief. I just wanted you to know what it is. I don't think that anything has changed in the past four hours. The problem has not gone away, it is still there. I hope those of you who supported the bill this morning will support it again this afternoon, and remember that we are only trying to give the same protection to the children of the State of Maine that we give to many other groups of people that are discriminated against.

I think the children of the State of Maine are our most valuable resource, and they deserve the opportunity for decent and fair housing.

The SPEAKER: The pending question is on the motion of the gentleman from West Bath, Mr. Stover, that this Bill and all its accompanying papers be indefinitely postponed. All those in favor will vote yes; those opposed will vote no.

The Chair recognizes the gentleman from Augusta, Mr. Paradis.

Mr. PARADIS: Mr. Speaker, I would like leave of the House to pair my vote with the gentlewoman from Belgrade, Mrs. Damren. If she were here, she would be voting yea; if I were voting, I would be voting nay.

ROLL CALL

YEA — Alopis, Armstrong, Austin, Bell, Berube, Bordeaux, Boyce, Brown, D.; Brown, K. L.; Cahill, Callahan, Carrier, Carter, Conary, Curtis, Davis, Day, Dexter, Dillenback, Drinkwater, Dudley, Foster, Fowlie, Gavett, Hanson, Higgins, L. M.; Holloway, Huber, Hunter, Hutchings, Ingraham, Jackson, Jordan, Kiesman, Kilcoyne, Lancaster, Lewis, Livesay, Lund, MacBride, Masterman, Matthews, Nelson, A.; Norton, O'Rourke, Paradis, E.; Paul, Perkins, Perry, Racine, Randall, Reeves, J.; Ridley, Roberts, Salsbury, Sherburne, Small, Smith, C. W.; Stevenson, Stover, Strout, Studley, Telow, Treadwell, Walker, Webster, Weymouth.

NAY — Baker, Beaulieu, Benoit, Boisvert,