30 Fiscal, Legal and Policy Concerns
Raised by LD 309

High costs of claims, lawyers, new agency obligations and legal proceedings.

1. No funding is provided for increased attorneys, appraisals, and other costs for the Attorney General's Office to defend the State's interests in mediation cases and litigation.
2. No funding is provided to cover compensation claims. Even a few such claims could add up to millions of dollars.
3. No funding is provided to purchase property, as one of the options for settling a compensation claim.
4. The bill requires the State to pay legal fees and other costs incurred by claimants, representing a further large claim for unappropriated funds.
5. The bill creates costs to the courts, with no funding provided.
6. The bill creates new costs to state agencies by shifting onto them the burden of identifying all land use options potentially available to the landowner, and evaluating them, with no funding provided.
7. The effort to exempt municipalities will have the effect of opening the State Treasury to paying claims, and the AG's office to defending against claims, where the state had no involvement other than to provide a broad legislative mandate that the municipality deal with a subject. Thus, Maine taxpayers as a whole will pay for decisions made at a municipal level.

Confused standards on which findings of a regulatory taking are based.

8. Because the 50% diminution standard, applied by juries under the bill, has no relation to constitutional takings law, the State will not be able to guard against groundless litigation with unpredictable outcomes.
9. The bill provides that a compensable taking occurs when a law or any set of laws results in a jury finding of a 50% diminution of property value. But then the bill also requires a weighing of factors under the more general takings standards set forth in the bill. These two incompatible criteria cannot be reconciled and will lead to confusion. Are the factors elements of the cause of action that must be proved? If not, what is their purpose?

Dubious appraisal that is pre-requisite to get a jury trial.

10. Requiring a "professional" appraiser provides no assurance of rigor or an unbiased appraisal. Indeed, one-sided appraisals submitted by claimants to get to the jury will be the norm.
11. The bill allows multiple laws and regulations to cumulatively give rise to a claim. How can the State possibly know whether its actions will lead to potential claims, when disparate laws and regulations of different agencies and levels of government may have claimed cumulative effects on property?
12. It will be impossible for courts and juries to assign particularized losses of value to unrelated laws enacted years apart, as part of a claim based on multiple laws and regulations?
13. The bill provides a right to a jury trial *based upon the claimant's one-sided assertion, that the State is not even permitted to contest*, of a 50% diminution in property value as shown by a

"professional" appraisal. §853(1). The State is given no opportunity to contest the appraisal in a motion to dismiss or other preliminary motion, guaranteeing a proliferation in jury trials.

Imprecise ripeness standard.

14. The bill provides a confusing set of instructions concerning ripeness of a claim before presentation to a jury. There is no requirement that a permit application is even a prerequisite.
15. The bill says that "ripeness" is met if a regulation or set of regulations of a real property "clearly and unequivocally" acts as a 50% diminution in property value. Who decides if this standard has been met? How is the determination made?
16. If a permit has been applied for, under the bill the claimant isn't held to the information it submits in its own application when proceeding to litigate its compensation claim in court.
17. If a permit is denied, it is completely unclear how the mandated mediation relates to a permit appeal process.
18. What if a permit receives a conditional approval? Does that constitute a denial for the purpose of filing a takings claim?

Questionable "entire parcel" requirement.

19. The bill allows claimants to convey portions of their property to family members, limited liability companies or others who do not meet the narrow definition. This would enable abuses where the claimant sells or conveys the developable portion of its property and retains the portion on which development is prohibited within a setback area, thereby assuring an avenue for a compensable taking of the latter.
20. The bill contains the remarkable allowance that a person or bank holding only a minor ownership interest in or mortgage on the property may pursue a takings claim without the consent of the other legal and equitable owners. §§854, 851(3).

Overly narrow nuisance, public health and other exemptions.

21. What does "narrowly construed" mean as it applies to the exemptions for regulations based upon nuisance, public health and safety, compliance with federal law, and pre-existing regulations? §855. Different understandings of this phrase between a claimant and the State will guarantee debate and litigation. Many commonly accepted environmental laws relating to clean air and water will be left in limbo as to whether they may be actionable as takings under the bill.
22. It is not clear whether the 'narrowly construed' exemption applies to federal laws delegated by the federal government, but written, administered and enforced by the State. Indeed, the narrow construction requirement for all exemptions suggests that federally delegated laws may not be exempt.
23. Litigation and argument will still occur around the application of laws in existence on the date of enactment as they are applied or interpreted in new ways; for example, if they are implemented based on updated maps.
24. The bill has done nothing to address the issue of whether an existing law, if recodified or modestly amended, would be considered a new regulation.

Inadequate process of mediation leading to state agency waivers.

25. While abutters to the claimant's property must be notified of impending mediation, they are not provided an opportunity to participate in the mediation, even though their interests may be at stake.

26. In the mandatory mediation the State agency's findings will not be considered. This severely handicaps the State during the process.

27. There is no requirement that the municipality in which the property is located may participate or even receive notice of the mediation, even though others in the community may be equally affected.

Alarming elements and process for mediated settlements.

28. The list of settlement options allows the State to accept payments in lieu of onsite mitigation. What is the meaning and implication of this option? It appears to mean that the State can accept payment by the landowner to avoid obeying the law.

29. The bill would allow the State, in a closed-door mediation, to agree to pay unappropriated money from the Treasury under a waiver of sovereign immunity, with no judicial review nor opportunity for public participation or even knowledge. How could the legislature possibly approve such a process that provides no opportunity for judicial review and appeal?

Unintended consequences guaranteed.

30. This bill (LD 309) is a completely novel proposal unlike anything enacted in any state in the nation. The bill has such a vast number of legal complexities and untested provisions that it is guaranteed to have unintended consequences. Without any relationship to Constitutional takings law, the 50% diminution standard, applied by juries under the bill, is guaranteed to spawn litigation with unpredictable outcomes for the State Treasury, Maine people, and state laws.

NRCM 2/26/15