

SENATE BILL NO. 347

INTRODUCED BY B. LAKE

1
2
3
4 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE PRIVATE PROPERTY ASSESSMENT ACT;
5 CLARIFYING AND EXPANDING THE DUTIES OF STATE AGENCY ACTIONS REGARDING PROPERTY THAT
6 MAY HAVE TAKING OR DAMAGING IMPLICATIONS; REQUIRING NOTICE OF PROPOSED AGENCY
7 ACTIONS TO THE PUBLIC AND INTERESTED PERSONS THROUGH E-MAIL AND POSTAL MAILING LISTS
8 AND A WEBSITE; ALLOWING CIVIL ACTION TO VOID A PROPOSED AGENCY ACTION; AND AMENDING
9 SECTIONS 2-10-102, 2-10-103, 2-10-104, AND 2-10-105, MCA."

10
11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

12
13 **Section 1.** Section 2-10-102, MCA, is amended to read:
14 **"2-10-102. Purpose.** ~~It is the policy of this state that~~ Under the Montana and United States constitutions,
15 a person may not be deprived of the use of private property without due process of law and that private property
16 may not be taken or damaged by a state agency without prior just compensation to the owner in accordance with
17 the meaning ascribed to these concepts by the United States supreme court and the Montana supreme court.
18 An assessment of each state agency action with taking or damaging implications is needed to avoid imposing
19 expensive litigation burdens on citizens and to minimize the risk of unanticipated demands on the state's fiscal
20 resources. The purpose of this part is to establish an orderly and consistent process, subject to public scrutiny,
21 that better enables state agencies to evaluate whether an action with taking or damaging implications might result
22 in the taking or damaging of private property; to reduce the risk of inadvertent burdens on the public in creating
23 liability for the government; to increase accountability and public participation; and to provide private property
24 owners with a private cause of action to invalidate a state agency action with taking or damaging implications if
25 the agency fails to comply with the procedures of this part. It is not the purpose of this part to expand or diminish
26 the private property protections provided in the federal and state constitutions and Montana statutes."

27
28 **Section 2.** Section 2-10-103, MCA, is amended to read:
29 **"2-10-103. Definitions.** As used in this part, the following definitions apply:
30 (1) (a) "Action with taking or damaging implications" means ~~a proposed state agency administrative rule,~~

1 ~~policy, or permit condition or denial pertaining to land or water management or to some other environmental~~
2 ~~matter that if adopted and enforced would constitute a deprivation of private property in violation of the United~~
3 ~~States or Montana constitution. It does not include:~~

4 ~~—— (a) proposed eminent domain proceedings;~~

5 ~~—— (b) a proposed seizure of property by law enforcement officials as evidence or under a state forfeiture~~
6 ~~statute;~~

7 ~~—— (c) a proposed forfeiture of property during or as a result of criminal proceedings; or~~

8 ~~—— (d) a proposal to repeal a rule, discontinue a government program, or implement a proposed change that~~
9 ~~has the effect of reducing regulation of private property an administrative or regulatory action of a state agency,~~
10 ~~including any rule, resolution, guideline, policy, action on an application or permit, or similar measure, that if~~
11 ~~adopted, acted upon, or enforced by a state agency would cause a taking or damaging.~~

12 (b) The following do not constitute an action with taking or damaging implications:

13 (i) actions of a state agency that were taken before [the effective date of this act];

14 (ii) actions of a state agency against property that is lawfully determined to be a private or public
15 nuisance;

16 (iii) actions of a state agency that are required by federal law;

17 (iv) actions of a state agency that limit the location or operation of property for the purpose of housing
18 sex offenders, selling illegal drugs, selling medical marijuana, or liquor control or property related to adult-oriented
19 businesses such as pornography, obscenity, or nude and topless dancing;

20 (v) actions of a state agency that establish locations for utility facilities;

21 (vi) a state agency's formal exercise of eminent domain involving real property;

22 (vii) a seizure of property by law enforcement officials as evidence or under a state forfeiture statute or
23 a forfeiture of property during or as a result of a criminal proceeding;

24 (viii) the discontinuance of a state agency action; or

25 (ix) actions of a state agency that:

26 (A) are taken in response to a real and substantial threat to public health and safety;

27 (B) can be verified as addressing a real and substantial threat; and

28 (C) do not impose a greater burden than is necessary to address the real and substantial threat.

29 (2) "Fair market value" means the prices estimated in terms of money, of private property that a willing
30 buyer would pay a willing seller after considering all factors in the marketplace that influence the price of private

1 property, including the highest and best use of the property.

2 (2) "Private property" means:

3 (a) all any real property, including but not limited to water rights interests protected under the fifth and
 4 fourteenth amendments to the United States constitution and Article II, sections 3, 4, 17, and 29, of the Montana
 5 constitution; and

6 (b) any personal property interests described in 70-1-104.

7 (3) "State agency" means ~~an officer, a state~~ board, commission, council, department, or other entity
 8 within the executive branch of state government created by constitution or statute that independently exercises
 9 governmental authority, except for those exercising the powers of the United States or any of its agencies through
 10 a formal delegation of federal authority. For the purposes of this section, a state agency does not include a
 11 regional, county, municipal, or other local government entity.

12 (4) "Taking or damaging" means ~~depriving a property owner of private property in a manner requiring~~
 13 ~~compensation under the 5th and 14th amendments to the constitution of the United States or Article II, section~~
 14 ~~29, of the Montana constitution~~ action by a state agency that:

15 (a) affects an owner's private property, in whole or in part, temporarily or permanently, in a manner that
 16 restricts or limits the owner's right to possess, use, modify, develop, sell, or otherwise freely transfer the property;
 17 and

18 (b) causes a diminution in fair market value of the affected property of at least 10%."

19

20 **Section 3.** Section 2-10-104, MCA, is amended to read:

21 **"2-10-104. Guidelines for actions with taking or damaging implications.** (1) The attorney general
 22 shall develop and provide to state agencies guidelines, including a checklist, to assist the agencies in identifying
 23 and evaluating agency actions with taking or damaging implications. The attorney general shall at least annually
 24 review the guidelines and modify them as necessary to comply with changes in statutes and court decisions.

25 (2) In developing guidelines, the attorney general shall include a provision that state agencies should
 26 consider and follow obligations imposed by ~~the 5th and 14th amendments to the Constitution of the United States~~
 27 ~~and Article II, section 29, of the Montana constitution, as construed by the United States supreme court and the~~
 28 ~~Montana supreme court,~~ Article II, sections 3, 4, 17, and 29, of the Montana constitution and by Montana statutes
 29 when considering and implementing an action with taking or damaging implications in order to avoid infringing
 30 constitutionally protected private property rights and causing unanticipated and undue burdens on the state

1 treasury."

2

3 **Section 4.** Section 2-10-105, MCA, is amended to read:

4 **"2-10-105. Impact assessment.** (1) Each state agency shall assign a qualified person or persons in the
5 state agency the duty and authority to ensure that the state agency complies with this part. Each state agency
6 action with taking or damaging implications must be submitted to that person or persons for review and
7 completion of an impact assessment. ~~The state agency may not take the action unless the review and impact~~
8 ~~assessment have been completed, except that the action with taking or damaging implications may be taken~~
9 ~~before the review and impact assessment are completed if necessary to avoid an immediate threat to public~~
10 ~~health or safety shall complete the impact assessment prior to enactment into rule or public dissemination of any~~
11 ~~rule, program, resolution, guideline, policy, or other similar measure and shall provide notice to the public and~~
12 ~~interested persons as required under [section 5].~~

13 (2) Using the attorney general's guidelines and checklist, the qualified person shall prepare a written
14 taking or damaging impact assessment for each state agency action with taking or damaging implications that
15 includes an analysis of at least the following:

16 (a) the likelihood that ~~a state or federal court would hold that the action is a taking or damaging~~ the action
17 will cause a taking or damaging of private property by depriving the owner of economically viable use of the
18 property, resulting in a temporary or permanent physical invasion of the property, or causing a diminution in fair
19 market value of all or part of the property;

20 (b) alternatives to the action that would fulfill the agency's statutory or regulatory obligations and at the
21 same time reduce the risk for a taking or damaging; and

22 (c) the estimated cost of any financial just compensation by the state agency to one or more ~~persons~~
23 property owners that ~~might would~~ be caused required by the action and the source for payment of the
24 compensation.

25 (3) A copy of the complete impact assessment ~~for a proposed action with taking or damaging implications~~
26 ~~must be given to the governor before the action is taken, except that an action to avoid an immediate threat to~~
27 ~~public health or safety may be taken before the impact assessment is completed and the assessment may be~~
28 ~~reported to the governor after the action is taken~~ file must be maintained and made available to the public at the
29 state agency's offices during regular business hours.

30 (4) The proposed action may be taken before the impact assessment is completed or before complete

1 notification to the public and interested persons as required under [section 5] only if necessary to avoid a real and
2 substantial threat to public health or safety.

3 (5) If an action is taken before the impact assessment is completed or before complete notification is
4 provided to the public or interested persons due to a real and substantial threat to public health or safety, the state
5 agency shall complete the impact assessment immediately after the action is taken, but in no case more than 20
6 days after the action is taken, and shall provide notice to the public and interested persons in accordance with
7 [section 5] immediately after the impact assessment is completed, but in no case more than 10 days after the
8 impact assessment is completed. The notice required under [section 5] must additionally include a specific
9 summary of the real and substantial threat that justified taking the action."

10
11 **NEW SECTION. Section 5. Notice to public and interested persons.** (1) After an impact assessment
12 has been completed, and regardless of the findings in the assessment, the state agency that performed the
13 impact assessment shall provide notice to the public and interested persons of its intent to engage in the
14 proposed action. The notice must be provided through use of electronic e-mail lists and postal mail lists to all
15 persons who have elected to be notified of impact assessments and through the use of a common website used
16 by all state agencies.

17 (a) The electronic e-mail lists and postal mail lists must be established to allow interested persons to be
18 on lists notifying them of impact assessments of all state agencies or of specific information based on agency
19 name or geographical location of a proposed action and may provide notice based on other criteria that would
20 promote public awareness of proposed actions.

21 (b) The website must be created to allow access to impact assessments of all state agencies or to
22 specific information based on agency name or geographical location of a proposed action and may also be based
23 on other criteria that would promote public awareness of proposed actions. The website must provide a summary
24 of the impact assessment and a link to a source for the complete impact assessment.

25 (2) If due to time constraints a state agency is compelled to take an action allowed by this part before
26 completion of an impact assessment, it shall, within 3 days of learning of the requirement to take the action, post
27 notice of the action and provide a brief explanation of the action, the need for expedited action, and an estimate
28 of when the action will be completed and the expected availability of the completed summary and impact
29 statement.

30 (3) Unless the action may be taken without a completed impact statement as provided in this part, the

1 state agency may not take the proposed action until it has completed and posted the impact statement.

2 (4) The state agency shall update the assessment and provide notice to the public if the action is not
3 adopted before the 180th day after the date the original notice was given.

4
5 **NEW SECTION. Section 6. Suit to invalidate state agency action.** (1) A state agency's adopted
6 action is not valid unless the action was taken in compliance with [section 5]. A private property owner affected
7 by a state agency action taken without fulfilling the requirements of [section 5] may bring suit for a declaration of
8 invalidity of the action.

9 (2) A suit under this section must be filed in a court in the county in which the property owner's affected
10 property is located. If the affected property is located in more than one county, the property owner may file suit
11 in any county in which the affected property is located.

12 (3) The court shall award a property owner who prevails in a suit under this section reasonable and
13 necessary attorney fees and court costs.

14
15 **NEW SECTION. Section 7. Liberal interpretation -- cumulative remedy.** (1) The provisions of [this
16 act] are to be liberally construed to effectuate the intent, policies, and purpose of this act.

17 (2) The cause of action and remedy created by [this act] are cumulative to Montana eminent domain law
18 and any other remedy provided by the laws and constitution of this state or the United States. [This act] may not
19 be construed as limiting any other laws or remedies protecting private property rights. In the event of a conflict
20 of laws, the law providing the greatest protection of private property rights must prevail.

21
22 **NEW SECTION. Section 8. Severability.** If a part of [this act] is invalid, all valid parts that are severable
23 from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part
24 remains in effect in all valid applications that are severable from the invalid applications.

25
26 **NEW SECTION. Section 9. Codification instruction.** [Sections 5 through 7] are intended to be codified
27 as an integral part of Title 2, chapter 10, part 1, and the provisions of Title 2, chapter 10, part 1, apply to [sections
28 5 through 7].

29 - END -