

1 SENATE BILL NO. 344

2 INTRODUCED BY J. PRIEST

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT ESTABLISHING THE MONTANA PROPERTY FAIRNESS ACT;
5 DEFINING TERMS; REQUIRING A GOVERNMENTAL ENTITY TO COMPENSATE A PROPERTY OWNER IF
6 THE GOVERNMENTAL ENTITY'S ACTION RESULTS IN TAKING OR DAMAGING THE PROPERTY BY
7 DIMINISHING THE PROPERTY'S FAIR MARKET VALUE; PROVIDING EXEMPTIONS; WAIVING
8 GOVERNMENTAL IMMUNITY FROM SUIT FOR TAKING OR DAMAGING PROPERTY; PROVIDING A
9 STATUTE OF LIMITATIONS; PROVIDING NOTICE, PUBLIC HEARING, AND FINAL DETERMINATION
10 PROCEDURES; PROVIDING FOR JUDICIAL REVIEW, JUDGMENT PROCEDURES, ATTORNEY FEES, AND
11 FEE AND COST PROCEDURES AND REQUIREMENTS; SUPERSEDING THE UNFUNDED MANDATE LAWS;
12 AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY DATE."
13

14 WHEREAS, Article II, section 3, of the Montana Constitution provides that all persons are born free with
15 certain inalienable rights, including, in pertinent part, the right of "acquiring, possessing and protecting property";
16 and

17 WHEREAS, Article II, section 29, of the Montana Constitution provides, in pertinent part, that private
18 property "shall not be taken or damaged" for public use without just compensation having been first made to the
19 owner; and

20 WHEREAS, the Legislature determines that government increasingly relies on regulations that consume
21 private property; and

22 WHEREAS, the Montana Legislature is the proper branch of government to define property and establish
23 policies and principles relating to property within the context of these state constitutional provisions and has
24 jealously guarded the people's liberty interests and inalienable rights in property by broadly defining property in
25 section 70-1-104, MCA; and

26 WHEREAS, the Legislature does not consent to the majority decisions of the sharply divided Montana
27 Supreme Court in the cases of *Kafka v. Montana Department of Fish, Wildlife & Parks*, 348 Mont. 80, 201 P.3d
28 8 (2008), and *Buhmann v. State of Montana*, 348 Mont. 205, 201 P.3d 70 (2008), because those decisions failed
29 to give effect to or eviscerated the foregoing provisions of Montana's Constitution and statutes; and

30 WHEREAS, the Legislature determines that those Montana Supreme Court decisions have needlessly

1 and recklessly limited the people's vested rights and interests in private property and intends that those decisions
2 may not define the state's policies with respect to private property nor express background principles of law
3 relevant to private property, and therefore intends to reaffirm the plain language of the foregoing provisions of
4 Montana's Constitution and statutes; and

5 WHEREAS, the Legislature finds it necessary to enact a private property protection statute that defines
6 when private property is taken or damaged for public use and provides remedies for the same, pursuant to which
7 an action of a governmental entity that results in the diminution in fair market value of private property by at least
8 10% gives rise to a cause of action for just compensation, except under certain circumstances prescribed by law.

9

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

11

12 NEW SECTION. Section 1. Short title. [Sections 1 through 11] may be cited as the "Montana Property
13 Fairness Act".

14

15 NEW SECTION. Section 2. Definitions. As used in [sections 1 through 11], unless the context requires
16 otherwise, the following definitions apply:

17 (1) "Action of a governmental entity" means an enforceable administrative, regulatory, or legislative
18 action of a governmental entity, including any statute, law, rule, ordinance, resolution, guideline, policy, action
19 on an application or permit, or similar measure, and whether enacted by a legislative body, citizen initiative, or
20 referendum.

21 (2) "Claim" means a written demand for compensation filed in accordance with [sections 1 through 11].

22 (3) "Enacted" means to enact, adopt, or amend.

23 (4) "Fair market value" means the price estimated in terms of money of private property that a willing
24 buyer would pay a willing seller after considering all factors in the marketplace that influence the price of private
25 property, including the highest and best use of the property.

26 (5) "Governmental entity" has the meaning as defined in 2-9-101.

27 (6) "Just compensation" means for purposes of an action for taking or damaging property, the
28 remuneration equal to the amount the fair market value of all or a portion of the affected property has been
29 decreased by the application or enforcement of the action of a governmental entity, determined by comparing
30 the fair market value of the portion or whole of the affected property as if the governmental action is not in effect

1 and as if the governmental action is in effect.

2 (7) "Owner" means the holder of legal or equitable title to private real property at the time a governmental
3 entity enacts or enforces an action affecting that property, and as further defined under Montana statutory and
4 common law. The term does not include a governmental entity for purposes of [sections 1 through 11].

5 (8) "Private property" means:

6 (a) any real property interest protected under the 5th and 14th amendments to the United States
7 constitution and Article II, sections 3, 4, 17, and 29, of the Montana constitution; or

8 (b) any personal property pursuant to 70-1-104.

9

10 **NEW SECTION. Section 3. Taking or damaging -- diminution in value -- action for just**
11 **compensation -- waiver in lieu of compensation -- exemptions -- question of fact for jury -- waiver of**
12 **governmental entity immunity.** (1) Except as provided in subsection (3), if the existing rights to possess, use,
13 modify, develop, sell, or otherwise freely transfer property are affected by any action of a governmental entity and
14 that action results in taking or damaging the property by diminishing its fair market value by at least 10%, the
15 owner of the property is entitled to just compensation from the governmental entity responsible for the action.

16 (2) This section does not limit a governmental entity's ability to waive or issue variances from that
17 governmental entity's action as applied to affected property. A governmental entity that chooses not to take action
18 that would result in taking or damaging private property is not liable for paying compensation under [sections 1
19 through 11].

20 (3) The following governmental entity actions are exempt from the requirements of subsection (1):

21 (a) actions of a governmental entity that:

22 (i) were enacted before [the effective date of this act];

23 (ii) limit or prohibit the use of real property previously recognized as a private or public nuisance;

24 (iii) are required by federal law;

25 (iv) limit the location or operation of property for the purpose of housing sex offenders, selling illegal
26 drugs, selling medical marijuana, or liquor control or property associated with pornography, obscenity, nude or
27 topless dancing, or other adult-oriented businesses;

28 (v) establish locations for utility facilities;

29 (vi) are taken in response to a real and substantial threat to public health and safety and that:

30 (A) can be verified to address the real and substantial threat; and

- 1 (B) do not impose a greater burden than is necessary to address the real and substantial threat;
2 (b) a governmental entity's formal exercise of eminent domain against only real property;
3 (c) a proposed seizure of property by law enforcement officials as evidence or under a state forfeiture
4 statute or a proposed forfeiture of property during or as a result of criminal proceedings; or
5 (d) the repeal of an action of a governmental entity.

6 (4) The governmental entity responsible for the action has the burden of demonstrating that the action
7 is exempt pursuant to the provisions of subsection (3).

8 (5) If an action of a governmental entity continues to apply to private property more than 180 days after
9 the governmental entity receives a written claim in a specific amount for just compensation as provided in [section
10 4], the owner has a cause of action for just compensation in a court in the county in which the property is located
11 unless the owner accepts a settlement offer by the governmental entity.

12 (6) A governmental entity may not charge any fee for considering whether to waive or grant a variance
13 from an action pursuant to subsection (2) in order to avoid responsibility for paying compensation as provided
14 in [sections 1 through 11].

15 (7) A demand for property owner relief or any waiver that is granted in lieu of compensation runs with
16 the land.

17 (8) Whether a governmental action results in a taking or damaging of private property is a question of
18 fact to be determined by a jury or, upon agreement of the parties, by the court sitting without a jury.

19 (9) Governmental entity immunity from suit and liability is waived and abolished to the extent of the
20 liability created by [sections 1 through 11].

21
22 **NEW SECTION. Section 4. Procedure for processing final determination period.** (1) (a) Within 180
23 days from the date of an action of a governmental entity or entities, a property owner that seeks compensation
24 under [sections 1 through 11] shall present the governmental entity or entities that have taken the action with
25 written notification, by first-class mail or personal delivery, describing the claim.

26 (b) To be complete, a claim under this section must include:
27 (i) the name, address, and other contact information of each claimant;
28 (ii) the address, if any, and tax lot number, township, range, and section of the affected property;
29 (iii) evidence of the date of acquisition by the claimant, including the instrument conveying the property
30 to the claimant and a report from a title company identifying the person in which title is vested and the acquisition

1 date and describing exceptions and encumbrances to the title that are of record;

2 (iv) a reference to the governmental entity action by paragraph, section, or any other description so that
3 the action is clearly identified;

4 (v) a description of the specific use of the property that the claimant desires to carry out but cannot, in
5 whole or in part, because of the governmental entity action; and

6 (vi) a valid appraisal of the property that supports the claim and demonstrates a taking or damaging of
7 the property in terms of the diminution in fair market value to all or a portion of the property of at least 10%.

8 (c) If a claim is incomplete, the governmental entity shall notify the claimant in writing of the information
9 that is missing within 30 days after the date of receipt of the claim by first-class mail or personal delivery and allow
10 the claimant to submit the missing information. If the governmental entity does not notify the claimant that
11 information is missing within 30 days after the claim is received, the claim is considered to be complete on the
12 date of receipt. If notice was provided within 30 days, the claim becomes complete when the governmental entity
13 receives:

14 (i) the missing information;

15 (ii) part of the missing information and written notification from the claimant that the remainder of the
16 missing information will not be provided; or

17 (iii) written notification from the claimant that none of the missing information will be provided.

18 (d) The governmental entity shall issue a final determination within 180 days after the date a claim is
19 complete. The final determination may include but is not limited to any of the following:

20 (i) an agreement to pay compensation equal to the diminution in fair market value of the property caused
21 by the governmental action;

22 (ii) an issuance of a waiver, development order, variance, special exception, or other extraordinary relief;

23 (iii) an offer to purchase the real property or an interest in real property by the appropriate governmental
24 entity, including the price and other material terms and conditions of the offer to purchase;

25 (iv) an adjustment of land development or permit standards or other provisions controlling the
26 development or use of land;

27 (v) modifications in the density, intensity, or use of areas of development;

28 (vi) the transfer of developmental or use rights;

29 (vii) an offer of land swaps or exchanges;

30 (viii) mitigation, including payments in lieu of onsite mitigation;

1 (ix) a change in location to the least sensitive portion of the property;

2 (x) conditioning the amount of development or use permitted; or

3 (xi) no changes to the action of the governmental entity.

4 (e) The governmental entity shall mail a copy of the final determination to the claimant and to any person
5 who submitted written evidence or oral testimony before the close of the record. The governmental entity shall
6 forward to the county, and the county shall record, a memorandum of the final determination in the deed records
7 of the county in which the property is located.

8 (f) The governmental entity shall make the entire record on review of a claim, including any staff reports
9 and written comments, available to the public for inspection at the office of the governmental entity during regular
10 business hours throughout the final determination period and for 5 years after the final determination period.

11 (2) At the expiration of the 180-day final determination period or after receiving the governmental entity's
12 final determination, the claimant may either accept the governmental entity's final determination or proceed to
13 file a claim for just compensation in a court in the county where the property is located. A copy of any pleading
14 by the claimant must be served on each of the governmental entities that made a settlement offer that was
15 rejected by the claimant.

16 (3) If the governmental entity and claimant enter into an agreement that has the effect of contravening
17 the application of a governmental action to the subject property, the governmental entity and the claimant shall
18 jointly file a petition in a court in the county where the property is located for approval of the agreement by the
19 court in order to ensure that the relief granted protects the public interest served by the action at issue and is the
20 appropriate relief necessary to prevent the governmental entity's regulatory effort from taking or damaging the
21 property.

22 (4) A governmental entity may not require a claimant to first submit an application to remove, modify,
23 vary, or otherwise alter the applicability of the action of a governmental entity to the owner's property as a
24 prerequisite to bringing a claim for or receiving just compensation.

25 (5) This section does not prohibit methods agreed to by the parties and lawfully available for arbitration,
26 mediation, or other forms of alternative dispute resolution, and governmental entities are encouraged to utilize
27 those methods to augment or facilitate the processes and actions provided for in this section.

28

29 **NEW SECTION. Section 5. Public notice of claims -- evidence and argument -- record on review.**

30 (1) (a) A governmental entity that receives a complete claim pursuant to [section 4] shall provide notice of the

1 claim pursuant to subsection (2) of this section at least 30 days before a public hearing on the claim or, if there
2 will not be a public hearing, at least 30 days before the deadline for submission of written comments. At a public
3 hearing on a claim, the governmental entity shall give the public an opportunity to be heard regarding the claim.

4 (b) A public hearing or deadline for submission of written comments under this section must be set no
5 later than 120 days after a complete claim is received by a governmental entity.

6 (2) (a) Notice provided under this section must be:

7 (i) mailed to all claimants and governmental entities identified in the claim at the addresses provided in
8 the claim; and

9 (ii) published conspicuously once a week for 3 weeks in a newspaper of general circulation within the
10 county where the property is located.

11 (b) The notice required under this section must sufficiently describe the claim and state:

12 (i) whether a public hearing will be held on the claim, the date, time, and location of the hearing, if any,
13 and the final date for submission of written comments relating to the claim;

14 (ii) that the claim and any submitted written comments will be available for public inspection at the office
15 of the governmental entity during regular business hours throughout the final determination period; and

16 (iii) that judicial review of the final determination of the governmental entity on the claim is limited to the
17 written evidence submitted to the entity and is available only for issues that are raised with sufficient specificity
18 to afford the governmental entity an opportunity to respond.

19 (3) Written comments on the claim must be submitted to the governmental entity not later than the close
20 of the public hearing on the claim or, if a public hearing is not held, the date that is specified by the governmental
21 entity in the notice required under this section.

22 (4) Within 30 days after a public hearing or the deadline for submission of written comments, the claimant
23 may submit to the governmental entity additional written comments in response. The comments must identify
24 the comments or arguments being addressed.

25 (5) After the public hearing or the deadline for submission of written comments, the governmental entity
26 shall review the entire record, including any responsive comments received in a timely manner from the claimant,
27 before issuing its final determination.

28
29 **NEW SECTION. Section 6. Statute of limitations.** An action for just compensation based on diminution
30 in value must be initiated within 3 years of the effective date of the action of a governmental entity or of the first

1 date the diminution of the existing rights to use, divide, sell, or possess private property applies to the owner's
2 parcel, whichever is later.

3
4 **NEW SECTION. Section 7. Judicial review.** Judicial review of a final determination under [sections
5 1 through 11] is limited to evidence in the record of the governmental entity at the time of its final determination
6 and is available only for issues that are raised before the governmental entity with sufficient specificity to afford
7 the governmental entity an opportunity to respond.

8
9 **NEW SECTION. Section 8. Judgment, final decision, or order -- payment of compensation --**
10 **appeal.** (1) A court may issue any order necessary to enforce the provisions of [sections 1 through 11] and to
11 make final determinations to provide any relief available under [sections 1 through 11].

12 (2) (a) A judgment in favor of a property owner or a final decision or order issued pursuant to [sections
13 4 and 5] that determines that a taking or damaging has occurred must include the factfinder's determination of
14 the monetary damages suffered by the property owner as a result of the taking or damaging.

15 (b) An award of compensation must include a reasonable award of prejudgment interest from the date
16 the claim was presented to the governmental entity as provided in [section 4].

17 (3) The governmental entity shall pay to the property owner the damages as determined in the judgment
18 or final order not later than 30 days after the date the judgment is rendered or the final decision or order is issued.

19 (4) As provided by law, a party may appeal a judgment that the action of the governmental entity has
20 or has not resulted in a taking or damaging. An appeal does not automatically stay the proceedings; however,
21 the court may stay the proceedings during the pendency of the appeal. If the governmental entity is the appellant,
22 the court shall enjoin the entity from invoking the governmental action resulting in the taking or damaging during
23 the pendency of the appeal.

24
25 **NEW SECTION. Section 9. Fees and costs.** (1) A property owner is not liable to any governmental
26 entity for attorney fees or costs in any action for just compensation based on diminution in value brought pursuant
27 to [sections 1 through 11].

28 (2) If a property owner prevails in an action for just compensation based on diminution of value and the
29 court determines that a settlement offer of the governmental entity or entities did not constitute a bona fide offer
30 to the property owner that reasonably would have resolved the claim, based upon the knowledge available to the

1 governmental entity or entities and the property owner during the 180-day final determination period, the property
2 owner may be awarded costs, expenses, and reasonable attorney fees from the governmental entity or entities,
3 according to their proportionate shares, as determined by the court. This award may include costs and fees
4 incurred defending any interlocutory appeal brought by the governmental entity or entities pursuant to this section.
5

6 **NEW SECTION. Section 10. Statutory construction.** The provisions of [sections 1 through 11] are
7 to be liberally construed to effectuate the intent, policies, and purpose of [sections 1 through 11] to protect private
8 property owners.
9

10 **NEW SECTION. Section 11. Causes of action cumulative.** (1) A cause of action created by [sections
11 1 through 11] is cumulative to the eminent domain provisions of Title 70, chapter 30, and any other remedy
12 provided by the laws and constitution of Montana or the United States.

13 (2) [Sections 1 through 11] may not be construed as limiting any other laws or remedies protecting
14 private property rights.

15 (3) In the event of a conflict, the law providing the greatest protection of private property rights must
16 prevail.
17

18 **NEW SECTION. Section 12. Unfunded mandate laws superseded.** The provisions of [this act]
19 expressly supersede and modify the requirements of 1-2-112 through 1-2-116.
20

21 **NEW SECTION. Section 13. Codification instruction.** [Sections 1 through 11] are intended to be
22 codified as an integral part of Title 70, and the provisions of Title 70 apply to [sections 1 through 11].
23

24 **NEW SECTION. Section 14. Saving clause.** [This act] does not affect rights and duties that matured,
25 penalties that were incurred, or proceedings that were begun before [the effective date of this act].
26

27 **NEW SECTION. Section 15. Severability.** If a part of [this act] is invalid, all valid parts that are
28 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications,
29 the part remains in effect in all valid applications that are severable from the invalid applications.
30

1 NEW SECTION. **Section 16. Effective date.** [This act] is effective July 1, 2011.

2

3 NEW SECTION. **Section 17. Applicability.** [This act] applies to governmental entity actions taken on
4 or after [the effective date of this act].

5

- END -