

SENATE BILL NO. 98

INTRODUCED BY C. SMITH

A BILL FOR AN ACT ENTITLED: "AN ACT ESTABLISHING THE MONTANA PROPERTY FAIRNESS ACT; DEFINING TERMS; REQUIRING A GOVERNMENTAL ENTITY TO COMPENSATE A PROPERTY OWNER IF THE GOVERNMENTAL ENTITY'S ACTION RESULTS IN TAKING OR DAMAGING THE PROPERTY BY DIMINISHING THE PROPERTY'S FAIR MARKET VALUE; PROVIDING EXCEPTIONS; WAIVING GOVERNMENTAL IMMUNITY FROM SUIT FOR TAKING OR DAMAGING PROPERTY; PROVIDING A STATUTE OF LIMITATIONS; PROVIDING FOR JUDICIAL REVIEW, JUDGMENT PROCEDURES, ATTORNEY FEES, AND FEES AND COSTS; SUPERSEDING THE UNFUNDED MANDATE LAWS; AND PROVIDING AN APPLICABILITY DATE."

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

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

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

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

WHEREAS, the Legislature does not consent to the majority decisions of the sharply divided Montana Supreme Court in the cases of *Kafka v. Montana Department of Fish, Wildlife & Parks*, 2008 MT 460, 348 Mont. 80, 201 P.3d 8 (2008), and *Buhmann v. State of Montana*, 2008 MT 465, 348 Mont. 205, 201 P.3d 70 (2008), because those decisions failed to give effect to or eviscerated the foregoing provisions of Montana's Constitution and statutes; and

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 gives rise
8 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:

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12 NEW SECTION. **Section 1. Short title.** [Sections 1 through 9] may be cited as the "Montana Property
13 Fairness Act".

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15 NEW SECTION. **Section 2. Definitions.** As used in [sections 1 through 9], unless the context requires
16 otherwise, the following definitions apply:

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

21 (2) "Claim" means a written demand for compensation filed in accordance with [sections 1 through 9].

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 provided 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 reduction in fair market value of all or a portion of the affected property resulting from
29 the application or enforcement of the action of a governmental entity, as of the date that the governmental action
30 is in effect.

(7) "Owner" means the holder of fee title to the subject private real property at the time a governmental entity enacts or enforces an action affecting that property and as further defined under Montana statutory and common law. The term does not include a governmental entity.

NEW SECTION. Section 3. Diminution in value -- just compensation. (1) Except as provided in subsection (3), if the existing rights to possess, use, modify, develop, sell, or otherwise freely transfer property are reduced or limited by any action of a governmental entity and that action results in taking or damaging the property by diminishing its fair market value, the owner of the property is entitled to just compensation from the governmental entity responsible for the action.

(2) Nothing in this section prohibits a governmental entity from reaching an agreement with an owner to waive the owner's claim for diminution in value only if the claim directly results from a governmental action requested by the property owner. A governmental entity that chooses not to take action that would result in taking or damaging private property is not liable for paying compensation under [sections 1 through 9].

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

(a) actions of a governmental entity that:

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

(ii) limit or prohibit a use or division of real property if the action is narrowly tailored to protect public health and safety, including rules and regulations relating to fire and building codes, health and sanitation, transportation or traffic control, solid or hazardous waste, and pollution control;

(iii) are required by federal law;

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

(v) establish locations for utility facilities; or

(vi) do not directly regulate an owner's property;

(b) a governmental entity's formal exercise of eminent domain against only real property;

(c) a proposed seizure of property by law enforcement officials as evidence or under a state forfeiture statute or a proposed forfeiture of property during or as a result of criminal proceedings; and

(d) the repeal of an action of a governmental entity if the repeal of the action does not have the effect of burdening property rights.

(4) In any action for just compensation under [sections 1 through 9], a determination of whether an action of a governmental entity is exempt under subsection (3) is a judicial question that must be determined without deference to any assertion by the governmental entity that the action is exempt. The governmental entity responsible for the governmental action shall establish by clear and convincing evidence that the action is exempt under subsection (3).

NEW SECTION. Section 4. Submission of claim for just compensation -- requirements -- waiver of governmental immunity. (1) (a) A property owner that seeks compensation under [sections 1 through 9] shall first present the governmental entity that took the action with written notification describing the claim.

(b) To be complete, a claim under this section must include:

(i) the name, address, and other contact information of each claimant;

(ii) the address, if any, tax lot number, and township, range, and section of the affected property;

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

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

(v) a demand in a specific amount for just compensation.

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

(i) the missing information;

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

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

(2) If an action of a governmental entity continues to apply to private real property more than 90 days after the owner makes a complete written notification, the owner has a cause of action for just compensation in a court in the county in which the property is located, unless the governmental entity and the owner reach an

1 agreement on the amount of just compensation to be paid, or unless the governmental entity amends, repeals,
2 or issues to the property owner a binding waiver of enforcement of the governmental action. The written demand
3 for just compensation supersedes any other statutory notice or demand requirements.

4 (3) A governmental entity may not charge any fee for considering whether to waive or grant a variance
5 from a governmental action under [section 3(2)] in order to avoid responsibility for paying compensation as
6 provided in [sections 1 through 9].

7 (4) The owner may not be required to submit an application to remove, modify, vary, or otherwise alter
8 the application of the governmental action to the owner's property as a prerequisite to demanding or receiving
9 just compensation under [sections 1 through 9].

10 (5) A claim under [sections 1 through 9] for compensation or any waiver that is granted in lieu of
11 compensation runs with the land.

12 (6) Immunity from suit and liability for a governmental entity is waived and abolished to the extent of the
13 liability created by [sections 1 through 9].

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15 **NEW SECTION. Section 5. Statute of limitations.** An action for just compensation based on diminution
16 in value must be made or forever barred within 3 years of the effective date of the governmental action, or of the
17 first date the governmental action is applied to the owner's property, whichever is later. A written demand for just
18 compensation made by the owner of the property pursuant to [section 4] is an exhaustion requirement that tolls
19 the 3-year time period for 90 days or the length of time that it takes for the governmental entity that is responsible
20 for the governmental action to deny the written demand, whichever is less.

21
22 **NEW SECTION. Section 6. Judgment, final decision, or order -- payment of compensation --**
23 **appeal.** (1) A court may issue any order necessary to enforce the provisions of [sections 1 through 9] and to
24 make final determinations to provide any relief available under [sections 1 through 9].

25 (2) (a) A judgment in favor of a property owner or a final decision or order that determines that a taking
26 or damaging has occurred must include the factfinder's determination of the monetary damages suffered by the
27 property owner as a result of the taking or damaging.

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

30 (3) The governmental entity shall pay to the property owner the damages as determined in the judgment

1 or final order not later than 30 days after the date the judgment is rendered or the final decision or order is issued.

2 (4) As provided by law, a party may appeal a judgment that the action of the governmental entity has
3 or has not resulted in a taking or damaging. An appeal does not automatically stay the proceedings; however,
4 the court may stay the proceedings while the appeal is pending. If the governmental entity is the appellant, the
5 court shall enjoin the entity from invoking the governmental action resulting in the taking or damaging while the
6 appeal is pending.

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8 **NEW SECTION. Section 7. Fees and costs.** (1) A property owner is not liable to any governmental
9 entity for attorney fees or costs in any action for just compensation based on diminution in value brought pursuant
10 to [sections 1 through 9].

11 (2) If a property owner prevails in an action for just compensation based on diminution of value and the
12 court determines that a settlement offer of the governmental entity did not constitute a bona fide offer to the
13 property owner that reasonably would have resolved the claim, based upon the knowledge available to the
14 governmental entity and the property owner, the property owner may be awarded costs, expenses, and
15 reasonable attorney fees from the governmental entity, according to their proportionate shares, as determined
16 by the court. This award may include costs and fees incurred when defending any interlocutory appeal brought
17 by the governmental entity pursuant to this section.

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

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23 **NEW SECTION. Section 9. Cause of action cumulative.** (1) A cause of action created by [sections
24 1 through 9] is cumulative to the eminent domain provisions of Title 70, chapter 30, and any other remedy
25 provided by the laws and constitution of Montana or the United States.

26 (2) [Sections 1 through 9] may not be construed as limiting any other laws or remedies protecting private
27 property rights.

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

NEW SECTION. **Section 10. Unfunded mandate laws superseded.** The provisions of [this act] expressly supersede and modify the requirements of 1-2-112 through 1-2-116.

NEW SECTION. **Section 11. Codification instruction.** [Sections 1 through 9] are intended to be codified as an integral part of Title 70, and the provisions of Title 70 apply to [sections 1 through 9].

NEW SECTION. **Section 12. Saving clause.** [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

NEW SECTION. **Section 13. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. **Section 14. Applicability.** [This act] applies to actions by a governmental entity taken on or after [the effective date of this act].

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