



Natural Resources Council of Maine

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Testimony of the Natural Resources Council of Maine In Opposition to LD 1039 and LD 1450 Takings Bills

May 7, 2013

Senator Valentino, Representative Priest, and members of the Judiciary Committee. My name is Pete Didisheim. I am the Advocacy Director for the Natural Resources Council of Maine, and I appreciate the opportunity to testify in opposition to both LD 1039 and LD 1450.

For many of us here today, consideration of these bills is déjà vu all over again. Legislation very similar to these bills was considered at length during the 125th Legislature. Those bills were defeated with bipartisan majorities, as was the case in 1995, 2000, and 2003—when so-called regulatory takings also were considered by the Maine Legislature and also were defeated with bipartisan majorities.

A similar pattern has played out across the nation. Takings bills like these were introduced in many states in the mid-1990s, and they occasionally have cropped up since, and they have been defeated time and time again—and for good reason.

Proposals like LD 1039 and LD 1450 could result in thousands of compensation claims against the state, demanding millions of dollars in payments from Maine taxpayers, creating a cascade of lawsuits, and undermining Maine's ability to make prudent land use and other regulatory decisions in support of the public interest.

Because we have been around this track many times before, I have attached to my testimony some highlights from previous discussions, including:

- 1) A 2012 letter to the committee from 43 Maine attorneys, including five former Maine Attorneys General, several Assistant Attorney Generals, two constitutional law professors, and lawyers with hundreds of years of experience representing public and private parties. The signatories strongly opposed the pending takings bill, LD 1810.
- 2) A *Bangor Daily News* editorial from last year urging lawmakers to oppose LD 1810. The editorial includes quotes from former state senator Peter Mills' testimony to the committee. Mills opposed last year's bill and he consistently spoke against similar bills while he served in the legislature.
- 3) Excerpts from letters sent last year to the committee from Florida land use experts who describe, in unequivocal terms, the harm that has been caused by the Bert-Harris Act. This is relevant because some have likened proposed legislation here in Maine to Florida's Bert-Harris Act, which is one of the only takings bills enacted at the state level anywhere in the country.

- 4) The \$1.3 million fiscal note (2012-2015) attached to last year's LD 1810 minority report. This is relevant to consideration of LD 1450, which is essentially identical to the LD 1810 minority report. As was true with that amended bill, LD 1450 attempts to avoid a fiscal note in the current fiscal year by delaying implementation to August 2014, but then the costs start piling in. Importantly, last year's fiscal note did not include the cost for payments to landowners of up to \$400,000 per claim. So, as stated in the estimate, "costs could be increased as a result of any payments to landowners."
- 5) A letter to Maine lawmakers from Bath Iron Works dating back to the 1995 takings debate. In that letter, Kevin Gildart, Assistant to the BIW President, voiced strong opposition to the fundamental concept of these takings bills, including with the following relevant excerpt:

"the Minority Report ignores the fact that with property rights come responsibilities of ownership. It unfairly tips the balance between protection of property rights and community rights to a safe and healthy environment. The Constitution does not guarantee the right to use property in ways that would injure neighbors, community or future generations unless property owners are paid not to."

These attachments are intended to remind the committee that bills like the ones before you today have been debated, and defeated for the right reasons, over and over again. LD 1039 and LD 1450 are filled with provisions that are confusing and untested. The bills would create boundless opportunities for creative lawyers to file cases against the State. Future lawmakers would face major new constraints on their ability to legislate on any issues affecting land use, and the people of Maine would suffer from the fiscal costs and policy consequences.

We can certainly discuss each of the provisions in these two bills, if that is the will of the committee. And there are plenty of experts who can help you understand the profound legal and policy consequences if either of these bills were to be enacted. But we have had those discussions and debate, repeatedly, which is why we are requesting the committee to strongly consider the prior bipartisan decisions by the Maine legislature to reject legislation like LD 1039 and LD 1450.

We urge you to vote Ought Not to Pass on both of these bills. I appreciate this opportunity to testify and would be glad to answer any questions that you may have.

Maine Attorneys Opposed to Takings Legislation – LD 1810

This letter was sent to the Judiciary Committee from 43 Maine Attorneys, including five former Maine Attorneys General, several Assistant Attorney Generals, two constitutional law professors, and lawyers with hundreds of years of experience representing public and private parties.

February 21, 2012

Dear Members of the Judiciary Committee:

As current and former members of the Maine Bar, we write to express our strong concerns with proposed legislation that would replace well-settled constitutional principles with untested statutory standards involving so-called regulatory takings. LD 1810 would impose a costly but unfunded burden upon Maine taxpayers, the Maine Attorney General's Office, and the Maine Judicial System. Moreover, it would substantially impair the enactment and enforcement of environmental and land use laws that the Legislature deems necessary to protect the public in the future.

LD 1810 would create a statutory scheme by which individual or corporate property owners could pursue compensation from the State Treasury in response to laws that these owners claim decrease the value of their property. Under the bill, claims for compensation could be pursued through the courts or through an informal and unregulated process whereby state agencies could either make payments to property owners or selectively waive provisions of Maine law at their discretion.

This bill is a complete and radical departure from settled Constitutional principles regarding the "taking" of private property rights. Those rights have been interpreted and applied in an extensive body of judicial decisions at both the federal and state levels.

By departing from constitutional jurisprudence on takings, LD 1810 would thrust Maine into uncharted waters in which the rights, entitlements, standards, and avenues of relief all would be subject to administrative and court interpretation and costly litigation. The Maine Attorney General would have to defend against these newfound compensation claims in order to protect Maine taxpayers. If the waiver provision of the law were invoked by state agencies, the result would be a patchwork of environmental and land use regulation across the State. And if waivers were granted, abutters to those properties likely would have grounds for legal action against the State, creating additional claims upon already overburdened State resources.

Some suggest that LD 1810 is consistent with Florida's regulatory takings law (the Bert Harris Act), but it is substantially different, and in ways that would make its application more problematic. LD 1810 has a completely different standard for establishing a regulatory takings claim, requires a jury for cases that go to trial, includes a vexing cumulative claims provision, has a longer statute of limitations, does not require informal dispute resolution before a claim can be filed, and is rife with ambiguous standards and processes. These differences increase the likelihood of costly litigation and would further subvert the ability of the Legislature to enact laws deemed necessary to protect Maine people, communities, and the environment, just as it has impaired the enactment and enforcement of land use and environmental laws in Florida.

For these reasons and more, over the past 20 years, the Maine Legislature has carefully considered and rejected proposals similar to LD 1810. We urge Maine lawmakers to do so again by voting against LD 1810. Doing so will uphold settled Constitutional principles and protect the rights of all Maine people to property values supported by the uniform and fair application of Maine law.

Respectfully,

Dan Amory

David Backer

Madge Baker

John Bannon

Carol Blasi

Peter Brann

John Brautigam

Juliet Brown

Brenda Buchanan

Greg Cunningham

Mary Denison

Peter DeTroy

Jon Edwards

Eliot Field

Ivy Frignoca

Robert Gips

Dennis Harnish

Michael High

Ernie Hilton

Hope Hilton

Horace Hildreth

Jamie Kilbreth

David Kallin

Andrew Ketterer

Howard Lake

Robert Levin

Bonnie Lounsbury

Jon Lund

Sean Mahoney

Sarah McDaniel

Janet Mills

Jeff Piampiano

Jeff Pidot

Russell Pierce

Steven Rowe

John Shumadine

Kaighn Smith

Jim Tierney

Sharon Tisher

Bill Townsend

Curtis Webber

John Whitman

Martin Wormer

LEAVE 'TAKINGS' BILL

It's one thing to see the value of real estate plummet when the economy tanks and no one is buying. But having value decline, or even disappear altogether, because state government enacted a new regulation rightly inspires outrage.

But allowing landowners to sue the state to recover value lost through regulations, as is proposed in LD 1810, sponsored by Rep. Andre Cushing, R-Hampden, is the wrong fix. Legislators sympathetic to such landowners instead should push for a better vetting process of regulations so such "takings" are few and far between.

In the abstract, a "taking" is tragic. Let's say you'd purchased a piece of land years ago with the hopes of building a few houses on it to then sell. The proceeds would provide retirement income. But last year, the state changed a law so that now no house can be built on the land, perhaps because a greater setback from wetland requirement was adopted.

The problems, though, may be more hypothetical than real. In the mid-1990s, when another takings bill was considered by the Legislature, a study group examined the problem. In response, it created a state-run mediation program to consider waivers for those whose property was devalued by new regulations. It did not see a flood of requests, but rather something closer to a handful of cases.

A different flood would follow if LD 1810 wins passage: lawsuits. The cost of settling could be in the millions or tens of millions, believes Pete Didisheim, advocacy director for the Natural Resources Council of Maine.

Peter Mills, a Republican former legislator, headed up the study group examining the problem in the mid-1990s. He submitted written testimony on LD 1810 which encapsulates its flaws:

"No one seems able to draft a takings statute that makes sense," Mr. Mills wrote. "That is not the fault of the drafters. It's the impossibility of the undertaking." He describes the process by which a property owner can easily make the case that a parcel has lost at least half its value — the threshold for recourse in the bill. The state then has 60 days to dispute that value, even though it has no access to the property.

A further problem, Mr. Mills argues, is that though the law directs that the entire parcel be taken into account, the owner could first split the land "in order to concentrate the impacts into affected parcels he creates."

Then Mr. Mills hones in on the bill's probable aim: "The primary impact — and its intended impact — is to stymie regulation for the benefit of large landowners with ample resources to paralyze state agencies. That is, in fact, how takings laws have been used in the few states that have enacted them. It's not a statute for the little guy."

Sixty years ago, Mr. Mills writes, "the rivers of Maine were open sewers." The shorefront zoning and water quality laws enacted in the early 1970s in response initially hurt landowners. "Had a takings law been in effect, these laws ... might never have been implemented," he notes. And ironically, riverfront land "has increased in value beyond anyone's imagination" because the water is clean.

Rep. Cushing, in explaining his reasons for proposing takings legislation, said he wanted "to put the Legislature on notice. When they enact a broad, sweeping law, they will have to consider the effect on property owners."

That's a legitimate concern, but a better way to address it is to maintain an open public hearing process on new laws and to limit rule-making by agencies that regulate land use.

Florida's Takings Law Not a Success

Thomas Pelham

Former Secretary, Florida Dept. of Community Affairs, under two Republican Governors

"In my opinion the Act [Bert Harris] has had a deleterious effect on land use policy and practice in Florida."

"The Bert Harris Act has had undesirable and unintended consequences. Although it has never resulted in an appellate court decision upholding a compensation award to landowners, the Act has created a new "cottage industry" of Bert Harris claims in which governmental and private litigants battle over the meaning of the Act's provisions. These battles have consumed valuable local government and judicial resources in trying to ascertain the meaning and application of the Act, and the chief beneficiaries have been the lawyers, property appraisers and other consultants needed to prosecute and defend against the litigation."

"Further, instead of providing compensation to landowners for bona fide claims, the Act has served as a club for landowners and developers to intimidate governmental agencies into granting development approvals even if they do not comply with existing regulations."

"If the Florida experience is any indication, adoption of Bert Harris Act-type legislation will only be the first step in an ongoing campaign by special development and landowner interests to further restrict the power of governmental agencies. Virtually every year in the Florida Legislature, proposals are introduced to expand the scope of the Bert Harris Act to give special treatment to specific interests, and to make it easier to bring claims under the Act. If the door is opened even slightly, be prepared to fight the battle over and over again in coming Legislative sessions."

"I believe the Bert Harris Act has introduced greater uncertainty into the land use decision-making process in Florida, has made the process more contentious and litigious, and has made it more difficult for local governments to engage in sound community planning and protect important environmental and natural resources."

Richard Grosso

Florida attorney, land use lawyer, and Professor at Nova SouthEastern University

"The Florida law established a takings standard that is more expansive than judicially-recognized 'takings' standard, is vague and hard to interpret. The result of this more expansive and vague standard has been to cast enormous uncertainty over regulatory programs, creating a massive chilling effect and making environmental and land use decisions more contentious and political. It has added a vague statute to the already heatedly debated 'takings' issue, providing much more 'relief' for lawyers and appraisers than for landowners."

"The Act has taken on a life of its own, well beyond its actual legal impact, as agency environmental and land use staff regularly invoke its name to justify weak policy recommendations, and overly-generous decisions that fail to protect natural resources or neighborhoods."

"The Act has undermined the effective functioning of government in our state, weakened important public protections, made sensible community development planning more difficult, and local land use decision-making more difficult, contentious and political. Like many of my fellow citizens, I believe the state's adoption of the Harris Act was a mistake which we will be paying for years to come."



125th MAINE LEGISLATURE

LD 1810

LR 2684(03)

An Act To Provide Ongoing Review of the Effectiveness and Fairness of Land Use Laws and Rules

Fiscal Note for Bill as Amended by Committee Amendment " "

Committee: Judiciary

Fiscal Note Required: Yes

Fiscal Note

Legislative Cost/Study

Potential current biennium cost increase - General Fund

Potential current biennium cost increase - Highway Fund

	FY 2011-12	FY 2012-13	Projections FY 2013-14	Projections FY 2014-15
Net Cost (Savings)				
General Fund	\$0	\$103,972	\$541,739	\$531,807
Appropriations/Allocations				
General Fund	\$0	\$103,972	\$541,739	\$531,807

Legislative Cost/Study

The estimated cost for 2 interim meetings of this committee is projected to be \$5,000 annually beginning in fiscal year 2012-13. If additional meetings are held the estimated cost for each additional meeting is \$2,500. The Legislature's proposed budget includes \$10,000 in fiscal year 2012-13 for legislative studies. Whether this amount is sufficient to fund all studies will depend on the number of studies authorized by the Legislative Council and the Legislature.

This bill includes a General Fund appropriation of \$20,693 in fiscal year 2012-13 to increase a part-time Legislative Analyst position to full-time effective January 1, 2013 in order to provide the required staffing to the new legislative committee. The General Fund costs for the position change increase to \$43,474 in fiscal year 2013-14 and \$45,632 in fiscal year 2014-15.

Fiscal Detail and Notes

This legislation creates a process for landowner relief related to regulatory takings. Depending upon the number or extent of any lawsuits filed, both General Fund and Highway Fund costs could be increased as a result of any payments to landowners. State agencies may also experience increased appraisal and witness costs. The amounts, by agency and fiscal year, cannot be estimated at this time.

Sec. Appropriations and allocations.

The following appropriations and allocations are made.

ATTORNEY GENERAL, DEPARTMENT OF THE

Administration - Attorney General 0310

Initiative: Provides funds for one full-time Assistant Attorney General position and related costs to address an anticipated increase in workload as a result of regulatory takings.

GENERAL FUND	2011-12	2012-13
POSITIONS - LEGISLATIVE COUNT	0.000	1.000
Personal Services	\$0	\$78,101
All Other	\$0	\$5,178
GENERAL FUND TOTAL	\$0	\$83,279

**ATTORNEY GENERAL, DEPARTMENT OF THE
DEPARTMENT TOTALS**

	2011-12	2012-13
GENERAL FUND	\$0	\$83,279
DEPARTMENT TOTAL - ALL FUNDS	\$0	\$83,279

LEGISLATURE

Legislature 0081

Initiative: Provides funding to increase one Legislative Analyst position from part-time to full-time to provide staff assistance to the committee on regulatory fairness.

GENERAL FUND	2011-12	2012-13
POSITIONS - LEGISLATIVE COUNT	0.000	0.500
Personal Services	\$0	\$20,693
GENERAL FUND TOTAL	\$0	\$20,693

**LEGISLATURE
DEPARTMENT TOTALS**

	2011-12	2012-13
GENERAL FUND	\$0	\$20,693
DEPARTMENT TOTAL - ALL FUNDS	\$0	\$20,693

SECTION TOTALS

	2011-12	2012-13
GENERAL FUND	\$0	\$103,972
SECTION TOTAL - ALL FUNDS	\$0	\$103,972

This bill also includes a General Fund appropriation of \$83,279 in fiscal year 2012-13 for the Department of the Attorney General to support the additional workload that results from regulatory takings. The Department of the Attorney General has identified the need for one part-time Assistant Attorney General position and one part-time Research Assistant position beginning in fiscal year 2013-14. The Judicial Department has also identified the need for additional staff beginning in fiscal year 2013-14; one Judge position, one Deputy Marshal position and one Law Clerk position. The Judicial Department will also require additional General Fund appropriations beginning in fiscal year 2013-14 for additional jury trial costs. The Judicial Department may experience an increase in Other Special Revenue Funds collections from an administrative fee that has yet to be determined.



Bath Iron Works Corporation

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K. P. GILDART
Assistant to the President

June 15, 1995

Dear Members of the Maine State Legislature:

I am writing to urge you to vote for the Majority Report on the "takings" bill, L.D. 1217, and to oppose the Minority Report.

I urge your support of the study commission being proposed by the bipartisan majority on the Judiciary Committee. It represents a sensible and responsible approach to the "takings" issue. The commission is charged with protecting private property rights as guaranteed by the Maine and US Constitutions, finding any laws that need to be fixed, evaluating the impact of "takings" legislation on taxpayers, and opening up much-needed dialogue between the bill's supporters and opponents.

We oppose the Minority Report for three reasons:

First of all, it is fiscally irresponsible. If the Minority Report were to pass, it would open up a Pandora's Box of lawsuits, and require taxpayer compensation far more often than required under the Constitution. At a time when the state cannot afford to maintain and improve its infrastructure, to properly educate our children, or to provide state services to the most needy, we can hardly afford to pay people to obey laws enacted through the democratic process.

Second, it undermines the ability of citizens to protect their communities. Under the Minority Report, laws that protect drinking water, community character and safety would be at risk because taxpayers simply could not afford to keep them. These laws are passed after vigorous debate by citizens at town meetings and by lawmakers in Augusta. Protections for lakes, rivers, coastal waters would be threatened, as would safeguards for pesticides, septic systems, fishing, hunting and more.

Finally, the Minority Report ignores the fact that with property rights come responsibilities of ownership. It unfairly tips the balance between protection of private property rights and community rights to a safe and healthy environment. The Constitution does not guarantee the right to use property in ways that would injure neighbors, community or future generations unless property owners are paid not to.

For these reasons, I urge you to vote for the Majority Report and against the Minority Report on L.D. 1217.

Sincerely,

Kevin P. Gildart