



19 Community Drive • Augusta, Maine 04330 • (207) 622-7501 • Fax: (207) 623-3590

**Testimony in Opposition to LD 1316 (“An Act To Make It Explicit That Maine Holds Title to Its Intertidal Lands”) and LD 1323 (“An Act to Revise the Laws Regarding the Public Trust in Intertidal Lands”) J. Andrew Cashman on behalf of the Maine Association of REALTORS®
April 25, 2019**

Senator Dill, Representative Hickman and members of the Joint Standing Committee on Agriculture, Conservation and Forestry, my name is Andy Cashman. I am a Partner at Preti Flaherty, a resident of Freeport, and I am here today on behalf of my client, the Maine Association of REALTORS®, which is a professional trade association with over 5000 members state wide. My members represent both buyers and sellers and are involved in both residential and commercial transactions. Our membership also includes affiliates, which are those professionals involved in real estate transactions, such as bankers, closing agents, title agents, appraisers, building inspectors, surveyors, etc. The Maine Association is a member of the National Association of REALTORS® (NAR) which is the largest trade association in the world.

The Maine Association of REALTORS® is strongly opposed to LD 1316 and LD 1323. If passed, LD 1316 would declare that the state holds title to intertidal land; LD 1323 would establish sweeping new permitted uses within intertidal land. Both bills seek to overturn decades of case law and constitutional analysis and represent the most egregious constitutional takings issue ever seen in our State.

By way of background: intertidal land is the land between the high and low tide marks. The land above the high tide mark is referred to as “upland” and this land belongs to the property owner. The land below the low water mark belongs to the state.

Intertidal land represents an interesting question: how do you deal with title between those points: land that is sometimes there (during low tide) and sometimes is not (during high tide). The answer to this question, for Maine, may be found in centuries of case law and constitutional history. In Maine, title to intertidal land has always belonged to the “upland property owner” but subject to certain restrictions. This goes back to colonial times when Maine and Massachusetts were governed together and the crown articulated clearly that this land, in what is now Maine and Massachusetts, belongs to the “upland owner” but is subject to certain rights of the public. Those rights were designed to ensure that the natural resources of the ocean could still be utilized. Although title was clearly stated to be held by the upland owner, the public had a right to cross that



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land to access the ocean. When Massachusetts became a state it continued this policy through the Colonial Ordinance of Massachusetts clearly declaring that the upland owner owns to the high tide line in fee simple absolute and owns to the low tide line but subject to the rights of the public to "fish, fowl and navigate." When Maine broke away from Massachusetts, we explicitly continued the same policy. This law has been upheld time and again by the Courts of Maine. In fact, in 1986, the Legislature passed a law entitled "Public Trust in Intertidal Land" (§573(1)(B)). It tried to take the intertidal zone for recreational uses. The Law Court declared that attempt unconstitutional in *Bell v. Town of Wells*, 557 A.2d 168 (1989) stating:

The legislature, by enacting in 1986 the Public Trust in Intertidal Land Act, 12 M.R.S.A. §§ 571-573, declared that "the intertidal lands of the State are impressed with a public trust" and that those rights of the public include a "right to use intertidal land for recreation". The Legislature thus imposed upon all intertidal land (defined by the Act in accordance with the Colonial Ordinance) an easement for use by the general public for "recreation" without limitation. The Superior Court held the Public Trust in Intertidal Land Act unconstitutional as a violation of the separation of powers provision of the Maine Constitution, Art. III. We do not reach the separation of powers question because the Act takes for public use much greater rights in the intertidal zone than are reserved by the common law and therefore the Act on its face constitutes an unconstitutional taking of private property. We agree therefore with the Superior Court that the Act is unconstitutional, but we ground our holding on the violation of the Takings Clauses of both the Maine and the United States Constitutions.

Fee simple ownership is one of the most important rights that we have. In Maine real property is the greatest asset that most people own. The question, over the years, is what exactly are the public's rights in this intertidal land. The courts have settled on the concept that the public is allowed to cross the land for purposes of "fish, fowl, or navigation." In other words, if you want to go to the ocean to do those things then you can cross the intertidal land to do it. Courts have also allowed activities like clamming and worming in the intertidal land, finding that these activities are like fishing in the ocean so they should be allowed. However courts have found that many other activities, like the recent case regarding seaweed harvesting, are not allowed in the intertidal land. To be clear: those cases find that the public does not have the inherent right to use the land for those but may with the upland property owner's permission.

The bills before you would ignore all of this and take away title or property rights from property owners without any compensation whatsoever. That is a clear violation of the constitutional prohibition against government taking property without compensation. Having reviewed the case law carefully, we do not make this claim casually. We feel very strongly about this because the scope of the property that is impacted here is staggering: Maine has the 4th highest length of coastal shoreland in the country (after Alaska, Florida and Louisiana) at 3,478 miles (more than 5,000 miles if we include all of Maine's 3,200 islands). 143 Maine towns have coastal zones. Maine's tidal ranges (the intertidal zone) are 9'-11' in southern Maine to around 19' in northern Maine --- and up to 50' in the Gulf of Maine's Bay of Fundy.

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These bills also have serious tax implications. Currently, taxes being paid by property owners include the value of the intertidal zone. If all that property is confiscated by these proposed laws then upland owners' remaining property will need to be reassessed, with costs to municipalities and loss of tax revenues.

Private property rights are sacred. Indeed, the social and economic fabric of our nation, and our state, is deeply rooted in the fundamental right of all people to own, use, and transfer real property. Real property ownership has been and continues to be one of the highest personal priorities of most Americans. The Maine Association of REALTORS® is committed to protection and preservation of the constitutional right of every individual to acquire, occupy, use and dispose of real property as he or she chooses within the law. The Association believes that if private property is confiscated by the government, as these bills propose to do, there must be just reimbursement to the property owner, and the government must have demonstrated a proven need for the property before a confiscation can occur. The Association urges all levels of government to respect the concept that private property ownership is made up of a bundle of rights, which includes use. If such use is denied or abridged or awarded to the public as these bills propose to do, the cost of "taking" should be equitably distributed. The individual property owner should not be expected to pay, through loss of use, for measures that benefit the public good and a broad number of citizens and which, in effect, limit the individual's private property rights. Importantly, the conflict over seaweed harvesting that precipitated these bills does not benefit the public generally but rather the commercial interests of a few companies.

For these reasons, we respectfully and strong urge you to vote ought not to pass on LD 1316 and LD 1323.

Thank you for your time and consideration.