

**Testimony by Dan Amory
In Opposition to LD 1810
Before the Judiciary Committee**

February 21, 2001

Sen. Hastings, Representative Nass, and members of the Committee. I am Dan Amory, an attorney with Drummond Woodsum, and I am here to speak in strong opposition to LD 1810.

As part of my remarks, I am submitting to the Committee a letter signed by more than forty members of the Maine Bar in opposition to LD 1810.

This letter is signed by five former Maine Attorneys General, a former Chief Deputy Attorney General, several former Assistant Attorneys General, as well as lawyers from across the state representing hundreds of years of career experience in public and private practice.

As stated in the letter, we believe that LD 1810 would impose a costly but unfunded burden upon Maine taxpayers, the Maine Attorney General, and the Maine court system, and would substantially impair the enactment and enforcement of new environmental and land use laws that future Legislatures deem necessary to protect the public.

The bill creates a new cause of action separate and distinct from what is provided by the Maine and U.S. Constitutions, as reflected in more than 100 years of case law. The attorneys who signed this letter, including two constitutional law professors, urge you in the strongest possible terms not to take this step. The bill represents a radical departure from settled Constitutional principles regarding the “taking” of private property rights, and would thrust Maine into uncharted waters and costly litigation.

I have practiced commercial law for almost forty years, representing lenders, owners, and developers in transactions both in Maine and nationally ranging from a few hundred thousand dollars to, in the context of Indian gaming, in the billions. Here are likely real-world consequences of LD 1810 if it were enacted:

First, the State would never have the money, resources or incentive to contest a regulatory takings claim. The State could never take the risk that a substantial judgment would be entered against it for compensation and attorney’s fees, and the Attorney General’s office would not have the appraisal and other resources needed to contest the claim. That means that any property owner that makes a regulatory takings claim would probably get a “takings variance,” exempting the property owner from laws that apply to everyone else. This is exactly what happened under Florida’s regulatory takings law, the Bert Harris Act.

Second, this bill will apply to large industrial facilities as much as small property owners. Do you really want to make State regulators waive laws enacted by future Legislatures to control the siting of nuclear power plants, open pit mines, or hazardous waste dumps?

Third, the process spelled out in LD 1810 is entirely private: abutters and other members of the public have no way to be heard on whether a law that applies to everyone else should be waived, and what the impacts of that waiver may be on neighbors, neighbors' property values, and the community. There is no judicial or other review. General and public laws enacted by you on behalf of the People of Maine could be waived privately and in secret. Before a town grants a zoning variance, it must give notice and hold a hearing, and the variance is subject to court review – but this bill contains no similar requirement for public notice or hearing before property owners, including developers of large commercial or industrial facilities, are granted a “takings variance.”

Some suggest that LD 1810 is consistent with Florida's Bert Harris Act, but it is substantially different -- and in ways that would make its application more problematic. LD 1810 has a completely different threshold 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; requires narrow construction of an exception for public health and safety; and is rife with ambiguous standards. These differences increase the likelihood of costly litigation, and further subvert the ability of the Legislature to enact laws to protect Maine people, communities, and the environment. A more detailed description of these differences is provided in materials to the Committee.

For all these reasons, as well as those set out in more detail in the letter, I and the Maine attorneys who signed the letter urge you to vote against LD 1810.