Testimony of Jeff Pidot
In Opposition to LD 1810
Before the Legislative Joint Standing Committee on Judiciary

February 21, 2012

Senator Hastings, Representative Nass and Members of the Judiciary Committee:

My name is Jeff Pidot. Until my retirement, I served for 31 years in the Maine Attorney General's office, for 17 years of that as Chief of the Natural Resources Division. I was the Office's expert on Constitutional takings issues and have written and spoken on the topic many times. I served on the Legislature's Takings Commission in 1995, where Republican Senator Peter Mills led efforts to devise reasonable approaches, subsequently enacted by the Legislature, to deal with landowner concerns about takings issues in a manner that comported with the Constitution, as LD 1810 does not.

LD 1810 is like several bills introduced to this body in the past, which have been opposed by the Attorney General and rejected by the Legislature. LD 1810 provides special entitlements to landowner claimants that have nothing to do with Constitutionally protected property rights. The bill would require agencies to pay claimants compensation out of the State Treasury, or to provide waivers allowing claimants to violate laws the Legislature imposes uniformly on all of us. The bill disrupts the careful balance set by the Constitution's takings clause as delineated by the U.S. Supreme Court and thousands of federal and state court decisions.

Attached to this testimony is a detailed section-by-section analysis of the legal problems with the bill, which I will highlight in this testimony, consolidated into six topics:

1. **The 50% diminution standard (see §§851(6), 853(1), 853(3)).** The bill sets as its trigger for compensation the benchmark of a claimed 50% diminution in property value caused by a law or any combination of laws. This standard has never been embraced by any court under the Constitution and will be subject to much case-by-case debate and litigation. The precise assignment of property value impacts resulting from a particular law or combination of laws will require costly appraisals and other expert investigations and will be hotly debated in many cases. Since under the bill, these decisions are ultimately made by juries and not judges, the results will often be unpredictable, devoid of any direction from the courts' Constitutional takings jurisprudence, and leaving no track record for future cases.

2. **Expansive scope of the bill's applicability (see §§851(4), 853, 857(3)).** The bill applies sweepingly to all future laws and regulations having an impact on real property, as many laws do. It also applies to amendments and re-codifications of existing laws and regulations. It further applies to agency permitting or other decisions under any of these laws, the effect of which will restart the statute of limitations in the bill. As the bill is not limited to the kind of land use regulations that may have been its aim, it is impossible to predict all the laws to which it might be applied. The bill is guaranteed to have many unintended consequences.

3. **Narrow scope of the bill's exclusions (see §§851(4), 855).** The bill purports to exclude municipal regulation, but this is a false promise, since the bill specifically extends to any state

mandated municipal program, for instance, municipal shoreland zoning ordinances. Accordingly, if a municipality were to amend its shoreland ordinance or zoning map, a commonplace occurrence, would the State or municipality be the defendant and liable for damages? Does the State have the right to waive the municipal ordinance, even though the municipality fashioned it to protect the local community? There is no assurance that municipalities will receive the exemption that the bill promises, and they could well be subject to compensation claims.

The bill also purports to exclude laws based upon nuisance, health and safety. While many laws are designed at least in part to protect against these public dangers, the bill instructs that these exemptions must be construed narrowly, which will give rise to mountains of disagreements and litigation as to which laws are included or excluded.

The bill further purports to exclude laws and regulations enacted prior to the bill's effective date. Yet the bill would apply to any amendment of such laws, even a minor adjustment or replacement, and to agency decisions under any of these laws.

4. Court decisions (§§853(1) and (2), 856). The bill is saturated with imprecision about how courts should make decisions concerning compensation claims. There is no prerequisite that the claimant file permit applications with the agency before filing in court. Instead, the bill directs the court to allow the case to go to a jury on the merest prima facie evidence supported by an appraisal. The appraisal submitted by the claimant need meet no requirements, either as to content or source. Thus, the court *must* send to the jury claims based only upon a self-serving assessment prepared for the claimant.

The bill further confuses the criteria by which courts would make these decisions. While a compensable taking occurs under the bill whenever a law or combination of laws results in a 50% diminution of value as determined by a jury, the bill also provides a number of other factors that courts usually weigh in making Constitutional takings determinations, such as the reasonable investment-backed expectations of the landowner. It is fundamentally unclear how these factors will be relevant to jury decisions applying the 50% diminution standard.

5. Agency decisions (§§851(7), 856 (first paragraph, (2) and (3)), 858). Whether in court or operating in what the bill calls "informal dispute resolution," the bill gives the agency discretion to decide whether to provide unappropriated compensation from the State Treasury or to waive State laws for the claimant. These are extraordinary powers given to an agency (the likes of which I've not seen before), yet there are no procedures, no opportunity for public comment, no consideration of the waiver's effect on neighbors whose property values will be adversely affected, and no opportunity for appeal. The upshot is to single out claimants for special treatment beyond their Constitutionally protected property rights, but at a considerable cost to the property rights of neighbors and the community, whose property values may be so adversely affected by a waiver that they then assert their own claim for compensation.

The waiver provided in LD 1810 stands apart from traditional variances found in many land use laws, which require strict adherence to legal criteria and procedure. Indeed, one of the measures

fashioned by the 1995 Takings Commission was to require such variances be placed in agency rules when otherwise a Constitutional taking might occur.

If the agency decides to compensate the claimant instead of waiving the law, it de facto is given condemnation authority, again without any procedural safeguards and even if the landowner doesn't want to give up its property.

Finally, when a claim is lodged with an agency, it is given 60 days to evaluate and give its response, including what remedy it will choose. Yet we know that agencies will be unable in this short time to do the necessary (and costly) work to investigate the claim, retain appraisers, and identify, as the bill requires, any allowed uses of the property that might avoid the claimed diminution in property values. The latter task alone would require the agency to assess all possible uses of the property, as well as the prospects of obtaining necessary state and local permits for such uses, all without so much as a permit application.

6. Attorneys fees (§859). When a claim is successfully pursued in court, under the bill the private lawyer representing the claimant may request payment by the State Treasury of the lawyer's fees, which in a high stakes case could be substantial. Recognizing that the outcome of jury verdicts in these cases will not be predictable, this provision alone could impose significant fiscal impacts. In this and many ways, LD 1810 is the ultimate lawyer's bill.

In sum, LD 1810 presents many severe legal problems. The bill represents a radical departure from the courts' balanced approach by which private property is protected under the Constitution. The bill creates many ambiguities, conflicts, opportunities for litigation, unfairness and arbitrariness, and unappropriated costs to the State Treasury. And the bill dangerously undermines the Legislature's ability to fashion new laws or amend existing ones to respond to future threats to the public's welfare, communities and environment.

Thank you.