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# MAINE'S WORKING WATERFRONT: PRESERVING COASTAL ACCESS FOR THE FUTURE OF COMMERCIAL FISHING AND OTHER WATER-DEPENDENT BUSINESSES

*Melissa Donahue\**

## I. INTRODUCTION

*“Maine’s 3,500 mile coastline is one of the most important resources in the Maine economy, but a number of trends have come together recently to raise renewed concerns about the future of Maine’s working waterfronts, a key part of Maine’s coastal resources.”* – Charles Colgan<sup>1</sup>

The working waterfront is an integral part of Maine’s coastal communities, raising millions of dollars in state revenues and generating roughly \$740 million of income by way of over 26,000 fishing-related jobs in the state each year.<sup>2</sup> Working waterfront property is shoreline property that supports commercial fishing and other water-dependent businesses.<sup>3</sup> Although commercial fishing is often a predominant concern, other water-dependent uses include boat building, boat yards, and marinas.<sup>4</sup> Despite the substantial contributions made by commercial

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1. CHARLES S. COLGAN, MAINE’S WORKING WATERFRONT COALITION, CONTRIBUTION OF WORKING WATERFRONTS TO THE MAINE ECONOMY 1 (2004).

2. Maine’s Working Waterfront Coalition, *Press Conference*, THE ISLAND INSTITUTE (May 27, 2003), <http://www.islandinstitute.org/documents/WWCpressconf05272003.pdf> [hereinafter Maine’s Working Waterfront Coalition, *Press Conference*].

3. See THE ISLAND INSTITUTE, MAPPING MAINE’S WORKING WATERFRONT (David Platt ed., 2007) [hereinafter MAPPING MAINE’S WORKING WATERFRONT]. There are a number of variations of the definition of working waterfronts, but for the purposes of this Comment a “working waterfront” includes coastal property that supports commercial fishing, boatbuilding, marinas, and other similar water-dependent uses.

4. *Maine’s Working Waterfront Coalition*, SEAGRANT, <http://www.seagrant.umaine.edu/files/pdf-global/06MWRcd/06MWR19.pdf> (noting that other water-dependent marine trades that fall within the purview of working-waterfront preservation efforts (boat building, marinas, etc.) supply an additional 3,000 jobs and \$85 million in annual earned wages statewide).

fisheries and other water-dependent businesses to the state economy, recent studies show that of the 3,500 miles of Maine shoreline property, only twenty miles remain accessible to commercial fisheries and other compatible uses.<sup>5</sup> Historically, the state of Maine has employed limited property tax incentives in addition to enabling legislation for municipal zoning ordinances as part of its comprehensive coastal zone management efforts to support and protect working waterfronts.<sup>6</sup> Today, the most significant contributors to the working waterfront preservation effort are some state entities and private nonprofit organizations.<sup>7</sup>

The problem of decreasing working waterfront access along the coast of Maine has been present as far back as 1989, when more than half of coastline property was occupied by a number of uses incompatible with working waterfront businesses.<sup>8</sup> The primary competing interest for at least the last twenty-five years has been the residential real estate market.<sup>9</sup> Tasked by Maine's Working Waterfront Coalition with

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5. See, e.g., MAPPING MAINE'S WORKING WATERFRONT, *supra* note 3. The Island Institute conducted a study in 2005 as a "community-based mapping project to quantify the working-waterfront resources for Maine's 142 coastal towns." *Id.* at 1. Of 1,555 identified saltwater access points (representing approximately thirty miles of the state's coastline), the study found that only 1,045 provide working-waterfront access. *Id.* at 3, 5. Although 1,045 access points seems like a substantial figure, those points only amount to twenty miles of working-waterfront access in total. *Id.* at 2. Additionally, of the 1,045 access points identified, only eighty-one are considered "prime working waterfront" (providing adequate parking, all-tide access, and on-site fuel availability), and only sixty-two of those prime working waterfront access points support commercial fishing activities. *Id.*

6. See *infra* Part II(B) (discussing Maine's enabling legislation for municipal zoning as a tool for preserving the working waterfront); see also *Current Land Use Programs*, MAINE.GOV, <http://www.maine.gov/revenue/propertytax/propertytaxbenefits/CurrentUseLandPrograms.htm> (last visited Mar. 16, 2014) (explaining that certain land used for working waterfront purposes is entitled to a reduction in just value for the purpose of property taxes).

7. See, e.g., David A. Tyler, *A Maine Idea That Could Help the Nation*, THE WORKING WATERFRONT (Nov. 2, 2009), <http://www.workingwaterfront.com/articles/A-Maine-idea-that-could-help-the-nation/13500>. In a 2009 article from the Island Institute's "Working Waterfront" publication, the author explained the recent "simple" approach to the problem of losing working waterfront property to incompatible residential uses, which consists of groups of advocates for Maine's waterfront industry "us[ing] state bond money, combined with private funds, to permanently preserve waterfront property used for commercial fishing." *Id.*

8. MAINE STATE PLANNING OFFICE & DEP'T OF ECON. & CMTY. DEVELOP., PROTECTING PRIME SITES FOR WATER DEPENDENT USES 1 (Mar. 1989), available at <https://www.maine.gov/dacf/mcp/downloads/ProtectingPrimeSitesForWaterDependentUses1989.pdf>.

9. COLGAN, *supra* note 1 ("Although oceanfront property in Maine is generally the most expensive real estate in the state, a steady and high level of pressure for

clarifying the economic impacts of Maine's working waterfront, University of Southern Maine professor, Charles Colgan, ultimately concluded that it was in Maine's best economic interest to protect against the conversion of working waterfront property to incompatible uses like residential real estate construction.<sup>10</sup>

At the tail end of the 1990s and into the new millennium, the stock market saw booming success, ultimately contributing to a "wealth effect" that led a significant portion of the U.S. population to loosen its purse strings and begin spending.<sup>11</sup> People with money to invest began purchasing second homes, particularly those located on waterfront property. It was during this time that Maine saw the beginning of "a major crunch" in the availability of coastal property as non-residents descended upon the Maine residential real estate market.<sup>12</sup> As demand rose for waterfront property and more coastal lands were converted into residential real estate, surrounding land values increased, which made it more costly for many Maine residents to maintain their current properties or to purchase new property along the shoreline.<sup>13</sup> As of 2000, the threat of losing Maine's working waterfront entirely to private ownership became evident.<sup>14</sup>

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development of residential property on the shoreline has been driven in the past few years by historically low interest rates and a 'flight to land' for money taken out of the stock market during the historic boom of the late 1990s.").

10. *Id.*

11. Yochi J. Dreazen, *Rate at Which Consumers Save Sinks to a Record*, WALL ST. J., Feb. 1, 2000, at A2 ("As stock gains boost their incomes, consumers boost their spending. The wealth effect also means that many Americans may feel more comfortable saving little or no money, relying on future stock-market gains to help them meet their long-term financial goals.").

12. Sara Kehaulani Goo, *Blue-Collar Town Becomes Tourist Haven—Painfully*, WALL ST. J., Feb. 23, 2000, at NE2 (examining the effects of the rise in non resident purchases of coastal property for residential uses on Maine citizens, particularly those in Southwest Harbor, Maine, Goo describes the situation as a "[t]idal wave of new, wealthy home buyers").

13. *Id.* (explaining that the large-scale purchase of Maine coastal properties by wealthy non-residents, who often built very expensive homes, spurred widespread revaluations of surrounding coastal properties, causing significant increases in property taxes for existing Maine residents. Revaluations also impacted local water-dependent businesses. For example, a local lobster and fish company owner experienced a 63% hike in property taxes on her business, bringing her total amount due from \$6,687 one year to \$10,876 the next).

14. *See, e.g.,* Susan Rayfield, *Fishermen Seek Property-Tax Relief; Rising Taxes Threatens Waterfront Commercial Property, They Contend*, PORTLAND PRESS HERALD, Feb. 4, 2000, at 5B ("With 93 percent of the shoreline in private hands, the only access left for fishermen will be expensive municipal piers unless action is taken.").

Historically, Maine has been a leader in the development of what are known nationwide as coastal zone management programs. Coastal zone management as a focus first manifested itself at the national level in the form of the federal Coastal Zone Management Act (CZMA) of 1972.<sup>15</sup> The Act established basic guidelines for state coastal zone management programs, and made grants available to such programs by way of application.<sup>16</sup> Maine's Coastal Program was approved under the CZMA in 1978.<sup>17</sup> Since then, Maine has established policies and enabled legislation to support the preservation of coastal lands for water-dependent uses, but actual management has been left mostly in the hands of coastal municipalities. A more recent method of working waterfront preservation in Maine has come about through the work of nonprofit organizations, with the support of some state bonds and federal grants.<sup>18</sup> These private organizations have raised funds to purchase rights to coastal lands and preserve them for water-dependent uses.

In Part II of this Comment, Subpart A will provide a more detailed discussion of the history of coastal zone management in Maine. Subpart B will discuss the current state of Maine's working waterfront—based on a few different studies conducted between 2000 and the present—which introduce the inefficacies of employing municipal zoning ordinances as a primary tool, and effectively demonstrate a serious need for increased preservation efforts. Part III will look at the recent success of leading state and private nonprofit organizations<sup>19</sup> in raising funds to preserve coastal property for water-dependent business and demonstrate the need for additional sources of funding as the key to preserving Maine's working waterfront for the future. Part IV will introduce a discussion of tax-related tools that could be utilized at the state and local levels in order to raise funds for furthering working waterfront preservation

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15. Coastal Zone Management Act, 16 U.S.C. §§ 1451-65 (2012).

16. *See id.* at §14551(a) (proclaiming “a national interest in the effective management, beneficial use, protection, and development of the coastal zone”).

17. Elizabeth C. Davis, Comment, *Preserving Municipal Waterfronts in Maine for Water-Dependent Uses: Tax Incentives, Zoning, and the Balance of Growth and Preservation*, 6 OCEAN & COASTAL L.J. 141, 161 (2001) (“The focus of Maine's Coastal Program was two-fold: 1) resource protection and conservation, and 2) resource development and management. The Plan was a combination of thirteen core environmental and land use statutes, which provided for state and local government implementation and enforcement, as well as cooperation, which was the main theory behind successful implementation of Maine's plan.”) (citations omitted).

18. *See Tyler, supra* note 7.

19. To illustrate the purchase and preservation process, this Comment will look at the work being done by Coastal Enterprises Inc., the Land for Maine's Future Program, and the Working Waterfront Access Protection Program. *See infra* Part III.

efforts. Part IV will ultimately propose an increase in Maine's Real Estate Transfer Tax rate for allocation to working waterfront land banking organizations and related groups. Finally, Part V will conclude by outlining a step-by-step plan for implementing the proposed tax rate increase and providing an example of a similar plan being utilized in Massachusetts.

## II. COASTAL ZONE MANAGEMENT IN MAINE

### *A. History*

Coastal zone management in Maine was a focus as early as 1969,<sup>20</sup> when a state task force began to develop a potential pilot program to coordinate coastal zone management between state and federal agencies.<sup>21</sup> Coastal zone regulation in Maine largely began in 1978, when the Maine Coastal Program (MECP) was approved under the CZMA.<sup>22</sup> The CZMA was established to address “the increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, [and] residential development . . . .”<sup>23</sup> The Act encouraged coastal states to develop comprehensive coastal zone management programs by establishing federal grants to be made available for such programs.<sup>24</sup>

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20. Davis, *supra* note 17, at 160 (citing NEW ENGLAND COUNCIL, PROCEEDINGS, NEW ENGLAND COASTAL ZONE MANAGEMENT CONFERENCE 116, 118 (Robert H. Forste ed., 1970)) (“The Maine State Planning Office took the lead on the project, and by 1970 had formed the Coastal Advisory Planning Task Force. The Task Force included sixteen members from both state agencies and academic institutions, and by 1970 had almost completed ‘phase one’ of its study, which was to ‘prepare a plan for coastal development and management considering state, regional, and national needs and objectives.’ By 1970, the United States Congress had begun to hold hearings on implementing what would become the Federal Coastal Zone Management Program, and Maine saw its nearly completed plan as a possible ‘pilot program’ of federal and state cooperation.”).

21. *Id.*

22. *Id.* at 161.

23. 16 U.S.C. § 1451(c) (2012).

24. National Oceanic and Atmospheric Administration (NOAA) of the U.S. Department of Commerce administers the Federal Coastal Zone Management Program. See Marine Law Inst., *Managing the Shoreline for Water Dependent Uses: A Report on the North Atlantic Water Dependent Use Study*, 9 TERRITORIAL SEA 1 (1989). The Act enumerated goals and requirements for eligibility of state programs to receive grants under section 1455. See 16 U.S.C. § 1455 (2012) (providing a detailed list of requirements for grants under the CZMA).

Maine's Coastal Program was originally implemented under the administration of the Maine State Planning Office.<sup>25</sup> The Program consisted of fourteen core statutes and initially focused primarily on environmental concerns relating to coastal property.<sup>26</sup> These statutes included the Alteration of Coastal Wetlands Law,<sup>27</sup> the Site Location and Development Law,<sup>28</sup> the Mandatory Shoreland Zoning and Subdivision Control Law,<sup>29</sup> and the Land Subdivision Law.<sup>30</sup> Although each of the preceding statutes incorporated some consideration of coastal development issues, Maine's collective coastal management program remained largely focused on the environmental implications of development along the coast.

In 1986, the Maine Legislature shifted gears and began to focus its efforts on the management of waterfront property, in the interest of water-dependent uses, with the enactment of Maine's Coastal Management Act.<sup>31</sup> The Act acknowledged the premier importance of the Maine coast, and declared that "the well-being of the citizens of this State depends on striking a carefully considered and well reasoned balance among the competing uses of the State's coastal area,"<sup>32</sup> listing nine specific policies to be implemented by state and local agencies

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25. The Maine State Planning Office was eliminated in July 2012, and the various programs under its administration were moved to different state agencies. *See* Marine Law Inst., *supra* note 24, at 20. The Maine Coastal Program in particular was moved to the Bureau of Resource Information and Land Use Planning. *See Maine Coastal Program*, MAINE.GOV, <http://www.maine.gov/dacf/mcp/about/index.htm> (last visited Feb. 1, 2014). For additional information and links to other related agencies and programs, see *Department of Agriculture, Conservation & Forestry*, MAINE.GOV, <http://www.maine.gov/dacf/> (last visited Feb. 1, 2014).

26. Marine Law Inst., *supra* note 24, at 21 ("As originally approved, the primary emphasis of the program was on protection of environmental values rather than on regulation of coastal uses.").

27. *Id.* (citing ME. REV. STAT. ANN. tit. 38, §§ 471-478 (2001 & Supp. 2012), now incorporated into the Natural Resources Protection Act, ME. REV. STAT. ANN. tit. 38, § 480-A *et seq.* (2001 & Supp. 2012)) (stating that the Alteration of Coastal Wetlands Law required that a permit be obtained for "all filling, draining, dredging or construction of permanent structures").

28. *Id.* (citing ME. REV. STAT. ANN. tit. 38, §§ 481-485, 488-490 (2001 & Supp. 2012)) (requiring a permit from the Board of Environmental Protection for any developments which may substantially affect the environment).

29. *Id.* (citing ME. REV. STAT. ANN. tit. 38, § 435 *et seq.* (2001 & Supp. 2012)) ("This law requires all municipalities to adopt zoning and subdivision control ordinances regulating land development within 250 feet of specified types of water bodies . . .").

30. *Id.* at 22 (citing ME. REV. STAT. ANN. tit. 38, § 4956 *et seq.* (2001 & Supp. 2012)).

31. ME. REV. STAT. ANN. tit. 38, §§ 1801-1803 (2001).

32. ME. REV. STAT. ANN. tit. 38, § 1801 (2001).

together.<sup>33</sup> Unfortunately, this new focus had a minimal effect on the way Maine's coastal communities managed their shoreline properties.

In a final report released in 2001, a subcommittee of the Maine Legislature was charged with studying the loss of working waterfront access with regard to commercial fishing in particular.<sup>34</sup> Reviewing the framework of Maine's coastal development regulation, the report listed a few policies and programs in addition to the initial coastal management program: Maine's shoreland zoning law, the Small Harbor Improvement Program (SHIP), and the Submerged Lands Program.<sup>35</sup> The shoreland zoning law enables coastal municipalities to create districts that give preferential treatment to water-dependent uses, including commercial fishing and other maritime activities.<sup>36</sup> SHIP is a state appropriated grant program that provides funds to coastal municipalities for upgrading and improving their public harbor infrastructures.<sup>37</sup> Finally, the Submerged Lands Program, administered by the Bureau of Parks and Lands, manages leases for rights and easements to develop and construct on state-owned submerged and intertidal lands.<sup>38</sup>

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33. *Id.* (including among these policies "1. Port and harbor development. Promote the maintenance, development and revitalization of the State's ports and harbors for fishing, transportation and recreation . . ." as well as "3. Shoreline management and access. Support shoreline management that gives preference to water-dependent uses over other uses, that promotes public access to the shoreline and that considers the cumulative effects of development on coastal resources . . .").

34. *See* COMM. TO STUDY THE LOSS OF COMMERCIAL FISHING WATERFRONT ACCESS AND OTHER ECON. DEV. ISSUES AFFECTING COMMERCIAL FISHING, FINAL REPORT, 120th Legis., 1st Sess., at i (Me. 2001) [hereinafter COMM. TO STUDY THE LOSS OF COMMERCIAL FISHING ACCESS].

35. *Id.* at 3-5.

36. ME. REV. STAT. ANN. tit. 38, § 447 (2001) (enabling coastal municipalities to establish districts that are preferential to water-dependent uses, but not requiring such establishment); *see also* ME. REV. STAT. ANN. tit. 38, § 448 (2001) ("In addition, a coastal municipality may adopt zoning ordinances establishing a commercial fishing and maritime activity zone."); ME. REV. STAT. ANN. tit. 38, § 436-A (2001) (defining commercial fishing activities as "activities directly related to commercial fishing and those commercial activities commonly associated with or supportive of commercial fishing, such as the manufacture or sale of ice, bait and nets, and the sale, manufacture, installation or repair of boats, engines and other equipment commonly used on boats").

37. COMM. TO STUDY THE LOSS OF COMMERCIAL FISHING ACCESS, *supra* note 34, at 4 (noting that "[d]ue to lack of public investment in its coastal infrastructure since 1979, a backlog of needed municipal harbor projects accumulated. In 1995, the \$58.9 million transportation bond issue that was passed by Maine voters included \$2.5 million for the SHIP program. The program has funded new wharf construction [and] complete pier rehabilitations.").

38. *Id.* at 5.



At the time of the special committee's report in 2001, it was clear that there was still much work to be done to preserve and protect Maine's working waterfront. The report particularly identified the need to review "state oversight functions" and "incentives for quality local coastal management."<sup>39</sup> Above all, the recurring theme of the report was that there simply was not enough empirical data and other information available to make a complete and effective assessment. Part B will introduce such data as it has been gathered by working-waterfront activist organizations.

*B. The Current Landscape:  
A Dwindling Working Waterfront and the Problem with Municipal  
Zoning as a Coastal Zone Management Tool*

Throughout the history of coastal zone management in Maine, a major obstacle has been a lack of any cumulative study of coastal waterfront access. In 2005, the Island Institute began a community-based mapping project, entitled "Mapping Maine's Waterfront," that would provide state and municipal entities with a comprehensive overview of current working waterfront access along the Maine coast.<sup>40</sup> This Part will discuss how the problem of diminishing working waterfront access came about in Maine, and will show that zoning has been the primary tool used to combat this problem at the state and local levels. An overview of the current status of Maine's working waterfront will illustrate a need for something more than zoning enabling legislation and sporadic municipal implementation. Part III will introduce an alternative tool that has been gaining momentum in the realm of coastal zone management in Maine—purchase and preservation—and will demonstrate its relative success.

Preserving Maine's coast for water-dependent uses is of great economic importance. In addition to being a source of tradition, residential ambience, and recreation, the Maine coast is a significant source of state revenues and jobs and income for citizens. Commercial fishing and other compatible water-dependent industries contribute at least \$700 million and maybe over \$800 million to the state economy,

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39. *Id.* at i.

40. MAPPING MAINE'S WORKING WATERFRONT, *supra* note 3, at 1 ("The goal of this research effort is to create a new tool in the form of a statewide Working Waterfront Access Map to facilitate dialogue between two historically divided coastal constituencies: the conservation community and the commercial fishing community.").

and are the source of tens of thousands of jobs for Mainers statewide.<sup>41</sup> Even if there is a decrease in demand for coastal property for water-dependent business, it is important to preserve a sufficient amount of waterfront access for the future. One of the primary threats to Maine's working waterfronts has historically been conversion to residential uses. Once a piece of coastal property is converted to an incompatible use, it can be very difficult, costly, time consuming, and perhaps impossible, to convert it back.

The principal contributing factor to the high costs associated with converting residential property back to a condition that facilitates use by water-dependent businesses is rooted in the concept of property value. Coastal property valued as residential real estate is often substantially more expensive than property that is valued according to its use for water-dependent business. A telling case study performed by the Island Institute revealed that in 2003 a tract of land worth an estimated \$300,000 for working waterfront use was listed for sale at the whopping price of \$800,000.<sup>42</sup> As the case study states, the only justification for the price discrepancy was that the property owner had recently obtained a construction permit to build a (very expensive) home.<sup>43</sup> Typically, the method of preserving working waterfront property often begins with having to purchase the property from a private landowner. In the Island Institute's case study, local lobstermen and a local land trust ended up paying \$710,000 to purchase the property in order to save it from conversion to residential use.<sup>44</sup>

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41. See Me. Dep't of Agric., Conservation & Forestry, *Working Waterfront Initiative*, MAINE.GOV, <http://www.maine.gov/dacf/mcp/wwi/index.htm> (last visited Feb. 1, 2014) ("Working waterfronts provide a link between land and sea that is critical to sustaining a diverse and thriving coastal economy. Commercial fishing and marine trades in Maine contribute more than \$800 million annually to the state's economy and employ about 30,000 people, giving fishermen and others both a livelihood and a valued way of life.").

42. MAPPING MAINE'S WORKING WATERFRONT, *supra* note 3, at 14; see also *Trust, Lobstermen Team Up to Save Dock*, BANGOR DAILY NEWS, Dec. 5, 2003, at A3, available at <http://news.google.com/newspapers?nid=2457&dat=20031205&id=ayg0AAAAIBAJ&sjid=BuEIAAAAIBAJ&pg=4867,923918>.

43. MAPPING MAINE'S WORKING WATERFRONT, *supra* note 3, at 14.

44. *Id.* This particular case study also demonstrates the significant time commitment that goes into preserving a piece of coastal property from conversion to residential use. After the group (including local lobster fishermen and members of the York Land Trust) succeeded in purchasing the property at its appreciated residential value, they still faced the trouble of crafting a conservation easement that would protect the property against future conversion to incompatible uses. Because these efforts often involve individuals and groups with different interests in the waterfront, it often takes a substantial amount of time to come to agreement on something like the structure of a conservation easement. See *id.*

The Island Institute has reported that of 5,300 total miles of Maine coastline, only twenty miles remain working waterfront accessible today.<sup>45</sup> The breakdown works as follows:

1. Along 5,300 total miles of coastline, the study identified 1,555 points of available saltwater access across 142 total coastal towns.<sup>46</sup>
2. Of the 1,555 saltwater access points, only 1,045 provide working-waterfront access (equaling only 20 miles total).<sup>47</sup>
3. Of the 1,045 working-waterfront access points, only 81 points are considered “prime working waterfront.”<sup>48</sup>
4. Only 62 of 81 “prime working waterfront” access points currently support commercial fishing activities.<sup>49</sup>

The Island Institute study illustrates the dismal prospects for the future of Maine’s working waterfront. Considering that just twenty miles support over 26,000 Maine jobs and over \$700 million in contributions to the economy, it is clear that the limited possible working-waterfront access remaining needs to be preserved.<sup>50</sup>

The major focus of coastal zone management at the state level in Maine in terms of legislation and regulation has been on enabling municipal zoning. The current coastal zoning enabling statute reads as follows:

Municipalities are encouraged to give preference...to functionally water-dependent uses and may extend *zoning* controls to accomplish this. A municipality may, within *coastal* shoreland areas, adopt *zoning* ordinances for functionally water-dependent uses. Municipalities may establish districts within

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45. *Id.* at 2.

46. *Id.* (“This access includes everything from public boat landings and municipal rights-of-way to boatyards, marinas, and private fishing docks.”). The 1,555 saltwater access points identified in this study represent just thirty total miles of Maine coastline. *Id.*

47. *Id.*

48. *Id.* (defining “prime working waterfront” as working-waterfront access property that provides “adequate parking, all-tide access, and on-site fuel availability”).

49. *Id.*

50. See ELIZABETH SHEEHAN & HUGH COWPERTHWAIT, COASTAL ENTERPRISES INC., PRESERVING COMMERCIAL FISHING ACCESS: A STUDY OF WORKING WATERFRONTS IN 25 MAINE COMMUNITIES 4 (2002), available at <https://www.maine.gov/dacf/mcp/downloads/workingwaterfront/preservingcommercialfishing.pdf> (observing that working waterfront now occupies only 25 total miles of Maine’s 53,000 mile coastline, and that this working waterfront property supports over 26,000 fishing-related jobs).

these *zones* to give preference to commercial fishing and other maritime activities. In creating such a *zone*, a municipality shall consider the demand for and availability of shorefront property for functionally water-dependent uses. *Zoning* ordinances adopted or extended pursuant to this section shall be pursuant to and consistent with a comprehensive plan.<sup>51</sup>

This statute lacks the foresight of a comprehensive zoning plan because it provides no real guidance for Maine's coastal municipalities to follow.<sup>52</sup> Although the statute requires municipal zoning ordinances to comport with a municipality's comprehensive zoning plan, it does not establish an overall scheme at the state level.<sup>53</sup> For this reason, municipal zoning ordinances that favor water-dependent uses are not created with a view to the possible cumulative effects on the state coastline as a whole.

As a recent study of the economics of working waterfronts in Maine has noted, the most significant competing use for coastal property in Maine is residential real estate development.<sup>54</sup> Maine's current coastal management policy, codified in 1985, recognizes "a state interest in the

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51. ME. REV. STAT. ANN. tit. 38, § 447 (2001 & Supp. 2012) (emphasis added).

52. Another statute allows municipalities to establish "commercial fishing and maritime activity zone[s]," and requires only the consideration of four vague factors:

1. *Utilization*. The number of commercial fishermen and the utilization of the shoreland area;
2. *Availability*. The availability of shoreland area for commercial fishing;
3. *Demand for property*. The demands for shoreland property for commercial and residential purposes not related to commercial fishing or maritime activity; and
4. *Access*. Access to the shore and availability of space appropriate for commercial fishing and maritime activities.

ME. REV. STAT. ANN. tit. 38, § 448 (2001 & Supp. 2012). Note that each of the above-described statutes allows, *but does not require* the implementation of coastal zoning ordinances and comprehensive plans. See ME. REV. STAT. ANN. tit. 38, §§ 447-448.

53. See ME. REV. STAT. ANN. tit. 38, § 447.

54. See, e.g., COLGAN, *supra* note 1, at i ("One key trend is the increasing pressure for conversion to other uses, primarily seasonal or year-round residences."). Colgan compares the economic benefits of residential real estate construction and working waterfront uses in Maine, and concludes that the preservation of coastal property for commercial fishing and other water-dependent uses is paramount. *Id.*; see also *id.* at 1 ("The evidence suggests that, while coastal real estate development does make a significant contribution to the Maine economy, those activities associated with working waterfronts make larger and more long-lasting contributions. The contribution to the economy of these activities, as measured by gross state product is at least \$15 million to \$23 million higher than that of residential development under conservative assumptions.").

conservation, beneficial use and effective management of the coast's resources; [and] that development of the coastal area is increasing rapidly and that this development poses a significant threat to the resources of the coast and to the traditional livelihoods of its residents.”<sup>55</sup> Statutes enacted to protect environmental interests on the coast and regulations requiring close review only for larger development projects allow smaller-scale and incremental development projects to slip through the cracks, as local governments are not sufficiently equipped to assess them on a comprehensive level.<sup>56</sup>

Although zoning ordinances are recognized as an integral part of any comprehensive coastal zone management program, there are a number of obstacles that impede their effectiveness. In 2001, a study of working waterfronts in twenty-five coastal municipalities in Maine highlighted an important reason why preserving the working waterfront through zoning can be difficult:

The challenge here on preserving commercial fishing access/working waterfronts is that, to date one of the most effective tools used to prevent conversion is exclusive zoning, which limits property rights and therefore property values. For the 25 towns studied *40% of the commercial fishing access is provided by private residences*. It raises tremendous concern and genuine opposition when working families are asked to limit the value of one of their major, if not only, asset—their land and property.<sup>57</sup>

The danger of limiting private property rights is always a principal concern wherever zoning is employed, and is a particularly significant problem for the working waterfront cause because, as the study states, a large percentage of working waterfront access is provided by way of privately owned shoreline property.<sup>58</sup>

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55. ME. REV. STAT. ANN. tit. 38, § 1801 (2001).

56. See Alison Rieser, *Managing the Cumulative Effects of Coastal Land Development: Can Maine Law Meet the Challenge?*, 39 ME. L. REV. 321, 325 (1987) (discussing the particular difficulties associated with “managing the cumulative effects of incremental development” that are faced by municipalities with limited information and jurisdiction).

57. SHEEHAN & COWPERTHWAIT, *supra* note 50, at 5 (emphasis in original).

58. The study identifies six ways in which water access rights are lost, the first three of which directly relate to private property issues: “1. [a]ccess to inter-tidal areas lost through no trespassing signs; 2. [n]ew coastal property owners closing off/contesting

The use of zoning to protect Maine's working waterfront is complicated by the vagueness of the related enabling statutes.<sup>59</sup> One basic reason for this is that the enabling legislation does not take into account the possibility of challenges by private property owners. In *Nollan v. California Coastline Commission*, the Supreme Court dealt with a challenge by a private coastal property owner against the Commission for conditioning his building permit on the grant of a public-access easement across his property.<sup>60</sup> The Court concluded that the condition and its supporting permit were impermissible, finding that the State could properly satisfy its interest in protecting public access to the beaches by paying for access easements under eminent domain; however, coastal residents alone could not be compelled to sacrifice their private property rights in favor of such an interest.<sup>61</sup>

Zoning as a tool for coastal zone management in Maine has proven to be relatively unsuccessful. In the Island Institute's 2007 study, the authors acknowledged zoning as a viable working waterfront protection tool; nevertheless, in surveying all 142 coastal communities in Maine, they discovered that "the vast majority of waterfront access was not protected through zoning measures."<sup>62</sup> The study recorded the following statistics:

- 446 (29%) waterfront access points are currently protected under some type of water-dependent use zoning
- 320 (21%) access points are both privately owned and fall outside of water-dependent use zoning, making them particularly vulnerable to conversion

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public access; and 3. [c]ommercial fishing access tenuous through lease agreements." *See id.*

59. *See, e.g.*, ME. REV. STAT. ANN. tit. 38, §§ 447-448 (2001 & Supp. 2012).

60. 483 U.S. 825, 827 (1987). In *Nollan*, the Commission stated that its primary purpose for the permit requirement at issue was to protect public access to the beach. *Id.* at 828. The Court held that the Commission's purpose was impermissible under the totality of the circumstances, and thus not subject to the deference accorded to actions properly exercised under the state police power. *Id.* at 838-39. While the purpose behind the land use regulation in *Nollan* was different from the case of preserving working waterfronts, the case is instructive in that it provides both: 1) an example of the minimum standard of review applicable to land-use regulations; and 2) an example of the Supreme Court striking down a land-use regulation created to promote public access to the shoreline.

61. *Id.* at 841-42.

62. MAPPING MAINE'S WORKING WATERFRONT, *supra* note 3, at 9.

- Only 45 (33%) of Maine’s coastal towns have some type of water-dependent use zoning, protecting 150 miles of coastline (*less than 3% of Maine’s coast*).<sup>63</sup>

Conceivably, the main reason behind the failure of municipal zoning as a tool for shoreline property preservation for water-dependent uses is that the task is too complex for Maine’s individual coastal municipalities to handle without substantial guidance from the state government, which they have not received.<sup>64</sup>

Currently, there are a number of organizations engaged in fundraising and working to promote and protect Maine’s working waterfront. The most effective way to preserve waterfront access for commercial fisheries and other water-dependent uses is to get the state involved in raising additional funds for these organizations, which have already made significant contributions to the effort to save Maine’s coast for water-dependent uses.

### III. A NEW TOOL: PURCHASE, PRESERVE, AND PROTECT—UTILIZING LAND USE RESTRICTIONS AND OUTRIGHT PURCHASE FOR THE FUTURE OF MAINE’S WORKING WATERFRONT

For the particular purpose of working waterfront conservation, a leading organization in Maine is the privately owned Coastal Enterprises, Inc. (CEI).<sup>65</sup> CEI is an important part of the coastal zone management effort in Maine because it is a large source of funding for (1) research; (2) purchasing coastal property and preserving it for water-dependent uses; and (3) investing in co-ops with Maine fishermen and other water-

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63. *Id.* (emphasis added).

64. For an in depth discussion of the problems with leaving comprehensive zoning plans in the hands of individual municipalities, see Rieser, *supra* note 56, at 327 (“Only when the laws are designed to ensure that decision-makers are equipped with the guidelines, planning goals, and resource-capacity studies necessary to address the questions of development thresholds, development forecasting, and allocation of development rights, will the statutes allow effective management of incremental development.”).

65. See *About CEI*, <http://www.ceimaine.org/about> (last visited Apr. 18, 2013) (“CEI is an expert in rural business funding, development and financing. A private, nonprofit Community Development Corporation (CDC) and Community Development Financial Institution (CDFI) based in Wiscasset, Maine, CEI was founded in 1977 to develop job-creating natural resources and small business ventures in rural regions of Maine, and has grown to serve business funding all of Maine, its primary market, and areas of northern New England and upstate New York.”).

dependent businesses.<sup>66</sup> CEI is affiliated with a number of state programs, including the Working Waterfront Access Program.<sup>67</sup>

CEI recognizes the delicate state of Maine's working waterfront, which is at risk of being lost to development.<sup>68</sup> The organization bases its operations on a tripartite scheme, known as the "3E perspective," which focuses on the economy, equity, and the environment.<sup>69</sup> CEI boosts the economy by providing loans and business assistance to commercial fishermen, as well as other water-dependent businesses; it increases equity by shedding light on the hardships facing marine-related businesses in Maine, primarily those closely related to the diminishing working waterfront; and lastly, it improves upon the environment by encouraging those men and women in fishing and other water-dependent industries who borrow funds through its programs to engage in research and development in the interest of propagating marine resources and fostering public health.<sup>70</sup>

The purchase and preserve tactic employed by organizations like CEI includes outright purchase of coastal properties, as well as the purchase of deed restrictions and other land use restrictions that stymie any potential development efforts on the properties involved. The Working Waterfront Access Protection Program (WWAPP) provides a prime example of the use of alternative land use restrictions to preserve working waterfront.<sup>71</sup> The WWAPP was established by a partnership between the Maine Department of Marine Resources (DMR) and the Land for Maine's Future Program (LMF),<sup>72</sup> which contracted with CEI to implement the program.<sup>73</sup> Projects seeking WWAPP funding are assessed based on six criteria established by the DMR: (1) the economic

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66. *See id.*

67. *See Working Waterfront Access Protection Program*, CEI, <http://www.ceimaine.org/consulting/natural-resources/fisheries-and-waterfront/working-waterfront-access-protection-program/> (last visited Mar. 16, 2014).

68. *Id.*

69. *About CEI*, *supra* note 65.

70. *See id.*

71. *See Working Waterfront Access Protection Program*, *supra* note 67.

72. *Land for Maine's Future*, MAINE.GOV, <http://www.maine.gov/dacf/lmf/> (last visited Feb. 9, 2014) ("The Land for Maine's Future Program was established in 1987 when Maine citizens voted to fund \$35 million to purchase lands of statewide importance. In 1997, new priorities were set forth by a commission of Maine citizens and in 1998 the legislature provided an appropriation of \$3 million. With these funds fully allocated and projects completed, Maine voters approved in November 1999, a public bond of \$50 million to support a rejuvenated and expanded program. In 2005, a \$12 million bond created a new Working Waterfront Protection Pilot Program.").

73. *Working Waterfront Access Protection Program*, *supra* note 67.



significance of the property to the commercial fisheries industry in the immediate vicinity and in the state as a whole; (2) the project's relation to nearby water-dependent business activities; (3) the degree of community support for the proposed investment; (4) the level of threat of conversion to uses incompatible with commercial fisheries businesses; (5) the utility of the proposed protected property for commercial fisheries business uses in terms of its natural characteristics and developed infrastructure; and (6) the project's potential job creation through specific investments described in a business plan.<sup>74</sup>

Applicants are selected based on a point system that follows the criteria stated above. Once a project is selected for funding, the DMR uses the allocated funds to purchase a deed restriction (also known in this context as a working waterfront covenant) on the related property from its owners.<sup>75</sup> This process has the dual effects of abrogating development rights and preserving the property for current and future water-dependent uses, while simultaneously providing substantial funds to the working waterfront landowners, who utilize the funds to improve their businesses.<sup>76</sup> The approval of multiple projects of the same character results in significant contributions to the preservation and protection of working waterfronts all along the coast of Maine.

The multi-faceted approach that CEI uses to preserve the working waterfront is exemplary, and should be emulated by other organizations looking to participate in the statewide preservation effort. Although allocating grant funds through the purchase of deed restrictions is currently the most significant source of funding for working waterfront projects that CEI offers, the organization also employs some different tactics to encourage improvement. A prime example of CEI's comprehensive approach to working waterfront preservation is its FISHTAG program, which incentivizes individuals and groups who seek loans from CEI for working waterfront projects to conduct research that

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74. Maine's Department of Marine Resources Working Waterfront Access Protection Program, CEI, *available at* <http://www.ceimaine.org/wp-content/uploads/2014/02/01-Overview-process-and-timeline-WWAPP-2014.pdf>.

75. *Id.* An additional important point to highlight regarding working waterfront covenants is that they provide the State with a right of first refusal if landowners who have received WWAPP funding decide to sell the property at a later date. *Id.* This right ensures that the property will continue to be assessed at its value as a working waterfront, rather than being valued at its highest and best use, which would ultimately be less affordable for working waterfront businesses. *Id.*

76. *See id.*

will contribute to the improvement of marine science and public health in the state by offering the possibility of lowering interest rates over time.<sup>77</sup>

The success of programs like LMF and WWAPP and affiliated organizations like CEI in preserving Maine's working waterfront property far exceeds the progress that has been achieved through sporadic municipal zoning ordinances across the state. The LMF, Maine's self-proclaimed "primary vehicle for acquiring public lands," has conserved more than 1,200 miles of shore lands, and 20 commercial working waterfront properties.<sup>78</sup> CEI continues its comprehensive approach: stimulating job creation, promoting marine and public health research and management projects, and encouraging environmental improvement.<sup>79</sup> The problem that these organizations are facing today is a significant lack of consistent and dependable funding.<sup>80</sup>

One way to remedy the lack of steady funding experienced by organizations that support working waterfront preservation in Maine is to either generate a new tax, or to reallocate an existing tax. There are pros and cons for both the introduction of a new tax and the reallocation of an existing tax that bear on the likelihood of their success. Ultimately, each possible solution to any funding problem, like the one currently facing the working waterfront effort in Maine, will be met with some degree of public resistance. Despite this resistance, something needs to be done in order to save Maine's working waterfront from almost certain extinction.

#### IV. THE FUNDING PROBLEM: GENERATING CONSISTENT AND DEPENDABLE REVENUES THROUGH THE USE OF TAX TOOLS

There are a number of tax-related tools that are commonly utilized to generate funds at both the state and federal levels. Presently, the only

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77. *FISHTAG Program*, CEI, <http://www.ceimaine.org/wpcontent/uploads/2014/02/FISHTAG.pdf> (last visited Feb. 27, 2014) ("The goals of the FISHTAG program are to: [s]upport economic diversification for fisheries, [g]enerate biological data for marine resource management, [g]arner fishermen's participation in marine research, [and] [e]ncourage the opportunity for marine scientists to learn from fishermen.").

78. *Land for Maine's Future*, MAINE.GOV, <http://www.maine.gov/dacf/lmf/> (last visited Feb. 27, 2014).

79. *See About CEI*, *supra* note 65.

80. The WWAPP was originally funded by a \$12 million bond issued in 2005, and continues to rely on the periodic issuance of state bonds as its chief source of funding. *See* ME. REV. STAT. ANN. tit. 12, § 6042 (2003) (establishing the WWAPP); ME. REV. STAT. ANN. tit. 12, § 6203-B (2003) (establishing the grant fund for the WWAPP). CEI relies on investments and donations solicited through its website. *See Investing*, CEI, <http://www.ceimaine.org/Investing> (last visited Feb. 27, 2014) [hereinafter *Investing*] (listing ways in which site visitors may invest in various projects).

tax-based measure in Maine related to the preservation of working waterfronts is an amendment to the State Constitution that allows coastal properties used for certain water-dependent purposes to be valued at their current use.<sup>81</sup> Widespread acknowledgement of Maine's working waterfront crisis and subsequent preservation efforts came to a head in 1999, when the state saw a boom in residential real estate on the coast, and seemed to sustain its momentum until roughly 2007, when Maine's Constitution was amended to enable current use valuation for working waterfront property tax assessment.<sup>82</sup> One particular consequence of the loss of momentum since that time is that lawmakers and activists lack access to current information relating to the state's working waterfront.<sup>83</sup> Due to this lack of information, it is difficult to assess the effects of current use valuation on protecting Maine's coast for water-dependent businesses. Regardless, it remains clear that significant measures must be taken in order to fix the dismal state of Maine's working waterfront before it vanishes completely.

Additional funds are required to support organizations like CEI in their efforts to protect Maine's working waterfront by purchasing coastal property and related land use covenants and collecting relevant information across the state. In the past, bonds have been issued to aid in preservation efforts,<sup>84</sup> but bonds are not a dependable source of funding.

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81. Maine tax law typically requires property to be assessed at its "just value," a term that may be equated with fair market value (what the property could sell for in a relative market). See HOMEOWNER'S GUIDE TO PROPERTY TAX IN MAINE (2004), available at <http://www.memun.org/MemberCenter/MultimediaLibrary/HomeownersGuidetoPropertyTax.aspx>. However, certain working waterfront properties may be assessed based upon their actual use, rather than the greatest possible value of the property. See e.g. *Current Land Use Programs*, MAINE.GOV, <http://maine.gov/revenue/propertytax/propertytaxbenefits/CurrentUseLandPrograms.htm#open> (last visited Feb. 27, 2014) (enumerating requirements for a property's designation as working waterfront property, which is subject to an exception from the state's general highest and best use taxation standard).

82. ME. CONST. art. IX, § 8.

83. There has not been a statewide gathering of information regarding the current landscape since the Island Institute's project that was completed in 2007. See MAPPING MAINE'S WORKING WATERFRONT, *supra* note 3.

84. For example, in July 2005 the Maine legislature allocated \$2 million out of a total \$83 million bond package to fund the establishment of the WWAPP. See *MLA Highlights 2005-06*, MAINE LOBSTERMEN'S ASSOCIATION, [http://www.maine lobstermen.org/pdf/MLAHighlights05\\_06.pdf](http://www.maine lobstermen.org/pdf/MLAHighlights05_06.pdf) (last visited Feb. 27, 2014). For additional information regarding similar bonds, see Memorandum from Michael Dixon to the Maine Sea Grant & Working Waterfront Tax Policy Grant Advisory Committee, Re: Tax-Based Opportunities and Challenges for Working Waterfront Protection (July 14, 2010), available at

Additionally, bonds have to be repaid, while tax revenues allocated to a particular program do not. Comparatively, tax revenues are a consistent and reliable funding source. Once a particular tax is levied, it is not commonly overturned, and it will be assessed and collected annually for some time. While there are a number of different tax tools at the State's disposal, historically the Maine legislature has been extremely resistant to use them for working waterfront initiatives.<sup>85</sup>

In 2010, two memoranda were composed regarding the possible use of tax-tools to raise money for working waterfront land banking and similar activities.<sup>86</sup> The memos were based on collaborative efforts between a few members of the Maine law community to present a comprehensive report to the Maine Working Waterfront Tax Policy Grant Advisory Committee.<sup>87</sup> Consideration of policy matters highlights the importance of achieving working waterfront preservation without placing a significant burden on Maine citizens and businesses.<sup>88</sup> Current expressions of state policy indicate that proposals that require increased taxes or the creation of new taxes (e.g. establishing a new state excise tax)<sup>89</sup> should not be considered as viable options at this time.<sup>90</sup> This Comment focuses on the Maine Real Estate Transfer Tax ("RETT"),<sup>91</sup> proposing a small percentage increase to be allocated to land banking organizations for the purpose of purchasing working waterfront

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[http://www.accessingthemainecoast.com/coastal\\_access\\_toolkit/DixonMemo\\_final.pdf](http://www.accessingthemainecoast.com/coastal_access_toolkit/DixonMemo_final.pdf) [hereinafter Dixon].

85. See, e.g., *Case Studies: Models for Using Tax Policy for Access*, ACCESSING THE MAINE COAST, [http://www.accessingthemainecoast.com/coastal\\_access\\_toolkit/using\\_taxation\\_for\\_access\\_case\\_studies.shtml](http://www.accessingthemainecoast.com/coastal_access_toolkit/using_taxation_for_access_case_studies.shtml) (last visited Feb. 27, 2014) ("Attempts to increase the Maine state RETT [real estate transfer tax] rate (less than one-half of one-percent) have repeatedly failed."). No other taxes have been established to support purchase and preservation of working waterfront properties.

86. Dixon, *supra* note 84; Memorandum from Steven Gerlach to the Working Waterfront Tax Policy Grant Advisory Committee, Re: Working Waterfront Tax Strategies (Sept. 20, 2010), available at [http://www.accessingthemainecoast.com/coastal\\_access\\_toolkit/Gerlach\\_memo.pdf](http://www.accessingthemainecoast.com/coastal_access_toolkit/Gerlach_memo.pdf) [hereinafter Gerlach].

87. *Id.*

88. See, e.g., ME. REV. STAT. ANN. tit. 36, § 7301 (2010 & Supp. 2012) ("It is the goal and policy of the State that by 2015 the State's total state and local tax burden be ranked in the middle 1/3 of all states . . .").

89. An excise tax is "[A] tax imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation fee)." BLACK'S LAW DICTIONARY 646 (9th ed. 2009); see also ME. REV. STAT. ANN. tit. 36, § 1504 (2010 & Supp. 2012) (providing an example of a state-imposed excise tax in Maine: the Maine State Excise Tax on Watercrafts).

90. See ME. REV. STAT. ANN. tit. 36, § 7301 (2010 & Supp. 2012).

91. See ME. REV. STAT. ANN. tit. 36, §§ 4641-A, -B (2010 & Supp. 2012).

properties and pertinent restrictive land use covenants, among other things discussed below.<sup>92</sup>

A real estate transfer tax is a tax or fee assessed upon the sale or transfer of real property.<sup>93</sup> Maine's RETT statute reads as follows:

1. Deeds. A tax is imposed on any deed by which any real property in this State is transferred.
  - a. The rate of the tax is \$2.20 for each \$500 or fractional part of \$500 of the value of the property transferred.
  - b. The tax is imposed 1/2 on the grantor and 1/2 on the grantee.<sup>94</sup>

This means that in Maine the RETT is less than 0.5% of the real estate value. Each month, as prescribed by statute, 90% of total RETT revenues are to be distributed to the state treasury, and 10% to county governments to cover the costs of local deed registration.<sup>95</sup> Historically, the percentage of RETT revenues that go to the state treasury have been allocated to the state's General Fund, which can be used for various purposes.<sup>96</sup> In recent years, however, a certain percentage of the state's RETT funds have been allocated to what is known as the Housing Opportunities for Maine Fund (HOME) Fund.<sup>97</sup> The state legislature has changed the allocation of state RETT revenues over the years to reflect different state funding needs.<sup>98</sup> Increasing the RETT rate by a fractional amount for allocation to a working waterfront fund could make a significant contribution to protection efforts while minimizing the impacts of additional taxation.

A closer look at the Maine HOME Fund illustrates the potential for successful fundraising through the allocation of State RETT revenues.<sup>99</sup>

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92. See Dixon, *supra* note 84; Gerlach, *supra* note 86. Some other tax-based tools include: income tax incentives, tax increment financing, additional current-use taxation incentives, property tax deferrals, and property tax abatements. See *id.* These additional tools may be useful as supplements to the proposed RETT percentage increase, but a discussion of these tools is beyond the scope of this Comment.

93. ME. REV. STAT. ANN. tit. 36, § 4641-A (2010 & Supp. 2012).

94. *Id.*

95. ME. REV. STAT. ANN. tit. 36, § 4641-B (3) (2010 & Supp. 2012).

96. *Id.* at § 4641-B (4-B).

97. *Id.* For information on Maine's HOME (Housing Opportunities for Maine) Fund, see ME. REV. STAT. ANN. tit. 30-A, §4852 (2013).

98. See, e.g., ME. REV. STAT. ANN. tit. 36, § 4641 (4-B) (B) (2010 & Supp. 2013).

99. See, e.g., MAINE STATE HOUSING AUTHORITY, HOUSING OPPORTUNITIES FOR MAINE FUND (April 2007) [hereinafter MAINE HOME FUND], available at

The HOME Fund was created in Maine as a result of a significant need for additional funding to assist Maine's Housing Authority with a number of projects all aimed toward the goal of providing affordable housing.<sup>100</sup> The statutory allocation method provided for distributions to the HOME Fund reflects a trend toward decreasing the amount of funds required to be allocated to the General Fund in favor of the HOME Fund.<sup>101</sup> In a report on the HOME Fund and its activity from 2002 until 2006, the Fund reported total receipts in excess of \$38 million.<sup>102</sup> This means that funds raised through less than 0.25% in RETT revenues totaled an average of \$9.5 million a year.

The creation and maintenance of Maine's HOME Fund<sup>103</sup> is significant because it demonstrates a successful solution to a funding problem very similar to the one currently facing working waterfront preservation organizations and agencies. The Maine Housing Authority<sup>104</sup> was in need of a funding source that it could not generate either through federal funds or through the further use of state issued bonds.<sup>105</sup> The HOME fund was authorized in 1982, and began receiving allocations from the state's RETT in 1984.<sup>106</sup> This is exactly what needs to be done to boost the working waterfront preservation cause.

The logistics of making an incremental (0.25-0.5%) increase in Maine's RETT rate are fairly simple. Any increase in the rate needs to be proposed and passed by the State Legislature. As with most funding

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[http://www.mainehousing.org/docs/default-source/housing-reports/housing-opportunities-for-maine-\(home\)-fund-uses---2005-06.pdf?sfvrsn=4](http://www.mainehousing.org/docs/default-source/housing-reports/housing-opportunities-for-maine-(home)-fund-uses---2005-06.pdf?sfvrsn=4).

100. The HOME Fund was established with the dual aims of (1) ameliorating homelessness and (2) boosting the housing construction industry. *See id.* at 3-5.

101. *See* ME. REV. STAT. ANN. tit. 36, § 4641-B (4-B)(A), (C) (2010 & Supp. 2013). For the 2011-12 fiscal year, the Treasurer had to set aside \$3.8 million in monthly RETT revenues for the General Fund before any distributions could be made to the HOME Fund. ME. REV. STAT. ANN. tit. 36, § 4641-B (4-B)(A)(3) (2010 & Supp. 2013). In contrast, in the current fiscal year the Treasurer need only set aside roughly \$245,000 each month for the General Fund before distributing the remainder to the HOME fund. ME. REV. STAT. ANN. tit. 36, § 4641-B(4-b)(C)(3) (2010 & Supp. 2013); *see also* MAINE HOME FUND, *supra* note 99, at 2 (noting that the reservation of an initial amount of money for the General Fund before monthly distributions were made to the HOME Fund was a part of a plan to allocate extra dollars to the General Fund during economic crisis).

102. MAINE HOME FUND, *supra* note 99, at 2.

103. A detailed report on the Maine HOME Fund is beyond the scope of this Comment. The Fund is discussed mainly as a model for possible working waterfront funding through allocation of a percentage of RETT revenues.

104. ME. REV. STAT. ANN. tit. 30-A, § 4852 (1) (2011).

105. MAINE HOME FUND, *supra* note 99, at 1.

106. ACCESSING THE MAINE COAST, [http://www.accessingthemainecoast.com/coastal\\_access\\_toolkit/acquiring\\_access.shtml](http://www.accessingthemainecoast.com/coastal_access_toolkit/acquiring_access.shtml) (last visited Mar. 16, 2014).

quests, the political process plays a major role in making this proposal work. Programs like CEI and the Island Institute, which conduct in depth information gathering and dissemination, are working to educate the Maine public with regard to the urgency of Maine's working waterfront problem.<sup>107</sup> Although it is to be expected that a number of citizens and special interest groups (i.e. residential real estate developers) will be resistant to an increase in the state RETT rate, the situation has become so immediate that some amount of resistance and distaste for a given solution must be overlooked in the long-term interest of the state.

The primary argument in favor of raising the RETT rate and allocating additional revenues to working waterfront preservation efforts goes back to the comparison of the economic benefits of the residential real estate industry versus those benefits of the water-dependent business industry. Working waterfront business contributes between \$15 and \$168 million each year to gross state product, more than the contributions of coastal residential construction.<sup>108</sup> Although the housing industry accounts for a larger percentage of the Maine workforce,<sup>109</sup> economic contributions from the housing industry tend to have a "disappearing impact," meaning that construction of residential homes typically do not contribute money back into the economy, with the exception of property taxes.<sup>110</sup> On the other hand, as a Portland journalist aptly noted, "[w]orking waterfronts . . . pump money into town and state coffers as long as there are fish."<sup>111</sup> Raising additional funds to help bolster the working waterfront industry is undoubtedly a sound and fruitful investment in Maine's economy.

If the state legislature were to raise the RETT percentage in Maine by just 0.25% (roughly equal to the allocation to the HOME Fund),

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107. See *Working-Waterfront Access*, ISLAND INSTITUTE, [http://www.islandinstitute.org/working\\_waterfront\\_access.php](http://www.islandinstitute.org/working_waterfront_access.php) (last visited Feb. 19, 2014).

108. COLGAN, *supra* note 1, at i. "Gross state product is the total value of goods and services produced in the Maine economy, and is analogous to the U.S. Gross Domestic Product." *Id.* at 2.

109. Compare MAINE HOME FUND, *supra* note 99, at 7 (estimating that roughly 50,000 (about 10%) of the Maine workforce is heavily involved in the residential housing industry and related sectors) (citing 2002 ECONOMIC CENSUS OF MAINE, [http://www.census.gov/econ/census02/guide/02EC\\_ME.HTM](http://www.census.gov/econ/census02/guide/02EC_ME.HTM) (last visited Feb. 23, 2014)), with Maine's Working Waterfront Coalition, *Press Conference*, *supra* note 2 (stating that the working waterfront industry in Maine accounts for over 26,000 jobs).

110. Alex Irvine, *Welcome Back (Continued)*, THE PORTLAND PHOENIX (June 11-17, 2004), [http://www.portlandphoenix.com/features/other\\_stories/multi3/documents/03919490.asp](http://www.portlandphoenix.com/features/other_stories/multi3/documents/03919490.asp) (quoting Charles Colgan, Maine economist and author of COLGAN, *supra* note 1).

111. *Id.*

working waterfront land banking organizations and related preservation groups could see millions of dollars in additional funds each year. Taking a conservative estimate of potential revenues from a 0.25% RETT allocation to working waterfront efforts, the cause could benefit by at least an extra \$4 to \$6 million each year.<sup>112</sup> A 0.25% increase would bring the total Maine RETT rate to a still very reasonable 0.75%. Across the United States, state RETT rates vary anywhere from 0.01% to a high of 4%, with a good number of states imposing a rate of roughly 1%.<sup>113</sup> Overall, a 0.25% increase in the state RETT rate would not only be very helpful in raising additional revenues, but would maintain a rate that is comparable with a majority of other states.

One potential reason why so many Maine coastal communities failed to utilize zoning tools to preserve their working waterfront properties is that the differences in demographics between the various coastal towns means that a one-size-fits-all “single programmatic approach” cannot be the answer.<sup>114</sup> While in some towns, like Portland, a comprehensive zoning structure may be the most appropriate means of preserving waterfront property for water-dependent business, in other towns something like a partnership between funding sources and preservation organizations may be a better fit. Raising and allocating significant additional funds to either a single newly established state entity—or several state and semi-private nonprofit entities—for distribution to working waterfront efforts of all types, would accordingly be the optimal approach.

## V. CONCLUSION

In order to make the proposed RETT increase and subsequent allocation of funds to working waterfront efforts in Maine a reality, the most significant step in the process is to gather current information, of

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112. To arrive at this figure, look at the average RETT revenues received by the Maine HOME Fund over the four year period from 2002 to 2006, and cut that figure down to reflect a very conservative estimate of the potential monetary benefits. *See* MAINE HOME FUND, *supra* note 99, at 2. Note that the suggested 0.25% RETT increase is a minimum starting point. Raising RETT by 0.5%, bringing the state RETT rate to 1% total, would result in an annual estimate of \$8 to \$12 million.

113. *See Real Estate Transfer Taxes*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/budget/real-estate-transfer-taxes.aspx> (last updated Sept. 2012) (listing RETT rates for all the states where they are applicable).

114. Irvine, *supra* note 110.



the type seen in the Island Institute's 2007 report,<sup>115</sup> and disseminate it statewide. Maine citizens, legislators in particular, need to be made aware of the grave consequences that will inevitably follow from a working waterfront that continues to diminish. Before an effort is made to get the issue introduced to the state legislature, the interested organizations and other entities need to collaborate and come up with a detailed plan regarding how the fund will work, how much money will be required, and expectations for the long-term. Once all the relevant information is gathered and assembled for presentation to the legislature, working waterfront interest groups will be able to work with a legislator to draft a proposal for an increase in the state RETT percentage.

The organization(s) that are in charge of the distribution of the working waterfront funds to various programs across the state will need a detailed plan and the proper infrastructure. There will likely be a formal application process for acquiring funds, similar to that of CEI's programs.<sup>116</sup> The organization(s) could distribute the funds in the form of matching grants, new grants, and loans. If the funds are able to generate some return in the form of interest payments on loans to working waterfront businesses and entities, such funds could be allocated to the repayment of state-issued bonds. Working waterfront advocates could lobby for enabling legislation to create land banks that would be eligible to receive funding generated by the increase in RETT revenues. Land banks work to preserve working waterfront properties by (1) purchasing properties outright or (2) purchasing conservation easements on privately owned coastal properties that prohibit conversion to uses that are incompatible with water-dependent activities.

This concept has been particularly successful for the Nantucket Islands in Massachusetts.<sup>117</sup> Describing the way in which the idea for the Nantucket Islands Land Bank came to be, former Nantucket town planner Bill Kline articulated a simple justification for allocating RETT funds to the preservation of local property: "if you wanted to buy or

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115. Necessary information in this context includes: (1) the most current landscape (how much working waterfront property is left today); and (2) economic information (demand for working waterfronts and general state of the economy today) as well as any other information relevant to the promotion of protecting the working waterfront. *See, e.g.,* MAPPING MAINE'S WORKING WATERFRONT, *supra* note 3.

116. *See Apply for a Loan*, CEI, [http://www.ceimaine.org/Apply\\_for\\_Financing](http://www.ceimaine.org/Apply_for_Financing) (last visited Feb. 23, 2014).

117. The Nantucket Land Bank has a webpage that provides links to pertinent legislation, a historical timeline for its establishment, and a description of how the organization works. *See* NANTUCKET ISLANDS LAND BANK, <http://www.nantucketlandbank.org/About.php> (last visited Feb. 23, 2014).

develop real estate, you must also pay to *protect* land from development.”<sup>118</sup> Nantucket citizens faced the same problem that Maine faces today: non-residents were purchasing coastal property at a rapid rate.<sup>119</sup> In 1984, Kline and fellow advocates received authority from the state legislature to establish a land bank that would be funded by a flat 2% RETT rate.<sup>120</sup> By 1990, the land bank had acquired approximately 1,000 acres of Nantucket property and maintained a \$20 million surplus.<sup>121</sup> Today, the Nantucket Land Bank and other similar organizations have successfully preserved almost half of the total available land as open space.<sup>122</sup>

The state of Maine has already come a long way in its efforts to preserve working waterfront property, having seen the formation of a number of local land banking organizations and recognizing the importance of preserving the coast at the state level. If working waterfront advocates are able to mount a successful campaign to raise the state RETT rate and allocate the additional funds to local land banks for the outright purchase of properties and conservation easements, there is no reason why the working waterfronts of Maine will not thrive.

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118. James Stolz, *Preserving Open Land, Nantucket Style*, COUNTRY JOURNAL, Nov./Dec. 1990, at 25.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Properties*, NANTUCKET ISLANDS LAND BANK, <http://www.nantucketlandbank.org/Properties.php> (last visited Feb. 27, 2014).