

MAINE STATE LEGISLATURE

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122nd MAINE LEGISLATURE

SECOND REGULAR SESSION-2006

Legislative Document

No. 1930

S.P. 730

In Senate, January 4, 2006

An Act Regarding Working Waterfront Covenants under the Land For Maine's Future Board

Submitted by the State Planning Office pursuant to Joint Rule 204.
Reference to the Committee on Judiciary suggested and ordered printed.

A handwritten signature in cursive script that reads "Joy J. O'Brien".

JOY J. O'BRIEN
Secretary of the Senate

Presented by Senator DAMON of Hancock.

Cosponsored by Senators: ANDREWS of York, SULLIVAN of York, Representatives: ASH of Belfast, BOWEN of Rockport, DUGAY of Cherryfield, EBERLE of South Portland, PINGREE of North Haven, RECTOR of Thomaston, SCHATZ of Blue Hill.

2 **Be it enacted by the People of the State of Maine as follows:**

4 **Sec. 1. 33 MRSA c. 6-A is enacted to read:**

6 **CHAPTER 6-A**

8 **WORKING WATERFRONT COVENANTS**

10 **§131. Definitions**

12 As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

14 1. Commercial fisheries businesses. "Commercial fisheries businesses" means any enterprise directly or indirectly concerned with the commercial harvest of wild or aquacultured marine organisms, whose primary source of income is derived from these activities. "Commercial fisheries businesses" includes without limitation:

20 A. Licensed commercial fishermen, aquaculturists and fishermen's cooperatives;

24 B. Individuals and businesses providing direct services to commercial fishermen and aquaculturists or fishermen's cooperatives; and

28 C. Municipal and private piers and wharves operated to provide waterfront access to commercial fishermen, aquaculturists or fishermen's cooperatives.

32 2. Qualified holder. "Qualified holder" or "holder" means a governmental entity authorized to hold an interest in real property or a nonprofit organization organized under state law whose purposes include the permanent protection of working waterfront or the enlargement of working waterfront opportunities for commercial fisheries businesses. A qualified holder may also include a 3rd party meeting the same qualifications met by a nonprofit organization that holds a right of enforcement of the working waterfront covenant, either in addition to or in lieu of the other qualified holders.

42 3. Working waterfront covenant. "Working waterfront covenant" means an agreement in recordable form between the owner of working waterfront real estate and one or more qualified holders that permits a qualified holder to control, either directly or indirectly, the use and sales price of working waterfront real estate for the primary purpose of making and preserving the permanent availability and affordability of that real estate for commercial fisheries businesses.

2 4. Working waterfront real estate. "Working waterfront
4 real estate" or "real estate" means land, legally filled lands,
 piers, wharves and other improvements to lands all adjacent to
 the navigable coastal waters of the State.

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8 **§132. Creation; conveyance; acceptance; duration; filing**

10 1. Working waterfront covenant. Except as otherwise
12 provided in this chapter, a working waterfront covenant may be
 created, conveyed, recorded, assigned, released, modified,
 terminated or otherwise altered or affected in the same manner as
 other real estate covenants created by written instrument.

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16 2. Right or duty. A right or duty in favor of or against a
18 qualified holder may not arise under a working waterfront
 covenant unless it is accepted in writing by the qualified holder.

20 3. Limitation. Except as provided in this chapter, a
22 working waterfront covenant is unlimited in duration unless a
 change of circumstances renders the working waterfront covenant
 no longer in the public interest as determined in an action under
 section 133, subsection 3.

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26 4. Filing. A working waterfront covenant must be recorded
28 in the County Registry of Deeds, and a copy of the covenant must
 be filed with the Executive Department, State Planning Office
 together with a map showing with specificity its location on the
 form or forms that the State Planning Office requires.

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32 5. Mortgagee's interest. A mortgagee's interest in real
34 property in existence at the time that a working waterfront
 covenant is created is not impaired by the working waterfront
 covenant as long as the mortgagee's interest is subordinated to
 the working waterfront covenant.

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38 6. Right to enter land. The instrument creating a working
40 waterfront covenant must provide for the right by the qualified
 holder to enter the real property to ensure compliance.

42 **§133. Judicial actions**

44 1. Owners; qualified holders. An action affecting a
 working waterfront covenant may be brought or intervened in by:

46 A. An owner of an interest in the real property burdened by
 the covenant;

48 B. A qualified holder of the benefit of the working
50 waterfront covenant; or

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C. The Attorney General.

2. Municipality. An action affecting a working waterfront covenant may be intervened in by the municipality in which the real property burdened by the covenant is located.

3. Power of court. The court may enforce a working waterfront covenant by injunction or other proceeding at law or in equity. Acting in accordance with charitable trust principles, the court may modify, terminate or deny equitable enforcement of a working waterfront covenant in an action in which the Attorney General is made a party when the Commissioner of Marine Resources finds that, due to a change in circumstance, the covenant is no longer necessary to advance the public interest in the commercial marine fisheries of the State. If the court modifies, terminates or denies equitable enforcement of a working waterfront covenant, the court may order payment by the landowner of money or other damages to the holder or the State, which shall apply the same in a manner consistent with the purposes of this law as approved by the court.

The fact that a working waterfront property might be used for more valuable economic purposes may not be considered in determining whether a working waterfront covenant is no longer in the public interest.

§134. Scope of working waterfront covenant

A working waterfront covenant must include without limitation at least one of the following terms:

1. Resale price of working waterfront real estate. Limitations on the resale price of working waterfront real estate;

2. Amount of equity appreciation. Limitations on the amount of equity appreciation that a landowner may derive from ownership of working waterfront real estate;

3. Improvements to working waterfront real estate. Limitations on the type, extent, use or dollar value of improvements that may be made to working waterfront real estate;

4. Persons to whom working waterfront real estate may be sold. Consistent with the purposes of this chapter, restrictions on the types of persons or businesses to whom working waterfront real estate may be sold, leased or used as long as such restrictions do not unlawfully discriminate against any person.

2 5. Options to purchase. The grant of rights of first
3 refusal or options to purchase to qualified holders or their
4 assigns, subject to the terms and conditions of the working
5 waterfront covenant;

6 6. Maintenance and insurance of working waterfront real
7 estate. The obligation to maintain, operate and insure working
8 waterfront real estate;

10 7. Construction and materials. The right to restrict or
11 specify types of buildings, structures and materials that may be
12 used in improvements on working waterfront real estate; and

14 8. Acts that may enhance affordability of working
15 waterfront real estate. The right to prohibit, limit or require
16 other acts that may enhance or allow the affordability and
17 availability of working waterfront real estate to commercial
18 marine fisheries operators in the future.

20 **§135. Validity**

22 A working waterfront covenant is valid and enforceable
23 notwithstanding any of the following conditions.

24 1. Not appurtenant to interest in real property. The
25 working waterfront covenant is not appurtenant and does not run
26 with an interest in real property.

28 2. Assignable to another holder. The working waterfront
29 covenant can be or has been assigned to another qualified holder.

32 3. Not recognized at common law. The working waterfront
33 covenant is not of a character traditionally recognized at common
34 law.

36 4. Imposes negative burden. The working waterfront
37 covenant imposes a negative burden.

38 5. Imposes affirmative obligations. The working waterfront
39 covenant imposes affirmative obligations upon the owner of an
40 interest in the burdened property or upon the qualified holder.

42 6. Benefit does not touch or concern real property. The
43 benefit of the working waterfront covenant is held by a qualified
44 holder who has not retained property that would benefit from
45 enforcement of the working waterfront covenant, or the benefit
46 does not touch or concern real property in any other way.

48 7. No privity of estate or contract. There is no privity
49 of estate or privity of contract.

