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STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION



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COMMISSIONER

**TESTIMONY OF**  
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**MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**SPEAKING IN OPPOSITION TO L.D. 1161**  
**AN ACT CONCERNING MARINA-BASED RESTURANTS IN**  
**THE SHORELAND ZONE**

**SPONSORED BY REPRESENTATIVE CEBRA**

**BEFORE THE JOINT STANDING COMMITTEE**  
**ON**  
**ENVIRONMENT AND NATURAL RESOURCES**

**DATE OF HEARING:**

**APRIL 12, 2021**

Senator Brenner, Representative Tucker, and members of the Committee, I am Nick Livesay, Director of the Bureau of Land Resources within the Department of Environmental Protection. I am here today to speak in opposition to L.D. 1161.

As an initial matter, the Department recognizes the appeal of waterfront dining and the importance of restaurants, whether located on a waterbody or in a town center, to Maine's economy. There may be good public policy reasons for allowing restaurants to be located in the shoreland zone without having to comply with water body setbacks and other dimensional requirements. The two key points the Department seeks to make today are:

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1. Whatever the public policy justifications for locating a restaurant within water body setbacks, protection of water quality is not one of them; and
2. If the Committee supports an exemption for restaurants, this bill is not the way to do it.

The advantages of vegetated buffers along water bodies and building setbacks are well known and underly the State's shoreland zoning, so I will focus on the second point.

L.D. 1161 amends the definition of "functionally water-dependent uses" to include marina-based restaurants. The purpose and effect of the amendment is to exempt these restaurants from water body setback requirements. Adding restaurants, even if just those located at a marina, to the definition of functionally water-dependent uses is internally inconsistent. Functionally water dependent uses are "those [1] that require, for their primary purpose, location on submerged lands or that require direct access to, or location in, coastal or inland waters and [2] that cannot be located away from these waters." (38 M.R.S. § 436-A(6).) Restaurants do not require proximity to a water body and can be located away from a water body. This is true of restaurants co-located with marinas. Even restaurants at marinas can develop kitchens, dining area, and parking outside the standard setback.

The result of adding marina-based restaurants to the list of examples of water dependent uses could have implications beyond just allowing restaurants immediately next to or even over the water. The list of examples in the definition is representative of the types of water-dependent uses; it is not an exclusive list. Other businesses similarly operated at a marina would have a legitimate claim, under the proposed definition, that they are no different than a restaurant in their level of need for water access or ability to locate elsewhere. Co-location with a marina would be the defining characteristic.

L.D. 1161 also adds a definition of "marina-based restaurant." This definition cross references the definition for "restaurant" in the statutory sections governing liquor licensing and establishes that the restaurant must be an "accessory use" to the primary

use of the premises as a marina. Similar to the proposed definition of water-dependent use, the definition of marina-based restaurant contains internal tension. The term “accessory structure or use” is defined in Department rule implementing the Mandatory Shoreland Zoning Act and means “a use or structure which is incidental and subordinate to the principal use or structure.” (Ch. 1000, § 17.) This is a common concept in municipal zoning. Where an establishment is regularly used for providing food to the public with kitchen and dining room equipment, as required to qualify as a restaurant, this use is no longer incidental or subordinate to another use on the property. An ice cream stand serving marina customers or other boaters could qualify as accessory, but a full restaurant catering to the general public is inconsistent with the traditional understanding of what constitutes an accessory use. A full restaurant is better characterized as a separate, standalone use.

Our understanding is that in pulling the concept of accessory use into the definition of marina-based restaurant, L.D. 1161 is attempting to enable the opening of restaurants at marinas on smaller lots with insufficient square footage to support two separate uses.

In conclusion, if the Committee is interested in allowing restaurants within waterbody setbacks or on lots otherwise not large enough to support two uses, the Department recommends this be done through a new, restaurant-specific section and without the changes to definitions proposed in the bill. We urge you to vote ought not to pass.

Thank you for the opportunity to provide testimony. I am available to answer questions of the Committee, both now and at work session.