MEMORANDUM

DATE: July 14, 2010

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Kristen Grant, Maine Sea Grant
Working Waterfront Tax Policy Grant Advisory Committee Members

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RE: Tax-Based Opportunities and Challenges for Working Waterfront Protection

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I. PROJECT OBJECTIVES

The goals of the overall project are to identify and evaluate impediments and opportunities related to working waterfront preservation in state and federal tax law, with a particular emphasis on assessing the viability of a proposed working waterfront conservancy. The results of this research and analysis will be "interpreted" for dissemination in various outreach forums, including the *Accessing the Maine Coast* website, and may be presented at the Waterways and Waterfronts Symposium in Portland, Maine in September 2010. If a working waterfront conservancy is deemed viable, its establishment would constitute the ultimate phase of the project.

The purpose of this memo is to make a preliminary survey and brief examination of notable impediments and opportunities in state and federal tax law as they might likely affect working waterfront protection efforts, as well as an initial assessment regarding the feasibility of a working waterfront conservancy. More in-depth analysis and decision-making, as well as any resulting initiatives, remain for later stages of the project.

II. QUESTIONS PRESENTED

1. What existing or potential state or federal tax provisions could lend themselves to the further protection and promotion of working waterfront?

2. What impediments to working waterfront preservation exist in state and federal tax law?

3. What is the degree of viability of a "Working Waterfront Conservancy," and what tax considerations would need to be taken into account in the formation of such a model?

III. BRIEF ANSWERS

1. A number and variety of potential tax tools exist at both state and federal levels, which, properly applied and coordinated, would very likely contribute to the preservation of working waterfront. Among the more promising variations are the proposed working waterfront conservancy model and the establishment of a land bank funded by real estate transfer taxes, or dedicated sales and excise taxes.

2. The obvious tax-related impediments to protection of working waterfront are those which increase the costs of sustaining commercial water-dependent uses on the waterfront: ever-increasing personal and business income taxes, and property taxes that rise with the incoming tide of people and development. Specifically, property taxes across the country are typically levied based on market value, which can pose a threat to less lucrative marine industries located on high-demand waterfront property. Logically, then, tax-based efforts to improve working waterfront preservation will aim to reduce the income and property tax burdens for water-dependent enterprises. More subtly, though, some of these tax tools, if not optimally implemented and coordinated with other tax tools, may become impediments to the full achievement of their own intended effects. For example, an overlay of current use taxation, a working waterfront covenant, a limited working waterfront zone, and tax increment financing on a single parcel or area of waterfront property, may lead one tactic to diminish, or even nullify, the benefits of the other.[1]

3. Although the model of a working waterfront conservancy appears theoretically feasible, its success would likely depend upon careful synchronization of amendments to both state and federal tax law.

IV. DISCUSSION

A. Defining Working Waterfront

First and foremost in any discussion of working waterfront is the ongoing struggle to define the term with precision and widespread political acceptance. Ever since the Coastal Zone Management Act of 1972 ("CZMA") first suggested that states prioritize planning to protect water-dependent uses, consensus as to exactly which waterfront uses ought to be protected has eluded federal, state and local authorities.[2] Many authorities

[1] At least one study has identified the succession transfer tax, or estate tax, as another cost borne with difficulty by watermen and women, whose incomes have diminished with each succeeding generation. *See* North Carolina Sea Grant Waterfront Access Study Committee: Final Report, April 13, 2007, ("NC Sea Grant Study"), http://www.ncseagrant.org/waterfronts. A thorough review of estate tax issues is beyond the scope of this memorandum.

[2] *See* 16 U.S.C. §§ 1451-1465 (2000).

recognize, often without agreement on the finer points, that the concept of working waterfronts encompasses uses that are water-dependent, water-related, water-enhanced, and non-water-dependent.[3] In other words, the fishing boat captain must have easy access to a boat (water-dependent), but she also needs to have diesel fuel, ice, and a distribution facility close at hand (water-related). The marine hardware dealer, the rigger's shop, the nautical museum, and the seafood restaurant may not require water access, but their businesses are indisputably enhanced by being close to the water.[4]

Whether enshrined in constitution, statute or agency guideline, these definitions range from a narrow fisheries-only categorization to more open-ended definitions that include boatyards, marinas, and even resort hotels.[5] Indeed, members of Congress from

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[3] *See* University of Florida Levin College of Law Conservation Clinic, Water-Dependent Use Definitions: A Tool to Protect and Preserve Recreational and Commercial Working Waterfronts, Oct. 30, 2006 ("WDU Definitions"), www.law.ufl.edu/conservation/waterways/waterfronts/.

[4] To complicate issues even more, waterfront revitalization experts Ann Breen and Dick Rigby note that other traditional uses on the waterfront (e.g., a bar for the watermen and women) might be equally indispensable to the overall character of the waterfront but not necessarily included in a statutory "water-dependent" definition (Interview of Ann Breen and Dick Rigby in National Oceanic and Atmospheric Administration, Preserving Waterfronts for Water Dependent Uses ("NOAA on Preserving Waterfronts") 1998, oceanservice.noaa.gov/websites/retiredsites/sotc_pdf/WDU.PDF.

[5] *Compare* Maine's statutory and regulatory authorities *with* Florida's Constitution and statute as amended in 2006. Under Maine's current use taxation policy, "working waterfront land means a parcel of land, or a portion thereof, abutting water to the head of tide or land located in the intertidal zone that is used primarily or used predominantly to provide access to or support the conduct of commercial fishing activities." 36 M.R.S. § 1132. The statute further describes the phrase "support the conduct of commercial fishing activities" and specifies that "predominantly" means more than 90% of the land is used for commercial fishing activity, while "primarily" means more than 50%, and the rate of reduction on the tax valuation varies accordingly. Though still tied to fisheries, the broader definition adopted by Maine's Working Waterfront Access Pilot Program encompasses properties fitting one or more of the following criteria (Maine's Department of Marine Resources' Working Waterfront Access Pilot Program Overview, 2010, http://www.wwapp.org/overview.cfm):

1. Active working waterfront which is strategically significant to the local, regional and state fisheries related economy;
2. Currently located and developed to fully support commercial fishing activities; providing key supports such as all tide access, fuel, bait, sales and/or adequate parking;
3. Under current and emerging threat by development and changing population dynamics of conversion to uses incompatible with commercial fishing activities;
4. In a community with a clear desire to maintain and support their commercial fishing enterprises as evidenced by zoning, comprehensive plans, etc., and;
5. A critical part of the local fishing infrastructure and provides key access for the area

By contrast, Maine's Department of Environmental Protection more inclusively refers to "functionally water-dependent uses," defined as follows: (ME DEP 06-096 CMR Ch. 1000):

> Functionally water-dependent uses - those uses that require, for their primary purpose, location on submerged lands or that require direct access to, or location in, coastal or inland waters and that can not be located away from these waters. The uses include, but are not limited to, commercial and recreational fishing and boating facilities, excluding recreational boat storage buildings, finfish and shellfish processing, fish storage and retail

the same state can be found espousing incompatible definitions of working waterfront, as can county officials within the same state.[6] Setting aside the aim of uniformity, after a comprehensive survey of working waterfront definitions, researchers at the University of Florida Levin College of Law suggest that the most effective working waterfront definitions include the following: 1) a statement of purpose, 2) a locally or regionally tailored description of place, 3) examples of included and excluded uses, and 4) provisions addressing water-related and water-enhanced uses as well as water-dependent uses.[7] Though it is beyond the scope of this memo to advocate any particular definition of working waterfront, such considerations will be crucial in obtaining optimal effects in any coordination of tax tools.

> and wholesale fish marketing facilities, waterfront dock and port facilities, shipyards and boat building facilities, marinas, navigation aids, basins and channels, retaining walls, industrial uses dependent upon water-borne transportation or requiring large volumes of cooling or processing water that can not reasonably be located or operated at an inland site, and uses that primarily provide general public access to coastal or inland waters.

Still more broadly, Florida describes and protects "recreational and commercial working waterfront," which includes boatyards, marinas, and, since 2006, resort hotels in its definition of working waterfront. *See* FLA. CONST. art. VII (amended 2008); FLA. STAT. § 342.201 (2009). According to Florida's Working Waterfront Protection Act 2009 (FLA. STAT. § 342.07):

> [T]he term "recreational and commercial working waterfront" means a parcel or parcels of real property that provide access for water-dependent commercial activities, including hotels and motels . . . or provide access for the public to the navigable waters of the state. Recreational and commercial working waterfronts require direct access to or a location on, over, or adjacent to a navigable body of water. The term includes water-dependent facilities that are open to the public and offer public access by vessels to the waters of the state or that are support facilities for recreational, commercial, research, or governmental vessels. These facilities include public lodging establishments, docks, wharfs, lifts, wet and dry marinas, boat ramps, boat hauling and repair facilities, commercial fishing facilities, boat construction facilities, and other support structures over the water.

[6] *Compare* the Working Waterfront Preservation Act of 2005, introduced by Senator Susan Collins, *with* the Keep America's Waterfront Working Act of 2009, introduced by Representative Pingree. According to Collins's bill: "A working waterfront area is defined as 'land that is used for or that supports commercial fishing or the aquaculture industry.'" S. 1723, 109th Cong. (Sept. 19, 2005); *see also* Josh Clemons, Stephanie Showalter, & Jason Savarese, National Sea Grant Law Center, Working Waterfronts in Alabama and Mississippi, April 2006, masglp.olemiss.edu/WWF.pdf. This definition did not change when Senator Collins reintroduced a modified version of the bill in 2009. S. 533, 111th Cong. (March 5, 2009). Representative Pingree's bill defines water-dependent commercial activities to include "commercial fishing, recreational fishing, tourism, aquaculture, boatbuilding, transportation," as well as, somewhat ambiguously, "many other water-dependent businesses." H.R. 2548, 111th Cong. (May 21, 2009). In the same section, the bill adds a further definition of working waterfront: "real property (including support structures over water and other facilities) that provides access to coastal waters to persons engaged in commercial fishing, recreational fishing business, boatbuilding, aquaculture, or other water-dependent, coastal-related business and is used for, or that supports, commercial fishing, recreational fishing, boatbuilding, aquaculture, or other water-dependent coastal-related business." H.R. 2548, 111th Cong. (May 21, 2009); *see also* WDU Definitions *at* 9-10 (describing varying definitions in four different Florida counties).

[7] *See* WDU Definitions *at* 22-27.

B. Why Protect Working Waterfront?

For decades, coastal state policymakers have grown progressively more concerned over the disappearance of large percentages of water-dependent fisheries and other marine trades, increasingly replaced at the shoreline by condominiums, "dockominiums," and other development more competitive in today's economy than more traditional functionally water dependent uses.[8] Maine, for example, has 149 coastal towns and over 5,300 miles of coastline, but only 20 miles of the 5,300-mile coastline are devoted to commercial fishing today.[9]

This trend apparently results from mounting pressures related to population growth and migration, increasing residential and recreational demand and development on the coast, and diminishing fishery stocks. The past thirty years have marked an unprecedented migration nationwide to the coast, such that more than half of the American population now live in the country's coastal counties.[10] At a basic level, many of these newcomers simply are not accustomed to the sights, smells, and sounds that can come with a thriving working waterfront, and complain about the "nuisance" of working waterfront.[11] In addition, with increasing population has come higher demand for living space, higher land values, and thus, with "highest and best use" tax policy, higher property taxes near the water. Meanwhile, fisheries stocks have crashed one after the other, and the average fisherman's income has dwindled. By extension, smaller, shorefront boatshops and baitshops have similarly suffered.[12]

Meanwhile, it is well established that traditional working waterfront industries play a vital role in the overall economy of coastal states, contributing to diverse opportunities for employment and skills training, but also to coastal tourism.[13] Fishing, in particular, supports a wide array of associated businesses and trades, all dependent to a greater or lesser extent on access or proximity to the water. These water-dependent uses,

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[8] *See, e.g.* Charles S. Colgan, Maine's Working Waterfront Coalition, The Contributions of Working Waterfront to the Maine Economy ("Colgan Study") February 2004.
[9] *Id.*
[10] National Ocean Service, *Ocean Facts*, 2007, http://oceanservice.noaa.gov/facts/population.html.
[11] MARINE LAW INST., NORTH ATLANTIC WATER DEPENDENT USE STUDY: MANAGING THE SHORELINE FOR WATER DEPENDENT USES: A HANDBOOK OF LEGAL TOOLS ("MLI HANDBOOK") December 1988.
[12] *Id*.
[13] *See generally* Colgan Study.

together with their attendant multiplier effects, dwarf the economic value of shoreside residential development by any measure.[14]

The concerns of planning experts, legislators, and voters across the nation have led to a number of responses. Recognizing the severity of the situation, coalitions have been built, task forces have been convened, and studies have been performed in most coastal states.[15] Popular and legislative awareness of the issues has grown in kind. In Maine, for example, just a few years after a similar initiative failed at the polls, seventy-two percent (72%) of the state's voters approved an amendment to the state constitution that would allow for a preferential tax valuation on certain working waterfronts. The state's legislature subsequently enacted a statutory scheme to provide for current use valuation of certain working waterfront, declaring that "[I]t is in the public interest to encourage the preservation of working waterfront land and to prevent the conversion of working waterfront land to other uses as the result of economic pressures."[16]

C. The Legal "Toolbox" for Protecting Working Waterfront

1. *Organizing Principles*

Initiatives in these coastal states across the country have sought to find, develop, and implement a diversified "toolbox" of legal strategies to help preserve their threatened water-dependent industries. According to the taxonomy of one scholar, "proactive tools" include direct revitalization efforts, partnerships, long-term planning, zoning, and landholding; "supportive tools" include various incentives, outlays of capital, community outreach efforts, and ongoing technical assistance to help waterfront businesses stay competitive; and "reactive tools" include impact reviews of specific projects, as well as studies of larger trends.[17] While some of these tools rely primarily on the authority of the state's police power to secure and promote general health, safety, and welfare through regulation, nearly all of these tools also involve tax considerations.

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[14] *See* Colgan Study *at* 6-7 (calculating economic contributions of fishing, processing, boatbuilding and marinas to amount to almost twice those of waterfront residential construction).
[15] *See, e.g.* Maine's Working Waterfront Coalition *and* similar groups in California, Florida, Maryland, Michigan, New York, North Carolina, Oregon, South Carolina, and Washington.
[16] 36 M.R.S. § 1131.
[17] *See generally* J. W. Good and R. F. Goodwin, Oregon State University Extension Service, Waterfront Revitalization for Small Cities ("Good-Goodwin Manual") 1990; Laurel Kellner, A Toolbox for Sustaining Working Waterfronts: Assessing Applications in Newport, Oregon ("Kellner Study") August 2009.

The tax-based tools, in turn, can be organized in a variety of ways. Some are rooted in the federal tax code, others in state or municipal tax provisions, but many require some degree of coordination between multiple taxation authorities. It might also be said that, like the uses on the working waterfront, some of the strategies discussed below are tax-dependent, while others are only tax-related or tax-enhanced. At a basic level, though, these tax tools are designed to accomplish one of a very few goals: 1) reduce costs for certain, more desired uses; 2) increase costs of certain, less desired uses; or 3) raise revenues to invest in protection and promotion of the desired uses.

2. *The Public Investment Model: Proposed Federal Legislation*

One common first reaction to the problem of the vanishing working waterfront is to purchase it. To that end, multiple measures have been presented to the United States Congress in recent years. Past bills have included the Working Waterfront Preservation Act of 2005 proposed by Senator Collins and the Keep America's Waterfront Working Act of 2009 introduced by Representative Pingree.[18] Each of these articulated the definition and significance of working waterfront somewhat differently, and each proposed to leverage different funding mechanisms. For example, Senator Collins' original bill sought to amend the Magnuson-Stevens Fisheries Act to fund grants directed only at commercial fisheries and aquaculture. Her subsequent bill, along with Representative Pingree's original bill, proposed to amend the Coastal Zone Management Act, while including boatbuilding and tourism in the definition of "water-dependent commercial activities." Representative Pingree's most recent related bill, introduced in 2010, offers no definition of working waterfront but proposes to amend a number of existing statutes to fund research and general coastal restoration.[19] To the extent that they propose to channel a fixed amount of appropriations for a fixed period through a government agency without specifying a sustainable source for the funding, these bills reflect a common first response to the issue of the vanishing working waterfront, that is, to use public expenditures to purchase and hold the waterfront. Ultimately, these types of public expenditures are financed by tax dollars, whether from direct appropriation of

[18] *Compare* S. 1723, 109th Cong. (Sept. 19, 2005) *with* H. R. 2548, 111th Cong. (May 21, 2009).
[19] *See* The Coastal Jobs Creation Act of 2010, H.R. 4914, 111th Cong. (March 23, 2010).

general treasury funds, as in the proposed federal legislation, or through government repayment of a bond issue over several years.

3. Acquisition of Development Rights and Land Banking

In another common strategy, development rights are severed from other rights of ownership to make them eligible for purchase or transfer.[20] The purchase of development rights (PDR), involves payment by a private (land trust or conservancy) or public (municipal or county commission) entity in exchange for an easement or covenant that limits future development on the property in question. Such covenants usually have a minimum required effective lifetime of twenty years, and are often designed to be permanent, reversible only by a court of law.[21] Operating from the same premise of severable ownership rights, the transfer of development rights (TDR) allows for a municipality, through regulation, to restrict development on one piece of property by offering development opportunities of equal value on another property in the town.[22]

Land banking, another method of land conservation, on the other hand, typically involves the outright purchase and holding of entire parcels of land. Privately financed and operated nonprofit land trusts have long engaged in both PDR techniques and land banking.[23] But states and municipalities have also entered the land banking business to protect, amongst others, farmlands and coastal lands.[24] The most prominent and widespread coastal programs have been established in southern New England, based on a model begun in Nantucket. The Nantucket Islands Land Bank, as well as its progeny in Martha's Vineyard and elsewhere, secures legislative authorization for the municipality or county to assess a two percent (2%) real estate transfer tax on all purchases of real

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[20] *See generally* Richard J. Roddewig and Cheryl A. Ingraham, American Planning Association, Transferable Development Rights Programs, May 1987; *see also* Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) (upholding severability and transferability of development rights so long as investment backed expectations not unreasonably infringed).

[21] *See, e.g.* UNIFORM CONSERVATION EASEMENT ACT § 1 (2007); 33 M.R.S. §§ 476 et seq; *see also* ELIZABETH BYERS & KARIN MARCHETTI PONTE, LAND TRUST ALLIANCE, THE CONSERVATION EASEMENT HANDBOOK ("CONSERVATION EASEMENT HANDBOOK") (2d ed. 2005).

[22] The authority for TDRs flows from public policy and, as a transfer, implicates no significant tax considerations other than those related to the differential in assessable values of the lands in question, a factor usually dispelled by current use taxation or restrictive zoning.

[23] These nonprofit land trusts depend for their existence and success on provisions in the state and federal tax codes, a dependence that will be examined in more detail later.

[24] *See* American Farmland Trust, http://www.farmland.org/; Maine Farmland Trust, http://www.mainefarmlandtrust.org/; Nantucket Islands Land Bank, http://www.nantucketlandbank.org/.

estate within the jurisdiction.[25] These monies are collected and administered by an elected body known as the Land Bank Commission, which then uses them to purchase coastal lands on the open real estate market. Once purchased, these lands can be held in perpetuity; assigned to limited, sanctioned public uses; or resold with newly applied conservation easements. Washington, Florida, New York, and North Carolina have established land-banking programs to help preserve coastal properties, and Little Compton, Rhode Island applies a similar model to preserve farmland.[26] Maine, too, has adopted a variation on land banking with its Land for Maine's Future program, but with two notable distinctions.[27]

4. *The Working Waterfront Access Pilot Program*

In 2005, as part of a larger $12 million bond package for the Land for Maine's Future Fund, Maine voters approved the dedication of $2 million to finance the preservation of working waterfront through the Working Waterfront Access Pilot Program ("WWAPP").[28] The WWAPP, administered by Coastal Enterprises, Inc. for the Department of Marine Resources and Land for Maine's Future, applied the initial $2 million to purchase statutorily enabled covenants on qualifying properties in order to limit use of the properties to working waterfront uses, essentially in perpetuity.[29] The program's initial success led to approval of another $3 million bond in 2007, then yet another $1.75 million approved by referendum in November of 2010.[30] Thus far, roughly

[25] Since its inception, the Nantucket Islands Land Bank has collected and invested almost $200 million dollars in transfer fees, and it now owns over 2,500 acres of land and protects another 179 acres with conservations easements. Nantucket Islands Land Bank Annual Report, 2009, http://www.nantucketlandbank.org/AboutHow.php.
[26] MLI HANDBOOK at 171.
[27] *See* Land for Maine's Future, http://www.maine.gov/spo/lmf/.
[28] Press Release, Maine State Planning Office, Working Waterfront Access Pilot Program Created, November 21, 2005, http://www.wwapp.org/pressreleases.cfm.
[29] Maine's Department of Resources Working Waterfront Access Pilot Program Overview, http://www.wwapp.org/overview.cfm; *see also* 33 M.R.S. §§ 131-136 (enabling statute for working waterfront covenants).
[30] Maine's Department of Resources Working Waterfront Access Pilot Process & Timeline, http://www.wwapp.org/processtimeline.cfm (last visited July 7, 2010); telephone interview with Jim Connors, Maine State Planning Office; Maine Department of the Secretary of State, Bureau of Corporations, Elections, and Commissions, Referendum Election Tabulations: November 2, 2010, http://www.maine.gov/sos/cec/elec/2010/referendum2010.html (last visited April 25, 2011); Maine Coast Heritage Trust, *Voters Approve Question 3*, http://www.mcht.org/news/2010/09/lmf_bond_on_november_ballot.shtml (last visited April 25, 2011).

twenty properties have been reserved exclusively for working waterfront use through this program.[31]

There are two noteworthy distinctions between the model in Maine and that in Nantucket. The first is that Maine's WWAPP operates primarily to secure restrictive covenants to limit the use and development of applicable lands, while Nantucket's land bank more typically holds outright title in fee simple to its lands.[32] The second crucial difference is the source of funding, which is also where tax-based strategies enter into consideration. The funding for the Land for Maine's Future Program requires the periodic issuance of bonds, each in turn requiring approval by state voters, whereas the Nantucket land bank is funded on an ongoing basis by the real estate transfer tax revenues.[33]

5. *Real Estate Transfer Tax*

Whether used to purchase development rights, or title in fee simple on the open market, the real estate transfer tax could serve as vehicle to secure funding for the long-term future. The real estate transfer tax is a tax or fee levied by local government (pursuant to state enabling statute) upon the sale or transfer of real property.[34] The most common transfer tax is split evenly by both buyer and seller, and the resulting revenues can be applied to a variety of uses.[35] As seen above, a dedicated real estate transfer tax of 2% of the purchase price has been successfully used to fund land banks, administered by elected officials to purchase waterfront lands on the open market in Massachusetts' Cape Cod region, as well as in Washington's San Juan Islands.[36]

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[31] Maine Department of Marine Resources, Working Waterfront Access Pilot Projects Completed, http://www.wwapp.org/projects.cfm.
[32] *Compare* Maine's Department of Resources Working Waterfront Access Pilot Program Overview, *supra* note 28, *with* Nantucket Islands Land Bank, http://www.nantucketlandbank.org/.
[33] *Compare* Land for Maine's Future, *supra* note 26, *with* Nantucket Islands Land Bank, *supra* note 31. The model in Little Compton, Rhode Island, moreover, may demonstrate the viability of such a funding mechanism even in a less affluent region. MLI HANDBOOK *at* 171.
[34] MLI HANDBOOK *at* 170.
[35] *Id*.
[36] *See* Nantucket Islands Land Bank, Other Land Banks, http://www.nantucketlandbank.org/AboutOtherLandBanks.php.

Such a real estate transfer tax, though at a substantially lower rate, has been in place in Maine since at least 1975.[37] The state legislature has fixed the transfer tax rate on all but a few exempted real estate transactions at $2.20 for every $500 (or less than one-half of one percent) of the value of the real estate in question.[38] Half of the amount is to be paid by the purchaser, the other half by the seller.[39] Of the revenues collected, ninety percent (90%) is to be forwarded to the state treasurer, while the remaining ten percent (10%) goes to cover registry costs at the county level.[40] Typically, those funds collected by the state Treasurer are to go to the General Fund, but, notably for the purposes of this memo, the legislature has mandated for coming years that certain percentages of these revenues be dedicated to the support of affordable housing initiatives.[41]

It follows that the legislature could similarly dedicate either a fixed amount or a percentage of real estate transfer tax revenues to support working waterfront protection (whether to support repayment of a bond issue, or to directly fund the purchase of working waterfront land or development rights). If the success of other New England land banks is any indicator, the transfer tax rate could presumably be increased without significant negative impact, and increased revenues could be dedicated to local or regional land banks for the purchase and protection of working waterfront. As a caveat, however, the spread of such land banking programs in Massachusetts eventually met with strong resistance from real estate developers.[42] Although the authority to impose a local transfer tax was initially sought by towns and approved by the state legislature, development interests soon challenged that grant of authority.[43] In the end, the question

[37] *See* 36 M.R.S. 4641-A, -B (2009).
[38] 36 M.R.S. 4641-A.
[39] *Id*.
[40] 36 M.R.S. 4641-B.
[41] *Id*.
[42] The Trust for Public Land, Real Estate Transfer Taxes, 2010, http://www.tpl.org/tier3_cdl.cfm?content_item_id=1060&folder_id=825. This need not always be the case, however; recognizing that preservation of the island's natural beauty was crucial to maintaining land values, realtors in Block Island, Rhode Island supported their town's transfer tax. *Id*.
[43] *Id*.

was ultimately put back to town voters and rejected in every town except for those on Nantucket and Martha's Vineyard.[44]

With the lessons of the Massachusetts land bank experience in mind, Maine could likely establish a similar land bank model, oriented towards the protection of working waterfront and funded by a portion of a moderate real estate transfer tax. Though authorization for such a model could be sought and applied at municipal, county, or state levels, securing both municipal and state approval seems optimal, given the prior history in Massachusetts.[45] Depending on the state, further exploration of the impacts stemming from traditions of "home rule" may be advisable.[46] According to the Federation of Tax Administrators, real estate transfer taxes vary from 0.01% in Colorado to 4% in Pennsylvania; finding the appropriate amount for any particular state or municipality would likely require a weighing of the funding needs and market impact.

6. Dedicated Excise Tax Funds

An excise is "a tax upon manufacture, sale or for a business license or charter and is to be distinguished from a tax on real property, income or estates."[47] Excise taxes may be levied by federal, state, or local governments. The most common targets of excise taxes are items like alcohol, tobacco, and gasoline, but they can be applied elsewhere as well. In one noteworthy example, a federal law known as the Dingell-Johnson Act, or the Federal Aid in Sport Fish Restoration Act, as amended by the Wallop-Breaux Act in 1984, provides for the direction of funds derived from excise taxes on rods and reels and

[44] *Id*. The town of Marblehead, Massachusetts also reportedly planned to establish a Marblehead Unique Seaport Trust in the mid-1980s, but the plan, though approved by town selectmen, failed to gain the approval of the state legislature. MLI HANDBOOK *at* 170; Telephone Interview with Rebecca Curran, Marblehead Town Planner, June 25, 2010.

[45] Indeed, insofar as it leaves open for each town to determine the precise funding mechanism, Maine's Voluntary Municipal Farm Support Program may very well lead to similar land banks across the state dedicated to farmland preservation.

[46] "Home rule is a state legislative provision or action allocating a measure of autonomy to a local government." (BLACK'S LAW DICTIONARY ["BLACK'S] 3d ed. 1996). In other words, in a "home rule state," powers otherwise in the province of the state (*e.g.*, zoning) may be delegated to municipalities. *See* University of South Carolina College of Arts and Sciences, Municipal Government Home Rule, http://www.cas.sc.edu/poli/civiced/Reference%20Materials/US_home_rule.htm. While the majority of states are, to some degree, home rule states, Massachusetts is not. *Id*. In some states, the scope of delegation is limited to fiscal matters, or police powers. *Id*.

[47] BLACK'S.

sport-fishing boats to the federal Secretary of the Interior, who is required to channel the funds to qualifying state programs oriented towards the restorations of fisheries.[48] Likewise, federal legislation known as the Pittman-Robertson Wildlife Restoration Act calls for state and federal collaboration to direct funds from excise taxes on guns and bullets and other hunting gear towards state-sponsored wildlife restoration programs.[49] In this manner, funds for a working waterfront conservation land bank at either a federal or state level might be raised through related excise taxes.

7. *Maine's Voluntary Municipal Farm Support Program*

In 2007, the Maine state legislature directed the Department of Agriculture to engage in substantive rulemaking to establish a Voluntary Municipal Farm Support Program ("VMFSP" or "the Program") designed, as its name would indicate, to achieve the legislative end of protecting more farmland in the state from increasing development pressures and tax burdens.[50] The resulting rule was approved by the legislature and became effective in March 2010.[51] Under the VMFSP, municipalities are empowered, should they so choose, to arrange for a funding mechanism that would cover all or part of the property tax costs of qualifying farmland in exchange for an agricultural conservation easement on that land.[52] Interested municipalities are required to develop the qualifying criteria for applicants, the process for application and approval, the mechanisms for property tax payment or deduction, and a model agricultural conservation easement.[53] Though the enabling statute has been enacted too recently to know what effect it will have, it would appear possible for towns to implement fee-based funding mechanisms akin to those described above in order to cover the costs of any tax relief accorded to qualified farmland owners. If the farm support program were to prove successful, such a combination of statewide statute enabling municipally designed tax support may hold promise for working waterfront protection efforts as well.

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[48] *See* 16 U.S.C. §§ 777-7771.
[49] 16 U.S.C. §§ 669-669i; *see also* 26 U.S.C. §§ 4161(b), 4181 (tax on firearms, ammunition, etc. to fund wildlife restoration).
[50] 7 M.R.S. §§ 60, 60-A (2009).
[51] L.D. 1812, 123rd Legis. (March 31, 2010).
[52] Me. Dept. of Agric. 01-001 CMR Ch. 37.
[53] *Id.*

8. *Planning and Zoning*

Another common strategy to protect water-dependent uses involves comprehensive planning and zoning of the waterfront, which have been done at every level of government, from the federal Special Area Management Plans featured in the Coastal Zone Management Act to state-sponsored Designated Port Areas in Massachusetts to Annapolis' Maritime Zoning Districts.[54] Most waterfront communities begin by mapping and taking an inventory of their waterfront industries in order to make comparisons with the past and to track any ongoing trends.[55] States and municipalities alike typically delineate certain districts of waterfront, which are subject to regulations restricting development to water-dependent uses. In addition, though, these district-based statutes, regulations, and ordinances often incorporate a variety of tax incentives designed to reduce costs to maritime industries, increase costs for non-water-dependent uses, and encourage capital investment in working waterfront enterprises.[56] Districts like those described can be defined at any level of government. Once those maritime districts are drawn, any number of tax tools, including federal and state income tax provisions, can be used to spur development in a certain business or industry, or geographical zone.[57]

9. Income Tax Incentives

Similarly, federal authorities have long used income tax incentives, often in the form of exemptions, credits, or deductions, to promote a given public policy. In 1913, the 16th amendment to the United States Constitution authorized the collection of federal income taxes, and most states followed suit, imposing their own income taxes, though at a lesser rate.[58] The primary purpose of the income tax is to raise revenues to fund government services, but the corollary authority to grant exemptions, deductions, and credits, and thereby influence policy, has also gained increasing significance and use as a

[54] *See, e.g.* 16 U.S.C. §§ 1451-1465 (The Coastal Zone Management Act, 2000), MASS. GEN. LAWS Ch. 91.
[55] *See* Good-Goodwin Manual; Kellner Study.
[56] *See, e.g.* Maine's Pine Tree Development Zones, *infra*, 30-A M.R.S. §§ 5250-H – 5250-P; Mass. Gen. Laws Ch. 91, *infra*.
[57] *See, e.g.* 26 U.S.C. § 45 (providing an income tax credit to producers of renewable energy); 26 U.S.C. § 1400N (enacted in the aftermath of Hurricane Katrina to spur redevelopment in the Gulf of Mexico coastal zone).
[58] U.S. CONST. art. XVI; BLACK'S; Accessing the Maine Coast, Glossary, 2009, http://www.accessingthemainecoast.com/coastal_access_toolkit/glossary_i_p.shtml.

tool for policy promotion. A tax exemption waives the obligation of certain defined individuals and entities to pay an income tax.[59] A tax credit reduces a taxpayer's total overall tax dollar-for-dollar, whereas a deduction only reduces the above-the-line taxable amount and thus only a percentage of each tax dollar.[60] The tax exemption therefore has the greatest impact on costs to the taxpayer, followed by the credit and the deduction. As such, the credit has greater impact than the deduction in promoting a particular legislative preference but is also used more selectively.[61]

For example, the federal government has codified legislative support for historic rehabilitation, brownfields redevelopment, and alternative energy production and use by enacting pertinent provisions in the Internal Revenue Code ("IRC" or "Code") that benefit both individuals and businesses, producers and purchasers.[62] Since 1997, for instance, Section 198 of the Code has provided for a *deduction* from reported income of the rehabilitation costs of a historic property, or of developer's costs for brownfields clean-up.[63] The IRC also provides specific credits, to be deducted from the actual income tax to be paid, for investment costs in pellet stoves, hybrid cars, and home energy efficiency improvements, to name just a few.[64] Similar incentives may also be applied at the state level; however, because state tax burdens are generally lighter, these tend to have somewhat less influence on public behavior.

At the state level, to take one example, Maine's Pine Tree Development Zone enabling legislation allows certain qualified businesses in certain areas specified deductions on reported business income, as well as a reduced payroll tax.[65] In another Maine example designed to attract venture capital from outside the state to spur small businesses within the state, up to sixty percent (60%) of outside investment dollars are

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[59] BLACK'S.
[60] *Id*.
[61] Because a tax exemption wholly eliminates a taxpayer's obligation to pay tax, and thus has a greater impact on tax revenues, it can be very difficult to garner public or legislative support for exemptions.
[62] *See* 26 U.S.C. §§ 45-48; 26 U.S.C. § 198(a).
[63] 26 U.S.C. §§ 47, 198(a). In general, "[t]he term 'brownfield site' means real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." 42 U.S.C. § 9601.
[64] *See* 26 U.S.C. §§ 45, 48.
[65] *See* 30-A M.R.S. §§ 5245 et seq. (Pine Tree Development Zone Enabling Legislation); *see also* 36 M.R.S. § 1760 (Sales and Use Tax in Pine Tree Development Zones); 36 M.R.S. § 2529 (Pine Tree Development Zone Insurance Business Income Tax Credit); 36 M.R.S. § 5215-W (Pine Tree Development Zone Income Tax Credit).

deductible as credits if certain conditions are met.[66] Under the Maine Seed Capital Tax Credit, in order for the deduction to be applied, the Finance Authority of Maine must certify the investment, based on a number of criteria, including the nature of the business.[67]

The income tax incentives described here represent a small fraction of the large number and wide variety of income tax credits and deductions that exist at both the state and federal levels. While no tax provision promoting working waterfront has been located, such tax credits or deductions could be enacted at either the state or federal level—or both—by following the models of provisions like those described above. Federal incentives might be more narrowly tailored with regard to what activities merit the credit in order to more evenly benefit all coastal states. State incentives, on the other hand, could be more broadly tailored to suit the specific needs of each state. For example, a hypothetical Maine Working Waterfront Tax Credit could provide a credit against Maine income taxes for investment in working waterfront industries—as defined under Maine law—to include fishing and related industries. By contrast, a hypothetical Florida Working Waterfront Tax Credit might include a broader range of industries—such as hotels—as befits that economy and the will of the Florida people.[68] It goes without saying that application of both state and federal credits in coordinated combination would go the farthest towards alleviating the tax burden on water-dependent uses.

10. Tax Increment Financing[69]

Large municipal projects, as well as large private development projects, are often funded today with the help of tax increment financing (TIF), which may be encouraged in

[66] 36 M.R.S. § 5215 *et seq*.
[67] *Id*.
[68] Because the compromise process required to achieve federal consensus would probably dilute the effect of a federal tax credit somewhat, well-tailored state tax credits might have as much of an impact, even though state taxes typically represent a smaller fraction of overall tax costs to the working waterfront business.
[69] The section on tax increment financing draws on the following sources: 30-A M.R.S. § 5221 *et seq.*; Maine Department of Economic and Community Development, Municipal Tax Increment Financing, March 8, 2010, www.mainebiz.org/business_assistance/doc/tif_manual_050105.doc; Interview with Shana Cook Mueller, Esq., June 25, 2010.

certain municipal zones. At the core of a TIF package is the premise that development will increase values and property tax revenues to the town. With a TIF approach, the municipality reserves a fixed percentage of these future tax revenues for repayment of the public or private financing package that enabled the development in the first place. In states with statutes enabling TIF, a municipality may declare a limited percentage of its area to be a tax increment financing district. This declaration essentially freezes the valuation of a blighted or undeveloped property at its current value in the eyes of the state and county. The town is thus permitted to collect the entirety of any revenue increases and devote a percentage of those extra revenues to paying for the development itself, or to reimbursing a private developer.

The uses and conditions of TIF vary according to state statute, but Maine, for example, permits traditional TIF arrangements as well as specified conditions for "downtown districts," "transit-oriented districts," or "arts districts." There are caps on the acreage and value of land allowed to be incorporated in a TIF district, and each district must be approved by the local legislative body and the state Department of Economic and Community Development. There is no minimum size or value for the area that may be declared a tax increment financing district. Thus, hypothetically, even a lone fishing dock in need of retrofitting could be declared a qualifying district, and the infrastructural improvements paid for by the increase in tax revenue.

On the other hand, because a TIF package presumes an increase in land value on the developed land, it would be challenging to find a way to use a TIF approach where working waterfront taxation, covenants, or zoning were already in effect, as any of these would likely impinge on any potential increase in valuation. In theory, TIF also relies on an ability by the developer to pay the increased property taxes to cover development costs, but increased property taxes are precisely one of the identified problems facing traditional water dependent uses. For these reasons, TIF measures would seem likely to serve only limited purposes for working waterfront protection in limited circumstances.

11. Current Use Taxation

Voters in many states have responded to threats to farmland and waterfront by endorsing a policy of current use taxation, which aims to address the problem of rising

property taxes.[70] To the extent that the term might imply any preferential tax rate for a select few, it can be somewhat misleading. Otherwise known as use-value assessment, this legal tool is more accurately described as affecting the valuation of a property pledged for a particular use, for example, as farmland or waterfront. Just as most states have a constitutional provision requiring the application of uniform tax rates for all, most states also require that, in most cases, a "just" value for a property reflect its full market value, or its "highest and best use."[71] Current use provisions allow for a reduction in just value for those select uses the public would prefer to see relieved of overwhelming development pressures.[72] In this manner, the public expresses the full weight of its "option demand," that is, the general and prevailing desire to ensure that the waterfront will continue to support longstanding industries and public access.

Ever since a people's initiative to limit property tax valuations was upheld by the United States Supreme Court in 1978,[73] many states have restricted assessments on certain kinds of property, like farmland, by restricting the basis of property valuation to its current use, rather than its "highest and best use."[74] In Maine, for example, current use taxation has been enacted by the legislature to provide an incentive for property owners to keep their property as open space, or farmland, or to use their property strictly to promote tree growth and forestry.[75] In each instance, amendment of the state constitution has been required prior to any enabling legislation.

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[70] MLI HANDBOOK at 165.

[71] *Id*. For example, the Maine Constitution requires that "[a]ll taxes upon real and personal estate, assessed by authority of this State, shall be apportioned and assessed equally according to the just value thereof" (ME. CONST. art. IX, § 8). As in other states, Maine law has for more than 75 years considered "just value" to be the equivalent of "fair market value," or the price a willing buyer would pay a willing seller. *See* McCullough v. Town of Sanford, 687 A.2d 629, 631 (Me. 1996) ("'Just value' means market value"); Alfred J. Sweet, Inc. v. City of Auburn 134 Me. 28, 31 (1935). For further discussion of property assessment and working waterfront preservation incentives, *see also* Elizabeth C. Davis, Comment, Preserving Municipal Waterfronts in Maine for Water-Dependent Uses: Tax Incentive, Zoning, and the Balance of Growth and Preservation, 6 OCEAN & COASTAL L.J. 141, 144 (2001); Shawmut Inn v. Town of Kennebunkport, 428 A.2d 384, 394-395 (Me. 1996).

[72] In Maine, land used "predominantly," *supra* note 5, as qualified working waterfront land is eligible for a 20% reduction in valuation, while land used "primarily" as working waterfront is eligible for a 10% reduction in just value (Maine Revenue Sevices, Maine's Current Use Programs, http://www.maine.gov/REVENUE/forms/propertytax/propertytaxbenefits/CurrentUseLandPrograms.htm).

[73] *See* Nordlinger v. Hahn, 505 U.S. 1 (1992) (holding a people's initiative amending the state constitution to restrict property tax revaluation constitutionally permissible because it violated no fundamental right and had a legitimate, rational basis).

[74] MLI HANDBOOK *at* 165.

[75] *See* 36 M.R.S. §§ 1131-1140-B.

Then, in 2005, pursuant to a referendum in which 72% of Maine voters endorsed working waterfront current use taxation, as well, the legislature passed an enabling act to provide for such a program for waterfront land that is used for or that supports commercial fishing activities.[76] Under the act, which did not become effective until the 2007 tax year,[77] owners of working waterfront property may apply to have their properties valued according to their current use as working waterfront. The application will be honored if the landowner can sufficiently demonstrate that the property is "primarily" or "predominantly" used as working waterfront under the statutory definition. As a corollary, however, the favorable valuation for tax purposes also incurs an obligation, under threat of financial penalty, to maintain the property for working waterfront uses only. The reduced valuation and associated tax reduction apply only to the *land* in question, not to any structures or equipment.[78] In effect, therefore, the fifty-five applications granted thus far only protect fifty-seven acres of working waterfront, and the average working waterfront property owner saves only $200 on his tax bill per year.[79] Meanwhile, participation rates are relatively high in two counties, while statistics reflect no interest in the program whatsoever in two other counties.[80]

Interpretation of the data remains somewhat open to question and debate. Do the figures indicate a hesitation amongst waterfront owners to participate in the program? Is there a need for improved public education about the program, or an amendment to enhance the benefit, or reduce the potential penalty, of the program? Or do these figures indicate the wholly successful impact of a rightly limited program? Should the penalties remain as written to prevent abuse of the program and ensure that municipalities derive the sought-after benefit in exchange for the reduction in property tax revenues? Whatever the answers to these questions, the model follows closely that adopted to protect farmlands and open space, and Florida voters soon followed those in Maine by amending their state's constitution and endorsing the enactment of similar legislation.[81] As mentioned above, though, the Florida constitution features a much broader definition

[76] *Id*.
[77] 36 M.R.S. § 1133.
[78] Telephone Interview with Jeff Kendall, Maine Revenue Services, June 2, 2010.
[79] Maine Revenue Services, 2010 Biennial Report on The Current Use Valuation of Certain Working Waterfront Land.
[80] *Id*.
[81] *See* FLA. CONST. art. VII, § 4; Fla. Stat. § 342.07; Fla. Stat. § 342.201.

of working waterfront, one that includes marinas, boatyards, launch facilities, and, as of 2006, resort hotels.[82]

12. Property Tax Deferrals

Florida also enacted an enabling statute in 2005 that would allow for property tax deferrals on working waterfront lands.[83] Under the statute, the owner of qualified working waterfront, upon approved annual application, is not required to pay property taxes that year. To be precise, this non-payment is not an abatement, but rather an interest-accruing deferral that legally takes the form of a lien on the property held by the state.[84] Thus, while the owner of the property is relieved from paying a portion or the entirety of the *ad valorem* tax, the unpaid tax remains a debt owed by the owner to the state and gathers interest until repaid.[85] Not surprisingly, a survey covering multiple coastal counties found the strategy of working waterfront tax deferrals to be of very limited appeal and effect.

13. Property Tax Abatement

In contrast to property tax deferral, which merely postpones payment, and current use taxation, which reduces the assessed value of a property, property tax abatement operates by applying a credit or reimbursement to forgive all or part of a landowner's property tax.[86] In other words, a property tax abatement reduces or eliminates the tax itself without affecting the assessed value of a property.[87] While the property tax abatement can be an effective incentive in the same manner as a credit on income tax, municipalities tend to apply the abatement method selectively because of the resulting loss of revenue. Moreover, the government entity granting the abatement normally

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[82] *See* FLA. CONST. art. VII § 4, art. XII.
[83] *See* FLA. STAT. § 197.303.
[84] *Id*.
[85] *Id*; *see also* University of Florida Levin College of Law Conservation Clinic, A Model Ordinance Establishing a Local Government Tax Deferral Program for Recreational and Commercial Working Waterfront Properties, 2006, www.law.ufl.edu/conservation/waterways/waterfronts/; University of Florida Levin School of Law Conservation Clinic, Recreational and Commercial Working Waterfronts in Florida: Perceptions of the Working Waterfronts Tax Deferral Program, 2008, http://www.law.ufl.edu/conservation/waterways/waterfronts/access.shtml.
[86] MLI HANDBOOK *at* 175.
[87] *See* BLACK'S (defining abatement as "[t]he act of eliminating or nullifying").

receives no direct benefit in exchange for its largesse. Thus, though there is no apparent legal reason an abatement mechanism could not be adopted for working waterfront, such a policy would likely be less popular, as it would require a greater contribution from the other taxpayers in town.[88]

14. Windfall, Land Gains Tax

A windfall tax, also known as a land gains tax, is a tax assessed to discourage capital gains resulting from the rapid purchase and sale of property. By imposing these financial penalties, such a tax "could discourage short term speculation that would rapidly drive up waterfront land values without producing any new on-site development."[89] Such a tax has been upheld by the Vermont Supreme Court, but, even fourteen years after that decision, Vermont remained the only state to have adopted a windfall tax—perhaps due to tax uniformity provisions in most other state constitutions.[90]

D. Quasi-Taxation: Special Assessments, Impact Fees, and Exactions

Grounded in a municipality's police power rather than its taxation power, special assessments, impact fees, and exactions are not tax tools, but they are included here as possible monetary and non-monetary incentives for a desired form of land use and development. Properly applied, they can be used by a municipal government to help finance larger waterfront construction and improvement projects related to water-dependent uses, and to discourage (or derive public benefit from) other major development projects.

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[88] According to the Maryland Working Waterfront Commission (Maryland Working Waterfront Commission Final Report ["MD Final Report", December 1, 2008, www.marbidco.org/Working%20Waterfront.pdf):

> Chapter 281 of 2008 gave Baltimore City, municipal corporations, and counties the authority to grant a tax credit for working waterfront properties. During the summer of 2008, a few counties looked at implementing this tax credit. However, anecdotal evidence indicates that local governments interested in adopting the tax credit are those that are unlikely to lose significant revenue as a result, implying that adoption of such a credit in those areas will not significantly reduce the tax burden for working waterfront properties.

[89] MARINE LAW INST., NORTH ATLANTIC WATER DEPENDENT USE STUDY: ECONOMICS OF WATERFRONT PLANNING AND WATER DEPENDENT USES, December 1988.

[90] MLI HANDBOOK *at* 169-70; *see also* Andrews v. Lathrop, 315 A.2d 860 (Vt. 1974) (legitimate state rationale for land gains tax means no violation of equal protection clause).

1. *Special Assessments*

In order to finance the construction or improvement of a large public facility, municipalities may impose charges on property owners who benefit from that facility.[91] Typical examples of this type of special assessment include road improvements, sidewalk construction, street lighting, and sewer extensions, but they might also partially finance municipal wharf projects and other capital-intensive waterfront improvements.[92] While some proportionality between assessment and project costs is desirable, legal challenges to this exercise of a municipality's police power have little chance of success, as the payor would have to show that the community at large derived no benefit at all from the public improvement.[93]

2. *Impact Fees and Exactions*

Impact fees and exactions, on the other hand, are imposed by municipalities on large new developments to cover the anticipated increased burden on an existing public facility or services.[94] For example, a large building project may be required to cover a town's higher costs of fire protection, water and sewer.[95] Rather than requiring a monetary payment, exactions instead place a condition on the grant of a development permit or license. These conditions ordinarily require a return grant of some easement by the developer to the public.

Originating in the 1950s and gaining currency in the 1960s, impact fees and exactions survived a number of legal challenges in the 1980s, but their use was eventually limited in two well-known United States Supreme Court decisions. While municipalities retain some discretion, impact fees must be enabled by state legislation, and both fees and exactions must also bear a rational and proportional relationship to a

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[91] MLI HANDBOOK *at* 172.
[92] *Id*.
[93] *Id*.
[94] *Id*. Municipalities in Sunbelt states like Florida, Texas, California, and Colorado rely heavily on impact fees. The Massachusetts Supreme Judicial Court has set forth three requirements that make for a legitimate impact fee as opposed to an illegitimate tax:

> 1) It must be imposed in exchange for a governmental service which benefits the party paying the fee in a manner not shared by other members of the public;
> 2) the fee must be paid by choice;
> 3) the party must have the option of not using the service, thereby avoiding the charge.

[95] MLI HANDBOOK *at* 172.

legitimate government objective in order to satisfy constitutional requirements.[96] In addition, there is some evidence that impact fees, even if constitutionally designed, can generate significant popular resentment if they are deemed excessive by the voting public.[97]

In the working waterfront context, special assessments might be imposed on waterfront property owners and users to fund the construction of new piers, bulkheads, and related infrastructure that would be of benefit to all, but of particular help to marine industries. Impact fees might be imposed on pleasure boaters, cruise ships, or transient yachts in the form of mooring, dockage or port fees. These likely would be dedicated primarily to maintaining the moorings and docks in question and related costs, but marine commercial activities may again derive some residual benefit. Finally, for example, in order to obtain a permit to build a private marina, the developer might be required to grant additional access to a certain number of fishing boats. So long as the relevant governmental body had outlined a legitimate public policy objective, and such fees and exactions bore a rational and proportional relationship to that objective, they would likely survive legal challenge and serve some limited ends in helping to preserve working waterfront.[98]

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[96] *See* Nollan v. Cal. Coastal Commn., 483 U.S. 825 (1987) (requiring essential nexus between rationale of exaction and legitimate state interest) *and* Dolan v. City of Tigard, 512 U.S. 374 (1994) (requiring both essential nexus and proportionality between exaction and projected impact of development).

[97] For example, in Bay County, FL, where once-popular impact fees are still legally valid, they have been limited to the point of non-existence.

[98] Another exemplar of effective use of a legal framework has been established in Mississippi, where lease fees on tidal lands held in public trust, rather than taxes, are collected to support waterfront conservation. *See* MISS. CODE § 29-15-9(2); MD Final Report. North Carolina has a similar program grounded in its authority over submerged lands under both federal and state Submerged Lands Acts, *Id*.; *see also* 43 U.S.C. §§1301-1315 (2002). In order to collect fees for leases on public trust land, a state must be recognized to hold those lands in trust for the public. In Maine, and in five other states, a public trust is recognized in submerged lands (lands covered by water at all tides) but not in the tidelands. Such a funding mechanism could conceivably be directed to the protection of water-dependent uses, although it remains to be seen if the benefits to working waterfront owners would outweigh the costs, since they presumably would be among those leasing the tidelands and submerged lands for their uses.

E. A Proposed Working Waterfront Conservancy

1. *The Concept*

Inspired by the successes of the WWAPP, by traditional land trusts and initiatives like the Maine Farmland Trust, working waterfront advocates have proposed the formation of a private, nonprofit Working Waterfront Conservancy. This conservancy would exist as a state-recognized not-for-profit corporation, exempt from taxes under Section 501(c)(3) of the IRC, which accords such status to charitable organizations providing specified public benefits. Like a traditional land trust, it could purchase lands outright for holding, purchase the development rights to properties for holding, or accept donations of either land or restrictive easements.

2. *The Traditional Land Conservancy*

A traditional land conservancy is able to claim tax-exempt status and to certify such donations of land or covenants for charitable deductions to the extent that the organization's supervision of such lands provides a significant public benefit recognized by the federal tax code. The key tool in this framework is the conservation easement, which is a nonpossessory interest that imposes limitations or restrictions on real property to the benefit of the holder.[99] In order to qualify for charitable deduction purposes, the donated conservation easement must meet the requirements of a "qualified conservation contribution" set forth in Section 170(h) of the Internal Revenue Code.[100] The gift must be to a corporation described in Section 501(c)(3), or other "qualifying organization."[101] The gift must also be "exclusively for conservation purposes," which the statute articulates to include public recreation or education; protection of fish, wildlife or plants; conservation of property with demonstrable historic value; or preservation of open space, farmland or forest, so long as it is for the scenic enjoyment of the public and consistent with a clearly delineated government program.[102] In order for the donated conservation

[99] UNIFORM CONSERVATION EASEMENT ACT § 1 (2007).
[100] 26 U.S.C. § 170(h)(1).
[101] 26 U.S.C. § 170(h)(3).
[102] 26 U.S.C. § 170(h)(4).

easement to qualify for such a deduction, it must be granted in perpetuity.[103] The Department of Treasury Regulations set forth a list of factors and a number of requirements to qualify for a charitable deduction, including a "significant public benefit" and "a clearly delineated Federal, State, or local governmental conservation policy."[104] Thus, despite the somewhat open-ended articulation of possible conservation purposes, "the path…to IRS acceptance can be thorny."[105]

3. *Weighing the Considerations*

Although it would seem counterintuitive to provide such a nonprofit exemption to a profit-making enterprise like a working waterfront fishery, such a challenge was overcome in establishing the American Farmland Trust. Of the 49 states with legislation enabling conservation easements, 27 also have state-level programs designed to purchase agricultural conservation easements on qualifying farmland.[106] Such programs, known in the agricultural context as PACE (Purchase of Agricultural Conservation Easement) Programs, operate in the same fashion as PDRs and also exist at independent and local levels in 18 states.[107]

Significantly, however, preservation of the land as a working waterfront is not currently a recognized public benefit under either Section 501(c)(3) or Section 170(h) of the Code. It could be argued, for example, that commercial aquaculture is analogous to commercial agriculture, and that working waterfronts have significant historic, cultural

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[103] 26 U.S.C. § 170(h)(5).
[104] *See* 26 U.S.C. § 170; Treas. Reg. § 1.170A-14; Conservation Easement Handbook *at* 513-17.
[105] Conservation Easement Handbook *at* 512. In recent years, many have questioned the legitimacy, in practice, of conservation easement deductions, which had gone largely without legal challenge for decades. Concerns rose to a level sufficient to prompt the Internal Revenue Service to issue a Notice warning of more frequent investigations and possible severe penalties for abuses (I.R.S. Notice 2004-41, I.R.B. 2004-28). The tales of abuse and potential ramifications for the future of conservation easements were addressed in a series of articles in law reviews and the mainstream media; *see, e.g.*, Nancy McLaughlin, Conservation Easements: A Troubled Adolescence, 26 J. LAND RESOURCES & ENVTL. L. 47 (2005); Jeffrey Tapick, Threats to the Continued Existence of Conservation Easements, 27 COLUM. J. ENVTL. L. 257 (2002); Joseph Stephens and David Ottaway, Developers Find Payoff in Preservation; Donors Reap Tax Incentives by Giving to Land Trusts, but Critics Fear Abuse of System, WASH. POST, Dec. 21, 2003, *at* A1 (one of several articles on the subject by Stephens and Ottaway). A number of cases also applied more rigorous scrutiny to the validity of conservation easement deduction claims. *See* Glass v. Comm'r, 471 F.3d 698 (6th Cir. 2006) (upholding two challenged deduction claims); Turner v. Comm'r, 126 T.C. 299 (2006) (levying 20% penalty tax for inaccurate deduction claim).
[106] American Farmland Trust, The Farmland Protection Toolbox, 2008, www.farmlandinfo.org/.
[107] *Id*.

and even scenic value. In the end, though, because the statute specifically mentions preservation of agriculture and silviculture (forestry), but omits any mention of aquaculture or fisheries, an administrative or judicial construction of the statute as it stands would likely not allow these or other working waterfront uses to qualify for tax exemption or for charitable tax deduction. Therefore, in order to transfer to working waterfront conservation the sort of landowner-conservancy symbiosis that has worked so successfully in traditional and agricultural conservation contexts, it would appear necessary to amend the Internal Revenue Code. As with the initiative to appropriate direct federal funding for investment in working waterfront preservation, this would likely require a concerted effort over an extended period to inform and transform the perceptions of stakeholders, legislators and the voting public.

V. CONCLUSION

In sum, ever-increasing property and income tax costs continue to burden traditional working waterfront uses. Notwithstanding these impediments, a number of tax-dependent, tax-related, and tax-enhanced opportunities exist to improve the prognosis for working waterfront preservation. Of these, the models of the state- or municipal-level land banks would appear to present viable opportunities in the near term. Whether through purchase of lands outright, or just of development rights, these land banks could be funded by real estate transfer taxes, dedicated excise tax revenues, or a variety of targeted fees. Federal public investment in working waterfront, along with the working waterfront conservancy model proposed, would require significant efforts at a national level to sway public and legislative opinion in favor either of direct appropriation, changes to the IRC, or both. That said, the biggest challenges in pursuing any of these measures will likely involve balancing the competing laws at different levels of government, balancing the effects of the various policy tools applied and balancing the definitions competing to articulate just what is meant by a "working waterfront."

APPENDIX: RESOURCES

1. Constitutions

a. U.S. CONST. amend. XVI.

b. ME. CONST. art. IX, § 8.

c. FLA. CONST. art. VII, § 4.

d. FLA. CONST. art. XII.

2. United States Supreme Court Decisions

a. Nordlinger v. Hahn, 505 U.S. 1 (1992).

b. Nollan v. California Coastal Commission, 483 U.S. 825 (1987).

c. Dolan v. City of Tigard, 512 U.S. 374 (1994).

d. Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

3. Other Court Decisions

a. Glass v. Commissioner, 471 F.3d 698 (6th Cir. 2006).

b. Turner v. Commissioner, 126 T.C. 299 (2006).

c. McCullough v. Town of Sanford, 687 A.2d 629 (Me. 1996).

d. Alfred J. Sweet, Inc. v. City of Auburn, 134 Me. 28 (1935).

e. Shawmut Inn v. Town of Kennebunkport, 428 A.2d 384 (Me. 1996).

f. Andrews v. Lathrop, 315 A.2d 860 (Vt. 1974).

4. Statutes and Legislative Documents

Federal

a. Federal Aid in Sport Fish Restoration Act, 16 U.S.C. §§ 777-777l (2010).

b. Coastal Zone Management Act, 16 U.S.C. §§ 1451-1465 (2010).

c. 26 U.S.C. §§ 45-48 (2010).

d. 26 U.S.C. § 170(h).

e. 26 U.S.C. § 198(a) (2010).

f. 26 U.S.C. § 501(c)(3).

g. 26 U.S.C. §§ 4161(b), 4181 (excise taxes on firearms, ammunition, etc.)
h. Aquatic Resources Trust Fund, 26 U.S.C. § 9504 (2010).
i. 42 U.S.C. § 9601 (2010).
j. Submerged Lands Act, 43 U.S.C. §§1301-1315 (2002).
k. The Working Waterfront Preservation Act of 2005, S. 1723, 109th Cong. (Sept. 19, 2005).
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APPENDIX: RESOURCES

12. Constitutions

a. U.S. CONST. amend. XVI.

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