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NAYS: Senators: ALFOND, BARTLETT, COLLINS, CRAVEN, DIAMOND, DILL, FARNHAM, GERZOFISKY, GOODALL, HASTINGS, HILL, HOBBS, JACKSON, JOHNSON, KATZ, LANGLEY, MARTIN, MASON, MCCORMICK, PATRICK, PLOWMAN, RAYE, RECTOR, ROSEN, SAVIELLO, SNOWE-MELLO, SULLIVAN, THIBODEAU, THOMAS, WHITEMORE, WOODBURY

EXCUSED: Senator: SCHNEIDER

3 Senators having voted in the affirmative and 31 Senators having voted in the negative, with 1 Senator being excused, **ADOPTION** of House Amendment "A" (H-806) to Committee Amendment "A" (H-711), in concurrence, **FAILED**.

Committee Amendment "A" (H-711) **ADOPTED**, in **NON-CONCURRENCE**.

Under suspension of the Rules, **READ A SECOND TIME**.

PASSED TO BE ENGROSSED AS AMENDED BY COMMITTEE AMENDMENT "A" (H-711), in NON-CONCURRENCE.

Sent down for concurrence.

The Chair laid before the Senate the following Tabled and Later Today Assigned matter:

SENATE REPORTS - from the Committee on **JUDICIARY** on Bill "An Act To Define 'Person Aggrieved' in Proceedings before the Department of Environmental Protection and the Maine Land Use Regulation Commission"

S.P. 546 L.D. 1647

Majority - **Ought Not to Pass** (7 members)

Minority - **Ought To Pass as Amended by Committee Amendment "A" (S-464)** (6 members)

Tabled - March 23, 2012, by Senator **ALFOND** of Cumberland

Pending - the motion by Senator **HASTINGS** of Oxford to **ACCEPT** the Minority **OUGHT TO PASS AS AMENDED BY COMMITTEE AMENDMENT "A" (S-464)** Report

(In Senate, March 23, 2012, Reports **READ**.)

THE PRESIDENT PRO TEM: The Chair recognizes the Senator from Oxford, Senator Hastings.

Senator **HASTINGS:** Thank you Mr. President. Ladies and gentlemen of the Senate, this is an interesting bill for those of you involved in court procedure, I guess. I'd have to say for most of my committee it was like a law school exam. What this bill is all about is who has the right to appeal a stacked decision to the full board; who has the right to participate in an appeal to the full board of the Department of Environmental Protection and LURC. The bills, as it came to us, attempted to give a definition of who

was entitled to do that. The rules of the Board of Environmental Protection and LURC allow a person aggrieved to appeal but does not define who that is. The bill came with a definition as to who that was, which the proponents said was substantially equivalent to the definition of who may appeal to the courts. Because the courts have already decided, if you appeal to the Superior Court they have already, by case law, decided who a person aggrieved is as a person with a particularized injury. It's just the idea that somebody has to have some skin in the game, if you will, to participate in the appeal. For instance, the courts will allow many of our natural resource agencies to be participants if, in fact, they have members who are close by or personally effected by the subject matter of the appeal. The primary objection by the opponents at the public hearing was that the proposed language in the bill in fact created a different standard than was required to appeal in court and made it a more difficult standard and raised the bar beyond what the court would require at that level.

Pardon me, Mr. President, but I got all wound up in the previous bill and have totally misplaced all my papers on this, so I'm going to stall for a second until I can find that and I'm still struggling.

The primary objection from the opponents of the bill at the committee level was that we're creating two different standards. There shouldn't be two different standards. It should be the same standard. In fact, they told us that, basically, both the Board of Environmental Protection and the LURC Board apply the same standard as the courts apply. The proponents of the bill said that's not the case. There have been many examples where they have allowed people in that had really no skin in the game. They did not meet the letter of the standing of having that particularized injury that would be required by the courts. In fact, the Natural Resource Council of Maine, I'll quote from their testimony at the public hearing. They said it would be confusing to have two different standards for appeal, meaning the standard to appeal to the DEP Board or LURC and the appeal to the Superior Court. That is what the Minority Report did. The Minority Report took that into account and replaced the bill, which had a definition of standing, with a committee amendment which simply directs both the Maine Land Use Regulation Commission and the Board of Environmental Protection to adopt rules to conform the standards for standing to appeal a decision to the commission to the judicial standards for standing to appeal a decision of the commission to the court. All they've done is said is that they've got to come up with rules that make.

THE PRESIDENT PRO TEM: Will the Senator defer. For what reason does the Senator from Cumberland, Senator Dill rise?

Senator **DILL:** With all due respect to my good Chair, I would just note that the amendment is not before us.

THE PRESIDENT PRO TEM: The Chair would rule that the Senator moved the Minority Ought to Pass Committee Amendment Report and that is what he is referring to, so it is properly before the Body. The Chair recognizes the Senator from Oxford, Senator Hastings.

Senator **HASTINGS:** Thank you Mr. President. Once again, what I am referring to is the Minority Ought to Pass Report as amended. The amended report, which replaced the bill with a direction to both LURC and the Board of Environmental

Protection to establish rules that create standards for standing to appeals to those boards to be exactly equivalent to the rules of standing to court. That's exactly what most of the opponents to the bill at the hearing asked us to do. They said we shouldn't have two different standards and we certainly should not have a standard at the board level that was higher than the appeal to court. We listened to that. In the Minority Report we have simply recommended, we have simply instructed, the two boards to establish those standards to be exactly equivalent. If you listen to one side, some of the opponents at the public hearing, they say it's unnecessary because they already do it. Well, then what harm is done? There were certainly plenty of those on the other side that say the boards have, in fact, gone beyond that. They have allowed people into the board hearings that would not have been allowed into a court hearing. In the end, pretty much everyone said that the standards ought to be the same. That's all the Minority Report does. I urge your support for the Minority Report. Thank you.

THE PRESIDENT PRO TEM: The Chair recognizes the Senator from Cumberland, Senator Dill.

Senator **DILL:** Thank you Mr. President. Men and women of the Senate, this is an interesting bill. I would just note that in an environment of trying to reduce red tape and regulations, what the Minority Report on this bill attempts to do is to create more bureaucracy, more rules that are simply unnecessary. There has been no problem identified that we are charged to fix. The end result is a narrowing of the field of people who can participate in the process that has to do with the environment. You may ask: why should it be that more rather than less people should participate in processes regarding the environment? The reason is because the environment is a public good. It's unlike other things that people litigate about. It's something that we all have a stake in and the more people who are invested, the more people who participate results in an outcome that is wider and applies to a broad spectrum of our community. I would urge you reject the current motion and stick with the majority of the committee which felt that, at this time, with no showing of any particularized problem, with no need to burden administrative agencies creating rules, with no real need to narrow the ability of the public to participate in processes that deal with the environment, especially in Maine when the environment is one of our biggest resources, that the bill is simply unnecessary. Again, I would urge you to reject the present motion and thank you very much.

THE PRESIDENT PRO TEM: The Chair recognizes the Senator from Franklin, Senator Saviello.

Senator **SAVIELLO:** Thank you Mr. President. Ladies and gentlemen of the Senate, it was interesting that preparing for this bill and putting it forth, I had to go back to my law school days which never existed. Let me just clear the air a little bit first. I think it's very important. My goal is never ever to stop public participation. Anybody who knows me, knows how we work in the committee I chair, and in my prior life as the Chairman of the Pesticide Control Board, if anything I bend over backwards to make sure the public participates. This clearly deals with appeals. That's it. I apologize because when I came to the hearing I did not have any specific examples of most recent ones. I do now. I've shared those with some of you. Let me just make sure that we're clear about this. The amendment really

addresses what I'd like to see accomplished. In fact, in some places, the Board of Environmental Protection already has this. Statute says they can allow interested parties to appeal, but their own rules say only an aggrieved individual can do that. If you go further, and this is where I've learned new words that I never knew before, you find that an aggrieved person has to have a particularized interest. That's a big word for me. They have to have a particularized interest. I tried to understand what that meant. That meant somebody that directly abuts the property. That means somebody who hunts and fishes on a particular property that is going to be developed in a way that they, perhaps, don't want it. That means that the organization that that group might belong to could participate in the appeal process. I want to also clarify something. During the L.D. 1 process there were a number of people who approached me about this. Knowing I would never get agreement, even though I know my good friend Mike, I doubted him. I pulled it out and I said, "This is something we'll do separately." As in the flyer that was sent around, I want to also clear up the fact that, yes, there has been a law firm that has helped me, but that's at my request and not at their drilling down on this. I needed the information. I'm not a lawyer.

Let me explain to you an example and give you a real example that happened. There were 40 cases that were in front of the Board of Environmental Protection. There are five of them that this happened to. I'm just going to pick one because it happens to be the one I know the most about. It's one called Juniper Ridge. That's the landfill that we own outside of Old Town and Alton. They applied to take medical waste into that facility, something that is a non-hazardous material that's actually burned in Pittsfield and taken up there for disposal. They opened the hearing process. I want to just point out so people know that depending on the issue, whether it is air or solid waste, the hearing record can be opened as much as two months to two years for people to participate with new information they gather during that period of time. In this case they went forward with their amendment to allow that waste to come into the landfill. After deliberation the Board of Environmental Protection decided to allow them to do that. It was appealed. It was appealed by something called the Local Advisory Committee. They do not have standing. In fact, we, together, when the landfill was bought by the State, actually established a committee, in statute. Their responsibilities are to review proposed contracts, hold periodic public meetings, provide project developer and departments with alternative contract suggestions, and serve as the liaison with the local towns. They do not represent the towns. Their own mission statement says to act as a liaison between the public and parties involved in the process at Juniper Ridge. However, they were given standing because they represented the communities. They do not. We didn't even allow that as a committee, as a Legislature. What did it amount to? Ultimately, they were allowed to appeal. The appeal lasted four months. Lots of money being spent only, at the end of the day, to have the appeal denied. That's the problem. It's the four months. It's the petitions. It's all of that. If the people were truly part of the town, which the town would have been able to do that but the town decided not to go further in each of those, Alton or Old Town, then they definitely would have been part of the appeal process. They did not. It delayed the project.

What the amendment does is simply clarify the fact that if this is an appeal you have to have a truly particularized interest. Thank you very much.

THE PRESIDENT PRO TEM: The Chair recognizes the Senator from Cumberland, Senator Dill.

Senator **DILL:** Thank you Mr. President. Men and women of the Senate, just briefly in response. In my experience as a lawyer, and I've been a lawyer for over 20 years, every single issue is litigated in a proceeding. The four months that it took to decide this particular case, which unfortunately we didn't have the benefit of learning about at the public hearing. Nonetheless, it sounds like it took four months in this particular case to resolve that one issue. I would submit that if we adopt the Minority Report and we have more rules that attempt to define who can and cannot participate in appeal it will take four months to determine whether or not they are an aggrieved person. We're not helping by increasing technical rules and increasing bureaucracy for the public to have to get over in order to participate in proceedings that deal with the environment.

THE PRESIDENT PRO TEM: The Chair recognizes the Senator from Sagadahoc, Senator Goodall.

Senator **GOODALL:** Thank you Mr. President. Men and women of the Senate, just for the record, especially for my Republican colleagues, I cannot always persuade the good Senator from Franklin to agree with me on environmental issues. Unfortunately, he and I do not agree on this and I would just, basically, lead with the statement; if it ain't broke why fix it? I disagree with the good Senator's example and a few other examples that may have been disseminated through the Body or members in the hallway because there is also an underlying due process by both LERC and the DEP when they hear these requests for appeals. In addition to that, sometimes, such as with the advisory committee example, members may not appeal because someone else is doing it for them. It's hard to go back and look specifically at certain examples, specifically dealing with Juniper Ridge because that is a hornet's nest to begin with. I think everyone would agree with that when it comes to people's feelings about that issue, the process, and how that has evolved. It is, obviously, in a much better place than it was when it first began. Getting back to the issue at hand, I think you also have to realize that the AG's office advises the DEP and LURC on all these issues. They are thought out carefully. They are reviewed. Often, when people are allowed to participate, when it is questionable, it is done so for the reason of due process. The good Senator from Cumberland talked about how if someone was denied the ability to appeal that ultimately that would be appealed to the Superior Court and that would just be further delay. I would disagree with the good Senator from Franklin and I would agree with the Senator from Cumberland. I do have a fear that this could result in additional litigation and more delay. We also have to look back at what the underlying reason for these boards are. They are an administrative body designed to hear appeals, especially appeals from the public. It allows people to do so by themselves, without hiring people like me, lawyers. If we want to make every process in state government involve a lawyer, and I hope we don't, we should keep adopting rules like this and statutes. We should preserve the right for citizens to easily go and appeal a decision. There hasn't been, in my opinion, the floodgates opening and it hasn't caused great problems. You can always make arguments in any situation that it could have been improved or it could have been strengthened or it was weakened

as a result of this and that. At the end of the day, it's not broke so let's not try to fix it because the end result is that we're just going to cause problems and we're going to erode public participation.

THE PRESIDENT PRO TEM: The Chair recognizes the Senator from Kennebec, Senator Katz.

Senator **KATZ:** Thank you Mr. President. Men and women of the Senate, I don't practice in environmental law so I've listened carefully and with interest to the debate. As I understand it, this really is not about public participation. If there is a public hearing on an issue before one of these agencies and someone is driving through the state of Maine on vacation from Kansas and happens into the hearing and if they want to weigh in they can. Anybody can weigh in at a public hearing. That's good and that's appropriate. The board or the hearing officer can take into account what the person from Kansas may have told them about their own experience in their own state. It's not about public participation at that point. It's about appeals. Appeals are very different animals. On appeal that person from Kansas can't participate nor should he or she be able to participate because they don't have a particularized injury. That is what the agencies, themselves, say. You need to be an aggrieved person. You must have a particularized injury. What I've learned from my good friend from Franklin, Attorney in Training Saviello, is that the board apparently in case, after case, after case has not been following their own rules. If they are not going to do so then that seems to be a particularly good time to put the intent of their own rules and out intent into statute. I have dealt with cases where folks need to show they are an aggrieved person and I would respectfully disagree that that leads to a great deal of its own time consuming litigation; that is that there would be months and months of delay in deciding whether someone is an aggrieved person or not. Usually it's an affidavit that is filed. Maybe there is an affidavit in opposition. Then the judge, hearing officer, the board, or whoever it is, makes that decision. I respectfully suggest that on appeals that one should have to have a particularized injury. If there is an issue in town and there is an abutter in question, that person ought to have standing, but the person from the other side of the county who doesn't have direct skin in the game shouldn't. It's a matter of getting to good decisions and it's a matter of getting decisions quickly. I didn't participate in the hearings or the discussions about L.D. 1, but I thought that the main impudence of that law, as I understood it, was not to change the outcome of decisions we make in Maine but to get to them more quickly. To get to yes or no in a fairly short period of time so businesses that thinking of coming here or expanding here know that they will be able to get an answer and not going to have to wait four or five years before they can tell if their projects will go on. To me, this bill helps shorten the amount of time to get to yes or no on a particular issue while at the same time protecting at least the legitimate public input into the process. Thank you, Mr. President.

THE PRESIDENT PRO TEM: The Chair recognizes the Senator from Sagadahoc, Senator Goodall.

Senator **GOODALL:** Thank you Mr. President. I appreciate the good comments from the good Senator from Kennebec and I'd ask him to keep those thoughts close at hand when we get to a bill in the future dealing with deference because I'll be making

those exact arguments and I will seek your vote on that. Sorry to talk about another bill, Mr. President.

That being said, I just want to point out, in all seriousness, the good Senator brought up an issue and I don't want any of us to be misled by the process which often takes place. Often we think of issues in front of the Department of Environmental Protection and the Land Use Regulatory Commission as large public processes and hearings well known. Frankly, the person from Kansas could hear about it while driving through the state and reading it in the paper and coming to testify at the public hearing, but many of these decisions are happening in the agency and they are not decisions that do not have big public hearings. As a result, the public learns about them once the decision is rendered. At that point an appeal would happen at the Board of Environmental Protection or the Land Use Regulatory Commission. There hasn't been a big public process. We really have to think about those situations. Those are the overwhelming number of appeals that go to these boards. That being said, the board does have the ability to deny standing, however they are very careful on how they do that to make sure that there are not available appeals dealing with due process. In regards to the time it takes to have one of those decisions made by a court if someone appeals a denial of standing, I would surely hope that it would happen quickly but to get a decision for a Superior Court in just the matter of a few days or weeks is very unlikely. I would disagree with the good Senator from Kennebec, that is going to take a month at minimum, in my opinion. That being said, we just really have to focus on what happens in reality. Typically appeals can occur and they are going to occur from agencies on issues that have not had a lot of public debate and that note is very important to the ability of the public to participate. Thank you very much, Mr. President.

THE PRESIDENT PRO TEM: The Senator from Cumberland, Senator Dill, requests unanimous consent of the Senate to address the Senate a third time on this matter. Hearing no objection, the Senator may proceed.

Senator **DILL:** Thank you Mr. President. I'll be very brief. Just in response to the good Senator Katz. If the problem is that we have agencies that aren't properly applying the rules then why would we deny an appeal from those very agencies? It just doesn't make sense to me. Thank you very much.

THE PRESIDENT PRO TEM: The Chair recognizes the Senator from Cumberland, Senator Woodbury.

Senator **WOODBURY:** Thank you Mr. President. I am opposing the motion as well. I want to explain how I got there. As I see it, there are three distinct authorities in this decision making process about whatever the issue is. There is the department, an administrative department of government that is doing its role. There is a citizen review board that can kind of oversee things when somebody's not happy when the department does something. Then there are the courts. I'm going to ask for a little bit of leeway here, Mr. President, in talking about the Taxation Committee for a moment. In the Taxation Committee we very often hear complaints from people who feel like the department, as in the government, has gone and interpreted laws in ways that they don't think were fair or that were new without prior notice. People want some place to go for recourse. We haven't really had a citizen review process to evaluate what the department, as

in government, has done. Some of our work over the course of this year has been to create a place where citizens can go to get a re-review of what was done. Then of course you have the courts who can interpret the laws. Bringing this back to this bill. There is the department that makes an initial decision. There is a citizen review board that can review something when somebody's not happy with that decision. Then there are the courts that make sure that the process was done appropriately and that the law was interpreted appropriately. As I see this bill, it is taking away some of the leniency and the latitude of that citizen review board to decide for itself who the appropriate people are to be able to talk about and influence their deliberations. That's why I don't really like the direction that this bill is going in. Thank you.

THE PRESIDENT PRO TEM: The Chair recognizes the Senator from Kennebec, Senator Katz.

Senator **KATZ:** Thank you Mr. President. Men and women of the Senate, I listened with interest to the comments of my good friend from Cumberland, Senator Woodbury. I think that is exactly the point. If you are appealing from a decision of someone in the tax department about your taxes your cousin shouldn't be allowed to weigh in on it. That's exactly what we are getting at here. It is narrowing the field so that only those that really have interest in that appeal can participate. Thank you.

THE PRESIDENT PRO TEM: The Chair recognizes the Senator from Cumberland, Senator Woodbury.

Senator **WOODBURY:** Thank you Mr. President. I appreciate that thinking that these citizen review boards very much do want to make sure that someone who relevant to the conversation is the one that they listen to. They should be the ones to decide. This is the public. This is the one place that is the public's chance to review what's happened. This is not saying that they can't stop someone from having standing. They absolutely can say that this person doesn't have standing. It's just that they elect to have the latitude to make that decision.

THE PRESIDENT PRO TEM: The Chair recognizes the Senator from Franklin, Senator Saviello.

Senator **SAVIELLO:** Thank you Mr. President. I'll be brief. I will just say that I have 12 pages here that say exactly what the good Senator Woodbury said. They are being allowed to participate. This is not to stop the public from doing it. It allows the public to appeal. It's to be consistent in that decision, one day to the next and one case to the next, one permit to the next. Thank you.

On motion by Senator **ALFOND** of Cumberland, supported by a Division of one-fifth of the members present and voting, a Roll Call was ordered.

THE PRESIDENT PRO TEM: The pending question before the Senate is the motion by the Senator from Oxford, Senator Hastings to Accept the Minority Ought to Pass as Amended by Committee Amendment "A" (S-464) Report. A Roll Call has been ordered. Is the Senate ready for the question?

The Doorkeepers secured the Chamber.

The Secretary opened the vote.

ROLL CALL (#394)

YEAS: Senators: COLLINS, DIAMOND, FARNHAM, HASTINGS, JACKSON, KATZ, LANGLEY, MARTIN, MASON, MCCORMICK, PLOWMAN, RAYE, RECTOR, ROSEN, SAVIELLO, SHERMAN, SNOWE-MELLO, THIBODEAU, THOMAS, WHITTEMORE, THE PRESIDENT PRO TEM - JONATHAN T.E. COURTNEY

NAYS: Senators: ALFOND, BARTLETT, BRANNIGAN, CRAVEN, DILL, GERZOFKY, GOODALL, HILL, HOBBS, JOHNSON, PATRICK, SULLIVAN, WOODBURY

EXCUSED: Senator: SCHNEIDER

21 Senators having voted in the affirmative and 13 Senators having voted in the negative, with 1 Senator being excused, the motion by Senator **HASTINGS** of Oxford to **ACCEPT** the Minority **UGHT TO PASS AS AMENDED BY COMMITTEE AMENDMENT "A" (S-464)** Report, **PREVAILED**.

READ ONCE.

Committee Amendment "A" (S-464) **READ** and **ADOPTED**.

Under suspension of the Rules, **READ A SECOND TIME** and **PASSED TO BE ENGROSSED AS AMENDED**.

Ordered sent down forthwith for concurrence.

All matters thus acted upon were ordered sent down forthwith for concurrence.

Senate at Ease.

Senate called to order by President Pro Tem
JONATHAN T.E. COURTNEY of York County.

Senator **ROSEN** of Hancock was granted unanimous consent to address the Senate off the Record.

Senator **JACKSON** of Aroostook was granted unanimous consent to address the Senate off the Record.

Senator **DIAMOND** of Cumberland was granted unanimous consent to address the Senate off the Record.

Senator **SNOWE-MELLO** of Androscoggin was granted unanimous consent to address the Senate off the Record.

Senator **SULLIVAN** of York was granted unanimous consent to address the Senate off the Record.

Off Record Remarks

Senator **PLOWMAN** of Penobscot was granted unanimous consent to address the Senate off the Record.

Senator **PATRICK** of Oxford was granted unanimous consent to address the Senate off the Record.

Senator **SULLIVAN** of York was granted unanimous consent to address the Senate off the Record.

Senator **PLOWMAN** of Penobscot was granted unanimous consent to address the Senate off the Record.

On motion by Senator **COLLINS** of York, **ADJOURNED**, until Monday, March 26, 2012, at 10:00 in the morning, in memory of and lasting tribute to James Carignan of Lewiston.