STATE OF MAINE

Inter-Departmental Memorandum

Date December 16, 1975

To Henry Warren & John Bastey — Dept. Environmental Protection

From Gregory Sample, Staff Attorney — Dept. Attorney General

Subject SITE LOCATION LAW

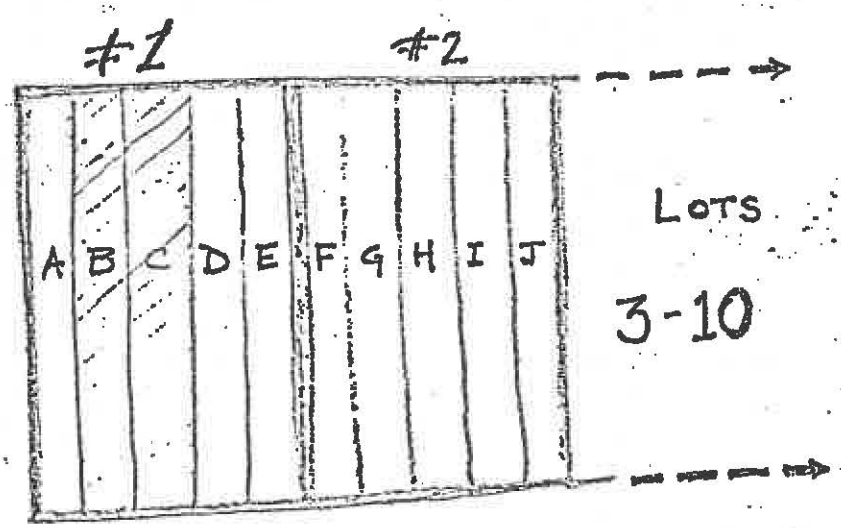
You pose questions based upon the following facts:

1. First Subdivider owns 110 acres of land and creates a 10 lot subdivision (lots 1-10) in which each lot is 11 acres;

2. Second subdivider buys lot #1 of the first subdivision and divides it into five lots (lots A-E) of 2.2 acres each and offers them for sale;

3. Second subdivider sells lots B and C of second subdivision;

4. Second subdivider buys lot #2 of first subdivision and divides it into five 2.2 acres lots (lots F-J) and offers the lots for sale, resulting in this arrangement:



You note that first subdivision is exempt from the Site Location Law, since it lacks a lot of less than 10 acres, and that the development of lot #1 by second subdivider is also exempt, since it comprises less than 20 acres. Then you ask:

1. Is this subdivision scheme subject to review under the Site Location Law when second subdivider offers lots F-J for sale? If so, why?

2. Does alienation of lots B and C, which cut off lot A from the remaining lots owned by second subdivider, cause title, right or interest problems or contiguity problems when lot #2 is divided and offered for sale? In other words, can second subdivider claim that he has a subdivision of only 7 or 8 lots of 2.2 acres each, and not of ten 2.2 acre lots?

ANSWER:

The answer to both questions depends upon the time at which the various actions take place. If lots B and C were sold within five years of the date on which lots F-J were first offered for sale,1/ all ten lots in the second subdivision (lots A-J) comprising 22 acres, are subject to the Site Location Law. If lots B and C were sold more than 5 years prior to the offering for sale of lots F-J, then only eight lots (lots A and lots D-J), comprising 17.6 acres, are offered for sale "during any 5-year period," and the second subdivision remains exempt from Site Location review. Under the facts described, there is no problem of title, right or interest (TRI) or of contiguity.

DISCUSSION:

The answer above is an extension of an Attorney General's opinion dated May 8, 1974, interpreting the Site Location Law. That opinion emphasizes that:

> if the sale or offering for sale of lots on their parcel of land exceeds 20 acres within 5 years they will be (subject to) the Site Location Law as to all lots, not merely those which exceed 20 acres. The first 20 acres are not free. A person is subject to the Site Law when he takes the first action in furtherance of an intent to develop or offer for sale more than 20 acres.

This aggregation is limited by statute, however, to 5-year blocks of time.

Assuming that all 22 acres (lots A-J) have been offered for sale in a 5-year period, all ten lots comprise the subdivision subject to the law, notwithstanding the facts that the developer has sold two of the lots, and that the sales took place before the lots causing the development to exceed 20 acres were opened or offered for sale. The concern for title, right or interest is inapplicable in this situation.

1/ The term "offered for sale," when used in this opinion refers to and adopts the meaning set forth in an informal opinion of this office to the Bureau Chiefs of the Department of Environmental Protection dated May 8, 1974.

As the Supreme Judicial Court has made clear in Walsh v. Brewer, 315 A.2d 200 (Me., 1974), TRI to the subject land is an implicit precondition to either administrative or judicial action regarding regulation or control of the use of land. The Court said:

> The question is whether plaintiff (developer) had the kind of relationship to the Eastern Avenue site which the Brewer Mobile Home Park and Zoning ordinances recognized as sufficiently germane to the scope of their regulation to confer status upon the plaintiff as a proper "applicant" for a license, permit or certificate of occupancy.

Whereas in Walsh there was no evidence before the Court to indicate that Walsh had yet obtained adequate TRI so that governmental officials and agencies might "be required to dissipate their time and energies in dealing with persons who are 'strangers' to the particular governmental regulation and control being undertaken, the questions posed for this opinion contain no such problem. Second subdivider has had title to all ten lots in question (lots A-J) and it is precisely the actions that he has taken or failed to take during the period of his ownership or control that the Site Law intends to have regulated by the Board of Environmental Protection. The developer's relation to the actions subject here to quasi-judicial control is direct and immediate, though it may be entirely in the past with respect to some lots.

Neither does the absence of present TRI deprive the Board of the power to act with respect to the lots already sold. Implicit in the authority to regulate is the power necessary to regulate effectively. 38 M.R.S.A. Section 482(5) clearly grants the authority to regulate, and among the remedies available to the Board is that specified in Section 485 to "order such person to restore the area affected by such construction or operation to its condition prior thereto or as near as may be, to the satisfaction of the (Board)." Enforcement action may however require the joinder of the present owners of the property as parties defendant.

When lots B and C of second subdivision are thus subjected to DEP jurisdiction, there is no "leapfrogging" or contiguity problem. The Site Location Statute makes no mention of a contiguity requirement, nor does there appear any reason to apply such a requirement, so long as the lots treated together are all part of a common scheme of development. The requirement that the subdivision be formed from a contiguous parcel of land is found in the Municipal Subdivision Law, 30 M.R.S.A. Section 4956, which definition has been applied to the Site Law in a prior opinion as a guide for interpretation, but that provision does not require the lots within the parcel which are offered for sale and thus made subject to the Site Law, to be contiguous.

The response above assumes that the two developers are acting independently and in good faith. The opinion does not address a situation where the developers intent to avoid or delay Site Location review by working together.

GREGORY W. SAMPLE, STAFF ATTORNEY
OFFICE OF THE ATTORNEY GENERAL