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Legal Opinions and Court Cases Related to the Subdivision Law

Prepared jointly by the State Planning Office
and the Penobscot Valley Regional Planning
Commission.

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Introduction

This Guide was prepared as a reference source for legal opinions and court cases related to the Subdivision Law. It has been designed in loose-leaf format so that as new opinions and court cases emerge, they can be inserted in a logical sequence. This Guide contains 7 sections as follows:

1. Subject guide to legal opinions and court cases. This is a subject guide to topics discussed in the opinions and court cases which follow. It is expected that this Guide will be periodically updated as new cases and opinions are added.
2. Attorney General's Opinions. This section contains opinions, informal and otherwise, issued by the Attorney General's Office, that appear to be relevant to the interpretation and administration of the Subdivision Law. Excluded from this collection are statements from the Attorney General's Office which decline to answer specific inquiries.
3. Maine Municipal Association Opinions. This section has been reproduced from the legal opinions section of the Maine Townsman. Editorial notes have been added where clarification was deemed appropriate.
4. SPO Memorandums. This section contains memorandums issued by the State Planning Office relative to the Subdivision Law.
5. Maine Supreme Court Cases. This section includes Maine Supreme Court cases which appear to be relevant to the Subdivision Law. Marginal notes have been editorially added to highlight certain paragraphs.
6. Superior Court Cases. This section has been included for Superior Court opinions, although a search of courthouse records has not been made to uncover cases which may exist. At the present time, only 1 case has been included in this section.
7. Subdivision Law. This section contains the existing Subdivision Law, as well as previous versions of the Law, which are often helpful in researching whether a subdivision was created at a particular point in time.

Credits: The Penobscot Valley Regional Planning Commission assembled opinions from the Attorney General's Office and the Maine Municipal Association. The State Planning Office assembled the court cases, and arranged and edited this Guide.

Subject Guide to Legal Opinions and Court Cases

Subject Guide to Legal Opinions and Court Cases

This Guide was prepared as a summary of topics contained in the opinions and court cases which follow. Each topic contains one or more abbreviated references which are explained below:

AG-1, AG-2, AG-3, etc., refers to opinions issued by the Attorney General's Office. These are numbered chronologically by date, so that new ones can be added according to a logical sequence as time goes by. Individual pages are also numbered in some of the longer opinions. Several opinions relative to the Site Location Act are also included because they contain discussion that would be relevant for the Subdivision Law.

MMA-1, MMA-2, MMA-3, etc., refers to opinions prepared by the Maine Municipal Association. These opinions are numbered chronologically as they appeared in various issues of the Maine Townsman. As new opinions appear, they can be added to this sequence.

SPO-1, SPO-2, etc., refers to memorandums issued by the State Planning Office. These are also numbered in chronological order according to date of issuance.

MSC-1, MSC-2 (page 54), MSC-3 (page 750), etc., refers to Maine Court cases which are arranged chronologically according to date. Since these opinions were copied directly from the Atlantic Reporter, page numbers from that source are also included, are used for reference purposes. Several cases related to the Site Location Act are included because they contain general discussions that would be relevant to the Subdivision Law.

sc-1, etc. This section is designed to include court case opinions from Superior Court. At this point, only the Phippsburg case has been included.

Subject Guide to Legal Opinions and Court Cases

Abuttor

Transfer of an interest in land to an abuttor is not a subdivision. See discussion in AG-8 (pp 2-3) and MMA-6.

Adoption of Regulations

For procedure to follow, see MMA-1.

Appeal Procedure

Appeal to decisions made under the Subdivision Law may be taken to Superior Court in accordance with Rule 80-B, Maine Rules of Civil Procedures. See AG-1 (p. 4).

See sc-1 for a copy of Rule 80-B.

Applicants for Subdivision Approval

Applicants for subdivision approval must have title, right, or interest in a parcel of land for which subdivision approval is sought in order to have "standing" (the right to apply) before the municipal reviewing authority. This principle was established in an opinion which dealt with the Site Location Act. The opinion further stated that mere oral representation regarding the existence of an option or contract is insufficient to establish standing. See AG-4.

Specific requirements for establishing title, right or interest, and particular problems relating to standing, are discussed in AG-5.

Approval of Plat

For a discussion of who should sign, see SPO-1.

Comprehensive Plan

It is not a requirement that a comprehensive plan be adopted prior to the adoption of subdivision control regulations. See AG-2.

Conditions

City Planning Board, in passing on plat, acts in an administrative capacity, and is without authority to impose conditions beyond compliance with municipal ordinance and general reasonableness. See MSC-2 (pp 53-54).

Constitutionality of Law

One recent court case concerning the Site Location Act contains an excellent discussion of Constitutional questions and the basis for police power regulations. The basic principles which are discussed apply to the Subdivision Law as well. See MSC-3. (see especially pp. 746-748).

Contiguous Parcels

Adjacent parcels of land are considered as one parcel of land for purposes of the Subdivision Law. See MMA-4.

Definition of What Constitutes a Subdivision

A subdivision is created when land is divided in a functional manner. Thus, cluster housing, shopping centers, mobile home parks, and apartment, condominium, or cooperative housing with multiple building units are subdivisions. See AG-1 (esp. p. 3).

For a discussion of high rise condominiums, see AG-3.

For a discussion of subdivision under the Site Location Act, see AG-7.

A municipality may, by ordinance, but not by regulation adopted by the municipal reviewing authority, define subdivision more restrictively or all inclusive than it is defined in State Law. See AG-9.

The sale of land to a water company is not exempt as a lot. See MMA-8.

In determining whether a subdivision was created at a particular point in time, the determination must be based on the law at that point in time. See AG-1 (p. 4), and MSC-1.

DEP Jurisdiction

The fact that a particular subdivision is subject to review under the Site Location Act does not eliminate the requirement for local review and approval. This principle is discussed in an opinion to the DEP relative to the Site Location Act. See AG-6.

Enforcement

The Attorney General's Office regards enforcement of the Subdivision Law as a local responsibility except under extraordinary circumstances. See AG-1 (page 4).

Gifts

Gifts are exempt as a lot. See MMA-3.

Grandfathering

A previously approved subdivision is not exempt from the requirements of a subsequently enacted zoning ordinance. A proposed use does not constitute a non-conforming use. See MMA-9.

A municipality is not required to take steps to protect unwary buyers who purchase undersized lots which should have been combined with adjoining land, but such action would avoid many problems and appeals. See MMA-9.

Interpretation of the Law

The legislative intent is of prime importance in the construction or interpretation of Statutes. This is a general principle of Law which was discussed in a recent court case. See MSC-3 (page 741).

Judicial Procedure

In one recent court case, the Maine Supreme Court discussed the doctrine of primary jurisdiction, which is essentially a judicial policy stating that the court will generally not decide an issue concerning which an administrative agency has decision making capacity until after the agency has considered the issue. This is similar to the concept of exhaustion of ^{administrative} legal remedies, by which a court can refuse to decide on a case on the basis that an administrative action has not yet been deemed complete. While the case dealt with the Board of Environmental Protection, these doctrines would probably apply in action involving the decisions of a municipal reviewing authority. See MSC-4 (p. 207).

Justification for Subdivision Regulation

One recent court case contains a good discussion of the need for subdivision regulation. Even though the discussion refers to the Site Location Act, the language is sufficiently broad so as to apply to the Subdivision Law. See MSC-3 (page 750).

Liability

A Planning Board member may not be held individually liable to individual suits as a result of decisions made in the discharge of the Planning Board's duties. See sc-2 (pages 8-10).

Municipal Regulation

Prior to 1971, the Subdivision Law was simply an enabling act, and did not require local review and approval. See MSC-4 (page 203).

Numerical Standards

The Spring Valley case discussed a rationale for determining and setting a specific numerical standard. See MSC-3 (page 752).

Parcel Retained by Subdivider

Land retained by the subdivider for his own use as a single family dwelling is not counted as a lot under certain conditions. See MMA-7.

Plantation Review Powers

A Plantation does not have the authority to review and approve subdivisions. See MMA-5.

Police Power

Subdivision regulation is a valid exercise of the police power. There is a general discussion of this principle in the Spring Valley case. See MSC-3 (page 746).

Request for Legal Interpretations or Opinions

The procedure for local Planning Boards to follow in requesting legal interpretations of the Subdivision Law was outlined in an opinion from the Attorney General's Office. See AG-3.

Retroactive Application of the Subdivision Law

For a general discussion of this, see AG-1 (page 4). See also MSC-1.

Review Considerations

Costs. It is public policy that the cost of development shall include those measures necessary to the protection of the environment of this State and this has already been determined by our Courts to be within proper limits of the police power. See sc-2 (page 6).

Discretion. The Legislature intended that there be room for discretion on the part of Planning Boards. See MSC-2, and sc-2 (pages 5-7).

Planning Board status. Planning Board status may affect subdivision review powers. See SPO-3.

Reasonableness. Actions and deliberations of Planning Boards must meet a general reasonableness test. Not everything will be spelled out by statute or ordinance, and it is expected that Planning Boards will exercise a general reasonableness. See MSC-2 (pp. 56-57), and sc-2 (page 7).

Tentative Approval does not compel final approval. The Planning Board does not have authority to make a prior commitment to approving a subdivision. See MSC-2 (pp. 54 and 56).

(Review Considerations) continued

Two-step approval. The basis for requiring preliminary and final plat approval must rest with specific statutes or regulations authorized thereunder. See MSC-2 (pp. 55-56).

Water Supply. For procedures to follow, see SPO-2.

Shoreland Zoning

Lot size, frontage, and setback requirements would apply to a previously approved subdivision, even if it means that unsold lots have to be combined. See MMA-9.

Signing of Plat

For a discussion of who should sign, see SPO-1.

Soils

The requirement that development not be built on soil types which are unsuitable to the nature of the undertaking is a reasonable one. While discussion of this point is contained in a case involving the Site Location Act, the language is broad enough to apply to the Subdivision Law. See MSC-3 (page 750).

Street Acceptance

A road shown on a plat prior to creation of the Planning Board is not subject to the Planning Board's jurisdiction. See MMA-2.

Tentative Approval of Plat

The Planning Board does not have authority to give tentative approval of a plat, or commit itself in advance to approving a particular subdivision proposal. See MSC-2 (page 54).

Transfer to an Abuttor

Transfer of land to an abuttor is exempt as a lot. See AG-8.

Water Supply

For a discussion of review considerations, see SPO-2.

Attorney General's Opinions

March 2, 1972

TO: ALL CONCERNED MUNICIPALITIES
FROM: ATTORNEY GENERAL'S DEPARTMENT AND THE MAINE
MUNICIPAL ASSOCIATION
RE: SUBDIVISION STATUTE - TITLE 30 MAINE REVISED
STATUTES, SECTION 4956 AS ENACTED BY CHAPTER 454
OF THE PUBLIC LAWS OF 1971

I. INTRODUCTION

Since the passage of the above act, both the Attorney General and the Maine Municipal Association have had numerous requests for guidance in the interpretation of the above law. Municipal officers and planning boards have requested official "Opinions" of the Attorney General regarding numerous provisions of the statute.

The Law prohibits the Attorney General from rendering opinions for other than State agencies or officials on matters dealing with State Law (as opposed to municipal ordinances or the legal relationships between private parties). In this case, however, it was decided that this unique statute required an advisory memorandum from the Attorney General. Though the cited statute is administered by municipalities, it may, according to its own terms, be enforced by the Attorney General. There is, therefore, a substantial connection with a State agency which would support an advisory memorandum. Moreover, because of the nature of the act, both the Attorney General and the Maine Municipal Association believe it is desirable to establish some uniform guidelines for the interpretation of the subdivision Law. Developers and municipal officers have an interest in uniform enforcement. If the Attorney General is to enforce the law, it is obvious that he must establish guidelines for his own use. Therefore, the Attorney General has determined that it is in the public interest to issue this memorandum. It must be emphasized that this memorandum is not an "Opinion" in the traditional sense, but rather only an informal interpretation of the referenced law. This has been prepared by the Department of the Attorney General after extensive consultation and discussion with the Maine Municipal Association. We strongly advise all planning boards and municipalities to consult their own counsel on any issue discussed herein or which may otherwise arise

II. SUBDIVISION

The most frequently asked category of questions usually requests further interpretation of the definition of "subdivision". It is obvious that an infinite variety of situations may arise under this law. It would be impossible to deal

with every conceivable fact situation. Therefore, in further defining "subdivision" we have attempted to establish a conceptual framework and to apply such framework to a variety of fact situations.

The term "subdivision", as contained in the statute, is defined as:

"The division of a tract or parcel of land into 3 or more lots for the purpose of sale, development or building."

Based on this definition, it is apparent that there are two elements to the definition: (1) The division of land, and (2) the purpose for which the division occurs. Of these two elements, the first is probably the more important and also more complicated. If we determine that there has been a division of land, it is a relatively simple matter to identify the purpose for which the division takes place (e.g., plainly a shopping center constitutes a "development." Query whether it is a division of land.)

It is also important to keep in mind the public policy implicit in this statute and the harm which it was designed to prevent. This statute enables municipalities to protect themselves against unplanned growth. The twelve criteria in § 4956(3) set forth the specific items with which the Legislature and municipalities were concerned. It should be apparent that these questions can be applied to a variety of developments, and are not just limited to residential subdivisions.

As we have noted above, the critical question is to determine whether in each case there has been a "division" of land into "lots". The term "lot" may be defined in two ways: either (1) according to its legal characteristics (e.g., a parcel of land identified on a plat or set out by metes and bounds), or (2) according to its character and function (e.g., a piece of land measured and set apart for private use and occupancy). See Words and Phrases and Black's Law Dictionary for further examples of "lot". Of the two definitions, the latter is the more helpful since it describes a more functional approach; that is, it is concerned not with legal form but rather with actual use. It is this functional approach which we have chosen to utilize in interpreting "subdivision", since we believe it is consistent with the purpose of the law. Having thus attempted to establish the conceptual framework of our analysis, it is now necessary to apply it to a few hypothetical fact situations.

The subdivision of land is usually accomplished by marking such divisions on a plat, a plan or by simply conveying the parcels. Clearly an outright sale of a portion of a parcel of land is a division. However, a "division" under this act may also be accomplished by other than selling lots. If the language of the statute only permitted division to be achieved by sale, then clearly dividing a parcel by leasing lots would not be a "division" as envisioned by the act. But the statute speaks of division for the purpose of sale and also for "development or building". Such development or building could occur without a sale of lots. Note also the language in § 4956(4) which prohibits "conveyances". A conveyance is a transfer of an estate or interest in real property, including a sale, gift, lease or mortgage. We conclude, therefore, that a division may occur when an interest in land is sold, leased or otherwise conveyed.

It is also conceivable that developments other than residential ones may be "subdivisions". Though the conclusion in any case depends on the particular facts, it is our opinion that cluster housing, shopping centers, mobile home parks, and apartment, condominium or cooperative housing with multiple building units may be deemed "subdivisions". The test again is the actual substance and not the legal form of the "development". It is obvious that if a developer built commercial units on adjacent parcels of land, and sold such units, there would be a subdivision. A different legal situation but similar practical effect is created when a developer connects the units (e.g., a shopping center). If the buildings are connected and the premises merely leased, we again have a situation which is similar in substance to the first example. The only real difference in each case is the legal relationship between the developer and the tenants of the units. We conclude that using our functional definition of "lots" (parcels of land identified and set aside for private use and occupancy) and keeping in mind the harm to be regulated, there is a subdivision. This same analysis may also be applied to various kinds of housing developments. Multiple unit housing would be a subdivision, but a highrise apartment, condominium or similar housing structure probably would not since there is no division of the land in the manner discussed above.

In general, we believe the above method of analysis can be applied to most situations. Though the list of examples is not exhaustive, it should aid municipalities and developers in determining the applicability of the law to a particular case.

III. RETROACTIVE APPLICATION

The second category of questions concerns the retroactive effect of the law and its application to divisions which occurred before the effective date of the law. The prohibition language of the statute refers to sales or conveyances. Clearly such prohibition could not be retroactive in effect since that would make sales in unapproved subdivisions, whenever made, illegal. Such a result would be extremely onerous and would be in effect making illegal those transactions which were at the time legal. Retroactive application of statutes is generally not approved. Furthermore, such an interpretation would make the statute apply ex post facto and such application is clearly prohibited. See 82 C.J.S., Statutes, § § 412-419. Sales or conveyances which occurred prior to the enactment of this law and which were in compliance with existing statutes are thus not affected by the passage of this act. The law applies only to sales occurring since its effective date. However, sales of lots after the effective date of this act, whether in a subdivision which was approved under prior law or not, are subject to this act. If the lots have not been sold and they are within a subdivision, those remaining unsold lots are subject to municipal approval. As a practical matter, this may mean that municipalities will give rather cursory review to a previously approved subdivision. Nevertheless, such review is required.

Editor's Note: This portion of the opinion would appear to be modified by the current Exemption clause in the Subdivision Law.

IV. APPEAL AND ENFORCEMENT

Finally, there have been questions as to appeal procedure and enforcement. Though the statute is silent on the right to appeal, such appeals may be taken pursuant to Rule 80B, Maine Rules of Civil Procedure. Enforcement will be the responsibility of the municipality. It would be an onerous burden on the Attorney General and a virtual impossibility to enforce the law on behalf of every city and town in the entire State. Municipalities have the power to enforce the law and the responsibility must rest with them. If they lack sufficient interest to do so, it seems inconsistent that they should demand action from the State. The Attorney General will act to enforce the law only under extraordinary circumstances, and then, when possible, in conjunction with the municipality.

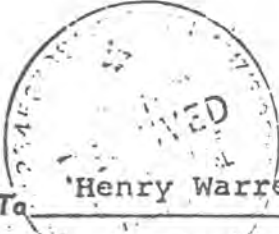
Casual sales by landowners, that is, selling of a lot or two every few years as opposed to planned and conscious development, is likely to be a major enforcement problem. Such persons are likely to be ignorant of the law or use such casual sales as a means of side-stepping the requirement of municipal review. Municipalities thus may wish to establish a procedure to be used in cases where they have

discovered a landowner who has or is about to come within the purview of the law. Such a procedure could include a notice to the landowner of the alleged violation and an opportunity for a hearing to determine whether the landowner is or has created a subdivision. The results of such hearing would then provide the basis for further legal proceedings by the planning board or municipal officers.

V. GENERAL

Questions regarding the form and substance of proposed municipal regulations and procedure should be referred to local counsel. Guidance is also available from the Maine Municipal Association.

Editor's Note: The following excerpts deals primarily with municipal requirements for the Mandatory Shoreland Zoning Act, but does contain a statement to the effect that the Subdivision Law permits the adoption of subdivision control regulation without the necessity of a comprehensive plan.



STATE OF MAINE

Inter-Departmental Memorandum Date September 7, 1972

To Henry Warren

Dept. Environmental Protection

From E. Stephen Murray, Assistant *ESM*

Dept. Attorney General

Subject Mandatory Zoning and Subdivision Control, 12 M.R.S.A. § 4811-4814
(P.L. 1971, c. 535)

You have asked for my opinion as to the following five issues all involving P.L. 1971, c. 535.

1. Must communities which adopt zoning and subdivision ordinances pursuant to the requirements of this law base such ordinances on a comprehensive plan?

My informal opinions are as follows:

1. Yes. While the first sentence of 12 M.R.S.A. § 4812 is merely a declaration of the law, i.e., that "municipal units of government pursuant to presently existing enabling legislation are authorized to plan, zone and control the subdivision of land", its inclusion in 12 M.R.S.A. § 4812 must be read as a directive to municipal units of government to zone shoreland areas pursuant to this "presently existing enabling legislation". To read the sentence otherwise would be to reduce it to mere surplusage, and when construing a statute, effect should be given to every word, phrase and clause contained in the statute. Camp Walden v. Johnson, 156 Me. 160, 163 A.2d 356 (1960). "Presently existing enabling legislation" is set forth in 30 M.R.S.A. §§ 4961-4964. 30 M.R.S.A. § 4962 provides that any zoning ordinance "or provision thereof" shall be "pursuant to and consistent with a comprehensive plan". Thus, in order to adopt zoning for shoreland areas, a municipal unit of government must first develop a comprehensive plan. It should be noted, however, that municipal units of government may adopt subdivision control ordinances for shoreland areas without first having developed a comprehensive plan for the reason that 30 M.R.S.A. § 4956 permits the adoption of subdivision control regulations (ordinances) without the necessity of a comprehensive plan.

STATE OF MAINE

Inter-Departmental Memorandum Date January 2, 1974

To Fourtin Powell

Dept. State Planning

From John M.R. Paterson JP

Dept. Attorney General

Subject Municipal Subdivision Statute, 30 M.R.S.A. § 4956

Your memorandum of October 31, 1973 commenting on the above statute and the informal memorandum issued by this office in 1972 was forwarded to me. I apologize for not having responded earlier to your comments, but, as I am sure you can appreciate, we have had a number of urgent matters to which we have been required to respond. In any event, I appreciate your comments and suggestions.

In general, I agree with your remarks regarding the interpretation of the definition of the term "subdivision" as found in §4956. I don't believe it was the intent of our Advisory Memorandum to exclude high-rise condominiums from the definition of subdivision. I am sure you can appreciate, however, that the interpretation given to that statute by this office is a rather broad interpretation and there is, of course, no guarantee that we are right. Indeed, there is a substantial segment of the Bar in Maine that disagrees with the views of this office. We have considered your suggestion of updating and revising our 1972 Advisory Memorandum and I would anticipate that at some time in the future we will do just that. In the meantime, we have tried to establish a procedure for answering the numerous inquiries which are directed to this office regarding interpretation of that statute. We have nearly finalized an agreement with the Maine Municipal Association along the following lines. Any inquiry from a land owner or an attorney requesting an interpretation of the subdivision statute would first be referred to the local planning board. The purpose of this step is to insure that the local planning board is aware that a question exists regarding some development in their community and to insure that the answer which we render is based on all the facts, including those that the developer chooses to advise us of and those of which the planning board is aware but which would otherwise not come to our attention. In the event that the planning board is unable to answer the question from the developer or attorney, the planning board may refer that question to the Maine Municipal Association. This second step is taken out of recognition of the fact that the Maine Municipal Association provides legal assistance to all 495 communities in the State and that the Attorney General is not the attorney for each municipality in the State. In addition, the Attorney General's office and Maine Municipal Association have worked closely in the past in formulating interpretation to the subdivision statute and we think it is only sensible that they continue to play a significant role in the future. In the event that a question arises which the Maine Municipal Association deems significant enough to refer to our office, the MMA would direct the question to us for an answer. We would, in turn, answer the question for the Maine Municipal Association. Once the details of this arrangement have been finalized it is our intention to advise all the municipalities of this agreement and the State and County Bar Associations. In addition, we would hope that the Maine Municipal

Association would keep all municipalities in the State aware of the interpretation issued in regard to the subdivision statute.

While this may seem like a rather cumbersome structure, it has the advantage of replacing what has, to date, been no system at all and has resulted in substantial state-wide confusion regarding interpretation of the subdivision statute and how a citizen goes about obtaining an answer to his question. Using the system outlined above, all parties conceivably interested in a particular question will be advised of the State's position.

I hope this answers your memorandum of the 31st. We would certainly appreciate receiving any other suggestions which you might have regarding this problem.

Thanks again for your interest.

Editor's Note: The following opinion does not deal directly with the Subdivision Law. However, it would appear to have a direct bearing on the administration of the Subdivision Law because it deals with the question of when an applicant has standing before a Planning Board. On the basis of this opinion, and the recent court case cited (*Walsh v. City of Brewer, Me.*), Planning Boards should be advised to require than an applicant demonstrate proof of title, right, or interest in a parcel of land for which subdivision approval is sought.

Inter-Departmental Memorandum Date March 26, 1974

To William R. Adams, Jr., Commissioner Dept. Environmental Protection

From Jon A. Lund, Attorney General Dept. Attorney General

Subject Pittston Company

SYLLABUS:

A person applying to the Board of Environmental Protection for a permit to build a development under the Site Location Act, 38 M.R.S.A. §§ 481-488, must demonstrate to the Board sufficient "title, right or interest" in the land for which the development is proposed to entitle him to status as an applicant before the Board.

FACTS:

The Pittston Company has applied to the Board of Environmental Protection for a permit to build an oil refinery and marine terminal in Eastport, Maine, pursuant to 38 M.R.S.A. §§ 481-488. At a late stage in the hearings before the Board at which such application was under consideration, a question was raised regarding Pittston's legal interest in the land proposed to be developed. According to your memorandum of March 18, 1974: "The record is clear that several significant parcels, including land necessary for the VLCC pier, are not under applicant's [Pittston's] control. . . ."

QUESTION:

May the Board act upon the application of The Pittston Company and either approve or disapprove the proposal?

ANSWER:

In order for the Board to have jurisdiction in this or any other case under the Site Law, it must find as a matter of fact that the applicant has sufficient "title, right or interest" in the property proposed for development.

REASONING:

We base our conclusion on the recent decision of Walsh v. City of Brewer, Me., --A.2d-- (Law Docket No. 73-3, February 5, 1974). In that case, Mr. Walsh applied to the Brewer Planning Board pursuant to a mobile home ordinance to use a parcel of land, owned by his wife and mother, as a mobile home park. As a result of the actions of the Brewer City Council and inaction of the Brewer Planning Board, Mr. Walsh filed suit for Declaratory Judgment. On appeal from a decision of the

Superior Court in favor of Walsh, the Law Court inquired into Walsh's relationship to the land in question to determine whether he had standing before the Brewer Planning Board as an applicant for a mobile home park. The Court questioned Walsh's standing despite the fact that the land was owned jointly by his wife and mother and that Mr. Walsh and the City of Brewer had stipulated in the Superior Court that

"At all times the Plaintiff [Mr. Walsh] . . . had authority from . . . [the legal owners] to propose and develop and operate a mobile home park on that site, with all related utilities and appurtenances."

The Law Court said that in order to have "standing" before the Planning Board the applicant would have to demonstrate that his relationship to the site of the proposed project was germane to the scope of the law regulating the use of such land. The Court concluded that the factual record was insufficient to establish Walsh's "standing" to be an applicant before the Brewer Planning Board and remanded the case to the Superior Court for further factual findings. The jurisdictional requirement of "standing" recognized by the Court was deemed by the Court to be:

"reasonable and highly desirable, policy-wise, to ensure that, absent clear and unquestionable legislative expression manifesting a different legislative attitude, governmental officials and agencies should not 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 law and facts at issue in Walsh are substantially similar to those involved in the instant question. The Brewer mobile home park ordinance was not a zoning ordinance, but a general land use ordinance, similar in form and purpose to the Site Law. As in the Brewer ordinance, we find in the Site Law no evidence of any "clear and unquestionable legislative attitude" that "title, right or interest" is not a prerequisite to standing as an "applicant" before the Board. The public policy on which the Walsh decision was premised is equally applicable to the Site Law. Indeed we can anticipate a variety of problems which might arise under the Site Law absent a requirement that an applicant have "title, right or interest" in the land for which a development is proposed. We can cite several examples. First, two or more applicants could apply to develop the same site, making it impossible for the Board to determine to whom approval ought to be given. Second, absent some indication that an applicant could implement a project, consideration of such application would require the Board members to "dissipate their time and energies" in dealing with hypothetical projects. Third, just

as a landowner should not find his property rezoned at the behest of a stranger, so a landowner should not find his land approved for an oil refinery at the request of a stranger. In short, we believe that all the public policy reasons underlying the Walsh decision apply with equal force to the question we confront here. We believe that "title, right or interest" is a necessary jurisdictional prerequisite to any decision by the Board in this or any other case.

The Court in Walsh did not clearly establish the type or extent of a "title, right or interest" which an applicant must demonstrate. However, based on our understanding of the rationale in Walsh and the cases cited by the Court therein, we can establish some general criteria for the Board to use. In order to establish such interest, an applicant must demonstrate to the finder of fact that it has control over the site and that the site can be developed by the applicant as proposed within a reasonable period of time. Sufficient control would include not only ownership in fee, but also some lesser interest, including a contract or option to purchase or other contractual agreement to acquire a right to develop the land, which right is enforceable by way of specific performance. Since contracts or options to purchase land may vary widely, the details of such contract, option or agreement are of critical importance. There are an infinite variety of such contracts and the applicant must demonstrate that the contract or option empowers it to develop the site within a reasonable period of time. A mere oral representation regarding the existence of an option or contract is insufficient to establish standing. Tripp v. Zoning Board of Review, 123 A.2d 144 (R.I., 1956), Rathkopf, The Law of Planning and Zoning, § 55.5 (1956). A willingness to negotiate for or seek sufficient interest in the future is no substitute for this requirement.

Final disposition of this case depends on factual findings to be made by the Board based on the record of any hearings. Since we are not the finder of fact, we have no way of knowing whether the applicant has carried his burden of proof regarding these jurisdictional facts. If the Board determines on the basis of the record that the applicant has not demonstrated sufficient "title, right or interest," it can either (1) dismiss the application for lack of jurisdiction, if satisfied that applicant has had sufficient opportunity to so demonstrate, or (2) reopen the record to permit the applicant an opportunity to establish the necessary jurisdictional facts. If the Board determines on the basis of the record that the applicant has demonstrated sufficient "title, right or interest," it must consider and rule on the proposal on its merits. If at some point the Board determines that it has jurisdiction over part of the proposal, it must then decide whether that partial development, standing alone, constitutes a development which can satisfy all the requirements of § 484 of the Site Law.

We would note in conclusion that the Board may not make a decision on the merits regarding any portion of the development over which it has no jurisdiction. We believe it would be in excess of the Board's authority and improper for the Board to make any informal ruling or issue an "advisory opinion" on an application over which it has no jurisdiction.

JON A. LUND
Attorney General

JAL/ec

Editor's Note: The following opinion is a clarification of the preceding opinion, by dealing at greater length with the specific documents needed to establish title, right, or interest, and by dealing with specific problems relating to standing before the Board of Environmental Protection. The points made may be relevant for the Municipal Reviewing Authority under the Subdivision Law.

Inter-Departmental Memorandum Date April 11, 1974

To William R. Adams, Commissioner

Dept. Environmental Protection

From Donald G. Alexander, Assistant

Dept. Attorney General

Subject Questions of Title, Right and Interest

Following is the response to the questions stated in your memo of April 4, 1974, relating to application of the "Title, Right and Interest" requirement and related matters. "Title, Right and Interest" is hereinafter referred to as "TRI."

Question 1. What must an applicant show to prove title, right or interest?

Answer: An applicant should be required to provide proof of TRI by submitting copies of his deed or deeds to the property, or an enforceable option to purchase the property, or a lease or some other contractual agreement for use of the property. Where a lease or other contractual agreement is presented to show TRI, it should be prima facie deemed sufficient to show TRI only if it is for a duration of 99 years. A lesser term should be allowed only where the applicant can demonstrate that the lease or other contractual agreement for the shorter time period is sufficient to cover the duration of the proposed development on the property.

However, the actual documents need not be presented if, by other means of proof, the applicant can demonstrate the nature and scope, duration and enforceability of his TRI with sufficient precision to give standing. This proof must be more than an oral or written statement by the applicant.

Discussion: In Walsh v. City of Brewer, Me., 315 A.2d 200 (1974) the court refused to accept, as sufficient evidence of TRI, a stipulation that the owners of the property - the wife and mother of the applicant - would allow the applicant to use the property for desired purposes. The Court held this stipulation as to TRI inadequate because it did not show the "nature and source" of the authority or that it had "sufficient duration" or "legal enforceability" (pp. 207-208). Other courts have also held that a simple statement of the existence of a purchase option is insufficient, Tripp v. Zoning Board of Review of City of Pawtucket, 123 A.2d 144 (R.I. 1956) and that proof of the "precise nature" of the agreement is required, Packham v. Zoning Bd. of Review of City of Cranston, 238 A.2d 387 (R.I. 1968). However, where proof has been presented, the Courts have accepted, as showing sufficient standing, Ralston Purina Co. v. Zoning Board, 12 A.2d 219 (R.I.) and contracts to purchase the property, Slamowitz v. Jelleme, 130 A. 883 (N.J.), Shulman v. Zoning Board of Appeals, 226 A.2d 380 (Conn.). Also an owner can apply, even though he has contracted to sell the property, contingent on a use permit being obtained. City of Baltimore v. Cohn, 105 A.2d 482, 204 Md. 523.

I was unable to find any case which absolutely required submission of the actual documents which formed the basis of TRI and excluded other methods of proof. Walsh v. City of Brewer and Tripp and Packham, supra, all indicated simply that more proof of TRI was needed, without actually specifying what that proof should be. Thus the conclusion that some proof other than actual documents is adequate to show TRI, if that proof, which must be more than a statement by the applicant, can demonstrate the "nature and source," "sufficient duration," "legal enforceability" and "precise nature" of the TRI. For example, the Department might accept written certification from a person expert in examining interests in property which (a) states that such person has examined the applicants claim of TRI, and (b) sets forth the facts upon which the judgment as to TRI is based in sufficient detail to show the precise nature of the applicant's TRI. The Department may, however, as a matter of policy determine that it does not choose to rely on such a written statement of TRI in lieu of the actual documents. Other means of proof, meeting the above standards, can also be allowed.

However, a requirement of submission of actual deeds, contracts or other agreements to prove TRI may be the only way that the Department can gain the necessary proof of jurisdiction in all cases without discriminating among applicants. As the Opinion of the Attorney General in the Pittston Case indicates: "Since contracts or options to purchase land may vary widely, the details of such contract, option or agreement are of critical importance. There are an infinite variety of such contracts . . ." To allow summaries of what an applicant's basis for TRI is raises the possibility of inaccuracy in such statements which, when discovered later, could render the whole proceeding on the application null and void. To require actual copies of documents in some instances and allow alternate proof of TRI in others raises the possibility of charges of discrimination in application of the law. Whether the Department will accept such written summary statements is, however, a matter of policy not a matter of law.

Leases and other contractual agreements which allow major capital improvements on a property while not transferring title are rare in Maine in cases other than those involving rights-of-way. It is common legal practice to make leases, easements or other contractual agreements permitting use of property for capital improvements for terms of at least 99 years. Therefore, this term is specified for the prima facie case as to adequacy of TRI where leases or other contractual agreements are presented to show TRI.

Question 2. Does a public agency with eminent domain powers have to prove title, right or interest?

Answer: The Department may take jurisdiction of applications from public agencies possessing eminent domain powers without requiring proof of TRI. Public agencies which do not have complete TRI in an involved property at the time of application may demonstrate TRI by a statement that such public agency is prepared to exercise its eminent

domain powers, if it is unable to acquire the property by other means.

Discussion: The Walsh v. City of Brewer decision was based principally on the question of standing and interpreted the question of standing by analogy to the issue of justiciability before the courts (p. 206). The Court listed several tests for determining if a matter was justiciable; whether the matter was a case or controversy or an "improper" advisory opinion, was the issue "ripe" for decision, are the parties the proper parties to be presenting the case, are there other policy reasons for exercising "judicial restraint" (p. 206). In a footnote the Court stated that absent a clear legislative mandate "governmental officials and agencies should not be required to dissipate their time and energies in dealing with persons who are 'strangers' to the particular governmental regulation and control being undertaken." (p. 207, note 4)

Because of the existence of eminent domain powers, the policy reasons the Court set out for refusing to consider a private applicant without adequate TRI do not apply to public agencies. A public agency without TRI would not present an application as a "stranger" but as an applicant fully capable of implementing any project approved by the Department.

It should be noted, however, that if anywhere in the record of an application a public agency indicates that it will not use eminent domain powers to acquire all or part of the property which is the subject of the application, then the status of that public agency, for the purposes of establishing standing, becomes the same as that of a private applicant. The policy reasons for making the distinction no longer apply.

Question 7. Does an application for a permit to operate a facility (e.g. air emission and waste discharge license, oil terminal permits, etc.) require a showing of title, right or interest?

Answer: There is no basis in the decided cases for a distinction between applications for permits to construct and applications for permits to operate on the issue of necessary proof of TRI. However, the Department may wish to make a policy distinction in terms of the degree of proof required.

Discussion: The four criteria that must be met to achieve standing, demonstrating the "nature and source," "sufficient duration," "legal enforceability" and "precise nature" of the TRI are simpler to meet for one seeking to operate an existing facility for a relatively limited and specified time period. Further, applicants for operating permits generally are in possession of the facilities which are the subject of the application and: "Possession shows a prima facie title," Brookings v. Woodin, 74 Me. 222 (1882). Thus there is a policy basis for requiring an applicant in possession and merely seeking permission to operate to provide different proof, if the Department chooses, than is required of an applicant for actual construction and alteration of land.

But the four criteria of adequate proof of TRI still must be met. The distinction between construction and operation is not always apparent. The question in the Walsh case was over an application for a license to maintain and operate a mobile home park (p. 202), and Walsh was in possession of the property but failed to qualify as an applicant.

Question 4. Can the Department process applications where there is a dispute as to title, right or interest?

Answer: The Department can only process applications where the applicant has TRI. Making a finding to that effect would be possible, but difficult, in a case where TRI is contested.

Discussion: Maine courts have held that they have both the power and the duty to examine jurisdictional questions in any case, Niles v. Marine Colloids, Inc., Me. 249 A.2d 277 (1969), Look v. State, Me. 267 A.2d 907 (1970). In other states this same duty to examine jurisdictional issues has been extended to administrative agencies; Hearn v. Cross, 80 A.2d 285 (D.C. 1951), 2 Am. Jur.2d., Administrative Law, § 332. However, I was able to find no decision stating that once an agency had considered the jurisdictional question and determined that it had jurisdiction it could not proceed further simply because its jurisdiction was contested. Such a decision to proceed could, however, be contested in court, and any agency which did proceed would risk having a court later declare its proceedings null and void because of lack of jurisdiction, 2 Am. Jur.2d, Administrative Law, §§ 489-491. To protect itself from wasted proceedings, therefore, the Department may wish to adopt a policy that it will not act on matters where TRI is questioned until the question has been judicially resolved or the question is deemed frivolous. The Department could defer nonfrivolous questions of this kind as the burden of proof of jurisdiction is on the applicant, and a serious question as to TRI would make the burden difficult to sustain.

Question 5. Is an application and an approval void if a dispute as to title, right and interest is discovered after Board approval?

Answer: An approval is not automatically void if a dispute as to jurisdiction develops after the approval. The approval would only be void if the jurisdictional issue were decided against jurisdiction.

Discussion: The Walsh case is clear that "lack of subject matter jurisdiction is always open at any stage of the proceedings" (p. 210). Thus, presumably the Department's duty to examine its jurisdiction is a continuing one, but simply raising a question as to jurisdiction is not identical in effect to a negative answer. Once the question is raised, the Department's options are to make a factual determination as to TRI, as was ordered in Walsh, and proceed accordingly or to refuse to act pending court determination of the issue. As in #4, the Department's refusal to act in this case would be based on the burden of going forward and the assumption that in a valid dispute,

the burden of going forward had not been sustained until the issue is finally determined in Court.

Question 6. Do tax liens or other liens or claims against the property affect an applicant's title, right or interest?

Answer: Yes, but where such clouds on title are discovered, the applicant still may demonstrate that he has sufficient TRI to pursue the application.

Discussion: 74 C.J.S., Quieting Title, § 14 lists numerous claims against property which constitute clouds on title and which thus can compromise TRI. These include attachments or liens placed on property by court order, taxes and other assessments against the property, easements, leases or other contracts affecting the property, contracts or options to purchase the property, conflicting deeds, and mortgages. The impact of each of these on TRI can vary greatly from case to case.

Walsh v. City of Brewer did not rule that any compromise of TRI would deprive an applicant of standing. It simply ruled that the applicant, on the facts presented, had not demonstrated "sufficient" TRI (p. 211). As the Attorney General's opinion in the Pittston Case noted, the sufficiency of TRI is a matter of fact for the Board to decide. Thus, where a cloud on title exists, the Board would have to determine if the applicant retains sufficient TRI to have standing.

The Department of Attorney General is continuing to examine the issues raised by questions 7 and 8; an answer on these points will be provided shortly.



DONALD G. ALEXANDER
Assistant Attorney General

DGA:mfe

AN INFORMAL OPINION

Editor's Note: While this opinion is directed to the administration of the Site Location Act, it also states that if a particular subdivision is subject to both State and local review, both must be obtained.

Inter-Departmental Memorandum Date April 19, 1974

From William R. Adams, Jr., Commissioner Dept. Environmental Protection
Donald G. Alexander, Assistant Dept. Attorney General
Subject Relationship of Department of Environmental Protection Approvals to Local Approvals of the Same Activity

Your memorandum of April 4, 1974, contained two questions regarding the relationship of DEP considerations to local land use regulations.

QUESTION:

Can the Board consider applications involving property which has not yet been zoned for its proposed use or which has not yet received the required local subdivision approval?

ANSWER:

Yes.

DISCUSSION:

I could find no case holding that the State agency would not have jurisdiction of a matter simply because local approvals relating to that matter had not been received. In addition, adverse local zoning or other land use regulations do not compromise an owner's title, right or interest in a property as that term is defined in Walsh v. City of Brewer, Me., 315 A.2d 200 (1974), since zoning or other land use regulations in no way compromise a person's capacity to convey the affected property. There are a number of cases which have held that both a city and a state may regulate a particular activity as long as the regulations are not inconsistent. Vela v. People, Colo., 484 P.2d 1204 (1971); Town of Cicero v. Weiland, Ill., 183 N.E.2d 40 (1962); Stary v. City of Brooklyn, Ohio, 114 N.E.2d 633 (1953); McQuillin, Municipal Corporations, 26.23(a). The facts in some of these cases indicate that local and state approvals may have been considered concurrently. Where there is inconsistency, the local regulations will be preempted by state action. Rinzler v. Carson, Fla., 262 So.2d 661 (1972); McQuillin, Municipal Corporations, 15.21.

QUESTION:

Conversely, can the Board adopt a policy that it will not consider applications until required local zoning and subdivision approval has been received?

ANSWER:

The Board may, by regulation, adopt such a policy, and such a policy would be most appropriately applied in cases where an actual change in a zoning ordinance is required before a project

Section 483 itself states that persons applying for a Site Location permit must submit the notice that they are applying for the permit: "together with such information as the Commission may, by regulation, require." Thus, the Board can require that an applicant provide adequate information before it starts to consider an application, and the time limit on consideration of the application need not begin running until the Department determines that such information has been provided.

It is important here to distinguish between an "incomplete" application and an application which is complete, but does not disclose sufficient information to warrant approval. The latter application must be considered. The distinction between the two situations is not exact and must be determined on a case by case basis. As a partial guide one might distinguish the two by determining if no information is provided on a matter required to be addressed, thus rendering the application incomplete, or if information is provided but it is insufficient to justify affirmative action, thus rendering the application complete, but unsatisfactory.

However, where actions suggested to justify delay are a result of the Department's own actions, such as seeking and receiving comments from other departments, the same basis for delaying consideration of an application does not exist. For example, if the applicant were required to provide the comments of the other department with his proposed application, then the 30-day period would not have to begin running until such comments were received, but if the Department itself seeks such comment after it has received the application, this does not effect the running of the 30-day period. As already noted, however, there exists an opinion of the Attorney General relating to the advisory as opposed to mandatory effect of the 30-day requirement.


DONALD G. ALEXANDER
Assistant Attorney General

DGA/bls

Inter-Departmental Memorandum Date May 8, 1974

To Henry Warren, Jack Bader, Dept. Environmental Protection
Hollis McGlauflin
From Donald G. Alexander, Assistant Dept. Attorney General
Subject Interpretation of "subdivision" under the Site Location Law
38 M.R.S.A. § 482(5)

Recently several questions have arisen as to what constitutes a "subdivision" so as to subject a housing development to approval or enforcement procedures under the site location law. The law is quite specific. It states that a development is subject to the law if it meets the following criteria:

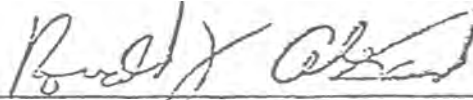
1. Division of a "parcel" into 5 or more lots.
2. Any lot being less than 10 acres in size.
3. If the lots total more than 20 acres, and
4. Are to be offered for sale or lease within a 5-year period.

Some confusion seems to have arisen because of the word "parcel." A "parcel" should be considered to be the block of land a developer owns, regardless of size. The law, by assuming that lots larger than 10 acres may be included in a subdivision, clearly contemplates that where part of a large parcel is divided into small lots and the remainder is left as one undivided lot, that large, undivided lot is part of the subdivision for purposes of application of the site location law.

Another point of confusion is over the term "to be offered for sale." The language of this phrase clearly implies an element of intent, as all proposals the Department considers are, at the very least, statements of intent. However, to have a violation of the law, more than just a plan on paper, must be shown; there needs to be some overt act in furtherance of the intent, such as the beginning of construction (disturbing the soil) or an actual offering for sale through solicitation or otherwise without a permit.

A third point of confusion is the proper differentiation of individuals and corporations when property is being transferred. Generally individuals and corporations are regarded as separate and distinct entities. However, this may not be the case where an individual controls or owns a significant interest in a corporation. Where there is a transfer between an individual and a corporation in which such individual has a significant interest, and the apparent result of the transfer is to exempt from the law activities which, if done by the individual or the corporation alone, would be subject to the law, then the law may well apply regardless of the transfer. Each such case should be evaluated on its own in consultation with the Department of Attorney General.

A final note; persons contemplating subdivisions of less than 20 acres should be aware that if the sale or offering for sale of lots on their parcel of land exceeds 20 acres within 5 years they will be in violation of 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.



DONALD G. ALEXANDER
Assistant Attorney General

AN INTERNAL OPINION

DGA:mfe

Editor's Note: The first part of this informal opinion, dealing with the question of whether a municipality may define subdivision more restrictively than State law, has been superceded by an opinion dated July 21, 1976, which follows. The portion which deals with transfer of interest in land to an abuttor would still appear to be valid.

STATE OF MAINE

Inter-Departmental Memorandum Date June 11, 1974

To Rich Rothe, Fourtin Powell

Dept. State Planning Office

From Edward Lee Rogers, Assistant

Dept. Assistant Attorney General

Subject _____

In your letter of April 9, 1974, you ask the following questions:

- (1.) Where State law defines subdivision for the purpose of required municipal review, can a municipality, by ordinance or by planning board regulation, define subdivision more stringently, or establish controls for the regulation of land divisions which are exempt from the law's definition of subdivision (i.e., define subdivision as two lots instead of three, and include the land retained by the subdivider)?
- (2.) If the answer to #1 is negative, will the recently enacted changes in the Law apply only to ordinances and regulations adopted pursuant to its enactment, or will the new amendments nullify provisions in existing ordinances or planning board regulations?
- (3.) The recent amendment of § 4956, sub-sect. 1, added a new sentence at the end to read as follows:

"For the purposes of this section, a lot shall not include a transfer of an interest in land to an abutting landowner, however accomplished."

Since this follows, rather than precedes, the provision dealing with 40 acre lots, does the clause, ". . . except where the intent of such sale or lease is to avoid the objectives of this statute.", apply to this new amendment? (If it does not, then the new subdivision law amendment exempting from review transfer of land to an abutting owner appears to create the possibility of unlimited subdivision without municipal review since such land is by definition a non-lot. In other words, if A sells 20,000 square foot separate parcels to abuttor B, can B then build on these parcels and sell them without review?)

In our opinion, the answer to question (1) is yes, and we therefore do not reach the second question. In our opinion, the answer to question (3) is no, the exception does not apply to the new amendment.

AN IMPROVED PRINTING

With regard to (1), 30 M.R.S.A. § 4956 expressly authorizes the municipalities to "adopt additional reasonable regulations governing subdivisions" in subsection 2B. This authorization is reiterated in 12 M.R.S.A. § 4812-A. Since 30 M.R.S.A. § 1917 grants municipalities the right to act unless prohibited from doing so by the State, the question is whether promulgation of a definition of subdivision by the State is a prohibition of the municipalities' right to adopt a more restrictive definition.

The State could have expressly denied the municipality the right to redefine subdivision. Instead it granted municipalities the unrestricted right to adopt additional regulations and ordinances. It is evident, therefore, the State was merely setting minimum standards, while leaving municipalities the freedom to adopt regulations consistent with the State law. Municipalities have in fact assumed that by passing a state minimum lot size law, the State did not preempt the right to define "lots" more restrictively and have acted accordingly. Given the expressed authorization in 30 M.R.S.A. § 4956, it is even more reasonable to assume municipalities are free to define subdivision more restrictively.

The definition may be made by regulation or ordinance. Anderson 19.20, Yokley 12.3, Villa-Laken Corp. v. Planning Board, 138 N.Y.S.2d 362 (1954). However, in view of the provision in subsection 2B a definition by ordinance would be more secure.

A warning should be added. Subsection 2B requires that additional regulations be "reasonable." It may, therefore, be unwise for a town to alter the "reasonable" provision in the State definition without having particular justification therefor. For example, the State law says no sale or lease of a lot 40 acres or larger shall be considered part of a subdivision. Unless a town was attempting to preserve an agricultural or natural area where 40 acre lots would not be sufficient to retain the character desired, it would seem of dubious validity for the town to attempt to impose a stricter definition than provided by this statute.

Turning to question (3), the new amendment to subsection 1 cannot be qualified by a clause preceding it in a separate sentence. Thus, literally construed, the clause in subsection 1, "except where the intent of such sale or lease is to avoid the objectives of the statute" does not apply to transfers to abutting landowners.

You express further concern about this point in your letter because the amendment states (somewhat ungrammatically) that "a lot shall not include a transfer * * * to an abutting landowner." (Underscoring supplied.) Further, the new amendment to subsection 5 (Section 2 of Chapter 700, P.L. 1973) provides that:

AN INFORMAL OPINION

"The owner of a lot which, at the time of its creation, was not part of a subdivision, shall not be required to secure the approval of the municipal reviewing authority for such lot in the event that the subsequent actions of a prior owner, or his successor in interest, of the lot creates a subdivision of which the lots is a part, however, the municipal reviewing authority shall consider the existence of such a previously created lot in passing upon the application of any prior owner, or his successor in interest, of the lot for approval of a proposed subdivision."

Considering these two amendments together, your concern is that the lot or lots transferred to an abutting landowner will be exempt from the law even if a subdivision is thus created by sequence of transfers from owner A to abutting owner B.

While the statute is not as clear as it ought to be, we believe that such a misuse of the law could be successfully challenged. Subsection 5 was amended solely to afford adequate title protection to a landowner when the prior owner subsequently creates a subdivision. An intentional avoidance of the law by transfers of lots to an abutting landowner would constitute a subterfuge. The courts ought to consider such conveyances dependent steps in an overall transaction designed to achieve a subdivision in violation of the law (the so-called "step transaction" doctrine).

The matter is not altogether free from doubt, however, and the statute ought to be amended to clarify it with regard to these matters, as well as several others. In particular, the assumption that we should look to "intent" in administering a statute is a dubious one because matters of intent or motive are difficult to prove as such. It would be preferable if the statute were rephrased in terms of the effect of certain conveyances resulting in evasion of the objectives or purposes of the law. We therefore suggest for your consideration the following changes:

1. Subsection 1 of § 4956 would be amended to read as follows:

1. Defined. A subdivision is the division of a tract or parcel of land into 3 or more lots within any 5-year period, whether accomplished by sale, lease, development, building or otherwise, except when the division is accomplished by inheritance, order of court or gift to a relative, ~~unless the intent of such gift is to avoid the objectives of this section. For the purposes of this section, a lot shall not include~~

A transfer of interest in land to an abutting landowner, ~~however accomplished,~~ shall not be considered part of a division of land for the purposes of this statute.

AN INFORMAL OPINION

In determining whether a parcel of land is divided into 3 or more lots, land retained by the subdivider for his own use as a single family residence for a period of at least 5 years shall not be included.

No sale or lease of any lot or parcel shall be considered as being a part of a subdivision if such a lot or parcel is 40 acres or more in size, ~~except where the intent of such sale or lease is to avoid the objectives of this statute.~~

The grantee, including a lessee, or his successors in interest of a lot which at the time of its creation and transfer to such grantee is not part of a subdivision may, at his or their option, elect (1) to have the lot not considered a part of a subdivision, or (2) as against the grantor, including a lessor, or his successor in interest who engaged in the actions hereinafter described, rescind the transfer and recover the purchase price, with interest, together with damages and costs in addition to any other remedies provided by law, if, solely by reason of the subsequent actions of the grantor of such lot or his successor in interest with regard to nearby lands, a subdivision is created of which the lot is a part. Such lot, however, shall be deemed a part of such a subdivision for the purpose of considering an application of such grantor of such lot or his successor in interest for approval of such proposed subdivision or for the purpose of determining whether there has been a violation of this statute by such grantor or his successor in interest.

The exceptions to the definition of a division or subdivision provided in this section shall not apply to a gift to a relative, to a lot 40 acres or more in size, or to a transfer to an abutting landowner if, the effect of such transaction or transactions would result in avoiding the objectives of this statute.

The present amendment of subsection 5 provided by Chap. 700 of P.L. 1973, would, of course, be struck if the foregoing amendment were to be adopted.


EDWARD LEE ROGERS
Assistant Attorney General

ELR/ec

AN INFORMAL OPINION

Editor's Note: This opinion indicates that municipalities may, by ordinance, but not by regulation adopted by the municipal reviewing authority, define a subdivision in ways more restrictive or all inclusive than it is defined in the Subdivision Law. This opinion modifies the preceding opinion, dated June 11, 1974.

STATE OF MAINE

Inter-Departmental Memorandum Date July 21, 1976

To Rich Rothe

Dept. State Planning

From Cabanne Howard, Assistant

Dept. Attorney General

Subject Municipal Regulation of Subdivisions

SYLLABUS: Under its Home Rule powers, a municipality may by ordinance regulate a subdivision of land regardless of the provisions of the Municipal Subdivision Law, 30 M.R.S. §4956. A municipal planning board, however, (or municipal officers acting in place of a planning board) may not, when discharging their responsibilities under the Municipal Subdivision Law, alter, by regulation or otherwise, the statutory definition of a subdivision.

FACTS: On June 11, 1974, this office rendered an opinion at the request of you and Fourtin Powell answering various questions regarding the interpretation of the Municipal Subdivision Law, 30 M.R.S. §4956. One of those questions was whether a municipality may by ordinance or planning board regulation, define and therefore regulate a subdivision in a manner more restrictive than the statute. In the opinion we answered this question in the affirmative. Id at 2. On April 22, and April 27, 1976, however, we received letters from two lawyers in the state who deal frequently with questions of this type, Mr. David Plimpton of Portland and Mr. Atherton Fuller of Ellsworth, indicating that they have been taking a contrary position with their clients and asking whether we would reconsider our position. Because of the state-wide importance of the question, we have determined to do so.

The relevant portion of the 1974 opinion is as follows:

"With regard to (1), 30 M.R.S.A. §4956 expressly authorizes the municipalities to 'adopt additional reasonable regulations governing subdivisions' in subsection 2B. This authorization is reiterated in 12 M.R.S.A. §4812-A. Since 30 M.R.S.A. §1917 grants municipalities the right to act unless prohibited from doing so by the State, the question is whether promulgation of a definition of subdivision by the State is a prohibition of the municipalities' right to adopt a more restrictive definition.

The State could have expressly denied the municipality the right to redefine subdivision. Instead it granted municipalities the unrestricted right to adopt additional regulations and ordinances. It is evident, therefore, the State was merely setting minimum standards, while leaving municipalities the freedom to adopt regulations consistent with the State law. Municipalities have in fact assumed that by passing a state minimum lot size law, the State did not preempt the right to define 'lots' more restrictly and have acted accordingly. Given the expressed authorization in 30 M.R.S.A. §4956, it is even more reasonable to assume municipalities are free to define subdivision more restrictively.

The definition may be made by regulation or ordinance. Anderson 19.20, Yokley 12.3 Villa-Laken Corp. v. Planning Board, 138 N.Y.S.2d 367 (1954). However, in view of the provision in subsection 2B a definition by ordinance would be more secure.

A warning should be added. Subsection 2B requires that additional regulations be 'reasonable'. It may, therefore, be unwise for a town to alter the 'reasonable provision in the State definition without having particular justification therefor. For example, the State law says no sale or lease of a lot 40 acres or larger shall be considered part of a subdivision. Unless a town was attempting to preserve an agricultural or natural area where 40 acre lots would not be sufficient to retain the character desired, it would seem of dubious validity for the town to attempt to impose a stricter definition than provided by this statute."

QUESTION: May a municipality by ordinance, or a municipal reviewing authority under the Subdivision Law by regulation, define a subdivision more restrictively than contemplated by the Subdivision Law?

ANSWER: A municipality may make such a definition by ordinance, but a municipal reviewing authority may not alter the statutory definition by regulation.

REASONING: The 1974 opinion that municipalities may regulate in a manner more restrictive than the statute was based on two grounds: (1) the existence, since 1969, of municipal "home rule" powers, MAINE CONSTITUTION, art. VIII, pt. 2, §1; 30 M.R.S. §1917, by which the municipalities may exercise any power inhering in government generally which is not prohibited to them, expressly or by clear implication, by the Legislature; and (2) the authority conferred by subsection 2(B) of the Subdivision Law which permits municipalities to adopt "additional reasonable regulations governing subdivisions."

In basing its result on the second of these two reasons, it appears the opinion was in error. In granting the authority to municipal reviewing authorities to adopt "regulations governing subdivisions" under the Subdivision Law, the Legislature clearly could not have been using the word "subdivision" in any sense other than the definition of that word explicitly provided in subsection 1 of the law. Thus, while a municipality might be able to adopt a regulation clarifying any ambiguity in the statutory definition of subdivision, it could not adopt a regulation defining a subdivision which is flatly contradictory to the statute. For example, a municipality might adopt a regulation defining with more precision the word "lease" in the statutory definition (so as to exclude, for example, motels - whose tenants might be thought to have one day "leases" - from the purview of the law), but a municipality cannot by regulation define a subdivision as consisting of only two lots, rather than the three required by the statute.

This is not to say, however, that a municipality cannot, through the exercise of its "home rule" powers, pass an ordinance regulating subdivisions in any way at all, so long as it does not violate the State or Federal Constitutions. To the extent the 1974 opinion rests on this basis, it is correct. A municipality could be prevented from so regulating only if it can be shown that the Legislature "expressly or by clear implication" has denied it the power to do so. Such a prohibition cannot be found in the Subdivision Law. That statute merely requires that the municipalities of the state regulate subdivisions to the degree set forth therein. Nowhere does it prohibit - or even imply - that they may not go further. In the absence of such a prohibition or implication, therefore, the municipalities must be judged to have the power (since 1969) to pass general subdivision regulatory ordinances defining subdivisions therein in any constitutional manner they choose.

JOSEPH E. BRENNAN
ATTORNEY GENERAL



RICHARD S. COHEN
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REC-1

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

DEC 7 1977

State Planning Office

November 30, 1977

To: Allen Pease, Director, State Planning Office
From: Joseph E. Brennan, Attorney General
Subject: Attorney General's Role in Enforcing the Subdivision
Law (30 M.R.S.A. §4956)

This opinion is in response to your question concerning the Subdivision Law. The question posed was "If a town consistently disregards the standards contained in the Subdivision Law (30 M.R.S.A. §4956), and further, if these deviations are considered to be significant, does the Attorney General have the legal authority to require towns that consistently and substantially disregard the standards set out in 30 M.R.S.A. §4956 to conform to the law in their review of subdivisions.

The Attorney General in Maine inherited common law power from England. Withee v. Land & Libby Fisheries Co., 120 Me. 121 (Me. 1921). As the chief law enforcement officer of the State he has wide authority to protect the interests of the State and its citizens:

". . . . as the chief law officer of the State, he may, in the absence of some express restriction to the contrary, exercise all such power and authority as public interest may from time to time require, and may institute, conduct, and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights. Withee, p. 23.

The Court in Withee called the Attorney General's powers "numerous" and "varied," Id. at 23.

In Lund Ex Rel Wilbur v. Pratt, 308 A.2d. 554 (Me. 1973), the Law Court expressly recognized that the Attorney General is a constitutional officer deriving this status from Article IV, Section 11. The Court, stressed that he has the power, absent an express statutory prohibition to the contrary, to maintain actions and proceedings to preserve order and protect the public's right. The Attorney General has the power to protect the entire community when an injury is shared by all equally. Von Tiling v. City of Portland, 268 A.2d. 888 (Me. 1970). In fact, he is the only person authorized to bring such suits. He has this authority because he is the representative of the people. A 1975 Massachusetts case, Secretary of Administration and Finance v. Attorney General, 326 N.E. 3d. 334 (Mass. 1975), stressed this basis for his power.

"The Attorney General represents the commonwealth as well as the Secretary . . . who requests his appearance. He also has a common law duty to represent the public interest. Id at 338.

The Maine courts concur:

"The chief law officer represents the whole body politic, or all the citizens and every member of the State. Only a few of the duties of the Attorney General are specified by statute; that official is, however, clothed with common law powers. It is for him, in instances like these to protect and defend the interests of the public."
In Re Maine Central Railroad Co. et al., 134 Me. 217 (Me. 1936).

I. Attorney General's Power to Bring Mandamus Action.

One of the common law powers of the Attorney General is the power to proceed against public officials in order to protect the best interests of the State. The cases in Maine and elsewhere have recognized that the Attorney General has the power to institute mandamus proceedings. The mandamus action is a proceeding to require the official or officials to do something they are required by law to do. Rogers v. Brown, 134 Me. 88 (Me. 1935).

It is generally conceded that a mandamus action by the Attorney General is authorized by his common law powers. Although Maine has abolished the writ of mandamus (a procedural device) the substantive cause of action remains and may be brought pursuant to Rule 80B Me. R. Civ.P. In determining whether mandamus must be had however, recourse must be made to the common law. Young v. Johnson, 161 Me. 64, 69 (1965).

In Kelley v. Curtis, 287 A.2d. 427 (Me. 1972), the Law Court had before it a mandamus action brought under Rule 80B, Me. R. Civ. P. The Plaintiff, a petition sponsor, sought to require the Governor of Maine to issue a proclamation of special election within a reasonable time after presentation to the Legislature of a petition seeking a ballot reform. The Legislature, before it adjourned, determined the reform measure was validly initiated. The Governor had not issued an order for six months following the adjournment, and suit was filed. By law, the Governor was required to call a special election "within a reasonably short time" after adjournment. The Court apparently had no problem with the 80B process. Both the Superior Court and the Law Court entertained the proceeding initiated under 80B. The Court did express some concern over the standing of the petitioner to proceed, but since it did not need to reach the standing issue, it was not discussed. In Farris, ex rel Dorsky v. Goss, 143 Me. 227 (1948), the Court allowed a private group to use the Attorney General's unique position of standing to bring a mandamus action to compel the Secretary of State to place an "initiated measure" as well as the enacted measure on the ballot so the voters could decide which they preferred. The Court had no problem with allowing the Attorney General to bring such an action.*

The power of the Attorney General to bring mandamus actions has been recognized in other jurisdictions. In Attorney General v. Trustees of Boston Elevated Railroad, 67 N.E. 2d. 676,685 (Mass. 1946), the Supreme Judicial Court of Massachusetts recognized the Attorney General's power to proceed against public officers by mandamus. A Texas Court, in Yolt v. Cook, 281 S.W. 837,843 (Tex. 1926), recognized that the "ancient and modern rules of common law," allowed the State and Attorney General the power to use mandamus proceedings in supervising municipalities.

*/ In McCaffrey v. Gartley, 377 A.2d.1367 (Me. 1977), a similar action was brought without invoking the Attorney General's powers.

The mandamus action serves a very specific purpose. Its use is restricted to cases in which it is clearly shown that an official has neglected or refused to do something required by law. In Littlefield v. Newell, 85 Me. 246 (Me. 1893), the Maine Attorney General filed a mandamus action against the mayor and aldermen of Lewiston to force them to comply with the town's charter and ordinances.

"It is a well-settled rule that mandamus extends to all cases of neglect to perform an official duty clearly imposed by law when there is no other adequate remedy. If the officers are required to act in a judicial or deliberative capacity, the court cannot, if it is true, control their official discretion, but may by its mandate compel them to exercise it. It cannot direct them in what manner to decide, but may set them in motion and require them to act in obedience to law. p. 111.

See also, Rogers v. Brown, supra and Mitchell v. Boardman, 10 A. 542 (Me. 1887), on protecting public rights.

II. Attorney General's Power to Appeal Local Administrative Decision.

The Subdivision Law (30 M.R.S.A. §4956 subsection 5) permits the Attorney General to enforce the law although it is generally envisioned that the Attorney General will only do so under extraordinary circumstances and hopefully with the aid of the municipality. In a joint memorandum filed by the Attorney General and the Maine Municipal Association, dated March 2, 1972, this office felt an 80B appeal under the Maine Rules of Civil Procedure would be available to those affected by decisions of the municipal authority. It seems clear that nothing prohibits the Attorney General from enforcing the law by requiring the municipality to abide by its requirements. The Attorney General's principal function is to protect the public interest and to maintain all suits and proceedings to enforce the laws of the State. Withee v. Libby Fisheries Company, supra at p. 123. Should he not carry out these functions, he would be violating his responsibilities

to the public. If a decision by the municipal authority in a subdivision case was so contrary to the dictates of the statute, the Attorney General might appeal from such a determination. Apparently, the exact question has not been ruled upon in Maine, although it is presently in front of the Law Court in Central Maine Power Co. v. Public Utilities Commission, (Law Ct. Docket No. Ken 73-43).

Other states have recognized that the Attorney General has the power to appeal from the decisions of agencies when the public interest is involved. In a Nebraska case, In Re Equalization of Assessment of Natural Gas Pipe Lines v. State ex re Soreman, 242 N.W. 609 (Neb. 1932), the power of the Attorney General to petition for a writ of error in the Supreme Court from a tax board's decision was recognized. And in a New Jersey case, Attorney General v. Delaware & B. B. R. Co., 27 NJEq. 631, the court held:

"In equity, as in the Law Court, the Attorney General has the right, in cases where the property of the sovereign or the interests of the public are directly concerned, to institute suit by what may be called 'civil information' for their protections. The state is not left without redress in its own courts, because no private citizen chooses to encounter the difficulty of defending it, but has appointed this high public officer on whom it has cast the responsibility, and to whom, therefore, it has given the right of appearing in its behalf and enriching the judgment of the Court on such questions of public moment. Id. p. 610.

Other cases in accord, Petition of Public Service Coordinated Transport et al., 74 A.2d. 580, 586 (N.J. 1950) and State ex rel Olsen v. Public Service Commissioner, 283 P.2d. 594 (Mont. 1955).

There seems little question that the Attorney General can bring suit against a recalcitrant town to require it in the future to apply the Municipal Subdivision Law or challenge subsequent decisions which substantially deviate from it. We would note that the Attorney General retains discretion with regard to bringing any particular action, and the decision on bringing an action would relate to the seriousness of the violation of law and the availability of resource of the Department to properly prosecute the action.


JOSEPH E. BRENNAN
Attorney General

Maine Municipal Association Opinions

Excerpts from the Maine Townsman

Legal Opinions

1. Procedure for adoption of Regulations (Feb., 1972)

Question: Our planning board would like to adopt a subdivision regulation following the new guidelines set forth by statute under Public Laws enacted by the 105th Legislature, Chapter 454, Section 4956, Land Subdivisions, par. 3, A through L. What procedure is necessary -- such as how many days of public notice, and is a public hearing necessary before final adoption?

Answer: I believe that 7 days' public notice should be given and that a public hearing is necessary before final adoption.

Editor's note: The requirement for a public hearing prior to adoption of regulations by the municipal reviewing authority is now required by subsection 2. b. of Section 4956 of the Subdivision Law.

2. Street Acceptance (Oct., 1972)

Question: Can the planning board be bypassed in ruling on the acceptance of a road in a subdivision by a petition being presented to the selectmen? I should mention that this subdivision was deemed to be in existence prior to the planning board. There has always been considerable doubt in the minds of the planning board as to what authority can be exerted over such subdivisions in this particular category. Perhaps I should further clarify to say the intent is to have this petition presented at either a special, preferably, or regular town meeting.

Answer: If the subdivision was in existence prior to the new law of last September, then I do not believe that the planning board would have a right to control the acceptance of the street. I assume this was a street which appeared on the original plan which must have been approved earlier, and I assume that lots have been sold off prior to the new law.

3. Gifts (Jan., 1973)

Question: This is to inquire if a certain division of land in the town falls within the meaning of M.R.S.A., Title 30, Sec. 4956, amended, and thus should come before the planning board for subdivision approval. Five lots ranging in area from 23 to 30 acres have been divided from a farm and conveyed as gifts to children of the owner. Is there anything that would exempt them from the subdivision approval requirement, particularly the fact that they are gifts rather than arms-length transactions?

Answer: It seems to me that under M.R.S.A. Section 4956 of Title 30 and also under your own regulations that the transfers would be legally proper since they constituted gifts and did not constitute either sales, developing or building of property. In other words, I don't believe the intent of the new statute is to apply to mere gifts, wills or inheritances.

4. Contiguous Parcels (Feb., 1974)

Question: Two problems have arisen in our town with respect to the definition of a "parcel of land" for subdivision purposes. The two situations are as follows:

- (1) An acreage was purchased prior to subdivision regulations and later this was followed by the same individual buying an adjacent piece of acreage from another person. Through the years the tracts were consolidated for tax purposes, but two separate deeds remain. Can these be treated as separate tracts for subdivision?
- (2) A single deeded parcel separated by a public road is taxed as two separate parcels. Is this considered two parcels for the purpose of meeting subdivision minimums, thus allowing six lots to be sold instead of three without a formal plan?

Answer: It is my opinion (1) that a contiguous parcel of land held by one person is treated as one parcel under the subdivision law, T. 30, M.R.S.A. § 4956, although acquired under two deeds, and (2) that a parcel of land divided by a town way is also treated as one parcel for the purposes of the subdivision law, unless the town owns the way in fee.

Editor's Note: The Subdivision Law now states that lands located on opposite sides of a public or private road shall be considered each a separate tract or parcel of land unless such road was established by the owner of land on both sides thereof. This provision of the Statute did not exist at the time this opinion was rendered.

5. Plantation Review Powers (Oct., 1974)

Question: Can you explain the duties of the plantation officials with respect to subdivision in our plantation?

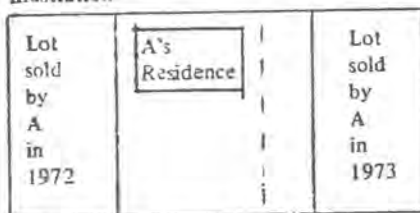
Answer: The definition of the term municipality provided by 1, M.R.S.A., § 72 (13), and 30, M.R.S.A., § 1901 (6), includes only cities and towns when used in most parts of Title 30.

I therefore conclude that a plantation cannot exercise any home rule powers as granted to municipalities by 30, M.R.S.A., § 1911-1920, nor any of the subdivision review functions charged to municipalities by 30, M.R.S.A., § 4956.

6. Sale to abutter (Nov., 1974)

Question: A man in town owned several acres of land on which he has maintained his residence for several years. In 1972 he sold a one-acre lot and in 1973 he sold another one-acre lot. He still lives on the remainder. He now wishes to sell a small strip of land to the abutter who purchased a lot in 1973. Will this create a subdivision?

Illustration:



Small strip of land which A wishes to sell to abutter.

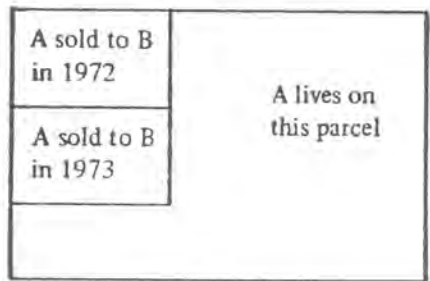
Answer: The State Subdivision Law (30, M.R.S.A., § 4956) now provides that transfers of property from one landowner to an abutting landowner shall not be counted as a lot for purposes of this law. Therefore, even though a person has divided his land in such a way that the transfer of one more lot might create a subdivision, he may still transfer land owned by himself to an abutter without having to file a subdivision plan.

7. Parcels retained by subdivider (Dec., 1974)

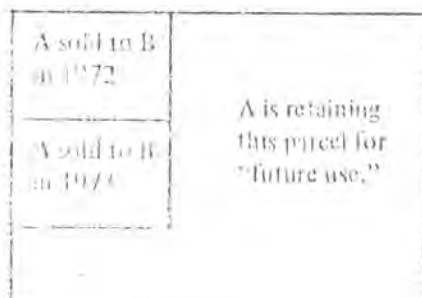
Question: Does the law say you can sell two pieces of land and live on one tract and not have a subdivision? Does the law say you can sell two tracts of land and reserve one tract for future use?

Answer: It is my opinion that a person does not have a subdivision within the scope of 30, M.R.S.A., Sec. 4956 if he owns a tract of land, sells two parcels and keeps the remaining land for his residence.

However, a lot reserved for future use generally counts as one lot for the purposes of this law if the subdivider does not use it as a residence. The following illustrations may help.



No subdivision until A sells one more lot, or until A moves from remaining parcel (if less than five years of use as a family residence).



Subdivision exists in my opinion because there has been a division into three lots within a five year period.

Editor's note: The Subdivision Law is now more precise about whether the property retained by the Subdivider is counted as a lot. The Law now stipulates that a lot retained by the subdivider is exempt only if two dividings of a tract or parcel are accomplished by a subdivider who shall have retained one of such lots for his own use as a single family residence at least 5 years prior to such second subdividing. Portions of this opinion also appeared in the Jan., 1975 edition of the Townsman.

8. Sale of lot to a water company not exempt (Feb., 1975)

Question: We have in our town a problem maintaining water pressure in a remote elevated area. The water company feels this can be eliminated by the installation of an intermediate pumping station. They have approached a property owner in a location ideally situated for just such an installation, and obtained a tentative agreement for the purchase of the needed land.

The owner, however, wishes to be certain that this sale will not be considered a division from the standpoint of Title 30, Section 4956, Land Subdivisions. He intends to sell house lots from the same parcel.

Can this sale to the water district be treated differently from private sales or must it be counted for the purpose of the law?

Answer: In my opinion, such a sale is not entitled to special treatment and must be treated as the sale of one lot for subdivision purposes.

9. Grandfathering of subdivisions (Jan., 1976)

Question: We are seeking your opinion and advice on the following:

1. Are operators of subdivisions which were approved prior to the State Shoreland Zoning Ordinance effective date but lying within the land area covered by this ordinance, required to alter their plot plans so that they comply with the minimum frontage, area, and setback provisions of the ordinance?
2. Is the Town obligated to, and is it recommended that the Town shall, notify such subdivision operators of the need to comply with the provisions of the Shoreland Ordinance where it is known that the plot plan approved originally would not comply in some parts?
3. What would be the proper method and best wording of such a notification?
4. What assistance can the Town receive in the enforcement of this ordinance from the Office of the Attorney General?

Answer: 1. In my opinion, the shoreland zoning ordinance demands that subdivision plats not now in conformance with the new and stricter environmental standards be revised by the landowner and resubmitted to the planning board for approval.

The law is well settled that, absent a statutory provision to the contrary, the approval and recording of a subdivision plat does not vest rights in the landowner. And the mere filing of a subdivision plan vests no rights. (*York Township Zoning Board of Adjustment v. Brown*, 182 A2d 707 (Pa. 1962)). Nor does official approval under existing law "freeze" the applicability -- and the developer's rights thereunder -- of the laws as regards the proposal. (*State ex. rel. Mar-Well, Inc. v. Dodge*, 177 NE2d 515 (Ohio, 1960); *State ex. rel. Bugden Development Co. v. Kiefaber*, 179 NE2d 360 (Ohio, 1960). See, Anderson, *American Law of Zoning* at sec. 19.23).

Where a zoning provision is changed before there is an actual use of the land in the subdivision, the developer must take heed of the new regulations.

The Ohio court said in the recent case;

Before an application for use of the premises is filed, (e.g. a building permit) the zoning requirements may be changed by the authority having the power to do so; and except within the limits fixed by the law, such changes are valid as to lands not then in use. The fact that an allotment plat is approved and recorded does not irrevocably fix the rights of the parties. Valid changes may thereafter be made with respect to such things as lot size and minimum lot area and the allotter must conform thereto. (*State ex. rel. Mar-Well, Inc. v. Dodge*, 177 NE2d 515 (Ohio, 1960)).

Similarly, a Connecticut court said:

The filing of a map showing lots in a proposed development cannot create a nonconforming use. If it could, a property owner, by the process of map filing could completely foreclose a zoning authority from ever taking any action with respect to the land included in the map, regardless of how urgent the need for regulation might be (*Corsimo v. Grover*, 170 A2d 267 (Conn., 1961)).

Proposed use does not constitute an existing nonconforming use; the use must be actual. Even where actual, as where part of the subdivision has been developed, the remainder of the subdivision may be subject to the new regulations. That the developer planned on completing his original plat is not sufficient to allow him exemption from the new requirements. His potential profits are not protected by the law. Only the most extreme hardship -- such as prevention of any economic use of the property at all -- would allow him to complete his original plan (*State ex. re. Bugden Development Co.*). Some relief, such as partial relief, might be given a developer whose improvements were so related to existing zoning regulations and so substantial as to be tantamount to a commencement of use, as to qualify him as a nonconforming user (*Wood v. North Salt Lake*, 390 P2d 858 (Utah, 1964)). Where the remainder of the subdivision has not been at all developed, however, he would be held to the new laws.

You might anticipate the argument by developers, or on their behalf, that filed subdivisions are grandfathered by a "general savings clause" in the statutes, 1 M.R.S.A., § 302 which states that:

The repeal of an act or resolve passed after the 4th day of March, 1870, does not revive any statute in force before the act or resolve took effect. The repeal of an act does not effect any punishment, penalty, or forfeiture incurred before the repeal takes effect, or any action or proceeding pending at the time of the repeal, for an offense committed or for recovery of a penalty or forfeiture incurred under the act repealed. Actions and proceedings pending at the time of the passage or repeal of an act are not affected thereby.

Where the subdivision statute was amended by the Legislature to include stricter standards, those plats recorded under prior subdivision statutes were grandfathered by this savings clause. However, the grandfathering does not apply where a completely new environmental law is enacted, rather than a mere amendment to one already existing.

2. Although it is nowhere specified in the law as a duty of the planning board or town officials, it would be in the interests of the town to take some preventive enforcement action, to avoid future controversy and litigation when sales and application for building permits are submitted. Such action would, in my opinion, make sure that landowners do not sell lots to buyers who are not aware of the restrictions which would prohibit their building. Also, it will avoid the political and personal problems where those unwary landowners, after being denied a building permit because of the shoreland zoning restrictions, come to the board of appeals for a variance. (Their only legal recourse is against the subdivider who sold them the land in a costly civil action along the lines of fraudulent sales). Any action the town takes now to assure that landowners will revise their subdivisions selling and/or developing will be in the interest of future "consumers".

However, I repeat, I do not feel that the town is obligated to take such steps. The burden is on the landowner to inform himself of land use ordinances and state statute which are applicable to his land ownership, development and real estate sales.

3. Should the town wish to take such action, I believe a simple letter should notify the landowners of the new zoning ordinance and either enclosing a copy or giving information where it can be found. The letter might also state that, according to legal advice you have obtained, the development cannot be undertaken without violating state law and local ordinances.

4. I cannot answer with certainty what help is available from the Attorney General's office. I suggest a letter to the Environmental Division of the Attorney General's office asking for their advice, should the landowners not comply.

Local officials might, of course, handle some problems administratively on the local level through refusal of necessary building permits. Where a developer or other landowner applies for a building permit, and the proposed building would be in violation of the shoreland ordinance, it should not be issued by the building inspector or code enforcement officer. (by E.E.G.)

10. Boundary Disputes (Feb., 1977)

Question: What must a subdivider produce as reasonable evidence of his boundaries?

Answer: The answer to this question is that, generally, a planning board should not be concerned with pinpointing exact boundary lines; and no evidence of boundary lines specifically need be sought. Instead, the planning board should be concerned basically with the developer's right to come before the planning board; that is, his standing to seek the jurisdiction of the planning board. Therefore, the planning board should mainly be concerned with the developer's ownership rights as to the property as a whole which he seeks to subdivide, and not its specific boundaries.

Thus, a planning board would be well within its jurisdiction to require the developer to produce the deed under which he owns the property, which deed should contain a reasonable description of the property, or require the developer to produce an option to purchase or other such conditional agreement under which he would have standing to come before them, which second type of document, if the developer falls into this conditional ownership category, should either contain a reasonable description of the property as a whole or which document should be accompanied by a deed or survey or other writing which reasonably describes the property in general to which the developer has conditional ownership rights.

It should be emphasized that the above-mentioned documents which may be required from the developer are not so required to prove the truth of the actual boundaries - for that would be a question for a judge or jury - but rather simply to allow the planning board to determine whether the developer has standing to come before them and, thereby, cause them to exercise their duties and responsibilities and expend time and effort in the review of the developer's subdivision application.

Question: How involved should the planning board become in a boundary dispute between the developer and an abutter?

Answer: Generally, the planning board should not get involved in such disputes. It is not the duty of the planning board to look behind the documents presented to them and to determine the truth behind such documents; substantiating actual boundary lines and determining boundary disputes is the duty for a judge or a jury.

However, if a boundary dispute is currently pending in the courts, it is my opinion that, in order to avoid the possibility of compounding the damages that might be suffered by one of the parties involved in the dispute, it would be advisable for a planning board to postpone its determination as to the subdivision until either the courts have finally determined the actual boundaries, or until the planning board has conferred with the presiding judge, in writing, as to his opinion in regards to whether or not the planning board should follow through with its review of the subdivision in question. (By PMB)

11. Second Dividing of Parcel (June, 1977)

Question: A person has lived on a parcel of land for more than five years. Within the last five years he has conveyed away two lots from the parcel and has retained the third lot as a single family residence. The person now wants to sell his single family residence to another party. Must the person obtain subdivision approval before the sale or offer to sell?

Answer: Although Title 30, Section 4956(1), second paragraph, is quite ambiguous in its wording, it must be interpreted if possible, in a manner consistent with what is perceived to be its purpose and intent.

The second paragraph reads as follows:

"In determining whether a tract or parcel of land is divided into three or more lots, the first dividing of such tract or parcel, unless otherwise exempted herein, shall be considered to create the first two lots and the next dividing of either of said first two lots, by whomever accomplished, unless otherwise exempted herein, shall be considered to create a 3rd lot, unless both such dividings are accomplished by a subdivider who shall have retained one of such lots for his own use as a single family residence for a period of at least five years prior to such 2nd dividing. Lots of 40 or more acres shall not be counted as lots."

The language after "3rd lot" creates the problem. If the wording "...one of such lots..." refers to the two lots created by the first dividing, then subdivision approval would be required before the sale of the residence because the subdivider has not retained one of the lots for his own use as a single family residence for 5 years prior to the second dividing. Stated differently, when the first lot in the parcel is sold the subdivider must retain the balance of the parcel for a 5-year period or obtain subdivision approval before sale.

If, however, the wording "...one of such lots..." refers to the three lots created by the second dividing, then subdivision approval would not have to be obtained because the subdivider retained a lot for his own single family purposes for the required 5-year period.

In my opinion, the second interpretation is the better one. First, the language lends itself to such an interpretation. It says:

"...the next dividing of either the said first 2 lots ... shall be considered to create a third lot, unless both such dividings are accomplished by a subdivider who shall have retained one of such lots..."

In other words the second dividing creates three lots unless one is retained and meets the criteria. Second, the retention language is obviously intended to treat a qualified homestead parcel (my wording) different from a parcel of raw land. However, under the first interpretation above they would be treated the same. For example, a person can sell only one lot from a parcel of raw land within a five-year period without creating a subdivision. Similarly, under the first interpretation a person could sell only one lot because he would have to hold the remainder of the parcel for five years from the date of the sale of the first parcel. Finally, the wording of the paragraph has recently been changed from "... for a period of at least 5 years..." to its current version "...for a period of at least 5

years prior..." This change would again indicate an intent to treat homestead parcels differently. Legislative intent must be respected if discernible. *State v. Tullo*, 366 A2d 843 (1976) and, therefore, I feel the second interpretation to be the better one (GHH).

12. Exemption to Subdivision Law (Oct., 1977)

Question: One of the exemptions to the subdivision law is for subdivisions "in actual existence on September 23, 1971 that did not require approval under prior law", 30 M.R.S.A. § 4956(5). When is a subdivision considered to be "in actual existence" to qualify for the exemption? Also, once grandfathered, can the property then be subdivided in any manner without further approval?

Answer: The mere fact that a developer has a plot plan that was drawn up prior to September 23, 1971 is not enough to claim the exemption.

In order to prove that a subdivision was in actual existence, there must be shown not only the existence of such a plan but also that the land was actually surveyed and lots marked on the surface of the earth by steel pins or regular markers and numbered in accordance with the plan, prior to September 23, 1971. *State Ex Rel Brennan v. R.D. Realty Corp., Me.*, 349 A.2d 301 (1975).

To put it a little more clearly in order to claim that the subdivision was in actual existence prior to September 23, 1971, the subdivider must show at a minimum, not only

- 1) the existence of the plot plan, but also,
- 2) that the land was surveyed and marked on the surface of the earth with with steel pins or regular markers and numbered, in accordance with the plan, and,
- 3) that such was accomplished before September 23, 1971, the critical date under the statute.

Should the subdivider meet the above criteria in regard to the entire plan, then the plan may be considered "grandfathered" and exempt from further approval under 30 M.R.S.A. § 4956. Should the subdivider meet the above criteria but only in regard to a portion of the entire plan, then only that portion shown to be in actual existence would be considered exempted.

Further, only that specific plan, or specific portion thereof, that is shown to be in actual existence prior to September 23, 1971 may be considered exempt from subdivision approval.

Therefore, in order to develop unproven portions, or to develop the land in a manner that does not conform to the proven plan, the subdivider would first have to secure prior approval from the planning board. To reiterate, once a particular plan has been proven to be in actual existence, it is only that particular scheme that is considered exempt, and the subdivider may not develop the land in a manner which deviates in any respect from that particular scheme without first obtaining planning board approval, since such deviations would be considered amendments to the "grandfathered" plan.

Finally, even if it is determined that a particular subdivision was in actual existence prior to September 23, 1971, if it is further determined that the subdivider, subsequent to that date, had conveyed, leased, or developed any portion in a manner not in conformance with the proven plan, in my opinion it would be clear that the subdivider would be deemed to have waived or given up any right to claim an exemption under 30 M.R.S.A. § 4956(5).


However, the determination of whether or not the plan was "in actual existence" is not applicable if the plan was recorded prior to the critical date since 30 M.R.S.A. § 4956(5) also provides an exemption for subdivisions "a plan of which has been legally recorded in the proper registry of deeds prior to September 23, 1971." (C.M.J.)

State Planning Office Memorandums

MEMORANDUM

May 1, 1973

TO: All Regional Planning Commissions

FROM: Fourtin Powell, Regional Planner, State Planning Office 

SUBJECT: Approval of Subdivision Plans

It has been brought to the attention of this office by John Attig of the Androscoggin Valley Regional Planning Commission that the enabling legislation for Subdivision Control Regulations, M.R.S.A. Title 30, §4956, does not specify who shall sign the plan of a subdivision to indicate approval or approval with terms and conditions when the selectmen or planning board act on a proposed subdivision.

In order to assure the legality of such signing, the Office of the Attorney General has informally suggested the following procedures:

1. When a subdivision plat or plan is signed by the selectmen in the absence of a planning board, it is preferable that all three selectmen sign the plat or plan. This would mean that, even if one signature were later declared invalid due to a conflict of interest or other reason, a majority of the selectmen would still have approved the subdivision.
2. When a subdivision plat or plan is signed by the planning board, it is preferable that a majority of the planning board members sign the plat or plan. Where approval is unanimous, it would be appropriate for all members present at the vote to sign the plat or plan. In cases where only the chairman of the planning board signs the plan, the clerk of the planning board should indicate on the plat or plan by affidavit that the chairman's signature reflects the vote of the majority of the planning board. Thus, in each case, there can be no question as to whether or not the approval of the subdivision reflects the will of the majority of the planning board.

MEMORANDUM

April 2, 1974

TO: All Regional Planning Commissions, Cooperative Extension Service

FROM: Fourtin Powell, Regional Planner, State Planning Office *FP*

SUBJECT: Subdivision Review Procedures - Water Supply

The State Subdivision Review law, Title 30, Section 4956, contains various features related to environmental protection and features primarily related to consumer protection. Those portions dealing with water supply contain strong elements of consumer protection.

Subsection 2 reads, in part, as follows:

"The municipal reviewing authority shall . . . issue an order denying or granting approval of the proposed subdivision or granting approval upon such terms and conditions as it may deem advisable to satisfy the criteria listed in subsection 3 and to satisfy any other regulations adopted by the reviewing authority, and to protect and preserve the public's health, safety and general welfare. In all instances the burden of proof shall be upon the persons proposing the subdivisions. In issuing its decision, the reviewing authority shall make findings of fact establishing that the proposed subdivision does or does not meet the foregoing criteria."

The criteria in Subsection 3, which must be met to the satisfaction of the municipal reviewing authority in order for them to approve a subdivision, include the following:

"3. Guidelines. When promulgating any subdivision regulations and when reviewing any subdivision for approval, the planning board, agency or office, or the municipal officers, shall consider the following criteria and before granting approval shall determine that the proposed subdivision:

B. Has sufficient water available for the reasonably foreseeable needs of the subdivision;

C. Will not cause an unreasonable burden on an existing water supply, if one is to be utilized; . . . "

Part C, above, applies to already installed public or private water supply systems. This criterion would be used where the subdivision was to be served by a common system. The average water usage of a single family dwelling, as used in the Minimum Lot Size law, Title 12, Section 4807-A, is 300 gallons per day. Therefore, where the average yield of an established ground or surface water supply is known, calculation of the additional water needs of the proposed subdivision and a determination of whether or not the necessary capacity is available is a relatively simple matter.

Part B, above, is the more general criterion which applies equally to any subdivision, whether supplied from a public or private (common) water source or from on-site, individual water sources. The most common individual water source is the well.

Since the municipal reviewing authority, ". . . shall determine that the proposed subdivision . . . has sufficient water available for the reasonably foreseeable needs of the subdivision . . .", that reviewing authority must be supplied with information which will enable it to make that determination. This information shall be furnished by the persons proposing the subdivision.

It is not possible to determine the presence of a given quantity and quality of underground water supply without drilling and pumping a well. Due to the expense of drilling, it is not possible in most instances for the subdivider to drill wells for each of his proposed lots or even for a sampling of the lots, particularly as there is no assurance that the subdivision will be approved. In any case, the presence of an adequate supply of potable water from one well does not guarantee that a nearby well will have a sufficient yield.

The Subdivision Review law was not intended to burden the subdivider with the expense of drilling wells which may not be used for a water supply, but it was intended to protect the potential buyer of a lot in a subdivision. The availability of sufficient ground water for single family residential purposes in many areas of Maine may be almost assured. However, where known ground water sources are limited and uncertain, the municipal reviewing authority may wish to use the following procedure:

- 1) Require the applicant to submit written drilling reports for wells in the vicinity of the proposed subdivision. These reports would not have to be actual "logs" of the wells, as these are the property of the well drillers, but the reports should be based on logs of these wells. No specific distance from the proposed subdivision is required, but a radius of one mile should provide a reasonable indication of groundwater availability and quality. Where records of nearby wells vary greatly, it may be advisable for the subdivider to hire a ground water hydrologist to provide expert testimony regarding the available information.
- 2) Require disclosure of the written drilling reports on which the municipal reviewing authority based its decision to the purchaser of any lot in the subdivision. This disclosure would be one of the conditions for approval of the subdivision and would be recorded with the proper registry of deeds.

This procedure would appear to provide three benefits: (1) The municipal reviewing authority would record the bases for its decision to approve the subdivision, (2) the potential buyer would be provided with information which would assist him in assessing the risks of purchasing a given piece of land, and (3) the presence or absence of water on

a given lot remains a private matter; the municipal reviewing authority would not "guarantee" the purchaser that sufficient potable water will be available on his lot.

Any comments, suggestions and alternatives to the above procedure would be welcome.

MEMORANDUM

TO: Regional Planning Commissions

Dec. 30, 1976

FROM: Rich Rothe

RE: Planning Board status and review of subdivisions

In a shoreland zoning newsletter dated March 13, 1974, we stated that there were several different types of Planning Boards, and that the way a Planning Board was created could affect its subdivision review powers. We stated that most Planning Boards were created in one of 3 ways:

1. Prior to September 23, 1971, specific State Statutes governed the creation of planning boards. These permissive laws were repealed by the 105th Legislature in 1971 when the principle of Home Rule was recognized by an amendment to the State Constitution, and in Title 30, M.R.S.A., Sec. 1917, which states that:

Any municipality may, by the adoption, amendment or repeal of ordinances or bylaws, exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution, general law or charter. No change in the composition, mode of election or terms of office of the legislative body, the mayor or the manager of any municipality may be accomplished by bylaw or ordinance.

The legal authority for the continuation of these "pre-1971" planning boards, and hence, their ability to function as the "municipal reviewing authority" for the purposes of the Subdivision Law, rests with the "savings provision of Title 30, M.R.S.A., which states that:

§ 4964. Savings provisions

Any planning board or district established and any ordinance, comprehensive plan or map adopted under a prior and repealed statute shall remain in effect until abolished, amended or repealed. Any property or use existing in violation of such an ordinance is a nuisance. Planning boards established pursuant to provisions of repealed section 4952, subsection 1 shall continue to be governed by those provisions until they are superseded by municipal ordinance and the municipal officers may pay board members a set amount, not to exceed \$10, for each meeting attended.

2. After September 23, 1971, a number of planning boards were created by ordinance, in accordance with the Home Rule Provision. In so doing, many municipalities utilized MMA's "Establishment of Municipal Planning Board" model ordinance, found in the appendix of SPO's "Guidelines for Local Planning Boards". This model includes provisions for composition, appointment (by selectmen), organization and rules, duties,

and powers. Planning boards created by this method would also have the authority to serve as the municipal reviewing authority for the purposes of the subdivision law.

3. After September 23, 1971, a number of Planning Boards were created informally by appointment of the Selectmen and without approval at a Town Meeting. Most of these informal Planning Boards were created in smaller towns that had never had a Planning Board for the purpose of preparing a shoreland zoning ordinance. In effect, these informal Planning Boards were created without the specific authorization contained in the now repealed Statute Title 30, M.R.S.A., Section 4952, and without specific authorization contained in a locally enacted municipal ordinance. Based on several discussions with attorneys at the Maine Municipal Association and the Attorney General's Office, it is our conclusion that such planning boards clearly had the authority to prepare the necessary ordinances in order to comply with the Mandatory Shoreland Zoning Act, but that such Planning Boards should not exercise the subdivision review powers given to Planning Boards under the Subdivision Law. Instead, such informally created Planning Boards should probably serve in an advisory capacity to the Selectmen, who in turn should make the final decisions to approve or disapprove a particular subdivision application. State law does not specifically prohibit an informally created Planning Board from exercising the function of municipal reviewing authority, but the municipality would probably be on firmer legal ground if this function were performed by a Planning Board created by method #1 or #2, or in the absence of either of these, by the Selectmen.

Maine Supreme Court Cases

Excerpt from: Dickinson v. Maine Public Service Company, Me., 244 A.2d 549 (1968) at 551.

Editor's note: The following language is taken from a case involving the Public Utilities Commission. While the case itself does not pertain to the Subdivision Law, or subdivision review, the excerpt does suggest that a decision must be limited to the law as of the date of the proceedings. This may have a direct impact on the administration of the subdivision law. For instance, in attempting to evaluate whether a subdivision has been created, it may be necessary to research the status of the Subdivision Law at a given point in time in order to determine whether the sale, lease, or development of a particular lot or parcel created a subdivision at that point in time.

[2-6] The Commission was of course cognizant of the fact that the Legislature had enacted amendments to become effective on a date subsequent to the Commission decree. In this connection the Commission stated: "We take judicial notice of the fact that the Maine Legislature has changed the existing law by Chapter 382 of the Public Laws of Maine, 1967, AN ACT to Grant Public Utilities Commission Control over Cooperatives. This law, however, does not become effective as such until ninety-one days after the adjournment of the Legislature which will be October 8, 1967. We are bound by the law that is in existence at the time of our decision." The Commission accordingly based its decision primarily on its determination as to whether or not it was economically feasible for Maine Public to render the requested service. *Heath v. Maine Public Service Co.* (1965), 161 Me. 217, 219 A.2d 701. This was the applicable test under the law as it existed on October 3, 1967, the date of the decree. As a quasi-judicial body the Commission had a duty to render decisions on petitions which had been pending more than two years and was under no obligation to defer its decision because of a change in the law effective *in futuro*. Moreover, the same Legislature enacted P.L.1967, Ch. 10 which amended 1 M.R.S.A.

Sec. 302 to read: "Actions *and proceedings* pending at the time of the passage or repeal of an Act are not affected thereby." (Italicized words added by amendment). The petitions were "proceedings" pending before the Commission, *Dickinson*, supra, and as such would by force of the amendment be governed by the law as it existed before the enactment of P.L.1967, Ch. 382. P.L.1967, Ch. 10 became effective on October 7, 1967, whereas as we have seen P.L. 1967, Ch. 382 by express legislative fiat became effective one day later. Decision does not rest, however, on this difference. Even if the amendments had become operative on the same date, the result would have been the same. P.L.1967, Ch. 10 and Ch. 382 are not conflicting, mutually inconsistent or irreconcilable. Each can be given its full force and effect without diminishing the effect of the other, "and both must stand as statutes of the State." *Stuart v. Chapman* (1908), 104 Me. 17, 24, 70 A. 1069, 1072. So construed, the statutes provided prospectively new criteria for determination by the Commission of petitions filed by customers of a cooperative seeking service from another utility serving the same area—but these new criteria are not applicable to petitions already pending on October 8, 1967. It is apparent, therefore, that the appellant was not prejudiced by the fact that the order of the Commission was promulgated a few days before the amendments became operative.

Ronald BOUTET et al.

v.

PLANNING BOARD OF the CITY OF SACO.

Supreme Judicial Court of Maine.

May 1, 1969.

Proceeding on appeal from a judgment of the Superior Court, York County, denying appeal from city planning board's refusal to approve subdivision plat. The Supreme Judicial Court, Williamson, C. J., held that city planning board, which was not authorized by ordinance or regulation to grant conditional approval of plat giving to developer settled rights to approval on compliance, had no authority to give conditional approval to subdivision plat with buffer area, and thus board's tentative approval of plat gave no rights to landowner to compel final approval on compliance with the conditions. The Court further held that exclusion of buffer zones in subdivision plats was not unreasonable.

Appeal denied.

1. Municipal Corporations ⇨43

City planning board, in passing on subdivision plat, acts in administrative capacity and is without authority to impose conditions beyond compliance with municipal ordinances and general reasonableness. 30 M.R.S.A. § 4956.

Planning Board acts in administrative capacity.

Authority to grant conditional approval. Tentative approval does not compel final approval.

2. Municipal Corporations ⇨43

Two-step process of tentative and final subdivision plat approval rests on statutes or regulations authorized thereunder.

3. Municipal Corporations ⇨43

City planning board, which was not authorized by ordinance or regulation to grant conditional approval of plat giving to developer settled rights to approval on compliance, had no authority to give conditional approval to subdivision plat with buffer area, and thus board's tentative approval of plat gave no rights to landowner to compel final approval on compliance with the conditions.

4. Estoppel ⇨62(5)

Landowner, who, between time subdivision plat with buffer strip was tentatively approved and date board reviewed plat and advised it would approve plat with exclusion of buffer strip, did no more than take down a barn, obtain variance of zoning ordinance with reference to lot sizes, which would have been required apart from issue of the buffer strip, and spend \$30 or \$40 in obtaining a new plat did not acquire right to approval of the subdivision plat with the buffer strip by estoppel.

5. Municipal Corporations ⇨43

Legislature, in enacting statute relating to land subdivisions, intended that there should be room for exercise of discretion by planning board. 30 M.R.S.A. § 4956.

6. Municipal Corporations ⇨43

Exclusion of buffer zones in subdivision plats, which buffer zones resulted in street with taxable land on only one side and with problem of maintenance, was not unreasonable even though subdivision plat with buffer zone had been tentatively approved prior to public hearing on and approval of policy against buffer strips. 30 M.R.S.A. § 4956.

7. Municipal Corporations ⇨43

Fact that city planning board had approved second buffer strip in subdivision

had no bearing on review of board's refusal to approve another buffer strip, and issue of whether second buffer strip lawfully could have been approved was not presented for review.

Charles W. Smith, Roger S. Elliott, Saco, for plaintiff.

Ronald E. Ayotte, Sr., Biddeford, for defendant.

Before WILLIAMSON, C. J., and WEBBER, DUFRESNE and WEATHERBEE, JJ.

WILLIAMSON, Chief Justice.

The Planning Board of Saco refused to approve a subdivision plan for development of house lots submitted under 30 M.R.S.A. § 4956. The appeal before us is from the denial of appeal in the Superior Court.

The controversy centers about a buffer strip zone two feet in width and running between the side of a proposed street or way and neighboring land, which the appellant insists he is entitled to have approved in the plat by the Board.

The proceedings before the Planning Board and the appeal to the Superior Court were in the name of Ronald Boutet. In the Superior Court it first appeared that title to the land in the proposed subdivision was, in fact, in Barbara Boutet, the wife of Ronald Boutet. The motion of the wife to join as a party plaintiff was granted in the Superior Court over the objection of the Planning Board. It is apparent from the record that Ronald Boutet acted at all times with the full knowledge and consent of his wife and we may well consider him to have been her agent. We find neither defect in procedure nor lack of jurisdiction. The facts, in substance, are as follows:

Mr. Boutet sought to develop the area with an access road from a city street to the rear of the land for the purpose of

opening a housing development. A plan of the proposed subdivision was submitted to the Planning Board in September, 1965. A month later, by agreement, certain lots of which the title was in dispute were removed from the plan. The proposed plan called for the buffer strip as indicated for a distance of approximately 800 feet.

On October 19, 1965 (reaffirmed on October 20) the Planning Board voted unanimously that: "We notify Mr. Boutet that if he will present a revised plan that fulfills the seven points outlined as per attached letter—the Board will approve his plan." Under point 6 of the letter the Planning Board required that the buffer strip in question and also another buffer strip, with which we are not concerned, should be clearly labeled as belonging to "Boutet".

On December 15th the Planning Board adopted, after public hearing, land subdivision regulations, including Article VII—

*"General Requirements for the Subdivision of Land * * **

B. The subdivider shall observe the following: * * *

10. Buffer zones shall not be allowed."

In April, 1966 Mr. Boutet first submitted a revised plan or plat in which he met all of the conditions for approval stated in the seven point letter of October. The Planning Board in May again reviewed the plat, and advised Mr. Boutet that the plat, with the exclusion of the buffer strip "will be approved forthwith upon its receipt by the Board. Such approval, however, as this letter of intent implies, will not be extended beyond October 30, 1966." It is from this decision that Mr. Boutet has appealed.

The statute reads in part as follows:

"30 M.R.S.A. § 4956: *Land Subdivisions.*

1. *Regulation.* A municipality may regulate the subdivision of land. * * *

C. Approval of a subdivision is based on its compliance with municipal ordinances and its general reasonableness."

[1] The Board in passing upon a subdivision plat acts in an administrative capacity. It is without authority to impose conditions beyond "compliance with municipal ordinances and its general reasonableness."

"In exercising its function of approving or disapproving a subdivision plan, the planning board acts in an administrative capacity. In passing upon a plan, its action is controlled by the regulations adopted for its guidance. It has no discretion or choice but to approve a subdivision which conforms to the regulations." *Langbein v. Planning Board of City of Stamford*, 145 Conn. 674, 146 A.2d 412, 414, (1958).

See also *Forest Construction Co. v. Planning & Zoning Com'n*, 155 Conn. 669, 236 A.2d 917 (1967).

We turn later to consideration of the regulation adopted by the Planning Board.

Mr. Boutet vigorously contends that the Board conditionally approved the plat with the buffer strip in October, 1965 and that therefore on compliance with the conditions in April, 1966 he was entitled as a matter of law to approval by the Board. There is nothing, however, in the record to establish that either by ordinance or regulation the Planning Board in October, 1965 was authorized to grant a conditional approval of a plat giving to the developer settled rights to approval on compliance.

By statute or regulation provision is sometimes made for what has been called a two-step process of subdivision plat approval involving tentative approval to be followed by final approval.

In *Pennyton Homes, Inc. v. Planning Bd. of Stanhope*, 41 N.J. 578, 197 A.2d 870, 872 (1964) the court in commenting on the original planning act said:

"There was no provision for the current two-step process of tentative and final

Planning Board must approve if an application conforms to all regulations.

2-step review process must be authorized by law or regulation.

plat approval. 'Approval' was a single act, final in nature, (except perhaps in one limited situation, see R.S. 40:55-19) and there was no problem of protection to a developer by reason of any preliminary or tentative approval."

In *Levin v. Livingston Tp.*, 35 N.J. 500, 173 A.2d 391, 397 (1961) the court said:

"So the general revision of the planning act in 1953 introduced for the first time a two-step approval procedure, permitting municipalities to provide for 'tentative approval' of plats, N.J.S.A. 40:55-1-18, by which these basic matters may be settled. From what has been said, it is obvious that tentative approval is the most important phase of the subdivision regulation process."

See also *Hilton Acres v. Klein*, 35 N.J. 570, 174 A.2d 465, 470 (1961); 3 American Law of Zoning (Anderson), (1968) § 19.13 "Preliminary and final plats: tentative approval"; § 19.19 "Subdivision regulations"; 2 Zoning Law and Practice (Yokley) (1965) § 12-7.

[2] The two-step process, useful as it doubtless is to developer and Planning Board, in our view rests on the statutes or regulations authorized thereunder. Here we find no foundation for a conditional approval in October, 1965.

[3] The action of the Board in October, 1965 thus gave no rights whatsoever to the landowner to compel final approval on compliance with the conditions. In reaching this conclusion we do not accept the argument of the defendant that the Board did not, in fact, give a tentative approval. We think the intention of the Board in October was clear. We are saying that the Board simply did not have authority to make such a commitment.

[4] The landowner gains nothing in this instance on the basis of an estoppel against the Planning Board and City. Assuming that under certain circumstances a landowner may acquire rights by estoppel

he has not done so on the facts of this case. At most between October, 1965 and April or May, 1966 the landowner did no more than take down a barn, which was an action not directly attributable to the location of the buffer strip, obtain a variance of the zoning ordinance with reference to lot sizes which would have been required apart from the issue of the buffer strip, and spend some \$30 or \$40 in obtaining a new plan. This is not sufficient change in his situation to claim that justice requires that the Planning Board and City are to be bound by the tentative approval in October, 1966. See *Levin v. Livingston Tp.*, supra, 173 A. at p. 402; *Tremarco Corp. v. Garzio*, 32 N.J. 448, 161 A.2d 241, 245 (1960); *Municipal Law (Rhyne)* p. 893 (1957).

The question then becomes whether the subdivision plat submitted in April, 1966 met the requirements of the ordinances of Saco and the general reasonableness test. If so, the landowner was entitled without more to approval by the Board.

[5] In our view the rule against a buffer strip or zone was proper under the "general reasonableness" provision of the statute. The Legislature intended that there should be room for exercise of discretion by the Planning Board. If the ordinances alone bounded the field of its authority the words "general reasonableness" would have no meaning.

The regulation by the Planning Board was properly adopted as part of a comprehensive plan for the city of Saco. 30 M. R.S.A. § 4952 relating to planning boards reads in part:

"2. *Plans.* The board shall prepare, adopt and may amend a comprehensive plan containing its recommendations for the development of the municipality.

A. Among other things, the plan may include the proposed general character, location, use, construction, layout, extent, size, open spaces and population density of all real estate, and the proposed method for rehabilitating blighted districts and eliminating slum areas.

Planning Board must exercise general reasonableness

B. The board shall hold a public hearing on its tentative proposals, before it adopts the plan or an amendment of it.

C. Once adopted by the board, the plan becomes a public record. It shall be filed in the office of the clerk."

The Board, therefore, in May had before it the policy against approval of buffer zones found in the regulations. The test, however, remains one of reasonableness. If the policy of the Board, whether by regulation or otherwise, does not lie within the test of reasonableness, it must fail and cannot be used as a measure of disapproval by the Board.

[6] On the record before us we are unable to say that the exclusion of buffer zones as a matter of law is not reasonable. The reasons against the approval of buffer zones in subdivision plats were persuasively set forth by the Chairman of the Planning Board in the adoption of the subdivision regulation in December, 1965. He testified in part as follows:

"I investigated the treatment of buffer strips in subdivisions and by other Planning Boards and by other planners in Maine. I consulted Mr. Klunder who is our planning consultant for the City. I consulted certain legal, got certain legal opinion about this. And in no place could I find where buffer strips, as such, were an approved device in a subdivision plotting. Further than this, from a point of view of the land involved, it meant that the Board, if they should approve a buffer strip here, would be approving a strip some seven hundred odd feet long on one side of the property, which was then, if you project to what is normal in a final disposition of subdivisions, that a street would then be asked to be approved by the City. And then the subdivider would have to be asking the City, in effect, to approve half a street. That is, they would be approving a street which would only have taxable land on it one side, when it would be possible to

have taxable land opened up to it on the other side, as well. So that you have the problem of maintenance. You have the problem of development which is the, for the best of the community, which should be so they could be opened up on both sides. I could find no technical way in which this could be done and still grant Mr. Boutet a buffer strip without just having removed it from the plan. We tried very hard, or I tried very hard, certainly, to find a method in which we could grant this. And I don't want to get into areas where I am giving other people's opinions. But I find it is very difficult to. Because, obviously, I had to go to * * * and in this case I was acting for the Board—to other sources for our information concerning the use of buffer strips. The only time that I could find that a buffer strip was approved by planners in subdivisions, or at any place, is when it is used for a public use. This is where it would be in the form—"

The COURT: In other words, the adjoining land is devoted to public purposes?

The WITNESS: * * * When it is, for example, in a playground or a park, or something similar to that, they sometime, when it is a public use, will provide a buffer strip. Other than that, I could find no instances where buffer strips was an approved device to be used in a subdivision—excuse me—subdivision regulation, or in a subdivision approval. We become sophisticated in our treatment, or in our consideration of these problems the longer that we get into things, and the more we have experience on them. We certainly, and I certainly know much more about buffer strips today than I did a year ago, and much more a year ago than I did two years ago. So that our information is constantly, and our knowledge is constantly growing on these things. This is one reason, I think, why our subdivision regulation lay on the table so long, because

we had had it presented to us by our first comprehensive planner back in 19—.

* * * I will say that I had several opinions, professional opinions as regards to buffer strip. None of them indicated that such should be approved.

* * * The basis used for approving plats at the present time is a subdivision regulation which we have adopted as of December 15, 1965.

Q—And you are familiar with the statutory provision with regard the basis to be used?

A—Yes.

Q—And what is that basis?

A—That is on the basis of the compliance with the ordinances, and of general reasonableness.

It is argued that if the buffer strip was reasonable in October, 1965 it therefore as a matter of law must be considered reasonable in May, 1966. This argument does not take into consideration that after public hearing, the Board in December, 1965 adopted the policy against buffer strips. No guarantee was given or could have been given that a buffer strip reasonable in October would be reasonable in May. Under the view of the landowner progress in the development of regulation and control of land subdivisions would be at a standstill.

[7] Furthermore, the fact that in both October and May the Planning Board appears to have approved a second buffer strip in the subdivision has no bearing upon the refusal to approve the strip in issue. We need not determine whether the second buffer strip lawfully could have been approved. It is sufficient for our purpose that the plat with the buffer strip in issue was not approved.

If Mr. Boutet had first applied in May, 1966 he would have been faced with a policy cast in the form of a subdivision regulation against his desired two-foot buffer strip approximately 800 feet in length. In

effect, he is asking the Planning Board and the Courts on appeal that the tentative approval based on conditions which he met ripened into a final approval in May. It is the two-step process which he seeks to utilize and which is not available to him. We find no error in the decision of the Superior Court upholding the failure of the Planning Board to approve the subdivision plat on the ground that there was not compliance with the "general reasonableness" provision of the statute.

The entry will be:

Appeal denied.

TAPLEY and MARDEN, JJ., did not participate.

Editor's note: This is a case which upholds the validity and the Site Location of Development Act. Many of the general principles stated could also be construed to apply to the Subdivision Law. This case is included in its entirety because of the large number of general principles set forth that would be applicable to the administration of the Subdivision Law.

In the Matter of **SPRING VALLEY DEVELOPMENT** By Lakesites, Inc.

Supreme Judicial Court of Maine.

Feb. 9, 1973.

The Environmental Improvement Commission issued order which denied subdivider the right to proceed with its development of 92-acre tract along one side of pond until such time as the subdivider had made proper application to the Commission and had received the Commission's approval. The subdivider appealed. The Supreme Judicial Court, Weatherbee, J., held that the Site Location of Development Law which requires persons intending to construct or operate a development which may substantially affect local environment to notify, before commencing the construction or operation, the Environmental Improvement Commission of their intent and the nature and location of the development is a reasonable exercise of the police power, is not unconstitutionally vague and does not deny equal protection of the law.

Affirmed and appeal denied.

1. Statutes \Rightarrow 181(1)

In seeking legislative intent the court turns first to the language which the lawmakers chose to use to carry out their purpose.

2. Health and Environment \Rightarrow 25.5

"Commercial" within the Site Location of Development Law which requires persons intending to construct or operate commercial development which may substantially affect local environment to notify the Environmental Improvement Commission before commencing the construction or operation of the development, was intended to describe the motivation for the development and not the type of activity to be per-

formed on the property after it is developed. 38 M.R.S.A. § 482.

See publication Words and Phrases for other judicial constructions and definitions.

3. Health and Environment \Rightarrow 25.5

In enacting the Site Location of Development Law the legislature intended to bring residential developments within the application of the Law and the offering for sale of subdivided lots constituted "commercial development" within provision which requires persons intending to construct or operate development which may substantially affect local environment to notify the Environmental Improvement Commission before commencing the construction or operation. 38 M.R.S.A. §§ 482-485.

See publication Words and Phrases for other judicial constructions and definitions.

4. Statutes \Rightarrow 220

When administrative body has carried out reasonable and practical interpretation of statute and this has been called to the attention of the legislature, the legislature's failure to act to change the interpretation is evidence that the legislature has acquiesced in the interpretation.

5. Health and Environment \Rightarrow 25.5

In enacting the Site Location of Development Law the legislature intended that a development with particular propensity to damage the environment should not be located in areas where the environment is particularly incapable of sustaining the impact without public injury. 38 M.R.S.A. §§ 481-488.

6. Health and Environment \Rightarrow 25.5

The Site Location of Development Law encompasses residential developments in which the developer merely subdivides the land into lots and offers the lots for sale without any intention to construct buildings or to provide additional improve-

ments or services on the lots. 38 M.R.S.A. §§ 481-488.

7. Constitutional Law ⇨48(1)

All acts of the legislature are presumed to be constitutional; this presumption is of great strength.

8. Constitutional Law ⇨48(1)

The burden is on him who claims that statute is unconstitutional to show its unconstitutionality.

9. Constitutional Law ⇨81

The state is permitted to exercise the police power for the protection of the public welfare, safety, order, morals and health.

10. Health and Environment ⇨29

The state may act, if it acts properly, under the police power to conserve the quality of air, soil and water and to do so the state may justifiably limit the use which some owners may make of their property. 38 M.R.S.A. §§ 481-488.

11. Property ⇨7

Landowner holds his property subject to the limitation that he may not use it to the serious disadvantage of the public.

12. Health and Environment ⇨20

The limitation of use of property for the purpose of preserving from unreasonable destruction the quality of air, soil and water for the protection of the public health and welfare is within the police power. 38 M.R.S.A. §§ 481-488.

13. Health and Environment ⇨21

The Site Location of Development Law which requires persons intending to construct or operate development which may substantially affect local environment to notify, before commencing the construction or operation, the Environmental Improvement Commission of their intent and the nature and location of the development

is a reasonable exercise of the police power. 38 M.R.S.A. §§ 481-488.

14. Constitutional Law ⇨81

In order that statute may be sustained as exercise of police power the act and its application under the police power must have clear, real and substantial relationship to the purposes of the act.

15. Health and Environment ⇨21

Application of the Site Location of Development Law to one who merely subdivides property is a valid exercise of the police power. 38 M.R.S.A. §§ 481-488.

16. Eminent Domain ⇨2(1)

The application of the Site Location of Development Law to subdivider of lake-shore property did not constitute such an unreasonable burden upon the property as would equal an uncompensated taking. U.S.C.A.Const. Amend. 5; M.R.S.A.Const. art. 1, § 21; 38 M.R.S.A. §§ 481-488.

17. Statutes ⇨47

The Site Location of Development Law, pertaining to the protection of the environment, is not unconstitutionally vague and impossible of compliance. 38 M.R.S.A. §§ 481-488.

18. Health and Environment ⇨21

Requirement of Site Location of Development Law that proposed developments must not be built on soil types which are unsuitable to the nature of the undertaking is reasonable. 38 M.R.S.A. § 484.

19. Health and Environment ⇨20

The legislature may properly demand that adequate provision will be made for loading, parking and traffic movement before the Environmental Improvement Commission shall approve a commercial or industrial development. 38 M.R.S.A. § 484.

20. Constitutional Law ⇨62(10)

The legislature may not endow the Environmental Improvement Commission

with naked discretion. 38 M.R.S.A. §§ 481-488.

21. Health and Environment ⇨25.5

The effect of commercial or industrial development upon property values is outside the scope and purposes of the Site Location of Development Law and the Environmental Improvement Commission would be impermissibly applying the force of the state's police power in the enforcement of the Act if it denied approval of a development because of failure of proof that property values would not be adversely affected. 38 M.R.S.A. § 484.

22. Statutes ⇨64(1)

The provisions of the Site Location of Development Law are severable and the unconstitutionality of provision that property values must not be unreasonably affected by the development does not affect the validity of the remainder of the Act. 38 M.R.S.A. §§ 481-488.

23. Statutes ⇨47

The standards which statute sets out to guide the determinations of administrative bodies must be sufficiently distinct so that the public may know what conduct is barred and so that the law will be administered according to the legislative will.

24. Constitutional Law ⇨208(1)

The legislature may, in its judgment, create classifications so long as they are not arbitrary and are based upon actual differences in classes which differences bear substantial rational relation to the public purpose sought to be accomplished by the statute.

25. Constitutional Law ⇨211

Health and Environment ⇨21

The requirement of Site Location of Development Law that subdivider over 20 acres must receive the approval of the Environmental Improvement Commission is not denial of equal protection of the law. 38 M.R.S.A. §§ 481-488.

26. Constitutional Law ⇨211

Health and Environment ⇨21

The Site Location of Development Law did not deny equal protection of the law to subdivider by administratively creating piecemeal zoning with arbitrary distinctions. 30 M.R.S.A. § 4962; 38 M.R.S.A. §§ 481-488.

27. Constitutional Law ⇨211

The application of the Site Location of Development Law on case by case basis but under the guidance of the explicit criteria of the statute is not in itself denial of equal protection. 38 M.R.S.A. §§ 481-488.

28. Appeal and Error ⇨66

Strong policy exists against piecemeal appellate review. Rules of Civil Procedure, rule 72(c).

29. Health and Environment ⇨25.5

The Environmental Improvement Commission is without authority to present interlocutory appeal to the law court or for the law court to entertain direct appeals on piecemeal basis. 38 M.R.S.A. § 487; Rules of Civil Procedure, rules 73, 73(f).

30. Health and Environment ⇨25.5

The Environmental Improvement Commission acted regularly and within the scope of its authority when it denied permission to subdivider to subdivide 92 acres located on one side of large pond on ground that the developer had failed to demonstrate that it had plans that would adequately protect the public's health, safety and general welfare. 38 M.R.S.A. §§ 481-488.

31. Health and Environment ⇨25.5

Findings of the Environmental Improvement Commission that proposed subdivision of 92 acres on one side of large pond would degrade the quality of ground water in and around the development and that the developer had failed to present plans that would adequately protect the public's health, safety and general welfare

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were supported by substantial evidence. 38 M.R.S.A. §§ 481-483.

Verrill, Dana, Philbrick, Putnam & Williamson by Loyall F. Sewall, Portland, for Spring Valley.

E. Stephen Murray, Asst. Atty. Gen., Augusta, for Environmental Improvement Comm.

Before DUFRESNE, C. J., and WEBBER, WEATHERBEE, POMEROY, WERNICK and ARCHIBALD, JJ.

WEATHERBEE, Justice.

Raymond Pond is located in the town of Raymond and is slightly more than one mile in length. Lakesites, Inc. is the owner of a large tract of land containing about 92 acres located on one side of the Pond. Lakesites' development of this land into a residential subdivision has been interrupted by an order of the Environmental Improvement Commission directing it to cease the operation of this development until Lakesites has applied for and received the Commission's approval of its development.

The Commission claims to have derived its authority for this order from 38 M.R.S.A. §§ 481-483, Site Location of Development Law, hereinafter referred to as the Site Location Law. Lakesites' appeal attacks both the Commission's interpretation of the Act as including residential subdivisions and the Act's constitutionality. We conclude that the authority of the Commission does extend to residential subdivisions and that the statute represents a valid exercise of the police power. We deny the appeal.

The agreed statement of facts and the testimony presented at hearing before the Commission reveal that Lakesites' property extends along the shore of the Pond at least 3400 feet.¹ Lakesites has subdivided this tract into 99 lots ranging in size from

20,000 square feet to 53,000 square feet with several other areas reserved from sale. It refers to this property as its Spring Valley Development.

Lakesites has cleared and graded portions of this land, has built a road for ingress and egress and has surveyed the property, marking off the boundaries of the individual lots. While it contemplates that purchasers will build year-round or part-time homes on their lots it does not intend to construct or participate in the construction of the buildings or to control the use of the lots "except insofar as there are any required deed restrictions". No action has been taken with respect to providing services for any of the lots.

Lakesites proposes that the selling of these lots be a profitable venture and it has placed their sale in the hands of licensed real estate brokers.

Lakesites submitted its subdivision plan to the Raymond Planning Board which, after some changes had been made, approved it as satisfying the only subdivision requirement then existing in the town ordinance—that of lot size. The subdivision plan was then recorded in the Cumberland County Registry of Deeds.

There was in effect at this time the Site Location Law the constitutionality of which is under attack. This law required persons intending to construct or operate a development which may substantially affect local environment to notify, before commencing the construction or operation, the Environmental Improvement Commission of their intent and the nature and location of the development. If the Commission determines it to be necessary, a hearing shall be held at which the developer has the burden of satisfying the Commission that the development will not substantially adversely affect the environment or pose a threat to the public's health, safety or general welfare. 38 M.R.S.A. §§ 483, 484.

1. The testimony and map indicate a frontage on the Pond much in excess of this figure.

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The Legislature defined developments which may substantially affect environment as meaning

"... [1] any commercial or industrial development which requires a license from the Environmental Improvement Commission, [2] or which occupies a land area in excess of 20 acres, [3] or which contemplates drilling for or excavating natural resources, excluding borrow pits for sand, fill or gravel, regulated by the State Highway Commission and pits of less than 5 acres, [4] or which occupies on a single parcel a structure or structures in excess of a ground area of 60,000 square feet." 38 M.R.S.A. § 482(2).

Although Lakesites' development did occupy a land area in excess of 20 acres, it did not notify the Commission of its intentions. However, the Commission eventually learned of Lakesites' plans and proceeded at once to schedule and conduct a hearing as it is authorized to do by section 485. Notice of the hearing was given Lakesites.

2. "L. Lakesites, Inc. is the owner of a lot or parcel of land located in Raymond, Maine, on or near Raymond Pond, exceeding 20 acres in size, to wit, 92 acres more or less.

2. Lakesites, Inc. has divided said 92 acres more or less, into approximately 90 lots ranging in size from 20,000 to 53,000 square feet.

3. Lakesites, Inc. has sold, is selling or is planning to sell or otherwise transfer interests in and to said lots to purchasers as a commercial venture, such lots to be used for year round or seasonal residential and/or recreational purposes.

4. Lakesites, Inc. has been and is operating a commercial development within the meaning of Title 38 M.R.S.A. § 482(2).

5. Lakesites, Inc. has made no application to nor submitted any evidence at the hearing held by the E.I.C. for approval pursuant to the Site Location of Development Law, although it was given ample opportunity to do so.

6. The record indicated that most of the soil in the area being developed by Lakesites, Inc. is of a steep slope and has a high seasonal water table.

Lakesites was represented at the hearing by its attorney who challenged the Commission's jurisdiction to regulate Lakesites' activity contending that the mere subdivision of land does not constitute a "commercial or industrial development" within the scope of the Site Location Law. The attorney made a formal objection to all testimony other than that relating to jurisdiction. He elected to waive his right to contest as to the merits of the case although he was offered full opportunity to do so, choosing not to offer evidence or to cross-examine witnesses who testified regarding the proposed development.

These witnesses testified at length as to various aspects of the environment which they said would be substantially adversely affected by the proposed development. Later, after consideration of the matter, the Commission made findings of fact² and held that Lakesites had failed in its burden to prove that its proposed development meets the standards for approval established by the Legislature in section 484³

7. The record indicated that most of the soil in the area is unsuitable for septic tank disposal of domestic sewage.

8. The development has been subdivided in such a fashion so that it will support housing for 90 families, all of whom must dispose of domestic sewage in some manner.

9. Since the developer, Lakesites, Inc., has not indicated that it has made any provision for collection, treatment or disposal of such sewage, and no municipal treatment and disposal system exists in the vicinity of the development, the only alternative is underground disposal of such sewage by means of a septic tank or related system.

10. The installation of up to 90 septic tank disposal systems in and upon the said development could degrade the quality of ground water in and around the said development, such ground water possibly being used for a drinking water supply, and degrade the waters of Raymond Pond."

3. "The commission shall approve a development proposal whenever it finds that:

1. Financial capacity. The proposed development has the financial capacity

and had failed to demonstrate that it had plans that would adequately protect the public's health, safety and general welfare. It issued an order denying Lakesites the right to proceed with its development until such time as it has made a proper application to the Environmental Improvement Commission and has received the Commission's approval.

From this decision of the Commission, Lakesites has appealed to the Supreme Judicial Court sitting as the Law Court, [38 M.R.S.A. § 487] raising specifically the issue as to whether the offering for sale of subdivided lots of the type owned by Lakesites is either a commercial or an industrial development⁴ subject to the provisions of 38 M.R.S.A. §§ 481-488 and, secondarily, if the Site Location Law is applied to this developer, are there constitutional violations of Equal Protection and Due Process.

The intent of the Legislature.

As to the first issue, we seek the Legislature's intent.

and technical ability to meet state air and water pollution control standards, has made adequate provision for solid waste disposal, the control of offensive odors, and the securing and maintenance of sufficient and healthful water supplies.

2. Traffic movement. The proposed development has made adequate provision for loading, parking and traffic movement from the development area onto public roads.

3. No adverse effect on natural environment. The proposed development has made adequate provision for fitting itself harmoniously into the existing natural environment and will not adversely affect existing uses, scenic character, natural resources or property values in the municipality or in adjoining municipalities.

4. Soil types. The proposed development will be built on soil types which are suitable to the nature of the undertaking."

4. The appellee makes no claim that Lakesites' project is an industrial development.
5. "See, 481. Findings and purpose.

"Legislative intent is the fundamental rule in the construction or interpretation of statutes. . . . Such a construction ought to be put upon a statute as may best answer the intention which the Legislators had in view, and when determinable and ascertained, the courts must give effect to it. . . ." *King Resources Co. v. Environmental Improvement Commission*, Me., 270 A.2d 863, 869 (1970).

In 1970 the 104th Legislature, meeting in special session, enacted several pieces of legislation directed toward reducing the destruction of our natural environment. One of the pieces of legislation introduced was L.D. 1834 entitled "AN ACT to Regulate Site Location of Development Substantially Affecting Environment" with which we are now concerned. After amendment it was enacted as P.L.1969, ch. 571, § 2 and became 38 M.R.S.A. §§ 481-488.

The Legislature's concise statement of its findings and Purpose⁵ makes clear to us the basis for its conclusion that site location was essential to insure that commercial

The Legislature finds that the economic and social wellbeing of the citizens of the State of Maine depend upon the location of commercial and industrial developments with respect to the natural environment of the State; that many developments, because of their size and nature, are capable of causing irreparable damage to the people and the environment in their surroundings; that the location of such developments is too important to be left only to the determination of the owners of such developments; and that discretion must be vested in state authority to regulate the location of developments which may substantially affect environment.

The purpose of this subchapter is to provide a flexible and practical means by which the State, acting through the Environmental Improvement Commission, in consultation with municipal state agencies, may exercise the police power of the State to control the location of developments substantially affecting local environment in order to insure that such developments will be located in a manner which will have a minimal adverse effect on the natural environment of the surroundings." (Emphasis added)

Legislative intent is key in interpreting law.

cial and industrial developments, which *because of their nature or their size*, will impose unusually heavy demands upon the natural environment, shall not be located in areas where the environment does not have the capacity to withstand the impact of the development. But did the Legislature intend to bring *residential* developments within the application of the law? If so, did it intend to include mere subdivisions?

[1] In seeking the legislative intent we turn first to the language which the lawmakers chose to use to carry out their purpose.

In reference to real estate, a "development" may be defined as "a developed tract of land" and "to develop" as "to convert (as raw land) into an area suitable for residential or business purposes" . . . "to alter raw land (into an area suitable for building)". Webster's Third New International Dictionary, 1967.

When we analyze the legislative definition of developments which may substantially affect environment we find that the Legislature saw fit to concern itself with two kinds of developments—1) those the operating procedures of which include the consumption of the natural resources themselves or which have a propensity to discharge, in the course of their processes, wastes and residues which lower the quality of surrounding air, soil or water and 2) those which are not *inherently* ecologically destructive but which because of their *size* are likely to impose great demands upon the environment.

The Legislature's concern for the first class is obvious. The operation of many industrial and some commercial developments—whether large or small—are likely to be direct assaults upon the environment itself. The ecological danger from the members of the second group, unlike the first, comes not principally from the type of activity to be performed on the property after it is developed but rather from the size and concentration of such developments. The Legislature's concern was that

large developments, apart from the type of activity located thereon, have an inherent potential for over-taxing the involved land, air and water upon which the public depends to sustain an acceptable quality of human living.

But the Legislature chose to apply the Act only to large developments which are industrial or commercial. The word "commercial" broadly means "from the point of view of profit" . . . "having profit as the primary aim". Webster's Third New International Dictionary, 1967.

[2] We think that the use of the word "commercial" was intended to describe the *motivation* for the development and not the type of activity to be performed on the property after it is developed. We consider that the Legislature chose to distinguish between commercial and non-commercial developments for a sound reason—it doubtless concluded that a greater need for supervision exists in the case of a commercially motivated development where the dominant factor is the hope for profit than in a non-commercial development where land is being prepared for public enjoyment or divided for family distribution or for some other purpose than profit. In other words, commercial residential developments have a propensity for being big, concentrated and exhausting to the resources of the environment.

[3] It seems to us that the business of subdividing large tracts of land and selling the lots must be considered a commercial venture. The Legislature doubtless so viewed it. Certainly, this construction best accords with the purpose of the statute. *Strout v. Burgess*, 144 Me. 263, 275, 68 A. 2d 241, 250 (1949).

This interpretation finds support in the history of the legislation we are examining.

This legislation was originally proposed to the 104th Legislature in the form of L. D. 1782 which stated that its purpose was to enable the State to guide and control the location of *commercial developments* which

Residential Development construed to be commercial venture.

substantially affect local environment. Such developments were described as including "any recreational, commercial, educational, industrial or residential development which by reason of its size, purpose, manufacturing process or use or handling of natural resources or products may tend to harm or adversely affect the natural environment of a locality to a substantial degree."

The Joint Select Legislative Committee on Natural Resources reported the bill back in a new draft, as L.D. 1834 and that it "Ought to pass". The new draft stated that its purpose was to enable the State to guide and control the location of commercial and industrial developments substantially affecting local environment. Such developments were characterized simply as commercial and industrial—the L.D. 1782 "recreational", "educational" and "residential" development language being dropped. The new draft as reported back also would have excluded from the operation of the Act developments intending "to locate in the appropriate zoned area of any municipality which had adopted a municipal plan and zoning and sub-division ordinances based thereon."

The Legislature eliminated the latter provision⁶ thus rejecting the concept that local zoning is capable of protecting the public from ecological harm. The new draft, as amended, was then enacted and was the law existing at the time of the present problem here under consideration.⁷

In the 105th Legislature, two attempts were made to remove *certain* classifications of residential developments from the operation of the Act passed by the previous Legislature.

L.D. 963 was introduced in the 105th Legislature. Its sole purpose was to exclude by amendment "permanent year-round housing" occupying less than 40 acres from the operation of the Site Location Law. L.D. 963 was defeated.

At the same session L.D. 1061 was introduced. Its sole purpose was to exclude from "commercial developments" all residential developments in municipalities which have planning boards. The Statement of Fact accompanying L.D. 1061 explained the purpose of the Bill as follows:

"The Environmental Improvement Commission has asserted authority under the site location law passed at the Special Session over residential developments, even though the statute is limited to 'commercial and industrial developments.' This bill would clarify that this is not the intent of the law."

This clear attempt in L.D. 1061 to remove some residential developments from the Site Location Law was also defeated.

In considering both L.D. 963 and L.D. 1061 the Legislature had its attention specifically directed to the inclusion of residential developments. It is significant that, even if enacted, neither of them would have removed *all* residential developments from the operation of the law. The Legislature, with its attention specifically directed to the fact that the Commission was then construing the Act to give it authority over residential developments of over 20 acres, still refused two opportunities even to limit the Commission's power to exercise this authority.

[4] It is a well accepted principle of statutory construction that when an administrative body has carried out a reasonable and practical interpretation of a statute and this has been called to the attention of the Legislature, the Legislature's failure to act to change the interpretation is evidence that the Legislature has acquiesced in the interpretation. *Androscoggin Savings Bank v. Campbell, Me.*, 282 A.2d 858 (1971); *Burrough of Matawan v. Monmouth County Board of Taxation*, 51 N.J. 291, 240 A.2d 8, 13 (1968); 2 *Sutherland, J. G., Statutes and Statutory Construction*, (3rd Ed.) Frank E. Horack, Jr., § 5109.

6. House Amendment "A" (H-691).

7. P.L.1969, ch. 571, § 2.

The 105th Legislature also had before it L.D. 1257, L.D. 710 and L.D. 1790 (a new draft of L.D. 710). The significance of its action on these measures is obscure.

L.D. 1257 concerned itself in part with proposing some nine changes to the Site Location Law. One such change defined a "development which may substantially affect environment" as one specifically including municipal, educational, commercial or industrial developments "including real estate subdivisions". The Committee on Natural Resources reported L.D. 1257 in a new draft under the same title which no longer made reference to the Site Location Law, and it thus becomes irrelevant to the present discussion.

L.D. 710 proposed some eleven changes to the Site Location Law, one of which was to alter the definition of "development which may substantially affect environment" to specifically include "any state, municipal, quasi-municipal, educational, commercial or industrial development, including subdivisions". L.D. 710 defined a "subdivision" as meaning a division of an existing parcel of land into three or more parcels within any 5-year period. The Committee on Natural Resources reported L.D. 710 in a new draft, L.D. 1790, under the same title, which contained some ten changes to the Site Location Law. Among others, it would have amended the definition of developments which may substantially affect environment to read "any state, municipal, quasi-municipal, educational, charitable, commercial or industrial development, including subdivisions, but excluding public ways." L.D. 1790 then defined a "subdivision" as meaning the division of a parcel of land into two or more parcels within a 5-year period. The Statement of Fact accompanying the new draft included this explanation of purpose: "(6)

to make it clear that subdivisions are covered by the Site Law and to define 'subdivisions'." L.D. 1790 was defeated.

While the earlier actions of the Legislature in defeating the two attempts to exclude some residential developments from the Site Location Law appears to indicate clear-cut approval of the Commission's interpretation of the Act as including such developments—that is, L.D. 963 and L.D. 1061—the defeat of L.D. 1790 contributes little if anything to our understanding of legislative intent.

L.D. 963 and L.D. 1061 were specific attempts to remove *some* residential developments from the operation of the Act—tacitly recognizing the Commission's authority over residential developments—and both failed. L.D. 1790, on the other hand, not only would have made it "clear that subdivisions are covered" but would have given the word subdivisions a drastically wide meaning and would have worked several other important changes in the Site Location Law.⁸

We simply cannot say what one or more of these proposed changes or additions may have motivated the Legislature to reject L.D. 1790.

The Legislature met in special session in 1972 and considered L.D. 2045 which would amend the Site Location Law in several respects. One of these proposed changes added in section 482(2) after "commercial or industrial developments", the words "including subdivisions". The amendment's statement of purposes included "(2) to make it clear that subdivisions are within the coverage of the law . . .". The attention of the Legislature was again specifically directed to the fact that the Commission was interpreting the Act to include residential developments

8. During legislative debate on L.D. 1790 in the House of Representatives, Representative Marion Fuller Brown informed the House that residential subdivisions had already been a major consideration in the administration of the Site Location Law. She said that in its administration

of the Site Location Law to that date, the Environmental Improvement Commission had processed 102 applications for approval and 61% of these had involved subdivisions. Legislative Record—House, June 21, 1971, at 4397.

(Statement of fact accompanying House Amendment "A" to L.D. 2045) and that this present appeal from the Commission's order, involving a determination of legislative intent, was then pending in court (Remarks of Representative Owen L. Hancock, Legislative Record-House, 105th Legislature, 1st Special Session, 1972 at 799). The House was informed by Representative Louis J. Marstaller that the purpose of the bill was to make it clear that residential subdivisions are within the application of the Site Location Law (Legislative Record-House, 105th Legislature, 1st Special Session, 1972, at 798). Representative Earl H. Smith told the House in debate that 85% of the applications acted upon by the Commission in the past two years had been residential subdivisions (Legislative Record-House, 105th Legislature, 1st Special Session, 1972, at 886).

With this information before it, the Legislature enacted the amendment.⁹

We find it significant in our assessment of legislative intent that the 105th Legislature, aware that the Commission was interpreting the Act to include residential subdivisions, took no affirmative action to indicate a contrary intent, rejected two attempts to remove *some* residential subdivisions from the operation of the Act and finally acted to add the specific words "including subdivisions".

In our opinion the 104th Legislature intended to include commercial residential developments among those developments which may substantially affect environment. But did the Legislature intend the Act to affect commercial residential developments where the developer merely plots the tract, subdivides it into lots by plan and offers the lots for sale to the public?

We consider that this was the Legislature's intention. The basic theory of the Act, as disclosed by the Legislature's Statement of Purpose, is to insure that "such developments *will be located* in a

manner which will have a minimal adverse impact on the natural environment of their surroundings". (Emphasis supplied.) The Legislature found "that the location of such developments is too important to be left only to the determination of the owners of such developments".

Section 483 requires a notification to the Commission by any person intending to construct or operate such a development before commencing construction or operation. The Commission is then empowered to *approve the location* or schedule a hearing thereon.

[5] The language of the Act and its clear underlying purpose reflect the Legislature's intention that a development with a particular propensity to damage the environment should not be located in areas where the environment is particularly incapable of sustaining the impact without public injury.

The Appellant argues to us that it was the Legislature's intention to prevent acts being done to the land which would harm the land and that, therefore, the law is directed to the person who will do the act—such as the builder—and not to the person who merely subdivides and sells the land. With this we cannot agree. The Legislature intended the Commission to scrutinize the proposals *before* the harmful act could be done. The Act is a preventive measure and the injury sought to be avoided can best be prevented as soon as plans for development reveal the harm which will occur upon its completion. We would hardly expect that the Legislature intended to postpone the determination of suitability of an area for a residential development until the lots had been sold to purchasers who will, upon starting construction, discover that they are participants in—as well as victims of—a local environmental disaster.

Furthermore, if a subdivider has sold the lots to numerous individual purchasers each of whom, among other things, is to

9. It became P.L. 1971, Special Session 1972, ch. 613 § 2.

construct his own building, grade his own land, build his own driveway to the street, and provide for his own sanitary sewage disposal, there would be no one "intending to construct or operate a development" who could be held responsible under the statute. We do not ascribe to the Legislature an intention that legislation so important to the public welfare would suffer from such inherent futility.

[6] We consider that both the legislative intent and the statutory language of the Act encompass residential developments in which the developer merely subdivides the land into lots and offers the lots for sale without any intention to construct buildings or to provide additional improvements or services on the lots. We do not find that the Act as so interpreted and applied is constitutionally impermissible. The subdividing is the initial step in such a development.

The Commission correctly ruled as fact that this particular residential development is a commercial development which may substantially affect environment requiring compliance with the provisions of the Site Location Law.

Constitutionality of the State's exercise of its police power under this Act.

In enacting the Site Location Law, the 104th Legislature presented the State with a means of minimizing, through the exercise of its police power, the irreparable damage being done to the environment. But the mere urgency of the action taken cannot override the necessity that the device which the Legislature has chosen for the public protection is one which is constitutionally permitted. It is Lakesites' contention that the Legislature has not chosen such a device here.

[7, 8] In our consideration of the validity of the Legislature's choice of legislation to accomplish its purpose we have in mind that all Acts of the Legislature are presumed to be constitutional, that this is a

presumption of great strength and that the burden is on him who claims that the Act is unconstitutional to show its unconstitutionality. *State v. Fantastic Fair*, 158 Me. 450, 186 A.2d 352 (1961).

[9,10] The State is permitted, of course, to exercise the police power for the protection of the public welfare, safety, order, morals and health. *Prudential Insurance Company of America v. Insurance Commissioner, Me.*, 293 A.2d 529 (1972); *York Harbor Village Corporation v. Libby*, 126 Me. 537, 140 A. 382 (1928). It seems self-evident in these times of increased awareness of the relationship of the environment to human health and welfare that the state may act—if it acts properly—to conserve the quality of air, soil and water.

[11] To do so the State may justifiably limit the use which some owners may make of their property. Our law has long recognized that a landowner holds his property subject to the limitation that he may not use it to the serious disadvantage of the public.

As early as 1835 the legislative body of the City of Bangor determined that the public safety demanded that wooden buildings should not be built in certain sections of the City and enacted an ordinance forbidding owners of land in these areas from erecting wooden buildings on their property. This Court upheld the constitutionality of the ordinance saying:

"Police regulations may forbid such a use, and such modifications, of private property, as would prove injurious to the citizens generally. This is one of the benefits which men derive from associating in communities. It may sometimes occasion an inconvenience to an individual; but he has a compensation, in participating in the general advantage. Laws of this character are unquestionably within the scope of the legislative power, without impairing any constitutional provision. It does not appropriate private property to public uses; but

Basis for Police power regulations

merely regulates its enjoyment. . . .” *Wadleigh v. Gilman*, 12 Me. 403, 405 (1835).

In 1907 the very philosophy contained in the statement of purpose of the present Act was expressed by the Justices of this Court in an Opinion in which they responded to a question from the Maine Senate. The Senate inquired whether

“In order to promote the common welfare of the people of Maine by preventing or diminishing injurious droughts and freshets, and by protecting, preserving, and maintaining the natural water supply of the springs, streams, ponds, and lakes and of the land, and by preventing or diminishing injurious erosion of the land and the filling up of the rivers, ponds, and lakes, . . .” *Questions and Answers*, 103 Me. 506, 507, 69 A. 627 (1907).

the Legislature had power under the Constitution to pass legislation which would prohibit the owners of wildland from unnecessary cutting or destruction of small trees “to preserve or enhance the value of such lands and trees thereon and protect and promote the interests of such owners and the common welfare of the people”. While the Opinion of the Justices is not precedent, we find that the reasoning which led to their conclusions is most impressive. The Justices found that the proposed legislation would not offend the constitutionally guaranteed right of “acquiring, possessing and defending property” or the provision that private property shall not be taken for public uses without just compensation. *Constitution of Maine*, Art. 1, §§ 1, 21. Six of the Justices answered¹⁰ quoting with approval the language of Chief Justice Shaw in *Commonwealth v. Alger*, 7 Cush. 53 (1851):

“We think it a settled principle, growing out of the nature of well-ordered civil society, that every holder of prop-

erty, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government and held subject to those general regulations which are necessary for the common good and general welfare. Rights of property like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the Legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. . . .” *Questions and Answers*, supra, 103 Me. at 510, 69 A. at 624-629.

The Maine Justices also quoted and relied on the language of the Maryland Court in *Windsor v. State*, 103 Md. 511, 62 A. 28 (1906):

“Property of every kind is held subject to those regulations which are necessary for the common good and general welfare. And the Legislature has the power to define the mode and manner in which one may use his property.” *Questions and Answers*, supra, 103 Me. at 513, 69 A. at 630.

The Justices said:

“There are two reasons of great weight for applying this strict construction of the constitutional provision to property in land: 1st, such property is not the result of productive labor, but is derived solely from the State itself, the original owner; 2nd, the amount of land

hoarded before the question could be presented. The eighth Justice did not participate.

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10. The seventh declined to answer, doubting that a “solemn occasion” did not exist inasmuch as the Legislature had not

being incapable of increase, if the owners of large tracts can waste them at will without State restriction, the State and its people may be helplessly impoverished and one great purpose of government defeated." Questions and Answers, supra, 103 Me. at 511, 60 A. at 629.

In *York Harbor Village Corporation v. Libby*, supra, this Court upheld the constitutionality of the statute which authorized village corporations to enact zoning ordinances and of the ordinance enacted under it. The Court followed the same reasoning as to the susceptibility of private property to restrictions upon its use necessitated by the public interest, saying:

"It is said that police power has not been, and perhaps cannot be, defined with precision. . . .

It is not the offspring of constitutions. It is older than any written constitution. It is the power which the states have not surrendered to the nation, and which by the Tenth Amendment were expressly reserved 'to the states, respectively, or to the people.'

Limitations expressed or necessarily implied in the Federal Constitution are the frontiers which the police power cannot pass. Within those frontiers its authority is recognized and respected by the Constitution and given effect by all courts.

We have seen that private property is held subject to the implied condition that it shall not be used for any purpose that injures or impairs the public health, morals, safety, order, or welfare. Under the police power, statutes and authorized ordinances give this condition practical effect by restrictions which regulate or prohibit such uses.

If the use is actually and so substantially an injury or impairment of the public interest in any of its aspects above enumerated, a regulating or restraining statute or ordinance conforming thereto, if

itself reasonable and not merely arbitrary, and not violative of any constitutional limitation, is valid. It is not a deprivation of property which the Constitution forbids, but an enforcement of a condition subject to which property is held." *York Harbor Village Corporation v. Libby*, supra, 126 Me. at 540, 541, 140 A. at 385, 386.

[12,13] We consider it indisputable that the limitation of use of property for the purpose of preserving from unreasonable destruction the quality of air, soil and water for the protection of the public health and welfare is within the police power.

Constitutionality of application of the Act to one who only subdivides.

Lakesites does not deny the power of the State to act properly under the police power to protect the environment but urges us that the application of the Act to one who merely subdivides is constitutionally forbidden. It argues that a remedial Act must be designed and applied rationally and reasonably to achieve the purposes for which the Act was devised. The evil to be avoided, the appellant contends, is the damaging impact of the development upon the environment and the impact occurs and the damage is sustained only with the construction and occupation of the premises—not when the land is only subdivided on plans and the lots are sold. Until such activity creating the impact occurs on the land, the Appellant argues, there is no burden or impact which can affect the environment and so the application of the Act to a mere subdivider as a prerequisite to his selling his land is not directly related to the Act's purpose.

[14] It is true that the Act and its application under the police power must have a clear, real and substantial relation to the purpose of the Act.

"In order that a statute may be sustained as an exercise of the police power, the courts must be able to see that

Basis for Police power regulation.

The Act and its application must have a connection to purpose of the Act.

Connection
between pur-
pose and pro-
visions of
Act.

the enactment has for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals, or general welfare, that there is some clear, real, and substantial connection between the assumed purpose of the enactment and the actual provisions thereof, and that the latter do in some plain, appreciable, and appropriate manner tend toward the accomplishment of the object for which the power is exercised." State v. Union Oil Co. of Maine, 151 Me. 438, 447, 120 A.2d 708, 712 (1956), quoting from 16 C.J.S. Constitutional Law § 195, at 940.

[15] In our opinion such a connection between the purpose of the Act and its application to the subdivider is clear and reasonable. We have concluded earlier in this opinion that the Legislature intended to empower the Commission to prevent ecological damage before it occurs rather than to permit the occurrence of harm which can then be cured only at great public expense—if at all. It is not unreasonable to place upon the subdivider who plans the number, size and location of the lots to be offered for sale the responsibility for avoiding an inevitable large scale ecological calamity. The subdividing for sale is the first step in a commercial residential development and the Legislature reasonably concluded that the public welfare requires that control be exercised through the subdivider rather than attempting it through (in this case) 90 different purchasers whose properties can perhaps never at that later point—because of sheer weight and concentration of numbers—avoid environmental misadventure.

Does the Act take Lakesites land without compensation?

[16] We see no merit to the Lakesites' contention that the application of the Act to it is an unconstitutional taking of its land without compensation.¹¹ Nothing in

the record indicates that the Act as applied constitutes such an unreasonable burden upon the property as would equal an uncompensated taking. State v. Johnson, Me., 265 A.2d 711 (1970); 16 Am.Jur.2d, Constitutional Law, § 294. In fact, the record demonstrates only that the Appellant's land cannot be sold for residential purposes while subdivided to the extent and in the manner Lakesites originally planned.

Is the Act unconstitutionally vague and impossible of compliance?

[17] The Appellant also argues that its land is being taken from it impermissibly because the criteria which the Act requires the landowner to meet is unconstitutionally vague and impossible of compliance.

Section 484 requires the Commission to approve a development proposal whenever it finds that:

"1. Financial capacity. The proposed development has the financial capacity and technical ability to meet state air and water pollution control standards, has made adequate provision for solid waste disposal, the control of offensive odors, and the securing and maintenance of sufficient and healthful water supplies.

2. Traffic movement. The proposed development has made adequate provision for loading, parking and traffic movement from the development area onto public roads.

3. No adverse affect on natural environment. The proposed development has made adequate provision for fitting itself harmoniously into the existing natural environment and will not adversely affect existing uses, scenic character, natural resources or property values in the municipality or in adjoining municipalities.

11. Constitution of the United States, Amendment V; Constitution of Maine, Art. I, § 21.

**Justification
for regulating
land sub-
divisions.**

4. Soil types. The proposed development will be built on soil types which are suitable to the nature of the undertaking."

Lakesites protests that as it is only a subdivider it cannot accurately foresee the activity to be performed on the lots it sells and so cannot control the future adequacy of provisions relating to pollution control and maintenance of healthful water supplies. To be sure, the Act imposes upon the developer—including the mere subdivider—responsibilities which he has not had in the past. The Legislature has determined that an owner of a large tract of undeveloped land may no longer subdivide it, sell the lots and then walk away from the transaction indifferent to the local catastrophe that may result when construction and occupancy reveal the incapacity of the environment to withstand the impact of the development. It may be that this responsibility can more easily be met by a subdivider who is also a constructor of the buildings but it is equally the responsibility of the subdivider who chooses only to sell the bare lots. The duty is no doubt more burdensome as the land is less suitable and it may be impossible of compliance if the environment is of a type incapable of sustaining the proposed development. In the latter situation the public welfare demands that the land be used for another purpose or that the impact of the same use be diminished. In many situations the subdivider may be able to meet his burden of affirmatively demonstrating to the Commission that he has met the criteria through satisfactory conditions in his instruments of sale. We do not consider the burden to be unreasonable in view of the overriding public interest.

The New Hampshire Court expressed the same basic philosophy when it found that an ordinance which required approval of subdivision developments conditioned upon the developer's paying for street gradings and surfacing, curbs, sidewalks, water mains, sewers and other improvements did not impose an unreasonable

burden upon a residential developer or amount to a taking of his land. The Court adopted the language of 2 Rathkopf. The Law of Zoning and Planning, ch. 71, § 9 (1960):

"Since the subdivision of a large tract of land into a number of small building lots and the development thereof, either for residential or industrial purposes increases the value of the land in the aggregate to the subdivider and at the same time imposes new burdens upon the municipality and, if uncontrolled, upon other elements in the community, the validity of imposing a duty upon the subdivider to comply with reasonable conditions relating to location, site plan, location of and width of roads and sidewalks, the installation of necessary storm drains and sewers, and to restrictions on lot sizes so that the subdivision will conform to the local requirements for the safety, health and general welfare of the subsequent owners of the individual lots therein and of the community has been generally recognized." *Blevens v. City of Manchester*, 103 N.H. 284, 170 A.2d 121, 122 (1961).

The Court added:

"The subdivision of land has a definite economic impact upon the municipality and hence the regulation of subdivision activities has been sustained as a means by which the interests of the public and the general taxpayer may be safeguarded and protected. Since the subdivider of land creates the need for local improvements which are of special benefit to the subdivision, it is considered reasonable that he should bear the cost rather than the municipality and the general taxpayer. . . ."

[18,19] The Appellant concedes that the requirement that a proposed development must not be built on soil types which are unsuitable to the nature of the undertaking is a reasonable one, and we agree. We also feel that there can be no serious

**Soils must be
suitable.**

question but that the Legislature may properly demand that adequate provision will be made for loading, parking and traffic movement and has done so clearly.

The requirement that the Commission must be satisfied that there will be no adverse effect upon the natural environment is the very substance of the Legislature's efforts to reduce despoilation of the environment to a minimum. While most such developments may be expected to "affect" the environment adversely to the extent that they add to the demands already made upon it, it is the *unreasonable* effect upon existing uses, scenic character and natural resources which the Legislature seeks to avoid by empowering the Commission to measure the nature and extent of the proposed use against the environment's capacity to tolerate the use.

[20] Of course, the Legislature may not endow the Commission with a naked discretion and it has here established criteria to guide the Commission's exercise of its power.

While the Legislature has used general language in requiring proof that the proposed development has adequate provision for fitting itself harmoniously into the existing natural environment, the Legislature has throughout the Act pointed out the specific respects in which the development must not offend the public interest and in which the development would be ecologically inharmonious. The Act recognizes the public interest in the preservation of the environment because of its relationship to the quality of human life, and in insisting that the public's existing uses of the environment and its enjoyment of the scenic values and natural resources receive consideration, the Legislature used terms capable of being understood in the context of the entire bill. The Legislature has declared the public interest in preserving the environment from anything more than

minimal destruction to be superior to the owner's rights in the use of his land and has given the Commission adequate standards under which to carry out the legislative purpose.

[21] For reasons not known to us the Act recites that *property values* also must not be (unreasonably) affected. In our opinion, the effect of developments upon property values is outside the scope and purposes of the Act and the Commission would be impermissibly applying the force of the State's police power in the enforcement of this Act if it denied approval of a development because of failure of proof that property values would not be adversely affected. We consider the addition of this dubious criterion constitutionally barred and void.

[22] There appears no reason to believe that the Legislature, with its purpose of ecological protection appearing so clearly, would have felt that the provision as to property values was indispensable to the effectiveness of the Act. We consider the section to be severable and that the validity of the remainder of the Act is unaffected.¹²

The invalidity of this portion of the criteria has no effect upon the Commission's refusal to approve of the development. The Commission's findings make clear that the effect of Lakesites' development upon property values in Raymond, if any, did not influence the Commission's decision.

[23] We have frequently held that the standards which a statute sets out to guide the determinations of administrative bodies must be sufficiently distinct so that the public may know what conduct is barred and so that the law will be administered according to the legislative will. The standards here are much more explicit than those which we found to be insufficient in *Waterville Hotel Corp. v. Board of Zoning Appeals*, Me., 241 A.2d 50 (1968) and those

values from the statute. P.L. 1971, Special Session 1972, Ch. 613, § 5.

12. In 1972 the Legislature, in Special Session during the pendency of this appeal, eliminated this condition as to property

of which we approved in *State v. Johnson*, Me., 265 A.2d 711 (1970).

We find that the standards which the Act imposes upon the commission and the applicants are clear, explicit, rationally related to the purposes of the Act and are adequate guides for the conduct of both the Commission and the applicants.

Does the Act deny the developer equal protection of the law?

[24] Finally, Lakesites argues that the Act denies a developer—and especially it—equal protection under the law. It argues that the subdivider of over 20 acres must receive the Commission's approval while the subdivider of under 20 acres faces no such requirements, and so it contends it is denied equal protection because size, it says, has no rational or reasonable correlation to the environmental impact. A 21 acre subdivision, it argues, may contain 5 residences while one of 19 acres may contain 19 residences. It is elementary that the Legislature may in its judgment create classifications so long as they are not arbitrary and are based upon actual differences in classes which differences bear a substantial rational relation to the public purpose sought to be accomplished by the statute. In *re Milo Water Company*, 128 Me. 531, 140 A. 299 (1930).

[25] The purpose, as we have said, was to control the locations of those commercial and industrial developments which could substantially adversely affect the environment. The Legislature evidently concluded that the size of a development has a distinct relationship to the amount of its potential adverse impact upon the environment and concluded that at this time the public interest could best be served by applying the admittedly severe restrictions of the new law to large developments. The justification of the distinction as to size seems most clear in such legislation as this. For example, in an area with no municipal sewage disposal system, such as in Spring Valley Development, and where

much of the soil has a high seasonal water table and is unsuitable for septic tank disposal of domestic sewage, the potential danger to the environment from the discharge of sewage from 90 residences must be greater than the discharge from 2 or from 19. Drawing the line at 20 acres is not a denial of equal protection. *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958); *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 55 S.Ct. 187, 79 L.Ed. 281 (1934).

"A state 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed. . . . if a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the 14th Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law.'" *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 556-557, 37 S. Ct. 217, 223, 61 L.Ed. 480 (1917).

"When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the Legislature must be accepted unless we can say that it is very wide of any reasonable mark." *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 41, 48 S.Ct. 423, 426, 72 L.Ed. 770, 775 (1927).

A law does not have to address all ills or evils to be upheld.

Justification for specific numerical standards.

In *State v. King*, 135 Me. 5, 188 A. 775 (1936) we found no constitutional violation in the classification of carriers which demanded a certificate of public convenience and necessity or a permit to operate as a contract carrier of those carriers who operated beyond 15 miles of the point of receipt, quoting the language used by the United States Supreme Court in deciding a similar issue:

"We think that the Legislature could properly take these distinctions into account, and that there was a reasonable basis for differentiation with respect to that class of operations. In this view, the question is simply whether the fixing of the radius at twenty-five miles is so entirely arbitrary as to be unconstitutional. It is obvious that the Legislature in setting up such a zone would have to draw the line somewhere, and unquestionably it had a broad discretion as to where the line should be drawn." *Continental Baking Company v. Woodring*, 286 U.S. 352, 370-371, 52 S.Ct. 595, 601, 76 L.Ed. 1155, 1166 (1931).

We see no irrational or arbitrary discrimination in the application of the Act to the large mere-subdivider. It is his act of subdividing that initially indicates the volume of the impact likely to fall upon the environment.

The distinction made by the Legislature does not appear to be unreasonable.

[26] In furtherance of its claim that it is denied equal protection, Lakesites contends that the statute would in effect authorize the Commission to create spot zones, administratively. The absence of a requirement of a comprehensive plan such as was demanded by the enabling statute which authorized municipalities to enact zoning ordinances,¹³ Lakesites argues, results in piecemeal zoning with arbitrary distinctions.

13. 30 M.R.S.A. § 4953, repealed P.L. 1971, ch. 455, § 2. The comprehensive plan is now required by 30 M.R.S.A. § 4962.

300 A 2d—43

While the Site Location Law bears a resemblance to zoning ordinances¹⁴ in that both seek to restrict the use of land to areas appropriate for the purpose, the basic purposes of the two laws are distinguishable. We have said that the Legislature has authorized municipalities to adopt zoning ordinances

"... as an integral part of a comprehensive plan for municipal development and promotion of the health, safety, and general welfare of its inhabitants. The geography, the economic and industrial development, the residential necessities, the nature and extent of residential, business and industrial growth of one municipality may be entirely different from those in another municipality." *Wright v. Michaud*, 160 Me. 164, 168, 200 A.2d 543, 545-546 (1964).

The *Wright* Court said also:

"In considering the provisions of a comprehensive zoning ordinance the legislative body may take into consideration the nature and character of the community and of its proposed zone districts, the nature and trend of the growth of the community and that of surrounding municipalities, the areas of undeveloped property and such other factors that necessarily enter into a reasonable and well-balanced zoning ordinance." *Wright v. Michaud*, supra, 160 Me. at 173, 200 A.2d at 548.

[27] The Site Location Law on the other hand is not directed toward promoting an orderly community growth relating one area of a community to all other areas. It is not concerned with where a development takes place in general but only that the development takes place in a manner consistent with the needs of the public for a healthy environment. It did not grant the Commission the authority to determine where the location of a develop-

14. *King Resources Co. v. Environmental Improvement Commission*, Me., 270 A.2d 863, 868 (1970).

must be left rather to give the Commission authority to measure the proposal and location against statutory standards and to apply reasonable terms and conditions which the proposal must meet in order that it may be "located in a manner which will have a minimal adverse impact on the natural environment". There is no constitutional necessity that the Commission be required to draw a comprehensive plan as part of the Site Location Law and the Legislature has not considered one to be essential to its purpose here, perhaps recognizing the difficulties which the preparation of such a plan relative to ecological problems would entail. The application of the Site Location Law on a case by case basis but under guidance of the explicit criteria of the statute is not in itself a denial of equal protection and there is no evidence that there has been such a denial to Lakesites.

We find that the application of the Act to Lakesites does not offend the provisions of either the state or federal constitutions.

[28] A strong policy against piecemeal appellate review has been manifest in the decisions of this Court for many years. *Hend v. Nickerson*, 148 Me. 465, 467, 95 A. 2d 817, 815 (1953). The principle that only final judgments are ripe for appellate review was preserved in the structure of our Maine Civil Rules and interlocutory review is authorized only when ordered by a Justice in the Superior Court in exceptional situations.¹⁵ The definition of final judgment as one which "fully decides and disposes of the whole cause leaving no further questions for the future consideration and judgment of the court" *Gilpatrick v.*

Glidden, 82 Me. 291, 203, 19 A. 169, 167 (1877) embraces our present problem.

The powers of the Environmental Improvement Commission are wholly statutory. *King Resources Company v. Environmental Improvement Commission*, supra. The authority to dispose of issues presented at hearing which the statute gives the Environmental Improvement Commission is to "make findings of fact and issue an order granting or denying permission"

The jurisdiction of the Law Court is also entirely statutory. 38 M.R.S.A. § 487 provides for an appeal direct to the Law Court from an order of the Commission. The statute states:

"The court shall decide whether the commission acted regularly and within the scope of its authority, and whether the order is supported by substantial evidence, and on the basis of such decision may enter judgment affirming or nullifying such determination."¹⁶

[29] There is completely absent any statutory authority for the Commission to present an interlocutory appeal to the Law Court or for the Law Court to entertain direct appeals on a piecemeal basis.

Although Lakesites chose to confine its participation in the hearing to an attack on the Commission's jurisdiction and waived the right of cross-examination and of presentation of evidence, the Commission's order fully "decides and disposes of the whole cause" and leaves "no further questions for the future consideration and judgment" of the Commission as to the development as presently proposed by Lakesites.

peal from an order of the Environmental Improvement Commission to the Law Court shall be taken "in the same manner as an appeal from a judgment of the Superior Court in a civil action" except for the time period within which the appeal must be taken. This amendment supplies no authority for interlocutory review.

15. M.R.C.P. Rule 72(e).

An excellent discussion of the final judgment rule is found in Field, McKusick and Wrath, *Maine Civil Practice*, 73.1-73.5.

16. Effective September 23, 1971 M.R.C.P. Rule 73 was amended by adding subsection (f) which now provides that an ap-

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[30,31] We find that the Commission acted regularly and within the scope of its authority and that its order is supported by substantial evidence.¹⁷

The Commission's¹⁸ determination is affirmed and the appeal is denied.

3. Health and Environment ⇨25.5

STATE of Maine ex rel. Joseph E. BRENNAN, Attorney General and the Board of Environmental Protection

v.

R. D. REALTY CORPORATION.

Supreme Judicial Court of Maine.

Dec. 18, 1975.

State appealed from a judgment of the Superior Court, Sagadahoc County, denying an injunction prohibiting construction of subdivision. The Supreme Judicial Court, Pomeroy, J., held that where land had been divided and lots surveyed and numbered prior to September 23, 1971, subdivision was in existence on such date and thus not subject to municipal subdivision law; and that subdivision project which was being developed in 1967 and 1968 was exempt from requirements of the site location of development law which does not apply to developments under construction on January 1, 1970.

Appeal denied.

1. Municipal Corporations ⇨43

Statute allowing municipal officers to act in the place of a planning board for purposes of approving proposed subdivisions applies only if municipality has adopted a land subdivision ordinance; in the absence of a duly enacted regulation for subdivisions no approval by municipal officers is required for a subdivision. 30 M.R.S.A. § 4956.

2. Municipal Corporations ⇨43

Where land had been divided into lots and lots had been surveyed, marked and numbered before September 23, 1971, subdivision was in existence on September 23, 1971 and thus not subject to municipal subdivision law which was not applicable to subdivisions in actual existence on September 23, 1971. 30 M.R.S.A. § 4956.

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Where there was active and continuous development of subdivision project during 1967, 1968 and 1969, project was exempt from the site location of development law which does not apply to developments under construction on January 1, 1970, relieving developer of duty to comply with the notification requirements of such law. 38 M.R.S.A. §§ 481 et seq., 482, 483, 488.

4. Health and Environment ⇨25.5

A determination that a subdivision development is subject to regulation by the Environmental Improvement Commission or exempt therefrom by the grandfather clause should be made preliminarily by Commission itself; judicial intervention in the controversy should take place prior to any administrative determination only in rare instances where issue is solely one of law or where relief sought is beyond capacity of administrative agency to give or where injunctive relief is sought to maintain status quo pending hearing and order. 38 M.R.S.A. §§ 481-488.

5. Administrative Law and Procedure ⇨228, 229

"Primary jurisdiction" and "exhaustion of administrative remedies" are both closely allied in basic function and concept for each rests on premise that an agency has primary authority to make certain decisions deemed relevant to determination of controversy.

6. Administrative Law and Procedure ⇨229

"Exhaustion" is a defense to judicial review of administrative action not as yet deemed complete.

7. Administrative Law and Procedure ⇨228

"Primary jurisdiction" determines whether the court or agency should make initial decision.

8. Administrative Law and Procedure ⇨228

The "doctrine of primary jurisdiction" is not an attempt to allocate power between courts and administrative agencies.

9. Administrative Law and Procedure ⇨228

As a matter of judicial policy, court will generally not decide an issue concerning which an administrative agency has decision capacity until after agency has considered the issue.

Cabanne Howard, Asst. Atty. Gen., Augusta, for plaintiff.

Marshall, Raymond & Beliveau by John G. Marshall, Lewiston, for defendant.

Before DUFRESNE, C. J., and WEATHERBEE, POMEROY, WERNICK, ARCHIBALD and DELAHANTY, JJ.

POMEROY, Justice.

The jurisdiction of the Maine Board of Environmental Protection to issue or deny approval of a development under the Site Location of Development statute, 38 M.R.S.A. § 481 et seq., is in issue in this case as a result of the denial of a permanent injunction.

That appellee, R. D. Realty Corporation is creating a subdivision within the meaning of 38 M.R.S.A. § 482(5) is not denied.

Also agreed is that appellee did not "notify the commission in writing of his [sic] intent and of the nature and location of such development" before commencing its construction. 38 M.R.S.A. § 483.

The complaint for injunction was denied as the result of a finding by the Court that the claim asserted by appellee that it was exempt from the provisions of the Act

1. "This Article shall not apply to any development in existence or in possession of ap-

under the provisions of 38 M.R.S.A. § 488¹ was valid.

This appeal by the State was seasonably entered following the denial of a complaint for injunction.

We deny the appeal.

The facts are not in dispute. In late 1966 or early 1967, the property in question was acquired by the Dube family. A corporation was subsequently formed with family members as sole stockholders with the intention of developing the area sufficiently to permit the sale of lots.

In 1967 a contractor was hired to clear 5 miles of rough roads to enable prospective purchasers to be shown the property during periods of favorable weather.

In that same year a cottage was built on the property. The cottage was used as an office and occasionally as an overnight dwelling. Electricity was connected to the cottage. A small area was cleared and made suitable for use as a small airplane landing area.

In 1968 an engineer was employed to prepare a rough plan of the area and to cause the lot sketched on the plan to be generally indicated on the surface of the earth. This work was completed during that year.

Many thousands of dollars have been expended by the developer in preparation of the development for the sale of lots.

All these facts were found as fact by the presiding Justice.

The complaint for injunction was in two Counts.

Count I of the complaint alleged a violation of the Site Location of Development law, 38 M.R.S.A. § 481 et seq.

Count II alleged violation of the municipal subdivision law, 30 M.R.S.A. § 4956.

pliable state or local licenses to operate or under construction on January 1, 1970 . . ."

In ruling as he did the presiding Justice based his conclusion that there was no violation of law on Sec. 488 of 38 M.R.S.A. and Sec. 4956 of 30 M.R.S.A.

Sec. 488 provides that:

"This Article shall not apply to any development in existence or in possession of applicable state or local license to operate or under construction on January 1, 1970."

The conclusion which the Justice below reached was:

"I find that this development was 'under construction' on January 1, 1970, and therefore is exempted by section 488 from application of the Site Location of Development Law."

As to Count II of the complaint, the Justice referred to 30 M.R.S.A. § 4956, paragraph 5, which reads as follows:

"This section shall not apply to proposed subdivisions approved by the planning board or the municipal officials prior to September 23, 1971 in accordance with laws then in effect nor shall they apply to subdivisions as defined by this section in actual existence on September 23, 1971 that did not require approval under prior law"

He then concluded as follows:

"I find that the area under consideration was subdivided prior to September 23, 1971 and that the lots were actually surveyed and marked either by steel pins or regular markers and numbered at a time when no approval was required by the municipality under prior law and therefore was exempted by the terms of 30 M.R.S.A. Section 4956."

The "prior law" was the municipal subdivision law as it read in 1964. This section provided, among other things, "A municipality may regulate the subdivision of land."

At all times material hereto the Town of Phippsburg had no regulation controlling the subdivision of land. The State points to subsection B of Section 1, 30 M.R.S.A. § 4956, which reads, in part, as follows:

"In a municipality which does not have a planning board, the municipal officers shall act in its stead for the purposes of this section."

This, the appellant says, requires that the municipal officers give approval to a proposed subdivision before it can be lawfully made, even though the municipality has no planning board and has adopted no regulations for subdivisions.

With this argument we cannot agree.

30 M.R.S.A. § 4956 came into being as a result of Public Laws of Maine, 1957, Chapter 405. This Chapter was entitled "An Act Revising the General Laws Relating to Municipalities." Section 1 amended the Revised Statutes by adding thereto a new chapter, which it numbered 90-A.

Section 61 of Chapter 90-A (of which subdivision of land is a part), provides:

"A municipality *may* act for the purpose of municipal development according to the following provisions." (Emphasis supplied)

Among those provisions is that with which we are presently concerned: "A municipality *may* regulate the subdivision of land."

This was merely an Enabling Act.

Certainly it cannot be argued that the Selectmen of the Town of Phippsburg had authority to regulate the subdivision of land in the absence of any ordinance enacted pursuant to this Enabling Act. Since the Town of Phippsburg did not see fit to adopt a subdivision ordinance until long after the subdivision was commenced in 1967, we think it apparent there was no

Discussion of the fact that prior to 1971, the Subdivision Law was merely an enabling Act.

requirement of municipal approval for the subdivision at that time.

[1] We read the section to which appellant refers, i. e.,

"In a municipality which does not have a planning board, the municipal officers shall act in its stead for the purposes of this section."

to mean that in any municipality which had adopted a land subdivision ordinance or regulation (which Phippsburg had not) if there was no planning board in the municipality which could approve the plat of a proposed subdivision, the municipal officers were directed to act in the stead of a planning board for the purpose of giving approval.

In the absence of a duly enacted regulation for subdivisions no municipal officer's approval was required for a subdivision under the statute as it read at the time this subdivision was undertaken.

We hold the presiding Justice was correct in his conclusion that the subdivision in this case was made at a time when no approval was required by the municipality. 30 M.R.S.A. § 4956.

Appellant directs attention to 30 M.R.S.A. § 4956 and observes that to be free of the application of the municipal subdivision law, the subdivision must have been "in actual existence" on September 23, 1971.

The Legislature's intention, the appellant says to quote from its brief, is clear "that in the case of projects for which municipal approval was not required only those actually completed by September 23, 1971, would qualify for grandfather's rights."

Again we must disagree.

The statute uses the words "in actual existence" and not the words "actually completed."

What was "in actual existence?"

The answer is: "Subdivision as defined by this section."

What section?

The answer is: "Section 9456, paragraph 5, of 30 M.R.S.A."

A subdivision was defined by the Act in effect at all times material to this case as "A division into three or more lots in urban areas or four or more lots in rural areas"

There is no dispute in this case but that there had been a division of the total parcel of land into many lots and as the presiding Justice found: "these lots were actually surveyed and marked by steel pins or regular markers and numbered" before September 23, 1971, the critical date under the statute.

[2] We are satisfied then that the presiding Justice was correct in his finding that the subdivision was "in actual existence" within the meaning of the applicable statute.

[3] We likewise conclude the presiding Justice was correct in his finding that 38 M.R.S.A. § 488 exempted this development from the application of the Site Location of Development law because "the development was under construction on January 1, 1970."

The appellant argues that the appellee had abandoned whatever "grandfather" rights which existed because, it says, nothing was done to prosecute the development for a period of five years.

The presiding Justice found as fact based on believable evidence that there was active and continuous development of the project during the years 1967, 1968 and 1969.

In view of this finding which is supported by credible evidence, it becomes unnecessary to discuss what period of inactivity will justify a conclusion there has been an abandonment of the subdivision.

That the Superior Court had jurisdiction of the subject matter and the parties is undoubted.

That this Court had jurisdiction to consider and decide the appeal from the denial of the injunction by the Superior Court Justice is likewise apparent.

We have, therefore, reviewed this record and have concluded that the complaint for an injunction was properly denied. This is our decision in the case.

However, we do have another concern. This is a matter which was not raised by the parties, either in their briefs or at oral argument, but which we choose to discuss in some detail.

The complaint for injunction recites that "the plaintiff, Attorney General of the State of Maine, is acting for himself and on behalf of the Board of Environmental Protection."

Two separate and distinct statutes, he alleges, are authority for the action taken: to wit, 38 M.R.S.A. §§ 481-488² and 30 M.R.S.A. 4956.

38 M.R.S.A. § 486 provides as follows:

"All orders issued by the commission under this subchapter shall be enforced by the Attorney General. If compliance with any order of the commission is not had within the time period therein specified, the commission shall immediately notify the Attorney General of this fact. Within 30 days thereafter the Attorney General shall bring an appropriate civil action designed to secure compliance with such order."

30 M.R.S.A. § 4956(5) provides in part that:

"The Attorney General, the municipality or the appropriate municipal officers may institute proceedings to enjoin the violation of this section."

² Provision for judicial review of any order of the Board of Environmental Protection is found in 38 M.R.S.A. § 487.

38 M.R.S.A. § 485 contains, among other things, provision that the Environmental Improvement Commission

"may at any time with respect to any person who has commenced construction or operation of any development without having first notified the commission pursuant to section 483, schedule and conduct a public hearing in the manner provided by section 484 with respect to such development."

The following paragraph in Section 485 provides that the Commission

"may request the Attorney General to enjoin any person, who has commenced construction or operation of any development without first having notified the commission pursuant to section 483, from further construction or operation pending such hearing and order."

It thus becomes clear that the statutory scheme envisions that ordinarily the Environmental Improvement Commission will make the determination that a development is or is not exempt from regulation by the Environmental Improvement Commission, in the first instance. The scheme contemplates judicial participation in determining the question in issue only after such issue is preliminarily resolved by the Commission after hearing, unless

- (a) it clearly appears the issue is only one of law, or
- (b) harm will result before the Commission can act if it is ultimately found the development is not exempt from regulation by the Commission, (in which case the status quo is maintained "pending such hearing and order" (under 38 M.R.S.A. § 485)).

The judicial participation is usually initiated either by appeal from the Commission's Order under the provisions of 38 M.R.S.A. § 487 in which case appeal is to

the Supreme Judicial Court sitting as a Law Court³ or by invoking 38 M.R.S.A. § 486, in which case "appropriate civil action" (i. e., complaint for injunction), is initiated in the Superior Court.

In *In Re Spring Valley Development*, Me., 300 A.2d 736 (1973), one of the issues was, as here, whether or not the action of the developer was subject to regulation by the Environmental Improvement Commission or exempt therefrom by the "grandfather clause."

There, as here, the Commission learned of the developer's activity, even though it had given no notice to the Commission of its intended development.

Upon learning of the developer's activities the Commission gave notice of hearing as provided by 38 M.R.S.A. § 483 and proceeded to adjudicate the issue.

When that issue was decided adversely to the developer, appeal was taken to the Supreme Judicial Court sitting as the Law Court pursuant to 38 M.R.S.A. § 487.

When judicial participation in the controversy was invoked there had already been a preliminary resolution of the issues by the Commission, which determination was made after hearing pursuant to Section 483.

[4] We decide that in all future cases determination that a development is subject to regulation by the Environmental Improvement Commission, or exempt therefrom by the "grandfather clause" (38 M.R.S.A. § 488), should be made preliminarily by the Commission itself. Judicial intervention in the controversy will take place prior to any administrative determi-

3. See: *King Resources Co. v. Environmental Improvement Commission*, Me., 270 A.2d 863 (1970).

4. We can envision the situation in which a developer may go on the site of a development with large earth-moving equipment and in a matter of hours make irreparable changes in the contour of the earth. In a case such as this, for example, a petition by the Com-

nation only in those rare instances where the issue is solely one of law or where the relief sought is beyond the capacity of the administrative agency to give, or where injunctive relief is sought under 38 M.R.S.A. § 485 to maintain the status quo "pending such hearing and order."⁴

We see "the doctrine of primary jurisdiction" as the occasion for this rule.⁵

In *Stanton v. Trustees of St. Joseph's College*, Me., 233 A.2d 718 (1967), we accepted the "doctrine of exhaustion of administrative remedies" as a general principle.

We recognize that the "doctrine of primary jurisdiction" is somewhat different from the "doctrine of exhaustion of administrative remedies" and of "ripeness."

Nevertheless, they are closely akin. *Public Utilities Commission v. United States*, 355 U.S. 534, 78 S.Ct. 446, 2 L.Ed. 2d 470 (1958).

[5] "Primary jurisdiction" and "exhaustion of administrative remedies" are both closely allied in basic function and concept. Each rests on the premise that an agency has the primary authority to make certain decisions deemed relevant to the determination of the controversy.

[6] "Exhaustion" emerges as a defense to judicial review of an administrative action not as yet deemed complete.

[7] "Primary jurisdiction" determines whether the Court or the agency should make the initial decision. *United States v. Western Pac. R. Co.*, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956).

mission for injunctive relief ought be entertained.

5. See: *Atchison, Topeka & Santa Fe Railway Company v. Wichita Board of Trade*, 412 U.S. 800, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973); see also *New England Telephone & Telegraph Co. v. Public Utilities Commission*, Me., 329 A.2d 792, 801 (1973).

Discussion of
primary jurisdiction,
exhaustion of
remedies.

[8] The "doctrine of primary jurisdiction" is not an attempt to allocate power between the courts and the administrative agencies. Authorities agree "the doctrine of primary jurisdiction" was established in *Texas & Pac. Railway v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S.Ct. 350, 51 L. Ed. 553 (1907). While in that decision there was no explicit reliance on Commission expertise as the controlling consideration, later cases rationalized the application of the rule on that basis.

[9] As a matter of *judicial policy* we will generally not decide an issue concerning which an administrative agency has decision capacity until after the agency has considered the issue.

One of the obvious results of the creation of the Maine Board of Environmental Protection is that an agency has been created which has developed an expertise in resolving the special problems with which it is, by law, required to become concerned. Merest prudence suggests that the courts ought to have the benefit of the Commission's prior expert evaluation of controverted facts, before it intervenes in a controversy over which the Commission has jurisdiction, (except to use legal processes to maintain the status quo pending hearing and decision of the issue in controversy by the Commission.)

An example of the application of this rationale by this Court is *Lewiston, Greene & M. T. Co. v. New England T. & T. Co.*, Me., 299 A.2d 895 (1973). There this Court was concerned with 35 M.R.S.A. § 305. That section provides, in part:

" . . . [I]n all cases in which the justness or reasonableness of a rate, toll or charge by any public utility or the constitutionality of any ruling or order of the commission is in issue, the law court shall have jurisdiction upon a complaint to review, modify, amend or annul any ruling or order of the commission, but only to the extent of the unlawfulness of such ruling or order. If in such com-

plaint it is alleged that confiscation of property or other violation of constitutional right results from such ruling or order, the law court shall exercise its own independent judgment as to both law and facts."

Even though the statute by its express terms directed that the Law Court exercise its own independent judgment, both as to law and facts, we ordered that

" . . . [T]he Public Utilities Commission is herewith directed promptly to take out evidence, in accordance with the foregoing delineations, from New England and any other of the parties who might wish to present evidence.

"After it has heard and taken such additional evidence the Commission, as it deems appropriate by reason thereof, is authorized, in accordance with Section 305, to modify its original findings, conclusions and Order, or to make new findings and conclusions and a new Order.

"The Commission shall report all the additional evidence which it has taken to the Law Court promptly and in manner such that, as required by Section 305,

" . . . the proof may be brought as nearly as possible down to the date of its report thereof to the court."

"If the Commission has modified its original findings of fact or made new findings of fact, or modified its original Order, or made a new Order, it shall file with the Law Court such modified findings of fact or Order or such new findings of fact or Order, if any."

This Court had earlier established the principle that even where independent judgment as to facts is mandated, the Law Court

" . . . may nonetheless exercise the prescribed 'independent judgment' as to facts and yet in that very process be 'informed and aided' by findings of the Public Utilities Commission." *Central*

Court will not intervene until administrative action complete.

Maine Power Company v. Public Utilities Commission, 156 Me. 295, 304, 163 A.2d 762, 768 (1960).

In the case now before us the Board of Environmental Protection has capacity to determine the mixed question of law and fact as to whether the development being operated by the defendant is or is not exempt from the requirements of 38 M. R.S.A. § 481 et seq.

As to all cases arising subsequent to this date, determination of all issues within its legal capacity should be made by the administrative tribunal before judicial in-

tervention will be invoked, except in those instances earlier described.

In this case the factual basis for the denial of injunctive relief has been thoroughly developed before the Justice of the Superior Court. The issues of law have been ably presented by both counsel. Under the circumstances we consider it appropriate to decide this case.

The entry must be,

Appeal denied.

All Justices concurring.

Cite as, Me., 374 A.2d 317

TOWN OF ARUNDEL

v.

Morrill and Frances SWAIN.

Supreme Judicial Court of Maine.

June 8, 1977.

Town brought action to enjoin landowners from violation of local subdivision ordinance. The Superior Court, York County, entered judgment for the landowners and the town appealed. The Supreme Judicial Court, Delahanty, J., held that: (1) town was bound by legislative definition of subdivision in enabling statute; (2) creation of a campground was not within the statutory definition of a subdivision into lots, and (3) town had no jurisdiction over creation of campgrounds.

Appeal denied.

9. We do not read *Carey v. Mackey*, 82 Me. 516, 20 A. 84 (1890) as inconsistent with our analysis here.

In *Carey* this Court interpreted a silent Florida divorce decree as leaving intact a previous separation agreement. Several factors, however, diminish the relevance of *Carey* for present purposes. First, while the Court held the agreement untouched by the Florida decree, it modified the agreement itself by crediting amounts paid under the decree to amounts due

1. Zoning ⇨5

Municipalities taking advantage of zoning powers granted by statute are bound by legislative definitions.

2. Zoning ⇨278

Creation of specified number of campsites did not constitute a division into lots contemplated by statute empowering municipalities to make zoning laws respecting approval of a "subdivision." 30 M.R.S.A. § 4956.

See publication Words and Phrases for other judicial constructions and definitions.

3. Statutes ⇨181(1)

That construction should be placed on statute as may best answer intention which legislators had in view, and when determinable and ascertained, courts must give effect to it.

4. Municipal Corporations ⇨43

Statute relating to approval of subdivisions by municipalities and speaking of a "division" into lots contemplates the splitting off of an interest in land and creation, by means of one of various disposition modes recited in statute, of an interest in another.

See publication Words and Phrases for other judicial constructions and definitions.

5. Statutes ⇨188

Words are to be given their plain and natural meaning and are to be construed according to their natural import in common and approved usage.

under the contract. Second, Florida apparently did not then recognize separation agreements as valid, so the Florida divorce court could not have modified what was to it an illegal contract. Third, for the same reason there was no Florida statutory equivalent of § 61.14 to clarify the issues raised in *Carey*. Fourth, it could be argued that the lump sum awarded by the decree was not inconsistent with the contractual provision of periodic payments.

6. Municipal Corporations ⇌ 43

Campground was not composed of requisite "lots" referred to in statute relating to municipality's approval of a subdivision defined as a division into "lots." 30 M.R.S.A. § 4956.

See publication Words and Phrases for other judicial constructions and definitions.

7. Statutes ⇌ 181(2), 184, 208

Absent legislative definition terms must be given meaning consistent with overall statutory context and must be construed in light of subject matter, purpose of statute, occasion and necessity for law, and consequences of particular interpretation.

Smith, Elliott, Wood & Nelson, P.A. by Alan S. Nelson, Saco, for plaintiff.

Reagan, Ayer & Adams by Wayne T. Adams, Kennebunk, for defendants.

Before DUFRESNE, C. J., and POMEROY, WERNICK, ARCHIBALD, DELAHANTY and GODFREY, JJ.

DELAHANTY, Justice.

By its complaint, the Town of Arundel (the Town) sought to enjoin defendants, Morrill and Frances Swain (the Swains), from violation of a local subdivision ordinance. From judgment entered for defendants, the Town appeals. We deny the appeal.

Pursuant to 30 M.R.S.A. § 4956,¹ the Town enacted a subdivision ordinance on March 17, 1972 which required local approval of subdivision developments. Although they believed that their proposed campground was not a subdivision and that, therefore, the Arundel Planning Board (the Board) had no jurisdiction over their endeavor, the Swains nevertheless submitted their plan to the Board on January 25, 1975. Under their preliminary plan, they sought permission to construct a campground, containing 101 campsites, with an operating

season extending from Memorial Day to Labor Day. A camper would pay a fee to the Swains in return for the right to occupy a campsite for "a period of one day, several days or a longer period." Each campsite would have its own electrical, water, and sewer outlets and, in addition, all campers would have access to certain common facilities including toilets, showers and washing machines.

The Swains' plan was approved on May 5, 1975. But then on May 27, 1975 that approval was rescinded, allegedly in order to hold an additional public hearing as required by the Town subdivision ordinance. On June 9, 1975 the Town filed a complaint alleging that the respondents had willfully disregarded the rescission and had proceeded with the construction of roads and buildings for the campground without the requisite approval. Averring that irreparable injury would be suffered if the subdivision ordinance were permitted to be so openly violated, plaintiff asked that the Swains be enjoined from continuing with their endeavor.

On October 28, 1975 the defendants, pursuant to the camping area licensing provisions contained in 22 M.R.S.A. §§ 2491 *et seq.*, were granted a license from the State Department of Health and Welfare to operate a campground of seventy-five sites. The license provided that an additional twenty-six sites could be requested if an adequate water supply were established. On December 2, 1975, the Swains submitted to the Board a revised plan for 101 sites, although they specifically stated therein that they were not recognizing Board jurisdiction over the proposed campground.

Approximately two months later, on February 3, 1976, the Board granted approval for seventy-five campsites, but it limited its approval to only twenty-five campsites in the first year, with construction of an additional twenty-five sites in the second year and twenty-five in the third year being dependent upon certain factors such as the

1. 30 M.R.S.A. § 4956 provides in pertinent part:
2. Municipal review and regulation.

A. Reviewing authority. All requests for subdivision approval shall be reviewed by the municipal planning board . . .

impact of the campground on road conditions and traffic safety.

On May 26, 1976 the Town moved to amend its original complaint, inserting a claim that the respondents had begun development of and intended to operate more than twenty-five campsites in the first year. Plaintiff asked that an order be issued requiring the Swains to comply with the Board conditions of February 3, 1976.

The presiding Justice issued an order denying the Town's motion, finding that the Town had failed to show a "sufficient jurisdictional basis for the granting of such extraordinary relief" and that "there has been no showing of irreparable harm." In response to plaintiff's motion for findings of fact and conclusions of law, the court filed a decree in which it said:

The Court concludes as a matter of law that a campground is not a "subdivision" within the meaning of Title 30 M.R.S.A. Section 4956 as amended and, therefore that Petitioner lacks jurisdiction over the proposed development of a campground by respondents.

A final judgment was entered on May 10, 1977.²

[1] The sole question to be resolved in this case is whether the proposed campground is a "subdivision" within the meaning of 30 M.R.S.A. § 4956. If it is a subdivision, then the local ordinance enacted pursuant to § 4956 is applicable and the Town has jurisdiction over the proposed use.³

[2] A "subdivision" is defined in the statute as ". . . the division of a

2. For clarification purposes, we note that the presiding Justice ordered the Town's motion for a temporary and permanent injunction denied on June 23, 1976. Judgment was entered accordingly. However, no order affirmatively granted relief for defendants until May 10, 1977 when, upon stipulation of counsel at oral argument and by leave of Court, a judgment of July 23, 1976 was finally filed. That judgment not only denied petitioner's motion but also directed that "final judgment upon the Complaint is ordered for the Defendants."

3. The local subdivision ordinance enacted by the Town has not been made a part of the record on appeal. However, since we are in accord with those jurisdictions which have held

tract or parcel of land into three or more lots within any five-year period whether accomplished by sale, lease, development, building or otherwise" We do not believe that the creation of a specified number of campsites is the type of "division" into "lots" which was contemplated by the legislature when it enacted § 4956. Although we intend to intimate no opinion on the issue, we recognize that a campground might fall within the scope of the phrase "development, building or otherwise." However, since we find lacking the prescribed "division" into "lots," we remain convinced that a campground does not qualify as a "subdivision" within the purview of § 4956.

[3] In construing the statute, we must bear in mind the fundamental rule that [s]uch a construction ought be put upon a statute as may best answer the intention which the Legislators had in view, and when determinable and ascertained, the courts must give effect to it. *In re Spring Valley Development, Me.*, 300 A.2d 736, 741 citing *King Resources Co. v. Environmental Improvement Commission, Me.*, 270 A.2d 863, 869 (1970).

See also *Natale v. Kennebunkport Board of Zoning Appeals, Me.*, 363 A.2d 1372 (1976); *Emple Knitting Mills v. City of Bangor*, 155 Me. 270, 153 A.2d 118 (1959). In *Blier v. Inhabitants of Town of Fort Kent, Me.*, 273 A.2d 732 (1971) we said:

Legislative expression must be read in the light of the lawmakers' purpose as

that the definition in the enabling statute controls, we can safely assume that the definition of subdivision is identical in both the ordinance and the enabling statute, 30 M.R.S.A. § 4956. See *The Peninsula Corp. v. Planning & Zoning Comm'n*, 149 Conn. 627, 183 A.2d 271 (1962); *Pratt v. Adams*, 229 Cal.App.2d 602, 40 Cal. Rept. 505 (1964); *Stoker v. Town of Irvington*, 71 N.J.Super. 370, 177 A.2d 61 (1961); see generally 3 A. Rathkopf, *The Law of Zoning and Planning* § 4 (3d ed. 1972). We fully agree with the principle that "[m]unicipalities taking advantage of the powers granted by the statute are bound by the legislative definition." *Stoker, supra*, 71 N.J.Super. at 378, 177 A.2d at 66.

the object the statute designs to accomplish oftentimes furnishes the right key to the true meaning of any statutory clause or provision. *Id.* at 734 citing *Middleton's Case*, 136 Me. 108, 3 A.2d 434 (1939).

Ofttimes cited as a fundamental purpose of subdivision legislation is the protection of the purchaser or lessee of land from unscrupulous developers. See, e. g., 3 A. Rathkopf, *The Law of Zoning and Planning* § 2 (3d ed. 1972). This goal is obviously only relevant when land is purchased or leased from a developer.⁴

Some enlightenment as to the lawmakers' intent can be gleaned from a reading of the enforcement section, 30 M.R.S.A. § 4956, which provides that a fine shall be charged against

[a]ny person, firm, corporation or other legal entity who sells, leases, or conveys for consideration, offers or agrees to sell, lease or convey for consideration any land in a subdivision which has not been approved as required by this section . . . (emphasis added).

Since the sanctions are aimed at those who sell, lease or convey for consideration (or those who offer or agree to do so), it may reasonably be inferred that the legislature intended to protect only purchasers, lessees, or those receiving land for consideration.

[4] Accordingly, it is our judgment that when the statute speaks of a "division," it contemplates the splitting off of an interest in land and the creation, by means of one of the various disposition modes recited in § 4956, of an interest in another. This does

4. Specifically speaking of Maine's subdivision law, one commentator has noted that the state and municipality are interested in accurate surveying, monumenting and legal description of properties to prevent fraud, to facilitate the marketing and conveyancing of and to enable accurate tax assessment and collection[.] considerations relevant only when land is bought and sold. O. Delogu, "Suggested Revisions in Maine's Planning and Land Use Control Legislation Part II," 21 *Maine L.Rev.* 151, 158 (1969).

5. Although, in our estimation, a campground is not divided into "lots" within the meaning of § 4956, this conclusion is not based upon our

not happen when a camper temporarily occupies a campsite.

[5,6] We also believe that a campground is not composed of the requisite "lots" prescribed in the statute. Words are to be given their "plain and natural meaning" and are to be construed according to their "natural import in common and approved usage." *Moyer v. Board of Zoning Appeals*, Me., 233 A.2d 311, 317 (1967) citing 1 E. Yokley, *Zoning Law & Practice* § 184 (2d ed. 1953). A "lot" has been defined as "a measured parcel of land having fixed boundaries." Webster's Third New International Dictionary 1338 (1971). Nowhere in the stipulated facts before us is it stated that the campsites have clearly delineated or fixed boundaries, and we cannot assume that they are so precisely measured off.⁵ *Pelletier v. Dwyer*, Me., 334 A.2d 867 (1975); *Trafton v. Hill*, 80 Me. 503, 15 A. 64 (1888).

Here, a single tract of land is involved, whether before or after its use as a campground. The situation is akin to the renting or occupying of space in an exhibition hall, a parking lot, or a drive-in theater. Of course, in all of these situations, land is somewhat parceled off, each customer being given a certain space to occupy for a certain period of time. But in our opinion this is not the type of "division" into "lots" which the legislature intended to regulate when it enacted § 4956.

[7] In our analysis we attempt to implement the sound principle of construction that

holding in *Robinson v. Board of Appeals*, Me., 356 A.2d 196 (1976), a case strongly relied upon by defendants. According to the Swains, *Robinson* held that "the application of lot size requirements to campgrounds is absurd." It is important to point out that our decision not to apply lot size requirements there was bottomed on an initial finding that a campground was not a "dwelling" to which the local zoning law would be applicable. Our holding today that a campground is not divided into "lots" is based solely on what we consider to be the common and natural meaning of the word. Defendants' reliance on *Robinson* is misplaced.

[a]bsent a legislative definition, the terms ["divide" and "lot"] must be given a meaning consistent with the overall statutory context, and be construed in the light of the subject matter, the purpose of the statute, the occasion and necessity for the law, and the consequences of a particular interpretation. *Finks v. Maine State Highway*, Me., 328 A.2d 791, 798 (1974) citing *Grudnosky v. Bislow*, 251 Minn. 496, 88 N.W.2d 847 (1958).

Having found the inherent policies of the subdivision law heavily directed toward protection of one taking an interest in land (as well as promotion of planned regulation of community growth), we conclude that a campground is not a subdivision within the scope of § 4956 and that therefore the Arundel Planning Board has no jurisdiction over the Swains' proposed endeavor.

The entry must be

Appeal denied.

All Justices concur.

Maine Superior Court Cases

RULES OF CIVIL PROCEDURE

RULE 80B. REVIEW OF GOVERNMENTAL ACTION

(a) **Mode of Review.** When review by the Superior Court, whether by appeal or otherwise, of any action or failure or refusal to act by a governmental agency, including any department, board, commission, or officer, is provided by statute or is otherwise available by law, proceedings for such review shall, except as otherwise provided by statute, be governed by these Rules of Civil Procedure as modified by this rule. The complaint and summons shall be served upon the agency and all parties in accordance with the provisions of Rule 4. The complaint shall include a concise statement of the grounds upon which the plaintiff contends he is entitled to relief, and shall demand the relief to which he believes himself entitled. No responsive pleading need be filed unless required by statute or by order of the court, but in any event any party named as a defendant shall file a written appearance within the time for serving an answer under Rule 12(a). Amended eff. April 15, 1975.

(b) **Time Limits; Stay.** The time within which review may be sought shall be as provided by statute, except that if no time limit is specified by statute, the complaint shall be filed within 30 days after notice of any action or refusal to act of which review is sought unless the court enlarges the time in accordance with Rule 6(b), and, in the event of a failure to act, within six months after expiration of the time in which action should reasonably have occurred. Except as otherwise provided by statute, the filing of the complaint does not stay any action of which review is sought, but the court may order a stay upon such terms as it deems proper.

(c) **Trial or Hearing; Judgment.** Any trial of the facts where provided by statute or otherwise shall be without jury unless the Constitution of the State of Maine or a statute gives the right to trial by jury. The judgment of the court may affirm, reverse, or modify the decision under review or may remand the case to the governmental agency for further proceedings. Amended eff. April 15, 1975.

(d) **Review by the Law Court.** Unless by statute or otherwise the decision of the Superior Court is final, review by the Law Court shall be by appeal or report in accordance with these Rules of Civil Procedure, and no other method of appellate review shall be permitted.

Entire rule amended eff. Dec. 31, 1967.

Maine State Planning Office
189 State Street
Augusta, Maine 04330

April 11, 1974

TO: Regional Planning Commissions, Extension Agents
FROM: Rich Rothe 
RE: Phippsburg Decision

The enclosed Superior Court decision, which has relevance for planning boards throughout the State, was sent to us by Brian Chernack for distribution to the other RPC's. According to Hank Sturm, SMCRPC, this decision resolves one of two suits brought against the Phippsburg Planning Board by Freeman Linscott. This one sought damages from the Town and from two of the Board members for "unduly influencing the other members." The other suit, which is still pending, seeks to overturn the decision of the Planning Board denying the plaintiff subdivision approval. Our interpretation of the highlights of the decision, which deals favorably with the issue of planning board liability, are as follows:

1. "The (Planning) Board members individually are not liable to individual suits even if they exercise their functions ... in bad faith ... To permit such suits would bring the matters of government in this state to an absolute halt. If people can only accept government office involving judgemental functions in some aspects at the peril of their goods and estates, and the liability to be (fined) in damages for every real or fancied error in judgement, the government would be brought to its knees. Under these circumstances, public policy dictates that Civil remedies of suit are not available" (extracts, page 8).

The remedy for dealing with a Board member who acts in bad faith is to remove him from his office. The justification for such a broad immunity is that it would be impossible to determine "bad faith" without submitting all accused officials to the burden of a trial and the danger of its outcome. Such prospects would discourage most people from serving (see discussion of Richard V. Ellis, page 9).

2. In discharging its responsibilities under the Subdivision Act, a planning board is acting in a judicial, or quasi-judicial capacity, not merely an administrative or ministerial capacity. Such a capacity requires that human judgement, reason, and subjective evaluation be employed in evaluating the environmental and other impacts of a proposal, and in prescribing specific means to accomplish the necessary ends. Environmental matters are simply too complex to be reduced in simple, rigid, guidelines and criteria which can be followed by the subdivider or developer without some interpretation by the reviewing authority. (Interpretation of discussion on pages 5 - 7).

3. The burden of proof lies on the one who would economically benefit from the proposal (i.e., the subdivider or developer). (Taken from page 6, and Title 30, § 4956, § 2.)
4. Planning Boards have a consumer protection responsibility under the Subdivision Act which compels the Board to consider the effects of the proposal on the potential purchasers of that property (see page 7, and State Planning Office memo "Subdivision Review Procedures - Water Supply," 4-2-74, for more on this).
5. "These functions (subdivision review) are not discretionary. They are mandatory upon the town and as such are a delegated governmental function and (sic) in the performance of which obviously the town cannot be liable." (page 9 - 10).

While this language applies to the administration of the Subdivision Act, a parallel could be drawn to the Mandatory Shoreland Zoning and Subdivision Control Act, which is also mandatory. We are still awaiting a reply from the Attorney General's Office regarding Planning Board liability. However, this decision should be of immediate interest and some comfort to planning boards concerned with this particular issue.

6. This case is dismissed with prejudice, which means that the Plaintiff cannot bring suit again, even if additional facts come to light.

STATE OF MAINE
YORK, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. 535/73

FREEMAN C. LINSKOTT, ET ALS.
PLAINTIFFS

vs.

TOWN OF PHIPPSBURGH, ET ALS.
DEFENDANTS

FINDINGS OF FACT, RULINGS
OF LAW AND DECREE OF COURT
ON DEFENDANTS' MOTIONS TO
DISMISS FOR FAILURE TO STATE
A CLAIM ON WHICH RELIEF MAY
BE GRANTED

This is an oppressive in terrorem action of tort by a would-be developer against the Town of Phippsburg and the members of its Planning Board individually for the recovery of damages as for negligence in their failure to approve a plan of land development proposed by the plaintiff, and in which he seeks to recover as compensatory damages the five hundred-odd per cent profit of \$586,000 expected to be recovered from his development, together with punitive damages of \$20,000 against two of the members of said Planning Board for mala fide in arriving at their judgment in refusing approval of his scheme for the development of said land.

The gravamen of the action is an alleged captious failure to comply with the provisions of Section 4956 of Title 30, M.R.S.A., and particularly Subsection 3 of said section and more definitively

the failure on the part of the Planning Board to specifically adjudicate on each of the Subsections A, B, C, D, E, F, G, I, J, K, and L of said Subsection 3. This particular statute provides, in essence, that before a tract of land may be subdivided into three or more lots, the plan of the developer or subdivider shall be first approved by "the municipal planning board, agency, or office, or if none, by the municipal officers" . . . therein called a municipal reviewing authority.

Said reviewing authority, subject to satisfying the burden of proof by the developer, shall determine that the development will not result in undue water or air pollution; that there is sufficient water available for reasonable foreseeable needs of the subdivision; that ^{it} will not cause an unreasonable burden on an existing public water supply if one is to be utilized; that it will not cause unreasonable soil erosion or reduce the capacity of the land to hold water so that a dangerous or unhealthy condition may result; that it will not cause unreasonable highway or public road congestion or unsafe conditions with respect to the use of highways or public roads existing or proposed; will provide for adequate sewerage waste disposal; will not cause an unreasonable burden on the ability of the municipality to dispose of solid waste and sewerage if municipal services must be utilized; will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable

natural areas; is in conformance with duly adopted subdivision regulations or ordinances, comprehensive plans, development plans or land use plan, if any; the subdivider has adequate financial and technical capacity to meet the above stated standards and, if situated in whole or in part within 250 feet of any pond, lake, river, or tidal waters will not adversely affect the quality of such body of water or unreasonably affect the shoreline of such body of water.

This particular piece of legislation shows the same philosophic approach as is found in M.R.S.A. Title 38, Subsections 482, 483, and 484 in which the Environmental Improvement Commission is required to concern itself with developments of twenty acres or more in extent. These sections were the subject of recent litigation in the Courts of this state and were found constitutionally viable in the matter of In Re Spring Valley Development By Lakesites, Inc., 300 A. 2d. 736. This law again withstood constitutional attack in the matter of In Re Maine Clean Fuels, Inc., 310 A. 2d. 736.

The defendants are at that grinding interface where the collisions of will and interest between aggressive land developers and those who would protect the quality of life in the state of Maine are at their bitterest. The problem is complex. The plaintiff claims that the legislation in question is also an unconstitutional deprivation of property and there is a failure of due process by the people charged with its enforcement who have not complied with the mandatory requirements of the statute in their findings. As these failures are willful, they subject the Board members to

punitive damages. The plaintiff's theory is that in these determinations the Planning Board is acting in^{an} administrative or ministerial capacity as distinguished from a judicial or quasi-judicial capacity.

In analyzing the contentions of the litigants, it is necessary that we turn to the purposes of the legislation in issue. What is intended to be accomplished; indeed what must be accomplished? Our Court has said in Portland Pipe Line Corp. v. Environmental Improvement Commission, et als., 307 A. 2d. 1.

"In the period from about 1960 to 1973 peoples throughout the world have wakened to the awful truth that if man continues random destruction of his natural environment, his natural environment will ultimately destroy him.

This destruction of the environment is not confined to the land alone, or the sea alone or the air alone.

Inspired by this sudden consciousness of the perils of pollution, legislative bodies everywhere have passed legislation designed to diminish pollution of our environment. Our Maine Legislature has been in the forefront of those seeking to control, and where necessary abate, threats of environment destruction."

It is clearly within the realm of common knowledge that Maine does not want to get into the same situation as the unfortunate inhabitants of Long Island, New York, who find themselves pumping from their water wells the non-biodegradable constituents of the effluent of their own septic tanks and those of their neighbors, and more unfortunately, will continue to do so for an indefinite period in

the future. This extreme example of the consequences of a degraded subterranean environment is not so farfetched when one considers the geology of this state. Shaped in surface configuration and the composition mixture and texture of its soils by the grinding blades of prehistoric glaciation, the chemistry, physical characteristics, and depth of the soil covering the basal ledge in the state of Maine not only varies from mile to mile but often from rod to rod or even in some instances from yard to yard.

Those who would develop land in the state of Maine are confronted continually with this rapid transition in even short distances from one type of soil to another, from one soil percolation rate to another, and with wide variations in depth of soil cover over the basic rock. Given this physical fact, the formulation of definitive guide lines to accomplish the absolute expedient protection of a particular environment encounters so many independent variables as to virtually defy simplistic solutions. The means in each case must be adapted to the ends to be accomplished, and the formulation of rigid guidelines or rigid criteria for installations to cope or deal with these variable factors either requires too much or not enough, and the intervention of human judgment and reason must be employed to accomplish the legislative mandate within the limits of economic feasibility. In some instances the ends required by the legislature to be accomplished simply cannot be met, and the land is simply unsuitable for residential

development and sometimes even for industrial development. The tolerance of our ecology for change is a factor which requires individual evaluation in each case, and the legislature has seen fit to place the burden of persuasion that these ends can and will be accomplished upon the would-be developer. The means required to accomplish these ends and persuade the licensing authorities is cast upon the one who would be economically benefited by the development proposed. In fine, it is public policy that the cost of development shall include those measures necessary to the protection of the environment of this state and this has already been determined by our Courts to be within the proper limits of the police power.

The question then becomes "is the function of a Planning Board operating under this section purely ministerial or does it involve discretions and a weighing and balancing of interests and thus more a judicial than a mere ministerial function?" In many situations of zoning and planning encountered by the Courts of this state, definitive areas of land use have been assigned, and zoning boards have been charged with seeing that the uses defined have been confined to the areas chosen and this, of course, being specific uses, permits more or less mechanical application of regulation to the proposed use. In this there is little occasion for the exercise of either judgment or discretion for the weighing of facts and so forth. On the other hand the objectives of this statute are so broad as to require subjective evaluation of the

means chosen to accomplish the required ends and to in fact choose perhaps between alternative means of accomplishing those requirements to see that they will be satisfactorily met not only in the first instance but for the long haul. The intent of the legislature is obviously to protect our state from permitting the development of housing accommodations which have degenerated in some of our cities to the revolting expedient of mere survival shelter, and which are chosen only by those whose socio-economic condition gives them no choice at all. The legislature of this state has decided, and wisely, that the developer is not permitted to sell his dreams and leave his purchasers as "participants in--as well as victims of--a local environmental disaster." Spring Valley, supra. Under these circumstances the Planning Board must evaluate and strike down unreasonable incursions. Since no encroachment upon the environment can be accomplished without degradation to some degree, they must determine whether the unavoidable part of that degradation is unreasonable and whether other means will better avoid it. Man's development of his land areas and his uses of energy have come to the point now where a balancing of competing interests is a sine qua non of survival. What man must pay for what he gets has become a judgmental choice. To hold that the Board charged with the discharge of such responsibility is merely administrative or ministerial is to belittle the problem, and the resolution of questions such as those delegated to it by this section of the statute is judicial or quasi-judicial.

The Board members individually are not liable to individual suits even if they exercise their functions captiously or in bad faith under the decided cases, and the remedy is either through criminal action or impeachment or removal. To permit such suits would bring the matters of government in this state to an absolute halt. If people can only accept government office involving judgmental functions in some aspects at the peril of their goods and estates, and the liability to be mulcted in damages for every real or fancied error in judgment, the government would be brought to its knees. Under these circumstances, public policy dictates that civil remedies of suit are not available.

The Court noted in Richards v. Ellis, 233 A. 2d. 37:

"Every informed citizen is constantly aware of the expanding use of boards and commissions with judicial or near judicial powers in the administration of government at all levels.

The licensing board and the school committee as we know have long histories. The Zoning Board is relatively a newcomer. Commissions such as the Industrial Accident, Public Utilities, Employment and Water Improvement come readily to mind. These examples could be multiplied."

And in the same case at page 38:

"The law has long recognized that the public good is best served by freeing the judge from the possibility of threat of civil liability for an er-

roneous decision however evil the motives of the judge may have been. The judge who violates the trust placed in him by the State is answerable at the criminal dock and is subject to impeachment or other removal process."

And in Rodway v. Wiswall, 267 A. 2d., 375:

"Richards was clearly a decision based upon public policy and which admittedly overruled prior case law which had applied the "good faith" test. It was deemed to be in the public interest to permit public officials and members of boards and commissions "with judicial or near judicial powers" to operate in an atmosphere immunized from the restraint and possible intimidation which might flow from the threat of vexatious personal suits. We see no occasion to depart from this position and therefore decline to overrule Richards.

The justification for extending so broad an immunity is:

"That it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty to the burden of a trial and to the inevitable danger of its outcome, would damper the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." Judge Learned Hand in Gregoire v. Biddle (CA 2) 177 F. 2d. 579, 581, quoted with approval in Richards v. Ellis, supra, at 39.

The duties under this particular section are mandated not only of this Planning Board but are mandated of all towns and, failing possession of a Planning Board, the municipal officers or selectmen themselves must undertake these judgmental functions. These functions

are not discretionary. They are mandatory upon the town and as such are a delegated governmental function and in the performance of which obviously the town cannot be liable.

In fine, the plaintiff fails to state a claim upon which relief can be granted both as to the individual defendants, the members of the Planning Board, and as to the Town of Phippsburg itself.

Case dismissed with prejudice.


Justice, Superior Court

April 2, 1974

A TRUE COPY
PAULINE C. DERRY
CLERK-SUPERIOR COURT

BY _____
DEPUTY CLERK

The Subdivision Law and copies of recent
amendments to it in reverse chronological
order

Subdivision Law

Title 30

§ 4956. Land subdivisions

1. **Defined.** A subdivision is the division of a tract or parcel of land into 3 or more lots within any 5-year period, which period begins after September 22, 1971, whether accomplished by sale, lease, development, buildings or otherwise, provided that a division accomplished by devise, condemnation, order of court, gift to a person related to the donor by blood, marriage or adoption, unless the intent of such gift is to avoid the objectives of this section, or by transfer of any interest in land to the owner of land abutting thereon, shall not be considered to create a lot or lots for the purposes of this section.

In determining whether a tract or parcel of land is divided into 3 or more lots, the first dividing of such tract or parcel, unless otherwise exempted herein, shall be considered to create the first 2 lots and the next dividing of either of said first 2 lots, by whomever accomplished, unless otherwise exempted herein, shall be considered to create a 3rd lot, unless both such dividings are accomplished by a subdivider who shall have retained one of such lots for his own use as a single family residence for a period of at least 5 years prior to such 2nd dividing. Lots of 40 or more acres shall not be counted as lots.

For the purposes of this section, a tract or parcel of land is defined as all contiguous land in the same ownership, provided that lands located on opposite sides of a public or private road shall be considered each a separate tract or parcel of land unless such road was established by the owner of land on both sides thereof.

2. Municipal review and regulation

A. **Reviewing authority.** All requests for subdivision approval shall be reviewed by the municipal planning board, agency or office, or if none, by the municipal officers, hereinafter called the municipal reviewing authority.

B. **Regulations.** The municipal reviewing authority may, after a public hearing, adopt additional reasonable regulations governing subdivisions which shall control until amended, repealed or replaced by regulations adopted by the municipal legislative body. The municipal reviewing authority shall give at least 7 days' notice of such hearing.

C. **Record.** On all matters concerning subdivision review, the municipal reviewing authority shall maintain a permanent record of all its meetings, proceedings and correspondence.

C-1. Upon receiving an application, the municipal reviewing authority shall issue to the applicant a dated receipt. Within 30 days from receipt of an application, the municipal reviewing authority shall notify the applicant in writing either that the application is a complete application or, if the application is incomplete, the specific additional material needed to make a complete application. After the municipal reviewing authority has determined that a complete application has been filed, it shall notify the applicant and begin its full evaluation of the proposed subdivision.

D. Hearing; order. In the event that the municipal reviewing authority determines to hold a public hearing on an application for subdivision approval, it shall hold such hearing within 30 days of receipt by it of a completed application, and shall cause notice of the date, time and place of such hearing to be given to the person making the application and to be published in a newspaper of general circulation in the municipality in which the subdivision is proposed to be located, at least 2 times, the date of the first publication to be at least 7 days prior to the hearing.

The municipal reviewing authority shall, within 30 days of a public hearing or within 60 days of receiving a completed application, if no hearing is held, or within such other time limit as may be otherwise mutually agreed to, issue an order denying or granting approval of the proposed subdivision or granting approval upon such terms and conditions as it may deem advisable to satisfy the criteria listed in subsection 3 and to satisfy any other regulations adopted by the reviewing authority, and to protect and preserve the public's health, safety and general welfare. In all instances, the burden of proof shall be upon the persons proposing the subdivision. In issuing its decision, the reviewing authority shall make findings of fact establishing that the proposed subdivision does or does not meet the foregoing criteria.

3. Guidelines. When promulgating any subdivision regulations and when reviewing any subdivision for approval, the planning board, agency or office, or the municipal officers, shall consider the following criteria and before granting approval shall determine that the proposed subdivision:

A. Will not result in undue water or air pollution. In making this determination it shall at least consider: The elevation of land above sea level and its relation to the floodplains, the nature of soils and subsoils and their ability to adequately support waste disposal; the slope of the land and its effect on effluents; the availability of streams for disposal of effluents; and the applicable state and local health and water resources regulations;

B. Has sufficient water available for the reasonably foreseeable needs of the subdivision;

C. Will not cause an unreasonable burden on an existing water supply, if one is to be utilized;

D. Will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result;

E. Will not cause unreasonable highway or public road congestion or unsafe conditions with respect to use of the highways or public roads existing or proposed;

F. Will provide for adequate sewage waste disposal;

G. Will not cause an unreasonable burden on the ability of a municipality to dispose of solid waste and sewage if municipal services are to be utilized;

I. Will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas;

J. Is in conformance with a duly adopted subdivision regulation or ordinance, comprehensive plan, development plan, or land use plan, if any; and

K. The subdivider has adequate financial and technical capacity to meet the above stated standards.

L. Whenever situated in whole or in part, within 250 feet of any pond, lake, river or tidal waters, will not adversely affect the quality of such body of water or unreasonably affect the shoreline of such body of water.

4. Enforcement. No person, firm, corporation or other legal entity may sell, lease, develop, build upon or convey for consideration, offer or agree to sell, lease, develop, build upon or convey for consideration any land in a subdivision which has not been approved by the municipal reviewing authority of the municipality where the subdivision is located and recorded in the proper registry of deeds, nor shall such person, firm, corporation or other legal entity sell or convey any land in such approved subdivision unless at least one permanent marker is set at one lot corner of the lot sold or conveyed. The term "permanent marker" includes but is not limited to the following: A granite monument, a concrete monument, an iron pin or a drill hole in ledge. No subdivision plat or plan shall be recorded by any register of deeds which has not been approved as required. Approval for the purpose of recording shall appear in writing on the plat or plan. No public utility, water district, sanitary district or any utility company of any kind shall install services to any lot in a subdivision for which a plan has not been approved.

Any person, firm, corporation or other legal entity who sells, leases, develops, builds upon, or conveys for consideration, offers or agrees to sell, lease, develop, build upon or convey for consideration any land in a subdivision which has not been approved as required by this section shall be punished by a fine of not more than \$1,000 for each such occurrence. The Attorney General, the municipality, the planning board of any municipality or the appropriate municipal officers may institute proceedings to enjoin the violations of this section and if a violation is found by the court, the municipality, municipal planning board or the appropriate municipal officers may be allowed attorney fees.

5. Exemptions. This section shall not apply to proposed subdivisions approved by the planning board or the municipal officials prior to September 23, 1971 in accordance with laws then in effect nor shall it apply to subdivisions as defined by this section in actual existence on September 23, 1971 that did not require approval under prior law or to a subdivision as defined by this section, a plan of which had been legally recorded in the proper registry of deeds prior to September 23, 1971. The division of a tract or parcel as defined by this section into 3 or more lots and upon all of which lots permanent dwellings structures legally existed prior to September 23, 1971 is not a subdivision.

The dividing of a tract or parcel of land and the lot or lots so made, which dividing or lots when made are not subject to this section, shall not become subject to this section by the subsequent dividing of said tract or parcel of land or any portion thereof, however, the municipal reviewing authority shall consider the existence of such previously created lot or lots in reviewing a proposed subdivision created by such subsequent dividing.

Chapter 454

AN ACT Relating to Municipal Regulation of Land Subdivisions.

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

R. S., T. 30, § 4956, repealed and replaced. Section 4956 of Title 30 of the Revised Statutes, as amended, is repealed and the following enacted in place thereof:

§ 4956. Land subdivisions

1. **Defined.** A subdivision shall be the division of a tract or parcel of land into 3 or more lots for the purpose of sale, development or building.

2. **Local regulation.** When a municipality has established a planning board, agency or office, such board, agency or office may adopt regulations governing subdivisions which shall control until superseded by provisions adopted by the legislative body of the municipality. Where a municipality has not established a planning board, agency or office, the municipal officers may adopt subdivision regulations which shall control until superseded by provisions adopted by the legislative body of the municipality.

3. **Guidelines.** When promulgating any subdivision regulations and when reviewing any subdivision for approval, the planning board, agency or office, or the municipal officers, shall consider the following criteria and before granting approval shall determine that the proposed subdivision:

A. Will not result in undue water or air pollution. In making this determination it shall at least consider: The elevation of land above sea level and its relation to the flood plains, the nature of soils and subsoils and their ability to adequately support waste disposal; the slope of the land and its effect on effluents; the availability of streams for disposal of effluents; and the applicable state and local health and water resources regulations;

B. Has sufficient water available for the reasonably foreseeable needs of the subdivision;

C. Will not cause an unreasonable burden on an existing water supply, if one is to be utilized;

D. Will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result;

E. Will not cause unreasonable highway or public road congestion or unsafe conditions with respect to use of the highways or public roads existing or proposed;

F. Will provide for adequate solid and sewage waste disposal;

G. Will not cause an unreasonable burden on the ability of a municipality to dispose of solid waste and sewage if municipal services are to be utilized;

H. Will not place an unreasonable burden on the ability of the local governments to provide municipal or governmental services;

I. Will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas;

J. Is in conformance with a duly adopted subdivision regulation or ordinance, comprehensive plan, development plan, or land use plan, if any; and

K. The subdivider has adequate financial and technical capacity to meet the above stated standards.

L. Whenever situated, in whole or in part, within 250 feet of any pond, lake, river or tidal waters, will not adversely affect the quality of such body of water or unreasonably affect the shoreline of such body of water.

The planning board agency or office, or if none, the municipal officers, shall issue an order denying or granting approval of the proposed subdivision or granting approval upon such terms and conditions as it may deem advisable to satisfy the criteria listed in this subsection, and to protect and preserve the public's health, safety and general welfare. In all instances the burden of proof shall be upon the person proposing the subdivisions.

4. Enforcement. No person, firm, corporation or other legal entity may convey, offer or agree to convey any land in a subdivision which has not been approved by the planning board, agency or office, or if none exists, by the municipal officers in the municipality where the subdivision is located, and recorded in the proper registry of deeds. No subdivision plat or plan shall be recorded by any register of deeds which has not been approved as required. Approval for the purpose of recording shall appear in writing on the plat or plan. No public utility, water district, sanitary district or any utility company of any kind shall serve any lot in a subdivision for which a plan has not been approved.

Any person, firm, corporation or other legal entity who conveys, offers or agrees to convey any land in a subdivision which has not been approved as required by this section shall be punished by a fine of not more than \$1,000 for each such conveyance, offering or agreement. The Attorney General, the municipality or the appropriate municipal officers may institute proceedings to enjoin the violation of this section.

CHAPTER 465

AN ACT to Amend Municipal Regulation of Land Subdivision Law.

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

Sec. 1. R. S., T. 30, § 4956, sub-§§ 1 and 2, repealed and replaced. Subsections 1 and 2 of section 4956 of Title 30 of the Revised Statutes, as repealed and replaced by chapter 454 of the public laws of 1971, are repealed and the following enacted in place thereof:

1. **Defined.** A subdivision is the division of a tract or parcel of land into 3 or more lots within any 5-year period, whether accomplished by sale, lease, development, building or otherwise, except when the division is accomplished by inheritance, order of court or gift to a relative, unless the intent of such gift is to avoid the objectives of this section.

In determining whether a parcel of land is divided into 3 or more lots, land retained by the subdivider for his own use as a single family residence for a period of at least 5 years shall not be included.

No sale or lease of any lot or parcel shall be considered as being a part of a subdivision if such a lot or parcel is 40 acres or more in size, except where the intent of such sale or lease is to avoid the objectives of this statute.

2. **Municipal review and regulation.**

A. **Reviewing authority.** All requests for subdivision approval shall be reviewed by the municipal planning board, agency or office, or if none, by the municipal officers, hereinafter called the municipal reviewing authority.

B. **Regulations.** The municipal reviewing authority may, after a public hearing, adopt additional reasonable regulations governing subdivisions which shall control until amended, repealed or replaced by regulations adopted by the municipal legislative body. The municipal reviewing authority shall give at least 7 days' notice of such hearing.

C. **Record.** On all matters concerning subdivision review, the municipal reviewing authority shall maintain a permanent record of all its meetings, proceedings and correspondence.

D. **Hearing; order.** In the event that the municipal reviewing authority determines to hold a public hearing on an application for subdivision approval, it shall hold such hearing within 30 days of receipt by it of a completed application, and shall cause notice of the date, time and place of such hearing to be given to the person making the application and to be published in a newspaper of general circulation in the municipality in which the subdivision is proposed to be located, at least 2 times, the date of the first publication to be at least 7 days prior to the hearing.

The municipal reviewing authority shall, within 30 days of a public hearing or within 60 days of receiving a completed application, if no hearing is held, or within such other time limit as may be otherwise mutually agreed to, issue an order denying or granting approval of the proposed subdivision or granting approval upon such terms and conditions as it may deem advisable to satisfy the criteria listed in subsection 3 and to satisfy any other regulations adopted by the reviewing authority, and to protect and preserve the public's health, safety and general welfare. In all instances the burden of proof shall be upon the persons proposing the subdivisions. In issuing its decision, the reviewing authority shall make findings of fact establishing that the proposed subdivi-

sion does or does not meet the foregoing criteria.

Sec. 2. R. S., T. 30, § 4956, sub-§ 3, ¶ F, amended. Paragraph F of subsection 3 of section 4956 of Title 30 of the Revised Statutes, as repealed and replaced by chapter 454 of the public laws of 1971, is amended to read as follows:

F. Will provide for adequate ~~solid and~~ sewage waste disposal;

Sec. 3. R. S., T. 30, § 4956, sub-§ 3, ¶ H, repealed. Paragraph H of subsection 3 of section 4956 of Title 30 of the Revised Statutes, as repealed and replaced by chapter 454 of the public laws of 1971, is repealed.

Sec. 4. R. S., T. 30, § 4956, sub-§ 3, amended. The last paragraph of subsection 3 of section 4956 of Title 30 of the Revised Statutes, as repealed and replaced by chapter 454 of the public laws of 1971, is repealed.

Sec. 5. R. S., T. 30, § 4956, sub-§ 4, amended. Subsection 4 of section 4956 of Title 30 of the Revised Statutes, as repealed and replaced by chapter 454 of the public laws of 1971, is amended to read as follows:

4. **Enforcement.** No person, firm, corporation or other legal entity may sell, lease, or convey for consideration, offer or agree to sell, lease or convey for consideration any land in a subdivision which has not been approved by the ~~planning board, agency or office, or if none exists, by the municipal officers in~~ municipal reviewing authority of the municipality where the subdivision is located, and recorded in the proper registry of deeds. No subdivision plat or plan shall be recorded by any register of deeds which has not been approved as required. Approval for the purpose of recording shall appear in writing on the plat or plan. No public utility, water district, sanitary district or any utility company of any kind shall ~~serve~~ install services to any lot in a subdivision for which a plan has not been approved.

Sec. 6. R. S., T. 30, § 4956, amended. The last paragraph of section 4956 of Title 30 of the Revised Statutes, as repealed and replaced by chapter 454 of the public laws of 1971, is amended to read as follows:

Any person, firm, corporation or other legal entity who sells, leases, or conveys for consideration, offers or agrees to sell, lease or convey for consideration any land in a subdivision which has not been approved as required by this section shall be punished by a fine of not more than \$1,000 for each such sale, lease or conveyance for consideration, offering or agreement. The Attorney General, the municipality or the appropriate municipal officers may institute proceedings to enjoin the violation of this section.

Sec. 7. R. S., T. 30, § 4956, sub-§ 5, additional. Section 4956 of Title 30 of the Revised Statutes, as repealed and replaced by chapter 454 of the public laws of 1971, is amended by adding a new subsection 5, to read as follows:

5. **Exemptions.** This section shall not apply to proposed subdivisions approved by the planning board or the municipal officials prior to September 23, 1971 in accordance with laws then in effect nor shall they apply to subdivisions as defined by this section in actual existence on September 23, 1971 that did not require approval under prior law. The division of a tract or parcel by sale, gift, inheritance, lease or order of court into 3 or more lots and upon which lots permanent dwelling structures legally existed prior to September 23, 1971 is not a subdivision.

CHAPTER 700

AN ACT to Clarify the Real Estate Subdivision Law.

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

Sec. 1. R. S., T. 30, § 4956, sub-§ 1, amended. The first paragraph of subsection 1 of section 4956 of Title 30 of the Revised Statutes, as last repealed and replaced by section 1 of chapter 465 of the public laws of 1973, is amended by adding at the end a new sentence to read as follows:

For the purposes of this section, a lot shall not include a transfer of an interest in land to an abutting landowner, however accomplished.

Sec. 2. R. S., T. 30, § 4956, sub-§ 5, amended. Subsection 5 of section 4956 of Title 30 of the Revised Statutes, as enacted by section 7 of chapter 465 of the public laws of 1973, is amended by adding at the end a new paragraph to read as follows:

The owner of a lot which, at the time of its creation, was not part of a subdivision, shall not be required to secure the approval of the municipal reviewing authority for such lot in the event that the subsequent actions of a prior owner, or his successor in interest, of the lot creates a subdivision of which the lot is a part, however, the municipal reviewing authority shall consider the existence of such a previously created lot in passing upon the application of any prior owner, or his successor in interest, of the lot for approval of a proposed subdivision.

Effective June 28, 1974

CHAPTER 468

AN ACT to Amend the Subdivision Law to Provide for More Housing
in the State.

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

Sec. 1. 12 MRSA § 4813, first ¶, as last repealed and replaced by PL 1973, c. 564, § 5, is amended by adding a new sentence at the end to read:

The Department of Environmental Protection and the Maine Land Use Regulation Commission shall with respect to these shoreland areas adopt said suitable ordinance by January 1, 1976.

Sec. 2. 30 MRSA § 4956, sub-§ 2, ¶ C-1 is enacted to read:

C-1. Upon receiving an application, the municipal reviewing authority shall issue to the applicant a dated receipt. Within 30 days from receipt of an application, the municipal reviewing authority shall notify the applicant in writing either that the application is a complete application or, if the application is incomplete, the specific additional material needed to make a complete application. After the municipal reviewing authority has determined that a complete application has been filed, it shall notify the applicant and begin its full evaluation of the proposed subdivision.

Effective October 1, 1975

CHAPTER 475

AN ACT to Clarify the Municipal Regulation of Land Subdivision Law.

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

Sec. 1. 30 MRSA § 4956, sub-§ 1, as last amended by PL 1973, c. 700, § 1, is repealed and the following enacted in place thereof:

1. Defined. A subdivision is the division of a tract or parcel of land into 3 or more lots within any 5-year period, which period begins after September 22, 1971, whether accomplished by sale, lease, development, buildings or otherwise, provided that a division accomplished by devise, condemnation, order of court, gift to a person related to the donor by blood, marriage or adoption, unless the intent of such gift is to avoid the objectives of this section, or by transfer of any interest in land to the owner of land abutting thereon, shall not be considered to create a lot or lots for the purposes of this section.

In determining whether a tract or parcel of land is divided into 3 or more lots, the first dividing of such tract or parcel, unless otherwise exempted herein, shall be considered to create the first 2 lots and the next dividing of either of said first 2 lots, by whomever accomplished, unless otherwise exempted herein, shall be considered to create a 3rd lot, unless both such dividings are accomplished by a subdivider who shall have retained one of such lots for his own use as a single family residence for a period of at least 5 years prior to such 2nd dividing. Lots of 40 or more acres shall not be counted as lots.

For the purposes of this section, a tract or parcel of land is defined as all contiguous land in the same ownership, provided that lands located on opposite sides of a public or private road shall be considered each a separate tract or parcel of land unless such road was established by the owner of land on both sides thereof.

Sec. 2. 30 MRSA § 4956, sub-§ 4, first sentence, as last amended by PL 1973, c. 465, § 5, is further amended to read:

No person, firm, corporation or other legal entity may sell, lease or convey for consideration, offer or agree to sell, lease or convey for consideration any land in a subdivision ~~which~~ unless the subdivision has ~~not~~ been approved by the municipal reviewing authority of the municipality where the subdivision is located, and unless a survey plan thereof showing permanent markers set at all lot corners has been recorded in the proper registry of deeds. The term "permanent marker" includes but is not limited to the following: A granite monument, a concrete monument, an iron pin or a drill hole in ledge.

Sec. 3. 30 MRSA § 4956, sub-§ 5, first paragraph, as enacted by PL 1973, c. 465, § 7, is amended to read:

This section shall not apply to proposed subdivisions approved by the planning board or the municipal officials prior to September 23, 1971 in accordance with laws then in effect nor shall they it apply to subdivisions as defined by this section in actual existence on September 23, 1971 that did not require approval under prior law or to a subdivision as defined by this section, a plan

PUBLIC LAWS, 1975

of which had been legally recorded in the proper registry of deeds prior to September 23, 1971. ~~The division of a tract or parcel by sale, gift, inheritance, lease or order of court into 3 or more lots and upon which lots permanent dwelling structures legally existed prior to September 23, 1971 is not a subdivision.~~ The division of a tract or parcel as defined by this section into 3 or more lots and upon all of which lots permanent dwelling structures legally existed prior to September 23, 1971 is not a subdivision.

Sec. 4. 30 MRSA § 4956, sub-§ 5, second paragraph, as enacted by PL 1973, c. 700, § 2, is repealed and the following enacted in place thereof:

The dividing of a tract or parcel of land and the lot or lots so made, which dividing or lots when made are not subject to this section, shall not become subject to this section by the subsequent dividing of said tract or parcel of land or any portion thereof, however, the municipal reviewing authority shall consider the existence of such previously created lot or lots in reviewing a proposed subdivision created by such subsequent dividing.

Effective October 1, 1975

SUBDIVISIONS—PERMANENT MARKERS—
ATTORNEY FEES

CHAPTER 703

S.P. 717—L.D. 2268

An Act to Revise Requirements for Permanent Markers under the Land Sub-
division Law.

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

Sec. 1. 30 MRSA § 4956, sub-§ 4, first sentence, as last amended by PL 1975, c. 475, § 2, is repealed and the following enacted in place thereof: No person, firm, corporation or other legal entity may sell, lease or convey for consideration, offer or agree to sell, lease or convey for consideration any land in a subdivision which has not been approved by the municipal reviewing authority of the municipality where the subdivision is located and recorded in the proper registry of deeds.

Sec. 2. 30 MRSA § 4956, sub-§ 5, 3rd ¶, last sentence, is amended to read: The Attorney General, the municipality, the planning board of any municipality or the appropriate municipal officers may institute proceedings to enjoin the violations of this section and if a violation is found by the court, the municipality, municipal planning board or the appropriate municipal officers may be allowed attorney fees.

Approved Apr. 1, 1976.

APPROVED

CHAPTER

JUN 15 '77

315

BY GOVERNOR

PUBLIC LAW

STATE OF MAINE

EFFECTIVE DATE

Oct. 24, 1977

IN THE YEAR OF OUR LORD NINETEEN HUNDRED SEVENTY-SEVEN

H. P. 832 — L. D. 1005

AN ACT Requiring Permanent Markers Prior to the Sale or Conveyance of Land in an Approved Subdivision.

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

30 MRSA § 4956, sub-§ 4, 1st sentence, as repealed and replaced by PL 1975, c. 703, § 1, is amended to read:

No person, firm, corporation or other legal entity may sell, lease or convey for consideration, offer or agree to sell, lease or convey for consideration any land in a subdivision which has not been approved by the municipal reviewing authority of the municipality where the subdivision is located and recorded in the proper registry of deeds, nor shall such person, firm, corporation or other legal entity sell or convey any land in such approved subdivision unless at least one permanent marker is set at one lot corner of the lot sold or conveyed.

IN HOUSE OF REPRESENTATIVES,.....1977

Read twice and passed to be enacted.

.....*Speaker*

IN SENATE,.....1977

Read twice and passed to be enacted.

.....*President*

Approved.....1977

.....*Governor*

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED
SEVENTY-SEVEN

S. P. 590 — L. D. 1896

**AN ACT to Make Additional Corrections of Errors and Inconsistencies in
the Laws of Maine.**

Emergency preamble. Whereas, Acts of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, Acts of this and previous Legislatures have resulted in certain technical errors and inconsistencies in the laws of Maine; and

Whereas, these errors and inconsistencies have created uncertainties and confusion in interpreting legislative intent; and

Whereas, it is vitally necessary to resolve such uncertainties and confusion to prevent any injustice or hardship on the people of Maine; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

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

Sec. 1. 1 MRSA § 12, last sentence, is amended to read:

If compensation for land is not agreed upon, the estate may be taken for the intended purpose by payment of a fair compensation, to be ascertained and determined in the same manner as and by proceedings similar to those provided for ascertaining damages in locating highways, in Title 23, chapters 201 to ~~206~~ 207.

Sec. 2. 3 MRSA § 2, as repealed and replaced by PL 1975, c. 750, § 1, is amended by adding a new paragraph at the end to read:

The expenses of members of the Legislature traveling outside the State shall be reimbursed for their actual expenses provided that the expense vouchers are approved by the President of the Senate or the Speaker of the House of Representatives.

Sec. 3. 3 MRSA § 3, as last amended by PL 1973, c. 590, § 2, is repealed.

Sec. 4. 3 MRSA § 22, 1st ¶, last sentence, as repealed and replaced by PL 1975, c. 604, § 1, is repealed and the following enacted in its place:

He shall receive a salary of \$400 per week for all official services performed by him during a regular or special session of the Legislature.

Sec. 5. Effective date. Section 4 of this Act shall be retroactive to January 5, 1977.

Lands shall enter into new leasehold agreements with such persons, and shall thereafter renew such leases on what may from time to time be reasonable terms and conditions, so long as the lessee complies with the terms and conditions of such leases and with all applicable laws and regulations of the State.

Sec. 116-A. 30 MRSA § 4552, sub-§ 18, 1st sentence, as enacted by PL 1975, c. 625, § 4, is amended to read:

"Mortgage loan" shall mean an interest-bearing obligation secured by a mortgage or note constituting a first lien on land and improvements in the State constituting ~~one family or multi family housing units, or a housing project,~~ and residential housing or a housing project, including, but not limited to, such improvements located on an Indian reservation in this State.

Sec. 117. 30 MRSA § 4602, sub-§ 2, ¶ C, next to last sentence, as enacted by PL 1969, c. 470, § 8, is amended to read:

The rate and amount of compensation of the director shall be established by the Governor ~~with the advice and consent of the Executive Council.~~

Sec. 118. 30 MRSA § 4602, sub-§ 2, ¶ D, 1st ¶, next to last sentence, as repealed and replaced by PL 1975, c. 770, § 175, is amended to read:

Each advisory board member and commissioner shall continue to hold office after the expiration of his term until his successor shall have been appointed ~~and, in the case of commissioners, confirmed by the Executive Council.~~

Sec. 118-A. 30 MRSA § 4756, 1st sentence, as amended by PL 1973, c. 625, § 205, is further amended to read:

The state authority shall have the power to purchase or to make commitments to purchase from banks, life insurance companies, savings and loan associations, the Federal Government and other financial institutions lawfully doing business in the State of Maine, the interest bearing obligations secured by mortgages and notes which are a first lien on land and improvements in Maine constituting ~~one family or multi family units~~ residential housing or a housing project, except that an obligation shall not be eligible for purchase by the state housing authority if the date of said obligation is prior to October 1, 1969.

Sec. 118-B. 30 MRSA § 4756, last ¶, 1st sentence, as enacted by PL 1975, c. 625, § 19, is amended to read:

Improvements constituting ~~one family or multi-family units~~ residential housing or a housing project shall include but not be limited to ~~housing projects~~ and improvements located on an Indian reservation in this State.

Sec. 118-C. 30 MRSA § 4760, 1st sentence, as amended by PL 1973, c. 517, § 3, is further amended to read:

The state authority may authorize the issuance of revenue bonds of the authority in the manner and as provided in section 4751 for any of its authorized purposes including the purchase of first mortgage loans or evidences thereof, for residential housing or a housing project in the State of Maine from the financial institutions and other agencies specified in section 4756.

Sec. 118-D. 30 MRSA § 4956, sub-§ 4, 1st sentence, as amended by PL 1977, c. 315, is further amended to read:

No person, firm, corporation or other legal entity may sell, lease, develop, build upon or convey for consideration, offer or agree to sell, lease, develop,

build upon or convey for consideration any land in a subdivision which has not been approved by the municipal reviewing authority of the municipality where the subdivision is located and recorded in the proper registry of deeds, nor shall such person, firm, corporation or other legal entity sell or convey any land in such approved subdivision unless at least one permanent marker is set at one lot corner of the lot sold or conveyed.

Sec. 118-E. 30 MRSA § 4956, last ¶, 1st sentence, as last amended by PL 1973, c. 465, § 6, is repealed and the following enacted in its place:

Any person, firm, corporation or other legal entity who sells, leases, develops, builds upon, or conveys for consideration, offers or agrees to sell, lease, develop, build upon or convey for consideration any land in a subdivision which has not been approved as required by this section shall be punished by a fine of not more than \$1,000 for each such occurrence.

Sec. 118-F. 32 MRSA § 202, sub-§ 2, as repealed and replaced by PL 1977, c. 404, is repealed.

Sec. 118-G. 32 MRSA § 211, 2nd ¶, 3rd sentence, as enacted by PL 1977, c. 463, § 3, is amended to read:

Landscape architect members shall initially be appointed, one for a 2-year term and one for a 3-year term; the initially appointed members shall be eligible to be qualified for admission to the examination to practice landscape architecture and the Governor shall make a written finding to that effect.

Sec. 118-H. 32 MRSA § 215, as enacted by PL 1977, c. 403, § 3, is repealed and the following enacted in its place:

§ 215. Removal of member; vacancies

The Governor may by due process of law remove any member of the board for misconduct, incompetency, neglect of duty or for any malfeasance in office. Any vacancy in the board caused by death, resignation or for any other cause, except completion of a full term of service, shall be filled in a like manner as an original appointment for a full term but with the new member to hold office only during the unexpired term of a member whose place he fills.

Sec. 118-I. 32 MRSA § 220, sub-§ 1, ¶ B, sub-¶ (2), as enacted by PL 1977, c. 463, § 3, is repealed and the following enacted in its place:

(2) No corporation as such shall be registered to practice architecture in this State, but it shall be lawful for a corporation to practice architecture providing at least $\frac{1}{3}$ of the directors, if a corporation, or $\frac{1}{3}$ of the partners, if a partnership, are licensed under the laws of any state to practice architecture and the person having the practice of architecture in his charge is himself a director, if a corporation, or a partner, if a partnership, and licensed to practice architecture under this chapter and all drawings, plans, specifications and administration of construction or alterations of buildings or projects by such corporation are under the personal direction of such registered architect. One-third of the directors or partners shall be licensed under the laws of any state to practice engineering, architecture, landscape architecture or planning. In cases where the number of directors or partners is not divisible by 3 the number of directors or partners shall be the number that results from rounding up or rounding down to the nearest number.

Sec. 118-J. 32 MRSA § 220, sub-§ 2, ¶ B, sub-¶ (2), as enacted by PL 1977, c. 463, § 3, is repealed and the following enacted in its place:

(2) No corporation as such shall be registered to practice landscape architecture in this State, but it shall be lawful for a corporation to prac-