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SPRING VALLEY: PUBLIC PURPOSE AND LAND USE
REGULATION IN A “TAKING” CONTEXT

By J. Kenneth Wainwright, Jr.*

INTRODUCTION

In the recent case of In re Spring Valley Development,1 the Supreme Judicial Court of Maine upheld the constitutionality of the Maine Site Location of Development Law.2 When considered in conjunction with other Maine subdivision legislation,3 the decision in Spring Valley represents a significant advance for environmental advocates in Maine. The case is philosophically satisfying because the judiciary, sub silentio, has ratified a legislative policy determination that, in regard to the environmental effects of land development, “bigger is not necessarily better.”4 From a legal point of view the case presents four important aspects: (1) a legislative policy decision to regulate land use in order to achieve the “highest and best use” of the natural environment of the state rather than the “most profitable use” of land; (2) a judicial liberalization of the amount of state regulation of land use which is allowable before a taking of property without compensation will be found; (3) a judicial ratification of the legislative shift of the burden of proof in subdivision and land development proceedings before the Environmental Improvement Commission; and (4) an affirmation of the requirement that developers and subdividers have and maintain the requisite financial capacity and technical ability to comply with state air and water pollution control standards.5 In order to appreciate fully the ramifications of the attitudinal shift which Spring Valley represents, it is necessary to examine the case law and legislative context in which it was decided.

I. BACKGROUND

A. Development of the Taking Concept

In Pennsylvania Coal Co. v. Mahon6 the Supreme Court outlined the balancing test to be applied in determining whether governmental regulation of land use so restricts the owner’s use and enjoyment of the property as to constitute a “taking of property without compensation” in violation of the Fifth Amendment. The Court struck down a state statute which sought to prevent mining that resulted in a subsidence of the topsoil above mineshafts. The Court found that the statute made it “commercially impracticable” to
mine certain coal owned by the petitioners and that this "commercial impracticability" constituted a "taking" of the petitioner's property as certainly as if it had been appropriated by eminent domain. While recognizing that some rights are enjoyed under an implied limitation and must yield to valid regulation by the police power, the Court held that where the diminution in value caused by the regulation reaches such a level as to constitute a "taking," the state must either cease the regulation or compensate the landowner. Therefore, in the Supreme Court's view, the difference between a valid regulation and a "taking" is a difference of degree, not kind. Moreover, each case of a claimed taking is to be judged on its own particular facts.

As a result of the Pennsylvania Coal opinion, governmental regulation of the use of land is subject to a stricter judicial test than other types of governmental regulations. "While other regulations are only tested to determine whether they bear a reasonable relationship to a valid public purpose, land use regulations must be tested by balancing the value of the regulation against the loss in value to each affected property owner." Thus, where a court finds that a regulation which deprives the owner of his "most profitable use" constitutes a "taking," three results are likely: (1) since the degree of state interference which will be allowed without compensation is lowered, the likelihood that a "taking" will be found is increased; (2) because the value of the regulation must be balanced against the loss in value to each affected property owner, piecemeal application of an environmental regulation may result; and (3) environmental quality will be higher in those states with sufficient revenues to afford more frequent compensation of landowners. In states with less money to expend, or in times of inflation, the presumable result is that the quality of the environment will suffer.

B. Case law immediately prior to Spring Valley

In State v. R.B. Johnson, defendant Johnson had applied for a permit, under the Maine Wetlands Act, to fill his land. The permit was denied. Johnson began to fill the land anyway, was enjoined from further filling by the Superior Court, and appealed from that decision on the grounds that it violated his due process rights. The Supreme Judicial Court agreed that the denial of the permit and the injunction against further filling so limited the use of Johnson's land as to amount to a taking of property without just compensation and an unreasonable exercise of the police power. The Johnson court...
accepted the lower court finding that, absent the addition of fill, Johnson's land "... has no commercial value whatever." The language of the opinion reflects the court's concept that a taking occurs if land cannot be used for its "most profitable" or "highest commercial" use. Such an essentially economic definition of a taking, if applied broadly, is antithetical to the purposes of environmental legislation, in which the "values" sought to be protected by regulating land use are frequently not readily subject to quantification. Applying a "most profitable use" standard, the court stated:

Broadly speaking, deprivation of property contrary to constitutional guarantee occurs 'if it deprives an owner of one of its essential attributes, destroys its value, restricts or interrupts its common necessary, or profitable use, hampers the owner in the application of it to the purposes of trade, or imposes conditions upon the right to hold or use it and thereby seriously impairs its value.' (emphasis added)

Analogizing the Wetlands Act to a zoning ordinance, the court noted that land use is always subject to reasonable police power regulations. However, it concluded that the area regulated by the act is a valuable resource of the state; and, since the benefits derived from enjoining Johnson would theoretically be state-wide, the cost of compensating Johnson should be borne publicly. "To leave appellants with commercially valueless land in upholding the restrictions presently imposed, is to charge them with more than their just share of the cost of this state-wide conservation program, granting fully its commendable purpose."

The Johnson decision exemplifies the result of applying a "most profitable" land use definition in environmental litigation. The case has been criticized, notwithstanding the fact that the court limited its holding to the particular facts of the case. It has been suggested that the injunction did not deprive the land owner of an existing use of his property, but merely prevented him from acquiring a new use made possible by the fill operation, and therefore required an unwarranted expansion of the taking concept. The result has also been criticized on policy grounds for protecting Johnson's right to engage in land speculation at the expense of the public interest in preserving the marshland.

Another case, King Resources Co. v. Environmental Improvement Commission, presented the first challenge to an administrative action under the Site Location Law. The plaintiff purchased an oil terminal from the United States and expended $522,500.00 on the project prior to January 1, 1970. The Environmental Improvement Commission filed a letter of protest before the Army Corps of
Engineers on the plaintiff’s application for permission to construct a new dock at the facility, pending a study of the project’s overall environmental impact by the Commission. The Commission also determined that the development was subject to its jurisdiction. Plaintiff appeared at a hearing before the Commission under protest of the Commission’s jurisdictional decision and requested the issuance of a license, to proceed with the development. When the Commission refused to grant the license, King Resources sought declaratory relief in the Supreme Judicial Court claiming that its particular development was not within the purview of the Site Location Law. The court found for the plaintiff and remanded the case for further proceedings. The court held that, although the Site Location Law did vest the Environmental Improvement Commission with powers of control and regulation of industrial and commercial developments for the express purpose of minimizing the impact of such developments on the environment, this particular development was excluded from Commission control. Citing the applicability provision of the Site Location Law, the court noted that this development was under construction prior to January 1, 1970 and therefore was not subject to the Commission’s jurisdiction. Like Johnson before it, King Resources presented a factual situation distinctly unfavorable to the environmental interests. In light of the applicability provision of the Site Location Law, the Environmental Improvement Commission’s assertion of jurisdiction over the King development was arguably ultra vires.

Thus, the period 1970-1973 saw attempts by the Environmental Improvement Commission to discover the limits of its jurisdiction and develop effective administrative procedures. The period before Spring Valley also saw the Maine courts applying a “most profitable use” standard to determine if an environmentally motivated administrative action constituted a taking without compensation. The result of the application of such a standard in environmental litigation was to give:

. . . the police power a narrow role in any state program for protecting natural resources, and thus has made a clean environment hostage to private property . . . The court has forced taxpayers to pay for maintaining privately owned land in its natural condition, worthless for private purposes, when the natural condition is of greater public value than would be its changed condition. In this day when land in its natural state is no longer a frontier to be peopled but a rare asset to be preserved, this result appears inconsistent with the historic purpose of judge-made property law to improve the social condition.
C. The Site Location Law

In 1970 the Maine Legislature enacted P.L. 1969, Special Session 1970, c. 571. Section one of the law declares the legislative purpose to be maintenance of the "highest and best use of the natural environment of the State." As will be discussed later, when confronted with a taking issue in the Spring Valley case, the Supreme Judicial Court adopted this new declaration of legislative purpose and reached a revised assessment of what constitutes a reasonable regulation of land vis-a-vis an unconstitutional taking by onerous regulation.

Section two of the statute embodies the Site Location Law, which vests the Environmental Improvement Commission with authority under the state police power to insure that developments substantially affecting the local environment would be so located as to have minimal impact. The law seeks to regulate large developments, defining a "development which may substantially affect the environment" as any commercial or industrial development which: (1) requires a license from the Environmental Improvement Commission; (2) occupies a land area in excess of twenty acres, or which contemplates excavating natural resources; or (3) occupies on a single parcel a structure or structures larger than 60,000 square feet.

III

The "natural environment of a locality" is defined to include "... the character, quality and uses of land, air and waters in the area likely to be affected by such development, and the degree to which such land, air and waters are free from non-naturally occurring contamination." Subdivisions were added to the list of "developments which may substantially affect the environment" in 1972. Subdivisions are defined as parcels in excess of twenty acres which are divided into at least five lots and offered for sale or lease during any five year period.

Procedurally, before a developer or subdivider can commence operation of the development, he is required to notify the Commission in writing of his intent and of the nature and location of the development. Within thirty days the Commission may either approve or disapprove the development or schedule a hearing on the developer's application. If the Commission disapproves a development without a hearing, the aggrieved developer may request a hearing, and one will be granted based upon his objections to the Commission's findings and conclusions.

From an environmental viewpoint, sections 484 and 485 of the Site Location Law are most attractive and demonstrate the greatest degree of legislative response to the environmental crisis. Section
Section 484 of the Site Location Law also provides that, at any hearing, the burden of proof shall rest with the proponent of the development. Such statutory shifts of the burden of proof are not novel and have been upheld in the courts. Without such a legislative shift of the burden of proof, the Environmental Improvement Commission would have to bear the burden in the often factually complex situations associated with environmental adjudications, resulting in an overall decline in the Commission's efficiency under the statute. The burden-shifting process also evidences a public policy which regards the public environment as superior to private gain, a policy compatible with the "highest and best use" concept of allowable regulation envisioned by the statute and upheld by the court in Spring Valley.

In the case of a person who does not notify the Environmental
Improvement Commission of his intentions and the location of his
development, and in the event that the Commission denies him
permission to continue his development after a hearing, section 485
empowers the Commission to order such a person “...to restore
the area affected by such construction or operation to its condition
prior thereto or as near as may be, to the satisfaction of the commis­sion.”60 The statute thus serves to cast upon the non-complying
developer the additional burden of insuring against the detrimental
effects of his non-compliance. By rendering a developer’s financial
condition subject to administrative review and alternatively by ren­
dering the non-complying developer a self-insurer, these Maine stat­
utes envision more stringent and activist control of potential pollu­
ters than federal environmental legislation.61

The situation in Maine prior to Spring Valley was thus character­
ized by two conflicting trends. On the one hand, the courts applied
traditional concepts to determine if a taking had occurred. On the
other hand, the legislature had issued a strong statement of legisla­
tive purpose which did not fit within the traditional quantitative
framework by which a court determined whether a taking had oc­
curred.

Between the public interest in braking and eventually stopping the
insidious despoliation of our natural resources which have for so long
been taken for granted, on the one hand, and the protection of appel­
lants’ property rights on the other, the issue is cast.62

II. The Case

The controversy leading to In re Spring Valley Development began
when Lakesites, Inc. subdivided a 92 acre tract located at Raymond
Pond in Raymond, Maine.63 The subdivider did not notify the Envi­
ronmental Improvement Commission of the development although
it exceeded the statutory limit of twenty acres. However, the Com­
mission learned of the development and scheduled a hearing. Al­
though the subdivider was given notice and was represented at the
hearing, it refused to offer evidence or cross-examine any witnesses,
contending that “a mere subdivision does not constitute a ‘commer­
cial or industrial’ development” within the purview of the Site Lo­
cation Law.64 The Commission made detailed findings,65 concluded
that Lakesites had failed to meet the standards66 of the Site Loca­
tion Law, and issued an order for Lakesites to discontinue the devel­
opment until the subdivider made a proper application to the Com­
misson and was granted the right to proceed by the Commission.
Lakesites appealed the Commission order to the Supreme Judicial
reiterating its contention that mere subdivisions are not embraced by the Site Location Law and challenging the constitutionality of the act as applied on due process and equal protection grounds.

A. Applicability of the Site Location Law to Subdividers

Lakesites' attack upon the applicability of the Site Location Law was two-pronged. The subdivider contended: (1) residential developments were not "commercial and industrial developments;" and (2) a subdivision, qua subdivision, could have no adverse ecological impact since the law was directed not at the subdivider but at the actual polluter. As in King Resources, the Spring Valley court examined the legislative history of the Site Location Law to determine its applicability. Concentrating upon the legislative definition of "developments which may substantially affect the environment," the court held that the act was aimed at two types of developments: (1) those whose operating procedures included the consumption of natural resources or whose operation resulted in the discharge of wastes and residues which lower the quality of surrounding air, soil, and/or water; and (2) those which, while not inherently ecologically destructive, because of their size and concentration are likely to impose great stress on the environment.

The court held that the term "commercial" was intended to describe the motivation for the development and not the nature of the activity to be performed on the property subsequent to development and found the business of subdividing large tracts of land and selling lots to be a commercial venture within the meaning of the act. Relying on legislative history, the court noted that the Environmental Improvement Commission's assertion of jurisdiction over residential subdivisions had been called to the legislature's attention and that that body had defeated bills whose purpose would have been to exclude certain residential subdivisions from the Commission's jurisdiction. Not content to base its findings on the legislature's "negative acquiescence" in the Commission's assertion of jurisdiction over subdivisions, the court considered the history of a subsequent amendment which made clear, by affirmative promulgation, that subdivisions were within the scope of the Site Location Law.

The court further held that the Site Location Law applied to commercially motivated residential developments where the developer merely plots the tract, subdivides the tract by plan (i.e., absent physical effect upon the land itself), and offers the lots for sale. In
short, the court accepted the legislative determination that large developments are subject to administrative review of their ecological impact even in the planning stage. Such a perspective reflects a realistic approach to the protection of environmental values. If review is possible only after a project has been initiated, irreparable damage may already have been done, notwithstanding subsequent administrative prohibition of further development.\textsuperscript{77}

By holding developments subject to review in the planning stage, the court disposed of Lakesites' corollary contention: that as a mere subdivider, its acts could not harm the land and, since the Site Location Law was aimed at activities which resulted in harm to the land, Lakesites was outside of the act's scope. Lakesites' contention was based on the traditional equitable notion that an individual's activities will be restrained only when the individual himself is the party responsible for the damage.\textsuperscript{78} Lakesites argued that the real damage resulted not from subdivision and sale of the land, but from activities subsequent to sale, by parties other than the subdivider. The court refuted the notion that only the last, damaging polluter is subject to injunction. Stressing the preventive nature of the act, the court reasoned:

\begin{quote}
We would hardly expect that the Legislature intended to postpone the determination of suitability of an area for 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.\textsuperscript{79}
\end{quote}

Holding the act of subdivision to be the first step in a development which may substantially affect the environment,\textsuperscript{80} the court implicitly recognized that review at the planning stage was most rationally related to the statutory goal and held the Spring Valley development to be subject to the Site Location Law.

\section*{B. Police Power and Regulation of Property}

Lakesites' second major contention was that the Site Location Law was an unconstitutional exercise of the police power. Presuming the validity of the law, the court cast the burden upon Lakesites to support its claim of unconstitutionality.\textsuperscript{81} Recognizing that the state may exercise the police power to protect the public health, safety, welfare, morals and order,\textsuperscript{82} the court ruled that within this authority the state may act to conserve the quality of air, soil, and water.\textsuperscript{83} The court noted the general proposition that a landowner holds his property subject to the limitation that his use of the property may not be to a public disadvantage\textsuperscript{84} and concluded 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.65

C. Due Process Challenge

While Lakesites did not contest the power of the state to act properly under the police power to protect the environment, it did suggest that the Site Location Law was: (1) not rationally related to its purpose; (2) a deprivation of property without compensation; and (3) void for vagueness. The present state of the law requires a double test to uphold state regulation of private property in the public interest.66 The two elements are that: (1) the public interest requires such state interference; and (2) the means employed by the state are reasonably related to the goal sought to be achieved. Probably not caring to argue against the public interest in preserving the environment, Lakesites attacked the Site Location Law on the grounds that it was not reasonably related to a legitimate state purpose.

1. Rational Relation of the Site Location Law to its Purpose

In its due process argument Lakesites again advanced the contention that the mere act of subdivision does not cause any impact upon the environment, so that application of the act to a subdivision is not directly related to the act's purposes. The court observed that since subdivision is the first step in development, it is more efficient to subject the instrumentality to review while it is controlled by one subdivider, rather than to delay until a later time when (as in the case of Spring Valley) the actions of 90 separate property owners would be impossible to review as a practical matter.67

The approach of the Maine court is reasonable. Arguably, many forms of pollution may be characterized as the cumulative result of several acts,68 any one of which standing alone would not amount to a nuisance.69 From a regulatory viewpoint, the difficulty arises in that the individual acts may be deemed reasonable and therefore not enjoinable as a nuisance, while the totality of those acts results in pollution. Although some courts have held that individually innocent acts may become actionable torts if they combine to cause damage,90 such an approach is insufficient because of its ex post facto character. While it may subject the individual polluters to liability, it does nothing to prevent the act of polluting. However, the Spring Valley court, by holding that the regulations of the Site Location Law applied to the development beginning with the act of subdivision, did achieve the preventive purpose of the statue. Be-
cause environmental legislation is designed to prevent ecological despoliation,\(^9\) the rational relation of an environmental statute to its purposes assumes a new proportion. To determine whether a particular environmental statute is rationally related to its purpose, the courts should look not only to the activity of the defendant to which the statute is applied, but also to the condition of the land at the time of that activity. Thus, the lesser the degree of pollution at the time when an environmental statute is applied, the greater the rational relation of the application of that statute to the achievement of its preventive purposes. Such a test is recommended because it recognizes (1) the essentially preventive character of environmental legislation and (2) the cumulative causal relationship underlying environmental pollution.

2. Deprivation of Property Without Compensation

The court summarily dismissed Lakesites’ contention that the Commission’s act in preventing the subdivision to the extent envisioned by Lakesites was an uncompensated taking.\(^92\) The scarcity of discussion on the “taking” issue in the opinion is due to the absence of data on the record below,\(^93\) which precluded all but the most cursory appellate review on this point. On the basis of this limited record, the court found that the Commission order merely prevented the appellants from selling their land while subdivided to the extent originally planned. In this the court found no deprivation of property, because reasonable use of the property was still possible.\(^94\)

The prevailing view today is that an otherwise valid police power regulation which restricts the use of property will not constitute a “taking” of property requiring compensation\(^95\) unless the regulation unreasonably precludes a reasonable use of the property\(^96\) or results in such a decrease in the value of the property as to be onerous.\(^97\) The “most profitable use” versus the “highest and best use” labels become relevant when a court attempts to make this determination. If a court holds a regulation which deprives the landowner of the “most profitable use” of his property to constitute a taking, environmental concerns could suffer because a state would have to be prepared either to compensate the landowner, or to forego the environmental regulation. However, if a court is provided with a clear statement by the legislature that the regulations are of overriding public importance and necessary to preserve the “highest and best use” of lands within the state (as was provided in the Site Location Law), environmental concerns will be promoted because the need for the regulations will outweigh the effect upon use and value in all but
the most extreme cases. The Spring Valley court ruled against the subdivider chiefly because of the lack of a record. However, it is not unreasonable to speculate that, had there been a record, the court, guided by the legislature's statement of purpose in the Site Location Law, would have reached the same result.

Other state courts have employed strong statements of legislative purpose to validate environmental regulations which had been confronted with a "taking" challenge. In Turnpike Realty v. The Town of Dedham, the Massachusetts Supreme Judicial Court approved a zoning plan designed to preserve sections of the Charles River flood plain. The court stressed the overriding public purpose found in Dedham's zoning bylaws which stated in part:

"(1) The purpose of the Flood Plain District is to preserve and maintain the ground water table; to protect the public health and safety, persons and property against the hazards of flood water inundation... and to conserve natural conditions, wild life, and open spaces for the education, recreation and general welfare of the public."

Although the plaintiff argued that the regulation resulted in an 88% diminution in the value of its property, the court upheld the zoning ordinance on the basis of the strong public purpose to be achieved.

In Just v. Marinette County, a case factually similar to Johnson, the plaintiffs challenged an injunction prohibiting them from further filling their shoreline property. Such filling was prohibited by a county zoning ordinance based on a state model. Recognizing the public purposes of the zoning ordinance the Wisconsin Supreme Court observed:

"The Justs argue their property has been severely depreciated in value. But this depreciation of value is not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling."

Because of its close factual similarity to Johnson, Just illustrates the efficacy of the "public purpose" hypothesis as a method to validate an environmental regulation which has been challenged as a "taking." Proceeding with a traditional taking analysis, the Maine court found a taking in Johnson where the Wetlands Act prohibited the plaintiff from changing the character of his property. In Just, the Wisconsin court, focusing on the overriding public purpose of the regulation, prevented the plaintiffs from acquiring a new use by changing the character of their land and validated the regulation.
In *Candlestick Properties, Inc. v. San Francisco Bay Conservation and Development Commission*, the court sustained the defendant Commission’s order prohibiting the plaintiff from filling its land abutting San Francisco Bay. Upholding the validity of the regulations against a “taking” challenge, the court made reference to the legislature’s strong statement of public purpose:

In those sections the Legislature has determined that the bay is the most valuable single natural resource of the entire region and changes in one part of the bay may also affect all other parts; that the present uncoordinated, haphazard manner in which the bay is being filled threatens the bay itself and is therefore inimical to the welfare of both present and future residents of the bay area; and that a regional approach is necessary to protect the public interest in the bay.

Viewed in conjunction with *Turnpike Realty, Just and Candlestick Properties*, *Spring Valley* stands for the proposition that overriding public purposes (a qualitative difference) can support an environmental regulation even though the resultant diminution in use or value may be great, as contrasted with *Pennsylvania Coal’s quantitative* approach where a taking is found when the diminution in use or value exceeds a certain undefined point.

3. Vagueness and Impossibility of Compliance in Terms of the Site Location Law

Commentators have criticized the Site Location Law as unclear and lacking workable standards. Lakesites claimed that the standards of the act which they were forced to meet were vague and impossible of compliance, and pointed out that they could not be expected to foresee what activities would be performed on the land once sold. The court rejected this contention, ruling that the subdivider could meet this responsibility by showing that conditions in his instruments of sale required subsequent compliance of later owners of the fee with the standards of the Site Location Law. The court’s suggestion, if adopted, would assure that a “highest and best use” standard, once applied to the subdivider, would also be applied to subsequent owners of the fee.

Lakesites’ most direct challenge on vagueness grounds was directed against that portion of the law which requires that the proposed development have “no adverse effect upon the natural environment.” Finding that the act was aimed at preventing the unreasonable effect of development upon existing uses, scenic character and natural resources, the court held that the act contained sufficiently specific standards with which the developer must comply.
As originally drafted, the Site Location Law did contain one standard which the court found impossible of compliance. The act required that the proposed development have no adverse effect upon property values. Lakesites contended that such a provision was unconstitutional. The court agreed, holding that the effect of developments upon property values is outside the scope and purposes of the Site Location Law. If the Environmental Improvement Commission were to deny approval of a development because the developer had failed to prove that property values would not be adversely affected, the court ruled that this would be an impermissible application of the police power. However, in light of the rest of the case, Lakesites' victory on this point can only be considered pyrrhic.

D. Equal Protection Challenge

Lakesites's final constitutional argument was that the Site Location Law, by requiring only subdivisions of an area greater than twenty acres to receive the Commission's approval, denied equal protection of the laws, because size alone has no rational relation to the environmental impact of a development. The court observed that the legislature had evidently concluded that the size of development does have a distinct relationship to the amount of its potential adverse impact. Noting that the legislature may draw lines which standing alone would appear arbitrary, but which nonetheless must be upheld if reasonable and rationally related to the legislative purpose, the court sustained the twenty acre limit of the Site Location Law. Arguing from dicta in King Resources which had analogized the Site Location Law to a zoning ordinance, Lakesites contended that the results of case by case application of the law was tantamount to "piecemeal zoning" which created arbitrary distinctions between developments. While both zoning ordinances and the Site Location Law restrict the use of land, the court distinguished them. Stating that the Site Location Law "... 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," the court found no arbitrary distinctions. It is important to note, as the court did, that the Site Location Law, despite its title, does not dictate the location of a development, but rather states that any development, regardless of location, must be constructed in compliance with the law's standards. The same standards are applied in each case. Any distinction in result arises, not from the application of different standards, but from case by case factual distinctions to which the
standards are applied. Holding that the Environmental Improvement Commission acted “regularly and within the scope of its authority,” the court affirmed the Commission’s decision and denied Lakesites’ appeal.122

III. CONCLUSIONS AND NEW DIRECTIONS

The Maine court’s strong affirmation of legislative purpose in *Spring Valley* bears legal and environmental significance in several respects:

(1) The court has upheld the legislature’s policy decision to regulate land use so as to achieve the “highest and best use” of the natural environment of the state. Strongly re-affirming the right of the state to limit property use for the purpose of preserving the environment,123 the court adopted the declaration of legislative purpose accompanying the Site Location Law and applied it in determining what constitutes a “reasonable regulation of land” as opposed to an “unconstitutional taking by onerous regulation.” Such an approach constitutes a marked divergence from the rationale used in the *Johnson* case by the same court. Juxtaposition of the two cases suggests that, where there is a clear statement by the legislature that the purposes of the regulation are of overriding public importance, the regulations will be sustained by the court when confronted with a “taking” challenge in all but the most extreme cases. The *Turnpike Realty, Just and Candlestick Properties* cases also demonstrate the potential of the “public purpose” hypothesis as a method of sustaining environmental regulations which have been opposed as “takings.”124

(2) Application of a public purpose designed to promote the “highest and best use” of land also assures that all states, regardless of their financial capabilities, will be able to preserve their environments through legislation. The *Johnson* court viewed the gains of environmental protection as state-wide in nature and found the attempt at regulation of use in that case to be a “taking” which would have required compensation if it were to be upheld.125 The corollary of such a viewpoint is that a larger proportion of environmentally motivated regulations potentially may be found to be “ takings” requiring compensation. Such a viewpoint directly relates a state’s environmental quality to the state’s ability to pay for it. However, in *Spring Valley*, because of the legislative command to consider the “highest and best use,” the regulation was not found to constitute a “taking,” and compensation was not required. The lesson of *Spring Valley* is that environmental quality need not be inextricably bound to the financial capacity of a state. By re-defining acceptable uses, the legislature can at least partially counteract the anti-environmental effects of inflation.

(3) *Spring Valley* also emphasizes another pro-environmental tool
which the legislatures and courts may employ. By shifting the burden of proof onto the potential polluter, the Site Location Law has freed the administrative body from having to carry complex burdens of proof. While a de facto shift could also be achieved by requiring the administrator to make a positive finding that no ecological harm will result from the proposed development, such a device has been criticized as depending too heavily on the official’s attitudes and beliefs. An explicit statutory shift of the burden has three results: (a) it frees the administrative agency from complex burdens, thus increasing the agency’s efficiency and scope of coverage; (b) it evidences a clear public policy which regards the preservation of the environment as superior to private, speculative gain; and (c) it subjects proposed uses of a particular tract to the same close administrative review as existing uses. This last result is desirable because such proposed uses are uniquely within the knowledge of the proponent of a particular development. However, when a legislature shifts the burdens of proof, it should also be careful to delineate clear and explicit standards to negate any potential due process challenge to the statute on vagueness grounds.

(4) The judicial approval of the financial provisions of the Site Location Law is also significant. By requiring a developer to have the financial and technical capabilities to meet the standards of the law and to maintain those capabilities until such standards are met, continuing review of a development after initial approval is assured. The financial provisions of the law also serve to insure that the environment will be entrusted to developers with the capacity to bear their public trust. The provision of the Site Location Law which requires a non-approved developer to restore an area under unauthorized development to its prior condition (or as close thereto as possible), serves to increase developer compliance with the law, for any developer who would attempt to ignore it is rendered a self-insurer of his conduct. Application of the explicit standards of the Municipal Regulation of Land Subdivisions Act, and the financial capacity review provisions of both acts helps assure the presence of both legitimate developers and legitimate developments.

(5) By holding that the Site Location Law applied to a mere subdivider, and by upholding the reviewability of developments in the planning stage, the court recognized that, in an environmental context, preventive legislation is the only meaningful kind. The court viewed subdivision as the first stage in a potential pollution causation chain and felt that review at that point was not only proper, but also the most reasonable course of action to follow. In assessing the rational relation to the purpose of future environmental legislation, it is suggested that courts focus not only on the activity of the defendant to which the statute is applied, but also on the condition of the land at the time when the statute is applied. The closer the land is to its unspoiled state when regulation is applied, the more rationally related that regulation is to its preventive purpose. Moreover, courts must recognize the essen-
tially cumulative causal nature of pollution and act to enjoin it at the earliest possible point, notwithstanding the contrary traditional equitable viewpoint.130

(6) By interpreting the word "commercial" (as used in the Site Location Law) to apply to the motivation for a development, rather than to the activity conducted on the property subsequent to development, the Spring Valley court followed the clear directive of legislative intent and gave the Site Location Law a broad scope of application. Such an interpretation brought residential developments squarely within the purview of the act. Since residential developments account for the majority of construction,131 their exclusion would have been illogical and might have seriously jeopardized the overall effectiveness of the law.

Spring Valley represents a clear judicial affirmation of legislation designed to prevent environmental deterioration. The decision indicates that where a statutory statement of public purpose is present, more and farther reaching land use regulations will be allowed before an uncompensated "taking" is found by the courts. By subordinating the right of private speculative gain to the public interest in environmental preservation, the Maine Legislature and Supreme Judicial Court have strengthened environmentally motivated land use regulation.

Footnotes

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130 A.2d 736 (Me., 1973). (Hereinafter cited as Spring Valley.)


Site Location Law, 38 M.R.S.A. § 481 (Supp. 1973):
The legislature finds 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 the environment.

The issue was considered tangentially in Spring Valley, but will be discussed, infra, because of its importance. Relevant statutes are:

(1) 38 M.R.S.A. § 484 (Supp. 1973):
The commission shall approve a development proposal whenever it finds that:

1. FINANCIAL CAPACITY. The developer has the financial capacity
and technical ability to meet air and water pollution control standards, and has made adequate provisions for solid waste disposal, the control of offensive odors and the securing and maintenance of sufficient and healthful water supplies.

Any person securing approval of the commission, pursuant to this article, shall maintain the financial capacity and technical ability to meet the state air and water pollution control standards until he has complied with such standards.

(2) 30 M.R.S.A. § 4956 (3)(K) (Supp. 1973):

(§§ 4956 (3)(A) to 4956 (3)(L) set forth certain pollution control standards applicable to all subdivisions of three or more lots for the purpose of sale, development or building. See infra, at n. 50.)

K. the subdivider has adequate financial and technical capacity to meet the above stated standards.

(3) 30 M.R.S.A. § 4962 (1)(G) (Supp. 1973):

G. When a person petitions for rezoning of an area for the purpose of development in accordance with an architect’s plan, the area shall not be rezoned unless the petitioner posts a performance bond equal to at least 25% of the estimated cost of the development. Said bond shall become payable to the municipality if the petitioner fails to begin construction in a substantial manner and in accordance with the plan within one year of the effective date of the rezoning.

The effect of these provisions is two-fold: (1) the financial capacity of each developer is open to administrative review; (2) where the developer petitions for a zoning variance, he is made an insurer of his compliance with environmental standards.

6260 U.S. 393 (1922). (Hereinafter cited as Pennsylvania Coal.)
7Id. at 414-5.
8Id. at 413.
9Id. at 416.
10Id. at 413.
11 Bosselman, F., et al., THE TAKING ISSUE, at 238, (Council on Environmental Quality, 1973), (emphasis added) (Hereinafter cited as Bosselman.)
13265 A.2d 711 (Me., 1970). (Hereinafter cited as Johnson.)
16265 A.2d 711, 716 (Me., 1970).
17Id. (emphasis added).
18Id. at 715.
19Id.
20Id. at 716.
21Id.
23Waite, supra n. 22, at 117-8.
24270 A. 2d 863 (Me., 1970). (Hereinafter cited as King Resources.)
25Id. at 865. Expenses included: repairs, $157,500; cleaning of tanks, $117,000; equipment, $60,000; water surveys, $98,000; and legal fees, $90,000.
26Id. at 865-6.
27Id. at 868.
28Id.
2938 M.R.S.A. § 488 (1970):
This Article shall not apply to any development in existence or in possession of applicable state or local licenses to operate or under construction on January 1, 1970 . . .
30270 A. 2d 865, 869-70 (Me., 1970).
31The Environmental Improvement Commission was re-named the “Board of Environmental Protection” under 38 M.R.S.A. § 341 (Supp. 1973).
33See supra nn. 18 - 23 and accompanying text.
34Waite, supra n. 22, at 118.
3538 M.R.S.A. § 361 (Supp. 1973):
It shall be the duty of the board exercising the police power of the State, to control, abate and prevent the pollution of the air, waters, coastal flats and prevent diminution of the highest and best use of the natural environment of the State. (emphasis added)
37See supra n. 2.
38See supra n. 31.
3938 M.R.S.A. § 481 (Supp. 1973):
The Environmental Improvement Commission, in consultation with appropriate state agencies, may exercise the police power of the State to control the location of those developments substantially affecting local environment in order 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.

See also supra n. 4.

38 M.R.S.A. § 482 (2) (Supp. 1973). Maine zoning laws define a subdivision as: "... the division of a tract or parcel of land into three or more lots for the purpose of sale, development or building."

38 M.R.S.A. § 482 (3) (Supp. 1973).
Pub. L. 1969, Special Session 1970, c. 571, § 2 provided a 14 day period. The limit was raised to 30 days by Pub. L. 1971, Special Session 1972, c. 613, § 4.

38 M.R.S.A. § 484 (2) - (4) (Supp. 1973):

2. TRAFFIC MOVEMENT. The developer has made adequate provision for traffic movement of all types out of or into the development area.

3. NO ADVERSE EFFECT ON THE NATURAL ENVIRONMENT. The developer has made adequate provision for fitting the development harmoniously into the existing natural environment and that the development will not adversely affect existing uses, scenic character, or natural resources in the municipality or in neighboring municipalities.

4. SOIL TYPES. The proposed developments will be built on soil types which are suitable to the nature of the undertaking.

30 M.R.S.A. § 4956 (3) (Supp. 1973):

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 since repealed;
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.

\(^{51}\)10 V.S.A. § 6086 (a) (1)-(10) (Supp. 1972).
\(^{52}\)30 M.R.S.A. § 4956 (2) (Supp. 1973). The Vermont statute places the burden of proof partially on the proponents of the development and partially on the opponents of the development. Under 10 V.S.A. § 6088 (b) (Supp. 1972) opponents must show that the proposed development:
(5) Will . . . cause unreasonable highway congestion or unsafe conditions with respect to use of the highways existing or proposed.
(6) Will . . . cause an unreasonable burden on the ability of a municipality to provide educational services.
(7) Will . . . place an unreasonable burden on the ability of local governments to provide municipal or governmental services.
(8) Will . . . have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.

Compare 38 M.R.S.A. § 484 (1) (Supp. 1973) and 30

At hearings held under this section the burden shall be upon the
person proposing the development to affirmatively demonstrate to the
commission that each of the criteria for approval listed in the preceding
paragraphs have been met, and that the public's health, safety and
general welfare will be adequately protected.

E.g., Administrative Procedure Act, 5 U.S.C. § 556 (d) (1970);

Wilkes, supra n. 12, at 159-61 and cases cited by Wilkes at 161,
n.72.

Traditionally, a public or private nuisance can be enjoined only
upon a showing of irreparable harm. "In the pollution context, how­
ever, the use of traditional proof burdens involves an unequivocal
social decision to favor the one who pollutes. . . ." Wilkes, supra n.
12, at 159. For an excellent discussion of burden shifting in an envi­
ronmental context see Wilkes, supra n. 12, at 159-62.


Compare National Environmental Policy Act of 1969, 42
U.S.C. §§ 4321 et seq.

265 A.2d 711, 716 (Me., 1970).

300 A. 2d 736, 739 (Me., 1973). The plaintiff had received the
prior approval of the Raymond Planning Board and commenced the
subdivision by clearing and grading portions of the tract, building
roads and surveying the bounds of individual lots. Lakesites also
placed the lots on the market through brokers. Id.

300 A. 2d 736, 748 (Me., 1973).

Id. n. 2:

1. 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 approxi­
mately 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. section 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 seasonable water table.

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.


270 A. 2d 863, 869 (Me., 1970).

See supra n. 40 and accompanying text.

300 A. 2d 736, 742 (Me., 1973).

Id.

Id.

L.D. 963, 105th Legislature, 1971, sought to exempt "permanent, year-round housing" occupying less than 40 acres from the Site Location Law. L.D. 963 was defeated. 300 A.2d 736, 743 (Me., 1973). L.D. 1061, 105th Legislature, 1971, stated its purpose as:

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. (Statement of Fact accompanying L. D. 1061, 105th Legislature, 1971.)

L.D. 1061 was also defeated. Id.

When an interpretation of a statute by an administrative body has been called to the attention of the legislature, the legislature's failure to act to change the administrative interpretation is evidence of legislative acquiescence in the interpretation. In re Spring Valley Development, 300 A. 2d 736, 743 (Me., 1973). See also Androscoggin Savings Bank v. Campbell, 282 A. 2d 858, 864-5 (Me., 1971); Bur-
rough of Matawan v. Monmouth County Board of Taxation, 51 N.J. 291, 300, 240 A. 2d 8, 13 (1968); 2 Sutherland, STATUTES AND STATUTORY CONSTRUCTION, § 5109 (ed. by Horack).

73L.D. 2045, 105th Legislature, 1st Special Session, 1972, sought to "... make it clear that subdivisions are within the coverage of the law. ..." Statement of Fact, House Amendment "A" to L.D. 2045, 105th Legislature, 1st Special Session, 1972. In floor debate, Rep. Louis J. Marstaller advised that the purpose of the bill was to make it clear that residential subdivisions are within the application of the Site Location Law. Remarks of Louis J. Marstaller, LEGISLATIVE RECORD—HOUSE, 105th Legislature, 1st Special Session, 1972, at 798. L.D. 2045 was enacted as Pub. L. 1973, c. 613, §§ 2 and 3. See supra n. 42, 43 and accompanying text.

76300 A. 2d 736, 745 (Me., 1973). The court relied on the language of the Site Location Law's statement of purpose:

... such developments will be located in such a manner which will have minimal adverse impact on the natural environment of their surroundings. (emphasis by court)


77Vermont has a similar provision. 10 V.S.A. §§ 6081 - 6091 (Supp. 1972). See also 42 U.S.C. § 4332 (C) (Impact Statement requirement of National Environmental Policy Act); Calvert Cliffs Coordinating Committee v. U.S. Atomic Energy Commission, 449 F.2d 1109, 1118, 1128 (D.C. Cir. 1971), holding that under NEPA, environmental issues should be considered at every important stage in the decision-making process. But see 38 M.R.S.A. § 485 (Supp. 1973) which would require a non-approved developer to return the land as much as possible to its prior condition.

7843 C.J.S., "Injunctions," § 34 at 467:

An injunction will not be issued restraining defendant from taking certain action unless he is himself the person attempting to take such action. ... .


80Id. at 746.

81But see Sherbert v. Verner, 374 U.S. 398 (1963). Where an exercise of the police power impinges on a First Amendment right, the burden is on the state to show a "compelling state interest" sufficient to outweigh the infringement.

82Prudential Insurance Co. of America v. Insurance Commissioner, 293 A. 2d 529 (Me., 1972); York Harbor Village Corporation v. Libby, 126 Me. 537, 140 A. 382 (1928).

83300 A. 2d 736, 746 (Me., 1973).

84Id. cases cited at 746-8. See also Ace Tire Co., Inc. v. Municipal

9300 A. 2d 736, 748 (Me., 1973).


7300 A. 2d 736, 749 (Me., 1973).


8Id. See also Warren v. Parkhurst, 45 Misc. 466, 92 N.Y.S. 725 (1904).


300 A. 2d 736, 749 (Me., 1973).

8Lakesites had refused to present evidence or cross-examine witnesses before the Environmental Improvement Commission. 300 A. 2d 736, 740 (Me., 1973). Because Lakesites had failed to introduce evidence as to the valuation of its property or evidence as to the effect of regulation on that valuation, the court lacked the necessary elements to allow it to engage in a traditional Pennsylvania Coal type of balancing test, and hence disposed of Lakesites' claim summarily.

9300 A. 2d 736, 749 (Me., 1973).


8Salamar Builders Corp. v. Tuttle, 29 N.Y. 2d 221, 225, 275 N.E.2d 585, 588 (1971).

8Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962) (dicta); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 415
(1922). But see Hadacheck v. Sebastian, 239 U.S. 394 (1915), where a diminution in value from $800,000 to $60,000 was upheld.


38 M.R.S.A. § 487 (Supp. 1973) provides that appeals from a decision of the Environmental Improvement Commission are made directly to the Supreme Judicial Court. Procedures before the Supreme Judicial Court are not de novo and review is limited to the application, the hearing record and the Commission’s order. The Commission’s order is to be sustained if supported by substantial evidence.


Id. at 894.

Id. at 900.

56 Wisc. 2d 7, 201 N.W. 2d 761 (1972). (Hereinafter cited as Just.)

56 Wisc. 2d 7, 10, 201 N.W. 2d 761, 765 (1972).

56 Wisc. 2d 7, 23, 201 N.W. 2d 761, 771 (1972).


Walter, supra n. 32, at 337.

See supra n. 5(1), 48.

See also Walter, supra n. 32, at 338.

300 A. 2d 736, 750 (Me., 1973).


... 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.

Id. at 751.
The proposed development will not adversely affect property values in the municipality or in adjoining municipalities. The court found the property value section to be severable and one that did not effect the constitutionality of the remainder of the statute. During the pendency of the Spring Valley case, the Legislature amended the Site Location Law eliminating the condition as to property value. Pub. L. 1971, Special Session 1972, c. 613, § 5; 300 A. 2d 736, 751 n. 12 (Me., 1973).

111 300 A. 2d 736, 752 (Me., 1973).


112 Id. at 863, 868 (Me., 1970).

“Piecemeal” or “Spot Zoning” is “... a provision in a zoning plan or a modification in such plan, which affects only the use of a particular piece of property or a small group of adjoining properties and is not related to the general plan for the community as a whole.” Winslow v. Zoning Board of City of Stamford, 143 Conn. 381, 389, 122 A. 2d 789, 793-4 (1956).

113 300 A. 2d 736, 753 (Me., 1973). (emphasis added)

114 Id. at 755.

115 Id. at 748.

116 See supra n. 101 - 108 and accompanying text.

117 265 A. 2d 711, 716 (Me., 1970).

118 Wilkes, supra n. 12, at 161.


121 See supra n. 91 and accompanying text.

122 Compare supra n. 78 and n. 89. See Wilkes, supra n. 12, at 159. “The right to sue for damages when the quality of a man’s homestead, work place, or life style is ruined is inadequate. A court of justice cannot legitimately say that compensation for loss of environments is the only remedy it can give.” Id. at 160.

123 In administering the Site Location Law prior to June 21, 1971 the Environmental Improvement Commission had processed 102 applications and 61% of these had involved subdivisions. Remarks of Rep. Marion Fuller Brown, LEGISLATIVE RECORD—HOUSE, 105th