

January 1992

Taking It Too Far: Growth Management and the Limits to Land-Use Regulation In Maine

Michael A. Duddy
University of Maine School of Law

Follow this and additional works at: <https://digitalcommons.mainerlaw.maine.edu/mlr>



Part of the [Constitutional Law Commons](#), [Land Use Law Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

Michael A. Duddy, *Taking It Too Far: Growth Management and the Limits to Land-Use Regulation In Maine*, 44 Me. L. Rev. 99 (1992).

Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol44/iss1/5>

This Comment is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

TAKING IT TOO FAR: GROWTH MANAGEMENT AND THE LIMITS TO LAND-USE REGULATION IN MAINE

I.	INTRODUCTION	99
	A. <i>An Overview of Taking Law in Maine</i>	101
	B. <i>Taking Law and the Growth Management Act</i>	103
II.	TRACING THE DEVELOPMENT OF A STANDARD	107
	A. <i>The Early Cases</i>	107
	B. <i>State v. Johnson: The Court Finds a Taking</i>	109
	C. <i>Seven Islands Land Co.: The Court Articulates the Current Standard</i>	114
III.	IMPORTANT CONSIDERATIONS IN APPLYING THE TAKING STANDARD	118
	A. <i>Controlling or Supporting Factors</i>	119
	B. <i>Subsidiary Considerations</i>	124
	C. <i>The Role of Physical Invasion</i>	127
IV.	LOCATING THE LIMITS TO UNCONSTITUTIONAL TAKINGS	131
V.	CONCLUSION	133
	A. <i>Constraints on Growth Management</i>	133
	B. <i>Modeling the Future of an Imaginary Maine Town</i>	135

I. INTRODUCTION

In 1989 Maine enacted the Comprehensive Planning and Land Use Regulation Act.¹ The Act's legislative findings declared that "[t]he State has a vital interest in ensuring that a comprehensive system of land-use planning and growth management is established as quickly as possible."² However, whenever the state exercises its police power to regulate private land use, it faces a constitutional limit as to how far it can go.³ When the land-use restriction exceeds

1. ME. REV. STAT. ANN. tit. 30-A, § 4311 (West Supp. 1990-1991), amended by P.L. 1991, ch. 622 (effective Dec. 23, 1991).

2. § 4312(1) (H).

3. This Comment addresses resolution of the taking question under the Maine Constitution only. The taking clause provides that: "Private property shall not be taken for public uses without just compensation." ME. CONST. art. I, § 21. The equivalent language in the United States Constitution is located in the Fifth Amendment: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. This provision applies to the states through the Fourteenth Amendment. See *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897). However, "[t]hough 'taking' arguments and analysis implicate provisions of the United States Constitution, it should be noted that every state constitution has express or implied provisions that parallel the federal language. Thus, the 'taking argument' may be raised in each state as a matter of state law." ORLANDO E. DELOGU.

that limit, a regulatory taking occurs. The Maine Supreme Judicial Court, sitting as the Law Court, has written:

Both the United States and the Maine Constitutions prohibit the government from taking private property for public purposes without just compensation. The traditional statement of the rule applicable to the constitutionality of "taking" was formulated by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."⁴

This Comment argues that the Comprehensive Planning and Land Use Regulation Act, as it is being interpreted and implemented by state and local officials across the state, encourages growth management regulation that goes too far. When regulation under the Act is applied too aggressively, it violates the Taking Clause of the Maine Constitution.⁵

This argument is based upon the premise that there exists in Maine law a standard for determining when a regulatory taking occurs. The problem, however, is that taking decisions by the Law Court have been fact-specific and seemingly unrelated.⁶ All but one of Maine's taking cases have involved an as-applied challenge to the land-use restriction rather than a facial challenge to the statute.⁷

MAINE LAND USE CONTROL LAW CASES, NOTES, COMMENTS (forthcoming 1992) (manuscript at 96, on file with author).

4. *Seven Islands Land Co. v. Maine Land Use Regulation Comm'n*, 450 A.2d 475, 482 (Me. 1982) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)) (citation omitted).

5. Aggressive regulation under the Act also prompts angry reaction from private landowners. Three years after the Act's passage, it has become apparent that comprehensive land-use plans formulated pursuant to the Act are meeting "stiff local opposition." Christine Kukka, *Comprehensive land use plans face tough sledding*, MAINE TIMES, week beginning Oct. 25, 1991, at 19, 21. For instance, ten of fifty-six towns that prepared comprehensive plans have had them rejected by voters. *Id.* at 19. In several of those towns, citizens rejected the plans because officials attempted to establish large-lot zoning schemes in certain areas of the towns. *Id.* at 19, 21. This Comment contends that landowners who oppose the more extreme of such plans may find strong legal support in the Maine Constitution's taking clause. *See infra* part V.

6. *See State v. Johnson*, 265 A.2d 711, 715 (Me. 1970) ("The determination of unconstitutional deprivation is difficult and judicial decisions are diverse.").

7. In *Bell v. Town of Wells*, 557 A.2d 168 (1989), the Public Trust in Intertidal Land Act, ME. REV. STAT. ANN. tit. 12, §§ 571-573 (West Supp. 1990-1991), was declared facially unconstitutional. Addressing the importance of the difference between as-applied and facial challenges to land-use regulation, the United States Supreme Court has written: "The posture of the case is critical because we have recognized an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987). The difference is that as-applied challenges "must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264,

Consequently, "the principal focus of the Law Court in 'taking' cases has become a factual inquiry" into the unique facts of each case.⁸ Because of this ad hoc approach, it is difficult "to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."⁹ This does not mean, however, that one is precluded from deriving a general rule regarding the taking issue in Maine.¹⁰ This Comment will demonstrate that upon comprehensive examination, a coherent test for resolving the taking question emerges from the Maine case law.

The discussion proceeds in the following manner. The remainder of this section gives a brief overview of the taking issue in Maine, and then discusses how the Comprehensive Planning and Land Use Regulation Act implicates taking law. Section II traces the standard that the Law Court has developed to resolve taking challenges to land-use regulations. Section III identifies the major factors in Maine case law important in applying the Law Court's taking standard. Section IV summarizes where the taking cases suggest the limit to government land-use regulation currently exists in Maine. Since a thorough review of the taking issue in Maine has not previously been presented, a significant portion of this Comment is devoted to Sections II-IV. Finally, the conclusion demonstrates how growth management regulation, aggressively applied, exceeds constitutional limits.

A. *An Overview of Taking Law in Maine*

During the course of over 150 years of adjudicating taking challenges,¹¹ the Law Court has been consistently public interest oriented.¹² The court has rarely viewed the arguments of private land-

295 (1981). "The test to be applied in considering [a] facial challenge is fairly straightforward." *Id.* It is whether the "mere enactment" of the ordinance "constitutes a taking." *Agin v. City of Tiburon*, 447 U.S. 255, 260 (1980).

8. *Seven Islands Land Co. v. Maine Land Use Regulation Comm'n*, 450 A.2d at 482.

9. *Hodel v. Virginia Surface Mining Reclamation Ass'n*, 452 U.S. at 295, *quoted in Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. at 495.

10. *See, e.g., DELOGU, supra note 3, manuscript at 96-97:*

In any one state when a regulatory measure is questioned on "taking" grounds, the large number of cases in existence (given that all 50 states generate such cases) usually allows each side . . . involved in the dispute to find support somewhere in the case law for their position. The question then is not, can a litigating party find state case law support for his "taking" position? They usually can. The real question is—is that support the general rule (or a minority position) . . . ?

11. The Law Court's treatment of the taking issue began with *Wadleigh v. Gilman*, 12 Me. 403 (1835). *See infra* text accompanying notes 48-51.

12. "Some states are more developer, private property oriented. Other states are

owners favorably. On only three occasions has the Law Court found that enactment or application of a land-use statute constituted a regulatory taking.¹³ In two of those cases, however, the challenged regulation entailed some physical invasion of the landowner's property, a situation in which the court is more likely to find a taking regardless of the court's general orientation.¹⁴ Nonetheless, the conclusion that the Law Court is predominantly public interest oriented must be tempered by an awareness that throughout the court's history there have been relatively few taking cases. Most taking challenges have been incidental to the case in chief, and many taking claims have been held deficient merely due to lack of evidence.

The Law Court has only periodically drawn upon United States Supreme Court treatment of the taking question in formulating its own test of a taking under the Maine Constitution. In *State v. Johnson*,¹⁵ the court referred to the "guiding principle" of diminution of value introduced by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*.¹⁶ In *Seven Islands Land Co. v. Maine Land Use Regulation Commission*,¹⁷ the court incorporated into its analysis Supreme Court cases.¹⁸ However, few of the Law Court's taking decisions since *Seven Islands* have incorporated important United States Supreme Court cases handed down since 1986.¹⁹ Consequently, while the Law Court has occasionally followed the lead of

consistently more protective of public interests broadly defined. A third group of states have attempted to stake out a middle ground. And, at any point in time, there are states that are in transition." DELOGU, *supra* note 3, manuscript at 96.

13. The cases are: *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989); *Brown v. Warchalowski*, 471 A.2d 1026 (Me. 1984); and *State v. Johnson*, 265 A.2d 711 (Me. 1970).

14. The cases are: *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989) and *Brown v. Warchalowski*, 471 A.2d 1026 (Me. 1984). See *infra* text accompanying notes 189-206.

15. 265 A.2d at 715.

16. 260 U.S. 393 (1922). The "guiding principle" states that a major factor in determining the limits to the government's exercise of police power is the "extent of the diminution" of values incident to property. "When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act." *Id.* at 413.

17. 450 A.2d 475 (Me. 1982).

18. See generally DELOGU, *supra* note 3, manuscript at 137 ("On the critical 'taking' issue, the most interesting aspect of the Law Court's reasoning is its ready adoption of modern U.S. Supreme Court cases . . .").

19. These include: *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) [hereinafter *First Lutheran Church*]; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). Indeed, one observer has argued that the Law Court, in *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989), incorrectly applied *Nollan*, and neglected to draw upon even less recent precedent—*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Pruneyard Shopping Ctr. v. Robins*, 477 U.S. 74 (1980); and *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). See Alison Rieser, *Public Trust, Public Use, and Just Compensation*, 42 ME. L. REV. 5, 11-14 (1990).

the United States Supreme Court, the standard that the Law Court has developed under Maine's taking clause has evolved substantially independently of the federal standard. Furthermore, whereas the United States Supreme Court may recently have signalled a more property oriented shift in its thinking on the taking issue,²⁰ the Law Court has not yet indicated whether it will follow this shift.

B. *Taking Law and the Growth Management Act*

Since the inception of widespread environmental awareness in the sixties and early seventies, Maine has enacted a series of state and local land-use regulations designed to protect the state's natural re-

20. The United States Supreme Court held for private property interests in two of its last three taking cases. In *First Lutheran Church*, which held that the Fifth Amendment requires compensation for temporary regulatory takings, the Court wrote:

We realize that . . . our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 416.

First Lutheran Church, 482 U.S. at 321-22.

In *Nollan v. California Coastal Comm'n*, the Court held that imposing a public easement permit condition on a building restriction resulted in a taking because there was a lack of nexus between the condition and the original purpose of the restriction. See *Nollan v. California Coastal Comm'n*, 483 U.S. at 837. The Court emphasized its emerging philosophy: "We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." *Id.* at 841.

In contrast, the Court in *Keystone Bituminous Coal Ass'n v. DeBenedictis* held that a state law regulating the extent of coal mining in order to prevent subsidence damage did not on its face constitute a taking without just compensation. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. at 501-02.

The Court, however, may now be preparing to distance itself from the *Keystone* decision. Recently the Court granted a writ of certiorari to review the taking question in a shorelands case from South Carolina. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991), cert. granted, 60 U.S.L.W. 3374 (U.S. Nov. 19, 1991) (No. 91-453). In *Lucas*, the petitioner was precluded from building on his beachfront property due to development restrictions imposed by a state statute. The state Court of Common Pleas held that the statute worked a regulatory taking, and awarded petitioner \$1,232,387.50 as just compensation. *Id.* at 895-96.

The Supreme Court of South Carolina, however, following *Keystone*, found that a taking had not occurred and reversed. The court characterized the petitioner's position as that of the dissent in *Keystone*. *Id.* at 896. As a result, how the United States Supreme Court decides *Lucas* will indicate whether the property-oriented shift signalled in *First Lutheran Church* and *Nollan* is an anomaly, or is now the prevailing view.

sources. Most of these private land-use restrictions have withstood taking challenges.²¹ Nonetheless, the Maine Legislature found that during the last decade "[t]he pace of land speculation and development [had] accelerated and outstripped the capacity of the State and municipalities to manage this growth under existing state and local laws."²² In response, the Legislature enacted the Comprehensive Planning and Land Use Regulation Act (hereinafter the Growth Management Act) in 1989.²³ The Act's first goal is "[t]o encourage orderly growth and development in appropriate areas of each community, while protecting the State's rural character, making efficient use of public services and preventing development sprawl."²⁴

The Growth Management Act provides for a program of municipal inventorying, planning, and zoning.²⁵ It neither preempts earlier state land-use legislation, nor introduces any new regulatory techniques. Instead, the Act sets up a planning process through which existing state and local land-use regulation can be incorporated into a town's growth management strategy.²⁶ However, the Growth Management Act differs from previous land-use regulation in its scope, involvement, and objectives. The Act has the potential to affect nearly every private landowner statewide.²⁷ The Act encourages

21. For example, the "as-applied" constitutionality of the Site Location of Development Act has been upheld. *See infra* text accompanying notes 81-91. Land Use Regulatory Commission deeryard zoning has also been upheld. *See infra* text accompanying notes 92-105. Application of Maine's Sand Dune Law has been upheld as well. *See infra* text accompanying notes 119-24.

22. ME. REV. STAT. ANN. tit. 30-A, § 4312(1)(C) (West Supp. 1990-1991).

23. § 4311.

24. § 4312(3) (A).

25. From passage of the Act until the close of 1991, the provisions of the Growth Management Act were mandates to be implemented by all municipalities. However, as part of an overall strategy to resolve the state's budget crisis, Maine's 115th Legislature amended the Act to make its provisions optional. P.L. 1991, ch. 622, §§ F-23, F-28, F-29 (effective Dec. 23, 1991). Municipalities now have the option of preparing a local growth management program with a comprehensive plan designating growth and rural areas. While the recent action by the Legislature reduces regulatory pressure from the state, the provisions of the Act can still be implemented aggressively by municipalities exercising their option. Thus, if a municipality chooses to implement a local growth management program in accordance with the Act's guidance, the thesis of this Comment is still valid.

26. "At a minimum, local ordinances must be consistent with The Natural Resources Protection Act [ME. REV. STAT. ANN. tit. 38, § 480-A to 480-T (West 1989 & Supp. 1990-1991)], The Endangered Species Act [ME. REV. STAT. ANN. tit. 12, § 7751-7758 (West 1989 & Supp. 1990-1991)], and The Mandatory Shoreland Zoning Act [ME. REV. STAT. ANN. tit. 38, § 435]." OFFICE OF COMPREHENSIVE PLANNING, MAINE DEPARTMENT OF ECONOMIC AND COMMUNITY DEVELOPMENT, GUIDELINES FOR THE COMPREHENSIVE PLANNING AND LAND USE REGULATION ACT 49 (1988) [hereinafter GUIDELINES].

27. "The Act requires each municipality in the state, except those municipalities within the jurisdiction of the Maine Land Use Regulation Commission, to develop a local growth management program . . ." *Id.* at 1. Note, however, that the provisions

greater citizen and government participation than other land-use regulations.²⁸ The Act focuses not only on preventing environmental damage, but also on protecting the state's rural character by preserving open space and access to outdoor recreation areas. Consequently, the Act allows more comprehensive regulation of private land use than earlier restrictions. For this reason, the potential for government to go beyond its constitutional restraints becomes greater. Thus, the taking question assumes increased importance.

In general, the Act allows each municipality to adopt a comprehensive plan and an implementation program.²⁹ However, "[d]esignation of growth and rural areas is the heart of the planning process."³⁰ Specifically, the Act allows "municipalities [to] designate at least two geographic areas—growth and rural areas—and develop specific implementation strategies for guiding growth in these areas."³¹ Growth areas are the areas where a municipality will direct its commercial, residential, and industrial growth over the next ten years.³² By definition, they present no taking difficulties. "Rural areas are those areas intended for resource production and other allied land use as well as the long-term protection of significant areas with natural, cultural, scenic, or recreational values."³³ By definition, rural-area zoning raises the taking question.

The avowed purpose of applying land-use restrictions to rural areas is to "discourage growth, particularly development that is incompatible with rural resources."³⁴ Emphasis is placed not only on protecting critical environmental areas from degradation, but on maintaining the "rural landscapes which are important to the character of the municipality."³⁵ Consequently, rural areas should include: agricultural and forest lands important to the local or regional economy; rural landscapes and other scenic open-space areas; land areas consisting of large contiguous open space, farmland, or forestland, or land areas in which the predominant pattern of development consists of homes interspersed among large open spaces, or land areas containing other rural resources that significantly con-

of the Act have recently been made optional. *See supra* note 25 and accompanying text.

28. One of the legislative purposes of the Act is to provide for state, regional, local, and citizen participation. *See* title 30-A, § 4312(2).

29. § 4326.

30. Josie Quintrell, *Growth and Rural Areas: What It Means for Your Town*, MAINE TOWNSMAN, March 1990, at 6.

31. GUIDELINES, *supra* note 26, at 42.

32. § 4326(3) (A) (1).

33. Quintrell, *supra* note 30, at 6.

34. *Id.* at 7. The GUIDELINES state: "Development inconsistent with the value and character of the rural [zone] should be discouraged." GUIDELINES, *supra* note 26, at 45.

35. GUIDELINES, *supra* note 26, at 44.

tribute to the municipality's rural character; and, land areas in which the municipality can ensure that the level and type of development will be compatible with maintenance of rural character and will not constitute or encourage development sprawl or strip development along roads.³⁶

As will be shown in subsequent sections of this Comment, the rural-zone designation implicates taking law in several ways. First, to the extent that private landowners in rural areas are permitted to pursue economically feasible natural-resource based development, there should be no question that the rural-area designation does not constitute a taking. The Law Court has clearly indicated that private landowners have no right to insist upon pursuing the development plan of their choice.³⁷ As long as the restriction leaves them some beneficial uses, no taking will occur.³⁸ However, local planners should be concerned that the forestry or agricultural potential of the land represents an opportunity for more than token development. The rural-zone designation must leave the private landowners with uses that represent significant, real, and immediate economic value.³⁹

Second, planners should be cautious not to preclude all economic uses of privately-owned open space in rural areas. The official *Guidelines for the Comprehensive Planning and Land Use Regulation Act*,⁴⁰ promulgated by the Department of Economic and Community Development to assist local planners in their management of rural areas, tend to mislead planners in the constitutional scope of their ability to restrict private land uses in the rural areas. This Comment will show that the advice in the GUIDELINES is so excessive that, if it had the force of law, it would constitute a taking on its face with no need for "as applied" arguments.⁴¹

Third, maintenance of rural character may be a legitimate objective for exercising police power,⁴² but it presents difficulties from a

36. Quintrell, *supra* note 30, at 7.

37. See, e.g., *In re Spring Valley Dev.*, 300 A.2d 736, 749 (Me. 1973) ("Appellant's land cannot be sold for residential purposes while subdivided to the extent and in the manner Lakesites originally planned.").

38. See *Hall v. Board of Env'tl. Protection*, 528 A.2d 453, 454 (Me. 1987).

39. See, e.g., *id.* at 456. In *Hall*, despite the denial of the building permit, the Halls' property still had "beneficial and valuable uses" and adjacent property with similar seasonal use had sold for "substantial sums." See *infra* text accompanying notes 119-24.

40. GUIDELINES, *supra* note 26.

41. See *infra* text accompanying notes 216-18.

42. It seems analogous to regulations designed to protect aesthetic values, which the United States Supreme Court approved in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), and which the Law Court has approved in *Stewart v. Inhabitants of Durham*, 451 A.2d 308 (Me. 1982). Nonetheless, the point is not without skeptics. In one handbook for local planners prepared prior to the Growth Management Act, the legal notes to the section on townwide zoning contend that courts will

taking perspective. Land-use restrictions that seek to protect sensitive environmental areas, such as sand dunes or wetlands, usually withstand taking challenges because they are in the nature of nuisance control measures. It is more difficult to portray as laws protecting the public from harm such land-use restrictions as those designed to preserve settings where the "predominant pattern of development consists of homes interspersed among large open spaces."⁴³ Rather, such restrictions seem more like laws designed to appropriate private land for public benefit. Consequently, the Law Court may be more willing to hold that regulations designed to maintain rural character, especially where degradation of sensitive natural resources is not at issue, constitute uncompensated takings.⁴⁴

Fourth, the growth management program attempts to provide public access to outdoor recreational areas such as surface waters and shorelines.⁴⁵ Where rural-area zoning is used to reach that objective, planners must clearly understand that such access must be accomplished through acquisition programs or voluntary actions.⁴⁶ Any attempt to impose a public easement on private land will likely be viewed as an unconstitutional taking under the doctrine elaborated in *Bell v. Town of Wells (Bell II)*.⁴⁷ Similarly, any attempt to regulate private land so as to provide public facilities will also likely be viewed as a taking.

Having thus set forth some of the problems raised by implementation of the Growth Management Act, the following three sections develop the current status of regulatory takings in Maine.

II. TRACING THE DEVELOPMENT OF A STANDARD

A. *The Early Cases*

In 1834 the newly incorporated city of Bangor, Maine enacted a zoning-type ordinance which declared that "[e]rections of wooden buildings, within the limits prescribed, are declared unlawful"⁴⁸ Chief Justice Weston, in *Wadleigh v. Gilman*,⁴⁹ compli-

be suspicious about the argument that things must be left as they are. PATRICIA SOLOTAIRE & STERLING DOW, III, *MANAGING RESIDENTIAL GROWTH: HOW YOUR TOWN CAN DO IT* 19 (1979) [hereinafter SOLOTAIRE & DOW].

43. Quintrell, *supra* note 30, at 7.

44. *See infra* text accompanying notes 147-63.

45. GUIDELINES, *supra* note 26, at 40-41.

46. *See, e.g.*, Jo Josephson, *Purchasing Public Land*, 52 MAINE TOWNSMAN 5 (1990) (describing recent state and municipal initiatives for purchasing public land).

47. 557 A.2d 168 (Me. 1989) [hereinafter *Bell II*]. *See infra* notes 189-198 and accompanying text. The first decision, *Bell v. Town of Wells*, 510 A.2d 509 (Me. 1986), is commonly referred to as *Bell I*. It addressed issues not pertinent to this Comment.

48. *Wadleigh v. Gilman*, 12 Me. 403, 404 (1835).

49. 12 Me. 403 (1835).

mented the city planners for their action. "It is an object, in the highest degree worthy of the attention of the city authorities, to take such measures . . . to lessen the hazard and danger of fire. No city, compactly built, can be said to be well ordered or well regulated, which neglects precautions of this sort."⁵⁰ Nonetheless, certain owners of lots within the protection zone, who were precluded from moving wooden buildings onto those lots, challenged the constitutionality of the—in their view—meddlesome law. The court upheld the city's action. "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 merely regulates its enjoyment."⁵¹ Thus, the Law Court established its earliest precedent on the taking question in land-use law.

The Law Court's early focus on the regulatory taking question treated it as akin to the right of eminent domain. In determining whether a taking had occurred, the court emphasized the need to evaluate the regulation's impact on the landowner's title. In *Cushman v. Smith*,⁵² the court interpreted the word "taken" in the Taking Clause of the Maine Constitution in the following manner: "To take the real estate of an individual for public use, is to deprive him of his title to it, or of some part of his title, so that the entire dominion over it no longer remains with him. He can no longer convey the entire title and dominion."⁵³ If the title to private property was not affected by a regulation, no taking had occurred.

In *Cushman*, the controversy primarily involved the question of just compensation. Nonetheless, the court attempted to articulate the full scope of the taking clause. "The provision was not designed, and it cannot operate to prevent legislation, which should authorize acts, operating directly and injuriously, as well as indirectly upon private property, when no attempt is made to appropriate it to public use."⁵⁴ The court concluded: "It was designed . . . to prevent the owner of real estate from being deprived of it, or of an easement in it, and to prevent any permanent change of its character and use without compensation."⁵⁵ Thus, absent some impact on the property's title, mere regulation of private land use did not constitute a taking for constitutional purposes.

In an *Opinion of the Justices*,⁵⁶ the Maine Supreme Judicial

50. *Id.*

51. *Id.* at 405.

52. 34 Me. 247 (1852).

53. *Id.* at 260.

54. *Id.* at 258.

55. *Id.*

56. 103 Me. 506 (1907). The actual title of this document as published in the reporter is "Questions and Answers." However, the title "Opinion of the Justices" more aptly describes the document as an advisory opinion.

Court approved of "this strict construction of the constitutional provision to property in land."⁵⁷ The justices were asked by the Maine Senate⁵⁸ to give their opinion on whether regulating the cutting of trees on privately owned land, without paying compensation, would result in an unconstitutional taking.⁵⁹ The justices replied:

While [the regulation] might restrict the owner of wild and uncultivated lands in his use of them, might delay his taking some of the product, might defer his anticipated profits, and even thereby might cause him some loss of profit, it would nevertheless leave him his lands, their product and increase, untouched, and without *diminution of title, estate or quantity*. He would still have large measure of control and large opportunity to realize values. He might suffer delay but not deprivation. While the use might be restricted, it would not be appropriated or "taken."⁶⁰

This strict test of the Taking Clause, which in practice tended to support most land-use regulation, prevailed unchallenged for many years. In 1957 the Law Court was still relying on this test to resolve the taking issue in *State v. McKinnon*.⁶¹ In *McKinnon*, the Legislature had enacted a bill that created a new state game preserve and prohibited any person from hunting or possessing firearms within the preserve limits.⁶² Two hundred and five acres of McKinnon's 285-acre tract were located within the boundaries of the game preserve. When McKinnon was arrested for hunting on his own land, but within the perimeter of the preserve, he challenged the constitutionality of the statute. The Law Court held that the establishment of the game preserve did not create a public easement. Consequently, the court upheld the Legislature's action because "[t]he law authorizing the State to establish game preserves on the property of a private owner does not take from him any title, dominion of ownership or essential use."⁶³

B. *State v. Johnson: The Court Finds a Taking*

1. *Casting the Issue*

*State v. Johnson*⁶⁴ represented a turning point in the Law Court's analysis of the taking issue. For the first time the court, in a unani-

57. *Id.* at 511.

58. The Maine Constitution provides that "[t]he Justices of the Supreme Judicial Court shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, required by the Governor, Senate or House of Representatives." ME. CONST. art. VI, § 3. When the justices do so, they are referred to as the Supreme Judicial Court rather than as the Law Court.

59. Opinion of the Justices, 103 Me. at 507-08.

60. *Id.* at 512 (emphasis added).

61. 133 A.2d 885 (Me. 1957).

62. *Id.* at 886.

63. *Id.* at 887.

64. 265 A.2d 711 (Me. 1970).

mous decision, conceptualized a taking as other than an unreasonable exercise of police power,⁶⁵ or as an actual transfer to the public of "title, dominion of ownership or essential use."⁶⁶ *Johnson* is also the only Maine case to date where the court, absent some form of physical impact,⁶⁷ held that the operation of a state law as applied to the use of a specific parcel of private property constituted a taking without compensation. Thus, *Johnson* is the seminal taking case in any examination of Maine precedent bearing on the rural-area zoning issue.

Johnson dealt with the operation of the original Wetlands Act⁶⁸ as applied to use of the appellants' tract of coastal marshland. The Act was "a conservation measure under the police power of the State to protect the ecology of areas bordering coastal waters."⁶⁹ It placed restrictions upon the alteration and use of wetlands without permission from pertinent municipal and state officials. The Johnsons' property consisted of a 220 x 700 ft. tract extending across an expanse of saltwater marshes. The easterly third of the tract, prior to passage of the Wetlands Act, had been filled and subsequently developed with seasonal dwellings. The westerly portion, which was the subject of the case, remained a tidal wetland⁷⁰ suitable for development only "by raising the grade above high water by the addition of fill"⁷¹

Following the effective date of the Act, the Johnsons applied for and were denied permission to fill a portion of their land. They subsequently deposited fill on the land,⁷² as a result of which the State sought and was granted an injunction under the Act in Superior Court. The Johnsons appealed, claiming that the denial of the permit and the granting of the injunction "so limit the use to plaintiffs of their land that such deprivation of use amounts to a taking of their property without constitutional due process and just compensation."⁷³ The court stated the controversy in larger terms: "Be-

65. See Opinion of the Justices, 103 Me. 506 (1907).

66. See *State v. McKinnon*, 133 A.2d 885, 887 (Me. 1957).

67. See *infra* text accompanying notes 188-212.

68. ME. REV. STAT. ANN. tit. 12, §§ 4701-4709, repealed by 1975 Me. Laws ch. 595, § 1 (current versions at ME. REV. STAT. ANN. tit. 38, §§ 480-C to 480-F, and 480-R (West 1989 & Supp. 1990-1991)).

69. *State v. Johnson*, 265 A.2d at 713.

70. The court described the property as a "marsh-land flooded at high tide and drained, upon receding tide, into the [Webhannet] River by a network of what our Maine historical novelist Kenneth E. Roberts called 'eel runs'" *Id.*

71. *Id.*

72. The Johnsons first filed an administrative appeal from the denial of the permit, which was remanded due to a lack of evidence on the nature of the property. The appeal from the injunction corrected this deficiency, and the two cases were consolidated. *Id.* at 713.

73. *State v. Johnson*, 265 A.2d at 714 (footnote omitted). The reference to a due process challenge as synonymous with a taking challenge was based on the language

tween 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 appellants' property rights on the other, the issue is cast."⁷⁴

2. *Holding: No Commercial Value is Equivalent to a Taking*

In searching for a standard to guide its analysis, the Law Court initially seemed content to draw upon the traditional approach developed in its own precedents. "The constitutional aspect of the current problem is to be determined by consideration of the extent to which appellants are deprived of their usual incidents of ownership Our State has applied a strict construction of the constitutional provisions as to land."⁷⁵ However, the Law Court then signalled that it was prepared to move beyond its earlier strict approach. Abandoning the title analysis embodied in *Cushman v. Smith*, the court wrote: "Conditions so burdensome may be imposed that they are equivalent to an outright taking, although the title to the property and some vestiges of its uses remain in the owner."⁷⁶

Having thus set the tone of discussion, the court focused on what it ultimately considered to be the controlling fact of this case. It accepted the lower court's finding that "the area of which appellants' land is a part 'is a valuable natural resource of the State of Maine and plays an important role in the conservation and development of aquatic and marine life, game, birds and waterfowl.'"⁷⁷ Nonetheless, the court found decisive the lower court's finding that "appellants' land absent the addition of fill 'has no commercial value whatever.'"⁷⁸ Consequently, the Law Court reversed the lower

of the Act itself:

§ 4704. Appeal

Appeal may be taken . . . for the purpose of determining whether the action appealed from so restricts the use of the property as to deprive the owner of the reasonable use thereof, and is therefore an unreasonable exercise of police power, or which constitutes the equivalent of a taking without compensation.

Id. at 713 n.1 (emphasis added).

The court stated that § 4704 "by its terms equates a deprivation 'of the reasonable use' of an owner's property with 'an unreasonable exercise of police power.'" *Id.* at 714. Consequently, although the court performs an analysis of the taking question, some of its reasoning is placed in the context of a due process discussion. Normally, however, the due process issue is examined separately from the taking issue. Section 4707 of the Wetlands Act was repealed by P.L. 1975, ch. 595, § 1. The current authority for initiating appeals is codified at ME. REV. STAT. ANN. tit. 38, § 346 (West 1989 & Supp. 1990-1991).

74. *State v. Johnson*, 265 A.2d at 716.

75. *Id.* at 714 (citations omitted).

76. *Id.* at 715 (citation omitted).

77. *Id.* at 716.

78. *Id.* (emphasis added).

court and held for the landowner, stating that "[t]he application of the Wetlands restriction in the terms of the denial of appellants' proposal to fill, and enjoining them from so doing deprives them of the reasonable use of their property and within Section 4704 is . . . equivalent to taking within constitutional considerations."⁷⁹ Thus, the standard proposed by *Johnson* is that where a land-use regulation strips private land of all commercial development value, it constitutes a taking.

3. *State v. Johnson and the Following Decade*

Johnson is significant because it demonstrates that taking considerations should be a real concern to public planners implementing the Growth Management Act's rural-area designation. The Law Court recognized that, even for the best of purposes, the state can go only so far in restricting what a private landowner can do with his land. *Johnson* is less helpful, however, in determining exactly how far the state can go. At most, it stands for the proposition that a taking occurs when government regulation strips private land of all commercial value. That does not mean, however, that a taking can only occur when all commercial value has been eliminated. After *Johnson*, it is still possible for a taking to occur when the state has regulated less intensively than to strip away all commercial value.⁸⁰ Nevertheless, *Johnson* tells us that rural-area regulation must leave a private landowner with viable commercial alternatives to simply walking upon and enjoying his property in an undeveloped condition.

In the decade following *Johnson*, the Law Court had two opportunities to build upon its holding in that case and thereby develop an approach to the taking question more favorable to private interests. As the following discussion indicates, however, the court declined to do so. In two cases challenging the applied constitutionality of the Site Location of Development Law,⁸¹ the court held that the statute was valid because it did not impose an unreasonable burden on private landowners. These "unreasonable burden" cases represent a transitional stage in the development of the court's taking standard. While the test of a taking they developed has not subsequently been followed by the Law Court, the cases are instructive for the insight they provide into what does not constitute a taking.

In *In re Spring Valley Development*,⁸² a developer was in the process of subdividing a 92-acre tract on the shore of Raymond Pond. The developer had received the local planning board's approval for

79. *Id.*

80. See discussion *infra* part IV.

81. ME. REV. STAT. ANN. tit. 38, §§ 481-490 (West 1989 & Supp. 1990-1991) (originally enacted by P.L. 1969, ch. 571, § 2).

82. 300 A.2d 736 (Me. 1973).

the subdivision but had not sought or received approval from the state in accord with the Site Location of Development Law. Consequently, the Environmental Improvement Commission (EIC)⁸³ issued an order denying the developer the right to proceed with the subdivision until it made a proper application to the Commission and received the Commission's approval.⁸⁴

The developer appealed the Commission's action by challenging the constitutionality of the Act's application, primarily on due process and equal protection grounds.⁸⁵ The developer also contended that the application of the Act to its land amounted to a taking without compensation. The court quickly dismissed the taking challenge as without merit. "Nothing in the record indicates that the Act as applied constitutes such an *unreasonable burden* upon the property as would equal an uncompensated taking."⁸⁶ The court cited *Johnson* as the source of this standard. "In fact," the court pointed out, "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."⁸⁷ That did not amount to an unconstitutional taking under the court's newly articulated "unreasonable burden" standard.

The companion case, *In re Maine Clean Fuels, Inc.*,⁸⁸ also involved a constitutional challenge to the application of the Site Location of Development Law. The EIC "denied the application of Maine Clean Fuels, Inc. (MCF), requesting approval of its proposed development of a petroleum refinery on Sears Island."⁸⁹ The developer argued that the EIC order was "so restrictive as to constitute an arbitrary taking."⁹⁰ Following the standard it formulated in *Spring Valley Development*, the court held that:

[u]nlike the situation in *State v. Johnson*, in the record before us there is no evidence relative to the 'extent of the diminution' in value of Sears Island to its owners resulting from the EIC order. Absent a showing that the EIC order resulted in "such an *unreasonable burden* upon the property as would equal an uncompensated taking," MCF's argument is not cognizable by this Court.⁹¹

Thus, in the absence of evidence of unreasonable burden, not even a restriction precluding a development as large as an oil refinery on a

83. P.L. 1971, ch. 618, § 12 substituted Board of Environmental Protection for Environmental Improvement Commission.

84. *In re Spring Valley Dev.*, 300 A.2d at 741.

85. The court upheld the constitutionality of the Act, as applied, on both the due process and equal protection grounds. *Id.* at 751-54.

86. *Id.* at 749 (citations omitted) (emphasis added).

87. *Id.*

88. 310 A.2d 736 (Me. 1973).

89. *Id.* at 739 (footnote omitted).

90. *Id.* at 742.

91. *Id.* at 742-43 (citations and footnotes omitted) (emphasis added).

privately owned island is enough to constitute a taking without compensation.

C. Seven Islands Land Co.: *The Court Articulates the Current Standard*

1. *Rendering the Property Substantially Useless*

In the early eighties the Law Court again updated its treatment of the taking question. In *Seven Islands Land Co. v. Maine Land Use Regulation Commission*⁹² the court incorporated then recent United States Supreme Court thinking on the taking issue into the development of a standard under the Maine Constitution.⁹³ The court wrote that "the principal focus of the courts in 'taking' cases has become a factual inquiry into the substantiality of the diminution in value of the property involved."⁹⁴ The court noted that the United States Supreme Court had recently "required the diminution to be very substantial indeed before a taking will be found."⁹⁵ Thus, the court concluded that "the mere extinguishment of one [property right] does not necessarily amount to a taking . . ."⁹⁶ The decisive question, said the court, is whether "its extinguishment would render the property *substantially useless*."⁹⁷ Notably, the court omitted any reference to *Johnson*.⁹⁸

Seven Islands involved a challenge to the action of the Maine Land Use Regulation Commission (LURC) in granting only a restricted permit for timber harvesting on privately owned woodlands in an unorganized township in Aroostook County.⁹⁹ LURC had placed certain land in the township, known as the Burpee Brook deer yard, into a protected classification. All of the land so zoned was located on private woodlands. "The effect of that zoning, which was designed to protect the deer wintering habitat, was to foreclose

92. 450 A.2d 475 (Me. 1982).

93. In addition to quoting from *Pennsylvania Coal Co. v. Mahon*, the court also borrowed language from *Agins v. Tiburon*, 447 U.S. 255 (1980); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Andrus v. Allard*, 444 U.S. 51 (1979); and *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). *Seven Islands Land Co. v. Maine Land Use Regulation Comm'n*, 450 A.2d at 482.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* (emphasis added) (citation omitted).

98. DELOGU, *supra* note 3, manuscript at 96-97. The fact that the court did not refer to *Johnson* indicates that the standard introduced in *Seven Islands* is, indeed, new. One can infer, therefore, that land can be rendered substantially useless without being stripped of all commercial value.

99. LURC has authorization for land-use regulation in unorganized and deorganized portions of the state. ME. REV. STAT. ANN. tit. 12, §§ 681-689 (West 1981 & Supp. 1990-1991).

timber harvesting . . . except with a permit issued by LURC"¹⁰⁰

One of the plaintiff's primary attacks on LURC's action was a taking challenge. The Law Court stated that "[t]he proper procedure for analyzing taking questions is to determine the value of the property at the time of the governmental restriction and compare that with its value afterwards, to determine whether the diminution, if any, is so substantial as to strip the property of all practical value."¹⁰¹ The first step in this analysis, said the court, is to identify the appropriate parcel of land to examine. "Because the principals . . . own all of the 25,000 acre township in which the Burpee Brook deer yard is situated, the parcel in question is the entire township. Seven Islands proffers no evidence that the value of this parcel has been diminished."¹⁰² Thus, resolution of the taking question became easy—in fact, almost tongue in cheek. "Seven Islands' claim is that denial of permission to cut any trees other than dead or dying fir on 432 acres of a 25,000 acre township and a temporary prohibition on cutting another 118 acres of the same tract renders it substantially useless. This claim must be rejected as a matter of law."¹⁰³

Incidental to its primary analysis, the Law Court pointed out two mistaken premises upon which Seven Islands Land Co. based its attack. First, the court made clear that in determining whether certain land has been rendered substantially useless, all profitable uses of the land must be considered, not merely the desired use. "Seven Islands simply asserts that the value of the land *as timberland* has been destroyed, and hence the value of the land *for any purposes* is zero. Seven Islands bases this claim on the assertion that the only profitable use of the land is timber harvesting."¹⁰⁴ Implicit in this statement is the view that the land potentially had many alternative commercial uses. Thus, by implication, a land-use restriction cannot constitute a taking absent proof that all profitable uses of the land have been precluded.

Second, although the multiple possible uses of a tract of land must be considered, taking analysis should focus on the effect of the regulation at the time the land-use restriction is challenged. "[I]n 'taking' cases there is no place for expectations of future profits except to the extent those expectations are reflected in present market value."¹⁰⁵ Thus, when determining the diminution in value of land after a governmental restriction, an estimate of future profits does

100. Seven Islands Land Co. v. Maine Land Use Regulation Comm'n, 450 A.2d at 478.

101. *Id.* at 482 (citation omitted).

102. *Id.*

103. *Id.* (citation omitted).

104. *Id.* (emphasis in original).

105. *Id.* at 483.

not enter into the calculation.

2. Applying "Substantially Useless" as a Standard

The test formulated in *Seven Islands* marked a significant change in the Law Court's treatment of the taking issue. This test remains the guiding principle for use in Maine courts today.¹⁰⁶ Notwithstanding the continuing vitality of *State v. Johnson*, the Law Court at present looks to *Seven Islands* for functional limitations on land-use regulation. As the following discussion indicates, all taking cases since that decision have applied and developed the "substantially useless" standard.

The first two taking cases to follow *Seven Islands* each involved applications for variances from municipal zoning schemes. Like other forms of land-use restrictions, municipal "[z]oning restrictions can amount to a taking of property even though title and some uses of the property remain with the owner."¹⁰⁷ Indeed, the same standard applies. In *Sibley v. Inhabitants of Wells*,¹⁰⁸ a local zoning board of appeals denied a landowner's application for a sideline setback and a minimum lot size variance to construct a house. In rejecting the taking claim, the Law Court wrote: "No taking exists unless the property has been rendered substantially useless. The Sibleys' land has substantial use and value in conjunction with the adjacent lot. No unconstitutional taking resulted . . ."¹⁰⁹

In *Curtis v. Main*,¹¹⁰ which also involved a variance application, the Law Court again drew directly on its analysis in *Seven Islands*. The court first found that "[g]iven the lots' position between water and road, the lots would be worthless as residential property without

106. Recently, for example, the Superior Court in Kennebec County applied the standard in *Diamond Cove Associates v. Board of Env'tl. Protection*, No. CV-90-18 (Me. Super. Ct., Ken. Cty. 1990). *Diamond Cove Associates* applied for "a permit under the Site Location of Development Law [ME. REV. STAT. ANN. tit. 38, §§ 481-490 (West 1989 & Supp. 1990-1991)] for a 65 lot single family subdivision on 102 acres of land on Great Diamond Island . . ." *Id.* at 1. The lots were the second phase of a larger project which already included renovation of existing structures into 134 condominium units. Total estimated costs for the entire project had reached \$23,000,000. The Board of Environmental Protection denied the permit. In rejecting *Diamond Cove Associates'* taking claim, the court wrote: "To seriously present this claim at this time suggests a view of the law that says in essence that denial of an application which would allow development to maximize profits from the land amounts to a taking. Nowhere is taking law stated so broadly." *Id.* at 17 (citations omitted). Furthermore, the court pointed out that a significant number of the Phase II lots, although not all sixty-five, would eventually receive approval. Consequently, the court held that "[t]he ability to profit from Phase I and to sell some [Phase II] lots after slight reconfiguring hardly renders the land 'substantially useless' which is what petitioner must demonstrate to prove a taking claim." *Id.*

107. *Curtis v. Main*, 482 A.2d 1253, 1258 (Me. 1984) (citations omitted).

108. 462 A.2d 27 (Me. 1983).

109. *Id.* at 31 (citations omitted).

110. 482 A.2d 1253 (Me. 1984).

setback variances."¹¹¹ Nonetheless, the court held:

Although there was no clear evidence of potential nonresidential uses developed below, the plaintiffs did not prove the absence of nonresidential beneficial uses. The burden was on the plaintiffs to prove that the subsequently enacted ordinance and the Board's refusal to grant variances rendered their property substantially useless. Because the plaintiffs failed to meet this burden, we cannot find that the Board unconstitutionally deprived the plaintiffs of their property.¹¹²

Evidentiary problems in one form or another are a common thread in most recent taking cases. In *Maine Land Use Regulation Commission v. White*,¹¹³ LURC had zoned 61 acres of a 102-acre farm as a permanent wildlife habitat protection zone in order to preserve a deer wintering area.¹¹⁴ The court held that LURC's action, which precluded timber harvesting in the zone, was not the equivalent of a taking "on the basis of the Whites' own testimony that the property has not been substantially reduced in value."¹¹⁵

Similarly, in *Molasses Pond Lake Association v. Soil and Water Conservation Commission*,¹¹⁶ "[n]o extended discussion of the issues raised . . . on appeal [was] required."¹¹⁷ The county Soil and Water Conservation Commission issued to the owner of a dam an order setting a lake's maximum water level—a level which the dam controlled. The dam owner objected because specific structural modifications to the dam were required in order for the dam to be capable of meeting the mandated water levels. The court quickly disposed of the taking claim, stating: "as there [was] no evidence establishing that the Association's property was rendered 'substantially useless' by the Commission's order, there has been no unconstitutional taking."¹¹⁸

In *Hall v. Board of Environmental Protection*,¹¹⁹ the court found that no taking had occurred because the landowners failed to present any believable evidence that their property had been rendered substantially useless by restrictive regulation.¹²⁰ The Halls owned an

111. *Id.* at 1257.

112. *Id.* at 1258 (citations omitted).

113. 521 A.2d 710 (Me. 1987).

114. The Whites tried unsuccessfully to distinguish their case from *Seven Islands* on the basis of the larger percentage of acreage affected by the restriction. *Id.* at 713. See *infra* note 136 and accompanying text.

115. *Id.* at 713. The court also noted that the Whites had no basis for a taking claim because "the 'taking', if any, occurred at the time of LURC's permanent zoning decision before the Whites acquired the property." *Id.*

116. 534 A.2d 679 (Me. 1987).

117. *Id.* at 680.

118. *Id.* at 680-81 (citing *Seven Islands Land Co. v. Maine Land Use Regulation Comm'n*, 450 A.2d at 482).

119. 528 A.2d 453 (Me. 1987).

120. *Id.* at 456. This was on the second appeal. The first appeal had been re-

oceanfront cottage which was lost due to storms and rapidly advancing beach erosion. The Halls then began "using their property during the summer months by living in a fully equipped 27-foot motorized camper connected to all utilities."¹²¹ This was standard practice in the area. The court noted "that there was a steady occupancy of seasonal residential units on all sides of the Hall property, including trailer and recreational vehicle sites."¹²² In fact, comparable properties abutting the Halls' land had sold for substantial sums of money. Thus, when the Board of Environmental Protection, under the authority of Maine's Sand Dune Law,¹²³ denied the Halls' application for a sand dune permit to construct a permanent residential structure on the property, the court held that this did not constitute a taking. "It is clear from the preponderance of the believable evidence that *beneficial and valuable uses of their property remain* available to the Halls despite the denial of a building permit by the BEP. Accordingly, we hold that there has been no taking of the Hall property"¹²⁴

The land-use restriction imposed on the Halls' property severely restricted the ways in which it could be developed. Nearly all development options were precluded. However, the property was not rendered substantially useless because the limited use that did remain had significant commercial value. Thus, *Hall* demonstrates that land-use regulation can dramatically restrict range of use without constituting an illegal taking, provided that the beneficial use that does remain has real value.

III. IMPORTANT CONSIDERATIONS IN APPLYING THE TAKING STANDARD

Simply tracing the development of a unifying standard in Maine taking cases will not yield a complete understanding of the issue. Seldom will a narrow application of the standard be sufficient to predict or encompass the Law Court's reasoning. For example, the United States Supreme Court has recognized that its decisions upholding land-use regulations, which are reasonably related to a valid state objective "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking'. . . ."¹²⁵

manded to address the taking issue. The court there wrote: "[T]he Plaintiffs assert that without approval of their application for a sand dune permit, the property is rendered substantially useless. That is sufficient to state a claim" *Hall v. Board of Env'tl. Protection*, 498 A.2d 260, 267 (Me. 1985).

121. *Hall v. Board of Env'tl. Protection*, 528 A.2d at 455.

122. *Id.* at 456.

123. ME. REV. STAT. ANN. tit. 38, §§ 471-478 (1964), *repealed* by P.L. 1977, ch. 300, § 29 and P.L. 1987, ch. 809, § 1 (current version at ME. REV. STAT. ANN. tit. 38, §§ 480-C to 480-F, 480-Q, 480-R (West 1989 & Supp. 1990-1991)).

124. *Hall v. Board of Env'tl. Protection*, 528 A.2d at 456 (emphasis added).

125. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978) (citing

While the Law Court has not expressly said the same regarding the "substantially useless" standard, the cases indicate that the Law Court recognizes "several factors that have particular significance" in resolving a taking challenge.¹²⁶

The following discussion examines each of these factors to determine how they affect the Law Court's taking analysis. The first section describes those considerations which typically control or buttress the court's analysis. The second section describes two subsidiary factors which often accompany a taking challenge. One factor is shown to be a good predictor of the court's disposition of a taking claim; the other is shown to be largely irrelevant to the taking analysis. Finally, section three demonstrates how one consideration—physical impact—is so significant to the Law Court's analysis that it calls for the application of its own taking standard.

A. *Controlling or Supporting Factors*

1. *Defining the Property in Question*

Before the Law Court can engage in an analysis of whether a governmental restriction has rendered privately owned land substantially useless, it must first decide the extent of the land upon which to properly focus.¹²⁷ In taking cases where the tract in question is in some manner associated with adjoining acreage under the same ownership, this becomes a critical factor in determining the success or failure of the taking claim because the unrestricted portion of the property may be able to generate a reasonable return for the whole tract.

The Law Court has generally considered taking claims in the context of the broadest view of the tract. When it has done so, it has never found a taking. In *Seven Islands*, the court refused to focus on the impact of the restriction on the 2,700 acres of deer yard, choosing instead to consider the taking claim in the context of the 25,000-acre privately owned township in which the deer yard was situated.¹²⁸ "In determining the amount of diminution, the focus is on the interference with the rights in the parcel as a whole, not merely the portion immediately affected."¹²⁹

generally *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1916)).

126. *Id.* at 124.

127. For instance, the United States Supreme Court has written: "[O]ne of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'" *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987) (quoting Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192 (1967)).

128. *Seven Islands Land Co. v. Maine Land Use Regulation Comm'n*, 450 A.2d at 482.

129. *Id.*

Similarly, in *Sibley v. Inhabitants of Wells*,¹³⁰ where the landowner owned two additional lots contiguous to the lot in question, the court declined to consider the single lot in isolation. The court noted that the lot had "substantial use and value in conjunction with the adjacent lot."¹³¹ Thus, the denial of the Sibleys' variance request did not amount to a taking.

The Law Court's predilection to consider the affected land in its broadest context is also followed by the lower courts. For example, in *Diamond Cove Associates v. Board of Environmental Protection*,¹³² where land-use restrictions on the portion of the land allocated to the second phase of a two-phase development were challenged, the Superior Court justice wrote: "The ability to profit from Phase I and to sell some lots after slight reconfiguring hardly renders the [Phase II] land 'substantially useless.'" ¹³³ By focusing on the broadest view of land ownership in each case, the court avoids classifying governmental land-use restrictions as unconstitutional takings.

On the other hand, the Law Court has at least once narrowly focused on the affected portion of a larger tract of land. In *Johnson*, in which the court found that a taking had occurred, the inquiry focused on the undeveloped westerly portion of the 700-foot-long tract.¹³⁴ The easterly portion of the tract had been filled and developed prior to the effective date of the Wetlands Act.¹³⁵ One can surmise that the court narrowed its focus due to the fact that the Site Location of Development Law became effective in between stages in the tract's development. However, the court did not explicitly state the reason for its narrow focus. Thus, since *Johnson* has not subsequently been limited or repudiated, the Law Court has left unresolved the issue of how narrowly a court should focus its taking inquiry.¹³⁶

130. 462 A.2d 27 (Me. 1983).

131. *Id.* at 31.

132. No. CV-90-18 (Me. Super. Ct., Ken. Cty., 1990). *See supra* note 106 and accompanying text.

133. *Id.* at 17.

134. *State v. Johnson*, 265 A.2d at 713.

135. *Id.*

136. Furthermore, in *Maine Land Use Regulation Comm'n v. White*, 521 A.2d 710 (Me. 1987), the Law Court failed to clarify whether the relative size of the land percentages affected by a restriction makes a difference in a taking analysis. "The Whites attempt[ed] to distinguish *Seven Islands Land Co.* on the disparate percentage of their total acreage affected by the zoning as compared to the percentage impact in *Seven Islands*." *Id.* at 713. In *White*, 61 acres of a 102-acre farm (60%) were affected by the restrictions, whereas in *Seven Islands Land Co.* only 2,700 acres of a 25,000-acre township (11%) were affected. The court concluded that "the attempted distinction is unavailing for two reasons." *Id.* The reasons the court offered, however, have nothing to do with invalidating this attempted distinction. First, the court noted that if any taking occurred, it did so before the Whites acquired the property. *Id.*

2. Reciprocity

The rationale the Law Court uses to justify upholding restrictions on the use of private property is based on a theory of reciprocity.¹³⁷ In Maine, the theory was explicitly stated as early as 1835 in *Wadleigh v. Gilman*:

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.¹³⁸

When the Law Court perceives that the balance between burdens and benefits is appropriate, it will find that the government action does not constitute a taking. For example, in holding that the challenged application of the Site Location Law did not amount to a taking, the court in *In re Spring Valley Development*¹³⁹ invoked the reciprocity doctrine and traced its development from the 1907 *Opinion of the Justices*¹⁴⁰ and *York Harbor Village Corp. v. Libby*.¹⁴¹ However, when the Law Court perceives that the landowner is carrying a disproportionate burden in relation to the generalized benefit he receives, the court is likely to find that the regulation constitutes a taking.¹⁴²

In *Johnson*, after finding that application of the Wetlands Act stripped the landowner's property of all commercial value, the court invoked the reciprocity doctrine in explaining why this result was unacceptable:

The benefits from [the wetland's] preservation extend beyond town limits and are state-wide. The cost of its preservation should be publicly borne. To leave appellants with commercially valueless

Second, the court pointed out that the Whites' own testimony established that the property had "not been substantially reduced in value." *Id.* Neither of these statements, however, resolves the question of how important the percentage of total land affected by a restriction is to the determination of whether a taking has occurred.

137. The United States Supreme Court has described the theory as follows: "Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. at 491 (citations omitted).

138. *Wadleigh v. Gilman*, 12 Me. at 405.

139. 300 A.2d at 746-48.

140. 103 Me. 506 (1907).

141. 126 Me. 537 (1928).

142. This follows United States Supreme Court thinking on the doctrine. "The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest." *Agin v. City of Tiburon*, 447 U.S. 255, 260 (1980).

land in upholding the restriction 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.¹⁴³

Because the generalized benefits conferred on the affected landowner by the public program were so disproportionate to the deprivation of use imposed on the landowner, application of the Wetlands Act constituted an unreasonable exercise of the State's police power.¹⁴⁴

Similarly, in *Kittery Water District v. Town of York*,¹⁴⁵ where the court disallowed a local planning board's attempt to impose a recreational-use condition on a permit to construct a reservoir, the court wrote: "[W]e find no authority for imposing such a burden on private property. The Planning Board sought to 'force [the District] to bear a disproportionate burden in the providing of public facilities'"¹⁴⁶ Thus, considerations of reciprocity play an important supporting role in determining whether a taking has occurred.

3. Nuisance Doctrine

In resolving a taking dispute, the outcome of the Law Court's analysis often turns on how the government regulation under attack is depicted.¹⁴⁷ In nearly every case in which the Law Court has viewed the regulation as a measure to prevent some form of public harm, it has refrained from holding that the law constitutes a taking.¹⁴⁸ For instance, in *State v. Lewis*¹⁴⁹ the court tersely disposed of

143. *State v. Johnson*, 265 A.2d at 716.

144. The court placed its conclusion within the framework of a substantive due process discussion, rather than within the context of a taking analysis, due to the court's interpretation of § 4704 of the Wetlands Act. *See supra* note 73.

145. 489 A.2d 1091 (Me. 1985).

146. *Id.* at 1094 (alteration by Law Court) (footnote omitted) (quoting *Pacific Legal Found. v. California Coastal Comm'n*, 180 Cal. Rptr. 858, 865 (Ct. App. 1982), *rev'd in part as not ripe*, 655 P.2d 306 (Cal. 1982)).

147. This parallels a theme common to United States Supreme Court analysis of the issue. "Many cases before and since *Pennsylvania Coal* have recognized that the nature of the State's action is critical in takings analysis." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. at 488. For instance, "'prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be *injurious* to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or appropriation of property.'" *Id.* at 489 (quoting *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887)) (emphasis added). Furthermore, "[t]he Court's hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of 'reciprocity of advantage' that Justice Holmes referred to in *Pennsylvania Coal*." *Id.* at 491.

148. *See, e.g.*, *Molasses Pond Lake Ass'n v. Soil and Water Conservation Comm'n*, 534 A.2d 679 (Me. 1987); *Hall v. Board of Env'tl. Protection*, 528 A.2d 453 (Me. 1987); *Maine Land Use Regulation Comm'n v. White*, 521 A.2d 710 (Me. 1987); *Seven Islands Land Co. v. Maine Land Use Regulation Comm'n*, 450 A.2d 475 (Me. 1982); *In re Maine Clean Fuels, Inc.*, 310 A.2d 736 (Me. 1973); *In re Spring Valley Dev.*, 300 A.2d 736 (Me. 1973); *State v. McKinnon*, 153 Me. 15, 133 A.2d 885 (1957); *Wadleigh*

the taking issue on this basis alone. The defendant in *Lewis* was convicted of maintaining an automobile junkyard in violation of a city ordinance. While the appeal was denied principally on procedural grounds, the taking issue was dealt with entirely in a footnote: "[Appellant's] collateral argument that the effect of the ordinance was an unconstitutional taking of his property overlooks the fact that private property is held subject to the implied condition that its use will not injure or impair the public interest."¹⁵⁰ Thus, merely recognizing a statute as a measure for preventing a public nuisance significantly reduces the likelihood that the government action will be held to constitute a taking.

This, however, is not always the rule. In *Johnson*, the court gave full measure to the importance of the Wetlands Act in "eventually stopping the insidious despoliation of our natural resources"¹⁵¹ The court noted that the landowner's property was part of "a valuable natural resource of the State of Maine . . .,"¹⁵² and that the "Act is a conservation measure under the police power of the State to protect the ecology of areas bordering coastal waters."¹⁵³ Nonetheless, the court held that application of the Act to the landowner's property constituted a taking. Thus, when the effect of a restriction is to strip private property of all commercial value, not even recognizing the act as a measure to prevent substantial public harm is sufficient to protect it from a taking challenge.¹⁵⁴

Furthermore, when a land-use regulation is perceived as creating a public use or benefit, it is more likely to constitute a taking.¹⁵⁵ In *Bell II*, for instance, the Public Trust in Intertidal Land Act was found to create "an easement for use by the general public for 'rec-

v. Gilman, 12 Me. 403 (1835). All the variance cases are implicitly reviewed in this context. See *Curtis v. Main*, 487 A.2d 1253 (Me. 1984); *Sibley v. Inhabitants of Wells*, 462 A.2d 27 (Me. 1983); *Barnard v. Zoning Bd. of Appeals*, 313 A.2d 741 (Me. 1974); *Lovely v. Zoning Bd. of Appeals*, 259 A.2d 666 (Me. 1969). The nonconforming-use cases are explicitly dealt with from this perspective. See *Senator Corp. v. Commissioner of Transp.*, 511 A.2d 37 (Me. 1986); *State v. National Advertising Co.*, 409 A.2d 1277 (Me. 1979); *Inhabitants of Boothbay v. National Advertising Co.*, 347 A.2d 419 (Me. 1975).

149. 406 A.2d 886 (Me. 1979).

150. *Id.* at 889 n.5.

151. *State v. Johnson*, 265 A.2d at 716.

152. *Id.*

153. *Id.* at 713.

154. Indeed, the United States Supreme Court has explicitly recognized this limitation to the nuisance analogy. "[O]ur cases have never applied the nuisance exception to allow complete extinction of the value of a parcel of property." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. at 513 (Rehnquist, C.J., dissenting).

155. See, e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 128 (1978) ("[G]overnment actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute 'takings.'").

reation' without limitation."¹⁵⁶ Thus, the Act constituted "a taking of private property for a public use."¹⁵⁷ In *Brown v. Warchalowski*,¹⁵⁸ the court found that the limited private rights of way created by statute "are open to public use and the easement rights therein belong to the public"¹⁵⁹ As a result, there was no dispute that the petition to lay out the right of way, "if successful, would constitute a taking in the constitutional sense."¹⁶⁰ In *Kittery Water District v. Town of York*,¹⁶¹ a recreational-use condition was distinguished from "an equitable swap for the loss of a very good wildlife nesting habitat," and characterized instead as "a disproportionate burden in the providing of public facilities."¹⁶² Consequently, the condition was disallowed. Indeed, as early as *Cushman v. Smith* the court declared: "The design [of the taking clause] appears to have been simply to declare, that private property shall not be changed to public property, or transferred from the owner to others, for public use, without compensation"¹⁶³ Therefore, whenever a government burdens a private landowner by appropriating a public use or benefit, rather than by regulating to prevent a public harm (albeit indirectly benefitting the public), the Law Court is more likely to equate the action to a taking.

B. Subsidiary Considerations

1. The Relationship to Variance Hardship Analysis

When a zoning ordinance imposes a land-use restriction on a landowner, and the landowner's subsequent variance application is denied, the zoning agency's action is typically challenged on both undue hardship and taking grounds.¹⁶⁴ The Law Court approaches each challenge in a distinct manner. However, in view of the current statutory definition of undue hardship, it will be shown that the analysis of the taking question and the analysis of the first test of undue hardship are coextensive. Consequently, resolution of one issue provides a means of predicting the outcome of the second issue.

Maine's municipal zoning statute¹⁶⁵ provides that a zoning board of appeals may grant a variance only in strict compliance with undue hardship criteria.¹⁶⁶ The requirement is based on two due pro-

156. *Bell II*, 557 A.2d at 176.

157. *Id.* at 177.

158. *Brown v. Warchalowski*, 471 A.2d 1026 (Me. 1984).

159. *Id.* at 1029. See *infra* notes 200-05 and accompanying text.

160. *Id.*

161. *Kittery Water Dist. v. Town of York*, 489 A.2d 1091 (Me. 1985).

162. *Id.* at 1094. See *infra* text accompanying note 206.

163. *Cushman v. Smith*, 34 Me. 247, 258 (1852).

164. See *Bishop v. Town of Eliot*, 529 A.2d 798 (Me. 1987); *Curtis v. Main*, 482 A.2d 1253 (Me. 1984); *Sibley v. Inhabitants of Wells*, 462 A.2d 27 (Me. 1983).

165. ME. REV. STAT. ANN. tit. 30-A, §§ 4351-4359 (West Supp. 1990-1991).

166. § 4353(4).

cess concerns. The first is that “[v]ariations should not be easily or lightly granted and a variance should be the exception and not the rule.”¹⁶⁷ The second is that the exercise of discretion by boards of appeals in granting or denying a variance appeal not be arbitrary, capricious, or unreasonable.¹⁶⁸ Despite its origin in due process concerns, the undue hardship analysis simultaneously addresses the unconstitutional taking standard.

The portion of the zoning statute controlling the granting of variances reads in pertinent part:

4. Variance. The board may grant a variance only when strict application of the ordinance to the petitioner and the petitioner's property would cause undue hardship. The term “undue hardship” as used in this subsection means:

A. The land in question cannot yield a reasonable return unless a variance is granted . . .¹⁶⁹

The court has interpreted this statutory language to mean the following: “Reasonable return is not maximum return. . . . The reasonable return prong of the undue hardship test is met ‘where strict application of the zoning ordinance would result in the practical loss of all beneficial use of the land.’ ”¹⁷⁰ This language is essentially the same as that used in *Seven Islands* to articulate the taking standard of rendering the land “substantially useless.”¹⁷¹ Recognizing that the two standards converge at this point provides a ready predictor of how the Law Court will decide a taking issue once the undue hardship issue has been addressed.

For instance, where the court finds that a variance request has been properly denied because the reasonable-return prong of the hardship criteria has not been met, it follows that no taking has occurred under the current “substantially useless” standard. Therefore, it is only in those variance cases where the reasonable-return test of undue hardship is met that the court need proceed further with a taking analysis.

Functionally, this was the result in *Curtis v. Main*.¹⁷² In its hardship analysis, the Law Court determined that “[o]n the evidence presented the Board was not compelled to conclude that the [first] undue hardship test had been satisfied.”¹⁷³ In its taking analysis the court restated its hardship finding in the language of the taking

167. *Lovely v. Zoning Bd. of Appeals*, 259 A.2d 666, 670 (Me. 1969).

168. *Barnard v. Zoning Bd. of Appeals*, 313 A.2d 741, 748 (Me. 1974).

169. Title 30-A, § 4353(4).

170. *Curtis v. Main*, 482 A.2d 1253, 1257 (Me. 1984) (citation omitted) (quoting *Thorton v. Lothridge*, 447 A.2d 473, 475 (Me. 1982)).

171. See *Seven Islands Land Co. v. Maine Land Use Regulation Comm'n*, 450 A.2d at 482.

172. 482 A.2d 1253 (Me. 1984).

173. *Id.* at 1257-58 (citation omitted).

standard; no taking occurred because the plaintiffs failed to prove that "the Board's refusal to grant variances rendered their property substantially useless."¹⁷⁴ Because the court supported the Board's conclusion on the hardship analysis, no valid taking challenge could exist.

2. *Nonconforming Uses*

The Law Court has had little opportunity to decide whether it is relevant to the taking question if a land-use restriction merely precludes proposed uses, or terminates non-conforming structures or uses. At the federal level, the Supreme Court has written that "'taking' challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted . . ."¹⁷⁵ In Maine, the important taking cases have involved land-use restrictions which impinge upon proposed uses.¹⁷⁶ However, in a line of cases dealing specifically with billboard regulation, the Law Court has indicated that classification of a use or structure as nonconforming has little relevance to the taking question.

In *Inhabitants of Boothbay v. National Advertising Co.*,¹⁷⁷ the Town enacted an ordinance prohibiting "all off-premise billboards and advertising signs in the Town . . . that are 'visible from a public way.'"¹⁷⁸ The ordinance allowed a tolerance period of ten months for nonconforming signs existing at the effective date of the ordinance. The Law Court held that "[t]he consequences of the instant ordinance are not a taking . . ."¹⁷⁹ It explained: "the defendant has not demonstrated to us or to the trial court that the actual property interest in the signs, as to their cost or intrinsic value, is substantially impaired or vitiated by the mandated removal."¹⁸⁰

The fact that the signs were already in existence was relevant only to emphasize how substantially the property interest was impaired. "We cannot say that the expectancy of maintaining a billboard rises to the level of an immutable or vested right. . . . Compensation is due only when the impairment is so substantial as to amount to a

174. *Id.* at 1258 (citation omitted).

175. *Penn Central Transp. Co. v. New York City*, 438 U.S. at 125.

176. For example, the Law Court avoided addressing the issue of nonconforming use in *Seven Islands Land Co. v. Maine Land Use Regulation Comm'n*, 450 A.2d at 481, by concluding that pre-harvest timber management in deer yards "is merely preparation for use, [which] does not rise to the level of being actual or substantial for the purposes of nonconformity."

177. 347 A.2d 419 (Me. 1975).

178. *Id.* at 421.

179. *Id.* at 424.

180. *Id.* at 424. Interestingly, the court does not cite to *Johnson* (or to any other taking case) to support its standard for reviewing the taking issue in this case.

taking."¹⁸¹ Since here the billboard was "neither condemned, nor . . . seized and dedicated to a public purpose"¹⁸² the ordinance did not amount to an unconstitutional taking.¹⁸³

In *Senator Corp. v. Commissioner of Transportation*,¹⁸⁴ the issue of existing use was argued with a different twist, but with a similar result. The billboard mandated for removal had been in place for over twenty-five years. However, since neither the appellant nor its predecessor in title had ever sought a permit for the sign, the billboard was not considered a nonconforming use, and thus was liable for immediate removal. Consequently, rather than adopting a version of the arguments used in *Inhabitants of Boothbay v. National Advertising Co.* and *State v. National Advertising Co.*, Senator argued that "the Act effects a taking of the land immediately beneath the sign."¹⁸⁵

The Law Court rejected this argument. The court stated that the "sign's removal must substantially impair or vitiate Senator's interest in that land" in order to constitute a taking.¹⁸⁶ The court found, however, that removal of the sign did not satisfy this test. "The billboard occupies a tiny fraction of Senator's whole parcel. Furthermore, the record shows that Senator plans a subdivision of its large parcel. Those plans could easily include the land now used for the sign."¹⁸⁷ Thus, the billboard line of cases suggests that taking analysis under the Maine Constitution is unaffected by whether the challenged regulation restricts either an existing use or a proposed use.

C. The Role of Physical Invasion

Cases challenging government regulation creating a public right of physical occupation or nontrespassory invasion of privately owned land constitute a distinct category of taking law.¹⁸⁸ A taking is nearly always found in such cases, in which the Law Court applies a

181. *Inhabitants of Boothbay v. National Advertising Co.*, 347 A.2d 419, 424 (Me. 1975).

182. *Id.*

183. In *State v. National Advertising Co.*, 409 A.2d 1277 (Me. 1979), the Law Court reaffirmed its reasoning in *Inhabitants of Boothbay*. Additionally, the court explained that the nonconforming use amortization period is relevant to the taking issue only if it seriously reduces the property's value. *Id.* at 1289.

184. 511 A.2d 37 (Me. 1986).

185. *Id.* at 38 (emphasis added).

186. *Id.*

187. *Id.* at 38-39.

188. The U.S. Supreme Court, for instance, has recognized "that where governmental action results in '[a] permanent physical occupation' of the property, . . . 'our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.'" *Nollan v. California Coastal Comm'n*, 483 U.S. at 831-32 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982)).

different standard than that used to review challenges to mere limitations on private land use. In Maine, the role of physical invasion in taking cases is best developed in *Bell II*.¹⁸⁹

The Law Court in *Bell II* held that Maine's Public Trust in Intertidal Land Act¹⁹⁰ "on its face constitutes an unconstitutional taking of private property."¹⁹¹ The court found that in passing the Act, the Legislature "imposed upon all intertidal land . . . an easement for use by the general public for 'recreation' without limitation."¹⁹² Consequently, the court held that "[s]ince the Act provides no compensation for the landowners whose property is burdened by the general recreational easement taken for public use, it violates the [Taking Clauses] in both our State and Federal Constitutions . . ."¹⁹³

The analysis the Law Court used to reach its holding was very different from the standard it had developed under the *Seven Islands* line of cases. The court began by returning to its early emphasis on the effect of the legislative action on "title, dominion of ownership or essential use."¹⁹⁴ It noted that "long ago" in *Cushman v. Smith* the court had addressed the significance of physical invasion to taking cases. "[The Takings Clause] was designed to operate and it does operate to prevent the acquisition of any title to land or to an easement in it . . ."¹⁹⁵ To buttress and expand on its own precedent, the court adopted an argument from an early Massachusetts case. "The interference with private property here involves a wholesale denial of an owner's right to exclude the public. If a possessory interest in real property has any meaning at all it must include the general right to exclude others."¹⁹⁶

The court explicitly addressed its rationale for not applying the "substantially useless" standard to physical invasion cases. "The public recreational easement taken by the Maine Act over ocean-

189. 557 A.2d 168 (Me. 1989).

190. ME. REV. STAT. ANN. tit. 12, §§ 571-573 (West Supp. 1990-1991).

191. *Bell II*, 557 A.2d at 177. This is also the only case in which the Law Court has sustained a facial challenge, rather than an as-applied challenge, to a land-use regulation.

192. *Id.* at 176.

193. *Id.* at 177. One observer, however, has written that the Law Court "erred in several significant ways in its constitutional analysis of the Intertidal Land Act, and by so doing, seriously short changed both the just compensation clause and the public trust doctrine." Rieser, *supra* note 19, at 11. The purpose of this Comment, however, is not to evaluate whether the Law Court's decision in *Bell II* was right or wrong, but to accept it as part of the legal landscape in Maine and ascertain what it tells us about the court's taking standard.

194. See *supra* text accompanying notes 48-63.

195. 557 A.2d at 177 (emphasis added) (quoting *Cushman v. Smith*, 34 Me. at 265).

196. Opinion of the Justices, 313 N.E.2d 561, 568 (Mass. 1974) (quoting NICHOLS, EMINENT DOMAIN § 5.1[1] (Rev. 3d ed. 1970)), quoted in *Bell v. Town of Wells*, 557 A.2d at 177.

front owners' land must be distinguished from the governmental action regulating private land use that we have in recent years examined under the Takings Clause."¹⁹⁷ The court cited to the line of cases beginning with *Seven Islands*. It explained that the "[*Seven Islands*] analysis becomes inappropriate, however, when the issue before us is the constitutionality of a statute that authorizes a physical invasion of private property."¹⁹⁸

The *Bell II* court, however, had precedent more recent than *Cushman v. Smith* to support its physical invasion doctrine.¹⁹⁹ While it did not explicitly develop its reasoning in *Brown v. Warchalowski*,²⁰⁰ nor explain why it was not applying the "substantially useless" standard to the taking issue, the court treated *Brown* like a physical invasion case. Warchalowski had petitioned the town²⁰¹ to lay out a private right of way following the course of a discontinued town road across Brown's land. The town granted the petition, subject to gates and bars, and awarded \$1 in damages to Brown.²⁰² The Law Court noted that the town's action created "a public easement as in the case of the laying out of any other state highway or county road."²⁰³ Thus, the court held that the laying out of the way, "if successful, would constitute a taking in the constitutional sense."²⁰⁴ The court explained its reasoning:

In order to result in a constitutional "taking," it is not necessary that the owner of property actually be removed from his property or completely deprived of its possession, but merely that an interest in the property or in its use and enjoyment be seriously impaired, such as when inroads are made upon an owner's title or an owner's use of the property to an extent that, as between private parties as in this case a servitude will attach to the land.²⁰⁵

Implicit in the standard applied is the court's fear that the servitude in question was a public easement which would authorize physical invasion of Brown's private property. As the Law Court later articulated in *Bell II*, the creation of public easements must be distinguished from government action which merely regulates private land use.²⁰⁶

197. *Id.*

198. *Id.* See also Rieser, *supra* note 19, at 9.

199. *Contra* Rieser, *supra* note 19, at 14 (arguing that the Law Court had no legal or policy basis in its case law for applying a physical invasion doctrine.).

200. 471 A.2d 1026 (Me. 1984).

201. Pursuant to former ME. REV. STAT. ANN. tit. 12, § 3001 (1964), repealed by P.L. 1979 ch. 253, § 1.

202. *Warchalowski v. Brown*, 417 A.2d 425, 428 (Me. 1980). This was the first appeal in the case.

203. *Brown v. Warchalowski*, 471 A.2d at 1029.

204. *Id.*

205. *Id.*

206. The physical invasion doctrine explicitly developed in *Bell II*, and implicitly

Indeed, the physical invasion doctrine clarifies what the Law Court was alluding to in *Foss v. Maine Turnpike Authority*.²⁰⁷ *Foss* involved the issue of whether sovereign immunity protected the Maine Turnpike Authority from an action for damages brought by a landowner with property abutting the turnpike. The landowners complained "that the Turnpike Authority's snow removal operations [had] resulted in runoffs of salt *onto their property* over a considerable period of time, resulting in the pollution of plaintiffs' water supplies, defoliation of their crops . . . and assorted other damage" ²⁰⁸ The Law Court held that the landowners could bring an action against the Authority under certain exceptions to the sovereign immunity doctrine. "[O]ne avenue of compensation still open to the plaintiff," the court observed, was a taking challenge.²⁰⁹ The court went on to suggest that on the facts before it the Authority's actions might constitute a taking. In doing so it anticipated the physical invasion doctrine it later developed in *Bell II*.

The *Foss* court began by stating: "In order to constitute a constitutional 'taking,' it is not necessary that the plaintiff actually be removed from his property or deprived of its possession, but merely that an interest in the property, or in its use and enjoyment, be seriously impaired."²¹⁰ This was certainly a less strict test than the Law Court had been willing to apply in taking cases from *Cushman v. Smith* through *Johnson*. However, the court seemed to recognize that the physical contact with the landowner's property distinguished this case from the standard regulatory taking cases.

Accordingly, since its own physical invasion doctrine was not yet developed, the Law Court drew support from a United States Su-

adopted in *Brown v. Warchalowski*, is consistent with, and provides a more powerful basis for, the Law Court's decision in *Kittery Water Dist. v. Town of York*, 489 A.2d 1091 (Me. 1985). The Water District, a quasi-municipal corporation holding its land as private property, applied for a permit from the local planning board to construct a reservoir on its property. The planning board in turn attempted "to impose as a condition to the granting of the permit that the District open access to the District's private water supply to those, in this particular case, wishing to fish or go boating." *Id.* at 1093. The court disallowed the condition, holding that "[b]ecause we find that the . . . Board had no authority to impose such uses, it is unnecessary at this point to reach the issue of whether the condition lends itself to an unconstitutional 'taking' under the Maine Constitution." *Id.* at 1094. The court based its holding on a questionable interpretation of the pertinent state statute. Indeed, the court qualified its tenuous analysis: "We decline, however, to rule . . . that the Planning Board is without authority to impose public recreational use conditions under *any* circumstance." *Id.* at 1094. Therefore, rather than base its holding on an ambivalent interpretation of ambiguous statutory language, the court could have based its holding on the physical invasion doctrine and resolved the case in a manner that would have provided useful general guidance to other boards.

207. 309 A.2d 339 (Me. 1973).

208. *Id.* at 341 (emphasis added).

209. *Id.* at 344.

210. *Id.*

preme Court case in which actual contact played a determinative role. It quoted from *United States v. Dickinson*,²¹¹ where a government dam had caused public waters to inundate private property, "noting that 'property is taken in the constitutional sense when . . . a servitude has been acquired either by agreement or in course of time.'"²¹² This is the same concern the court would subsequently voice in *Brown v. Warchalowski*. Clearly, the Law Court viewed the Authority's physical invasion of the land through its salting operations as imposing a servitude on the land for the public use. An invasion of this nature would constitute a taking, regardless of whether the landowner's interest in or use of the property was seriously impaired.

IV. LOCATING THE LIMITS TO UNCONSTITUTIONAL TAKINGS

The Maine cases make clear that state and local governments are accorded great latitude in regulating the use of private land.²¹³ The apparent reluctance of the Law Court to incorporate *Johnson* into its subsequent case law indicates a strong concern for the public interest in land-use regulation. Unless the application of a land-use restriction to a particular property renders the parcel substantially useless, it is unlikely that a court in Maine will find that the restriction constitutes a taking for which compensation must be paid. This standard, however, applies only to laws which merely regulate private use. If the restriction creates or recognizes any form of public servitude in private property, giving the public a right to actually enter upon the land, a court will likely find a taking without regard to considerations of diminution of property value.

Provided that no physical invasion is involved, however, the difficult question is determining at what point the property is rendered substantially useless. At the outer limit the court recognizes that land is rendered substantially useless when it is stripped of *all* commercial value for *any* viable economic use. Thus, while government has significant power to regulate land use, the limit to that power is defined in terms of some residual ability of the property owner to develop the property. That may only mean the ability of a landowner to install a temporary recreational vehicle on the property for seasonal use, but it means more than restricting the landowner to enjoying her land in an unimproved state. This holds true no matter how worthy the government objective embodied in the regulation.

On the other hand, this does not mean that a landowner has a

211. 331 U.S. 745, 748 (1947).

212. *Foss v. Maine Turnpike Auth.*, 309 A.2d at 344.

213. See generally *In re Spring Valley Dev.*, 300 A.2d at 746-48. ("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." *Id.* at 746.)

right to pursue the development plan of his choice. A government land-use restriction may completely bar a particular form of land use, as long as other beneficial commercial uses of the land remain. Similarly, merely restricting a private landowner's ability to maximize profits from a particular land use is never a taking. Furthermore, it does not matter to the taking question whether the restriction precludes a proposed use or an existing use. Unless the restriction leaves the property substantially useless for any development purpose, it is unlikely to constitute a taking.

The question the case law leaves unanswered, however, is whether there is some minimum intensity of land-use regulation that is sufficiently burdensome to constitute a taking. In principle, it seems clear that there must be such a possibility. The standard the Law Court has used since *Seven Islands* employs the term "substantially," not "completely," to modify the adjective "useless." Moreover, since the Law Court has infrequently mentioned *Johnson* in its taking decisions, *Johnson* must be viewed as illustrating merely the extreme case—an outer limit—within which a taking can occur, not as establishing the definitive requirement for all takings. Thus, there is in principle some minimum level of regulation—an inner limit—beyond which government action likewise becomes equivalent to an illegal taking.

We know that regulating timber harvesting in deer yards does not get beyond this inner limit, nor does restricting the scope of construction on sand dunes. Zoning for minimum lot size, setback restrictions, or building material requirements has proven not sufficiently burdensome, nor has the disapproval of site permits for subdivisions or oil refineries. The list goes on, but a mere enumeration fails to make the inner threshold any clearer. This is because in trying to locate an inner limit it is unlikely "that diminution in property value, standing alone, can establish a 'taking' . . ."²¹⁴ Therefore, factors which the Law Court has indicated are important to evaluating the taking standard assume increased importance.

For instance, in examining a taking challenge to a land-use restriction the Law Court adopts the broadest view of the affected property. Indeed, the court even tends to consider the property in the context of the surrounding landscape.²¹⁵ In doing so, the court is unlikely to find that a land-use restriction constitutes a taking because the land nearly always has some value in conjunction with, or in comparison to, its surroundings. Consequently, in order for a restriction whose impact is less harsh than in *Johnson* to constitute a taking, it is likely that circumstances must be such as to cause the court to focus on the smallest unit of land in question.

214. *Penn Central Transp. Co. v. New York City*, 438 U.S. at 131 (citations omitted).

215. *See supra* notes 119-24 and accompanying text.

Similarly, considerations of reciprocity and the nature of the restriction become important in a less restrictive land-use regulatory climate. Where a landowner can make a case for being forced to shoulder a disproportionate share of the costs of a restriction, in relation to the generalized benefits she receives, the Law Court will probably be more willing to find a taking. Concomitantly, where a landowner can characterize a land-use regulation as a means to appropriate facilities or impose servitudes for public use, rather than as a measure to prevent a public nuisance, the court will be more likely to find a taking. Thus, it is likely that the inner limit to how far state government can go in regulating private land use will be defined in terms of how substantially useless a property has been rendered, and how significantly the Law Court views other factors such as the extent of the property, reciprocity, and the nature of the restriction.

V. CONCLUSION

A. *Constraints on Growth Management Imposed by the Taking Clause*

The constraint placed upon state and local land-use officials by the Maine Constitution's taking clause is real and increasingly relevant. As state and local land-use regulation becomes more restrictive and all-encompassing in the wake of the Growth Management Act's passage, the right of private landowners to derive economically beneficial uses from their land is arguably being diminished. As state and local planners work to protect not only natural resources and sensitive ecological areas, but rural character and open space as well, the tendency is to forget—or fail to recognize—that there is a constitutional limit to how far a regulation can go before it constitutes an illegal taking.

The case law indicates that, at the outer limit, land-use regulation that renders a piece of property substantially useless for any economic development constitutes a taking. This is true no matter how laudable the government objective. Similarly, regulation that creates or recognizes a public easement or servitude over private land also constitutes a taking. However, it is arguably also true that regulation that stops short of stripping a private parcel of all commercial value, or permitting a physical invasion of the land by the public, can likewise result in a taking. The outcome in such a situation depends upon the other variables important in taking jurisprudence.

The Growth Management Act does not appear on its face to constitute a taking. Nevertheless, the language used in the official *Guidelines for the Comprehensive Planning and Land Use Regulation Act* goes far beyond the provisions contained in the Act itself. The *Guidelines* state that “[r]ural areas are not intended to be areas

set aside for future growth."²¹⁶ The *Guidelines* recommend that "[i]n some areas, due to physical constraints or state, regional or local policies, development should be prohibited."²¹⁷ Furthermore, with regard to critical natural resources, "[m]unicipalities are encouraged to adopt more stringent regulations."²¹⁸ These official recommendations suggest to local planners that they have a greater authority to regulate private land use than the case law indicates is constitutional. As *Johnson* indicates, even in the most sensitive rural areas, privately owned land cannot be stripped of all commercial value via regulation and thereby rendered substantially useless, else a taking will be found to have occurred. Thus, the direction contained in the *Guidelines* would probably be sufficient by itself, if it had the force of law, to constitute a facial taking. At the very least, the *Guidelines* seriously mislead local officials about the power they have to regulate private land use.

Furthermore, application of the Act's rural-area designation raises several taking questions. These are most pronounced where some form of cluster zoning or large minimum lot size scheme is implemented. For instance, if through cluster zoning a large portion of a private tract is required to be preserved as open space, the tract's value in conjunction with a small area of clustered development may nonetheless be substantial. Accordingly, the cluster zoning might not cross the inner limit of government regulation sufficient to violate the taking clause. Conversely, if density limits cause very large portions of otherwise developable land to be left in an undeveloped state with perhaps only one residence permitted per landholding, application of the density limits may constitute a taking if they are found to render the tract substantially useless. While such regulatory schemes may be advocated for their desired effect on values such as rural character and open space, their potential to exceed the limit of acceptable restrictions on private land must be acknowledged by planners and local officials.²¹⁹

One observer has written that "a single model for guiding growth does not exist [under the Growth Management Act]."²²⁰ The Act does not advocate any specific technique of land-use management. The Act merely specifies that "policies and ordinances may include, without limitation: density limits; cluster or special zoning; acquisition of land or development rights; or performance standards"²²¹ Other options include: restricting permitted land uses, re-

216. GUIDELINES, *supra* note 26, at 44.

217. *Id.* at 45.

218. *Id.* at 48.

219. *Cf. SOLOTAIRE & Dow, supra* note 42, at 19 (describing how a large-lot zoning scheme was struck down).

220. Quintrell, *supra* note 30, at 7.

221. ME. REV. STAT. ANN. tit. 30-A, § 4326(3) (A) (West Supp. 1990-1991).

stricting road access points,²²² establishing resource production zones, establishing buffer requirements, and establishing a transfer of development rights (TDR) program.²²³ No blanket statement can be made evaluating all the options from a taking perspective. The application of each of these techniques must be examined to ensure that they do not render property substantially useless.

B. *Modeling the Future of an Imaginary Maine Town*

One organization has attempted to envision how the growth management program might unfold in an imaginary Maine community. The Natural Resources Council of Maine (NRCM) has used build-out maps²²⁴ to chart projected residential development under three land-use strategies in the fictitious town of Deerfield.²²⁵ The town they envision has characteristics typical of many small Maine communities.²²⁶ It has a traditional village center, with development gradually spread out along major roads. The landscape surrounding the town is scenic, with many small working farms and woodlots. A significant amount of the land within town limits consists of wetlands and other unbuildable terrain. Residents hunt, hike, and snowmobile on the large private tracts with the permission of the landowners. The population, currently at 2,000, is expected to grow at a rate of twenty percent, or 400 people, by 2010, and eventually reach a population of 14,000.

Growth management option number one is to establish a one-acre minimum lot size in the growth area and a two-acre minimum for the rural area. "This is typical of development patterns in many Maine communities that do not have significant restrictions on residential development in rural areas."²²⁷ Clearly, due to the low intensity of the land-use restrictions, no taking issues are likely to arise. In the NRCM scenario, however, the result after twenty years is that there are fewer working farms, less public access to recreational lands, a loss of scenic landscapes, and development sprawl. In the long term, Deerfield loses all of its working farm and forest lands, and public outdoor recreational opportunities are limited. NRCM regards this as the worst scenario.

Growth management option number two requires cluster develop-

222. "A municipality may regulate access to its public roads but in doing so it must be cautious A road access ordinance must not deny property access to the public road system. To do so may be an unconstitutional taking of property rights without compensation." SOLOTAIRE & DOW, *supra* note 42, at 45-46.

223. Quintrell, *supra* note 30, at 8-9.

224. Build-out maps trace the projected growth of a community at specific intervals of time, e.g., 5, 10, and 20 years.

225. Jerry Bley, *Facing the Future in Deerfield, The Implications of Three Different Land Use Strategies*, MAINE GROWTH MANAGEMENT NEWS, Fall 1990, at 4.

226. *Id.*

227. *Id.*

ment for subdivisions in the rural areas. "For example, a twenty-acre subdivision could have ten residential lots which are clustered on no more than ten acres of land; the remaining ten acres are permanently protected as open space."²²⁸ According to the NRCM scenario, this results in great improvements in maintaining the rural landscape with all its associated amenities. From a taking standpoint, the scheme raises more questions but appears constitutionally sound. It is unlikely that a tract of private land will be viewed as substantially useless if some of it must be left open while growth is clustered on some portion of it. A community will get into difficulty, however, if it attempts to impose any form of public easement for recreation or access to recreation areas on the privately owned open spaces. Such common use by the subdivision residents as part of the ownership rights attaching to their private lots would clearly be allowed, but the town will have difficulty extending this into a general public right. This step is precluded under the physical invasion doctrine enunciated in *Bell II*.²²⁹

Growth management option number three encourages more dense development in growth areas, but ensures strict protection for rural areas. The town achieves its rural-area objectives through strict zoning and limiting density to one residential unit per twenty acres. According to the NRCM, the result of this scenario is that "[t]he rural areas of the community remain largely unchanged both in appearance and use."²³⁰ However, the strict development limits throughout the town's rural areas raise serious taking questions. Imposing a twenty-acre minimum lot size on undeveloped land has the potential to render private property substantially useless. The taking issue is clearest if the property has only marginal forestry or agricultural potential but has good soils for building. Many undeveloped lots of less than twenty acres would, at least theoretically, be precluded from developing any beneficial commercial uses. Where the property does not contain critical wildlife habitat, or delicate ecological areas, it will be hard to frame the land-use restrictions as nuisance protection measures. Rather, they will appear to be measures to appropriate benefits, such as rural character and scenic views, for the public.

Furthermore, although this scenario purports to present a future where "[o]utdoor recreation opportunities are plentiful,"²³¹ this may not be the case. Even though large blocks of private land might be kept undeveloped, the town will still have no authority to impose public servitudes on the land. Consequently, rather than leading to a future where "the majority of the town's land remains rural,"²³²

228. *Id.* at 5.

229. 557 A.2d 168, 177-78; *see supra* text accompanying notes 189-98.

230. Bley, *supra* note 225, at 6.

231. *Id.*

232. *Id.*

and thus supposedly available for public recreational use, the growth management restrictions of option three may suppress the town's growth without achieving the town's rural-character planning objectives.

In a companion article to "Facing the Future in Deerfield,"²³³ the NRCM concludes: "Provided that they are rationally conceived and applied, most land-use laws are likely to withstand challenge from a legal perspective. Private property rights, therefore, become an issue of public policy and values, not legal debate."²³⁴ Unfortunately, a review of taking law indicates that this is not the case. Although the Law Court has shown a readiness to support the strong use of governmental police power in land management, it has nonetheless recognized that there is a limit to the restrictions state or local government can place on private land use. This limit is not made irrelevant by claiming salutary objectives, rational thought, or proper legislative procedures. To suggest that as long as state and local planners satisfy these criteria they will enjoy an unfettered hand in administering the Growth Management Act, is to send the wrong signal. It may be true that "[b]y designating growth and rural areas, towns establish a framework for directing future growth to appropriate areas and away from areas that deserve protect[ion]. It is through these designations that towns can strike the balance between conservation and development interests."²³⁵ However, without a complete understanding of Maine taking law, local governments will be unable to strike a constitutional balance between their exercise of authority and the rights of private landowners.

Michael A. Duddy

233. See *supra* note 225.

234. *Id.* at 7.

235. Quintrell, *supra* note 30, at 9.

