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General Discretion Under Maine's Site Location of Development Law

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GENERAL DISCRETION UNDER MAINE'S SITE LOCATION OF DEVELOPMENT LAW

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I. INTRODUCTION

The 1960s brought nationwide concern about the environmental impact of post-World War II development and industrial growth.[1] Efforts to protect the environment took many different forms.[2] Part of Maine's response to the growing need for environmental improvement measures was the Legislature's enactment in 1970 of the Site Location of Development Law (Site Law).[3]

The Site Law gives the state control over the location of developments that would substantially affect the environment, rather than leaving such decisions to single towns and individual developers. The Law also addresses concerns beyond those dealt with in air and water pollution control legislation.[4] The Site Law initiated an ambitious statewide program, and it is not surprising that the Legislature has amended the statute numerous times since its original passage.[5] The most recent amendment was in 1988, when the Legislature clarified the Law's meaning and provided the state agencies responsible for administering the Site Law sufficient scope, oversight, and enforcement capability to achieve its goals.[6]

Nonetheless, whether the Site Law has achieved its purposes and has actually given the state some control over developments is a matter of some debate.[7] It is therefore appropriate to analyze the

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1. For a general discussion of the growth of the environmental movement in the United States, see COUNCIL ON ENVIRONMENTAL QUALITY (CEQ), TENTH ANNUAL REPORT, ENVIRONMENTAL QUALITY 1-15 (1979); 1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 1.01 (1988).

2. 1 F. GRAD, *supra* note 1, § 1.01.

3. ME. REV. STAT. ANN. tit. 38, §§ 481-489 (1978). *See also* 3 Legis. Rec. 806 (1970) (statements of Sen. Sewall and Sen. Berry).

4. *See* ME. REV. STAT. ANN. tit. 38 § 481 (1978). *See also* 3 Legis. Rec. 676-77 & 729-35 (1970) (debate about amendment to Site Law deleting language that would exempt developments located in towns with zoning ordinances from operation of the statute).

5. For an example of such amendments, see P.L. 1983, ch. 513. Other Site Law amendments are discussed *infra* at notes 21, 22, 31, 56, 58, 59-64 & 89 and accompanying text. *See also* L.D. 2202, Statement of Fact (113th Legis. 1987) (enacted as P.L. 1987, ch. 812).

6. P.L. 1987, ch. 812.

7. For example, in the early 1980s concern was expressed that despite regulation under the Site Law, development was causing significant loss of wildlife habitat. *See* Platt, *BEP Study Shows Loss of Wildlife Habitat*, Bangor Daily News, Feb. 2-3,

purposes of the Site Law and the legislated means to achieve those purposes, particularly in light of the substantial 1988 amendments which attempt to clarify and streamline the procedures mandated by the Site Law.[8] The following discussion describes the provisions of the Site Law and demonstrates that the Legislature confers general discretion on state agencies to fulfill the statute's broad mandate.

II. Overview of Statutory Provisions

A. *Agencies Responsible for Administering the Site Law*

As with many complex environmental statutes enacted in Maine,[9] the Legislature has conferred upon the Board of Environmental Protection (BEP or Board) and, to a lesser extent, the Department of Environmental Protection (DEP or Department) responsibility for administering the Site Law.[10] To fully understand the provisions and procedures of the Site Law, a brief description of the Board and the Department is necessary.

The Board was established in 1971 to replace the Environmental Improvement Commission.[11] In general, the Legislature has charged the BEP to exercise the police power of the state to "prevent diminution of the highest and best use of the natural environment of the State."[12] The BEP is primarily empowered to regulate activities that affect the environment and natural resources of the state, to issue

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1980, at 27, col. 2. Critics have also expressed concern over the failure of the Site Law to address cumulative impacts of development. *See, e.g.*, Sleeper, *DEP Decisions Weigh Many Factors, Staff Says*, Portland Press Herald, May 1, 1987, at 12, col. 2. Another source of contention was a provision, found at Me. Rev. Stat. Ann. tit. 38, § 482(5)(G) (Supp. 1987-1988), that exempted from Site Law review the creation of lots in excess of 40 acres. *See, e.g.*, Turkel, *Land Development Bill Means Review for Some*, Maine Sunday Telegram, Apr. 14, 1988, at 18, col. 1; *Editorial*, Portland Press Herald, Apr. 5, 1988, at 8, col. 1; Turkel, *Drive to Close Land Use Loophole Faces Fierce Fight*, Maine Sunday Telegram, Apr. 3, 1988, at 1, col. 3. The so-called 40-acre loophole was closed by the 1988 amendments. P.L. 1987 ch. 812, § 7 (amending Me. Rev. Stat. Ann. tit. 38, § 482(5) (Supp. 1987-1988)). For an early critique of the Site Law, see Walter, *The Law of the Land: Development Legislation in Maine and Vermont*, 23 Maine L. Rev. 315 (1971).

8. P.L. 1987, ch. 812. *See also* L.D. 2202, Statement of Fact (113th Legis. 1988).

9. *See, e.g.*, Me. Rev. Stat. Ann. tit. 38, §§ 480-A to 480-S (Supp. 1988-1989) (protection of natural resources); Me. Rev. Stat. Ann. tit. 38, §§ 541-560 (1978 & Supp. 1988-1989) (oil discharge prevention and pollution control); Me. Rev. Stat. Ann. tit. 38, §§ 561 to 570-G (Supp. 1988-1989) (underground oil storage facilities and ground water pollution); Me. Rev. Stat. Ann. tit. 38, §§ 581-611 (1978 & Supp. 1988-1989) (protection and improvement of air); Me. Rev. Stat. Ann. tit. 38, §§ 1301 to 1319-U (Supp. 1988-1989) (waste management).

10. Me. Rev. Stat. Ann. tit. 38, §§ 481, 483-A, 485-A (1978 & Supp. 1988-1989) (as amended by P.L. 1987, ch. 812).

11. P.L. 1971, ch. 618, § 9. Me. Rev. Stat. Ann. tit. 5, § 12004(5) (Supp. 1988-1989); Me. Rev. Stat. Ann. tit. 38, § 361 (Supp. 1988-1989).

12. Me. Rev. Stat. Ann. tit. 38, § 361 (Supp. 1988-1989).

licenses and permits, to set standards and procedures, to hold hearings and to adopt rules. The Board consists of ten members appointed by the Governor and subject to confirmation by the Legislature.[13] The BEP is part of the Department of Environmental Protection.[14]

The Department of Environmental Protection consists of the Board and a Commissioner of Environmental Protection (Commissioner), who is appointed by the Governor subject to confirmation by the Legislature.[15] The Commissioner is empowered to employ staff to fulfill the duties of the Department and Board.[16] The duties of the Department are to establish coordination and assistance procedures for all environmental permits issued by agencies of the state for activities within the organized municipalities.[17] The Commissioner may also exercise the duties of the Board that the Board delegates to the Commissioner.[18] Delegated duties under the Site Law are discussed below.[19]

B. The Findings and Purposes of the Site Law

The first section of the Site Law sets forth the Legislature's findings and purposes in enacting the statute, and the remaining provisions establish the means to achieve those purposes. The purpose of the Site Law, set forth in section 481,

> is to provide a flexible and practical means by which the State, acting through the Board of Environmental Protection, in consultation with appropriate state agencies, may exercise the police power of the State to control the location of those developments substantially affecting local environment in order to insure that such developments will be located in a manner which will have a minimal adverse impact on the natural environment within the development sites and of their surroundings and protect the health, safety and general welfare of the people.[20]

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13. *Id.*
14. *Id.* § 341.
15. *Id.*
16. *Id.* § 342(2).
17. *Id.* § 341.
18. *Id.* § 342(3) (1978).
19. *See infra* notes 41-44 and accompanying text.
20. ME. REV. STAT. ANN. tit. 38, § 481 (Supp. 1988-1989). A 1971 amendment substituted "Board of Environmental Protection" for "Environmental Improvement Commission," the agency originally charged with administering the Site Law. P.L. 1971, ch. 618, § 12. In 1983, an amendment inserted the words "within the development sites" to reverse the interpretation of the Site Law given by the court in Valente v. Board of Environmental Protection, 461 A.2d 716 (Me. 1983), which held that the Site Law allowed the BEP to consider a development's effect only on the surrounding environment and not within the development site. P.L. 1983, ch. 513, § 1. *See also infra* notes 22 & 87-90 and accompanying text. P.L. 1979, ch. 466, § 11, added the language "and protect the health, safety and general welfare of the

The Legislature also set forth in section 481 a number of findings that further elaborate the purposes of the Site Law:

> The Legislature finds that the economic and social well-being of the citizens of the State of Maine depends upon the location of . . . developments with respect to the natural environment of the State; that many developments because of their size and nature are capable of causing irreparable damage to the people and the environment on the development sites and in their surroundings; that the location of such developments is too important to be left only to the determination of the owners of such developments; and that discretion must be vested in state authority to regulate the location of developments which may substantially affect the environment and quality of life in Maine.[21]

This provision contains language added in 1983 to clarify that the statute, contrary to a judicial interpretation of the section, is concerned not only with the impact of development on the surrounding people and environment but also on the people and environment *within* the development.[22] The language referring to quality of life was added in 1988.[23]

As knowledge about the particular adverse environmental impact of developments was brought to the attention of the Legislature, further findings were added. In 1981, the Legislature found that groundwater in particular geological formations is an important resource particularly susceptible to injury from pollutants and expressed the intent to prohibit activities that discharge or may discharge pollutants to groundwater on such formations.[24] In contrast, the Legislature found in 1987 that noise generated at the development site was best regulated at the local level and enacted measures to limit state control over noise effects.[25]

The Findings and Purposes section of the Site Law expresses the Legislature's intent to confer broad discretion on the BEP to regulate the location of developments which may substantially affect the environment and quality of life in Maine. Indeed, the expressed pur-

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people."

21. ME. REV. STAT. ANN. tit. 38, § 481 (Supp. 1988-1989) (emphasis added) (as amended by P.L. 1987, ch. 812, § 1).

22. P.L. 1983, ch. 513, § 1, added the language "on the development sites" and reversed the Law Court's interpretation of the Site Law in *Valente*, discussed in *supra* note 20.

23. P.L. 1987, ch. 812, § 1. For an interpretation of the "quality of life" language, see *infra* note 31 and accompanying text.

24. ME. REV. STAT. ANN. tit. 38, § 481 (Supp. 1988-1989). This finding was added as a result of recommendations of the Groundwater Protection Commission. *See* L.D. 1559, Statement of Fact (110th Legis. 1981), and L.D. 1647, § 3 (110th Legis. 1981) (enacted as P.L. 1981, ch. 449). At the same time, a further criterion regarding groundwater protection was added to section 484. *Id. See also infra* note 62 and accompanying text.

25. ME. REV. STAT. ANN. tit. 38, §§ 481, 482-A (Supp. 1988-1989).

pose of the statute is to provide "a flexible and practical means" by which the BEP may exercise the police power of the state to control the location of developments to ensure that they will have minimal adverse impact on the natural environment and will protect the health, safety, and general welfare of the people. As will be shown below,[26] this language appears to confer on the BEP maximum legislative authority to regulate development, as defined by the statute.

Other provisions of the Site Law do, however, limit the BEP's control over developments in several ways. First, a number of provisions define those developments subject to BEP regulation; all development in the state is not subject to the Site Law.[27] Second, several provisions set forth the procedures that the BEP and developers must follow in reviewing a proposal under the Site Law.[28] Third, there are provisions that provide criteria for the BEP in its Site Review process.[29] The provisions setting forth these three types of limitations will be discussed in turn.

C. Developments Subject to BEP Regulation

The Findings and Purposes section of the Site Law makes clear that the discretion vested in the BEP is to regulate the location of only those developments "which may substantially affect the environment and quality of life in Maine."[30] Developments which may substantially affect quality of life are not further defined, nor is there any legislative history illuminating the meaning of that phrase. The Supreme Judicial Court of Maine, sitting as the Law Court, has issued opinions using the phrase "quality of life" to mean less tangible aspects of the environment, such as crowding, loss of recreational opportunities and aesthetic values,[31] and it is reasonable to give the phrase in the Site Law the same meaning.

The statute gives "development which may substantially affect the environment" a precise meaning:

> [A]ny state, municipal, quasi-municipal, educational, charitable, residential, commercial or industrial development which:
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> A. Occupies a land or water area in excess of 20 acres;

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26. *See infra* notes 157-225 and accompanying text.

27. *See infra* notes 30-37 and accompanying text.

28. *See infra* notes 38-55 and accompanying text.

29. *See infra* notes 56-67 and accompanying text.

30. ME. REV. STAT. ANN. tit. 38, § 481 (Supp. 1988-1989).

31. *See, e.g.*, Gabriel v. Town of Old Orchard Beach, 390 A.2d 1065, 1069-70 (Me. 1978) (noting town's interest in regulating matters that affect quality of life, such as aesthetic considerations linked to development of town's tourist industry, and upholding ordinance restricting nudity in commercial establishments); Fitzgerald v. Baxter State Park Auth., 385 A.2d 189, 196 (Me. 1978) (quoting Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972)) (noting that aesthetic and environmental well-being is an all-important ingredient of quality of life, and suggesting that recreational values may also be important).

> B. Contemplates drilling for or excavating natural resources on land or under water where the area affected is in excess of 60,000 square feet;
> C. Is a mining activity . . . ;
> D. Is a hazardous activity . . . ;
> E. Is a structure . . . ;
> F. Is a conversion of an existing structure . . . ;
> G. Is a subdivision . . . ; or
> H. Is a multi-unit housing development . . . located wholly or in part within the shoreland zone.[32]

Thus, the statute lists the activities regulated under the Site Law.

The statute also eliminates some activities from review under the Site Law. Certain activities regulated by the Department of Transportation, the Land Use Regulatory Commission and the Department of Marine Resources are excluded from developments regulated by the BEP.[33] Also exempt from Site Law regulation are developments in existence, in possession of applicable state or local licenses to operate or under construction on January 1, 1970, developments specifically authorized by the Legislature prior to May 9, 1970, certain public service transmission lines, renewal or revision of certain licenses, and rebuilding or reconstruction of natural gas pipelines or transmission lines within the same right of way.[34]

Thus the Site Law does not regulate all development in the state. Rather, as the Law Court observed in *In re Spring Valley Development*,[35] the Site Law is concerned with "developments, which *be-*

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32. ME. REV. STAT. ANN. tit. 38, § 482(2) (Supp. 1988-1989) (as amended by P.L. 1987, ch. 812, § 2). Mining activity, hazardous activity, structure, subdivision and multi-unit housing developments are further defined in section 482, and additional provisions regarding mining activities are found at *id.* § 490. Section 482(2)(F)-(H) was added in 1988, and the definition of subdivision was substantially changed in the 1988 amendments. P.L. 1987, ch. 812, § 2.

33. ME. REV. STAT. ANN. tit. 38, §§ 482(2), 488 (Supp. 1988-1989) (as amended by P.L. 1987, ch. 812, §§ 2, 14).

34. *Id.* § 488. A number of cases have interpreted this provision. In King Resources v. Environmental Improvement Commission, 270 A.2d 863 (Me. 1970), the owners of an inactive World War II oil terminal sought to modernize and resume operating the facility. The court held the terminal to be "in existence" prior to January 1, 1970, and therefore exempt from Site Law review under section 488. Similarly, in Brennan v. R.D. Realty Corp., 349 A.2d 201 (Me. 1975), the court held that a subdivision was "under construction" and therefore exempt from Site Law review, despite the fact that all activity ceased in the period 1970-75 with the only prior work done on the site being surveying and construction of a small cottage and a road. A later case construes the section 488 exemption more narrowly. In Brennan v. Saco Construction, Inc., 381 A.2d 656 (Me. 1978), the court refused to apply the exemption to a development originally conceived as part of a larger development for which the developer had already obtained applicable licenses. Because the developer subdivided the original development, the court held that the new development was not exempt from Site Law review, despite the fact that some clearing and utility work had been done prior to January 1, 1970.

35. 300 A.2d 736 (Me. 1973).

cause of their nature or their size, will impose unusually heavy demands upon the natural environment."[36] The definition of development is concerned with two types of development—those that by their operating procedures consume natural resources or lower the quality of the surrounding environment (such as drilling, excavating, mining and hazardous activities) and those which because of their size pose ecological danger and make great demands on the environment (such as development in excess of twenty acres, structures, conversions of structures, subdivisions and multi-unit housing developments).[37] Accordingly, the type of development activities the BEP must regulate under the Site Law's mandate are limited.

D. Procedures for Site Law Review

The statute generally provides the procedures for BEP review of developments, as defined by the Site Law. Section 483-A of the Site Law prohibits the construction, operation, sale or lease of any development requiring BEP approval without such approval.[38] The first step towards approval is the application—the person intending to construct or operate a development must notify the DEP of the intent, nature and location of the development along with any other information that the BEP, by rule, requires.[39] The BEP or the Commissioner may approve the proposed development with appropriate and reasonable terms and conditions, disapprove the proposed development or schedule a hearing.[40]

The Board presumptively has the power to issue all licenses and permits,[41] but it may delegate that power to the Commissioner.[42] Under the Site Law, the Legislature has delegated to the Commissioner and Department staff authority to decide applications for

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36. *Id.* at 742 (emphasis in original).

37. *Id.*

38. ME. REV. STAT. ANN. tit. 38, § 483-A (Supp. 1988-1989) (as amended by P.L. 1987, ch. 812, § 11).

39. *Id.* § 485-A(1) (as amended by P.L. 1987, ch. 812, § 11). Section 483 of the Site Law, prior to the amendment, contained substantially the same provisions as new section 485-A. Section 12 of the original bill proposing the 1988 amendments intended to delete old section 483, *see* L.D. 2202, § 12 (113th Legis. 1988), but was inadvertently omitted from the enacted bill. This error will most likely be corrected in the 1989 legislative session. Conversation with Denise Lord, Maine State Planning Office (Oct. 14, 1988). These procedures are amplified in Me. Dep't of Envtl. Protection Reg. ch. 372 (Aug. 8, 1979), *reprinted in* 2 CODE OF MAINE RULES 203261-65 (1988). Special procedures are followed for a proposed development which is classified as a hazardous activity. *See* ME. REV. STAT. ANN. tit. 38, § 487-A (as amended by P.L. 1987, ch. 812, § 13).

40. ME. REV. STAT. ANN. tit. 38, § 485-A(2) (Supp. 1988-1989) (as amended by P.L. 1987, ch. 812, § 11).

41. *See id.* § 361. *See also infra* note 44.

42. ME. REV. STAT. ANN. tit. 38, § 342(3) (1978). *See supra* note 18.

structures at existing facilities that do not increase the square footage of the total ground area of the facility by more than 50%.[43] Also, the Board has delegated to the Commissioner and the Department staff applications for subdivisions of less than seventy-five acres with fewer than twenty-five lots to contain fewer than twenty-five housing units.[44]

If the BEP issues an order without a hearing, the applicant may request a hearing within thirty days after notice of the Board's decision. The BEP must then schedule and hold the requested hearing.[45] When the BEP determines to hold a hearing before issuing a decision, section 486-A sets forth the procedures.[46] In general, the procedures of the Maine Administrative Procedure Act must be followed.[47] The Board is required to solicit and receive testimony to determine whether the proposed development will in fact substantially affect the environment or pose a threat to the public's health, safety, or general welfare. In addition, the Board must permit the applicant to provide evidence on the economic benefits and impact on energy resources of the proposal.[48]

The statute expressly provides that the burden is on the person proposing the development to demonstrate affirmatively to the BEP that each of the criteria for approval listed in the Site Law has been met "*and* that the public's health, safety and general welfare will be adequately protected."[49] Within thirty days after the Board adjourns the hearing, it must make findings of fact and issue an order granting or denying permission to the applicant to proceed with the proposed development. The Board may also grant permission "upon such terms and conditions as the board deems advisable to protect and preserve the environment and the public's health, safety, and general welfare."[50] According to DEP regulations, terms and conditions may only address minor or easily corrected problems, but "shall not substitute for or reduce the burden of proof of the developer to affirmatively demonstrate to the Board that each of the standards of the Site Location Law has been met."[51] BEP orders are

43. ME. REV. STAT. ANN. tit. 38, § 344(2)(E) (1978).

44. Me. Dep't of Envtl. Protection Reg. ch. 1(8)(E) (Feb. 8, 1984, amended May 20, 1985), *reprinted in* 2 CODE OF MAINE RULES 201001, 2011008-10 (1988). Since the Board presumptively has the power to approve or deny Site Law permits, the BEP will generally be the only agency referred to in discussing the agency's powers and duties respecting permits.

45. ME. REV. STAT. ANN. tit. 38, § 485-A (as amended by P.L. 1987, ch. 812, § 11).

46. *Id.* § 486-A (as amended by P.L. 1987, ch. 812, § 12).

47. *Id.* § 486-A(1) (as amended by P.L. 1987, ch. 812, § 12) (referring to *id.* tit. 5, §§ 8001-11008 (1978 & Supp. 1988-1989)).

48. *Id.* tit. 38, § 486-A(1) (as amended by P.L. 1987, ch. 812, § 12).

49. *Id.* § 486-A(2) (as amended by P.L. 1987, ch. 812, § 12) (emphasis added).

50. *Id.* § 486-A(3) (as amended by P.L. 1987, ch. 812, § 12).

51. Me. Dep't of Envtl. Protection Reg. ch. 372(2) (Aug. 8, 1979), *reprinted in* 2 CODE OF MAINE RULES 203261, 203261 (1988).

subject to review by the superior court under Rule 80B of the Maine Rules of Civil Procedure.[52]

In addition to statutorily required procedures, the DEP has developed its own regulations regarding the processing of applications,[53] hearings on applications[54] and special regulations for hearings on applications of significant public interest.[55] The statute and the regulations provide a well-developed set of procedures to guide both applicants and the agency in handling applications for Site Law permits.

E. Criteria for Approval of Developments

In addition to the procedures that must be followed in order for an applicant to obtain approval of a proposed development, the Site Law contains certain criteria that must be satisfied before a permit may be issued. Section 484 provides that the BEP "shall approve a development proposal whenever it finds that" eight specific criteria have been met.[56]

First, the developer must demonstrate that it has the financial capacity and technical ability to develop the project consistently with state environmental standards and with the provisions of the Site Law.[57] Second, the developer must make "adequate provision for

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52. M.R. Civ. P. 80B. Rule 80B generally governs when "review by the Superior Court, whether by appeal or otherwise, of any action or failure or refusal to act by a governmental agency, including any department, board, commission, or officer, is provided by statute . . . ." *Id.* Me. Rev. Stat. Ann. tit. 38, § 346(1) (1978) provides that "any person aggrieved by any order or decision of the [Board of Environmental Protection] may appeal therefrom to the Superior Court. These appeals to the Superior Court shall be taken in accordance with Title 5, chapter 375, subchapter VII." *Id.* The latter statutory reference is to the provisions of Maine's Administrative Procedure Act, Me. Rev. Stat. Ann. tit. 5, §§ 11001-11008 (1978 & Supp. 1988-1989), that govern judicial review of final agency actions.

53. Me. Dep't of Envtl. Protection Reg. ch. 1 (Feb. 8, 1984, and amended May 20, 1985), *reprinted in* 2 Code of Maine Rules 201001-18 (1988).

54. Me. Dep't of Envtl. Protection Reg. ch. 20 (Dec. 21, 1975, and amended Mar. 8, 1981), *reprinted in* 2 Code of Maine Rules 201051-60 (1988).

55. Me. Dep't of Envtl. Protection Reg. ch. 30 (May 15, 1973, and amended Feb. 8, 1978), *reprinted in* 2 Code of Maine Rules 201101-16 (1988).

56. Me. Rev. Stat. Ann. tit. 38, § 484 (Supp. 1988-1989) (as amended by P.L. 1987, ch. 812, § 10). The amendment substantially changed section 484. Prior to 1988, section 484 also contained the provision regarding hearings, which is now in section 486-A. The amendment also added the criteria dealing with infrastructure, flooding and sand supply, in addition to changing the language of certain criteria existing prior to the amendment. *Compare id.* § 484 (1978 & Supp. 1988-1989).

57. Me. Rev. Stat. Ann. tit. 38, § 484(1) (Supp. 1988-1989) (as amended by P.L. 1987, ch. 812, § 10). This language is more general than the repealed language, which, instead of directing the developer to develop the project "*in a manner consistent* with state environmental standards," *id.* (emphasis added), required the developer to "meet state air and water pollution control standards, and [to make] adequate provision for solid waste disposal, the control of offensive odors, and the securing and maintenance of sufficient and healthful water supplies[.]" *Id.* § 484(1) (1978).

traffic movement of all types into, out of or within the development area."[58] In 1988, the Legislature added the following language to the second criterion:

> The Board shall consider traffic movement both on-site and off-site. Before issuing a permit, the Board shall find that any traffic increase attributable to the proposed development will not result in unreasonable congestion or unsafe conditions on a road in the vicinity of the proposed development.[59]

Third, the developer must make adequate provision for fitting the development harmoniously into the existing natural environment and the development must not adversely affect existing uses, scenic character, air quality, water quality, or other natural resources in the municipality or in neighboring municipalities.[60] The fourth criterion requires that the proposed development "will be built on soil types which are suitable to the nature of the undertaking and . . . will not cause unreasonable erosion of soil or sediment nor inhibit the natural transfer of soil."[61] The proposed development may not "pose an unreasonable risk that a discharge to a significant groundwater aquifer will occur" under the fifth criterion.[62]

The sixth criterion requires that the developer make adequate provision for the infrastructure of the development, such as utilities, roadways and open space. Moreover, the proposed development must not have an unreasonable adverse effect on the utilities, roadways and open space in the municipality or area served by those services or open space.[63] Seventh, the proposed activity must "not unreasonably cause or increase the flooding of the alteration area or adjacent properties nor create an unreasonable flood hazard to any structure."[64] Finally, if the proposed activity is on or adjacent to a sand dune, it must not "unreasonably interfere with the natural supply or movement of sand within or to the sand dune system."[65]

Each of the statutorily mandated criteria has been amplified by

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58. *Id.* § 484(2) (as amended by P.L. 1987, ch. 812, § 10).

59. *Id.*

60. *Id.* § 484(3) (as amended by P.L. 1987, ch. 812, § 10). The 1988 amendment added the specific references to air and water quality.

61. *Id.* § 484(4) (as amended by P.L. 1987, ch. 812, § 10). The 1988 amendment added the prohibition against unreasonable soil or sediment erosion and the reference to inhibiting the natural transfer of soil.

62. *Id.* § 484(5). This provision was originally added at the same time as a finding regarding the importance of prohibiting discharges of pollutants into groundwater. *See supra* note 24.

63. ME. REV. STAT. ANN. tit. 38, § 484(6) (Supp. 1988-1989) (as amended by P.L. 1987, ch. 812, § 10). The BEP must use any applicable standard set forth in the municipality's comprehensive land use plan in assessing the impact on open space.

64. *Id.* § 484(7) (as amended by P.L. 1987, ch. 812, § 10).

65. *Id.* § 484(8) (as amended by P.L. 1987, ch. 812, § 10).

regulation.[66] Also, although the provisions of section 484 make clear the subject matter dealt with in each criterion, the statute confers on the BEP some discretion in determining whether each has been satisfied. Thus, in determining whether a developer "has the financial capacity and technical ability to develop the project *in a manner consistent* with state environmental standards," whether "any traffic increase . . . will . . . result in *unreasonable* congestion," or whether the proposed development will "cause *unreasonable* erosion of soil," "pose an *unreasonable* risk" to a ground water aquifer, "have an *unreasonable* adverse effect on" utilities, "*unreasonably* cause or increase flooding," or "*unreasonably* interfere with the natural supply or movement of sand,"[67] the BEP has a certain amount of flexibility in deciding whether each criterion has been met.

F. Conclusion

The Site Law is ambitious in its purpose to provide a flexible and practical means by which the BEP can control developments so as to minimize their adverse impact on the natural environment and protect the health, safety, and general welfare of the people. The Findings and Purposes section uses language that expresses an intent to confer broad discretion on the agency; it states that the purpose of the Site Law is to provide the BEP with the means to exercise the police power of the state and vests discretion in the agency to regulate developments that substantially affect both the environment and quality of life in Maine. The remaining provisions of the Site Law require BEP approval of developments, as defined by the statute, and provide procedural and substantive standards for that approval.

However, one question not clearly answered by the statutory provisions concerns how much discretion the BEP has in deciding Site Law applications, and what criteria the BEP must apply. If one reads section 484 in isolation, it suggests that the BEP *must* ap-

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66. *See* Me. Dep't of Envtl. Protection Reg. ch. 371 (Oct. 4, 1982) (definitions of terms used in the Site Location of Development Law and regulations); ch. 372 (Nov. 1, 1979) (policies and procedures under the Site Location Law); ch. 373 (Nov. 1, 1979) (financial capacity standard of the Site Location Law); ch. 374 (Nov. 1, 1979) (traffic movement standard of the Site Location Law); ch. 375 (Nov. 1, 1979) (no adverse environmental effect standard of the Site Location Law); ch. 376 (Sept. 14, 1980) (soil types standard of the Site Location Law). When this Article was in production, the Department of Environmental Protection was revising the regulations to conform with the 1988 amendments. Regulations governing traffic and noise were scheduled to be available for public comment before the end of 1988, with others to follow. Conversation with David Dominie, Me. Dep't of Envtl. Protection (Oct. 26, 1988). The DEP has now released its proposed traffic regulations. *See* Me. Dep't of Envtl. Protection, Notice of Agency Rule-making Proposal, Traffic Movement Standard of the Site Location Law (1989).

67. ME. REV. STAT. ANN. tit. 38, § 484 (Supp. 1988-1989) (as amended by P.L. 1987, ch. 812, § 10) (emphasis added).

prove any development that meets the eight criteria of that section with nothing further required. Another reading, more in keeping with the Findings and Purposes section of the Site Law, and one which gives effect to all statutory terms, is that the BEP has much broader discretion when considering Site Law applications and *must* determine that a proposed development will adequately protect the public's health, safety, and general welfare. Support for this reading is found in section 486-A, which places the burden on the developer to demonstrate that the criteria for approval (presumably those set forth in section 484) are met *and* that the public's health, safety, and general welfare will be adequately protected. Moreover, section 486-A requires that the Board solicit testimony to determine whether the development will substantially affect the environment or pose a threat to the public's health, safety, or general welfare. The Site Law would be clearer and the Legislature's intent would be unmistakable if a "health, safety and welfare" criterion had been added to section 484. Nonetheless, as is shown below, the language of the Site Law, the case law interpreting its provisions, and the case law concerning general delegations to state agencies all support the conclusion that the Site Law requires the BEP to consider whether a proposed development adequately protects the public health, safety, and welfare, and that the broad discretion conferred on the Board to determine the content of that additional criterion is constitutional.

III. Interpreting the Language of the Site Law

As shown above, the language of the Site Law provides that successful applicants for permits must demonstrate not only that the criteria enumerated under section 484 are satisfied, but that, more generally, the public's health, safety, and general welfare will also be adequately protected. Examination of the case law setting forth general approaches to the Site Law and interpreting the criteria for Site Law applications demonstrates that the statute confers general discretion on the BEP and that the BEP can conditionally approve or deny applications that fail to demonstrate adequate protection of public health, safety, and general welfare.

A. General Approaches of Cases Interpreting the Site Law

As discussed above,[68] the expressed purpose of the Site Law is to provide a flexible and practical means by which the BEP may exercise the police power of the state to insure that developments will be located in a manner that will have minimal adverse impact on the environment both within and around the development and will protect the health, safety, and general welfare of the people. When in-

68. *See supra* note 20 and accompanying text.

terpreting specific terms of the Site Law, the Law Court has taken care to give a meaning to the statutory provisions that will effectuate the broad purpose of Maine's Site Location of Development Law.

The leading case setting the tone for interpreting the Site Law is *In re Spring Valley Development.*[69] In *Spring Valley Development,* a developer claimed that the Site Law did not apply to residential subdivisions[70] and was unconstitutional. In rejecting the developer's claim regarding the applicability of the Act to residential subdivisions, the court read the definition of "development"[71] in light of the Findings and Purposes section and concluded that the Site Law applies to residential developments because such developments have a propensity to damage the environment. Residential developments thus should not be located in areas where the environment is incapable of sustaining the impact without public injury, a concern too important to be left only to the determination of the developer.[72] In other words, failure to apply the statute to residential development would defeat its purposes.

Subsequent cases have followed *Spring Valley Development* in recognizing the need to interpret specific provisions broadly to effectuate the expressed purposes of the Site Law. Thus, in *In re Maine Clean Fuels*[73] the Law Court rejected an earlier view of the Site Law as being only in the nature of a zoning ordinance. Instead, the court reiterated that the statute was enacted to provide "the State with a means of minimizing, through the exercise of its police power, the irreparable damage being done to the environment."[74] Reading the criteria for approval of developments in light of the statute's purpose, the court concluded that the statutory standards are constitutionally adequate.[75]

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69. 300 A.2d 736 (Me. 1973).

70. At the time the case arose, the Site Law defined a development subject to review under the statute as

> [1] any commercial or industrial development which requires a license from the Environmental Improvement Commission, [2] or which occupies a land area in excess of 20 acres, [3] or which contemplates drilling for or excavating natural resources, . . . [4] or which occupies on a single parcel a structure or structures in excess of a ground area of 60,000 square feet.

Id. at 740 (quoting ME. REV. STAT. ANN. tit. 38, § 482(2) (1970)). In 1972, the Legislature amended the Site Law to make clear that residential subdivisions are within the application of the statute. *Id.* at 744-45 (discussing P.L. 1971, ch. 613, § 2).

71. *Id.* at 741-42. *See also supra* note 32 and accompanying text.

72. *In re* Spring Valley Dev., 300 A.2d at 745. This conclusion is consistent with the Site Law's legislative history. *See supra* text accompanying footnote 21.

73. 310 A.2d 736 (Me. 1973).

74. *Id.* at 742 (quoting *In re* Spring Valley Dev., 300 A.2d at 753-54, and rejecting a narrower view of the statute taken in King Resources Co. v. Environmental Improvement Comm'n, 270 A.2d 863, 868 (Me. 1973)).

75. *Id.*

In *In re Belgrade Shores, Inc.*,[76] the Law Court held that the Site Law required BEP approval for the mere subdivision and sale of unimproved lots. Citing the statute's purpose to control the location of developments by a flexible and practical means, and the court held that the BEP's supervision over the mere subdivision of land would further this purpose. A number of reasons supported this holding: assessment of the suitability of location did not require a certain level of improvement; practical considerations required approval at an early stage of development before substantial investment in construction; and the express concern that regulation be "flexible and practical" negated a more categorical approach. In addition, if the subdividing of land were withdrawn from BEP review, the lots would be sold to individuals who could not be held responsible under the statute because each individual lot was too small to meet the definition of development under the Site Law.[77] The Law Court also held that the BEP's grant of conditional approval of a particular application was fully within the Board's discretion under the statute and consistent with the flexibility and pragmatism espoused in section 481 of the Site Law.[78]

In *Brennan v. Saco Construction, Inc.*,[79] the court overcame its usual reluctance to disregard the legal entity of a corporation and held subject to Site Law review two development proposals by two development companies owning adjacent fifteen-acre parcels acquired from a third company. The third company was the controlling stockholder of the other two companies, and one individual was president of all three companies. The court reasoned that honoring the two development corporations' separate identities would circumvent the Site Law and defeat the legislative policy described in *Spring Valley Development* which requires BEP control over large developments for the purpose of minimizing the likely adverse impact of such projects on the environment.[80]

In summary, Law Court opinions interpreting the Site Law have

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76. 371 A.2d 413 (Me. 1977).

77. *Id.* at 415 (citing *In re* Spring Valley Dev., 300 A.2d at 745, 746).

78. *Id.* at 416. The court upheld the Board's conditional approval of an application, despite noncompliance with two of the criteria listed under section 484, where such noncompliance was minor or easily corrected. *See also In re* Ryerson Hill Solid Waste Disposal Site, 379 A.2d 384, 387 (Me. 1977) (upholding Board's conditional approval of application to dispose of sludge due to the untried nature of the proposal).

79. 381 A.2d 656 (Me. 1978).

80. *Id.* at 661-62 (citing *In re* Spring Valley Dev., 300 A.2d at 752). *See also* Board of Envtl. Protection v. Bergeron, 434 A.2d 25 (Me. 1981) (recognizing the Site Law's concern over the potentially adverse impact of large developments, and the need to give a flexible and practical construction to statutory terms to accommodate the purposes of the Act, the court reversed the superior court's judgment that a tract of land was not a "single parcel" subject to Site Law review solely because a public road passed through the tract).

reiterated a number of concerns. First, the court interprets specific statutory terms to ensure that the broad legislative purposes expressed in section 481 are furthered. Second, the court has construed broadly the definition of "developments" subject to BEP review under the Site Law to ensure that the BEP has control over all development likely to have an adverse affect on the environment.[81] The Law Court's approach is not merely a matter of deferring to the BEP's reasonable and practical interpretation of the statute,[82] but is also an expression of the court's recognition that the BEP should not be unduly hampered in administering an important and far-reaching statute. Finally, the court has repeatedly recognized the need for the BEP to adopt practical and flexible means to accomplish the statutory purposes. In addition, a number of other cases not discussed above suggest a tendency by the court to uphold any reasonable exercise by the BEP of the discretion conferred upon it by the Legislature, or at least, general agreement with the Board's interpretation of the Site Law.[83]

Two cases undercut the foregoing generalizations, but each was later repudiated. First, in *King Resources Co. v. Environmental Im-*

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81. One possible exception to this statement is *In re* International Paper, 363 A.2d 235 (Me. 1976), where the court upheld the BEP's finding that the major expansion of a paper mill would not adversely affect the natural environment, despite an intervenor's argument that the BEP should make a specific finding that the development will not degrade existing air quality in the area. The court reasoned that the Site Law emphasizes BEP control over *location* of development, not air quality, and therefore need not make special air quality findings. This narrow view of what facts the BEP should consider in reviewing Site Law applications may also be viewed as the court deferring to the BEP's discretion in administering the statute. *See infra* note 82 and accompanying text.

82. *See In re* Spring Valley Dev., 300 A.2d at 743.

83. *See, e.g.*, Annable v. Board of Envtl. Protection, 507 A.2d 592 (Me. 1986) (holding that while the BEP has primary jurisdiction to determine whether a development is grandfathered and therefore not subject to Site Location review under section 488, the Board was not obligated to determinate whether the grandfathered provision applied to property owner who petitioned for such a determination); Murray v. Inhabitants of Lincolnville, 462 A.2d 40 (Me. 1983) (upholding BEP's determination that applicant for Site Law approval had sufficient title, right or interest in particular property to have standing before the BEP); Gulick v. Board of Envtl. Protection, 452 A.2d 1202 (Me. 1982) (holding that although there was conflicting evidence, BEP's finding that developer of shopping center made adequate provision for traffic movement was supported by competent and substantial evidence); *In re* Lappie, 377 A.2d 441 (Me. 1977) (holding BEP's finding that developer of landfill had financial capacity to meet environmental standards and that developer had made adequate provision for traffic safety was supported by the record); *In re* Pittston Co. Oil Refinery, 375 A.2d 530 (Me. 1977) (holding that other state agencies lacked standing to appeal BEP approval of development of oil refinery; statutory scheme of Site Law suggests that while BEP should consult with other agencies in considering applications for Site Law approval, such agency involvement terminates when the BEP renders its final order).

provement Commission,[84] the court viewed the Site Law as in the nature of a zoning ordinance and construed its restrictions strictly and its exemptions in favor of the owner of property.[85] This view of the Site Law was repudiated in *Spring Valley Development* and *Maine Clean Fuels*.[86] Second, in *Valente v. Board of Environmental Protection*[87] a divided court held that the Board acted outside its statutory powers when it denied a Site Law permit to an applicant seeking to strip twelve to eighteen inches of loam from the site. The court held that the statute only allowed the BEP to consider the development's effect on the environment surrounding the development site and not the reduction in crop growing capacity of the applicant's own land.[88] In an opinion more in keeping with other case law interpreting the Site Law, the dissent in *Valente* expressed concern that the majority's holding would considerably limit the effectiveness of the environmental protection laws, viewed the Board's decision to deny the permit as within the discretion vested in the BEP by the Legislature, and found nothing in the BEP's regulations or the statute's legislative history to warrant a contrary conclusion.[89] The Legislature subsequently repudiated the majority opinion in *Valente* and adopted amendments to reverse the decision.[90]

Thus, any interpretation of the discretion conferred by the Site Law on the BEP must advance the statute's purpose of minimizing environmental damage and protecting the public health, safety and welfare and support the BEP's use of flexible and practical means to accomplish that purpose. A broad interpretation of the discretion conferred by the Site Law would allow the BEP to fulfill these statutory purposes.

B. Interpretation of Substantive Criteria

A statute cannot, of course, be read to delegate general discretion to an agency unless its provisions support such a reading. Specific provisions of the Site Law, interpreted in accordance with the court's general approach to the statute, support the conclusion that the Legislature intended that applicants satisfy something more than the criteria under section 484 to gain approval under the Site Law.

As noted above,[91] section 484 provides that the BEP shall approve

84. 270 A.2d 863 (Me. 1970).
85. *Id.* at 868-69.
86. *See supra* notes 69-75 and accompanying text.
87. 461 A.2d 716 (Me. 1983).
88. *Id.* at 719-20.
89. *Id.* at 720-23 (McKusick, C.J., dissenting). The dissent in *Valente* is further discussed *infra* notes 217-21 and accompanying text.
90. P.L. 1983, ch. 513. *See also supra* notes 20 & 22 and accompanying text.
91. *See supra* notes 56-65 and accompanying text.

a development proposal when the eight specific criteria delineated in that section have been met. Clearly, those eight criteria must be satisfied before the Board may issue a permit.[92] The applicant's failure to meet any one of the required criteria is fatal to the application.[93]

In addition to the section 484 criteria, a developer must meet another standard before the Board may approve an application. Section 486-A states that at hearings held under that section, "the burden is upon the person proposing the development to demonstrate *affirmatively* to the Board that each of the criteria for approval listed in this article has been met, *and that the public's health, safety and general welfare will be adequately protected.*"[94]

Cases interpreting the Site Law are equivocal as to whether this provision and its predecessor add a separate criterion to those under section 484 such that failure to satisfy that criterion is fatal to a permit application. *Maine Clean Fuels*[95] suggests that there *is* a separate health, safety, and welfare criterion. In that case the Law Court upheld the denial of an application for a Site Law permit by the Environmental Improvement Commission, the predecessor to the BEP. After conducting hearings, the Commission concluded that the applicant had failed to sustain its burden of proof not only regarding financial capacity and technical ability, adequate provision for water supplies, traffic movement and effect on the natural environment, but also had failed to prove that the proposed development would "adequately protect the public health, safety and general welfare."[96] The court implicitly upheld the application of health, safety, and general welfare as a separate criterion by rejecting the developer's challenge that all the criteria are impermissibly vague.[97] Nevertheless, because there was substantial evidence to uphold the Board's finding that the more specific section 484 criteria were not satisfied, the court never reached the question of whether the BEP could deny or conditionally approve an application based on failure to satisfy the health, safety, and welfare criterion, even

92. The section 484 criteria have been elaborated in DEP regulations. *See supra* note 66 and accompanying text. As of this writing, regulations have not yet been developed for the criteria added in 1988.

93. *See In re* Belgrade Shores, Inc., 371 A.2d 413, 416 (Me. 1977); *In re* International Paper Co., 363 A.2d 235, 240 (Me. 1976); *In re* Maine Clean Fuels, Inc., 310 A.2d 736, 740-41, 752 (Me. 1973).

94. P.L. 1987, ch. 812, § 12 (codified at ME. REV. STAT. ANN. tit. 38, § 486-A(2) (Supp. 1988-1989)) (emphasis added). A comparable provision was formerly found at ME. REV. STAT. ANN. tit. 38, § 484 (1978 & Supp. 1987-1988) and was a part of the original statute. *See also supra* note 49 and accompanying text.

95. 310 A.2d 736 (Me. 1973).

96. *Id.* at 740-41. The Commission reached similar conclusions regarding a proposed development in *In re* Spring Valley Development, 300 A.2d 736, 751 (Me. 1973), and the court upheld the Commission's denial of a permit to the developer.

97. *In re* Maine Clean Fuels, 310 A.2d at 742 (citing *In re* Spring Valley Dev., 300 A.2d at 752).

where the section 484 criteria are met.[98]

The implicit holding of *Maine Clean Fuels* was undercut three years later in *In re International Paper Company*.[99] In *International Paper*, the court again upheld a BEP decision, in this case approving an application. The language in *International Paper* suggests that the Board must make specific affirmative findings only as to each of the specific criteria enumerated in section 484.[100] One argument evidently advanced by the intervenors in *International Paper* was that under the provisions of the Site Law, a development must adequately protect the public's health, safety, and welfare and that the Board, therefore, must require the applicant to prove that the development will not degrade existing air quality in the area.[101] Nevertheless, inasmuch as the Board had simultaneously considered the Site Law permit and air emission license application and conditioned approval of the Site Law application on compliance with the air license standards, the court discerned no need for separate air quality findings under the Site Law.[102] Thus the court never addressed whether the applicant met its burden of proving adequate protection of health, safety, and general welfare. If this question had been addressed, the court probably would have held that evidence of compliance with air license standards was sufficient to uphold the Board's approval of the application.[103]

The seemingly contradictory language of *Maine Clean Fuels* and *International Paper* can be reconciled by viewing both cases as part of the Law Court's tendency to uphold the exercise of discretion by an administrative agency.[104] Viewed in that way, it seems likely that the court would uphold a Board decision denying or conditionally approving an application that failed to protect adequately public health, safety, and welfare, even though the specific criteria of section 484 were met. Indeed, the court should uphold such a decision, as will be more fully explored in the next section.

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98. The court never reached the question because it found substantial support in the record for the Commission's conclusion regarding water supplies, financial capacity and technical ability and effect on the environment. *In re* Maine Clean Fuels, 310 A.2d at 752-56. Since failure to prove each of the criteria of section 484 is fatal to an application, *id.* at 754, the court saw no useful purpose in further itemizing the evidence supporting the Commission's other conclusions. *Id.* at 756-57.

99. 363 A.2d 235 (Me. 1976).

100. *Id.* at 240. At the time *International Paper* was decided, section 484 required compliance with only four criteria.

101. *Id.* at 239. The intervenors evidently also asserted that the Board require the applicant to prove that the development would not degrade existing air quality under the Site Law provisions that require proposed developments to have a minimal adverse impact on the natural environment.

102. *Id.* at 241.

103. For a discussion of evidence needed to uphold a Board decision, see *infra* notes 105-108 and accompanying text.

104. *See supra* note 83 and accompanying text.

C. *The Site Law Confers General Discretion on the BEP*

In order to fulfill the overall intent and specific provisions of the Site Law, the statute should be read to require the BEP to review applications for permits not only for compliance with the section 484 criteria, but also for adequate protection of the public's health, safety, and general welfare.

First, the language of the statute supports this view. Section 486-A(2) places an affirmative burden on each applicant to demonstrate that not only are the section 484 criteria met, but that the health, safety, and welfare will be adequately protected.[105] In general, the failure to meet the burden on any element that an applicant is required to prove will result in the denial of the requested permit.[106] The Board may not, of course, arbitrarily deny any application; its decision must be supported by substantial evidence on the record as a whole.[107] When the applicant fails to present sufficient evidence, however, to support an affirmative finding that the health, safety, and welfare is adequately protected, section 486-A(2) requires that the Board must deny the permit.[108]

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105. P.L. 1987, ch. 812, § 12, (codified at ME. REV. STAT. ANN. tit. 38, § 486-A(2) (Supp. 1988-1989)). *See also supra* note 49 and accompanying text.

106. *See* cases cited *supra* note 93 and accompanying text. A case reaching the same conclusion in a non-Site Law setting is American Legion v. Town of Windham, 502 A.2d 484 (Me. 1985).

107. *See, e.g.*, Gulick v. Board of Envtl. Protection, 452 A.2d 1202, 1208 (Me. 1982) (Board's decision must stand if its underlying findings are warranted by the evidence, and the Board is in the best position to assign appropriate weight to widely conflicting expert opinions); *In re* Belgrade Shores, Inc., 371 A.2d 413, 416 (Me. 1977) (court reviews whether record reflects "substantial" evidence to support Board's finding); *In re* Maine Clean Fuels, Inc., 310 A.2d 736, 741 (Me. 1973) (decisions under the Site Law must be based on substantial evidence, which is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"). *See also* American Legion v. Town of Windham, 502 A.2d 484 (Me. 1985); Mack v. Municipal Officers of Cape Elizabeth, 463 A.2d 717, 720-21 (Me. 1983) (holding that record contained sufficient evidence to support findings of Board of Zoning Appeals that denied a building permit to applicants who failed to satisfy a health and safety criterion for a setback exception). *Cf.* V.S.H. Realty, Inc. v. Gendron, 338 A.2d 143, 145 (Me. 1975) (refusing to uphold denial of license to mix, store and keep for sale flammable liquids when the application was supported by *uncontradicted* evidence that the proposed operation did not pose a threat to public safety).

108. DEP regulations are consistent with this interpretation of an applicant's failure to meet its burden of proof. *See* Me. Dep't of Envtl. Protection Reg. ch. 1(12) (Feb. 8, 1984), *reprinted in* 2 CODE OF MAINE RULES 201001, 201014. This regulation provides:

> 12. *Burden of Proof*
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> An applicant for a new, renewed or transferred license or permit shall have the burden of proof and the burden of going forward unless otherwise provided by law or regulation. The "burden of proof" shall be defined as the burden of presenting sufficient evidence for the Board or Commissioner to make the affirmative findings required by law or regulation regarding matters about which no questions are raised and the burden of presenting a

One commentator has expressed doubt that a reviewing court would uphold an agency determination denying a permit application for failure to meet the burden of proof in the absence of evidence on the record to support the denial.[109] The Site Law has, however, anticipated this problem.

Section 486-A(1) provides that when a hearing is held on a particular application, either because the BEP schedules a hearing or a developer requests one, the Board "shall solicit and receive testimony to determine whether that development will in fact substantially affect the environment or pose a threat to the public's health, safety or general welfare."[110] This provision requires the BEP to have affirmative evidence of health, safety, and welfare presented to it, and allows the BEP to develop a record from which it can make the required determination of whether an applicant has met its burden in this regard.[111]

It should be noted that section 486-A(1) also requires the Board to permit the applicant to provide evidence on the economic benefits of the proposal as well as its impact on energy resources.[112] In contrast to the requirement regarding evidence of health, safety, and welfare, this provision places no affirmative obligation on the Board, but requires it to allow certain evidence if the applicant presents it. Clearly, the Legislature would not place an affirmative obligation on the Board to solicit and receive testimony about the threat posed by a proposed development to health, safety, and general welfare if it did not intend such testimony to be used in the Board's decision-making process.

Second, this reading of the statute is consistent with the case law that interprets specific statutory terms in the Site Law to further the purposes set forth in section 481. This same case law also construes BEP review broadly, and seeks to provide the BEP with a flexible and practical means by which to exercise the police power of the state regarding location of developments in order to protect the health, safety, and general welfare of the people.[113] Conferring gen-

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preponderance of the evidence regarding matters about which a question is raised.

Id. The regulations suggest that when an applicant has the burden of proof, it must generally present sufficient evidence for the Board or Commissioner to make the affirmative findings required. When a question is raised about a matter, presumably by the Board, Department or an intervenor, the applicant has the burden of presenting a preponderance of the evidence regarding that matter.

109. C. KOCH, ADMINISTRATIVE LAW AND PRACTICE § 6.42, at 487 (1985).

110. P.L. 1987, ch. 812, § 12 (codified at ME. REV. STAT. ANN. tit. 38, § 486-A(1) (Supp. 1988-1989)). *See also* ME. REV. STAT. ANN. tit. 38, § 485-A(1), (2) (Supp. 1988-1989); *supra* notes 45-48 and accompanying text.

111. *See supra* notes 47-48 and accompanying text.

112. P.L. 1987, ch. 812, § 12 (codified at ME. REV. STAT. ANN. tit. 38, § 486-A(1) (Supp. 1988-1989)).

113. *See supra* note 48 and accompanying text.

eral discretion on the BEP to consider health, safety, and general welfare in making decisions on applications fulfills the statutory purpose of the Site Law. Section 481 plainly states the need for developments to be located in a manner to protect the health, safety, and welfare of the people.[114] The recent amendment to section 481 suggests that there are certain intangible values, expressed by the term "quality of life," that the Board should address in its Site Law review process,[115] and *Spring Valley Development* emphasized the need for Board control over developments in areas incapable of sustaining the impact without public injury.[116] Requiring the Board to regulate a proposed development when some aspect of it threatens health, safety, or welfare fulfills these purposes, even though the Legislature has not yet anticipated a problem by developing a standard in section 484. In drafting a statute, the Legislature cannot foresee every aspect of a proposed development that may threaten health, safety, and welfare, quality of life or the environment. Over the statute's nearly twenty-year history the criteria in section 484 have been amended and supplemented many times. This fact demonstrates that the Legislature cannot exhaustively list every conceivable problem that every development may pose, and new concerns always arise.[117] Indeed, in the one instance when the court tried to limit the Board's discretion, the Legislature acted swiftly to overturn that narrow view of the Board's role in the Site Law review process.[118] The Legislature has dealt with its own inherent limitations by conferring general discretion on the Board.

Similarly, the Board is encouraged to read the more specific section 484 criteria broadly to assure that the far-reaching purposes of the Site Law are achieved because the Site Law itself imposes on applicants a burden of satisfying the health, safety, and welfare standard, and requires the Board to deny permits where that burden is not met. Moreover, conferring general discretion to consider health, safety, and welfare concerns provides the Board with some flexibility to address problems in a practical way. For example, the Board may deny a permit or condition approval of a permit where common sense indicates a problem in a proposal that is not specifically addressed by the statute.

On the face of the statute, however, a number of questions arise regarding this interpretation. First, the provisions concerning the requirement that the Board solicit and receive testimony and the applicant's burden of proof regarding health, safety, and welfare are

114. *See supra* note 20 and accompanying text.
115. *See supra* notes 21, 23 & 30-31 and accompanying text.
116. *See supra* notes 37 & 72 and accompanying text.
117. *See supra* notes 24 & 62-65 and accompanying text.
118. *See supra* notes 20, 22 & 87-90 and accompanying text.

both set forth in the section governing the conduct of hearings[119] which are not held on every application. Arguably, health, safety, and welfare concerns may form the basis for the Board's decision only when a hearing is held. That view, however, would require the Board to schedule a hearing on every application raising health, safety, and welfare problems. Particularly in cases where the Board wished to conditionally approve a proposal, such a view would deny the Board the flexible and practical means to exercise its police power, contrary to the express purpose of the Site Law.[120] Moreover, an applicant dissatisfied with BEP denial or conditional approval of a project based on health, safety, and welfare concerns may request a hearing which the Board must schedule.[121] Thus, no applicant is ever denied a hearing where concerns can be aired. Nevertheless, for reasons more fully developed below, the Board ought to hold a hearing when it intends to *deny* an application solely on health, safety, and welfare concerns, though such a hearing is less necessary when approval is conditioned on the developer's addressing such concerns.[122]

A thornier problem is raised by section 486-A(3):

> **3. Findings of fact; order.** Within 30 days after the Board adjourns any hearing held under this section, it shall make findings of fact and issue an order granting or denying permission to the person proposing the development to construct or operate the development, as proposed, or granting that permission upon such terms and conditions as the Board deems advisable to protect and preserve the environment and the public's health, safety and general welfare . . . .[123]

Clearly, this section contemplates that when the Board has health, safety, and welfare concerns, it can conditionally approve on terms and conditions necessary to address those concerns. Could, however, the Board ever deny approval altogether because of health, safety, and welfare concerns? The answer to this question is yes, and section 486-A(3) can be read consistently with section 486-A(2).

As shown above,[124] section 486-A(2) theoretically gives the Board the authority to deny a permit to any applicant who fails to meet its burden of proof on *any* criterion, including adequate protection of health, safety, and welfare. DEP regulations in fact support the view that permits must be denied to any applicant who fails to satisfy

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119. *See supra* notes 45-52 and accompanying text. These provisions were formerly in section 484. *See* ME. REV. STAT. ANN. tit. 38, § 484 (1978 & Supp. 1987-1988). There is no legislative history clearly revealing the reason for the change.

120. *See supra* notes 20 & 78 and accompanying text.

121. *See supra* note 45 and accompanying text.

122. *See infra* note 223 and accompanying text.

123. P.L. 1987, ch. 812, § 12 (codified at ME. REV. STAT. ANN. tit. 38, § 486-A(3) (Supp. 1988-1989)).

124. *See supra* notes 92-93 and accompanying text.

this burden and that conditional approval cannot be used to vary this burden.[125] Section 486-A (3) does not withdraw the Board's authority to deny permits when the applicant fails to meet its burden of proof, but creates an exception and confers discretion on the Board to approve conditionally a proposal that raises health, safety, and welfare concerns rather than deny the permit. This exception makes sense since section 484, recently amended, addresses the major areas where state regulation is required. Additional health, safety, and welfare concerns are likely to be relatively minor and more appropriately dealt with by a conditional permit rather than outright denial. Nevertheless, nothing in section 486-A(3) should be read to limit the Board's authority to deny permits in appropriate cases.

Despite the clear import of the words of the statute, two objections might be raised against vesting the Board with discretion to make determinations on applications based on health, safety, and welfare concerns: first, that the terms require an applicant to meet criteria which are unconstitutionally vague and impossible of compliance and second, that the vesting of the Board with general discretion is an unconstitutional delegation of powers. As demonstrated by the subsequent discussion, these concerns are not fatal to the Legislature's delegation of general discretion to the Board.

IV. CONSTITUTIONAL ISSUES

A. Vagueness

Vagueness challenges to the Site Law are not new. In *Spring Valley Development*,[126] the developer argued that then-existing criteria under section 484 were unconstitutionally vague and impossible of compliance.[127] In rejecting this argument, the court reiterated its reason for invalidating vague statutes by noting that "the standards which a statute sets out to guide the determinations of administrative bodies must be sufficiently distinct so that the public may know what conduct is barred and so that the law will be administered according to the legislative will."[128] Although acknowledging that the Legislature used general language in requiring proof that a proposed development has adequate provision for fitting itself harmoniously into the existing natural environment, the court did not find that this reason was offended:

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125. *See supra* note 51 and accompanying text.

126. 300 A.2d 736 (Me. 1973).

127. The criteria in effect under section 484 at the time *Spring Valley Development* was decided required that the developer show financial capacity, adequate provision for traffic movement, no adverse affect on the natural environment and soil types suitable to the nature of the undertaking. *Id.* at 749-50 (quoting ME. REV. STAT. ANN. tit. 38, § 484 (1970)).

128. *Id.* at 751.

> [T]he Legislature has throughout the Act pointed out the specific respects in which the development must not offend the public interest and in which the development would be ecologically inharmonious. The Act recognizes the public interest in the preservation of the environment because of its relationship to the quality of human life, and in insisting that the public's existing uses of the environment and its enjoyment of the scenic values and natural resources receive consideration, the Legislature used terms capable of being understood in the context of the entire bill. The Legislature has declared the public interest in preserving the environment from anything more than minimal destruction to be superior to the owner's rights in the use of his land and has given the Commission adequate standards under which to carry out the legislative purpose.[129]

Thus, because the criterion could be understood in the context of the entire Site Law, it was not unconstitutionally infirm. Similarly, the criteria relating to soil types and traffic movement were so clearly reasonable that they were upheld without discussion.[130] In contrast, the court struck down a criterion that property values not be unreasonably affected because it was outside the scope and purpose of the Act.[131] The court concluded that standards which the Site Law imposes on the administrative body and applicants and which could be understood in the context of the entire Act and which carried out its purposes are "clear, explicit, rationally related to the purposes of the Act and are adequate guides for the conduct of both the [Board] and the applicants."[132]

The court in *Spring Valley Development* did not address itself to the requirement that a proposed development must adequately protect the public's health, safety, and general welfare. The question thus arises whether that requirement is clear, explicit, rationally related to the purposes of the Act and an adequate guide for the conduct of both Board and applicants.

1. Rational Relationship

The idea expressed in *Spring Valley Development* that a statutory requirement must be rationally related to the purposes of the Act does not so much deal with a vagueness problem, but rather concerns whether the requirement is a proper exercise by the Legislature of its police power.

The Maine Constitution describes the Legislature's full power to

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129. *Id.*

130. *Id.* at 750-51.

131. *Id.* at 751. The Legislature eliminated the condition as to property values from the statute. *Id.* n.12 (quoting P.L. 1971, ch. 613, § 5).

132. *Id.* at 752. *See also* Secure Environments, Inc. v. Town of Norridgewock, 544 A.2d 319, 322 (Me. 1988); *In re* Maine Clean Fuels, Inc., 310 A.2d 736, 742 (Me. 1973).

make all reasonable laws and regulations for the defense and benefit of the people of this state.[133] This power entitles the Legislature "to pass regulations designed to promote the public health, safety and welfare."[134] Any legislative exercise of the police power must, of course, be reasonable; an exercise is reasonable if its purpose is to benefit the public welfare and the methods adopted bear a rational relationship to that goal.[135]

Courts have held that there is a public benefit when any state of facts either known or reasonably assumed lends support to the legislative enactment, and accords great weight to legislative findings of public benefit.[136] The Site Law's legislative findings express concern for the potential harm of large developments and the need to vest discretion in state authority to regulate such developments. The stated purpose is to provide a flexible and practical means by which the BEP can exercise the police power to minimize the adverse impact of such developments on the natural environment and protect the health, safety, and general welfare of the people.[137] These findings and purposes support the public benefit of the Site Law.[138]

In order to bear a rational relationship to the purpose, a measure must be reasonably appropriate to accomplish the intended purpose.[139] In the case of the Site Law, the rational relationship test is easily met. A statute that requires the BEP to review developments to determine whether, among other criteria, they adequately protect the public's health, safety, and welfare is certainly appropriate to accomplish the statute's stated purpose of protecting the people's health, safety, and general welfare.[140] The discussion in *Spring Valley Development* regarding the requirement that a proposed development fit harmoniously into the existing natural environment supports this conclusion.[141] Indeed, *Spring Valley Development* held that the Site Law was a constitutional exercise of the state's police

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133. ME. CONST. art. IV, pt. 3, § 1.

134. Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Ass'n, 320 A.2d 247, 254 (Me. 1974). *See also* Ace Tire Co. v. City of Waterville, 302 A.2d 90, 96 (Me. 1973); *In re* Spring Valley Dev., 300 A.2d 736, 746 (Me. 1973); Watson v. State Comm'r of Banking, 223 A.2d 834, 836 (Me. 1966), *appeal dismissed*, 389 U.S. 9 (1967).

135. National Hearing Aid Centers, Inc. v. Smith, 376 A.2d 456, 460 (Me. 1977); Maine State Hous. Auth. v. Depositors Trust Co., 278 A.2d 699, 705 (Me. 1971).

136. Common Cause v. State, 455 A.2d 1, 16 (Me. 1983); National Hearing Aid Centers v. Smith, 376 A.2d at 460.

137. *See supra* notes 19-20 and accompanying text.

138. *See In re* Spring Valley Dev., 300 A.2d 736, 741-42, 745 (Me. 1973).

139. National Hearing Aid Centers v. Smith, 376 A.2d at 461. *See also* Lambert v. Wentworth, 423 A.2d 527, 536 (Me. 1980); Burne v. John Hancock Mut. Life Ins. Co., 403 A.2d 775, 778 (Me. 1979).

140. *See In re* Maine Clean Fuels, Inc., 310 A.2d 736, 742 (Me. 1973).

141. *See supra* note 127 and accompanying text.

power.[142] Thus, requiring proposed developments to protect adequately the public's health, safety, and welfare satisfies the rational relationship test and is a valid police power exercise.

2. *Vagueness*

The other idea expressed in *Spring Valley Development* was that a statutory requirement must be clear, explicit and an adequate guide for the conduct of both Board and applicants. This requirement coincides with the Law Court's traditional analysis of vagueness problems. In general, the court has recognized that definiteness is a due process requirement and has two major functions: to guide the adjudication of rights and duties and to guide the individual in planning future conduct.[143] As elaborated by the court:

> [T]he law must provide reasonable and intelligible standards to guide the future conduct of individuals and to allow the courts and enforcement officials to effectuate the legislative intent in applying these laws. Though concerned primarily with criminal sanctions, the doctrine has been applied in instances where one must conform his conduct to a civil regulation.
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> . . . .
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> A statute is void for vagueness when it sets guidelines which would force men of general intelligence to guess at its meaning, leaving them without assurance that their behavior complies with legal requirements and forcing courts to be uncertain in their interpretation of the law. Such an unacceptable statute would often be "so vague and indefinite as really to be no rule or standard at all".[144]

While definiteness of statutory standards is important to guide both decisionmakers applying the law and individuals planning their conduct, the court has recognized that a statutory standard is not unconstitutionally vague merely because it fails to delineate precise instances of proscribed conduct. The English language is limited in its ability to be both specific and manageably brief, and standards are satisfactory if "they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand

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142. *In re* Spring Valley Dev., 300 A.2d at 746-48.

143. Swed v. Inhabitants of Bar Harbor, 158 Me. 220, 225, 182 A.2d 664, 667 (1962). The same concern is expressed in *Spring Valley Development*, where the court states that standards must be sufficiently distinct so that the public may know what conduct is barred and that the law will be administered according to the legislative will. *In re* Spring Valley Dev., 300 A.2d at 751. *See supra* note 126 and accompanying text.

144. Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Ass'n, 320 A.2d 247, 253 (Me. 1974) (footnotes and citations omitted). *See also* City of Portland v. Jacobsky, 496 A.2d 646, 649 (Me. 1985); Maine Real Estate Comm'n v. Kelby, 360 A.2d 528, 531 (Me. 1976).

and comply with . . . ."[145] The court has recognized three sets of circumstances that appropriately balance the need for definiteness and the recognition that expressed standards are limited by language and the need for brevity.

First, as discussed in *Spring Valley Development*, standards are not vague when they are capable of being understood in the context of the entire statute, particularly by reference to expressed statutory purposes.[146] Thus, the meaning of individual standards is not determined by viewing the standard in isolation, but by reading it in the context of the whole statute. Second, when a statute regulates businessmen who are likely to understand its terms and plan their conduct accordingly, there is no vagueness problem, even if in some instances the language might require interpretation or present formidable factual issues of proof.[147] For example, the court held that a statute proscribing " 'bad faith, incompetency or untrustworthiness, or dishonest, fraudulent or improper dealings,' not in the abstract, but *on the part of real estate brokers and salesmen*" was not unconstitutionally vague.[148] Thus, a statute is not vague when those regulated by it understand its meaning. Third, the court has found no vagueness problem when a statute delineates specific factors that a decisionmaker must consider and confers general discretion on the decisionmaker to afford sufficient flexibility to fashion orders appropriate to each individual case.[149] For example, no vagueness problem was found in the marital property statute that requires the presiding justice to consider three specific factors before dividing marital property in such proportions as the court deems "just."[150] Thus, like the first set of circumstances, meaning is given to general standards by looking at the whole statute.

The Site Law requirement that developments adequately protect

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145. Maine Real Estate Comm'n v. Kelby, 360 A.2d at 532 (quoting United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 578-79 (1973)). *Cf.* Stone v. Board of Registration, 503 A.2d 222, 228 (Me. 1986) (court refuses to interpret statute contrary to its plain meaning).

146. *See supra* notes 126-30 and accompanying text.

147. Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoemakers Protective Ass'n, 320 A.2d at 253-54 (statute requiring one month's notice to employees by a business that is voluntarily closing is not vague because the terms are sufficiently common in normal business experience). *Cf.* Swed v. Inhabitants of Bar Harbor, 182 A.2d 664, 667 (Me. 1962) (holding that statute applying to potentially unlimited class is unconstitutionally vague).

148. Maine Real Estate Comm'n v. Kelby, 360 A.2d at 532 (emphasis in original).

149. *See, e.g.*, Fournier v. Fournier, 376 A.2d 100, 103 (Me. 1977) (upholding marital property disposition statute against vagueness challenge because statute exhibits requisite specificity to enable trial justice to effect broad equitable distribution); Maine Real Estate Comm'n v. Kelby, 360 A.2d at 531-32 (upholding statute describing thirteen specific acts of misconduct and one more general ground for the suspension or revocation of a real estate broker's or real estate salesman's license).

150. Fournier v. Fournier, 376 A.2d at 102-103.

the public's health, safety, and general welfare avoids unconstitutional vagueness by containing all three sets of circumstances that balance the need for definiteness and the limitations of language. The Site Law sets forth extensive findings and expresses its purposes, and the terms are capable of being understood in the context of the entire statute. In *Spring Valley Development* the court recognized that the specific concerns raised throughout the Site Law (such as minimizing destruction of the natural environment because of its relationship to the quality of human life) give meaning to the specific criteria.[151] Indeed, the court generally reads specific provisions of the Site Law to effectuate its broad purposes.[152]

Moreover, the Site Law does not regulate every development in the state, but only those of a certain size and type. The proponents of such developments are more likely to be familiar with the kind of criteria the Board will impose.[153] In addition, the general health, safety, and welfare requirement is accompanied by eight more specific criteria. Thus a developer is put on notice of the types of concerns the Board may raise in exercising its discretion under the more general standard. At the same time, the Board has sufficient flexibility to fashion orders appropriate to an individual case, thereby fulfilling one of the Site Law's purposes.[154] Moreover, Site Law review occurs when a development is still a *proposal.*[155] The procedures of the statute provide ample opportunity for the developer to learn of specific concerns the Board may have long *before* the development is built.[156] The developer is not left without assurance that his behavior complies with legal requirements; he can learn of such requirements at an early stage of the proceedings.

Thus, the health, safety, and welfare criterion is sufficiently definite to satisfy the two functions of the vagueness doctrine. That criterion, understood in the context of the entire statute (particularly

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151. *See supra* notes 126-29 and accompanying text.

152. *See supra* notes 69-80 and accompanying text.

153. *See supra* notes 30-32 and accompanying text (describing developments subject to the Site Law). See also Maine Real Estate Comm'n v. Kelby, 360 A.2d 528, 532 (Me. 1976), and Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Ass'n, 320 A.2d 247, 254 (Me. 1974), discussed *supra* notes 144-45 and accompanying text, in which the court regards application of the statute to a limited class as a factor weighing in favor of the statute's constitutionality.

154. *See supra* notes 20 & 78 and accompanying text.

155. *In re* Belgrade Shores, Inc., 371 A.2d 413, 415-16 (Me. 1977), and *In re* Spring Valley Dev., 300 A.2d 736, 750 (Me. 1973), discuss the importance of Site Law review occurring early in the process of development. *Cf.* Stone v. Board of Registration in Medicine, 503 A.2d 222, 228 (Me. 1986) (court refuses to construe statute in a manner contrary to meaning reasonably relied on by applicant for medical license in planning his educational program).

156. *See supra* notes 38-55 and accompanying text. *See also* ME. REV. STAT. ANN. tit. 5, § 9001 (1978) (allowing agency to make advisory ruling on applicability of statute or rule to any interested person or his property).

the Findings and Purposes section and the eight specific criteria of section 484), is capable of being understood by those charged with administering the statute as well as by the limited class of individuals to whom the statute applies.

Although it is likely that the health, safety, and welfare requirement would survive the court's usual analysis for testing the definiteness of statutory terms, there is one further problem. While the Legislature clearly has the power to pass regulations designed to promote and protect the public's health, safety, and welfare and to determine the content of such regulations, there remains some uncertainty about whether a state agency is similarly empowered. Thus, there is a possible problem of unconstitutional delegation of discretion by the Legislature to the extent that the Site Law confers on the BEP, *an agency*, the power to determine the content of the health, safety, and welfare criterion in the context of a particular application. This problem will now be addressed.

B. Delegation of General Discretion

1. Legislative Power to Pass Regulations Protecting the Public's Health, Safety, and Welfare

The Law Court has often discussed the Legislature's exercise of the state's police power, and has broadly interpreted the Legislature's inherent power to pass regulations designed to promote and protect the public health, safety, and welfare.[157] The court has also frequently observed that private property is held subject to the implied condition that it shall not be used for any purpose that injures or impairs the public health, safety, or welfare.[158] The court has had some difficulty in articulating precisely what is encompassed by the concept of public welfare:

> "The concept of public welfare is broad and inclusive. * * * The values it represents are spiritual * * [sic] as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."
> "The term public welfare has never been and cannot be precisely defined. Sometimes it has been said to include public convenience, comfort, peace and order, prosperity, and similar concepts, but not to include 'mere expediency.' "[159]

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157. *See supra* note 132 and accompanying text.

158. *See In re* Spring Valley Dev., 300 A.2d at 748. *See also* Wright v. Michaud, 160 Me. 164, 171, 200 A.2d 543, 547 (1964); York Harbor Village Corp. v. Libby, 126 Me. 537, 540, 140 A. 382, 386 (1928).

159. Wright v. Michaud, 160 Me. at 173, 200 A.2d at 548 (quoting Berman v. Parker, 348 U.S. 26, 33 (1954) and Advisory Opinion of the Justices to the Senate, 128 N.E.2d 557, 561 (Mass. 1955)) (upholding refusal by Board of Appeals to grant variance from zoning ordinance). *See also* Gabriel v. Town of Old Orchard Beach, 390 A.2d 1065, 1069 (Me. 1978) (upholding ordinance controlling nudity in licensed busi-

Despite this difficulty, the court on many occasions, has determined when a statute limiting the use of property is a proper police power exercise. For example, *Spring Valley Development* held that the Site Law's limitations on the use of property for the purpose of preserving the quality of air, soil and water in the interest of the public health and welfare was within the police power.[160] In another case, the court upheld an ordinance controlling nudity in licensed businesses as serving a city's legitimate police power interest in preserving the quality and aesthetics of urban life.[161] Thus, the court displays the sense that there are commonly understood concepts encompassed in the implied condition that property not be used to injure or impair public health, safety, and welfare. Consequently, a legislative enactment that limits the use of property in order to protect the environment and quality of life is well within that concept.

In the Site Law, the Legislature clearly intended to delegate to the BEP the police power to control the location of developments to protect the health, safety, and general welfare of the people.[162] The means to accomplish this purpose is the requirement in section 486-A that developers whose property is subject to review demonstrate that a proposed development will adequately protect the public's health, safety, and general welfare.[163] Since all property is held subject to the implied condition that it shall not be used for any purpose that injures or impairs public health, safety, and welfare, section 486-A expressly imposes a condition that already impliedly exists in the state's police power. The Legislature clearly has the power to impose such a condition and to regulate and even prohibit developments that detrimentally affect the public's health, safety, and welfare. Under the Site Law, however, the *Legislature* is not the body that determines whether the health, safety, and welfare condition has been satisfied. Rather, the Site Law delegates such power to an administrative agency, and arguably offends separation of powers under the Maine Constitution by doing so.

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nesses as serving city's legitimate interest in preserving the quality of urban life and aesthetic considerations); York Harbor Village Corp. v. Libby, 140 A. 382, 385-86 (1928) (zoning ordinance prohibiting use of property as camping ground was reasonable exercise of police power). Also, in Ace Tire Co. v. Municipal Officers of Waterville, 302 A.2d 90, 96-97 (Me. 1973), the court noted that the police power defies definitional specifics and requires a certain elasticity to keep pace with changing concepts of public welfare.

160. *In re* Spring Valley Dev., 300 A.2d 736, 748 (Me. 1973). *See also* Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442 (1960).

161. Gabriel v. Town of Old Orchard Beach, 390 A.2d at 1070.

162. ME. REV. STAT. ANN. tit. 38, § 481 (Supp. 1988-1989), *quoted in supra* note 19 and accompanying text.

163. *Id.* § 486-A.

2. *The General Test for Determining the Constitutionality of a Delegation*

The concern about delegation derives from the Maine Constitution. As discussed above,[164] the constitution vests in the Legislature the police power to enact regulations to preserve and protect the health, safety, and welfare. The constitution, however, prohibits any one of the three branches of government from exercising powers which properly belong to another. Hence, the executive branch may not exercise legislative powers.[165]

Over the last 100 years, governmental police power regulations have expanded in response to the increasing complexity of political, social, and economic life in this country. Legislatures necessarily granted discretion to other bodies, such as agencies of the executive branch, to administer complex laws. Strict adherence to separation of powers was no longer possible. Earlier courts rationalized such delegation by finding that other bodies had "only a power to 'fill in details' or 'find facts' [and the delegation was] not really [a] transfer [of] 'legislative power.' "[166] Over time, however, legislatures delegated powers that were unquestionably legislative in character. As a result, courts required a new approach that preserved the essential spirit of separation of powers while recognizing the need for some delegation of the powers that legislatures cannot practically exercise themselves.[167]

In Maine, the Law Court has evolved standards to accommodate the constitutional requirement of separation of powers and the practical need for the delegation of some legislative power.[168] In *Kovach v. City of Waterville*,[169] the court recognized that the Legislature may delegate to an administrative body some authority to exercise its judgment and discretion in adjudicating a fact, but required that the statute provide adequate procedural safeguards.[170] Over time, the court has elaborated its standard for reviewing the constitutionality of a legislative delegation of authority to an administrative agency:

> [The court will] review the legislation in context to see whether the legislation contains
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> "sufficient standards—specific or generalized, explicit or

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164. *See supra* note 133-34 and accompanying text.

165. ME. CONST. art. III, § 2.

166. City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387, 404 (Me. 1973) (Wernick, J., concurring and dissenting).

167. *Id.*

168. For a good discussion of the Law Court's shift from requiring "primary standards" articulated by the Legislature to an approach emphasizing adequate procedural safeguards, see Comment, *Administrative Law: Approaches to Delegation*, 30 MAINE L. REV. 14 (1978) [hereinafter cited as *Approaches*].

169. 157 Me. 411, 173 A.2d 554 (1961).

170. *Id.* at 416-17, 173 A.2d at 556-57.

> implicit[—]" to guide the agency in its exercise of authority so that (1) regulation can proceed in accordance with basic policy determinations made by those who represent the electorate and (2) some safeguard is provided to assist in preventing arbitrariness in the exercise of power.[171]

The court has devised a threefold test to determine whether standards are sufficient. "The Legislature has provided an administrative agency with adequate standards to guide its decisionmaking when 'the legislation clearly reveals the purpose to be served by the regulations, explicitly defines what can be regulated for that purpose, and suggests the appropriate degree of regulation.' "[172] Many of the concerns addressed by this test are similar to those employed by the court in analyzing vagueness problems.[173] As in the vagueness analysis, the court ensures that the legislation sufficiently guides the agency in its exercise of authority so that it may regulate without arbitrariness in accordance with the basic policy determinations of the Legislature.[174] Indeed, the court sometimes collapses its vagueness analysis into its criteria for analyzing unconstitutional delegation questions.[175]

In determining the purpose to be served by regulations, the court looks both to the general responsibility of the agency[176] as well as the expressed purpose of the statute in question and purposes implicit in general language.[177] For example, in a case challenging the standards under which the Department of Human Services promulgated the Maine Plumbing Code, the court upheld the delegation. In doing do, the court looked to the Department's general responsibility to supervise the health and lives of the citizenry as well as the delegated authority of the Department to adopt plumbing regulations that are necessary for the protection of life, health and welfare

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171. Northeast Occupational Exch., Inc. v. State, 540 A.2d 1115, 1116 (Me. 1988) (quoting Maine School Admin. Dist. No. 15 v. Raynolds, 413 A.2d 523, 529 (Me. 1980)).

172. *Id.* (quoting Lewis v. State Dep't of Human Servs., 433 A.2d 743, 748 (Me. 1981)).

173. *See supra* notes 140-47 and accompanying text.

174. *See, e.g.*, Lewis v. State Dep't of Human Servs., 433 A.2d 743, 747 (Me. 1981) (to be constitutional, statutes delegating discretionary authority to administrative agencies must contain standards sufficient to guide administrative action).

175. *See, e.g.*, Secure Environments, Inc. v. Town of Norridgewock, 544 A.2d 319, 321 (Me. 1988) (combining vagueness and delegation analyses when analyzing a municipal landfill ordinance).

176. *See* Lewis v. State Dep't of Human Servs., 433 A.2d 743, 746 (Me. 1981); Central Me. Power Co. v. Public Util. Comm'n, 414 A.2d 1217, 1224-25 (Me. 1980).

177. Swift River Co. v. Board of Envtl. Protection, 550 A.2d 359, 361 (Me. 1988); Northeast Occupational Exch. v. State, 540 A.2d at 117; Lewis v. State Dep't of Human Servs., 433 A.2d at 746-47; Central Me. Power Co. v. Public Util. Comm'n, 414 A.2d at 1224-25; Maine State Hous. Auth. v. Depositors Trust Co., 278 A.2d 699, 703 (Me. 1971).

and the successful operation of the health and welfare laws.[178] The first part of the test resembles the court's vagueness analysis which recognizes that a general term may be capable of being understood in the context of the entire statute.[179]

Under the Site Law, the purposes to be served are clear. The Legislature has generally charged the BEP with the duty to exercise the police power of the state to "prevent diminution of the highest and best use of the natural environment of the State."[180] As discussed above,[181] the Legislature also specifically set forth the purposes of the Site Law: to provide a flexible and practical means by which the BEP may exercise the police power to control the location of developments so as to minimize their impact on the natural environment, and to protect the health, safety, and general welfare of the people. The Legislature's purpose in delegating power to the BEP under the Site Law is clear; indeed, the court often looks to the Site Law's purpose in interpreting specific terms.[182] Thus, the first part of the test is met.

The second part of the test requires that the Legislature explicitly define what can be regulated for this purpose. Legislation satisfies this part of the test when the activity subject to regulation is carefully defined,[183] or when terms are used that are readily understood by those regulated.[184] Again, the Site Law satisfies this second part. Proposed development subject to regulation under the statute is de-

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178. Lewis v. State Dep't of Human Servs., 433 A.2d at 746-47. *See also* Maine State Hous. Auth. v. Depositors Trust Co., 278 A.2d at 702-703 (actions by Housing Authority fulfilled purpose to eliminate overcrowded, unsanitary and unsafe dwelling conditions that menace the health, safety, morals and welfare of the state). *Cf.* Small v. Maine Bd. of Registration & Examination in Optometry, 293 A.2d 786, 788 (Me. 1972) (declaring invalid a delegation containing no statement of legislative policy).

179. *See supra* note 146 and accompanying text.

180. ME. REV. STAT. ANN. tit. 38, § 361 (Supp. 1988-1989). *See supra* note 12 and accompanying text.

181. *See supra* note 20 and accompanying text.

182. *See supra* notes 68-80 and accompanying text.

183. Northeast Occupational Exch. v. State, 540 A.2d at 1117 (upholding statute that authorized agency to license facilities for provision of mental health services which are defined as "out-patient counseling, other psychological, psychiatric, diagnostic or therapeutic services and other allied services"); Lewis v. State Dep't of Human Servs., 433 A.2d at 747 (delegation of authority to promulgate plumbing and sewage regulations upheld where plumbing and subsurface sewage disposal systems carefully defined); Finks v. Maine State Highway Comm'n, 328 A.2d 791, 797 (Me. 1974) (upholding statute delegating to agency eminent domain power over property along and adjacent to state highways because statutory terms subject to inherent limitations and capable of interpretation in light of the statutory purpose and prior judicial opinions); Maine State Hous. Auth. v. Depositors Trust Co., 278 A.2d 699, 705 (Me. 1971) (upholding as sufficiently limited a statute delegating authority to make housing available to low income persons where statutory terms defined).

184. *See, e.g.*, State v. Boyajian, 344 A.2d 410, 413 (Me. 1975) (statute prohibiting sale of "potent medicinal substances" upheld because pharmacists understood the meaning of that term).

fined with great precision.[185] Moreover, as discussed above,[186] developers of large scale projects who are in the business of development and whose proposals are most likely to threaten health, safety, and welfare understand what these terms mean with respect to their activities.

The third part of the test requires that the legislation suggest the appropriate degree of regulation. The purpose of this part is to assure that there are adequate procedural safeguards to protect against the agency's arbitrariness and abuse of discretion.[187] The court has found statutes to contain adequate procedures when rules promulgated to implement the statute are adopted pursuant to the Maine Administrative Procedure Act,[188] and subject to its safeguards of judicial review, modification on petition of any affected person and public notice prior to adoption.[189] The Site Law clearly contains adequate procedural safeguards. Not only are the rules promulgated to implement the statute adopted pursuant to the Administrative Procedure Act,[190] but those whose applications are adjudicated by the DEP or BEP are entitled to an explanation of the agency's decision, a hearing before the BEP on an applicant's objections to the agency's decision, an order setting forth the findings of fact supporting the order and an appeal to the superior court of a Board order.[191] Thus, any abuse of discretion by the agency in determining the content of the health, safety, and welfare criteria, as well as whether it has been satisfied in a particular case, can be checked by court review; the reviewing court can apply the same tests to BEP determinations that it uses in deciding whether legislative enactments to protect the health, safety, and welfare are proper police power exercises.[192] These procedures guard against arbitrariness in the agency's implementation of the Site Law.

3. *The Court's Special Recognition of the Appropriateness of General Delegations*

Over the last fifteen years, the Law Court has recognized in several cases that extensive procedural safeguards to protect against an abuse of discretion may actually compensate for the lack of precise guidelines.[193] This recognition suggests that the Law Court has rede-

185. P.L. 1987, ch. 812, § 2 (codified at ME. REV. STAT. ANN. tit. 38, § 482(2) (Supp. 1988-1989)). *See supra* note 32 and accompanying text.

186. *See supra* note 150 and accompanying text.

187. *See* Northeast Occupational Exch. v. State, 540 A.2d 1115, 1116 (Me. 1988).

188. ME. REV. STAT. ANN. tit. 5, §§ 8001-11116 (1979 & Supp. 1988-1989).

189. Northeast Occupational Exch. v. State, 540 A.2d at 1117; Lewis v. State Dep't of Human Servs., 433 A.2d 743, 749 (Me. 1981).

190. *See supra* note 47 and accompanying text.

191. *See supra* notes 45-52 and accompanying text.

192. *See supra* notes 154-58 and accompanying text.

193. Northeast Occupational Exch. v. State, 540 A.2d at 1117; Lewis v. State

fined the purpose of the delegation doctrine: the concern is not so much with separation of powers and regulation proceeding in accordance with legislative intent, but rather with the need to protect against unnecessary and uncontrolled discretionary power.[194] Professor Kenneth D. Davis, a leading proponent of the shift from standards to safeguards, explains:

> The need is usually not for standards but for safeguards. One may surmise that even now the most perceptive courts are motivated much more by the degree of protection against arbitrariness than by the doctrine about standards that they write about in their opinions. When statutes delegate power with inadequate protection against unfairness or favoritism, and when such protection can be easily provided, the reviewing courts may well either insist upon such protection or invalidate the legislation. The elements of protection that may often be feasible include a hearing with a determination on the record, a requirement of findings and reasons, respect for consistency of principle from one case to another, and opportunity for check or supervision either by administrative review or legislative review or judicial review. The kinds of protection that should be required are necessarily variables that depend upon circumstances. By and large, the safeguards required for adjudication are greater than those required for general rule making.[195]

Professor Davis notes that protection against unnecessary and uncontrolled discretion can be accomplished not only by requiring adequate safeguards to guide determinations in individual cases, but also through legislative supervision of major policymaking by agencies, including committee hearings and day-to-day consultations of substantive and appropriations committees and their staffs with agencies and their staffs.[196]

In Maine, the Law Court has considered adequate procedural safeguards to resolve the constitutionality of a delegation where it may not be feasible to supply precise standards without frustrating the purposes of the particular legislation. For example, in *Lewis v. State Department of Human Services*[197] the Law Court upheld a generality of standards in legislation authorizing the promulgation of the Maine State Plumbing Code because the effective regulation of plumbing and subsurface sewage disposal systems "requires a

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Dep't of Human Servs., 433 A.2d at 749; State v. Boynton, 379 A.2d 994, 995 (Me. 1977); Finks v. Maine State Highway Comm'n, 328 A.2d 791, 796 (Me. 1974).

194. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3.15, at 206 (2d ed. 1978 & Supp. 1980).

195. *Id.* § 3.14, at 205, *cited in* Northeast Occupational Exch. v. State, 540 A.2d at 1117. *See also* City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387, 409-10 n.4 (Me. 1973) (Wernick, J., concurring and dissenting) (summarizing the debate about the appropriate purposes of a delegation doctrine).

196. K. DAVIS, *supra* note 194, § 3.15, at 206.

197. 433 A.2d 743 (Me. 1981).

flexibility and attention to changing technology which are incompatible with more detailed standards issued by the Legislature."[198] Similarly, in *Finks v. Maine State Highway Commission*,[199] the court upheld the authority conferred on the agency to take through eminent domain property to preserve natural scenic beauty along and adjacent to any state highway because more specific language would frustrate the statute's purpose of highway beautification. The court explained that the "Legislature would be hard pressed to define in specifics the broad connotation which the expression 'natural scenic beauty' conveys . . . ."[200] Thus, the Law Court has upheld a broad delegation where a statute exhibits a need for agency flexibility or a purpose incapable of more precise definitions.

The Site Law is the type of statute where extensive procedural safeguards should compensate for the absence of more detailed standards governing the exercise of discretion. The Law Court has often construed the Site Law broadly to effectuate the statute's purposes, to provide a practical and flexible means to minimize the impact on the environment, and to protect public health, safety, and welfare from certain types of development.[201] Indeed, in *Maine Clean Fuels*, the court impliedly approved delegating to the BEP broad police power authority to achieve the statute's purpose.[202] Fulfillment of this purpose requires flexibility and attention to changing technology regarding how developments are constructed and their impact measured; this purpose would be frustrated if the BEP and DEP could never look at problems not previously encountered or understood and not addressed by the more specific criteria of the Site Law. Moreover, the phrase "public's health, safety, and welfare" may be incapable of more precise definition.[203] To require the Legislature to define specifically the term would frustrate the Site Law's purposes.

Indeed, in *Secure Environments, Inc. v. Town of Norridgewock*,[204] the Law Court held that a municipal ordinance requiring a municipal administrative board to apply criteria similar to those in section 484 of the Site Law in deciding whether to grant permits for landfill construction and operation was a proper delegation. In doing so, the

198. *Id.* at 749.

199. 328 A.2d 791 (Me. 1974).

200. *Id.* at 796. *See also* Superintending School Comm. of Bangor v. Bangor Education Ass'n, 433 A.2d 383, 386-87 (Me. 1981); State v. Boynton, 379 A.2d at 995; *Approaches*, *supra* note 168, at 18-20. It is interesting that in State v. Fin & Feather Club, 316 A.2d 351, 356 (Me. 1974), the court did not even consider possible constitutional problems when reviewing a broad delegation of power to the Baxter State Park Authority.

201. *See supra* notes 68-80 and accompanying text.

202. *See supra* note 74 and accompanying text.

203. *See supra* notes 156-58 and accompanying text.

204. 544 A.2d 319 (Me. 1988).

court suggested that the ordinance, and hence the Site Law, is the type of legislation requiring flexibility and attention to changing technology and is not susceptible to more detailed standards.[205] This suggestion is consistent with case law in other jurisdictions noting a similar need for flexibility in statutes which, like the Site Law, are directed at control of environmental problems.[206]

There is language in *Secure Environments* which, upon first reading, may indicate a contrary conclusion regarding the health, safety, and welfare criterion. The court distinguished the ordinance under review from that in *Cope v. Inhabitants of the Town of Brunswick*,[207] in which the court held that an ordinance providing that an application for a special exception would be approved only if a proposed use would not "adversely affect the health, safety and general welfare of the public" was an unconstitutionally vague delegation. As the court noted, "[w]hat is required by 'the health, safety or general welfare of the public' is a legislative decision that must be made by the municipality's legislative authority and not by a municipal administrative Board."[208]

However, cases striking down such general delegations involve delegations under *municipal* ordinances to *municipal* administrative boards and should not govern delegations by the Legislature to a state agency.[209] There are a number of reasons to support this distinction. First, unlike state agencies whose discretion is conferred directly by the Legislature, municipal administrators receive their authority from the Legislature through municipal legislative bodies.[210] These administrators are, therefore, one step further removed from the Legislature than are state agencies. Second, the Legislature

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205. *Id.* at 323 n.4.

206. *See* State v. Braun, 378 A.2d 640 (Del. Super. Ct. 1977). *See also* Hindt v. State, 421 A.2d 1325, 1331 (Del. Super. Ct. 1980) (citing with approval Boynton v. State, 379 A.2d 994 (Me. 1977)).

207. 464 A.2d 223 (Me. 1983).

208. Secure Environments, Inc. v. Town of Norridgewock, 544 A.2d at 323 (discussing Cope v. Inhabitants of the Town of Brunswick, 464 A.2d 223 (Me. 1983)). Other cases expressing similar conclusions include Wakelin v. Town of Yarmouth, 523 A.2d 575 (Me. 1987); Fitanides v. Crowley, 467 A.2d 168 (Me. 1983); Stucki v. Plavin, 291 A.2d 508 (Me. 1972); Phillips Petroleum Co. v. Zoning Bd. of Appeals, 260 A.2d 434 (Me. 1970); Waterville Hotel Corp. v. Board of Zoning Appeals, 241 A.2d 50 (Me. 1968).

209. *See, e.g.*, Lewis v. State Dep't of Human Servs., 433 A.2d at 748, (holding that *Stucki* and *Waterville Hotel Corp.* were distinguishable because they involved delegation of authority to local boards, not the delegation of authority by the Legislature to a state agency). *See also supra* note 74 and accompanying text (discussing cases holding that the Site Law is clearly distinguishable from local zoning ordinances).

210. For example, in the case of municipal boards, the Legislature has granted authority to municipalities to create boards of appeal to hear appeals from other municipal bodies, such as planning boards administering zoning ordinances. *See* ME. REV. STAT. ANN. tit. 30, § 2411 (1978 & Supp. 1988-1989).

has considerable oversight of state agency activities. The Legislature appropriates money to the state agencies, and agency personnel often interact with the Legislature regarding how statutes are implemented and should be amended.[211] Also, the Maine Administrative Procedure Act allows legislative review of agency rules.[212] Moreover, in the case of the BEP and the Commissioner, those in charge of agency policy are appointed by the Governor and confirmed by the Legislature.[213] Such oversight, absent in the case of municipal boards, provides an opportunity to assure that regulation is proceeding in accordance with the policy determinations of elected representatives and serves to check abuses of agency discretion.[214] Third, state agencies with considerable administrative expertise and professionalism are better able to resist the potential for favoritism and discrimination likely to result from the influence of local politics.[215]

In summary, the Site Law is the type of statute requiring a general delegation to effectuate its purposes and contains extensive procedural safeguards that compensate for any lack of precision in its standards.

4. Exercise of Discretion in the Absence of Regulations

Several cases which uphold the constitutionality of general delegations to agencies involve the promulgation of regulations in accordance with the Maine Administrative Procedure Act (APA), which is used to further the purposes of the authorizing statute.[216] This result is appropriate because the procedures of the APA compensate for any lack of precision in the statutory standards. Accordingly, under the Site Law the court should uphold regulations promulgated by the Board in accordance with the procedures of the APA

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211. *See, e.g.*, ME. REV. STAT. ANN. tit. 38, § 361 (Supp. 1988-1989) (requiring the BEP to make recommendations to each Legislature).

212. ME. REV. STAT. ANN. tit. 5, §§ 11111-11116 (Supp. 1988-1989).

213. *See supra* notes 13 & 15 and accompanying text.

214. *See supra* text accompanying note 195, in which Professor Davis discusses how legislative oversight accomplishes the purpose of delegation doctrine.

215. *See Approaches*, *supra* note 168, at 14-15 (quoting City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387, 406 n.3 (Me. 1973)); Finks v. Maine State Highway Comm'n, 328 A.2d 791, 795 n.2 (Me. 1974). In the *Biddeford* case, the court struck down the delegation of legislative authority to private arbitration boards, which poses many of the same problems as delegations to municipal boards. In *Approaches*, the author discusses why the degree of specificity required to uphold a legislative delegation depends on who is the recipient of the delegation.

216. *See, e.g.*, Northeast Occupational Exch. v. State, 540 A.2d 1115, 1117 (Me. 1988) (statute delegating authority to Commission of Mental Health and Mental Retardation requires that any rules promulgated must be adopted pursuant to Administrative Procedures Act); Lewis v. State Dep't of Human Servs., 433 A.2d 743, 749 (Me. 1981) (adequate procedural safeguards compensate for want of precise guidelines in statute delegating authority under which state plumbing code is promulgated).

which elaborate what an applicant must show to satisfy its burden of proving that a proposed development adequately protects the public's health, safety, and general welfare, so long as such regulations further the purposes of the Site Law.

A more troublesome situation is presented if the BEP denied a Site Law application because of its failure to protect adequately the health, safety, and welfare in a way not described in regulations. The argument to uphold such a decision was best stated in Chief Justice McKusick's dissent in *Valente v. Board of Environmental Protection*,[217] the majority opinion of which was repudiated by the Legislature.[218] In *Valente*, the BEP had denied an application for a Site Law permit to remove the topsoil from forty acres of land. The Board found that such removal would adversely affect existing and potential agricultural uses of the site in the community and would eliminate substantial natural farmland resources. The majority ordered the Board to grant the permit, but the Chief Justice disagreed and would have upheld the Board's discretion in applying section 484(3) of the Site Law,[219] even though no specific regulations prohibited topsoil mining:

> It is true, of course, that an agency is ordinarily bound by its own "legislative" rules and regulations. *See* 2 K. Davis, *Administrative Law Treatise* § 7:21, at 98—99 (2d ed. 1979). In this case, however, the Board did not violate the regulations it promulgated in 1979 when it denied Valente's topsoil mining application on farmland conservation grounds. Those regulations by their terms were not exhaustive or exclusive. The Board's own accompanying note stated plainly that the regulations were intended only to cover "several specific areas of concern" that "the Board has identified." That language was enough to put permit applicants on notice that the Board considered itself free, in ruling on future permit applications, to take cognizance of factors not yet administratively identified as legitimate criteria under section 484(3). Like its predecessor, the Environmental Improvement Commission, the Board of Environmental Protection is ordinarily free to apply the Site Location Law "on a case-by-case basis . . . under the guidance of the explicit criteria of the statute." *In re Spring Valley Development*, 300 A.2d 736, 754 (Me. 1973). While a valid regulation promulgated in a quasi-legislative proceeding may not be violated or ignored in an adjudicatory context, the Board's authority to make adjudicatory decisions "under the guidance of the explicit criteria of the statute" is not limited by the existence of nonexhaustive regulations such as those at issue here.[220]

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217. 461 A.2d 716 (Me. 1983).

218. *See supra* notes 20 & 22 and accompanying text.

219. ME. REV. STAT. ANN. tit. 38, § 484(3) (1978) (requiring that "the development will not adversely affect existing uses . . . or natural resources in the municipality or in neighboring municipalities").

220. Valente v. Board of Envtl. Protection, 461 A.2d at 722-23 (footnote omitted).

Thus, the dissent concluded that when the regulations generally evidence no intent to exclude consideration of factors other than those listed, the Board was free to take into account, when considering a development permit application, any other factors that come within the scope of the statute.[221]

This conclusion finds support in *Maine School Administrative District No. 15 v. Raynolds*,[222] which involved the State Board of Education's allocation of interest earned on the proceeds of school construction bonds to payment of debt services. The court upheld this exercise of discretion by the Board even though it was not embodied in a regulation but rather in a policy issued by the Board after the school construction projects were in process. The court viewed the policy as consistent with the statutory mandate to the Board. Moreover, the Board apparently followed a procedure involving notice and open meetings when it promulgated the policy and thus satisfied the court that the Board employed adequate procedural safeguards. Together, these two cases suggest that even when the BEP has no regulations dealing with a particular problem, it may decide an application based on its responsibility to protect the health, safety, and general welfare.

The BEP's discretion is not unfettered. First, if the Board denied a permit for failure to adequately protect the health, safety, and welfare, but its decision was based on factors not found in existing regulations, special attention should be paid to procedural safeguards.[223] The Board is, of course, required to explain its decision under the Site Law[224] so that the applicant can request a hearing on the decision and appeal to a court. But the Board should go further and hold a hearing in such a case because a hearing would provide the same type of notice and openness found to be important in *Raynolds*. Also, the basis for the decision should, like in *Raynolds*, be formalized into a policy or regulation to guide future applicants and to assure their nonarbitrary treatment.

Second, the Site Law itself provides some limits to the exercise of the Board's discretion. Any Board order must be related to the general duty of the BEP and the purposes of the statute, and an application could not be denied merely because a single person objected where there was no unreasonable impact on the environment or on the health, safety, or welfare of the public.

In the 1988 amendments, the Legislature expanded the section 484 criteria for approval of proposed developments. By clearly expanding the BEP's authority to regulate development, hopefully re-

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221. *Id.* at 723.

222. 413 A.2d 523 (Me. 1980).

223. *See supra* text accompanying note 195, where Professor Davis suggests that adjudication requires greater safeguards than rulemaking.

224. *See supra* note 50 and accompanying text.

moved much need for the Board or DEP to exercise its more general discretion to protect the public health, safety, and welfare. However, as new problems emerge and are recognized, the BEP should be allowed to carry out the responsibilities assigned to it in the Site Law before the Legislature can address such problems by amending the Site Law. For example, as more is learned about the hazards of radon exposure in residences, the BEP should be able to prohibit residential development in areas where hazardous radon levels are likely to occur, or, at very least, prescribe measures to minimize the hazard. Also, as burgeoning development strains the resources of some parts of Maine, the BEP must be allowed to examine the cumulative impact of proposed development on particular areas. Section 481 speaks quite clearly of the need to vest discretion in the Board to regulate development which may affect quality of life. Thus, the provision can be fairly read to empower the BEP to protect aesthetic values and recreational opportunities as well as to limit unnecessary crowding in the Site Law review process.[225] In short, the Site Law provides an important tool that, with proper use, can allow the Board and Department of Environmental Protection to achieve the important purposes of the statute.

V. CONCLUSION

The Site Location of Development Law is ambitious in its purpose of charging the Board of Environmental Protection with the authority to insure that developments will be located in a manner which will have a minimal adverse impact on the environment and will protect the health, safety, and general welfare of the people. The Legislature has, however, conferred discretion upon the Board to deny or conditionally approve applications for Site Law permits that fail to protect adequately the public's health, safety, and general welfare. This general delegation is constitutional, despite the fact that under some circumstances the Board may have to determine the meaning of the health, safety, and welfare criterion, so long as the Board observes procedural safeguards and relates the exercise of such discretion to its general duties and the purposes of the Site Law. By the proper exercise of the authority conferred by the Site

225. In *In re* Egg Harbor Assocs., 185 N.J. Super. 507, 449 A.2d 1324 (1982) a New Jersey court interpreted a law similar to the Site Law to allow that state's Department of Environmental Protection to require a developer to include low and moderate income housing in a waterfront development. The court's conclusion was based on language in the statute's prefatory findings and declarations section that cited the importance of serving the state's long term social, economic, aesthetic, and recreational interest. Like the Site Law, the New Jersey statute prohibited the issuance of a permit absent a finding that the proposed construction will not impair the public health, safety, and welfare. Thus, the court read the health, safety, and welfare criterion as empowering the department to address the needs articulated in the findings and declarations section.

Law, the BEP and DEP can achieve the statute's ambitious purposes.