

MAINE STATE LEGISLATURE

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STATE OF MAINE

Inter-Departmental Memorandum Date Dec. 31, 1975

To Henry Warren

Dept. Environmental Protection

From John M. R. Paterson, Assistant

Dept. Attorney General

Subject Delegation of Authority under 38 M.R.S.A. § 489

You have orally posed several questions regarding construction of the above statute. Those questions are answered herein.

I. Section 489 authorizes a "municipality" to apply for delegation of site review authority for subdivisions of less than 100 acres. Who in a municipality is authorized to make such an application?

As a general rule, if a statute confers a power on a municipality but provides no mode for exercise of that power, the municipality must prescribe a manner of execution by ordinance or resolution. Appropriate municipal legislation is necessary in order to discharge the statutory grant of power. McQuillan, *Municipal Corporations*, § 10.29-10.30 (3d Ed.) However, § 489 is not so much grant of power as it is an authorization to a municipality, upon application and approval by BEP, to exercise a power the municipality already has pursuant to 30 M.R.S.A. § 4956 in place of the BEP.

To apply pursuant to § 489 a municipality must have created a Planning Board. In acting pursuant to § 489, a planning board would perform no function significantly different from the functions it necessarily performs otherwise; its decisions would simply carry an additional result for subdivision applications of a certain size. Consequently, we conclude that in creating a planning board, unless its ordinances and other municipal legislation indicate otherwise, a municipality authorizes the board to perform functions reasonably ancillary to a primary task of approving subdivisions, and that one such ancillary task is applying to BEP for delegation of site review authority.

Consequently, the § 489 application may be made either by independent ordinance or resolution of the municipality or by action of the planning board. As a practical matter, the easiest way to be assured that authority to apply for a § 489 delegation has not been withheld from a planning board is to obtain the opinion of counsel for the municipality that the planning board has this authority.

2. Section 489(1)(C) requires the adoption of an "ordinance or regulation" designed to meet certain procedural standards. How does a municipality adopt a regulation?

The municipal legislative authority may do so, just as it adopts ordinances. In addition, Title 30, M.R.S.A., § 4956 authorizes the municipal reviewing authority (either the municipal offices or planning board) to adopt regulations, which may be procedural as well as substantive. The reviewing authority acts to adopt regulations just as it would act on any other matter, such as approval of a subdivision. Therefore, a planning board may adopt regulations to satisfy the requirements of § 489.

3. Section 489 provides time requirements for municipal review that differ from time provisions in 30 M.R.S.A. § 4956. How are these differences reconciled?

If a municipality has not received § 489 authority, the time requirements of § 4956, Title 30, control issuance of the municipal permit while the appropriate section of Title 38 controls BEP action. If a municipality has § 489 authority, it must follow the time requirements of § 489(2) whenever it is acting on an application that is within the scope of § 489.

In any event, the time requirements in § 4956 and § 489 are directory only and failure of a municipality to act within the requisite time period does not automatically deprive it of jurisdiction to act on the application.

4. Under Title 38, Section 361 and BEP regulations, fees are imposed upon Site Law applicants. All fees collected by BEP go to the General Fund of the State. To whom do such fees go in the event of applications handled under § 489?

The only fee BEP may collect with respect to an application processed under § 489 is its fee for "approval" of the municipality's permit pursuant to § 489(3). That fee should be treated like any other fee collected by BEP. Since current BEP regulations impose no fee for such review, BEP regulations must be amended if the BEP wishes to collect such a fee.


JOHN M. R. PATERSON