

## DRAFT

06-096

DEPARTMENT OF ENVIRONMENTAL PROTECTION

Chapter 373:

**FINANCIAL CAPACITY AND TECHNICAL ABILITY STANDARD OF THE SITE LOCATION LAW**

SUMMARY: This chapter includes rules adopted pursuant to the "financial capacity" and "technical ability" standard of the Site Location of Development (Site Law), 38 M.R.S.A. § 484(1). These rules describe the scope of review of the Board in determining a developer's compliance with the "financial capacity" standard of the Site Location Law (38 M.R.S.A., Section 484(1); the information which shall be submitted, when appropriate, within an application for approval; and, the terms and conditions which the Board may impose on the approval of an application to ensure compliance with the standard.

**1. Introduction.** To meet state environmental standards, the applicant must have a sufficient level of financial capacity and technical ability. This chapter relates to the financial capacity and technical ability standard of the Site Location of Development Law (Site Law). 38 M.R.S.A. § 484(1).

**21. Financial Capacity to Meet Pollution Control Standards**

**A. Standard, Scope of Review.** In determining whether the developer has the financial capacity to meet state air and water pollution control standards, the Board department shall consider all relevant evidence to the effect that the developer has the financial capacity to construct, operate, and maintain all aspects of the development, and not just the pollution control aspects. The applicant shall have financial capacity to design, construct, operate, and maintain the development in a manner consistent with state environmental standards and the provisions of the Site Law. The applicant must have the financial capacity to design and construct all aspects of the development, and not solely the environmental protection aspects. Evidence of financial capacity must be provided prior to a decision on an application, except as otherwise conditioned by the department.

The department may issue a permit under the Site Law that conditions any site alterations upon a developer providing the department with evidence that the permittee has been granted a line of credit or a loan by a financial institution authorized to do business in this State as defined in Title 9-B, section 131, subsection 17-A or with evidence as provided in Section 2(B).

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NOTE: The Supreme Judicial Court of Maine stated in the case of In re: Maine Clean Fuels, Inc., 310 A. 2d 736, 755 (1973) that "it is clear that the ability to finance the cost of meeting pollution standards is inexorably a part of the ability to obtain total financing." Furthermore, the Board's experience with developers has shown that air and water pollution control equipment is usually installed after all other aspects of the development are completed. If the developer's funds run low or run out toward the end of development, the pollution control aspects of the development may be slighted. Therefore, in determining financial capacity, the Board requires proof of adequate funding for the completion of a development, including the pollution control aspects.

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**B. Submissions.** The Applications for approval of a proposed developments shall must include evidence that affirmatively demonstrates that the developer has the financial capacity to undertake design, construct, operate, and maintain the proposed development, including but not limited to, the following information such as the following, when appropriate:

## DRAFT

06-096

## DEPARTMENT OF ENVIRONMENTAL PROTECTION

- (1) Cost estimates. Accurate and complete cost estimates of the development, including all proposed phases. The itemization of major costs may include, but not be limited to, the cost of the following activities: land purchase, erosion control, roads, sewers, structures, water supply, utilities, pollution abatement and landscaping.
- (2) Time schedule. The time schedule for construction of all phases proposed, and for satisfying pollution abatement measures.
- (3) Evidence of funds. Evidence such as the following:
  - (a) ~~(a)~~ Letter of commitment or intent to fund. A letter from a financial institution, governmental agency, or other funding ~~agency entity~~ indicating a commitment to provide to the applicant a specified amount of funds and the uses for which the funds may be utilized. ~~utilized.~~ ~~(4) In~~ ~~In~~ cases where funding is required but there can be no commitment of money until approvals are received, a letter of "intent to fund" from the appropriate funding institution indicating the amount of funds intended to be provided to the applicant and their specified uses for which the funds are intended.

In cases where one or more limited liability corporations are part of the applicant's corporate structure, evidence must be submitted describing the applicant's corporate structure, and demonstrating that the proposed financing is clearly linked from the financing institution to the applicant.

(b) Self-financing

- (i) ~~(5)~~ The most recent corporate annual report or financial statements indicating availability of sufficient funds to finance the development together with explanatory material explaining interpreting the report, when requested, and evidence that funds have been set aside for the proposed development. Corporate annual reports or financial statements should be audited, or evidence must be submitted describing why audited reports are not available.
- (ii) ~~(6)~~ Copies of bank statements of accounts held by the applicant or other evidence indicating availability of that funds, are available and have been set aside for the proposed development. when the developer will personally finance the development.

(c) Government agency

- (i) Evidence that funds to complete the development have been included in an approved budget, that the expenditure of funds has been approved by the appropriate legal entity such as the municipality or the Legislature, that the issuance of bonds has been approved to cover the cost of the development, or that grant money has been obtained to cover development costs.
- (ii) In cases where funding is required but there can be no commitment of money until approvals are received, a detailed plan outlining how funds for the development will be obtained and evidence that legal authority exists to implement the plan.

06-096

DRAFT  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

(d) Non-profit organization.

(i) Evidence that funds to complete the development have been included in an approved budget and that grant money or other funds have been obtained to cover the development costs.

(ii) In cases where funding is required but there can be no commitment of money until approvals are received, a detailed plan outlining how funds for the development will be obtained, including projections for and status of any fund raising.

(4) Phased development. The department may find that the applicant has demonstrated adequate financial capacity to comply with department requirements provided (a) the applicant has demonstrated financial capacity for a separate first phase, and (b) the permit is conditioned to require that evidence of financial capacity adequate for review and approval be submitted to the department prior to construction of each subsequent phase. Construction of each subsequent phase may not begin prior to approval of financial capacity.

(5) Certificate of Good Standing. If the applicant is a registered corporation, provide a Certificate of Good Standing (available from the Secretary of State).

**C. Terms and Conditions.** The department Board may, as a term or condition of approval, establish any reasonable requirement to ensure that the developer has and will maintain the financial capacity to meet state environmental air and water pollution control standards, such as: the following.

(1) Performance bond. Requiring the posting of a performance bond to ensure that the air and water pollution control plans are completed as approved.

(2) Phased development. Prior to the start of the first phase of construction and each subsequent phase, the permittee shall provide a cost estimate for that phase as well as evidence that the applicant has been granted a sufficient line of credit or a loan by a financial institution authorized to do business in this State or evidence of any other form of financial assurance determined by this Chapter to be adequate by the department for review and approval.

(3) Dedication of funds. Prior to the start of construction, the permittee shall submit, to the department for review and approval, final financial arrangements indicating that funds have been specifically dedicated to the proposed development costs.

**32. Technical Ability to Meet Air and Water Pollution Control Standards**

**A. Preamble.** ~~The Board is concerned that the developer have not only the financial capacity but also the technical ability and skilled manpower to meet pollution control standards, particularly when a large scale development includes sophisticated pollution abatement measures.~~

**AB. Standards. Scope of Review.** ~~In determining whether the developer has the technical ability to meet state air and water pollution control standards, the department Board shall consider all~~

## DRAFT

06-096

## DEPARTMENT OF ENVIRONMENTAL PROTECTION

~~relevant evidence to that effect, such as: the following.~~ The developer shall have the technical capacity-ability to design, construct, and operate, and maintain the proposed development in a manner consistent with state environmental standards.

- (1) Capability. ~~Evidence that p~~Project personnel are ~~must be~~ capable of properly designing, installing, operating and maintaining pollution control devices the proposed project in accordance with state environmental standards.
- (2) Adaptation. ~~Evidence that, even if~~ the applicant's technical personnel have never before constructed or operated designed, constructed, and operated a development like the one proposed, competent engineering and field operational personnel must will be available who and can adapt their training and experience to accomplish the required tasks.
- (3) Prior conduct. ~~The department may consider e~~Evidence regarding the developer's prior conduct as a measure of willingness and ability to meet all terms and conditions of approval established by the department Board.

**BC. Submissions.** ~~The a~~Applications for approval of a proposed development must shall include evidence that affirmatively demonstrates that the developer has the technical ability to design, construct, operate and maintain undertake the proposed development, including but not limited to the following information such as the following, when appropriate.:

- (1) Experience and training. A statement of the developer's prior experience or appropriate training, or both, relating to the nature of the proposed development.
- (2) Personnel. A description of the types of personnel who will be ~~employed~~used to design, installconstruct, and operate, and maintain the proposed development-pollution control measures, including but not limited to resumes, or similar documents describing experience with similar projects.

**CD. Terms and Conditions.** ~~The department Board~~ may, as a term or condition of approval, establish any reasonable requirement to ensure that the developer has the technical ability to design, construct, and operate and maintain the development in a manner consistent with state environmental standards, meet state air and water pollution control standards, such as: the following.

- (1) Professional assistance. ~~Requiring the developer to employ~~ The permittee shall employ a capable professional engineer or other professional knowledgeable and experienced in the disciplines necessary to ensure that state air and water pollution control environmental standards are met.
- (2) Training program. ~~Requiring~~ The permittee shall implement a training program for the appropriate personnel to acquaint them with the operation and maintenance of pollution control equipment, and with state environmental control standards.

## DRAFT

06-096

## DEPARTMENT OF ENVIRONMENTAL PROTECTION

(3) ~~Third-party inspector (3PI). When the development is of substantial size and of a complex nature, requiring provision for an independent consultant to conduct on-site inspection, at the developer's expense, to ensure proper execution of plans as approved, including any conditions imposed by the Board. The permittee shall retain the services of a third-party inspector in accordance with the Department's third party inspection program, if required by the Department.~~

~~(4) Prior approval of site contractor. Prior to the start of construction, the permittee shall submit details related to the site contractor to the department for review and approval.~~

### ~~3. Adequate Provision for Solid Waste Disposal~~

~~A. Scope of Review. In determining whether the developer has made adequate provision for solid waste disposal, the Board shall consider all relevant evidence to that effect, such as evidence that:~~

~~(1) All solid waste will be disposed of in a manner which ensures that:~~

~~(a) No adverse effects on the natural environment will result;~~

~~(b) Public health, safety, and welfare will not be adversely affected; and~~

~~(c) The wastes will not combine with other wastes, water, or other natural or man-made substances to create additional harmful effects to the natural environment or the public health, safety, and welfare.~~

~~B. Submissions. Applications for approval of a proposed development shall include evidence that affirmatively demonstrates that the developer has made adequate provision for solid waste disposal, including information such as the following, when appropriate:~~

~~(1) The types and estimated quantities of solid waste to be generated by the development and the proposed method of disposal.~~

~~(2) A letter from the operator of a solid waste disposal facility or a municipality stating that adequate capacity exists for solid waste generated by the development and that the development may utilize the solid waste disposal facility.~~

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~~NOTE: The Board may deny approval if the solid waste disposal facility proposed to be used is not in compliance with applicable state laws and regulations.~~

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~~(3) When the proposed development is or includes the establishment of a solid waste disposal facility, the developer shall supply evidence of compliance with the Solid Waste Management Act (38 M.R.S.A., Section 1301 et seq.).~~

~~C. Terms and Conditions. The Board may, as a term or condition of approval, establish any reasonable requirement to ensure that the developer has made adequate provision for solid waste disposal, such as requiring:~~

06-096

DRAFT  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

- (1) a groundwater quality monitoring program;
- (2) on-site construction supervision or engineering inspection by a certified engineer or geologist;
- (3) operational inspections and reports by an independent consultant.

#### **4. Adequate Provisions for the Control of Odors**

**A. Preamble.** The Board recognizes that offensive odors may be generated by solid waste disposal facilities and certain types of commercial and industrial developments and that these odors can have an undesirable effect on surrounding uses and people living in the area.

**B. Scope of Review.** In determining whether the developer has made adequate provision for the control of odors, the Board shall consider all relevant evidence to that effect.

**C. Submissions.** Applications for approval of any development likely to be the source of offensive odors shall include evidence that affirmatively demonstrates that the developer has made adequate provision for the control of odors, including information such as the following, when appropriate:

- (1) the identification of any sources of odors from the development;
- (2) an estimation of the area which would be affected by the odor, based on general experience in dealing with the material or process used in the development, or similar materials or processes;
- (3) proposed systems for enclosure of odor-producing materials and processes, and proposed uses of technology to control, reduce or eliminate odors.

**D. Terms and Conditions.** The Board may, as a term or condition of approval, establish any reasonable requirement to ensure that the developer has made adequate provision for the control of odors.

#### **5. Adequate Provision for Securing and Maintaining Sufficient and Healthful Water Supplies**

**A. Scope of Review.** In determining whether the developer has made adequate provision for securing and maintaining a sufficient and healthful water supply, the Board shall consider all relevant evidence to that effect.

**B. Submissions.** Applications for approval of proposed developments shall include evidence that affirmatively demonstrates that the developer has made adequate provision for securing and maintaining a sufficient and healthful water supply, including information such as the following, when appropriate:

## DRAFT

06-096

## DEPARTMENT OF ENVIRONMENTAL PROTECTION

- (1) ~~A letter from the appropriate utility or water district that a sufficient and healthful water supply exists and may be utilized by the development.~~
- (2) ~~If water is to be supplied on-site, a letter from a geologist or well driller knowledgeable about the area where the development is located that a sufficient and healthful water supply is likely to be available.~~
- (a) ~~If there is reasonable doubt that a sufficient and healthful water supply can be provided by means of on-site wells, the following may be required:~~
- (i) ~~water from wells located in close proximity to the development site be tested for potability; and/or~~
- (ii) ~~a test well be dug or drilled on the development site and a report prepared indicating the volume and potability of water obtained from the well.~~
- (3) ~~If water supply and sewage disposal are to be handled on-site, and if lots are less than 2 acres in size, identification of the location of wells and on-site sewage disposal systems for each lot. The separation distance between wells and on-site sewage disposal areas shall be at least the minimum distance established in the State of Maine Plumbing Code.~~
- (4) ~~If water is to be provided by a common source:~~
- (a) ~~evidence that there will be sufficient water to serve the development;~~
- (b) ~~evidence that the common water supply system will be constructed in conformance with the Maine Drinking Water Regulations, authorized by 22 M.R.S.A., Section 601; and~~
- (c) ~~evidence that adequate provision has been made for the establishment of a mechanism to ensure proper operation and maintenance of the water supply system.~~
- C. ~~Terms and Conditions.~~** ~~The Board may, as a term or condition of approval, establish any reasonable requirement to ensure the adequate provision of a sufficient and healthful water supply, such as requiring that:~~
- (1) ~~One or more central wells be installed with adequate water for the development.~~
- (2) ~~An applicant arrange for adequate water service with a local utility or water district, or provide an adequate off-site common well, in cases where the Board determines that on-site water supplies may not be adequate.~~
- (3) ~~The location of wells and on-site sewage disposal areas be established by deed conditions.~~

AUTHORITY:

38 M.R.S.A. Section 343

06-096

DRAFT  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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