

Department of Environmental Protection
Chapter 373: Financial and Technical Capacity Standards of the Site Location of
Development Act
Basis Statement and Response to Comments
December 10, 2015

The Department is amending Chapter 373 to update the requirements for financial capacity and technical ability to reflect changes in nomenclature and Department practices since the rule was adopted in 1979. The amendments remove surplus language, provide greater clarity as to how an applicant may satisfy the requirements of the Site Location of Development Act (“Site Law”), and provide examples of common terms and conditions applied to Site Law permits issued by the Department.

The Department posted the rule for public comment on September 23, 2015, and held a public hearing on October 15, 2015. The comment period ended October 26, 2015 at 5:00 pm. No persons commented at the public hearing and one person submitted written comments. Written comments were received from the following person:

Juliet Browne, Verrill Dana

In addition to any changes detailed below, the Department made other non-substantive changes after consultation with the Maine Office of Attorney General.

Comments and Responses

Comments below may be abbreviated, paraphrased, and/or consolidated. In some cases, typographical or other minor errors in comments may have been corrected.

1. Comment: The commenter contends that requiring a developer who is self-financing a project to provide copies of bank statements or other evidence that the funds have been “set aside” for the proposed development amounts to a de facto requirement that the funds be placed into escrow and is neither necessary nor practicable. A requirement that funds for the entire project be set aside at the outset of construction will unnecessarily restrict allocation of resources and capital and will strongly discourage investment in the state. The change is also unnecessary because the Department has the flexibility to require the developer to post a performance bond. (Sections 2(B)(3)(b)(ii) and 2(C)(3))

Response: The Department’s proposal does not require full “up-front” financing, but instead requires that an applicant provide evidence of sufficient funding to undertake and complete the proposed project. The Department’s proposal with regard to funds being set aside states:

- (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.~~

Copies of bank statements with funds set aside are just one mechanism that could be utilized to meet this requirement; the Department may also accept other evidence of funding availability. Since the proposed revisions require that applicants have the 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 Department requires documentation that the necessary funding is, and will be available, for the development of the project. No changes were made in response to this comment.

2. Comment: The commenter recommends changing the word “evidence” to “explanation” in section 2(B)(3)(b) regarding why audited reports are not available, and comments that it is not clear what additional explanation of the financial reports and/or annual report the Department is seeking in its proposed changes to that section.

Response: Since audited annual reports or financial statements are important when assessing an applicant’s financial capacity to construct a development, the Department’s proposal requires an applicant to provide information detailing the reason this information is not available. The Department has amended section 2(B)(3)(b)(i) of its proposal to state:

(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. The financial information in any annual report and any financial statement should be audited, or an explanation provided. Corporate annual reports or financial statements should be audited, or evidence must be submitted describing why audited reports are not available.

3. Comment: The commenter notes that section 2(B)(3)(b) suggests that the annual reports are audited, when it is actually financial statements which are audited.

Response: Annual reports, which have been required by the Securities and Exchange Commission for publicly-owned businesses since 1934, are formal financial statements that are published yearly and provided to company stockholders and other interested parties. Annual reports assess the year’s operations and future prospects, and provide a variety of business information, including:

- A general description of the industry or industries in which the company is involved.
- A brief description of the company’s business in the most recent year.
- A listing of the company’s directors and executive officers, as well as and their principal occupations.
- Market price of the company’s stock and dividends paid.
- Audited statements of income, financial position, cash flow, and notes to the statements providing details for various line items.

The commenter is correct to note that the annual report itself is not audited. The financial information within the annual report however, is generally audited. To clarify these requirements, the Department has revised its proposal to state:

(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.~~ The financial information in any annual report and any financial statement should be audited, or an explanation provided ~~Corporate annual reports or financial statements should be audited, or evidence must be submitted describing why audited reports are not available.~~

4. Comment: The commenter argues that the more detailed requirements for cost estimates in section 2(B)(1) would include sensitive business information, such as the cost of land acquisition, and recommends that some of these elements be combined. The commenter suggests the breakdown include development costs, construction costs, maintenance costs and other costs.

Response: The proposed language is necessary for the Department's review of the costs of developing a proposed project and consistent with current practice. No changes were made in response to this comment.

5. Comment: The commenter notes that section 2(B)(3)(d) proposes more relaxed requirements for non-profit organizations and suggests that all developers should be provided with similar flexibility.

Response: The Department proposed separate categorical requirements for non-profit organizations because the financing mechanisms for non-profits typically differ significantly from those of other potential developers. Many non-profits solicit and accept donations from the public or apply for grants from foundations and the government to fund services and programs, unlike most other non-government entities, that are typically either self-financed or use capital markets. The Department's proposal, rather than providing for more relaxed requirements, simply recognizes that non-profits utilize different financing mechanisms. No changes were made in response to this comment.

6. Comment: The commenter supports the proposed changes related to phased development in section 2(B)(4) and for clarity suggests adding the following to the last sentence of this section: "for that phase."

Response: The Department agrees with the commenter and has made the suggested change to section 2(B)(4). The revised proposal states:

(4) Phased development. In cases of phased development or long term construction projects, 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 for that phase.

7. Comment: The commenter contends that the proposed changes in section 3(B)(2), to the description of personnel are impracticable. Personnel responsible for operating and maintaining the development are not likely to be identified until after construction is complete.

Response: The rule does not require the names of the people who will be responsible for operating and maintaining the development, but the general responsibilities and titles of the responsible personnel. No changes were made in response to this comment.