



Department of Environmental Protection

One Winter Street Boston, MA 02108 • 617-292-5500

Charles D. Baker
Governor

Karyn E. Polito
Lieutenant Governor

Matthew A. Beaton
Secretary

Martin Suuberg
Commissioner

SUMMARY OF CHAPTER 91 WATERWAYS REGULATORY REVISIONS FOR FACILITIES OF LIMITED ACCOMMODATION 310 CMR 9.00

The Department of Environmental Protection is responsible for effective stewardship of the Commonwealth's public trust lands, which include present waterways and filled former tidelands along the waterfront. Although many of these areas have been developed, Commonwealth tidelands are held in trust for the benefit of the public and private tidelands are subject to an easement with public rights. Buildings within these areas must be licensed and meet regulatory requirements to ensure use and enjoyment of the area by the public. Buildings located on public trust tideland areas must provide facilities of public accommodation (FPAs) on the ground floor, where goods or services are available to the transient public at large. Examples of FPAs include restaurants, retail stores, hotels, museums, and transportation facilities. Facilities of private tenancy (FPTs), such as residences, industrial facilities, or private offices, have not been allowed on the ground floor except on private tidelands more than 100 feet from the shoreline. While there is general agreement that FPAs serve the function of drawing the public to the waterfront, concerns have been raised about the ability of FPAs to thrive, or even open at all, in areas along the waterfront that lack sufficient development. Under-utilized or inaccessible space in buildings along the waterfront detracts from the paramount purpose of c. 91 - to activate, preserve, and protect public use and enjoyment of tidelands. The purpose of the revisions to the Chapter 91 regulations is to address this issue, without any net loss of benefits provided to the public along the waterfront.

Purpose and Process for the Regulatory Revisions

Starting from the premise that preserving and enhancing public uses of the waterfront contributes vital environmental, civic and economic benefits, the Department undertook a comprehensive effort to examine the effect FPA requirements have had on waterfront development and to explore ways the regulations may be revised to be more responsive to reconciling the desire of businesses and residents to work, live and commute by the water with the Department's obligation to regulate tidelands in trust for the public. The Department convened an external advisory committee of developers and waterfront advocates to evaluate the FPA requirement and

recommend options to revise the FPA regulations to the extent necessary to solve any problems. The stakeholder group addressed the following specific questions:

- How successful have FPAs been in promoting the public use and enjoyment of the waterfront? Have FPA's constrained private development without a corresponding public benefit? What are the discernible reasons why FPAs are successful in some instances, and not successful in others? Are vacant or under-utilized FPAs a concern in Boston and Cambridge alone, or elsewhere?
- What role should FPAs play in the currently planned and future vision for the Boston Harbor and nearby waterfronts, including increased opportunities for cultural and civic institutions and activities?
- What modifications, if any, should be made to current FPA rules? Should the Department modify the amount, type, location and time period for FPA's depending on factors such as the density and current or planned uses of the surrounding built environment?
- What flexibility, if any, should the Department allow for application of FPA requirements in different tideland areas (*i.e.*, Commonwealth Tidelands versus Private Tidelands)?
- Under what circumstances, if any, should a landowner be permitted to fund or provide a substitute FPA at another location?
- Under what circumstances, if any, should revisions to FPA rules apply to existing, licensed projects?

The Department concluded that the FPA requirement generally has been successful in enriching the experience of the public along the waterfront and provides important public benefits. The challenge was to respond to the concerns of private developers of sites in outlying areas with sparse foot traffic that the ground floor could remain vacant and inaccessible to public use.

While there was not universal agreement on the extent of this problem, there was agreement that inaccessible interior space along the waterfront does not promote public use and enjoyment of tidelands, and represents a lost opportunity for the public. The revisions to the regulations are intended to allow, under limited circumstances, alternative means of promoting the public use and enjoyment of the waterfront to address instances in which existing FPA rules do not secure these benefits. These proposals will not in any way affect the Harbor Walk or other aspects of Chapter 91 licensing applicable to outdoor areas, but only apply to the ground floor uses within buildings. The proposals would also not affect any governing provisions in a Municipal Harbor Plan. The standard for a Chapter 91 nonwater-dependent license remains the same, that the project serve a proper public purpose and its benefits exceed any detriments to the public's rights in tidelands. The revisions include three distinct options described below. The Department received public comment on these options and revised the draft regulations to address the comments.

Concept of Facilities of Limited Accommodation

The regulatory revisions create a new category of use that differs from FPAs and FPTs, called Facilities of Limited Accommodation or FLAs. FLAs are open to the public by appointment or enrollment but must provide goods or services directly to customers through in- person access to

the facility, although some goods or services could be provided by mail order or electronically. FPAs are defined as facilities which are open to the public on a transient or “walk in” basis. FPTs continue to include residences, industrial plants, and business or professional offices that are not open for direct access by the public as customers. The hallmark of FLAs is that, like FPAs and unlike FPTs, they are open to the public on a regular basis, but FLAs lack the “walk right in” quality of FPAs. While FLAs are not designed for the transient public, they may nonetheless draw people to the waterfront and will not “privatize” the waterfront because they are open to the public, not just to employees of private businesses. For members of the public who do not frequent waterfront hotels or dining establishments, the presence of FLAs may extend a new reason to come to the waterfront to a more diverse Commonwealth citizenry. Examples of FLAs could include physician and dentist offices, legal and accounting firms, office space for not-for-profit organizations, artist studios open by appointment, and child or elderly care services. The extent to which an applicant would be required to demonstrate an inability to secure ground floor FPAs before proposing FLAs varies between the proposals. In some instances, the applicant must reassess the feasibility of FPAs during the term of a license and transition to FPAs where possible. The Department would rely in part on the opinion of the local economic development office as to whether a project site could sustain an FPA. Where a license requires FPAs, the revised regulations would require that the licensee comply with the terms of the license by keeping the ground floor open to the public even if simply to provide seating unless or until the license is revised to allow FLAs. Where necessary for security, a licensee could provide an FPA such as a community meeting space available upon request. FLAs would be allowed on either Commonwealth tidelands or on private tidelands within 100 feet of the shoreline.

Concept of Monetary Contribution for Substitution of FLAs for FPAs

FLAs would be allowed only in specified ways under each of the proposals, with compensation for any extent to which the FLA use provides less benefit to the public as compared to an FPA use. The applicant would be required to provide compensation in the form of monetary payments based on a percentage of the net operating income from the FLA. Net operating income is defined as the gross rents of the FLA minus operating expenses and property taxes as calculated on a square footage basis for the entire building. The percentage (20%) is targeted to the amount of the substitution of FLAs for FPAs. In response to public comments, the Department created an opportunity for owner-occupied buildings to present a calculation of an equivalent monetary value to the formula for Net Operating Income. The monetary compensation would support additional facilities or programming for the public to enhance the waterfront in addition to any public benefits that would otherwise be required of an applicant to obtain a Chapter 91 license. Typically, the FPA supported by the annual monetary contribution would be located in geographic proximity to the project site, consistent with other regulatory requirements that allow off-site benefits where necessary and statutory language that links the public benefits with the project tidelands. For projects with no other acceptable means to ensure accountability, the Department may require the deposit of funds into an account managed by the

Department's revenue office. The monetary compensation would support additional facilities or programming for the public to enhance the waterfront in addition to any public benefits that would otherwise be required of an applicant to obtain a Chapter 91 license. An applicant would be required to identify for funding a facility or programming to activate the waterfront during evening and weekend hours to compensate for any lack of activation that may result from the substitution of FLAs for FPAs.

In addition to facilities or programming, the annual monetary compensation for the substitution of FLAs for FPAs could support water transportation, even if operated by a for-profit company. The funding may also provide a vehicle for the support of major public amenities along the waterfront that are beyond the scope of any applicant, by enhancing an existing FPA. This concept had its genesis in Municipal Harbor Planning in the term "special public destination facility," a project designed to activate the waterfront by drawing the public to a special attraction. Some members of the public may accrue a greater benefit from the availability of additional facilities or programming from this funding than they would, for example, from access to a hotel lobby or a retail store that may be FPAs for which they have no particular need or interest. The funded benefits would be identified and approved in the Chapter 91 license, to provide accountability as to how the money will be spent. An applicant would also be required to provide the public benefits that are otherwise required to obtain a Chapter 91 license.

Concept of Self-Certification

The concept of FLAs with monetary payments for waterfront amenities would require additional oversight by Department's Chapter 91 staff. The regulatory revisions shift some of this burden to licensees by requiring the submission of an annual certification by the licensee of the amount of ground floor space allocated to FLAs, the use of the space, the net operating revenues, and demonstration that the compensatory amounts have actually been paid. Self-certification has been used successfully in several other Department programs. The purpose of the annual self-certification requirement is to assist the Department in implementation of the revisions and ensure that the public benefits are fully realized.

Regulatory Revisions to Add or Revise Definitions

The terms "Facility of Limited Accommodation" and "Net Operating Income" are included in the definition section of the regulations. Also in the definition section, a discrete revision to the list of FPTs is intended to distinguish business or professional offices that are FPTs from the new category of Facilities of Limited Accommodation. In response to public comments the Department has also included a definition of "Local Economic Development Authority" and "Development Site". The Local Economic Development Authority is responsible for providing the municipality's concurrence or rejection of the analysis presented by the applicant of whether the location can support FPAs. "Development Site" provides the boundaries of the location of FPAs when they are allowed to be relocated as explained below.

Proposal to Vary the FPA Obligation based on Building Density

The stakeholder group identified smaller buildings as presenting greater challenges in meeting the ground floor FPA requirement, due to reduced density and related lack of foot traffic. The threshold for small building was originally set at five stories, because above that height different construction techniques are used. The final regulation modified the five story requirement in response to public comment to be a height of 75' instead due to the variation in the height of stories. The calculation of the required amount of Facilities of Public Accommodation continues to be based on the area (square footage) of the ground floor of buildings on filled Commonwealth Tidelands or on filled Private Tidelands within 100 feet of the project shoreline. Currently, up to 75% of the ground floor must be FPA, with upper floor access and utilities allowed to occupy no more than 25% of the building footprint. In this circumstance, an applicant proposing a new building could reduce the FPA requirement to no less than 25%, with the remaining area of the ground floor on tidelands, no more than 50%, devoted to FLAs. As compensation, the applicant would be required to annually pay 20% of the Net Operating Income of the FLA area to fund a special project providing public benefits within the area of the project site. The requirement of no less than 25% FPAs is a minimum that will not be waived by the Department, regardless of foot traffic, density, level of economic development, or the absence of potential revenues generated by the FPA. If revenue generating FPAs are not available, a licensee could provide a seating area, exhibit gallery, community meeting space or similar public amenities. The license would include a condition that requires review by the Department after 15 years to determine whether the site can support an FPA, and if so, would require the license holder to transition to FPA uses. This determination would be based upon a showing by the licensee that efforts to locate an FPA tenant(s) have been unsuccessful for more than one year, even with an offer of below market rents to nonprofit organizations, and a finding by the local economic development agency that such tenants are not available. If the Department determines that FPAs are not feasible, it will establish a schedule for further review. The purpose of this proposal is to target the type of building more likely to need the flexibility to include FLAs, while providing for a reassessment for the feasibility of FPAs that may occur over time.

Proposal to Vary the FPA Requirement for Existing Buildings with a Short-term Condition in a License to Allow FLAs

Some stakeholders identified situations where existing buildings were located in areas without sufficient foot traffic or density to sustain ground floor FPAs. In this circumstance, an applicant could demonstrate that efforts to locate FPA tenant(s) have been unsuccessful for more than one year, even with an offer of below market rents to nonprofit organizations, and a concurrence by the local economic development agency that such tenants nonprofit tenants are not feasible. An applicant would be required to maintain at least 25% of the ground floor on tidelands as FPAs, which could include either indoor seating, exhibit gallery or community meeting space that would be available on request when revenue generating FPAs are not available. The applicant would be required to pay 20% of the net operating income for any substitution of FLAs for FPAs. The applicant would be required to identify a project to be supported by the funds to

further enhance the waterfront in the vicinity of the site for the department's approval, in addition to otherwise applicable Chapter 91 licensing requirements. The ground floor must be devoted to FPAs at the end of the ten year period, unless the applicant applies for an extension of up to ten years and provides the same showing as required when the short-term license was initially issued. A licensee may request an extension prior to the end of the term when necessary for leasing. The purpose of this proposal is to address situations where existing buildings are unable to meet the FPA requirements for a limited period of time.

Proposal for License Amendments to Allow FLAs for Existing Licensed Buildings

Under this regulatory revision, the proposals to allow FLAs with compensation for new buildings may be extended to existing buildings using the amendment procedure in the Waterways Regulations where applicable. To be eligible, the licensee must meet the requirements for an amendment, the requirements for the FLA substitution and compensation amounts, and provisions to ensure that FPAs have been explored and are unavailable. Licensees must comply with the terms of the license by keeping the ground floor open to the public unless or until the license is revised to allow FLAs.

Regulatory Revision for Ground Floor Facilities Related to Project Shoreline Provisions

The revised regulations also include a revision to the section on the conservation of capacity of the project shoreline for water-dependent purposes, which affect both Commonwealth tidelands and private tidelands and currently prohibit ground floor FPTs within 100 feet of the water. In some situations, Chapter 91 jurisdiction cuts through a narrow sliver of the building, frustrating efforts to effectively provide meaningful public access or benefits. The revision enables the Department to allow any portion of the equivalent ground floor FPA or FLA to be relocated within the building footprint or elsewhere on the Development Site if it determines that the alternative location would more efficiently promote public use and enjoyment of the project site. In the case of a relocation of the ground floor FPA or FLA to a non-jurisdictional area on the development site, the License would contain provisions binding the Licensee to any agreed commitments of the FPA or FLA placement in that area as well as any monetary requirements. The purpose of this revision is to ensure that effective public benefits are provided in these situations, regardless of the precise jurisdictional boundaries.

The public comment period for the regulations was open from March 11 to April 25, 2016. Public hearings were held on April 5, 6 and 7, 2016. Twenty-five (25) written comments were received from environmental advocacy groups, environmental consulting firms, attorneys, businesses and trade organizations associated with development and marine industrial uses. Regulatory revisions were made in response to the comments as discussed above.