

Waterways Program Guidance Document: Extended License Terms

Guidance Applicability: Waterways Program Staff; Chapter 91 License Applicants and Current Licensees

Date: [____]

Purpose: The purpose of this guidance is to describe the Department’s approach to evaluating a project’s eligibility for an extended license term, identify the minimum expected public activation and resiliency actions, and provide recommendations on the type of information to be provided by the applicant to support of a request for extended term.

Introduction to Chapter 91

The Public Waterfront Act, [M.G.L. Chapter 91](#), and its implementing regulations [310 CMR 9.00](#) (collectively referred to as “Chapter 91”), require a waterways license or permit for any activity located in, on, under, or over flowed tidelands, filled tidelands, Great Ponds, and certain non-tidal rivers and streams located throughout the Commonwealth – unless such activity or activities are exempt from license and permit requirements under 310 CMR 9.05(3).

Chapter 91 licenses and permits are necessary to protect and promote the Public Trust Rights and inherent public interest in these water bodies by ensuring that proposed projects and activities: do not unreasonably interfere with navigation and the rights of the public or adjacent waterfront property owners and protect water-dependent uses and serve a proper public purpose.

Standard License Term

The standard license term for private projects is 30 years. The Department may, at its discretion, issue a license with a term exceeding 30 years. 310 CMR 9.15(1)(a) and (b).

Unlimited License Term

The Department may issue a license for an unlimited term for any project whose entire control, development, and operation is undertaken by a public agency for the provision of services directly to the public (or to another public agency for such provision to the public) by the public agency, its contractor or agent. 310 CMR 9.15(1)(c).

Extended License Term

The Department may, in its discretion, issue a license for a term longer than 30 years, in accordance with the provisions at 310 CMR 9.15(1)(b), but in no case may a term exceed 65 years for a project on flowed tidelands or other waterways or 99 years for a project on filled tidelands.

If a license for a private project includes both flowed and filled tidelands, the Department may, at the applicant’s request, establish a weighted average term for the entire project or a portion of the project based on the relative amounts of surface area of flowed versus filled tidelands. 310 CMR 9.15(1)(b)1.

Factors for Consideration in Granting an Extended License Term

Applicants seeking a license term longer than the standard 30 years must demonstrate to the Department that an extended term would be appropriate. Pursuant to 310 CMR 9.15(1)(b)2, an applicant is required to provide justification for an extended term, given the following:

1. *The expected life of the structure.* Applicants may provide a letter in support of the extended license term from the project's structural engineer or architect attesting to the expected life of the structure.
2. *Typical financing requirements.* Applicants may provide a letter in support of an extended license term in consideration of any special financing arrangements. The letter should describe why an extended term is necessary for project financing.
3. *Consistency with an approved Municipal Harbor Plan ("MHP"), if any.* The Department will review a request for an extended license term for compliance with an applicable Approved MHP, if any, to ensure consistency.
4. *Appropriateness of long-term dedication of tidelands to the proposed use(s) in the particular location.* In evaluating the appropriateness of dedicating certain tidelands for an extended term, the Department typically considers:
 - The nature of the proposed use(s), including whether the project is primarily water dependent or primarily nonwater-dependent and whether the corresponding public benefits associated with private uses adequately address long-term dedication of tidelands for any private uses. Nonwater-dependent uses are subject to additional standards, including the standards at 310 CMR 9.51, to ensure that such projects provide a proper public purpose.
 - Long-term stability of the site: Susceptibility to flooding, storm surge or high long-term average erosion rates will be considered.
 - Whether the project is located on Commonwealth Tidelands or Private Tidelands. The minimum requirements for licensing non-water dependent projects vary between projects located on filled Private Tidelands versus filled Commonwealth Tidelands. Projects on Commonwealth Tidelands are subject to the additional standards at 310 CMR 9.53 – *Activation of Commonwealth Tidelands for Public Use* which includes the following standard:

"A nonwater-dependent use project that includes fill or structures on Commonwealth tidelands, except in Designated Port Areas, must promote public use and enjoyment of such lands to a degree that is fully commensurate with the proprietary rights of the Commonwealth therein, and which ensures that private advantages of use are not primary but merely incidental to the achievement of public purposes."

Applicants seeking an extended term license must demonstrate that the project will provide public benefits, including access to and activation of tidelands, beyond the baseline requirements that would qualify an applicant for a standard 30-year license term. Additional benefits could include, among others:

Commonwealth Tidelands

- Subsidized cultural/civic uses
- Special public destination facilities
- Enhanced programming
- Enhanced public open spaces

Private Tidelands

- Subsidized cultural/civic uses
- Special public destination facilities
- Public programming
- Public open spaces
- Ground-floor FPAs

5. *Any other relevant factors.* The Department considers climate resiliency as a relevant factor in determining if an extended term license is appropriate for a project. Applicants seeking an extended term license are required to:

- Demonstrate the adaptability of the site and building to predicted sea level rise for the duration of the full extended term.
- Consider how required elements such as publicly accessible open space, lateral waterfront access, ground-floor Facilities of Public Accommodation and other required public benefits will be protected for the full extended term.
- Applications should be reviewed against the [Massachusetts Coast Flood Risk Model / Sea Level Rise and Coastal Flooding Viewer](#) and local studies and models when available (i.e., [Climate Ready Boston](#))

Minimum Information to be Provided

To facilitate the Department's review of a request for an extended-term license, applications should include the following:

- Commitments to provide public benefits for the full extended term that exceed baseline requirements for a standard 30-year term.
- Identify potential impacts due to projected sea level rise and increased precipitation, addressing flood pathways, for the full extended term.
- Describe how the project has been designed to avoid, minimize and mitigate such impacts while avoiding additional impacts to the project site or off-site parcels.
- Describe design features and planned adaptation measures to ensure compliance with applicable Chapter 91 standards for the full extended term.
- Describe measures incorporated into the project to prepare for climate change based on current models. For example:
 - The use of proposed fill as a means of protecting against potential impacts of sea level rise must include an analysis of flow pathways for stormwater and tidal flooding.
 - Solid structures and fill intended to protect against sea level rise should be designed with appropriate safety margins to accommodate horizontal or vertical expansion if needed.

Other Requirements for Applicants Seeking an Extended License Term

The Department is required to hold a public hearing for non-water dependent use projects and accept public comments on all license applications. Consideration of an extended term license must be included in the license application, stated in the public notice and announced at the public hearing required for nonwater-dependent use projects. 310 CMR 9.13(3)(a).

For projects on Commonwealth tidelands or Great Ponds, the Department is required to hold a public hearing and issue written findings concerning the extended term. 310 CMR 9.15(1)(b)3

If occupation fees are required by 310 CMR 9.15(1)(b)4, such fees are calculated commensurate with the extended term.

Extended term licenses for nonwater-dependent uses include special conditions requiring the licensee to submit periodic compliance inspection reports. 310 CMR 9.15(1)(b)5.