

Waterways Program Guidance Document: Facilities of Public Accommodation

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

Date: []

Purpose: the purpose of this guidance is to set forth the Department’s approach to reviewing proposed Facilities of Public Accommodation when included in a nonwater-dependent use application.

Introduction to Chapter 91

The Public Waterfront Act, M.G.L. Chapter 91 and its regulations (referred to as “Chapter 91”), require a Chapter 91 waterways license or permit for any activity located in, under, or over flowed tidelands, filled tidelands, Great Ponds and certain non-tidal rivers and streams located throughout the Commonwealth.

Chapter 91 licenses and permits are necessary to protect and promote the 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.

Facilities of Public Accommodation

A Facility of Public Accommodation (FPA) is a “*facility at which goods or services are made available directly to the transient public on a regular basis, or at which advantages of use are otherwise open on essentially equal terms to the public at large (e.g., patrons of a public restaurant, visitor to an aquarium or museum), rather than restricted to a relatively limited group of specified individuals (e.g., members of a private club, owners of a condominium building). FPA’s may be either water-dependent, accessory to water-dependent, or nonwater-dependent...*” 310 CMR 9.02.

FPAs include all manner of interior and exterior spaces and facilities that are open to the transient public and could include, for example: open spaces, parks, restaurants, theaters, educational or cultural institutions, ferry terminals, transit stations, community meeting spaces, retail or services facilities. See 310 CMR 9.02 and below for a more expansive list of FPAs.

Facilities of Private Tenancy

An FPA is distinct from a Facility of Private Tenancy (FPT), which is a facility available to a relatively limited group of specified individuals (e.g., members of a private club, owners of a condominium building) rather than to the public at large (e.g., patrons of a public restaurant, visitors to an aquarium or museum). Examples of FPTs include houses, condominiums and other residential units, businesses that do not rely upon customer access as a significant element of the business, industrial facilities and any interior to exterior space that is not open to the transient

public on at least equal terms with the members of any private party, group or organization. Facility of Private Tenancy is defined at 310 CMR 9.02.

When are FPAs required?

All **nonwater-dependent use projects** must provide an FPA to allow the public to continue to access the tidelands despite the presence of the non-water dependent use project on such lands. The scope of the required FPA depends on the type of tideland on which the project is located and whether the project includes buildings with FPTs.

- **Flowed Tidelands:** For a nonwater-dependent use project, any pile-supported structure on flowed tidelands is required to be an FPA.
- **Filled Tidelands:** For nonwater-dependent buildings on filled tidelands, any part of the ground level of such buildings that is within 100 feet of the project shoreline (*i.e.*, the high water mark) must be an FPA. 310 CMR 9.51(3)(b).
- **Building with FPTs on Private Tidelands:** For nonwater-dependent building with FPTs on upper floors and located on filled Private Tidelands, any portion of the ground floor within 100 feet of the project shoreline must be FPA, though up to 25% of the ground floor may be dedicated to Upper Floor Accessory Services such as utility shafts, elevators, stairways, and entryways.
- **Buildings with FPTs on Commonwealth Tidelands:** For nonwater-dependent buildings with FPTs on upper floors and located on Commonwealth Tidelands, regardless of distance from the project shoreline, the ground floor must include at least 75% FPA, with up to 25% permitted to be utilized as Upper Floor Accessory Services. FPAs in buildings on Commonwealth Tidelands must meet the standards in 310 CMR 9.53.

The Department may allow any portion of the equivalent area of FPAs to be relocated within the building footprint, or in other buildings owned, controlled, or proposed for development by the applicant if the Department determines the alternative location would more effectively promote public use and enjoyment of the project site. 310 CMR 9.51(3)(b).

What type of FPA is acceptable?

The Department evaluates proposed FPAs on a case-by-case basis, with consideration of whether the project is located on Private Tidelands or Commonwealth Tidelands, the nature of the project, the conditions of the waterbody on which the project is located, and other relevant factors. The definition of FPA in 310 CMR 9.02 includes a non-exhaustive list of examples of possible FPAs:

- (a) public restaurants or entertainment facilities;
- (b) theaters, performance halls, art galleries, or other establishments dedicated to public presentation of the fine arts;

- (c) hotels, motels, or other lodging facilities of transient occupancy;
- (d) educational, historical, or other cultural institutions open to the public;
- (e) interior spaces dedicated to the programming of community meetings, informational displays, special recreational events, or other public activities;
- (f) sports or physical fitness facilities open to the public;
- (g) open spaces, pedestrian walkways, or outdoor recreation facilities open to the public;
- (h) retail sales or service facilities;
- (i) ferry terminals, transit stations, and other public transportation facilities;
- (j) marina berths for transient use; and
- (k) vehicular ways open to the public or parking facilities open to the public, including users of facilities of public accommodation.

Acceptable FPAs for Projects Located on Filled Private Tidelands versus Filled Commonwealth Tidelands

The Department's evaluation of a proposed FPA depends initially on whether the project is located on Private Tidelands or Commonwealth Tidelands.

- **Projects on Private Tidelands:**

For projects located on Private Tidelands, any FPA meeting the FPA definition at 310 CMR 9.02, including but not limited to an FPA identified on the list of examples in the definition, is presumed by MassDEP to meet the FPA requirement.

- **Projects on Commonwealth Tidelands:**

Nonwater-dependent buildings proposed to be located on Commonwealth Tidelands, other than those sited in Designated Port Areas, must meet heightened requirements given the greater rights of the public in Commonwealth Tidelands versus Private Tidelands. These heightened requirements for activating Commonwealth Tidelands for public use are set forth in **310 CMR 9.53**. The standards in 310 CMR 9.53 ensure that nonwater-dependent use projects in Commonwealth Tidelands 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. The standards require the Department to balance factors affecting the quantity and quality of benefits provided to the public, weighed against detriments to public rights associated with facilities of private tenancy.

Nonwater-dependent use projects in Commonwealth Tidelands are required to attract and maintain substantial public activity on the site on a year-round basis, through the provision of water-related public benefits of a kind and to a degree that is appropriate for the site, given the nature of the project, conditions of the waterbody on which it is located, and other relevant circumstances.

FPA's are a critical part of a proposed project's ability to meet the standard of attracting and maintaining substantial public activity on the site. Special consideration will be given to proposed FPA's that enhance the destination value of the waterfront by serving significant community needs, attracting a broad range of people, or providing innovative amenities for public use.

Other standards in 310 CMR 9.53 that inform the Department's analysis of proposed FPA's in projects on Commonwealth Tidelands include:

- If the project site includes a water-dependent use zone, at least one facility utilizing the shoreline must also promote water-based public activity, such as ferries, cruise ships, water shuttles, public landings and swimming/fishing areas, excursion/charter/rental docks, and community sailing centers.
- The project is required to include exterior open spaces for active or passive public recreation, such as parks, plazas and observation areas. To the maximum reasonable extent these spaces must be located at or near the water and include appropriate pedestrian amenities such as lighting, seating, restrooms and trash receptacles.
- The project must promote other development policies of the Commonwealth, through the provision of nonwater-related benefits in accordance with applicable governmental plans and programs and in a manner that does not detract from the provision of water-related public benefits.

How Can a Chapter 91 License Applicants Demonstrate a Proposed FPA on Commonwealth Tidelands Meets the Requirements of the Waterways Regulations?

Applicants should demonstrate that a proposed FPA meets the criteria in 310 CMR 9.53. To do so, applications should detail how the FPA will help attract and maintain substantial public activity on the site on a year-round basis. If the proposed FPA will serve a significant community need, the application should explain how that community need was identified and how it will be served by the FPA. If the applicant believes the proposed FPA will attract a broad range of people or will provide an innovative amenity, the application should describe in detail how the FPA will do so.

For example, if the ground floor is the lobby of a Facility of Private Tenancy such as condominiums or an office building, then the application should demonstrate that the area dedicated to FPA includes appropriate features that meet the standards of 310 CMR 9.53. Such features could include appropriate signage that informs the public that it is welcome in the FPA space; design features or furnishings that facilitate and maintain public use of the space (e.g., seating and tables); or a dedicated space that clearly serves an identified community need (e.g., community meeting rooms).

9.53: Activation of Commonwealth Tidelands for Public Use

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. In applying this standard, the Department shall take into account any factor affecting the quantity and quality of benefits provided to the public, in comparison with detriments to public rights associated with facilities of private tenancy, especially those which are nonwater-dependent; and shall give particular consideration to applicable guidance specified in an Approved Municipal Harbor Plan, as provided in 310 CMR 9.34(2)(b)2. At a minimum, the Department shall act in accordance with 310 CMR 9.53(1) through (4).

(1) The project shall not include fill or structures for nonwater-dependent use of Commonwealth tidelands which the Department determines are necessary to accommodate a public agency which intends to pursue a water-dependent use project on such lands, provided written notice of such agency's intention is submitted to the Department prior to the close of the public comment period on the license application. Such determination shall be based upon a clear showing, within a period of time deemed reasonable by the Department, that the agency's project has met the criteria of 310 CMR 9.36(5)(a)2. through 4.

(2) The project shall attract and maintain substantial public activity on the site on a year-round basis, through the provision of water-related public benefits of a kind and to a degree that is appropriate for the site, given the nature of the project, conditions of the waterbody on which it is located, and other relevant circumstances. In making this determination, the Department shall act in accordance with 310 CMR 9.53(2)(a) through (e):

(a) in the event the project site includes a water-dependent use zone, at least one facility utilizing the shoreline in accordance with the provisions of 310 CMR 9.52(1)(a) must also promote water-based public activity; such facilities include, but are not limited to, ferries, cruise ships, water shuttles, public landings and swimming/fishing areas, excursion/ charter/rental docks, and community sailing centers;

(b) the project shall include exterior open spaces for active or passive public recreation, examples of which are parks, plazas, and observation areas; such open spaces shall be located at or near the water to the maximum reasonable extent, unless otherwise deemed appropriate by the Department, and shall include related pedestrian amenities such as lighting and seating facilities, restrooms and trash receptacles, children's play areas, and safety ladders along shoreline walkways, as appropriate; such facilities shall be sized in accordance with 310 CMR 9.53(2)(b)1. through 2.:

1. the amount of such space shall be at least equal to the square footage of all Commonwealth tidelands on the project site landward of a project shoreline and not

within the footprint of buildings, less any space deemed necessary by the Department to accommodate other water-dependent uses; the Department may also allow a portion of such open space to be devoted to public ways and/or surface parking open to the public, including users of the facility of public accommodation, provided that below grade or structured parking is not a reasonable alternative and that the open space devoted to public vehicular use does not exceed that devoted to public pedestrian use;

2. as provided in 310 CMR 9.34(2)(b)1., the Department shall waive the requirements of 310 CMR 9.53(2)(b)1., if the project conforms to an Approved Municipal Harbor Plan which, as determined by the Secretary in the approval of said plan and by the Department through the adoption of substitute provisions in said plan, specifies alternative requirements for public outdoor recreation facilities that will establish the project site as a year-round locus of public activity in a comparable and highly effective manner;

(c) the project shall devote interior space to facilities of public accommodation, other than public parking, with special consideration given to facilities that enhance the destination value of the waterfront by serving significant community needs, attracting a broad range of people, or providing innovative amenities for public use; such public interior space shall be located at the ground level of all buildings containing nonwater-dependent facilities of private tenancy, unless the Department determines that an alternative location would more effectively promote public use and enjoyment of the project site or is appropriate to make ground level space available for water-dependent use or upper floor accessory services; the extent of such interior space shall be determined in accordance with 310 CMR 9.53(2)(c)1. through 2.:

1. such space shall be at least equal in amount to the square footage of all Commonwealth tidelands on the project site within the footprint of buildings containing nonwater-dependent facilities of private tenancy;

2. as provided in 310 CMR 9.34(2)(b)1., the Department shall waive the requirements of 310 CMR 9.34(2)(c)1., if the project conforms to an Approved Municipal Harbor Plan which, as determined by the Secretary in the approval of said plan, and by the Department through the adoption of substitute provisions in said plan, specifies alternative requirements for interior facilities of public accommodation that will establish the project site as a year-round locus of public activity in a comparable and highly effective manner;

(d) the project shall include a management plan for all on-site facilities offering water-related benefits to the public, to ensure that the quantity and quality of such benefits will be effectively sustained; management elements which may be covered by the plan include, but are not limited to, signage, maintenance, hours and rules of operation, organizational arrangements and responsibilities, pricing, financing, and procedures for resolving use conflicts; if deemed appropriate, the Department may require the applicant to offer to the public, in the form of an

easement, an enforceable right of access to or use of a proposed water-dependent facility of public accommodation; and

(e) in the event that water-related public benefits which can reasonably be provided on-site are not appropriate or sufficient, the Department may consider measures funded or otherwise taken by the applicant to provide such benefits elsewhere in the harbor or otherwise in the vicinity of the project site.

(3) The project shall promote other development policies of the Commonwealth, through the provision of nonwater-related benefits in accordance with applicable governmental plans and programs and in a manner that does not detract from the provision of water-related public benefits. In making this determination, the Department shall act in accordance with 310 CMR 9.53(3)(a) through (d):

(a) the Department shall take into account any guidance forthcoming from a state, federal, regional, or municipal agency as to the extent to which the project will contribute to or detract from the implementation of any specific policy, plan or program relating to, among other things: education; employment; energy; environmental protection; historic or archeological preservation; housing; industry; land use; natural resources; public health and safety; public recreation; and transportation.

(b) the Department shall act in accordance with the written recommendation of the Secretary of any state Executive Office in whose area of agency or program jurisdiction the proposed project falls, provided that said recommendation is made pursuant to an MOU or other written agreement with the Department as to the manner and extent to which the nonwater-related policies, plans, and programs of said Executive Office will be promoted in relation to water-related public interests.

(c) the Department shall give primary consideration to the implementation of policies, plans, or programs that: 1. have been officially adopted by statute, regulation, or other formal instrument of legislative or administrative action; and 2. complement measures taken by the project to serve water-related public purposes; examples of such complementary policies include the improvement of public transportation systems in order to foster ease of public movement to and from waterfront facilities, and the inclusion of affordable housing in residential development in order to make waterfront tenancy and access available to a broader segment of the public than would be the case under prevailing market conditions;

(d) the Department shall consider only those nonwater-related benefits accruing to the public in a manner that is reasonably direct, rather than remote, diffuse, or theoretical. Examples of direct public benefits include meeting a community need for mixed-income residential development, creating a large number of permanent jobs on-site, and reutilizing idle waterfront properties. Corresponding examples of indirect public benefits include increasing the general supply of market-rate housing, improving overall economic conditions, and expanding the property tax base of a municipality.

(4) In the event a nonwater-dependent use project is located on Great Ponds, the Department shall apply the provisions of 310 CMR 9.53(1) through (3), to the portion of the project site lying below the natural low water mark.

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