

## **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.

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### **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.

FPA’s 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 FPA’s.

### **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?**

**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 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 as defined at 310 CMR 9.02 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, to attract and maintain substantial public activity as required by 310 CMR 9.53(2), an interior FPA should have signage visible to passersby making them aware the space is open to the public. The interior space should include functional amenities that provide appropriate value to the public, such as seating and tables, electrical outlets, free Wi-Fi, water bottle fill stations, and restrooms.

Applicants should consider the attraction of an FPA from the public's perspective. For example, a member of the public walking by a ground floor with retail or a café is more likely to assume

that area is open to the public. A ground floor FPA with no retail or other traditional indications of being open to the public may need to do more to attract public activity. In such cases, applicants may enhance the quality of the FPA by committing, for example, to allowing for and facilitating public meetings, programming or events in the FPA.

Exterior FPAs must also attract and maintain substantial public activity at the site. Outdoor FPAs could include open spaces, parks, playgrounds, pedestrian walkways, or outdoor recreation facilities. In all cases, the outdoor FPA should be obviously open and available to the public, and should be free of impediments to access, such as fencing or gates. Outdoor FPAs should include functional amenities that attract public use, such as seating, tables, and shaded areas if appropriate.