

310 CMR 9.00: DEPARTMENT OF ENVIRONMENTAL PROTECTION

PROPOSED CHANGES RELATED TO FACILITIES OF PUBLIC ACCOMODATION 12-19-16

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Development Site – means the area owned, controlled, or proposed for development by the applicant in which a project will occur.

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EIR means Environmental Impact Report as defined in 301 CMR 11.00: *MEPA Regulations*.

Environmental Monitor means the semi-monthly publication of proposed actions and projects which require MEPA filings with the Secretary pursuant to M.G.L. c. 30, §§ 61 through 62H.

EOEEA means the Executive Office of Energy and Environmental Affairs.

Facility of Limited Accommodation means a facility at which goods or services are made available directly (e.g., in person by customer access to the facility, not exclusively by means of mail order, telecommunications or other electronic transmission) to the public on a regular basis primarily by appointment or enrollment on essentially equal terms to the public at large rather than restricted to a relatively limited group of specified individuals. Facilities of Limited Accommodation may be either water-dependent, accessory to water-dependent, or nonwater-dependent, and shall include but not be limited to:

- Rehabilitation clinics and medical facilities;
- Business or professional offices that serve customers by appointment or enrollment and by customer access to the facility;
- Child care centers and elderly or other social service centers, provided that the facility does not interfere with access to public spaces outside of a building; and
- Artist and photography studios open to the public by appointment.

Facility of Private Tenancy means a facility at which the advantages of use accrue, on either a transient or a permanent basis, 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). Such facilities may be water-dependent, accessory to water-dependent, or nonwater-dependent, and may include but are not limited to:

- houses, apartments, condominiums, and other residential units;
- business or professional offices
- that do not rely upon customer access as a significant element of the business or profession; -
- industrial facilities, including but not limited to manufacturing plants and electric power generating stations;

FINAL – current regs showing final changes

- vehicular ways or parking facilities not open to the public; -open spaces, pedestrian walkways, or outdoor recreation facilities not open to the public; and
- marina berths for long-term exclusive use.

Facility of Public Accommodation means 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, visitors 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). Facilities of public accommodation may be either water-dependent, accessory to water-dependent, or nonwater-dependent, and shall include but are not limited to:

- public restaurants or entertainment facilities;
- theaters, performance halls, art galleries, or other establishments dedicated to public presentation of the fine arts;
- hotels, motels, or other lodging facilities of transient occupancy;
- educational, historical, or other cultural institutions open to the public;
- interior spaces dedicated to the programming of community meetings, informational displays, special recreational events, or other public activities;
- sports or physical fitness facilities open to the public; -open spaces, pedestrian walkways, or outdoor recreation facilities open to the public;
- retail sales or service facilities;
- ferry terminals, transit stations, and other public transportation facilities;
- marina berths for transient use; and
- vehicular ways open to the public or parking facilities open to the public, including users of facilities of public accommodation.

FEMA means the Federal Emergency Management Agency.

Fill means any unconsolidated material that is confined or expected to remain in place in a waterway, except for: material placed by natural processes not caused by the owner or any predecessor in interest; material placed on a beach for beach nourishment purposes; and dredged material placed below the low water mark for purposes of subaqueous disposal.

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Local Economic Development Authority – means a municipal planning board, zoning board, or other board or commission so designated by a municipality; community development corporations designated in accordance with M.G.L. c. 40H; municipal economic development and industrial corporations designated in accordance with M.G.L. c. 121C; municipal housing authorities designated in accordance with M.G.L. c. 121B, § 3; municipal redevelopment authorities designated in accordance with M.G.L. c. 121B, § 4; urban development corporations designated in accordance with M.G.L. c. 121A; and 40B district planning commissions established under M.G.L. c. 40B, including, but not limited to, the Cape Cod Commission, the Martha’s Vineyard Commission and the Boston Redevelopment Authority.

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Municipal Official means the mayor of a city, the board of selectmen of a town, or the council of a municipality having a manager-council form of government.

Natural High Water Mark means the historic high water mark of a Great Pond.

Natural Low Water Mark means the historic low water mark of a Great Pond.

Net Operating Income means the rental income from a Facility of Limited Accommodation within the licensed structure minus its operating expenses and property taxes calculated as an amount per square foot for the licensed structure or a comparable value if owner occupied. Operating expenses may include expenses for management, legal and accounting services, insurance, janitorial and security services, maintenance, supplies, and utilities.

Noncommercial Community Docking Facility means a facility for berthing of recreational vessels accessory to residential or nonprofit seasonal camp use (e.g., summer camps).

Non-profit Organization means an organization exempt from federal income taxation under § 501(c)(3) of the U.S. Internal Revenue Code.

Nonwater-dependent Use means a use as specified in 310 CMR 9.12.

Nonwater-dependent Use Project means a project consisting of one or more nonwater-dependent uses, or a mix of water-dependent and nonwater-dependent uses, as specified in 310 CMR 9.12(1).

Notification Date means a specified date by which a public notice must be published in the newspaper and/or the *Environmental Monitor*, and mailed to municipal officials, and on which the public comment period commences.

Ocean Sanctuary means an ocean area wherein certain restrictions on activities apply, as defined in M.G.L. c. 132A, § 13 and 302 CMR 5.00: *Ocean Sanctuaries*.

Party means the applicant, any person allowed by the Department to intervene pursuant to c. 30A, § 1, or any ten citizens allowed by the Department to intervene pursuant to c. 30A, § 10A.

Person means any individual, partnership, trust, firm, corporation, association, commission, district, department, board, municipality, public or quasi-public agency or authority.

Present means contemporaneous with the review of an application, request for determination of applicability, or other action by the Department.

Private Recreational Boating Facility means a facility for berthing of recreational vessels at which all

berths and accessory uses thereto are not available for patronage by the general public, or where exclusive use of any such berth is available on a long-term basis. Such berths shall not include a berth reserved for the operator of said facility.

Private Tidelands means tidelands held by a private person subject to an easement of the public for the purposes of navigation and free fishing and fowling and of passing freely over and through the water. In accordance with the Colonial Ordinances of 1641-47, the Department shall presume that tidelands are private tidelands if they lie landward of the historic low water mark or of a line running 100 rods (1650 feet) seaward of the historic high water mark, whichever is farther landward; such presumption may be overcome upon a showing that such tidelands, including but not limited to those in certain portions of the Town of Provincetown, are not held by a private person or upon a final judicial decree that such tidelands are not subject to said easement of the public.

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- (a) the total surface coverage by buildings and other permanent structures, insofar as it may affect the amount of open space where flexibility to serve water-dependent purposes will be retained;
 - (b) the layout and configuration of buildings and other permanent structures, insofar as they may affect existing and potential public views of the water, marine-related features along the waterfront, and other objects of scenic, historic or cultural importance to the waterfront, especially along sight lines emanating in any direction from public ways and other areas of concentrated public activity;
 - (c) the scale of buildings and other permanent structures, insofar as it may affect wind, shadow, and other conditions of the ground level environment that may affect users of water-dependent facilities; and
 - (d) the landscape design of exterior open spaces, insofar as it may affect the attainment of effective pedestrian and vehicular circulation within and to areas of water-dependent activity.
- (3) The Department shall find that the standard is not met if the project does not comply with the following minimum conditions which, in the absence of a municipal harbor plan which promotes the policy objectives stated herein with comparable or greater effectiveness, are necessary to prevent undue detriments to the capacity of tidelands to accommodate water-dependent use:
- (a) new pile-supported structures for nonwater-dependent use shall not extend beyond

the footprint of existing, previously authorized pile-supported structures or pile fields, except where no further seaward projection occurs and the area of open water lost due to such extension is replaced, on at least a 1:1 square foot basis, through the removal of existing, previously authorized fill or pile-supported structures or pile fields elsewhere on the project site; as provided in 310 CMR 9.34(2)(b)1., the Department shall waive the on-site replacement requirement if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative replacement requirements which ensure that no net loss of open water will occur for nonwater-dependent purposes, in order to maintain or improve the overall capacity of the state's waterways to accommodate public use in the exercise of water-related rights, as appropriate for the harbor in question;

(b) Facilities of Public Accommodation, but not nonwater-dependent facilities ~~Facilities of private tenancy~~ Private Tenancy, shall ~~not~~ be located on any pile-supported structures on flowed tidelands, ~~nor~~ and at the ground level of any filled tidelands within 100 feet of a project shoreline; The Department may allow any portion of the equivalent area of a Facility of Public Accommodation to be relocated within the building footprint, or in other buildings owned, controlled or proposed for development by the applicant within the Development Site if the Department determines the alternative location would more effectively promote public use and enjoyment of the project site. As provided in 310 CMR 9.34(2)(b)1., the Department shall waive the above use limitations if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative limitations and other requirements which ensure that no significant privatization of waterfront areas immediately adjacent to the water-dependent use zone will occur for nonwater-dependent purposes, in order that such areas will be generally free of uses that conflict with, preempt, or otherwise discourage water-dependent activity or public use and enjoyment of the water-dependent use zone, as appropriate for the harbor in question;

(c) new or expanded buildings for nonwater-dependent use, and parking facilities at or above grade for any use, shall not be located within a water-dependent use zone; except as provided below, the width of said zone shall be determined as follows:

- along portions of a project shoreline other than the edges of piers and wharves, the zone extends for the lesser of 100 feet or 25% of the weighted average distance from the present high water mark to the landward lot line of the property, but no less than 25 feet; and
- along the ends of piers and wharves, the zone extends for the lesser of 100 feet or 25%.

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9.56: Standards for Facilities of Limited Accommodation

Facilities of Limited Accommodation may be authorized on filled Commonwealth Tidelands or filled Private Tidelands under certain circumstances where a project site cannot support Facilities of Public Accommodation for a period of time. Projects including Facilities of Limited Accommodation as a substitution for Facilities of Public Accommodation described in 310 CMR 9.53(2)(c) and referenced in 310 CMR 9.51(3)(b) must meet any otherwise applicable requirements of 310 CMR 9.00. The substitution of Facilities of Limited Accommodation for Facilities of Public Accommodation fulfills the requirements for licensing under 310 CMR 9.31(2)(b)1 provided otherwise applicable requirements are met. The calculation of the required amount of Facilities of Public Accommodation or the amount of the payment to allow the substitution shall be based on the area (square footage) proposed for Facilities of Limited Accommodation located on the ground floor of buildings on filled Commonwealth Tidelands or Private Tidelands within 100 feet of the project shoreline. The substitution of Facilities of Limited Accommodation for Facilities of Public Accommodation may not be inconsistent with an approved Municipal Harbor Plan under 310 CMR 9.34(2).

(1) An application for a building less than or equal to seventy-five feet (75') in height, may substitute Facilities of Limited Accommodation in up to fifty percent of the interior space required to be devoted to Facilities of Public Accommodation. The remainder of the required ground floor interior space, with the exception of Upper Floor Accessory Services, shall be devoted to Facilities of Public Accommodation. The requirement that no less than twenty-five percent of the otherwise required ground floor interior space be devoted to Facilities of Public Accommodation may not be waived by the Department, regardless of foot traffic, density, level of economic development, or the absence of potential revenues generated by the Facility of Public Accommodation. The Applicant shall provide notice of the project to the Local Economic Development Authority and any response it has received from the authority. If the Local Economic Development Authority responds in writing that the project area has a sufficient level of development to support a Facility of Public Accommodation, the Department shall not authorize the substitution of a Facility of Limited Accommodation. If the authority concurs in writing that the project area lacks sufficient development to support a Facility of Public Accommodation or does not respond to the notice and the Department does not request additional information within sixty days of receipt of a license application, the Local Economic Development Authority will be deemed to concur with the request and the substitution of a Facility of Limited Accommodation shall be authorized. The first floor design shall be capable of accommodating a Facility of Public Accommodation. Twenty percent of the net operating income per year generated from the Facilities of Limited Accommodation shall be paid annually by the project to fund specific construction or activities, approved by the Department, to activate the waterfront in geographic proximity to the project site. The activation provided by the specific construction or activities shall extend to evening and/or weekend hours wherever feasible to compensate for any lack of activation that may result in the substitution of Facilities of Limited Accommodation for Facilities of Public Accommodation. The funding of specific construction or activities shall be in

addition to applicable requirements at 310 CMR 9.53(2) and 310 CMR 9.52(1). The specific construction or activities to be funded shall be identified by the Applicant and approved by the Department prior to licensing.

A condition of the license shall include, on or before the fifteenth anniversary of the first certificate of occupancy, a requirement for the Department to review the uses of the Facilities of Limited Accommodation to determine whether the project site could support Facilities of Public Accommodation, typically based upon foot traffic and density, based on information provided by the Licensee. The Licensee shall file any relevant information at least six months prior to the fifteenth anniversary. If the Department determines that Facilities of Public Accommodation can be supported and the project is unable to obtain a contrary opinion as referenced in 310 CMR 9.56(2)(d), the Department shall provide the Licensee with a schedule for submittals for transition to such uses. If the Department determines that Facilities of Public Accommodation cannot be supported or the Licensee obtains such an opinion as referenced in 310 CMR 9.56(2)(d), the Department shall specify a time period for a subsequent review. The Licensee shall certify annually to the Department the amount of space devoted to Facilities of Limited Accommodation, the use of the space, the net operating income from the Facilities of Limited Accommodation, and a demonstration of payment for the substitution of Facilities of Limited Accommodation for Facilities of Public Accommodation as specified in 310 CMR 9.56(2)(f). The Licensee shall provide an electronic copy of the certifications and notice of any information submitted six months prior to the fifteenth anniversary review, upon request to any person who filed comments during the public comment period on the written determination for the project.

(2) An application for a building greater than 75' in height that can demonstrate that its project site is unable to fully support Facilities of Public Accommodation, based on foot traffic and density, may apply for a short-term condition in a license to authorize up to fifty percent of the interior space required to be devoted to Facilities of Limited Accommodation in accordance with 310 CMR 10.51 and 10.53 for some portion of the ground floor interior space otherwise required to be devoted to Facilities of Public Accommodation, provided that no less than twenty-five percent of such required interior space shall be devoted to Facilities of Public Accommodation. The requirement that no less than twenty-five percent of the ground floor interior space otherwise required be devoted to Facilities of Public Accommodation may not be waived by the Department, regardless of foot traffic, density, level of economic development, or the absence of potential revenues generated by the Facility of Public Accommodation. The short-term condition in the license may not exceed ten years. At the expiration of the term, the ground floor shall be devoted to Facilities of Public Accommodation unless the licensee applies for an extension for no more than ten years and proves that the provisions of 310 CMR 9.56(2)(a)-(d) are met. Applications for extensions prior to expiration of the term may be allowed only where necessary to maintain occupancy. For an Applicant seeking a short-term condition in the license to authorize Facilities of Limited Accommodation in the interior space otherwise required to be devoted to Facilities of Public Accommodation, twenty percent of net operating income per year generated from the Facilities of Limited Accommodation shall be paid by the licensee annually to fund specific construction or activities, approved by the Department, to activate the waterfront. The activation provided by the specific construction or activities shall extend

to evening and/or weekend hours wherever feasible to compensate for any lack of activation that may result in the substitution of Facilities of Limited Accommodation for Facilities of Public Accommodation. The specific construction or activities to be funded shall be identified by the Applicant and approved by the Department prior to licensing. The funding of specific construction or activities shall be in addition to applicable requirements at 310 CMR 9.53(2) and 310 CMR 9.52(1). A project seeking a short term condition in a license shall:

- a) not be inconsistent with any substitutions, offsets or conditions of approval established in an approved Municipal Harbor Plan as provided in 310 CMR 9.34(2);
 - b) demonstrate that marketing efforts for at least one year have failed to identify any prospective Facility of Public Accommodation, even with the offer of up to 50% below market rents to civic or cultural not-for-profit organizations and a diligent good faith attempt to locate tenants which shall include advertisements in at least two commercial real estate marketing publications and listing with a commercial real estate brokerage;
 - c) comply with the conditions in the license requiring Facilities of Public Accommodation unless or until another use is authorized; this requirement may not be waived by the Department, regardless of foot traffic, density, level of economic development, or the absence of potential revenues generated by the Facility of Public Accommodation;
 - d) obtain the written concurrence of the Local Economic Development Authority that the project area lacks the level of development to support a Facility of Public Accommodation at the time of licensing or amendment. If the Local Economic Development Authority does not respond to the notice and the Department does not request additional information within sixty days of receipt of a license application, the Local Economic Development Authority will be deemed to concur with the request;
 - e) ensure that the first floor design will be capable of accommodating a Facility of Public Accommodation at the end of the term; and
 - f) certify annually the space devoted to Facilities of Limited Accommodation, the use of the space, the net operating income from those facilities, and demonstration of payment.
- (3) A licensee may request an amendment of an existing license to authorize Facilities of Limited Accommodation, provided the request meets the requirements for an amendment at 310 CMR 9.24, the requirements identified in 310 CMR 9.56(2)(a)-(d), and other applicable requirements of 310 CMR 9.56(1) or 310 CMR 9.56(2). A short term license condition for Facilities of Limited Accommodation amending an existing license may be for a limited term of ten (10) years or fifteen (15) years, depending on the height of the building.

REGULATORY AUTHORITY

310 CMR 9.00: M.G.L. c. 21A, §§ 2, 4, 8, and 14; c. 91, §§ 1 through 63; c. 91A, § 18.