

MassDEP Proposes Revisions to Facilities of Public Accommodation Regulations

April 22, 2016

After a multi-year study process involving an advisory group of stakeholders, the Department of Environmental Protection (MassDEP) is proposing revisions to regulations implementing the state waterways licensing program under Chapter 91. The revisions would provide more flexibility for property owners to fill rental space on or adjacent to tidelands by allowing for uses open to the public by appointment or enrollment. **Interested parties have until 5:00 p.m. on May 9, 2016 to submit written comments via email to dep.talks@state.ma.us.**

The current regulations classify waterfront uses in two categories. **Facilities of Private Tenancy ("FPTs")** are used by "a relatively limited group of specified individuals rather than the public at large," such as residences, business or professional offices and industrial facilities. **Facilities of Public Accommodation ("FPAs")** are facilities in which "goods or services are made available directly to the public on a regular basis, or at which the advantages of use are otherwise open on essentially equal terms to the public at large." Examples include restaurants, performance areas, hotels, retail establishments and educational and cultural institutions.

The regulations also distinguish between water-dependent uses, such as a marina, and non-water-dependent uses, such as an office or retail store. To promote public enjoyment of the Commonwealth's tidelands, the regulations prohibit non-water-dependent FPTs on piers or on the ground floor of structures on filled tidelands within 100 feet of a shoreline. Moreover, any non-water-dependent use project that includes fill or structures on Commonwealth tidelands must include ground floor FPAs.

In practice, this has resulted in vacant space due to a lack of tenant demand in certain locations, (e.g. at the ends of piers) which, needless to say, does not promote the public use and enjoyment of tidelands. To address this, MassDEP has proposed a third use classification, **Facilities of Limited Accommodations ("FLAs")**, facilities in which goods or services are made available directly to the public on a regular basis primarily by appointment or enrollment on essentially equal terms. Examples include health clubs, child care centers and elderly or other social service centers.

Under the proposed revisions, FLAs may be authorized for a limited term and for up to 75% of required FPA space where a project site cannot support FPAs. Twenty percent of annual FLA-generated net operating income must fund specific construction or activities approved by MassDEP to activate the waterfront near the project site. By expanding the uses allowed along tidelands in limited situations, MassDEP hopes to activate parts of the shoreline for semi-public use, which would otherwise remain vacant.

Goulston & Storrs will continue to follow the revision process. **For questions about the information in this advisory, please contact your usual Goulston & Storrs attorney.**

This advisory should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer concerning your situation and any specific legal questions you may have.

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