

RESPONSES TO FREQUENTLY ASKED QUESTIONS ARISING IN THE LAND USE CONTEXT, IN LIGHT OF THE COVID-19 VIRUS OUTBREAK MARCH 21, 2020

We have recently received numerous questions related to land use permitting activities, in light of emergency response efforts to address the coronavirus COVID-19 outbreak, including state and sometimes local declarations of emergency, closures of town/city halls to the public, decisions to have staff work remotely, closure of Massachusetts courts to the public, and implementation of Governor Baker's March 12, 2020 "Order Suspending Certain Provisions of the Open Meeting, G.L. c. 30A, §20," which essentially provides for "virtual" meetings of public bodies on a temporary basis during this public health emergency. Against this daily evolving landscape, we have provided the below information on frequently asked topics relative to land use permitting activities. As always, we will continue to update you with new developments. In addition, you should contact your Land Use attorney at KP Law to discuss any specific situations or concerns.

Are existing statutory deadlines for action on land use permit applications stayed or tolled due to the current State of Emergency? What if we cannot meet due to complications arising from the COVID-19 outbreak?

Unfortunately, **at the present time**, any statutorily imposed deadlines for acting upon land use permit applications **have not been stayed** by act of the Governor or the Legislature. We will inform you should either the Governor or the Legislature adopt measures to provide relief from these deadlines in light of the COVID-19 situation. Should you have any questions concerning applicable statutory deadlines for any particular type of permit or application, please contact your Land Use Attorney at KP Law.

Please note that we are strongly encouraging all land use permitting boards/commissions to seek blanket 90-day extensions of statutory (and/or local, if applicable) deadlines **from all applicants**. In some instances, that extension might be for the time required to open a public hearing after receipt of the application, an extension of time to conduct the public hearing itself, or the time for issuance of a decision after the close of a public hearing. Although an individual board or committee may believe that it has sufficient time to complete necessary hearings and render decisions on pending or new applications, in these uncertain times, it is nonetheless prudent to obtain extensions. Indeed, while there are instances where you may not need or use an extension, it is better to have one. This will help ensure that you are not faced with a situation where either, you are required to take action on multiple applications in a very short time frame, and/or you are limited in the amount of time that you can devote to reasonably considering a pending application due to time constraints.

At the end of this document, you will find a sample extension form for your use. We highly recommend that you obtain a written agreement from applicants to any extension of time. The sample extension form contains signature spaces for both the applicant and designated representative of the relevant board/committee/commission. However, in the present circumstances, if you are unable to obtain the signature of either the applicant or the designated representative of the board/committee, email confirmation from an applicant or applicant's representative agreeing to the extension should suffice if that is all you are able to obtain. Any written extension authorization should be filed with the City/Town Clerk.

Finally, it appears that there is some confusion about an Order recently issued by the Massachusetts Supreme Judicial Court, Order OE-144, dated March 17, 2020, which contains the following provision: ***9. All statutes of limitations are tolled from the date of this Order through April 21, 2020. Unless otherwise ordered by the applicable court, all deadlines set forth in statutes or court rules, standing orders, or guidelines that would otherwise expire before April 21, 2020, are extended to that date.*** In our opinion, this Order tolls the statutory deadlines for aggrieved persons to file court appeals of actions taken by land use permitting boards under relevant provisions of state law. The Order **does not** extend the statutory deadlines for local action on pending applications, however.

If city/town hall is closed, how do we (or should we) facilitate the filing with the clerk of Notices of Appeal under G.L. c. 40A, §17?

Chapter 40A, §17 requires that persons aggrieved who file a land use permitting appeal in court must provide notice of the appeal to the city or town clerk. By statute, these court appeals must be filed within twenty days of the action (or inaction) challenged. Moreover, notice of the filing of a court appeal, together with a copy of the court complaint itself, must be provided to the clerk "so as to be received within such twenty days." The burden is on the plaintiff(s) to ensure that this notice is timely filed with the clerk, and unexpected closures of the clerk's office will not necessarily relieve plaintiffs of this burden. With that said, where you anticipate that a closure of city/town hall (either completely or just to the public) to last for the immediately foreseeable future, we do think it advisable to determine an alternative means through which these notices of appeal can be delivered to the clerk.

It is ultimately a policy decision as to what alternative means you will provide and implement. With that said, we **do not** recommend that this alternative means be through accepting email transmittal of notices of appeal in the first instance, however, as this may set up a precedent in the future, when your city/town hall resumes normal operations. Instead, many communities are establishing an accessible, secured "drop box", located outside city/town hall, in the police station lobby, or other location that is not closed off to the public. (Indeed, some communities already have such a drop box for bill payments, for example). It is your choice whether you also advise that people email the relevant town staff when they have deposited something in the drop box, to facilitate retrieval and processing. Additionally, it is your choice whether you also want to acknowledge receipt of filings via email response to the applicant/plaintiff.

Finally, whatever you decide, it is important to establish a regular protocol for how frequently the drop box will be checked, by which staff person(s) or official(s), as well as ensuring that filings are date stamped upon retrieval from the drop box. It is preferable that the drop box be checked daily, as of the close of business, and all items received be marked received that day. We realize that as this situation continues to unfold, many town/city halls may resort to a “skeleton crew” or to not staff town hall on a daily basis in normal circumstances. Regardless, some town/city official or employee should be designated to check the drop box each day and date stamping the contents. This protocol should be publicized through means that will reach the broadest possible public audience, such as postings on your website, local cable access, any government social media platforms, on external bulletin boards, and even the front door of town/city hall. Particularly with respect to notices of appeal, you will want to communicate to the public how frequently the clerk or staff on the clerk’s behalf will be checking the drop box.

Of course, notices of appeal can also be mailed, but again, it is the plaintiff’s responsibility to ensure that such notices are received within the twenty day appeal period.

Can a city/town suspend acceptance of land use permit applications (whether for zoning relief, special permits, building permits, etc.)?

As there is no present relief from compliance with statutory deadlines, suspending or refusing to accept any new land use permit applications may have legal consequences resulting from inaction (i.e., constructive grant or approval in certain circumstances). Massachusetts courts have generally ruled that a municipality lacks authority to decline to accept a license or permit application where state law does not provide that authority.

Regardless of whether your town or city hall has closed entirely, or is simply closed to the public but staff are still working, it is important to have developed a plan for receipt of permit applications, obtaining extensions, and the like. As discussed above, some communities have advised applicants who do not wish to mail application materials to deliver them to the secured, accessible drop box location at town/city hall or at the police station (rather than “in person” to a staffed office, as was frequently done prior to the onset of the COVID-19 virus outbreak). Regular schedules for checking these drop boxes, and marking application materials received, should be devised. Applicants should be advised to inform the relevant board/commission, staff liaison (if any), and the city/town clerk via email, that materials have been deposited in the mail or the drop box, to ensure that staff is alerted to the incoming application.

Even if your city/town hall is closed entirely (and staff are not working, or are working remotely), unless some action is taken at the Executive or Legislative levels to provide relief from statutory deadlines for action, you will need to develop a plan for some staff member or official to check the mail and drop box for new applications. In any event, it is important that staff record the date applications are received. This may be the date application materials are retrieved from a drop box, for instance. (If staff are working, efforts should be made to check drop boxes daily, and recording receipt of materials at the end of each day).

Where government operations are suspended generally in response to the current situation, we simply do not know how a court in the future will calculate statutory deadlines for purposes of determining whether a

board or commission timely acted within those deadlines. Nonetheless, it makes good sense to try to keep a clear record of dates of receipt of application materials (however received), date(s) applicants were contacted for extension requests, efforts to contact applicants with respect to possible postponement or continuance of pending public hearings, applicants' responses to these contacts, and the like.

In terms of electronic submission of applications, please be reminded that some statutes require delivery of applications either in person or by certified or registered mail (depending upon the type of application). As a result, while accepting courtesy copies of electronically-submitted applications may facilitate the processing during a time when staff is working remotely, or operating on a "skeleton crew," applications that are received solely via electronic means may not be sufficient to comply with statutory requirements.

To the extent that your board/commission typically signs application approvals or denials, but you anticipate having difficulties securing in-person signature(s) due to limitations imposed by the COVID-19 virus outbreak, you may wish to consider having the board/commission vote to authorize a staff liaison to sign on its behalf a previously voted decision, and/or previously approved plan.

What if we don't have the technology for a virtual meeting and/or the board/committee members are not comfortable conducting a meeting virtually and by remote participation?

The Governor's March 12th Order (referenced above) allows for multi-member public bodies to conduct public meeting or public hearings "virtually." We have explained that Order in detail previously; that explanation can be found on our website. A reminder that where either a public meeting or a public hearing is conducted "remotely," all votes taken must be by roll call vote, and recorded in the minutes as a roll call vote.

In a nutshell, for public meetings, a public body may conduct the meeting entirely by virtual means, so long as the public has the ability to watch or listen to the proceedings in real time, through electronic means, unless the town/city is unable to provide that access due to economic hardship (limited technological resources) and "despite best efforts." (In the event that any of these situations occur, please contact your Land Use attorney at KP Law for further guidance.) Accurate minutes should be taken of the meeting as well to ensure compliance with the Open Meeting Law.

For public hearings required by state or local law or regulation, where the rights of the public to attend, participate, and be heard, are implicated, both the applicant and/or applicant's representative(s) and the public must be provided with the ability to participate remotely through electronic means, without exception.

Thus, assuming that: 1) you are unable to obtain an extension of time from the applicant for matters requiring a public hearing; 2) you are required to act in order to meet statutory or regulatory deadlines; 3) a virtual hearing cannot occur due to lack of adequate technology or board preference; and, 4) you feel compelled to proceed because you do not want to risk a constructive grant or approval (or other legal consequences of failure to act within a required time frame), then, you will have to proceed with an in-

person public hearing. In such circumstances, though, be mindful of the Governor’s ban on gatherings of more than 25 people, effective through April 5, 2020 (unless further extended or rescinded). Significantly, if there are more than 25 people in attendance (including applicant(s), representative(s), board members and staff), adjustments will have to be made to ensure that all attendees are not in the same room at the same time, in accordance with the Governor’s ban and recommended social distancing. If that is not possible, then the hearing ought to be terminated, despite the consequences relative to any particular application. This may mean that the hearing is continued to another date, if time permits, or that the board/committee will have to issue a substantive decision (which decision may be a denial due to the lack of an extension from the applicant, the requirement to act in accordance with statutory deadlines, and the fact that due to the Governor’s ban, the board/committee had no choice but to terminate the public hearing).

Does the answer to this question change if town/city hall is closed to the public?

If your town/city hall, or other public buildings at which public body meetings are held, are closed to the public, then there will need to be coordination amongst the public body, staff, and administration to see how access might otherwise be provided, in a limited fashion, for members of the public to attend an in-person public hearing. Closures of public buildings to the public, though, creates challenges to proceeding, which would be eliminated if you were able to obtain any necessary extensions of time from an applicant and simply postpone or continue the hearing.

If we cancel or postpone a public hearing, are we required to send out new notices to abutters and/or re-advertise a public hearing?

Our short answer is that we recommend continuing a public hearing, not canceling it whenever possible. Generally, if you cancel a statutorily-required land use permitting public hearing, you will need to re-advertise public hearings and send out new notices to abutters, with the new hearing date.

If you have opened the public hearing and are postponing or continuing the hearing to a specific date, however, our opinion is that no new publication notice or notice to abutters needs to be made. For further guidance on the continuation of public hearings, please see our March 11, 2020 “Considerations for Municipalities and Government Entities Implicated by Novel Coronavirus COVID-19,” available on our website.

We will continue to keep you updated on developments in the face of this rapidly-evolving pandemic. A reminder that we have established a **Coronavirus “hotline”**, at coronavirusinfo@k-plaw.com. A dedicated team of our attorneys is available through this “hotline” e-mail address to answer the most frequently-asked legal questions arising from COVID-19. One of these designated attorneys will respond promptly to your inquiries. In some instances, you may be referred to your primary, land use, or labor contact, and you should of course feel free to contact these attorney(s) directly with COVID-19 related questions.

Disclaimer: This information is provided as a service by KP Law, P.C. This information is general in nature and does not, and is not intended to, constitute legal advice. Neither the provision nor receipt of this information creates an attorney-client relationship with KP Law, P.C. Whether to take any action based upon the information contained herein should be determined only after consultation with legal counsel.

SAMPLE EXTENSION AGREEMENT - (May be put on City/Town Letterhead)

EXTENSION AGREEMENT

Applicant, _____ (insert name of applicant) and the [City/Town of _____] Planning Board/Zoning Board of Appeals/Conservation Commission agree to extend the deadlines, as provided for under (check one):

- a. ____ G.L. c. 40A (variance, special permit, G.L. c. 40A, §6 finding, appeal of Building Inspector’s decision/issuance of building permit/zoning enforcement) and the Zoning Bylaw.
- b. ____ G.L. c. 40B (comprehensive permit).
- c. ____ G.L. c. 41 (subdivision) and the Subdivision Rules and Regulations.
- d. ____ G.L. c. 131, § 40 (Notice of Intent/Determination of Applicability) and the Wetland Protection Bylaw, if applicable.

regarding Applicant’s _____ (insert date application was stamped as filed with City/Town Clerk) Application for a _____ (insert variance, special permit, appeal of Building Inspector’s determination, appeal of request for zoning enforcement, comprehensive permit, or subdivision, Notice of Intent, Determination of Applicability, as applicable) regarding the property located at _____ in _____, MA [insert location]. The applicable deadlines are extended as follows:

- A. The time to open the public hearing is extended to _____ (insert date).
- B. The time to close the public hearing is extended to and includes _____ (insert date).
- C. The time to take final action and file notice of same with the City/Town Clerk is extended to _____ (insert date).

Date

Authorized Signature of Applicant

Date

Authorized Representative of Board/Committee/
Commission

Filed with City/Town Clerk: _____, 2020