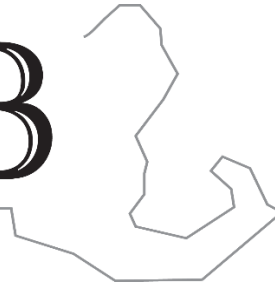


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MASSACHUSETTS ASSOCIATION OF HEALTH BOARDS COVID–19 Guidance Chapter 53 of the Acts of 2020 *An Act to Address Challenges Faced by Municipalities and State Authorities Resulting From COVID-19*

Public health professionals, especially local health departments and boards of health, are facing many questions from local public officials, residents, parents, health care providers, and others about COVID–19. MAHB’s series of documents are meant to provide answers and guidance to health departments and boards of health. **This document is provided for educational purposes only and is not to be construed as legal advice. For legal advice, please contact your city or town attorney.**

Question: Has this new law affected local boards of health (LBOH) in the issuance and enforcement of various permits?

Answer: Yes. The new state law affects LBOHs and other municipal departments in their permitting roles.

Analysis: On March 26, 2020, Governor Charlie Baker entered an Executive Order, COVID-19 Order No. 17, entitled an "*Order Suspending State Permitting Deadlines and Extending the Validity of State Permits*,"¹ that is **inapplicable** to LBOHs. This Order suspends "[a]ny requirement that a hearing commence within a specific period of time after the filing of or appeal of a decision on an application" for an approval and "[a]ny requirement that a state permitting agency [must] issue a decision on an application [or] an appeal of an application."

¹ Available at <https://www.mass.gov/doc/march-26-2020-permit-extension-order/download>

This Order is mentioned solely to avoid any ambiguities or confusion, as it applies only to “state permitting agencies,” and thus, LBOHs need not be concerned with it.

However, a week later, Governor Baker signed into law Chapter 53 of the Acts of 2020, an “Act to Address Challenges Faced by Municipalities and State Authorities Resulting from COVID-19” (the “COVID-19 Act”).² This is a comprehensive law to adopt measures to keep municipalities and certain corporations operating during the state of emergency that was declared by Governor Baker on March 10, 2020.

The COVID-19 Act addresses many municipal functions such as the timing of town meeting; adoption and implementation of municipal budgets; sources of funding; municipal real estate transactions; issuance and collection of various tax bills, abatements, water and sewer bills; and liquor sales and delivery. It also allows public corporations and charities to alter their means of conducting business meetings and electing officers.

The law also permits retired public employees, whose pension rights carried restrictions against continuing on government payrolls beyond a restricted number of hours, to return to the public positions from which they retired to lend their sage experience to governmental operations, without penalty to their pensions.

Of particular interest to LBOH, are sections 17 and 18 of the COVID-19 Act, which address permitting by municipal authorities. The following is a summary of the local permitting provisions:

- **What are “permits,” under the COVID-19 Act?** “Permits” are broadly defined to include permits, variances, special permits, licenses, amendments, extensions, and “other approvals” issued by LBOH.³
- **Rules pertaining to “Applications”:** Under the COVID-19 Act, during the pendency of the state of emergency, an application is deemed accepted as of the date of filing if it is filed with, and certified as received by, the LBOH. Applications may be filed electronically either through a web portal or attached to an email. Close scrutiny must be paid to all inbound electronic platforms, as the applicant may request an official certification of receipt of the electronically filed document.⁴

² Available at <https://malegislature.gov/Laws/SessionLaws/Acts/2020/Chapter53>.

³ COVID-19 Act, § 17(a). This is not the first time Massachusetts has had an emergency permit extension. In 2010, as a result of a crumbled economy and in an attempt to salvage vulnerable businesses, the Legislature passed the 2010 Permit Extension Act. Under that Act, the courts construed “permits” very broadly, so it is likely that the same construction would apply under this emergency provision. See PIERCE ATWOOD LLP, Massachusetts Passes Local Permitting Relief for COVID-19 Emergency (April 6, 2020), [available at https://www.pierceatwood.com/alerts/massachusetts-passes-local-permitting-relief-covid-19-emergency](https://www.pierceatwood.com/alerts/massachusetts-passes-local-permitting-relief-covid-19-emergency).

⁴ COVID-19 Act, § 17(b)(i); see PIERCE ATWOOD LLP, [supra](#) Note 3.

In practice, this procedure suspends many statutory and regulatory filing formalities, like those found in G.L. c. 40A, § 9, which require that special permit applications must be filed with a municipal clerk who certifies the time and date of filing, and then filed with the LBOH, and affects procedural regulations adopted by the LBOH such as submitting copies of full-size plans and other materials. Boards cannot refuse to accept an application, merely because they deem the application incomplete.⁵

Under the COVID-19 Act, an LBOH may contest an application's completeness in only two instances: if the applicant appeals a decision or if the application is denied "on other grounds."⁶ It is this author's opinion that, as with most permit applications, if the LBOH acts reasonably to protect the public health and the decision is well grounded upon a complete record, the chances of an appeal are slim, keeping in mind the breadth of G.L. c. 111 and the extremity of the current emergency.

The COVID-19 Act suspends several permitting deadlines and affects LBOH action on several matters. For instance, under Section 17(b)(iii),⁷ a permit that is valid and in effect as of March 10, 2020 remains valid during the state of emergency and for a reasonable time thereafter to allow the permit holder to complete the renewal process.

If a permitting hearing was under way, and not concluded, at the time of the declaration of the emergency, March 10, 2020, then the proceedings are tolled, and no action may take place pursuant to the subject matter of that hearing, until 45 days after the termination of the emergency.⁸ Similarly, if a permit is of the type that ongoing inspections and/or actions are needed to be taken, such as a Title V action or a restaurant opening, the post-termination period is extended to 60 days, unless additional time is needed. Unlike other proceedings by a LBOH, this extension may be granted at the sole discretion of the chair of the board, in the absence of a quorum, subject to certain notice provisions.⁹

In the event of an *urgently needed* action that does not otherwise fit within the COVID-19 Act, Section 17(d) provides for the availability of the remote-access open meeting provision

⁵ See PIERCE ATWOOD LLP, supra Note 3.

⁶ COVID-19 Act, § 17(b)(i).

⁷ This provision states: "a permit in effect or existence as of March 10, 2020, including any deadlines or conditions of the permit, shall not lapse or otherwise expire and the expiration date of the permit, or time period for meeting a deadline or for performance of a condition of the permit, shall toll during the state of emergency."

⁸ COVID-19 Act, § 17(b)(vii).

⁹ COVID-19 Act, § 17(c).

discussed in another guidance on this web page.¹⁰ The COVID-19 Act does not completely prevent permitting, because the LBOH has the option of convening within the parameters of the relaxation of the Open Meeting Law stated in the Governor’s Executive Order entered March 12, 2020.¹¹ Any and all permitting that is consistent with social distancing and other public health mandates as ordered by the Governor may still be conducted.

If the proceeding is held pursuant to the LBOH’s quasi-judicial jurisdiction (acting in its capacity to “judge” after a public hearing on a specific alleged violation),¹² there is a specific subsection of the COVID-19 Act that says, “[n]otwithstanding any general or special law to the contrary and without limiting the foregoing, this section shall apply to the conduct of public meetings, public hearings or other actions taken in a quasi-judicial capacity by all local boards and commissions.”¹³

Conclusion: The permitting process for LBOH may be affected by the provisions of Chapter 53 of the Acts of 2020. Board members should contact their city or town attorney if they are in doubt about whether to proceed with the issuance of a permit. The COVID-19 Act *does* permit relaxations of otherwise stringent standards, as set forth above.

¹⁰ See generally MASSACHUSETTS ASSOCIATION OF HEALTH BOARDS, COVID-19 Notice Requirements for Board of Health Meetings During a Declared State of Emergency (March 30, 2020), available at <https://www.mahb.org/wp-content/uploads/2020/04/OML-Notice-emergency-meetings-v3-msbredlines033120.pdf>

¹¹ OFFICE OF THE GOVERNOR, Order Suspending Certain Provisions of the Open Meeting Law, G. L. c. 30A, § 20 (March 12, 2020), available at <https://www.mass.gov/doc/order-suspending-certain-provision-of-open-meeting-law/download>.

¹² See Nelson v. State Bd. of Health, 186 Mass. 330, 334-35 (1904) (discussing quasi-judicial nature of board of health’s powers).

¹³ COVID-19 Act, § 17(f).