

June 11, 2020

Daniel Padien, Waterways Program Chief  
Department of Environmental Protection  
One Winter Street  
Boston, MA 02108

**Subject: COVID-19 and Chapter 91 Public Spaces**

Dear Mr. Padien:

As the Commonwealth takes steps to safely reopen the Massachusetts economy, get people back to work, and ease social restrictions, it is critical for the Department of Environmental Protection (MassDEP) to provide guidance on the opening and use of public spaces currently licensed by the Waterways Program pursuant to Chapter 91. Conservation Law Foundation (CLF) and Boston Harbor Now (BHN) offer our preliminary thoughts and recommendations below.

### **Principles for Public Spaces in the COVID-19 Era**

The past three months have demonstrated how critical outdoor public spaces are for our health and well-being. In Boston, the Harborwalk has served as a place of respite and access to the coastline for many during this public health crisis. Some people are discovering these waterfront spaces for the very first time. Access to public spaces and amenities provided under Chapter 91 will continue to play a critical role as the Commonwealth begins to recover from the COVID-19 pandemic.

Many of these public waterfront spaces co-exist with a variety of businesses and uses, including restaurants, offices, retail, and more. In most cases, the public benefits associated with those spaces were minimum conditions for approval of the businesses on tidelands in the first place. Expectations for the reopening of public spaces and amenities should be consistent with the state guidance and social distancing guidelines. To the extent that some businesses are also requesting reasonable flexibility for uses on the property, which may be inconsistent with their existing waterways license conditions, MassDEP should address this with a temporary forbearance policy.

There have always been challenges in balancing public and private interests on Chapter 91 properties, and this moment is no different. MassDEP must prioritize public access to and use of the waterfront to meet its trustee obligations.

## **Recommended Forbearance Policy**

Given the current unprecedented circumstances and the temporary nature of the accommodations being requested, we recommend that MassDEP adopt a temporary forbearance policy. The policy would allow licensees some flexibility in the use of Chapter 91 properties under a specific set of conditions. MassDEP would reserve the right to revise or revoke the policy at any time and would also reserve the right to bring a licensee that does not comply with the terms of the policy into compliance with its Chapter 91 license.

The policy should include the following conditions:

### Occupying public space should be a last resort

- Private uses should not encroach upon existing public open spaces and parks where there are alternatives available. Property owners and businesses should take advantage of underutilized spaces, particularly those typically dedicated to cars, like parking lots, street parking spaces, and roads. The City of Boston has offered flexibility to many businesses to recapture some of these spaces for uses like outdoor seating, for example, the new "[Cafe Zones](#)" in the North End.

### Forbearance should be temporary

- Any guidance issued by the Department should be explicitly temporary in nature. We recommend tying the expiration of the guidance to an appropriate phase of the Governor's reopening plan, like the partial or complete return of indoor dining at restaurants.
- The Department should explicitly note that any temporary guidance does not alter the existing Chapter 91 license conditions and that licensees can be brought into compliance with those conditions at any time at the discretion of the Department.

### Forbearance should be conditional

- To take advantage of the forbearance policy, licensees must continue to be in reasonable compliance with all license conditions and make all existing public amenities available to the public including restrooms and meeting spaces.
- Any additional outdoor seating must be temporary, moveable furniture and must be open to the public free of charge. (Note: it is necessary that any additional seating be public, not private. Many licenses require that these exterior open spaces be free and available to the public 24/7 and to allow exclusive private use of seating would alter the underlying license conditions, which MassDEP does not have the authority to do outside of a formal license amendment or minor

modification process.)

- Any additional outdoor seating must be at least six feet away from the landward edge of the Harborwalk to conform with social distancing guidelines (the entire width of the Harborwalk must also be clear as described below).
- Restaurants may not place tablecloths, silverware, menus, or other items on the additional tables, which would signal that they are not available to non-patrons. We encourage restaurants on Chapter 91 properties to take advantage of this new, public seating by offering and promoting the option of takeout service.
- Every additional table must display a sign indicating that it is available for public use, free of charge. Mass DEP may want to suggest standardized language to simplify the creation of signage for individual property owners and businesses.

#### The Harborwalk must remain open

- Under no circumstances should private businesses or uses encroach onto the Harborwalk or equivalent lateral shoreline access paths. The full widths of these paths should be open at all times for free and unobstructed use by the public. Property owners and businesses must also be sure to keep perpendicular access to the Harborwalk and the shoreline open and free from obstruction, whether from physical objects or from people. For example, under no circumstances should access be blocked by a line of people waiting to be served or seated at a restaurant.

Thank you for your consideration of these recommendations. Please reach out to Deanna Moran ([dmoran@clf.org](mailto:dmoran@clf.org)), Alice Brown ([abrown@bostonharbornow.org](mailto:abrown@bostonharbornow.org)), and Aaron Toffler ([atoffler@bostonharbornow.org](mailto:atoffler@bostonharbornow.org)) with any questions.