Client Alert: Massachusetts House Bill Proposes to End Local COVID-19 Permitting Stay as of December 1, 2020

By Christopher R. Agostino on October 14, 2020



Earlier this year, we reported that **House Bill 4617** effectively stayed the expiration of local approvals and permitting deadlines as of March 10, 2020 in response to COVID-19. Governor Baker also issued COVID-19 Executive **Order No. 17**, which stayed permitting activity before state agencies. Both the state and local orders were originally set to expire, "45 days after the termination of the [COVID-19] state of emergency". At the time, no one expected that the state of emergency would last throughout 2020 with no end in sight. When it became apparent that the state of emergency would endure, the Governor was able to quickly amend his initial order as it applied to state permitting agencies. The Governor's COVID-19 **Order No. 42** issued on July 2nd lifted the stay applicable to state permitting agencies as of August 10, 2020. Arguably, the Governor's July 2nd order could be interpreted to compel action by local permitting agencies that review and issue state permits (e.g. a local conservation commission acting under State Wetlands Protection Act), but as a practical matter such an argument is not going to win over any local boards that are not inclined to act on their own initiative. Because all local permitting was stayed by legislative action, a clear legislative amendment is necessary to decouple the local permitting freeze from expiration of the Governor's state of emergency.

Many local permitting agencies (e.g. local zoning boards, conservation commissions, boards of health, etc.) have continued to conduct business via Zoom, email, and other remote technology, which has allowed these boards to accept new applications, hold hearings, and issue permits. The Governor facilitated the use of remote hearing technology by relaxing certain requirements of the Open Meeting Law as of March 12, 2020. Nevertheless, many local boards have refused to accept new applications and have not held any hearings on pending permits. Instead, they have relied on the legislative stay that remains applicable to local permitting agencies as long as the state of emergency remains in effect. Some local boards have simply remained closed without any threat of 'constructive permit approval' or other permit deadlines as a result of the stay. Some boards have held hearings, but they have allowed applications to linger for months without any sense of urgency since statutory time standards remain tolled. Admirably, many local boards have conducted business as usual via remote technology despite the local permitting stay.

It appears the legislature might finally take action to resolve this gridlock, particularly in light of the fact that many local boards have proven that they can effectively conduct business via remote technology. **House Bill 5014** proposes to uncouple expiration of the local tolling period from the lifting of the state of emergency. The proposed legislation sets December 1, 2020 as the date certain upon which the permitting stay will be lifted. If the legislature passes H. 5014 as currently proposed, any permits, hearing deadlines, or expiration dates that were tolled as of March 10, 2020 will begin to run again as of December 1, 2020. For those hearings that were stayed or continued as of March 10th, local

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boards would be required to restart the hearing process prior to December 1, 2020. It is assumed that H. 5014 will be passed in advance of the proposed December 1, 2020 deadline in order to give reasonable advance notice to any local board or permit holder that had permit matters pending as of the March 10th tolling date. It is important that local boards and permit holders revisit the status of any permits or applications that were pending as of March 10, 2020 in order to determine how much time they have left to act once the clock starts running again on December 1st. The draft bill does allow the secretary of housing and economic development to waive the December 1st tolling deadline upon request by a local board; however, there is no clear standard for the grant of such a waiver. The proposed bill also includes language meant to provide relief to permit holders that were required to commence construction or otherwise act during the tolling period, where such action is not feasible shortly after December 1, 2020. Again, the legislation does not provide clear guidance on this topic in its current form.

We thank **Lynne Sweet of LDS Consulting Group LLC** for alerting us to this pending legislation and will continue to monitor the status of H. 5014 as it works through the legislature. Based on this pending legislation, it is appropriate to review the current status of any permits or approvals in light of the proposed December 1st tolling deadline in order to keep ahead of any potential action that might be required.

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