

## **Legislature Pulls Back Some COVID-19 Pandemic Relief for Permit Granting Authorities**

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With the enactment of Chapter 201 by the Massachusetts Legislature on November 10, 2020, municipal, district, county and regional permitting authorities (collectively, “permitting authorities”) now will have to take action sooner than they may have expected.

For developers, builders, landowners, and real estate professionals, this likely will speed up the processing of applications before conservation commissions, zoning boards of appeal, planning boards, boards of health, and regional permit granting authorities.

For anyone holding a permit in effect as of March 10, 2020, Chapter 201 does not modify the suspension - in effect for several months now - of permit expiration dates, deadlines within permits, or deadlines to record permits.

Specifically, on November 10, 2020, the Governor signed into law omnibus legislation that pulls back on, and effectively sunsets, much of the flexibility the Massachusetts Legislature gave permitting authorities at the outset of the COVID-19 pandemic.

This Chapter 201 of the Acts of 2020, “An Act Making Appropriations For Fiscal Year 2020 To Provide For Supplementing Certain Existing Appropriations And For Certain Other Activities And Projects”, among many other things significantly modifies Chapter 53 of the Acts of 2020, enacted in early April, 2020.

Chapter 53, entitled “An Act to Address Challenges Faced By Municipalities and State Authorities Resulting from COVID-19”, became known as the “Municipal Relief Act” for providing permitting authorities at every level of government - except the state level - to postpone processing permit applications and conduct meetings remotely without dire legal consequences while Governor Baker’s March 10, 2020 COVID-19 state of emergency is in effect.

The Governor issued specific orders in March and August affecting state permits and state permit granting authorities.

Perhaps feeling that many permit granting authorities have adapted to working during the pandemic while sensing that the state of emergency would not be lifted soon, the Legislature apparently felt it was time to set more definitive and closer deadlines than “the termination of the state of emergency” which anchors many of the permitting provisions of the Municipal Relief Act.

Perhaps developers, builders, and others seeking permits, amendments, renewals, extensions, and other actions had complained to their state legislators about delays caused by the Municipal Relief Act.

Regardless of the motivation, Chapter 201 will phase-out many of these interim permitting authority powers and options by December 1, 2020, or soon thereafter, unless a state agency secretary grants dispensation for good cause.

For example, the Municipal Relief Act gave permitting authorities the ability to postpone taking further actions on pending applications for which the public hearing was opened before March 10, 2020 (but not yet concluded) to their first meeting within 45 days of the end of the state of emergency.

Chapter 201 significantly changes that not-so-firm deadline to a very firm deadline of December 1, 2020 “unless such date is extended by relief from the secretary of housing and economic development [DHCD Secretary]”.

For permitting authorities which had been delaying the inevitable, this new December 1, 2020 deadline will be a loud wake-up call to resume permitting or to seek and obtain relief from the DHCD Secretary.

For applications filed before March 10, 2020, for which the hearing was not opened, and for applications filed after March 10, 2020, the Municipal Relief Act allowed permitting authorities to toll the running of any statutory or regulatory deadline to open the hearing until 45 days after the end of the state of emergency.

Chapter 201 changes this to say that the time period will resume on December 1, 2020 unless relief is obtained from the DHCD Secretary.

The Municipal Relief Act conferred significant new powers on the chair of a permitting authority to reschedule, more than once and without a quorum present, pending matters to a date within 45 days after the end of the state of emergency. This was considerable discretion in one official. Fortunately, there was an effective notification requirement when this power was exercised.

Chapter 201 now constrains the chair’s by replacing the deadline with a new one of December 1, 2020 unless relief is obtained from the DHCD Secretary.

The Municipal Relief Act also tolled any constructive approval or denial of permits due to a permitting authority’s failure to act within the time required by statute, bylaw, ordinance or regulation. Such a deadline was tolled as long as the permit granting authority acted within 45 days after the end of the state of emergency or a date prescribed by law, whichever date was later.

Chapter 201 changes this tolling to say that time period to act is tolled between March 10, 2020 and December 1, 2020, unless relief from the deadline is granted by the DHCD Secretary.

Permitting authorities may apply to the DHCD Secretary for relief from the deadlines specified above if they are: “(i) unable to conduct meetings and public hearings remotely due to lack of access to broadband or other technical limitations; and (ii) unable to conduct such meetings or hearings in person in accordance with applicable public health orders regulating gatherings during the state of emergency.” They must show “good cause”. However, Chapter 201 leaves it up to the DHCD Secretary to decide what should be the new deadline. Thus, the actual effect of Chapter 201 may end up lying in the hands of the DHCD Secretary, Mike Kenneally.

Also, the Municipal Relief Act prevented a permitting authority from revoking or modifying a permit if the permit holder fails to exercise or start work under a permit as of March 10, 2020 was a result of the state of emergency. This permit-holder protection was to end 60 days after the end of the state of emergency. Chapter 201 now ends this protection on December 1, 2020. Relief from this deadline cannot be obtained from the DHCD Secretary.

Noteworthy is what Chapter 53 did not change relative to permits in effect as of March 10, 2020. Chapter 201 does NOT modify the Municipal Relief Act’s suspension, during the state of emergency of such a permit’s expiration date and deadlines within permits. Similarly, Chapter 201 does NOT modify the Municipal Relief Act’s tolling of the requirement to record a permit to make it effective or to exercise rights under the permit. The Municipal Relief Act suspends the requirement to record during the time the relevant registry was closed or imposed restrictions on public access. Permittees take careful note to seek extensions of any permit before the state of emergency ends and to monitor when the applicable registry re-opens or opens to the public.

In conclusion, with the enactment of Chapter 201, project proponents and developers may obtain relief from permitting authorities which have been enjoying their rights under the Municipal Relief Act to postpone, somewhat indefinitely, their permitting duties. Now, and within several weeks, those permitting authorities will have to take action very soon or seek and obtain relief from the DHCD Secretary. If the DHCD Secretary does not grant relief, this will speed up or break up any log jam in the processing of applications which would be good news for project proponents. Thus, much may lie in the hands of the DHCD Secretary.