

Risk Management Bulletin #90

Land Use; April 2020

Building Permit Processing Under the Governor's Stay-at-Home and Social Distancing Proclamations

By Michael C. Walter
Keating, Bucklin & McCormack

Washington State Governor Jay Inslee's March 23 [Emergency Proclamation 20-25](#) ("Stay Home - Stay Healthy") and March 25 [Emergency Proclamation 20-28](#) (prohibiting in-person meetings at physical locations through April 23, 2020) raise questions about whether and to what extent local jurisdictions can accept new building permit applications, continue to process existing building permit applications, and/or issue permits related to current applications. This Risk Bulletin provides general guidance on these issues.

Initial considerations:

- **Practical** - does your jurisdiction have adequate staff to handle new applications or continue processing existing ones? Can staff work remotely on applications? Does your jurisdiction have an electronic portal or other remote access method of filing an application, making payment, communicating with staff?
- **Builder/developer Interests** - ensure good customer service so that builder's investment-back expectations are realized to the extent practicable under the Proclamations.
- **Legal** - potential liability for missing statutory or code-based deadlines; violation of applicant's vested rights; liability under chapter [RCW 64.40](#) and 42 U.S.C. Sec. 1983; violation of applicants' due process and equal protection rights; other potential legal claims.
- **Balance** - can your jurisdiction continue to intake and process applications to ensure good customer service balanced against the Governor's Proclamations requiring social distancing and appropriate health and worker protection measures and which currently restrict or prohibit construction through April 8, 2020?

Q: Can my jurisdiction accept and continue to process building permit applications, or issue building permits on applications currently in the approval pipeline?

A: With the limitations and considerations discussed below, the answer is "yes".¹ Neither of the Governor's Emergency Proclamations or his March 25 Guidance Memo address this question. However, they also do not prohibit or restrict local governments from accepting or processing building permit applications or issuing building permits. The legal risks for not processing applications or issuing permits, assisting builders with prompt resumption of

¹ This analysis assumes local government employees involved in permitting are maintaining "continuity of operations of essential critical infrastructure sectors", and the jurisdiction's building department and permitting employees are defined as "essential critical infrastructure workers." Such workers are arguably part of an "essential workforce" under the Governor's Proclamations because they can be defined as "workers to ensure continuity of building functions."

construction after the Governor's Orders are lifted or modified, support local jurisdictions' authority to process applications and issue building permits.

Q: *Are there reasons to continue accepting or processing building permit applications or issuing permits for applications in the pipeline?*

A: Yes. The potential for legal exposure, the expectations of builders and property owners, and good customer service support continued processing and issuance of building permits, *assuming social distancing and appropriate health and worker protection measures can be maintained*. Continuing to accept and process building permit applications and to issue permits will mitigate permit damage and delay claims under chapter [64.40 RCW](#), 42 Sec. 1983, and due process and equal protection claims.²

Many builders want to continue with permitting and issuance of permits so that, notwithstanding the current prohibition on residential and commercial construction, builders and developers can have a permit "in hand" when the construction ban is lifted. Additionally, many builders and developers have financing that is contingent upon submittal of an application or issuance of a permit. This financing could be jeopardized if the processing or issuance of permits is halted without good cause.

Finally, good customer service supports continued processing and issuance of building permits – as long as social distancing and appropriate health and worker protection measures can be maintained. There is no "one-size-fits-all" answer to whether your jurisdiction should continue taking or processing applications or issuing building permits, and the decision to continue such actions is up to each jurisdiction.

Q: *What are the limitations/considerations on accepting new building permit applications?*

A: See the discussion above. New building permit applications can be accepted during the Proclamation period(s), with the following qualifications/limitations: (1) your jurisdiction has adequate and available staff to take in and process new applications; (2) the application process, as well as acceptance of payments and documentation, can be done remotely through an electronic process (website, application portal) and without "over-the-counter" or personal interaction; (3) staff can remotely communicate with applicants throughout the process without personal interaction; (4) a written record of the application and all communications is made and retained; and (5) the same process is applied to all building permit applicants (to ensure fairness and avoid equal protection claims). Additionally, if staff is or may be unable to meet statutory or code-based processing or issuance deadlines, new applicants should be made aware of that and asked to either consent to potential delay (a tolling agreement, for example) or condition permit processing on potentially not meeting those deadlines. Good communication and equal application of the processing timelines is important.

² If applications are already in the approval pipeline, they are likely vested to current land use regulations and thus have constitutionally protected due process rights.

Q: *What are the limitations and considerations on continuing to process existing building permit applications?*

A: See the discussion above. There is a heightened reason to continue to process current, “in-the-pipeline” applications due to applicants’ expectations, statutory (and possibly code-based) considerations, the vested status of existing applications, and due process and chapter [64.40 RCW](#) delay damage considerations. Again, good communication with applicants and equal application of the processing timelines is key.

Q: *What are the limitations and considerations on issuance of building permits?*

A: See the discussion/limitations regarding new and in-the-pipeline applications. Here, too, there are heightened reasons to issue permits for “in-the-pipeline” applications for the reasons stated above - assuming adequate staff and the ability to remotely issue the permits. **NOTE:** All issued permits should be conditioned with or have a disclaimer on them that the permit does not authorize any construction or other activity in violation of any law, expressly including the Governor’s Emergency Proclamations and related Guidance Memoranda.³ Additionally, the jurisdiction should provide a tolling provision to allow for or extend the life of building permits beyond the typical 180-day lifespan.⁴

Q: *What should we do if we aren’t going to continue to accept, process or issue building permits?*

A: *At a minimum*, provide ample and clear notice to current applicants and to the public through multiple means, such as: (1) direct (electronic or other written) notice to current applicants; (2) your website; (3) electronic portals; (4) auto-replies on staff emails; and (5) notices posted outside city hall, planning and building departments and other buildings.

Other options include: (1) An executive order or proclamation by the mayor or other authorized executive; (2) an interim control measure; or (3) a moratorium. If a moratorium is adopted (this option should be last resort), ensure that it:

- Is done in consultation with your attorney, building official and/or planning or community development director, and administrator or manager;
- Has good findings to support the emergency basis and need for the moratorium;
- Is limited to six months, and rescind it earlier if possible;
- Includes recognition of and protections for vested permits;
- Includes a tolling provision to address statutory⁵ and code-based permitting deadlines; and
- Is compliant with statutory moratoria/interim control procedures and limitations.⁶

³ A sample of such a condition/disclaimer accompanies this discussion.

⁴ The International Building Code (IBC), which most jurisdictions have adopted by reference, provides that building permits are valid for 180 days (construction or other activity must start within 180 days of permit issuance), and can be extended at the jurisdiction’s discretion of an additional 180 days. See IBC Sec. 105.5 (2018 ed.).

⁵ See, e.g.: RCW 36.70B.070 (28 days’ notice of project application); 36.70B.080 (120 days to process a completed permit application); RCW 36.70B.110 (notice of application, comments, hearing etc.); RCW 58.17.095 (public hearing on subdivision within 21 days of notice); RCW 58.17.095 (deadline to approve preliminary plat applications - 90 days, and final plats within 30 days).

⁶ See, e.g., RCW 36.70A.390 (GMA) and RCW 35A.63.220 (code cities).

Q: *What about permits or land use approvals other than building permits?*

A: This *building permit* advice⁷ may not be appropriate for other permits or land use approvals such as binding site plans, full and short plats, BLAs, CUPs, SUPs, PUDs, variances, RUEs, master use permits, or other quasi-judicial permits/approvals, which may have different application criteria, processes, hearing requirements and timelines. Any permits requiring a public hearing or meeting⁸ should not be issued, and the hearings associated with them either postponed or continued in light of the Governor's Proclamation prohibiting taking "action" on, among other things, land use permits requiring a public hearing or meeting.⁹ Any order should also state the effect of the continuance or postponement on the processing time for permit application.

Consider tolling the processing timelines during the duration of the Governor's Emergency Proclamations. Consult your jurisdiction's attorney, building official or development services director, and administrator/manager to address permitting concerns and tailor advice and action to your jurisdiction's staffing, permitting issues, remote access and communications abilities and development concerns.

(See next page for Sample Permit Disclaimer.)

⁷ The advice in this bulletin is intended for building permits only, which are ministerial (administrative) and require no public hearing or meeting and can typically be done without direct (personal) contact with applicant.

⁸ For example, preliminary and final plats require a public hearing, as do other land use permits and approvals such as site plans, MUPs, and some BLAs, CUPs.

⁹ See Governor's Proclamation 20-28.

SAMPLE: DISCLAIMER/CONDITION FOR BUILDING PERMITS

The issuance or granting of this permit shall not be construed to be a permit for, or approval of, any violation of this Code or any other ordinance or order of the City, of any state or federal law, or of any order, proclamation, guidance advice or decision of the Governor of this State. To the extent the issuance or granting of this permit is interpreted to allow construction activity during any period of time when such construction is prohibited or restricted by any state or federal law, or order, proclamation, guidance advice or decision of the Governor of this State, this permit shall not authorize such work and shall not be valid. The building official is authorized to prevent occupancy or use of a structure where in violation of this Code, any other City ordinances of this jurisdiction or any other ordinance or executive order of the City, or of any state or federal law, or of any order, proclamation, guidance advice or decision of the Governor. The building official is authorized to suspend or revoke this permit if it is determined to be issued in error or on the basis of incorrect, inaccurate or incomplete information, or in violation of any City ordinance, regulation or order, state or federal law, or any order, proclamation, guidance or decision of the Governor.

© Copyright April 2020 by Washington Cities Insurance Authority. All rights reserved. This material was prepared by Washington Cities Insurance Authority (WCIA) for the exclusive use of its employees and staff and WCIA-member cities and entities. No part of this material may be reproduced in any form whatsoever, incorporated into any information retrieval system, electronic or mechanical, or distributed to third parties, without the express, written permission of WCIA, the copyright holder. All inquiries should be addressed to: Robin Aronson, Risk Services Manager, Washington Cities Insurance Authority, P.O. Box 88030, Tukwila, WA 98138 (206) 687-7900