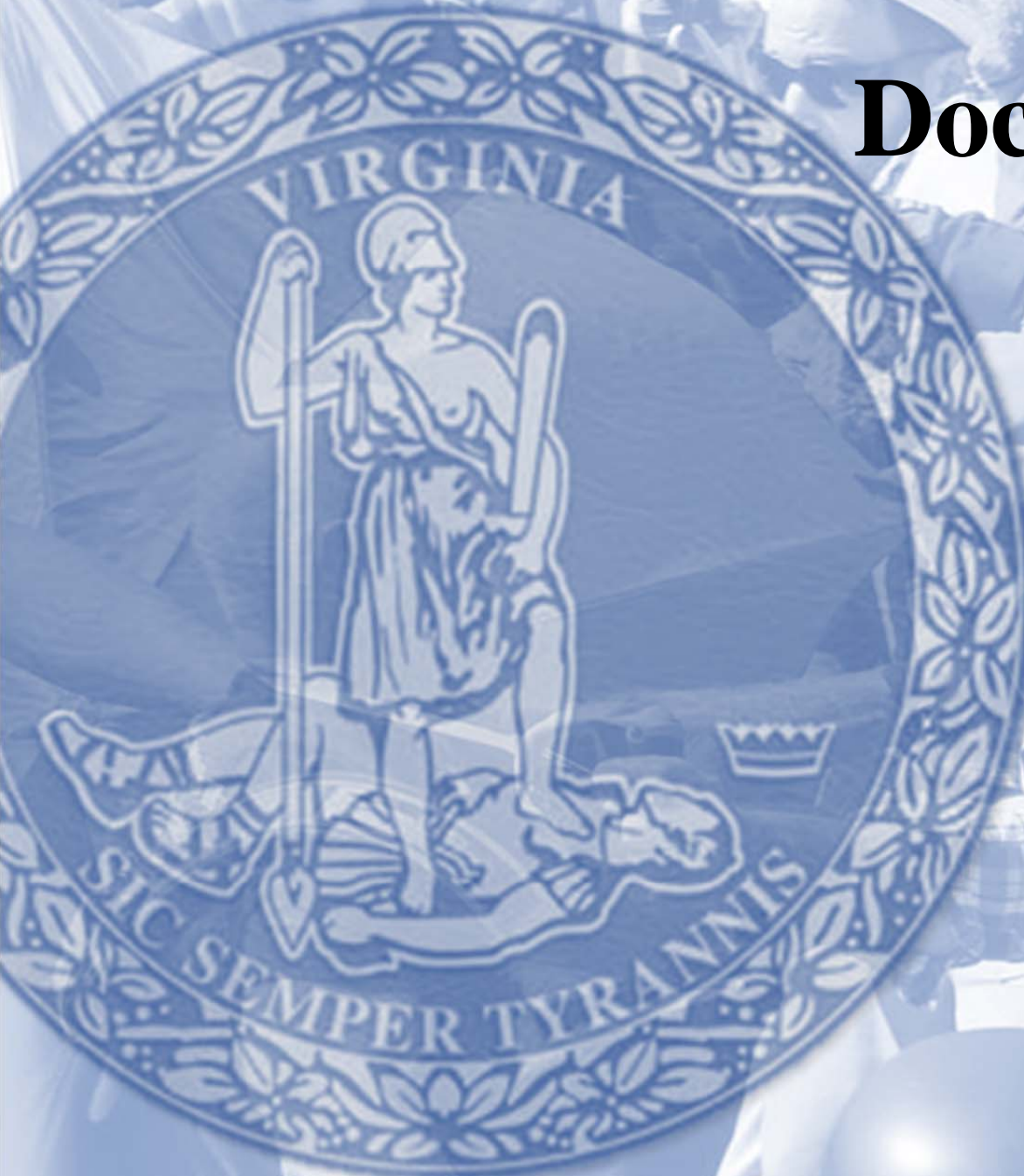


Permitting Reference Document



**Governor's Task Force on Public Safety
Preparedness and Response to Civil Unrest**

December 2017

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Introduction

Incidents of civil unrest are becoming more prevalent and are endangering communities across the country. The Commonwealth of Virginia experienced this firsthand on August 12, 2017, when a “Unite the Right” rally in the City of Charlottesville evolved into a violent incident of civil unrest. Virginia experienced three tragic deaths on August 12: first when a domestic terrorist drove his car into a crowd, killing 32-year-old Heather Heyer and injuring dozens more, and next when a Virginia State Police helicopter assigned to monitor the rally crashed, killing Lieutenant H. Jay Cullen, III, and Trooper-Pilot Berke M.M. Bates. Governor McAuliffe took immediate action and signed Executive Orders 67 and 68 (2017) to ensure a thorough review of the events leading up to August 12 and the state’s ability to support Charlottesville’s response.

Executive Order 67 temporarily suspended permitting at the state-owned Robert E. Lee Monument, located in the City of Richmond, pending a review of the state’s permitting process by the Governor’s Task Force on Public Safety Preparedness and Response to Civil Unrest, which was established under Executive Order 68. The Task Force was chaired by Brian J. Moran, Secretary of Public Safety and Homeland Security, and was charged with reviewing state and local permitting processes, developing an emergency regulation governing permitting at the Lee Monument and developing recommendations for governments to consider with regard to permitting. In order to fulfill this charge, Secretary Moran convened a Permitting Work Group.

The Work Group met four times and was comprised of state and local officials, including a Commonwealth’s Attorney, local permitting officials, first responders, and representatives from the Virginia Association of Counties (VACo) and the Virginia Municipal League (VML). Task Force staff administered a statewide survey, with the assistance of VACo and VML, in order to collect information about how localities address many of the identified issues in this reference document.

In addition to the statewide survey, staff reviewed and presented information from secondary sources, phone interviews, state and local laws and ordinances, federal case law, and examples of permitting processes nationwide. While permitting processes varied significantly, especially with regard to First Amendment activities, several common themes and best practices emerged.

Throughout the review, the Permitting Work Group and Task Force recognized that adopting a robust permitting process is a critical component of preventing events from becoming violent, as permitting processes provide localities with advance notice and facilitate thorough planning. As such, both groups recommended that all localities have a comprehensive permitting process. The Work Group and Task Force also recommended that all state and local permitting processes consider the factors addressed in this reference document, which outlines issues that affect significant governmental interests and provides a framework for putting necessary precautions into place to minimize the risk of civil disturbance(s). The Virginia Department of General Services, the agency responsible for maintaining the Lee Monument, considered all of the issues detailed in this document when promulgating emergency regulations governing permitting at the Lee Monument.

This document, however, is not exhaustive of all factors that may be considered and is not intended to be a rulebook. Nothing within this document should be construed as legal advice. Rather, this document is a reference for developing permitting processes. Permitting processes should be based on the specific needs and characteristics of each individual locality.

The Permit Development and Review Process

A permitting process enables localities to create a mechanism to review information about potential events and consult with all relevant internal and external departments, as well as the applicant, to facilitate a successful event.

Public officials must begin with an understanding of a *traditional public forum*. The Supreme Court of the United States has repeatedly emphasized the right of individuals to exercise freedoms of speech and assembly in traditional public forums. A traditional public forum includes public streets, public sidewalks, and public parks. These are places that have, “been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”¹

In order to preserve these freedoms, governments are strictly limited in their ability to regulate speech in traditional public forums. However, governments may regulate activities in traditional public forums if the regulations are content-neutral and pertain only to the time, place, or manner of the speech. Time, place or manner regulations may be valid, provided “they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”²

Regulations must advance a significant governmental interest, such as maintaining public safety and public order, promoting the free flow of traffic on public streets and sidewalks, allocating public resources, regulating competing uses of public places, regulating amplified sound, and preserving public parks and places.³ State and local governments may enforce these significant interests through a well-designed permitting process.

Permits are a form of time, place and manner regulations. Governments, through the issuance of permits, may regulate when an event may start and end, where an event may be held, and the manner in which an event may occur. The Supreme Court of the United States has ruled that requiring a permit in advance of an event is constitutional because it gives authorities advance notice to train and administer proper policing, to ensure that there are no overlapping events, thus “minimizing the risk of disorder.”⁴

Localities may face legal challenges on any aspect of their permitting process, therefore, it is critical that public officials engage in a thorough, deliberative process and document all decisions. Permitting processes that eliminate opportunities for individual discretion and that provide clear, well-documented procedures in advance are more likely to withstand judicial scrutiny. Additionally, due to the intricacies of First Amendment case law, localities should

¹ *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009).

² *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

³ *Jones v. Parmley*, 465 F.3d 46, 56–57 (2d Cir. 2006).

⁴ *Cox v. New Hampshire*, 312 U.S. 569, 575–76 (1941).

consult with their counsel before enacting or updating their permitting process and supporting policies.

Threshold for Requiring a Permit

As noted above, there is a constitutional right of assembly in public spaces, such as parks, streets and sidewalks, that can only be limited based on significant governmental interests. The first step in developing a permitting process is adopting a threshold, or number of participants, that should require an event to be permitted based on significant governmental interests. Permitting thresholds equip localities with a clear mechanism for reviewing information about potential events and clarify when a permit is required.

Jurisdictions vary nationwide on what number triggers the need for a permit, and there is no clear formula or judicial interpretation establishing this threshold. While there is no magic number, it is clear from case law that a key factor is whether localities engage in a deliberative process to adopt a number that is clear, reasonable, and justifiable based on a number of factors.

The critical factors for determining the threshold number include, but are not limited to, maintaining public safety and public order, promoting the free flow of traffic on public streets and sidewalks, allocating public resources, regulating competing uses of public places, regulating amplified sound, and preserving public parks and places. It is important to note that courts have upheld the need for small group exceptions for First Amendment events and localities are cautioned against adopting what may be considered an unreasonably low threshold.⁵

Determining Capacity for Permitted Events in Public Spaces

Setting maximum capacity limits for public spaces allows governments to allocate sufficient resources to events in order to ensure public safety and order. For indoor events, the maximum number of occupants is established by the building official or other regulatory entity in accordance with the Virginia Uniform Statewide Building Code.⁶ Capacity limits are enforced by the state or local fire marshal in accordance with the Statewide Fire Prevention Code.⁷ However, determining capacity limits in outdoor spaces is challenging because there is no standard model or formula.

Size of the space is often the primary determining factor in calculating capacity limits. There are several formulas that may help localities identify a preliminary number, which can then be adjusted based on factors articulated below. Dr. G. Keith Still, an expert in crowd safety and risk analysis, concluded that crowds with one person per approximately 11 ft² are stable and allow for free-flowing movement within a space. He further elaborates that risk increases as crowd density increases, particularly if individuals within the crowd are moving at different rates of speed. Using this calculation, a 1,000 ft² space could hold up to 90 people. It should be noted that this number does not take into account any considerations other than the free movement of people,

⁵ *Cox v. City of Charleston*, 416 F. 3d 281, 284-287, 288 (4th Cir. 2005).

⁶ Virginia Uniform Statewide Building Code, available at <http://www.dhcd.virginia.gov/index.php/va-building-codes/building-and-fire-codes/regulations/uniform-statewide-building-code-usbc.html>.

⁷ Virginia Statewide Fire Prevention Code, available at <http://www.dhcd.virginia.gov/index.php/va-building-codes/building-and-fire-codes/regulations/statewide-fire-prevention-code-sfpc.html>.

and localities are encouraged to consult with public safety, transportation, or other officials on the factors outlined below to adjust the limit to the specific space.

Some jurisdictions use the Herbert Jacobs method to determine maximum capacity within a space, which was developed by a journalist in the 1960s, to estimate crowd density. Jacobs determined that in a dense, static crowd, each person occupies 4.5ft² of space. It is important to note that this method was developed for the purpose of estimating density of an existing crowd and is not intended to determine how many people can safely occupy a space. As such, localities are cautioned against using the Jacobs method to determine maximum capacities for spaces. Once a locality has determined how many people *can* be in a space, they may want to consider how many people *should* be in a space. Additional considerations to inform decision making include, but are not limited to, public safety, traffic flow, and noise levels. Localities may want to consider the characteristics of each space, including whether the site is located in an urban, rural, or residential area, whether there are safe access and exit points to the space, and whether public safety officials are able to easily access the space in case of an emergency. Assessing these factors will allow localities to best determine the maximum number of people that could safely congregate in a space.

Ingress and egress should be significant considerations. In addition to routine ingress and egress, a variety of emergency scenarios should be evaluated. The Department for Culture, Media and Sport in the United Kingdom utilizes a formula to calculate evacuation times based on predictive flow rates, the desired evacuation time frame, and the number of exits. Based on this formula, it is expected that on an un-level surface, 66 people can exit out of a three-foot exit per minute, and on a level surface, 82 people can exit out of a three-foot exit per minute.⁸ The department suggests that based on the level of risk, emergency evacuation times should range from two and a half to eight minutes, and capacity or exit opportunities should be adjusted accordingly.

When determining maximum capacity limits in public spaces, localities should also balance the factors listed above with First Amendment considerations. Jurisdictions that set maximum capacities at a finite number are encouraged to review historical numbers of event sizes at particular locations, document the process, memorialize the factors used in the analysis, and be transparent with the public.

Tiered Permit Applications

Tiered permit applications allow localities to evaluate permits based on predetermined and clearly defined factors. These factors may include the size of event, the type of event (static vs. mobile), the duration of event, etc. For example, a locality may create a permitting system that requires different permit applications based on the number of expected attendees (e.g., Tier 1 = 50 or less attendees; Tier 2 = 51 to 99 attendees; Tier 3 = 100 to 250; etc.). Localities may also establish one standard application, which is then reviewed internally using a tiered structure based on fixed, predetermined criteria.

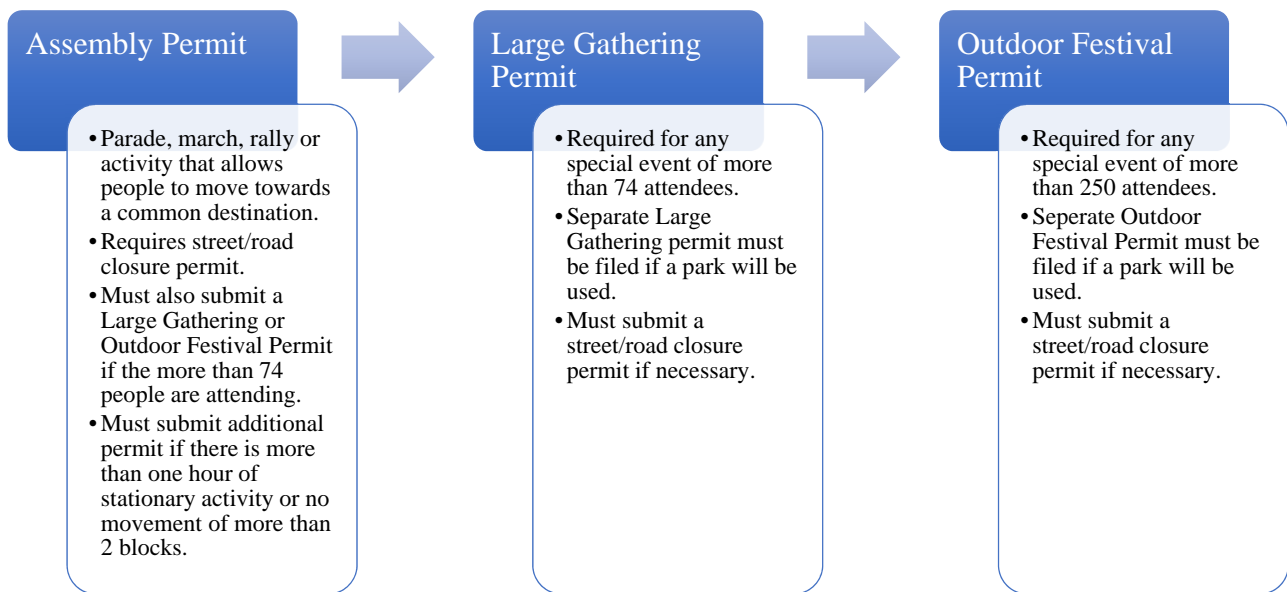
Tiered systems allow localities to neutrally apply restrictions and deploy resources based on the predetermined criteria. Localities may consider the significant governmental interests detailed

⁸ Guests= Number of 3-ft. exits / (flow rate * evacuation time)

above when establishing the criteria for each tier. Doing so may simplify the process for the locality and the applicant by creating uniform processes that are applicable to all events within a tier, regardless of the content or purpose of the event. This system, for example, may allow first responders to determine standard crowd safety requirements for different events. It also may also help the permitting agency identify other companion permits that may be required for an event within the tier (e.g. road closure permit).

Some localities in Virginia have adopted tiered permitting processes, including the City of Blacksburg, Henrico County, and Loudoun County. Atlanta, Georgia implemented a detailed tiered permitting process and has three separate permit applications and two tiered park permits (as shown in *Figure 1*). Atlanta requires applicants to submit proof that they have applied for additional permits as necessary, such as tent, stages, generators, off-duty police.

Figure 1. The City of Atlanta's Tiered Permitting Application System⁹



Weapons Restrictions

Each jurisdiction has the discretion to determine whether to ban weapons during permitted events based on public safety. Localities may choose to ban weaponized items that could endanger citizens, including but not limited to pepper spray, water cannons, Tasers, bricks, hammers, aerosol cans, improvised shields made of metal, plastic or wood, torches, bats, sticks, etc.

Currently, pursuant to the *Code of Virginia*, localities may not adopt restrictions on possession or carrying of firearms. However, permit applicants may choose to ban firearms at their events.

⁹ City of Atlanta Municipal Code, Article II, 10-126, available at https://library.municode.com/GA/Atlanta/codes/Code_of_Ordinances?nodeId=PTIICOORENOR_CH10ALBE_ARTIIDEMA_DIV3SPPE_S10-126TEPESPEV.

Localities should consider engaging with applicants in advance to discuss public safety implications and potential restrictions on firearms and other weapons at their events.

Off-Duty Public Safety Officers

Certain events have the potential to strain or exceed the capabilities of normal public safety and public service functions. For example, a parade may require additional public safety officials to assist with crowd control, monitor or re-route traffic and perform other tasks. A large gathering during summer months may present the potential for heat-related injuries and illnesses that may require additional emergency medical services resources. Localities should consider requiring permit holders to hire off-duty public safety officials or other security personnel, preferably those licensed by the Commonwealth.

When making this determination, localities should consider a number of factors, including whether the cost to the permit holder is reasonable. This is especially critical for First Amendment events, as high costs and fees may be viewed as a deterrent to the speech or assembly. Localities choosing to require that applicants hire public safety officials as a condition of the permit should consider developing a predetermined matrix with costs, indicating how many personnel are required based on factors like size and location of the event, public safety concerns, whether alcohol is present, etc.

Time Restrictions

Determining when particular spaces should be open to the public is a key component of reviewing or developing general rules and permitting processes for events. During the deliberation process, localities should consider not only the hours that public spaces are available for use, but also whether restrictions should be placed on the duration of permitted events. Both issues are important to protecting public safety as well as ensuring that citizens have ample opportunities to enjoy public spaces, engage in community events, and exercise their First Amendment rights.

The time frame for which public spaces are open to citizens may be set as a general rule and apply to any use of the space. Factors influencing this determination may include, but are not limited to, public safety, whether the space is located in a residential area, whether it is located in an urban or rural environment, hours of daylight, and noise and volume. With regard to limiting the duration of permitted events, localities may want to consider the administrative and public safety factors involved in sustaining long events, including the set-up and break-down times.

Additionally, public spaces that require road closures, are located in or near residential communities, or are in high-demand may influence a locality's decision to limit the length of an event. If a locality chooses to limit the duration of an event, it is important to engage in a deliberative, well-documented process to identify a clear, justifiable decision.

Timeline for Submitting and Reviewing Permit Applications

Each local permitting process should clearly indicate how far in advance of an event applicants must apply for a permit, as well as the time frame within which the locality must review and make a final determination to approve or deny an application. Setting clear timelines allows localities to not only effectively manage the administrative process and ensure proper planning, but also to help citizens understand the process. Jurisdictions should consider coordinating with

the various departments involved in managing a permitted event, particularly public safety and transportation agencies, to determine the necessary amount of advance planning and preparation.

Jurisdictions may also want to consider incorporating an exception into their process to allow for spontaneous events. The City of Fredericksburg, for example, requires all applications to be submitted at least 60 days prior to the event but will accept applications for events that are scheduled to occur in less than 60 days so long as the event organizer provides a written statement explaining why the application could not have submitted within the standard 60-day period.

Fees

A locality may determine whether it is necessary or beneficial to charge an application fee in consultation with their counsel. Governments may charge a nominal application fee to defray the administrative costs of processing special event permits, and may charge the permit holder for the cost of providing public services for the event. Governments may charge a rental fee for the use of public spaces.

However, under the First Amendment, the permit holder may not be charged for expenses related to spectators or counter-protesters. Fees, costs, and charges must be reasonable, definite and content-neutral.¹⁰ The permitting process should also contain provisions to waive fees for indigent individuals based on predetermined, content-neutral factors.¹¹ When determining whether or how to charge fees, localities should engage in a transparent, deliberative process to ensure the process is clear, well-documented, and justifiable.

Coordination

Proper coordination among relevant internal and external departments is critical to ensuring a safe and successful event. When reviewing and planning for potential permitted events, it is important to determine which departments, including state and regional partners, should be involved in the permit review process. Localities should also consider how to facilitate coordination among entities to ensure that all relevant perspectives are considered prior to the approval or denial of a permit application. While localities may include any number of departments in the process, the Work Group recommended that as a best practice, first responder agencies should always be involved in the review to ensure public safety during events.

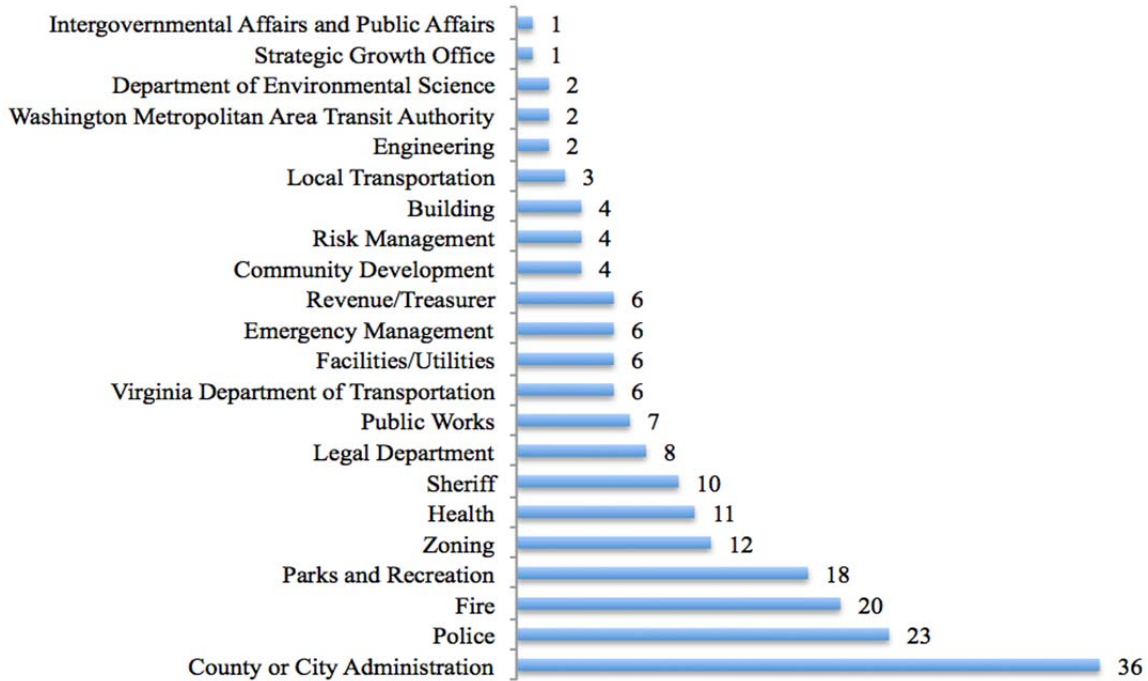
Maintaining public safety and order during events involves many factors and resources. One important component is intelligence gathering and information sharing. Localities should consider developing processes for exchanging information with relevant neighboring localities and state agencies, as well as requesting additional resources in advance of an event, if needed.

¹⁰ *Forsyth Co. v. Nationalist Movement*, 505 U.S. 123, 133 (1992).

¹¹ *Cent. Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1523 (11th Cir. 1985).

The number and type of agencies involved in the permit review process will vary by locality and should be based on department function. Additionally, agency involvement may vary based on the type and size of event.

Figure 2. Agencies and Departments Involved in the Permitting Process

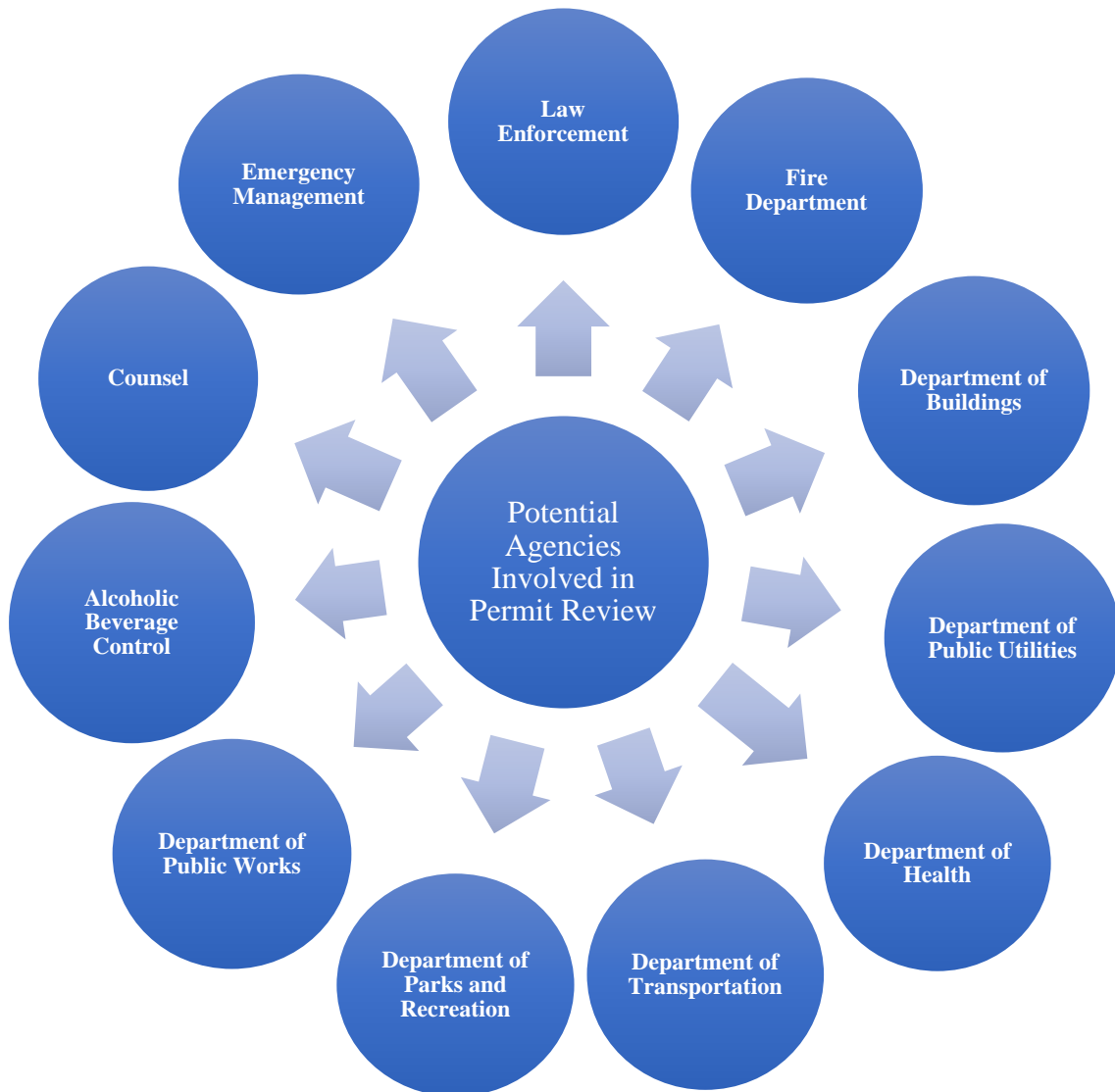


Institutionalizing a fixed system for coordinating with all entities will allow the locality and permit applicants to clearly understand the process, which is particularly important if multiple permits are required for one event. Jurisdictions nationwide use various approaches to address this issue.

Localities may choose to have applicants submit one application and then internally distribute applications to the relevant departments. Alternatively, applicants may be required to separately submit applications to each permit-issuing department. In either scenario, localities may consider developing a checklist for internal use to facilitate coordination among departments and identify a comprehensive list of permit requirements. The checklist may also be provided to the applicant so he or she is aware of all responsibilities.

Additionally, depending on the number of departments involved and the predetermined process, a jurisdiction may want to consider identifying a special events coordinator to manage the process, or creating a task force or committee to oversee the permitting process. This designated person or group would be responsible for coordinating with all necessary departments and for scheduling any necessary meetings with organizer to discuss the event.

Figure 3. Potential Agencies Involved in the Permitting Process



Communication

Actively communicating with relevant departments and the applicant throughout the review process is critical to maintaining transparency, addressing issues that may arise throughout the review process, and ultimately, ensuring a successful event. In order to maintain transparency, localities may want to develop a guidebook, post information on their website, or otherwise provide applicants with information about the permitting process in advance. Additionally, localities may establish a process for regularly communicating with the applicant before, during and after receipt of the application. In doing so, the parties may identify additional mutually agreed upon conditions or restrictions that will enhance the safety or flow of the event.

Localities should consult with their counsel and prosecutor to highlight and review existing laws that will assist law enforcement in maintaining public safety and order, which should include a discussion about what constitutes an unlawful assembly. If an unlawful assembly occurs, possession of a firearm or other deadly or dangerous weapon is a Class 5 felony.

Approval and Denial Process

Before receiving permit applications, all localities should consider establishing clear rules and criteria for approving or denying permit applications. Embedding these criteria into the permitting process eliminates discretion and ensures that approval or denial decisions are based solely on predetermined, content-neutral criteria. As with many factors in permitting, these criteria should be transparent, well-documented, justifiable and communicated to the applicant.

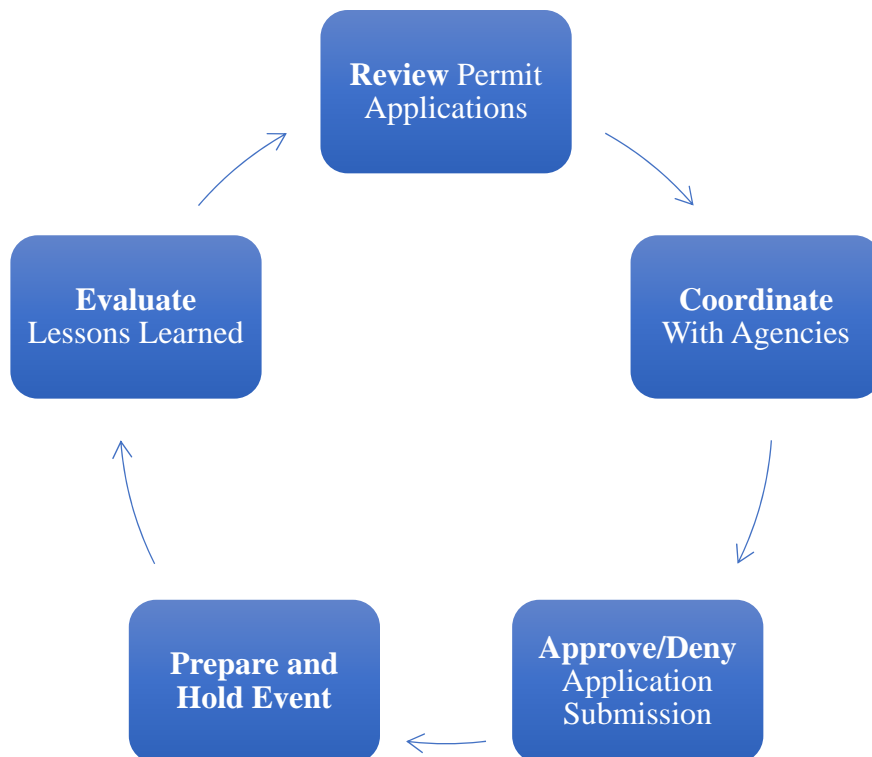
Jurisdictions have the discretion to determine an internal timeline for processing an application. The timeline should allow enough time for the locality to coordinate with all necessary agencies and departments, make arrangements, and coordinate with the applicant on any unresolved issues prior to the final determination. This timeline should also provide the applicant with adequate time to plan the event or make other arrangements if the permit is denied.

Jurisdictions are discouraged from implementing an automatic approval processes for permits. Without adequate attention and preparation, it is impossible for the locality to plan for and host a safe, secure event.

Evaluation and Feedback

At the conclusion of permitted events, localities should consider reviewing the permitting and planning process to identify any areas for improvement or gaps (*see Figure 4*). Ensuring that applicants and agencies understand the permitting process may eliminate future confusion or issues.

Figure 4. Permitting Improvement Cycle



Appendix A: Task Force Members

Brian J. Moran, (Chair), Secretary of Public Safety and Homeland Security
Curtis Brown, Deputy Secretary of Public Safety and Homeland Security
Melvin Carter, Chief of Fire and Emergency Services, City of Richmond
Tonya Chapman, Chief of Police, Portsmouth Police Department
Steven Cover, Deputy City Manager, City of Virginia Beach
Suzette Denslow, Deputy Chief of Staff to Governor McAuliffe
Fran Ecker, Director, Department of Criminal Justice Services
Quintin Elliott, Chief Deputy Commissioner, Virginia Department of Transportation
Phyllis Errico, General Counsel, Virginia Association of Counties
Colonel Steven Flaherty, Superintendent, Virginia State Police
Colonel David R. Hines, Sheriff, County of Hanover
Carlos Hopkins, Secretary of Veterans and Defense Affairs
La Bravia Jenkins, Commonwealth's Attorney, City of Fredericksburg
William Leighty, Former Chief of Staff, Governor Warner and Governor Kaine
Dr. Marissa Levine, Virginia State Health Commissioner, Virginia Department of Health
Delegate L. Scott Lingamfelter, Virginia House of Delegates, 31st District
David McCoy, Associate Vice President of Public Safety and Chief of Police, University of Richmond
Victoria Pearson, Deputy Attorney General, Office of the Attorney General
Colonel Anthony S. Pike, Chief of Police, Division of Capitol Police
James Redick, Director, Division of Emergency Management, City of Norfolk
Senator Bryce Reeves, Senate of Virginia, 17th District
Noah Simon, City Manager, City of Lexington
Dr. Jeffrey Stern, State Coordinator, Virginia Department of Emergency Management
Noah Sullivan, Counsel to the Governor
Major General Timothy Williams, Adjutant General of Virginia, Department of Military Affairs

Appendix B: Permitting Work Group Members

Brian J. Moran, (Chair), Secretary of Public Safety and Homeland Security

Christopher Beschler, Director, Department of General Services

Steven Cobb, Deputy Attorney General, Office of the Attorney General

Suzette Denslow, Deputy Chief of Staff, Office of the Governor

Kathleen Dooley, City Attorney, City of Fredericksburg, Virginia Municipal League

Alfred Durham, Chief of Police, City of Richmond

Phyllis Errico, General Counsel, Virginia Association of Counties

Michael N. Herring, Commonwealth Attorney, City of Richmond

Brian McGraw, State Fire Marshal, Virginia Department of Fire Programs

Victoria Pearson, Deputy Attorney General, Office of the Attorney General

Colonel Anthony S. Pike, Chief of Police, Division of Capitol Police, Commonwealth of Virginia

Senator Bryce Reeves, Senate of Virginia, 17th District

Allen Rothert, Special Events Coordinator, City of Richmond

Lieutenant Colonel Tracy Russillo, Deputy Superintendent, Virginia State Police

Noah Sullivan, Counsel to the Governor

Major John Venuti, Chief of Police, Virginia Commonwealth University