

113 CMR: HEALTH FACILITIES APPEALS BOARD

113 CMR 1.00: RULES OF PROCEDURE

1.01: Appellate Review by the Board

1.02: Commencement of Appeals

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1.01: Appellate Review by the Board

(1) Rule 1 -- Right of Appeal.

(a) Any applicant for a certification of need, or comparable applicant, aggrieved by a determination of need made by the Department of Public Health under M.G.L. c. 11, § 25C, shall have the right to appeal such determination to the Board; provided that a proper claim of appeal is filed with the Board within 14 days after the determination of need. This time period is computed from the date of receipt of the determination of need by the appellant.

(b) The state comprehensive health planning agency, the regional comprehensive health planning agency, or agencies with geographical jurisdiction of the area to be served by the health care facility, and any ten taxpayers of the Commonwealth shall also enjoy this right of appeal.

(c) A person shall be considered "aggrieved" within the meaning of 113 CMR 1.00 if he has been substantially prejudiced by the determination or the determination will have the probable effect of wasting public monies.

(d) Appeals to the Board may be taken only from determinations of need made pursuant to M.G.L. c. 111, § 25C by the Department.

(2) Rule 2 -- Scope of Review upon Appeal.

(a) In an appeal, the Board shall consider only whether the determination of need appealed from was an abuse of the Department's discretion, a failure to observe procedures required by law, including all regulations adopted by the Department regarding determinations of need, or a violation of applicable provisions of law.

(b) If determinations of fact have been made by the Department, the Board will not reject them unless mutually inconsistent, contradictory, or inconsistent with or not supported by the weight of the evidence upon which they were presumably based.

(c) In the event the Board determines that the record is inadequate to allow the required consideration, it may order a hearing.

(3) Rule 3 -- Parties to Appeal.

(a) The parties to an appeal shall consist of the appellant, the applicant for the determination of need, each comparable applicant, each group of ten taxpayers of the Commonwealth who petition to intervene or who had previously requested a public hearing on the application, the regional comprehensive health planning agency or agencies with geographical jurisdiction over the area to be served by the health care facility, the state comprehensive health planning agency, the Executive Office of Elder Affairs, and the Department.

(b) Any person who is a party to an appeal by virtue of 113 CMR 1.01(3)(a) may withdraw as a party by filing a notice of withdrawal with the Board. Withdrawal shall take effect upon receipt.

(c) Any ten taxpayers of the Commonwealth, not already a party to an appeal, may file a petition to intervene as a party within 14 days of the Board's receipt of the claim of appeal in the case. Every such petition shall contain the name and address of each of the petitioning taxpayers, the title or a brief description of the appeal in which the ten taxpayers wish to intervene, a designation of a spokesman from among their number or an attorney who will represent them, and his business address.

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1.02: Commencement of Appeals

(1) Rule 4 -- Claims of Appeal. Every appeal shall be commenced by the filing of six copies of a claim of appeal, so entitled, which shall state the name and address of the appellant, the names and addresses of all other parties, the specific matter or matters in which the appellant alleges to be aggrieved, the complete grounds and justification of the appeal, and whether suspension of 113 CMR 1.02(6) is sought and, if so, the basis for such request. The claim shall, when filed by ten taxpayers, also designate a spokesman from among their number, or an attorney who will represent them, and his business address. Defects in appeals shall be subject to provisions of 113 CMR 1.02(5).

(2) Rule 5 -- Answers to Claims of Appeal. Each party shall have the right to file an answer to a claim of appeal within 14 days after service of a copy of such claim upon the party. Any allegation contained in the claim shall be deemed denied by any party unless specifically admitted in an answer filed by the party.

(3) Rule 6 -- Signatures. Every paper filed or served pursuant to 113 CMR 1.02(4) shall be signed by the party making such filing or service or by his attorney. Such signature shall constitute certification by the signer that he has read the document, that to the best of his knowledge, information and belief there is good ground to support it, and that it is not interposed for delay.

(4) Rule 7 -- Filing and Service of Papers.

(a) Service of any paper relating to an appeal, including any claim of appeal, notice, motion, brief, or decision, shall be filed with the Board and, except for the record designated in accordance with 113 CMR 1.03(1), shall be served simultaneously by hand delivery or by first-class mail, postage prepaid, upon every party to the appeal.

(b) All papers filed with the Board shall be delivered by hand, or mailed first-class, to the Board's agent for filing at Room #980, Boston University School of Law, 765 Commonwealth Avenue, Boston, MA 02215 c/o William Kaleva, Administrator. A paper shall be deemed to be filed on the date stamped "Received" by the Board's agent for filing, provided that the paper contains a title indicating the appeal to which the paper relates and the names of all parties to the appeal. All papers shall be filed six copies.

(c) Whenever a paper is filed with the Board or with a hearing officer of the board, the person making such filing shall attach thereto a certificate that he has served a copy on all parties, as required by this rule. The certification shall list all such parties by name and address, and phone number, if available.

(5) Rule 8 -- Defects. For failure to comply with any of the provisions of 113 CMR 1.02(1) or 1.02(4) the Board may strike the affected paper from the record, dismiss the appeal, or grant the party a period of time, not more than ten days, to correct the defect.

(6) Rule 9 -- Stays Pending Final Decisions of the Board. The filing of a claim of appeal shall operate as a stay of the determination of need appealed from and any determinations of need on all comparable applications unless, upon request by a party, the Board is satisfied that a stay is not necessary to preserve the substantial interest of any party pending a final decision by the Board.

(7) Rule 10 -- Filing of Record of Determination with Board.

(a) Within 14 days after service of the required copies of a claim of appeal upon the Department, or within such further time as the Board may allow upon the Department's motion, the Department shall file the original, or a true copy, of the record of the determination appealed from with the Board. In the event the Department fails to comply with this rule, and the Board determines that such failure prejudices a party other than the Department, then the running of the 60 day period within which the Board must make the final decision is automatically suspended.

(b) Such record shall consist of the determination of need, application for a determination of need, and all supporting documents, all reasons stated for the determination of need, together with all materials considered by the Department in making the determination of need, and a transcript of the portion of the meeting at which the determination of need was made.

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(c) In addition to the original, or true copy, of the record filed by the Department hereunder, the Department shall simultaneously file with the board five copies of the following portions of the record: the application for a determination of need, the staff summary, the recommendations of the "A" and "B" agencies and any ten taxpayer groups, the transcripts of the relevant portions of any Public Health Council meetings, and the official notice of the determination of need.

(d) Parties to an appeal may obtain copies of all or any portion of the record of the determination upon request to the Board and the tendering of the costs of such copying. Upon a showing of exceptional financial need by party, the Board may in its discretion waive all or a portion of the costs of copying to that party.

1.03: Conduct of Appeals

(1) Rule 11 -- Argument.

(a) Parties shall have a right to argue appeals orally, but under such limitations regarding time and scope as may be imposed by the Board.

(b) Each party is encouraged to submit argument in writing to the Board in support of its claim of appeal or answer, as the case may be, provided that every such written argument is filed in six copies.

(2) Rule 12 -- Motions.

(a) Every request by a party to the Board to take any action in connection with an appeal shall be made by written motion which shall indicate the action sought and the grounds therefore.

(b) A party served with a copy of a motion in accordance with 113 CMR 1.02(4) must file any written statement of objection to the action sought within five days after such service, or earlier if so ordered by the Board or its Chairman.

(c) The Board shall promptly rule on every motion properly made. A hearing shall be held thereon only if ordered.

(d) In the event that expediency requires that a decision on a motion be made before the Board is scheduled to meet, the Chairman may rule on the motion. Any such ruling by the Chairman is subject to review by the full Board at the meeting following the ruling.

(3) Rule 13 -- Final Decision.

(a) The Board shall render a final decision in every appeal within 60 days after the filing of a claim of appeal under 113 CMR 1.02(1), except as provided for in 113 CMR 1.02(7)(a). If the final decision is to set aside the determination appealed from, the case shall be remanded to the Department for action consistent with such decision.

(b) The date of the final decision is the date on which it is voted on in final form by the Board.

(c) Every party to an appeal shall be served with a copy of the final decision and if the decision is to deny the appeal, each party shall be notified at such time of his right with respect to judicial review in the Superior Court under M.G.L. c. 30A, § 14.

(4) Rule 14 -- Form of Decision. Every decision shall be in writing and shall contain a statement of the reasons therefor, including a determination of each issue of fact or law necessary to such decision.

(5) Rule 15 -- Quorum Voting.

(a) At any meeting of the Board, a quorum shall consist of three members of the Board eligible to participate in and vote upon the appeal.

(b) Decisions on all issues put to vote shall be made by majority vote.

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(6) Rule 16 -- Ex Parte Communications.

(a) No person except a member or agent of the Board shall communicate *ex parte* with any member or agent of the Board with respect to the merits of a proceeding. However, a request for information concerning procedural matters shall not be prohibited by 113 CMR 1.00. Any member or agent of the Board to whom an *ex parte* communication is directed in violation of 113 CMR 1.00 shall immediately inform the chairman of the Board in writing of the substance of such communication and the circumstances of its receipt. Where an appellant has violated 113 CMR 11.00, the Board may, in its discretion, dismiss his appeal.

(b) 113 CMR 1.00 does not prohibit interested persons or organizations from filing amicus briefs with the Board. Such briefs may be considered by the Board in its discretion.

(7) Rule 17 -- Date of Receipt.

(a) Whenever 113 CMR 1.00 requires that a period of time begin upon receipt of a paper, the paper shall be deemed to be received on the date such paper is properly filed with the Board or its hearing officer in accordance with 113 CMR 1.02(1).

(8) Rule 18 -- Docket. A docket shall be maintained for the recording of all appeals claimed under 113 CMR 1.00 and for the entry of all papers.

REGULATORY AUTHORITY

113 CMR 1.00: M.G.L. c. 30A, § 9; c. 111, § 25F.