Office of Medicaid
BOARD OF HEARINGS

Appellant Name and Address:

[redacted]

Appeal Decision:	Approved in part, Dismissed in part	**Appeal Number:**	2179509
Decision Date:	02/08/2022	**Hearing Date:**	01/13/2022
Hearing Officer:	Paul C. Moore	**Record Closed:**	01/26/2022

Appearance for Appellant:
[redacted]

Appearance for MassHealth:
Jennifer Carroll, Taunton MassHealth Enrollment Center (by telephone)

Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street
Quincy, MA 02171

APPEAL DECISION

Appeal Decision:	Approved in part, Dismissed in part	**Issue:**	Excess Assets
Decision Date:	02/08/2022	**Hearing Date:**	01/13/2022
MassHealth Rep.:	Jennifer Carroll	**Appellant Rep.:**	[redacted]
Hearing Location:	Board of Hearings (remote)		

Authority

This hearing was conducted pursuant to Massachusetts General Laws (G.L.) Chapters 118E and 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

By a notice dated November 26, 2021, MassHealth notified the appellant that she is not eligible for long-term care coverage due to excess assets (Exhibit 1). The appellant filed a timely with the Board of Hearings (BOH) on December 17, 2021 (130 CMR 610.015; Exhibit 2). Denial of MassHealth assistance is a valid ground for appeal to BOH (130 CMR 610.032).

An appeal hearing was held telephonically on January 13, 2022. At the close of the hearing, the hearing officer left the record of the appeal open until January 27, 2022 for the appellant to submit updated bank statements, as well as a sworn statement from one of the appellant's sons about the acquisition and usage of real estate adjacent to the appellant's home, which MassHealth deemed countable in the appellant's eligibility determination (Exh. 7). The hearing officer also left the record open until February 3, 2022 for MassHealth to respond to the appellant's record-open submission (*Id.*).

Action Taken by MassHealth

MassHealth determined that the appellant is not eligible for MassHealth long-term coverage due to excess assets, *to wit*, the value of real estate it deemed countable to the appellant.

Issue

The issue is whether MassHealth correctly determined that the appellant is not eligible for MassHealth long-term care coverage due to excess assets.

Summary of Evidence

The MassHealth representative from the Taunton MassHealth Enrollment Center ("MEC") testified by telephone that the appellant, who is over 65 years of age, entered a nursing facility on [redacted] The appellant filed an application for MassHealth long-term care coverage on September 21, 2021, and the facility is seeking MassHealth coverage for the appellant's stay beginning on June 19, 2021. The MassHealth representative testified that she sent out an information request to the appellant on October 13, 2021, seeking corroborative information about the appellant's assets. The information sought was due back to MassHealth on November 12, 2021. Not all information was timely received, so the MassHealth representative sent a denial notice to the appellant on November 26, 2021, apprising the appellant that real estate located at [redacted] is countable.[1] This real estate, according to the MassHealth representative, has a fair-market value of $267,500.00. Although the real estate is adjacent to the appellant's principal residence, which MassHealth deems non-countable, it does not "appertain" to the principal residence, making it countable, according to MassHealth.[2] In addition, the November 26, 2021 denial notice apprised the appellant that a completed SC-1 Form from the appellant's nursing home was still needed, as well as a copy of the appellant's personal needs allowance (PNA) account at the facility, showing a current balance, a letter from the facility showing how much the appellant has paid privately to facility, and updated statements for two accounts the appellant owns at [redacted] (Testimony, Exh. 5, Exh. 1).[3]

With regard to the real estate located at [redacted] the MassHealth representative testified that a garage is located on the site, and it was formerly a commercial business. Currently, "Google Maps" shows that the garage at [redacted] is dilapidated and in disuse, and that there are junked vehicles located on the site. In addition, [redacted] is described in a deed distinct from the deed to the principal residence, and it is also taxed separately by the town of [redacted] The MassHealth representative stated that [redacted] does not support the use of the appellant's principal residence located next door. She asserted that [redacted] could be sold by the appellant, adding that she sent the appellant's attorney an Agreement to Sell this real estate, which was not completed and returned to MassHealth (Testimony).

The appellant was represented at hearing by an attorney, who submitted a legal brief prior to the appeal hearing, which the hearing officer marked as Exhibit 6. The legal brief states in relevant part:

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[1] The denial notice also states, "[redacted] over assets, show under $2,000" (Exh. 1).
[2] The appellant stated on her MassHealth application that she has an intent to return home (Testimony).
[3] The MassHealth representative testified that the SC-1 Form, statement of the PNA account, and a private pay letter from the appellant's facility have now been received.

> [The appellant] and her late husband, [redacted], acquired title to their principal residence . . . in 1980.[4] In 1998, [redacted]. acquired an appurtenant parcel, known and numbered as [redacted] which, at one time, had a functioning garage (now in disrepair and a dump site) [redacted] conveyed title to both parcels to [the appellant] in 2011. [The appellant] continues to own both parcels and, in 2013, recorded a Declaration of Homestead appropriately covering both.
>
> [redacted] was approved for long-term MassHealth benefits, effective July 1, 2011. His application included deeds and real estate tax bills related to both parcels. . . .
>
> [redacted]'s benefits were erroneously terminated in 2012, and a new application was filed in June, 2013 with the same information related to both parcels, requesting benefits retroactively to July 22, 2012. When benefits were approved as of March 1, 2013, [the appellant] appealed on [redacted] behalf and, at fair hearing, successfully obtained benefits retroactively to the termination date. [redacted] died on [redacted]
>
> [The appellant] applied for community benefits for herself in 2019, again with the same two appurtenant parcels, and benefits were approved.
>
> [The appellant] then entered a skilled-nursing facility, where she screened short-term. This meant that she remained on community MassHealth, without the need to file a long-term application.
>
> [The appellant] then screened long-term, as of June 19, 2021. As a result, she had to file a second MassHealth application. Once again (for the fourth time!), her home and appertaining land were disclosed to the caseworker. . . .
>
> On November 26, 2021, MassHealth issued a denial of benefits, claiming that [the appellant] had not provided information needed to determine eligibility, including 'proof teh (*sic*) acre on [redacted]. is listed for sale for FMV w/realtor this is countable asset. . .'"

(Exh. 6, pp. 1-2)[5]

The appellant's legal brief goes on to argue that:

> CMR 130.520.008 lists assets which are non-countable when determining eligibility for community and long-term MassHealth applicants. CMR 130.520.008(A) specifically provides that 'the home of the applicant or member. . . and any land appertaining to the

[4] Internal citations to exhibits attached to the legal brief are omitted.
[5] Initials are used to protect confidentiality.

> home. . .' are non-countable. MassHealth regulations contained in CMR 130.515.001 do not define 'appertaining.'
>
> If a definition provided under a state regulation is unclear, the state must turn to Social Security regulations (the POMS) for clarification. Furthermore, pursuant to 42 CFR 435.201, state Medicaid eligibility requirements cannot be more restrictive than the federal income and asset rules. Therefore, federal rules must be consulted.
>
> In determining the resources of an individual and any eligible spouse, 20 CFR 416.1210, Security Act Section 1613(a)(1), and 42 U.S.C. §1382b(a)(1) exclude 'the home (including the land appertaining thereto)' and POMS Section S1 01130.100 (The Home Exclusion) excludes 'an individual's home,' which includes 'not only the plot of land on which the home is located, but also [applies] to any adjoining land. Land that adjoins the home plot is land not completely separated from the home plot by land in which neither the individual nor his or her spouse has an ownership interest.' It does not matter if the home was obtained at a different time from the rest of the real property, there is more than one document of ownership (e.g. separate deeds), or if the holdings are assessed and taxed separately.
>
> The land at issue, [redacted], is appertaining to [the appellant's] principal residence and is not separated from the home plot by land in which [the appellant] does not have an ownership interest. Therefore, it is non-countable and it is not appropriate nor necessary for [the appellant] to execute an Agreement to Sell as a condition of eligibility.

(*Id*., pp. 2-3)[6]

At hearing, the appellant's attorney, who appeared by telephone, asked the MassHealth representative how she defines "appertaining to," as that term is used in the MassHealth regulation. The MassHealth representative responded that she "Googled" the definition of "appertaining," and that she understands that it means "supportive of the function of the primary residence." The appellant's attorney stated that when MassHealth regulations do not explicitly define a term, as here, MassHealth is required by law to consult the POMS, not Google. The appellant's attorney asserted that pursuant to the former, "appertaining to" is synonymous with contiguous, adjoining, or connecting. To her legal brief, the appellant attached a copy of a plot plan of the two parcels at issue, reflecting that the parcels are contiguous, and not separated by land owned by another person or entity (Testimony, Exh. 6).

The appellant's attorney asserted that it does not matter what use is made of the real estate of [redacted] as it is clear that the site is appertaining to the principal residence next door (Testimony).

[6] POMS is an acronym for the Social Security Administration Program Operations Manual System.

The MassHealth representative stated that she cannot speak for other MassHealth representatives who, in the past, did not find [redacted] countable to the appellant and to her late spouse when determining their MassHealth eligibility.

Regarding the [redacted] accounts, the MassHealth representative stated that if the appellant can spend down asset amounts exceeding $2,000.00 by paying the nursing facility what is owed, and can supply updated bank statements and a private pay letter from the facility attesting that assets have been reduced, then MassHealth would accept that as proof of the spenddown.[7]

At the close of the hearing, the hearing officer left the record of the appeal open until January 27, 2022 for the appellant to supply copies of updated bank statements showing reduced assets, a copy of check payable to the nursing facility and/or a private pay letter from the facility, and a copy of a sworn statement from one of the appellant's sons attesting to the purpose for which [redacted] was used, and by whom, the date that any commercial usage of [redacted] ended, and who, if anyone, uses the site now (Exh. 7). The hearing officer also agreed to give the MassHealth representative one additional week, or until February 3, 2022, for MassHealth to report back whether assets have been reduced, and whether MassHealth would alter its decision regarding the countability of [redacted] *(Id.)*.

On or about January 24, 2022, the hearing officer received correspondence from the appellant's attorney reflecting that a check payable to the nursing facility in the amount of $8,525.08 was paid on January 18, 2022, and that as of January 18, 2022, the balance in each account is well below $2,000.00 (Exh. 8A). With her correspondence, the appellant's attorney also forwarded a copy of a sworn statement from [redacted], one of the appellant's sons, which states in pertinent part:

> [redacted] [appellant's late husband] and his brother. . . obtained the property at [redacted] in December of 1955. It is unknown as to when the garage was built on the property. [redacted] the town of [redacted] Building Commissioner and Zoning Enforcement Officer, reports that they currently have no record of the garage being built. The property reportedly was never zoned for commercial use. Any of [redacted]'s or his brothers relatives who could have provided information concerning the building of the garage are now deceased.
>
> The garage was initially utilized to store farming equipment and park dump trucks as [redacted]. worked for [redacted] making animal feed deliveries. To the best of my knowledge [redacted]. [family surname] Excavating was established in 1978 and the garage was utilized to maintain trucks and excavating equipment. To the best of my knowledge the property on [redacted] was deeded from [redacted]. and his brother to [redacted]. and [the appellant] in 1980 and the garage stopped being utilized in 1998.

[7] The MassHealth representative did not specify the exact balance in the [redacted] accounts.

> To our family, [redacted]. . . was always a part of our home. [The appellant's] grandchildren would spend time there during the summer riding their bikes, playing on the tire swings and helping [redacted] plant in the large garden areas and pumpkin patches that were on the property.
>
> The garage at [redacted] has been in disrepair for at least 10 years. It cannot be utilized as the roof is collapsed and it is not safe to enter the building. Various pieces of machinery and equipment have been towed to the property, however the equipment is not functional. . . .

(Ex. 8B)

The appellant's attorney also submitted a number of photographs of [redacted] (Exh. 8C).

On or about January 24, 2022, the MassHealth representative sent e-mail correspondence to the hearing officer and the appellant's attorney seeking clarification of how the appellant's assets were spent down (Exh. 9). The appellant's attorney responded via e-mail on January 25, 2022 (Exh. 10). On January 26, 2022, the MassHealth representative sent e-mail correspondence to the hearing officer and the appellant's attorney confirming that MassHealth agrees that the appellant now has less than $2,000.00 in total assets in both [redacted] accounts (Exh. 11).

Findings of Fact

Based on a preponderance of the evidence, I find the following:

1. The appellant is over 65 years old, and has resided in a nursing facility since [redacted], [redacted] (Testimony, Exh. 5).

2. The appellant filed an application for MassHealth long-term care benefits on September 21, 2021 (*Id*.).

3. The appellant is seeking a MassHealth coverage for her nursing facility stay beginning on June 19, 2021 (*Id*.).

4. The appellant stated on her MassHealth application that she has an intent to return home (Testimony).

5. MassHealth is not counting the appellant's principal residence in her eligibility determination, but is counting real estate located at [redacted], that MassHealth states does not appertain to the principal residence located next door (Testimony, Exh. 5, Exh. 1).

6. The appellant owns two bank accounts located at [redacted], which, when combined, contained in excess of $2,000.00 in assets as of November 26, 2021 (Exh. 1, Exh. 5).

7. By notice dated November 26, 2021, MassHealth notified the appellant in writing that it denied her MassHealth application due to excess assets (Exh. 1).

8. The appellant filed a timely appeal of this decision with the BOH on December 17, 2021 (Exh. 2).

9. [redacted] the appellant's late husband, and his brother obtained the property at [redacted] in December of 1955 (Exh. 8B).

10. [redacted] was deeded from [redacted] and his brother to [redacted] and the appellant in 1980 (*Id*.).

11. A garage located at [redacted] was used for commercial purposes beginning in 1978, and ceased being used as a commercial property in about 1998 (*Id*.).

12. The garage at [redacted] is in disrepair, no one lives there, and the site is used for storage of junked vehicles (Testimony, Exh. 6, Exh. 8B).

13. The appellant receives no business or other income from [redacted]

14. [redacted] is contiguous with the appellant's principal residence next door; there is no real estate owned by another person or entity separating the plots (Exh. 6).

15. The appellant continues to own both her principal residence and [redacted] and, in 2013, recorded a Declaration of Homestead covering both (Exh. 6).

16 [redacted] has a fair-market value of $267,500.00 (Testimony).

17. Following the appeal hearing, during a record-open period, the appellant paid the nursing facility $8,525.08, and thus reduced total assets in her [redacted] accounts to less than $2,000.00 (Exh. 8A, Exh. 11).

Analysis and Conclusions of Law

MassHealth regulations at 130 CMR 520.016(A) state in relevant part:

> Institutionalized Individuals. The total value of assets owned by an institutionalized single individual or by a member of an institutionalized couple must not exceed $2,000.
>
> …

MassHealth regulations at 130 CMR 516.005 address the start date of MassHealth Standard coverage to cover a nursing home stay, as follows:

> The begin date of MassHealth Standard, Family Assistance, or Limited coverage may be retroactive to the first day of the third calendar month before the month of application, if covered medical services were received during such period, and the applicant or member would have been eligible at the time services were provided. If more than one application has been submitted and not denied, the begin date will be based on the earliest application that is approved.

MassHealth regulations at 130 CMR 520.008, "Noncountable Assets," state as follows:

> Noncountable assets are those assets exempt from consideration when determining the value of assets. In addition to the noncountable assets described in 130 CMR 520.006 and 520.007, the following assets are noncountable.
>
> (A) **The Home. The home of the applicant or member and the spouse and any land appertaining to the home, as determined by the MassHealth agency, if located in Massachusetts and used as the principal place of residence, are considered noncountable assets**, except when the equity interest in the home exceeds the amount described in 130 CMR 520.007(G)(3). The home is subject to the lien rules at 130 CMR 515.012: Real Estate Liens. If the home is placed in a trust or in an arrangement similar to a trust, the MassHealth agency will apply the trust rules at 130 CMR 520.021 through 520.024.
>
> …

(Emphasis added)

First, the appellant owns bank accounts containing countable assets. *See*, 130 CMR 520.007(B). These bank accounts were identified in the denial notice of November 26, 2021, with the notation "must show under $2,000." Following the hearing, during a record-open period, the appellant showed that she spent down assets by paying the nursing facility a portion of what she owes them, and MassHealth agrees that the combined balances in the bank accounts are less than $2,000.00.

Therefore, this portion of the appeal is DISMISSED.

The only remaining issue to be decided is the countability of the land and garage at [redacted]. There is no dispute that the appellant's principal residence, located adjacent to [redacted], is not countable to her. The question arises whether [redacted] is "appertaining" to the appellant's principal residence.

Regulations at 130 CMR 515.001 *et seq*. do not define "appertaining to." However, as urged by the appellant's attorney, the POMS does provide subregulatory guidance on this issue. In particular, POMS Section S1 01130.100(A) (The Home Exclusion) (effective February 12, 2010) provides as follows:

> 1. The home
> An individual's home is property in which he or she has an ownership interest and that serves as his or her principal place of residence. It can include:
> • the shelter in which he or she lives;
> • the land on which the shelter is located; and
> • related buildings on such land.
> 2. Principal place of residence
> An individual's principal place of residence is the dwelling the individual considers his or her established or principal home and to which, if absent, he or she intends to return. It can be real or personal property, fixed or mobile, and located on land or water.
>
> …

See also, 20 CFR §§416.1210 and 1212.

POMS Section S1 01130.100(B) (The Home Exclusion) also sheds light on the countability of land and buildings appertaining to the home, as follows:

> **1. Exclusion of the home**
> **An individual's home, regardless of value, is an excluded resource. . . .**
> 2. Exclusion of the home includes land on which the shelter is located
> For purposes of excluding "the land on which the shelter is located" (see SI 01130.100A.1), it is not necessary that the individual own the shelter itself.
> EXAMPLE**:** If an individual lives on his or her own land in someone else's trailer, the land meets the definition of a home and is excluded. However, if the individual does not own the shelter, it is necessary to consider whether the shelter results in in-kind support and maintenance (ISM) (e.g., rent-free shelter). For information on rent-free shelter, see SI 00835.370.
> **3. Exclusion of the home includes adjoining property and related buildings**
> **a. Land**
> **The home exclusion applies not only to the plot of land on which the home is located, but also to any adjoining land. Land that adjoins the home plot is land not completely separated from the home plot by land in which neither the individual nor his or her spouse has an ownership interest.**
> **Easements and public rights of way (e.g., utility lines, roads, etc.) do not separate other land from the home plot.**

b. Buildings
The home exclusion applies to all buildings on excluded land.

…

(Emphasis added)

The above-referenced section of the POMS settles the issue of what land and buildings "appertain" to the principal residence. The appellant's home is excluded from countability. Also, it is clear that [redacted] is land adjoining the appellant's home, and is not completely separated from the home by land in which the appellant, a widow, does not have an ownership interest. The plot plan in evidence shows the parcels are contiguous.

As to the garage at [redacted], POMS Section S1 01130.100(B), above, clarifies that any buildings on excluded land are also to be excluded from countability. Therefore, neither the parcel of land at [redacted], nor the garage located on it, are countable to the appellant, because they appertain to the appellant's home.

MassHealth's decision to count the parcel and garage at [redacted] was erroneous.

This portion of the appeal is APPROVED.

Order for MassHealth

Rescind notice of November 26, 2021. Do not count the land and building at [redacted] to the appellant. Establish MassHealth eligibility for the appellant as of June 19, 2021, if otherwise eligible.

Inform the appellant of her coverage start-date in writing, without appeal rights.

Implementation of this Decision

If this decision is not implemented within 30 days after the date of this decision, you should contact your MassHealth Enrollment Center. If you experience problems with the implementation of this decision, you should report this in writing to the Director of the Board of Hearings, Office of Medicaid, at the address on the first page of this decision.

Paul C. Moore
Hearing Officer
Board of Hearings

cc: Justine Ferreira, Appeals Coordinator, Taunton MassHealth Enrollment Center