COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals

SEA VIEW CONVALESCENT AND NURSING HOME, *Petitioner* v. EXECUTIVE OFFICE FOR HEALTH AND HUMAN SERVICES, *Respondent*	Docket No. RS-17-651 MAR 14 2024

Appearance for Petitioner:

Thomas Beatrice, *Esq.*

Appearance for Respondent:

Michael Capuano, *Esq.*

Administrative Magistrate:

Eric Tennen

SUMMARY OF DECISION

Petitioner, Sea View, sought a revised capital payment after completing over 50% of a construction project pursuant to a Determination of Need. EOHHS denied Sea View's request because it found that the construction was outside of the scope of the Determination of Need. However, Sea View presented sufficient and credible evidence establishing by a preponderance of the evidence that its renovations were within the scope of the project. Sea View was thus entitled to the revised capital payment.

INTRODUCTION

Sea View operates various nursing homes. The one at issue here is in Rowley. In 1995, Sea View sought permission to renovate this property. The process is known as seeking a Determination of Need ("DON"). In 1997, the Executive Office of Health and Human Services ("EOHHS") granted permission ("the 1997 DON"). In 2008, Sea View was again granted

permission to undertake more renovations. In 2015, upon completing over 50% of this project, Sea View requested a "revised capital payment," a request allowed by law for improvements made pursuant to a DON. Sea View believed all the work fell under the scope of the original 1997 DON. However, EOHHS denied its request, reasoning that the 2008 renovation was not covered under the original 1997 DON. Sea View appealed.

I held a hearing over the course of three days in which three witnesses testified: for Sea View, their corporate President, Stephen Comley, and their accountant/consultant, Theresa Horky; for EOHHS, Pavel Terpelets, the Director of Institutional Services for the MassHealth Office of Long-Term Services and Support. I entered 12 exhibits into evidence. EOHHS submitted its closing brief on December 15, 2023. Sea View submitted its closing brief on February 23, 2024 at which point I closed the administrative record.

FINDINGS OF FACT

1. EOHHS is an executive office comprised of various sub-agencies. One of those agencies is the Department of Public Health ("DPH"). Within DPH is the Bureau of Health Care Safety and Quality ("BHCSQ"). And within the BHCSQ is the Determination of Need ("DON") office. *See* (Ex. 5, Letterhead); < https://www.mass.gov/info-details/dph-bureaus-and-programs > (Last visited March 7, 2024).

2. Sea View operates several nursing homes including one in Rowley, MA. (Comley testimony.)

The Rate Setting Process

3. Before diving into the facts of this case, a general summary of the rate setting process is warranted.

4. Setting rates for nursing facilities is complicated. There are multiple inputs, formulas, and parties involved.

5. In the context of this case, rates refer to the amount of money a facility is paid through Medicaid to care for residents. A facility might have private pay residents and may charge them market rate. But for residents paying through Medicaid, there is a complicated formula that determines certain reimbursements to a facility. *See generally* G.L. c. 118E, *et seq.*

6. EOHHS is the umbrella organization that oversees rate setting for facilities. Rates are set at least once a year. The typical cycle involves setting rates in October. However, for a variety of reasons, rates are sometimes set off-cycle in addition to, or instead of, October. (Terpelets testimony.)

7. The rates are calculated by an agency called the Center for Health Information Analysis ("CHIA").[1] This general rate setting process creates the baseline that ultimately determines how much each facility will receive. *See* G.L. c. 12C, § 2. (Terpelets testimony).

8. All rate calculations are tied to a base year, which is "the calendar year used to compute the standard payments." 101 Code Mass. Regs. § 206.02.

9. A "rate year" is the "12-month period from October 1st through September 30th." 101 Code Mass. Regs. § 206.02.

10. A facility's individual rates are based on cost reports submitted by it for the "rate year." 101 Code Mass. Regs. § 206.08; (Terpelets testimony.)

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[1] CHIA is an agency broadly responsible for financial oversight of health care and related facilities. G.L. c. 12C, *et seq.* Among other things, it "shall review and comment upon all capital expenditure projects requiring a determination of need under section 25C of chapter 111." G.L. c. 12C, § 19.

11. The cost reports from the individual facilities are used to calculate how much that facility will be paid for that rate year based on the effective base year rates. The rates are then certified by the Secretary. 101 Code Mass. Regs. § 206.09(1); (Terpelets testimony.)

12. The base year is not normally current. For example, for rate year 2024, the base year is 2019 for all facilities. In rate year 2019, the base year was 2014. (Terpelets testimony.)

13. EOHHS does not update the base year annually. But when it does, this is known as rebasing. Between 2014 and 2019, the base year was 2014. Rates for every rate year within that span were calculated using the 2014 base year rates. EOHHS rebased in 2019 and that became the base year. From 2019 through the present, the base year has remained 2019. (Terpelets testimony.)

14. In theory, that could mean that when EOHHS calculates rates for individual facilities, unless it has rebased, facilities will be reimbursed using older calculations. In 2019, facilities were reimbursed off base year 2019; but they were also reimbursed off base year 2019 rates in 2020, 2021, 2022, etc.

15. However, EOHHS will often increase the rates of a base year by regulation, usually to keep pace with inflation.[2] (Terpelets testimony.)

16. There are many components that factor into nursing home rates. During the time period in question, there were about 10 different components. (Horky testimony.)

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[2] For example, this is how the most current regulations explain recent calculations: "The base year for the nursing standard payments and the operating cost standard payments effective October 1, 2022, is 2019. The nursing and operating payments are increased from the base year by a cost adjustment factor of 15.59%." 101 Code Mass. Regs. § 206.03.

17. The costs reports that facilities submit to EOHHS should include all the costs associated with all the different components for which they seek reimbursement, but it is up to the facilities to report all their costs. (Horky testimony; Terpelets testimony.)

Capital Expenses

18. Among the components that factor into reimbursement rates are capital expenses. These are expenses for fixed assets that a nursing home invests in for the benefit of the residents. This includes equipment—think an industrial dryer or beds. It also includes construction costs, from building a ramp to building an entirely new wing. (Horky testimony.)[3]

19. A facility can incur capital expenses without prior permission if the expenses are below a threshold amount ("the expenditure minimum"). In 1997, this was approximately $500,000. Today it is approximately $2,000,000. (Horky testimony; Terpelets testimony.)[4]

The DON process

20. Anything above the expenditure minimum requires a facility to get a DON.

21. The DON process is governed by a statute and regulation. G.L. c. 111, § 25C; 105 Code Mass. Regs. § 100.00 *et seq.*

22. A DON is required for "substantial capital expenditures for construction of a health care facility" or to "substantially change the service of the facility." G.L. c. 111, § 25C; 105 Code of Mass. Regs. § 100, *et seq.*

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[3] In its entirety, "[c]apital costs include depreciation expenses on building, improvements, equipment, software, and other limited life assets; long-term interest expense; building insurance; real estate tax; non-income portion of Massachusetts Corporate Excise Taxes; personal property taxes on nursing facility equipment; other rental expenses for fixed costs; and other fixed costs." 101 Code Mass. Reg. § 206.02.

[4] Some expenses under the expenditure minimum may nevertheless have to go through a "plan review" process. (Terpelets testimony.) If such a "plan review" process exists, no witness or party has directed me to an authority that explains it. My own research has not turned anything up either.

23. The process can stretch out years—from requesting an approval, getting the approval, finding financing, undertaking the improvement, and finally being reimbursed. (Horky testimony.) As will be seen, in this case, Sea View filed an application for a DON in 1995 yet it did not request reimbursement until 2015.

24. The DON office, within BHCSQ (which is within DPH), oversees this process. (Terpelets testimony.)

25. If granted permission, a facility may go forward with the project. If a facility seeks to deviate from an approved DON, it must request an amendment. The amendment process is also governed by regulation. 105 Code Mass. Regs. §§ 100.750-100.758.[5]

26. There are three kinds of amendments (which the regulations synonymously refer to as changes or modifications): immaterial, minor, and significant. As one can imagine, each more substantive amendment requires more procedures.

27. An "immaterial" change requires the DON holder to submit a written description of the proposed changes to the Program Director[6] and the BHCSQ. The description must contain a narrative. Ultimately, the Program Director either approves the changes or, if they determine the changes are not immaterial, orders the holder to comply with the alternative processes for minor or significant changes. 101 Code Mass. Regs. § 100.754.

28. "Minor" changes involve a similar process but also require a "certificate of truthfulness." 101 Code Mass. Regs. § 100.755.

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[5] 105 Code Mass. Regs. §§ 100, *et seq.* has been amended several times since 1997. However, the provisions regarding DON amendments remained unchanged between 1997 and 2008. The 2008 version is reproduced in its entirety in the Appendix to this decision.

[6] "Program Director means the employee of the Department who, under the general supervision of the Commissioner, administers the Determination of Need Program." 105 Code Mass. Regs. § 100.020.

29. "Significant" changes involve those same steps and more, including public notice and public hearings. 101 Code Mass. Regs. § 100.756.

30. Once the work begins, a facility can request a "revised capital payment" after it "has expended at least 50% of the maximum capital expenditure for an approved determination of need[.]" 101 Code Mass. Regs. § 206.05(3)(a)(1). (Terpelets testimony).

31. The rate is "revised" because it is in addition to whatever capital reimbursements the facilities already received for other capital improvements during the same time period.

32. The request for this revised capital payment functions outside of the yearly rate setting process. That is because a facility can reach that 50% threshold at any time. Moreover, because these expenditures can be very expensive, revised capital payments allow the facilities to be reimbursed some money before their projects are finished. (Terpelets testimony.)[7]

33. Once a revised capital payment is approved, the reimbursement is spread out over 10 years. It is effective the day the facility submitted its request. The approval can take time—sometimes months or years. However, if approved, the facility will receive a back payment, retroactive to the date of request and through the date or approval. The balance of the

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[7] The testimony explaining the benefits of receiving a revised capital payment, in place of capital rates calculated as part of the general rate setting process, was a little confusing. I infer there are advantages to receiving a revised capital payment, though I cannot describe them all in detail. The witnesses agreed that a revised capital payment allows reimbursement for some expenditures more quickly than submitting them in the yearly costs reports as part of the rate setting process. A revised capital payment may also be higher than an annual capital rate. Yet, some testimony suggested that if a facility never sought a revised capital payment, it would still eventually be reimbursed for those expenses—it would just be later and possibly at a reduced rate. There was even testimony that Sea View may have already been reimbursed for some of the expenses of this construction in a recent rate setting cycle (but outside the revised capital payment process). Whether it has is not before me. What is before me is Sea View's claim to a revised capital payment. On remand, EOHHS will have to determine if granting Sea View its request for a revised capital payment entitles it to anything more than what it has received to date.

reimbursement will then be added to the facility's annual payments moving forward. (Terpelets testimony; Horky testimony).

Sea View's DON Process

34. In 1995, Sea View applied for a DON for a two-story renovation project. The project was numbered 3-1381. DPH approved the request on April 22, 1997 (the 1997 DON). (Stipulated Facts; Ex. 3.)

35. The project was to renovate a 62-bed, Level III[8] nursing home in Rowley and for "new construction of an addition to the existing facility to replace 7 Level III beds." Sea View was also approved to make use of a "one-time expansion of 11 Level III beds[.] The "total complement will be 73 Level III beds." (Ex. 3.)

36. EOHHS's approval letter was extremely detailed, explaining the gross square footage associated with the project, very specific maximum capital expenditures, and estimated first year incremental operating costs. (Ex. 3.)

37. It indicated the approval was "valid authorization only for the project for which made and only for the total capital expenditure approved." (Ex. 3.)

38. A DON approval can come with conditions. This one came with a few.

39. It noted that "no construction may begin until the holder has received final plan approval in writing from the Division of Health Care Quality." (Ex. 3.)

40. It also specified that the "applicant shall accept the maximum capital expenditure of $2,379,868 (May 1995 dollars) as the final cost figure except for those increases allowed pursuant to 105 CMR 100.751 and 752." (Ex. 3.)

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[8] "Level III" refers to the intensity of care and supervision provided to the residents. The Rowley facility is a Level III facility. (Comley testimony.)

41. The Department reserved the right to deny plan approval for certain financial reasons "at the time final architectural plans and specifications are submitted to the Division of Health Care Quality for approval." (Ex. 3.)

42. Stephen Comley was Sea View's owner, President of the corporation, and administrator for the relevant time periods. (Comley testimony.)

43. He was the only witness who provided any evidence regarding the DON process, Sea View's numerous interactions with EOHHS and its sub-agencies, and the construction process. Because some of these events occurred over 20 years ago, his memory is understandably incomplete. That said, he was able to remember many important facts and I credit his testimony.

44. The Rowley facility had a greenhouse attached to the first floor of the facility's main building. (Comley testimony.)

45. There were numerous inspections prior to beginning construction. These showed that the greenhouse was deficient in many ways, particularly around safety issues relative to the patient population. The inspectors essentially required the greenhouse to be brought up to the current code, because the building was woefully outdated. Also, for a variety of topographical and architectural reasons, access to all new utility hardware necessary for the new construction would have to go under the greenhouse. (Comley testimony.)

46. Sea View decided to undertake the required renovations to the greenhouse in order to go through with its proposed construction. However, Sea View did not have the capital to attack the project right away, especially given some of the issues regarding the greenhouse's condition. Thus, they delayed construction and were not ready to start until 2007. (Comley testimony.)

47. At that point, they were dealing with a lot of different people from a lot of different agencies. Mr. Comley felt as if each agency and each person were constantly requiring different

things that at some point overwhelmed him. For example, in 2008, there was a total turnover of staff that Sea View had been dealing with at EOHHS. Sea View had to essentially start over because the new people knew nothing about the project.[9] (Comley testimony.)

48. Around 2008, someone asked Mr. Comley to draft a project narrative. Mr. Comley could not remember who. He obliged. The narrative, dated June 2008, incorporated the new issues Sea View had learned it would have to address since the 1997 DON, e.g. bringing the greenhouse up to code, relocating access to the utilities under it, etc. The narrative also included supporting documentation by Sea View's architect and an affidavit.[10] (Comley testimony; Ex. 12.)

49. The person that asked him to draft this told him to refer to the original DON and note that the construction referenced within the 2008 narrative was not part of the original approval. Mr. Comley believed the renovations in the 2008 narrative were encompassed in the 1997 DON. However, he felt he was not in a position to argue and added that language as instructed. Thus, the narrative stated that "this project was never considered as part of a previous DON #3-1381 [the 1997 DON]. The proposed conservatory is a replacement of an existing greenhouse at the same location." (Comley testimony; Ex. 12.)

50. The 2008 narrative referenced the "conservatory," which Mr. Comley explained was another way of referring to the greenhouse. He believes this was one source of confusion. (Comley testimony.)

51. A few months later, in September 2008, Sea View received a letter from Peter Demetre, a Project Engineer, regarding "PLAN APPROVAL." The letter approved the plan to renovate the

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[9] Mr. Comley could not remember the names of most of the people he spoke with nor the departments they worked at. Thus, I sometimes refer generally to "people."

[10] The supporting documents are not in evidence, but referenced by a September 2008 letter which is in evidence. (Ex. 4.)

"conservatory" outlined in the 2008 narrative. It stated the project met the Department's[11] criteria under its "abbreviated review" process. Mr. Comley believed then (and now) that the 2008 narrative merely restated the construction encompassed under the 1997 DON. (Comley testimony; Ex. 4.)

52. There was no one available from EOHHS to testify about these events. Mr. Comley was the only person who had some memory of the events but, as noted, he could not recall much. Thus, I am left to deduce what occurred from his testimony and the other available evidence.

53. One possibility is that Sea View was simply complying with the condition from the 1997 DON that it could not begin construction until it "received final plan approval in writing from the Division of Health Care Quality." The process included submitting "final architectural plans." The 2008 letter from the Division of Health Care Quality appears to be this "final approval." Much evidence points to this:

- The person who requested Sea View's narrative had been working with Sea View on the 1997 DON implementation.
- Mr. Comley understood this was needed before anything within the 1997 DON could be accomplished.
- Sea View drafted this narrative in consultation with this DPH employee when it was finally ready to begin construction.
- The 2008 letter from Peter Demetre was regarding "PLAN APPROVAL."
- Peter Demetre was a "project engineer," which would be the kind of person who would review (and approve) architectural plans.

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[11] It is not clear which Department Mr. Demetre represented. The letterhead is from DPH and the "Division of Health Care Quality" which I infer is another name for the Bureau of Health Care Safety and Quality.

54. The other possibility is that Sea View sought a "minor" amendment to the 1997 DON, and possibly just an "immaterial" amendment. Some evidence points to that:

- Sea View's submission was called a "narrative." (The amendment process requires all requests contain a "narrative comparison" of the project and proposed changes).
- The approval letter referenced supporting documentation and an "affidavit." (The minor amendment process requires a "certificate of truthfulness.")
- An amendment usually means a change or addition to the DON, and the narrative explained that the work was not contemplated by the original 1997 DON application.
- The approval letter came from the DHCQ, who is required to be copied for all amendment requests and the DON program is within that agency.
- Amendments still require architectural "plan approval."

55. Between these two competing interpretations, I find that the narrative was not part of an amendment process but was simply the "plan approval" process referenced in the 1997 DON. The most compelling evidence is that the 2008 letter was for "PLAN APPROVAL" and was signed by an architect. Any amendment to a DON requires written approval by the DON Director. If such approval (or denial) existed, I presume it would have been referenced

somewhere and within the Department's files. The fact that I do not have that document is good evidence it does not exist.[12,13]

56. On March 5, 2012, Sea View apparently sent a letter to EOHHS asking for an extension of the authorization period for the 1997 DON. That letter is not in evidence. However, what is in evidence is EOHHS's response on March 8, 2012, which noted that "the period of authorization for DON projects for renovations or replacement of nursing homes approved after June 1992 has no expiration date." (Stipulated facts; Ex. 5.)

57. Sea View moved forward with construction. (Comley testimony.)

58. On January 5, 2015, the Division of Health Care Facility Licensure and Certification, which appears to be another division within the BHCSQ,[14] sent Sea View a letter informing it

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[12] There is one additional piece of evidence that supports my conclusion. In 2018, Sea View wrote a letter to the DON Director asking for a "minor modification" to the 1997 DON. The modification arose because Sea View had very old plumbing and infrastructure for delivering water. Around that time, the town of Rowley put in a new water treatment facility. The combination of these two things led Sea View's water quality to drop significantly causing massive disruption and additional costs. Sea View needed to update their plumbing system. This letter explained that this upgrade was also necessary to complete the remaining renovations under the 1997 DON. (Ex. 10.) Mr. Comley was ambivalent as to whether he ever got a response from the DON program director. But Sea View updated the outdated plumbing anyway. (Comley testimony.) This 2018 letter is some further evidence that the 2008 narrative was not a request for a minor amendment. It shows Sea View knew that any request for a minor amendment would be characterized as such and had to be submitted to the DON program office.

[13] EOHHS argues this was not a request for an amendment to the 1997 DON because it did not have any of the hallmarks associated with a DON amendment. I agree. But if this was not a request for a DON amendment, then what was it? EOHHS does not say.

[14] There was no testimony about this division or its role in the DON process, if any. I conclude it is a division of BHCSQ based on the mass.gov website. <https://www.mass.gov/orgs/bureau-of-health-care-safety-and-quality > (last visited March 7, 2024.)

This corroborates Mr. Comley's testimony that he was consistently confused about which department or person he was dealing with, especially since I can barely keep straight the various divisions within EOHHS and their role in this process.

that the Division "reviewed and approved the use of a newly renovated space and the relocation of a 2-bed room . . . effective November 17, 2014." The project included the "relocation of a 2-bed room to the chapel on the Floor 2 nursing unit, and a new addition that included a Conservatory on Floors 1 and 2 and a basement level receiving/storage area." (Ex. 6.)

59. I find that this 2015 letter referenced the renovations contemplated by the 2008 narrative.

60. To date, Sea View ultimately renovated the greenhouse, or conservatory, but it did not construct the new wing (the "one time expansion" envisioned in the 1997 DON). At some point, Sea View could not keep up with the changes it was being asked to make by the various agencies and inspectors, nor the costs associated with those changes. But the renovations it did undertake were extensive, including about 70% of the renovations proposed in the 1997 DON along with all the new requirements heaped upon Sea View over the years. (Comley testimony.)

61. And, as referenced above in the 2018 letter seeking a minor modification, renovations continue through today.

62. In August 2015, Sea View wrote to CHIA asking it to issue a revised capital payment pursuant to 101 Code Mass. Regs. § 206.00(4). It enclosed several documents. The request came because, according to Sea View, "the new conservatory per the 9/11/2008 letter is complete." It received no response. (Ex. 7.)

63. Sea View then filed an appeal post-marked August 2, 2017. The appeal letter listed numerous actions Sea View was appealing including appealing the rates effective July 1, 2017 and filed with the Secretary on June 30, 2017. Sea View suggests, and EOHHS does not dispute, that letter also included an appeal concerning the revised capital rate at issue in this case. (Ex. 1.)

64. On August 8, 2017, Sea View again wrote to CHIA requesting a revised capital payment. It explained "Sea View has spent over the 50% at this point in the determination of need process.

Sea View Total Maximum Capital Expenditure is $2,379,868 per the April 22, 1997 letter. The expenditure as of 12.31.26 are 1,633,497.21 or 69.9%." (Ex. 8.)

65. CHIA responded by e-mail asking for attachments as required by regulation. (Ex. 9.)

66. After an exchange of e-mails, in 2021, CHIA (and DPH DON) ultimately declined to issue a revised capital payment. In an e-mail, it explained its reasons:

- The construction of the conservatory costing $1,176,283 was never in the scope of the DON Project #3-1381. This project, as approved by DON, consisted of a substantial renovation to the entire facility, new construction of an addition to replace 7 beds, and a one-time expansion of 11 beds (please refer to Attachment #1 for a copy of the approved DON Project #3-1381). Moreover, in a document received by DPH Plan Review from Sea View on 6/12/2008 (please refer to Attachment #2), it is stated "This project [the conservatory project] was never considered as part of a previous DoN Project #3-1381".

- DPH Plan Review approvals obtained from the DPH Division of Health Care Safety and Quality do ***not*** imply DPH DON approval of an amendment to DON Project #3-1381 (please refer to Attachment #5).

- Sea View did not complete the necessary documentation for DON to process an amendment to the DON Project #3-1381 despite specific instruction from Nora Manri, past director of DON, in an email on 1/12/2018 (please refer to Attachment labeled "Determination of need Sea view Retreat"). This email was in response to owner/administrator Stephen Comley's letter dated 1/12/2018 requesting an amendment to DON Project #3-1381 (please refer to Attachment #3).

- DPH DON cannot amend a DON project ***after*** the project was completed. The conservatory costs were completed prior to December 31, 2016 according to the list of costs submitted to CHIA (please refer to Attachment #4).

(Ex. 2) (emphasis in original).

67. Mr. Terpelets was also part of this process. His job requires him to review some of CHIA's determinations. He was asked to review this one. He agreed with CHIA's assessment that the 2008 project was not part of the 1997 DON. This was based on simply reading the 1997 DON letter and other documents (contained within the exhibits). He acknowledged, however, that this was the first time he had worked on a case in which CHIA found work fell outside of a

DON. He also acknowledged that he knew nothing about this specific project other than what he read in the submission to him. Mr. Terpelets was a credible witness who provided helpful background to the rate setting process. However, because he has no personal knowledge about the facts in dispute, I disregard his conclusion that the 2008 project was not part of the 1997 DON.

DISCUSSION

DALA has jurisdiction to hear this appeal.

I *sua sponte* raised the issue of jurisdiction after noticing a possible problem. Whether DALA has jurisdiction turns on what exactly is being appealed. Generally, EOHHS establishes rates of payment for facilities—at least annually and sometimes off-cycle. G.L. c. 118E, § 13C. It then files certified rates with the Secretary. 101 Code Mass. Regs. § 206.09(1). If a facility is unhappy with those rates, it may appeal. 101 Code Mass. Regs. § 206.09(2). But EOHHS takes other actions that may be subject to an appeal. The statute recognizes this and creates two very different timeframes to appeal:

> [A]ny person, corporation or other party aggrieved by an interim rate or a final rate established by the executive office or a governmental unit designated to perform ratemaking functions by the executive office, or by failure of the executive office to set a rate or to take other action required by law and desiring a review thereof shall, within 30 days after said rate is filed with the state secretary or may, at any time, if there is a failure to determine a rate or take any action required by law, file an appeal with the division of administrative law appeals established by section 4H of chapter 7.

G.L. c. 118E, § 13E. Thus, appeals of interim or final rates must be filed within 30 days after the rate itself is filed with the secretary of state. *Alden Ct. Skilled Nursing, et al. v. EOHHS*, No. 2284-2091D (Suffolk Superior Feb. 9, 2024). However, when EOHHS fails to determine a rate or take any other action required by law, an appeal can be filed at any time.

Here, the Petitioner agrees that EOHHS filed its 2017 rates with the secretary on June 30,

2017; but its appeal was not postmarked until August 2, 2017. If the Petitioner only had 30 days to appeal, it had to have been filed, *i.e.* postmarked, by July 31, 2017.[15] 801 Code Mass. Regs § 1.01(4)(a) ("Papers filed by U.S. mail shall be deemed filed on the date contained in the U.S. postal cancellation stamp or U.S. postmark"). The Petitioner's appeal of the final 2017 rates was thus filed two days too late.

However, Sea View also appealed the failure to revise its capital rate for the work arising out of the 1997 DON. That could be interpreted as a failure to determine a rate. At the very least, Sea View is arguing the department failed to take an action required by law—revise its capital rate.

Requests to revise capital rates can occur at any point. They are triggered when a facility surpasses 50% of the DON approved project total. Thus, a request to revise a capital rate is not part of the yearly rate setting process. If approved, the facility would receive a retroactive payment (again, outside of the yearly rate setting process). And its capital rate would be adjusted moving forward, but not because of cost reports submitted as part of the rate setting process.

Sea View asked for the revised capital rate in 2015. EOHHS did not grant it and, at most, sought more information. Sea View was entitled to file its appeal any time after it became clear EOHHS failed to take action, which in this case, would be at some reasonable time following its 2015 request. I need not determine exactly how much time EOHHS had to respond because Sea View filed its appeal two years later. Under just about any formulation, it is reasonable for a party to expect a response in less than two years. *Cf.* G.L. c. 32, § 16(4) (party may appeal 30 days after request for written decision if Retirement Board fails to act); G.L. c. 58A, § 6 (party

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[15] The 30-day deadline was July 30, 2017. But because that was a Sunday, the deadline fell on the next day, July 31, 2017. 801 Code Mass. Regs § 1.01(4)(d).

may appeal after Board of Assessors fails to act within three months of application or Commissioner of Revenue fails to act within six months of application); G.L. c. 40A, § 9 (failure of the special permit granting authority to take final action upon an application for a special permit within ninety days following the date of the public hearing on the application "shall be deemed to be a grant of the permit applied for"), G.L. c. 40A, § 15, para. 5 (providing that the failure of a zoning board of appeals to act within seventy-five days of an application or petition "shall be deemed to be the grant of the relief, application or petition sought").

EOHHS later denied Sea View's request after Sea View had already filed this appeal. Nothing required Sea View to wait indefinitely for a response. The fact that Sea View continued to seek a revised capital rate after it filed this appeal does not divest it of its ability to simultaneously pursue its rights before DALA. *Cf.* 101 Code Mass. Regs. § 206.09(2) ("EOHHS may amend a rate or request additional information from the provider even if the provider has filed a pending appeal [of a final or interim rate]").

The work described in the 2008 narrative was within the scope of the 1997 DON.

Turning to the heart of this appeal, the question is whether the work Sea View did fell under the renovations approved by the 1997 DON. The regulations are silent as to which party has the burden of proof and I cannot locate any prior DALA decisions which speak to this. I will follow the customary approach that the party who initiates the appeal is the Petitioner and Petitioners normally carry the burden of proof by a preponderance of the evidence. 801 Code Mass. Reg. § 1.01(2)(c); *Pepin v. Div. of Fisheries & Wildlife*, 467 Mass. 210, 227 (2014), *quoting* A.J. Cella, Administrative Law and Practice § 243 (1986). I find that Sea View has met its burden in this case.

The parties rightly focus on the 2008 narrative because all construction flows from that

document. EOHHS argues this narrative could not be interpreted as a request for an amendment to the 1997 DON because it did not comply with the regulations regarding DON amendments. As noted above, I agree. I find that the 2008 narrative was part of the approval process required by the 1997 DON that EOHHS approved. If it was not, the only other possibility is that it was a request for a minor amendment that, again, EOHHS approved. The narrative must be one of these two things because no other interpretation is plausible and EOHHS offers no third interpretation.[16] Either way, the work is within the scope of the 1997 DON entitling Sea View to the revised capital rate.

By 2008, Sea View and EOHHS understood that to accomplish the things contemplated in the 1997 DON, Sea View had to perform a lot of additional work, such as bringing the greenhouse/conservatory up to code and updating numerous utilities. Most of these requirements came from EOHHS, through its sub-agencies and their employees. It makes no sense that these sub-agencies would ask Sea View to present a plan for extensive, expensive construction they were requiring Sea View to undertake but for which they never intended to reimburse Sea View. Indeed, there is nothing that gives EOHHS or its sub-agencies the power to compel a nursing home to undertake such expensive repairs outside of a something like the DON process. The only logical conclusion is that EOHHS was working with Sea View to help it navigate the DON process and ensure its renovations would ultimately be approved—which they later were. I highly doubt the renovations would have been approved had Sea View refused to comply with EOHHS's mandate to perform these additional repairs.

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[16] Neither party argues the narrative was a new DON application, and righty so. The narrative did not comply with the regulations governing requests for a DON. And in approving it, EOHHS did not issue a new DON number or an approval letter (like the extensive letter approving the 1997 DON).

I do not place much stock in the language from the 2008 narrative indicating that some of the work was not contemplated by the original 1997 DON. I credit Mr. Comley's testimony that he was essentially ordered to put that language in the letter by the person who held his approval in their hands. Also, because I find the 2008 narrative and the approval letter were how the parties documented the approval process outlined in the 1997 DON, that language is irrelevant to determining what the narrative represented. Nothing prevents the persons in charge of "plan approval" for DONs from asking facilities to include additional renovations or repairs needed to fulfill the DON project. At that point, if the renovations were not feasible, the plan would have been rejected. But as the renovations were feasible, subject to some additional construction, the plan was approved and the approval incorporated the additional work.

CONCLUSION

One of the risks with projects that span over 20 years is that the parties in place at the beginning are not the parties in place at the end. I understand why EOHHS takes the position it does, because no one at EOHHS now was involved in the planning process decades ago. But Mr. Comley was, and his credible testimony supports Sea View's position. Based on this record, Sea View's construction fell under the 1997 DON and it was entitled to a revised capital payment. EOHHS's decision denying Sea View's request is **reversed**.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Eric Tennen

Eric Tennen
Administrative Magistrate

APPENDIX

100.750: Amendment of Approved Projects

After a determination of need has been issued no changes in the project may be made except as herein provided.

(A) Changes or modifications which are. immaterial shall not require approval but shall be reported to the Department in accordance with the procedures set forth hi 105 CMR 100,754.

(B) Changes or modifications which are minor shall not be made unless the Program Director or Council approves such modifications in accordance with the procedures set forth in 105 CMR 100.755. The review shall be limited to determining whether the changes or modifications arc minor, whether they fall within the scope of the project as initially approved, and whether the changes are reasonable.

(C) Changes or modifications which are significant shall not be made unless the Department approves such changes in accordance with the procedures set forth in 105 CMR 100.756.

(D) It shall be within the Program Director's discretion to determine, in accordance with, the criteria set forth at 105 CMR 100.751 through 100.753, whether the requested changes or modifications are immaterial, minor, or significant.

100.751: Immaterial Changes

The following are immaterial changes:

(A) Increases or decreases in cost allocation among or between architectural costs, construction contract, fixed equipment, and site services which do not result in any increase in the maximum capital expenditure (other changes from one category to another, including changes from financing to construction, shall be considered minor or significant changes);

(B) Changes in the proposed method of financing which do not result in any increase in the maximum capital expenditure or operating costs for Interest in any year,

(C) Changes in the maximum capital expenditure to the extent of the inflation adjustment provided for in 105 CMR 100.551 (I)(5);

(D) Increases in bed capacity of the project or the beds allocated to a specific service by 12 or fewer beds with respect to health care facilities other than acute-care hospitals;

(E) Changes in the architectural design which do not result in any changes in the spatial allocation among different components of the project, aggregate gross square footage, bed capacity or maximum capital expenditure. Any such changes in the architectural design shall be subject to the Department's architectural plan approval as provided for in 105 CMR 100.551(G).

100.752: Minor Changes

The following are minor changes:

(A) Increases or decreases in the spatial allocation among different components of the project which result in increases or decreases of up to 25% of the originally approved gross square footage for that component, provided that such changes do not result in any changes in the aggregate gross square footage, bed capacity, or maximum capital expenditure (unless approved hereunder). Any such increases or decreases in the spatial allocation of the project's different components shall also be subject to the Department's architectural plan approved as provided for in 105 CMR 100.551(G);

(B) Increases or decreases in the aggregate gross square footage up to 15% of the approved space or 2000 gross square feet, whichever is greater, provided that such a change in aggregate gross square footage does not result in any change in the bed capacity or maximum capital expenditure (unless approved hereunder);

(C) Deletions from the originally approved project which the Program Director determines to be minor in nature;

(D) Increases in the max' um capital expenditure of up to 10% of the inflation adjusted originally approved total expenditure and decreases in the maximum capital expenditure, increases shall be allowed only for contingencies which could not have been reasonably foreseen, which are not reasonably within the control of tire holder and for which the inflationary adjustment contained in 105 CMR 100.551(I)(5) is not appropriate: and

(E) Changes in the type of equipment which the Program Director determines not to be technologically different from that approved, provided that such a change does not result in any increase in the maximum capital expenditure (unless approved hereunder) or any increase in the likely operating costs.

100,753: Significant Changes

The following are significant changes:

(A) Changes, modifications, or deletions of tile approved determination of need which are not expressly set forth at 105 CMR 100,751 or 100.752:

(B) Modifications or deletions of any condition set forth in the approved determination of need;

(C) Extensions of the authorization period of an approved determination of need or an exemption from determination of need for long term care facilities in underbedded areas granted pursuant to 105 CMR 100.611: and

(D) Build out of any shell space in (lie project that was subject to determination of need review

by the Department.

100.754: Procedure for Immaterial Changes

The holder, prior to implementing any immaterial change, shall submit to the Program Director a written description of the proposed changes, with two copies of the proposal, A copy of the proposal shall be filled at the same time with the Division of Health Care Quality. The proposal shall contain a narrative comparison of the approved project and the proposed immaterial changes. Within 60 days of receipt of the proposed immaterial changes, the Program Director shall determine whether such proposed changes, as defined at 105 CMR 100.751, are immaterial. The Program Director, may within this time period, request further information from the holder in order to assess whether the proposed changes are immaterial. If additional information is requested, the Program Director shall have 20 days from the receipt of such additional information to determine whether the changes are immaterial. If the Program Director determines that a proposed change is not immaterial, he or she shall order the holder to follow the procedures set forth at 105 CMR 100.755 or 100,756. No immaterial change may be implemented prior to the expiration of 60 days after the submission of a complete description of the proposed changes. The Program Director may waive the 60 day waiting period by written notice. If the Program Director does not respond within 60 days of receipt of the proposed immaterial changes, the holder shall be authorized to make the proposed changes.

100.755: Procedure for Minor Changes

(A) The holder, prior to implementing any minor change, shall submit to the Program Director a written request for an amendment to an approved determination of need together with two copies of the request. The request shall contain a narrative comparison of the approved project and the proposed changes, and the rationale for the proposed changes.

(B) The request shall include a certificate of truthfulness and proper submission pursuant to 105 CMR 100.324, certifying the truthfulness of the facts contained in the request, and that the requisite number of copies have been sent by mail or delivered by hand to the Program Director.

(C) The Program Director shall take no action on the request until such request has been on file with the Department for at least 20 days, except that if the Program Director finds that the request proposes a significant change, lie or she shall require the holder to follow the procedures set forth a! 105 CMR 100.756. The Program Director may request such additional information from the applicant which he or she deems necessary. After said 20 days, the Program Director shall be authorized to act on the request, The Program Director shall send written notice of his or her decision to the holder. If the Program Director denies the request, the holder may have the Program Director's decision reviewed by the Council by filing a written request for review within 14 days of receipt of the notice, together with a statement of objections to the Program Director's decision, The Program Director shall notify the holder of the date of the Council meeting at which his or her decision will be reviewed at least seven days prior to said meeting.

100.756: Procedure for Significant Changes

(A) The holder, prior to implementing any significant change, shall submit to the Program Director a written request for an amendment to an approved determination of need together with two copies of the request, A copy of the request shall also be filed at the same time with the appropriate Regional Health Office, the Division of Health Care Finance and Policy, the Department of Eider Affairs if necessary under 105 CMR 100.152; and the Department of Mental Health if necessary under 10S CMR 100.153, Thu request shall contain a detailed description and comparison of the approved project with the proposed change, a description of the cost implications, anti the rationale for the proposed change,

(B) The request shall include a certificate of truthfulness and proper submission pursuant to 105 CMR 100.324, certifying the truthfulness of the facts contained in the request and that the requisite number of copies have been sent by mail or delivered by hand to the parties specified in 105 CMR 100.756(A),

(C) The applicant shall cause notice of the proposed amendment to the approved determination of need to be published prior to the filing of such request in accordance with 105 CMR 100.330 and 100.331(A), Said notice shall identify the applicant by name and address, the name and address of the facility involved, shall describe the approved project and proposed changes to the project, and shall state the capital expenditures associated with the proposed change, Said notice shall also contain the following statement: "Persons who wish to comment on the proposed amendment must submit written comments within 20 days of the filing date of the request to the Department of Public Health, Attention: Program Director, (at its current address). The request for amendment may be inspected at such address and also at the (name and address of appropriate Regional Health Office)," No request for amendment shall be accepted for filing unless the applicant submits an affidavit of publication in conformance with 105 CMR 100.332.

(D) Persons who wish to comment on the proposed amendment must submit their comments, in writing, to the Program Director, within 20 days of the filing date of the request,

(E) The Department shall take no action on the request until the request has been on file with the Department for at least 20 days,

(F) If the request relates to a project which was originally approved pursuant to the delegated review process, as set forth at 105 CMR 100.504 through 100,506 or the procedure for exemption from determination of need for long term care facilities in underbedded areas as set forth in 105 CMR 100.608 through 100,611, and if no comments objecting to the proposed amendments are filed within the 20 day period set forth at 105 CMR 100.756(D), then the Commissioner shall be authorized to act on the amendment request.

(G) If the request is not eligible for action pursuant to 105 CMR 100.7.56(F), then the Program Director shall prepare a written staff report for the Council. This report shall summarize the proposed changes to the project, and the comments if any, of the persons set forth at 105 CMR 100.756(A) and the comments submitted by persons in accordance with 105 CMR 100.756(D), Said staff report shall also contain the recommendations of staff regarding the proposed

amendment to the original determination of need.

(H) Where the staff report recommends approval of the proposed amendment and is consistent will) all specific comments submitted in writing, the Program Director shall send copies of the staff report to the person requesting the amendment and the parties identified in 105 CMR 100.756(A) and 100.756(D) and notice to such persons of the date of the Council meeting at Which the proposed amendment will be considered at least seven days prior to the Council meeting,

(I) Where the staff report recommends denial of the proposed amendment or where it is inconsistent with a specific recommendation submitted in writing, the Program Director shall send copies of the staff report to the person requesting the amendment and the parties identified in t05 CMR 100.756(A) and 100.756(D) and notice to such persons of the date of the Council meeting at which the proposed amendment will be considered at least 21 days prior to the Council meeting. The person requesting the amendment and the other parties set forth at 100.756(A) and 100.756(D) shall be afforded the opportunity to submit written reactions to the staff report and to make a brief presentation to the Council prior to the Council taking action with regard to the proposed amendment.

100.757: Effect of Amendment on Authorization Period

The Issuance of an amendment to on approved determination of need shall not, unless otherwise provided, result in the extension of the period during which the applicant must make substantial progress toward completion, as required by 105 CMR 100.551(D) and 105.551(F),

100.758: Effect of Significant Change to a Project That Was Below the Expenditure Minimum

Any party that did not submit an application for a project that was below the expenditure minimum but subsequently involves the build out of shell space must submit a request for an advisory ruling pursuant to 105 CMR 100.120 for a determination by the Department of whether the project in its entirety exceeds the expenditure minimum and requires DoN approval.