

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS
TDHCA Governing Board Approved Draft of
10 TAC §1.7, Appeals Process

Disclaimer

Attached is a draft of proposed new 10 TAC §1.7, Appeals Process, that was approved by the TDHCA Governing Board on June 28, 2018. This action will entail the repeal of the current rules at 10 TAC §1.7, Staff Appeals Process, and at 10 TAC §1.8, Board Appeals Process, and one contemporaneous new rule being proposed to replace it. This document, including its preamble, is expected to be published in the July 13, 2018, edition of the Texas Register and that published version will constitute the official version for purposes of public comment and can be found at the following link: <https://www.sos.texas.gov/texreg/index.shtml>.

Public Comment

Public Comment Period: Start: 8:00 a.m. Austin local time on July 16, 2018
End: 5:00 p.m. Austin local time on August 16, 2018

Comments received after 5:00 p.m. Austin local time on August 16, 2018, will not be accepted.

Written comments may be submitted, in hard copy/fax or electronic formats to:

Texas Department of Housing and Community Affairs
Attn: Brooke Boston
Rules Comments
P.O. Box 13941
Austin, Texas 78711-3941
Email: brooke.boston@tdhca.state.tx.us

Written comments may be submitted in hard copy or email formats within the designated public comment period. Those making public comment are encouraged to reference the specific draft rule, policy, or plan related to their comment as well as a specific reference or cite associated with each comment.

Please be aware that all comments submitted to the TDHCA will be considered public information.

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS
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Preamble for proposed new 10 TAC §1.7. Appeals Process

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC §1.7, Appeals Process. The purpose of the proposed new section is to provide compliance with Tex. Gov't Code, §2161.003, add the purpose and statutory authority for the rule, clarify the exclusion of multifamily programs from the rule, make changes within the definitions section, improve the definition for an Affiliated Party, add a section for Persons Eligible to Appeal which statute requires be in the rule and had not been previously, revise the Grounds for Appeal section to provide for a broader set of grounds for appeal, improve the clarity and wording in the two Process sections, provide clear language on what the Board's decision option may be, clarify the language regarding the handling of a granted appeal that had been related to awards, and specify that appeals may still have an opportunity to be re-heard by the Board in certain circumstances.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the new section is in effect, enforcing or administering the new section does not have any foreseeable implications related to costs or revenues of the state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT. Mr. Irvine also has determined that, for the first five years a rule would be in effect:

1. The proposed rule does not create or eliminate a government program;
2. The proposed rule will not require a change in the number of employees of the Department;
3. The proposed rule will not require additional future legislative appropriations;
4. The proposed rule will result in neither an increase nor a decrease in fees paid to the Department;
5. The proposed rule will not create a new regulation, except that it is replacing a rule being repealed simultaneously to provide for the updating and improved clarity of that rule;
6. The proposed rule will not expand an existing regulation;
7. The proposed rule will not increase the number of individuals subject to the rule's applicability; and
8. The proposed rule will neither positively nor negatively affect this state's economy.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of the new section will be ensuring a rule that is consistent with program administration at the Department and improved clarity of the rules. There will not be any economic cost to any individuals required to comply with the new section, because the processes described by the rule have been in place through the rule found at this section being repeal.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES. The Department has determined that there will be no economic effect on small or micro-businesses or rural communities.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held July 16, 2018, to August 16, 2018, to receive input on the new section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Brooke Boston, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by fax to (512) 475-0220, or email brooke.boston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time AUGUST 16, 2018.

STATUTORY AUTHORITY. The new sections are proposed pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules. Except as described herein the proposed new sections affect no other code, article, or statute.

§1.7. Staff Appeals Process

(a) Purpose. The purpose of this rule is to provide the procedural steps by which an appeal can be filed relating to Department decisions as authorized by Tex. Gov't Code §§2306.0321 and 2306.0504 which together require an appeals process be adopted by rule for the handling of appeals relating to Department decisions and debarment. Appeals relating to low income housing tax credits, multifamily mortgage revenue bonds, multifamily loans, and their associated underwriting are governed by a separate appeals process provided at §10.902 of this Title.

(b) Definitions. The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. If not defined below, Capitalized terms used in this section have the meaning in the rules that govern the applicable program under which the appeal is being filed.

(1) Affiliated Party--An individual, corporation, partnership, joint venture, limited liability company, trust, estate, association, cooperative or other organization or entity of any nature whatsoever that directly, or indirectly through one or more intermediaries, has Control of, is Controlled by, or is under common Control with any other Person. All entities that share a Principal are Affiliates.

(2) Appeal--An Appealing Party's notice to challenge a decision or decisions made by staff and/or the Executive Director regarding an Application, Commitment, Contract, Loan Agreement, Debarment, or LURA as governed by this section.

(3) Appeal file--The written record of an Appeal that contains the applicant's Appeal; the correspondence, if any, between Department staff or the executive director and the Appealing Party; and the final Appeal decision response provided to the Appealing Party.

(4) Appealing Party--The Administrator, Affiliated Party, Applicant, Person, or Responsible Party (as provided for in §2.401 of this Title regarding Debarment from Programs Administered by the Department) who files, intends to file, or has filed on their behalf, an Appeal before the Department.

(c) Persons Eligible to Appeal. An Appeal may be filed by any Administrator, Applicant, Person, or Responsible Party (as provided for in §2.401 of this Title regarding Debarment from Programs Administered by the Department), or Affiliated Party of the Administrator, Applicant, Person or Responsible Party who has filed an Application for funds or reservation with the Department, or has received funds or a reservation from the Department to administer.

(d) Grounds to Appeal Staff Decision. Appeals may be filed using this process on the following grounds:

(1) Relating to applying for funds or requesting to be approved for reservation authority an Appealing Party may appeal if there is:

(A) disagreement with the determination of staff regarding the sufficiency or appropriateness of documents submitted to satisfy evidence of a given threshold or scoring criteria, including the calculation of any scoring based items;

(B) disagreement with the termination of an application;

(C) disagreement with the denial of an award or reservation request;

(D) disagreement with the amount of the award recommended by the Department, unless that

amount is the amount requested by the Applicant;

(E) concern that the documents submitted were not processed by Department staff in accordance with the Application and program rules in effect; and/or

(F) a determination by the Board or the Executive Director that there is good cause for an Appeal because there are implicated interests to be protected by due process.

(2) Relating to issues that arise after the award or reservation determination by the Board, an Appealing Party may appeal if there is:

(A) disagreement with a denial by the Department of a Contract, Commitment, Loan Agreement, or LURA amendment that was requested in writing; or

(B) a determination by the Board or the Executive Director that there is good cause for an Appeal because there are implicated interests to be protected by due process.

(3) Relating to debarment a Responsible Party may appeal a determination of debarment, as further provided for in §2.401(k) of this Chapter.

(4) Affiliated Party Appeals. An Affiliated Party has the ability to appeal only those decisions that directly impact the Affiliated Party, not the underlying agreements. An Affiliated Party may appeal a finding of failure to adequately perform under an Administrator's Contract, resulting in a "Debarment" or a similar action.

(e) Process for Filing an Appeal of Staff Decision to the Executive Director.

(1) An Appealing Party must file a written Appeal of a staff decision with the Executive Director not later than the seventh calendar day after notice has been provided to the Appealing Party. For purposes of this section, posting of materials or logs on the Department's website is considered "notice" when identified as such in the application process as a public notification mechanism.

(2) The written appeal must include specific information relating to the disposition of the Application or written request for change to the Contract, Commitment, Loan Agreement, and/or LURA. The Appealing Party must specifically identify the grounds for the Appeal based on the disposition of underlying documents.

(3) Upon receipt of an Appeal, Department staff shall prepare an Appeal file for the Executive Director. The Executive Director shall respond in writing to the Appealing Party not later than the fourteenth day after the date of receipt of the Appeal. The Executive Director may take one of the following actions.

(A) Concur with the Appeal and make the appropriate adjustments to the staff's decision; or

(B) Disagree with the Appeal, in concurrence with staff's original determination, and provide the basis for rejecting the Appeal to the Appealing Party.

(f) Process for Filing an Appeal of the Executive Director's Decision to the Board.

(1) If the Appealing Party is not satisfied with the Executive Director's response to the Appeal provided under (e)(3) above, they may appeal in writing directly to the Board within seven days after the date of the Executive Director's response.

(2) In order to be placed on the agenda of the next scheduled meeting of the Department's Board, the Appeal must be received by the Department at least fourteen days prior to the next scheduled Board meeting. Appeals requested under this section received after the fourteenth calendar day prior to the Board meeting will generally be scheduled at the next subsequent Board meeting. However, the Department reserves the right to place the Appeal on a Board meeting agenda if an Appeal that is timely filed under paragraph (1) is received fewer than fourteen calendar days prior to the next

scheduled Board meeting. The Executive Director shall prepare Appeal materials for the Board's review based on the information provided.

(3) If the Appealing Party receives additional information after the Executive Director has denied the Appeal, but prior to the posting of the Appeal for Board consideration, the new information must be provided to the Executive Director for further consideration or the Board will not consider any information submitted by the Applicant after the written Appeal. New information will cause the deadlines in this subsection to begin again. The Board will review the Appeal de novo and may consider any information properly considered by the Department in making its prior decision(s).

(4) Public Comment on an Appeal Presented to the Board. The Board will hear public comment on the Appeal under its Public Comment Procedures in §1.10 of this Subchapter. While public comment will be heard, persons making public comment are not parties to the Appeal and no rights accrue to them under this section or any other Appeal process. Nothing in this section provides a right to Appeal any decision made on an Application, Commitment, Contract, Loan Commitment, or LURA if the Appealing Party does not have grounds to appeal as described in subsection (d) of this section.

(5) In the case of possible actions by the Board regarding Appeals, the Board may:

(A) Concur with the Appealing Party and grant the Appeal; or

(B) Disagree with the Appealing Party, in concurrence with the Executive Director's original determination, and provide the basis for rejecting the Appeal.

(C) In instances in which the Appeal, if granted by the Board would have resulted in an award to the Applicant, the Application shall be evaluated for an award as it relates to the availability of funds and staff will recommend an action to the Board in the meeting at which the Appeal is heard, or a subsequent meeting. If no funds are available in the current year's funding cycle, then the Appealing Party may be awarded funds from a pool of deobligated funds or other source, if available.

(D) In the case of actions regarding all other Appeals, the Board shall direct staff on what specific remedy is to be provided, allowable under current laws and rules.

(g) Board Decision. Appeals not submitted in accordance with this section will not be considered, unless the Executive Director or Board, in the exercise of its discretion, determines there is good cause to consider the appeal. The decision of the Board is final unless the Board determines within 45 days of a Board decision that it has erred in fact or law in its determination, in which case an Appeal may be reconsidered by the Board on a motion by a party to the Appeal or the Department.

(h) Limited Scope. The appeals process provided in this rule is of general application. Any statutory or specific rule with a different appeal process will be governed by the more specific statute or rule. Except as provided for in §2.401 of this Title regarding Debarment from Programs Administered by the Department, this Section does not apply to matters involving a Contested Case Proceeding under §1.13 of this Subchapter.