

## TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

## TDHCA Governing Board Approved Draft of

10 TAC Chapter 1, Administration, Subchapter A General Policies and Procedures, §1.7 Appeals Process

**Disclaimer**

Attached is a draft of proposed 10 TAC, §1.7 Appeals Process, that was approved by the TDHCA Governing Board on November 9, 2023. This action entails a repeal and a proposed new rule. This document, including its preamble, is expected to be published in the November 24, 2023, 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>.

In compliance with §2001.023, Texas Government Code, a summary of the proposed rule follows:

Various state and federal laws require the Department to provide the opportunity for an appeal process for determinations by the Department relating to applicants to Department programs. That appeals process is outlined in 10 TAC Chapter 1, Administration, Subchapter A General Policies and Procedures, §1.7 Appeals Process. Pursuant to Tex. Gov't Code §2001.039 state agencies are required to review a rule every four years to assess whether the reasons for initially adopting the rule continue to exist. This rule has been identified by staff as needing revisions to provide greater clarity on the circumstances in which appeals may be filed. Such revisions are being proposed through the repeal of the current rule and a simultaneous new rule to be proposed in its place.

**Public Comment**

**Public Comment Period:** Start: 8:00 a.m. Austin local time on November 24, 2023

End: 5:00 p.m. Austin local time on December 26, 2023

Comments received after 5:00 p.m. Austin local time on December 26, 2023, will not be accepted. Written comments may be submitted electronically within the designated public comment period to: [brooke.boston@tdhca.state.tx.us](mailto:brooke.boston@tdhca.state.tx.us).

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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## DEPARTAMENTO DE VIVIENDA Y ASUNTOS COMUNITARIOS DE TEXAS

Borrador aprobado por la Junta Directiva del TDHCA de la sección (§) 1.7 ["Proceso de apelación"] del subcapítulo A ["Políticas y procedimientos generales"] del capítulo 1 del título 10 del Código Administrativo de Texas (TAC)

**Descargo de responsabilidad**

Se adjunta un borrador de la propuesta para la sección (§) 1.7 ["Proceso de apelación"] del título 10 del Código Administrativo de Texas (TAC). Se aprobó por parte de la Junta Directiva del TDHCA el 9 de noviembre de 2023. Esta medida supone una derogación y una nueva regla propuesta. Se espera que este documento, incluyendo su preámbulo, se publique en la edición del *Texas Register* del 24 de noviembre de 2023. Esa versión publicada constituirá la versión oficial para fines de comentarios del público y se puede encontrar en el siguiente enlace: <https://www.sos.texas.gov/texreg/index.shtml>.

De conformidad con la sección (§) 2001.023 del Código de Gobierno de Texas, se incluye a continuación un resumen de la regla propuesta:

Diversas leyes estatales y federales exigen que el Departamento brinde la oportunidad de un proceso de apelación respecto a determinaciones del Departamento relacionadas con solicitantes a los programas del Departamento. Ese proceso de apelación se describe en la sección (§) 1.7 ["Proceso de apelación"] del subcapítulo A ["Políticas y procedimientos generales"] del capítulo 1 del título 10 del Código Administrativo de Texas (TAC). De conformidad con la sección (§) 2001.039 del Código de Gobierno de Texas, se les exige a las agencias estatales la revisión de una regla cada cuatro años para evaluar si las razones para la adopción inicial de dicha regla continúan existiendo. El personal ha identificado que esta regla necesita revisiones con el fin de brindar mayor claridad sobre las circunstancias en las que se pueden presentar apelaciones. Dichas revisiones se proponen mediante la derogación de la regla actual y la propuesta simultánea de una regla nueva en su lugar.

**Comentarios del público**

**Periodo de comentarios del público:** Inicio: 8:00 a. m., hora local de Austin, del 24 de noviembre de 2023

Finalización: 5:00 p.m. hora local de Austin, del 26 de diciembre de 2023

No se aceptarán los comentarios que se reciban después de las 5:00 p. m., hora local de Austin, del 26 de diciembre de 2023. Los comentarios por escrito pueden enviarse de manera electrónica dentro del período designado de comentarios del público a [brooke.boston@tdhca.state.tx.us](mailto:brooke.boston@tdhca.state.tx.us).

Se anima a quienes formulen comentarios públicos a que hagan referencia al borrador de la regla, política o plan específico relacionado con su comentario, así como una referencia o cita específica asociada a cada comentario. Tenga en cuenta que todos los comentarios enviados al TDHCA se considerarán información pública.

**DEPARTAMENTO DE VIVIENDA Y ASUNTOS COMUNITARIOS DE TEXAS**

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## **Preamble for proposed repeal of Chapter 1, Administration, Subchapter A General Policies and Procedures, §1.7 Appeals Process**

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of Chapter 1, Administration, Subchapter A General Policies and Procedures, §1.7 Appeals Process.

The purpose of the proposed repeal is to replace the current rule with a new, clarified rule.

Tex. Gov't Code §2001.0045(b) does not apply to the rule proposed for action because it was determined that no costs are associated with this action, and therefore no costs warrant being offset.

The Department has analyzed this proposed rulemaking and the analysis is described below for each category of analysis performed.

### **a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.**

Mr. Bobby Wilkinson has determined that, for the first five years the repeal would be in effect:

1. The repeal does not create or eliminate a government program but relates to changes to existing guidance for program subrecipients.
2. The repeal does not require a change in work that would require the creation of new employee positions, nor are the rule changes significant enough to reduce work load to a degree that eliminates any existing employee positions.
3. The repeal does not require additional future legislative appropriations.
4. The repeal will not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.
5. The repeal is not creating a new regulation, except that it is being replaced by a new rule simultaneously to provide for revisions.
6. The repeal will not expand, limit, or repeal an existing regulation.
7. The repeal will not increase or decrease the number of individuals subject to the rule's applicability.
8. The repeal will not negatively or positively affect the state's economy.

### **b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.**

The Department has evaluated the repeal and determined that the repeal will not create an economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The repeal does not contemplate or authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

### **d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).**

The Department has evaluated the repeal as to its possible effects on local economies and has determined that for the first five years the repeal would be in effect there would be no economic effect on local employment; therefore, no local employment impact statement is required to be prepared for the rule.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the changed sections would be an updated and clarified rule. There will not be economic costs to individuals required to comply with the repealed section.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held November 24, 2023, to December 26, 2023, to receive input on the proposed action. Written comments may be submitted by email to [bboston@tdhca.state.tx.us](mailto:bboston@tdhca.state.tx.us). ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local (Central) time, December 26, 2023.

STATUTORY AUTHORITY. The proposed repeal is made pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules. Except as described herein the proposed amended sections affect no other code, article, or statute.

## §1.7 Appeals Process

**Preamble for proposed new 10 TAC Chapter 1, Administration, Subchapter A General Policies and Procedures, §1.7 Appeals Process**

The Texas Department of Housing and Community Affairs (the Department) proposes new 10 TAC Chapter 1, Administration, Subchapter A General Policies and Procedures, §1.7 Appeals Process.

The purpose of the proposed rule is to make changes to provide greater clarity on the circumstances in which appeals may be filed.

Tex. Gov't Code §2001.0045(b) does not apply to the rule proposed for action because it was determined that no costs are associated with this action, and therefore no costs warrant being offset.

The Department has analyzed this proposed rulemaking and the analysis is described below for each category of analysis performed.

**a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.**

Mr. Bobby Wilkinson has determined that, for the first five years the new section would be in effect:

1. The new section does not create or eliminate a government program but relate to changes to existing regulations applicable to Department subrecipients.
2. The new section does not require a change in work that would require the creation of new employee positions, nor are the rule changes significant enough to reduce work load to a degree that eliminates any existing employee positions.
3. The new section does not require additional future legislative appropriations.
4. The new section will not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.
5. The new section is not creating a new regulation, except that they are replacing sections being repealed simultaneously to provide for revisions.
6. The new section will not expand, limit, or repeal an existing regulation.
7. The new section will not increase or decrease the number of individuals subject to the rule's applicability.
8. The new section will not negatively or positively affect the state's economy.

**b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.**

The Department has evaluated the proposed new section and determined that the proposed action will not create an economic effect on small or micro-businesses or rural communities.

**c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043.** The proposed new section does not contemplate or authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

**d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).**

The Department has evaluated the new section as to its possible effect on local economies and has determined that for the first five years the proposed new section would be in effect there would be no economic effect on local employment; therefore, no local employment impact statement is required to be prepared for the rule.

**e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5).** Mr. Wilkinson 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 sections would be an updated and clarified rule. There will not be economic costs to individuals required to comply with the new section.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the new section is in effect, enforcing or administering the rule does not have any foreseeable implications related to costs or revenues of the state or local governments.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held November 24, 2023, to December 26, 2023, to receive input on the proposed action. Comments may be submitted by email to [bboston@tdhca.state.tx.us](mailto:bboston@tdhca.state.tx.us). ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local (Central) time, December 26, 2023.

STATUTORY AUTHORITY. The proposed new section is made pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules. Except as described herein the proposed new section affects no other code, article, or statute.

## §1.7 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 competitive low income housing tax credits, or when multifamily loans are contemporaneously layered with competitive low income housing tax credits, and the associated underwriting, are governed by a separate appeals process provided at §11.902 of this title (relating to Appeals Process) (§2306.0321; §2306.6715).

(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 in this section, 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 the Department to challenge a decision or decisions made by staff and/or the Executive Director regarding an Application, Commitment, Contract, Loan Agreement, Debarment, Underwriting Report, or LURA as governed by this section.

(3) Appeal Ffile--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 under Subchapter D, §2.~~102401~~ of this title (relating to Enforcement Definitions~~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 Subchapter D, §2.~~102401~~ of this title, 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) Disagreement with one or more conditions placed on the award or reservation; or

~~(F) 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 disagreement with a denial by the Department of a Contract, payment, 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) When grounds for appeal are not evidenced or stated in conformance with this Section, the Board or the Executive Director may determine in their ~~sole~~ discretion that there is good cause for an Appeal because ~~there are implicated due process interests are sufficiently implicated to be protected by due process.~~~~

~~(34) Relating to debarment, a Responsible Party may appeal a determination of debarment, as further provided for in §2.401(k) of this title.~~

~~(45) 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, as further described Chapter 2, Subchapter D, Debarment from Participation in Programs Administered by the Department, of this title.~~

(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, the date of notice will be considered the date of an Application-specific written communication from the Department to the Applicant; in cases in which no Application-specific written communication is provided, the date of notice will be the date that logs are published on the Department's website when such logs are identified as such in the application including but not limited to a Request for Proposals or Notice of Funding Opportunity, or in the rules for the applicable program 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 ~~F~~file for the Executive Director. The Executive Director shall respond in writing to the Appealing Party not later than the fourteenth calendar 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;
- (B) Disagree with the Appeal, in concurrence with staff's original determination, and provide the basis for rejecting the Appeal to the Appealing Party; or
- (C) In the case of appeals in exigent circumstances (such as conflict with a statutory deadline) or with the consent of the appellant, for appeals received five calendar days or less of the next scheduled Board meeting, the Executive Director may decline to make a decision and have the appeal deferred to the Board per the process outlined in subsection (f)(2) of this section, for final action.

(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 in subsection (e)(3) of this section, they may appeal in writing directly to the Board within seven calendar 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) of this subsection 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 (relating to Public Comment Procedures). 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.

(h) Limited Scope. The appeals process provided in this rule is of general application. Any statutory or specific rule with a different appeal process, including the limitations expressed in subsection (a) of this section, will be governed by the more specific statute or rule. Except as provided for in §2.401 of this title, this section does not apply to matters involving a Contested Case Proceeding under §1.13 of this subchapter (relating to Contested Case Hearing Procedure).