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Philip Laird
Cannabis Control Appeals Panel
801 Capitol Mall, Suite 601
Sacramento, CA 95814

VIA EMAIL AND US MAIL
philip.laird@bcsh.ca.gov

RE: Comments on proposed regulations for Cannabis Control Appeals Board

Dear Mr. Laird:

Thank you for the opportunity to provide comments on the proposed regulations for the Cannabis Control Appeals Panel.

Our Firm's Experience

In order to understand the context of our comments, we preface our remarks by explaining that the attorneys of our firm have many years of government and administrative law experience, including working for and/or presenting cases before the Office of Administrative Hearings, the Department of Alcohol Beverage Control, the Alcohol Beverage Control Appeals Board, and the California courts. Our practice areas include licensed businesses or individuals, including those regulated by the Department of Consumer Affairs as well as local jurisdictions. We also have a significant background in creating hearing processes, rulemaking, and conducting hearings. Therefore, we are able to look at your proposed regulations from multiple angles, including licensees, regulators, rulemakers, and tribunals.

Areas of Comment

Per the discussion below, the following is a summary of the areas of comment regarding the proposed regulations:

Regulation	Language	Comment/Suggestion
Generally	“authorized agent”	Clarify.
6000	Definition of “appellant” and “party”	Clarify.
6003 / Notice of Appeal	Form	<ul style="list-style-type: none"> • Add stay provision. • Add service address for appellant. • Attach rather than incorporate form. •
6004 (a)	Time for transcript before dismissal contemplated	Modify.
6004 (c)	Requirement of Five Copies of record	<ul style="list-style-type: none"> • Consider electronic copy only, or only one paper hard copy to Panel. • Agency can make own copy, if needed. • Consider cost waiver provision. • Reference 11523 review.
6005 / Email Address	Form, including Title	<ul style="list-style-type: none"> • Consider renaming form. • Do not require completion by appellant unless changing address after appeal filed. • Explain jurisdiction if not appellant or agency party. • Attach rather than incorporate form.
6006	Use of term “respondent”	Consider use of “other parties” or other term.

Legal Discussion

Terms & Definitions –With regard to definitions, the Administrative Procedure Act (APA) provides a definition of “party” in Government Code 11500. For consistency reasons, you may want to reference that your definition in proposed regulation 6000 is in addition to (or clarification of) the statutory provisions.

Your proposed regulations reference authorized agents. Are you referring to a cannabis business corporate member who is authorized to represent the business (see *Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd.* (2002) 99 Cal.App.4th 1094), or are you contemplating that non-attorneys may represent licensees or applicants in these proceedings? *Please clarify.* You may wish to refer to the 2017 Attorney General opinion, 14-101 (for your convenience, the link is https://oag.ca.gov/system/files/opinions/pdfs/14-101_1.pdf).

Finally, the way the form and regulations are written, it is unclear as to “appellant” – while a licensee or applicant for licensure are obvious, other “aggrieved parties” may exist. In the Alcoholic Beverage Control Appeals Board context, for example (and after which the statute authorizing these regulations suggests modeling), those who protest the issuance of a license may also be a party to the original hearing and therefore an appellant before that Board. Anyone who has successfully intervened in the case pursuant to the APA, Government Code 11440.50, might also be a party from the hearing that would have rights to appeal. Might an agency also be an appellant, if (for instance) the Bureau of Cannabis Control disagrees with a decision adopted by the Director of Consumer Affairs? Under proposed 6003, subsection (a), this appears not to be the case, but perhaps the regulations could be clarified.

You also use the term “respondent” in regulation 6006 but not elsewhere, so it might be easier to continue with the use of party – and allow that the Executive Director could issue additional timelines for briefs written

by multiple parties.

Administrative Records (Transcript + Exhibits) - Regulation 6004, subsection (a) provides that an appellant shall have 60 days to obtain the complete underlying administrative record or risk dismissal. However, often factors interfere with obtaining a transcript in that time which are outside of an appellant's control, such as court reporter illness or unavailability. While proof that the appellant has requested a cost estimate from the court reporting (or transcription) service might show a substantial step in pursuing an appeal, an appellant is then at the mercy of receiving the estimate and, after paying the deposit, waiting for the transcript to be prepared.

As the extension provision in subsection (d) is discretionary, this in no way protects an appellant's right to receive a timely transcript.

In addition, there is no reason to force an appellant to submit an original and FIVE copies (which are additional certified copy costs from the court reporter). If the transcript can be submitted electronically and save paper, no hard copy should be required to be lodged. If it cannot be submitted electronically, the original copy should be enough for the Panel. Your assertion that one copy is required for each Panel member does not take into consideration that the record may be reviewed electronically by panel members, which may be done concurrently, or that the Panel could make copies for those Panel members who require it.

Subsection (c) of proposed regulation 6004 requires an appellant to provide copies of the complete record to all parties. While your initial statement of reasons explains that the Office of Administrative Hearings (OAH) will have the record and is the single source for obtaining the record, this is not always the case. OAH may remand exhibits back to agencies during the course of a hearing (and does in fact do so on occasion). We could anticipate times, especially if cannabis or other controlled substances, weapons, or edible items are exhibits in a disciplinary hearing, where OAH will not want to take custodial control but will mark and remand an exhibit back to the licensing authority before the matter is submitted. Further, post-

proposed decision, an agency will receive the exhibits (which are part of the full record in addition to the transcript), so the exhibits should not be required to be obtained and then duplicated and re-served to an agency. And, should an agency decide under the APA, Government Code section 11517, subdivision (b)(2)(E), to hear the matter by itself, they will have the exhibits and the transcript before them. A non-agency appellant should not have to shoulder the cost of providing an agency with a certified copy of the transcript and indeed, the OAH regulations provide for cost waiver orders from a court. (Given that review is happening by the panel in lieu of superior court, you may want to consider how an appellant might be certified *in forma pauperis*.) Additionally, as the agency itself may likely have a clause in its court reporting contracts to allow for agency photocopies of certified transcripts, the agency should obtain a copy from the Appeals Panel. If the agency is handling the transcript billing at the outset, the agency could simply make a copy (or scan) on receipt from the court reporter.

An appellant does not have complete control over how long a hearing takes. If an ALJ or agency draws a hearing out, then a non-agency appellant is forced under the proposed regulation to pay extra for a complete hearing transcript. Because hearings are required to be held under the APA, the regulation should reference the judicial review statute of the APA, Government Code section 11523. The Appeals Panel is contemplated as taking the place of superior court, therefore costs should be assessed similarly, with potential for cost reimbursement when an agency decision is determined to be incorrect.

Suggestion: Modify subsection 6004 to not require additional hard copies of transcripts, or hard copies at all if electronic version can be provided. Delete requirement for appellant to pay for agency copy of record and provide for benefits under the APA, Government Code section 11523. Include relevant information for a party seeking a waiver of fees and costs to be declared *in forma pauperis* (Government Code section 68511.3).

Issues Regarding Forms – Regarding the form 6003, Notice of Appeal, we would suggest an additional area for an appellant to indicate that

they are requesting a stay of the underlying decision, since your proposed regulations contemplate that stays will not be automatic.

Regarding the form incorporated by 6005, the title implies that one must certify an email address when, in fact, it is an opt-in/opt-out mechanism. The regulation is not requiring an individual to adopt email technology; the form appears to be simply a request for address of service, be it email or postal mail. Therefore we suggest that the title of the form be revised to conform, perhaps *Certification of Service Address?*

However, we question the need for a completely separate form to gather an appellant's address for service when that information could be included in the Notice of Appeal (form 6003). Both currently-proposed forms require information about the case, so it appears duplicative and burdensome to have separate forms for the person filing an appeal. Therefore, we suggest deleting 6005(a)'s requirement to have appellant complete this form.

If there are other parties to the appeal, what is the jurisdictional authority to require them to complete form 6005? We suggest this be an optional service address form if a non-appellant party seeks to use a postal address not already listed on the agency decision's proof of service or to consent and designate an email address. It could also be used by any party to change a service address during the pendency of an appeal.

Finally, with respect to the two one-page forms, they are not so lengthy that they require being incorporated by reference. The more transparent method would be to attach them as an appendix to your regulations and have them printed with the regulations.

Final Thoughts

From our work before the Alcoholic Beverage Control Appeals Board, we applaud the insertion of timelines for the Panel to render a decision as it will provide all parties with some amount of certainty and transparency, and agree that 90 days seems reasonable – at least to start.

Again, we appreciate the opportunity to comment and offer our

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assistance in making these regulations as clear and fair as possible. Please let us know if we can be of assistance going forward.

Thank you for your consideration.

Sincerely,

A handwritten signature in blue ink that reads "Heather C. Hoganson". The signature is written in a cursive style.

Heather C. Hoganson
Simas & Associates, Ltd.

HCH:ms

cc: Steven L. Simas, Esq.
Daniel J. Tatick, Esq.
Julianne Allen, Paralegal