

Massachusetts School Building Authority

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Bulletin 07-01

School Closings, Sales, Leases or Other Removal From Service.

Scope: This bulletin is intended to provide guidance to cities and towns and school districts (collectively "Districts") with respect to closing or otherwise removing school facilities from service. In particular, this bulletin will discuss: (a) how the removal from service of a school facility might affect any pending or subsequent grant applications to the Massachusetts School Building Authority ("the Authority"); (b) the calculation and enforcements of amounts owed to the Authority pursuant to M.G.L. c. 70B and 910 CMR 2.00 as a result of removal from service; and (c) notice and other procedural requirements in connection with closing or otherwise removing a school from service.

Executive Summary: Although Districts may have valid reasons for school reconfigurations, the Authority's grant monies are finite and must be awarded in accordance with clear statutory priorities. Accordingly, as described below, Districts that have closed school buildings within ten years may be ineligible for Authority assistance, and in any event will likely be at a disadvantage vis-a-vis other Districts in the competition for Authority resources. **(See §I (A) and (B))**

The Authority expects that eligibility issues will be determined in connection with its review of a District's Statement of Interest ("SOI"). Although Districts should not hesitate to submit SOIs for all proposals, not all proposals will advance to the formal application stage. **(See §I (C))**

Further, when contemplating the removal of a facility from service, Districts should conform to the procedures described below so as to ensure eligibility for future applications. Although a proposal for a new project will be reviewed at the SOI stage, certain notice and compensation requirements are triggered earlier, beginning at the time a District proposes to remove a school from service. **(See §II, III)**

I. Removal of A School Facility From Service and Eligibility for Authority Grant Applications.

(A) Statutory and Regulatory Provisions.

M.G.L. c. 70B and 963 CMR 2.00 make ineligible any application for a grant whose purpose is to replace a schoolhouse sold, leased or otherwise removed from service in the past ten years. Such an application may only be considered if the Authority determines that the need for the facility covered by the proposed grant could not have reasonably been anticipated at the time that such schoolhouse was removed from service. Thus, the removal of a school facility, for whatever reason, means a subsequent application may not even be eligible for consideration.

This statutory prohibition raises two issues for potential applicants: (1) does the proposed project in fact replace the school facility removed from service, and (2) was the need for the new school facility reasonably anticipated at the time of the removal from service?

Whether a new facility is replacing a facility removed from service may be obvious in some cases but in others less so. Certainly, closing a facility cannot create a contemporaneous or foreseeable need for a new facility or even new construction. In the Commonwealth's very largest cities, however, a proposed new school may not be replacing a school removed from service if the school-aged population has migrated to the area in which the new project is proposed (and the older school is geographically distant from any student population). In most cases, however, if students could have been educated in a facility removed from service and are now proposed to be educated in a new facility, then the Authority will likely find the proposed facility replaces the facility removed from service.

With respect to the question of reasonable anticipation, note that 963 CMR 2.21(1) requires Districts to notify the Authority prior to removal from service and to provide a significant amount of information intended to show that at the time of closing there will not be any anticipated need for a new facility as a result of the closing. (The process for providing this information is described below at Section III.) While either enrollment patterns or existing facilities may change unexpectedly during ten years, the need for a new facility cannot be apparent from the outset.

As more fully described below (See I(C)), the Authority will review both questions subsequent to the submission of the SOI based on the submitted SOI and supporting documents as well as the Authority's fact finding. Also, separately, Districts should review the process associated with removal of a facility from service as described below (Section III). These steps may be necessary years in advance of the submission of an SOI and are mandatory for Districts in order to remain eligible for Authority grants.

(B) Prioritization of Projects.

Applicants should also be aware that even if the removal from service of a facility does not render an application ineligible, it might make the application less competitive given the nature of the Authority's grant program. The limit on total facilities grants for fiscal year 2008 is \$500,000,000. Although a large sum, it is finite, especially given the costs of individual projects. Thus, not every application, even if eligible, will be awarded a grant in a given year.

The Legislature has required the Authority to prioritize the award of grants pursuant to statutory standards. Specifically, section eight of c. 70B establishes an order of priorities for the grant program. Applicants should review those priorities, but their focus is to ameliorate safety issues, to ameliorate existing, expected or short term overcrowding and to prevent loss of accreditation. While school districts and eligible applicants may have many good reasons for reconfiguring schools, those reasons may not mesh with the statutorily created priorities and care should be taken not to create a situation which does not compete favorably. Specifically, reconfiguration, including some new construction, to realize operational savings does not, on its own, constitute a high priority rationale.¹

Chapter 70B § 15(d) does provide that these ineligibility provisions might not apply, at the discretion of the Authority, if the sale or lease of a facility removed from service is for "non profit public purposes." In connection with submitted SOI's, the Authority will evaluate every sale or changed use of a facility, but given the nature of the program, the use of the removed facility for a public purpose will not automatically render eligible a proposal for a new facility.

(C) Process for Evaluating Applications in Light of Earlier School Closings.

The Authority's application process is best described in 963 CMR. In particular, §§2.09 and 2.10 describe the process for the submissions and review of SOI's and, if appropriate, the more formal application process. The SOI process, described at both 963 CMR 2.09 and the Authority's web site (www.massschoolbuildings.org), calls for the submission of materials that would demonstrate the District's needs under the statutory priorities. A District submitting an SOI that has closed or removed a school from service will have an opportunity to discuss its decision during the SOI process, but c. 70B § 15, 963 CMR 2.09(3) and (5), and 963 CMR 2.10 (2)(b) all create the presumption that an application following a facility's removal from service, will be ineligible.

As the Authority describes in the SOI forms, the grant process will require a collaborative review of a District's needs. Thus, once an SOI is submitted, the Authority will work closely with the District to identify deficiencies remediable through the Authority's grant

¹ We do note that pursuant to c. 70B § 8, priority number five in the Order of priorities is for "projects needed in the judgment of said authority for the replacement renovation, or modernization of the heating system in any school house to increase energy conservation and decrease energy related costs in said schoolhouse."

program. The Authority will review projected enrollments, the District's master plan, and the state of the school facilities. In particular, the Authority may undertake a Facilities Assessment to understand fully the deficiencies identified in the report. The Facilities Assessment will review the state of existing facilities and historical maintenance levels.

At the conclusion of the SOI process, the Authority will determine whether to invite a District to submit a formal application. At this point, the Authority will make eligibility determinations based on what it has learned, including whether the proposed facility replaces one removed from service in the preceding ten years.

(In addition to the SOI process, Districts must comply with notice and process requirements of 963 CMR 2.21 when contemplating removing a facility from service. Those requirements may well be triggered in advance of the SOI and are described below at Section III).

II. Calculations of Amounts Owed the Authority as a Result of Removal From Service.

(A) Calculation

In addition to the effect removal from service may have on the application process, 70B also provides that the Authority is entitled to certain sums in connection with any sale or lease of the facility removed from service. In particular, section 15(a) provides that "net proceeds from the sale or lease shall be divided between the commonwealth and the general funds of the applicable eligible applicant in proportion to the commonwealth's prior investment in the assisted structure or facility..." In addition, "[t]he authority may issue regulations to recapture commonwealth assistance for capital construction for any approved school facilities projects for school buildings that are removed from service". 963 CMR 2.21 further requires that the sale or lease of a facility may be for no less than fair market value.

In essence, the Authority will require the District to first use the proceeds to pay off the bondholders and the Authority will terminate any remaining grant assistance payments. The remaining proceeds will be divided between the Commonwealth and the District in proportion to the Commonwealth's prior investment. If the proceeds from any sale or lease are less than the amount needed to repay the debt, the District shall make future debt payments out of the proceeds, but the Authority's grant assistance payments shall terminate.

(B) Enforcement

For pre 2004 school buildings, c. 70B section 15(b) requires that outstanding grant payments, after reduction reflecting allocation of proceeds from a sold or leased building shall be deducted from the town or district's "cherry sheet." Moreover, c. 70B authorizes the authority to develop rules to recapture commonwealth investment in schools removed from service. The Authority has a local aid intercept authority and will use that

mechanism unless a satisfactory agreement is reached with respect to any proceeds. Going forward, the Authority anticipates that it will require applicants to pay all amounts owed to the Commonwealth under section 15, before additional grant applications will be processed.

III. Procedures for Removing Schools from Service.

Both 70B and 963 CMR 2.21 establish rules for notice and process when removing schools from service. Following these rules are crucial for Districts to ensure eligibility for future Authority grants. The notice and process provisions are intended to ensure that: (1) a Districts understand the full ramifications of removing a school from service (and allows a District an opportunity to establish that new school construction was not anticipated at the time of a school closing), and (2) proper calculations can be made and agreements entered into, to reimburse the Authority for its contributions to the facility. Failure to comply will jeopardize a District eligibility of future grants.

Districts must comply with the following timeline:

- Notification to Authority of intent to remove facility from service at least six months before intended removal date.
 - Because this notice, and any subsequent closure, triggers a formal process with respect to Commonwealth recoupment of funds, and because it will determine eligibility of pending or future applications, the notice must be submitted in the same manner as a SOI, i.e., signed by; (1) the local Chief Executive Officer, (2) the Chairperson of the School Committee and (3) the Superintendent.
 - Although the Authority will continue to try to provide informal guidance to districts at all times, for purposes of statutory and regulatory compliance, inquiries or other informal letters will not satisfy the Authority's notice requirements.
- In addition to a formal notice signed as above, Districts must include:
 - a plan for accommodating any displaced school programs and services;
 - a plan for accommodating district students within the remaining school buildings, as a result of the sale, lease or removal from service of said school facility;
 - a long-range plan for accommodating district students based on the Authority's Enrollment Projections;
 - any future plans for the sale or lease of property under control of the school district; and
 - any future plans for the construction, renovation, addition or lease of school facilities in the school district.

- Districts must thereafter cooperate in a final audit to determine the cost of the facility to be removed.
- The Authority will arrange for an appraisal to be performed to determine fair market value of facility.
- Authority and District enter into agreement for repayment of commonwealth funds.

As stated above, the Notice obligations accrue when a District intends to remove a school from service and are independent of the SOI and application projects. While school closings may be part of a proposed reconfiguration, often they are not, and Districts should have these notification requirements in mind.

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