§ 32.29 Approval of new construction.

(a) As used or referred to in this section, unless a different meaning clearly appears from the context:

1. "Facility" is limited to a facility in which services are offered for which an operating certificate is required by this article.

2. "Construction" means the erection, building, or substantial acquisition, alteration, reconstruction, improvement, extension or modification of a facility, including its equipment, the inspection and supervision thereof; and the studies, surveys, designs, plans, working drawings, specifications, procedures, and other actions necessary thereto that require the submission of an application for an operating certificate or amendment to an operating certificate or certificate of approval previously issued by the office of alcoholism and substance abuse services; or which is likely to have an impact on state aid.

(b) The construction of a facility shall require the prior approval of such commissioner if the provider of services seeking to engage in such construction receives funding from the office of alcoholism and substance abuse services pursuant to this chapter and/or seeks a funding source for such construction project other than from the mental health services facilities improvement program, or its successor agency, directly or indirectly through a closely related entity.

1. An application for such construction together with such other forms and information as shall be prescribed, shall be submitted to the office of alcoholism and substance abuse services.

2. The office shall forward a copy of the application for approval of the proposed construction, and any accompanying documents, to the local governmental unit responsible for community services for the mentally disabled where the facility is to be located. The local governmental unit shall report its recommendations on the proposed construction within a reasonable time.

3. Upon receipt of the recommendations of the local governmental unit, or upon the lapse of a reasonable time for comment by the local

governmental unit, the commissioner shall submit the application for facilities other than community residences along with the recommendations of the local governmental unit, if any, to the advisory council on alcoholism and substance abuse services for its review and recommendation. The commissioner shall not act upon an application for construction of a facility other than a community residence without having first given the advisory council on alcoholism and substance abuse services a reasonable opportunity to make its recommendation on the application, provided however, that the commissioner may act upon an application for construction by an applicant possessing a valid operating certificate when the applicant qualifies for review without the recommendation of the council pursuant to regulations adopted by the commissioner with the advice of the council in accordance with the procedures noted in section 19.05 of this chapter.

(c) The commissioner shall not act upon an application for construction of a facility unless the applicant has obtained all approvals and consents required by law for its incorporation or establishment. The commissioner, in approving the construction of a facility, shall take into consideration and is empowered to request information and advice from all available sources including local and area mental hygiene and health planning agencies and groups and shall not grant approval of an application for construction unless, based on the information and advice received and his or her own review he or she is satisfied as to (i) the public need for the facility or the services at the time and place and under the circumstances proposed, taking into consideration local, regional, and statewide need; (ii) the absence of availability and feasibility for development of facilities or services which may serve as alternatives or substitutes for the whole or any part of the proposed construction; (iii) the overall financial condition of the applicant, through review of audited financial statements, taking into consideration the adequacy of financial resources and sources of future revenue; (iv) the absence of more efficient architectural solutions to construction proposed; and (v) the sufficiency of such other matters as he or she may deem pertinent in the public interest.

(d) If the commissioner proposes to disapprove an application for construction of a facility, he or she shall afford the applicant an opportunity to be heard in accordance with subdivision (e) of this

section. The commissioner shall not take any action contrary to the recommendation of the advisory council on alcoholism and substance abuse services, unless he or she first appears before the council and explains his or her reasons therefor. The commissioner shall not take any action contrary to the advice of the local governmental unit for facilities other than community residences until he or she affords an opportunity to the local governmental unit to request a public hearing and if so requested, a public hearing shall be held in accordance with subdivision (e) of this section. The commissioner, on his or her own motion, may hold a hearing on an application for construction of a facility.

(e) At the public hearing the commissioner shall outline all pertinent matters regarding the application. Thereafter, any person in attendance shall be given a reasonable opportunity to present an oral or written statement and to submit other documents concerning the application for construction. A record of the hearing shall be kept, including written statements submitted. Copies of such record shall be available to the public for examination without cost during normal business hours at the office of alcoholism and substance abuse's central office. Copies shall be reproduced upon written request and payment of the cost thereof. Further adjourned hearings may be scheduled.

(f) Nothing in this section shall limit the application of provisions of article twenty-eight of the public health law.