



Report to the Board of Directors

Prepared by the Flood Control District of Maricopa County

Title: Floodplain Regulations – Appeals Process Revisions

Document Number: Text Amendment FCD 2013-001

Board Meeting Date: 4/9/2014 (continued from 3/12/2014)

Advisory Board Date: 1/22/2014

Supervisor Districts: All

Request: Text Amendment FCD 2013-001 to the Floodplain Regulations for Maricopa County, revising the appeals process under the regulations to reduce a regulatory burden.

Discussion: The proposed text amendment will accomplish the following:

- Clarify that appeals on reactivated sand and gravel permits are limited to the requirement for written notification, or the revised permit renewal date, and that reactivation of a voluntarily-suspended sand and gravel permit is not a new permit.
- Remove from Section 409 (Appeals) language pertinent to variances, which are separately addressed in the regulations; and, clarify parties' appeal abilities by distinguishing the allowable bases of appeal for "any person", "applicants", and "regulated persons".
- Specify information that is required to be included in a written notice of appeal: name and address of the person requesting the interpretation, the regulation that requires clarification, any facts relevant to the requested interpretation and the person's proposed interpretation of the applicable regulation. This information is consistent with the requirements for applicants who are seeking a clarification of interpretation pursuant to A.R.S. § 48-3649.
- Remove the requirement to stay all activities during the pendency of an appeal.
- Clarify the scope of Floodplain Review Board interpretations as affecting only the dispute between the appellant and District employees, rather than being generally applicable. The edit is intended to ensure that the Maricopa County Enhanced Regulatory Outreach Policy's requirements are applied to broader regulation interpretations.
- Clarify that, following an appeal to the Floodplain Review Board, the appellant (rather than "any person") has the right to pursue further appeal to the Board of Directors; and that an appellant aggrieved by a Board of Directors decision may file a special action in the Superior Court of the State of Arizona.

Previous Board Actions: The Board of Directors approved the current version of the Floodplain Regulations for Maricopa County under resolution FCD 2011R005 on November 30, 2011. (C-69-12-018-7-00).

On January 29, 2014, the Board of Directors took action to set a public hearing for March 12, 2014 to solicit comments and consider the adoption and enforcement of the proposed text amendment, and to publish a public notice thirty days prior to the public hearing. (C-69-14-026-M-00)

On March 12, 2014, the Board of Directors continued the subject agenda item to the April 9, 2014 Board of Directors Meeting.

Staff Recommendation: Approve

Flood Control Advisory Board Action: January 22, 2014: Approve (5-0) staff's recommendation to initiate a change to the Floodplain Regulations for Maricopa County, and recommend to the Board of Directors approval of Text Amendment FCD 2013-001.

Advisory Board Discussion Notes: Discussion was held clarifying the process for issuing new permits following permit expiration, reactivating voluntarily-suspended sand and gravel extraction permits, and the scope of District determinations in reviewing sand and gravel extraction floodplain use permits. It was moved by Mr. Justice and seconded by Mr. Dovalina to approve the item as submitted. The motion carried unanimously.

Public Meeting Dates: An initial stakeholder meeting was held on October 24, 2013. Six external stakeholders attended. A Flood Control Advisory Board meeting was held on January 22, 2014, with eleven attendees.

Public Support/Opposition: The content of the proposed Floodplain Regulations Amendment was formulated through a collaborative effort with Arizona Rock Products Association staff. Stakeholder meeting attendees indicated no opposition to the proposed amendment. Flood Control Advisory Board meeting attendees did not offer comments. One comment sheet was received at the stakeholder meeting and one was received through the Enhanced Regulatory Outreach website, both indicating support.

On March 10, 2014, the Flood Control District received a letter (attached) indicating opposition to the proposed amendment. This opposition was filed by Jeri L. Kishiyama, Esq. Staff does not concur with the letter of opposition, but does believe that the following originally-constructed language could be clarified: "An applicant for a license may file an appeal seeking an interpretation of the regulations, after substantively complying with A.R.S. §48-3649, if the meaning of a word, phrase or section is in doubt or

challenging a denial of a permit.” For clarity, Staff recommends this language be eliminated and replaced with: “After substantively complying with A.R.S. §48-3649, an applicant for a license may file an appeal seeking an interpretation of the regulations if the meaning of a word, phrase or section is in doubt; or an applicant may file an appeal challenging a denial of a permit.”

Other Public Agency Involvement:

Invitations to the stakeholder meeting were sent to representatives of all cities and towns in Maricopa County, and various federal and state agencies. The stakeholder meeting was attended by staff representatives of the City of Peoria, City of Buckeye and City of Chandler. The Flood Control Advisory Board meeting was attended by representatives of the City of Phoenix and the Town of Fountain Hills.

Attachments:

Proposed amendment; Flood Control Advisory Board presentation, attendance roster and minutes; stakeholder meeting agenda, minutes, materials and attendance roster; approval memorandum per Moratorium on Increased Regulatory Burdens; public comments.

Prepared by:
Christopher Fazio, Finance Manager 

Reviewed by:
Ed Raleigh, P.E., Deputy Chief Engineer & General Manager 

Proposed Text of Amendment

Floodplain Regulations for Maricopa County Proposed Text Amendment FCD 2013-001

Paragraph E of Section 401, Floodplain Use Permit Required, is amended to read as follows:

- E. Voluntary Limited Suspension of a Floodplain Use Permit for Extraction of Sand and Gravel or Other Materials: The permittee may request a suspension of a Floodplain Use Permit for the extraction of sand and gravel or other materials by submitting a written request to the Floodplain Administrator that contains the following information:
1. The facility location and permit number for which a suspension is being requested,
 2. The effective date and time frame of the suspension,
 3. A statement of the reason or reasons for the suspension, and
 4. Current facility contact information to be maintained with the Floodplain Administrator.

If the permittee is in compliance with the current permit, the Floodplain Administrator shall issue a suspension of the existing permit for a period not-to-exceed five (5) years during a single suspension period or not-to-exceed a total of five (5) years during multiple suspension periods. The expiration date for any permit suspended under this Section shall be extended by the total time period(s) of the suspension(s).

While a Floodplain Use Permit for the extraction of sand and gravel or other materials is suspended, the permittee is required to maintain existing erosion controls; and to make repairs to the property necessitated by flood events as required by permit or agency directive. All mining, processing of material, material handling, grading, or any other activities not expressly authorized by the Floodplain Administrator within the floodplain shall cease during the suspension period(s). The suspension of the Floodplain Use Permit for the extraction of sand and gravel or other materials does not limit the permittee's right to maintain or remove equipment or impact any other operations that take place entirely outside of the floodplain.

While a Floodplain Use Permit for the extraction of sand and gravel or other materials within the floodplain is suspended, the Floodplain Administrator may inspect the permitted property to ensure compliance with this Section.

The permit may be reactivated by the permittee by submitting a written notification to the Floodplain Administrator fifteen (15) days prior to the resumption of operations to allow the Floodplain Administrator time to inspect the site to verify compliance with the permit. At the end of the suspension period or upon reactivation of the permit, the Floodplain Administrator will ~~issue a new~~ reactivate the permit with a revised renewal date reflecting the extension of the time associated with suspension period. For purposes of Section 409, only the written notification requirement and revised renewal date are appealable on a reactivated permit.

Paragraph B of Section 404, Permit Conditions, is amended to read as follows:

B. Extraction of Sand and Gravel or Other Materials

Issuance of a Floodplain Use Permit for extraction of sand and gravel or other material shall include the following conditions:

1. The Plan of development is subject to post-flood review and possible modification if necessary due to flood related changes in river morphology.
2. The operator of an active sand and gravel extraction operation permitted under these Regulations shall maintain a copy on site of the permit along with an approved Plan of development bearing the approval of the Floodplain Administrator. Failure to maintain a copy on site of the approved Floodplain Use Permit and Plan of development shall be a violation of these Regulations, subject to revocation of the Floodplain Use Permit pursuant to this Section and a fine pursuant to Section 708 of these Regulations.
3. A Floodplain Use Permit for the extraction of sand and gravel or other materials shall not exceed a five (5) year duration unless suspended pursuant to Section ~~404(B)7~~ 401(E) and may be issued for a lesser duration of time as determined by the Floodplain Administrator.
4. The Floodplain Administrator may issue a permit of short duration for an applicant participating in an ongoing application process.
5. Any request for a major or minor change to an approved Floodplain Use Permit for the extraction of sand and gravel or other materials including an approved Plan of development shall require an application to amend the permit.
6. The Floodplain Administrator shall advise the applicant that the issuance of a floodplain use permit does not negate any requirements to obtain all permits from those governmental agencies from which approval is required by Federal or State law.

Section 409, Appeals, is amended to read as follows:

- A. Appeals may be taken to the Floodplain Review Board pursuant to A.R.S. §48-3612(B) and A.R.S. §48-3642 ~~by any person who feels that there is error or doubt in the interpretation of these Regulations, which includes denial of permits and final decisions of inspections, or that due to unusual circumstances attaching to his property an unnecessary hardship is being inflicted on him. The appeal shall state whether it is a plea for an interpretation or a variance and the grounds for the appeal. Any person, if there is a dispute between the person and district employees or if location of a floodway or floodplain is in doubt, may file an appeal seeking an interpretation of the regulations if the meaning of a word, phrase or section is in doubt. After substantively complying with A.R.S. §48-3649, an applicant for a license may file an appeal seeking an interpretation of the regulations if the meaning of a word, phrase or section is in doubt; or an applicant may file an appeal challenging a denial of a permit. A regulated person, if there is a dispute between the regulated person and district employees of a final decision of a district based on the results of an inspection, may file an appeal to the Floodplain Review Board seeking an interpretation of the regulations if the meaning of a word, phrase or section is in doubt.~~

- B. Appeals ~~of any decision of the Floodplain Administrator~~ to the Floodplain Review Board shall be filed with the Floodplain Administrator within thirty (30) calendar days of the receipt of notice of the decision to be appealed, or sixty (60) calendar days from the date of the decision whichever is earlier. The notice of appeal shall be in writing on a form provided by the Floodplain Administrator and specify the grounds for appeal shall state the name and address of the person requesting the interpretation, the regulation that requires clarification, any facts relevant to the requested interpretation and the person's proposed interpretation of the applicable regulation.
- C. ~~During the pendency of an appeal all existing floodplain delineations shall remain in effect. All other matters regarding the proceeding shall be stayed during its pendency unless the Administrator certifies to the Floodplain Review Board that by reason of facts surrounding the application the stay would, in his or her opinion, cause imminent peril to life or property. Any interpretation of the regulations issued by the Floodplain Review Board shall only affect the dispute between the appellant and district employees. If the district wants to expand the application of the Floodplain Review Board's interpretation of the regulations, the district shall follow the procedures required by Maricopa County's Enhanced Regulatory Outreach Program Policy.~~
- D. The Floodplain Review Board shall fix a time for hearing the appeal and give notice to the parties in interest and to the public as set forth herein. The Floodplain Review Board shall hear and decide the appeal within a reasonable time.
- E. Property shall be posted pursuant to procedures adopted by the Floodplain Review Board.
- F. Any ~~person~~ appellant aggrieved by a decision of the Floodplain Review Board may, within thirty (30) days of such decision, appeal to the Board of Directors by filing a written notice of appeal with the Clerk of the Board on a form provided by the Floodplain Administrator. Said notice shall specify the grounds of the appeal state the name and address of the person requesting the interpretation, the regulation that requires clarification, any facts relevant to the requested interpretation and the person's proposed interpretation of the applicable regulation. ~~The Board of Directors shall conduct the appeal under such rules of procedure, as they shall adopt.~~
- G. Any ~~person~~ appellant aggrieved by a decision of the Board of Directors may file a special action in Superior Court of the State of Arizona ~~to determine if an abuse of discretion by the Board of Directors, the Floodplain Review Board or the Floodplain Administrator may have occurred.~~
- H. ~~Failure to appeal the Floodplain Administrator's order pursuant to a variance to the Floodplain Review Board within the time period set forth in these Regulations, shall render the order of the Floodplain Administrator final and enforceable.~~

**Flood Control Advisory Board Presentation,
Attendance Roster and Draft Minutes**



Enhanced Regulatory Outreach Program

Notice of Public Meeting

Date/Time: Wednesday, January 22, 2014, 2:00 p.m.

Location: Flood Control District Administration Building
New River Conference Room
2801 West Durango Street, Phoenix, Arizona 85009

The Flood Control Advisory Board of the Flood Control District of Maricopa County will host a Public Meeting to discuss proposed revisions to the Floodplain Regulations for Maricopa County. The subject matter to be discussed includes:

Case#/Title: FCD 2013-001/Appeals Process Revision.

Overview: Revision to the following sections of the Floodplain Regulations for Maricopa County: Paragraph E of Section 401, Paragraph B of Section 404, and Section 409. The proposed text amendment will accomplish the following:

- Clarify that appeals on reactivated sand and gravel permits are limited to the requirement for written notification, or the revised permit renewal date, and that reactivation of a voluntarily-suspended sand and gravel permit is not a new permit.
- Remove from Section 409 (Appeals) language pertinent to variances, which are separately addressed in the regulations; and, clarify parties' appeal abilities by distinguishing the allowable bases of appeal for "any person", "applicants", and "regulated persons".
- Specify information that is required to be included in a written notice of appeal: name and address of the person requesting the interpretation, the regulation that requires clarification, any facts relevant to the requested interpretation and the person's proposed interpretation of the applicable regulation. This information is consistent with the requirements for applicants who are seeking a clarification of interpretation pursuant to A.R.S. § 48-3649.
- Remove the requirement to stay all activities during the pendency of an appeal. Clarify the scope of Floodplain Review Board interpretations as affecting only the dispute between the appellant and District employees, rather than being generally applicable. The edit is intended to ensure that the Maricopa County Enhanced Regulatory Outreach Policy's requirements are applied to broader regulation interpretations.
- Clarify that, following an appeal to the Floodplain Review Board, the appellant (rather than "any person") has the right to pursue further appeal to the Board of Directors; and that an appellant aggrieved by a Board of Directors decision may file a special action in the Superior Court of the State of Arizona.

For more information and to follow Maricopa County's regulatory adoption process step by step, please visit: <http://www.maricopa.gov/regulations/>. Also, you may submit comments at: <http://www.maricopa.gov/regulations/comments.aspx>.



Flood Control Advisory Board
 January 22, 2014
 Agenda Item 7

Floodplain Regulations for Maricopa County Text Amendment FCD 2013-001

Kelli A. Sertich, AICP, CFM
 Division Manager
 Floodplain Management & Services

Action Requested

Initiate a change to the Floodplain
 Regulations for Maricopa County,
 and recommend to the Board of Directors
 approval of
 Text Amendment FCD 2013-001

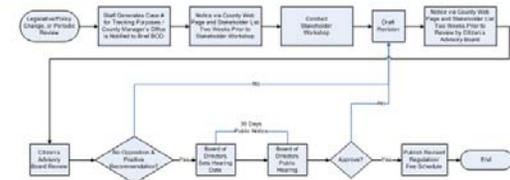


Purpose & Introduction

- Several Text Amendment to Article Four of Floodplain Regulations for Maricopa County have been proposed
- Collaborative effort between stakeholders
- Text Amendment following the Enhanced Regulatory Outreach Process
 - ✓ Steps 1 and Step 2 - Stakeholder Meeting complete

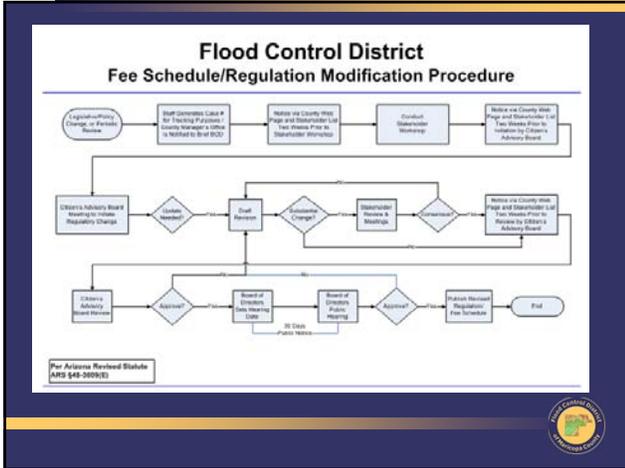


Expedited Flood Control District Fee Schedule/Regulation Modification Procedure



Per Arizona Revised Statute
 ARS 44-309C(2)





Proposed Amendments

Paragraph E of Section 401, Floodplain Use Permit Required, is amended to read as follows:
(Last paragraph)

The permit may be reactivated by the permittee by submitting a written notification to the Floodplain Administrator fifteen (15) days prior to the resumption of operations to allow the Floodplain Administrator time to inspect the site to verify compliance with the permit. At the end of the suspension period or upon reactivation of the permit, the Floodplain Administrator will issue a new reactivate the permit with a revised renewal date reflecting the extension of the time associated with suspension period. For purposes of Section 409, only the written notification requirement and revised renewal date are appealable on a reactivated permit.



Proposed Amendments

Paragraph B of Section 404, Permit Conditions, is amended to read as follows:

3. A Floodplain Use Permit for the extraction of sand and gravel or other materials shall not exceed a five (5) year duration unless suspended pursuant to Section ~~404(B)~~ 401(E) and may be issued for a lesser duration of time as determined by the Floodplain Administrator.



Proposed Amendments

Section 409, Appeals, is amended to read as follows:

A. Appeals may be taken to the Floodplain Review Board pursuant to A.R.S. §48-3612(B) and A.R.S. §48-3642 by any person who feels that there is error or doubt in the interpretation of these Regulations, which includes denial of permits and final decisions of inspections, or that due to unusual circumstances attaching to his property an unnecessary hardship is being inflicted on him. The appeal shall state whether it is a plea for an interpretation or a variance and the grounds for the appeal. Any person, if there is a dispute between the person and district employees or if location of a floodway or floodplain is in doubt, may file an appeal seeking an interpretation of the regulations if the meaning of a word, phrase or section is in doubt. An applicant for a license may file an appeal seeking an interpretation of the regulations, after substantially complying with A.R.S. §§ 48-3649, if the meaning of a word, phrase or section is in doubt or challenging a denial of a permit. A regulated person, if there is a dispute between the regulated person and district employees of a final decision of a district based on the results of an inspection, may file an appeal to the Floodplain Review Board seeking an interpretation of the regulations if the meaning of a word, phrase or section is in doubt.



Proposed Amendment (con't)

- B. Appeals ~~of any decision of the Floodplain Administrator~~ to the Floodplain Review Board shall be filed with the Floodplain Administrator within thirty (30) calendar days of the receipt of notice of the decision to be appealed, or sixty (60) calendar days from the date of the decision whichever is earlier. The notice of appeal shall be in writing on a form provided by the Floodplain Administrator and ~~specify the grounds for appeal~~ shall state the name and address of the person requesting the interpretation, the regulation that requires clarification, any facts relevant to the requested interpretation and the person's proposed interpretation of the applicable regulation.



Proposed Amendment (con't)

- C. ~~During the pendency of an appeal all existing floodplain delineations shall remain in effect. All other matters regarding the proceeding shall be stayed during its pendency unless the Administrator certifies to the Floodplain Review Board that by reason of facts surrounding the application the stay would, in his or her opinion, cause imminent peril to life or property. Any interpretation of the regulations issued by the Floodplain Review Board shall only affect the dispute between the appellant and district employees. If the district wants to expand the application of the Floodplain Review Board's interpretation of the regulations, the district shall follow the procedures required by Maricopa County's Enhanced Regulatory Outreach Program Policy.~~
- D. The Floodplain Review Board shall fix a time for hearing the appeal and give notice to the parties in interest and to the public as set forth herein. The Floodplain Review Board shall hear and decide the appeal within a reasonable time.



Proposed Amendment (con't)

- E. Property shall be posted pursuant to procedures adopted by the Floodplain Review Board.
- F. Any ~~person~~ person appellant aggrieved by a decision of the Floodplain Review Board may, within thirty (30) days of such decision, appeal to the Board of Directors by filing a written notice of appeal with the Clerk of the Board on a form provided by the Floodplain Administrator. Said notice shall ~~specify the grounds of the appeal~~ state the name and address of the person requesting the interpretation, the regulation that requires clarification, any facts relevant to the requested interpretation and the person's proposed interpretation of the applicable regulation. ~~The Board of Directors shall conduct the appeal under such rules of procedure as they shall adopt.~~



Proposed Amendment (con't)

- G. Any ~~person~~ person appellant aggrieved by a decision of the Board of Directors may file a special action in Superior Court of the State of Arizona ~~to determine if an abuse of discretion by the Board of Directors, the Floodplain Review Board or the Floodplain Administrator may have occurred.~~
- ~~H. Failure to appeal the Floodplain Administrator's order pursuant to a variance to the Floodplain Review Board within the time period set forth in these Regulations, shall render the order of the Floodplain Administrator final and enforceable.~~



Staff Recommendation

Staff recommends the following actions:

- Initiate a change to the Floodplain Regulation for Maricopa County
- Recommend to the Board of Directors approval of Text Amendment FCD2013-001



Regulatory Outreach Program

Web site address for the Regulatory Outreach Site

<https://www.maricopa.gov/regulations/>

Comments on this process can be submitted by going to the Comments tab on the site



Questions?

History of Floodplain Regulations

- 1974 regulations available in Maricopa County
- 1975 regulations adopted by Board of Supervisors/Directors
- 1977 regulations to conformance with NFIP
- 1986 regulations brought into conformance with Flood Control Districts by State Statute
- Regulations periodically amended

(amended March 23, 1987; April 6, 1988; September 18, 1989; September 3, 1991; December 15, 1993; November 1, 2000; December 20, 2006; November 30, 2011)



Regulatory Outreach Program

<http://www.maricopa.gov/regulations/fo/>





Flood Control District of Maricopa County

Flood Control Advisory Board

Meeting Minutes for January 22, 2014 – Agenda Item No.7

Board Members Present: Hemant Patel, Chairman; Scott Ward, Secretary; DeWayne Justice, Ray Dovalina, Ex Officio; Bob Larchick, Ex Officio

Board Members Absent: Dallas Tanner, Vice Chairman; Melvin Martin

Staff Members Present: Tim Phillips; Wayne Peck, General Counsel; Amir Motamedi, Christopher Fazio; Scott Vogel; Kelli Sertich, Patrick Schafer; Linda Reinbold, Anna Medina; and Ed Raleigh.

Guests Present: Randy Harrell, Fountain Hills; Nathan Ford, RBF; Jeff Minch, Wood/Patel; Raj Shah, Ritoch Powell; Justine Buler, Dibble Engineering; Laura Marquis, Hoskin Rayan; Hasan Mushtaq, City of Phoenix; Brian Schalk, Atkins; Stuart Kimball, G&K; Laurie Marin, Kimley-Horn; Huri Raghavan

Chairman Patel called the meeting of the Flood Control Advisory Board (FCAB) to order at 2:00 p.m. on Wednesday, January 22, 2014.

7) **FLOODPLAIN REGULATIONS FOR MARICOPA COUNTY TEXT AMENDMENT FCD 2013-001, APPEAL PROCESS REVISION**

Presented by Kelli Sertich, Floodplain Management & Services Division Manager

STAFF RECOMMENDS THE FOLLOWING ACTION: Initiate a change to the Floodplain Regulations for Maricopa County and recommend to the Board of Directors of the Flood Control District of Maricopa County approval of Text Amendment FCD 2013-001

Ms. Sertich reviewed that during 2011, staff completed a revamp of the floodplain regulations, making minor changes as a result of a FEMA community assistance visit. The minor text amendments are located in Article 4 of the regulations, which is an administrative section, Floodplain Use Permit Appeals and Variance. She reviewed the process that staff has taken the proposed changes through, requests for comments from stakeholders, various meetings and a workshop with the stakeholders. No opposition has been suggested. The notice has been reposted on the regulatory outreach webpage. The next stage in the process is to present the proposed change the Flood Control Advisory Board. If approved by the Board, the changes would be provided to the Board of Directors for the public hearing and approval process.

She then reviewed the proposed text revision. Revisions to Section 401, Sand and Gravel Permits, included a clarification in language and an added sentence for clarification of appeals. A revision to Section 404 involved a correction in the cross-referencing of sections. Revisions to the Appeals Section 409 included changes resulting from recent State statute changes for the bill of rights for permitting.

Board Member Ward asked whether a sand and gravel permit allowed the user the unilateral right to mine in those floodways. Ms. Sertich confirmed this to be true but added that it would have to

be conducted in accordance with regulations. Board Member Ward asked about the term of the permit. Ms. Sertich replied that they are for up to five years. Board Member Ward asked if a compliant user can then reapply for an extension of the original permit. Mr. Phillips replied that it is not an extension. Mr. Raleigh confirmed this, stating that a new permit would be issued upon reapplication by a compliant applicant. He added that a provision allows a suspension in an active sand and gravel extraction permit, which allows the user to suspend the permit, for example, due to a downturn in the economy which leads to a lull in business or a need to not operate. When the suspension ends, they are not issued a new permit, but a reactivation of their suspended permit.

Ms. Sertich reviewed a further portion of the appeals section, where a clarification in language was needed in regards to the appeal process and the interpretation of the regulations issued. A further change was noted under Section F, where a clarification in language was made from "person" to "appellant." Some sentences containing repetitive language were struck.

Board Member Ward asked about the application process and whether the application is made to staff or to a governing body that reviews and issues the permit. Mr. Phillips responded that staff reviews the application, as the regulating body. Mr. Raleigh clarified that staff is issuing a floodplain use permit only. They do not consider hours of operation, dust control or other related issues. In addition, there is permit paperwork that the applicant must file with the State, that is unrelated to the application process with the District.

Board Member Ward asked for confirmation that the permit does not allow an applicant to receive a prescriptive easement of use of the floodplain in perpetuity. Ms. Sertich confirmed that it does not. General Counsel Mr. Peck added that the permits are for property that the applicant already owns.

Board Member Justice asked for confirmation that the changes have been vetted by all the stakeholders. Mr. Phillips and Ms. Sertich confirmed this.

ACTION: It was moved by Mr. Justice and seconded by Mr. Dovalina to approve the item as submitted. The motion carried unanimously.

The meeting adjourned at 2:52 p.m.

**Stakeholder Meeting Agenda, Minutes, Materials and
Attendance Roster**



Flood Control District

of Maricopa County

STAKEHOLDER MEETING AGENDA

Floodplain Regulations for Maricopa County

Text Amendment FCD 2013-001

Adobe & Harquahala Conference Rooms

October 24, 2013 10:00 am – 11:00 am

1. Welcome and Introductions – Communities and Organizations
2. Purpose and Introduction – Kelli Sertich, AICP, CFM
3. Maricopa County Enhanced Regulatory Outreach Program Website
4. Proposed Amendment to Floodplain Regulations for Maricopa County
5. Discuss Issues and Next Steps



Flood Control District

of Maricopa County

STAKEHOLDER MEETING MINUTES

Floodplain Regulations for Maricopa County

Text Amendment FCD 2013-001

Adobe & Harquahala Conference Rooms

October 24, 2013 10:00 am – 11:00 am

The meeting commenced at 10:00 am. District staff initiated the meeting with introductions from all attendees. The stated meeting purpose was to review with stakeholders a proposed text amendment to the Floodplain Regulations for Maricopa County, clarifying language in the regulations related to the appeals process.

District staff provided a walkthrough of the County's Regulatory Outreach website, providing instructions in the process for receiving notifications related to regulatory items, and for entering comments related to regulatory items.

Staff reviewed the proposed text changes, and the meeting was opened for comments and questions.

Arizona Rock Products Association representatives voiced support for the amendment, aligning the appeals process in the Floodplain Regulations with language in the State Statutes.

A representative of the City of Peoria questioned the five-year limit on voluntary suspension periods for Sand and Gravel Extraction Permits. District staff provided an explanation of the five-year limit but clarified that the five-year period was not being changed by the proposed amendment and therefore outside the scope of this regulatory update process. The City of Peoria representative questioned regarding the limits on appeals available to "any person" under the proposed Section 409 edits to the Floodplain Regulations. Clarification was provided that the proposed language was to meet statutory requirements.

A poll of attendees indicated no opposition to the proposed amendment.

Attendees were notified of next steps in the process, and the District's current intent to follow its Expedited Regulatory Outreach Process provided that no opposing comments are received.

The meeting adjourned at approximately 10:45 am.



MARICOPA COUNTY'S ENHANCED REGULATORY OUTREACH PROGRAM



Maricopa County has five regulatory departments that seek to ensure the safety and well-being of our community. Because we understand that regulations and rulemaking decisions, discussions, and meetings can be confusing, we developed the Enhanced Regulatory Outreach Program that allows citizens to easily monitor and engage in the adoption and amendment of all regulations.

AIR QUALITY · ENVIRONMENTAL SERVICES · FLOOD CONTROL · PLANNING & DEVELOPMENT · TRANSPORTATION

ENHANCED PUBLIC PARTICIPATION—STAY INVOLVED

Your comments are important! Feedback is compiled and presented to every voting body to help policymakers during the decision process. Submit comments for every proposed regulation going through this program by visiting:

<http://www.maricopa.gov/regulations/comments.aspx>.

RECEIVE UP TO DATE NOTIFICATIONS—STAY INFORMED

Sign-up today to receive notice from the five Maricopa County regulatory departments about calendar changes or where items are in the process by visiting: <http://www.maricopa.gov/regulations/Notifications.aspx>.

FOLLOW MARICOPA COUNTY'S REGULATORY ADOPTION PROCESS—STEP-BY-STEP

- Step 1** County Manager Briefed Board of Supervisors
- Step 2** Conduct Stakeholder Workshop
- Step 3** Stakeholder Notification 2 Weeks Prior to Citizen's Board or Commission
- Step 4** Public Meeting to Initiate Regulatory Change
- Step 5** Specific Departmental Processes
- Step 6** Stakeholder Notification 2 Weeks Prior to Citizen's Board or Commission
- Step 7** Public Meeting to Make Recommendation to Board of Supervisors
- Step 8** Schedule BOS Public Hearing
- Step 9** Board of Supervisor Public Hearing
- Step 10** Item Adopted





Floodplain Regulations for Maricopa County Text Amendment FCD 2013-001

Stakeholder Meeting

October 24, 2013

AGENDA

1. Welcome and Introductions – Communities and Organizations
2. Purpose and Introduction – Kelli Sertich, AICP, CFM
3. Maricopa County Enhanced Regulatory Outreach Program Website
4. Proposed Amendment to Floodplain Regulations for Maricopa County
5. Discuss Issues and Next Steps



Purpose & Introduction

- Several Text Amendment to the Floodplain Regulations for Maricopa County have been proposed
- Collaborative effort between stakeholders
- Text Amendment following the Enhanced Regulatory Outreach Process
 - ✓ Step 2 Stakeholder Meeting



Regulatory Outreach Program

<http://www.maricopa.gov/regulations/fc/>



Proposed Amendments

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(Last paragraph)

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Proposed Amendments

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Proposed Amendments

Section 409, Appeals, is amended to read as follows:

A. Appeals may be taken to the Floodplain Review Board pursuant to A.R.S. §48-3612(B) and A.R.S. §48-3642 ~~by any person who feels that there is error or doubt in the interpretation of these Regulations, which includes denial of permits and final decisions of inspections, or that due to unusual circumstances, attaching to his property an unnecessary hardship is being inflicted on him. The appeal shall state whether it is a plea for an interpretation or a variance and the grounds for the appeal. Any person, if there is a dispute between the person and district employees or if location of a floodway or floodplain is in doubt, may file an appeal seeking an interpretation of the regulations if the meaning of a word, phrase or section is in doubt. An applicant for a license may file an appeal seeking an interpretation of the regulations, after substantially complying with A.R.S. §§ 48-3649, if the meaning of a word, phrase or section is in doubt or challenging a denial of a permit. A regulated person, if there is a dispute between the regulated person and district employees of a final decision of a district based on the results of an inspection, may file an appeal to the Floodplain Review Board seeking an interpretation of the regulations if the meaning of a word, phrase or section is in doubt.~~



Proposed Amendment (con't)

- B. Appeals ~~of any decision of the Floodplain Administrator~~ to the Floodplain Review Board shall be filed with the Floodplain Administrator within thirty (30) calendar days of the receipt of notice of the decision to be appealed, or sixty (60) calendar days from the date of the decision whichever is earlier. The notice of appeal shall be in writing on a form provided by the Floodplain Administrator and specify the grounds for appeal shall state the name and address of the person requesting the interpretation, the regulation that requires clarification, any facts relevant to the requested interpretation and the person's proposed interpretation of the applicable regulation.



Proposed Amendment (con't)

- C. ~~During the pendency of an appeal all existing floodplain delineations shall remain in effect. All other matters regarding the proceeding shall be stayed during its pendency unless the Administrator certifies to the Floodplain Review Board that by reason of facts surrounding the application the stay would, in his or her opinion, cause imminent peril to life or property. Any interpretation of the regulations issued by the Floodplain Review Board shall only affect the dispute between the appellant and district employees. If the district wants to expand the application of the Floodplain Review Board's interpretation of the regulations, the district shall follow the procedures required by Maricopa County's Enhanced Regulatory Outreach Program Policy.~~
- D. The Floodplain Review Board shall fix a time for hearing the appeal and give notice to the parties in interest and to the public as set forth herein. The Floodplain Review Board shall hear and decide the appeal within a reasonable time.



Proposed Amendment (con't)

- E. Property shall be posted pursuant to procedures adopted by the Floodplain Review Board.
- F. Any **person** appellant aggrieved by a decision of the Floodplain Review Board may, within thirty (30) days of such decision, appeal to the Board of Directors by filing a written notice of appeal with the Clerk of the Board on a form provided by the Floodplain Administrator. Said notice shall ~~specify the grounds of the appeal, state the name and address of the person requesting the interpretation, the regulation that requires clarification, any facts relevant to the requested interpretation and the person's proposed interpretation of the applicable regulation.~~ **The Board of Directors shall conduct the appeal under such rules of procedure as they shall adopt.**



Proposed Amendment (con't)

- G. Any **person** appellant aggrieved by a decision of the Board of Directors may file a special action in Superior Court of the State of Arizona ~~to determine if an abuse of discretion by the Board of Directors, the Floodplain Review Board or the Floodplain Administrator may have occurred.~~
- H. ~~Failure to appeal the Floodplain Administrator's order pursuant to a variance to the Floodplain Review Board within the time period set forth in these Regulations, shall render the order of the Floodplain Administrator final and enforceable.~~



Issues and Next Steps

- Discussion
- Next Steps





Questions?

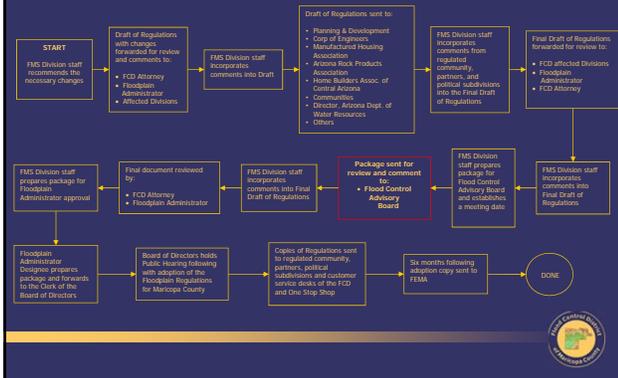
History of Floodplain Regulations

- 1974 regulations available in Maricopa County
- 1975 regulations adopted by Board of Supervisors/Directors
- 1977 regulations to conformance with NFIP
- 1986 regulations brought into conformance with Flood Control Districts by State Statute
- Regulations periodically amended

(amended March 23, 1987; April 6, 1988; September 18, 1989; September 3, 1991; December 15, 1993; November 1, 2000; December 20, 2006; November 30, 2011)



Floodplain Regulations for Maricopa County Revision Procedure





Flood Control District of Maricopa County

REGULATORY OUTREACH WEBSITE – WWW.MARICOPA.GOV/REGULATIONS

Building Relationships

“Maricopa County has five regulatory departments that seek to ensure the safety and well-being of our community. Because we understand that regulations and rule-making decisions, discussions, and meetings can be confusing, we have developed this web-site to allow citizens to easily monitor and engage in the adoption and amendment of all regulations.”

Monitor and engage in regulatory actions



Select agency for applicable information



Follow the process for proposed actions



Provide comments directly



Subscribe for notifications



**Maricopa County Enhanced Regulatory Outreach Program
Tentative Schedule**

Department: Flood Control District

Contact: Kelli Sertich

Date Entered in Process: September 4, 2013

Item Name and Number: TA FCD 2013-001 – Floodplain Regulations Appeals Process

Step No.	Process	Date	Comments
1	County Manager brief Board of Directors	Week of September 23, 2013	Amendment/clarification related to appeals process
2	Notification Two Weeks Prior to Stakeholder Workshop	October 7, 2013	Notice via County web page and stakeholder list
3	Stakeholder Workshop	October 24, 2013	Stakeholder workshop to review proposed amendment and gather input
4	<i>Notification Two Weeks Prior to Citizens' Board Meeting</i>	<i>Tentative November 20, 2013</i>	<i>Notice/staff report via County web page, stakeholder list, and advisory board agenda</i>
5	<i>Public Meeting to Initiate Regulatory Change</i>	<i>Tentative December 4, 2013</i>	<i>Flood Control Advisory Board; following meeting, evaluate suitability of Expedited Process</i>
6	<i>Notification 30 Days Prior to Board of Directors Meeting</i>	<i>Tentative December 11, 2013 Assumes Expedited Process</i>	<i>If requirements for Expedited Process are met; SOLAR deadline November 21, 2013</i>
7	<i>Board of Directors Public Hearing</i>	<i>Tentative January 22, 2014 Assumes Expedited Process</i>	<i>If requirements for Expedited Process are met; SOLAR deadline January 2, 2014</i>
8	<i>Item Adopted</i>	<i>Tentative January 22, 2014 Assumes Expedited Process</i>	<i>Publish copy of revised Floodplain Regulations to County web site</i>



Flood Control District

of Maricopa County

FLOODPLAIN REGULATIONS AMENDMENT FCD 2013-001 - ATTENDANCE ROSTER

Name	Agency	Email	Phone
<u>TONY BEUCHE</u>	<u>FCDMC</u>	<u>TONYBEUCHE@MAIL.MARICOPA.GOV</u>	<u>602.506.2329</u>
<u>STU KIMBALL</u>	<u>COAK</u>	<u>SSK@GKNET.COM</u>	<u>602-530-8425</u>
<u>Jennea Bono</u>	<u>FCDMC</u>	<u>jennabono@mail.maricopa.gov</u>	<u>602.506.7841</u>
<u>Christopher Fozis</u>	<u>FCDMC</u>	<u>christopherfozis@mail.maricopa.gov</u>	<u>602.506.4489</u>
<u>DON KIRBY</u>	<u>CHANDLER</u>	<u>DONALD.KIRBY@CHANDLERAZ.GOV</u>	<u>480-782-3128</u>
<u>DAN DUFF</u>	<u>ARPA</u>	<u>DAN@ABROCKPRODUCTS.OR</u>	<u>602.692.7328</u>
<u>Barton CHARROY</u>	<u>PERISA</u>	<u>bartoncharroy@perisiaz.gov</u>	<u>602-773-7212</u>



Flood Control District

of Maricopa County

FLOODPLAIN REGULATIONS AMENDMENT FCD 2013-001 - ATTENDANCE ROSTER

Name	Agency	Email	Phone
Mauricio Lacwell	WC SCOTTEN	MAURICIO@SCOTTEN.COM	623 547 4661 x226
Steve Trussell	ARPA	stev@azrockproducts.org	602 989-3854

**Approval Memorandum per Moratorium on
Increased Regulatory Burdens**



Flood Control District of Maricopa County

Date: September 4, 2013

To: Tom Manos, County Manager

Via: Joy Rich, Deputy County Manager *JR*

From: Tim Phillips, Chief Engineer & General Manager *TP 9/4/13*

Subject: Text Amendment FCD 2013-001 to Floodplain Regulations of Maricopa County

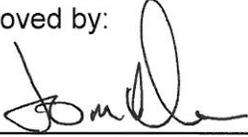
In accordance with the "Moratorium on Increased Regulatory Burdens" (C-44-13-104-M-00), the Flood Control District of Maricopa County requests your approval to pursue a text amendment to the Floodplain Regulations of Maricopa County (TA FCD 2013-001). The proposed amendment generally clarifies the process and limitations associated with appeals. Consistent with the moratorium, the amendment is proposed to lessen a regulatory burden.

The proposed amendment accomplishes the following:

- Clarify that appeals on reactivated sand and gravel permits are limited to the requirement for written notification, or the revised permit renewal date, and that reactivation of a voluntarily-suspended sand and gravel permit is not a new permit.
- Remove from Section 409 (Appeals) language pertinent to variances, which are separately addressed in the regulations; and, clarify parties' appeal abilities by distinguishing the allowable bases of appeal for "any person", "applicants", and "regulated persons".
- Specify information that is required to be included in a written notice of appeal: name and address of the person requesting the interpretation, the regulation that requires clarification, any facts relevant to the requested interpretation and the person's proposed interpretation of the applicable regulation. This information is consistent with the requirements for applicants who are seeking a clarification of interpretation pursuant to A.R.S. § 49-3649.
- Remove the requirement to stay all activities during the pendency of an appeal.
- Clarify the scope of Floodplain Review Board interpretations as affecting only the dispute between the appellant and District employees, rather than being generally applicable. The edit is intended to ensure that the Maricopa County Enhanced Regulatory Outreach Policy's requirements are applied to broader regulation interpretations.
- Clarify that, following an appeal to the Floodplain Review Board, the *appellant* (rather than "any person") has the right to pursue further appeal to the Board of Directors; and that an appellant aggrieved by a Board of Directors decision may file a special action in the Superior Court of the State of Arizona.

Staff recommends advancing this text amendment through the Enhanced Regulatory Outreach process to provide clarification regarding the appeals process and to lessen applicants' regulatory burden.

Approved by:



Tom Manos, County Manager

**Public Comments
and Responses**

Floodplain Regulations of Maricopa County Proposed Text Amendment FCD 2013-001

Comment Card

Comments may alternately be provided through the maricopa.gov/regulations "Comments" page

Comment is intended to:

Express Support

Express Opposition

Other

Your contact information – fields marked by * are mandatory:

Name* Steve Trussell

Agency ARPA

City* Phoenix

Email* sttruss@azrockproducts.org

Phone (602) 989-3854

Would you like to be contacted regarding your comment?* not necessary

Comments:

The Arizona Rock Products Association is very pleased with both the process and the results of the changes. We are affirmed that the changes to the FCD regulations will provide both clarity and consistency with existing statutes. Thank You!

From: Kelli Sertich - FCDX
Sent: Monday, January 27, 2014 12:00 PM
To: jathompson2144@yahoo.com
Subject: Issue: FCD 2013-001 Floodplain Regulations Appeals Process

Mr. Thompson,
13811 N 11th Street is located in the City of Phoenix. Phoenix has assumed floodplain management responsibilities within its jurisdiction. The Flood Control District of Maricopa County does not have regulatory authority in Phoenix. The text amendment for appeals to the Floodplain Regulations for Maricopa County is applicable for property owners in unincorporated Maricopa County and the 13 communities that the Flood Control District of Maricopa County performs floodplain management for.

However, the requirement for Flood Insurance is a Federal one that is part of the National Flood Insurance Program (NFIP). The Flood Control District of Maricopa County does not have the authority to require flood insurance. This requirement is based on federal law and is at the lenders discretion to require property owners to purchase flood insurance. You may wish to contact the Floodplain Administrator at the City of Phoenix to discuss your flood insurance concern. The phone number is (602) 262-4960.

Kelli A. Sertich, AICP, CFM
Floodplain Management & Services Division Manager
Flood Control District of Maricopa County
(602) 506-2202

The Flood Control District strives to provide excellent customer service to residents of Maricopa County. Your participation in this survey will help us to ensure that we are achieving our goal. [Click here to take our Customer Service Survey](#)

Citizen Comments

Issue: FCD 2013-001 Floodplain Regulations Appeals Process

Citizen's Name: john thompson
Organization:
City: Phoenix
Zip: 85022
Phone Number: 480-352-8344
Phone Type: mobile
Email: jathompson2144@yahoo.com

Does citizen want to be contacted: yes

Comment is regarding: express support

Comments:
would like property exempted from flood control-requiring flood ins.13810 n, 11th. st. pgx, 85022

Time of Request: 1/27/2014 9:27:20 AM

Jeri L. Kishiyama, Esq.

207 West Northview Avenue, Phoenix, Arizona 85021

March 10, 2014

Maricopa County Board of Directors
Flood Control District of Maricopa County
301 West Jefferson, Tenth Floor
Phoenix, AZ 85003

Dear Supervisors:

It is disappointing to report that Maricopa County has failed to enact new legally enforceable rulemaking procedures. First, its new “policy” that it entitled “Enhanced Regulatory Outreach Program” amounts to nothing more than a public relations statement. It is a “policy” that has no legal effect. The County or State needs to enact enforceable procedures to protect the public in the rulemaking process, including ensuring that interested citizens are made aware of and given the proper opportunity to participate in the process. Second, an example of the ongoing rulemaking procedural problems, the County is on the verge of passing rule changes that are legally problematic. The County has proposed changes to its rules for appeals from Flood Control District decisions, which are utterly confusing and remarkably vague and ambiguous.

The County’s Rulemaking Policy Is an Unenforceable Facade

The “Enhanced Regulatory Outreach Program” adopted by policy #A1518 dated December 10, 2012 and revised on March 25, 2013, is unenforceable against the County and the Flood Control District of Maricopa County (FCD). This “policy” is a façade that fails to meet the basic requirement of an enforceable rule. A legally enforceable rule must be enacted to address the rulemaking procedural deficiencies of the FCD.

The applicable statutes set forth the regulatory authority of FCD. Specifically, the legislative actions of the FCD are permitted by and through the Maricopa County Board of Supervisors acting as the Board of Directors (BOD) of the FCD. A.R.S. § 48-3602. The statutes authorize the BOD to adopt rules and bylaws for the orderly operation of the FCD. A.R.S. § 48-3603(C)(13). Additionally, the statutes authorize BOD to adopt rules regarding “[t]he hearing and review of decisions on actions prescribed by this chapter.” A.R.S. § 48-3603(C)(24). The BOD may adopt **rules** (not policy) after:

[A] public hearing at which parties in interest and other citizens have an opportunity to be heard. At least thirty days before the hearing, a notice of the time and place of the hearing shall be published in a newspaper of general circulation within the county A notice of any hearing accompanied by a copy of each of the proposed regulations shall be furnished to the director [Water

Resources]¹ at least thirty days before the date of the hearing. A copy of any regulation adopted by a district pursuant to this article shall within five days Thereafter be filed with each political subdivision and municipal corporation in the area of jurisdiction [Maricopa County].

Nowhere in the statutes is the BOD's legislative authority designated to be through "policy," which subverts the intent of the foregoing statutes to regulate the regulator (and specifically a taxing authority) through formal rulemaking. A.R.S. § 48-3601 *et seq.*²

Further, the record does not demonstrate that the BOD complied with the foregoing statute when it allegedly adopted "policy." Indeed, the statutes, as amended in 2012, under the Regulatory Bill of Rights, state that "[t]o ensure fair and open regulation by districts, a person: * * * (3) Is entitled to have a district not base a licensing decision in whole or in part on licensing conditions or requirements that are not specifically authorized as provided in section 48-3644." A.R.S. § 48-3644 prohibits a licensing decision or condition that is not specifically authorized by statute, and a general grant of authority is insufficient for same.

The BOD's adoption of a "policy" is woefully inadequate in light of the statutory rulemaking required by a special taxing district. The "policy" can only be described as "rulemaking by stealth." The record does not evidence the adoption of a rule or regulation (regardless of the administrative function granted to a county manager) by the BOD of the FCD. In addition, the public notice of the "expedited" rulemaking is also woefully inadequate. In light of the recent litigation between ABC and the FCD, the inaccurate notice of rulemaking can only be viewed as intentional so that ABC is being misled as to the real date of the BOD hearing. *See* attached.

Finally, policy is not legally binding on the regulated stakeholders or third-party stakeholders (public). *See, Hutchinson v. Harris County*, 120 S. Ct. 1655 (2000)(Court will defer to agency interpretation of its own regulation only if the regulation has the force of law – informal agency pronouncements are not law). In fact, should the FCD determine that the "policy" does not benefit it, it can revoke the policy with a mere request from the BOD, without notice and hearing to anyone.

The BOD has neither the statutory nor legal authority to regulate the FCD through "policy." The "Enhanced Regulatory Outreach Program" is an authorized attempt to circumvent the applicable statutes and is unauthorized by law. *A fortiori*, the "rulemaking" under the "policy" is unauthorized and without effect.

¹ Director is defined in A.R.S. § 48-3605 and used *passim* in the applicable statutes.

² A.R.S. § 48-3603(C)(15) allows other "required" work to be performed by county employees. The statute, however, does not grant regulatory authority to the county manager.

Background

Applicable Statutes to Proposed Rulemaking

Under A.R.S. § 48-3612, the Board of Supervisors may establish a Board of Review that is authorized to do the following:

- Review and interpret flood control district regulations if a meaning of a word, phrase or section is in doubt if a dispute exists between the appellant and district employees;
- Review a dispute regarding the location of a floodway or floodplain if the designation of the floodplain or floodway is in doubt; and
- Allow variances from terms or regulations to the extent the variance does not result in damage or danger to persons or property in the floodplain under A.R.S. § 48-3609(B)(7), or if a strict interpretation of a regulation would be an unnecessary hardship.

Additionally, A.R.S. § 48-3612(B) authorizes *any person*³ to appeal a Board of Review decision if that person “[f]eels that there is error or doubt in the interpretation of the regulation or that an unnecessary hardship is being inflicted on him.” Emphasis added. The appeal shall state whether the appeal is based upon interpretation of a regulation or a variance, and the grounds for the appeal.

Finally, A.R.S. § 48-3612(C), authorizes an appeal of the Board of Review decision to the BOD within 30 days of the decision.

Another statute also referenced in Rule 409, is A.R.S. § 48-3649, entitled “Clarification of interpretation.” Under that statute a “*person*” may request a clarification of a statute, ordinance, regulation, executive order, delegation agreement or authorized substantive policy statement⁴ *affecting the procurement of a license* by submitting a written request that includes, *inter alia*:

- The statute, ordinance, regulations, executive order, delegation agreement or authorized substantive policy statement or part of the statute, ordinance,
- regulation, executive order, delegation agreement or authorized substantive policy statement that requires clarification;
- Any facts relevant to the requested ruling;

³ Person is defined in A.R.S. §§ 1-215(28), 48-3601, and 48-3641.

⁴ Neither the statutes nor the rules deal with unauthorized substantive policy statements.

- The *person's* proposed interpretation of the applicable statute, ordinance, regulations, executive order, delegation agreement or authorized substantive policy statement or part of the statute, ordinance, regulation, executive order, delegation agreement or authorized substantive policy statement; and
- Whether the issue or related issues are being considered by the district in connection with a license or a license application.

Emphasis added.

Proposed Rule

The specific language of the rulemaking as proposed by FCD in Rule 409, and with which the undersigned takes issue, states (excluding strikeouts and underlining):

Section 409. Appeals

A. Appeals may be taken to the Floodplain Review Board pursuant to A.R.S. § 48-3612(B) [see statute cited above] and A.R.S. § 48-3642. Any person, if there is a dispute between the person and district employee or if location of a floodway is in doubt, may file an appeal seeking an interpretation of the regulations if the meaning of a word, phrase or section is in doubt. ***An applicant for a license*** may file an appeal seeking an interpretation of the regulations, ***after substantially complying with A.R.S. §§ [sic] 48-3649***, if the meaning of a word, phrase or section is in doubt ***or challenging a denial of a permit***. ***A regulated person***, if there is dispute between the regulated person and district employees ***of a final decision of a district based on the results of an inspection***, may file an appeal to the Floodplain Review Board seeking an interpretation of the regulations if the meaning of a word, phrase or section is in doubt.

* * *

C. Any interpretation of the regulations issued by the Floodplain Review Board shall only affect the dispute between the appellant and district employees. If the district wants to expand the application of the Floodplain Review Board's interpretation of the regulations, the district shall follow the procedures required by Maricopa County's Enhanced Regulatory Outreach Program Policy.

* * *

F. Any *appellant*⁵ aggrieved by a decision of the Floodplain Review Board may, within thirty (30) days of such decision

⁵ The proposed rule strikes the word "person" and replaces it with the word "appellant."

March 10, 2014

Page 5

G. Any *appellant* aggrieved by a decision of the Floodplain Review Board may file a special action in the Superior Court of the State of Arizona.

Emphasis added.

Concerns with Proposed Rule

First, the proposed rule modification conflicts with the standing provided by the controlling statute. As noted above, the Legislature defined “person” and allows a person to bring an appeal under A.R.S. §§ 48-3612(B) and 48-3649. Under these authorizing statutes, a person (not just an appellant) may challenge the interpretation of regulations. Thus, the statutes clearly contemplate and allow a non-party to a floodplain permit to challenge the language of a regulation.

The changed language in Rule 409(A), (C), (F), and (G), however, limits who may file an appeal. Any attempt to broaden or limit the statutory reference is beyond the scope of the FCD’s statutory authority. *See, Northwest Fire District v. U.S. Home of Arizona Construction Co.*, 215 Ariz. 492, 161 P.3d 535 (2003)(*En Banc*)(a special district can exercise only the limited powers granted to it by the legislature); *McKesson Corp. v. AHCCCS*, 230 Ariz. 440, 286 P. 3d 784 (App. 2012), (AHCCCS can change the word “person” and use its discretion to draw on less than full authority, “[u]nless the legislature has expressly provided otherwise.”

Second, the structure of the proposed Rule 409 is confusing. Sentences two, three, and four appear to be separate bases of appeal. If the sentences that reference the three types of appeals (a dispute between a person and an FCD employee, an applicant for a license, and a regulated person) are separate bases for appeal, then each type of appeal should be set out in separate subsections. As stated now, the rule appears to be a list of random thoughts thrown together.

Third, and related to the second concern is that the proposed rule appears to combine appeals under Rule 409 with appeals under other FCD regulations – Rules 705-707. Specifically, in Rule 409, sentence three, the sentences states “[a]n applicant for a license may file an appeal . . . *or* [in] challenging a denial of a permit,” and sentence four states “[a] regulated person, if there is a dispute between the regulated person and the district employees of *a final decision based upon the results of an inspection.*” Because a person may appeal the denial of an FCD permit and a person may appeal a final action regarding an inspection, Rule 705-707, specifically Rule 707(F), a person may have to comply with both sets of rules. A simple clarification could address this issue.

The fourth issue is Rule 409’s requirement in the third sentence that an applicant for a license may file an appeal challenging an interpretation as well as a denial of a permit. The use of the word “or” is confusing and inappropriate. Additionally, the language of the rule requires compliance with A.R.S. § 48-3649, an unnecessary step for permit

Maricopa County Board of Directors

March 10, 2014

Page 6

appeals, and may even be a jurisdictional compliance issue should an appeal be referred to any of the FCD Boards.

Fifth, Rule 409 is unclear, vague, and ambiguous:

- Sentence two limits appeals (a) between a person and a district employee, or (b) if the location of the floodway or floodplain is in doubt. The term “dispute” is not defined, and the rule is unclear as to what is a dispute. Additionally, does the “dispute” have to be with a district employee, or the FCD generally?
- Sentence two is limited to appeals seeking an interpretation of regulations if the meaning of a word, phrase, or section is in doubt. The use of passive voice makes this portion of the sentence incomprehensible – who doubts? What does “doubt” mean? What if the phrase is ambiguous, but it is not in doubt (not sure in whom the doubt must be)? If FCD does not think the language is in doubt, does the appeal fail? Does the “doubter” have to satisfy the “doubt” requirement as a basis for jurisdiction of an appeal?

Sixth, Rule 409’s sentence four is problematic. The language in sentence four references a dispute with a district employee (also in sentence two) and inspections. The language, however, states that the regulated person may file an appeal based on the final decision on an inspection seeking an interpretation if a word, phrase, or section is in doubt. Because the language at the end of sentence four is passive voice and not clearly stated, it appears that an inspection can *only* be challenged if it involves the interpretation of regulations. The result would be that a regulated person cannot challenge the underlying issues regarding an inspection, *i.e.* the inspection was not performed appropriately by an appropriate inspector. The language of sentence four imposes confusing and improper limits on an appeal.

Finally, the applicable statutes, A.R.S. §§ 48-3612(B) and 48-3649, allow an appeal and regulatory challenge on a case-by-case basis. Rule 409(C), however, goes beyond the reach of those statutes by making case-by-case challenges impossible and void if the district follows the Maricopa County Enhanced Regulatory Outreach Program to make the regulatory interpretation applicable to all persons⁶ within the County. The language of the section seems to render meaningless certain legal doctrines and specific requirements of collateral estoppel and *res judicata*. A person not a part of any of the previous regulatory interpretations would be forever barred from challenging a particular rule interpretation if the FCD seeks to make the interpretation unchallengeable in the future. Moreover, the foregoing statutes make reference to specific applications of the law to certain conditions. Specifically, A.R.S. § 48-3612(A)(2) allows variances in Maricopa County Board of Directors

March 10, 2014

⁶ Section (C) does not state how broadly the reach of the section would go, meaning all persons, applicants, or appellants.

the terms or regulations if “[o]wing to *peculiar conditions*, a strict interpretation would work an unnecessary hardship” and A.R.S. § 48-3612(B) allows an appeal by any person “[w]ho feels that there is error or doubt in the interpretation of the regulation or that due to *unusual circumstances attaching to his property an unnecessary hardship is being inflicted on him*.” Emphasis added. Section (C) is beyond the scope of the statutes and the district does not have any statutory authority whatsoever to make case-by-case standards applicable to all.

Conclusion

Ostensibly, the rulemaking is based upon a lawsuit between the Town of Youngtown and Salt River Materials. The Flood Control Advisory Board minutes from October 2013 indicate that the parties settled the case and that the rule is not necessary. Even assuming the FCD determines that the settlement does not render the rulemaking unnecessary, the FCD has no statutory authority to enact the rulemaking by following the Enhanced Regulatory Outreach Program. Further, the rulemaking language is less than clear, creates undue burdens on statutorily authorized persons who may appeal, and confuses and combines numerous other FCD rules regarding appeals. ABC Sand and Rock, Inc. Co. hereby requests that the BOD disapprove the rulemaking.

Should you have any questions, please contact Jeri Kishiyama at (602) 997-0857 (home) or at (602) 758-6534 (cell) regarding any questions you may have.

Very Truly Yours,

Jeri L. Kishiyama, Esq.

Enclosure

cc: David Waltemath
Sean Berberian, Esq.
Tim LaSota, Esq.

Maricopa County | Site Map | Search | Phone Directory | Departments | Services



Building Relationships

Maricopa County

Current Location: Regulatory Departments | Flood Control | Regulatory

Regulatory Meetings | Flood Control

Date	Time	Title and Agenda			Location
03/14/2014	9:00 am	Board of Directors Meeting	staff reports	minutes	BOS Auditorium
01/22/2014	2:00 pm	Flood Control Advisory Board Meeting	staff reports	minutes	2801 W. Durango, New River Conf Rm
12/4/2013	2:00 pm	Flood Control Advisory Board Meeting	staff reports	minutes	2801 W. Durango, New River Conf Rm
10/24/2013	10:00 am	Stakeholder Meeting	staff reports	minutes	2801 W. Durango, Adobe & Harquahala Conf Rm



Maricopa County Regulations
Phone: 602.506.7167 | Fax: 602.506.3951

Maricopa County | 201 W. & Grand Ave. | Phoenix, AZ 85003 | 602-506-2011
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PUBLIC NOTICE

**MARICOPA COUNTY, ARIZONA
TEXT AMENDMENT 2013-001 TO THE FLOODPLAIN REGULATIONS FOR MARICOPA COUNTY**

NOTICE IS HEREBY GIVEN that a public hearing will be held before the Board of Directors of the Flood Control District of Maricopa County, on Wednesday, March 12, 2014, at 9:00 a.m., in the Supervisors' Auditorium, 205 West Jefferson, Phoenix, Arizona, to solicit comments and consider the adoption and enforcement of the proposed Text Amendment FCD 2013-001 to the Floodplain Regulations for Maricopa County. Upon Flood Control District Board of Directors' approval, this item will become effective March 12, 2014.

In accordance with A.R.S. §48-3603 and 48-3609, the Flood Control District Board of Directors adopts and enforces the Floodplain Regulations for Maricopa County and associated fees. The state statutes also direct the Flood Control District to provide floodplain management to communities that have elected not to assume their own floodplain management and all unincorporated areas within Maricopa County. The proposed text amendment FCD 2013-001 generally clarifies the process and limitations associated with appeals.

All persons wishing to appear for or against the Fee Schedule for the Floodplain Regulations for Maricopa County are directed to attend the hearing or file a statement in writing with the Clerk of the Board of Supervisors, 301 West Jefferson, Tenth Floor, Phoenix, Arizona, prior to the hearing. For further information, please contact Kelli Sertich, Floodplain Management & Services Division Manager, at 602-506-2202.

DATED this 29th day of January, 2014.

**FRAN McCARROLL, CLERK
BOARD OF DIRECTORS
MARICOPA COUNTY, ARIZONA**

PUBLICATION DATE: Thursday, February 13, 2014

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03/10/2014 15:23 FAX

From: Jeri Auther [<mailto:auther.jeri@gmail.com>]
Sent: Tuesday, March 11, 2014 2:20 PM
To: Tim Phillips - FCDX; Ed Raleigh - FCDX
Subject: Fwd: comments for Board of Directors meeting

FYI

----- Forwarded message -----

From: **Jeri Auther** <auther.jeri@gmail.com>
Date: Tue, Mar 11, 2014 at 2:16 PM
Subject: comments for Board of Directors meeting
To: clerkboard@mail.maricopa.gov, barneyd@mail.maricopa.gov, chucris@mail.maricopa.gov,
akunasek@mail.maricopa.gov, chickman@mail.maricopa.gov, mrwilcox@mail.maricopa.gov
Cc: Steve Trussell <steve@azrockproducts.org>, "Kimball, Stuart S." <stuart.kimball@gknet.com>, Sean Berberian <sberberian@wbazlaw.com>, "Timothy A. La Sota" <TAL@tblaw.com>, David Waltemath <abcsandrocks@cox.net>

Fran:

Enclosed is a letter containing comments for tomorrow's hearing. I accidentally dropped a part of a quote when I emailed to the Board last night. I will re-email today. I will appear to comment tomorrow.

Thanks,

Jeri Kishiyama (Auther)



Maricopa County Attorney

BILL MONTGOMERY

March 21, 2014

Jeri L. Kishiyama, Esq.
207 West Northview Avenue
Phoenix, Arizona 85021

Re: Enhanced Regulatory Outreach Program (EROP)

Dear Ms. Kishiyama:

Your letter of objection to proposed changes to the Floodplain Regulations of the Flood Control District of Maricopa County, dated March 10, 2014, has been presented to me. Pursuant to the requirements of Maricopa County's Enhanced Regulatory Outreach Program (EROP), formal response is required. Please accept this letter, which will be made part of the public record, as your response.

EROP is not a "rule." EROP is a policy adopted by the Maricopa County Manager after direction from the Board of Supervisors to increase public input in the process of creating regulations within Maricopa County. EROP, issued by the County Manager on December 10, 2012 and revised on March 25, 2013, also instructed that each Department and agency adopt a substantive policy statement, pursuant to A.R.S. §11-1601 and A.R.S. § 48-3641. The policy does not have the force of law; however, a department that violates the policy does run the risk of disciplinary action for violating a policy established by the County Manager. Further, the policy states that no "code, rule, regulation or ordinance can be enforced without substantial compliance with this policy." So, again, if a department or agency were to enforce a code, rule, regulation or ordinance in violation of this policy, possible disciplinary action could result.

A.R.S. § 48-3603(B) provides: "The board of directors shall exercise all powers and duties in the acquisition and operation of the properties of the district and in carrying out its regulatory functions under this article as are ordinarily exercised by the governing body of a municipal corporation." A.R.S. § 9-137 grants to cities and towns "all the powers, duties, rights and privileges granted to incorporated cities and towns under the laws and constitution of this state."

Your letter contends that EROP "fails to meet the basic requirement of an enforceable rule." This is correct. EROP was never intended to be legally enforceable, but was and is "only advisory" and informs the public of the district's "current practice, procedure or method of action."

It seems there is some confusion about what is being proposed, which has caused some conflation between the regulation and the process of regulation adoption. A specific amendment to the Floodplain Regulations is being proposed. The procedure being used to adopt that amendment to the Floodplain Regulations is EROP, pursuant to the direction of the County Manager and the substantive policy statement posted on the EROP Flood Control District's web site.

There appears to be further confusion as to how a Floodplain Regulation is to be adopted. With respect to floodplain regulations, the Board of Directors is required to adopt regulations as provided in A.R.S. §48-3609. See, A.R.S. § 48-3603(D). The right of the Board of Directors to adopt rules and by-laws for the orderly operation of the District (which is not in any way involved with the proposal pending before the Board), A.R.S. § 48-3603(C)(13), should not be confused with the public hearing requirements for the adoption of any new or change to Floodplain Regulations, A.R.S. §48-3609(E).

The letter challenges the creation of EROP claiming that its adoption violated state statute because the procedure of A.R.S. §48-3609(E) was not followed. However, no such process is required for a substantive policy statement. Additionally, the claim that EROP violates A.R.S. § 48-3644 is misplaced as EROP does not involve any license as that term is broadly defined in A.R.S. § 48-3641(3).

The claim in the letter that "policy is not legally binding on the regulated stakeholders or third-party stakeholders" is correct. However, EROP is intended to bind the departments and agencies of Maricopa County, including the District, and not third parties. EROP is a statement by the County Manager of the policies the County Manager demands be followed when codes, rules, regulations or ordinances are to be adopted to ensure the widest range of public input possible.

Substantive Arguments Against the Proposed Amendment

Initially it should be noted that there appears to be no issues raised with the proposed amendment to Section 401 E concerning Floodplain Use Permitting or the correction of citation in Section 404 B. (3). It appears the only concerns relate to the appeal process that is being proposed for amendment, Section 409.

The proposed changes were outlined in the Staff Report. Your apparent bases of the objection are 1) the proposal changes the standing of who may appeal; 2) the structure of the rule is confusing; 3) the proposal is vague; 4) the proposal is applicable to Sections 705-707 dealing with violations, requiring compliance with two sets of rules; 5) the third sentence of the proposal is confusing; 6) a new requirement, compliance with A.R.S. §48-3649 is imposed before an appeal can be taken; 7) the fourth sentence is unclear; and 8) the proposed change to Section 409(C) eliminates case by case challenges.

1. The proposal does not change the issue of standing. The proposal retains the right of any person to challenge if that person believes there is error or doubt in the interpretation of the regulations. The sentences that follow actually expand the right to appeal, specifying that applicants may file appeals for a wider range of issues.
2. You state: "sentences two, three and four seem to be separate bases of appeal." That statement is correct. Four separate bases of appeal are provided
3. Purportedly, the use of the word "doubt" in the second sentence is vague. Staff does not agree that the use of "doubt" makes the proposal vague.
4. This is incorrect. The proposal applies during the application process or if there is a general disagreement with something done by the District. Section 705 only comes into play after a violation has been processed. The proposal does not and is not intended to be applicable to matters going through a violation procedure.
5. Your point about the third sentence being confusing is well taken. As proposed, the sentence reads: "An applicant for a license may file an appeal seeking an interpretation of the regulations, after substantively complying with A.R.S. §48-3649, if the meaning of a word, phrase or section is in doubt or challenging a denial of a permit." It is suggested this sentence be reworked to read: "After substantively complying with A.R.S. §48-3649, an applicant for a license may file an appeal seeking an interpretation of the regulations if the meaning of a word, phrase or section is in doubt; or an applicant may file an appeal challenging a denial of a permit."
6. The language relating to A.R.S. § 48-3649, which is recent, requires someone allegedly aggrieved by an interpretation to first ask that the District change its interpretation. It is, effectively, an administrative appeal to the agency before the appeal process commences. This is consistent with the statute and the proposal is incorporating that requirement.
7. The District believes that sentence four is clear. This appeal to the Floodplain Review Board is and is intended to be limited to a challenge to an inspection because of a bad interpretation of a regulation, rule or statute. If there is an underlying challenge to the quality of an inspection or the qualifications of the inspector, it is not now heard by the Floodplain Review Board and it would not be heard by the board under the proposed amendment. Jurisdiction on such a matter lies elsewhere.

Your letter questions the use of the word "dispute". "Dispute" is used in A.R.S. § 48-3612(A)(1) and does not appear to cause any confusion. Also, if a term is not defined by a statute, ordinance or regulation, the general meaning of the word is applied. It is dubious that if an applicant felt a regulation had one meaning but the District felt it had another, anyone would argue there was not a dispute.

8. This change provides that if a challenge is made by a specific applicant, whatever interpretation the District makes on that application is not precedential. If the District wants that interpretation to be of general applicability, then an amendment to the regulations, following EROP, is required. In no way would that affect the ability of a subsequent applicant to question the same regulation as amended, or filing any case-by-case challenge. What the proposal will do is prevent the development of something akin to case law interpretations that the District will constantly apply without notice to the public. The proposal provides more transparency. Further, this change has no impact whatsoever on the variance provision of A.R.S. § 48-3612(A)(2).

Sincerely,

MARICOPA COUNTY ATTORNEY
CIVIL SERVICES DIVISION



Wayne J. Peck
Deputy County Attorney
cc: Tim Phillips, PE