



Staff Report to the Flood Control Advisory Board Information Sheet

Reference:	Resolution FCD 2016R004, EROP Item FCD 2016-2
Meeting Date:	April, 27, 2016 2 p.m., Flood Control Advisory Board, 2801 W. Durango St., Phoenix, 85009
Agenda Item:	4
Supervisor Districts:	All
Request:	Text amendment to the Board of Hearing Review Procedures.
Support/Opposition:	None known
Recommendation:	Endorse the text amendment and send it to the Board of Directors for adoption.
Discussion:	<p>This text amendment will bring the Board of Hearing Review procedures into compliance with changed language in State law, and will add additional detail to the procedures that will clarify burden of proof and order of argument before the Board.</p> <p>Per State law and our Floodplain Regulations, the Flood Control District has an appeals process for floodplain violations and for damages to District facilities. This process includes an appeal board called the Board of Hearing Review. Per State Statute 48-3615.01.D, "The Board of directors shall adopt written rules of procedure for the hearing and review of hearings. These rules shall be adopted in the same manner as floodplain ordinances."</p> <p>Proposed verbatim language is noted below (added language is underscored, deleted language is struck-through).</p> <p>This text amendment is being processed using the Enhanced Regulatory Outreach Program. Two stakeholder workshops were held on March 9, 2016, and on April 11, 2016.</p>
Recommendation:	Staff recommends that the Flood Control Advisory Board endorse the text amendment to the existing Board of Hearing Review Procedures, and recommend that the text amendment to the existing Board of Hearing Review Procedures be adopted by the Board of Directors.

Exhibit A

Board of Hearing Review Procedures

- A. The Board of Hearing Review ("Board") shall consider only ~~The review shall be limited to~~ the record of proceedings, before the Hearing Officer and n ~~n~~ No new evidence shall be introduced. The record of proceedings shall include all pleadings and orders in the Hearing Officer's file, copies of all evidence submitted to the Hearing Officer at the hearing, a copy of the audiotape of the hearing, ~~and~~ a copy of the Chief Engineer's final decision and order, and any prior orders of the Board of Hearing Review or a reviewing court. If the Board ~~of Hearing Review~~ determines that a transcript of the audiotape is necessary, a transcript shall be prepared at the District's expense. A trial *de novo* is not permitted.
- B. The person ~~The written~~ requesting for review by the Board of Hearing Review of the Chief Engineer's final decision and order ~~by the Board of Hearing Review~~ shall be delivered a written request for review to the Clerk of the Board of Directors within ~~fifteen (15)~~ 10 days after the date of the ~~final~~ Chief Engineer's final decision and order.
- C. Within thirty (30) calendar days of ~~Upon~~ receipt of the written request for review, the Chief Engineer shall, ~~within thirty (30) calendar days~~, prepare and transmit the complete record to the clerk of the Board of Hearing Review and schedule the request for review to be heard by the Board.
- D. Not fewer than ten (10) working days prior to the date of the hearing, the ~~The~~ clerk of the Board of Hearing Review shall notify all parties of the date, time, and place of the ~~request for review~~ hearing by certified mail to the last known address of the parties, ~~at least ten (10) working days prior to the date of the hearing~~.
- E. The Chairperson of the Board ~~of Hearing Review, or designee~~, shall preside at all ~~request for review~~ hearings and shall decide on all questions pertaining to procedure. When appropriate, the Chairperson may issue a prehearing order providing guidance to the parties on the conduct of the hearing.
- F. Each party shall ~~have be allowed~~ 10 ~~ten~~ five minutes to present oral arguments. The Chairperson or Board may extend this time. ~~Time limits may be extended at the discretion of the Chairperson or Board.~~
- G. Each ~~All~~ members of the Board and Board counsel may question representatives of any ~~all~~ parties appearing before them as to the party's view of the law and record.
- H. The findings of fact of the Hearing Officer and conclusions of law accepted by the Chief Engineer shall carry with them a rebuttable presumption of validity. The party requesting review before the Board of Hearing Review shall bear the burden of demonstrating by a preponderance

of the evidence that either these findings of fact or conclusions of law are arbitrary, capricious, unreasonable or unsubstantiated by the record established before the Hearing Officer. As to any penalty imposed by the Chief Engineer, the Chief Engineer shall bear the burden of persuasion that the penalty is just and equitable under the circumstances. Once that initial burden is met, the party requesting review before the Board of Hearing Review shall bear the burden of demonstrating that the penalty imposed is unjust and/or inequitable under the circumstances or is inconsistent with the law.

- I.H. Based on the record before the Board of Hearing Review, the Board of Hearing Review may deny, approve, modify or return to the Chief Engineer for further consideration, the order of the Chief Engineer's final decision or order or the order of the Hearing Officer. The Board of Hearing Review shall issue a written order of its decision including findings of fact and conclusions of law, and shall submit its final written order on the matter to the Chief Engineer within 30~~thirty~~ days after completion of the hearing. The decision of the Board of Hearing Review shall be decided by a majority vote of the participating members. The clerk of the Board of Hearing Review Copies of the order shall be serve copies of the Board's order on all parties to the hearing. The decision to uphold or deny the Chief Engineer's final decision and order shall be decided upon by motion and a majority vote of the members of the Board of Hearing Review.
- I.I. The final decision of the Board of Hearing Review is subject to judicial review pursuant to A.R.S. Title 12, Chapter 7, Article 6.

Appendix

Typical Order of Argument Before the Board

Except as otherwise provided by order of the Chairperson under Section E or by the Board, the order of argument before the Board of Hearing Review shall will generally be as follows:

Representatives of each party may submit a brief, not to exceed 10 pages in length, to the clerk of the Board of Hearing Review not less than five days before the hearing to assist the Board in understanding their arguments. The clerk will promptly distribute copies to the Board and Board counsel.

The representative of the party seeking review of the decision and order of the Chief Engineer's final decision and order or Hearing Officer shall speak first and present argument as to why the decision and order of the Chief Engineer's final decision and order or Hearing Officer is in error and should be denied or modified. The representative of the party requesting review may, with the approval of the Chairperson, reserve time for rebuttal. Board members or Board counsel may ask questions of the representative.

The representative of any other party properly admitted to the hearing shall speak next and present argument as to why the ~~decision and order of the~~ Chief Engineer's final decision and order ~~or Hearing Officer~~ should be approved, denied, or modified. If there are multiple such parties, they shall speak in an order determined by the Chairperson. Board members or Board counsel may ask questions of the representatives.

The representative of the Flood Control District shall speak after all other parties and present argument as to why the ~~decision and order of the~~ Chief Engineer's final decision and order ~~or Hearing Officer~~ should be approved. Board members or Board counsel may ask questions of the representative.

The representative of the party requesting review may, if time was reserved for rebuttal, present rebuttal solely to argument presented by another party. Board members or Board counsel may ask questions of the representative.

Following presentation of all argument, the Board Chairperson, or designee, will enquire of Board members and Board counsel whether there are any additional questions. When appropriate, representatives of all parties may be invited to provide responses to questions.

The Chairperson, or designee, will ask the Board members and Board counsel if executive session is needed. If so and otherwise allowed under law, the Board will go into executive session ~~retire to~~ hear advice of counsel. If needed, the Board may schedule an executive session in accordance with applicable law.

Following executive session, if any, the Board will deliberate in open session. The Board may make a decision, ask Board counsel to research and/or draft a decision, or take the matter under advisement or any combination of the above. Upon deciding what action it is taking, the Board will adjourn until it is ready to complete its deliberations and adopt an order. Notice will be provided of such time to the parties at least ~~ten~~ days in advance, unless the parties agree on the record to a different schedule.



Enhanced Regulatory Outreach Program

FCD 2016-02 Text Amendment to the Board of Hearing Review Procedures Stakeholder Meeting 2 Notes

Staff Attendees: Kelli Sertich, Eric Hiser on behalf of BOHR, Ed Raleigh, Wayne Peck, Lynndsay O'Neill

Meeting Date: Tuesday, April 12, 2016 9:30 a.m. – 10:30 a.m.

1. MEETING PURPOSE

Meeting began at 9:40 a.m.

- To review requested changes from Stakeholder Meeting No. 1 for a text amendment to the FCD Board of Hearing Review Procedures.
- Three stakeholders were present.

2. PURPOSE AND INTRODUCTION

- To adopt a text amendment for the FCD Board of Hearing Review Procedures. This text amendment will bring the Board of Hearing Review procedures into compliance with changed language in State law, and will add additional detail to the procedures that will clarify burden of proof and order of argument before the Board.

3. EROP

- An overview of the EROP process and background of the Board of Hearing Review was given, following the agenda of the meeting.
- Discussion started over the Revised Draft Procedures of the Board of Hearing Review from Eric Hiser, highlighting the changes suggested since the last stakeholder meeting.
- Feedback was given, from Wayne Peck for Section B, regarding the input of the word “final” in the last sentence before “order.”
- Dialogue continued with a narrative of changes to the procedure paragraphs and the Appendix.
- An attendee questioned whether the Board of Hearing Review Procedures would be given a number and into which document it would be placed.
- Staff member Kelli Sertich responded stating it is a standalone resolution separate from the Floodplain Regulations similar to the fee schedule and timeframes.
- After presentation further comments were made by attendees:
 - The EROP web page is not clear on where current documents are located. It is hard to locate the updated drafts on the FCD website. Attendee commented that the District is a separate entity from the county so they look for information on the FCD website. FCD staff will address these issues with county OET and ITC staff to clarify items on EROP, and locate drafts on homepage of FCD website, that way all information is available on the FCD website, and the EROP website can be accessed if needed.



Enhanced Regulatory Outreach Program

- Numbers less than 11 need to be spelled out (ten).
- The usage of passive voice instead of active voice makes it unclear who is doing the action – FCD staff will look into the need for any changes to properly identify who is doing the said action.
- Why doesn't the appendix fold into the paragraphs of the procedure, having an appendix and the word "shall" implies that it is not mandatory.
- Attendee commented that the BOHR procedures should be in the Floodplain Regulations so users did not need to located documents in different locations. FCD staff indicated it would not be included as part of the Regulations, but a sentence will be added into the Floodplain Regulations document, "BOHR can be found at...", in order to cross reference the document used. A combined document will also be made available on the FCD website.

4. NEXT STEPS

- Send written comments to Kelli Sertich at kas@mail.maricopa.gov.
- Text amendment will be presented at the April 27, 2016 Flood Control Advisory Board meeting.
- Agenda item is for FCAB to endorse and move to the Board of Directors.

5. WRAP UP

- No further questions were asked by the attendees.
- Meeting adjourned at 10:06 a.m.