



# Staff Report for the Board of Directors

## Prepared by the Flood Control District of Maricopa County

### Information Sheet

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<b>Reference:</b>	Resolution FCD 2016R004 (PCN 019.01.01) EROP 2016-02
<b>Meeting Date:</b>	June 22, 2016 - Board of Directors
<b>Agenda Item:</b>	FCD Agenda of the BOD
<b>Supervisor District:</b>	All
<b>Request:</b>	Adopt a Text Amendment to the Board of Hearing Review Procedures
<b>Support/Opposition:</b>	None known
<b>Action Required:</b>	Adopt a text amendment to the Board of Hearing Review Procedures.
<b>Background:</b>	<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 in the attached.</p> <p>This text amendment will be processed using the Enhanced Regulatory Outreach Program. A stakeholder workshop was held on March 9, 2016 and on April 12, 2016. The item was presented to the FCAB on March 23, 2016 to initiate the process and April 27, 2016 for endorsement and recommendation to the Board of Directors.</p>
<b>Recommendation:</b>	It is moved that the Board of Directors adopt a text amendment to the Board of Hearing Review Procedures.
<b>Discussion:</b>	DRAFT PROPOSED TEXT



# Flood Control District of Maricopa County

## Flood Control Advisory Board

**Meeting Minutes for April 27, 2016**

**Board Members Present:** Melvin Martin, Chairman; Gregg Monger, Secretary; Richard Schaner, Vice Chairman; Hermant Patel; DeWayne Justice; Bob Larchick

**Board Members Absent:** Ray Dovalina.

**Staff Members Present:** William D. Wiley, P.E., Chief Engineer and General Manager; Wayne Peck, General Counsel; Kelli Sertich; Eric Hiser; Patrick Shafer; John Hathaway

**1) CALL TO ORDER**

The meeting of the Flood Control Advisory Board (FCAB) was called to order at 2:04 p.m. on Wednesday, April 27, 2016.

**2) PLEDGE OF ALLEGIANCE**

The Pledge of Allegiance was recited.

**3) APPROVE THE MINUTES OF MARCH 23, 2016**

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

**4) PUBLIC HEARING ACTION ITEM - TEXT AMENDMENT TO THE BOARD OF HEARING REVIEW PROCEDURES**

Presented by Kelli Sertich, FMS Manager; and Eric Hiser, Counsel to the Board of Hearing Review

**STAFF RECOMMENDS THE FOLLOWING ACTION:** It is moved 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.

Ms. Sertich reviewed what was discussed at the last meeting. That is: The State statutes require that Flood Plan Regulations be adopted by the Board of Hearing Review and that there be an appeals process should there be questions or violations regarding the Flood Plan Regulations. In order to have an appeals process, there needs to be a Board of Hearing Review in place. This five-member board sits as that Board of Hearing Review and is appointed by the Board of

Directors. That Board of Hearing Review would hear decisions of the hearing officers and final orders of the Chief Engineers whenever there were violations of regulations. The text amendment will help bring the procedures into compliance with some changes that were made to state statutes last year and additionally help to give more guidance to the Board and the participants of the process.

Additionally, Maricopa County has an Enhanced Regulatory Outreach Process ("EROP") to ensure the stakeholders were included and they were reaching out to invite people to participate in that process. The Enhanced Regulatory Outreach site outlines the different processes and regulations.

Two stakeholder workshops were held to date with three participants at each meeting. Adjustments to the work procedures were made based on the input at those meetings. No additional written comments had yet been received.

General Counsel Peck clarified that the membership of the Board of Hearing Review was not the membership of FCAB and they are two separate, distinct boards. The EROP process was adopted by Maricopa County, but the Flood Control Board of Directors also adopted a resolution requiring that FCD follow the same process.

Mr. Hiser stated the purpose of the change was twofold: To conform the rules to the state statute requirements; and to provide more guidance to members of the public and the Board in terms of how the course of the hearing process goes through. There were verbal comments regarding how to work in conjunction with the open meeting law and a request to change the language from passive to active. Mr. Hiser reviewed the changes by paragraph.

The new appendix to be adopted was reviewed by Mr. Hiser. The appendix sets forth the order that people appear unless altered by the Chairperson or by the Board at the hearing. It was decided that this was best left in the realm of guidance rather than regulation, so that the Board could vary it as the interest of justice required.

In response to a question posed by Chairman Martin, Mr. Hiser confirmed that they could not discuss something outside of the agenda if an agenda had been advertised, the same as it is now.

Board Member Shaner asked if a party seeking review was the same as the party requesting review in all cases. Mr. Hiser responded that it was and that could be amended for consistency.

Regarding the portion of the appendix which read, "The representative of any other party properly admitted to the hearing shall speak and asked to present argument," Board Member Justice asked if that meant only those that had intervened. Mr. Hiser responded that was correct. Mr. Hiser also responded to Board Member Justice's concern regarding conforming the numbers to the Secretary of State's preferred style.

Ms. Sertich reviewed the next steps for processing this amendment. The information would be posted on the EROP site and also on the webpage.

The Chairman asked if there were any questions or comments from the public, and opened the floor to the Board. No questions or comments were voiced.

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

When Recorded Return to:  
Contracts Branch  
Flood Control District of Maricopa County  
2801 West Durango Street  
Phoenix, AZ 85009-6399

## **RESOLUTION FCD 2016R004**

### **Text Amendment to the Board of Hearing Review Procedures of the Flood Control District of Maricopa County**

#### **Agenda Item: C-69-16-035-6-00**

**WHEREAS**, the Flood Control District of Maricopa County (District) was established in accordance with provisions of Arizona Revised Statutes, Title 48, Chapter 21, to identify flood problems, and control waters of rivers, streams and other surface waters to eliminate or minimize flooding of property and the endangering of lives of residents in Maricopa County; and

**WHEREAS**, protection of the integrity of flood control district facilities and property through the enforcement of the Floodplain Regulations for Maricopa County is essential to the District's ability to prevent flooding damage to property and the endangering of lives; and

**WHEREAS**, Arizona Revised Statutes (A.R.S.) section 48-3603(C)24 require for a district that intends to take enforcement action pursuant to section 48-3615.01 to adopt written rules of procedure for the hearing and review of decisions by the Board of Hearing Review; and,

**WHEREAS**, procedures for the Board of Hearing Review were previously adopted by Resolution FCD 2012R002 dated March 14, 2012; and,

**WHEREAS**, the procedures are revisited to conform with changes in state legislation, and to add additional detail to the procedures that will clarify burden of proof and order of argument before the Board; and,

**WHEREAS**, the Board of Directors of the Flood Control District of Maricopa County (Board) has held a public hearing as required under A.R.S. section 48-3609.

**NOW, THEREFORE, BE IT RESOLVED**, the Board in order to carry out its statutory duty to protect the Flood Control District, life, health and property of county residents hereby adopts the Text Amendment to the Board of Hearing Review Procedures for the Flood Control District of Maricopa County as attached hereto and marked as Exhibit A; and

**BE IT FURTHER RESOLVED**, the Board designates the Chief Engineer and General Manager for the District to administer and enforce the decisions of the Board of Hearing Review for the Flood Control District of Maricopa County.

Dated this \_\_\_\_ day \_\_\_\_\_, 2016.

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Chairman, Board of Directors

ATTEST:

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Clerk of the Board

## Exhibit A

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### Board of Hearing Review Procedures

- A. The Board of Hearing Review (“Board”) shall consider only the record of proceedings. 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, a copy of the Chief Engineer’s final decision and order, and any prior orders of the Board or a reviewing court. If the Board 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 requesting review by the Board of the Chief Engineer’s final decision and order shall deliver a written request for review to the Clerk of the Board of Directors within 15 days after the date of the Chief Engineer’s final decision and order.
- C. Within 30 calendar days of receipt of the written request for review, the Chief Engineer shall 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 10 working days prior to the date of the hearing, the clerk of the Board of Hearing Review shall notify all parties of the date, time, and place of the hearing by certified mail to the last known address of the parties.
- E. The Chairperson of the Board, or designee, shall preside at all 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 10 minutes to present oral arguments. The Chairperson or Board may extend this time.
- G. Each member of the Board and Board counsel may question representatives of any party 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 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 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. Based on the record before the Board, the Board may deny, approve, modify or return to the Chief Engineer for further consideration, the Chief Engineer's final decision or order. The Board 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 days after completion of the hearing. The Board shall decide by a majority vote of the participating members. The clerk of the Board of Hearing Review shall serve copies of the Board's order on all parties to the hearing.
- J. The final decision of the Board 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 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 requesting review of the Chief Engineer's final decision and order shall speak first and present argument as to why the Chief Engineer's final decision and order 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 Chief Engineer's final decision and order 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 Chief Engineer's final decision and order 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 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 10 days in advance, unless the parties agree on the record to a different schedule.