

NOTICES OF PROPOSED RULEMAKING

Unless exempted by A.R.S. § 41-1005, each agency shall begin the rulemaking process by first submitting to the Secretary of State's Office a Notice of Rulemaking Docket Opening followed by a Notice of Proposed Rulemaking that contains the preamble and the full text of the rules. The Secretary of State's Office publishes each Notice in the next available issue of the *Register* according to the schedule of deadlines for *Register* publication. Under the Administrative Procedure Act (A.R.S. § 41-1001 et seq.), an agency must allow at least 30 days to elapse after the publication of the Notice of Proposed Rulemaking in the *Register* before beginning any proceedings for making, amending, or repealing any rule. (A.R.S. §§ 41-1013 and 41-1022)

NOTICE OF PROPOSED RULEMAKING

TITLE 12. NATURAL RESOURCES

CHAPTER 5. STATE LAND DEPARTMENT

[R07-255]

PREAMBLE

1. Sections Affected

R12-5-2301
R12-5-2302
R12-5-2303
R12-5-2304
R12-5-2305
R12-5-2306
R12-5-2307
R12-5-2308
R12-5-2309
R12-5-2310
R12-5-2311
R12-5-2312
R12-5-2313
R12-5-2314
R12-5-2315

Rulemaking Action

Amend
Amend

2. The specific authority for the rulemaking, including both the authorizing statute (general) and the statutes the rules are implementing (specific):

Authorizing statute: A.R.S. § 37-213(E)

Implementing statutes: A.R.S. §§ 27-234(J), 27-567(F), 37-132(A)(7), 37-214, 37-215, 37-236(C), 37-285(F), 37-312(M), 37-321.01(E), 37-331.01(C), 37-334(E), and 37-335(F) and (I)

3. List of all previous notices appearing in the *Register* addressing the proposed rules:

Notice of Rulemaking Docket Opening: 13 A.A.R. 262, February 2, 2007

4. The name and address of agency personnel with whom persons may communicate regarding the rulemaking:

Name: Lorraine Duran
Address: State Land Department Board of Appeals
1616 W. Adams St.
Phoenix, AZ 85007
Telephone: (602) 542-2603
Fax: (602) 542-2508
E-mail: lduran@land.az.gov

5. An explanation of the rules, including the agency's reasons for initiating the rulemaking:

In response to a five-year-review report approved by the Council on May 3, 2005, the Board is amending its rules to make them more clear, concise, and understandable and consistent with Board procedure.

6. A reference to any study that the agency proposes to rely on in its evaluation of or justification for the proposed rule and where the public may obtain or review the study, all data underlying each study, any analysis of the study

Notices of Proposed Rulemaking

and other supporting material:

None

7. A showing of good cause why the rules are necessary to promote a statewide interest if the rules will diminish a previous grant of authority of a political subdivision of this state:

Not applicable

8. The preliminary summary of the economic, small business, and consumer impact:

The rulemaking, which simply makes existing rules more clear, concise, and understandable, will have minimal economic impact.

9. The name and address of agency personnel with whom persons may communicate regarding the accuracy of the economic, small business, and consumer impact statement:

Name: Lorraine Duran
Address: State Land Department Board of Appeals
1616 W. Adams St.
Phoenix, AZ 85007
Telephone: (602) 542-2603
Fax: (602) 542-2508
E-mail: lduran@land.az.gov

10. The time, place, and nature of the proceedings for the making, amendment, or repeal of the rules or, if no proceeding is scheduled, where, when, and how persons may request an oral proceeding on the proposed rules:

The Board shall hold an oral proceeding regarding the proposed rules if a written request is submitted to the individual identified in item 4 on or before the 30th day after this notice is published. The rulemaking record will close at 5:00 p.m. on Friday, September 7, 2007.

11. Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules:

None

12. Incorporations by reference and their location in the rules:

None

13. The full text of the rules follows:

TITLE 12. NATURAL RESOURCES

CHAPTER 5. STATE LAND DEPARTMENT

ARTICLE 23. BOARD OF APPEALS

Section

- R12-5-2301. Definitions
- R12-5-2302. ~~Contents of a~~ Notice of Appeal
- R12-5-2303. Notice of Hearing
- R12-5-2304. Prehearing Disclosure
- R12-5-2305. Continuances
- R12-5-2306. Computation of Time; Additional Time After Service by Mail
- R12-5-2307. Service of Documents Other than Subpoenas
- R12-5-2308. Subpoenas
- R12-5-2309. Motions
- R12-5-2310. Hearing
- R12-5-2311. Evidence
- R12-5-2312. Objection to Decision by Chairperson
- R12-5-2313. Ex Parte Communications
- R12-5-2314. Decision of the Board
- R12-5-2315. Rehearing or Review of Decision

ARTICLE 23. BOARD OF APPEALS

R12-5-2301. Definitions

Unless the context requires otherwise, the words defined below shall have the following meaning when found in these rules in this Article:

1. "Appellant" means the person ~~who that~~ files a notice of appeal with the Clerk ~~pursuant to~~ under A.R.S. § 37-215.
2. "Board" means the Land Department Board of Appeals appointed by the Governor ~~pursuant to~~ under A.R.S. § 37-213(A).
3. "Chairperson" means the Chairperson or, in the Chairperson's absence or by designation, the Vice-chairperson of the ~~Land Department Board of Appeals.~~
4. "Clerk" means the person designated as ~~Clerk of the Land Department by the~~ Board of Appeals to handle administrative matters for the Board.
5. "Commissioner" means the ~~State Land Commissioner of the state of Arizona appointed under A.R.S. § 37-131,~~ or the ~~Land Commissioner's duly authorized deputy designee.~~
6. "Department" means the ~~State Land Department of the state of Arizona.~~
7. "Ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.
7. "Good cause" means a reason that the Board determines is substantial enough to afford a legal excuse.
8. "Party" ~~has the same meaning as prescribed in A.R.S. § 41-1001.~~
- 8-9. "Person" ~~shall include~~ means an individual, limited liability company, corporation, association, partnership, receiver, trustee, guardian, executor, administrator, fiduciary representative, ~~or any~~ group acting as a unit, and ~~includes~~ any department, agency, or instrumentality of the state or ~~of any a governmental political~~ subdivision thereof.
9. "Person outside the Board" means any person other than a Board member, an employee, or consultant of the Board, ~~or an attorney representing the Board in its adjudicatory role.~~

R12-5-2302. Contents of a Notice of Appeal

- A. A person that files a notice of appeal ~~filed pursuant to~~ under A.R.S. § 37-215 shall ~~contain~~ ensure that the notice is written and contains a clear and concise statement of the grounds for appeal and the specific relief requested.
- B. If a notice of appeal regards a final decision of the Commissioner relating to classification or appraisal of lands or improvements, the person filing the notice of appeal shall file it with the Commissioner under this Article.
- C. If a notice of appeal regards a final decision of the Commissioner not relating to classification or appraisal of lands or improvements, the person filing the notice of appeal shall file it with the Department under A.R.S. Title 41, Chapter 6, Article 10.

R12-5-2303. Notice of Hearing

- A. Setting a hearing date. Within 10 days ~~from the date of receiving the~~ after receipt of a notice of appeal under A.R.S. § 37-215 and R12-5-2302(B), the Clerk shall set a date for the hearing ~~in compliance with A.R.S. § 37-215.~~
- B. Service of a notice of hearing. At least 30 days before ~~the date of the~~ a hearing, the Clerk shall serve notice of the hearing, by certified mail or personal service, to the appellant, ~~the~~ Department, and all other parties to the appeal.
- C. Contents of a notice of hearing. The Clerk shall ensure that a notice ~~shall contain~~ of hearing contains a statement:
 1. A statement ~~identifying~~ Identifying the Board, the parties, and the matters asserted;
 2. A statement ~~of~~ Establishing the date, time, and place of the hearing;
 3. A statement ~~of~~ Identifying the legal authority and jurisdiction under which the hearing is to be held;
 4. A statement ~~advising~~ Advising the parties of the requirements of R12-5-2305; and
 5. A reference to Referencing the particular ~~Sections of the~~ statutes and rules involved.

R12-5-2304. Prehearing Disclosure

- A. Witnesses and Exhibits exhibits. At least ~~40~~ 15 days ~~prior to~~ before the date set for hearing date, each party shall:
 1. File with the Clerk:
 - a. A list of all witnesses who may be called to testify on behalf of the party, and
 - b. Eight copies of all documentary exhibits to be offered on behalf of the party; and
 2. Serve upon each other party ~~one~~ a copy of the list of witnesses and a list of all exhibits to be offered on behalf of the party.
- B. The Board shall exclude the testimony of ~~any a~~ witness and the admission of ~~any an~~ exhibit not disclosed ~~pursuant to~~ under subsection (A), unless the Board determines that ~~the~~ admission of the evidence ~~would be~~ is in the ~~interests~~ interest of fairness and justice.

R12-5-2305. Continuances

- A. General. The Chairperson may, for good cause, continue or reschedule ~~any a~~ hearing ~~before the Board~~ on the Chairperson's own motion, ~~on~~ application of a party, or ~~on~~ stipulation of the parties.
- B. Application for continuance.
 1. Filing. To obtain A party ~~applying for~~ a continuance of a hearing, a party shall file an application for continuance with the Clerk ~~of the Land Department Board of Appeals~~ and serve a copy of the application on all parties no later than 10

Notices of Proposed Rulemaking

days before the scheduled date of the hearing. ~~The~~ For good cause, the Chairperson may allow ~~the~~ a party to file and serve ~~the motion an~~ application for continuance ~~after the expiration of such period for good cause less than 10 days before the scheduled hearing.~~

2. Contents. ~~The~~ A party filing an application for continuance shall ~~state~~ ensure that the application states why the continuance is ~~being~~ requested, why a stipulation from adverse parties was not obtained, and the amount of time ~~being~~ requested.

~~C.3.~~ Response; and reply. ~~Any~~ An opposing party may; ~~file and serve a response~~ within five days after ~~such~~ service of an application for continuance; ~~file and serve a response.~~ A ~~The~~ Board shall permit a reply shall be permitted that is served within five days after the response is served.

~~D.C.~~ Stipulations. The parties may stipulate to a continuance. The Board ~~will~~ shall accept ~~such stipulations~~ a stipulation that is filed no later than 72 hours ~~prior to before~~ the date and time scheduled for the hearing.

~~E.D.~~ Time limits. ~~Absent consent of~~ Unless the parties agree, the Board shall not grant a continuance ~~cannot be granted which would result in~~ if granting the continuance causes the hearing not ~~being to be~~ conducted in compliance with A.R.S. § 37-215(C).

R12-5-2306. Computation of Time; Additional Time After Service by Mail

- A. Computation. ~~In computing~~ To compute any period of time prescribed or allowed by ~~these rules this Article~~ or by order of the Board, the day of the act, event, or default after which the ~~designated~~ period of time begins to run is not to be included. The last day of the period ~~so computed shall be~~ is included, unless ~~it~~ the last day is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day ~~which that~~ is not a Saturday, Sunday, or legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays ~~shall be~~ are excluded in the computation.
- B. Service by mail. ~~Whenever~~ If a party has a right or is required to do some act or proceed within a prescribed period after the service of a notice or other paper ~~upon the party~~ and if the notice or paper is served by mail, five calendar days ~~shall be~~ are added to the prescribed period.

R12-5-2307. Service of Documents Other than Than Subpoenas

- A. Method of service. Unless otherwise specified by ~~these rules in this Article,~~ service of documents a person shall serve a document other than ~~subpoenas shall be made~~ a subpoena by:
 1. ~~Hand delivery~~ Personal service with receipt or certificate of delivery;
 2. Legible ~~facsimile~~ fax with confirmed receipt; or
 3. ~~Personal service,~~ or
 4. By regular ~~Regular~~ mail, properly addressed with postage prepaid, to each party in the proceeding.
- B. Service on attorney. ~~When~~ If a party has appeared by an attorney, service upon ~~such the~~ attorney shall be ~~is~~ deemed service upon ~~such the~~ party.
- ~~B.C.~~ Time of service. Service ~~shall be deemed~~ is made at the time of personal service of the document a document is:
 1. ~~Personally served; or upon deposit of the document~~
 2. ~~Faxed to the number contained in Board's records for the person being served; or~~
 3. ~~Deposited in the United States mail, postage prepaid, in a sealed envelope, and addressed to the person being served, at the last known person's address of record.~~

R12-5-2308. Subpoenas

- A. Issuance of ~~subpoenas a subpoena.~~ In connection with any hearing, ~~the Chairperson, upon~~ Upon written application of a party or on the Chairperson's own motion, ~~the Chairperson~~ may issue ~~subpoenas a subpoena~~ requiring the attendance and testimony of ~~witnesses a witness,~~ or the production of documentary or other tangible evidence, or both. ~~Applications to compel witnesses who are not parties to the proceedings, or agents of such parties, to produce documentary evidence shall specify the books, papers, or documents desired.~~
- B. Specificity required. A party that applies for a subpoena to compel production of documentary or other tangible evidence shall ensure that the application specifically identifies the books, papers, documents, or other evidence desired.
- ~~B.C.~~ Service of ~~subpoenas a subpoena.~~ Subpoenas shall be personally served. Service of each subpoena is the responsibility of the party requesting the subpoena. A party that applies for a subpoena shall ensure that the subpoena is personally served. The person serving a subpoena shall provide proof of service by filing with the Board a certified statement of the date and manner of service and the name of the person served.
- D. Objection to a subpoena. A party or the person served with a subpoena who objects to the subpoena, or a portion of the subpoena, may file a written objection with the Board. The person filing an objection shall:
 1. File it within five days after service of the subpoena or at the beginning of the hearing, whichever occurs first; and
 2. Ensure that the objection states why the subpoena is unreasonable or oppressive or how the desired testimony or evidence may be obtained by an alternative method.

R12-5-2309. Motions

- A. Generally. ~~An application to~~ A party that requests an order or other relief from the Board ~~for an order or other relief shall be made by file~~ a motion. Unless ~~the motion is made during a hearing, it~~ a motion shall be made in writing at least 10 days before the hearing. ~~The motion shall state with particularity the grounds on which it is based and shall set forth~~ All motions, whether written or oral, shall state the factual and legal grounds supporting the motion and the relief or order sought. ~~Prehearing motions shall be considered on the written materials submitted by the parties, unless the Chairperson directs otherwise.~~
- B. Response to motion; reply. ~~Any~~ A party may file a response to a prehearing motion within five days after service of such the prehearing motion, and ~~The responding party shall serve the response on the moving party. The moving party shall have five days after service of a response to~~ may file a reply to that within five days after service of the response.
- C. Affidavits. ~~Motion documents which rely~~ If a party makes a motion that relies on facts that are neither ~~not~~ apparent in the record, and of which the Board cannot take ~~nor~~ subject to judicial ~~official~~ notice, the party shall be supported ~~support the motion by affidavit or other satisfactory evidence.~~
- D. Rulings on motions. ~~The Board shall consider a prehearing motion on the written materials submitted by the parties, unless the Chairperson directs otherwise.~~ The Chairperson may rule on a procedural motions; motion, but all other motions shall be ruled upon by the ~~The Board shall rule on a non-procedural motion.~~

R12-5-2310. Hearing

- A. Recording of hearing. ~~The Board shall ensure that a hearing record is made shall be by~~ tape-recorded recorder or stenographically recorded stenographer.
- B. Order of appearance. The Chairperson shall designate the order in which parties shall introduce their evidence.
- C. Improper ~~Conduct~~ conduct. ~~None~~ It is improper conduct to fail to comply with any an order of the Chairperson or ~~disruption of any to disrupt a hearing, shall be deemed improper~~ A person who engages in improper conduct and grounds for exclusion shall be excluded from the hearing if the Chairperson determines that exclusion is necessary to facilitate the hearing.

R12-5-2311. Evidence

- A. Generally. ~~All witnesses~~ A witness at a hearing shall testify under oath or affirmation. ~~All~~ To encourage a full and true disclosure of the facts, the Chairperson shall ensure that all parties shall have the right to present such oral or documentary evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts. The Chairperson shall ~~receive~~ admit evidence that the Chairperson determines is relevant, probative, and material evidence; and rule upon offers of proof; ~~and~~ The Chairperson shall exclude all evidence the Chairperson has determined to be ~~determines is~~ irrelevant, immaterial, or unduly repetitious.
- B. Evidence. The Chairperson may conduct a hearing in an informal manner ~~and~~ without adherence to the rules of evidence required in judicial proceedings.
- C. Official ~~Notice~~ notice. The Board may take official notice of any matter than might be judicially noticed by a superior court of ~~the state of~~ Arizona or any matter that is peculiarly within the knowledge of the Board as an expert body.

R12-5-2312. Objection to Decision by Chairperson

If any member of the Board objects to a decision of made by the Chairperson ~~pursuant to these rules~~ under this Article, the Board member may request that the Board vote on the matter in question and the Chairperson shall submit the matter to a vote of the ~~entire~~ Board.

R12-5-2313. Ex Parte Communications

- A. Prohibitions. ~~In any contested case before the Board, except to the extent required for disposition of ex parte matters as authorized by law or these rules of procedure:~~
 - 1. ~~No interested person outside the Board shall make or knowingly cause to be made to any Board member, employee, or consultant who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;~~
 - 2. ~~No Board member, employee, or consultant who is or may reasonable be expected to be involved in the decisional process of the proceeding shall make or knowingly cause to be made to any interested person outside the Board an ex parte communication relevant to the merits of the proceeding. A party shall not communicate, directly or indirectly, orally or in writing, with a member of the Board about any substantive issue relating to a proceeding before the Board unless:~~
 - 1. All parties are present, either personally or by an attorney;
 - 2. It is during a scheduled proceeding where an absent party fails to appear after proper notice; or
 - 3. It is by written motion with a copy to all parties.
- B. Record. ~~A Board member, employee, or consultant who is or may reasonably be expected to be involved in the decisional process of the proceeding, who receives, makes, or knowingly causes to be made a~~ an ex parte communication prohibited by this rule, shall place in the public record of the proceeding:

Notices of Proposed Rulemaking

1. ~~all such~~ A copy of the ex parte communication if the communication is written; or communications and all written responses to the communications and
 2. A summary of the substance of the ex parte communication if the communication is by oral testimony in the record state the substance of all such oral communications.
- C. Action by Board. Upon receipt of a an ex parte communication by a member of the Board made or knowingly caused to be made by a party in violation of this Section, the Board, to the extent consistent with the interests of justice ~~and the policy of the underlying statutes and rules~~, may require the party making the ex parte communication to show cause why his the party's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected ~~on account of such by the violation~~.
- ~~D. Effective time period. The provisions of this Section shall apply beginning at the time in which a notice of appeal is filed in a contested case unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of the person's acquisition of such knowledge.~~

R12-5-2314. Decision of the Board

- A. Time limit. Unless the parties stipulate otherwise, the Board shall render its final decision within 60 days ~~from the date of~~ after the hearing.
- B. Contents. The ~~Board's decision~~ Board shall ~~contain its~~ include findings of facts and conclusions of law, separately stated, ~~and in the Board's decision~~.

R12-5-2315. Rehearing or Review of Decision

- A. Generally. ~~Except as provided in subsection (F), any party in a contested case before the Board who is aggrieved by a decision rendered in such case may file with the Board, not later than 15 days after service of the decision, a written motion for rehearing or review of the decision, with supporting memorandum, specifying the particular grounds therefor. For purposes of this subsection, a decision shall be deemed to have been served when personally delivered or mailed by certified mail to the party at his last known residence or place of business. The Board may also grant a rehearing or review on its own initiative not later than 15 days after a written decision has been issued. Except as provided in subsection (G), within 30 days after service of notice of a final decision issued by the Board, a party may file with the Board a written motion for rehearing or review of the decision. A party is not required to file a motion for rehearing or review of a decision to exhaust the party's administrative remedies. A party may seek judicial review of the Board's final decision under A.R.S. Title 12, Chapter 7, Article 6.~~
- B. Amendment of motion; response; oral argument. ~~A party may amend a motion for rehearing or review under this rule may be amended at any time before it is ruled upon by the Board rules on the motion. A Another party may file a response may be filed to a motion for rehearing or review within 10 days after service of such the motion or amended motion by any other party. Motions and responses A party shall ensure that a motion or response is shall be supported by memoranda a memorandum discussing legal and factual issues. Oral argument may be requested by either party or by the Board.~~
- C. Grounds for rehearing or review. ~~A rehearing or review of the decision may be granted for any of the following causes materially affecting the moving party's rights: The Board may grant a rehearing or review for any of the following reasons materially affecting a party's rights:~~
1. Irregularity in the ~~administrative proceedings of the Board or its staff or the prevailing party~~, or any order or abuse of discretion ~~which that~~ deprived the moving party of a fair hearing;
 2. Misconduct of the Board, ~~or its staff~~, or the prevailing party;
 3. Accident or surprise ~~which that~~ could not have been prevented by ordinary prudence;
 4. Newly discovered material evidence ~~which that~~ could not, with reasonable diligence, have been discovered and produced at the ~~original~~ hearing;
 5. Error in the admission or rejection of evidence or other errors of law occurring at the ~~administrative hearing or during the progress of the proceedings~~;
 6. ~~That the~~ The findings of fact or decision is not justified by the evidence or is contrary to law.
- D. Affirmation or modification of decision; grant of rehearing or review. The Board may affirm or modify ~~the a~~ decision or grant a rehearing or review to all or ~~any some~~ of the parties on all or ~~part some~~ of the issues for any of the reasons ~~set forth listed in subsection (C), and~~. The Board shall specify with particularity the grounds for an order modifying a decision or granting a rehearing or review. If a rehearing or review is granted, the rehearing or review shall cover only the matters specified in the order.
- E. after giving notice and an opportunity to be heard, the Board may grant a rehearing for reasons not specified in a party's motion. An order modifying a decision or granting a rehearing shall specify the grounds for such order. Board initiated rehearing or review. Not later than 30 days after the date of a decision and after giving the parties notice and an opportunity to be heard, the Board may, on its own initiative, order a rehearing or review of the decision for any reason it might have granted a rehearing or review on motion of a party. The Board may grant a motion for rehearing or review, timely served, for a reason not stated in a motion. The Board shall specify with particularity the grounds on which a rehearing or review is granted under this subsection.

~~E.F.~~ Affidavits. When a party bases a motion for a rehearing ~~is based or review~~ upon affidavits, ~~they~~ the party shall be served ~~serve the affidavits~~ with the motion. An opposing party may, within ~~40~~ 15 days after ~~such~~ service, serve opposing affidavits. ~~Which This~~ This period may be extended for an additional period not exceeding 10 days by the Chairperson of the Board for a maximum 10 days for good cause ~~shown~~ or by written stipulation of the parties. Reply affidavits may be permitted.

~~F.G.~~ Emergencies. If in a particular decision the Board makes specific findings that the immediate effectiveness of such decision is necessary for the preservation of the public health and safety and that a rehearing or review of the decision is impracticable, unnecessary, or contrary to the public interest, the decision may be issued as a final decision without an opportunity for a rehearing or review. If a decision is issued as a final decision without an opportunity for rehearing, any application for judicial review of the decision shall be made within the time limits permitted for applications for judicial review of the Board's final decisions. Exigency. If, in a particular decision, the Board makes a specific finding that the immediate effectiveness of the decision is necessary for preservation of the public health, safety, or welfare and that a rehearing or review of the decision is impracticable, unnecessary, or contrary to the public interest, the decision may be issued as a final decision without an opportunity for a rehearing or review.

~~G.H.~~ Time Limits limits. ~~A~~ The Board shall consider a motion for review or rehearing ~~will be considered expeditiously and in no case more than within~~ 90 days after it ~~has been~~ is filed. If the Board grants a rehearing ~~is granted or review~~, the Board shall conduct the rehearing or review ~~it will be held expeditiously and in no case more than within~~ 90 days after issuing the order granting the rehearing ~~has been or review~~ issued.