

ARIZONA

GOVERNOR'S REGULATORY
REVIEW COUNCIL

Petitions/Appeals Training and Review of HB2599

Tuesday, July 26, 2022
10:00 a.m.

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Overview

1. Statutory Bases to Seek Council Relief (Petitions/Appeals)
2. Current Council Procedure for Most Common Petitions/Appeals
3. Changes to Council Procedure for Petitions/Appeals Resulting from HB2599

Statutory Bases to Seek Council Relief

- **A.R.S. § 41-1033(E): Appeal of an Agency's Decision on Petition**
 - “Any person may petition an agency to...[r]eview an existing agency practice or substantive policy statement that the petitioner alleges to constitute a rule.” *See* A.R.S. § 41-1033(A).
 - “If an agency rejects a petition pursuant to subsection C of this section, the petitioner has thirty days to appeal to the [C]ouncil to review whether the existing agency practice or substantive policy statement constitutes a rule.” *See* A.R.S. § 41-1033(E).

Statutory Bases to Seek Council Relief

- **A.R.S. § 41-1033(F): Petition Regarding Compliance with A.R.S. § 41-1030**
 - “A person may petition the council to request a review of a final rule based on the person's belief that the final rule does not meet the requirements prescribed in section 41-1030.”
 - A.R.S. § 41-1030:
 - (A) Rule was made and approved in substantial compliance with APA (e.g. notice, public participation, time and manner of rulemaking, etc.).
 - “A rules is invalid unless it is consistent with the statute, reasonably necessary to carry out the purpose of the statute...” (HB2599)
 - (C)(1) Agency shall not make a rule under a specific grant of rulemaking authority that exceeds the subject matter areas listed in the specific statute authorizing the rule.
 - (C)(2) Agency shall not make a rule under a general grant of rulemaking authority to supplement a more specific grant of rulemaking authority.
 - (C)(3) “An agency shall not make a rule that is not specifically authorized by statute.” (HB2599)

Statutory Bases to Seek Council Relief

- A.R.S. § 41-1033(G): Petition Alleging Regulation is Unauthorized or Unduly Burdensome
 - A person may petition the council to request a review of:
 - An existing agency practice;
 - Substantive policy statement;
 - Final rule; or
 - Regulatory licensing requirement
 - That the petitioner alleges:
 - Is not specifically authorized by statute
 - “Exceeds the agency’s statutory authority” (HB2599)
 - Is unduly burdensome; or
 - Is not demonstrated to be necessary to specifically fulfill a public health, safety or welfare concern.

Statutory Bases to Seek Council Relief

- A.R.S. § 41-1008(G): Petition for an Alternative Expiration Date
 - A fee that is established or increased by exempt rulemaking is effective for two years unless an extension is granted by the Council. *See* A.R.S. § 41-1008(E).
 - “A person...may petition the [C]ouncil to establish [an expiration] date that is different than the [expiration] date under subsection E of this section but no earlier than two years after the exempt rule is made.” *See* A.R.S. § 41-1008(G).

Statutory Bases to Seek Council Relief

- **A.R.S. § 41-1052(B): Early Review Petition Regarding a Proposed Rule**
 - A person may submit a petition requesting early review of a proposed rule, “if the proposed rule is alleged to violate any of the criteria prescribed in [A.R.S. § 41-1052(D)] and if the early petition is filed by a person who would be adversely impacted by the proposed rule.”
- **A.R.S. § 41-1055(E): Petition Regarding Need for an Economic Impact Statement**
 - “Before filing a proposed rule with the secretary of state, an agency may petition the [C]ouncil for a determination that the agency is not required to file an economic, small business and consumer impact statement.”

Statutory Bases to Seek Council Relief

- **A.R.S. § 41-1056(M): Petition to Include an Obsolete Rule in a 5YRR**
 - “A person who is regulated or could be regulated by an obsolete rule may petition the [C]ouncil to require an agency that has the obsolete rule to consider including the rule in the five-year report with a recommendation for repeal of the rule.”
- **A.R.S. § 41-1056(N): Petition to Reduce a Licensing Time-frame in a 5YRR**
 - “A person who is required to obtain or could be required to obtain a license may petition the [C]ouncil to require an agency to consider including a recommendation for reducing a licensing time frame in the five-year report.”

Statutory Bases to Seek Council Relief

- **A.R.S. § 41-1056.01(D): Appeal Regarding Economic Impact of a Rule**
 - A.R.S. § 41-1056.01(A): Within two years after a rule is finalized, a person who is or may be affected by the rule may file a written petition with an agency objecting to all or part of a rule on any of the following grounds:
 - The actual economic, small business or consumer impact significantly exceeded the impact estimated in the EIS submitted during the making of the rule.
 - The actual economic, small business or consumer impact was not estimated in the EIS submitted during the making of the rule and that actual impact imposes a significant burden on persons subject to the rule.
 - The agency did not select the alternative that imposes the least burden and costs to persons regulated by the rule, including paperwork and other compliance costs, necessary to achieve the underlying regulatory objective.
 - If a person petitions an agency under A.R.S. § 41-1056.01(A), the person may appeal the final decision of the agency regarding rulemaking to the Council within 30 days.

Statutory Bases to Seek Council Relief

- **A.R.S. § 41-1081(F): Appeal of a Delegation Agreement**
 - "Delegation agreement" means an agreement between an agency and a political subdivision that authorizes the political subdivision to exercise functions, powers or duties conferred on the delegating agency by a provision of law. *See* A.R.S. § 41-1001(8).
 - “For at least thirty days after publication of the notice of the proposed delegation agreement in the register, the agency shall provide persons the opportunity to submit in writing statements, arguments, data and views on the proposed delegation agreement and shall provide an opportunity for a public hearing if there is sufficient public interest.” *See* A.R.S. § 41-1081(C).
 - A person who objected to a proposed delegation agreement under A.R.S. § 41-1081(C) “may appeal to the [C]ouncil the delegating agency’s decision to enter into the delegation agreement within thirty days after the agency gives written notice to enter into the delegation agreement pursuant to [A.R.S. § 41-1081(E)]....”

Current Procedure for A.R.S. § 41-1033 Petitions/Appeals

- Initial Procedure for A.R.S. § 41-1033(E) Appeal:
 1. Appeal filed with Council after agency rejects petition pursuant to A.R.S. § 41-1033(C);
 2. Council staff notifies the affected agency head of receipt of the appeal by 5:00pm the following business day (R1-6-402(C));
 3. At least three (3) Council members must request that the appeal be placed on the agenda of the Council's next meeting for review within fourteen (14) days after filing;
 - If not, the appeal does not move forward;
 - If so, Chairperson sends written notice to person filing appeal and affected agency head within fourteen (14) days of the third Council member's request that the appeal will be placed on the agenda for the Council's next meeting (R1-6-402(D));
 - **HB2599 removes this initial requirement. Procedure is now consistent for all A.R.S. § 41-1033 petitions/appeals.**
 4. Appeal is placed on the agenda for the Council's next Study Session for review.

Current Procedure for A.R.S. § 41-1033 Petitions/Appeals

- A.R.S. § 41-1033(H):

1. “If the [C]ouncil receives information contained in...” an A.R.S. § 41-1033 petition/appeal and believes the allegations have merit and warrant a hearing after review at the Study Session, at least four (4) Council members must vote at the following Council Meeting to hold a hearing on the petition/appeal
 - If not, the petition/appeal does not move forward
 - HB2599 reduces Council member voting threshold to hold a hearing on a A.R.S. § 41-1033 petition/appeal from four (4) Council members to three (3)
 - HB2599 removes “contained in the petition” from A.R.S. § 41-1033(H)
 - Council need only “receive information” rather than a formal petition or appeal
2. Within ten (10) days after receipt of the fourth Council member’s request, Council staff will notify the agency that a hearing has been or will be placed on a future Council agenda.
3. Not later than thirty (30) days after receiving notice from Council staff, the agency shall submit a response to the petition/appeal to the Council for review.
 - A.R.S. § 41-1033(I): Council meeting at which hearing will occur shall not be before expiration of agency’s 30-day response period.

Current Procedure for A.R.S. § 41-1033 Petitions/Appeals

- A.R.S. § 41-1033(H):

4. Within ninety (90) days after receipt of the fourth Council member's request, the Council shall determine whether any of the following applies:
 - a. The agency practice or substantive policy statement constitutes a rule (A.R.S. § 41-1033(E));
 - If so, it is void (A.R.S. § 41-1033(J)).
 - b. The final rule meets the requirements prescribed in section 41-1030 (§ 41-1033(F));
 - If not, it is void (A.R.S. § 41-1033(J))
 - c. An existing agency practice, substantive policy statement, final rule or regulatory licensing requirement **exceeds the agency's statutory authority, is not specifically authorized by statute, or** meets the guidelines prescribed A.R.S. § 41-1033(G).
 - If not, the Council may modify, revise, or declare void (A.R.S. § 41-1033(J))

Current Procedure for A.R.S. § 41-1033 Petitions/Appeals

- Council Decision

- A.R.S. § 41-1033(K):

- “A council decision pursuant to this section shall include findings of fact and conclusions of law, separately stated. Conclusions of law shall specifically address the agency's authority to act consistent with section 41-1030.”

- When the Council votes on a petition/appeal it should hold two (2) separate votes:

1. A decision on the petition itself based on the criteria in A.R.S. § 41-1033(E), (F), or (G); and
2. A vote to direct Council staff to draft a Letter of Decision meeting the requirements of A.R.S. § 41-1033(K)

- Letter of Decision:

- Sent to agency and petitioner/appellant no later than seven (7) days after the Council makes a decision and includes the reason for, and date of, decision
- If the Council modifies, revises, or declares a rule void, letter will either outline the modifications/revisions or state that the rule is void to be submitted to the Secretary of State's Office pursuant to A.R.S. 41-1033(J)

Current Procedure for A.R.S. § 41-1033 Petitions/Appeals

- HB2599 adds new language to what is now A.R.S. § 41-1033(K):
 - “If an agency decides to further pursue a practice, substantive policy statement or regulatory licensing requirement that has been declared void or has been modified or revised by the Council, the agency may do so only pursuant to a new rulemaking.”
 - Provides clarity regarding procedures surrounding Council decisions on A.R.S. § 41-1033 petitions/appeals

Other Changes Resulting from HB2599

- Adds new section A.R.S. § 41-1039:
 - Codifies EO 2022-01 (“Rulemaking Moratorium”) into statute
- Codifies **five (5) double-spaced page limit** for all A.R.S. § 41-1033 petitions/appeals and agency responses
 - Was only a rule requirement pursuant to R1-6-402(B)
- Adds new subsection A.R.S. § 41-1033(I):
 - “At the hearing, the Council shall allocate the petitioner and the agency an equal amount of time for oral comments not including any time spent answering questions raised by Council members. The Council may also allocate time for members of the public who have an interest in the issue to provide oral comments.”