

TITLE 2 PUBLIC FINANCE
CHAPTER 61 STATE INDEBTEDNESS AND SECURITIES
PART 9 DETERMINATIONS OF THE STATE BOARD OF FINANCE

2.61.9.1 ISSUING AGENCY: State Board of Finance, 181 Bataan Memorial Building, Santa Fe, New Mexico.
[2.61.9.1 NMAC - N, 12/15/2015]

2.61.9.2 SCOPE:

A. Counties requesting a determination from the state board of finance that a proposed county industrial revenue bond project will not directly or substantially compete with an existing business or enterprise located within the boundaries of the county or within five (5) miles of the proposed project.

B. Commissions, departments, institutions, bureaus or agencies thereof and political subdivisions of the state requesting a determination from the board of greater public need when public property is taken.
[2.61.9.2 NMAC - N, 12/15/2015]

2.61.9.3 STATUTORY AUTHORITY:

A. Section 4-59-15 NMSA 1978 provides that if any representative of an existing business or enterprise located within the boundaries of the county or within five (5) miles of the proposed county industrial revenue bond project alleges, in a written complaint filed with the county governing body within fifteen (15) days of the meeting at which an ordinance or resolution authorizing the issuance of county industrial revenue bonds is adopted, that the proposed project would directly and substantially compete with such an existing business or enterprise located within the boundaries of the county or within five (5) miles of the proposed project, the bonds in connection with that project shall not be issued until the board has determined that the proposed project will not directly or substantially compete with an existing business or enterprise located within the boundaries of the county or within five (5) miles of the proposed project. The board shall conduct a hearing and make a determination within ninety (90) days of receiving a request for determination from the county. An existing business or enterprise for which county industrial revenues bonds were previously issued by the county shall not be entitled to file a complaint pursuant to Section 4-59-15 NMSA 1978.

B. As with other matters before the board, records submitted to the board pursuant to Section 4-59-15 NMSA 1978 and this rule are subject to inspection pursuant to the Inspection of Public Records Act, Sections 14-2-1 to -12 NMSA 1978, as amended, unless exempted from inspection pursuant to Subsection A of Section 14-2-1 NMSA 1978.

C. There is no provision in law placing the board or its procedures under the Administrative Procedures Act, Sections 12-8-1 to -25 NMSA 1978, as amended (see Section 12-8-23 NMSA 1978). As such, determinations by the board made pursuant to Sections 4-59-15 NMSA 1978 and 42-2-3 NMSA 1978 are not adjudicatory proceedings as described in Section 12-8-2 NMSA 1978 and may be conducted through administrative hearings, as described therein. See *State ex rel. King v. Lyons*, 2011-NMSC-004, 26, 149 N.M. 330.

D. Section 42-2-3 NMSA 1978 provides that the state may acquire, either temporarily or permanently, public or privately owned lands, real property or any interests therein, including water rights or any easements deemed necessary or desirable for present or future public road, street or highway purposes by gift, agreement, purchase, exchange, condemnation or otherwise. Such lands or interests in real property may be acquired in fee simple. The state may use the special alternative procedure to acquire lands or any interest therein for any public purpose for which the power of eminent domain may be properly exercised. And for purposes of Section 42-2-3 NMSA 1978, when state-owned property must be taken, the board shall first determine the greater public need, unless the state defendant in whom title is vested concedes that the purposes for which the property is sought to be taken is the greater public need.
[2.61.9.3 NMAC - N, 12/15/2015]

2.61.9.4 DURATION: Permanent.
[2.61.9.4 NMAC - N, 12/15/2015]

2.61.9.5 EFFECTIVE DATE: December 15, 2015, unless a later date is cited at the end of a section.
[2.61.9.5 NMAC - N, 12/15/2015]

2.61.9.6 OBJECTIVE:

A. The board finds that increased economic competition, wages, and demand for labor are positive outcomes of economic development incentives, including industrial revenue bonds. Therefore, the board will exercise its authority to determine whether direct or substantial competition exists in a manner that allows healthy competition to occur in the interest of economic development, but that avoids material negative impact to an existing business that files a complaint pursuant to Section 4-59-15 NMSA 1978.

B. This rule establishes criteria that will be considered and administrative hearing procedures that will be followed to ensure compliance with the mandates of Section 4-59-15 NMSA 1978 and Section 42-2-3 NMSA 1978.

[2.61.9.6 NMAC - N, 12/15/2015]

2.61.9.7 DEFINITIONS:

A. “Administrative hearing” means a public hearing for which notice and an opportunity to be heard are provided prior to the Board’s consideration and issuance of the determinations contemplated by this rule. Administrative hearings under this rule do not require that the parties thereto be afforded all the elements of a traditional judicial proceeding.

B. “Board” means the state board of finance.

C. “Ex parte communications” means any oral, written or electronic communications between one party (or its attorney) and any board member(s) that occur out of the presence of, or without the consent of an opposing party (or its attorney). Communications included in this definition, in addition to direct communications, include indirect communications as where a party requests or suggests to a non-party to contact a board member on any matter related to a pending determination. Ex parte communications also occur when individuals sympathetic to one party make oral, written or electronic communications to any board member out of the presence of, or without the consent of the opposing party (or his/her attorney) on any matter related to a pending determination.

D. “State” or “state defendant” includes, with respect to determinations of the greater public need described at 2.61.9.9 NMAC, any commission, department, institution, bureau or agency thereof as well as all political subdivisions of the state.

[2.61.9.7 NMAC - N, 12/15/2015]

2.61.9.8 PROCEDURE FOR BOARD DETERMINATION OF DIRECT OR SUBSTANTIAL COMPETITION PURSUANT TO THE COUNTY INDUSTRIAL REVENUE BOND ACT:

A. A county with which a complaint has been filed pursuant to Section 4-59-15 NMSA 1978 shall submit the following to the board to request the board to make a determination:

(1) a cover letter stating the action requested from the board;

(2) a copy of the complaint filed with the county;

(3) a map depicting the location of the existing business or enterprise and the proposed project that allows verification that the existing business or enterprise is located within the boundaries of the county or within five (5) miles of the proposed project;

(4) a certification by an authorized county official verifying that county industrial revenue bonds have not previously been issued by that county for the existing business or enterprise that filed the complaint, and noting whether the existing business or enterprise has ever in the past been denied the issuance of industrial revenue bonds;

(5) a copy of the final industrial revenue bond application submitted to the county by the new business; and

(6) a copy of any resolution or ordinance adopted by the county related to the proposed industrial revenue bonds.

B. Within seven (7) days of receipt of a request that the board make a determination pursuant to Section 4-59-15 NMSA 1978, the board’s staff will cause notice to be published in a newspaper of general circulation in the state and in a newspaper published in the county in which the complaint has been filed or in a neighboring county if no publishing newspaper exists in said county. The form of notice will be as follows, subject to any revision that may be necessary in the discretion of the board’s staff to ensure accuracy, coherency or to comply with instructions from the board:

“NOTICE OF PUBLIC HEARING: The State Board of Finance (SBOF) is accepting public comments from all interested persons related to a request by (county) for a determination pursuant to Section 4-59-15 NMSA 1978. This statute provides that if a written complaint is filed with a county governing body within fifteen (15) days of the meeting at which an ordinance or resolution authorizing the issuance of county industrial revenue bonds is adopted, alleging that the proposed project would directly or substantially compete with an existing business or enterprise

located within the county or within five (5) miles of the proposed project, the bonds shall not be issued until the SBOF has determined that the proposed project will not directly or substantially compete with the existing business or enterprise. The SBOF shall conduct an administrative hearing and make a determination within ninety (90) days of receiving a request for determination from the county. The request for determination was received by the SBOF from (county) on (date). Interested persons are invited to submit public comments that will assist the SBOF in making its determination by demonstrating that the proposed project to benefit (new business) either does or does not directly or substantially compete with existing business or enterprise (existing business or enterprise). Criteria that the SBOF may consider in making its determination are established in its rule governing this matter at Subsection F of 2.61.9.8 NMAC, and include information about business inputs and the impact on input costs, competition for sales and the impact on sales prices, information about the local labor market and workforce training costs, specific business models employed by the two (2) businesses, whether the businesses are part of a cluster economy, information on regional transportation, transmission, pipeline or other infrastructure constraints, information on the geographical distribution of sales for the existing business or enterprise and the new business, and any other information that an interested person believes will assist the SBOF in making its determination. (Insert description of any other information the board solicits in relation to a particular request for determination.) Public comments must be submitted in writing to Director, 181 Bataan Memorial Building, 407 Galisteo Street, Santa Fe, NM 87501, and shall not be submitted directly to SBOF members. Initial public comments should be submitted by (first public comment deadline). Initial public comments received by (first public comment deadline) will be published on the SBOF website, (website address). In response to public comments published on the SBOF website, additional public comments may be submitted by (second public comment deadline). Copies of the request for determination and the written complaint are available in room 181, Bataan Memorial Building, Santa Fe, NM 87501 and on the SBOF website. It is anticipated that the SBOF will schedule a public administrative hearing on this issue, which is expected to take place (meeting date) subject to notice requirements established in the SBOF's Open Meetings Resolution, SBOF Policy (policy number), to hear presentations from (county), (existing business or enterprise), and (new business). Following this administrative hearing, the SBOF may deliberate and make a determination pursuant to Section 4-59-15 NMSA 1978 or may take action at a later date. The SBOF in its discretion may require persons participating in administrative hearings related to this issue to do so under oath. The SBOF may employ experts to assist it in making its determination. Interested persons are instructed to refrain from communicating directly with board members concerning matters related to the request for determination. All commentary, either written or oral, shall be submitted to the board via the process for submitting written public comment described in this notice of public comment period, or through comment or testimony received at the administrative hearing.”

C. At its next regular meeting or at a special meeting called for this purpose following receipt of a complaint, the board chairperson will appoint a member of the board as hearing officer to preside over administrative hearings related to the request for determination. The hearing officer will be delegated the authority to consider and dispose of non-dispositive motions, respond to procedural questions that arise between the board's meetings, to take all measures necessary for maintenance of order and for the efficient, fair and impartial consideration of issues arising before and during administrative hearings including but not limited to keeping the administrative hearing on schedule, taking or admitting written public comment, and making such orders as may be necessary to preserve decorum and protect the orderly administrative hearing process.

D. At a regular or special meeting following the conclusion of the second public comment deadline established in the notice of public comment period, the board will hear presentations from the county, the existing business or enterprise, and the new business. By a preponderance of the evidence, the existing business or enterprise shall have the burden of proving that the proposed project will directly and substantially compete with the existing business. Following these presentations, the board may ask questions of all persons appearing before it to elicit information it deems necessary to make its determination. The board may then deliberate, make a determination at that time, or make a determination at a later date.

E. The board will make its determination at a regular or special meeting within 90 days of receiving the request for determination. Upon announcing its determination, the hearing officer will direct the board's staff and counsel to draft a written determination containing findings of fact and citations to the administrative hearing record. The written determination will be approved by the board at the next regular or special meeting, which may occur more than ninety (90) days after the board's receipt of the written complaint from the county.

F. In making its determination, the board may consider the following information contained in the administrative hearing record as a result of written public comment and verbal testimony, as well as any other criteria the board deems relevant in its sole discretion:

- (1) competition for business inputs such as raw materials, manufacturing technology, capital and labor, including whether any increased competition for business inputs is likely to be met by increased supply for business inputs without generating a substantial increase in the costs of business inputs for the existing business or enterprise;
- (2) competition for sales, including whether any increased competition for sales will likely be absorbed in the market without a substantial reduction of prices received by the existing business or enterprise;
- (3) information about the local labor market, including the county unemployment rate, the size of the existing workforce relative to the employment levels of the existing business or enterprise and the new business, training costs of the workforce at the existing business or enterprise and the new business, and any factors that may suggest whether or not labor is likely to relocate to the area if labor demand increases as a result of the new business;
- (4) specific business models employed by the two (2) businesses and commentary on whether the two (2) businesses are likely to compete directly or substantially either in a geographic sense or in providing goods or services in the same specific market segments;
- (5) whether the new business and existing business are part of a cluster economy, in which a group of interconnected firms benefit from co-location;
- (6) information on regional transportation, transmission, pipeline, or other infrastructure constraints; and
- (7) information on the geographical distribution of sales for the existing business or enterprise and the new business.

[2.61.9.8 NMAC - N, 12/15/2015]

2.61.9.9 PROCEDURE FOR BOARD DETERMINATION OF GREATER PUBLIC NEED

RELATED TO SPECIAL ALTERNATIVE CONDEMNATION PROCEDURE: When state-owned property must be taken and the state defendant in whom title is vested does not concede that the purpose for which the property is sought is the greater public need, the state entity that seeks to take the property may submit the following to the board to request the board to make a determination:

- A.** A submission from the state entity seeking to take the property that includes:
 - (1) a cover letter stating the action requested from the board;
 - (2) a description of its public need for the property, including copies of any master planning documents that require the property to be taken;
 - (3) a description of the selection process it used to identify the property and describing its efforts to identify other property that would be suitable to meet the public need;
 - (4) a description of efforts it has made with the state defendant to attempt to resolve the dispute prior to seeking a determination from the board;
 - (5) documentation to allow verification of the legal description of the property; and
 - (6) a resolution of the state entity's governing body requesting the board's determination, or a letter from the head of the state entity if such state entity has no governing body.
- B.** A submission from the state defendant, through the state entity seeking to take the property that includes the following items:
 - (1) a resolution of the state defendant's governing body stating that it does not concede that the purpose for which the property is sought is the greater public need, or a letter from the head of the state defendant if such state defendant has no governing body;
 - (2) a description of its public need for the property, including copies of any master planning documents that require the property to be retained; and
 - (3) a description of its use and maintenance of the property during the past five (5) years.
- C.** A state defendant that fails to submit these requirements through the state entity seeking to take the property within a reasonable timeframe, in the board's sole discretion, may be found to be nonresponsive and, as a result, the board may make its determination of greater public need in favor of the state entity seeking to take the property.
- D.** At a regular or special meeting called for this purpose, the board will hear presentations from the state entity seeking to take the property and the state defendant. Following these presentations, the board may ask questions of all persons appearing before it to elicit information it deems necessary to make its determination. The board may then deliberate, make a determination at that time, or make a determination at a later date.
- E.** The board will announce its determination at a regular or special meeting. Upon announcing its determination, the board will direct the board's staff and counsel to draft a written determination containing findings

of fact and citations to the hearing record. The written determination will be approved by the board at a subsequent regular or special meeting.

F. In making its determination, the board may consider the following information contained in the hearing record as a result of written public comment and verbal testimony, as well as any other criteria the board deems relevant in its sole discretion:

(1) the competing public needs for the property demonstrated by the state entity seeking to take the property and by the state defendant, with primary consideration given to public needs it finds are substantially related to public peace, health, safety, welfare, and secondary consideration given to public needs it finds are substantially related to economic development, recreation, speculative, and undefined use;

(2) whether the state entity seeking to take the property made reasonable efforts to identify other properties that would be suitable to meet the public need; and

(3) whether the state defendant has actively used or maintained the property for any purpose during the past five (5) years.

[2.61.9.9 NMAC - N, 12/15/2015]

2.61.9.10 EX PARTE COMMUNICATIONS PROHIBITED: No party or its attorney shall engage in ex parte communications regarding a pending determination with any hearing officer appointed to preside over an administrative hearing. Likewise, a hearing officer shall not engage in ex parte communications on any matter to which that hearing officer has been appointed with any party or its attorney. However, there may be occasions when brief ex parte communications are warranted, for example, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits. A summary of what was communicated shall be promptly disclosed to the individual who did not participate in the ex parte communication. Board members and staff shall not engage in any ex parte communications on any matter or for any reason related to a pending determination with any party, attorney or interested person.

[2.61.9.10 NMAC - N, 12/15/2015]

HISTORY OF 2.61.9 NMAC: [RESERVED]