

# Collection of Guiding Cases & Authorities

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by the  
Arizona Registrar of Contractors

## Notice Required by A.R.S. § 41-1091

This substantive policy statement is advisory only. A substantive policy statement does not include internal procedural documents that only affect the internal procedures of the agency and does not impose additional requirements or penalties on regulated parties or include confidential information or rules made in accordance with the Arizona administrative procedure act. If you believe that this substantive policy statement does impose additional requirements or penalties on regulated parties you may petition the agency under section 41-1033, Arizona Revised Statutes, for a review of the statement.

# Introduction

## The Registrar & The Office of Administrative Hearings

Arizona law requires the Registrar to send its cases to the Office of Administrative Hearings. At the Office of Administrative Hearings, an Administrative Law Judge hears the Registrar's cases. After a case is heard, the Administrative Law Judge sends a recommended decision back to the Registrar.

## The Recommended Decision & The Final Administrative Decision

After receiving the Administrative Law Judge's recommended decision, the Registrar may do three things: accept it, modify it, or reject it. The ultimate product is called the Registrar's final administrative decision.<sup>1</sup>

Even though the Administrative Law Judge's recommended decision is not final, the recommend decision contains facts, legal statements, and insights that shape the Registrar's final administrative decision.

## Access to Recommended Decisions & Their Principles and Insights

Past recommended decisions from the Office of Administrative Hearings are useful. They contain principles and insights that show how the Registrar handles its administrative cases.

Members of the public can access copies of the recommended decisions through a web portal maintained by the Office of Administrative Hearings.<sup>2</sup>

The Registrar, however, wants to make it as simple as possible for the public to access not just the text of the recommended decisions, but the principles and insights contained in them. And so the Registrar provides this Collection of Guiding Cases and Authorities.

## The Collection of Guiding Cases and Authorities

In this Collection of Guiding Cases and Authorities, you will find principles and materials drawn directly from the Administrative Law Judges' recommended decisions.

Additionally, the Collection contains principles drawn from other respected legal authorities. Those principles guide the Registrar and the Administrative Law Judges who hear the Registrar's cases.

## The Collection is Published as a Substantive Policy Statement

The Collection of Guiding Cases and Authorities is published on the Registrar's website as a substantive policy statement. A substantive policy statement is:

a written expression which informs the general public of an agency's current approach to, or opinion of, the requirements of the federal or state constitution, federal or state statute, administrative rule or regulation, or final judgment of a court of competent jurisdiction,

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<sup>1</sup> Anyone wishing to understand the statutory basis of this process should read the Uniform Administrative Hearing Procedures Act in Title 41 of the Arizona Revised Statutes, especially A.R.S. § 41-1092.07 and A.R.S. § 41-1092.08.

<sup>2</sup> The address for the web portal is <http://www.azoah.com/portal.html>.

including, where appropriate, the agency's current practice, procedure or method of action based upon that approach or opinion.<sup>3</sup>

Under A.R.S. § 41-1001(22), a substantive policy statement is not a law or a binding rule; a substantive policy statement “is advisory only.”

### Usefulness of the Collection

Because the Collection of Guiding Cases and Authorities contains principles and insights that guide the Registrar and the Administrative Law Judges, the Collection can also guide members of the public.

By gathering and setting forth past cases and relevant authorities, the Collection offers insight and guidance to anyone involved in one of the Registrar’s cases.

The Collection also offers insight about how the Registrar might handle a case during its investigation. In an investigation, the Registrar has “sole discretion” to issue a citation or close a case.<sup>4</sup> The Registrar exercises that discretion in light of the principles and authorities contained in this Collection.

### Contents of the Collection

Currently, the Collection of Guiding Cases and Authorities covers the following topics:

- Abuse of the Administrative Process
- Acceptance of the Surface
- Cooperation
- Denial of Access
- Notice and Opportunity to Cure
- Preponderance of the Evidence
- Professionalism

### Evolution of the Collection

The Collection of Guiding Cases and Authorities is not a static document. Over time, the Collection will cover more topics. It will also express the principles and insights it contains with increasing refinement.

The Registrar will publish updates to the Collection on its website. Because the Collection is a substantive policy statement, the Registrar will file those updates with the Secretary of State, as required by A.R.S. § 41-1091(A).

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<sup>3</sup> This is the definition contained in A.R.S. § 41-1001(22).

<sup>4</sup> The Registrar’s discretionary authority comes from A.R.S. § 32-1155(A).

## Collection of Guiding Cases & Authorities

### Abuse of the Administrative Process

- “The Registrar of Contractors relies on complaints to carry out some of the mandates of the office. When anyone attempts to use the complaint process inappropriately, it undermines the Registrar’s ability to perform the duties that the citizens of Arizona depend on to ensure that the buildings in which they live, work, and play are safe. When that process is compromised, it is appropriate to dismiss the complaint in its entirety.”

Source: *Reeks v. Superscape, LLC*, No. 2016A-594 (ALJ Decision at 1:19–24).

### Acceptance of the Surface

- “As a general principle in construction, a subcontractor who performs work on top of a surface prepared by another accepts the surface. The subcontractor should have inspected the surface for any flaws or defects that would affect the work he proposes before performing the work. If he found the surface to be unacceptable, he should have called any defects to the owner’s or general contractor’s attention so that the owner can choose whether to pay for the defective surface to be corrected or if the owner is not willing to pay to correct the surface, the contractor may obtain an explicit warranty disclaimer.”

Source: *Deeb v. Checks Epoxy*, No. 2014A-3258 (ALJ Decision at 11:11–19).

The same Administrative Law Judge Decision elaborates in an extensive footnote:

- “No Arizona authority addresses the Registrar’s policy that a subsequent contractor who accepts a surface prepared by an earlier contractor also accepts full responsibility for the outcome. The policy is supported by case law from other jurisdictions. *See generally* cases cited at “Duty of Contractor to Warn Owner of Defects in Subsurface Conditions,” 73 A.L.R.3d 1213 (1976). A contractor who knew or should have known of a defect in the surface does not perform construction in a workmanlike manner if the contractor fails to notify the owner of the defect and the construction later fails due to the defective surface. *See, e.g., Parker v. Thornton*, 596 So. 2d 854, 858 (Miss. 1992); *Lewis v. Anchorage Asphalt Paving Co.*, 535 P.2d 1188, 1199 (Alaska 1975). The principle is based on common sense and a need for fair dealings between contractors and property owners: For the requirements of public order and the obligation implicit in every contract that the work will be done in a good and workmanlike manner would compel us to reject a contention that an undertaker is not responsible for building upon a site which he knows to be defective. In such a case, the barest standards of care would require him to bring the defect to the attention of the owner before proceeding. The owner would then have an opportunity to make the indicated adjustment in the contract to provide against

the defective soil condition of which he had no prior knowledge. . . . *Wurst v. Pruyn*, 202 So. 2d 268, 271-72 (La. 1967) (citation omitted).”

Source: *Deeb v. Checks Epoxy*, No. 2014-3258 (ALJ Decision at 11:20–30).

### Cooperation

- “American jurisprudence implies in all contracts the obligation to cooperate in the performance of the contract and not to delay, hinder, or interfere with the performance of other parties. Over the years, owners have been found on numerous occasions to have breached their implied duty of cooperation in the context of construction contracts. Such instances have included failure to provide timely site access, failure to inspect the work or complete other work necessary to allow the contractor to proceed, and failure to reasonably schedule and coordinate owner-controlled work.”

Source: Philip L. Bruner and Patrick J. O’Connor, Jr., *Bruner & O’Connor on Construction Law*, § 12:55 (West Group 2002) (citing *inter alia* Restatement (Second) of Contracts §§ 212 to 223); *id.* § 9:99 (noting subsidiary duties, including “an ‘implied duty’ to make timely decisions” and “an ‘implied duty’ to exercise inspection and approval rights reasonably”).

### Denial of Access

- “Complainants are not prevented from refusing access because of their right to exclude others from their homes and it would not be appropriate to require contractors to trespass. [But it] is recognized that lack of access impinges on one party’s ability to defend itself and utilizing the benefits of the Registrar of Contractors is a privilege. Therefore, it is recommended that the Registrar dismiss complaints in which access is denied.”

Source: *BB Ewing Property Management v. Khart Management LLC* No. 2015-1168(ALJ Dec. 15:19–25).

### Notice and Opportunity to Cure

- “A breach cannot be said to be material if it is curable, notice to cure is given, and prompt steps are taken to cure or to offer assurances of cure. The right of a breaching party to be given an opportunity to cure its own material breach is an ancient equitable principle.... Cure is relevant to materiality by virtue of its focus on elimination of the breach and its implied assurance of intent to tender adequate future performance.... Providing a cure notice of curable breaches deemed by the nonbreaching party to be sufficiently material to warrant termination for cause is a fundamental prerequisite to termination.... Unless expressly waived, the right to cure is implied in every contract as a matter of law.”

Source: Philip L. Bruner and Patrick J. O’Connor, Jr., *Bruner & O’Connor on Construction Law*, § 18:15 (West Group 2002).

## Preponderance of the Evidence

- “A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not.”

Source: *Evans v. Creative Finishing Services*, No. 2016A-1138-ROC (ALJ Decision 7:1-7) (quoting Morris K. Udall, *Arizona Law of Evidence* § 5 (1960)).

- A preponderance of the evidence is “[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.”

Source: *Evans v. Creative Finishing Services*, No. 2016A-1138-ROC (ALJ Decision 7:1-7) (Black’s Law Dictionary at 1220 (8th ed. 1999)).

## Professionalism

- A professional licensed contractor must comply with the workmanship standards, and if it cannot comply with the standards, it must not undertake the job.

Source: *Evans v. Creative Finishing Services*, No. 2016A-1138-ROC (ALJ Decision 7:13-17).

- Licensed contractors are expected to have sufficient professionalism to deal with difficult clients and situations.

Source: *Evans v. Creative Finishing Services*, No. 2016A-1138-ROC (ALJ Decision 7:24-26).