

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE METROPOLITAN COUNCIL

In the Matter of the Proposed  
Rules Governing Metropolitan  
Significance Reviews.

REPORT OF THE  
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Phyllis A. Reha on September 29, 1988 at 1:00 P.M. at the Mears Park Centre Building, Conference Room 2A, 230 East Fifth Street, St. Paul, Minnesota, and continued until all interested persons present had an opportunity to participate by asking questions and presenting oral and written comments. A second hearing was arranged for at the same location and date to commence at 7:00 P.M. No interested participants attended the second hearing so no testimony was taken.

The Metropolitan Council is not an agency of the state having statewide jurisdiction pursuant to Minn. Stat. § 14.02, subd. 2, but is a creation of the State Legislature and performs legislative and administrative functions relating to the planning and development of the Metropolitan area pursuant to Minn. Stat. § 473.122. Although the Administrative Procedure Act (APA) is not generally applicable to the Metropolitan Council, Minn. Stat. § 473.174, subd. 5 requires rules or any major alteration or amendment thereto to be developed and promulgated by the Council in accordance with the provisions of the APA, Chapter 14, and rules pursuant thereto.

This rulemaking proceeding was held to determine whether the Metropolitan Council fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of rules, whether the rules are needed and reasonable, and whether any modifications of the rules proposed by the Metropolitan Council after initial publication constitute impermissible, substantial changes.

Representing the staff of the Metropolitan Council (Council) was Ms. Barbara Sennis, Mears Park Centre, 230 East Fifth Street, St. Paul, Minnesota 55101. Representing the Metropolitan and Community Development Committee of the Metropolitan Council was Ms. Joan Campbell, Metropolitan Council member.

Nine (9) persons signed the hearing register, and three (3) public witnesses appeared and spoke at the hearing. All persons desiring to testify were given an opportunity to do so. The record remained open for the submission of written comments through October 14, 1988. After the expiration of the initial comment period, the record remained open for an additional three (3) working days through Wednesday, October 19, 1988 for responsive comments, at which time the hearing record closed for all purposes.

This Report must be available for review to all affected individuals upon request for at least five working days before the Metropolitan Council takes

any further action on the rule(s). The Council may then adopt a final rule or modify or withdraw its proposed rule. If the Council makes changes in the rule other than those recommended in this report, it must submit the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the Council must submit it to the Revisor of Statutes for a review of the form of the rule. The Council must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

#### FINDINGS OF FACT

##### Procedural Requirements.

1. On August 4, 1988, the Metropolitan Council filed the following documents with the Chief Administrative Law Judge:

- (a) A copy of the proposed rules with a certification of approval as to form by the Revisor of Statutes.
- (b) The Order for Hearing accompanied by a document of authority.
- (c) The proposed Notice of Hearing.
- (d) The Statement of Need and Reasonableness. (SONAR).
- (e) A statement of the number of persons expected to attend the hearing and the estimated length of the agency's presentation.

2. On Monday, August 22, 1988, a Notice of Hearing, a brief description of the proposed changes and the location of the SONAR were published at 13 State Register 395 through 397.

3. On September 2, 1988, the Metropolitan Council filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing as mailed.
- (b) The Notice of Hearing (with attachment of an overview of the proposed rules) sent to persons and associations pursuant to the discretionary notice provision of Minn. Stat. § 14.14, subd. 1a.
- (c) The Metropolitan Council's certification that its mailing list was accurate and complete.
- (d) The Affidavit of Mailing the Notice to all persons on the Metropolitan Council's list.
- (e) An Affidavit of Additional Discretionary Notice given pursuant to Minn. Stat. § 14.14, subd. 1a.
- (f) Photocopies of all materials received by the Metropolitan Council following a Notice of Intent to Solicit Outside Opinion published at 12 State Register 829 on October 19, 1987, and a copy of the pages of the State Register on which the Notice was published.
- (g) A statement of the names of Metropolitan Council personnel who will represent the Metropolitan Council at the hearing and a statement that there were no other witnesses solicited by the Council to appear on its behalf.
- (h) A statement that there was no petition requesting rule hearing.
- (i) A photocopy of the pages of the State Register in which the Notice of Hearing was published on August 22, 1988 at 13 State Register 395.

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of hearing.

3. The period for submission of initial written comments and statements remained open through October 14, 1988, the period having been extended to ten (10) calendar days following the close of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1, an additional three business days were allowed for the filing of responsive comments. The record therefore closed on October 19, 1988. Three public exhibits were received prior to the close of the initial comment period. The Council submitted its written comments on October 14, 1988.

#### Fiscal Note.

4. Minn. Stat. § 14.11, subd. 1 provides that if the adoption of a rule by an agency will require the expenditure of public monies by local public bodies, the agency shall provide a reasonable estimate of the total cost to all local public bodies in the state to implement the rule for the two years immediately following the adoption of the rule if the estimated cost exceeds \$100,000 in either of the two years. In its SONAR, the Metropolitan Council states that when participating in a Metropolitan Significance Review, the Council absorbs most of the cost, the expenditure of public monies is at the local government's discretion and is not mandated by rule. Accordingly, a Fiscal Note is not required in this case.

#### Small Business Considerations.

5. Minn. Stat. § 14.115 contains special notice provisions when the agency's rule may affect small businesses. The only plausible effect the proposed rules may have on small business is when a small business is a project sponsor. However, it is highly improbable that a small business would propose a project that would have a potential impact on one of the Metropolitan systems, or on a publicly financed facility, or a substantial effect on existing or planned use of development within a local governmental unit other than the local unit in which the proposed project is located. The agency has complied with Minn. Stat. § 14.115.

#### Effects on Agricultural Land.

6. Minn. Stat. § 14.11, subd. 2, provides that if the proposed rules may have a direct and substantial adverse effect on agricultural land, the agency shall provide a written statement to that effect. In its SONAR, the Metropolitan Council states that the proposed rules will not have a direct or substantial adverse impact on agricultural land. To the contrary, within the framework of the Metropolitan Significance rule is an evaluation of the land use impact of a proposed development. The current rule lists criteria which support agricultural usage. This criteria has been revised in the proposed rule and can be found in part 5800.0040, subp. 4(B). The changes to the proposed rules will not affect the Council's support for agricultural land. The agency has complied with Minn. Stat. § 14.11, subd. 2.

#### Fees Imposed by Rules.

7. The proposed rules do not fix any fees nor does the statute

authorizing promulgation of the rules require that any fees be fixed. Therefore, no approval from the Commissioner of Finance is required.

#### Statutory Authority.

8. Minn. Stat. § 473.173 requires that the Metropolitan Council put into effect rules establishing standards, guidelines and procedures for determining whether any proposed project is of Metropolitan Significance. Section 743.173, subd. 5, provides the Metropolitan Council with the statutory authority to revise its rules in accordance with the Administrative Procedure Act, Ch. 14, and rules pursuant thereto. The broad purpose of the Metropolitan Significance rules is to promote the orderly and economic development, public and private, of the Metropolitan area. Subdivision 6 also mandates the Metropolitan Council and the Advisory Metropolitan Land Use Committee to review and assess the rules following their effective date at least every two years thereafter. The Metropolitan Council has the statutory authority to promulgate revisions to rules governing Metropolitan Significance reviews.

#### Nature of and Need for the Proposed Rules.

9. The Metropolitan Council's current rules regarding Metropolitan Significance Reviews are ten years old. During that 10-year period, the Council has reviewed and approved many local plans under the Metropolitan Land Planning Act. The Council has refined its hearing procedure for adopting and revising policy plans, and it has revised all of its policy plans for Metropolitan systems. These changes have contributed to the need to revise the current rules. Recent use of the rules has led the Metropolitan Council and participating communities to conclude that the rules need revision.

The question of whether a rule is needed usually focuses on whether a problem exists that requires regulation. See, Beck, Bakken and Muck, Minnesota Administrative Procedure, 393 (1987). In order to satisfy the need requirement, the Council must make a presentation of facts that demonstrate the existence of a problem requiring some administrative attention. The Metropolitan Council's objective in the promulgation of the revised rules is the improvement of the existing system for Metropolitan Significance Reviews. The relationship of each change to this overall objective is discussed in the Council's SONAR. The proposed rules are needed to better implement the legislative mandate of Minn. Stat. § 473.173 which provides: "The purpose of these rules shall be to promote the orderly and economic development, public and private, of the Metropolitan area.

10. The original rules, adopted in 1978 included language and concepts which were outdated. Because amending the current rules would require so many strikes and underlining, the Metropolitan Council determined that it would be more appropriate to repeal the existing rules and propose an entirely different set of rules. In so doing, many of the same provisions and concepts have been retained. In its SONAR and at the hearing, the Metropolitan Council only addressed provisions which were revisions of the existing rules. The provisions which were not changed had already been scrutinized for need and reasonableness when the rules were first adopted pursuant to the Minnesota Administrative Procedure Act rulemaking process and, therefore, their need and reasonableness need not be re-established. See, Minn. Rule 1400.0500, subp. 1. The Administrative Law Judge finds that this is an appropriate

interpretation and, therefore, this rulemaking Report will only address those provisions which have been revised in language and concept.

11. This rule revision process commenced over a year prior to the Notice of the rulemaking proceeding. The Metropolitan Council elicited input from local governments, agencies and interested members of the public who deal with the Metropolitan Council. This solicitation occurred through direct letters of invitation to comment on the proposed changes, published solicitation of outside opinion, and the creation of an advisory committee comprised of interested non-Council persons. Throughout the process of revising this rule, close cooperation occurred between the advisory committee and the Council.

#### Reasonableness of the Proposed Rules.

12. The question of whether a rule is reasonable focuses on whether it has a rational basis. The Minnesota Court of Appeals has held a rule to be reasonable if it is rationally related to the end sought to be achieved by the statute. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 440 (Minn.App. 1985); Blocker Outdoor Advertising Company v. Minnesota Department of Transportation, 347 N.W.2d 88, 91 (Minn.App. 1984). The Supreme Court of Minnesota has further defined the burden by requiring that the agency "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984).

In support of the adoption of the proposed changes, the Metropolitan Council has prepared a detailed Statement of Need and Reasonableness. The Council relied primarily on its SONAR as its affirmative presentation at the hearing. The comments made at the public hearing and in written comments following the hearing supplemented the agency's presentation. As a result of the Council's conscientious efforts to solicit opinions from the groups most affected by the proposed rules, most of the comments during the public hearing process were favorable to the proposed changes.

13. This Report will not discuss each proposed change. It will focus on those provisions that the Administrative Law Judge or members of the public questioned. Persons or groups who do not find their particular comments in this Report should know that the Administrative Law Judge has read and considered each and every suggestion. A part not commented on in this Report is hereby found to be needed and reasonable and does not exceed the statutory authority for the promulgation thereof. It is further found that on those parts not commented on, the Metropolitan Council has documented its need and reasonableness with an affirmative presentation of facts.

#### PART-BY-PART ANALYSIS

##### Part 5800.0020. Definitions.

14. Part 5800.0020, subp. 24. Policy Plan or Guide Chapter defines the source an interested party could reference to determine the policies which shape the Council's recommendations regarding a finding of Metropolitan Significance. In this definition, there are references by incorporation to the major policy standards upon which the Council's decisions are based. At the hearing, Floyd Olson, Deputy City Attorney for the City of Minneapolis,

commented that policy plans should not have the force and effect of law, and that the rule improperly incorporates by reference. Mr. Olson suggested that it is a potential violation of due process to give ever-changing policy plans the effect of suspending large projects, especially if the policy plans are not specifically stated in the proposed rules. He further suggested that incorporation by reference necessitated the extra effort of researching other sources for the exact standards the Council planned to employ rather than having the standard easily accessible within the rules.

15. The plans or chapters proposed by the Metropolitan Council to be incorporated by reference already have the force and effect of law pursuant to Minn. Stat. § 473.145 relating to the Metropolitan Development Guide; Minn. Stat. § 473.146 relating to policy plans for Metropolitan agencies; Minn. Stat. § 473.147 relating to the recreation open space development guide/policy plan; Minn. Stat. § 473.149 relating to the solid waste management development guide/policy plan.

16. Pursuant to Minn. Stat. § 14.07, subd. 4, an agency may incorporate by reference in its rules publications and documents which are determined by the Revisor of Statutes to be conveniently available to the public. The Revisor of Statutes has determined that the plans or chapters proposed to be incorporated by reference are available to the public. In the proposed rule, the Council has clearly identified the material to be incorporated and has stated that the material is subject to frequent change. It also provides a statement of availability. The plans and chapters are available in the Minitex interlibrary loan system available at the public libraries. They are easily accessible to the affected public.

17. It is appropriate that the plans or chapters are incorporated by reference in the proposed rules because they are subject to frequent change. The Council states in its SONAR that fluidity and modification of the standards is necessary to reflect the current needs and concerns of the affected communities involved in Metropolitan Significance Reviews. Fixed standards would present inflexible criteria which would not reflect the community's needs over time. Inclusion of the verbatim text of the plans or chapters would be not only voluminous, but would require unreasonably frequent rule amendment.

18. The last sentence of part 5800.0020, subpart 24 currently provides as follows: "The policy plans or guide chapters referenced in any Metropolitan Significance Review will be those in effect at the time of the review." The Association of Metropolitan Municipalities (AMM) suggests that the language as written allows ambiguity in interpretation with respect to the "time of the review." The AMM suggests that the language of this rule should assure that the policies used in any review would not change during the course of a review, even if the Council adopted a new plan or guide chapter prior to the time the review is completed.

In response to the AMM's suggestion, the Metropolitan Council has proposed to add the following language to the definition of "policy plan or guide chapter":

The policy plans or guide chapters referenced in any Metropolitan Significance Review will be those in effect at the time the review is initiated. (Underlined language denotes proposed change).

The Administrative Law Judge finds that the Metropolitan Council's proposed revision of this sentence is necessary and reasonable as it clarifies the Metropolitan Council's intent that the policy plans or guide chapters referenced will be those in effect at the time the review is initiated. Adoption of this proposed change is not a substantial change from the rules as originally published in the State Register.

The entire rule part is found to be needed and reasonable as amended.

Part 5800.0040. Criteria for Determining Metropolitan Significance.

19. This proposed rule part contains three types of criteria for determining Metropolitan Significance: (1) those that apply when a proposed project affects a Metropolitan system; (2) those that apply when a project is publicly subsidized; and (3) those that apply when a project affects a local governmental unit. The criteria addressing publicly subsidized projects is new to the revised rules. The other two sets of criteria are found in the current rules, although both have been revised.

20. During the rule drafting process, the area of criteria for determining Metropolitan Significance was the most controversial topic. At the hearing, the Metropolitan Council outlined how it involved the area communities and interested agencies and persons in an advisory function to assist in the drafting of this section. Numerous meetings were held and many drafts of this section were critiqued by the advisory group before a satisfactory version of this section was proposed. In the proposed revisions, the system impact standards in the plan amendment guidelines have been substituted for the current physical system effects. This change not only introduces greater consistency among Council procedures, it updates standards that are now more than ten years old to reflect current policy plans. For example, the revised rules include a solid waste criterion that is not addressed in the existing rules. This criterion was added to reflect the Council's increased statutory role in the area of solid waste.

21. The existing rules do not specifically address the criteria the Council will use to determine when to initiate a review based on potential economic effects. Lack of economic criteria in the existing rules resulted in considerable criticism of the Metropolitan Council in two recent Metropolitan Significant Reviews when the Council attempted to raise economic issues about the project. The proposed revisions now clarify those limited instances where the Metropolitan Council can get involved in projects that have potential economic impact; that is, where a proposed project with public subsidy threatens a publicly financed facility. The Council's concern is with the use of public subsidies to compete with facilities in other communities that are supported directly with taxpayer dollars. Inclusion of criteria dealing with economic impact received no negative comment and is found to be needed and reasonable.

22. Part 5800.0040, subpart 2 enumerates the criteria to be used by the Metropolitan Council to determine whether a proposed project affecting a Metropolitan system has Metropolitan Significance. In subpart 2 A. through G. and I. through K., the Council starts out each descriptive paragraph with the word "may". Floyd Olson commented that the use of the word "may" throughout subpart 2 is too vague and that the uncertainties of this wording

impermissibly gives the Metropolitan Council too much discretion to suspend a proposed project.

In subpart 2, A. to G. and I. to K., the word "may" is used to describe a triggering condition which would indicate that a significance review would be in order. The term "may" does not indicate any type of discretionary component or duty to be performed. The preliminary finding that the existence of the criteria will trigger a significance review does not amount to the Metropolitan Council's final determination that Metropolitan Significance has been demonstrated. Thus, the use of the word "may" found in subpart 2A. through G. and I. through K. is appropriate as it does not describe a duty or discretionary act of the Metropolitan Council. The rule as written is found to be needed and reasonable.

23. Mr. Olson and the AMM commented that the use of the word "significant" in 5800.0040, subpart 2.A. is too vague and has not been defined within the context of these proposed rules. Mr. Olson and the AMM suggest that the word "significant" be replaced with the word "substantial" which is defined in the proposed rule. In its post-hearing comments, the Metropolitan Council agrees that it is more appropriate to use the word "significant" to describe the changes in timing, staging, and capacity or service area of local facilities found in subpart 2.A. The Administrative Law Judge finds that the replacement of the word "significant" for the word "substantial" in this subpart is necessary and reasonable and does not constitute a substantial change from the rules as originally published in the State Register.

#### Part 5800.0050 - Exempt Projects.

24. The existing rules currently exempt projects from review if they are consistent with a Council-approved local comprehensive plan. Part 5800.0050 clarifies the Council's duties and its role in determining what projects are exempt from review. For example, the proposed rule no longer provides for reevaluation of an existing local plan prior to the adoption of a plan under the terms of the Metropolitan Land Planning Act since all communities (except Landfall) now have such a plan.

The major change to this proposed rule part is subpart 6 which provides for "vested rights." The existing rules currently allow initiation of a review up to the time of construction or major site alteration. This creates uncertainty for the local unit of government and the developer as to whether they will have to undergo a significance review. The proposed rules now tie the vesting of a proposed project to 30 days following a negative declaration on an environmental assessment worksheet or a determination of adequacy on an environmental impact statement, or in the event no environmental review is required, 30 days following the local approval of a plan amendment or rezoning. Establishing a time limitation for review initiation is reasonable as it recognizes the fact that a project is substantially complete in terms of resources and commitments by the time it is ready for construction. A significance review at this late stage in the project could cause undue hardship. The public testimony and comments support this vesting feature in the revised rule. The Metropolitan Council has demonstrated the need for and reasonableness of this proposed rule part.



Part 5800.0070 - Preliminary Finding of Metropolitan Significance.

25. Part 5800.0070 provides two new steps in the Significance Review process: (1) A preliminary finding of Metropolitan Significance; and (2) a scoping of issues. The existing rules do not clearly specify a time period for the Chair to review the information submissions and related material. The proposed rule provides ten (10) working days for the Chair to examine these materials. The revision also provides for a preliminary finding of Metropolitan Significance as a threshold criteria which must be met before a formal review process will be undertaken. Lastly, the proposed rule provides a scoping mechanism which requires the Council Chair to pinpoint the issues to be included in the review at the outset of the review process. Those who testified and submitted comments strongly supported the preliminary finding and scoping of issues concepts.

26. Although the AMM strongly supports the scoping of issues concept in part 5800.0070, subpart 2, it recommended that the Metropolitan Council consider adding to this subpart a clarifying sentence which would read as follows:

A description of the issues will be included with said notice.

The AMM believes timely identification of all of the issues to be considered will help reduce confusion and help assure a fairer process. In its post-hearing comments, the Metropolitan Council did not address this recommendation except to state that it had no objection to the change. A review of the Council's SONAR indicates that it is the Council's intent that the notice should identify the issues included in the review. It would follow that these issues should also be provided within the notice to the governmental unit or developer. This would clarify the specific relevant issues and prevent the potential for the Council to raise other issues in an untimely fashion. While the rule is reasonable as published, inclusion of the clarifying sentence within this rule subpart would not be a substantial change from the rules as originally published in the State Register. The Metropolitan Council has demonstrated the need for and reasonableness of the proposed rule part.

Part 5800.0100 - Review Alternatives.

27. Part 5800.0100, subpart 1 provides that the Council Chair may determine that a proposed project under review is more suited to mediation than to a formal public hearing process. The addition of mediation as an option to resolve disputes which may occur during the review process was applauded by those who testified and those who submitted comments. The use of this alternative process is less formal and more conducive to compromise and cooperation. One of the goals of the Metropolitan Council's Significance Review process is to promote the orderly, economic development of the Metropolitan area. A dispute resolution process such as mediation will support the achievement of this goal. The Metropolitan Council has demonstrated the need for and reasonableness of this rule part.

28. Part 5800.0100, subpart 3 provides the procedure for use of an Administrative Law Judge. Under the existing rule, a public hearing regarding Metropolitan Significance may be conducted by the Significance Review

Committee of the Metropolitan Council or, if the committee desires, by an Administrative Law Judge from the Office of Administrative Hearings. This rule provision does not propose any change to the use of the Administrative Law Judge. The only changes to this rule part is to clarify that the use of an Administrative Law Judge is only for purposes of holding the public hearing, not for delegating the decisionmaking responsibility assigned to the Metropolitan Council by statute. Further, the proposed rule no longer specifies the contents of the Report of the Administrative Law Judge recognizing that the Report could vary from review to review.

29. Floyd Olson, representing the City of Minneapolis and the AMM support the right of the Significance Review Committee to use an Administrative Law Judge for conducting the public hearing and preparing a Report and Recommendation to the Review Committee. However, both Mr. Olson and the AMM suggest that any party to the Significance Review process should also have the right to determine that a public hearing be conducted by an Administrative Law Judge. Metropolitan Significance Review public hearings deal with important policy issues, and have profound impacts on private development and land use rights. Mr. Olson and the AMM believe that these interests can be best protected through an impartial hearing process. Further, if the hearings are conducted in an orderly trial-type fashion, due process will be protected and judicial review, if necessary would be streamlined.

30. In its SONAR and in its post-hearing comments, the Metropolitan Council emphasizes that the use of the Administrative Law Judge should not be for delegating decisionmaking authority and responsibility which are assigned to the Council by statute. The use of an Administrative Law Judge is only one of the many alternatives which the Chair of the Significance Review Committee may choose to assist in determining the status of a proposed project. The Council is concerned that the broader use of an Administrative Law Judge may tend to formalize the entire procedure. Thus, parties with limited resources would have a disadvantaged position. Further, the Metropolitan Council points out that it has not proposed a change to the existing rules relative to the use of an Administrative Law Judge. The Council suggests that the issue of use of an Administrative Law Judge had been previously scrutinized when the rules were first adopted. Accordingly, since there has been no change to the use of the Administrative Law Judge and it has been previously found to be needed and reasonable, the Council does not have to justify again an existing rule that has not been changed with respect to this issue.

31. The Metropolitan Council is not an agency of the State of Minnesota and is therefore not required to use the contested case procedures of the Administrative Procedure Act. Certainly, if the Metropolitan Council chooses to, it may contract with the Office of Administrative Hearings pursuant to Minn. Stat. § 14.55 for the purpose of utilizing an Administrative Law Judge for public hearings or informal dispute resolution. Such a contract defines the scope of the Administrative Law Judge's duties which may include the preparation of Findings, Conclusions or a Recommendation for action by the Metropolitan Council. The Council cannot delegate its decisionmaking authority to an Administrative Law Judge. Except in relationship to rulemaking, there is no requirement in Ch. 473 relating to Metropolitan government which requires the Metropolitan Council to utilize the Office of Administrative Hearings for the purpose of conducting public hearings. The Council does have the discretion, however, pursuant to Minn. Stat. § 473.129 to exercise all powers which may be necessary or convenient to enable it to

perform and carry out its duties and responsibilities including the contract for professional services.

The Administrative Law Judge finds that the existing procedure for use of Administrative Law Judges at the discretion of the Significance Review Committee does not violate due process nor is it inconsistent with enabling legislation. Further, due to the fact that the Council has chosen not to revise this portion of the rule, and it has been previously determined to be needed and reasonable, the Administrative Law Judge will make no recommendation to broaden the use of the Administrative Law Judge for Metropolitan Significance Reviews. Minn. Rule 1400.0500, subpart 1 provides that when amending its rules, an agency need not show the need or reasonableness of existing rules which are not affected by the proposed amendments. Finally, it is important to note that a rule is not unreasonable simply because a more reasonable alternative exists. It is sufficient that the Metropolitan Council has acted within its statutory bounds of authority and that the choice among possible alternative standards adopted to the statutory end is one which a rational person could have made. Federal Security Administrator v. Quaker Oats Company, 318 U.S. 218, 233, 158 A.L.R. 823 (1943).

#### Part 5800.0110 - Steps in the Hearing Process.

32. Part 5800.0110, subpart 4, Significance Review Report provides that at least ten days before the public hearing, the Council staff will prepare a written report on the proposed project. The AMM commented that this report should be made available sooner so that interested parties may be better prepared for commenting at the hearing. Although the AMM's comments are reasonable with respect to notifying the interested parties, it cannot be said that the 10-day period allowed with this rule is unreasonable. Because of the short length of the total review process, it would be impractical to require the Council to have a report prepared sooner. The Administrative Law Judge concludes that the rule as written is needed and reasonable and no change is recommended.

#### Part 5800.0130 - Council Determination.

33. Part 5800.0130, subpart 2 - Metropolitan Council Final Determination provides that the Council must adopt a final determination including Findings of Fact, Conclusions and Recommendations with regard to the Metropolitan Significance of the proposed project. The Council must find that the proposed project is or is not of Metropolitan significance, based on the conclusion that it does or does not cause one or more of the effects in the appropriate subpart in 5800.0040, which refers to the various policy plans or guide chapters.

34. The AMM expressed concern in its written comments that the various policy plans and chapters might change during the review procedure and therefore should be more appropriately identified as information tools but not binding policies and plans in determining Metropolitan Significance. As discussed previously in Finding 15 above, the policy plan or guide chapters adopted pursuant to various provisions in Minn. Stat. ch. 473 have the force and effect of law pursuant to Minn. Stat. § 473.146, subd. 2b. These subdivisions clearly indicate that the Legislature intended the Council to use its policies in determining matters of Metropolitan Significance. However, to

alleviate the AMM's concern, the Metropolitan Council adopted the suggestion of the AMM by adding to part 5800.0020, subpart 24 - definition of policy plan or guide chapter - that the policy plans or guide chapters referenced in any Metropolitan Significance Review will be those in effect at the time the review is initiated. (See Finding 18). This change will ensure that the policies used in any review will not change during the course of the review, even if the Metropolitan Council adopts a new plan or guide chapter during that time. Part 5800.0130, subpart 2 is found to be needed and reasonable as written.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. That the Metropolitan Council gave proper notice of the hearing in this matter.
2. That the Council has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, and all other procedural requirements of law or rule.
3. That the Council has documented its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).
4. That the Council has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).
5. That the additions and amendments to the proposed rules which were suggested by the Council after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, Minn. Rule 1400.1000, Subp. 1 and 1400.1100.
6. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.
7. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Council from further modification of the rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

It is hereby recommended that the proposed rules be adopted consistent with the Findings and Conclusions made above.

Dated: November 18, 1988.

*Phyllis A. Reha*

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PHYLLIS A. REHA  
Administrative Law Judge