

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF ADMINISTRATION

In the Matter of
Proposed Permanent
Rules Relating to
Minnesota State
Building Code.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on February 2, 1990, at 9:00 a.m. at the Sheraton Airport Hotel, 2525 East 78th Street, Bloomington, Minnesota.

This report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, to determine whether the Minnesota Department of Administration (Department) has fulfilled all relevant substantive and procedural requirements of law or rule, to determine whether the proposed rules are needed and reasonable, and whether or not the rules, if modified, are substantially different from those originally proposed.

Charlene Hatcher, Special Assistant Attorney General, 1100 Bremer Tower, St. Paul, Minnesota 55101 appeared on behalf of the Department at the hearing. The agency panel appearing in support of the proposed rules consisted of Elroy Berdahl, Technical Services Section Supervisor; Alvin Kleinbeck, Code Administrator; Milton Bellin, Minnesota Health Department Plumbing Unit; and James Berg, Department of Labor and Industry Code Enforcement Division Director.

Approximately one hundred persons attended the hearing. Eighty persons signed the hearing register. The Administrative Law Judge received eight exhibits as evidence during the hearing. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments for twenty calendar days following the date of the hearing or February 22, 1990. Pursuant to Minn. Stat. § 14.15, subd. 1 (1988), three business days were allowed for the filing of responsive comments. On February 27, 1990, the rulemaking record closed for all purposes.

Beyond the oral comments at the hearing, the Administrative Law Judge received 313 post-hearing written comments from interested persons. The Department submitted a written comment responding to matters discussed at the hearing. Eleven comments were received after the record closed and, therefore, those comments were not considered.

The Department must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commissioner of Administration (Commissioner) of actions which will correct the defects and the Commissioner may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Commissioner may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Commissioner does not elect to adopt the suggested actions, she must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Commissioner elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Commissioner may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Commissioner makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then she shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Department files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

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

FINDINGS OF FACT

Procedural Requirements

1. On December 20, 1989, the Department filed the Notice of Hearing proposed to be issued with the Chief Administrative Law Judge.

2. On January 2, 1989, the Department filed the following documents with the Chief Administrative Law Judge:

- (a) A copy of the proposed rules certified by the Revisor of Statutes.
- (b) The Statement of Need and Reasonableness.

3. On January 2, 1990, a Notice of Hearing and a copy of the proposed rules were published at 14 State Register 1612.

4. On December 29, 1989, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice.

5. On January 30, 1990, less than 25 days prior to the hearing, the Department filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing as mailed.
- (b) The Agency's certification that its mailing list was accurate and complete.
- (c) The Order for Hearing.
- (d) The names of Commission personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
- (e) A copy of the State Register containing the proposed rules with the Administrative Law Judge.
- (f) The comments received following the Department's request for comments and a copy of the Department's request for comments.

6. On January 31, 1990, the Department filed the Affidavit of Mailing the Notice to all persons on the Agency's list with the Administrative Law Judge.

The documents were available for inspection and copying at the Office of Administrative Hearings from the date of filing to February 27, 1990, the date the record closed.

The Department did not comply precisely with the filing deadlines of Minn. Rules 1400.0300 and .0600. However, no members of the public inquired of the Administrative Law Judge to inspect or copy the documents required to be filed under those rules. No one expressed any objection or claimed to be prejudiced by the Department's late filing. The Administrative Law Judge finds that the Department's noncompliance with Minn. Rules 1400.0300 and .0600 is not a defect in the rulemaking proceeding.

Nature of the Proposed Rules.

7. The proposed rules modify the presently existing code governing standards for regulating design, construction occupancy and maintenance of structures by adopting and amending the Uniform Building Code (UBC), 1988 edition.

Statutory Authority.

8. In its Notice of Hearing, the Department cites Minn. Stat. § 16B.61 (1989) as authorizing the Department to adopt the proposed rules. This statute requires the Department to promulgate rules establishing a code "for the construction, reconstruction, alteration, and repair of

state-owned buildings, governing matters of structural materials, design and construction, fire protection, health, sanitation, and safety." Minn. Stat. § 16B.61. The Department has general authority to adopt these rules.

Small Business Considerations in Rulemaking.

9. Minn. Stat. § 14.115, subd. 2 (1988), requires state agencies proposing rules affecting small businesses to consider methods for reducing adverse impact on those businesses. In the Statement of Need and Reasonableness (SONAR), the Department stated it had evaluated the effect of the proposed rules on small business and considered each of the methods set forth in that statute. The Department asserts that the purpose of the rules is to establish a minimum standard and to exempt small businesses would defeat that purpose. Similarly, reducing the performance standards for small business is inappropriate since those entities would fall below the minimum standard intended to protect the health and safety of the public. The proposed rules impose no reporting requirements, so the rules cannot be made less rigorous when applied to small businesses. The Department has met the requirements of Minn. Stat. § 14.115, subd. 2, with respect to the impact of the proposed rules on small businesses.

Fiscal Note.

10. Minn. Stat. § 14.11, subd. 1, requires proposers of rules requiring the expenditure of public funds in excess of \$100,000 per year by local public bodies to publish an estimate of the total cost to local public bodies for a two-year period. The proposed rules will not require any expenditure of funds by a local agency or school district.

Impact on Agricultural Land.

11. Minn. Stat. § 14.11, subd. 2, requires proposers of rules that have a "direct and substantial adverse impact on agricultural land in this state" to comply with additional statutory requirements. These rules have no impact on agricultural land and, therefore, the additional statutory provisions do not apply.

Substantive Provisions.

12. The portions of the proposed rules which received comment or otherwise need to be examined will be discussed below. Any rule not mentioned is found to be needed and reasonable. Also, any rule not mentioned is found to be authorized by statute.

Proposed Rule 1301.0200 -- Building Official Certification.

13. This proposed rule requires all building officials meet the prerequisites for Class II certification, except for those who qualify for the grandfathered certification of proposed rule 1301.0200, subpart 2. Those building officials who hold a Class I certification may continue to hold that classification. No new Class I certifications will be issued after July 1, 1990. Numerous municipalities, building

officials and the Lake Country Chapter of the International Conference of Building Officials objected to the termination of Class I certification. Jan Gasterland, Building Code Officer for the City of St. Paul, asserted that municipalities use Class I certified building official positions as entry level positions and that no rationale exists for eliminating Class I certification. The SONAR does not directly address this issue, but it does state that Class I certification is granted to individuals with "a minimal amount of education and training". In its post-hearing comment, the Department bases discontinuing Class I certification on its limited application, as opposed to the general applicability of Class II certification. The Department is granted the express statutory authority to certify building officials and "may establish classes of certification that will recognize the varying complexities of code enforcement". Minn. Stat. § 16B.65, subd. 3. The language of the statute clearly grants the Department discretion to establish several classes or only one. The proposed rule part is needed and reasonable to establish a classification standard for building officials. Nonetheless, the comments suggest that there is some need for the Class I certification and it is recommended that the Department consider those comments again.

Proposed Rule 1301.0300 -- Certification Prerequisites.

14. Several commentators objected to the level of certification required as a prerequisite to Class II certification. Under proposed rule 1301.0300, the applicant for certification must have a degree or certificate from a listed organization, or one that is comparable to those organizations listed, prior to applying for Class II certification. Orrion Roisen, Building Official of the City of Albert Lea, suggested that smaller communities would not be able to hire persons who meet the requirements of this proposed rule part and suggested that an experience alternative be retained instead. No one has suggested that the duties of inspecting work done in smaller towns makes a lesser certification standard reasonable.

Jan Gasterland suggested the educational prerequisite be expanded to permit "equivalent education", or a bachelors degree (in civil engineering, structural engineering, or architecture), or five years of experience as a contractor, in lieu of the community college certificate requirement or the associate degree requirement. No facts are present in the record to show that the alternatives offered by Jan Gasterland are the equivalent to the standards set by the Department. The Department has shown that the rule, as proposed, is needed and reasonable to establish minimum prerequisites for Class II certification. Despite this finding of need and reasonableness, however, the Administrative Law Judge recommends that the Department compare the background provided by a bachelors degree in civil engineering, structural engineering, or architecture to that provided by the associate degree in building inspection. If the education provided for the purpose of building inspection is comparable, it would be reasonable to include those degrees in the certification portion of the proposed rules. This addition would not constitute a substantial change.

Proposed Rule 1305.0100 -- Adoption of the Uniform Building Code by Reference.

15. Proposed Rule 1305.0100 incorporates by reference chapters 1 to 60 and appendixes of the 1988 edition of the Uniform Building Code (UBC). This document is published by the International Conference of Building Officials (ICBO). The proposed rule part contains the name and address of this organization. The Revisor of Statutes has approved the rule as to form, and this approval constitutes a finding by the Revisor that the document incorporated by reference is conveniently available to the public. Minn. Stat. § 14.07, subd. 4(a). However, the proposed rule part lacks: 1) a statement that the document incorporated by reference is not subject to frequent change; and, 2) a statement of where the incorporated document is made available. These two statements are required by Minn. Stat. § 14.07, subd. 4(a). Not including either of those statements constitutes a defect in the rules for failure to fulfill a statutory requirement. The defect may be corrected by adding to the end of the proposed rule part language similar to the following:

The Uniform Building Code is not subject to frequent change and a copy of the Uniform Building Code, with amendments for use in Minnesota, is available in the office of the commissioner of administration.

Adding the foregoing to the proposed rule part will meet the requirements of Minn. Stat. Ch. 14. The proposed rule, with that change, is needed and reasonable. The change would be made to comply with a statutory requirement and does not constitute a substantial change.

Proposed Rule 1305.1795 -- Required Sanitation Fixtures Based on Occupant Load (1) (2) (6); 5-E.

16. Proposed rule 1305.1795 adds a table, denoted 5-E to chapter 5 of the UBC. This provision did not receive any adverse comment, but the Department seeks to amend the table to delete "(6)" from the first line of the table. The change was not opposed and does not constitute a substantial change. The Department has shown that the proposed rule part is needed and reasonable.

Rule 1305.1750 -- Roof Access.

17. The Department proposes to delete this rule part owing to the adoption of the language in the Uniform Mechanical Code § 704(h) (hereinafter "UMC"). This change has engendered objections from fire fighters and municipalities because the uniform language of the UMC does not require access standards as stringent as existing provisions of Minn. Rule 1305.1750. That rule requires a stairway leading to a scuttle or bulkhead, as opposed to ladder access as provided for in the UMC. In a companion report to this proceeding, the Administrative Law Judge has upheld the Department's authority to make that change in the UMC. Report of the Administrative Law Judge, No. 69-0210-4325-1 (Mechanical Code)(issued March 29, 1990). The Department's deletion of this rule merely conforms the UBC with the UMC and is needed and reasonable.

As noted in the foregoing finding, a companion rulemaking proceeding relating to the UMC has been instituted by the Department. In the report to that proceeding, the Administrative Law Judge has urged the Department to consider retaining Rule 1305.1750. Since Rule 1305.1750 is not a part of this rulemaking proceeding, retention of the rule cannot constitute a substantial change from the rule as published in the State Register. The Department should note, if it decides to retain Rule 1305.1750, the exemptions located at section 3306(a) and (g) of the UBC and determine whether either of those exemptions should be deleted. Such deletions would be needed and reasonable to render the proposed rules consistent and does not constitute a substantial change.

Proposed Rule 1305.3860 -- Section 1215.

18. This proposed rule part alters UBC § 1215 to add a new section for sound control. No objections were raised to this proposed rule part. The Department seeks to delete the word "Division" from the new section to maintain consistent language throughout the rule. The Department has shown that the proposed rule part is needed and reasonable and that the change is not a substantial change.

Proposed Rule 1305.6430 -- Table 38-A.

19. Proposed rule 1305.6430 amends Table 38-A of the UBC by adding footnote 8. This footnote sets the standpipe requirement at four stories or more in buildings equipped with approved automatic fire extinguishing devices (sprinklers). Many fire marshals and fire chiefs objected to this change, asserting that standpipes are needed, even in buildings with automatic fire extinguishing devices, because fire departments frequently must "damp down" embers remaining from extinguished fires. The commentators have not supported these assertions with specific facts. Further, the UBC, prior to being amended in an earlier rulemaking proceeding, changed the original four story height (in the UBC), to a three story limit. This more restrictive requirement is being loosened by the Department, in accordance with the UBC, where an additional safety factor is present. The Department has shown that the proposed rule is needed and reasonable.

Uniform Building Code Section 1204 -- Exits and Emergency Escapes.

20. Section 1204 of the UBC requires basements in every dwelling unit to have at least one operable window or door (approved for emergency escape) which opens directly into a street, alley, yard or exit court. Many commentators, most of whom are engaged in the business of home construction, objected to this portion of the UBC. The grounds for these objections are: 1) in winter, these exits will become unusable due to unremoved snow; 2) the presence of these excavations could present a danger to persons, absent guardrails or other barriers; 3) security for occupants could be compromised by permitting ingress, as well as emergency escape; and, 4) the cost of residential housing would be increased. The Department asserted that more than 1000 deaths have been attributed to persons trapped in basements in fires, without an adequate means of escape. The objections raised by the commentators are valid

concerns, but the obligation of the Department to protect the lives of persons occupying buildings constructed under the UBC justifies enforcement of this uniform provision. The Department has shown that UBC section 1204 is needed and reasonable.

Other Comment.

21. The Department notified the Commissioner of Finance, pursuant to Minn. Stat. § 16A.128, that fees would be charged pursuant to the proposed rule. The Commissioner of Finance, through a representative, has approved the proposed fees. The statutory requirements for establishing a fee by rule have been met.

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

CONCLUSIONS

1. That the Department gave proper notice of the hearing in this matter.
2. That the Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule.
3. That the Department has demonstrated 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)(ii), except as noted at Finding 15.
4. That the Department has documented the need for and reasonableness of its proposed rules with 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 amendments and additions to the proposed rules which were suggested by the Department 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, and Minn. Rule 1400.1000, Subp. 1 and 1400.1100.
6. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusion 3 as noted at Finding 15.
7. That due to Conclusion 3, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.
8. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

9. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed 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 except where specifically otherwise noted above.

Dated: March 29, 1990.



STEVE M. MIHALCHICK
Administrative Law Judge