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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF PUBLIC SAFETY
FIRE MARSHAL DIVISION

In the Matter of the Proposed Permanent Rules of the State Fire Marshal Relating to Furniture Flammability, Minn. Rules Chapter 7510.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on September 21, 1992, at 9:00 a.m. in Hearing Room 5, State Office Building, 100 Constitution Avenue, St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20 (1990) to hear public comment, determine whether the State Fire Marshal Division of the Minnesota Department of Public Safety (hereinafter referred to as "the Fire Marshal" or "the Fire Marshal's Office") has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, determine whether the proposed rules are needed and reasonable, and determine whether or not modifications to the rules proposed by the Fire Marshal's Office after initial publication are substantially different from those originally proposed.

Jeffrey Bilcik, Special Assistant Attorney General, 525 Park Avenue, Suite 500, St. Paul, Minnesota 55103, appeared on behalf of the Fire Marshal's Office. The hearing panel consisted of State Fire Marshal Thomas R. Brace, Deputy Fire Marshal Patrick Sheehan, and David Orren, Rules Coordinator for the Department of Public Safety.

Forty-two persons attended the hearing. Thirty-four persons signed the hearing register. The Administrative Law Judge received eighteen agency exhibits and thirteen public 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 until October 12, 1992, twenty calendar days following the date of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1 (1991 Supp.), five business days were allowed for the filing of responsive comments. At the close of business on October 19, 1992, the rulemaking record closed for all purposes. The Administrative Law Judge received numerous written comments from interested persons during the comment period. The Fire Marshal's Office submitted written comments responding to matters discussed at the hearing and comments filed during the twenty-day period. In its written comments, the Fire Marshal's Office proposed further amendments to the proposed rules.

This Report must be available for review by all affected individuals upon request for at least five working days before the agency takes any further action on the rules. The agency may then adopt final rules or modify or withdraw its proposed rules. If the State Fire Marshal makes changes in the rules other than those recommended in this Report, he must submit the rules with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of final rules, the agency must submit the rules to the Revisor of Statutes for a review of the form of the rules. The agency must also give notice to all persons who requested to be informed when the rules are 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 July 14, 1992, the Fire Marshal's Office filed the following documents with the Chief Administrative Law Judge:

(a) a copy of the proposed rules as certified by the Revisor of Statutes;
(b) a copy of the proposed Order for Hearing;
(c) a copy of the proposed Notice of Hearing;
(d) the Statement of Need and Reasonableness (SONAR);
(e) an estimate of the number of persons expected to attend the hearing and the expected length of the Fire Marshal's presentation at the hearing; and
(f) a statement that the Fire Marshal intended to provide discretionary additional public notice of the hearing to members of a task force that advised the Fire Marshal on the development of the rules and to persons who had previously requested a hearing.

2. On July 17, 1992, the Fire Marshal's Office mailed the Notice of Hearing to all persons and associations who had registered their names with the Department of Public Safety for the purpose of receiving such notice.

3. On July 20, 1992, the Fire Marshal's Office mailed the Notice of Hearing to those persons and associations that had expressed interest in the rulemaking proceeding and other persons and associations, in accordance with its intent to provide additional discretionary notice.

4. On August 3, 1992, a copy of the proposed rules were published in 17 State Register 219.

5. On August 7, 1992, the Fire Marshal's Office filed the following documents with the Administrative Law Judge:

(a) the Notice of Hearing as mailed;
(b) a photocopy of the pages of the State Register containing the Notice of Hearing and the proposed rules;

(c) a copy of the Notice of Solicitation of Outside Opinion published in 15 State Register 1852 (Feb. 19, 1991), together with all materials received in response to that notice;
(d) affidavits stating that the Notice of Hearing was mailed on July 17, 1992, to all persons on the rulemaking mailing list of the Department of Public Safety and certifying that the Department's mailing list was accurate, complete, and current as of that date;
(e) affidavits stating that the Notice of Hearing was mailed on July 20, 1992, to persons and associations selected to receive additional discretionary notice; and
(f) the names of persons who would represent and testify on behalf of the Fire Marshal's Office at the hearing.

Nature of the Proposed Rules and Statutory Authority

6. In this rulemaking proceeding, the State Fire Marshal's Office seeks to promulgate new rules establishing minimum flammability and labeling standards for seating furniture in public occupancies. The proposed rules define terms included in the Minnesota Furniture Fire Safety Act and the rules; adopt furniture flammability performance standards; specify requirements for the labeling of articles of seating furniture; exempt certain items of furniture from compliance with the rules; delineate testing and documentation requirements; and establish procedures for enforcement of the Act and the rules.

As its authority for promulgation of the rules, the Fire Marshal's Office relies upon the Furniture Fire Safety Act, which is codified in Minn. Stat. §§ 299F.840 to 299F.848 (1990). The Act requires, inter alia, that new seating furniture offered for sale in Minnesota on or after January 1, 1992, for use in certain "public occupancies" must meet flammability requirements set out in rules to be adopted by the State Fire Marshal. "Public occupancies" are defined in the Act to include jails, prisons, and penal institutions; hospitals, mental health facilities, and similar health care facilities; nursing care and convalescent home; child day care centers; public auditoriums and stadiums; and public assembly areas of hotels and motels containing more than ten articles of seating furniture. Minn. Stat. § 299F.841 (1990).

The Act itself does not specify the fire safety performance standards which must be met, but authorizes the Fire Marshal to promulgate rules setting forth such standards. The statute specifies:

> The state fire marshal shall adopt rules necessary for the enforcement of sections 299F.840 to 299F.848 within six months of January 1, 1992. The fire marshal, in adopting rules, shall consider the testing and labeling procedures and requirements set forth in Technical Bulletin 133 of the state of California, "Flammability Testing and Labeling Procedures for Use in Public Occupancies," published in April 1988 by the California Bureau of Home Furnishings and Thermal Insulation and periodically the deletions, revisions, and updates of California Technical Bulletin 133. An amendment to a rule does not apply to seating manufactured before the effective date of the amendment. New seating furniture sold for use in a public occupancy that meets the test criteria under rules adopted by the fire marshal must

conform to the labeling requirements specified under the adopted rules.

Minn. Stat. § 299F.844 (1990) The Act further authorizes the Fire Marshal to "inspect or audit the testing of seating furniture as may be considered necessary under rules adopted under section 299F.844" and "institute a civil action or proceeding to enjoin a person from selling seating furniture . . . that does not meet the requirements of sections 299F.840 to 299F.847 . . . ." Minn. Stat. §§ 299F.847 and 299F.848 (1990).

As noted above, Minn. Stat. § 299F.844 indicates that the Fire Marshal "shall" adopt rules "within six months of January 1, 1992." Several commentators, including Maryanne Hruby, Executive Director of the Legislative Commission to Review Administrative Rules (LCRAR), and Mary Rodenberg-Roberts, counsel to REM-Minnesota, Inc., asserted that the Fire Marshal's failure to adopt these rules by the July 1, 1992, deadline deprives the Office of authority to adopt the proposed rules at this time. Ms. Hruby suggested that the Fire Marshal should obtain new authority from the Legislature before proceeding with the proposed rules.

The Furniture Fire Safety Act does not specify any penalty for failure to meet the rulemaking deadline. It is a "well established rule of statutory construction that statutory provisions defining the time and mode in which public officers shall discharge their duties, and which are obviously designed merely to secure order, uniformity, system, and dispatch in public business, are generally deemed directory" rather than mandatory. Wenger v. Wenger, 200 Minn. 436, 438, 274 N.W. 517, 518 (1937). Where the governing statute fails to specify any penalty for the failure of the public officer to act within a directory time period, the failure to act does not deprive the officer of the power to act later. See, e.g., Heller v. Wolner, 269 N.W.2d 31, 33 (Minn. 1978) (court's failure to comply with statutory provision providing that it "shall" hold a hearing within thirty days of request for hearing did not deprive the court of jurisdiction to render a valid decision after the thirty-day period); Szczech v. Commissioner of Public Safety, 343 N.W.2d 305, 307 (Minn. Ct. App. 1984) (court retains jurisdiction to hear implied consent cases even though it failed to hold a hearing within sixty days as required by statute). In past rulemaking proceedings, other agencies have also missed statutory deadlines for adopting rules. In such cases, it has been determined that the agency does not lose jurisdiction to adopt the rule unless specific language to that effect is included in the authorizing statute. See, e.g., In the Matter of the Proposed Adoption of Rules Governing Teacher Education Curriculum, Minnesota Rules Part 8700.2810, and Teacher Education Program Evaluation, Minnesota Rules, Part 8710.7710, OAH Docket No. 8-1302-4483-1, at 3 (report of Administrative Law Judge issued June 6, 1990). The Fire Marshal's failure to meet the deadline for adoption of these rules thus does not constitute a defect in the proposed rules.

The Administrative Law Judge concludes that the Fire Marshal has statutory authority to adopt these rules.

Small Business Considerations in Rulemaking

7. Minn. Stat. § 14.115, subd. 2 (1990), provides that state agencies proposing rules which may affect small businesses must consider methods for reducing adverse impact on those businesses. Several commentators, including

Architect Gaius Nelson, Interior Designers Jill Kruger, Kate Hebel, and Colleen Schmaltz, and Professional Upholsterer James Druk, stressed that the rules as originally proposed would have a significant impact upon small businesses due to the increased furniture costs associated with compliance with the proposed performance standards. These commentators were particularly concerned about the impact on small custom and used furniture businesses.

The Fire Marshal's Office acknowledged in its Statement of Need and Reasonableness ("SONAR") that "[t]he rules will have a direct effect on small businesses engaged in operating public occupancies and small businesses engaged in manufacturing or reupholstering seating furniture for use in public occupancies." SONAR at 4. In the SONAR, the Fire Marshal considered methods of reducing the impact of the proposed rules on small businesses. The SONAR notes that the burden of compliance will be reduced for small businesses that sell furniture in other jurisdictions requiring similar performance standards; several months' lead-in time had been incorporated prior to the enforcement date of the rules; the proposed rules authorize the use of classification systems by which manufacturers may determine compliance for an entire product line; manufacturers are permitted to decide how to design or build furniture to meet the specified performance standards; and certain small businesses will fall within the exemptions set forth in the proposed rules. The Fire Marshal's Office concluded that exempting small businesses from the performance standards set by the proposed rules would be inconsistent with the purpose of Minn. Stat. § 299F.844.

The Fire Marshal has proposed an effective date of March 1, 1993, for compliance with the new standards. This date provides time for altering the production process to conform to the new standards and eases the impact of the proposed rules on manufacturers, including those which are small businesses. The proposed rules do not mandate design or operational standards, but impose flammability performance standards. Manufacturers are provided the utmost flexibility in meeting the flammability standards. The Administrative Law Judge concludes that the Fire Marshal's Office has complied with Minn. Stat. § 14.115, subd. 2, by minimizing the adverse impact on small businesses, consistent with the intent of the Furniture Fire Safety Act and the proposed rules.

Fiscal Note

8. Minn. Stat. § 14.11, subd. 1 (1990), requires that agencies proposing rules that will require 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 the two years immediately following adoption of the rules. In its Notice of Hearing and SONAR, the Fire Marshal's Office stated that the proposed rules will not require expenditures by local bodies of government in excess of $100,000 in either of the two years immediately following adoption. The Fire Marshal acknowledged that many local public bodies operate public occupancies such as nursing homes, hospitals, and jails and that, initially, seating furniture that complied with the rules as oiginally proposed would likely cost five to forty percent more. The Fire Marshal's Office stated, however, that it believes that:

> [E]xpenditures by local public bodies will increase little if at all due to the fire safety standards mandated by the Act and implemented by the proposed rules. The standards do not

> mandate the purchase of furniture, only that new furniture meet the standards. In most cases, local public bodies will not increase expenditures for furniture, but will buy fewer pieces of furniture with a fixed budget amount. It is important to note that the rules merely implement the Act and any spending increases associated with the rules will arise primarily from the requirements of the Act.

Notice of Hearing at 5.

The conclusion that the proposed rules would not require expenditures exceeding the amounts specified in Minn. Stat. § 14.11 was disputed by Joel Jamnik, Legislative Counsel for the League of Minnesota Cities, Mary Rodenberg-Roberts, Counsel for REM-Minnesota, Inc., Charles Osell, Supervisor of the Rule Administration and Policy Development Unit of the Long Term Care Management Division of the Minnesota Department of Human Services, and Gaius Nelson. These commentators pointed out that the costs to local public bodies would increase significantly as a result of the rules as originally proposed, since the cost per item would increase and the need for furniture would not decrease. They contended that local public bodies do not have total flexibility in furniture purchases, asserted that the Fire Marshal had not rendered a realistic assessment of the cost impact, and argued that the Fire Marshal must assess the fiscal impact of the proposed rules on local public bodies prior to proceeding with the proposed rules.

The information submitted does not provide an adequate basis on which to find that the Fire Marshal's Office was required to prepare a fiscal note with respect to the proposed rules. The statutory requirement for a fiscal note is triggered when the proposed rules will require expenditures by local public bodies in excess of the specified amounts. The proposed rules do not require any nondiscretionary expenditure by local public bodies. There is no immediate obligation to replace existing furniture with furniture meeting the new performance standard and no mandate that any specific furniture be purchased. Expenditures for furniture are flexible, both in terms of quantity and quality. The options available to local public bodies include delaying purchases, scaling down the number of items purchased, and choosing less expensive items.

Any increase in the cost of furniture per item obviously will affect the acquisition decisions of a local public body, but will not necessarily result in any measurable increase in the amount of money spent by a local public body during the two years following adoption of the rules. Due to the flexibility of furniture purchases by local public bodies, it would be extremely speculative to attempt to arrive at an estimate of any increase in the amount which might be spent by local public bodies during the two-year period. The failure of the Fire Marshal's Office to provide an estimate of the cost to local public bodies does not constitute a defect in the proposed rules. Moreover, much of the discussion of increased costs hinged upon the original proposal that Technical Bulletin 133 would serve as the primary performance standard. Any potential impact on the expenditure of public funds has been diminished with the decision of the Fire Marshal's Office to modify the proposed rules to specify Technical Bulletins 117 and 133 as alternative performance standards. (See Finding 16 below). Furniture meeting the TB 117 standard is already widely available. The purchase of furniture complying

with TB 117 is unlikely to result in signficantly increased costs to local public bodies, even if their furniture acquisition plans go unaltered.

The Administrative Law Judge thus finds that the Fire Marshal's Office was not required to prepare a fiscal note with respect to the proposed rules.

Impact on Agricultural Land

9. Minn. Stat. § 14.11, subd. 2 (1990), requires that agencies proposing rules that have a "direct and substantial adverse impact on agricultural land in the state" comply with the requirements set forth in Minn. Stat. §§ 17.80 to 17.84 (1990). Because the proposed rules will not have a direct and substantial adverse impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2, these statutory provisions do not apply.

Outside Information Solicited

10. In formulating these proposed rules, the Fire Marshal published a notice soliciting outside opinions in the State Register in February, 1991. The Fire Marshal also convened an advisory task force to assist in the development of the proposed rules. At the hearing and in post-hearing comments, several commentators including Gaius Nelson, Sue Baldwin, Iris Freeman, and Kate Hebel, were critical of the composition of the task force. They believed that fire safety organizations and individuals who stood to gain financially from the adoption of the proposed rules were overrepresented while other groups, such as health care consumers and representations of the child care industry, were underrepresented. They also complained that the task force failed to consider alternatives to TB 133 when developing the original proposed rules.

While it is unfortunate that several groups affected by the proposed rules were not represented on the task force, this does not constitute a defect in the rulemaking process. There is no statutory requirement that a task force be convened or any mandate that all interested parties be represented if one is convened. Moreover, as discussed below, the Fire Marshal's Office has proceeded to consider alternatives to TB 133 and, in fact, has now modified the proposed rules to specify TB 117 as an alternative standard to TB 133.

Substantive Provisions

11. The Administrative Law Judge must determine, inter alia, whether the need for and reasonableness of the proposed rules has been established by the Fire Marshal's Office by an affirmative presentation of fact. The Fire Marshal prepared a Statement of Need and Reasonableness (SONAR) in support of the adoption of the proposed rules. At the hearing, the Fire Marshal primarily relied upon its SONAR as its affirmative presentation of need and reasonableness. The SONAR was supplemented by the comments made by the Fire Marshal's Office at the public hearing and in its written post-hearing comments.

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. Ct. 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).

This Report is generally limited to the discussion of the portions of the proposed rules that received significant critical comment or otherwise need to be examined. Because some sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary. The Administrative Law Judge specifically finds that the need for and reasonableness of the provisions that are not discussed in this Report have been demonstrated by an affirmative presentation of facts, and that such provisions are specifically authorized by statute. Any change proposed by the Fire Marshal from the rules as published in the State Register which is not discussed in this Report is found not to constitute a substantial change.

Proposed Rule 7510.5500 - Purpose
Proposed Rule 7510.5510 - Scope

12. The purpose and scope of the proposed rules are set forth in parts 7510.5500 and 7510.5510. These provisions indicate that the proposed rules "establish minimum flammability and labeling standards for seating furniture in public occupancies" and apply to "seating furniture manufactured on or after March 1, 1993, that is sold, used, or intended for use in public occupancies." As noted above, the proposed rules were designed to provide small businesses and other manufacturers and owners of public occupancies several months' lead time after adoption of the rules to become familiar with the requirements and achieve compliance. The Furniture Fire Safety Act provides that "new seating furniture offered for sale in this state on or after January 1, 1992, must meet applicable flammability requirements as set out by rule" but did not mandate an effective date for the Fire Marshal's rules. See Minn. Stat. § 299F.884 (1990). Both proposed rule parts are consistent with the Furniture Fire Safety Act and have been shown to be needed and reasonable.

Proposed Rule 7510.5520 - Definitions

Subparts 2 and 9.B. - Child Day Care Centers

13. Proposed rule part 7510.5520 is composed of fourteen subparts. Subpart 9.B. includes child day care centers within the definition of "public occupancies." Subpart 2 defines a "child day care center" as a facility required to be licensed by the Department of Human Services (DHS) under parts 9503.0005 to 9503.0175 of the Minnesota Rules and classified as Group E, Division 3, Occupancies by the Minnesota Uniform Fire Code.

Sue Baldwin, Executive Director of the Early Childhood Directors Association, Grace Norris, Community Services Coordinator for the Greater Minneapolis Day Care Association, Ann Flaherty, Furniture Buyer for day care centers, Susan Johnson-Jacka, co-owner of Bright Start Children's Centers, Priscilla Williams, owner of Especially for Children Child Development

Centers, and Deborah Schlick, Child Care Coordinator for the City of St. Paul, argued that the proposed flammability standards were not needed or reasonable with respect to day care facilities. They emphasized that stringent no-smoking rules are imposed in day care settings, periodic fire drills are conducted, a high ratio of trained adults to children is required, and no day care fire-related deaths have been reported in the country during the last decade. Ms. Flaherty indicated that there are very few manufacturers in the region that would be able to supply children's furniture complying with TB 133 and that the price of children's furniture would be tripled. Ms. Baldwin and Ms. Schlick maintained that the federal Hazardous Substances Act and standards issued by the Consumer Product Safety Commission (CPSC) provide adequate protection against furniture flammability in day care facilities. The commentators thus urged that day care centers be exempted from the proposed rules.

The Furniture Fire Safety Act specifically included day care centers among the "public occupancies" for which the Fire Marshal was required to promulgate flammability standards. Minn. Stat. § 299F.844 (1990). The Fire Marshal asserts that the federal Hazardous Substances Act is inapplicable to furniture that is covered by the Flammable Fabrics Act, and the Flammable Fabrics Act, while applicable to children's furniture, does not establish flammability or labeling standards for children's furniture. In support of this argument, the Fire Marshal included with its post-hearing comments a copy of a CPSC advisory opinion on its flammability standards. See Memorandum, Flammability Requirements Applicable to Products of "Interior Furnishing," (U.S. Consumer Products Safety Commission, April 30, 1987).

None of the commentators has demonstrated that federal statutes or regulations have established furniture flammability standards which apply to furnishings in child day care centers. The Fire Marshal is statutorily required to adopt some standard for such occupancies. The hearing record does not contain sufficient evidence of an alternative federal standard. The modification of the proposed rules to allow the use of TB 117 will reduce the cost of compliance for day care centers and should increase the likelihood that complying furniture will be readily available. The inclusion of day care centers within the proposed rules has been demonstrated to be needed and reasonable.

Sue Baldwin, Susan Johnson-Jacka, and other commentators also objected to the failure to include preschools and family day cares within the definition of "child day care center." They indicated that the potential fire hazards were just as great in preschool settings and greater in family day care situations, and felt day care centers were unfairly singled out for coverage in the proposed rules. The Fire Marshal indicated that the subpart is consistent with the statutory definition of "child day care center" and emphasized that family day cares and preschools have not been included in regulations promulgated by the Department of Human Services which govern day care centers.

The Fire Marshal's Office has established that the proposed rules are needed and reasonable as they relate to day care centers.

Subpart 9.A. - Group I Occupancies

14. Item A of proposed subpart 9 defines "public occupancies" to include "Group I Occupancies." This term is defined in subpart 4 of the proposed

rules to mean institutional occupancies as set forth in section 9.117 of the Minnesota Uniform Fire Code. Although Minn. Stat. § 299F.841, subd. 6 (1990), does not expressly refer to Group I Occupancies when listing the "public occupancies" to which the Act and the rules promulgated by the Fire Marshal are to apply, the institutions specifically mentioned in the statute--jails, prisons, penal institutions, hospitals, mental health facilities, nursing care facilities, and convalescent homes--are in fact classified under the Uniform Fire Code as Group I Occupancies.

Richard Korman, Research Analyst for the Minnesota Hospital Association, argued that hospitals are already subject to extensive fire safety requirements and urged that they be exempted from the proposed rules. He emphasized that, to his knowledge, no patients, staff members, or visitors have been killed or injured in a hospital fire. The Furniture Fire Safety Act expressly includes hospitals among the public occupancies to be regulated. The Fire Marshal is required to promulgate rules setting forth some furniture flammability standard applicable to hospitals. In addition, as was the case with day care centers, there is no evidence that alternative regulation of furniture flammability in hospital settings is already in place. The proposed rules are needed and reasonable in their coverage of hospitals.

The Association of Residential Resources in Minnesota ("ARRM"), Project New Hope, Inc., Hiawatha Homes, Inc., CareCo Homes, Inc., REM-Minnesota, REM Consulting and Services, and Clay County Residence, Inc., objected to the possible interpretation of the rules as including Home and Community Based ("HCB") waiver sites and Intermediate Care Facilities for the Mentally Retarded ("ICFs/MR") among covered public occupancies. They stressed the fire safety measures already in place in such facilities, the costs associated with compliance, and the need to maintain a home-like environment, and urged that the proposed rules expressly exempt programs for less than sixteen people which are licensed as either ICFs/MR or HCB waiver sites. In its post-hearing comments, the Fire Marshal's Office indicated that Class A and Class B ICFs/MR and all HCB Waiver Sites with fewer than sixteen beds are not considered Group I Occupancies and the rules thus would not apply to them. The Fire Marshal has modified the proposed rules to add the following sentence at the end of subpart 9: "Public occupancies do not include home and community based waiver sites and intermediate care facilities for the mentally retarded with fewer than 16 beds."

This subpart, as modified in the Fire Marshal's post- hearing submission, is needed and reasonable to clarify the fact that the proposed rules do not apply to HCB waiver sites or ICFs/MR with fewer than sixteen beds. The change was made in response to comments received during the rulemaking proceeding and does not constitute a substantial change from the rule as originally proposed.

Subpart 12 - Seating Furniture

15. As originally proposed, subpart 12 of the rules defined "seating furniture" solely by indicating that the term had the meaning given it in the Furniture Fire Safety Act, Minn. Stat. § 299F.841. The statutory definition provides as follows:

> "Seating furniture" means movable or stationary furniture, manufactured on or after January 1, 1992, including children's furniture, that is made of or with loose or attached cushions

or pillows or is itself stuffed or filled in whole or in part with filling material; is or can be stuffed or filled in whole or in part with any substance or material, hidden or concealed by fabric or other covering, including cushions or pillows belonging to or forming a part of the furniture; together with the structural units, the filling material, and its container and its covering that can be used as a support for the body of a human being or a person's limbs and feet when sitting or resting in an upright or reclining position.

Minn. Stat. § 299F.841, subd. 3 (1990).

Ann Flaherty and Priscilla Williams pointed out that it was unclear whether such items as infant and child car seats, infant carriers, high chairs, changing pads, potty chairs, carpet squares, and padded pyramids would be deemed to constitute seating furniture in child care settings, and asked for clarification of the rules in this regard. In its post-hearing comments, the Fire Marshal indicated that infant and child car seats and infant carriers should not be covered by the proposed rules because they are designed for transportation rather than for use as seating furniture. High chairs, if upholstered, would be encompassed within the rules while potty chairs, which are rarely if ever upholstered, would not be covered. In order to clarify the definition, the Fire Marshal modified the proposed rules to include a more easily understood version of the statutory definition and exclude infant or child car seats and infant carriers. As finally proposed, subpart 12 would read as follows:

> Subp. 12. Seating furniture. "Seating furniture" means movable or stationery [sic] furniture, including children's furniture, that satisfies the following conditions:
>
> A. It is manufactured on or after January 1, 1992.
>
> B. It is made of or with loose or attached pillows or is itself filled in whole or in part with filling material, hidden by fabric or other covering. Cushions or pillows belonging to or forming a part of the furniture also satisfy this condition.
>
> C. The components described in item B, together with the structural units, the filling material, and the container and covering, can be used as a support for a person's body or a person's limbs and feet when sitting or resting in an upright or reclining position.
>
> Seating furniture does not include infant or child car seats and infant carriers.

The exclusion of car seats and infant carriers is needed and reasonable in light of the intended purpose of the rules. While such seats do meet the general definition of seating furniture, their specialized use and low risk of fire exposure justify their exclusion from the definition. It would be impossible to bring infant and child car seats (which are required to be used

in passenger cars under Minn. Stat. § 169.685, subd. 5 (1990)) into child day care centers without the exemption.

The remaining language of subpart 12 is nearly identical to the statutory definition, except for the reference to the manufacture date of covered furniture. The statute refers to furniture manufactured on or after January 1, 1992, while the rules refer to furniture manufactured on or after March 1, 1993. The Fire Marshal justifies the change by noting that the March 1, 1993, date is consistent with the enforcement date for the rules which is established in proposed rule 7510.5510. Under normal circumstances, the statutory standard would be controlling, and any variance from that standard would exceed the agency's statutory authority in adopting rules. See, e.g., Can Manufacturers Institute, Inc. v. State, 289 N.W.2d 416 (Minn. 1979). These proposed rules, however, establish performance standards for furniture flammability. The statute, read literally, would require the regulated public to meet those standards as of January 1, 1992, even though the statute itself contemplated that the flammability standards would not even be adopted until six additional months had passed. Minn. Stat. § 299F.844 (1990). Thus, the regulated public was faced with the prospect of either suspending production of seating furniture pending promulgation of the proposed rules or continuing production and risking noncompliance with the standard that was eventually adopted by the Fire Marshal. There is no evidence in the rulemaking record that the Legislature intended to place manufacturers in such an untenable situation. Further, no one objected to the manufacture date specified in the rules. The Administrative Law Judge concludes that the extension of time to comply contained in the proposed rules is consistent with the legislative intent to apply standards to seating furniture in a prospective rather than retroactive fashion. Modification of the definition of seating furniture to include only those items manufactured on or after March 1, 1993, is within the State Fire Marshal's statutory authority and is needed and reasonable.

Subpart 12, as finally proposed, is needed and reasonable. The changes were discussed in post-hearing comments and were not objected to by any interested persons. The new language does not constitute a substantial change from the rules as originally proposed.

Proposed Rule 7510.5530 - Performance Standards Adopted by Reference

16. As originally proposed, subpart 7510.5530 adopted California Technical Bulletin 133 (TB 133) as the general standard for seating furniture flammability effective March 1, 1993. TB 133 is a composite flammability test which requires an article of furniture to withstand exposure to a propane burner for eighty seconds without igniting, producing excessive heat, smoke, or carbon monoxide gas, or consuming an excessive amount of oxygen. TB 133 at 3. TB 133 is the most stringent flammability standard presently in use for seating furniture in the United States. The states of Illinois and California have recently adopted TB 133 as a mandatory statewide standard, with various exceptions. Municipalities such as San Francisco, Los Angeles, and San Diego have used TB 133 in the past as a standard for seating furniture in public occupancies. The City of Boston has established alternative test methods of either TB 133 or Underwriter's Laboratory (UL) 1056. Pursuant to the City of Boston's standard (BFD IX-10), the outcome of UL 1056 must meet the heat release and mass loss standards of TB 133.

Minn. Stat. § 299F.844 (1990) specifies that the Fire Marshal "shall consider the testing and labeling procedures and requirements set forth in Technical Bulletin 133 of the state of California . . . ." At the time the rules were originally proposed and the public hearing was held, the Fire Marshal was of the view that the adoption of TB 133 was required by Minn. Stat. § 299F.844 unless there was a compelling reason to the contrary. Numerous commentators, including Gaius Nelson and Marianne Hruby, maintained that the legislative intent was to leave the Fire Marshal with the discretion to choose any appropriate standard and, further, that any standard chosen must be shown to be needed and reasonable.

Sue Baldwin, Executive Director of the Early Childhood Directors Association; Gaius Nelson, Architect; Richard Korman, Research Analyst for the Minnesota Hospital Association; Charles Osell of the Long Term Care Management Division of DHS; Tom Kopacek of A & M Business Interior Services; Linda Makinen, Senior Interior Designer with the University of Minnesota Hospital and Clinic; Rick Carter, President of Care Providers of Minnesota; Kate Hebel, Interior Designer with New Edition; Jill Kruger, Interior Designer with Arvid Elness Architects; James Druk, past president of the Professional Upholsterers' Association of Minnesota; Manny Feldson, Director of Research for Maharam Fabrics; Colleen Schmaltz, Interior Designer; Michael Finn of the Minnesota Association of Homes for the Aging; and many other interested parties also objected that TB 133 is too expensive to implement, and is not needed or reasonable under the circumstances. Many commentators maintained that TB 133 is an unrealistic standard because it measures response to circumstances akin to arson, rather than circumstances which are more likely to be encountered (e.g., cigarette ignition). Several persons indicated that it is very difficult to predict whether a particular item of furniture will pass the test, and stated that Minnesotans will be forced to incur costs associated with research and development involving the relatively new standard. If compliance were required with TB 133, it was estimated that the cost of furniture would rise from 5% to 40%, with many items increasing in cost from 25% to 30%. The cost of custom-made furniture in particular would be affected due to the need to build at least one additional piece of every item constructed for use (and eventual destruction) during the testing process. Mr. Feldson estimated that it would cost approximately $1200 to test a chair for compliance with TB 133. Numerous individuals commented that the price and availability of furniture would change dramatically if TB 133 were required, and that it would be difficult to create a home-like atmosphere in health care and residential settings.

The State Fire Marshal acknowledged that higher costs would result from the proposed standard. One of the methods initially proposed to ease the impact of the rule was to exempt furniture to be used in fully sprinklered public occupancies, if the item of furniture met two component tests developed in California, TB 116 and TB 117. TB 116 is a standard which was developed and used before TB 133 to measure the flame retardance of upholstered furniture. The test is accomplished by lighting three cigarettes on all horizontal surfaces and measuring the outcome once the cigarettes extinguish themselves. An item fails TB 116 if obvious flaming combustion occurs or if a char develops extending more than two inches in any direction away from the cigarette. Cigarette testing is also done to establish compliance with TB 117. Unlike TB 133, TB 117 tests components, not finished pieces of furniture. Thus, a manufacturer can purchase materials which are certified as passing TB 117 and be certain that the finished product will pass TB 117. The

testing requirement is thus removed from the manufacturer and resulting costs are significantly reduced.

Mr. Nelson, Ms. Hebel, Mr. Feldson, Mr. Druk, and others urged that TB 116 and/or 117 be used in place of TB 133, whether or not the public occupancy is sprinklered. All of these commentators maintained that the suggested alternatives provided adequate flammability protection while keeping costs within reasonable levels. Based on the comments made by these interested persons, the Fire Marshal's Office modified the proposed rule in its first post-hearing comment to indicate that furniture could satisfy the flammability requirements by either complying with TB 133 or complying with both TB 116 and TB 117. Mr. Nelson suggested that this change still resulted in an overly burdensome rule, since the test for TB 116 requires the destruction of a completed piece of furniture or of a full-scale model. The Fire Marshal's Office agreed and further modified the proposed rule in its second post-hearing submission to delete the reference to TB 116. The Fire Marshal also clarified the proposed rules by setting forth TB 133 and TB 117 as alternative standards rather than listing TB 133 as the standard for compliance and then exempting furniture that complied with TB 117.

The rule as finally proposed states as follows:

> Seating furniture manufactured on or after March 1, 1993, that is sold, used, or intended for use in public occupancies must meet the requirements of either item A or item B.
>
> A. Seating furniture meeting the requirements of this item must meet the test requirements set forth in Technical Bulletin 133 of the state of California, "Flammability Test Procedure for Seating Furniture for Use in Public Occupancies," published in January 1991 by the California Bureau of Home Furnishings and Thermal Insulation which is incorporated by reference, is not subject to frequent change, and is available at the State Law Library, 25 Constitution Avenue, Minnesota Judicial Center, St. Paul, Minnesota 55155.
>
> B. Seating furniture meeting the requirements of this item must be constructed using upholstery fabric and filling materials that meet the test requirements set forth in Technical Bulletin 117 of the state of California, "Requirements, Test Procedures and Apparatus for Testing the Flame Retardance of Filling Materials Used in Upholstered Furniture," published in January 1980 by the California Bureau of Home Furnishings and Thermal Insulation which is incorporated by reference, is not subject to frequent change, and is available at the State Law Library, 25 Constitution Avenue, Minnesota Judicial Center, St. Paul, Minnesota 55155.

As finally proposed, part 7510.5530 establishes a minimum standard of flammability for seating furniture which can be met by either the more stringent testing required by TB 133 or the less stringent testing which

establishes compliance with TB 117. This alternative standard approach allows manufacturers flexibility while meeting the need to establish a flammability standard in seating furniture. The overwhelming majority of comments supported using the TB 117 method to set the minimum flammability standard. Most commentators indicated that TB 117 would result in little or no increased cost to consumers. The State Fire Marshal implicitly recognized the validity of TB 117 through its inclusion in the rules as originally proposed for certain sprinklered public occupancies. The evidence in the rulemaking record supports the conclusion that a minimum flammability standard of TB 117 is needed and reasonable.

The State Fire Marshal originally believed that adoption of TB 133 was mandated by Minn. Stat. § 299F.844. The statute states that the Fire Marshal "shall consider" TB 133. That language does not require adoption of TB 133, but it does require that TB 133 be examined and, if suitable, be adopted. The State Fire Marshal has demonstrated that TB 133 is needed and reasonable as a standard for seating furniture flammability. Allowing alternative standards is also reasonable. The decision to modify the rules by specifying alternative standards meets the concerns raised by many commentators during the rulemaking proceeding. The use of TB 117 was widely discussed at the hearing and in post-hearing comments, and the rules as modified do not constitute a substantial change from the rules as originally proposed.

Proposed Rule 7510.5540 - Exempt Articles

17. As originally proposed, rule part 7510.5540 was composed of four subparts which described specific articles of furniture that are exempt from the seating flammability standards established in the proposed rules. Subpart 1 simply reiterated that articles of seating furniture exempted by Minn. Stat. § 299F.842 from compliance with the Furniture Fire Safety Act are also exempt from compliance with the proposed rules. Subpart 2 provided that furniture that met the requirements of TB 116 and TB 117 and is used in a building that is protected throughout by an automatic sprinkler system was exempt from having to meet the TB 133 standard. Subpart 3 of the rules as originally proposed exempted reupholstered furniture from having to satisfy TB 133 if the following requirements were met: 1) the item was in use in a public occupancy before January 1, 1993, 2) the item has never met the requirements of TB 133; 3) replacement filling material is fire retardant; and 4) all filling material is completely encased in material designed to slow the spread of fire, increase escape time, prevent rapid combustion, insulate internal materials, and restrict generated gases. Subpart 4 allowed the Fire Marshal to grant exemptions for articles of health care, beauty, and barber furniture if that article is necessary to provide the service, a complying article of furniture is not commonly available on the market, and granting the exemption does not unreasonably compromise fire safety. Subparts 2, 3, and 4 of the proposed rules are discussed below.

Subpart 2 - Sprinklered Buildings

18. Several commentators were critical of the requirement in the rules as originally proposed that furniture meeting the requirements of TB 117 could only be exempt from compliance with TB 133 if the building in which it was used was fully sprinklered. In its post-hearing comments, the Fire Marshal's Office decided that it was appropriate to delete subpart 2 in its entirety. As discussed above, part 7510.5530 has been modified to delineate TB 133 and

TB 117 as alternative standards in the same rule part. All references to TB 116 have been deleted from the proposed rules. By taking this approach, the exemption for furniture meeting TB 117 has been extended to any building regardless of whether it is fully protected by an automatic sprinkler system. The deletion of subpart 2 removes any reference to sprinklered buildings and thereby clarifies the intent of the proposed rule. The issue was fully discussed at the hearing, and no one has objected to the proposed language change. The deletion of subpart 2 does not constitute a substantial change from the rules as originally proposed.

Subpart 3 - Reupholstered Furniture

19. Kate Hebel of New Edition, Architect Gaius Nelson, Tom Kopacek of A & M Business Interiors, and Jim Druk, past President of the Professional Upholsterers Association of Minnesota, asserted that the rules as originally proposed imposed unreasonable burdens with respect to reupholstered furniture. They commented that it would be difficult to keep accurate records relating to the historical use of particular items of furniture in public occupancies, and asserted that the rules as originally proposed would have a detrimental impact on the market for used furniture in public occupancies. The State Fire Marshal acknowledged the difficulties inherent in showing that an article has never met the flammability standards and was used in a public occupancy prior to January 1, 1993, and deleted those requirements. The proposed rules were also modified to eliminate the requirement that the replacement filling material be fire retardant.

To ensure that the reupholstery exemption is not used to avoid the flammability standard, the State Fire Marshal added a requirement that the item must have been manufactured prior to March 1, 1993, the date the alternative flammability standards become effective. The proposed rules have also been modified to add an item indicating that the reupholstered furniture may be used in a public occupancy if all replacement or additional filling material and the fabric used to reupholster the item meets TB 117. The rules continue to provide that it is in any event sufficient if all new filling material is completely encased in a fire resistant material.

Subpart 3 of the proposed rule part would thus read as follows:

> Subp. 3. Reupholstered furniture. An article of seating furniture manufactured before March 1, 1993, that is reupholstered after March 1, 1993, may not be used in a public occupancy unless it meets the requirements of either item A or item B of part 7510.5530 or unless it meets one of the following criteria:
>
> A. all replacement and additional filing material and the fabric used to reupholster the article meet the requirements of part 7510.5530, item B, or
>
> B. all filling material is completely encased in material designed to slow the spread of fire, increase escape time, prevent rapid combustion, insulate internal materials, and restrict generated gases.

The Administrative Law Judge finds that subpart 3 as modified in post-hearing comments is needed and reasonable. The language changes proposed by the Fire Marshal will decrease the burdens placed upon reupholstering and used furniture businesses while continuing to require compliance with fire safety standards. The proposed modifications were discussed at the hearing and in post-hearing submissions, and were made in response to public comments. The modifications do not constitute a substantial change from the rules as originally proposed.

Subpart 4 - Health Care, Beauty, and Barber Furniture

20. Persons who purchase specialty furniture used in health care, beauty, or barber settings may apply for an exemption from the seat furniture flammability standards. By the terms of subpart 4, that exemption must be granted if the article of furniture is necessary to provide a service, an article which does comply with the flammability standards is not commonly available, and the Fire Marshal determines that the article does not unreasonably compromise fire safety. No commentators objected to the method of obtaining an exemption. The State Fire Marshal has set specific mandatory standards which limit discretion to grant or deny exemptions. Although the Fire Marshal's determination of whether a complying item is "not commonly available on the market" or whether fire safety will be "unreasonably compromised" by use of a non-complying item necessarily calls for the exercise of subjective judgment, the exemption criteria specified do provide standards which can be independently assessed upon review. The exemption process will permit persons in the listed occupations who would otherwise be adversely affected by the proposed rules to demonstrate the propriety of exempting any individual article of furniture for use in a public occupancy. Subpart 4 has been shown to be needed and reasonable.

Subpart 5 - Personal Furniture

21. The rules as originally proposed did not contain an exception from the flammability standards for the personal furniture of nursing home residents. Numerous individuals who design, furnish, or operate long-term care facilities or represent residents living in such facilities supported the inclusion of such an exception, including Bill Bergum of Care Providers of Minnesota; Charles Osell of DHS; Gaius Nelson, Architect; Jennie Larson of Ottertail Nursing Home; James Pederson, Administrator of Hillcrest Nursing Home; Mary Nell Zellner, Administrator of Friendship Manor Nursing Home; Iris Freeman of the Minnesota Alliance for Health Care Consumers; Annette Thorson of Berkshire Residence; and Michael Finn of the Minnesota Association of Homes for the Aging. These commentators emphasized that stringent fire safety precautions are taken in nursing homes, and the effectiveness of these measures is evidenced by the fact that there have been only three fire deaths related to upholstered seating furniture in Minnesota nursing homes over the last 15 years. Approximately 45,000 persons reside in nursing homes in Minnesota, and about half of them ask to bring articles of personal furniture with them. The rules as originally proposed would have precluded residents from furnishing their rooms with a personal chair unless the chair was newly purchased or reupholstered to meet the proposed standards. All of the testimony presented on this issue indicated that, for many residents, the retention of a "favorite" chair enables them to feel more comfortable and at home in a new environment, and the inability to bring in personal furniture would have a significant adverse impact upon their dignity and quality of life.

The State Fire Marshal initially suggested that the exemption for furnishings meeting TB 116 and TB 117 located in fully sprinklered buildings would meet the needs of nursing home residents and provide adequate protection from fires. The commentators pointed out that there was no guarantee that the resident's choice of chair would meet TB 116 and TB 117 and stressed that approximately half of the long-term care facilities in Minnesota are only partially sprinklered. The commentators also raised questions concerning whether a chair initially allowed in a sprinklered area of a building would still be permissible if the resident were moved to a non-sprinklered area in the same facility.

In post-hearing comments, the Fire Marshal considered issues relating to residents' quality of life and the need for fire safety. The pervasive use of smoke detectors, the continuous presence of trained staff members, widespread use of sprinkler systems, and restrictions against smoking in residents' rooms provided support for the allowance of a limited exception for residents' personal furniture. The Fire Marshal noted that the low number of fire deaths over the last fifteen years suggested that existing methods of fire protection are effective to substantially ensure resident safety from fires. Allowing personal furniture improves the atmosphere of residents' living quarters, reduces the institutional appearance of the rooms, ensures the presence of one comfortable article of furniture, and creates a personal link between the resident and that resident's room. Furthermore, Minn. Stat. § 144.651 (1990) and 42 C.F.R. § 483.10 seek to protect the ability of residents to maintain personal possessions when residing in a long-term care facility. The Fire Marshal was persuaded, based upon the testimony of those involved in long-term health care, that the benefits associated with continuing to allow noncomplying furniture in long-term care facilities outweighed the marginal additional protection offered by imposing the proposed flammability standards.

Accordingly, a new subpart 5 has been added to proposed rule part 7510.5540. The new subpart initially incorporated language which exempted one chair belonging to a resident from the flammability standards if that chair was used in the resident's room. One commentator suggested that a chair with an ottoman (or other similar footrest) be defined as one article of furniture. The Fire Marshal agreed with this suggestion and added a sentence to the proposed rules to that effect. Another commentator pointed out that restricting the allowable personal chair to the resident's room could cause confusion given the current trend toward apartment-type suites. To eliminate this potential confusion, the Fire Marshal replaced the word "room" with "personal living area" in subpart 5, item C. As finally proposed, subpart 5 would read as follows:

> Subp. 5. Personal furniture. An article of seating furniture in a nursing care or convalescent home is exempt from the requirements of part 7510.5530 if the following criteria are met:
>
> A. the article is used in accordance with Minnesota Statutes, section 144.651, subdivision 22, and Code of Federal Regulations, title 42, part 483.10;
>
> B. the article belongs to a resident;
>
> C. the article is used in the resident's personal living area; and

D. the resident has no more than one such exempt article in the nursing care or convalescent home.

For purposes of this subpart, a chair and accompanying footstool are considered one article of seating furniture.

The Fire Marshal has demonstrated that subpart 5, as finally proposed, is needed and reasonable. The new language incorporates the suggestions of a large number of commentators. The risks and benefits of the new subpart were carefully and thoughtfully assessed in the Fire Marshal's post-hearing comment. While the effect of the new subpart does have an impact on a large number of people, those affected had notice of the proposed rules and an opportunity to thoroughly discuss the issue. The change does not constitute a substantial change from the rules as originally proposed.

Proposed Rule 7510.5550 - Labeling Requirements

22. In order to ensure that the State or Local Fire Marshal responsible for inspecting public occupancies may readily determine whether a particular article of seating furniture complies with the flammability standards, the proposed rules incorporate a requirement that labels be affixed to articles of seating furniture that are in compliance with the proposed rules. The labeling requirements will also ensure that the consumer is aware of the standards met by the furniture which he or she contemplates buying. As originally proposed, subpart 1 of the rules prescribed the language to be included on the label to be placed on furniture meeting the TB 133 standard, subpart 2 prescribed the language to be included on the label to be placed on furniture in fully-sprinklered buildings meeting the TB 117 standard, and subpart 3 prescribed the language to be included on the label to be placed on reupholstered furniture meeting the requirements of rule part 7510.5540.

Due to the modifications made in the proposed rules, it was necessary for the Fire Marshal to propose changes in the labeling requirements as well. Subpart 1 is altered by changing its title from "Standard label" to "TB 133 label" and including a citation to part 7510.5530, item A (the new location of the TB 133 standard). The actual label requirement for furniture which meets the TB 133 standard remains unchanged. Subpart 2 is modified by changing its title from "Label for furniture in sprinklered buildings" to "TB 117 label." The language of the label itself is modified to delete references to TB 116 and to conform to the TB 117 label currently required in California. Although the Fire Marshal's Office indicated that the language of the label is less than perfect since it does not mention TB 117, the Office indicated that the California language is the most likely label to receive universal usage. The label required by subpart 3 of the proposed rules is also altered in order to include references to Technical Bulletins 133 and 117, and delete the word "however." All three subparts continue to permit manufacturers to obtain approval of labels with different language if the label indicates compliance with the appropriate standard and is accepted by another jurisdiction as meeting that jurisdiction's label requirements.

The Fire Marshal has shown that the labeling requirements, as modified, are needed and reasonable to inform consumers of the standards met by particular articles of furniture and facilitate inspections to determine compliance with the proposed rules. The modifications made to subparts 1, 2,

and 3 conform the labels to the standards finally proposed in this rulemaking. The modifications do not constitute a substantial change from the rules as originally proposed.

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

CONCLUSIONS

1. The State Fire Marshal gave proper notice of this rulemaking hearing.

2. The State Fire Marshal has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a, and 2 (1990), and all other procedural requirements of law or rule so as to allow him to adopt the proposed rules.

3. The State Fire Marshal has demonstrated his statutory authority to adopt the proposed rules pursuant to Minn. Stat. § 299F.844 (1990), 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) (1990).

4. The State Fire Marshal 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) (1990).

5. The additions and amendments to the proposed rules which were suggested by the State Fire Marshal 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 (1990), and Minn. Rule pts. 1400.1000, subp. 1, and 1400.1100 (1991).

6. Any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

7. A Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the State Fire Marshal 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 consistent with the Findings and Conclusions made above.

Dated this 18th day of November, 1992.

Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

Reported: Tape Recorded; No Transcript.