5-0210-8674-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF ADMINISTRATION

In the Matter of Proposed Adoption of Amendments to Chapters 1360 and 1361 of the Minnesota State Building Code [Prefabricated Homes and Industrialized/Modular Buildings].

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Howard L. Kaibel, Jr., on June 13, 1994, at 1:00 p.m. in Room 408, Metro Square Building, 7th and Robert Streets, St. Paul, 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 applicable to the adoption of the rules, whether the proposed rules are needed and reasonable and whether or not modifications to the rules proposed by the Department after initial publication are impermissible substantial changes.

Amy Kvalseth, Assistant Attorney General, 525 Park Street, St. Paul, Minnesota 55103, appeared on behalf of the Department. The Department's hearing panel consisted of Thomas Joachim, State Building Official; Elroy Berdahl, Supervisor of the Technical Services Section; and Scott McLellan, Code Representative.

Seventeen persons attended the hearing. Fifteen people signed the hearing register. 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 fourteen calendar days following the date of the hearing, to June 27, 1994. Pursuant to Minn. Stat. § 14.15, subd. 1 (1992), five working days were allowed for the filing of responsive comments. At the close of business on July 5, 1994, the rulemaking record closed for all purposes. Written comments were submitted by interested persons and the Department responding to matters discussed at the hearings and suggesting changes in the proposed rules.

The Department must wait at least five working days before it takes any final action on the rule(s); 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 Department of actions which will correct the defects and the Department 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 Department may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Department does not elect to adopt the suggested actions, it must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Department 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 Department may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Department makes changes in the rule other than those suggested by the Administrative Law Judge and Chief Administrative Law Judge, then it shall submit the rule, with the complete hearing 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 March 25, 1994, 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 Notice of Hearing proposed to be issued;
(c) the proposed Order for Hearing in this matter;
(d) the names of persons who would represent the Department and witnesses it might call at the hearing; and,
(e) the Statement of Need and Reasonableness (SONAR).

2. On April 28, 1994, 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.

3. On April 28, 1994, the Department mailed the SONAR to the Legislative Committee to Review Administrative Rules.

4. On May 2, 1994, a copy of the proposed rules was published at 18 State Register 2298.

5. On June 7, 1994, the Department 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 together with all materials received in response to that notice;
(d) the Department's certification that its mailing list was accurate and complete as of April 28, 1994, and the Affidavit of Mailing the Notice to all persons on the Department's mailing list; and,
(e) the Affidavit of Mailing the SONAR to the Legislative Committee to Review Administrative Rules.

6. Minn. Rule 1400.0600 requires that the documents listed in Finding 5 be filed with the Office of Administrative Hearings at least 25 days prior to the hearing on the rule. The documents were filed only six days before the hearing. This failure to meet the filing requirement is a procedural defect in these rules.

Under Minn. Stat. § 14.15, subd. 5, harmless errors arising out of a failure to comply with the procedures for rulemaking must be disregarded if:

(1) the failure did not deprive any person of the opportunity to participate meaningfully in the rulemaking process, or

(2) the agency has taken corrective action to cure the defect.

There is no evidence that the error deprived any person of the opportunity to participate in the hearing. The failure to meet the filing requirement is a harmless error. The error must be disregarded by operation of Minn. Stat. § 14.15, subd. 5.

Nature of the Proposed Rules and Statutory Authority.

7. Industrialized/modular buildings are closed-construction buildings made away from their ultimate location. Such buildings do not include manufactured homes (also known as mobile homes) and "prefabricated buildings" built by small contractors (who build up to three per year) which are separetely regulated under proposed rule part 1360. Minn. Stat. § 16B.75 ratified the Interstate Compact on Industrialized/Modular Buildings (the Compact) in 1990. The Compact seeks to develop a uniform national building code for industrialized/modular buildings and a uniform system of inspection to certify compliance with that code, by joint action of all or most of the individual states, preempting U.S. Congressional regulation. The proposed rules would adopt the uniform Model Rules and Regulations proposed under the Compact for industrialized/modular buildings and prefabricated buildings as most recently amended on December 3, 1993.

The compact became effective as soon as it was ratified by three states. So far, only three states have adopted it: Minnesota, New Jersey and Rhode Island. Rhode Island has no manufacturers of industrialized/modular buildings and New Jersey has only three manufacturers who do not export units to other states. Minnesota buildings are not exported to New Jersey or Rhode Island and those states do not manufacture buildings for consumption in Minnesota. Transportation costs for moving industrialized/modular buildings to their installation sites generally restrict manufacturers to sales within a few hundred miles of their construction sites.

Most of the buildings imported into Minnesota come from Wisconsin and all of the buildings exported from Minnesota are sold in Wyoming and the four immediately adjacent states, mostly Wisconsin. Minnesota and Wisconsin have a reciprocal understanding, allowing units built and certified in Minnesota to be sold in Wisconsin without further inspections and vice-versa.

There is nothing in the record to suggest that the Compact will be ratified in the near future by Wisconsin or any other state. It is on the contrary alleged, without contradiction, that the compact has been considered and rejected by states with major industrialized/modular manufacturing industries, including Illinois and Indiana.

The uniform building code proposed under the Compact was drafted by commissioners appointed from the three current participating states. The uniform code would not be effective in Minnesota until that code is adopted by our Department of Administration under our the Administrative Procedure Act (Minn. Stat. Ch. 14). Minn. Stat. § 16B.61, subd. 1, sets out the Department's rulemaking authority as follows:

> Subject to sections 16B.59 to 16B.73, the commissioner shall by rule establish a code of standards 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. The code must conform insofar as practicable to model building codes generally accepted and in use throughout the United States. In the preparation of the code, consideration must be given to the existing statewide specialty codes presently in use in the state. Model codes with necessary modifications and statewide specialty codes may be adopted by reference. The code must be based on the application of scientific principles, approved tests, and professional judgment. To the extent possible, the code must be adopted in terms of desired results instead of the means of achieving those results, avoiding wherever possible the incorporation of specifications of particular methods or materials. To that end the code must encourage the use of new methods and new materials. Except as otherwise provided in sections 16B.59 to 16B.73, the commissioner shall administer and enforce the provision of those sections.

The proposed rules would adopt by reference a model code for the construction and inspection of industrialized/modular buildings and prefabricated buildings. The Department has the statutory authority to adopt these rules.

Small Business Considerations in Rulemaking.

8. Minn. Stat. § 14.115, subd. 2, provides that state agencies proposing rules affecting small businesses must consider methods for reducing adverse impact on those businesses. In its SONAR, the Department stated:

> The uniform regulation of the production of industrialized buildings by manufacturers in the compacting states will result in a reduction in the costs of manufacture since the members

states have agreed to allow the siting of units in their states without the imposition of any regulatory requirements other than those outlined in the Model Rules and Regulations. Thus, a manufacturer can take advantage of economies of scale, with fewer special requirements to meet, and should realize savings in both design and manufacturing costs.

By making the code requirements for industrialized construction the same in Minnesota and in other states participating in the compact, the compact and these implementing rules will make it easier for "small businesses", to produce industrialized buildings for a multi-state market. Also deriving benefit from the compact and implementing rules will be those "small businesses" that are engaged in erection and installation of industrialized buildings and may now be able to obtain units at a lower costs [sic] because of savings that the manufacturers will be able to pass along.

The proposed new rules would not impose any additional compliance requirements upon these "small businesses". Minnesota manufacturers of industrialized buildings would be able to ship their products into other participating states without having to comply with additional requirements in those states. The amount of money saved by elimination of this paperwork will depend on the volume of shipments of units between participating states, but it is likely to be substantial, and to become more substantial as more states join the compact. No additional professional services will be required as a result of these amendments and new rules. There is no basis for any differential requirements for small businesses because all producers [in] participating states are entitled to benefit from improved procedures and no lesser degree of code compliance can be accepted from "small businesses" because public health, safety and welfare requirements are the same regardless of who constructs or markets the building.

By regulating manufacturers of prefabricated buildings apart from the interstate compact, the manufacturers benefit in that none of the reporting requirements, schedules, or deadlines identified in items (a), (b), or (c) are applicable. However, the lessening or exempting of code requirements for small businesses is not appropriate as Minnesota Statute 16B.59 requires the commissioner of administration to administer a state code of building construction which will provide basic and uniform performance standards for all residents of the state.

SONAR, at 8-10.

At present only two other states, New Jersey and Rhode Island, have adopted the uniform code required by the Compact. There are no other states in the Compact. According to uncontradicted testimony from Marlene J. Pooler of Showcase Homes, Inc., a Minnesota manufacturer of prefabricated buildings, no such buildings produced in Minnesota are shipped to either New Jersey or Rhode Island. Therefore, there are no savings in either design or manufacturing costs arising out of the adoption of these rules.

There is currently no "multi-state market" of states adhering to the requirements of the Compact available to Minnesota producers. The state of Wisconsin is the primary out-of-state destination of prefabricated housing from Minnesota. Wisconsin and Minnesota have a reciprocal arrangement whereby each state accepts the inspection of the other as meeting its own building code requirements. The Department acknowledges that this recriprocal arrangement would be abrogated if the uniform building code under the Compact were adopted.

The net impact of this abrogation is disadvantageous to Minnesota manufacturers under the uniform rules as currently approved by the three state IBC. A Minnesota representative on the Commission indicated that this was unintentional and was not really understood until they looked at the model rules after they were finalized and discovered,

> "Oops! We may have created a concern that it is easier for the noncompacting states' manufacturers to work within the program than it is for the in-state manufacturers." (Hearing testimony)

Abrogation of the Wisconsin reciprocal arrangement would require Minnesota producers who sell in Wisconsin to obtain an additional (possibly third party) inspection to certify the prefabricated building meets Wisconsin building codes (and vice-versa, if importing is allowed). This effect of adopting the rules would impose a cost on both Wisconsin and Minnesota producers. This effect is not included in the Department's analysis of small business considerations and is contrary to the predicted impact in the above-quoted SONAR.

The Department maintains that easing inspection requirements or exempting small businesses from those requirements are inappropriate because minimum standards are statutorily mandated to protect residents of the state. SONAR, at 10. This rationale is not applicable to products manufactured in Minnesota for sale in Wisconsin and other reciprocity states. Such products are developed for the Wisconsin and other reciprocal states' markets and are inspected to ensure they meet those states' building codes. Obviously, the Department is willing to ease inspection requirements and exempt small businesses building less than four units per year, pursuant to proposed revised Rule 1360.

Marlene Pooler estimated that the inspections required under the model rules would cost $400.00 per house. This is an increase over the present inspection cost of $90.00 to $120.00. The fee is occasionally $60.00 if the inspector "doubles up" by inspecting two units on the same trip. The Department acknowledged that some increase in the cost of inspection is likely, but argued that they could reduce some inspections based on "past performance," that some savings will be realized since inspections can occur at any point in the construction process of a prefabricated building and most manufacturers have more than one building under construction at one time.

A table of costs estimated for each manufacturer was submitted by the Department. The table projected the following inspection schedule:

Dynamic Homes	2 weeks	25 inspections
Homera	2 weeks	25 inspections
Showcase	8 weeks	6 inspections
Verndale	4 weeks	12 inspections
Worldwide	PER JOB	

June 30, 1994 Department Letter, Attachment 3.

The costs of inspections were also estimated by the Department in Attachment 3. For Dynamic Homes, the highest estimate was $685.00. The lowest estimate for inspections at Dynamic Homes was 426.00. Assuming, arguendo, that the lowest rate would be available for each inspection, Dynamic Homes would be assessed $10,650.00 in inspection fees. The total inspection fees paid by Dynamic Homes in 1993 was $1,466.27. This is at a minimum, a seven-fold increase in the inspection fees incurred by Dynamic Homes by the Department's own estimates.

The Department did not estimate what costs would be incurred by manufacturers who would require a Wisconsin inspection. Those costs are likely to increase since a Minnesota inspection would no longer be honored in Wisconsin. There is no mechanism in the rule to relieve a manufacturer of the cost of a Minnesota inspection when the unit is manufactured for installation in Wisconsin.

The rules proposed by the Department will affect small business by increasing inspection fees in Minnesota and imposing duplicative inspection requirements on products manufactured in Minnesota for sale in Wisconsin and vice versa. The Department's analysis under Minn. Stat. § 14.115, subd. 2, for reducing the adverse impact of rules on small businesses is defective. The Department has not adequately considered how the rules will affect small businesses and has not adequately considered ways in which the impact of the proposed rules on those businesses can be reduced. The impact of the rules would be to dramatically increase the costs of inspections on manufacturers and create barriers to interstate sales of products. The Department has not complied with Minn. Stat. § 14.115, subd. 2. Under Minn. Stat. § 14.115, subd. 5, this rule cannot be adopted. To adopt the rule, the Department must conduct an analysis of small business considerations that takes into account the duplication of inspections, the increase in costs under the rules, the impact on interstate sales and ways in which those increased costs and impacts can be reduced or eliminated. Once that analysis is completed, a new notice of hearing can be published and mailed to persons on the agency mailing list and persons who attended the hearing.

Department staff confirmed at the hearing that postponing adoption of the uniform rules would not adversely affect the existing regulatory program. The delay will give Wisconsin more time to consider becoming a Compact state, which would eliminate most of the likely adverse impact on small business.

Fiscal Notice.

9. Minn. Stat. § 14.11, subd. 1, requires the preparation of a fiscal notice when the adoption of a rule will result in the expenditure of public funds in excess of $100,000 per year by local public bodies. The notice must include an estimate of the total cost to local public bodies for a two-year

period. In its SONAR, the Department 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. No notice is required in this rulemaking.

Impact on Agricultural Land.

10. Minn. Stat. § 14.11, subd. 2 (1988), imposes additional statutory requirements when rules are proposed that have a "direct and substantial adverse impact on agricultural land in this state." The statutory requirements referred to are found in Minn. Stat. §§ 17.80 to 17.84. The rules proposed by the Department will have no substantial adverse impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2 (1988).

Reasonableness of the Proposed Rules.

11. 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 rules, the Department prepared a Statement of Need and Reasonableness (SONAR). The Department has relied primarily on its SONAR as its affirmative presentation of need and reasonableness at the hearing. The Department's comments made at the public hearings and in written comments following the hearing supplemented that presentation.

This Report will not discuss each rule part, or each change proposed by the Department from the rules as published in the State Register. The Report will focus on those provisions that the participants questioned. Persons or groups who do not find their particular comments in this Report should know that each and every suggestion has been read and considered.

Industrialized/Modular Buildings

Proposed Rule 1361.0100 - Purpose

12. Proposed Rule 1361.0100 indicates that the rules will govern the construction of industrialized/modular buildings. In addition, the purpose of the rules is identified as establishing a licensing and certification system for such products. As discussed in Finding 7, above, the Department is expressly authorized to adopt rules setting construction, licensing, and certification standards. Proposed rule 1361.0100 is needed and reasonable as proposed.

Proposed Rule 1361.0200 - Definitions

13. Proposed rule 1361.0200 establishes definitions of terms used in these rules. Only subpart 6 of the proposed definitions requires comment. Subpart 6 defines "model rules and regulations" as those incorporated by reference in part 1361.0700. There is no part 1361.0700. This constitutes a defect in the proposed rule since the incorrect citation is unreasonably misleading. To cure this defect, the Department must replace "part 1361.0700" in subpart 6 with "part 1361.0300." The subpart, as modified, is needed and reasonable to define "model rules and regulations." The change cures a defect and does not constitute a substantial change.

Proposed Rule 1361.0300 - Incorporation of Model Rules and Regulations

14. In part 1361.0300, the Department incorporates the Model Rules of the Industrialized Buildings Commission (IBC), including the December 3, 1993 amendments, into the Minnesota state building code. The proposed rule indicates the model rules are not subject to frequent change and are available at the Minnesota state law library. Proposed rule 1361.0300 meets the requirements of incorporation by reference in Minn. Stat. § 14.07, subd. 4. Marlene Pooler objected to the need to establish a quality assurance program. The Department responded that since Showcase Homes uses conventional construction methods, Showcase homes is not required to meet the quality assurance requirements of the model rules. The incorporation of the model rules is needed and reasonable.

Proposed Rule 1361.0400 - Certification

15. Proposed rule 1361.0400 requires any industrialized/modular buildings or components "sold, offered for sale, or installed in the state" bear the IBC seal and data plate. These items can only be obtained if the model rules are complied with by the manufacturer and an inspection program is in place. As currently written, this rule would appear to prohibit the importation of industrial/modular buildings or components into Minnesota except from New Jersey or Rhode Island. No imports from those states are received in Minnesota.

As discussed in Finding 8, supra, industrial/modular buildings or components manufactured in Minnesota and sold for installation in other states are required by this rule to undergo the inspection process. This inspection process will impose costs on Minnesota manufacturers and not meet the Wisconsin and other states' requirements for inspection. Most industrial/modular buildings or components manufactured in Minnesota and sold to buyers outside the state are installed in Wisconsin and must meet Wisconsin standards. To continue making sales to buyers located in Wisconsin, (if Wisconsin does not retaliate against our import ban with one of their own) the manufacturer must have a second inspection. This is unreasonable, since it requires the manufacturer to pay for two inspections.

There are a number of methods to cure this defect in the proposed rule. The Department could delete part 1361.0400 and retain the existing inspection process. The rule part could also be modified to require any industrial/ modular buildings or components sold for installation in Minnesota bear the IBC seal and data plate. If the second option is chosen, language should be added to require any industrial/modular buildings or components sold for installation outside of Minnesota meet the existing inspection requirements.

The second option is needed and reasonable only if the State of Wisconsin agrees to retain the existing reciprocal arrangement under the alternative inspection approach. Either change would accommodate the needs of manufacturers who sell their products in Wisconsin. The changes would not appear to be a substantial change, requiring an additional hearing. However, an additional bearing will be needed in any case, to comply with the small businesses statute, so the revision can be considered there.

Proposed Rule 1361.0500 - Installation

16. Proposed Rule 1361.0500 requires that all industrial/modular buildings or components must be installed in compliance with the Minnesota state building code. This code would include the model rules incorporated by reference in this rulemaking. Requiring installed industrial/modular buildings or components to meet these standards is independent of requiring inspections and labels. Adopting the installation standards in the model rules has been shown to be needed and reasonable.

Prefabricated Buildings

Proposed Rule 1360.0100 - Title and Scope

17. Proposed rule 1360.0100, subpart 2, establishes the scope of the rules for certifying "prefabricated buildings." The Department has proposed that this rule apply to those manufacturers who make up to three such buildings for installation in Minnesota per calendar year, exempting them from Chapter 1361. Makers of buildings that do not meet the definition of "prefabricated buildings" or who construct more than three such buildings must follow the rules on industrial/modular buildings or components discussed above at Findings 12 to 16. The Department has shown exempting manufacturers of limited numbers of prefabricated buildings from the industrial/modular buildings rule to be needed and reasonable.

Proposed Rule 1360.0200 - Definitions

18. Proposed rule 1360.0200 sets out definitions of terms used in the rule. Subpart 14a defines "manufacturer" as "any person or firm engaged in the manufacturing of not more than three prefabricated buildings for permanent installation in Minnesota in a calendar year." Vern Muzik of Dynamic Homes inquired into whether single companies with lumber yards at multiple locations were considered one manufacturer under the rule. The Department indicated that the rule was intended to treat each lumber yard as a manufacturer, regardless of ownership. The Department's interpretation is inconsistent with the plain language of the subpart. The Department will have to alter the wording of the subpart for the intended meaning to be expressed as a rule.

Vern Muzik objected to the Department's interpretation as allowing some manufacturers to manipulate the rule to avoid participation in the inspection program under the industrial/modular buildings rule. The Department indicated that to date, no such manufacturer has assembled more than three units in all its locations. June 30, 1994 Department Letter, Attachment 2. The inspection process the Department proposes for industrial/modular buildings would be geared to individual locations that produce such buildings. Any location that

produces three or fewer buildings per calendar year would not fit readily within the Department's proposed approach to industrial/modular building inspection. The Department has not shown, however, that allowing a single person or firm to construct up to three prefabricated buildings at as many locations as it can establish per calendar year is needed or reasonable.

The Department's intent to allow manufacturers at multiple locations could be incorporated into the existing rule language. The existing rule focuses on the "person or firm." To expand the definition of manufacturer, the Department could use the following language:

> Any person or firm engaged in the manufacturing of not more than three prefabricated buildings per single location [for permanent installation in Minnesota?] [or anywhere else?] in a calendar year.

The language would meet the Department's intent for the subpart. The revision of the subpart has not been shown, however, to be needed or reasonable. The new language would also appear to be a substantial change. Hearing participants curtailed their criticisms of this proposal upon being assured at the hearing that the language proposed would not allow for such an expansion of the exemption. If its changed, they have a legal right to be heard.

19. The remainder of the proposed rule on prefabricated buildings would delete extensive provisions from the existing rule. It would also update terms used in the inspection process, revising and simplifying inspections. No commentators objected to these changes. However, the Department has not shown them to be needed and reasonable.

Revising Rule 1360 to limit its application to producers of less than four units per year, would leave the rest of the manufacturers unregulated until Rule 1361 can be revised, adopted and effectively implemented, which may take a significant while. This is a defect which can only be corrected by adopting the revised Rule 1360 and the new uniform IBC rule in Chapter 1361 at the same time, with the same effective date.

When the new hearing is conducted on this simultaneous process, more attention must be paid in the SONAR and/or testimony to documenting the need for and reasonableness of, the proposed approach in Rule 1360, with an affirmative presentation of facts.

If there are no firms, for example, that would use a 3-unit-per-separate-site provision, as stated in departmental post-hearing comments, why is a provision creating such an exception needed? If there are several large businesses with 6 or 8 separate sites, as alleged, capable of taking advantage of such a provision in the future, what is the rationale for granting them a simplified and competitively advantageous, less expensive inspection system? What is the concrete evidence of the need for this proposal and how is that evidence rationally related to the approach chosen?

Particular attention should also be devoted to the extensive proposed deletions. There is nothing in the SONAR, for example, relating to the proposed deletion of 1360.0600, the state reciprocity provisions and the cancellation of the explicit recognition of the existing reciprocity arrangement with Indiana. Mr. Jerry Pearo from Hilltop Trailer Sales

indicated at the hearing that most of his company's modular non-residential units, (apparently included in the definitions in proposed rule 1361.0200 subp. 4) are imported from Indiana. What will be the potential and/or likely effects on his business, and on similarly situated businesses, of deletion of this reciprocity? Why is such deletion needed? Does deletion mean that small builders will not be able to export any longer to reciprocity states? (It is simply unclear on this record what the precise impacts will be of proposed language changes, because the uniform rules and procedures seem to be, at best, tentative. Mr. Joachim indicated at the hearing, or example, that the original intent of the compact [arguably explicitly embodied in Minn. Stat. § 16B.75] was to limit certification to compact states, but that they now plan to allow individual manufacturers to qualify for seals. It simply cannot consequently be definitively found that deletion of reciprocity in Rule 1360 will put smaller manufacturers, exempt from Rule 1361, at a competitive advantage or disadvantage relative to manufacturers in non-compact states.)

Effective Date of Rules

20. The manufacturers of industrial/modular buildings and the Department met together after the hearing and have recommended the following criteria for setting the effective date of part 1361:

1. After obtaining documentation from Wisconsin state officials stating that they will accept Minnesota manufactured industrialized/modular buildings with IBC labels into the State of Wisconsin provided these units meet Wisconsin building codes;

or,

2. Upon action of the Industrialized Buildings Commission (IBC) establishing deadlines for noncompacting state manufacturers (i.e. time limit to ship into compacting state, then the noncompacting state must have signed interim reciprocal agreement or have joined the compact. If not, the noncompacting manufacturers can no longer ship into compact state).

June 21, 1994 Department Letter.

The Department and manufacturers deserve commendation for attempting to find a way of jointly resolving this matter. However, the regulated public needs to know more precisely when a particular rule applies. An effective date for a rule gives notice that a rule will be effective at a certain time. The criteria proposed to be adopted would not set any particular time for the rule to be effective. An effective date can certainly be conditional, but the condition must be definitive and clearly stated. Lack of a clear time at which the proposed rules will become effective is unreasonable. This is a defect in the proposal to adopt the foregoing criteria as an effective date.

The Judge has not proposed any language to fix this defect, because proposed rule part 1361 cannot be adopted in this proceeding anyway, due to the Department's defective consideration of the effects of the rule part on small businesses. The agreed upon need to set criteria for changes before the rule will become effective is another way of saying that the rule, as a whole, is not reasonable at this time. It is fair to say that there was a concensus among hearing participants, including Department Staff, that the Department and/or the IBC will have to make significant changes before a reasonable rule can be adopted and implemented.

Such changes (including arguable those jointly proposed conditions set forth above, especially #2), would probably be "substantial changes" that could only be enacted after an additional hearing, pursuant to Minn. Stat. § 14.15, subd. 3. Such a hearing will be required in any case, to comply with the small business law.

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

CONCLUSIONS

1. The Minnesota Department of Administration (the Department) gave proper notice of this rulemaking hearing.

2. The HECB has substantially 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 so as to allow it to adopt the proposed rules, except noted in Finding 8.

3. 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) and (ii).

4. The Department 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), except as noted at Findings 13, 15, 19, and 20.

5. The additions and amendments 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, except as noted at Findings 18 and 20.

6. The Administrative Law Judge has suggested language to correct the defects cited in Conclusions 2 and 4, as noted at Findings 8, 13, 15, and 19.

7. Due to Conclusions 4 and 6, this Report has been referred to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

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

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted only after a new hearing upon new notice.

Dated this 4th day of August, 1994.

HOWARD L. KAIBEL, Jr.
Administrative Law Judge

Reported: Tape Recorded; No Transcript; Tapes No. 12,999 and 13,056