

August 26, 2009

Carol Milligan
Minnesota Department of Agriculture
625 Robert Street North
St. Paul, MN 55155

RE: In the Matter of the Proposed Amendments to the Rules Governing the Agriculture Development Bond Beginning Farmer Loan Program, *Minnesota Rules*, Parts 1650.0511 to 1650.0531.
OAH Docket No. 70-0400-20823-1.
Governor's Tracking No. AR 475.

Dear Ms. Milligan:

This is to inform you that the above-referenced rules are approved as to legality. The Administrative Law Judge has not made any negative findings with respect to these rules.

For clarity of the rulemaking record, however, the Administrative Law Judge makes the following additional observations:

Determination Required by Minn. Stat. § 14.128

As required by Minn. Stat. § 14.128, the Board of the Minnesota Rural Finance Agency (Board) has made its determination regarding the effect of the rules on the regulations of a local unit of government. The Administrative Law Judge reviewed the agency's determination and concurs with the agency's finding that a local unit of government will not be obliged to adopt or amend an ordinance or other regulation in order to comply with the proposed rules.

Additional Mailing List

Minnesota statutes section 14.22 requires that, in addition to publishing proposed rules and a Notice of Intent to Adopt Rules Without a Public Hearing in the State Register and mailing the proposed rules and Notice to the agency's rulemaking mailing

list, the agency must also “make reasonable efforts to notify persons or classes of persons who may be significantly affected by the rule by giving notice of its intention in newsletters, newspapers, or other publications, or through other means of communication. Minnesota statutes section 14.23 requires that the agency describe its “efforts to provide additional notification . . . or . . . explain why these efforts were not made” in its Statement of Need and Reasonableness (SONAR).

In its SONAR, the Board stated that it would provide the rules and notice of intent to adopt the rules without a public hearing to the Minnesota Bankers Association, the Independent Community Bankers Association and Farm Credit Services. Earlier in the SONAR, the Board stated that the “classes of people affected by the proposed rules are agriculture lenders and borrowers.” While the Additional Notice Plan provides notice to the lenders referred to in the SONAR, it does not provide any notice to the farmers who are potential borrowers. Such notice would not have been difficult to provide – there are numerous organizations and institutions that represent and serve farmers in the state. Nor does there appear to be any information on the Rural Finance Authority’s website about the proposed rule change. The Board does not explain why it failed to notify any organizations representing potential borrowers.

The Board’s failure to develop an Additional Notice Plan that included all identified classes of persons who may be significantly affected by the rule or to explain in the SONAR why it did not do so is an error. In this instance, the Administrative Law Judge finds that the error is harmless pursuant to Minn. Stat. § 14.15, subd. 3 because “the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.” Although those groups and their individual members who were not notified may have been deprived of an opportunity to participate in the process, beginning farmers will benefit from the proposed rules which are based on federal law and will allow more people to participate in the loan program. Therefore, the Board’s failure to include organizations representing farmers in an Additional Notice Plan did not harm these groups.

The Administrative Law Judge is concerned about this lack of Additional Notice and reminds the Board that the additional notice plan requirement furthers several of the important purposes of the Administrative Procedure Act, including those which are to:

- (a) provide oversight of powers and duties delegated to administrative agencies;
- (b) increase public accountability of administrative agencies;
- (c) increase public access to governmental information; and to
- (d) increase public participation in the formulation of administrative rules.¹

While the Legislature was quick to point out that these purposes do not necessarily result in separate guarantees of substantive rights for regulated parties, it was the lawmakers’ collective “expectation that better substantive results will be achieved in the everyday conduct of state government by improving the process by which those results

¹ See, *Minnesota Statutes* § 14.001 (1), (2), (4) and (5) (2006).

are attained.”² It is widely acknowledged that direct lines of two-way communication, between government agencies and regulated parties, benefit the agency, the regulated parties and the broader public.³

The rules of the Office of Administrative Hearings (OAH) permit an agency to ask OAH for prior approval of the additional notice plan before publishing the request for comments or the notice of proposed rules.⁴ Once the additional notice plan is approved, the approval is final and the agency can proceed with the rulemaking knowing that an inadequate notice plan will not require the agency to return to the early rulemaking stages. This optional prior approval procedure is frequently used by agencies and boards. In this case, the Board did not seek prior approval of its additional notice plan under the rule. The Administrative Law Judge strongly recommends that, in future rulemaking proceedings, the Board take advantage of the optional prior approval process.

Our Office will file four copies of the adopted rules with the Secretary of State, who will forward one copy to the Revisor of Statutes, one copy to the Governor, and one to the Department for its rulemaking record. You will then receive from the Revisor’s Office three copies of the Notice of Adoption of the rules. Your next step will then be to arrange for publication of the Notice of Adoption in the *State Register*.

With the approval of the adoption of these rules, our Office has closed this file. We are returning the rule record to you so that your agency can maintain the official rulemaking record in this matter as required by Minn. Stat. § 14.365. If you have any questions regarding this matter, please contact Laura Schlatter at (651) 361-7847.

Sincerely,

/s/ Eric L. Lipman

ERIC L. LIPMAN
Administrative Law Judge

cc: Revisor of Statutes
Legislative Coordinating Commission
Minnesota Attorney General’s Office

² See, *Minnesota Statutes* § 14.001 (2006).

³ See, *U. S. Dep’t of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1152 n. 11 (5th Cir. 1984) (There is a “widely-shared recognition that administrative agencies need direct lines to the public voice because of their distance from the elective process”); *Jewish Community Action, et al. v. Comm’r of Public Safety*, 657 N.W.2d 604, 610 (Minn. App. 2003) (“an administrative agency needs public input to remain informed”); accord, U.S. Senate Report on the federal Administrative Procedure Act of 1946, S.Doc. No. 248, 79th Cong., 2d Sess. 19-20 (1946) (“Public participation . . . in the rulemaking process is essential in order to permit administrative agencies to inform themselves, and to afford safeguards to private interest”).

⁴ Minn. R. part 1400.2060.

Governor's Office

Nancy Breems
Secretary of State, Elections Division
180 State Office Building
100 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, Minnesota 55155-1299

RE: In the Matter of the Proposed Rules of the Plumbing Board Governing the
Plumbing Code and Plumbing Licensing and Registration;
OAH Docket No. 16-1900-20065-1. Governor's Tracking No. AR 384.

Dear Ms. Breems:

Pursuant to Minnesota Statutes, section 14.26, and Minnesota Rules, part 1400.2300, subpart 5, our office is filing with the Secretary of State four copies of the above-entitled adopted rules. The rules were approved for legality by our office on August 26, 2009.

Please send the agency copy of the rules to:

Patricia Munkel-Olson
Minnesota Department of Labor and Industry
443 Lafayette Road North
St. Paul, Minnesota 55155-4344

If you have any questions regarding this matter, please feel free to contact me.

Sincerely,

Laura Schlatter
Staff Attorney
(651) 361-7847

Enclosures