

May 26, 2022

**VIA EMAIL ONLY**

Merritt Clapp-Smith  
204 Administration Building  
50 Sherburne Ave  
Saint Paul, MN 55155  
[merritt.clapp-smith@state.mn.us](mailto:merritt.clapp-smith@state.mn.us)

**Re: *In the Matter of the Proposed Rules of the Capitol Area Architectural and Planning Board Governing Capitol Area Commemorative Artwork, Minnesota Rules Chapter 2400***  
**OAH 65-9055-37789; Revisor R-4720**

Dear Merritt Clapp-Smith:

Enclosed please find the Report of the Chief Administrative Law Judge in the above-entitled matter and the Report of Administrative Law Judge Ann C. O'reilly. The Board may resubmit the rule to the Chief Administrative Law Judge for review after changing it, or may request that the Chief Administrative Law Judge reconsider the disapproval.

If the Agency chooses to resubmit the rule to the Chief Administrative Law Judge for review after changing it, or request reconsideration, the Board must file the documents required by Minn. R. 1400.2240, subps. 4 and 5.

If you have any questions regarding this matter, please contact Denise Collins at (651) 361-7875, [denise.collins@state.mn.us](mailto:denise.collins@state.mn.us) or via facsimile at (651) 539-0310.

Sincerely,



MICHELLE SEVERSON  
Legal Assistant

Enclosure

cc: Office of the Revisor of Statutes  
Legislative Coordinating Commission

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules of the  
Capitol Area Architectural and Planning  
Board Governing Capitol Area  
Commemorative Artwork, Minnesota  
Rules Chapter 2400

**REPORT OF CHIEF  
ADMINISTRATIVE LAW JUDGE  
ON REVIEW OF RULES**

This matter came before the Chief Administrative Law Judge pursuant to the provisions of Minn. Stat. § 14.15, subds. 3, 4 (2020), and Minn. R. 1400.2240 subp. 4 (2021). These authorities require the Chief Administrative Law Judge to review an administrative law judge's findings that a proposed agency rule is defective and should not be approved.

This rulemaking concerns the proposed rules of the Capitol Area Architectural and Planning Board (Board) governing its determinations related to changes, improvements, and additions to commemorative works in the Minnesota Capitol Area.

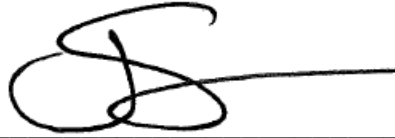
Based upon a review of the record in this proceeding, the Chief Administrative Law Judge **CONCURS** with the disapproval of the proposed rule amendments identified in the Administrative Law Judge's Report dated May 18, 2022. The changes or actions necessary for approval of the disapproved rules are identified in the Administrative Law Judge's Report.

If the Board elects not to correct the defects associated with the proposed rules, the Board must submit the rule to the Legislative Coordinating Commission and the House of Representatives and Senate policy committees with primary jurisdiction over state governmental operations for review under Minn. Stat. § 14.15, subd. 4.

If the Board chooses to make changes to correct the defects or adopt the recommendations of the Administrative Law Judge, it shall submit to the Chief Administrative Law Judge (and clearly labeled): (1) a copy of the rules as initially proposed; (2) the order adopting the rules; (3) the rules showing the Board's changes in redlined format; and (4) a "clean" copy of the rules, as finally modified (without redline changes), as the Board intends to submit to the Revisor for publication. The Chief Judge

will then determine whether the defects have been corrected and whether the modifications to the rules make them substantially different than originally proposed.

Dated: May 26, 2022

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a horizontal line extending to the right.

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JENNY STARR  
Chief Administrative Law Judge

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules of the  
Capitol Area Architectural and Planning  
Board Governing Capitol Area  
Commemorative Artwork, Minnesota  
Rules Chapter 2400

**REPORT OF  
ADMINISTRATIVE LAW JUDGE**

This matter came before Administrative Law Judge Ann C. O'Reilly for a rulemaking hearing on March 14, 2022. The public hearing was held online via interactive video conference and telephone connection using WebEx technology.

The Capitol Area Architectural and Planning Board (Board or CAAPB) proposes to amend Minnesota Rules, chapter 2400, which currently regulates the Board's determinations regarding changes, improvements, and additions to commemorative works in the Minnesota Capitol Area.<sup>1</sup> The amendments also include new provisions regulating the removal of commemorative works.<sup>2</sup>

The hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act (APA).<sup>3</sup> The purpose of this process is to ensure that state agencies meet all requirements established by law for adopting rules.

The hearing process permits agency representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. Further, the hearing process provides the general public an opportunity to review, discuss, and critique the proposed rules.

The hearing was open to all members of the public who wished to attend. The proceedings continued until all interested persons, groups, or associations had an opportunity to be heard concerning the proposed rules. Seventeen members of the public made statements or asked questions during the hearing.<sup>4</sup> Twelve written comments were received during the comment period.<sup>5</sup>

After the close of the hearing, the Administrative Law Judge kept the rulemaking record open for another 20 calendar days, until April 4, 2022, to permit interested persons and the Board to submit written comments. Following the initial comment period, the

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<sup>1</sup> Exhibit (Ex.) D (Statement of Need and Reasonableness (SONAR)).

<sup>2</sup> *Id.*

<sup>3</sup> See Minn. Stat. §§ 14.131-.20 (2020).

<sup>4</sup> See Hrg. Tr.

<sup>5</sup> See eComments PDF Report.

hearing record was open an additional five business days to permit interested parties and the Board an opportunity to reply to earlier-submitted comments.<sup>6</sup> The hearing record closed on April 11, 2022.

On May 11, 2022, the Chief Administrative Law Judge extended the deadline for the Report to May 25, 2022.<sup>7</sup>

### SUMMARY OF CONCLUSIONS

The Board has complied with all procedural requirements of rule and law. The Board also has the legal authority to adopt the proposed rules. The Board has established that the rules are needed, reasonable, and not substantially different from those noticed in the *State Register*. The Administrative Law Judge **APPROVES** the proposed rules, as written or modified by the Board in response to comments, with the exception of the following rules, which are **DISAPPROVED**:

- 2400.2703, subp. 3, item K (as modified by the Board and re-lettered)
- 2400.2703, subp. 3, item N (as modified by the Board and re-lettered)
- 2400.2703, subp. 7, item L (as modified by the Board, now re-lettered Item M)
- 2400.2703, subp. 7, Item M (as modified by the Board, now re-lettered Item N)
- 2400.2703, subp. 8

The Administrative Law Judge **APPROVES** the following proposed rules as to legality, but urges technical changes to the rules to provide clarity and consistency, and to better comply with existing law:

- 2400.2040, subp. xx and xx<sup>8</sup> (definitions of “public hearing” and “public meeting”)
- 2400.2040, subp. 24b
- 2400.2040, subp. 65a
- 2400.2703, subp. 1, item A
- 2400.2703, subp. 1, item B
- 2400.2703, subp. 3, items A through J (as modified by the Board and re-lettered)
- 2400.2703, subp. 3, items L and M (as modified by the Board and re-lettered)
- 2400.2703, subp. 5, item F
- 2400.2703, subp. 5, item G (as modified by the Board)
- 2400.2703, subp. 6, item A (as modified by the Board)
- 2400.2703, subp. 6, item B
- 2400.2703, subp. 7, items A through K (as modified by the Board and re-lettered)
- 2400.2703, subp. 9

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

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<sup>6</sup> See Minn. Stat. § 14.15, subd. 1 (2020).

<sup>7</sup> Order Extending Deadline for Rule Report (May 11, 2022).

<sup>8</sup> These provisions were submitted by the Board without numbering. They will need to be numbered as subparts.

## FINDINGS OF FACT

### I. Regulatory Background to the Proposed Rules

1. The CAAPB is composed of 12 members and chaired by the Lieutenant Governor.<sup>9</sup> Four members are appointed by the Minnesota Governor, three members are appointed by the Mayor of St. Paul, two members are appointed by the President of Minnesota Senate, and two members are appointed by the Speaker of the Minnesota House of Representatives.<sup>10</sup>

2. Under Minnesota law, the CAAPB is charged with, among other things, the authority to preserve and enhance the dignity, beauty, and architectural integrity of the Minnesota State Capitol, its grounds, and the 60-block Capitol Area defined by statute.<sup>11</sup> As part of that delegation of authority from the legislature, the Board is responsible for long-term planning and zoning decisions for the Capitol Area, as well as decisions on changes and improvements to monuments, memorials, and commemorative works in the Capitol Area.<sup>12</sup>

3. In June 2020, as a result of civil unrest, monuments and memorials were vandalized or removed, legally or illegally, from public spaces in areas throughout the United States. In Minnesota, such civil unrest resulted in the unauthorized toppling of the Christopher Columbus statue outside of the Minnesota State Capitol.<sup>13</sup>

4. These events caused the CAAPB to realize that, while their rules addressed the addition and construction of new monuments, memorials, and commemorative works, there was not a stated legal path to remove such items.<sup>14</sup>

5. As a result, on June 25, 2020, the Board voted to create two task forces to evaluate this issue: (1) a Public Engagement Task Force to establish a process to consider public opinion about commemorative works on Capitol grounds; and (2) a Decision Process Advisory Task Force to propose changes to the procedural rules to address modification and removal of existing works.<sup>15</sup>

6. The Public Engagement Task Force met and conducted public engagement from February to May 2021.<sup>16</sup> The task force held four meetings, conducted an online survey (which received 345 responses), and held 25 community listening sessions across the state in which approximately 200 people attended.<sup>17</sup> Using the information collected,

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<sup>9</sup> Minn. Stat. § 15B.03 (2020).

<sup>10</sup> *Id.*

<sup>11</sup> Minn. Stat. § 15B.01 (2020). The “Capitol Area” is specifically defined in Minn. Stat. § 15B.02 (2020).

<sup>12</sup> Minn. Stat. § 15B.01; Minn. R. 2400.2000-.2380 (2021).

<sup>13</sup> Ex. D at 6.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 10-11.

<sup>17</sup> *Id.*

the Public Engagement Task Force prepared a 44-page report of its work in November 2021.<sup>18</sup>

7. The Decision Process Advisory Task Force was tasked with conducting a review of the CAAPB policies, procedures, and rules related to commemorative works on Capitol grounds and the Capitol building.<sup>19</sup> It later narrowed its scope to consider only the policies, procedures, and rules for additions, modifications, or removal of monuments, memorials, and commemorative works in the Capitol Area (not the Capitol building), over which CAAPB has exclusive jurisdiction.<sup>20</sup> (The Minnesota Historical Society has shared jurisdiction over artwork in the Capitol building.)<sup>21</sup>

8. The Decision Process Advisory Task Force met 12 times from October 2020 to May 2021, in a series of six, two-part meetings.<sup>22</sup> These meetings were live-streamed and recorded for viewing on the CAAPB website.<sup>23</sup>

9. When reviewing the rules, policies, and procedures involving commemorative works, the Decision Process Advisory Task Force identified the following missing elements:

- Opportunities for review or modification for existing commemorative works;
- A comprehensive list of definitions written in clear language;
- An accessible web-based interface with an explanation of the support available to members of the public wishing to engage in the process;
- Clarity around the fiscal obligations of applicants and the state;
- Transparency around the individuals and groups responsible for making decisions regarding commemorative artwork; and
- Explicit opportunities for public input regarding commemorative artwork decisions.<sup>24</sup>

10. Ultimately, the task force created a “Policy for Commemorative Artwork on Capitol Grounds,” which was part of the Decision Process Advisory Task Force Report released in February 2020.<sup>25</sup> The task force recommended that its policy replace the Board’s 2012 Policy for Commemorative Artworks in the Minnesota State Capitol Area

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 11-13.

<sup>20</sup> *Id.* at 11.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 12.

<sup>25</sup> *Id.* at 13.

and the Commemorative Works in the Capitol Area: A Framework for Initiation, Evaluation and Implementations of Commemorative Works in the Capitol Area, May 1993, which is referenced in existing Minn. R. 2400.2705.<sup>26</sup>

11. The CAAPB reviewed the task force's proposed policy and decided, instead, to make the proposed policy changes in the rules (Minn. R. Part 2400), rather than continue to make reference in the rules to an external document.<sup>27</sup> The Board determined that establishing its policies, procedures, and processes by rule provides more clarity, transparency, and accessibility to the public.<sup>28</sup>

## II. Rulemaking Authority

12. The purpose of the CAAPB is set forth in statute as follows:

- to preserve and enhance the dignity, beauty, and architectural integrity of the Capitol, the buildings immediately adjacent to it, the Capitol grounds, and the Capitol Area;
- to protect, enhance, and increase the open spaces within the Capitol Area when considered necessary and desirable to improve the public enjoyment of them;
- to develop proper approaches to the Capitol Area for pedestrians, the highway system, and mass transit system so that the area achieves its maximum importance and accessibility; and
- to establish a flexible framework for growth of the Capitol buildings in keeping with the spirit of the original design.<sup>29</sup>

13. As part of this delegation of authority, Minn. Stat. § 15B.08, subd. 3, provides that “No substantial change or improvement may be made to public lands or public buildings in the Capitol Area without the written approval of the board.”

14. To guide its decision-making process, the legislature requires that the Board establish a comprehensive plan for the Capitol Area.<sup>30</sup> Under Minn. Stat. § 15B.06, subd. 1, and consistent with the comprehensive plan, the Board may regulate, in the Capitol Area: (1) the kind, character, height, and location of buildings and other structures; (2) the size of yards and open spaces; (3) the percentage of lots to be occupied; and (4) the uses of land, buildings, and other structures.

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Minn. Stat. § 15B.01.

<sup>30</sup> Minn. Stat. § 15B.05, subd. 1.



15. To implement its duties and purposes, the statute grants the Board broad rulemaking authority. Minn. Stat. § 15B.03, subd. 6, provides:

The board may adopt rules under chapter 14, the Administrative Procedure Act, that it believes are needed and reasonable to accomplish the purposes of this chapter.

16. The statute further authorizes the Board to develop, by rule, “standards and design-review procedures for proposed construction in the Capitol Area that significantly affect the area's dignity, beauty, and architectural integrity.”<sup>31</sup> Construction includes building or changing a monument,<sup>32</sup> as well as the other activities defined by Board rule.<sup>33</sup>

17. In the existing rules guiding the Board’s decisions, the rules address the standards and procedures for placing and approving monuments, memorials, and commemorative works.<sup>34</sup> The rules incorporate by reference: the Comprehensive Plan for the State Capitol Area, 1998, as amended in 2009 (Comprehensive Plan); Specific Actions for Implementation of the Comprehensive Plan for the State Capitol Area, February 1998; and the Commemorative Works in the Capitol Area: A Framework for Initiation, Evaluation and Implementations of Commemorative Works in the Capitol Area, May 1993 (the Existing Commemorative Works Policy).<sup>35</sup> These documents (and existing rules) are to guide the Board in its decisions regarding approval of new works, but do not address the modification or removal of existing works.<sup>36</sup>

18. Given the legislative authority to adopt rules needed and reasonable to accomplish the purposes of Minn. Stat. ch. 15B (2020), as set forth in Minn. Stat. §§ 15B.03, subd. 6 and 15B.06, subd. 2, the Administrative Law Judge finds that the Board has the legal authority to adopt the proposed rules.

### **III. Procedural Requirements of Minn. Stat. Ch. 14 and Minn. R. Ch. 1400**

#### **A. Request for Comments**

19. Minnesota Statutes section 14.101 (2020) requires that an agency, at least 60 days prior to the publication of a notice of intent to adopt rules or a notice of hearing, solicit comments from the public on the subject matter of a proposed rulemaking. Such notice must be published in the *State Register*.<sup>37</sup>

20. On October 11, 2021, the Board published in the *State Register* a Request for Comments seeking comments on the proposed changes to Minn. R. part 2400.<sup>38</sup>

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<sup>31</sup> Minn. Stat. § 15B.06, subd. 2.

<sup>32</sup> Minn. Stat. § 15B.05, subd. 5(4).

<sup>33</sup> Minn. Stat. § 15B.08, subd. 1(c).

<sup>34</sup> Minn. R. 2400.2705, subp. 1(A) (2021).

<sup>35</sup> Minn. R. 2400.2705, subp. 1(B) (2021).

<sup>36</sup> There is one reference in the Policy to relocation of works. See Ex. D at 9.

<sup>37</sup> Minn. Stat. § 14.101.

<sup>38</sup> Ex. A1 (Request for Comments).

21. The Request for Comments was published at least 60 prior to the publication of the Notice of Intent to Adopt Rules, as discussed below.

22. Approximately 18 people submitted comments on the proposed rule changes.<sup>39</sup>

23. The Administrative Law Judge finds that the Board complied with the requirements set forth in Minn. Stat. § 14.101.

## **B. Publication of Notice of Hearing**

24. Minnesota Statutes section 14.14, subdivision 1a, (2020) and Minn. R. 1400.2080, subp. 6 (2021), require that an agency publish in the *State Register* a notice of hearing at least 30 days prior to the date of hearing and at least 30 days prior to the end of the comment period.

25. An agency may request approval of its notice of hearing by an administrative law judge prior to service.<sup>40</sup>

26. The Board requested approval of its Notice of Hearing on January 18, 2022.<sup>41</sup>

27. On January 24, 2022, the Administrative Law Judge approved the Board's Notice of Hearing for form and substance.<sup>42</sup> The Administrative Law Judge revised the Board's draft hearing notice and provided the revised hearing notice to her order as Attachment A.<sup>43</sup>

28. The Notice of Hearing was published in the February 7, 2022, *State Register*.<sup>44</sup> The Notice of Hearing informed the public that the hearing would take place via WebEx on March 10, 2022, that the initial comment period closed five working days after the hearing date (but could be extended up to 20 calendar days by the Administrative Law Judge), and that a five-working-day rebuttal period followed the close of the comment period.<sup>45</sup> The Notice of Hearing was published more than 30 days prior to the hearing date and the end of the comment period.

29. The Notice of Hearing identified the date and time of the hearing in this matter.<sup>46</sup> Because of the COVID-19 pandemic, the hearing took place solely on WebEx,

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<sup>39</sup> Ex. A2 (Request for Comments, Comments Received).

<sup>40</sup> Minn. R. 1400.2080 (2021); Minn. Stat. § 14.22 (2020).

<sup>41</sup> Letter requesting review of hearing notice and approval of additional notice plan (Jan. 18, 2021).

<sup>42</sup> Order on Request for Review and Approval of Additional Notice Plan and Notice of Hearing (Jan. 24, 2022).

<sup>43</sup> *Id.* at Attachment A.

<sup>44</sup> Ex. F (Notice as published in *State Register*).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

and the Notice of Hearing informed the public how to access the WebEx hearing via an internet accessible device (computer, smartphone, or tablet) or by telephone.<sup>47</sup>

30. The Notice of Hearing contained all information required in Minn. R. 1400.2080.

### **C. Notice Requirements**

#### **1. Notice to Official Rulemaking List**

31. Minnesota Statutes section 14.14, subdivision 1a, requires that each agency maintain a list of all persons who have registered with the agency for the purpose of receiving notice of rule proceedings.

32. On February 7, 2022, the Board emailed a copy of the Notice of Hearing and proposed rules, to all persons and entities on its official rulemaking list.<sup>48</sup> The Board also certified the accuracy of its rulemaking mailing list, which contained a total of 652 emails addresses.<sup>49</sup>

33. The Notice of Hearing advised that the comment period would expire no sooner than five working days after the close of the hearing on March 10, 2022, but could be extended for an additional 20 calendar days by the Administrative Law Judge.<sup>50</sup>

34. Minnesota Statutes section 14.14, subdivision 1a, requires that agencies give notice of intent to adopt rules by U.S. mail or electronic mail to all persons on its official rulemaking list at least 30 days before the date of hearing.

35. Minnesota Rule 1400.2080, subpart 6, provides that a notice of hearing or notice of intent to adopt rules must be mailed at least 33 days before the end of the comment period or the date of the hearing.

36. There were at least 33 days between the date of service of the Notice of Hearing on the rulemaking list (February 7, 2022) and the hearing date (March 14, 2022).

37. The Administrative Law Judge concludes that the Board fulfilled the notice requirements set forth in Minn. Stat. § 14.14 (2020) and Minn. R. 1400.2080, subp. 6.

#### **2. Additional Notice**

38. Minnesota Statutes section 14.14, subdivision 1a(a), requires that an agency make reasonable efforts to notify persons or classes of persons who may be significantly affected by the rule being proposed by giving notice of its intent to adopt rules. Such notice may be made in newsletters, newspapers, or other publications, or

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<sup>47</sup> *Id.*

<sup>48</sup> Ex. G-3 (Certificate of Mailing Notice of Hearing on Rulemaking List).

<sup>49</sup> Exs. G-2 (Certificate of Accuracy of Mailing List).

<sup>50</sup> Ex. F (Notice of Hearing as served on mailing list).

through other means of communication.<sup>51</sup> This notice is referred to as “additional notice” and is detailed by an agency in its additional notice plan.

39. Minnesota Statutes sections 14.131 and 14.23 (2020) require that an agency include in its Statement of Need and Reasonableness (SONAR) a description of its efforts to provide additional notice. Alternatively, the agency must detail why additional notification efforts were not made.<sup>52</sup>

40. An agency may request approval of its additional notice plan by an administrative law judge prior to service.<sup>53</sup>

41. The Board requested approval of its Additional Notice Plan on January 18, 2022.<sup>54</sup>

42. On January 24, 2022, the Administrative Law Judge approved the Board’s Additional Notice Plan, with certain additional requirements.<sup>55</sup> The Judge required that the Board’s Additional Notice Plan be revised to:

- Specifically identify to whom the email notice will be sent for each of the interested governmental agencies (e.g., the Commissioner of the Department of Administration, the Director of the Minnesota Historical Society, the Commissioner of DEED, all members of the Ramsey County Board of Commissioners, the Director of the St. Paul Planning and Economic Development Department, St. Paul Mayor Melvin Carter, and each of the St. Paul City Council Members).
- Specifically identify its CAAPB “GovDelivery list” as the list maintained by the Board pursuant to Minn. Stat. § 14.14, subd. 1a.
- Clarify that “commemorative works task forces members and email update subscribers” means all members of the Decision Process Advisory Task Force and the Public Engagement Task Force members.
- Clarify what the “Governor’s Office weekly email update to subscribed community parties and stakeholders” group consists of.
- More specifically identify the “press and media contacts,” including what media outlets they are associated with and what 12 publications will receive notice;

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<sup>51</sup> Minn. Stat. § 14.14, subd. 1a(a).

<sup>52</sup> Minn. Stat. §§ 14.131, .23.

<sup>53</sup> Minn. R. 1400.2060, subp. 3 (2021).

<sup>54</sup> Letter requesting review and approval of hearing notice and additional notice plan (Jan. 18, 2022).

<sup>55</sup> Order on Request for Review and Approval of Additional Notice Plan and Notice of Hearing (Jan. 24, 2022).

- Provide notice to leaders of each of the federally recognized Indian Tribes in Minnesota identified at <https://mn.gov/portal/government/tribal/mn-indian-tribes/>;
- Provide notice to all members of the Minnesota State Arts Board;
- Provide notice to the American Institute of Architects Minnesota through its President or Board members;
- Provide notice to veterans' groups in Minnesota, including the American Legion (Minnesota American Legion Auxiliary), the Veterans of Foreign Wars (VFW) (Minnesota Department of Veterans of Foreign Wars), the Minnesota Department of Veteran's Affairs (attention Commissioner), and any other veterans' groups that may have interest in the commemorative works currently located on Minnesota Capitol grounds;
- Provide notice to the Southeast Asian Diaspora Project (SEAD) and any other Laotian or Hmong organization that may have an interest in the commemorative works currently located on Minnesota Capitol grounds.
- Provide notice to the Minnesota Police and Peace Officers Association, the Minnesota State Fire Chiefs Association, the Minnesota Professional Firefighters Association, the Frontline Foundation, and any other police, fire, or first responder organization that may have an interest in the commemorative works currently located on Minnesota Capitol grounds;
- Provide notice to the Minnesota League of Women Voters and any other women's suffrage organization that may have an interest in the commemorative works currently located on Minnesota Capitol grounds; and
- Provide notice to the Minnesota Department of Transportation and any other transportation workers association that may have an interest in the commemorative works currently located on Minnesota Capitol grounds.

43. The Board revised its draft SONAR to reflect its revised Additional Notice Plan.<sup>56</sup> Board provided notice according to the approved revised Additional Notice Plan, by serving, on February 7, 2022, a copy of the Notice of Hearing and hyperlinks to the SONAR and proposed rules on the individuals, organizations, governmental agencies and entities, and media outlets identified in the revised Additional Notice Plan contained

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<sup>56</sup> See Ex. D at 36-41.

in the final SONAR.<sup>57</sup> The Notice of Hearing and hyperlinks to the SONAR and proposed rules were:

- Posted on the CAAPB website;
- Emailed to Board members, staff, and advisors (26 people);
- Emailed to CAAPB GovDelivery subscribers (2700 addresses);
- Emailed to members of the Decision Process Advisory Task Force and Public Engagement Task Force and email subscribers to the task forces' project lists (35 people);
- Emailed to CAAPB agenda email subscribers (72 people);
- Included in the Governor's weekly email update to subscribed community-based organizations interested in the equity-focused work of the administration (800 email addresses);
- Emailed to five state senators and four state representatives;
- Emailed to the commissioners of the Minnesota Departments of Administration, Employment and Economic Development, Human Rights, Human Services, Transportation, and Veteran's Affairs;
- Emailed to the Association of Minnesota Counties, League of Minnesota Cities, Metropolitan Council, Ramsey County Commissioners, St. Paul Mayor Melvin Carter, St. Paul City Council members, the St. Paul Heritage Preservation Commission, the St. Paul Planning and Economic Development Department, and the Capitol River District Council;
- Emailed to the Minnesota State Historical Society, Minnesota Historic Preservation Office, Ramsey County Historical Society, and Rethos (a local nonprofit organization).
- Emailed to the directors of the Southeast Asian Diaspora Project, Hmong American Partnership, Council on Latino Affairs, Council on Asian Pacific Minnesotans, Indian Affairs Council, leaders of the 11 federally recognized Indian Tribes in Minnesota, Women Winning, Minnesota League of Women Voters, and the Women's Foundation of Minnesota;

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<sup>57</sup> Supplemental Ex. G (detailing service for Additional Notice Plan).

- Emailed to the American Legion (Minnesota Auxiliary), the Veterans of Foreign Wars (Minnesota Department), the Minnesota Department of Military Affairs (National Guard), the Frontline Foundation, Minnesota Police and Peace Officers Association, Minnesota State Fire Chiefs Association, and the Minnesota Professional Firefighters Association;
- Emailed to the Minnesota Humanities Commission, the State Arts Board, and Public Arts Minnesota;
- Emailed to the American institute of Architects (MN), American Society of Landscape Architects (MN), American Planning Association (MN), and the University of Minnesota design, arts, urban studies and law departments; and
- Emailed to 63 contacts from 26 media publications with local, regional, or statewide coverage.<sup>58</sup>

44. The Administrative Law Judge finds that the Board complied with its revised Additional Notice Plan set forth in its SONAR and fulfilled the additional notice requirements set forth in Minn. Stat. §§ 14.14, subd. 1a(a), .131, .23.

### **3. Notice to Legislators**

45. Minnesota Statutes section 14.116 (2020) requires the agency to send a copy of the Notice of Intent to Adopt and the SONAR to certain legislators and the Legislative Coordinating Commission at the time it serves its Notice of Intent to Adopt to persons on its rulemaking list and pursuant to its additional notice plan.<sup>59</sup>

46. On February 7, 2022, the Board emailed a copy of the Notice of Intent to Adopt Rules/Notice of Hearing, SONAR, and proposed rules to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the proposed rules, and to the Legislative Coordinating Commission, in compliance with Minn. Stat. § 14.116.<sup>60</sup>

47. The Administrative Law Judge concludes that the Board fulfilled its responsibilities under Minn. Stat. § 14.116.

### **4. Notice to the Legislative Reference Library**

48. Minnesota Statutes sections 14.23 and 14.131 and Minn. R. 1400.2070, subp. 3 (2021), require the agency to send a copy of the SONAR to the Legislative Reference Library when the Notice of Intent to Adopt is served.

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<sup>58</sup> *Id.*

<sup>59</sup> Minn. Stat. § 14.116.

<sup>60</sup> Exs. K-2 (email to Legislators) Ex. K-4 (email to Legislative Coordinating Commission).

49. On February 5, 2022, the Board mailed a copy of the SONAR to the Legislative Reference Library.<sup>61</sup>

50. The Administrative Law Judge concludes that the Board fulfilled its responsibilities under Minn. Stat. §§ 14.23 and .131.

## **5. Notice of Impact on Farming Operations**

51. Minnesota Statutes section 14.111 (2020) imposes additional notice requirements when the proposed rules affect farming operations.

52. The Board concluded that the proposed rules do not impact farming operations.<sup>62</sup>

53. The Administrative Law Judge agrees with the Board and concludes that the Board fulfilled its responsibilities under Minn. Stat. § 14.111.

### **D. Rule Hearing**

54. Due to the COVID-19 pandemic and state regulations limiting in-person hearings, a remote hearing was held on March 10, 2022.<sup>63</sup> The hearing was conducted by videoconferencing and telephone using WebEx technology. Members of the public who did not have access to the internet were able to call into the hearing and participate through audio.

55. At the hearing, the Board submitted copies of the following documents, as required by Minn. R. 1400.2220 (2021):

Ex. A: the Board's Request for Comments as published in the *State Register* on October 11, 2021;

Ex. B: Petition for Rulemaking (omitted as not applicable)

Ex. C: the proposed rules dated January 21, 2022, including the Revisor's approval;

Ex. D: the SONAR, dated February 4, 2022;

Ex. E: a copy of the transmittal email of the SONAR to the Legislative Reference Library on February 5, 2022;

Ex. F: the Notice of Hearing as mailed or emailed and published in the *State Register* on February 7, 2022;

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<sup>61</sup> Ex. E (letter to Legislative Reference Library).

<sup>62</sup> Ex. D at 43 (SONAR).

<sup>63</sup> See Hearing Transcript (Hrg. Tr.).



Ex. G: the Certificate of Accuracy of the Mailing List;  
Ex. H: the Certificate of Giving Additional Notice (February 7, 2022);  
Ex. I: written comments received by March 10, 2022;  
Ex. J: Omitted as inapplicable;  
Ex. K-1: Board Resolution Authorizing Hearing Notice;  
Ex. K-2: Notice to Legislators of Intent to Adopt dated February 7, 2022;  
Ex. K-3: Letter to Minnesota Management and Budget dated January 26, 2022.

56. The Board's witnesses at the public hearing included: Merritt Clapp-Smith, CAAPB Executive Secretary; Lieutenant Governor Peggy Flanagan, CAAPB Chair, Carl Crawford, Chair of the Public Engagement Taskforce; and Gwen Westerman, Chair of the Decision Process Advisory Taskforce.

57. Lieutenant Governor Peggy Flanagan explained the background of the CAAPB, the Board's statutory authority to promulgate rules, and the need for rulemaking.<sup>64</sup> Carl Crawford and Dr. Gwen Westerman discussed public and shareholder involvement, including the preliminary drafting of the proposed rules.<sup>65</sup> Merritt Clapp-Smith, CAAPB Executive Secretary, discussed the reasonableness of the proposed rule amendments.<sup>66</sup>

58. The hearing was open to the public. The proceedings continued until all interested persons, groups, or associations had an opportunity to be heard concerning the proposed rules.

59. Seventeen members of the public made statements or asked questions during the hearing.<sup>67</sup> Twelve written comments were received during the comment period.<sup>68</sup>

60. The Board filed Additional Modifications to the Proposed Rules with the Office of Administrative Hearings on March 30, 2022.<sup>69</sup>

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<sup>64</sup> Hrg. Tr. at 18-21.

<sup>65</sup> *Id.* at 21-24.

<sup>66</sup> *Id.* at 25-35.

<sup>67</sup> See Hrg. Tr.

<sup>68</sup> See eComments PDF Report.

<sup>69</sup> Potential Modifications to Proposed Rules (March 30, 2022) (on file and of record with the Minn. Office Admin. Hearings).

61. The Board responded to the comments with specific responses or rebuttals filed in eComments on April 4 and 11, 2022.<sup>70</sup> These responses also contained modifications the Board made to the rules.<sup>71</sup>

62. On April 14, 2022, the Board filed a Supplement to Exhibit G, detailing its compliance with the Additional Notice Plan.<sup>72</sup>

63. On April 15, 2022, the Board filed Exhibit K-4, evidence of service of the Notice of Hearing, SONAR, and proposed rules on the Legislative Coordinating Commission on February 7, 2022.<sup>73</sup>

64. Also on April 15, 2022, the Board filed Exhibit G-2, a revised Certificate of Accuracy of the Mailing List, and Exhibit G-3, a Certificate of Mailing of the Notice of Hearing on the agency's rulemaking list pursuant to Minn. Stat. § 14.14, subd. 1a.<sup>74</sup> The certificates evidence that the Board emailed its rulemaking list with a copy of the Notice of Hearing and proposed rules on February 7, 2022.

65. On April 27, 2022, the Board submitted additional modifications to the proposed rules.<sup>75</sup>

#### **IV. Statutory Requirements for the SONAR**

##### **A. Regulatory Factors**

66. The Administrative Procedure Act requires an agency adopting rules to address eight factors in its SONAR.<sup>76</sup> Those factors are:

- (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
- (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;

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<sup>70</sup> Board's Preliminary Responses to Comments and Modifications (Apr. 4, 2022); Board's Final Responses to Comments and Modifications (Apr. 11, 2022).

<sup>71</sup> Board's Preliminary Responses to Comments and Modifications (Apr. 4, 2022); Board's Final Responses to Comments and Modifications (Apr. 11, 2022).

<sup>72</sup> Supplemental Ex. G (Certificate of Service for Additional Notice Plan).

<sup>73</sup> Ex. K-4 (Transmission letter to Legislative Coordinating Commission).

<sup>74</sup> Exs. G-2 (Certificate of Accuracy of Mailing List) and G-3 (Certificate of Mailing of Notice of Hearing).

<sup>75</sup> Letter to Administrative Law Judge Ann O'Reilly from Merritt Clapp-Smith (Apr. 27, 2022).

<sup>76</sup> Minn. Stat. § 14.131.

- (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
- (5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;
- (6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals;
- (7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference; and
- (8) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule and reasonableness of each difference.<sup>77</sup>

#### **1. Classes of Persons Affected, Benefitted, or Bearing Costs of the Proposed Rule**

67. In the SONAR, the Board describes the classes of persons who will likely be affected by the proposed rules, including the classes of persons that will bear the costs of the proposed rules and the classes that will benefit from the proposed rules.<sup>78</sup>

68. The Board explained that the classes of person affected or benefitted by the proposed rules include:<sup>79</sup>

- any person who visits or works at the Capitol campus;
- groups of people who identify with the meaning and symbolism of a monument, memorial, or commemorative work on the Capitol campus;
- people and groups associated with current commemorative works on the Capitol campus;

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<sup>77</sup> *Id.*

<sup>78</sup> Ex. D at 30 (SONAR).

<sup>79</sup> *Id.*

- all applicants for adding, modifying, and removing commemorative works, including contractors, architects, engineers, and artwork professionals;
- groups of people who are troubled, angered, or intimidated by a work at the Capitol campus and want it modified or removed;
- groups of people who are troubled, angered, or saddened by the potential modification or removal of an existing work at the Capitol campus;
- the State Arts Board, Department of Administration, Minnesota Historical Society, Minnesota Society of the American Institute of Architects, Minnesota Department of Employment and Economic Development, Ramsey County, City of St. Paul's Planning and Economic Development Department, St. Paul Mayor, and St. Paul City Council;
- persons or groups who wish to officially apply for modification or removal of an existing work; and
- people who are upset by seeing, reading, or hearing about vandalism to an existing work.

69. With respect to the persons or entities that will bear the costs of the proposed rule, the SONAR identifies:

- persons or groups who apply to add, modify, or remove work; and
- potential funders, including philanthropic groups, private parties, and taxpayers, who cover the costs for the applicant to pursue addition, modification, or removal of a monument, memorial, or commemorative work.<sup>80</sup>

70. Because the proposed rules require that applicants who apply to add, modify, or remove commemorative works must arrange for funding for the projects before the projects could be implemented (either self-funding, philanthropic funding, or state funding), the SONAR does not address how the costs of adding, modifying, or removing commemorative works will impact the parties who must bear these costs or how much these costs may be (the costs depend on the type of project proposed).

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<sup>80</sup> *Id.*

## 2. Probable Costs to the Board and Other Agencies for Implementation and Enforcement and Effect on State Revenues

71. The SONAR next analyzes the probable costs to the Board and to other agencies in implementing and enforcing the proposed rule changes, as well as what effect the proposed rules may have on state revenues.<sup>81</sup>

72. Under the law, the state must pay administrative and planning expenses of the Board.<sup>82</sup> The Board may also contract for professional and other services to assist it in performing its functions.<sup>83</sup> In addition, the state must pay the Board's expenses for: (1) competition premiums; (2) land acquisition in the Capitol Area; and (3) capital improvements in the Capitol Area to property owned or to be owned by the state.<sup>84</sup>

73. The Board estimates that there will be three types of costs for the Board associated with the proposed rules: (1) implementation costs; (2) operational costs; and (3) enforcement costs.<sup>85</sup> Two of those types of costs (implementation and operational costs) would also be incurred by the Department of Administration, the only other state agency to incur costs directly as a result of the proposed rules.<sup>86</sup>

74. The Board notes that there is no revenue to the Board or state associated with the proposed rules.<sup>87</sup> Nor is there any legislative appropriation of funds to the Board to pay for new commemorative works, or to modify or remove existing works. In other words, the proposed rules establish procedures for the Board's review and approval of requests to add, modify, or remove commemorative works, but there is no state funding allocated to cover the costs of such proposed projects. Instead, the proposed rules provide that the applicants for additions, modifications, or removals procure all funds required to complete the proposed projects.

75. The first category of costs to the Board and the Department of Administration recognized in the SONAR are "implementation costs." Implementation costs to the Board include the cost of drafting new guidance materials and forms, application and workplan templates, public engagement materials, and other written materials to assist in the implementation of, and public education about, the rules, as well as the creation of a new CAAPB website page.<sup>88</sup> The Board estimates that the "implementation costs" to the Board associated with the proposed rules will be \$20,000 to \$50,000; and that the implementation costs to the Department of Administration will be

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<sup>81</sup> *Id.* at 31-32.

<sup>82</sup> Minn. Stat. § 15B.03, subd. 7.

<sup>83</sup> Minn. Stat. § 15B.03, subd. 4(c).

<sup>84</sup> Minn. Stat. § 15B.17, subd. 2.

<sup>85</sup> Ex. D. at 31-32.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 32.

<sup>88</sup> *Id.* at 31.

approximately \$1,000.<sup>89</sup> According to the SONAR, the Department of Administration's implementation costs only relate to the "review of implementation materials."<sup>90</sup>

76. The second category of costs the SONAR identifies is "operational costs." For the Board, operational costs include the costs associated with its review of applications, amounts paid by the Board to contracted professionals to assist the Board in its determinations, the cost of public engagement (including expenses to hold public meetings and hearings), and final Board decision-making costs.<sup>91</sup> The Board estimates that the review of additions of commemorative works would cost the Board approximately \$65,000 per application and \$20,000 in review costs to the Department of Administration.<sup>92</sup> For modification requests, the Board estimates that the operational costs to the Board would be between \$25,000 to \$45,000 per request, with costs to the Department of Administration for review of applications being between \$5,000 and \$15,000 per modification request.<sup>93</sup> For removal petitions, the Board estimates that the operational costs to the Board for review would be between \$20,000 and \$35,000 per petition, and \$7,500 in costs to the Department of Administration for review of each petition.<sup>94</sup>

77. While the SONAR identifies implementation and operational costs for the Department of Administration, it does not detail what those costs are.<sup>95</sup> Later in the SONAR, the Board explains that the Department of Administration's expenses are related to its "time and expertise to review construction, installation, and maintenance documents, and to oversee the physical work of addition, modification, or removal if or when it occurs."<sup>96</sup> According to the Board, the Department of Administration is the agency that would need to perform and oversee the addition, modification, or removal.<sup>97</sup> Given that implementation and operational costs for the Department of Administration would also include overseeing all the construction work and documents, the Board's estimates appear low.

78. There are no public monies allocated to the Board or the Department of Administration for new Capitol artwork or modifications or removals of existing artwork. Consequently, the rules require that applicants procure their own funding of the projects -- the proposed rules require that project applicants deposit the full costs of the project (plus 20 percent of those costs for ongoing maintenance) with the Department before implementation of any new construction on the project. (See proposed Rule 2400.2703, subp. 3). But the proposed rules only require such a deposit for new commemorative projects -- not for modifications or removals of existing works. This is a material issue that

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 31-32.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 34.

<sup>97</sup> *Id.*

is addressed below with respect to changes needed to proposed Rule 2400.2703, subp. 7 (modifications and removals).

79. With respect to “enforcement costs”, the SONAR identifies only the cost of periodic reviews of existing artwork. According to proposed Rule 2400.2703, subp. 1, the Board must review all existing commemorative works on Capitol grounds every 10 years or “as needed.” The Board estimates that the cost to the Board for each such review would be between \$50,000 and \$75,000.<sup>98</sup> The Board notes that the Department of Administration would not incur costs for these reviews.<sup>99</sup>

80. As explained above, the costs related to the proposed rules, as estimated by the Board, do not include the actual construction costs of the projects (i.e., the additions, modifications, or removals). Under the proposed rules, those project costs will be borne by the project sponsor, philanthropic organizations, or taxpayers, depending on the source(s) from which the sponsor has procured project funding. Because the proposed rules do not anticipate the Board or the Department of Administration paying for the actual construction costs of such projects, the SONAR does not address these potential costs.

### **3. Less Costly or Less Intrusive Methods for Achieving the Purpose of the Proposed Rule**

81. The SONAR evaluated whether there are less costly or less intrusive methods for achieving the purpose of the proposed rule changes.<sup>100</sup>

82. The SONAR notes that the costs to the Board and state could be reduced if the procedural steps for review and approval of applications were reduced or simplified, such as reducing public input, eliminating public hearings or meetings, minimizing research or analysis, and removing the committees used in the review process.<sup>101</sup> However, the Board concluded that the costs of increasing public involvement and awareness, formalizing the review process to increase consistency and diversity of opinions, and thoroughly vetting each application were reasonable and necessary to ensure good decision-making.<sup>102</sup>

83. After a full analysis, the Board concluded that there are no less costly or less intrusive alternatives for achieving the purposes of the proposed rules.<sup>103</sup>

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<sup>98</sup> *Id.* at 32.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

#### 4. Description of Alternative Methods for Achieving the Purpose of the Proposed Rule Considered by the Board and Why Alternatives Were Rejected

84. The SONAR describes the alternative methods for achieving the purpose of the proposed rule changes that were seriously considered by the Board and explains the reasons why these alternatives were rejected in favor of the proposed rule changes.<sup>104</sup>

85. The SONAR describes three alternatives considered: (1) maintaining the status quo and not amending the rules; (2) updating the Policy for Commemorative Works in the Minnesota Capitol Area (Commemorative Works Policy or Policy) only; and (3) amending the rules with fewer procedural steps, conditions, and criteria.<sup>105</sup>

86. The Board first considered not amending the rules at all and, instead, relying on the Commemorative Works Policy to address modifications or removals of commemorative works.<sup>106</sup> However, the Policy only addressed the relocation of works found incompatible with CAAPB objectives, not the modification or removal of such works.<sup>107</sup> The Board believed this would result in ambiguity, confusion, inconsistent decisions, and lack of decision-making criteria.<sup>108</sup>

87. Next, the Board considered updating the Commemorative Works Policy. However, after reviewing the draft updates to the Policy recommended by the Decision Process Advisory Board, CAAPB staff decided that it was better to make the changes in the rules because the important subject matter warranted “the rigor and scrutiny of the rulemaking process,” as well as “the transparency the public sought.”<sup>109</sup>

88. Finally, the Decision Process Advisory Task Force and the Public Engagement Task Force presented to CAAPB staff and Board a decision-making process, by rule, that it believed addressed the comments and concerns voiced by the public and interested parties.<sup>110</sup> CAAPB staff then added and removed steps that it thought would simply and clarify the process.<sup>111</sup> Ultimately, the Board determined that the rules contained “the minimum [steps] needed to provide a clear, transparent, and consistent process for all applicants.”<sup>112</sup> According to the SONAR, removal of any more procedural steps “would compromise achieving a particular outcome . . . fundamental to the . . . process.”<sup>113</sup>

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<sup>104</sup> *Id.* at 32-33.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 33.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*



## 5. Probable Costs of Complying with Proposed Rules, Including the Portion of the Total Costs Borne by Identifiable Categories of Affected Parties

89. The SONAR addresses the probable costs of complying with the proposed rule by explaining that such costs are unknown. While the SONAR provides cost estimates for the Board and the Department of Administration for implementation, operation, and enforcement of the rules,<sup>114</sup> the SONAR does not address the potential costs to project applicants who must procure funding for the projects or the public (i.e., taxpayers) who may be asked to assume the costs for any new artwork or the removal or modification of existing monuments.<sup>115</sup>

90. The SONAR notes that the cost to construct and repair existing works on Capitol grounds has varied widely of the years.<sup>116</sup> According to the former CAAPB Executive Secretary Paul Mandell, the memorials constructed since 1987 “involved both private dollars and a state appropriation; and that, on average, [such projects took] three to five years from the original idea . . . through dedication, and cost at least \$450,000.”<sup>117</sup>

91. Because there have never been rules addressing removal or modification of commemorative works, the Board states that the costs related to removal and modification cannot be estimated.<sup>118</sup>

92. The SONAR advises that costs related to the rule amendments will be paid or absorbed by:

- Applicants using private and/or philanthropic resources;
- CAAPB for the time and expertise to review and process applications, and to host public meetings or hearings;
- The Department of Administration for time and expertise to review construction, installation, and maintenance documents, and to oversee the construction work.
- The Minnesota Historical Society for the time and expertise to consult with the CAAPB during the review process.<sup>119</sup>

93. The Board does not estimate or recognize the potential cost to taxpayers for additions, removal, or modification of works in its analysis because the proposed rules provide that applicants making such requests procure funding for the project. It will be the applicant’s responsibility to seek public funding for such applications. While the proposed

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<sup>114</sup> Ex. D at 31-32.

<sup>115</sup> *Id.* at 34.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

rules are clear that all project construction costs (and an additional 20 percent of those costs for maintenance) must be deposited with the Department of Administration before commencement of construction for new artworks, the proposed rules are silent as to any deposit of costs with the Department of Administration for modification or removal requests. This issue is addressed below with respect to proposed Rule 2400.2703, subp. 7.

94. Minnesota Management and Budget (MMB), in its review, concluded:

The cost of adding new or modifying or removing existing commemorative artwork is the responsibility of the applicant. Compliance will be the responsibility of the applicants and other interested and impacted parties, and enforcement of the rules will be the responsibility of the board. As such, the rules will not affect or pertain to governments. The proposed amendments should therefore have no direct fiscal impact to local units of government. However, if a local unit of government voluntarily applies for an addition or removal of a commemorative artwork in the Capitol Area the local unit of government would bear this cost [if] the request is approved. Based on this information, I believe the CAAPB has reasonably analyzed and presented the potential costs and benefits of the proposed rule and there will be no direct fiscal impact on local units of government.<sup>120</sup>

95. The Administrative Law Judge, therefore, concludes that the Board has undertaken a basic assessment of the probable costs of complying with the proposed rules, but does not address the costs that will result to applicants or taxpayers as those costs would depend upon the type of request made and what entities or individuals are found to fund the projects.

## **6. Probable Costs or Consequences of not Adopting the Proposed Rules, Including Costs Borne by Individual Categories of Affected Parties**

96. In addition to identifying the costs of implementing, operating, complying with, and enforcing the rule changes, the SONAR also evaluates the probable costs or consequences of not adopting the proposed rule changes.<sup>121</sup>

97. The SONAR explained that not adopting the rule amendments would leave ambiguities and confusion on how the Board is to handle and review requests for modification or removal of commemorative works, and may result in groups not making such requests due to the lack of a clearly stated process.<sup>122</sup> These costs would be borne by the Board and members of the public who seek to modify or remove a commemorative work they find objectionable.<sup>123</sup>

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<sup>120</sup> Ex. K-3 (MMB letter).

<sup>121</sup> Ex. D at 34 (SONAR).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

## **7. Assessment of Differences Between Proposed Rules and Existing Federal Regulations**

98. The SONAR assesses the differences between the proposed rules and existing federal regulation.<sup>124</sup> It concludes that there are no existing federal regulations relating to the addition, modification, or removal of commemorative works in the Capitol Area.<sup>125</sup> In addition, the proposed rules do not conflict with any federal regulations or regulate any facilities or properties owned or managed by the federal government.<sup>126</sup>

99. Accordingly, there is no evidence in the record that the proposed rules would conflict with any federal regulations.

## **8. Cumulative Effect of the Rule with Other Federal and State Regulations**

100. The SONAR also assesses the cumulative effect of the proposed rule changes with other federal and state regulations related to the specific purpose of the proposed rules.<sup>127</sup> The SONAR states that “[t]here are no effects of the rule that relate to other federal or state regulations.”<sup>128</sup>

101. There is no evidence in the record that that there will be any cumulative effect of the proposed rules with other federal and state regulations.

### **B. Performance-Based Regulation**

102. The Administrative Procedure Act requires an agency to describe in its SONAR how it has considered and implemented the legislative policy supporting performance-based regulatory systems.<sup>129</sup> A performance-based rule is one that emphasizes superior achievement in meeting the agency’s regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.<sup>130</sup>

103. The SONAR explains that the proposed rules prescribe a process for application and review of new commemorative work proposals or applications to modify or remove an existing work.<sup>131</sup> The objectives, steps, conditions, and criteria are detailed but are nonetheless qualitative.<sup>132</sup> The Board asserts these procedures are not too prescriptive.<sup>133</sup> The Board acknowledges that proposed Rule 2400.2703, subps. 3 and 7 are the most prescriptive and describe the processes for application and review of new

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 35.

<sup>128</sup> *Id.*

<sup>129</sup> Minn. Stat. §§ 14.002 and 14.131 (2020).

<sup>130</sup> Minn. Stat. § 14.002.

<sup>131</sup> Ex. D at 42 (SONAR).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

works (subpart 3) and modification or removal of existing works (subpart 7).<sup>134</sup> The Board asserts that “[c]lear and consistent steps provide a consistent and dependable process for all applicants, the public and the CAAPB. Within each step there is some flexibility in how it is achieved.”<sup>135</sup>

### **C. Consultation with the Commissioner of Minnesota Management and Budget**

104. Minnesota Statutes section 14.131 requires that agencies consult with the Commissioner of Minnesota Management and Budget (MMB) to help evaluate the fiscal impact and fiscal benefits of the proposed rule on local units of government.

105. At some point in time, the Board sent MMB a copy of the proposed rules and the draft SONAR for review and analysis under Minn. Stat. § 14.131.<sup>136</sup> On January 26, 2022, MMB issued a Memorandum analyzing the fiscal impacts and benefits of the proposed rules on local units of government.<sup>137</sup> MMB concluded:

The cost of adding new or modifying or removing existing commemorative artwork is the responsibility of the applicant. Compliance will be the responsibility of the applicants and other interested and impacted parties, and enforcement of the rules will be the responsibility of the board. As such, the rules will not affect or pertain to governments. The proposed amendments should therefore have no direct fiscal impact to local units of government. However, if a local unit of government voluntarily applies for an addition or removal of a commemorative artwork in the Capitol Area the local unit of government would bear this cost [if] the request is approved. Based on this information, I believe the CAAPB has reasonably analyzed and presented the potential costs and benefits of the proposed rule and there will be no direct fiscal impact on local units of government.<sup>138</sup>

106. The Administrative Law Judge finds that the Board fulfilled its legal requirements to consult with the MMB under Minn. Stat. § 14.131.

### **D. Summary of Requirements Set Forth in Minn. Stat. § 14.131**

107. The Administrative Law Judge finds that the Board has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems, and the fiscal impact on units of local government.

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Ex. K-3 (MMB letter).

<sup>138</sup> *Id.*

## **E. Cost to Small Businesses and Cities under Minn. Stat. § 14.127**

108. Minn. Stat. § 14.127 (2020), requires the Board to “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.” The Board must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.<sup>139</sup>

109. The Board determined that the cost of complying with the proposed rule changes will not exceed \$25,000 for any business or any statutory or home rule charter city in the first year after the rule takes effect.<sup>140</sup>

110. There is no evidence in the record that any business or city will incur expenses as a result of the proposed rule unless such entity is an applicant to add, modify, or remove a commemorative work in the Capitol Area, or agrees to fund such a project on behalf of an applicant.

111. The Administrative Law Judge finds that the Board has made the determinations required by Minn. Stat. § 14.127 and approves those determinations.

## **F. Adoption or Amendment of Local Ordinances**

112. Under Minn. Stat. § 14.128 (2020), the agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.<sup>141</sup>

113. The Board concluded that no local government would need to adopt or amend an ordinance or other regulation to comply with the proposed rules.<sup>142</sup>

114. There is no evidence in the record that any local ordinance or regulation will be impacted.

115. The Administrative Law Judge finds that the Board has made the determination required by Minn. Stat. § 14.128 and approves that determination.

## **V. Public Comments**

116. Nearly all of the 17 written and oral comments received were supportive of the proposed rules, including the need for, and reasonableness of, the processes created under the rules for adding, modifying, and removing commemorative works in the Capitol Area.

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<sup>139</sup> Minn. Stat. § 14.127, subds. 1 and 2.

<sup>140</sup> Ex. D at 42 (SONAR).

<sup>141</sup> Minn. Stat. § 14.128, subd. 1.

<sup>142</sup> Ex. D at 42 (SONAR).

117. The comments fell into three general categories: (1) the need for fair and inclusive representation of artwork on Capitol grounds; (2) commending the Board for its work on the rules, including the need for, and reasonableness of, the rules; and (3) urging that implementation of the rules work toward greater inclusion and public participation in the artwork selection and removal process.

118. First, a majority of commenters noted that commemorative works on Capitol grounds should be representative of Minnesota's rich and diverse history, including groups and voices that have not, historically, been represented in Capitol Area memorials, statues, and commemorative works. These commenters touted the rules as providing an inclusive, representative, transparent, and publicly accessible processes for ensuring these important goals when decisions are made regarding Capitol Area works.<sup>143</sup> Commenters expressed that the Capitol Area should be a welcoming place for all Minnesotans to feel represented and respected. To that end, commenters noted that commemorative artworks set the tone for visitors to feel that the Capitol is the "people's house" and belongs to all Minnesotans.<sup>144</sup> These commenters urged that the rules be enforced in a way to ensure that art is consistent with current public sentiment, values, and priorities, as some works from the past may not accurately reflect history and may be offensive to certain groups or individuals.<sup>145</sup>

119. Second, many commenters commended the task forces, Board, staff, and stakeholders for their work in crafting processes for determinations on the addition, modification, and removal of commemorative works, that: (1) incorporate diverse viewpoints and decision-makers; (2) create opportunities for public input and involvement; (3) provide transparency; (4) are accessible and understandable to the general public; (5) can be applied fairly and consistently; and (6) offer a structured and organized process

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<sup>143</sup> Comments of Shelley Buck, member of the Prairie Island Tribe of Dakota (Tr. at 36-38); Comments of Thao Mee Xiong, Coalition of Asian American Leaders (Tr. at 41-44); Comments of Christina Woods, member of Bois Forte Nation and Executive Director of Duluth Art Institute (Tr. at 44-47); Comments of David Jordan Harris, Executive Director of RIMON, the Minnesota Jewish Arts Council (Tr. at 47-49); Comments of Jonathan Gershberg, Jewish Community Action (Tr. at 51-54); Comments of MaryMargaret Zindren, Executive Vice President of the American Institute of Architects Minnesota (Tr. at 54-57; eComment 7); Comments of Rosa Tock, Executive Director of the Minnesota Council on Latino Affairs (Tr. at 66-69; eComment 12); Comments of Linda Sloan, Executive Director of Minnesotans of African Heritage (Tr. at 70-72); Comments of Sia Her, Executive Director of the State Council on Asian Pacific Minnesotans (Tr. at 72-76).

<sup>144</sup> Comments of Thao Mee Xiong, Coalition of Asian American Leaders (Tr. at 41-44); Comments of Jonathan Gershberg, Jewish Community Action (Tr. at 51-54); Comments of Rosa Tock, Executive Director of the Minnesota Council on Latino Affairs (Tr. at 66-69; eComment 12); Comments of Sia Her, Executive Director of the State Council on Asian Pacific Minnesotans (Tr. at 72-76); Comments of Ted Lentz, Cass Gilbert Society (Tr. at 85-89).

<sup>145</sup> Comments of David Jordan Harris, Executive Director of RIMON, the Minnesota Jewish Arts Council (Tr. at 47-49); Comments of Jonathan Gershberg, Jewish Community Action (Tr. at 51-54); Comments of MaryMargaret Zindren, Executive Vice President of the American Institute of Architects Minnesota (Tr. at 54-57; eComment 7); Comments of David Brauer, Jewish Community Action (eComment 8).

for review to prevent capricious decisions or impassioned, unauthorized removal of public property.<sup>146</sup>

120. Finally, commenters viewed the proposed rules as a way for groups, who have not been adequately represented in Capitol artworks, to have a process by which they can share their stories and experiences to make the Capitol a place that better represents Minnesota's rich and diverse history. These commenters note that the proposed rules create an opportunity to increase public involvement, understanding, and dialogue about Minnesota's history, and foster a greater sense of inclusion on Capitol grounds.<sup>147</sup>

121. Some commenters made specific recommendations to the Board with respect to implementation of the rules. MaryMargaret Zindren, Executive Vice President of the American Institute of Architects Minnesota, recommended that the Board, when implementing the rules, take extra effort to ensure that the processes for adding, modifying, and removing commemoratives works be well publicized through websites and media outlets; that frequently asked question (FAQ) documents be prepared to outline the process for the public; and that the Board utilize social media as part of its outreach efforts.<sup>148</sup> The Board responded that it plans to utilize these tools to communicate with the public as part of the review process.<sup>149</sup>

122. Two commenters recommended that the documents outlining the application process for adding, modifying, and removing commemorative works, and the

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<sup>146</sup> Comments of Julie Blaha, Minnesota State Auditor and Decision Process Advisory Task Force member (Tr. at 39-40; eComment 8); Comments of Christina Woods, member of Bois Forte Nation and Executive Director of Duluth Art Institute (Tr. at 44-47); Comments of Lindsey Dyer, Decision Process Advisory Task Force and State Historic Preservation Office Review Board member (Tr. at 49-51); Comments of Jonathan Gershberg, Jewish Community Action (Tr. at 51-54); Comments of MaryMargaret Zindren, Executive Vice President of the American Institute of Architects Minnesota (Tr. at 54-57, eComment 7); Comments of Pat Thompson (Tr. at 58); Comments of Dr. Heidi Swank, Executive Director of RETHOS Places Reimagined (Tr. at 59-63); Comments of Erin Campbell, Assistant Commissioner of the Department of Administration (Tr. at 63-65) (noting that the Department has received inquiries from the public in the past seeking removal of public monuments, which were referred to the CAAPB, but this caused confusion because there was no clear or well-defined process for removal); Comments of Dana Badgerow (Tr. at 76-79; eComment 9); Comments of Brandon Schorsch (Tr. at 79-85) (also noting that removal of monuments without authorized processes can result in "political showboating" by extremist groups); Comments of Ted Lentz, Cass Gilbert Society (Tr. at 85-89); Comments of Craig Smith (eComment 1) (also recommending that commemorative works focus on "representative memorials" rather than individuals); Comments of Luke Hanson (eComment 2); Comments of Ken Iosso (eComment 3); Comments of Jessica Intermill (eComment 4); Comments of Colleen Sheehy, Executive Director of Public Art St. Paul (eComment 6); Comments of David Brauer, Jewish Community Action (eComment 8).

<sup>147</sup> Comments of Shelley Buck, member of the Prairie Island Tribe of Dakota (Tr. at 36-38); Comments of Thao Mee Xiong, Coalition of Asian American Leaders (Tr. at 41-44); Comments of Christina Woods, member of Bois Forte Nation and Executive Director of Duluth Art Institute (Tr. at 44-47); Comments of Rosa Tock, Executive Director of the Minnesota Council on Latino Affairs (Tr. at 66-69; eComment 12); Comments of Sia Her, Executive Director of the State Council on Asian Pacific Minnesotans (Tr. at 72-76).

<sup>148</sup> Comments of MaryMargaret Zindren, Executive Vice President of the American Institute of Architects Minnesota (Tr. at 54-57; eComment 7).

<sup>149</sup> CAAPB Response to Comments of MaryMargaret Zindren, Executive Vice President of the American Institute of Architects Minnesota.

forms available to the public, be available in English, as well as other languages to increase accessibility and inclusivity<sup>150</sup> These and other commenters urged the Board to seek out individuals with diverse ethnic and cultural backgrounds to be a part of the decision-making process.<sup>151</sup> The Board did not specifically respond to these recommendations.

123. One commenter, John Andreozzi, advocated for the Christopher Columbus statue to be reinstalled on Capitol grounds with a plaque that credits Columbus with “forging the permanent link between the eastern and western hemispheres, and condemns his genocidal campaign against Native Americans.” Mr. Andreozzi further recommended that a Native American commemorative work could be placed near the Columbus statue. Mr. Andreozzi presented a lengthy recitation of Columbus’ life, concluding that many historic figures, like Columbus, have both positive and negative aspects of their lives.<sup>152</sup> Mr. Andreozzi did not comment on the substantive aspects of the rules.<sup>153</sup>

## VI. Rulemaking Legal Standards

124. Under the Minnesota Administrative Procedure Act and associated rules, an agency proposing to adopt rules must: (1) establish its statutory authority to adopt the proposed rules; (2) show that it has fulfilled all relevant legal and procedural requirements; and (3) demonstrate the need for and reasonableness of each portion of the proposed rules with an affirmative presentation of facts.<sup>154</sup>

125. Pursuant to Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record,<sup>155</sup> “legislative facts” (namely, general and well-established principles that are not related to the specifics of a particular case, but that guide the development of law and policy),<sup>156</sup> and the agency’s interpretation of related statutes.<sup>157</sup>

126. A proposed rule is reasonable if the agency can “explain on what evidence it is relying and how the evidence connects rationally with the agency’s choice of action

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<sup>150</sup> Comments of Rosa Tock, Executive Director of the Minnesota Council on Latino Affairs (Tr. at 66-69; eComment 12); Comments of Brandon Schorsch (Tr. at 79-85).

<sup>151</sup> Comments of MaryMargaret Zindren, Executive Vice President of the American Institute of Architects Minnesota (Tr. at 54-57; eComment 7); Comments of Rosa Tock, Executive Director of the Minnesota Council on Latino Affairs (Tr. at 66-69; eComment 12); Comments of Linda Sloan, Executive Director of the Council for Minnesotans of African Heritage (Tr. at 70-72); Comments of Brandon Schorsch (Tr. at 79-85).

<sup>152</sup> Comments of John Andreozzi (eComment 11).

<sup>153</sup> *Id.*

<sup>154</sup> Minn. Stat. §§ 14.05, subd. 1, .14, subd. 2; Minn. R. 1400.2100.

<sup>155</sup> *See Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).

<sup>156</sup> *Compare generally, U.S. v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976).

<sup>157</sup> *See Mammenga v. Agency of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Hous. Inst.*, 347 N.W.2d at 244.



to be taken.”<sup>158</sup> By contrast, a proposed rule will be deemed arbitrary and capricious where the agency’s choice is based upon whim, devoid of articulated reasons or “represents its will and not its judgment.”<sup>159</sup>

127. An important corollary to these standards is that, when proposing new rules, an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one.<sup>160</sup> Thus, while reasonable minds might differ as to whether one or another particular approach represents “the best alternative,” the agency’s selection will be approved if it is one that a rational person could have made.<sup>161</sup>

128. A rule must be disapproved if it:

- was not adopted in compliance with procedural requirements of Minn. Stat. ch. 14 and Minn. R. part 1400 (unless the administrative law judge decides that the error is harmless error under Minn. Stat. §§ 14.15, subd. 5 or 14.26, subd. 3(d));
- is not rationally related to the agency’s objective or the record does not demonstrate the need for or reasonableness of the rule;
- is substantially different than the proposed rule, and the agency did not follow the procedures of Minn. R. 1400.2110;
- exceeds, conflicts or does not comply with, or grants the agency discretion beyond that which is allowed by law, its enabling statutes or other applicable law;
- is unconstitutional or illegal;
- improperly delegates the agency’s powers to another agency, person or group;
- is not a “rule” as defined in Minn. Stat. § 14.02, subd. 4, or by its own terms cannot have the force and effect of law; or
- is subject to Minn. Stat. § 14.25, subd. 2, and the notice that hearing requests have been withdrawn and written response to it show that the withdrawal is not consistent with Minn. Stat. § 14.001(2), (4) and (5).<sup>162</sup>

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<sup>158</sup> *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

<sup>159</sup> *See Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm’n*, 251 N.W.2d 350, 357-58 (Minn. 1977).

<sup>160</sup> *Peterson v. Minn. Dep’t of Labor & Indus.*, 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).

<sup>161</sup> *Minn. Chamber of Commerce*, 469 N.W.2d at 103.

<sup>162</sup> Minn. R. 1400.2100.

129. Because the Board made changes to the proposed rules after the date the rules were originally published in the *State Register*, it is necessary for the Administrative Law Judge to determine if this new language is substantially different from that which was originally proposed.<sup>163</sup>

130. During the response and rebuttal period, the Board detailed revisions it would make to the proposed rules in response to the stakeholder feedback received during the hearing and comment period. On March 30, April 4, April 11, and April 27, 2022, the Board filed responses and modifications to the proposed rules.<sup>164</sup>

131. The standards to determine whether any changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2 (2020). The statute specifies that a modification does not make a proposed rule substantially different if:

- (1) the differences are within the scope of the matter announced in the notice of hearing and are in character with the issues raised in that notice;
- (2) the differences are a logical outgrowth of the contents of the notice of hearing, and the comments submitted in response to the notice; and
- (3) the notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.<sup>165</sup>

132. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider whether:

- (1) persons who will be affected by the rule should have understood that the rulemaking proceeding could affect their interests;
- (2) the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the hearing notice; and
- (3) the effects of the rule differ from the effects of the proposed rule contained in the hearing notice.<sup>166</sup>

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<sup>163</sup> Minn. R. 1400.2110 (2021).

<sup>164</sup> Potential Revisions to Proposed Rules (Mar. 30, 2022); Preliminary Response to Comments letter (Apr. 4, 2022); and Final Responses to Hearing Comments and Proposed Modifications (Apr. 11, 2022); Letter to Administrative Law Judge Ann O'Reilly from Merritt Clapp-Smith noting additional modifications (Apr. 27, 2022) (on file and of record with the Minn. Off. of Admin. Hrg.).

<sup>165</sup> Minn. Stat. § 14.05, subd. 2.

<sup>166</sup> See Minn. Stat. § 14.05, subd. 2.

## VII. Rule-by-Rule Analysis

133. Several sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report will not necessarily address each comment or rule part. Rather, the discussion that follows below focuses on those portions of the proposed rules as to which commentators prompted a genuine dispute as to the language used in the rules, practical issues with implementation of the rules, or otherwise requires closer examination.

134. The Administrative Law Judge finds that the Board has demonstrated by an affirmative presentation of facts the need for, and reasonableness of, all rule provisions that are not specifically addressed in this Report.

135. Further, the Administrative Law Judge finds that all provisions that are not specifically addressed in this Report are authorized by law and that there are no other defects that would bar the adoption of those rules.

136. While still supporting the proposed rules and their purposes, some commenters questioned word choices, the meaning of certain provisions, and identified areas where clarifications might be needed. These comments are detailed below.

### **PART 2400.2040: DEFINITIONS**

137. Proposed Rule 2400.2040 sets forth 17 new definitions to be used in interpreting the rules.

138. Proposed Rule 2400.2040, subp. 24b defines “design process” and subpart 65a defines “removal.” While these definitions are not legally defective and are approved, they should be reviewed to ensure consistency with modifications made by the Board (or recommended by the Administrative Law Judge below) with respect to proposed Rule 2400.2703, subps. 3 and 7.

139. The Judge recommends the following technically changes to these definitions as set forth below, with explanations for each change provided in footnotes:

Subp. 24b. **Design process.** "Design process" means the process that the board follows after the board approves a request for the addition or modification of a commemorative artwork ~~to the Capitol grounds, a design~~

~~review group selects a designer or design concept, and money is raised for the design and implementation.~~<sup>167</sup> The design process includes:

- A. approval of a schematic design: the description of the overall design concept for an artwork;
- B. design development: a refined version of the schematic design with scaled drawings showing the architectural and site plan details and list of materials;
- C. review and execution of construction documents: the instructions for contractors to build the artwork; and
- D. the bidding process: the search for a contractor to execute the artwork, based on price and qualifications.

Subp. 65a. **Removal.** "Removal" means ~~the review process and decision under part 2400.2703 to the removal~~ of an artwork from the Capitol grounds.<sup>168</sup>

140. While the Board's proposed definitions of "design process" and "removal" are not legally defective under Minn. R. 1400.2100, they are confusing and conflict with other of the proposed rules. Therefore, the Administrative Law Judge is not disapproving these proposed subparts as legally defective but is encouraging the Board to consider adopting the recommended modifications provided by the Judge above.

141. The Administrative Law Judge **APPROVES** proposed Rule 2400.2040. However, the Judge urges the Board to adopt the changes recommended by the Judge to ensure clarity and consistency within the rules.

142. When initially reviewing the originally proposed rules, the Administrative Law Judge noted that, in certain parts, the Board used, interchangeably, the terms "public hearing" and "public meeting" (see *e.g.*, originally proposed Rule 2400.2703, subp. 7, item D). At the public hearing on the rules, the Judge asked the Board if it intended public hearings and public meetings to proceed differently, or whether the Board were using

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<sup>167</sup> This change makes the definition of "design process" consistent with the provisions in proposed Rule 2400.2703, subps. 3 and 7, as modified by the Board and the Administrative Law Judge herein. The proposed rules, as written, do not require that monies be raised and deposited before the Board begins the design review process. Therefore, the Board should consider where in the process the deposit of funds must occur. If the Board intends that the deposit of funds occur before the design process begins, then the Board will need to further modify Subparts 3 and 7. As written, proposed Rule 2400.2703, subps. 3 and 7 only require that such deposit occur before implementation of construction. In addition, in Subpart 7, there is no process for a design review group or the selection of designer or design concept. Therefore, this definition is attempting to impose steps in the process that are not articulated in Subpart 7. This renders the definition of "design process" ambiguous and potentially in conflict with proposed Rule 2400.2703. Moreover, it is unclear why this term is defined when it appears nowhere in the rules.

<sup>168</sup> Removal is not a process. It is an act. This definition would make the word removal mean something other than the common meaning of the word and could cause confusion.

these two different terms interchangeably.<sup>169</sup>

143. In response to the Judge's question, the Board proposes including two additional definitions in Part 2400.2040: "public hearing" and "public meeting."<sup>170</sup> The Board modified the proposed rules to adding the following (unnumbered subparts):

Subp. xx. Public hearing. "Public hearing" means a formal proceeding held by the Capitol Area Architectural and Planning Board to receive comment from all interested parties, including the general public, on a proposed issue or action before the Board for consideration and possible decision. All meetings of the Capitol Area Architectural and Planning Board, including public hearings, comply with open meeting law, as described in Minnesota Statutes, chapter 13D.

Subp. xx. Public meeting. "Public meeting" means a meeting that is open to attendance by the general public and is hosted online or in a physical location that is accessible to the general public. Public meetings can be any size, address any topic, and may be organized and managed as determined by the meeting host. The host for the meeting may be the CAAPB, or any public, private, nonprofit or community entity.

144. While the Administrative Law Judge finds that definitions for "public meeting" and "public hearing" may be helpful to the rules, the proposed definitions are confusing and conflict with other of the proposed rules. To remain consistent with modifications to proposed Rule 2400.2703, subps. 3 and 7, and the Judge's own recommendations for changes to those subparts, the Judge recommends that the following additional changes be made to the definitions, as set forth below:

Subp. xx. Public hearing. "Public hearing" means a formal proceeding held by the board<sup>171</sup> ~~Capitol Area Architectural and Planning Board~~ to receive comment from all interested parties, including members of the general public, on a proposed issue or action before the bBoard for consideration or and possible decision under Minnesota Rules part 2400.2700, subparts 3 and 7. At least 30 days prior to the hearing date, notice shall be: (1) posted on the board's website; (2) mailed to the applicant; and (3) served on any other party requiring notice under Minnesota Rules part 2400.2703.<sup>172</sup> ~~All meetings of the Capitol Area Architectural and Planning Board, including public hearings, comply with Open Meeting Law, as described in Minnesota Statutes, chapter 13D.~~<sup>173</sup>

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<sup>169</sup> Tr. at 63.

<sup>170</sup> Board Final Response to Public Comments and Modifications at 5 (Apr. 11, 2022),

<sup>171</sup> "Board" is already a defined term in existing Rule 2400.2040, subp. 15.

<sup>172</sup> A public hearing necessarily requires some notice requirement. The Board can determine what notice it wishes to provide for these hearings, but the notice should be meaningful and real. Note that proposed Rule 2400.2703, subp. 7, item G (as modified) requires notice on the original sponsor and artist (or representative) of an existing artwork for which a modification or removal request has been made. The change recommended by the Judge is consistent with proposed Rule 2400.2703, subp. 7, item G.

<sup>173</sup> This is unnecessary because this subpart is addressing public hearings, not public meetings.

Subp. xx. Public meeting. “Public meeting” means a meeting held by the board or its designated committee<sup>174</sup> that is open to attendance by the general public and is hosted online or in a physical location that is accessible to the general public. Public meetings must comply with all requirements of Minnesota Statutes, chapter 13D.<sup>175</sup> ~~Public meetings can be any size, address any topic, and may be organized and managed as determined by the meeting host.~~<sup>176</sup> ~~The host for the meeting may be the CAAPB, or any public, private, nonprofit or community entity.~~<sup>177</sup>

145. While the Board’s proposed definitions of “public hearing” and “public meeting” are not legally defective under Minn. R. 1400.2100, they are confusing and in conflict with other of the proposed rules. Therefore, the Administrative Law Judge is not disapproving these proposed subparts as legally defective but is strongly encouraging the Board to consider adopting the recommended modifications provided by the Judge.

146. The Administrative Law Judge **APPROVES** these new subparts. However, the Judge urges the Board to adopt the changes recommended by the Judge to ensure clarity and consistency within the rules. If adopted, the recommended modifications do not render the proposed rules substantially different than those originally proposed in the Notice of Hearing. However, it is likely that all the definitions in the existing Rule 2400.2040 and proposed Rule 2400.2040 will need to be renumbered to accommodate these new definitions. When re-submitted the rules for final approval, the Board should identify all changes to subpart numbers in Rule 2400.2040 for the Revisor of Statutes.

## **PART 2400.2703: STANDARDS FOR COMMEMORATIVE ARTWORK**

147. Part 2400.2703 sets forth the processes and criteria for reviewing applications for additions of new commemorative artwork and requests for modification or removal of existing commemorative artwork in the Capitol Area.

### **Part 2400.2703, Subpart 1: Guiding Principles for Commemorative Artwork**

148. After the public hearing, the Board modified proposed Subpart 1 (guiding principles for commemorative artwork), as follows:<sup>178</sup>

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<sup>174</sup> Proposed Rule 2400.2703, subps. 3 and 7 provide for public meetings held by the Board and the “commemorative artwork review committee”.

<sup>175</sup> The reference to open meeting laws is moved from the “public hearing” definition and more appropriately belongs in the “public meeting” definition.

<sup>176</sup> Public meetings referenced in proposed Rule 2400.2703, subps. 3 and 7 do not address “any topic” and cannot be hosted by third parties. Accordingly, this sentence is both ambiguous and in conflict with the proposed rules.

<sup>177</sup> The Administrative Law Judge is unclear why the Board is proposing that public meetings be hosted by third parties. The public meetings referenced in the proposed rules are held by the Board or the commemorative artwork review committee, not third parties.

<sup>178</sup> Board Responses to Comments and Modifications to Proposed Rules (Mar. 30, 2022).

- A. The collection of cCommemorative artwork on the Capitol grounds must reflect the state’s diverse history and people.
- B. The board must:
  - (1) provide for public input, public access, and transparency in making decisions about commemorative artwork on Capitol grounds; and<sup>179</sup>
  - ~~(2) consider the historic, architectural, and artistic integrity of the Capitol building; and~~
  - ~~(3)~~(2) review existing commemorative artwork as needed every ten years to:
    - (a) gather public input regarding the commemorative artwork collection;
    - (b) ensure that the artwork in the commemorative artwork collection meet the standards and intent of parts 2400.2040 and 2400.2703.
- C. All decisions about commemorative artwork must account for the historic, architectural, and artistic integrity of the Capitol building and grounds.

149. The Board first proposes to add the words “the collection of” to Subpart 1, Item A to clarify that the Board’s review of new and existing artwork looks to the Capitol Area’s collection of work as a whole -- and not each piece of artwork individually -- to ensure that it reflects the state’s diverse history and people.<sup>180</sup>

150. The Administrative Law Judge finds that the Board’s rationale for this modification to proposed Rule 2400.2703, subp. 1, item A, is reasonable and is not substantially different from the proposed rule in the Notice of Hearing. The modification provides clarity to the proposed rules and is **APPROVED** without any additional recommendations from the Administrative Law Judge.

151. The Board also seeks to modify proposed Rule 2400.2703, subp. 1, item B(2) by removing the second provision (“consider the historic, architectural, and artistic integrity of the Capitol building”). The Board explains that Subpart 1, Item B(2) was erroneously left in the draft of proposed rules and is redundant with Subpart 1, Item C.

152. The Administrative Law Judge finds that this modification is reasonable and is not substantially different from the proposed rule in the Notice of Hearing. Accordingly, the modification to proposed Rule 2400.2703, subp. 1, item B is **APPROVED**. The Judge also recommends that the word “and” be included after Subpart 1, Item B(1); and that subpart 1, item B(3) be renumbered as subpart 1B(2) (see above).

153. At the rule hearing, commenter Brandon Schorsch questioned the Board about originally proposed Subpart 1, Item B(3), which discusses the review of existing

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<sup>179</sup> Recommended addition by Administrative Law Judge.

<sup>180</sup> Board Responses to Comments and Modifications to Proposed Rules (Mar. 30, 2022).

commemorative artwork by the Board every 10 years.<sup>181</sup> Mr. Schorsch inquired whether the Board only reviews the collection of artwork every 10 years, or if a review can happen more frequently than every 10 years.<sup>182</sup>

154. In its response to Mr. Schorsch, the Board explained that the proposed rule states that review of existing commemorative artwork shall occur “*as needed or every ten years.*”<sup>183</sup> According to the Board, this means that the review can happen “as needed” or every 10 years, whichever comes first.<sup>184</sup> Therefore, if the Board finds that a full review of existing artwork is “needed,” it can conduct that review in a time period shorter than every 10 years.<sup>185</sup> The Judge is satisfied with the Board’s response as correct and fairly articulated in the proposed rule.

155. Commenter Colleen Sheehy recommended that the Board change the word “lasting” in proposed Rule 2400.2703, subp. 2, item B (conditions for adding new artwork) to “long-term.”<sup>186</sup> As a criterion for considering new artwork, proposed Rule 2400.2703, subp. 2, item B requires that “the artwork has *lasting* statewide significance for Minnesotans.”<sup>187</sup>

156. The Board responded that the word “lasting” in relation to “significance” indicated that the work will retain its significance for “many, many years.”<sup>188</sup> The Board did not explain why it thought “lasting” was a better adjective than “long-term.” Nonetheless, because the word “lasting” is sufficiently clear and defined in any dictionary, the Board’s word choice is an adequate one and does not require the change suggested by Ms. Sheehy.

157. Ms. Sheehy also suggested replacing the word “lasting” with “long-term” in proposed Rule 2400.2040, subp. 19d, clause C (requiring commemorative artwork “to have *lasting*”<sup>189</sup> historic and cultural significance”).<sup>190</sup> Ms. Sheehy reasoned that “long-term” was used later in the same subpart 19d to explain that artwork “may be event-based, temporary, or long-term.” While it is true that the proposed rules do use the term “long-term” in subpart 19d to describe artwork, it is not necessary that the proposed rules be modified to change “lasting” to “long-term” for clause C. Thus, for the reasons set forth above, the Board’s word choice of “lasting” in proposed Rule 2400.2040, subp. 19d, clause C, is sufficiently clear so as not to require any modification.

158. Proposed Rule 2400.2703, subp. 2, item C requires that artwork be “respectful of the diversity of Minnesotans.” Commenter Paul Mandell questioned the word choice of “respectful,” inquiring how a work of art may be disrespectful of diversity.<sup>191</sup>

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<sup>181</sup> Comments of Brandon Schorsch (Tr. at 79-85).

<sup>182</sup> *Id.*

<sup>183</sup> Emphasis added.

<sup>184</sup> Board Response to Comment of Brandon Schorsch (Mar. 30, 2022).

<sup>185</sup> *Id.*

<sup>186</sup> Comment of Colleen Sheehy (eComment 6).

<sup>187</sup> Emphasis added.

<sup>188</sup> Board’s Final Response to Comments at 6 (Apr. 11, 2022).

<sup>189</sup> Emphasis added.

<sup>190</sup> Comment of Colleen Sheehy (eComment 6).

<sup>191</sup> Comment of Paul Mandell (eComment 5).



The Board responded that the clause's intended meaning was that artwork cannot be disrespectful of the diversity of Minnesotans.<sup>192</sup> Because the word "respectful" is sufficiently clear, generally understood, and defined in any English dictionary, the Board's choice of phrasing is acceptable and does not require disapproval.

### **Part 2400.2703, Subpart 3: Application and Review Process for New Artwork**

159. Proposed Rule 2400.2703, subp. 3 addresses the application and review process for new artwork. After the rule hearing and comment period, the Board decided to modify Subpart 3, adding new clauses and re-lettering the subsequent items.<sup>193</sup> The modifications that the Board made to originally proposed Subpart 3, Items A, B, C, and D are set forth below:<sup>194 195</sup>

#### **Subp. 3 Application and review process for new artwork**

A. An applicant requesting placement of a commemorative artwork in the Capitol area must submit the application form available on the board website ~~from board staff~~. The ~~website~~board must ~~also~~ provide clear and accessible instructions for completing the form. When board staff receive ~~a completed~~ an addition application, ~~of a commemorative artwork request form~~, board staff must review the application for completeness and provide written confirmation of the application's receipt to the applicant. ~~If the information required by the application form is not complete, board staff must notify the applicant within ten days of application receipt indicating if the application is complete or incomplete. If that the application is incomplete board staff must~~ and indicate what information is missing.

B. Board staff must review the each complete application and prepare a report analyzing if the application request for addition meets all of the conditions under subpart 2 with a recommendation to the board on whether to accept the application. The full board must vote to accept or reject the application based on whether the application meets all of the conditions in subpart 2.

C. Board staff must post a summary of the proposal and the staff report on the agency website and provide timely updates about its progress through the review steps, including opportunities for public input and meetings of the Board at which the application will be discussed or voted upon.

D. After the staff report is publicly released, the agency must hold

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<sup>192</sup> Board's Final Response to Comments and Modifications to Rules at 6 (Apr. 11, 2022).

<sup>193</sup> Board's Final Response to Comments and Modifications to Rules at 7-9 (Apr. 11, 2022); Letter to Administrative Law Judge Ann O'Reilly from Merritt Clapp-Smith (Apr. 27, 2022).

<sup>194</sup> *Id.*

<sup>195</sup> The final modifications submitted on April 11, 2022, were different from the revisions contained in the "Proposed Rule Revisions – Revisor Copy" provided by Merritt Clapp-Smith on April 22, 2022. The Judge is working from the final modifications submitted on April 11, 2022, and the revisions submitted on April 27, 2022, because those were the modifications formally submitted.

one or more public meeting(s) and provide an opportunity for input on the CAAPB website for at least 30 days to gather public comment on whether the application request for addition meets all of the conditions under subpart 2.<sup>196</sup>

E. When the comment period and public meeting(s) are complete, board staff will prepare a report and recommendation to the board to accept or reject the application to proceed for review under subp. 3. F. to 3. N. and subps. 4 and 5 based on whether the application meets all of the conditions in subpart 2. The board will meet to consider the report, at which public comment is invited, and vote if the application meets all of the conditions in subp. 2 and can advance for review.

(1) If the board accepts an addition application ~~for an addition request~~, board staff must notify the applicant and the Department of Administration ~~w~~Within 14 days of the board's vote accepting the application ~~board staff must notify the Department of Administration of the addition request and post a proposal summary on the board's website.~~

(2) If the board rejects an addition application ~~for an addition request~~, board staff must notify the applicant ~~that the board has rejected the application for an addition request~~ and provide reasons for the rejection.

F.G. After an application is accepted, ~~accepting an application for an addition~~, board staff and architectural advisers must conduct a site selection study with the applicant for the proposal. The Department of Administration must review and comment on proposed sites where the board is considering displaying the commemorative artwork. Board staff and architectural advisers must recommend a site for the proposed artwork to the full board based on the criteria for the location of new artwork in subpart 4.

G.D. After board staff and advisors identify a site for the proposed artwork, the board must hold a public hearing and must affirm through board vote that the proposal meets all of the conditions under subpart 2. The board must notify the applicant of the board's final decision.

[Based upon these modifications, originally proposed Subpart 3, Items C through K are re-lettered to as Items F through N.]

160. The Board explained that Rule 2400.2703, subp. 3, as originally proposed, was confusing with respect the initial review of the application for completeness and the subsequent step of reviewing a complete application for compliance with Subpart 2 (the

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<sup>196</sup> Modified on April 27, 2022, by the Board. See letter to Administrative Law Judge Ann O'Reilly from Merritt Clap-Smith (Apr. 27, 2022).

conditions for adding new artwork).<sup>197</sup>

161. The Board's modifications were also in response to: (1) commenter MaryMargaret Zindren's general recommendation that the Board make extra efforts to ensure the application process is adequately publicized to obtain input from the public; and (2) commenter Dr. Heidi Swank's concern that the addition request process did not contain sufficient "space for public engagement."<sup>198</sup>

162. The Administrative Law Judge finds that the Board's proposed modifications do not render the rule substantially different from the proposed rule as published in the Notice of Hearing because: (1) the changes are within the scope of the matter announced in the Notice of Hearing and are in character with the issues raised in the Notice; (2) the modifications are a logical outgrowth of the content of the Notice of Hearing and the comments submitted in response to the Notice; and (3) the Notice of Hearing providing fair warning that the outcome of the rulemaking proceeding could be the rule in question.

163. While the Board's proposed modifications to Subpart 3 are not legally defective under Minn. R. 1400.2100, the modifications made by the Board are confusing and conflict with other parts of the proposed rules. Therefore, the Administrative Law Judge is not disapproving Subpart 3, but is encouraging the Board to consider further modifying the subpart as recommended by the Judge below. These revisions bring clarity and cohesion to Subpart 4, and sort out differences between the various modifications submitted to the Judge by the Board after the rule hearing.

164. The Judge recommends that Subpart 3, Items A and B, and the new Items C, D, E, F, G, and H be revised to read as follows, with explanations contained in the footnotes:<sup>199</sup>

### **Subp. 3 Application and review process for new artwork**

A. **Application.**<sup>200</sup> An applicant requesting placement of a new commemorative artwork in the Capitol area must submit the application an addition request<sup>201</sup> to the board, using the form available on the board's website. The website must provide clear and accessible instructions for

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<sup>197</sup> Board's Final Response to Hearing Comments and Modifications at 7 (Apr. 11, 2022).

<sup>198</sup> *Id.*; Comments of MaryMargaret Zindren, Executive Vice President of the American Institute of Architects Minnesota (Tr. at 54-57; eComment 7); Comments of Dr. Heidi Swank, Executive Director of RETHOS Places Reimagined (Tr. at 59-63).

<sup>199</sup> The "final" modifications submitted on April 11, 2022, were different from the revisions contained in the "Proposed Rule Revisions – Revisor Copy" provided by Merritt Clapp-Smith on April 22, 2022. The Judge is using the "final" modifications submitted by the Board on April 11, 2022, as well as the additional modifications submitted on April 27, 2022, not the "Proposed Rule Revisions – Revisor Copy" provided by Ms. Clapp-Smith on April 22, 2022, which appear inconsistent with the modifications submitted to the Judge on April 11 and 27, 2022.

<sup>200</sup> The Administrative Law Judge recommends that clause titles be inserted in Subpart 3, items A through N, to help clarify the steps in the new artwork review process.

<sup>201</sup> "Addition request" is a defined term in proposed Rule 2400.2040, subp. 3a. It is defined to mean "the application form that an applicant submits to the board requesting the addition of a new artwork..." Therefore, it is redundant to call it an addition request application form.

completing the application form. ~~When board staff receive an addition application, board staff must review the application for completeness and notify the applicant within ten days if application receipt to the applicant indicating if the application is complete or incomplete. Within ten calendar days<sup>202</sup> of the board's receipt of an addition request, board staff must determine whether the application form is complete and inform the applicant of that determination. If the application is found incomplete, board staff must advise the applicant that the application is incomplete and ~~indicate~~ identify what information is missing.~~<sup>203</sup>

B. **Staff Report.** ~~Once an application is determined to be complete, b~~Board staff must review the ~~complete~~ addition request application and analyze whether it meets all of the conditions in subpart 2. Board staff shall and prepare a written report of its findings analyzing if the application request for addition meets all of the conditions under subpart 2.<sup>204</sup>

C. **Posting.** Board staff must post a summary of the ~~proposal addition request, as well as and~~ the staff report on the agency board's website. The posting shall also include and provide timely updates about the application's its status, progress through the review steps, including opportunities for public input, and meetings of the bBoard<sup>205</sup> at which the application will be discussed or voted upon.<sup>206</sup>

D. **Comment Period.** After the staff report is ~~posted publicly released, the board agency must open a 30-day public comment period and hold one or more at least one public meeting(s) hearing<sup>207</sup> and provide an opportunity for input on the CAAPB website for at least 30 days, to gather public comment input on whether the application addition request for addition meets all of the conditions set forth in under~~ subpart 2.<sup>208</sup>

E. **Staff Recommendation and Board Decision.** When the comment period and public hearing meeting(s) are complete, board staff ~~shall will~~ prepare a written summary report of the comments received and provide a recommendation to the board on whether to accept or reject the application and to proceed to the next step in the project review process, or

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<sup>202</sup> Makes clear that the 10 days are counted as calendar days, not business days.

<sup>203</sup> These changes merely change the order of the sentences to provide clarity.

<sup>204</sup> This sentence was moved to earlier sentence.

<sup>205</sup> The word "board" should not be capitalized in the rules. The term "board" is defined in existing Rule 2400.2040, subp. 15.

<sup>206</sup> All changes are intended to provide clarity, not change the content of the proposed rule, as modified by the Board.

<sup>207</sup> It appears that the Board seeks to include a public hearing at the stage in the process when it is determining whether the proposal meets the conditions for adding new artwork in Rule 2400.2703, subp. 2. A public hearing solicits formal public comments, whereas a public meeting is more of an open forum during a board meeting for members of the public to be heard.

<sup>208</sup> The Judge's recommended changes revert to the Board's modifications submitted on April 11, 2022, which were clearer.

to reject the application for failing to meet all conditions set forth in subpart 2, for review under subp. 3. F. to 3. N. and subps. 4 and 5 based on whether the application meets all of the conditions in subpart 2. The board will ~~shall~~ then meet to consider the addition request, staff report and recommendation, and public comments received. ~~report, at which public comment is invited, T~~the board shall ~~and determine whether the addition request if the application~~ sets forth in subpart 2 and can advance for further review. The board meeting shall be open to the public. After its discussion, the board shall vote on whether to accept or reject the application for further review. A majority vote of the full board is required to accept the application and advance it for further review.<sup>209</sup>

(1) If the board accepts an addition ~~request~~ application-request, board staff must notify the applicant and the Department of Administration within 14 calendar days<sup>210</sup> of the board's vote accepting the application for further review.

(2) If the board rejects an addition ~~request~~ application-request for failing to meet all conditions of subpart 2, board staff must notify the applicant in writing within 14 calendar days<sup>211</sup> and provide reasons for the rejection.

F. **Site Selection Study.** After an addition request application is accepted by the board for further review, board staff and its architectural advisers must conduct a site selection study with the applicant ~~for the proposal~~. The Department of Administration must review and comment on proposed sites ~~where the board is considering displaying for~~ the commemorative artwork. Board staff and its architectural advisers must recommend a site for the proposed artwork to the full board based on the criteria for the location of new artwork set forth in subpart 4.

G. **Public Meeting on Site Selection.** After board staff and its architectural advisers identify a site for the proposed commemorative artwork<sup>212</sup>, the board must hold a public meeting<sup>213</sup> ~~hearing and to determine must affirm through board vote that the proposal~~ whether the proposed location meets all of the criteria~~conditions~~ set forth in ~~under~~ subpart 4 2.<sup>214</sup> After an opportunity to hear public comments at the board meeting, the board shall vote on the location for the commemorative artwork. A majority

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<sup>209</sup> Because the proposed rules are silent as to whether a majority or unanimous vote is necessary from the Board, it is important to include this information in the rule. The Board should thus decide whether the vote to accept or reject the application is a majority or unanimous vote and include this in the rule.

<sup>210</sup> This adds clarity between business or calendar days.

<sup>211</sup> This change is consistent with the notice to applicants upon acceptance of the application.

<sup>212</sup> This change is consistent with defined terms (addition request).

<sup>213</sup> Because a public hearing will have already been held on the conditions for new artwork set forth in Rule 2400.2703, subp. 2, it appears that only a public meeting would be necessary for site selection (a less controversial step in the process).

<sup>214</sup> This change is required because the Board would have already voted on whether the project meets the conditions of Subpart 2.

vote of the full board is required to accept a site location for any new commemorative artwork.<sup>215</sup> The board must notify the applicant in writing of the board's site final selection decision within 10 calendar days of the meeting.<sup>216</sup>

**H.E. Design Process Funding.** If the board ~~accepts~~ approves the addition request application of the proposed artwork and approves the artwork's location, the applicant must raise money or otherwise pay for the cost of ~~completing conducting the design process~~ a design competition.<sup>217</sup> This money covers the cost of the design ~~selection process,~~<sup>218</sup> including but not limited to such as promotion, publicity, design review group expenses, and, in the case of a formal competition, awards or stipends for the design competition finalists.

[Note that the remaining clauses in proposed Rule 2400.2703, subp. 3 will need to be re-lettered to I, J, K, L, M, and N in the final rules.]

165. Proposed Rule 2400.2703, subp. 3, items A, B, C, D, E, F, and G, as modified by the Board, are **APPROVED**. However, the Judge urges the Board to adopt the changes recommended by the Judge to ensure consistency and clarity within Subpart 3 and with other parts of Chapter 2400. The modifications recommended by the Administrative Law Judge above do not render proposed Rule 2400.2703, subp. 3 substantially different from the proposed rule in the Notice of Hearing and provide increased clarity.

166. Commenter Ken Iosso noted that, under the proposed rules (modified Rule 2400.2703, subp. 3, item H), the applicant is required to fund a design contest, and that this results in extra burden and costs to the applicant.<sup>219</sup> Mr. Iosso questioned whether the applicant could simply identify an artist and design as part of its application, rather than engage in a competitive artist and design selection process.<sup>220</sup>

167. The Board responded as follows:

Competitions in the Capitol Area have a long tradition and are a statutory requirement for new buildings and artworks over a certain dollar value. Recent state reforms for equity in contracting have improved access to design competitions and hiring for small, minority and woman owned

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<sup>215</sup> This vote can be a unanimous or a majority vote, but the Board needs to be clear what type of vote is required for site selection. Without this detail, the Board could find itself in conflict.

<sup>216</sup> It is helpful to include timeframes when creating a process to avoid claims of delay, inattention, prejudice, etc.

<sup>217</sup> Proposed Rule 2400.2703, subp. 3, item K (as modified) addresses the design process and does not require a formal design competition. It allows for an open solicitation for design proposals or a design competition. Also "design process" is a defined term in proposed Rule 2400.2040, subp. 24b. Also, "design process" is a defined term in proposed Rule 2400.2040, subp. 24b. Therefore, it should be incorporated into the rules.

<sup>218</sup> Again, this should be consistent with the definition of the "design process" set forth in proposed Rule 2400.2040, subp. 24b.

<sup>219</sup> Comments of Ken Iosso (eComment 3).

<sup>220</sup> *Id.*

businesses. Since commemorative works projects are managed by the State, funds for the work are remitted to the State, and the State oversees all purchasing and hiring consistent with state policies and practices. Requiring an open and competitive process for selection of a commemorative work designer has multiple benefits which ensure that:

- alternative concepts are considered[;]
- the best value designs for the investment are chosen[;]
- access to and opportunity for a range of teams and designers, who are proactively informed of the competition through state vendor outreach to certified small, minority and woman owned businesses[;]
- a broad and diverse group of stakeholders and the public are informed of the design process and can provide input or participate in a design committee[;]
- the design team is experienced and qualified (or licensed as necessary in some cases), which reduces a range of financial and safety risks during and after implementation[;]
- ensures that the principles and concepts established for the urban, architectural and landscape design of the Minnesota State Capitol mall and grounds are accounted for[; and]
- a consistent and fair process is used for selection of designers, under the procedures in Minnesota Rules Chapter 2400 for the [CAAPB].

Ultimately, CAAPB staff have observed, over years of experience with the design and implementation of public projects, that a well-run, open, and competitive designer selection process ensures the best project[s] for Minnesota, and often saves money in the long run.<sup>221</sup>

168. The Administrative Law Judge finds the Board’s rational for Subpart 3, Item H is reasonable and, therefore, **APPROVES** proposed Rule 2400.2703, subp. 3, item H, as modified by the Board. However, the Judge urges the Board to adopt the changes recommended by the Judge to ensure clarity and consistency within Subpart 3 and Chapter 2400.

### **Proposed and Modified Rule 2400.2703, Subpart 3, Item I**

169. Proposed Rule 2400.2703, subp. 3, item I, as re-numbered in the modification (originally item F), discusses the development of a design framework. “Design framework” is a defined term under the proposed Rule 2400.2040, subp. 24a.

170. Commenter Dr. Heidi Swank suggested that the reference in Item I to a “plan for informing and engaging key stakeholders and members of the public during the

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<sup>221</sup> Board’s Final Response to Comments and Modifications to Rules at 9 (Apr. 11, 2022).

design competition” be set forth in rule, rather than devised by each applicant. The Board responded by stating, “The intent of that recommendation is good, however, this step is technical in nature and not a good opportunity for public input.” In response, however, the Board modified Item K (originally Item I) to include public involvement, as will be discussed below.

171. First, the Administrative Law Judge recommends that Item I (formerly Item F) be revised to make it consistent with modified Item K, addressing a design process. This also makes Item I consistent with the defined term “design process” included in proposed Rule 2400.2040, subp. 24b.

172. The Judge recommends the following technical changes to modified Item I:

I. **Design Framework**.<sup>222</sup> The applicant must work with board staff and the board’s architectural advisers to develop a design framework<sup>223</sup> document that includes:

- (1) the goals and objectives of the applicant;
- (2) the applicable zoning standards, project planning parameters, or design guidelines for the selected site;
- (3) the proposed budget, schedule, location, site-specific conditions, and technical parameters;
- (4) the plan for informing and engaging key stakeholders and members of the public during the design ~~process~~competition;<sup>224</sup> and
- (5) additional ~~design process~~ competition guidelines, including the composition of the design selection group, designer qualifications, the criteria that the design selection group must use, and submission requirements.

173. The Administrative Law Judge **APPROVES** proposed Rule 2400.2703, subp. 3, item I, as modified by the Board. However, the Judge urges the Board to adopt the changes recommended by the Judge to ensure consistency and clarity within Subpart 3 and Chapter 2400.

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<sup>222</sup> Title added to provide clarity in the steps of the review process, consistent with the other changes recommended by the Administrative Law Judge for Subpart 3.

<sup>223</sup> This is a defined term in proposed Rule 2400.2040, subp. 24a.

<sup>224</sup> The proposed rule (Subpart 3, Item K, as modified) does not require a design competition. Item K, as modified, states that the Board must initiate “*either* an open solicitation for design proposals *or* a request for qualification process to select a designer or design concept through a design competition.” (Emphasis added.) The rule only requires that the design be competitively bid. The Board specifically defines “design process” in proposed Rule 2400.2040, subp. 24b. Therefore, it should remain consistent in its use of terms.



### Part 2400.2703, Subpart 3, Item J

174. Proposed Rule 2400.2703, subp. 3, item J, as modified (originally item G), addresses testimony by the Board to the legislature required by Minn. Stat. § 15B.21, subd. 3. This statute states that: “(a) The board must give testimony to the legislature on any proposal for a memorial in the Capitol Area”; and (b) “The testimony must deal with the proposal's compatibility with the standards, policies, and objectives of the comprehensive plan.”

175. Proposed Rule 2400.2703, subp. 3, item J, as modified, contained a reference to the “Capitol mall design framework,” in addition to the Comprehensive Plan for the Minnesota Capitol Area (Comprehensive Plan).

176. On April 27, 2022, the Board modified item J to remove the reference to the “Capitol mall design framework” contained in the originally proposed rule.<sup>225</sup>

177. The Capitol Mall Design Framework is dated 1990. Under the 2040 Comprehensive Plan, the Capitol Mall Design Framework must be updated by 2025.<sup>226</sup> According to Ms. Clapp-Smith, the Board’s Executive Secretary, the Board intends to make the Capitol Mall Design Framework an attachment to the Comprehensive Plan when the framework is updated sometime before 2025. Rather than incorporate the 1990 Capitol Mall Design Framework document in the rules, the Board decided to remove its reference in the rules altogether and replace it with “design objectives” contained in the Comprehensive Plan. The Board states that the reference to the Capitol Mall Design Framework is unnecessary and could cause confusion with the new defined term “design framework” set forth in proposed Rule 2400.2040, subp. 24a.

178. The Administrative Law Judge finds that the Board’s modifications to proposed Rule 2400.2703, subp. 3, item J, do not render the rule substantially different from the rule as originally proposed.

179. The Judge recommends that Item I be revised as follows to be consistent with Minn. Stat. § 15B.21:

J. **Testimony to Legislature.**<sup>227</sup> In accordance with Minnesota Statutes, section 15B.21, subdivision 3, the board must provide testimony to the legislature on any commemorative artwork proposal in the Capitol area seeking legislative authorization or appropriation of funding. The applicant may be asked to testify about ~~on behalf of~~<sup>228</sup> the applicant's

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<sup>225</sup> Letter to Administrative Law Judge Ann O’Reilly from Merritt Clapp-Smith (April 27, 2022) (on file and of record with the Minn. Office Admin. Hearings).

<sup>226</sup> 2040 Comprehensive Plan for the Minnesota Capitol Area at 70. See <https://mn.gov/mn/caapb/2040%20Comprehensive%20Plan%20web.pdf>.

<sup>227</sup> This headline is consistent with the other modifications to bring clarity to the addition process laid out in the rule.

<sup>228</sup> Minn. Stat. § 15B.21, subd. 3, does not state that the Board must testify on behalf of an applicant. It states that the Board shall testify about “the proposal's compatibility with the standards, policies, and objectives of the comprehensive plan.” *Id.* Because the proposed rule conflicts with the statute, the words “on behalf of” must be removed.

proposal. This testimony must address the proposal's alignment with the design objectives of Capitol mall design framework and the Comprehensive Plan for the Minnesota Capitol Area,<sup>229</sup> which is incorporated by reference, is not subject to frequent change, and is available on the Capitol Area Architectural and Planning Board website.

180. The Administrative Law Judge **APPROVES** proposed Rule 2400.2703, subp. 3, item J, as modified by the Board. However, the Judge urges the Board to adopt the changes recommended by the Judge to ensure consistency with Minn. Stat. § 15B.21.

### **Part 2400.2703, Subpart 3, Item K**

181. After the rule hearing, the Board modified proposed Rule 2400.2703, subp. 3, item K (formerly item H), in response to the comments of Dr. Heidi Swank. Dr. Swank suggested that the process for reviewing addition requests include more opportunities for public input.<sup>230</sup>

182. To that end, the Board modified the rule as follows:<sup>231</sup>

H.K. Using the ~~Capitol mall design framework~~ and design objectives in the Comprehensive Plan for the Minnesota Capitol Area incorporated by reference in subpart 3.J under item G, the board must initiate either an open solicitation for design proposals or a request for qualification process to select a designer or design concept through a design competition. The board must assemble a design review group to assist the board in selecting a designer or design concept. The design review group must include board members, board staff, architectural advisers, Minnesota Historical Society staff, designers, Department of Administration staff, the applicant, at least two members of the general public to be selected through an application process, and any other members that the board determines necessary to help the board select a designer or a design concept. The design review group must review the designer or design concept applications and vote for a designer or design concept. After the design review group's vote, the board must review and approve of the design review group's process and decision to ensure that the design review group followed the procedures in The Handbook of Architectural Design Competitions, which is incorporated by reference, is not subject to frequent change, and is available on the American Institute of Architects website.

183. Proposed Rule 2400.2703, subp. 3, item K, as modified by the Board, leaves final design and designer selection to a “design review group,” a group of individuals consisting of some board members, board staff, architectural advisors,

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<sup>229</sup> Currently, there is no “Capitol mall design framework.” Minn. Stat. § 15B.21, subd. 3, only requires that the testimony “deal with the proposal's compatibility with the standards, policies, and objectives of the comprehensive plan.”

<sup>230</sup> Comments of Dr. Heidi Swank, Executive Director of RETHOS Places Reimagined (Tr. at 59-63).

<sup>231</sup> Including the Board's removal of the reference to the Capitol Mall Design Framework, modified on April 25, 2022.

Minnesota Historical Society staff, designers, Department of Administration staff, the applicant, two members of the public, and “other members” as the Board deems “necessary.” It is unclear in the rule whether all members of the Board are included in the design review group.

184. The final design and designer selection is an important decision that falls within the statutory authority of the Board, not others. Therefore, while a design review group is certainly helpful, it cannot be charged with final authority over the selection of the design or designer of a commemorative work. This improperly delegates the Board’s authority to others. According, proposed Rule 2400.2703, subp. 3, item K, as modified, is **DISAPPROVED**.

185. To remedy this defect, the Administrative Law Judge recommends that the following changes be made to Item K:

**H.K. Design Review Group and Selection.**<sup>232</sup> Using design objectives in the Capitol mall design framework and the Comprehensive Plan for the Minnesota Capitol Area incorporated by reference under item JG, the board must initiate either an open solicitation for design proposals or a request for qualification process to select a designer or design concept through a design competition. The board must assemble a design review group to assist the board in selecting a design, designer, or design concept. The design review group must include at least two<sup>233</sup> board members, board staff, architectural advisers, Minnesota Historical Society staff, designers, Department of Administration staff, the applicant, at least two members of the general public appointed by the board chair<sup>234</sup> ~~to be selected through an application process, and any other members~~ professionals that the board determines necessary to help the board select a design, designer, or a design concept. The design review group must review the design proposals, designer applications, or design concept applications and vote for a design, designer, or design concept to recommend to the board. After considering the design review group's recommendation ~~vote,~~ the board must vote to review and approve or reject ~~of~~ the design review group's recommendation ~~process and decision.~~ A majority vote of the board is required to accept a design, designer, or design concept.<sup>235</sup> All design competitions must to ensure that the design review group followed the procedures in The Handbook of Architectural Design Competitions, which is incorporated by reference, is not subject to frequent change, and is available on the American Institute of Architects website.

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<sup>232</sup> Title added for clarity in identifying steps in the addition request application process.

<sup>233</sup> Having two board members on the design review committee is consistent with the number of board members in proposed Rule 2400.2703, subp. 7, item F, as modified.

<sup>234</sup> This is consistent with language the Board has added to Subpart 7, involving the review of modification and removal requests and adds clarity as to who selects the members of the public.

<sup>235</sup> This provision simply clarifies the type of vote required to determine the design, designer, or design concept. It could be a unanimous vote if the board so selected that option, but it is advisable to identify the type of vote required to avoid future disputes.

186. Before resubmitting this rule for approval, the Board should carefully review Minn. Stat. §§ 15B.05, subd. 3 and 15B.10, which require the Board to use a competitive process for all construction on public lands or new public buildings. Item K, as re-lettered and drafted by the Board, provides that “the board must initiate *either* an open solicitation for design proposals *or* a request for qualification process to select a designer or design concept through a design competition. (Emphasis added.) Accordingly, Item K appears to allow for selection of a design through an open solicitation process or a design competition. The Board’s legal counsel should review this item to ensure legality of the process for design and designer selection.

187. The Board is encouraged to review this Item K and resubmit its provision for final approval consistent with the issues identified by the Administrative Law Judge.

### **Part 2400.2703, Subpart 3, Item L**

188. Proposed Rule 2400.2703, subp. 3, item L, as modified (originally item I), addresses the funding for new commemorative works. It provides that the applicant is responsible for procuring the money to complete the proposed project, as well as maintenance costs. The SONAR provides no information about the need and reasonableness of this cost provision. This provision also received no substantive comment or opposition.

189. To create consistency with the other modifications, the Administrative Law Judge recommends that Item L be modified as follows:

**L. L. Project Costs.**<sup>236</sup> Upon selection of a designer and design concept by the design review group ~~and~~ but before design and construction begin, the applicant must deposit with the Department of Administration enough money to complete the project as designed and an amount equal to 20 percent of the total estimated construction costs to cover the cost of operation, repairs, and maintenance of the work over time. Board staff are available to ~~offer funding advice and~~<sup>237</sup> provide testimony to the legislature under Minnesota Statutes section 15B.21, subdivision 3, but shall ~~must not~~ ~~directly~~ raise money for the applicant.<sup>238</sup>

190. Commenter Linda Sloan noted that “[m]arginalized communities might not have access to funding for additions. However, their idea might be worthy of selection.”<sup>239</sup> The Board explained that the state does not have any dedicated funding for commemorative artwork at this time. Therefore, the rules could only address self-funded applications or applications that obtain funding from other sources, like philanthropic

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<sup>236</sup> The addition of a title for the section is consistent with other modifications recommended by the Administrative Law Judge.

<sup>237</sup> Having Board staff providing “funding advice” to applicants is fraught with issues. It is best that Item L be consistent with Minn. Stat. § 15B.21, subd. 3.

<sup>238</sup> These changes ensure that the Board does not engage in activities that could be perceived as raising funds for any particular project.

<sup>239</sup> Comments of Linda Sloan, Executive Director for the Council for Minnesotans of African Heritage (Tr. at 70-72).

entities or the state legislature.<sup>240</sup> In other words, there are no state funds currently appropriated to the Board to fund additions, modifications, or removals of artwork.<sup>241</sup> Accordingly, the proposed Rule 2400.2703, subd. 3 Item L (as modified) imposes a condition on applicants that they procure funding for their projects before the projects begin construction. (The proposed rule counterpart for modifications and removals – proposed Rule 2400.2703, subp. 7 -- is not clear on this requirement and is discussed in detail below.)

191. The Administrative Law Judge finds that proposed Rule 2400.2703, subp. 3, item L, as modified, is not substantially different from the rule as originally proposed in the Notice of Hearing. The Administrative Law Judge **APPROVES** Rule 2400.2703, subp. 3, item K, as modified by the Board. However, the Judge urges the Board to adopt the changes recommended by the Judge to ensure clarity and consistency with the law.

### **Part 2400.2703. Subpart 3, Item M**

192. To ensure consistency with the remaining proposed rules, the Administrative Law Judge recommends the following changes to proposed Rule 2400.2703, subp. 3, item M:

M. J. Working Group.<sup>242</sup> ~~After funding is provided project costs are deposited with the Department of Administration, as required under this subpart 3,~~<sup>243</sup> board staff and advisers, a designer or an artist, an applicant committee, and a Department of Administration project manager must form a working group to monitor the design framework and budget during the schematic design and design development phases. With guidance from the working group, the selected designer must enter into a contract with the Department of Administration that includes a project timeline and budget.

193. Proposed Rule 2400.2703, subp. 3, item M, as modified by the Board, is **APPROVED**. However, the Judge urges the Board to adopt the changes recommended by the Judge to ensure clarity and consistency within the rules.

### **Part 2400.2703, Subpart 3, Item N**

194. After the rule hearing, the Board modified proposed Rule 2400.2703, subp. 3, item K (now item N), as follows:<sup>244</sup>

N. K. The selected designer must proceed with the schematic design

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<sup>240</sup> Board's Final Responses to Comments and Modifications at 10 (Apr. 11, 2022).

<sup>241</sup> *Id.*

<sup>242</sup> Addition of a title is suggested for clarity and consistency with the other changes recommended by the Administrative Law Judge.

<sup>243</sup> This change adds clarity and consistency with proposed Rule 2400.2703, subp. 3, item L, as modified by the Board and Judge.

<sup>244</sup> Board's Final Responses to Comments and Modifications at 11 (Apr. 11, 2022); Letter to Administrative Law Judge Ann O'Reilly from Merritt Clapp-Smith including additional changes (Apr. 27, 2022).

and design development phases with regular working group reviews. After receiving approval by the executive secretary of the schematic design and design development phases, the project must proceed with construction documents and bidding under the guidance of the working group. ~~The board must issue the f~~Final approval of bid documents by the executive secretary must to comply with the design framework document described in Subp. 3.1., the design objectives identified Capitol mall design framework in the Comprehensive Plan for the Minnesota Capitol Area, and parts 2400.2040 and 2400.2703.

195. The Board explained that clarification was needed in Item N to make clear that formal Board action is not required for the approval of bid documents.<sup>245</sup> According to the Board, the Board has a long-standing practice of having the executive secretary approve final bids.<sup>246</sup> In addition, the Board later expressed its intent to remove all references to the “Capitol Mall design framework” in the rules and replace it with “design objectives identified in” the Comprehensive Plan.<sup>247</sup>

196. The Administrative Law Judge finds that the delegation of authority to the executive secretary in Item N is improper and without basis in the SONAR.

197. Under modified Item N, as proposed, final approvals of the design scheme and development phases would be left to the Board’s working group and executive secretary instead of the Board. This is an improper delegation of the Board’s statutory authority over commemorative artwork on Capitol grounds. There is nothing in the SONAR to explain why the Board seeks to remove itself from the final approval process and delegate its statutory authority to a group or employee without the Board’s review or consent on this important step in the process.

198. The same is true with respect to the delegation of authority to the executive secretary to approve bids. In explaining its modification, the Board merely stated that it has been a “longstanding practice” to delegate authority to approve bids to the executive secretary. Because the Board is not funding any of the construction for new artwork, it is curious why the Board would need to approve bids when it is not a contacting party to the construction and is not responsible for payment. Nonetheless, because there is no affirmative presentation of facts to support the need and reasonableness of this provision in the SONAR, the Judge cannot fully evaluate the reasoning for this delegation.

199. Accordingly, proposed Rule 2400.2703, subp. 3, item N, as modified, is **DISAPPROVED** as improperly delegating the Board’s powers to another individual.

200. To rectify this defect, the Board could make the following changes:

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<sup>245</sup> Board’s Final Response to Comments and Modifications at 10 (Apr. 11, 2022).

<sup>246</sup> *Id.*

<sup>247</sup> See Letter to Administrative Law Judge Ann O’Reilly from Merritt Clapp-Smith (Apr. 27, 2022), on file and of record with the Off. of Admin. Hrg.

N K. Final Approvals.<sup>248</sup> The selected designer must proceed with the schematic design and design development phases of the design process<sup>249</sup> with regular working group reviews. The board must approve the project's ~~After receiving approval by the executive secretary of the design framework,~~ final schematic design, and design development<sup>250</sup> ~~phases.~~ The final design must comply with the project's design framework, the Comprehensive Plan for the Minnesota Capitol Area, and all parts of this rule. After board approval of the final schematic design and design development, the project ~~may~~must proceed with construction documents and bidding under the guidance of the working group. ~~Final approval of bid documents by the~~ The board executive secretary is authorized to execute construction and bid documents that have been approved by the board. ~~must comply with the design framework document described in Subp. 3.1., the Capitol mall design framework in the Comprehensive Plan for the Minnesota Capitol Area, and parts 2400.2040 and 2400.2703.~~

201. These changes give the Board – not a working group or executive secretary – final authority to approve or reject the design framework, project design, and design process. These changes do not render modified Item N substantially different from the rule as originally proposed and would be approved on resubmission. However, before resubmitting Item N for approval, the Board should carefully review Item N and ensure that the Board (not another party) has final approval of the design and construction of the project, and review why the Board would need to be signing construction and bid documents when: (1) the Department of Administration will be administering and overseeing the construction work; and (2) the project costs are being funded by the applicant (or from funding procured by the applicant).

#### **Part 2400.2703, Subpart 4: Criteria for Determining Location of New Artwork**

202. Proposed Rule 2400.2703, subp. 4 addresses the criteria for determining the location of new artwork.

203. On April 27, 2022, the Board modified Item F to remove the reference to the “Capitol mall design framework,” for the reasons explained above in relation to proposed Rule 2400.2703, subp. 3.<sup>251</sup> The Board modified Item F as follows:

F. The artwork must fit within the thematic organization of the Capitol grounds and comply with the design objectives of Capitol mall design framework ~~in the Comprehensive Plan for the Minnesota Capitol Area,~~ which is incorporated by reference in subpart 3, item GJ. The board must consider the site's relationship to other artwork and the Capitol.

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<sup>248</sup> A title is added by the Administrative Law Judge to add in demarcation of each step in the addition request approval process.

<sup>249</sup> “Design process” is a term defined in proposed Rule 2400.2040, subp. 24b.

<sup>250</sup> The definition of “design process” in proposed Rule 2400.2040, subp. 24b, includes “design development” not “design development phases.” The Board should be consistent in using its defined terms.

<sup>251</sup> Letter to Administrative Law Judge Ann O'Reilly from Merritt Clapp-Smith (April 27, 2022) (on file and of record with the Minn. Off. of Admin. Hrg.).

204. The Board's modification of proposed Rule 2400.2703, subp. 4, item F is not a substantial change to the rule and is **APPROVED**.

#### **Part 2400.2703, Subpart 5: Criteria for Design of New Artwork**

205. Proposed Rule 2400.2703, subp. 5, addresses the criteria for the design of new commemorative artwork.

206. Commenter Colleen Sheehy questioned use of the terms "clear and understandable" in Item F of Subpart 5.<sup>252</sup>

207. Item F reads:

F. The intended message of the artwork must be clear and understandable. The artwork must convey a meaning of enduring value for future generations. The artwork may incorporate signage.

208. Ms. Sheehy inquired whether the requirement that artwork be "clear and understandable" would prohibit the use of abstract art and other "representational imagery."<sup>253</sup> The Board responded that the terms "clear and understandable" refers to the message of the work, not its physical character.<sup>254</sup> According to the Board, "[a]n abstract work with appropriate signage or interpretive information would meet the criterion."<sup>255</sup>

209. Because the wording of Item F states that *the message* must be clear and understandable, the Administrative Law Judge finds that the item is sufficiently clear and unambiguous. According, proposed Rule 2400.2703, subp. 5, item F is **APPROVED**, as written.

210. Item G of Subpart 5 addresses materials used in the construction of the artwork. Ms. Sheehy also commented that she believed the materials listed were too "prescriptive" and would not allow the new of new materials that may, in the future, be developed.<sup>256</sup> She states, "It's best to leave the door open to new ways of working."<sup>257</sup>

211. The Board responded to Ms. Sheehy's comments by stating that the rule does not prohibit the use of new materials. Instead, Item G merely states a preference (not a requirement) for stone or bronze for key features because it encourages compatibility with the predominant use of stone as a unifying element with other aspects of the Capitol building.<sup>258</sup>

212. The Administrative Law Judge finds that the preferences listed in Item G are reasonable, given the inclimate weather conditions in Minnesota, as well as the need for cohesiveness of the Capitol Area as a whole.

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<sup>252</sup> Comments of Colleen Sheehy, Executive Director of Public Art Saint Paul (eComment 6).

<sup>253</sup> *Id.*

<sup>254</sup> Board's Final Responses to Comments and Modifications at 11 (Apr. 11, 2022).

<sup>255</sup> *Id.*

<sup>256</sup> Comments of Colleen Sheehy, Executive Director of Public Art Saint Paul (eComment 6).

<sup>257</sup> *Id.*

<sup>258</sup> Board's Final Responses to Comments and Modifications at 11 (Apr. 11, 2022).



213. Proposed Rule 2400.2703, subp. 5, item G also states:

. . .If water features and in-ground lighting are included in an artwork, an applicant must deposit money into a maintenance and operating fund that is at least 20 percent of the construction costs.

214. Commenter Paul Mandell noted that this clause is redundant with proposed Rule 2400.2703, subp. 3, item L (as revised, Item I in original).<sup>259</sup> The Board agreed and modified Rule 2400.2703, subp. 5, item G to remove this clause as redundant. This modification is reasonable and necessary.<sup>260</sup> Accordingly, the Board modified Item G as follows:

G. Materials for the artwork must be visible to people nearby, durable, and compatible with the artwork's setting. To address durability concerns, the board must give preference to an artwork made of bronze over stainless steel. The board must give preference to an artwork using stone, such as granite or limestone, for key features, vertical elements, flooring, and surfaces. If an artwork uses concrete, the board must consider the artwork's color, texture, scoring, aggregate, and density. An artwork must not include metal seating that could cause burns. ~~If water features and in-ground lighting are included in an artwork, an applicant must deposit money into a maintenance and operating fund that is at least 20 percent of construction costs.~~

215. Proposed Rule 2400.2703, subp. 5, item G, as modified, is **APPROVED**.

216. On April 27, 2022, the Board modified Item I of Subpart 5 to remove the reference to the "Capitol mall design framework, as explained above."<sup>261</sup> The Board modified Item I as follows:

I. The size of the artwork must reflect the artwork's importance and adhere to the design objectives ~~Capitol mall design framework~~ in the Comprehensive Plan for the Minnesota Capitol Area, which is incorporated by reference in subpart 3, item ~~GJ~~. Due to the limited open space on the Capitol grounds, the board must give preference to smaller commemorative artwork.

217. The Board's modification to proposed Rule 2400.2703, subp. 5, item I is not a substantial change to the rule and is **APPROVED**.

### **Part 2400.2703, Subpart 6: Conditions for Modification or Removal**

218. Proposed Rule 2400.2703, subp. 6 addresses conditions for modification or removal of an existing commemorative artwork.

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<sup>259</sup> Comments of Paul Mandell (eComment 5).

<sup>260</sup> Board's Final Responses to Comments and Modifications at 12 (Apr. 11, 2022).

<sup>261</sup> Letter to Administrative Law Judge Ann O'Reilly from Merritt Clapp-Smith (April 27, 2022) (on file and of record with the Minn. Off. of Admin. Hrg.).

219. Commenters Brandon Schorsch, Luke Hanson, and Colleen Sheehy all questioned the use of the word “overwhelming” in Subpart 6, Item A.<sup>262</sup> Item A states that the Board must consider a request for modification or removal if, in relation to an existing commemorative artwork, “there has been sustained, *overwhelming*, and documented public objection to the artwork.”<sup>263</sup>

220. The Board responded to the comments by modifying Item A to change the word “overwhelming” to “broad-based.”<sup>264</sup> The Board reasoned that “overwhelming” could be ambiguous to some readers and could be too strict of a standard for objectors to meet.<sup>265</sup>

221. The Administrative Law Judge finds that replacing the word “overwhelming” with “broad-based” is reasonable and adds clarity. According, proposed Rule 2400.2703, subp. 6, item A, as modified, is **APPROVED**.

222. Subpart 6, Item B states: “the artwork does not meet the guiding principles or violates parts 2400.2040 and 2400.2703.”

223. The Administrative Law Judge finds that Subpart 6, Item B is vague and confusing. It is unclear what the Board is attempting to address in this clause because the SONAR only restates what the proposed rule provides. To remedy these issues, the Judge recommends a technical modification to Item B as follows:

B. the artwork conflicts with ~~does not meet~~ the guiding principles set forth in subpart 1, item A ~~or violates parts 2400.2040 and 2400.2703.~~<sup>266</sup>

224. Proposed Rule 2400.2703, subp. 6, item B is **APPROVED**. However, the Judge urges the Board to adopt the changes recommended by the Judge to ensure clarity within the rules.

#### **Part 2400.2703, Subpart 7: Application and Review Process for Modification or Removal of an Existing Artwork**

225. Proposed Rule 2400.2703, subp. 7, sets forth a detailed process of reviewing and approving or disapproving requests for modification or removal of an existing commemorative artwork. Proposed Subpart 7 (application and review process for modification or removal of an existing artwork) is similar to Subpart 3 (application and review process for new artwork), in that it establishes a review procedure for applications. Subpart 3 (new artwork application procedure) was modeled after the existing requirements for the addition of new artworks contained in the Policy for Commemorative Works in the Minnesota State Capitol Area (Feb. 2012); whereas Subpart 7 (applications

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<sup>262</sup> Comments of Brandon Schorsch (Tr. at 79-85); Comments of Luke Hanson (eComment 2); Comments of Colleen Sheehy, Executive Director of Public Art Saint Paul (eComment 6).

<sup>263</sup> Emphasis added.

<sup>264</sup> Board’s Final Responses to Comments and Modifications at 12 (Apr. 11, 2022).

<sup>265</sup> *Id.*

<sup>266</sup> The Board’s vague reference to “guiding principles” is clarified by reference to Subpart 1. The Board’s vague references to violations of parts 2400.2040 and 2400.2700 would be remedied by specifically identifying what provisions an artwork could violate. As written, the item is too vague. How can an artwork violate definitions contained in Rule 2400.2040?

for modification or removal) was drafted anew.

226. After receiving public comments, the Board realized that some word choices in Subparts 3 and 7 were different and could be interpreted as imposing a different standard for review.<sup>267</sup> As a result, the Board decided to modify Subpart 7 to attempt to align the language of the two application processes (new additions and modification and removal).<sup>268</sup>

227. The Board made the following modifications to proposed Subpart 7 after the public hearing:<sup>269</sup>

**Subp. 7. Application and review process for modification or removal of an existing artwork.**

A. An applicant requesting the modification or removal of a commemorative artwork in the Capitol area must submit the application form available on the board website. The website board must also provide clear and accessible instructions for completing the form. When board staff receive a modification or removal application, request, board staff must review the application for completeness and provide written confirmation of receipt to the applicant. Board staff must not process incomplete applications and must notify the applicant within ten days of application receipt indicating if the application is complete or incomplete. If if the application is incomplete board staff must indicate what information is missing.

B. Board staff must review the complete application and prepare a report analyzing if the application request for determine if the modification or removal request meets one or more of the conditions in subpart 6.

C. Board staff must post a summary of the proposal and the staff report on the agency website and provide timely updates about its progress through the review steps, including opportunities for public input and meetings of the Board at which the application will be discussed or voted upon.

D. After the staff report is publicly released, the agency must hold one or more public meeting(s) and provide an opportunity for input on the CAAPB website for at least 30 days to gather public comment on whether the application request for modification or removal meets one or more of the conditions under subpart 6.<sup>270</sup>

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<sup>267</sup> Board's Final Responses to Comments and Modifications at 13 (Apr. 11, 2022).

<sup>268</sup> *Id.* at 13-14.

<sup>269</sup> *Id.* at 13-15. See also, Letter to Administrative Law Judge Ann O'Reilly from Merritt Clapp-Smith (Apr. 27, 2022).

<sup>270</sup> As further modified in the Letter to Administrative Law Judge Ann O'Reilly from Merritt Clapp-Smith (Apr. 27, 2022).

E. When the comment period and public meeting(s) are complete, board staff will prepare a report and recommendation to the board to accept or reject the application to proceed for review under Subp. 7F. to 7.N and Subps. 8 and 9 based on whether the application meets one of more of the conditions in subpart 6. The board will meet to consider the report, at which public comment is invited, and vote if the application meets one or more of the conditions in subp. 6 and can advance for review.

(1) ~~If the board accepts an application for a modification or removal request meets one or more conditions in subpart 6, board staff must notify the applicant and the Department of Administration within that the application has been accepted. Within 14 days of the board's vote accepting the application. completing the review of an application for modification or removal of an existing artwork, board staff must notify the Department of Administration of the modification or removal request and post a proposal summary on the board website.~~

(2) ~~If the board rejects a modification or removal application request does not meet any of the conditions in subpart 6, board staff must notify the applicant that the board rejected the application and provide the reasons for the rejection.~~

FG. After an application is accepted, if the board executive secretary receives a complete request form and determines that the request meets one or more conditions in subpart 6 for modification or removal, the board executive secretary must convene a select commemorative artwork review committee that includes the following members appointed by the chair of the board:

- (1) one board member;
- (2) one architectural adviser;
- (3) one person appointed by the commissioner of the Department of Administration to represent the agency;
- (4) two professionals experienced in the fields of visual art, public art, art history, architecture, or history. One of the professionals must have knowledge of artwork conservation;
- (5) two members of the public;<sup>271</sup>
- ~~(56)~~ up to five additional committee members as needed for

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<sup>271</sup> Board's Final Responses to Comments and Modifications at 10 (Apr. 11, 2022).

technical expertise or to represent the public interest; and

(67) board staff that oversee and support the committee's work.

G.D. The commemorative artwork review committee must open a 30-day comment period and hold at least one public meeting to gather public input regarding a proposed modification or removal. The committee may ~~also decide to hold additional public meetings or gather community input using other methods. If the applicant is no longer available,~~ The committee must give timely notice of the public meeting(s) ~~to an individual or a group that shares the applicant's values or is able to represent the applicant's perspective. At least ten days in advance of the public hearing, the committee must give notice of the hearing to the applicant requesting modification or removal of the artwork, and to an individual or a group that represents or is connected to the artist or sponsor of the original artwork and provide them~~ The committee must give both the applicants the opportunity to speak at the public meeting(s). ~~testify at the public hearing.~~

H.E. The board executive secretary must prepare and post on the board website a commemorative artwork background report that includes:

(1) a written description and images of the artwork, information about and images of the artwork's site, and a warranty of the originality of the artwork;

(2) the origin, derivation, history, and past ownership of the artwork; the original acquisition method and purchase price; the original intent of the artwork by the artist or organization that advanced the artwork; and evidence of public debate, if applicable;

(3) a summary of the proposed modification or removal;  
and

(4) an analysis of the reasons for the proposed modification or removal and the proposal's impact on the commemorative artwork collection.

I.F. Board staff must provide the commemorative artwork background report to the commemorative artwork review committee for review and present the report to the public in a public hearing. Each committee member must present the committee member's views and participate in the discussion. The committee must make the committee's recommendation to the full board for a final decision. The board must determine if an additional 30-day comment period and second public hearing are necessary to gather further input. Upon making the final

decision concerning the request, the board must send a written copy of the board's decision to the applicant.

JG. The board executive secretary must prepare and post to the board website a report that includes:

(1) a summary of feedback received from the public hearing and any additional input gathered using other methods;

(2) opinions gathered from committee experts or other independent professionals, such as conservators, engineers, architects, critics, and safety experts who are professionally qualified to comment on the artwork and on the concern prompting review; and

(3) a detailed budget for all aspects of the modification or removal request, options for funding the request, and a recommendation on who should be responsible for funding the request.

KH. If the board approves the application for modification or removal and before implementation begins, the applicant must demonstrate that funding for the project, consistent with the estimated budget, is committed. Board staff are available to offer funding advice and provide testimony to the legislature but may not directly raise money to fund the project.

Lf. If the board approves the request to modify an existing artwork, the board must work with the Department of Administration pursuant to Minnesota Statutes, section 15B.15, subdivision 2, paragraph (a), and the Minnesota Historical Society pursuant to Minnesota Statutes, section 15B.34, clause (3), to initiate a request for qualification or request for proposal process to select a design.

MJ. If the board approves of the request for the removal of an artwork, the Minnesota Historical Society must determine the final disposition of the artwork pursuant to Minnesota Statutes, section 138.68. The Minnesota Historical Society reserves the first right of refusal for removed artwork of historic value. If the Minnesota Historical Society does not accept the artwork, the artwork's disposition must be determined according to Minnesota Statutes, section 138.68.

228. The Judge will separately address the Board's modifications to Items A through L, which are approved and subject to technical recommendations by the Judge, and Items M and N, which are disapproved.

**Proposed Rule 2400.2703, Subpart 7, Items A – L, as Modified by the Board**

## After Hearing

229. The Board explained that modifications to Subpart 7, Items A through (modified) F were meant to make the steps in the modification and removal review process similar to (as much as possible) the steps in the application review process for new artwork in Subpart 3.<sup>272</sup>

230. With respect to modifications to Item G (originally Item D), two commenters questioned what the word “applicants” referred to in the rule – whether that meant the original sponsor of the artwork when it was first approved or the applicant for removal or modification. Given the ambiguity, the Board modified Item G (originally Item D) after the hearing to clarify that notice must be given to both the applicant for the removal or modification, as well as to the individual or group representing or connected to the original artist or sponsor of the contested artwork.<sup>273</sup> The Administrative Law Judge finds this modification to be necessary and does not amount to a substantial change in the rule as originally proposed. However, the Judge does recommend some changes to this provision for clarity.

231. With respect to Subpart 7, Item K (formerly Item H), involving the funding of costs to remove an artwork, Commenter Ken Iosso noted that it is unfair for an applicant offended by an artwork to have to fund the removal or raise money to do so, especially when that applicant likely had no part in placing the piece there in the first place.<sup>274</sup>

232. The Board responded by stating that “[a]t this time, there is no designated funding to assist applicants with the cost of commemorative works activities. However, public, private or philanthropic donors could step in with finding assistance for applicants.”<sup>275</sup> The Board hopes to encourage public, private and philanthropic sources to create funds that applicants could apply for to add, remove, or modify commemorative works.<sup>276</sup>

233. Given the absence of state funding for the rules to add, modify, or remove commemorative works, the Board’s reason is a reasonable one.

234. While the Administrative Law Judge finds that the Board’s proposed modifications to Subpart 7 are generally reasonable and necessary, the Judge does find that many of the provisions require additional modifications – not only to be consistent with changes the Board made (and the Judge recommends) to Subpart 3, but to bring clarity and cohesion to the process.

235. For the reasons set forth above with respect to proposed Rule 2400.2703, subp. 3, and for the reasons explained in the footnotes to the changes below, the Administrative Law Judge recommends that the following technical revisions be made to the modified Subpart 7, Items A through L (as modified by the Board):

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<sup>272</sup> *Id.* at 13-14.

<sup>273</sup> *Id.* at 14-15.

<sup>274</sup> Comment of Ken Iosso (eComment 3).

<sup>275</sup> Board’s Final Response to Comments and Modifications at 15 (Apr. 11, 2022).

<sup>276</sup> *Id.*

Subp. 7. **Application and review process for modification or removal of an existing artwork.**

A. **Application.**<sup>277</sup> An applicant requesting the modification or removal of a commemorative artwork in the Capitol area must submit to the board the a modification or removal request application using the form available on the board's website. The website must provide clear and accessible instructions for completing the application form. ~~When board staff receive a modification or removal application, board staff must review the application for completeness and notify the applicant w~~Within ten calendar days of the board's receipt of the application, board staff must determine whether the application form is complete and inform the applicant of the determination. receipt indicating if the application is complete or incomplete. If the application is found incomplete, board staff must advise the applicant that the application is incomplete and identify ~~indicate~~ what information is missing.

B. **Staff Report.** Once an application is determined to be complete, b~~Board staff must review the complete modification or removal request application and analyze whether it meets all of the conditions in subpart 6. Board staff shall prepare a written report of its findings. analyzing if the application request for modification or removal meets one or more of the conditions in subpart 6.~~

C. **Posting.** Board staff must post a summary of the modification or removal request, as well as proposal and the staff report on the agency board's website. The posting shall also include ~~and provide~~ timely updates about the application's its progress through the review steps status, ~~including opportunities for public input, and meetings of the b~~Board at which the application will be discussed or voted upon.

D. **Initial Comment Period and Public Hearing.** After the staff report is ~~posted publicly released,~~ the agency board must open a 30-day public comment period and hold at least one or more public hearing~~meeting(s)~~<sup>278</sup> and ~~provide an opportunity for input on the CAAPB website for at least 30 days to gather public comment input on whether the modification or removal application request for modification or removal meets one or more of the conditions set forth in under~~ subpart 6.

E. **Staff Recommendation and Board Decision.** When the 30-day comment period and public hearing meeting(s) are complete, board staff ~~will~~ shall prepare a written summary report of the comments received

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<sup>277</sup> Headings inserted to provide clarity and organization, similar to Subpart 3.

<sup>278</sup> Because there is no entity to conduct a meeting (i.e., this is not a board meeting or a committee meeting), the better option is for board staff to conduct a public hearing. This is consistent with the process set forth for new additions of artwork in Subpart 3.



and provide a recommendation to the board on whether to accept or reject the application and proceed for review under Subp. 7F to 7.N and Subps. 8 and 9 based on whether the application meets to the next step in the review process or reject the application for failing to meet one or more of the conditions set forth in subpart 6. The board will shall then meet to consider the report, modification or removal request, staff report and recommendation, and public comments received. The board meeting shall be open to the public and at which public comment shall be is invited. After hearing additional public comment, the board shall and vote if the application meets one or more of the conditions in subp. 6 and can advance for review on whether the application meets one or more of the conditions in subpart 6 and can advance for further review. A majority vote of the full board is required to accept the application and advance it for further review.<sup>279</sup>

(1) If the board accepts an application for a modification or removal request, board staff must notify the applicant and the Department of Administration within 14 calendar days of the board's vote accepting the application for further review.

(2) If the board rejects an application for modification or removal request for failing to meet one or more of the conditions set forth in subpart 6, board staff must notify the applicant in writing within 14 calendar days and provide reasons for the rejection.

F. **Commemorative Artwork Review Committee.** After an application is accepted for further review, the board ~~executive secretary~~<sup>280</sup> must convene a ~~select~~<sup>281</sup> commemorative artwork review committee, to review the artwork identified in the modification or removal request. The committee must that includes the following members appointed by the chair of the board:

- (1) one board member;
- (2) one architectural adviser;
- (3) one person appointed by the commissioner of the Department of Administration to represent the agency;
- (4) a representative from the Minnesota Historical

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<sup>279</sup> Again, this can be a majority or a unanimous vote, but the Board should expressly state which type of vote is required.

<sup>280</sup> This authority is in the province of the Board and better left to Board selection.

<sup>281</sup> The word "select" could be read to be a committee of "select" people, as opposed to review "select" artwork. A sentence stating that the committee is formed only to review the contested work should remedy this issue.

Society;<sup>282</sup>

(54) two professionals experienced in the fields of visual art, public art, art history, architecture, or history. One of the professionals must have knowledge of artwork conservation;

(65) two members of the ~~general~~ public;

(76) up to five additional committee members as needed for technical expertise ~~or to represent the public interest~~;<sup>283</sup> and

(87) board staff ~~to that oversee and~~<sup>284</sup> support the committee's work.

G. **Second Public Comment Period.** The commemorative artwork review committee must open a second 30-day comment period and hold at least one public meeting<sup>285</sup> to gather public additional input regarding the a proposed modification or removal request to determine if the request satisfies criteria for modification or removal set forth in subparts 8 or 9. ~~The committee may hold additional public meetings or gather community input using other methods.~~<sup>286</sup> The committee must give timely written notice<sup>287</sup> of the public meeting(s) to the applicant requesting modification or removal of the artwork, and to the artist and original sponsor of the artwork at issue or, if that is not possible, an individual or a group that a representatives or is connected to of the artist or and original sponsor of the subject original artwork, if such representatives can be reasonably

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<sup>282</sup> Minn. Stat. § 15B.34(c) provides that the board “jointly, with the Minnesota Historical Society, review and approve the design, structural composition, and location of all monuments, memorials, or works of art presently located in the public and ceremonial areas of the State Capitol, or that will be placed in the public or ceremonial areas, according to section 138.68.” Accordingly, the Board should include a representative from the Historical Society in this step in the process. This is consistent with proposed Rule 2400.2703, subp. 3, item K, as modified.

<sup>283</sup> This is rendered unnecessary by the Board’s modification to appoint two members of the public.

<sup>284</sup> Board staff do not oversee the committee’s work, they assist the committee. The Board oversees the committee.

<sup>285</sup> In this Subpart 7, the Board is using the terms “public hearing” and “public meeting” interchangeably. A public hearing is customarily more formal and allows for oral comment by the public. It generally involves a moderator who ensures that public comments are orderly presented and can include a written transcript or recording. (See the Public Utility Commission hearings as examples.) A public meeting generally involves a meeting of a governmental body that is open to the public. The meeting allows the public to be present but does not necessarily allow time for public comment. It is less formal than a public hearing. The Board should be clear with what it seeks at each step in the process.

<sup>286</sup> The Judge recommends striking this sentence. First, the preceding sentence allows for more than one meeting. Second, the opportunity to “gather community input using other methods” is too vague and could lead to claims that the information gathering system was not conducted fairly, transparently, or through the procedures established in these rules..

<sup>287</sup> This change clarifies how the notice shall be given to prevent future disputes on notice.

identified.<sup>288</sup> The committee must and provide all parties them the opportunity to speak at the public meeting(s) of the commemorative artwork review committee.

H. **Background Report.** Prior to the public meeting of the commemorative artwork review committee, tThe board executive secretary must prepare and post on the board website a commemorative artwork background report that includes:

(1) a written description and images of the artwork that is the subject of the modification or removal request, information about and images of the artwork's locationsite, and a warranty of the originality of the artwork;

(2) the origin, derivation, history, and past ownership of the artwork; the original acquisition method and purchase price; and the original intent of the artwork by the artist or organization that advanced the artwork; and evidence of public debate, if applicable;<sup>289</sup>

(3) a summary of the proposed modification or removal request and stated reasons therefor;<sup>290</sup> and

(4) an analysis of ~~the reasons for the proposed modification or removal,~~ and the proposal's potential impact on the Capitol's commemorative artwork collection;<sup>291</sup> and

(5) a recitation of the criteria for modification or removal set forth in subparts 8 and 9 that the board must use in reaching its decision to grant or deny a modification or removal request.

I. **Committee Meeting.** Board staff must provide the commemorative artwork background report to the commemorative artwork review committee prior to the committee's meeting<sup>292</sup> ~~for review and may present the report to the public in~~ at the committee's a public

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<sup>288</sup> This change clarifies that the Board should attempt to locate the original artist and sponsors for notice, but if those individuals or groups are no longer available, then a representative, if determinable, can suffice. It also leaves open the possibility that there may no longer be a representative available, for example, if an artwork is old, the artist is deceased, and the sponsoring group has disbanded.

<sup>289</sup> The Board should consider whether it is prudent for its staff to gather evidence of public debate or whether it is best to leave evidence collection to the applicant who is making the request and ultimately carries the burden of persuasion in making its case that its application should be granted. This would ensure that the Board remain a neutral decision-maker. However, this is a policy decision for the Board.

<sup>290</sup> This is where the applicant's evidence of public debate can be summarized.

<sup>291</sup> To ensure neutrality, it is better to summarize the claims made in the modification or removal request, rather than have board staff "analyze" them. An analysis could inject personal judgment, bias, or opinion.

<sup>292</sup> This mimics the requirement that the report be posted on the website.

~~meeting~~hearing.<sup>293</sup> Each committee member must present the committee member's views and participate in the discussion during the meeting. The committee ~~must~~shall vote and make the committee's a written recommendation to the full board on whether the board should grant or deny the modification or removal request based upon the criteria set forth in subparts 8 and 9 for a final decision. A majority vote of the committee is required for the committee to recommend granting the modification or removal request.<sup>294</sup> ~~The board must determine if a 30-day comment period and second public hearing are necessary to gather further input.~~<sup>295</sup> Upon making the final decision concerning the request, the board must send a written copy of the board's decision to the applicant.<sup>296</sup>

J. **Final Report to the Board.** Along with the committee's recommendation to the board, ~~the~~ board executive secretary must prepare for the Board and post to the board website a report that includes:

(1) a summary of the public comments feedback received ~~from~~ the public meetings and hearings and any additional information obtained during the application review process ~~input gathered using other methods;~~<sup>297</sup>

(2) opinions gathered from committee experts or other independent professionals, such as conservators, engineers, architects, critics, and safety experts who are professionally qualified to comment on the artwork and on the concern prompting review, which are obtained during the application review process;<sup>298</sup> and

(3) a detailed budget for all aspects of the modification or removal request, and applicant's stated options for funding the request; and

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<sup>293</sup> See Item G (as modified). The public meeting is the meeting of the commemorative artwork review committee. It is not a public hearing.

<sup>294</sup> Without some indication of how the committee will come to agreement (i.e., by vote and what percentage of the vote is required), there is confusion as to how the committee shall come to a recommendation. The Board should indicate in the rule whether unanimous or majority vote of the committee is required for a recommendation.

<sup>295</sup> This sentence is moved to Item K, where it fits more suitably into the chronology of the procedures devised by the Board in these rules, as modified by the Board.

<sup>296</sup> This sentence is moved to Item L, where it fits more suitably into the chronology of the procedures devised by the Board in these rules, as modified by the Board.

<sup>297</sup> "Input gathered using other methods" could indicate that Board staff, the committee, and Board may use other methods and obtain information from sources that come outside of the specific public processes and procedures set forth in these proposed rules. This could be contrary to the transparency that the Board is attempting to create in these detailed public procedures, as explained in the SONAR. Accordingly, the Board might wish to consider modifying this provision to allow consideration of other information, so long as it is obtained through these procedures and not through other "outside" methods.

<sup>298</sup> This addition ensure transparency.

a recommendation on who should be responsible for funding the request.<sup>299</sup>

K. **Board Final Decision.**<sup>300</sup> After receiving the committee's recommendation and staff final report, the board must determine if another additional 30-day comment period and/or second public hearing are necessary to gather additional further input.<sup>301</sup> If the board determines that another opportunity for public comment or a public hearing is necessary, then the board's final decision shall occur once the additional public comment period or public hearing have occurred.<sup>302</sup> If the board determines that no additional comment period or public hearing is needed, the board shall proceed to decision by holding a public meeting at which a vote to grant or deny the request for modification or removal shall be taken.<sup>303</sup> The board must apply the criteria in subparts 8 and 9 when considering to grant or deny a request for modification or removal.<sup>304</sup> A majority vote of the full board is required to grant a request for modification or removal of an existing commemorative artwork.<sup>305</sup> After upon making the final a decision concerning the request for modification or removal, the board must send a written copy of the board's decision to the applicant<sup>306</sup> and the artist and original sponsor of the artwork at issue, or their representatives as provided in paragraph G of this subpart.<sup>307</sup>

LK. **Project Costs.** If the board grants ~~approves the application a~~ request for modification or removal, but ~~and~~ before implementation of the project begins, the applicant must deposit with the Department of

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<sup>299</sup> Because there is no state funding associated with these rules for addition, modification, or removal of commemorative artwork, Board staff should only identify potential funding options, not make funding recommendations. Funding for additions, modifications, and removal, pursuant to the proposed rules, must be procured by the applicant, not the Board or its staff.

<sup>300</sup> This important step in the process needs to be addressed and defined to ensure a complete process. The proposed rules properly address this step in the artwork addition process, but do not fully address it in the modification and removal process. Hence the provisions recommended by the Administrative Law Judge. The Judge's Item K breaks the Board's Item I into a separate part.

<sup>301</sup> This sentence is moved from Item I, a modified by the Board for clarity and proper chronology. Given the number of public meetings and hearings that already occur in the process, it does not appear that the rules need to give the Board another opportunity to open the public comment and hearing process. The Judge would approve this proposed rule without this provision. The Board should consider whether this option is necessary.

<sup>302</sup> For clarity and proper chronology, this sentence is moved from Item I, as modified by the Board, to (this) Item K.

<sup>303</sup> This sentence is to reflect the deletion made by the Judge to Item I, which is moved to (this) Item K.

<sup>304</sup> This change clarifies what the Board is reviewing and deciding.

<sup>305</sup> Again, identifying whether a majority or unanimous vote is required will avoid potential disputes.

<sup>306</sup> This sentence originally appeared in Item I, as modified by the Board. It is merely moved to Item K.

<sup>307</sup> The addition to advise the artist and sponsor of the subject artwork is consistent with Item G of this subpart.

Administration enough money to complete the modification or removal,<sup>308</sup> consistent with the estimated budget, including any costs to restore the area of removal,<sup>309</sup> or demonstrate that public funding for the full project, consistent with the estimated budget, is committed by the legislature or other public body. Board staff are available to offer funding advice and<sup>310</sup> provide testimony to the legislature but may not directly raise money to fund the project.

236. While the Board's modifications to Subpart 7 are not legally deficient under Minn. R. 1400.2100, they neglect substantive elements of the process, including funding, and lack clarity and consistency with the remainder of the rules. Therefore, the Administrative Law Judge is not disapproving of the Board's modifications, but is providing technical recommendations for the Board to consider and implement to ensure a clear and cohesive process.

237. The Administrative Judge finds that the Board's modifications to the proposed rule (Subpart 7, Items A through K) – and, if incorporated, the Judge's recommended additional technical changes (Items A through L) -- are needed and reasonable. These modifications do not render the rule substantially different from the rule originally published with the Notice of Hearing because: (1) the differences are within the scope of the matter announced in the Notice of Hearing and are in character with the issues raised in the Notice; (2) the differences are a logical outgrowth of the contents of the Notice of Hearing and comments submitted; and (3) the Notice of Hearing provided fair warning that the outcome of the rulemaking proceeding could be the rule in question.

238. Accordingly, the proposed Rule 2400.2703, subp. 7, items A through K, as modified by the Board, are **APPROVED**. However, the Judge urges the Board to adopt the changes recommended by the Judge to ensure clarity and consistency within the rules, which would include a new Item L.

### **Proposed Rule 2400.2703, Subpart 3, Items L and M (as Modified by the Board After Hearing)**

239. With respect to the Board's proposed Rule 2400.2703, subp. 7, items L and M, as modified by the Board (and not as re-lettered by the Judge's technical recommendations), are **DISAPPROVED**.

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<sup>308</sup> This change is consistent with the proposed language of Rule 2400.2703, subp. 3, item L (as modified by the Board). Without this change, there would be no assurances that money is readily available to ensure that the project is fully funded. If public funding is sought for the project, then the project should not be started until those funds are approved and actually allocated to the project. This is an important step in the process that is present in Subpart 3 (dealing with additions) but was absent with respect to modifications and removals.

<sup>309</sup> It is important that the Board ensure that any removal costs include amounts to restore the site to its original state or to a state that is aesthetically pleasing and consistent with the Comprehensive Plan. This type of language should be included in modified Item N, addressing the granting of removal requests.

<sup>310</sup> Providing "advice" to applicants on funding could subject the Board to claims that its staff is acting as an advocate for, or advisor to, applicants, which exceeds the statutory authority granted to the Board, and could undermine the Board's intent to remain a neutral party in the process.

240. Proposed Rule 2400.2703, subp. 7, items L and M address what will occur if the Board grants a request for modification (Item L) or a request for removal (Item M). The items, as modified by the Board read:<sup>311</sup>

L. If the board approves the request to modify an existing artwork, the board must work with the Department of Administration pursuant to Minnesota Statutes, section 15B.15, subdivision 2, paragraph (a), and the Minnesota Historical Society pursuant to Minnesota Statutes, section 15B.34, clause (3), to initiate a request for qualification or request for proposal process to select a design.

M. If the board approves of the request for the removal of an artwork, the Minnesota Historical Society must determine the final disposition of the artwork pursuant to Minnesota Statutes, section 138.68. The Minnesota Historical Society reserves the first right of refusal for removed artwork of historic value. If the Minnesota Historical Society does not accept the artwork, the artwork's disposition must be determined according to Minnesota Statutes, section 138.68.

241. While these provisions address some aspects of a modification or removal, they do not address all the logistical aspects of such projects and leave gaps in the process that must be filled for the rules to provide the guidance they intend. Specifically, proposed Item L (dealing with modification requests) does not contain any provisions to ensure that the plans or designs for modification are reviewed or approved by the Board or the Department of Administration (the agency that must undertake or oversee the work).

242. Minn. Stat. § 15B.15, subd. 2(a), provides that “(a) The [CAPPB] board and the commissioner of administration, jointly, must have, prescribe, and periodically revise their standards and policies on the repair, furnishing, appearance, and cleanliness of, *and change to*, the public and ceremonial areas of the Capitol.”<sup>312</sup> But this statute does not state what the process is to have a modification approved by the Board or the Department of Administration -- hence the purported purpose of these rules. Citation to Minn. Stat. § 15B.15, subp. 2(a) only states that there must be standards and policies, but the Board’s stated purpose of the rules is to establish those standards and procedures. Therefore, additional clarification is needed.

243. Similarly, Minn. Stat. § 15B.34(c) provides that the board “jointly, with the Minnesota Historical Society, review and approve the design, structural composition, and location of all monuments, memorials, or works of art presently located in the public and ceremonial areas of the State Capitol, or that will be placed in the public or ceremonial areas, according to section 138.68.” But the proposed Item L does not address *how or when* the Board will review or approve the requested modifications during the application review process. A simple sentence requiring Board final approval of the modification design plan would remedy this issue.

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<sup>311</sup> Board’s Final Responses to Comments and Modifications to Proposed Rules (Apr. 11, 2022).

<sup>312</sup> Emphasis added.

244. As with modified Item L, the proposed Item M does not contain any provisions to ensure that the plans for performing the removal are approved by the Board and the Department of Administration (the agency that must undertake the work); or that restoration will be made to the site where the artwork is removed. Instead, Item M merely gives the Historical Society the right of first refusal to own the removed artwork and confirms the Historical Society's authority to finally dispose of it. Item M does not address the plans for removal or restoration of the site, or the Board's review or approval of the same. In some cases, removal could require extensive work and restoration. Consider, for example, a removal of the Peace Officers Memorial:



245. Removal of a monument like the Peace Officer's Memorial would require substantial dismantling that must be overseen by the Department of Administration and approved by the Board. It would also leave a substantial area of the Capitol grounds in need of restoration.

246. Contrast the provisions for design review contained in proposed Rule 2400.2703, Subpart 3 (involving approval of the design of new artwork) with Subpart 7 (removal or modification of existing artwork). The Board's modifications to proposed Rule 2400.2703, subp. 3, includes site studies, design approvals, a design review group, an implementation/oversight work group, and Board approvals of final plans. While not all of these processes are applicable to the modification or removal of an existing artwork, some of these aspects do need to be addressed in Subpart 7. For example, for a modification, there would need to be some plans or designs for the modification that would need to be reviewed by the Board and approved. Likewise, for a removal, there would be logistics of the removal that the Board would naturally want to review and approve, to ensure that the removal is conducted in a safe and orderly manner, and in a way that restores the site to a condition consistent with the beauty and nature of the Capitol grounds.

247. Notably, Minn. Stat. § 15B.08, subd. 3, provides that "No substantial change or improvement may be made to public lands or public buildings in the Capitol Area without the written approval of the board." Therefore, a final written approval of any plans to change commemorative works in the Capitol Area is required before it can begin. Subpart 7, as proposed, does not entail a process for final approval of plans for



modifications or removal. Subpart 7 stops short: it establishes a process for granting or denying a modification or removal request, but it does not include a process for approving or overseeing how the modification or removal would be orchestrated (i.e., the logistics of the modification or removal).

248. The Board need not include detailed processes in Items L and M (modified to Items M and N), like the Board did with additions, but the Board should address, in some way, the review and approval of modification and removal plans. Without such provisions, proposed Rule 2400.2703, subp. 7 is incomplete and ripe for conflict. It is also in conflict with the Board's duties in Minn. Stat. § 15B.08, subd. 3.

249. When resubmitting Subpart 7 for approval, the Administrative Law Judge recommends including the following changes (including adding titles and re-lettering the items consistent with the changes recommended to the rest of Subpart 7 above):

ML. **Granting of Modification Requests.** If the board approves grants<sup>313</sup>~~the~~ request to modify an existing commemorative artwork on Capitol grounds. . . . [Board to add the processes for Board approval of design plans here]

NM. **Granting of Removal Requests.** If the board approves grants ~~of the~~ request for the removal of ~~an~~ commemorative artwork on Capitol grounds, the Minnesota Historical Society must determine the final disposition of the artwork pursuant to Minnesota Statutes, section 138.68. The Minnesota Historical Society reserves the first right of refusal for removed artwork of historic value. If the Minnesota Historical Society does not accept the artwork, the artwork's disposition must be determined according to Minnesota Statutes, section 138.68. [Prior to giving the Historical Society final authority to take or dispose of the artwork, the Board should add processes for Board approval of the removal and de-construction plans.]

250. Accordingly, proposed Rule 2400.2703, subp. 7, items L and M, as modified by the Board (now items M and N) are **DISAPPROVED** as inconsistent with existing law but can be resubmitted with additional detail. Such additions would not likely render the rule substantially different from the rules as originally proposed because the modifications would likely be within the scope and character of the rule as published in the Notice of Hearing, or logical outgrowths of the contents of the Notice.

### **Part 2400.2703, Subpart 8: Criteria for Modification of Existing Artwork**

251. Proposed Rule 2400.2703, subp. 8 sets forth the criteria that the Board must use to evaluate a request for modification. The Board notes that no public comments were

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<sup>313</sup> The Board "accepts or rejects" an application in proposed Rule 2400.2703, subp. 7, item E, when determining whether the proposal complies with the conditions contained in Subpart 6. The Commemorative Artwork Review Committee recommends finally granting or denying a request for modification or removal in Subpart 7, Item I. The Board finally grants or denies a request for modification or removal in Subpart 7, Item K. Therefore, the correct word to use in the final stage is "grant".

received with respect to Subpart 8. The Board offered no modifications to Subpart 8.

252. While there were no objections to Subpart 8, the Administrative Law Judge finds the subpart confusing and ambiguous and, therefore, **DISAPPROVES** proposed Rule 2400.2703, subp. 8.<sup>314</sup>

253. Subpart 8 purports to establish 11 criteria that the Board “must” use in evaluating requests for modification. Each criterion is written in a mandatory fashion, indicating that each of the 11 criteria must be met before the Board may grant a modification request.

254. Yet, when reading the criteria, it appears that the Board intended for the criteria to be considered but that not all of the 11 criteria need be met for before a request is granted. Because it is unclear in the subpart whether all of the criteria must be met before a request is granted or whether the 11 criteria are merely points for the Board to consider, this ambiguity must be clarified before the subpart can be approved.

255. Due to the ambiguity that is contained in Subpart 8, the Administrative Law Judge recommends the following revisions:

Subp. 8. **Criteria for modification of an existing artwork.** The board must ~~use~~ consider and apply<sup>315</sup> all<sup>316</sup> the following criteria to evaluate requests for the modification of a commemorative artwork:

A. The proposed modification ~~must~~ makes the artwork more welcoming and engaging to nearby and statewide communities. ~~The applicant, with the support of board staff, must involve nearby and statewide communities in the conceptualization and development of the proposed modification.~~<sup>317</sup>

B. The proposed modification ~~must~~ embraces historical ~~complexity~~ facts and ~~create space for~~ fosters a productive range of responses, conversations, and interpretations.<sup>318</sup>

C. The proposed modification ~~must~~ considers the social and cultural conditions at the time of the artwork's addition.<sup>319</sup>

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<sup>314</sup> See Minn. R. 1400.2100.

<sup>315</sup> In modifying this subpart, the Board should consider whether it is requiring that a modification request meet all of these criteria, or whether the Board must simply consider and apply these criteria in making its decision. If the Board intends that all 11 criteria be met, then it should say that expressly in the subpart.

<sup>316</sup> Does the Board intend that a modification request satisfy all the criteria or just some of them? This must be clarified in the rule to prevent dispute.

<sup>317</sup> This is better addressed in the process portion of proposed Rule 2400.2703, subp. 7, if the Board wants to include it in the rules. It is not a criterion.

<sup>318</sup> This criterion is ambiguous, and the Board should consider re-writing. It is unclear what “historical complexity” means or what “create space” means. Also, is the phrase “create space” intended to be read literally or is this a figurative or slang phrase?

<sup>319</sup> This criterion seems to better address the “historical complexity” issue set forth in Item B and would support the deletion of the reference to history in Item B.

D. The proposed modification ~~must~~—prompts reflection, conversation, and awareness of the stories, perspectives, and experiences of historically marginalized or oppressed communities.

E. The proposed modification ~~must~~—incorporates the views of all<sup>320</sup> other interested groups and individuals and considers the relationship of these groups' collective history, heritage, and values to the artwork.

F. The proposed modification ~~must~~—creates an opportunity to increase public understanding of and dialogue about Minnesota's history.

G. The proposed modification ~~must~~—enhances the artwork's function as a source of collective identity and belonging for all Minnesotans.

H. The proposed modification ~~must~~—generates, contributes to, or enhances existing social activity in the surrounding public space.<sup>321</sup>

H.I. The proposed modification ~~must~~—represents or commemorates a significant event, group, or individual in Minnesota's history.<sup>322</sup>

J.I. The proposed modification ~~must~~—respects the contributions and perspectives of the artwork's creators and the group or individuals depicted in the artwork and the group's or individuals' communities.

K.J. The proposed modification ~~must~~—seeks to achieve peace, reconciliation, truth, ~~and~~ justice for individuals, groups, and communities that are not represented or who are misrepresented in the artwork~~historical record~~.<sup>323</sup>

L.K. The proposed modification ~~must~~—acknowledges evolving social values and accounts for the views and needs of the contemporary community.

256. The Board should also contemplate whether, as a criterion, it should consider the availability of funding to complete the modification before it grants a request for modification.

257. Should the Board adopt the Administrative Law Judge's recommendations, they would not render Subpart 8 substantially different from the rule as originally proposed in the Notice of Hearing. However, as written, Proposed Rule 2400.2703, subp. 8 is

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<sup>320</sup> How would the Board determine if a modification incorporates the view of "all" groups?

<sup>321</sup> This appears to be a separate criterion that was inadvertently added to Item G.

<sup>322</sup> These are supposed to be criterion for modification. This appears to be a criterion for a new artwork. The Judge recommends that this be removed from this subpart.

<sup>323</sup> A modification to an artwork is to change the existing artwork, not create a new piece.

**DISAPPROVED** as ambiguous and confusing.

**Part 2400.2703, Subpart 9: Criteria for Evaluating Removal of an Existing Commemorative Artwork**

258. Proposed Rule 2400.2703, subp. 9 identifies the 11 criteria that the Board must consider when evaluating a request for removal. This subpart received no substantive comments or objections, and the Board has not modified these provisions.

259. To ensure consistency with the other proposed rules (as modified), to ensure clarity, and to avoid conflict with other provisions, the Administrative Law Judge recommends the following technical changes to Subpart 9:

Subp. 9. **Criteria for evaluating removal of an existing commemorative artwork.** The board must consider<sup>324</sup> the following criteria to evaluate a request for the removal of an existing commemorative artwork:

A. community feedback about the artwork, the artwork's site, and the artwork's condition collected at public meetings and hearings,<sup>325</sup>

B. the degree to which the artwork misrepresents the state's history or has the effect of significantly intimidating or adversely affecting a group of people;

C. the method by which the artwork was acquired and accessioned in the commemorative artwork collection, such as by donation, loan, or commission;

D. the qualifications and professional reputation of the artist, and the artwork's craftsmanship, conceptual content, style, and form;

E. the availability of necessary funding for conservation, maintenance, and repair of the artwork in its current location; availability of exhibition and storage space if the artwork is removed; availability of real property for siting the artwork if it is removed; <sup>326</sup> ~~and staff support~~; <sup>327</sup>

F. the degree to which removal of the artwork would detract from the overall artistic and architectural integrity of the Capitol or Capitol area;

G. the artwork's style, form, scale, diversity, quantity, quality,

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<sup>324</sup> The word "consider" is more consistent with the fact that these are criteria the Board must use to evaluate the request, as opposed to conditions that must be met before approval. The criteria in Subpart 9 are drafted more clearly as criteria to consider than the mandatory conditions the Board included in Subpart 8.

<sup>325</sup> Because the proposed rules allow for both public meetings and hearings, this should be modified to address both.

<sup>326</sup> This provision needs clarity. As written, it is unduly vague and subject to multiple interpretations.

<sup>327</sup> This appears and inappropriate as Board staff should remain neutral during the process.

longevity, and compatibility with the existing commemorative artwork collection, ~~and goals of the board;~~<sup>328</sup>

H. accessibility, public safety, and the social, cultural, historical, ecological, physical, and functional context of the artwork in relation to the site, both existing and planned;

I. issues related to liability, insurance, intellectual property rights, warranties, ownership, theft, vandalism, loss, indemnification, and public safety;

J. safety, the avoidance of emergencies caused by hazards, ~~and relevant construction schedules, and the allowance of enough time for a review process;~~<sup>329</sup> and

K. the value of the artwork as determined by a professional appraiser;

L. the plan for returning the space left by removal of the artwork to its original condition or a condition that is aesthetically consistent with the surrounding Capitol grounds;<sup>330</sup> and

M. the availability of funding to pay for the removal and restoration of the removal site.<sup>331</sup>

260. Because proposed Rule 2400.2703, subp. 9, is not legally defective under Minn. R. 1400.2100, it is not being disapproved. The subpart would, however, benefit from additional modifications (as recommended by the Judge) to: (1) ensure consistency with the other proposed rules (as modified); (2) provide clarity; and (3) avoid conflict with other provisions.

261. Proposed Rule 2400.2703, subp. 9 is **APPROVED**. However, the Judge urges the Board to adopt the changes recommended by the Judge to ensure clarity, consistency within the rules, and avoidance of conflict with other provisions.

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<sup>328</sup> This should be stricken as being too vague and broad. "Goals of the board" need to be identified. This can be replaced with specific reference to a document detailing the objectives, such as the Comprehensive Plan or even the "guiding principles for commemorative artwork" contained in proposed Rule 2400.2703, subp. 1.

<sup>329</sup> The procedures set out in proposed Rule 2400.2703, subp. 7 should be sufficient. If not, there is a provision in Subpart 7 to allow the Board an opportunity to reopen public comments and schedule another public hearing. Therefore, this provision is unnecessary and in conflict with Subpart 7.

<sup>330</sup> This addition is recommended as a criterion for the Board to consider but is merely a recommendation. It appears to be a factor that the Board has not addressed in the rules.

<sup>331</sup> The Board may want to consider whether funding can actually be secured to complete the removal and restore the site before it grants the request for removal.

## **Proposed Rule 2400.2705: Standards for Civic and Institutional Uses**

262. The revisions to existing Rule 2400.2705 received no public comment and the Judge finds no issues with this rule. Accordingly, the changes to existing Rule 2400.2705 are **APPROVED**.

Based upon the Findings of Fact and the contents of the rulemaking record, the Administrative Law Judge makes the following:

### **CONCLUSIONS OF LAW**

1. The Administrative Law Judge has authority and jurisdiction to review these rules under Minn. Stat. § 14.14, .15, .50(2020), and Minn. R. 1400.2100 (2021).

2. The Board gave all required notice to interested persons in this matter pursuant to Minn. Stat. §§ 14.101, .111, .116, .131, .14, .22, .23, .25, .37, 115.44 (2020) and Minn. R. 1400.2060, .2070, .2080, .2230 (2021), including all additional notice requirements of rule and law.

3. The Board has fulfilled the procedural requirements of Minn. Stat. §§ 14.101, .111, .116, .131, .14, .20, .22, .23, .24, .25, 115.44, and Minn. R. .2060, .2070, .2080, .2090, .2210, .2220, .2230, and all other applicable rules and laws.

4. The Board has demonstrated its statutory authority to adopt the proposed rules pursuant to Minn. Stat. §§ 14.05, subd. 1 (2020).

5. The Board has fulfilled all substantive requirements of Minn. Stat. §§ 14.002, .127, .128, .131, .14, .23, .24, .50, and Minn. R. 1400.2070, .2080, and all other applicable rules and laws.

6. The Additional Notice Plan, Notice of Hearing, proposed rules, and the SONAR complied with Minn. Stat. §§ 14.131, .22, .23 and Minn. R. 1400.2060, .2070, .2080.

7. The Board 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 and 14.50, with the exception of the following proposed rules which were **DISAPPROVED**:

2400.2703, subp. 3, item K (as modified by the Board and re-lettered)  
2400.2703, subp. 3, item N (as modified by the Board and re-lettered)  
2400.2703, subp. 7, item L (as modified by the Board)  
2400.2703, subp. 7, Item M (as modified by the Board)  
2400.2703, subp. 8

8. The Administrative Law Judge **APPROVES** the following proposed rules, but urges the Board to make recommended technical changes to ensure consistency in

the rules, to provide clarity in the provisions, and to avoid potential disputes as to interpretations of the rules:

2400.2040, subp. xx and xx (definitions of “public hearing” and “public meeting”)  
2400.2040, subp. 24b  
2400.2040, subp. 65a  
2400.2703, subp. 1, item A  
2400.2703, subp. 1, item B  
2400.2703, subp. 3, items A through J (as modified by the Board and re-lettered)  
2400.2703, subp. 3, items L and M (as modified by the Board and re-lettered)  
2400.2703, subp. 5, item F  
2400.2703, subp. 5, item G (as modified by the Board)  
2400.2703, subp. 6, item A (as modified by the Board)  
2400.2703, subp. 6, item B  
2400.2703, subp. 7, items A through K (as modified by the Board and re-lettered)  
2400.2703, subp. 9

9. The Board’s amendments to existing Rule 2400.2705 are **APPROVED**.

10. The modification to Rules 2400.2040, subp. xx and xx; .2703, subp. 1, items A and B; subp. 3, items A through H and J; subp. 5, item G; subp. 6, item A; subp. 7, and items A through K are **APPROVED**. While these modifications were proposed by the Board after publication of the rules in the *State Register*, they do not render those rules “substantially different” within the meaning of Minn. Stat. §§ 14.05, subd. 2. Such modifications are needed and reasonable, and should be adopted by the Board. However, the Administrative Law Judge has provided specific technical recommendations for the Board to consider to ensure clarity, consistency, and cohesion.

11. Due to the disapproval of certain rules, this Report has been submitted to the Chief Administrative Law Judge for her consideration pursuant to Minn. Stat. § 14.15 and Minn. R. 1400.2240, subp. 4.

12. Any Finding of Fact that might properly be termed a Conclusion of Law, and any Conclusion of Law that might properly be termed a Finding of Fact, are hereby adopted as such.

13. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude, and should not discourage, the Board from further modification of the proposed rules, provided that the rule finally adopted is based upon facts appearing in this rule hearing record and the Board complies with the requirements of Minn. R. 1400.2110, if the modification results in a substantially different rule.

14. Should the Board accept the modifications recommended by the Administrative Law Judge in this Report, the Board should re-submit the modified rules in their entirety for review and final approval, along with revisions to the disapproved rules.

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

### RECOMMENDATION

**IT IS HEREBY RECOMMENDED** that the proposed rules, as modified, be adopted except where otherwise noted above.

Dated: May 18, 2022



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ANN C. O'REILLY  
Administrative Law Judge

### NOTICE

The Board must make this Report available for review by anyone who wishes to review it for at least five working days before it may take any further action to adopt final rules or to modify or withdraw the proposed rules. If the Board makes changes in the rules, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

Because the Administrative Law Judge has determined that the proposed rules are defective in certain respects, state law requires that this Report be submitted to the Chief Administrative Law Judge for her approval. If the Chief Administrative Law Judge approves the adverse findings contained in this Report, she will advise the Board of actions that will correct the defects, and the Board may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected.

However, if the Chief Administrative Law Judge identifies defects that relate to the issues of need or reasonableness, the Board may either adopt the actions suggested by the Chief Administrative Law Judge to cure the defects or, in the alternative, submit the proposed rules to the Legislative Coordinating Commission for the Commission's advice and comment. If the Board makes a submission to the Commission, it may not adopt the rules until it has received and considered the advice of the Commission. However, the Board is not required to wait for the Commission's advice for more than 60 days after the Commission has received the Board's submission.

If the Board elects to adopt the actions suggested by the Chief Administrative Law Judge and make no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, it may proceed to adopt the rules. If the Board makes changes in the rules other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, it must submit copies of the rules showing its changes, the rules as initially proposed, and the proposed order adopting the rules to the



Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Board must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the Department, and the Department will notify those persons who requested to be informed of their filing.