



Capitol Area Architectural and Planning Board



204 Administration Building
50 Sherburne Avenue
Saint Paul, Minnesota 55155
Phone: 651.757.1500
Web: www.mn.gov/CAAPB
TTY: 800.627.3529

April 4, 2022

The Honorable Ann O'Reilly
Administrative Law Judge
Office of Administrative Hearings
600 North Robert Street
P.O. Box 64620
Saint Paul, Minnesota 55164-0620

DRAFT

This is a draft 'Response to Comments' letter, which the CAAP Board will review at its meeting on April 5, 2022.

Re: In the Matter of the Proposed Rules of the Capitol Area Architectural and Planning Board Governing Commemorative Artworks on the Minnesota Capitol Grounds; OAH Docket No. 65-9055-37789; Governor's Revisor's ID 04720

Dear Judge O'Reilly:

This letter contains the Capitol Area Architectural and Planning Board's responses to comments it has received.

1. The Capitol Area Architectural and Planning Board [CAAPB] has met its burden to show that the proposed rule is needed and reasonable.

Minnesota Statutes, section 14.14, subdivision 2, requires the Capitol Area Architectural and Planning Board to "make an affirmative presentation of facts establishing the need for and reasonableness of the proposed rules . . ." [In making its affirmative presentation, the Department must show that its action has a rational basis. See Beck, G., and M. Konar-Steenberg, section 22.1, [Minnesota Administrative Procedure, Third Edition](https://mitchellhamline.edu/minnesota-administrative-procedure/) <https://mitchellhamline.edu/minnesota-administrative-procedure/>. (2014)]

The CAAPB has stated its affirmative presentation in its Statement of Need and Reasonableness, which the CAAPB relies on to establish the need for and reasonableness of the proposed rules. The CAAPB's evidence clearly meets the rational basis standard and compels one to conclude that the proposed rules of the Capitol Area Architectural and Planning Board are needed and reasonable.

2. The Capitol Area Architectural and Planning Board has carefully reviewed all comments and identified trends in who commented and common themes they addressed.

The proposed Capitol Area Architectural and Planning Board rules governing the addition, modification, or removal of commemorative artworks on the Minnesota Capitol grounds are considered an important and necessary step as articulated by the seventeen people who spoke at the hearing and additional comments submitted to the OAH eComments site. The spoken and written comments have overwhelmingly supported the proposed rule amendments, with suggestions focused on clarifying and strengthening the language.

Twenty-five people commented for the public hearing. Seventeen spoke at the hearing on March 14th and four of these people also sent their comments to the OAH eComments website. Eight additional people submitted written comments to the eComments site. Nine commenters spoke on behalf of ethnic or cultural organizations, four spoke on behalf of art and architectural organizations, and five were current or recent state agency leaders. Seven people were from the general public, having had no prior involvement with the CAAPB or noted affiliation with a group or agency.

Among the pages of comments, several themes emerged. Each of the top five themes were expressed by at least half of the commenters. These themes are best expressed in a sampling of their words.

Represent Minnesota on the Capitol Grounds

“Commemorative art is one of the very public ways that we tell our story to ourselves and to visitors. That art shows not just who we are, but who we think we should be.”
– Hearing Comment 14, transcript page 73, line 25- page 74, line 3.

“We [AIA MN Board of Directors] believe that these rules and procedures will help to increase the degree to which the commemorative artworks displayed on our Capitol grounds resonate with Minnesotans; that they will result in stronger, more accurate, and more expansive representation of Minnesotans’ experiences and valued histories” – Hearing Comment 8, transcript page 54, line 25- page 55, line 6

Provide a Welcoming Place for All

“We believe this process could help bring forward our concerns for representation at the Capitol and on Capitol grounds and help display the true cultural history of Minnesota. The Capitol is supposed to be the people’s house, but not all the people in Minnesota feel welcomed there. It is time that changed.”
– Hearing Comment 1 , transcript page 38, lines 3-9

“The approachability and accessibility criteria is thus a useful and reasonable criteria to include in order to make this beautiful space, especially the Capitol mall, one that can be welcoming and enjoyable for all.”
– Hearing Comment 12, transcript page 67, lines 20-25

Expand Opportunities for Public Input

“Allow more people to participate in the discussion of what is displayed.” – Hearing Comment 1, transcript page 37, lines 14-15

“Changing the rules to include public participation is the most important step that this body could take to ensure that we are engaging in difficult conversations, that we understand that talking about these issues is how we move forward from this point in our history.” – Hearing Comment 10, transcript page 60, lines 20-25

Focus on Inclusion in Updates to the Commemorative Works Collection

Dakota people have been a part of the land now called Minnesota for centuries.... We believe this process could help bring forward our concerns for representation at the Capitol and on Capitol grounds and help display the true cultural history of Minnesota. – Hearing Comment 1, transcript page 37, line 25 – page 38, line 6

“Much of the work at the State Capitol either erases, unremembers, or overwrites the contributions of indigenous peoples within the state of Minnesota. And this is true not just for our communities and our culture, but for many others, mostly black and brown people who have played a large role in the formation of our state.” – Hearing Comment 4, transcript page 46, lines 4-11

Make the Commemorative Works Process Easy to Access and Understand

“When emotions run high, like when discussing changes or removal of a work,...clear, fair, workable rules can calm difficult situations and chart a good path to solutions.... To ensure that we [the Decision Process Advisory Task Force] came to a process that was reasonable, the makeup of the team that devised the rules had a wide range of experiences and opinions on commemorative works on the Capitol grounds, as well as diversity in terms of race, ethnicity, gender, wealth, and more...One outcome of that diversity is a set of rules that focuses on processes that are in plain language, that are logical, and workable”. – Hearing Comment 2, transcript page 39, line 20- page 40, line 13

“This plan encompasses a very well-rounded process and is pretty much approachable to any constituency who would have concern or a group of constituencies who want to bring forward their opinions and point of view on art.” – Hearing Comment 4, transcript page 46, line 22 – page 47, line 1

3. The Capitol Area Architectural and Planning Board has responded to the comments made and issues raised during the hearing and comment period.

The CAAPB appreciates the thoughtful questions and suggestions brought forward in the comments. They provided a fresh lens on the proposed rules and inspired revisions that improve clarity and opportunities for public input in the commemorative works process.

The remainder of this document highlights public comments on specific rules language, our responses, and proposed rule revisions. It is organized in the order of the rule subparts, as follows:

- As each subpart is introduced, it is titled in this form, **Subp. #.X. – short descriptive title**. The ‘short descriptive title’ for each item is not from the rules text, it is a topic cue for the reader of this document.
- Hearing comments and questions are briefly described, and each commenter is identified by a number, such as “Hearing Commenter 4.” The full text of each comment and the commenter’s name can be found in the document “[CAAPB Response to Hearing Comments](#)”, found on the CAAPB website and the [OAH eComments site](#). Sometimes CAAPB staff play the role of a commenter and note something they think should change in the rules.
- The comment or question for each subpart is followed by a “CAAPB Response”, except when CAAPB staff are the source of the comment.
- If CAAPB supports a revision to the proposed rule language for that subpart, then it is noted in a text box under the header “Revision to Proposed Rules.”

2400.2040 DEFINITIONS

There were several comments and questions regarding the meaning or interpretation of certain words in the proposed rules. These questions are addressed in the subpart where they appear, with one exception. During the hearing, the Administrative Law Judge recommended that the rules better differentiate between the use and meaning of “public meeting” and “public hearing.”

“...the rules, they switch back and forth between public meeting and public hearing, and they have kind of different ideas. So, you know, whatever the Board can do to help clarify that, if it should be public meeting or public hearing, or if there is differences in how they intend for those processes to work. I think that would be helpful to me. That’s something that stood out when I first read the rules. So I’m just going to give you a little heads-up to help me with that as I go through.” - Judge Ann O’Reilly, transcript page 63, line 5-15

CAAPB Response The terms ‘public hearing’ and ‘public meeting’ are used repeatedly in the rules and should be clearly described to differentiate them. The term “public hearing” has a specific meaning. It is a meeting that requires public notice and opportunity for public comment before and during the hearing meeting. However, this term is not familiar to all people, and may be confused with “public meeting” which can have various meanings. This can be addressed by adding two definitions to 2400.2040. First, add “public hearing” which clearly states that public comment is invited and expected at public hearings. Second, add “public meeting”, another term that is used repeatedly in the proposed rules, to describe the variety of forms a public meeting can take.

Revision to Proposed Rules

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.

2400.2703 Subpart 1. Guiding principles for commemorative artwork.

Subp. 1.A. – Collection of Artworks (RD4720 lines 4.21 – 4.22)

CAAPB staff comment – Staff recommend clarifying that Subp. 1.A. “*Commemorative artwork on the Capitol grounds must reflect the state's diverse history and people.*” is achieved through the mix of all of the artworks. It is not expected that each artwork independently reflect diverse people and history. The intent of the current words may be intuitive to most people, but it is easy to revise the statement to be unambiguous to all.

Revision to Proposed Rules

Subp. 1.A. to “The collection of commemorative artwork on the Capitol grounds must reflect the state's diverse history and people.”

Subp. 1.B.(2) – Artistic Integrity (RD4720 lines 5.3 – 5.4)

CAAPB staff comment – Staff noticed that the words in Subp. 1.B.(2) “*consider historic, architectural, and artistic integrity of the Capitol building*” are repeated in Subp. 1.C. “*All decisions about commemorative artwork must account for the historic, architectural, and artistic integrity of the Capitol building and grounds.*” Having the phrase in two places is a typo. During rules drafting, the phrase, which carries over from the existing CAAPB policy on commemorative works, was tested in a couple of places in Subp. 1 and was accidentally not deleted from the secondary location.

Revision to Proposed Rules

Subp. 1.B.(2) “consider the historic, architectural, and artistic integrity of the Capitol building; and”

Subp. 1.B.(3) – 10 Year Review (RD4720 lines 5.5 – 5.8)

Hearing Commenter 16 asked if **Subp. 1.B.(3)** [line 5.5] *“(3) review existing commemorative artwork as needed or every ten years to:...”* prohibited artwork from being reviewed more often if new information or concerns about a work suddenly come to light.

CAAPB Response

The words *“as needed”* are intentionally used in the rule language to enable review to happen more frequently than every ten years. Ten years identifies the minimum frequency for review.

2400.2703 Subpart 2. Conditions for adding new artwork

Subp. 2.B – Lasting (RD4720 lines 5.15 – 5.15)

eCommenter 6 recommended that the word “lasting” in Subd. 2.B. *“the artwork has lasting statewide significance for Minnesotans”* be changed to “long-term,” to allow for new beliefs and opinions that develop over time. The commenter made a similar recommendation for **Subp. 19d (line 5.15)**, to change *“lasting significance”* to *“long-term significance.”*

CAAPB Response

In **Subp. 19d. and Subp. 2.B.** the word "Significance" is used as a noun and "lasting" is the adjective that qualifies it. Merriam Webster defines "lasting" as "existing or continuing a long while". Therefore, "lasting significance" is an appropriate term to describe significance that is long-term. The language is a threshold for selecting works that will retain their significance to people for many, many years. If there is a possibility that the proposed subject of the work will have short-lived significance, then the effort and expense to add it to the grounds should not be undertaken. This same intent is the rationale for waiting at least 10 years after someone's death to commemorate them, as required in Subp. 2.E.(4). Ten years offers the time and distance with which to better understand the lasting significance of the person. The language does not preempt future change to the work, but it is intended to avoid it.

Subp. 2.C. – Diversity (RD4720 line 5.16)

eCommenter 5 asked how respect for a diversity of people can be reflected in a single work, as required for new works under conditions *Subp. 2.C. “artwork is respectful of the diversity of Minnesotans”*. He wondered if the intent of the condition was really about not allowing works that in some way represent disrespect for the diversity of Minnesotans, and if yes, should it be worded differently.

CAAPB Response

The intent of Subp. 2.C. could be conveyed with the current phrase, *“artwork is respectful of...”* or with the phrase *“artwork cannot be disrespectful of...”* The two phrases express the same thing. The current phrasing is preferred for its simplicity and positive framing of the intent.

2400.2703 Subpart 3. Application and review process for new artwork.

Subp. 3.A. and Subp. 3.B. – Application (RD4720 lines 6.3 – 6.20)

CAAPB staff comment – Staff observed that references to application review were mentioned throughout Subp. 3. and did not clearly differentiate the types of review happening at each step in the process. The first step in reviewing an application is to determine if the application is “complete,” meaning that it contains all of the information required for the application. This should be clearly stated in Subp. 3.A. In Subp. 3.B. the ambiguous phrase “accept the application” should be revised to state the specific intent that the review is to determine if the application meets the conditions of Subp. 2.

Revision to Proposed Rules

Subp. 3.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.

Subp. 3.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.~~

Subp.s 3.B., 3.C., and 3.D. – Engagement (RD4720 lines 6.10 – 7.6)

Hearing Commenter 8 noted that “without making significant efforts to create user-friendly and easy-to-find tools and information, it is possible that the admirable goals of this process may not be achieved as intended.” The commenter suggested a variety of communication tools to engage and encourage public input, such as the CAAPB website, FAQ documents, media, and social media. Other public commenters asked that the rules provide assurance that information on commemorative works requests and reviews be easy to find and understand, and that opportunities for public input be clearly identified.

Hearing Commenter 10 suggested that there be specific opportunity for public notice and input during the application review step described in **Subp. 3.D.** *“After board staff and advisers 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.”*

CAAPB Response

One the primary goals of the proposed rules amendments in 2400.2703 is to increase public access to and understanding of the decision-making for commemorative works. The CAAPB plans to use a variety of engagement tools with the public throughout each commemorative works review process, and this intent should be explicitly noted in the rules. Engagement is a two-way street; information

is provided to people and those people give their input in return. Therefore, two new steps are recommended and a revision to Subp. 3.C.

First, add a new step to Subp. 3., after steps A. and B., identifying how information about the application process and review will be shared with the public. The step should also be added to the application review steps for modification and removal in Subp. 7.

Second, add another new step to Subp. 3., after new step C., for a 30-day comment period and one or more public meetings to ask for public input on whether or not the application meets the conditions of Subpart 2 and should continue for review. The step should also be added to the application review steps for modification and removal in Subp. 7.

Third, revise Subp. E (formerly Subp. C.) to reference the activities in new step D and require that after the public input, CAAPB staff will prepare a report and recommendation to the board. Expand the language in the step about a board vote to clearly state what the board will be considering and voting on, and that public comment is invited at the board meeting.

Revisions to Proposed Rules

Subp. 3.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.

Subp. 3.D. After the staff report is publicly released, the agency must open a 30-day comment period and hold one or more public meeting(s) to gather public input on whether the application request for addition meets all of the conditions under subpart 2.

Subp. 3.E. ~~C.~~ When the comment period and public meeting(s) are complete, ~~the full board staff will prepare a report and recommendation to the~~ board ~~must vote~~ to accept or reject the application to proceed for review under subp 3. F. to 3. N. and subp.s 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.

Subpart 3.B. (Subp. 3.E. in revised version) – Accept or Reject (RD4720 lines 6.10 – 6.20)

CAAPB staff comment - The language in Subp. 3.B.(1) and (2), and Subp. 3.D. can be simplified for clarity.

Revision to Proposed Rules

Subp. 3. ~~E.B.~~ ... (1) If the board accepts an addition application ~~for an addition~~ request, board staff must notify the applicant and the Department of Administration within ~~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.

...

Subp. 3. ~~F.D.~~ 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.

Subpart 3.F. (Subp. 3.H. in revised version) – Design Competition (RD4720 lines 7.12– 7.23)

eCommenter 3 expressed concern that Subp. 3.E. (lines 7.8) [*“...applicant must raise money or otherwise pay for the cost of conducting a design competition.”*] put a burden of both time and money on the applicant. The commenter asked if the applicant could identify an artist and a design before submitting an application to the CAAPB.

CAAPB Response

Competitions in the Capitol Area have a long tradition and are a statutory requirement for new buildings and art works 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 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 is 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.
- a consistent and fair process is used for the selection of designers, under the procedures in Minnesota Rules Chapter 2400 for the Capitol Area Architectural and Planning Board.

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 for Minnesota, and often saves money in the long run.

Subp. 3.F. (Subp. 3.I. in revised version) – Public Input (RD4720 lines 7.12 – 7.23)

Hearing Commenter 10 suggested that there be specific opportunity for public input during the application review step described in **Subp. 3.F., line 7.12** *“The applicant must work with board staff and the architectural advisers to develop a design framework document that includes:...”* The intent of that recommendation is good, however, this step is technical in nature and not a good opportunity for public input. Alternatively, Subp. 3.I. (revised as Subp. 3.K) is a good place to incorporate public participation. The same should be done in corollary step in Subp. 7.D.

Revision to Proposed Rules

Subp. 3.~~I.~~ ~~K.~~ and Supb. 7.D. ...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...”.

Subpart 3.J. (Subp. 3.L. in revised version) – Funding (RD4720 lines 9.3 – 9.8)

Hearing Comment 13 expressed concern about applicants being responsible for funding commemorative works activities. Specifically, they said *“The issue of applicant funding should also be addressed. Marginalized communities might not have access to funding for additions. However, their idea might be worthy of selection. How do you ensure that these suggestions are able to be executed?”*

CAAPB Response

The concern about funding requirements for applications is justified. It creates an imbalance in access between economically advantaged groups and economically disadvantaged groups. The reason for the requirement is the lack of an alternative funding source. At this time, the State does not have dedicated funding for commemorative works activities, and therefore can only implement self-funded applications, or applications that request special funding from the Minnesota Legislature. CAAP board and staff have discussed the potential of exploring funding opportunities with public, private, and philanthropic partners.

Subp. 3.K. (Subp. 3.N. in revised version) – Bid Approval (RD4720 lines 9.9 – 9.15)

CAAPB staff comment – Staff found an error in this language regarding how bids for work are approved. In the last sentence, the use of the words “The board” is ambiguous since it could refer to a formal meeting and action of the Board (which is not mentioned or intended in the step) or refer to action taken by the executive secretary on behalf of the board. It is long-standing practice at the CAAPB that the executive secretary gives final approval of bid documents for contracted work, acting on behalf of the board. here.

Revision to Proposed Rules

Subp. 3. ~~N.L.~~ The selected designer must proceed with the schematic design 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.I., the Capitol mall design framework in the Comprehensive Plan for the Minnesota Capitol Area, and parts 2400.2040 and 2400.2703.

2400.2703 Subpart 4. Criteria for determining location of new artwork.

There were no specific comments on Subp. 4 and CAAPB staff have no recommended revisions.

2400.2703 Subpart 5. Criteria for design of new artwork.

Subp. 5.F. – Artistic Style (RD4720 lines 11.1 – 11.3)

eCommenter 6 was concerned that the language in **Subp. 5.F. (line 11.1)** “*the message of the artwork must be clear and understandable*” would limit the works to being representational imagery, instead of allowing abstract art forms that can express subjects in profound ways, with the Vietnam Memorial on the National Mall being a prime example.

CAAPB Response

"Clear and understandable" refers to the message of the work, not its physical character. An abstract work with appropriate signage or interpretive information would meet the criterion.

Subp. 5.G. – Materials (RD4720 lines 11.4 – 11.12)

eCommenter 6 was also concerned that the list of materials an artist needs to use, as described in **Subp. 5.G. (line 11.4)**, is too prescriptive and does not allow for new materials that have been developed or that might be used. The commenter noted that in public art, artists are trying to advance the field to rely less on extractive processes that require energy-intensive processing that contributes to climate change.

CAAPB Response

The CAAPB rules are not intended or written to prohibit new materials. The language in lines 11.6 to 11.8 -- "The board must give preference to an artwork using stone, such as granite or limestone, for key features, vertical elements, flooring, and surfaces." -- identifies a preference for stone in certain elements of the work but does not require it and allows for other materials. The preference for incorporating some stone encourages compatibility with the predominant use of stone as a unifying element with other works and the Capitol building.

Subp. 5.G. – Maintance funding (RD4720 lines 11.4 – 11.12)

eCommenter 5 commented that the 20% deposit for maintenance required in 2400.2703, Subp. 5.G. “Materials for the artwork..... if water features and in-ground lighting are included.....an applicant must deposit money.... at least 20 percent of construction costs” seemed to already be required in Subp. 3.I. “Upon selection of a designer and design concept by the design review group and 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. ...”

CAAPB Response The two references are redundant and were inadvertently mentioned in two parts of the rule. The requirement should only be mentioned in **Subp. 3.I.**, where it was carried over from the existing Policy for Commemorative Works in the Minnesota Capitol Area (2012).

[\[https://mn.gov/caapb/assets/Accessible_Policy_for_Commemorative_Works_tcm1087-280139.pdf#False\]](https://mn.gov/caapb/assets/Accessible_Policy_for_Commemorative_Works_tcm1087-280139.pdf#False)

Revision to Proposed Rules

Subp. 5.G. ...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.~~

2400.2703 Subpart 6. Conditions for modification or removal of an existing artwork.

Subp. 6.A. – Public Objection (RD4720 lines 12.4 – 12.5)

Hearing Commenter 16, eCommenter 2, and eCommenter 6 all questioned the use and interpretation of the word “overwhelming” in Supb. 6A (line 12.4) for “A. *there has been sustained, overwhelming, and documented public objection to the artwork;...*” Specifically there were concerned that it might be interpreted so strictly that no applicant could ever document enough objection to qualify as “overwhelming.”

CAAPB Response

Overwhelming may be ambiguous and could be interpreted strictly or leniently. It also does not address if the sentiment comes from a variety of people or from a focused interest group. More specifically, that it might be interpreted to set such a high bar that no application would ever meet the standard. Other comments expressed the same concern and therefore we recommend replacing the word with “broad-based”. Merriam Webster defines broad-based as “involving or attracting many different types of people”, which is part of the intent of this requirement.

Revision to Proposed Rules

Subp. 6A, line 12.4: “A. *there has been sustained, broad-based, overwhelming, and documented public objection to the artwork;...*”

2400.2703 Subpart 7. Application and review process for modification or removal of an existing artwork.

Subpart 7.A. to 7.C. (Subparts 7.A. to 7. F. in revised version) – Application Review (RD4720 lines 12.16 – 13.22)

CAAPB staff comment - Subpart 7 and Subpart 3 both address the application and review process for commemorative artwork requests. Subpart 3 for new works and Subpart 4 for modifications or additions. The two processes differ in some ways, but the first steps of application review for completeness and consistency with the required conditions, can and should be the same. However, the language in the hearing rules draft for the early steps of Subpart 3 and Subpart 7 was not the same, as a result of the drafting process. During the rules drafting, Subpart 3 was modeled on the existing requirements for the addition of new works, as found in the [Policy for Commemorative Works in the Minnesota State Capitol Area February \(2012\)](#). The language was simplified in some places and better explained in others. Subpart 7 for modifications and removals was written as a new subpart. The early steps followed the elements and intent of Subpart 3 but did not use exactly the same words. This difference was noticed by CAAPB staff, but since each subpart stood on its own and made sense, making the words identical was not a priority. CAAPB staff now think differently, based on the frequent public comment request for clear and easy to understand rule language. Revising the language in the early parallel steps of Subpart 3 and Subpart 7 will eliminate questions or confusion about why the steps are phrased differently. If the language is different, readers might assume it was intentional and that the early steps of each subpart are not the same.

The revisions to Subpart 7 align the language with the revised Subpart 3 language. The rationale for adding new steps to improve clarity and to provide more opportunity for public input are the same for Subpart 3 and Subpart 7. Therefore, the explanation of revisions on those same steps 7.A. to 7.F. is not repeated here but are shown as follows.

Revision to Proposed Rules

Subp. 7.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.

Subp. 7.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.

Subp. 7.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.

Revision to Proposed Rules

Subp. 7.D. After the staff report is publicly released, the agency must provide a place on its website and hold one or more public meeting(s) to gather public comment on whether the application request for modification or removal meets one or more of the conditions under subpart 6.

Subp. 7.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 7.F 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 of 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.

Subp. 7.FC. 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: ...

Supb. 7.D. (Subp. 7.G. in revised version) – Applicant (RD4720 lines 13.23 – 14.7)

Two hearing comments focused on the intent of the word “applicant” in Subp. 7.D. (line 14.7). eCommenter 3 asked who “both applicants” referred to and eCommenter 5 (who worked as the Executive Director of the CAAPB until July 1, 2021) noted that the “applicant” was intended to refer to the original applicant or sponsor group of the work when it was installed.

CAAPB Response

The purpose of the statement is to ensure that someone who understands the background and intent of the original work is notified and invited to share that information in the public meeting held to discuss the work. The proposed rules language should be revised to clarify the intended “applicant” and their role.

Revision to Proposed Rules

~~Subp. 7.G.~~ 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 applicants~~ the opportunity to ~~speak at the public meeting(s). testify at the public hearing.~~

Subp. 7.H. (Subp. 7.K. in revised version) - Funding (RD4720 lines 15.12 – 15.15)

eCommenter 3 noted that Subp. 7.I. (line 15.16) suggests that the applicant for the removal of an offending statue has to help fund its removal. They were concerned about this and said, *“If the statue causes their community pain and they had no part in its placement, it feels like added weight to ask them to raise money to take it down.”*

CAAPB Response

Other people have expressed this concern about the proposed rule language which states *“the applicant [for a modification or removal request] must demonstrate that funding for the project, consistent with the estimated budget, is committed.”* It is something we have thought a lot about. At 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 funding assistance for applicants.

As with applications for new additions, it requires applicants for modification or removal to identify funding for the work. The difference is that in cases of modification or removal, the requests may be coming from groups that are concerned by the work, and therefore should not be asked to pay for the issue to be addressed. After much discussion, the condition for funding remains, with an intent to encourage public, private and philanthropic sources to create a fund that applicants could apply to for commemorative works activities on the Capitol grounds.

2400.2703 Subpart 8. Criteria for modification of an existing artwork.

There were no public comments that questioned or suggested changes to any criteria or language in Subpart 8. The general sentiment of comments supported clear rules by which to consider requests for the modification of existing artwork.

2400.2703 Subpart 9. Criteria for removal of an existing commemorative artwork.

There were no public comments about specific language in Subpart 9. The general sentiment of comments supported clear rules by which to consider requests for the modification of existing artwork.

Hearing Commenter 7 was the only person who noted specific language, expressing appreciation for **Subp. 9.B. *the degree to which artwork misrepresents the state history or has the effect of significantly intimidating or adversely affecting a group of people.***, which he said, “can start a discussion about the impact that certain commemorative works have on communities.”

2400.2705 STANDARDS FOR CIVIC AND INSTITUTIONAL USES.

There were no public comments on the proposed revisions to 2400.2705. The revisions simply redirect rules regarding commemorative works to be in a new section 2400.2703, instead of being in a Subpart of 2400.2705.

In Conclusion

The CAAPB has addressed the questions and suggestions made during the hearing and comment period and responded with revisions to the proposed rules in a number of areas. The CAAPB has shown in its Statement of Need and Reasonableness and in the public hearing that the rules are needed and reasonable. We respectfully submit that the Administrative Law Judge should recommend adoption of these rules.

Respectfully submitted,

Merritt Clapp-Smith

Merritt Clapp-Smith, Executive Secretary
Capitol Area Architectural and Planning Board

Notes on Substantial Difference. The limitations on changing proposed rules are stated in Minnesota Statutes, section 14.05, subdivision 2, which prohibits an agency from modifying proposed rules so that they are substantially different from the proposed rules.

“14.05 GENERAL AUTHORITY.

Subd. 2. **Authority to modify proposed rule.** (a) An agency may modify a proposed rule in accordance with the procedures of the administrative procedure act. However, an agency may not modify a proposed rule so that it is substantially different from the proposed rule in the notice of intent to adopt rules or notice of hearing.

(b) 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 intent to adopt or 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 intent to adopt or notice of hearing and the comments submitted in response to the notice; and

(3) the notice of intent to adopt or notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.

(c) In determining whether the notice of intent to adopt or notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be the rule in question the following factors must be considered:

(1) the extent to which persons who will be affected by the rule should have understood that the rulemaking proceeding on which it is based could affect their interests;

(2) the extent to which the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the notice of intent to adopt or notice of hearing; and

(3) the extent to which the effects of the rule differ from the effects of the proposed rule contained in the notice of intent to adopt or notice of hearing.”