

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA BUILDING CODE DIVISION

In the Matter of Cy-Con, Inc.'s  
Appeal of the Decision of the  
Minneapolis Building Code  
Board of Appeals Regarding  
Skyways from Target Center

FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson on September 8, 1992 at the Office of Administrative Hearings, 100 Washington Square, Suite 1700, Minneapolis, Minnesota 55401-2138.

The record was closed on September 8, 1992 at the conclusion of the hearing.

Bradley J. Martinson, from the firm of Petersen, Tews & Squires, P.A., 4800 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402-2208, appeared on behalf of the Appellant, Cy-Con, Inc. Peter W. Ginder, Assistant City Attorney, A-1700 Hennepin County Government Center, 300 South Sixth Street, Minneapolis, Minnesota 55487-0170, appeared on behalf of the Respondent, City of Minneapolis.

Notice is hereby given that, pursuant to Minn. Stat. 14.61 the final decision of the Commissioner of Administration shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Commissioner Dana B. Badgerow, 200 Administration Building, St. Paul, Minnesota 55155.

STATEMENT OF ISSUES

The issue to be determined in this proceeding is whether the Minneapolis Code of Ordinances, section 85.20, adopting by reference the State Building Code found in Minn. Stat. 16B.59 to 16B.73 and related rules found in Minn.

Rules pts. 1300.1200 to 1300.3100, and the Uniform Building Code, as amended and adopted pursuant to Minn. Stat. 16B.61, governs construction of the skyways constructed by Cy-Con, Inc. to connect the Target Center to the Fifth and Seventh Street parking garages.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Cy-Con, Inc. (Cy-Con) is a general building contractor in the Minneapolis-St. Paul metropolitan area. In the spring of 1991, Cy-Con bid on, and was awarded the contract for, a Minnesota Department of Transportation

(MNDOT) project for the construction of what MNDOT termed a "skyway bridge". The project was to connect the Target Center to the Fifth and Seventh Street parking ramps in Minneapolis, Minnesota. The skyway was to pass over Second

Avenue North, adjacent to it, and over Seventh Street North and Sixth Street North in Minneapolis.

2. The skyway system is unique to Minneapolis and St. Paul. Neither the Uniform Building Code (U.B.C.) nor the State Building Code define or even mention "skyways" per se. The first skyway was built in the 1950s or early 1960s. The City of Minneapolis has required general building permits for all skyways constructed in that city, including those designated as "bridges" by MNDOT.

3. The skyway to be constructed by Cy-Con had specifications developed by MNDOT. MNDOT also required that the contractor obtain all "required permits" but failed to specify what those might be. The project was to be inspected by MNDOT or its consultants for safety and compliance with its specifications.

4. The City of Minneapolis, Department of Regulatory Services (City) is the appropriate "local building official" for building code purposes. The local building official is charged with administering and enforcing the State Building Code pursuant to Minn. Stat. 16B.71 (1990). To achieve this, the local building official charges permit fees to fund inspections of structures covered by the building code. One type of structure regulated is "pedestrian walkways". A "pedestrian walkway" is defined in the U.B.C. as a "walkway used exclusively as a pedestrian trafficway." U.B.C. 417.

5. A skyway is an elevated, fully enclosed structure between buildings. Most of the skyways in Minneapolis extend over streets which are defined as "public ways". The purpose of a skyway is to support pedestrian traffic. A skyway may have some or all of the following characteristics: heating, cooling, and/or ventilation mechanisms; electrical facilities; intermediate exits; and fire sprinkling systems. Minimum standards a skyway must meet are not prescribed in statute, rule or ordinance. The particular skyway at issue has heating, air conditioning, and electrical systems, fire sprinklers, and exit doors.

6. Since 1969, Cy-Con has constructed hundreds of bridges in the Twin Cities metropolitan area, including 12 pedestrian bridges, five of which are located in the City of Minneapolis. Cy-Con was not required to get a general

building permit for any of these projects. Of the pedestrian bridges built by Cy-Con, none connect buildings; they are open to the elements and contain no mechanical heating or cooling mechanisms. Cy-Con had never built a skyway before bidding on this project and was not familiar with the City's history of requiring permits.

7. Before construction of the skyway began, the City informed Cy-Con that the project required a general building permit. Cy-Con took the position that a building permit was not required because a skyway is similar to a bridge and the building code does not apply to bridges. The City concedes that bridges are not subject to permit under the State Building Code.

B. In a letter dated June 11, 1991, Charles Young, president of Cy-Con, wrote to the Department of Regulatory Services maintaining that the skyway was a bridge, both structurally and functionally, and was not subject to the provisions of the building code. He argued that the project did not require a general building permit from that department. T. F. Thorstenson, director of the Inspections Division of the Department of Regulatory Services and the

building official overseeing the project, responded with a letter dated June 12, 1991 which stated, in part:

Although we agree that "bridges" per se are not subject to permit, this skyway connection is not considered a bridge only. Rather, the space is an occupied, enclosed passageway with conditioned air, an extension of the existing buildings it connects, and subject to the provisions of the building code.

The City refused to waive the permit and fee requirements. In a letter dated June 27, 1991, Mr. Thorstenson wrote to the Appellant that a skyway is a "pedestrian walkway" within the meaning of the U.B.C.

9. Although Cy-Con continued to dispute the City's interpretation, it submitted an application for a building permit and submitted construction plans to the City of Minneapolis for review. The application listed the project's value at \$3,500,000. Cy-Con paid a fee of \$15,390.18. That fee amount includes \$8,539.50 as a building permit fee, \$5,550.68 as a plan exam fee and \$1,300.00 as a state surcharge. Of the total value of the project, two-thirds was allocated to conventional bridge work, and the remaining one-third to the "envelope" which covers the bridge.

10. In a previously constructed project, the City of Minneapolis has separated the value of bridge work from the value of other buildings and has not required a permit for the bridge portion of the work. However, the City has never done this in the case of a skyway.

11. Cy-Con appealed the decision of the Regulatory Division to the Minneapolis Building Code Board of Appeals. The Board of Appeals, in a decision issued on August 5, 1991, unanimously determined that skyways were "pedestrian walkways" for purposes of the building code and are subject to permit requirements. The Board based its decision, at least in part, on the need to ensure that the project would be inspected for safety. Cy-Con then brought this appeal pursuant to Rule 1300.2600 and Minn. Stat. 16B.67.

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

## CONCLUSIONS

I. The Administrative Law Judge and the Department of Administration have jurisdiction over this matter pursuant to Minn. Stat. 16B.67 and 14.50 (1990). The Notice of Hearing was proper in all respects. The Department has complied with all procedural and substantive provisions of law or rule.

2. The City's determination that a skyway was a "pedestrian walkway" for building code purposes is a valid interpretation of the code and should be upheld.

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

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of the Department of Administration issue an Order upholding the decision of the Minneapolis Board of Appeals which required Appellant to have a general building permit and to pay the concomitant fees.

Dated this            day of October, 1992.

PETER C. ERICKSON  
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped; No Transcript Prepared.

MEMORANDUM

The Appellant in this matter, Cy-Con, Inc., has the burden to show that the City's application of permit fee was improper. Minnesota Rule 1400.7300, subp. 5, states: "The party proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard." In this case, Cy-Con is seeking fees paid to the City be refunded. Appellant has the burden of proof.

Appellant argues that a skyway is a bridge and that bridges are not subject to building code permit requirements; and, even if a skyway is subject to building code provisions, this project is excepted because it is built primarily in a public way. Minn. Rules 1300.1500 and 1300.2300 establish the scope of the State Building Code. These rules explicitly except from the code's reach "work located primarily in a public way." The term "public way" is defined in the Uniform Building Code (U.B.C.) as "any street, alley or similar parcel of land essentially unobstructed from the ground to the sky which is deeded, dedicated or otherwise permanently appropriated to the public for public use. . . ." U.B.C. 417 and 3301(b).

Appellant contends that the skyway is located primarily in a public way because it passes over Second Avenue North, Seventh Street North and Sixth

Street North in Minneapolis. However, the second paragraph of Minnesota Rules 1300.1500 and 1300.2300 instructs that specific provisions in the State Building Code override general provisions. Section 4501 of the U.B.C. reads in relevant part:

Nothing in this code shall prohibit the construction and use of a structure between buildings and over or under a public way, provided the structure complies with all requirements of this code.

Principles of statutory construction presume that the legislature intended an entire statute (in this case rules) to be "effective and certain". Minn. Stat. 645.17, subd. 2 (1990). The construction urged by Appellant would render section 4501 of the U.B.C. ineffectual. The only reasonable construction which gives effect to all of the provisions at issue herein suggests that if skyways are "buildings or structures" for the purpose of the building code, Minn. Rules 1300.1500 and 1300.2300 do not except them simply because they pass over public ways. The specific provision found in section 4501 of the U.B.C. takes precedence.

Appellant also argues that because there is no specific mention in the U.B.C., State Building Codes or other rules of the term "skyway", a general building permit cannot be required for the construction of a skyway. Appellant supports this argument by pointing out that bridges are not mentioned in any statutory or rule provision and are not thus subject to building code requirements. Skyways are very similar, from both a structural and a functional viewpoint, to bridges and are also not specifically addressed by statute or rule.

The City of Minneapolis has interpreted section 509 of the U.B.C. which governs "pedestrian walkways", to include skyways. "Pedestrian walkways" are defined in section 417 of the U.B.C. as "a walkway used exclusively as a pedestrian trafficway". If an agency interpretation of existing law is so contrary to the plain meaning of the law that a new policy is created, the agency has engaged in illegal rulemaking in violation of the Minnesota Administrative Procedures Act (Minn. Stat. 14.01 to 14.69). *White Bear Lake Care Center, Inc. v. Minnesota Dept. of Pub. Welfare*, 319 N.W.2d 7, 9 (Minn. 1982). However, under Minnesota law, an agency may, in its discretion, formulate policy through case-by-case adjudication to fill in gaps in a regulatory framework. *Bunge Corp. v. Commissioner of Revenue*, 305 N.W.2d 779, 785 (Minn. 1981) (citing *S.E.C. v. Chenery*, 332 U.S. 194, 203 (1947); *American Power and Light Co. v. S.E.C.*, 329 U.S. 90, 106 (1946)). When the agency determination involves a broad policy statement of general applicability, as opposed to a specific regulatory provision being applied to specific facts, the rulemaking process must be complied with. *in re Hibbing Taconite Co.*, 431 N.W.2d 885, 894 (Minn. Ct. App. 1988); see generally, *G. Beck, et al.*, *Minnesota Administrative Procedure*, 16.6 (1987 and Supp. 1990).

The Judge has concluded that the term "pedestrian walkway" could reasonably be interpreted to include skyways under the U.B.C. and State Building Code. The City of Minneapolis has been applying building code standards and permit requirements to skyway construction for the past 30 years. This interpretation is not such a new broad policy or so contrary to the language of the building code that it violates the A.P.A. This determination must be viewed in light of the overriding purpose of the U.B.C. and the State Building Code which is to protect workers on a project during

construction and the general public who will be using the structure after construction is complete. see U.B.C. 0LQQ Stat. 16B.59. This purpose is furthered only if the building code is construed to cover skyways

because if construed otherwise, parts of the project may not be inspected for safety, or be inspected by an agency lacking the expertise of the local building official. The decision of the Minneapolis Board of Appeals should be affirmed.

P.C.E.