

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF ADMINISTRATION

In the Matter of
Proposed Permanent
Rules Relating to
Minnesota State
Building Code.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on February 2, 1990, at 9:00 a.m. at the Sheraton Airport Hotel, 2525 East 78th Street, Bloomington, Minnesota.

This report is part of a rulemaking proceeding held pursuant to Minn. Stat. SS 14.131 to 14.20, to hear public comment, to determine whether the Minnesota Department of Administration (Department) has fulfilled all relevant substantive and procedural requirements of law or rule, to determine whether the proposed rules are needed and reasonable, and whether or not the rules, if modified, are substantially different from those originally proposed.

Charlene Hatcher, Special Assistant Attorney General, 1100 Bremer Tower, St. Paul, Minnesota 55101 appeared on behalf of the Department at the hearing. The agency panel appearing in support of the proposed rules consisted of Elroy Berdahl, Technical Services Section Supervisor; Alvin Kleinbeck, Code Administrator; Milton Bellin, Minnesota Health Department Plumbing Unit; and James Berg, Department of Labor and Industry Code Enforcement Division Director.

Approximately one hundred persons attended the hearing. Eighty persons signed the hearing register. The Administrative Law Judge received eight exhibits as evidence during the hearing. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments for twenty calendar days following the date of the hearing or February 22, 1990. Pursuant to Minn. Stat. sec. 14.15, subd. 1 (1988), three business days were allowed for the filing of responsive comments. On February 27, 1990, the rulemaking record closed for all purposes.

Beyond the oral comments at the hearing, the Administrative Law Judge received 313 post-hearing written comments from interested persons. The Department submitted a written comment responding to matters discussed at the hearing. Eleven comments were received after the record closed and, therefore, those comments were not considered.

The Department must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. sec. 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commissioner of Administration (Commissioner) of actions which will correct the defects and the Commissioner may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Commissioner may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Commissioner does not elect to adopt the suggested actions, she must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Commissioner elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Commissioner may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Commissioner makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then she shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Department files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

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

FINDINGS OF FACT

Procedural Requirements

1. On December 20, 1989, the Department filed the Notice of Hearing proposed to be issued with the Chief Administrative Law Judge.

2. On January 2, 1989, the Department filed the following documents with the Chief Administrative Law Judge:

- (a) A copy of the proposed rules certified by the Revisor of Statutes.
- (b) The Statement of Need and Reasonableness.

3. On January 2, 1990, a Notice of Hearing and a copy of the proposed rules were published at 14 State Register 1612.

4. On December 29, 1989, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice.

5. On January 30, 1990, less than 25 days prior to the hearing, the Department filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing as mailed.
- (b) The Agency's certification that its mailing list was accurate and complete.
- (c) The Order for Hearing.
- (d) The names of Commission personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
- (e) A copy of the State Register containing the proposed rules with the Administrative Law Judge.
- (f) The comments received following the Department's request for comments and a copy of the Department's request for comments.

6. On January 31, 1990, the Department filed the Affidavit of Mailing the Notice to all persons on the Agency's list with the Administrative Law Judge.

The documents were available for inspection and copying at the Office of Administrative Hearings from the date of filing to February 27, 1990, the date the record closed.

The Department did not comply precisely with the filing deadlines of Minn. Rules 1400.0300 and .0600. However, no members of the public inquired of the Administrative Law Judge to inspect or copy the documents required to be filed under those rules. No one expressed any objection or claimed to be prejudiced by the Department's late filing. The Administrative Law Judge finds that the Department's noncompliance with Minn. Rules 1400.0300 and .0600 is not a defect in the rulemaking proceeding.

Nature of the Proposed Rules.

7. The proposed rules repeal the presently existing code governing standards for heating, ventilating and air-conditioning (HVAC) and refrigeration installation and maintenance, and adopts the 1988 edition of the Uniform Mechanical Code, with some alterations of the uniform code provisions to meet climatic and construction needs in Minnesota.

Statutory Authority.

8. In its Notice of Hearing, the Department cites Minn. Stat. 16B.61 (1989) as authorizing the Department to adopt the proposed rules.

This statute requires the Department to promulgate rules establishing a code "for the construction, reconstruction, alteration, and repair of state-owned buildings, governing matters of structural materials, design and construction, fire protection, health, sanitation, and safety." Minn. Stat. sec. 16B.61. The Department has general authority to adopt these rules.

Small Business Considerations in Rulemaking.

9. Minn. Stat. sec. 14.115, subd. 2 (1988), requires state agencies proposing rules affecting small businesses to consider methods for reducing adverse impact on those businesses. In the Statement of Need and Reasonableness (SONAR), the Department stated it had evaluated the effect of the proposed rules on small business and considered each of the methods set forth in that statute. The Department asserts that the purpose of the rules is to establish a minimum standard and to exempt small businesses would defeat that purpose. Similarly, reducing the obligation of compliance for small business is inappropriate since those entities would fall below the minimum standard intended to protect the health and safety of the public. No reporting requirements, beyond requesting modifications for non-conforming devices, the rules cannot be made less rigorous when applied to small businesses. The Department has met the requirements of Minn. Stat. sec. 14.115, subd. 2, with respect to the impact of the proposed rules on small businesses.

Fiscal Note.

10. Minn. Stat. sec. 14.11, subd. 1, requires proposers of rules requiring the expenditure of public funds in excess of \$100,000 per year by local public bodies to publish an estimate of the total cost to local public bodies for a two-year period. The proposed rules will not require any expenditure of funds by a local agency or school district.

Impact on Agricultural Land.

11. Minn. Stat. sec. 14.11, subd. 2, requires proposers of rules that have a "direct and substantial adverse impact on agricultural land in this state" to comply with additional statutory requirements. These rules have no impact on agricultural land and, therefore, the additional statutory provisions do not apply.

Substantive Provisions.

12. The portions of the proposed rules which received comment or otherwise need to be examined will be discussed below. Any rule not mentioned is found to be needed and reasonable. Also, any rule not mentioned is found to be authorized by statute.

Proposed Rule 1346,0050 -- Incorporation by Reference.

13. Proposed Rule 1346.0050 incorporates by reference chapters 1 to

20 and appendixes A, B, and C of the 1988 edition of the Uniform Mechanical Code (UMC). This document is published by the International

Conference of Building Officials (ICBO) and the International Association of Plumbing and Mechanical Officials (IAPMO). The proposed rule part contains the names and addresses of these organizations. The Revisor of Statutes has approved the rule as to form, and this approval constitutes a finding by the Revisor that the document incorporated by reference is conveniently available to the public. Minn. Stat. sec. 14.07, subd. 4(a). However, the proposed rule part lacks: 1) a statement that the document incorporated by reference is not subject to frequent change; and, 2) a statement of where the incorporated document is made available. These two statements are required by Minn. Stat. § 14.07, subd. 4(a). Not including either of those statements constitutes a defect in the rules for failure to fulfill a statutory requirement. The defect may be corrected by adding to the end of the proposed rule part language similar to the following:

The UMC is not subject to frequent change and a copy of the UMC, with amendments for use in Minnesota, is available in the office of the commissioner of administration.

Adding the foregoing to the proposed rule part will meet the requirements of Minn. Stat. Ch. 14. The proposed rule, with that change, is needed and reasonable. The change would be made to comply with a statutory requirement and does not constitute a substantial change.

Proposed Rule 1346.0304 -- Permit Fees.

14. This proposed rule states that the local authority establishes permit fees within its area of enforcement. The rule recites the formula which sets the maximum limit at which a permit fee may be set. The Department is not setting a fee by rule in proposed rule 1346.0304 and, therefore, need not comply with Minn. Stat. § 16A.128. The proposed rule part is needed and reasonable to eliminate a potential conflict between the UMC and Minn. Stat. §§ 16B.62, subd. 1 (setting the maximum permit amount that could be assessed on single family dwellings) or 16B.70, subd. 1 (allowing surcharges by the administering authority).

Proposed Rule 1346.0404 -- Boilers.

15. Proposed rule 1346.0404 amends the definitions of "Boiler, high pressure" and "Boiler, low pressure" to change the difference between the two from more or less than 160 pounds per square inch (psi) to more or less than 30 psi. Any boiler higher than 30 psi is defined as high pressure and any boiler not exceeding 30 psi is defined as low pressure. Glen Gausman of BKBM consulting engineers objected to the boiler definition on the ground that the American National Standard Safety Code (ANSI) and the UMC both use 160 psi as the distinction. Minnesota law

places any boiler with a pressure over 30 psi under the regulatory authority of the Department of Labor and Industry. Minn. Stat. § 326.461, subd. 2. The Department has amended the UMC to conform with the statutory scheme established in Minnesota. The Department has shown that the proposed rule part is needed and reasonable.

Proposed Rule 1346,0710 -- Roof Access.

16. The only change in language between this proposed rule part and the language contained in the UMC is the deletion of the word "readily" from the phrase "readily accessible" as used in UMC sec. 710(h). This change has engendered objections from fire fighters and municipalities because the uniform language of the UMC would displace the existing provisions of Minn. Rule 1305.1750. That rule requires a stairway leading to a scuttle or bulkhead, as opposed to ladder access as provided for in the proposed rule part. The objection expressed by Dennis Chada on behalf of the City of St. Paul is representative of all the objections. Mr. Chada asserted that the proposed rule makes reaching equipment in an emergency when roofs are icy or snow-laden both difficult and hazardous. The SONAR only addressed the reason for deleting "readily." The Department is required to adopt a code which "must conform insofar as practicable to model building codes generally accepted and in use throughout the United States." Minn. Stat. sec. 16B.61, subd.

1. The Department has complied with this statutory obligation in adopting the UMC and no facts have been presented to show that using ladders in lieu of a stairway is hazardous or renders the rooftop equipment inaccessible. One may assume that using a stairway to gain access to the roof is easier than using a ladder, but no evidence was presented to indicate that problems exist in gaining access through a ladder. No one has shown that the proposed rule part is unreasonable. The Department has shown that the proposed rule is needed and reasonable.

Despite the foregoing finding of need and reasonableness of the rule as proposed, the Administrative Law Judge urges the Department to consider retaining Rule 1305.1750. The number and consistency of comments submitted by fire fighters in opposition to the proposed rule suggest there are valid reasons to keep the existing rule in effect. Retention of an existing rule, in the absence of a direct conflict, does not require a showing of need or reasonableness. Further, retention of the rule would not constitute a substantial change from the rule as published in the State Register. The Department should note, if it decides to retain Rule 1305.1750, the exemptions located at section 3306(a) and (g) of the Uniform Building Code (UBC) and determine whether either of those exemptions should be deleted. Such deletions could be made in the companion rulemaking proceeding on the UBC to render the proposed rules consistent and could not constitute a substantial change in the rulemaking proceeding for the UMC.

Proposed Rule 1346,2003 -- Compensating Hoods.

17. This proposed rule part alters UMC sec. 2003(i) to add a requirement for tempered air and increases the percentage of extracted air from the kitchen area to 80% of the required airflow (up from 20% in the UMC). Only the increased percentage of airflow was objected to in comments received as part of this proceeding. The SONAR asserts that this increase is required to ensure venting of air from across the cooking area. None of the commentators who objected showed that the increase is unreasonable. The Department is emphasizing one aspect of the rule on compensating hoods and has articulated a reason for its

action. The Department has shown that the proposed rule part is needed and reasonable.

Proposed Rule 1346,2108 -- Pressure Relief or Safety Valve.

18. Proposed rule part 1346.2108 amends UMC Appendix B, section 2108 to provide for pressure relief valves on hot water boilers and safety valves on steam boilers. This proposed rule part received no adverse comment, but the Department wishes to change the word "damage" in subpart 1 to "injury," for esthetic reasons. The proposed rule part is reasonable and necessary to prevent injury to persons near boilers and the change is not a substantial change.

Proposed Rule 1346.2127 -- Steam, Liquid, and Piping Systems.

19. This proposed rule part amends the UMC to establish the jurisdictional boundaries between these rules and the high pressure piping code, Minn. Rules Ch. 5230. As discussed in Finding 15, above, the jurisdiction of the Department and the Department of Labor and Industry is determined by statute. The clarification of which code governs which systems is needed and reasonable.

In addition to determining jurisdiction, the proposed rule sets out material specifications for piping systems that fall under the Department's jurisdiction. The only specification that attracted adverse comment appears in proposed rule 1364.2127, sections 2127, 2(A)(i) and 2127, 3. The first portion is identical to the UMC provision, except for the addition of the following:

Plastic pipe must not be used in any service of 120 degrees Fahrenheit or more.

Section 2127, 3 of the UMC is altered by the Department to permit the use of polybutylene piping or tubing of SDR-11 which conforms to specification ASTM D 3309 in piping systems. The temperature restriction of 120 degrees Fahrenheit placed on these piping systems is repeated in this portion of the proposed rules.

The original language in section 2127, 3 of the UMC provides a series of ratios of temperature to pressure for which conforming polybutylene pipe or tubing is approved for use. The ratios are as follows:

TEMPERATURE (OF)	PRESSURE (PSI)
73	200
180	100
200	80

Clearly, the UMC has approved use of polybutylene pipe at temperatures exceeding 1200 Fahrenheit. These proposed rules govern only systems with

a design pressure of 30 psi or less. See, Finding 15, supra. If the UMC temperature table were followed, it would seem that the temperature restriction, if altered, should be raised to something above 2000 Fahrenheit, not lowered to 1200 Fahrenheit.

The SONAR is silent on the reasons for choosing 1200 Fahrenheit as an upper limit on the temperature for polybutylene piping systems. The Department cited no facts at the hearing or in post hearing comment to show a rational relationship between the temperature limitation and the intended outcomes of the proposed rules.

This restriction was vigorously opposed by Wirsbo Company, Infloor Heating Systems, Vanguard Plastics, Inc., Floor Systems Distributor, Inc., Gyp-crete Corporation, the Plastics Pipe Institute, and Trio Sales Co., Inc. These entities submitted voluminous data that tends to show polybutylene pipe that conforms to ASTM D 3309 is capable of safely exceeding the 1200 Fahrenheit limitation in building applications requiring less than 80 psi of pressure. The commentators suggested that, in heating applications, the design temperature requires an upper limit of, at minimum, 1400 Fahrenheit. The evidence in the rule hearing record, while not conclusive, suggests that the upper temperature limit for polybutylene piping is higher yet, at the low pressures within the jurisdiction of these proposed rules.

The Administrative Law Judge in a rulemaking proceeding is required to make a "'searching and careful, inquiry of the hearing record to ensure that the agency action has a rational basis." *Manufactured Housing Institute v. Peterson*, 347 N.W.2d 238, 244 (Minn. 1984). "Further, the agency must explain on what evidence it is relying and how that evidence connects rationally with the agency's choice of action to be taken." *Id.* at 244. Having conducted such an inquiry, the Judge has not discovered a rational basis for the 1200 standard. The Department has neither disclosed its evidence for the proposed rule, nor shown any connection between the temperature standard and purpose of the rule. The Department has not demonstrated the need for or reasonableness of the 1200 Fahrenheit standard and this failure constitutes a defect in the proposed rule part.

The evidence in the hearing record does not establish any particular temperature (other than the ratios recited in this Finding) above which polybutylene pipe conforming to specification ASTM D 3309 cannot be used. To cure the defect found in the proposed rule part, the Department must delete the last sentence of proposed rule 1346.2127, section 2127, 2(A)(i). In proposed rule 1346.2127, section 2127, 3 of the UMC, the Department may cure the defect by replacing the proposed language with the following:

3. Hot water piping systems may be constructed of polybutylene pipe or tubing of SDR-11 conforming to specification ASTM D 3309.

In the alterative, the Department may opt to leave the UMC unamended with respect to section 2127, 2(A)(i) and section 2127, 3. Using either option, the Department can rely upon the express statutory authority of

Minn. Stat. 16B.61, subd. 1 to adopt a uniform code, without making a specific finding with respect to polybutylene pipe and use as a standard the existing language of the UMC which sets ASTM D 3309 as the standard in piping systems. The conflicting language in the unamended UMC would

not take precedence over the original jurisdictional statement in this proposed rule part. The standard, as set forth in the UMC, is needed and reasonable to establish a minimum standard for the use of polybutylene piping and tubing for use in piping systems. The changes were fully discussed at the hearing and in post hearing comment. Neither of the suggested changes constitute a substantial change.

Proposed Rule 1346,2133 -- Table 21-C.

20. Proposed Rule 1346.2133 amends table 21-C of Appendix B of the UMC. The Department noted in an errata sheet that the wrong table 21-C was published and is amending the proposed rule part by substituting the correct table 21-C. No one objected to the replacement of the new table 21-C for the published version. This change does not constitute a substantial change and is needed and reasonable.

Proposed Rule 1346,2215 -- Liquified Petroleum Gas Facilities Piping.

21. This proposed rule would have deleted the UMC provisions contained in Appendix B, section 2215 regarding liquified petroleum (LP) gas facilities and piping. William Mahre of Suburban Gas Company and the Minnesota Propane Gas Association suggested the existing language of the UMC be retained, except for the sixth and seventh paragraphs, which would be deleted. A further sentence would also be added which would read as follows:

LP gas appliances, LP gas applications, and installations must be in accordance with the rules of the Minnesota State Fire Marshal and this code.

The Department agreed to these suggestions at the hearing. The alteration of the proposed rule will retain needed language protecting the health and safety of propane users and the general public. Deleting paragraphs six and seven will permit the continued placement of LP facilities and piping below grade (underground) and allow existing below grade LP facilities to be serviced. Since LP usage is widespread in Minnesota and thousand of users would be affected by prohibiting below grade LP facilities, the deletion of those paragraphs is reasonable. These changes do not constitute a substantial change and are both needed and reasonable.

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

CONCLUSIONS

1. That the Department gave proper notice of the hearing in this matter.

2. That the Department has fulfilled the procedural requirements of Minn. Stat. SS 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule.

3. That the Department has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. SS 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i)(ii), except as noted at Finding 13.

4. That the Department has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. SS 14.14, subd. 2 and 14.50 (iii), except as noted at Finding 19.

5. That the amendments and additions to the proposed rules which were suggested by the Department after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. sec. 14.15, subd. 3, and Minn. Rule 1400.1000, Subp. 1 and 1400.1100.

6. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusions 3 and 4 as noted at Findings 13 and 19.

7. That due to Conclusions 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. sec. 14.15, subd. 3.

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

9. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

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

RECOMMENDATION

It is hereby recommended that the proposed rules be adopted except where specifically otherwise noted above.

Dated: March 29 1990.

STEVE M. MIHALCHICK

Administrative Law Judge