

Code)

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 written comments were received after the record closed in this matter and 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, 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 elevator construction, operation and maintenance, and put in its place the 1987 edition of the American National Standard Safety Code for Elevators and Escalators A17.1-1987, the A17.1a-1988 supplement, and the A17.3-1986 supplement (hereinafter, "ANSI"). In addition, the proposed rules specify variances from the national code; set additional standards for elevator construction and operation; require permits for any work to be performed on elevators; establish tests; and set procedures to followed in case of accidents.

Statutory Authority.

8. In its Statement of Need and Reasonableness (SONAR), the Department cites Minn. Stat. sec. 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 SONAR, the Department stated that the effect of the proposed rules on small business was evaluated. No reporting requirements, except in the case of accidents, are imposed by the rules. In any event, the reporting requirement established by the rule is minimal and cannot be reduced without eliminating the requirement. The Department considered reduction of compliance inappropriate since the rules establish a minimum standard intended to protect the health and safety of the public while using elevators. Similarly, exempting small businesses from the proposed rule is inappropriate since the rules are intended to be a minimum standard. The Department has concluded that 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. 2 requires proposers of rules requiring the expenditure of public funds in excess of \$100,000 per year by local public bodies to publish 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 1305,5102 -- Scope.

13. Proposed Rule 1305.5102 sets the scope of the proposed rules as applying to all new and existing installations of elevators and related devices. Further, the proposed rule part delegates administrative responsibility for Part XXI of ANSI (governing wheelchair and chair lifts in private residences) to municipal building officers. Also, the Department of Labor and Industry is exempted by statute from enforcement of these rules in cases of owner-occupied dwellings of four units or less. Municipal enforcement is specifically authorized by Minn. Stat. 16B.62, subd. 1. The proposed rule part is needed and reasonable to clearly denote municipal administrative authority.

Proposed Rule 1305,5103 -- ANSI Code Adopted by Reference.

14. This proposed rule part adopts the American National Safety Code for Elevators and Escalators A17.1-87, supplement A17.1a-1988 and ANSI A17.3-1986, with alterations by these proposed rules, as the substantive rule on elevators, escalators and related devices. This adoption by reference is specifically authorized by Minn. Stat. sec. 16B.61, subd. 1.

The statute requires that the code so adopted be "based on the application of scientific principles, approved tests and professional judgment." Minn. Stat. sec. 16B.61, subd. 1. The ANSI code meets these requirements. The Department has stated that the adopted code is not subject to change without prior deliberation. SONAR, at 3. Minn. Stat. sec. 16B.64, subd. 3, requires only that the adopted code be filed with the

Secretary of State and that a complete copy of the code be kept on file in the office of the Commissioner. The Department is exempted from distributing the adopted reference (or incorporating the actual text of that reference) within its proposed rule. Minn. Stat. sec. 16B.64, subd. 2.

B. James Berg, Director of Code Enforcement for the Minnesota Department of Labor and Industry commented that the Department should adopt by reference supplement A17.1b-1989 in addition to the other parts of the ANSI code to bring the proposed rule up to date prior to its adoption. The Department has not chosen to incorporate this latest update into the rulemaking process. The Department is not required to adopt rule provisions and is free to decline to do so. The Department has met the requirements of Minn. Stat. sec. 16B.64 in this proposed rule part. The incorporation by reference of this proposed rule part is needed, reasonable and specifically authorized by statute.

Proposed Rule 1305.5104 -- Definitions.

15. Subpart (a) of proposed rule 1305.5104 defines "ANSI Code" as the ANSI/ASME A17.1 Code-1987, with supplement A17.1a-1988 and ANSI A17.3-1986, Safety Code for Elevators and Escalators, an American National Standard published by the American Society of Mechanical Engineers. Owing to the incorporation by reference of this document,

defining the shortened name "ANSI Code" is needed and reasonable.

Subpart (b) defines "authority having jurisdiction" as the building code enforcement agency of local government where the code is enforced or

the Department of Labor and Industry, depending on whether the work site is within or outside the enforcement sphere of local government. The Administrative Law Judge suggests that the Department add "by local government" after "where the code is enforced" to clarify the exact scope of local jurisdiction. The existing language does not constitute a defect and this Subpart is needed and reasonable to define a term which appears frequently throughout the proposed rules. Should the Department alters the definition, the new language would not constitute a substantial change.

Proposed Rule 1305,5105 -- Permits.

16. Proposed rule 1305.5105 was not objected to by any of those who submitted written comments or testimony at the hearing. The proposed rule part requires permits for work on, or operation of, elevators, escalators or other related devices, except when the device is installed in a dwelling unit for the sole use of the occupant. In that instance, no permit is required. Subpart (f) specifies that a fee shall accompany any application to obtain a permit under these rules. This Subpart does not set the fee, rather, the authority having jurisdiction sets the appropriate fee. This method of requiring and setting the appropriate fee is authorized by Minn. Stat. sec. 16B.71, which references the "building permit fees . . . the inspecting municipality customarily imposes for its administration and enforcement of the code." In the Department's errata sheet, a change is listed to delete the word "major" from "major alterations" in Subpart (a). The Department justifies this deletion on the ground that there is no definition of "major alterations" in the proposed rules. The deletion of "major" does not significantly alter the meaning of the rule, will reduce confusion over the rule's meaning and may discourage attempts to evade the permit requirement. Proposed rule 1305.5105 is needed and reasonable. The change in the rule part does not constitute a substantial change.

Proposed Rule 1305,5106 -- Inspections, Tests, and Approvals.

17. This proposed rule part establishes the procedure for approving plans, conducting inspections, conducting tests, issuing certificates of approval and authorizing limited use of elevators prior to completion of the surrounding building. No one objected to any of the provisions contained in this proposed rule part. Proposed rule 1305.5106 is needed and reasonable to establish a process for testing and inspecting elevators.

Proposed Rule 1305,5107 -- Accidents.

18. Proposed rule part 1305.5107 requires reporting of any accident involving an elevator or related device and establishes a procedure to investigate the particular device involved and remove that device from service until its reuse is approved by the authority having jurisdiction. No one objected to this proposed rule part. Proposed rule 1305.5107 is needed and reasonable to protect public safety and remove unsafe equipment from use.

Proposed Rule 1305,5108 -- Design; Special Provisions.

19. This portion of the proposed rules sets particular requirements that must be incorporated into the design of elevators or related devices, as applicable. The Department has altered the last sentence in Subpart (a) of proposed rule 1305.5108 to add the word "are." In Subpart (e)(3), the Department has deleted UBC and changed the reference to section 5108(e)(6), as being the correct cross reference. These changes are made to clarify effect or correct grammar and do not constitute a substantial change. The matters governed by this proposed rule part range from the type of carpeting acceptable for elevator use to the length of delay between the "hall call" (indication of elevator arrival) and the closure of the elevator doors. No objections were made to these varied design provisions. Proposed rule 1305.5108 is needed and reasonable to set particular requirements not already created by the ANSI code.

Proposed Rule 1305,5112 -- Amendments to ANSI A17.1-1987.

20. Proposed rule 1305.5112 sets forth provisions that are to be changed from the present language appearing in the ANSI Code. B. James Berg, Director of Code Enforcement, Department of Labor and Industry, summarized the comments of many fire prevention officials who suggest that ANSI A17.1-1987 211.3d be changed to permit the fire chief, rather than the authority having jurisdiction, to direct placement of lock boxes containing keys for key-operated elevators. Further, the fire chief would determine what key would open the lock box. This suggestion stems from the need, in the event of fire, to have each elevator controlled by the fire department. The Department has agreed to follow this suggestion. In its posthearing comment submitted by Mr. Berg, the Department has proposed that Rule 211.3d be amended to place lock box location under the jurisdiction of the local fire chief. Further, the Department proposed to change Rule 211.3d to grant the right of approval of the key used in lock boxes to the local fire chief. Although these amendments could create problems in implementing the elevator rules insofar as the fire departments have no enforcement authority under the proposed rules, granting local fire chiefs the authority to locate and regulate lock boxes is needed and reasonable. Local fire departments must be able to find and use the lock box in an emergency and this provision ensures efficiency by permitting local uniformity of lock box operation. The proposed amendment was fully discussed at the hearing and in the comments and the change does not constitute a substantial change.

Fire protection officials also suggested that ANSI A17.1-1987 rule 102.2 be amended to not require use of automatic disconnect of the main power supply when sprinklers are in the machine room only, the sprinklers are equipped with cycling heads (on/off type), and the elevator has Phase I emergency recall. Their rationale is that power need not be disconnected from the elevators where the sprinklers are activated on only an intermittent basis. The damage to electrical components in the machine room would be minimized and the sprinkler would automatically deactivate. Under the system required by ANSI A17.1-1987 rules 102.2 and 211.3, the sprinklers would remain on in the machine room until emergency

personnel arrived to shut them off and power would remain off to the elevators until manually reactivated. The Department, through Mr. Berg, has adopted the proposed amendment. Following the new language, as opposed to the model code, is appropriate because it permits the use of available technology to decrease damage in the event of fire, without increasing risk factors to persons in the building during the emergency. Under the Department's approach, in the event of fire in the machine room, the main power source will not be disconnected from the elevators, but the elevators would be removed from normal service. The sprinklers would operate only until the heat sensor indicated a drop in temperature below a pre-set level. Less water would be used, reducing the risk of damaging components in the machine room. The proposed rule, as amended, is needed and reasonable. The proposed change was discussed at the hearing and does not constitute a substantial change.

The Department proposes to amend ANSI A17.1-1987 rule 208.1 to retain the prohibition against winding drum machines present in the existing rules. No one objected to this provision; it is needed and reasonable; and the amendment does not constitute a substantial change.

Proposed Rule 1305,5113 -- Inclined and Vertical Wheelchair Lifts.

22. Proposed rule 1305.5113 states that wheelchair lifts do not meet the accessibility requirements of chapter 1340 of Minnesota Rules. However, the Legislature has expressly approved the use of wheelchair lifts in public buildings. Minn. Stat. sec. 16B.61, subd. 5(g) (Supp. 1989) states:

(g) Equipment allowed. The code must allow the use of vertical wheelchair lifts and inclined stairway wheelchair lifts in public buildings. An inclined stairway wheelchair lift must be equipped with light or sound signalling device for use during operation of the lift. The stairway or ramp shall be marked in a bright color that clearly indicates the outside edge of the lift when in operation. The code shall not require a guardrail between the lift and the stairway or ramp. Compliance with this provision by itself does not mean other handicap accessibility requirements have been met.

Building accessibility requirements of Minn. Rules ch. 1340 appear to apply to most buildings used by the public, which includes public buildings. While the proposed rule does not prohibit the use of wheelchair lifts, the fact that it does not allow them to be used to comply with any accessibility requirements conflicts with the statutory requirement, at least as to public buildings.

Under Minn. Stat. sec. 645.16, when interpreting statutes, each word must be interpreted to have meaning, if possible. The only interpretation that gives meaning to the entire last sentence of the statute is that wheelchair lifts may be used to meet certain

accessibility requirements.

The only handicap accessibility requirements that wheelchair lifts could meet are: 1) accessibility to all levels of the floor of building' access and 2) accessibility of other stories or levels under Minn. Rules 1340.0300, subps. 3 and 4. The Department's exclusion of wheelchair lifts from meeting these standards operates to prohibit these devices in public buildings despite the statutory permission to use these devices. Thus, the rule is invalid because it conflicts with the statute. J.C. Penny Co., Inc. v. Comm'r of Economic Security, 353 N.W.2d 243 (Minn.App. 1984). To cure this defect, a provision excluding public buildings must be added.

Because the Legislature has approved the use of wheelchair lifts in public buildings, it would seem that they would also be acceptable in private buildings. However, the SONAR does not provide any reason or cite any authority upon which to base its exclusion of wheelchair lifts from fulfilling the requirements of chapter 1340 in private buildings used by the public. The Department has not shown that barring wheelchair lifts from meeting the requirements of chapter 1340 is needed or reasonable. The Department must delete the second sentence of proposed rule 1305.5113 to cure this defect.

The Department must change an additional section of proposed rule 1305.5113 in light of the provision of Minn. Stat. sec. 16B.61, subd. 5(g), which states that "the code shall not require guardrail between the lift and the stairway or ramp." The Department is amending ANSI A17.1 rule 2001.1a to require such lifts to be "separated from the ramp or stair by a solid guard rail not less than 42 inches in height. Handrails complying with the requirements of the UBC Section 3306(j) must be provided on the ramp or stairway side of the guardrail." The Department has not shown that this provision is needed and reasonable, particularly in the face of the statutory prohibition against such a requirement with regard to public buildings. The Department must delete the proposed rule amending ANSI A17.1 rule 2001.1a to cure this defect.

Proposed Rule 1305,5118 -- Existing Installations.

23. This proposed rule part establishes rights, obligations and procedures under which devices presently operating may continue to do so and what must be done in the event of damage or unsafe conditions. No objections were raised to this proposed rule part. The Department seeks to amend the language of the proposed rule to include language presently in the existing elevator rule. The new language would define "material change" for the purpose of determining what code must be complied with when a device is altered. The new language does not constitute a substantial change. The proposed rule, as amended, is needed and reasonable to permit older devices to continue in operation without constant remodeling, so long as the devices remain in a safe condition.

Other Comments.

24. Additional changes were suggested by the Department to ANSI

A17.1-1987 Rule 110.13 (Entrances, Swing Type); Rule 210.1a (Types of Operating Devices); and, Rules 204.2d, 301.7, 1603.6, 1708.3b, 1708.3c

and 1803.4 (prohibiting side emergency exits). None of these changes were objected to. The prohibition against side emergency exits is retained from the existing rules. None of these changes constitute a substantial change.

Raymond Albrecht objected to the minimum size provisions for wheelchair lifts contained in ANSI A17.1-1986. He related his experience with a wheelchair lift with interior dimensions of 33 inches by 50 inches. Mr. Albrecht suggests that an additional 8 inches of clearance is needed for those who cannot alter the position of the foot supports on power wheelchairs. This might also permit an attendant to ride the lift with the chair-bound passenger. The Department responded that the proposed minimum dimensions are identical to those set forth in the uniform code. The Administrative Law Judge is sympathetic to the difficulties presented to individuals when using wheelchair lifts. The Judge recognizes that, in many instances, a few inches can render an elevator, a wheelchair lift, or an entire building inaccessible. Nevertheless, the need for a uniform rule is clear. When lift manufacturers and those who manufacture wheelchairs can refer to a common frame of reference, conflicts of size can be reduced. The uniform minimum size is needed and reasonable.

Judd Jacobson of Minnesota Home Elevator objects to the provision contained in ANSI A17.1a, Rule 2000.10a permitting key operation of elevators for the handicapped. Mr. Jacobson commented that this objection is supported by the Community Living Committee of the Minnesota State Council on Disability. The Department responded that the key operation requirements are reasonable and necessary to maximize elevator availability and prevent vandalism. Mr. Judd bases the objection to key operation on the physical inability of some persons to use the key system. While total accessibility to all building space with the least possible inconvenience is a worthwhile goal, the Department has articulated sufficient facts to demonstrate that permitting key operation is needed and reasonable.

Michael Carlson of Medical Aids, Inc. proposed language which would permit the use of chair lifts in public buildings. The Department opposes this suggestion, asserting that such chair lifts are not safe for use in such settings. Chair lifts do not come within the scope of Minn. Stat. sec. 16B.61, subd. 5(g) and, therefore, the Department is not required to allow the use of such devices. The Department is entitled to exercise its expertise, within the limits of its statutory mandate and the rule's necessity and reasonability. Mr. Carlson has not rebutted the Department's finding that such devices are not safe in public settings. Further, Mr. Carlson has not shown that such devices will assist building owners in meeting the requirements of Minn. Rule Chapter 1340. The prohibition of chair lifts in public buildings is 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 22.

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 22.

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 Finding 22.

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 29th 1990.

STEVE M. MIHALCHICK
Administrative Law Judge