

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Petition of the Minnesota  
Pipe Trades Association for a Declaration  
that the Interim Approval for Air Admittance  
Valves Issued by the Commissioner of the  
Minnesota Department of Health is an  
Unadopted Rule

**AMENDED ORDER**

By Petition filed July 8, 2005, the Minnesota Pipe Trade Association (MPTA or "Petitioner") seeks an order directing the Department of Labor and Industry ("the Department") to cease enforcement of an unadopted rule. The Department filed a written response on July 22, 2005. On that same date, the Administrative Law Judge invited Studor, Incorporated (Studor), a North American distributor of air admittance valves (AAVs), to submit a response because of Studor's direct involvement in seeking the Interim Approval at issue in this matter. On July 27, 2005, Studor filed a Petition to Intervene and that petition was granted. On August 12, 2005, Studor filed a response to the Petition. On September 2, 2005, the Minnesota Plumbing, Heating and Cooling Contractors (MPHCC) and the Minnesota Mechanical Contractors Association (MMCA) requested permission to intervene. The parties submitted letter briefs on whether the intervention should be allowed, and the ALJ granted the intervention requests of MPHCC and MMCA on September 19, 2005. The Petitioner responded to the responses of the Department and Studor on September 22, 2005. Oral argument was heard on September 29, 2005. The record closed on October 6, 2005, with the filing of correspondence.

Frank Vogl and Edward P. Sheu, Attorneys at Law, Best & Flanagan, LLP, 225 South Sixth Street, Suite 4000, Minneapolis, MN 55402-4690, represented the Petitioner, and Intervenor MPHCC and MMCA. Jocelyn F. Olson, Assistant Attorney General, 1200 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2130, represented the Department of Labor and Industry. Gary A. Van Cleve, Attorney at Law, Larkin, Hoffman, Daly & Lindgren, Ltd., 1500 Wells Fargo Plaza, 7900 Xerxes Avenue South, Minneapolis, MN 55431-1194, represented Intervenor Studor.

Based upon all of the filings by the parties, the oral argument, and for the reasons set out in the Memorandum which follows,

IT IS HEREBY ORDERED THAT:

1. The Department of Labor and Industry cease enforcement of the document entitled "Interim Approval for Air Admittance Valve as an Alternate Fixture, Appurtenance, Material or Method."
2. The Department publish this decision in the State Register.

3. The Department shall bear the costs associated with this proceeding.

Dated: January 3, 2006

/s/ Steve M. Mihalchick  
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STEVE M. MIHALCHICK  
Administrative Law Judge

### NOTICE

This decision is the final administrative decision under Minn. Stat. § 14.381. It may be appealed to the Minnesota Court of Appeals under Minn. Stat. §§ 14.44 and 14.45.

### MEMORANDUM

The Minnesota Pipe Trades Association has brought a petition before the Office of Administrative Hearings pursuant to Minn. Stat. § 14.381. Petitioner is an association of nine pipe trade unions representing employees who work in the plumbing industry in the state of Minnesota. The Petition maintains that the “Interim Approval for Air Admittance Valve as an Alternate Fixture, Appurtenance, Material or Method” (“Interim Approval”) issued by the Department of Health in October of 2004 is an unadopted rule. The Petition requests that the Administrative Law Judge order the Department of Labor and Industry to cease enforcement of the Interim Approval.

The Department and Studor oppose the Petition and argue that the Interim Approval of the AAV was an appropriate determination made under the provision in the Plumbing Code that allows for the approval of “alternate” fixtures, material or methods. According to the Department and Studor, the Interim Approval of AAVs is not an unadopted rule but rather the legal result of the application of a duly adopted rule provision to specific facts under which alternate products or methods may be approved.

### Regulatory Background

The Minnesota Plumbing Code, Minn. R. ch. 4715, prescribes minimum standards for all new plumbing installations, including additions, extensions, alterations and replacements connected to a water or sewage disposal system. The Code sets forth the principles of proper plumbing methods, specifies acceptable materials, and outlines installation procedures that will ensure sanitary conditions. Until May 16, 2005, the Plumbing Code was administered by the Minnesota Department of Health (MDH). After that date, responsibilities relating to the Plumbing Code were transferred to the Department of Labor and Industry.<sup>1</sup>

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<sup>1</sup> Department of Administration Reorganization Order No. 193.

Minn. R. 4715.0330, subp. 1, provides that the “administrative authority” may approve the use of “alternate” fixtures, appurtenances, materials and methods that are not “expressly approved” or “expressly prohibited” by the Code. The “administrative authority” is defined as either: 1) the governing body of a unit of government that adopts and maintains a comprehensive plumbing enforcement program that includes enforcement of the Minnesota Plumbing Code; or 2) the head of the state agency administering the Code.<sup>2</sup>

To obtain approval of an “alternate” fixture or material, a person must, prior to installation or use, submit to the administrative authority “such proof as may be required to determine whether such fixture, appurtenance, material or method is of such design or quality, or both, as to appear to be suitable, safe, and sanitary for the use for which it is intended.”<sup>3</sup> If the administrative authority determines that it does appear to be suitable, safe, and sanitary for the use which it is intended, the administrative authority may permit such use.

### **Factual Background**

Studor is a North American distributor of Air Admittance Valves (AAVs). AAVs are devices used as vent terminals for individual and branch fixtures in plumbing drainage systems.<sup>4</sup> AAVs are an alternative to the traditional plumbing method of venting each plumbing fixture out through the roof of the building. Such “open pipe venting” provides for multiple openings to allow air into a building’s plumbing system to avoid air pressure differences that may cause the loss of water from water trap seals and may allow sewer gas into the building. AAVs, on the other hand, are one-way valves installed on plumbing drainage systems that allow air to enter the plumbing drainage system without a vent extended to the outside air.<sup>5</sup> The AAV is designed to allow air to enter the plumbing system when a negative pressure develops in the system, preventing siphonage of water from water trap seals. The device is designed to close by gravity under no-flow conditions or under positive internal pressure, i.e., sewer backup, preventing sewer gas from escaping into the building.<sup>6</sup> However, every AAV system does have at least one open pipe vent extended through the roof of the building to relieve positive pressure to prevent forcing of trap seals through back pressure.<sup>7</sup> According to Studor, the AAV is a cost-effective alternative to labor-intensive and expensive venting systems that rely exclusively on open pipe vents.<sup>8</sup>

AAVs are not expressly approved for use by the Minnesota Plumbing Code. On January 23, 2001, Studor President Jack Beuschel appeared before the Minnesota Department of Health’s Plumbing Advisory Council to request approval of the AAV as an alternate method or material under Minn. R. 4715.0330.<sup>9</sup> The Advisory Council makes recommendations regarding new products, materials and methods of

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<sup>2</sup> Minn. R. 4715.0100, subp. 2.

<sup>3</sup> Minn. R. 4715.0330, subp. 2.

<sup>4</sup> Department’s Ex. B.

<sup>5</sup> Report of the Administrative Law Judge, Finding No. 77 at p. 22 (February 3, 2003); Beuschel Aff. ¶ 2.

<sup>6</sup> *Id.*

<sup>7</sup> Beuschel Aff. ¶ 2.

<sup>8</sup> Beuschel Aff. ¶ 3.

<sup>9</sup> Leitheiser Aff. ¶ 7.

plumbing.<sup>10</sup> The Advisory Council noted concerns about testing of the product and tabled its decision to review submitted material.<sup>11</sup> On May 22, 2001, Beuschel again appeared before the Advisory Council seeking approval of the AAV.<sup>12</sup> The Advisory Council expressed concerns about the ability of the AAV to seal properly under static conditions. The Advisory Council denied Studor's request for product approval.<sup>13</sup> Studor subsequently submitted to the Advisory Council third-party testing results and again requested the AAV be approved as an alternate material under Rule 4715.0330.<sup>14</sup>

By letter dated October 26, 2001, then Commissioner of Health Jan Malcolm denied Studor's request for approval of the AAV as an alternate material or method under Rule 4715.0330.<sup>15</sup> Commissioner Malcolm cited to the requirements in the Code that each vent terminal be extended to the outer air (Rule 4715.0220 (I))<sup>16</sup> and that vent pipe terminals pass through the roof (Rule 4715.2530, subp. 2) as support for MDH's interpretation that the installation of an AAV is "something expressly prohibited by the Minnesota Plumbing Code." According to Commissioner Malcolm, a rule revision would be required to approve use of AAVs in jurisdictions where the Plumbing Code applies. Commissioner Malcolm informed Studor that the next planned revision of the Minnesota Plumbing Code would occur in 2002.

In October of 2002, MDH did propose amendments to the Minnesota Plumbing Code.<sup>17</sup> MDH declined, however, to make any revisions to the rules to address the use of AAVs. A rulemaking hearing before Administrative Law Judge Kathleen Sheehy was held on December 6, 2002. Neither the rule amendments as proposed nor the rule amendments adopted provided for the use of AAVs. However, a representative of Studor appeared at the hearing and presented testimony and evidence about the suitability and safety of AAVs. In its post-hearing comments, MDH listed several grounds for rejecting any proposal to amend the rules to permit the use of AAVs including concerns about AAVs failing and allowing the release of sewer gas into a building because the "various testing and listing standards do not assure us that AAVs are as safe as traditional venting systems."<sup>18</sup>

Administrative Law Judge Kathleen Sheehy issued her Rule Report on February 3, 2003. ALJ Sheehy found that because one of the principles of the Plumbing Code requires venting of each terminal to the air outside the building, it "precludes the use of AAVs as alternative methods of venting the plumbing system."<sup>19</sup> ALJ Sheehy also found, however, that the record as a whole supported the conclusion that AAVs that are properly tested to ASSE/ANSI standards function in a manner that is as safe as the traditional method of open pipe venting and she strongly recommended that MDH

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<sup>10</sup> Minn. R. 4715.0330, subp. 4.

<sup>11</sup> Beuschel Aff. ¶ 8 and Ex. D.

<sup>12</sup> Beuschel Aff. ¶ 9.

<sup>13</sup> Beuschel Aff. ¶ 9 and Exs. F and G.

<sup>14</sup> Beuschel Aff. Ex G.

<sup>15</sup> Letter submitted by Petitioner and received at oral argument hearing on September 29, 2005.

<sup>16</sup> Subsequently renumbered as Minn. R. 4715.0200 (I).

<sup>17</sup> 27 State Register 582 (October 21, 2002).

<sup>18</sup> Hansen Aff. Ex. C, Report of the Administrative Law Judge, Finding No. 92 at p. 25 (February 3, 2003).

<sup>19</sup> Hansen Aff. Ex. C, Report of the Administrative Law Judge, Finding Nos. 84 and 85 at p.24 (February 3, 2003).

reconsider its position on AAVs.<sup>20</sup> On February 5, 2003, the Chief Administrative Law Judge issued his Report in which he stated the following regarding the use of AAVs:

AAVs are not allowed under the existing plumbing code, and the department did not propose to allow them in the amended code, either as an approved or alternate material or method. In addition, the existing code, at part 4715.0200 (I), contains a provision, which, as a practical matter, precludes the use of AAVs as alternative methods of venting. That provision is not proposed for amendment in this proceeding.<sup>21</sup>

Approximately 15 months later, on May 13, 2004, the MDH issued the “Air Admittance Valve – Alternative Material Approval by the Commissioner of Health, May 11, 2004.” After several revisions of the language, the Commissioner of Health announced on October 8, 2004, that she “along with manufacturers of air admittance valves have arrived with an agreement to allow the use of air admittance valves in Minnesota.”<sup>22</sup> The agreement took final form as an “Interim Approval” on October 29, 2004. The Interim Approval is in effect “until this matter is reviewed for a possible rule revision in the Minnesota Plumbing Code.”

## Legal Analysis

Minn. Stat. § 14.381, subd. 1(a) allows for the filing of a petition seeking an order of an administrative law judge that an agency is “enforcing or attempting to enforce a policy, guideline, bulletin, criterion, manual standard, or similar pronouncement as though it were a duly adopted rule.” Subdivision 1(b) of the statute provides that “an agency determination is not considered to be an unadopted rule when the agency enforces a law or rule by applying the law or rule to specific facts on a case-by-case basis.” If the administrative law judge finds that the agency is enforcing an unadopted rule, the administrative law judge must direct the agency to cease enforcement of the unadopted rule.<sup>23</sup>

A rule is defined as “every agency statement of general applicability and future effect . . . adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.”<sup>24</sup> Generally, when an agency’s interpretation of a statute or rule coincides with the plain meaning of that statute or rule, the agency is not deemed to have engaged in rulemaking.<sup>25</sup> In other words, if an agency statement is consistent with the plain meaning of the statute interpreted, the agency action is authorized by the statute itself and the fact that no rule was adopted does not render the statement invalid.<sup>26</sup> However, when an agency’s announced policy

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<sup>20</sup> *Id.*, Finding No. 102.

<sup>21</sup> Hansen Aff. Ex. D Report of the Chief Administrative Law Judge (February 5, 2003).

<sup>22</sup> Hansen Aff. Ex. B.

<sup>23</sup> Minn. Stat. § 14.381, subd. 2.

<sup>24</sup> Minn. Stat. § 14.02, subd. 4.

<sup>25</sup> *Cable Communications Board v. Nor-west Cable Communications Partnership*, 356 N.W.2d 658, 667 (Minn. 1984).

<sup>26</sup> *Sellner Manufacturing Co. v. Commissioner of Taxation*, 202 N.W.2d 886, 888-89 (Minn. 1972); *Good Neighbor Care Centers v. Dep’t of Human Services*, 428 N.W.2d 397, 402 (Minn. App. 1988), *review denied*, (Minn. 1988).

is inconsistent with the statute or a rule, the courts have often invalidated that policy.<sup>27</sup> And where the policy makes new law without the public input required by rulemaking under the APA, the policy will be invalidated.<sup>28</sup>

The question presented is whether the Interim Approval issued by the MDH is an unadopted rule or whether it meets the criteria of Minn. Stat. § 14.381, subd. 1(b) by applying an already existing formally adopted rule (4715.0330) to specific facts on a case-by-case basis. In other words, is the Interim Approval an unadopted rule or is it an authorized application of Rule 4715.0330 to specific facts?

The alternate fixture approval procedure set forth in the Minnesota Plumbing Code at Minn. R. 4715.0330, subds. 1 and 2 provides as follows:

Subpart 1. Approval of alternate fixtures. The administrative authority may approve the use of fixtures, appurtenances, materials, and methods of a type not expressly approved, nor expressly prohibited by, this code after determination that such fixtures, appurtenances, material, or method is of such design or quality, or both, as to appear to be suitable, safe, and sanitary for the use for which it is intended.

Subpart 2. Proof of suitability of fixture. Any person desiring to install or use a fixture, appurtenance, material, or method of a type not expressly authorized nor expressly prohibited by this code shall, prior to such installation or use, submit to the administrative authority such proof as may be required to determine whether such fixture, appurtenance, material, or method is of such design or quality or both, as to appear to be suitable, safe, and sanitary for the use for which it is intended. If the administrative authority determines that it does appear to be suitable, safe, and sanitary for the use which it is intended, it may permit such use.

The Petitioner argues that the Commissioner of Health did not have the authority to approve AAVs as an alternate fixture or material because the Plumbing Code expressly prohibits the use of AAVs. The Minnesota Plumbing Code includes 23 principles entitled “Basic Plumbing Principles.”<sup>29</sup> The ninth principle, (item I), states as follows: “Each vent terminal shall extend to the outer air and be so installed as to minimize the possibilities of clogging and the return of foul air into the building.” Petitioner contends that since AAVs do not vent to the outer air as required by the Code, they are expressly prohibited and cannot be used as an alternative method.<sup>30</sup> According to the Petitioner, any vent system that does not comply with the basic principles of the Code must be considered “expressly” prohibited.

The Department and Studor argue that AAVs are not expressly prohibited by the Code. The Code contains express prohibitions of certain types of plumbing devices, but

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<sup>27</sup> *Swenson v. State Department of Public Welfare*, 329 N.W.2d 320, 324 (Minn. 1983).

<sup>28</sup> *Johnson Brothers Wholesale Liquor Co. v. Novak*, 295 N.W.2d 238, 243 (Minn. 1980).

<sup>29</sup> Minn. R. 4715.0200.

<sup>30</sup> The Petitioner cites to other provisions of the Code that also prescribe open pipe venting to outside air, such as Minn. R. 4715.0920 (requiring that all traps be protected from siphonage and back pressure by properly installed vent pipes), and Minn. R. 4715.2510 (requiring trap seals be protected against siphonage and backpressure by the appropriate use of soil or waste stack or vents.)

does not mention AAVs.<sup>31</sup> According to the Respondents, what the Petitioner is really arguing is that AAVs are prohibited by implication. The alternate fixture approval rule, however, requires an express prohibition. Because AAVs are not expressly prohibited by the Code, Respondents maintain that the Commissioner had the authority to approve their use as an alternate fixture and that such approval was the end result of the Commissioner's proper application of the alternate fixture approval provision to the specific facts of this case.

After reviewing the record and considering the arguments of counsel, the Administrative Law Judge concludes that AAVs are expressly prohibited by the Plumbing Code and cannot be approved as an alternative fixture or method under Minn. R. 4715.0330. The Code expressly requires that vent terminals extend to the outer air. AAVs do not vent to the outside air. They do not comply with one of the basic principles of plumbing and therefore are expressly prohibited from being used as an alternate method.

Even if AAVs are not expressly prohibited by the Plumbing Code, the Administrative Law Judge concludes that the Interim Approval issued by the Commissioner of Health is not a permissible application of the alternate approval process set forth at Minn. R. 4715.0330. The language of Minn. R. 4715.0330 suggests that the alternate fixture approval process is meant to be applied on a case-by-case basis to the specific facts of individual requests. Subdivision 2 requires that "any person desiring to install or use a fixture" that is not expressly approved or prohibited in the Code demonstrate that the fixture appears safe for the use intended. The administrative authority may permit "such use" if it does appear safe. The process is meant to allow the approval of a request to use an alternate fixture brought by a person for a specific use. Thus, for example, if AAVs were not expressly prohibited by the Plumbing Code, it would be appropriate for the administrative authority to approve the use of an AAV in a particular building. The Interim Approval issued by MDH, however, is not the result of an individual application for a specific use. Instead, it is an "agreement" of general applicability reached after protracted negotiations between MDH, Studor and manufacturers of AAVs. The result is a general or global change to the Plumbing Code that authorizes the use of an alternate fixture or method that does not comply with existing plumbing principles set forth in the Code. Such an across-the-board change that is inconsistent with the Plumbing Code may only be accomplished by amending the rules through formal rulemaking under the Administrative Procedure Act. The alternate fixture approval process may not be used to circumvent rulemaking under the APA.

In addition, the Interim Approval does not meet the exception for unadopted rules provided for in Minn. Stat. § 14.381, subd. 1(b). Contrary to the claims of the Department, this is not a situation where the agency is applying a longstanding provision of the Plumbing Code to specific facts on a case-by-case basis. Case-by-case determinations involve specific facts applied to specific parties.<sup>32</sup> Here, the Interim Approval is an announced statement of general applicability and future effect, not a

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<sup>31</sup> See Minn. R. 4715.0960, "Traps Prohibited," and Minn. R. 4715.2420, "Prohibited Fittings and Connections."

<sup>32</sup> *In re Hibbing Taconite Co.*, 431 N.W.2d 885, 894-95 (Minn. App. 1988).

case-by-case determination. As such it meets the definition of “rule” under Minn. Stat. § 14.02, subd. 4, without having been adopted by the procedures set forth in the APA.

The ALJ concludes that the Interim Approval is an unadopted rule that may not be enforced absent formal rulemaking under the APA. The Department is ordered to cease enforcement of the Interim Approval.

S.M.M.