

**Minnesota Plumbing Board**  
**c/o Department of Labor and Industry**  
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**Saint Paul, MN 55155-4344**  
**dlc.cldboards@state.mn.us**

May 28, 2015

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

Re: In the Matter of the Proposed Rules of the Minnesota Plumbing Board Governing the **Minnesota Plumbing Code**, namely, Adoption of the 2012 Uniform Plumbing Code, with Amendments; OAH Docket No. 60-1904-32225; Revisor's ID No. R-04139 (Final Response)

Dear Judge LaFave:

This letter contains the Minnesota Plumbing Board's Final Response to comments it has received and testimony provided relative to the proposed permanent Minnesota Rules, Chapter 4714, governing the Minnesota Plumbing Code, adoption of the 2012 Uniform Plumbing Code with Amendments.

Most of the concerns raised and issues discussed in written comments received after the hearing were repetitive of comments already received and addressed by the Board's SONAR or initial Response letter. In this Final Response, the Board will address only new comments.

**I. The Board acted within its statutory authority when it selected the UPC to incorporate by reference, with amendments, into the proposed rule.**

The Board has the sole statutory authority to adopt the Plumbing Code that must be followed in Minnesota and any Plumbing Code amendments.<sup>1</sup> As stated and described in the SONAR and Response letter, the Board satisfied all applicable rules and statutes necessary to adopt the proposed rule.

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<sup>1</sup> Minn. Stat. § 326B.435, subd. 2(a)(3) (2014).

Douglas Seaton alleges that “by proposing adoption of the UPC on April 19, 2011, the MSPB unilaterally selected the UPC, without providing due notice or consideration of the IPC, and thereby prematurely adopted the rule that is presently at issue without engaging in any of the legally required rulemaking process and violated the notice provisions of Section 14.101, subd. 1, of the Minnesota Administrative Procedures Act.”<sup>2</sup> However, a motion by a board with the appropriate statutory authority to adopt a model code, with amendments, in the next rulemaking is not “adopting” a rule as that term is used in the Administrative Procedures Act.

**A. The Board did not adopt a rule at the April 19, 2011, Board meeting.**

It was clear at the April 19, 2011, Board meeting that the Board was not adopting a rule or model code. There were multiple references to that exact point at the meeting. For example, consider the discussion after the final motion was made to adopt the UPC and direct the National Code Review Committee to report any necessary changes to the Board. Before the vote on this final motion, one Board member asked if the Product and Code Review Committee still needed to meet “after the next rulemaking process.”<sup>3</sup> Board Chair Parizek responded:

Just to clarify the rulemaking process, we are currently in rulemaking.<sup>4</sup> We cannot adopt a national code in current rulemaking. It has to be done on a separate rulemaking process. We’re anticipating printing of the updated version of the Minnesota Plumbing Code in probably 2012 ready for distribution and to go through another rulemaking process for a national code, we’d be looking at a number of years out.<sup>5</sup>

Similarly, Chair Parizek testified at the April 30, 2015, hearing about both the recommendation by the National Code Committee and the April 19, 2011, Board vote. Regarding the National Code Committee recommendation, Chair Parizek stated:

The Board members present voted unanimously in favor of adopting a Model Plumbing Code. It was not noted in the motion, but the Board was well aware that adoption of a national code can only be accomplished through proper rulemaking, and the intent was to move forward down this path.<sup>6</sup>

Regarding the April 19, 2011, Board meeting, Chair Parizek stated:

After various motions and discussion, a motion was passed to adopt the Uniform Plumbing Code with state amendments. Again, the Board was well aware that this can only be done through proper rulemaking. The vote was 9 in favor, 1 opposed, with an

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<sup>2</sup> Douglas Seaton comment dated May 20, 2015, page 1.

<sup>3</sup> Exhibit 64A with Lungstrom edits, page 39, lines 26 to 28.

<sup>4</sup> Chair Parizek was referring to the ongoing rulemaking regarding amendments to chapter 4715 before the proposed adoption of a model code, and to the ongoing rulemaking regarding plumbing licensing, certification, registration, and continuing education. *See* 35 SR 1583 (May 10, 2010); 35 SR 400 (Sept. 7, 2010); 36 SR 45, 46 (Aug. 1, 2011).

<sup>5</sup> Exhibit 64A with Lungstrom corrections, page 39, lines 26 to 36.

<sup>6</sup> Rule Hearing Transcript, page 23, lines 6-11.

abstention from the Department, choosing to remain neutral on the Plumbing Code choice.<sup>7</sup>

As recognized by Chair Parizek at the April 19, 2011, Board meeting, adopting a rule is a process and does not occur at a single meeting much less with a single vote. As evidenced in the hearing record, the Board has been working on the proposed rule for approximately four years.<sup>8</sup> The actions of the Board during those four years clearly show that they understood the adoption of the UPC with state amendments was a process. At the October 16, 2012, Board meeting, the Board authorized the publication of a Request for Comments.<sup>9</sup> At the July 15, 2014, Board meeting, the Board authorized the Board Chair to sign the Notice of Intent to Adopt Rules and take other necessary action to adopt the rules, with all amendments to the rule approved by the Board.<sup>10</sup> No order of adoption has been signed, no notice of adoption has been published, nor have other required steps and approvals been received that are necessary for actual adoption of a rule.<sup>11</sup> Mr. Seaton provides no legal basis for his statement that the Board adopted the rule without following the legally required rulemaking procedures.

**B. The Board satisfied the requirements in Minnesota Statutes, section 14.101, subdivision 1.**

Lastly, Mr. Seaton alleges that the Board violated the notice provisions in Minnesota Statutes, section 14.101, subdivision 1. This statute requires that an agency publish a Request for Comments in the State Register at least 60 days before publishing the Notice of Hearing or Notice of Intent to Adopt Rules. The Board published the required Request for Comments on November 13, 2012.<sup>12</sup> This was more than 60 days before the March 9, 2015, publication of the Dual Notice in the State Register.<sup>13</sup> The Board therefore satisfied the legal requirements of Minnesota Statutes, section 14.101, subdivision 1.

**II. Factual corrections**

The Board corrected many of the relevant factual misstatements in the Response letter, but some misstatements were repeated in the post-hearing comments and warrant further clarification.

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<sup>7</sup> Rule Hearing Transcript, page 23, lines 15-20.

<sup>8</sup> For example, the Requests For Action were received in 2010, the motion and vote to move forward with a model code was in April 2011, the Request for Comments was published in November 2012, the Board approved its first draft of the proposed rule in July 2014, and the required two-thirds majority votes on all proposed rule amendments since have occurred as recently as April 2015. *See* Exhibits 39 and 40; 1; 44; and 57, respectively.

<sup>9</sup> *See* Hearing Exhibit 45, page 4.

<sup>10</sup> *See* Hearing Exhibit 54, pages 4-5.

<sup>11</sup> *E.g.*, the rule has not been approved by the Office of Administrative Hearings (under Minn. Stat. § 14.26, subd. 1 or Minn. Stat. § 14.16, subd. 1) or filed with the Secretary of State (per Minn. Stat. § 14.16, subd. 3).

<sup>12</sup> *See* Hearing Exhibit 1.

<sup>13</sup> *See* Hearing Exhibit 17.

### **A. Minnesota does not adopt the International Electrical Code.**

Douglas Seaton asserts that Minnesota's electrical code is one of the family of ICC codes adopted in Minnesota.<sup>14</sup> That is incorrect. Minnesota does not adopt the International Electrical Code.<sup>15</sup> Pursuant to Minnesota Statutes, section 326B.32, subdivision 2(a)(3), the Minnesota Board of Electricity must adopt "the most current edition of the National Electrical Code and any amendments thereto." The Board of Electricity has the sole rulemaking authority to adopt the Minnesota Electrical Code.<sup>16</sup> In Minnesota Rules, part 1315.0200, the Board of Electricity adopts the 2014 National Electrical Code (NEC). By mistakenly believing that Minnesota's Electrical Code is part of the ICC family of codes, Mr. Seaton apparently admits that Minnesota's Electrical Code works well with the ICC codes adopted in Minnesota. There is every reason to believe that the proposed Plumbing Code will also work well with the ICC codes adopted in Minnesota.

### **B. Statements made at the April 19, 2011 Board meeting.**

Timothy Power alleged that Board Chair John Parizek made a statement at the April 19, 2011, Board meeting about preferring a model code that is controlled by plumbers so that "those of us in the industry control our own destiny."<sup>17</sup> As you can see in hearing Exhibit 64A, a transcript of the April 19, 2011, Board meeting, it was not Board Chair Parizek who made the statement. Rather, the transcript attributes the statement to a person named "Jim." When considered with the recording of the hearing, it becomes clear that it was Board member James Gander who made this statement, not Chair Parizek.

### **III. The proposed rule meets or exceeds the applicable standard of review; it is needed and reasonable.**

The proposed rule is needed and reasonable. Mr. Seaton refers to the standard of review utilized by the Minnesota Court of Appeals on page five of his letter dated May 20, 2015, but that is not the standard of review that applies here. Even if that standard of review applied here, the Board disagrees that it "engaged in arbitrary and capricious decision-making." To the contrary, the Board spent many years considering adopting a model code and came to a reasoned conclusion.

### **IV. Conclusion.**

The Board has operated within its legal authority to adopt the proposed rule, has met all procedural requirements of the Administrative Procedure Act and other applicable statutes, and has established that the proposed rule is both needed and reasonable. Moreover, the modifications to the proposed rule submitted and explained at the hearing and in the

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<sup>14</sup> See Douglas Seaton comment dated May 20, 2015, page 4.

<sup>15</sup> As noted in the Board's Response letter, the International Electrical Code has not been updated or published since 2003. It is not included in slide 5 (or any slide, for that matter) of Lee Clifton's PowerPoint presentation or in his testimony describing that slide. Transcript of April 30, 2015, Rule Hearing, at 81, lines 2 to 16.

<sup>16</sup> Minn. Stat. § 326B.32, subd. 2(a)(3) (2014).

<sup>17</sup> See Timothy H. Power comment dated May 1, 2015, and Transcript of April 30, 2015, Rule Hearing, at 62, lines 5 to 13. Also, note that Timothy Malooly and Ron Nienaber referred to the same quote but attributed it, generally, to a "board member." See Transcript of April 30, 2015, Rule Hearing, at 56, lines 14 to 22 (Nienaber) and page 77, line 23 to page 78, line 3 (Malooly).

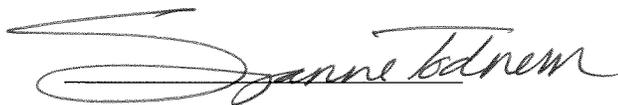
Response letter are within the Board's legal authority, and the modifications do not render the rule substantially different from the rule as proposed in the Board's Notice of Hearing. Therefore, the Board respectfully requests that an Order be issued which recommends the adoption of the proposed rule as modified.

Dated: May 28, 2015

By:

A handwritten signature in black ink, appearing to read "John Parizek", written over a horizontal line.

JOHN PARIZEK  
Chair, Minnesota Plumbing Board

A handwritten signature in black ink, appearing to read "Suzanne Todnem", written over a horizontal line.

SUZANNE TODNEM  
Attorney for Minnesota Plumbing Board  
General Counsel, Minnesota Department  
of Labor and Industry