



Office of Administrative Hearings
The Honorable Barbara J. Case
600 Robert Street North
St. Paul, MN 55164-0620

September 8, 2020

Re: Proposed Rules Governing Adoption of the 2020 National Electrical Code, *Minnesota Rules*, Part 1315.0200; Revisor's ID Number R-4632
OAH Docket No. 82-9001-36673

Housing First Minnesota provides the following written submissions¹ with respect to the hearing that took place on August 19, 2020, before the Honorable Barbara J. Case regarding OAH Docket No. 82-9001-36673, adoption of the 2020 National Electrical Code. Housing First Minnesota requests that the Electrical Board be held to the statutorily imposed administrative standards to which all other agencies hold themselves. The Electrical Board's comments at the hearing on August 19 shed light on the shrouded and closed-door policies that led to the opaque policy-making process that the Electrical Board has consistently deployed.

By way of background, Housing First Minnesota represents more than 1,100 member firms engaged in all aspects of the housing industry, including new home construction, remodeling, suppliers, land development and the related trades. Through our Housing First Minnesota Foundation's partnership with the Minnesota Assistance Council for Veterans, our organization is committed to eradicating veteran homelessness in Minnesota and has just started

¹ The written submission on behalf of Housing First Minnesota was prepared with the assistance of Courtney Ernston, Attorney with Minnesota Construction Law Services, Nick Erickson, Director of Research and Regulatory Affairs with Housing First Minnesota, and James Vagle, Vice President of Advocacy with Housing First Minnesota.



its fifth transitional home for homeless veterans. Housing First Minnesota believes that every Minnesotan should have a safe, durable, and affordable place to call home.

I. Housing First Minnesota’s Interest in the Board’s Decisions.

Housing First Minnesota and the Electrical Board have many common stated goals, including a desire to provide safe, affordable housing to the Minnesota public. Housing First Minnesota advocates for legislation that makes housing more accessible, provides information on how proposed regulations will affect housing prices, and informs the public on any relevant shifts in policy or law. Safe, affordable housing benefits everyone. Housing First Minnesota is not attempting to argue the merits of the 2020 NEC; rather, Housing First Minnesota is here as an advocate for the statutory process the Electrical Board has once again entirely abandoned, as it has historically done. By ignoring standard process and moving forward without legitimate consideration of amendments, the true costs and impact of proposed NEC updates were denied appropriate and necessary consideration. Looking at the SONARs from previous adoptions of the NEC, the Electrical Board largely copies and pastes its reasoning with new numbers or dates and “hits submit” without providing a sound basis that is both required and desirable for the adoption of a new code.

Other than the plumbing and electrical boards, which have their own rulemaking authority by way of Minnesota statute, all other construction code rulemaking falls under the authority of the Department of Labor and Industry’s Commissioner. The Department’s technical staff conducts the same rigorous analysis that the Plumbing Board does of proposed rule changes to ensure compliance with statute, analyze the cost to the public or other stakeholders, and promote safety and new technology, systems and techniques.

II. The Process.

Minnesota's building codes are meant to serve as basic and uniform performance standards. These standards establish reasonable safeguards for health, safety, welfare, comfort, and security and provide for the use of modern materials, devices, and techniques. In doing so, the statutes also require a balancing act when it comes to any addition to the codes that could potentially place a large financial burden on the cost of housing. This balance between regulatory impact and cost helps keep housing affordable, while ensuring reasonable safety measures are met. These goals work together, with a tradeoff in price needing to correlate with a gain in safety. This is not to say that if a change in the NEC results in a cost increase that the change cannot occur, but rather that the Board must be cognizant of the *real* costs associated with its continual adoption of the NEC and must balance those real costs with the cumulative regulatory impacts affecting housing. We find it regrettable that the Board issued flippant remarks that the only costs associated with the new NEC are simply purchasing new code books. It is just such a cavalier attitude that presents clear danger to the necessary balance required in rulemaking. In fact, the Board discussed the actual increased costs only in reaction to two survey responses that the Board received on a survey it initiated². Furthermore, Housing First Minnesota has attached several attestations from home builders in Minnesota³ who employ less than 50 full-time employees and state that the proposed adoption of the NEC without amendments will add more than \$25,000.00 in business costs per year.

Affordable housing is one of the biggest crises facing Minnesotans. Minnesota consistently ranks at the bottom of U.S. Census data in terms of available housing inventory, both overall and for-ownership. The State's lack of available inventory was cited in the 2018

² See Electrical Board Meeting Minutes, January 14, 2020, attached as Exhibit A

³ See Housing First Minnesota Member Attestations, attached as Exhibit B

Minnesota Task Force on Housing as a significant factor in rising home prices.⁴ Our new home prices are far higher than neighboring states. Sadly, the Twin Cities is home to the largest racial equity gap in homeownership in the United States.⁵ Lack of access to entry-level homes has disparately impacted younger home buyers, Minnesotans of color and workforce home buyers, from becoming homeowners. To ensure the Electrical Board does its part to meet these goals, the statute was created to provide minimum standards.

a. The Electrical Board’s Process.

On July 9, 2019, the Electrical Board met to discuss the adoption of the 2020 NEC.⁶ Despite acknowledgment that the 2020 NEC had not yet been finalized at the national level, the question was placed to the Board if they wanted to adopt the code with or without Minnesota amendments. “Kurdi said he prefers adopting the national code, without MN amendments, and made a motion, seconded by Givens.”⁷ Gary Thaden, representing the Minnesota members of the National Electrical Contractors Association, said he believed the “safest course” would be for the Board to “call a special meeting after the NFPA decides on final language or delegate to a sub-committee for review” given the fact that “the Board needs to know the final language before adopting otherwise he believes this puts the Board at risk.”⁸ Based on these comments, the motion to adopt the 2020 NEC without amendments was withdrawn and the Board voted to appoint a sub-committee.

On September 12, 2019, the first meeting of the sub-committee took place.⁹ The meeting began at 11:00 a.m. and adjourned at 1:41 p.m. The sub-committee reviewed 25 pages from the

⁴ See 2018 Minnesota Task Force on Housing Report, attached as Exhibit C.

⁵ *Id.*

⁶ See Electrical Board Meeting Minutes, July 9, 2019, attached as Exhibit D

⁷ *Id.*

⁸ *Id.*

⁹ See Electrical Board NEC 2020 Adoption Review Committee Meeting Minutes, September 12, 2019, attached as Exhibit E.

2020 NEC textbook that outlined the specific changes. On October 8, 2019, the sub-committee met for the second and final time.¹⁰ The meeting began at 8:00 a.m. and adjourned at 8:21 a.m. At 9:01 a.m., the Electrical Board met as a whole and unanimously voted to adopt the 2020 NEC without amendments.¹¹

III. The Electrical Board Did Not Meet the Chapter 14 Requirements.

The agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. Minn. Stat. § 14.14, subd. 2 (more commonly known as “Chapter 14”). A proposed rule is reasonable if the agency can “explain on what evidence it is relying and how the evidence connects rationally with the agency’s choice of action to be taken.” *Manufactured Hous. Inst. v. Petterson*, 347 N.W.2d 238, 244 (Minn. 1984).

Pursuant to Minn. Stat. 326B.32, Subd. 2(a)(3), the Electrical Board must adopt the most current version of the NEC *and any amendments*. §§ 14.05, 14.131, 14.23 and 14.25 (emphasis added). Minn. Stat. § 326B.02, subd. 5 provides that administrative rules may be made that “adopt, amend, suspend, [or] repeal” sections of the Building Code *so long as* the rulemaking procedures in Chapter 14 are followed. The Administrative Law Judge analyzes this procedure and makes the following inquiries:

Whether the agency has statutory authority to adopt the rule; whether the rule is unconstitutional or otherwise illegal; whether the agency has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government officials; whether the rule constitutes an undue delegation of authority to another entity; and whether the proposed language meets the definition of a rule.

See Minn. R. 1400.2100. In this challenge, Housing First Minnesota focuses specifically on whether the agency has complied with the rule adoption procedures, which we argue, it has not.

¹⁰ See Electrical Board NEC 2020 Adoption Review Committee Meeting Minutes, October 8, 2019, attached as Exhibit F.

¹¹ See Electrical Board Meeting Minutes, October 8, 2019, attached as Exhibit G.

The specific requirements of Chapter 14 and the inadequacies of the Electrical Board's analysis follow.

A. SONAR and Agency Analysis

1. Statutory Requirements of SONAR.

A Statement of Need And Reasonableness (SONAR) ensures that the agency's decision is well reasoned. *Builders Ass'n of the Twin Cities v. Minn. Dep't of Labor & Indus.*, 872 N.W.2d 263 (Minn. Ct. App. 2015). The SONAR requires the analysis of 8 factors that must be included.

The issues with this particular SONAR are found in the following paragraphs:

- (1) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule...
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
- (5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses or individuals, and
- (6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses or individuals.”

Minn. Stat. § 14.131. Numerous requirements within the Electrical Board’s SONAR are grossly insufficient. “As made clear by the text of Minn. Stat. § 14.131, the agency must ‘ascertain ... information’ relating to the listed inquiries and make a ‘reasonable effort’ to complete the needed assessments.” OAH 8-1900-30855 at 17. The following areas of the SONAR show the lack of analysis that took place, despite the statutorily required criteria.

a. Less costly methods and description of alternatives.

The Electrical Board has not brought any evidence that adopting the 2020 NEC without amendment will be the least costly method for the parties involved, especially considering the considerable changes present within. Their statement stops at “[t]he Board has determined that there are no less costly or intrusive methods for achieving the purpose of the proposed rule. The NEC is recognized throughout the United States and many other countries as the prevailing model electrical code.” SONAR at 4. No evidence is presented as to the 2020 NEC specifically or why it is superior to alternatives. Most importantly, the Electrical Board does not explain why the 2020 NEC, written to have extremely broad application, does not need even minor tweaks to make it best fit specifically to Minnesota.

To determine that there are not less costly methods, the Electrical Board must necessarily make a comparison. The Electrical Board speaks in the language of comparisons when saying “[t]he board has determined that there are no less costly or intrusive methods.” SONAR at 4. On the same page, they state “[n]o other methods were considered for achieving the purpose of the proposed rule.” *Id.* It is unclear how you can determine that an alternative is less costly than all other alternatives without analyzing any other alternatives. Such a finding, expressing the agency’s will rather than its judgment, would be found arbitrary and capricious by a Minnesota court. *Reserve Mining Co. v. Minn. Pollution Control Agency*, 364 N.W.2d 411, 414 (Minn. Ct.

App. 1985). An administrative ruling should likewise find that the Electrical Board's reasoning was grossly inadequate.

Further, this conclusion appears to be premised on a mistaken belief that the question presented asks whether adoption of the 2020 NEC with or without amendments will be costlier *to adopt*. Rather, the question asked is far more complex: whether the goals the Electrical Board attempts to reach, safer and more affordable homes, through adoption of the 2020 NEC could be reached by less costly means. Failing to consider costs within this lens did not avail affected parties of the protections a SONAR is designed to provide. The Electrical Board considered an irrelevant "alternative" while failing to address potential alternatives that the industry has flagged as necessary, preferable, or both.

b. Cumulative Effects.

The Electrical Board determined that "[t]here are no applicable federal regulations that address electrical code issues in the construction of non-federally owned buildings" and therefore, cumulative effects did not need to be addressed. The Electrical Board again misses the point. The Supreme Court has established that the Federal Fair Housing Act can be violated if policies affecting housing prices disparately impact protected groups of people. *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015). This case is meant as a simple example only; while the Electrical Board assumes that it need not do any analysis on conflicts with federal (or state law), there are several tangential laws that come into play. The deference provided to "experts" under Minnesota law expects that the Electrical Board's choice to adopt a new rule, one that affects housing prices, construction, and general procedure, would take such laws into consideration. This partly explains why similarly positioned agencies take *years* to adopt new codes, while the Electrical

Board brushed through it in barely more than a month. Housing First Minnesota holds “the experts” to their proofs when claiming its boiler-plate SONAR and rationale present the best choice for Minnesota policy.

c. Performance-Based Regulation.

A performance-based rule is one that emphasizes superior achievement in meeting the agency’s regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals. Minn. Stat. § 14.002. The above paragraphs are incorporated herein as reference, again emphasizing that the agency has not analyzed any alternatives that justify why its chosen alternative is the superior way of meeting the agency’s regulatory objectives.

d. Minn. Stat. § 14.127.

Minnesota statute requires the Department to “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.” Minn. Stat. § 14.127. Evidence at the hearing discussed the changes to individual contractors that were expected. However, the Electrical Board showed very little analysis, much of which was misguided. The Electrical Board explained, “[b]ased on discussion contributions from business owners and board members who work for or with small cities or businesses, the Board determined that no small business or small city will spend \$25,000 in the first year after the rules take effect to comply with the proposed rule.” SONAR at 9. This conclusory language claims that some fact finding took place. However, the Electrical Board clearly misunderstands the costs at issue. “Some small cities or small businesses in the industry might purchase new code books, but the cost would be approximately a few hundred dollars, depending on how many books were purchased.” *Id.* The

Electrical Board understands “costs” as the cost of adopting these provisions; the Electrical Board fails to understand that “costs” refers to the changing costs of construction and homes. Without this analysis, affected parties are not protected by expert analysis of potential rules prior to their institution.¹²

Further, it should not have been left to Housing First Minnesota to explain this to the Board and provide analysis. This evidence was not hiding in the weeds, but was properly raised to the agency during the rulemaking process. The Electrical Board has failed to provide analysis on these legitimate questions. Again, concluding that Minn. Stat. § 14.127 would not be violated without showing its work represents the board’s will, not its judgment. *Reserve Mining Co. v. Minn. Pollution Control Agency*, 364 N.W.2d 411, 414 (Minn. Ct. App. 1985).

e. Adoption or Amendment of Local Ordinances.

Under Minn. Stat. § 14.128, the Department must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The Department must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.

OAH 8-1900-30855 at 19 (citing MINN. STAT. § 14.128, subd. 1). Again, conclusory language stated that no new ordinances would be required, with the Electrical Board failing to explain its basis for this finding.

2. Other examples.

Outside examples are informative of what this process should look like. In reviewing the Department of Labor and Industry’s 2014 decision to adopt the International Residential Code, the Administrative Law Judge was able to lay out the considerations the Department of Labor considered prior. The court explained that the Department had shown a difference between

¹² See Housing First Minnesota Member Attestations, attached as Exhibit B.

certain-sized homes when considering the need for sprinkler systems. Speaking of larger homes, it explained, “there is increased life-safety and property protection with automatic fire sprinkler systems as demonstrated by occupants having sufficient time to escape, by providing additional structural protection for first responders, and by limiting the extent of structural damage.” Therefore, a need for sprinkler systems in all homes of 4,500 square feet or larger could be rationally supported, despite complaints.

The Minnesota Plumbing Board also provides an example of what a SONAR process should look like. The Plumbing Board took more than a year-and-a-half to recommend adoption of the UPC (one of the uniform plumbing standards). *Water in Motion, Inc. v. Minn. Dep't of Labor & Indus.*, 2016 Minn. App. Unpub. LEXIS 1064, 3-4 (Minn. Ct. App. 2016). During this time, numerous meetings were held and another uniform plumbing standard was examined (IPC) in addition to the standard then adhered to. *Id.* at 4-5. The UPC was selected over the previous standard and the IPC standard due to four factors. *Id.* at 6. The UPC was ultimately adopted with amendments. *Id.* at 4. Again, the analysis of the board was available to the public, could clearly show it had been undertaken, and was based on comparisons, data, and reason.

Another example of the Plumbing Board following the appropriate level of review is related to the adoption of the 2018 UPC. The Plumbing Board met in October of 2019 to discuss the adoption of the 2018 Uniform Plumbing Code.¹³ The review and rulemaking committee provided a 20-page document outlining specific lines within the proposed code and comments, questions, or concerns that were voiced. The rulemaking committee then discussed each line in turn, suggested action to the Board as a whole, who then voted on whether to keep, amend, or omit the proposed line. The Electrical Board provides no such analysis here. However, the

¹³ See Plumbing Board Meeting Minutes, October 15, 2019, attached as Exhibit I

Electrical Board is not entirely devoid of process. In fact, in the January 2020 meeting of the Board, there are six-and-a-half single-spaced pages dedicated to discussing whether or not to adopt licensing reciprocity with Wisconsin and Texas.¹⁴

Ironically, in that same meeting, the Electrical Board also discussed the status of the adoption of the NEC. When asked about what the Board needed to do as compared to the adoption of the 2017 NEC, “[General Counsel Jeff] Lebowski said there are things that should be done differently this time – the Board needs to discuss costs.”¹⁵ The Board continued its practice of overgeneralizations and simply stated “[t]he department is well apprised of the changes in the 2020 code and some will result in cost reductions... For the most part costs will wash – some increases and some decreases.”¹⁶ This does not provide the requisite level of detail that the Board must provide.

IV. Relief Requested.

Allowing the 2020 NEC to be implemented without proper rulemaking undermines the proper work of all other building code bodies which undertake a proper, adequate and thorough review of the building codes under their charge, which is in line with their duties under Chapter 14. Housing First Minnesota respectfully requests that this Court adopt one of two options:

1. Remand the proposed adoption of the 2020 NEC to the Electrical Board to undergo a proper and statutorily compliant SONAR. This SONAR must analyze legitimate alternatives, provide a full cost analysis, and address the legitimate concerns that have been brought to the Board’s attention, or;

¹⁴ See Exhibit A, pgs. 2-9.

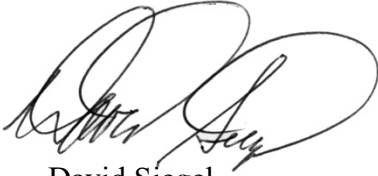
¹⁵ *Id.*, pg. 9

¹⁶ *Id.* pgs. 9-10

2. Under Minnesota State Statutes 14.127, Subdivisions 2 and 5, with the agency determination of the SONAR disproved, the contested provisions 2020 NEC brought forth by Housing First Minnesota should be severed and remanded to the Legislature for review and adoption.

Absent an action requiring the Electrical Board to meet its statutory burden the interest of justice cannot be served.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "David Siegel", written in a cursive style.

David Siegel
Executive Director