No. A13-[illegible]

STATE OF MINNESOTA

IN COURT OF APPEALS

Builders Association of the Twin Cities,

Petitioner,

vs.

Minnesota Department of Labor and Industry,

Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

The Builders Association of the Twin Cities ("Petitioner") challenges two separate rulemaking proceedings by the Minnesota Department of Labor and Industry ("DLI") involving the State Building Code. One challenged rule, Minn. R. ch. 1309 (2015) ("1309 Rule"),[1] was promulgated following a public hearing on the merits. The other challenged rule, Minn. R. ch. 1322 (2015) ("1322 Rule"), was promulgated pursuant to non-hearing rulemaking procedures because fewer than 25 persons requested a hearing. These rulemaking proceedings upheld the need for and reasonableness of the 1309 Rule and the 1322 Rule. This matter involves a pre-enforcement declaratory judgment action under Minn. Stat. §§ 14.44-.45 (2014).

STATEMENT OF FACTS

I. ADMINISTRATIVE FRAMEWORK

A. The State Building Code

The State Building Code ("Code") establishes minimum standards for the construction, reconstruction, alteration, repair, and use of buildings and other structures within Minnesota. *See* Minn. Stat. ch. 326B (2014); Minn. R. ch. 1300 (2013). The Code is intended to "provide basic and uniform performance standards, establish reasonable safeguards for health, safety, welfare, comfort, and security of the residents of this state and provide for the use of modern methods, devices, materials, and techniques which will in part tend to lower construction costs." Minn. Stat. § 326B.101. The Code

[1] Both challenged rules became effective in 2015. Thus, although the revisor has not published the 2015 version of the Minnesota Rules at the time of this brief, the rule revisions subject to this case will be cited as "(2015)" for clarity and ease of reference.

governs "matters of structural materials, design and construction, fire protection, health, sanitation, and safety, including design and construction standards regarding heat loss control, illumination, and climate control." *Id.* § 326B.106, subd. 1.

The Legislature provided DLI with broad authority to "adopt, amend, suspend, and repeal rules relating to [DLI's] responsibilities under [chapter 326B]," including the Code. *Id.* §§ 326B.02, subd. 5, .106, subd. 1. Chapter 326B requires the Code to "conform insofar as practicable to model building codes generally accepted and in use throughout the United States," and explicitly provides that DLI may exercise its broad rulemaking authority to adopt by reference "[m]odel codes with necessary modifications." *Id.* § 326B.106, subd. 1; *see also id.* § 326B.02, subd. 6. The Code "is adopted and periodically updated to include current editions of national model codes in general use and existing statewide specialty codes and their amendments." Minn. R. 1300.0080.

The Code incorporates many model codes by reference, including the International Residential Code, International Building Code, International Existing Building Code, International Energy Conservation Code, International Mechanical Code, and International Fire Code. Minn. R. 1300.0050; Minn. R. chs. 1305, 1307, 1309, 1311, 1322, 1346, 7511 (2013). Together, these model codes and their amendments "establish minimum requirements to safeguard the public health, safety, and general welfare through structural strength, means of egress facilities, . . . energy conservation, and safety to life and property from fire and other hazards attributed to the built environment and to provide safety to firefighters and emergency responders during emergency operations."

Minn. R. 1300.0030, subp. 1. The Code applies statewide and supersedes all municipal building codes. Minn. Stat. § 326B.121, subd. 1.

B. Rulemaking Under The Minnesota Administrative Procedure Act.

DLI amends the Code pursuant to the rulemaking procedures of the Minnesota Administrative Procedure Act ("MAPA"). *Id.* § 326B.13, subd. 1; *see also* Minn. Stat. ch. 14 (2014); Minn. R. ch. 1400 (2013). Under the MAPA, an agency cannot adopt a proposed rule until an Administrative Law Judge ("ALJ") with the Office of Administrative Hearings has reviewed its reasonableness, necessity, and legality. *See* Minn. Stat. §§ 14.16, .26; *see generally* Minn. R. 1400.2000-.2310. The MAPA provides separate requirements for rules reviewed by an ALJ after a public hearing and rules reviewed without hearing, but all formal MAPA rulemaking proceedings nevertheless follow common preliminary steps.

The first required formal step is a 60-day public comment period, which is initiated by publication in the State Register of a Request for Comments on the subject matter of a possible rulemaking proposal. Minn. Stat. § 14.101, subd. 1. The Request for Comments alerts the public to the subject matter of rules under consideration, identifies groups and individuals likely to be affected, and provides interested persons with information about participating in the rulemaking process. *Id.* The agency may also convene an advisory committee to obtain additional input. *Id.* § 14.101, subd. 2.

The MAPA also requires preparation of a Statement of Need and Reasonableness ("SONAR") describing the agency's efforts to provide notice to those affected by the proposed rule ("Additional Notice Plan") and including, to the extent the information can

be ascertained through reasonable effort, eight other specific categories of information. *Id.* §§ 14.131, .23. The SONAR "must summarize the evidence the agency is relying on to justify both the need for and the reasonableness of the proposed rules, and must state how the evidence rationally relates to the choice of action taken." Minn. R. 1400.2070. It must be sufficiently specific "that interested persons will be able to fully prepare any testimony or evidence in favor of or in opposition to the proposed rules," but it "need not contain evidence and argument in rebuttal of evidence and argument presented by the public." *Id.*

1. Rulemaking With A Public Hearing

Rulemaking hearings are public proceedings and afford anyone interested in a proposed rule the opportunity to present evidence and participate in the process. *Id.* § 14.14, subds. 1, 2a; Minn. R. 1400.2210. An agency formally promulgating rules under the MAPA may elect to hold a rule hearing and is required to hold a hearing if it receives 25 or more qualifying hearing requests. Minn. Stat. §§ 14.14, subd. 1, .25, subd. 1.

Hearings on rulemaking proceedings occur before an ALJ. Minn. Stat. §§ 14.14, subd. 2a. At hearing, the agency enters its rulemaking documents into the record and makes an affirmative presentation of the facts to establish that the proposed rule is reasonable and necessary and that the agency has complied with all substantive and procedural requirements. Minn. Stat. § 14.14, subds. 2-2a; Minn. R. 1400.2210, subp. 3, .2220, subps. 1, 3. Interested parties may ask questions and may present oral and written statements and evidence. Minn. Stat. § 14.14, subd. 2a; Minn. R. 1400.2210, subp. 4, .2220, subp. 4. The agency may present evidence responding to statements made

by interested parties, and the interested parties may further respond to the agency's additional evidence. Minn. Stat. § 14.14, subd. 2a; Minn. R. 1400.2210, subps. 4-5, 7.

After the hearing, the ALJ provides the agency and all other interested parties time to submit additional comments and written material into the record. Minn. Stat. § 14.15, subd. 1; Minn. R. 1400.2230, subp. 1. The agency and all other interested parties then have a five-day rebuttal period to review and respond in writing to materials submitted during the post-hearing comment. Minn. Stat. § 14.15, subd. 1; Minn. R. 1400.2230, subp. 2. The hearing record closes on the last day of the post-hearing response period. Minn. R. 1400.2230, subp. 3.

After the record closes, the ALJ must prepare a report approving or disapproving the proposed rule. Minn. Stat. § 14.15, subd. 2; Minn. R. 1400.2240. If the ALJ finds no defects and approves the rule, the agency may adopt the rule and publish notice of its adoption in the State Register. Minn. Stat. §§ 14.16, subd. 1, .18, .38; Minn. R. 1400.2090, .2240, subps. 3, 10.

2. Rulemaking Without A Public Hearing

In lieu of proceeding directly to hearing, an agency may issue a Dual Notice, which explains that a public hearing has been tentatively scheduled and will be canceled if the agency receives fewer than 25 hearing requests. Minn. Stat. §§ 14.22, .23, subd. 1; Minn. R. 1400.2080, subps. 1-5. The Dual Notice provides for a comment period with a specified end date and notifies the public of the right to request a hearing and to comment in support of or opposition to the proposed rule. Minn. R. 1400.2080, subps. 1-5.

An agency issuing a Dual Notice submits a hearing request, along with its proposed rule, SONAR, Additional Notice Plan, and proposed Dual Notice, for review by an ALJ. Minn. Stat. §§ 14.14, .22-.23; Minn. R. 1400.2060, subp. 2, .2080, subp. 5. Upon approval of the Dual Notice and Additional Notice Plan, the agency publishes the Dual Notice in the State Register, mails the Dual Notice to persons registered to receive such notices, and follows its Additional Notice Plan to alert persons likely to be substantially affected by the proposed rule. Minn. Stat. §§ 14.14, subd. 1a, .22-.225; Minn. R. 1400.2080.

If the agency receives fewer than 25 requests for hearing, it cancels the hearing. *See* Minn. Stat. §§ 14.25, .26, subd. 1. The agency then files its rulemaking record with the ALJ for review and approval. Minn. Stat. § 14.26, subd. 1; Minn. R. 1400.2300-.2310. If the ALJ approves the rule, the agency may publish notice of the rule's adoption in the State Register.[2] Minn. Stat. §§ 14.26, subd. 3(a), .38; Minn. R. 1400.2300.

II. DLI AMENDS THE MINNESOTA RESIDENTIAL CODE, MINN. R. CH. 1309, BY ADOPTING THE 2012 INTERNATIONAL RESIDENTIAL CODE.

A. The Challenged Automatic Fire Sprinkler Standard.

The 1309 Rulemaking relates to DLI updating and adopting the Minnesota Residential Code's ("MRC") underlying model code, the International Residential Code

[2] No written report is prepared unless the ALJ disapproves the rule. *See* Minn. Stat. § 14.26, subd. 3.

("IRC"), from its 2006 version to its 2012 version.[3] Prior to this rulemaking, the MRC required automatic sprinkler systems to be installed in all two-family dwellings and townhouses greater than 9,250 square feet. *See* Minn. R. 1309.0300-.0301 (2013).[4] As relevant here, the 1309 Rulemaking adopted the 2012 IRC—including its automatic fire sprinkler requirement for all single- and two-family dwellings—and amended it to exclude single-family dwellings of less than 4,500 square feet from the sprinkler requirement. *See* Minn. R. 1309.0313 (2015) ("Fire Sprinkler Standard").

B. DLI Collects Input From Stakeholders, Including Representatives Of Building And Fire Safety Groups.

Prior to the 1309 Rulemaking, DLI last amended the MRC in 2007 when it adopted the 2006 IRC. (A-5.B at 1.) In 2009, the IRC included for the first time a requirement for automatic fire sprinklers in all one- and two-family homes. (A-5.B at 27, 31.) DLI elected not to pursue the 2009 IRC update, however, due to the severe slowdown then affecting Minnesota's construction economy and a lack of technical experts available to assist DLI with the adoption. (A-5.B at 1; A-6 at 97.) Instead, in

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[3] The IRC is a national model code maintained and updated by the International Code Council ("ICC"). (A-5.B at 1.) The ICC reviews and modifies the IRC every three years to incorporate the most current code provisions for use throughout the nation. (*Id.*) The 1309 Rulemaking record contains additional background information regarding the development of the IRC and its compatibility with other ICC model codes. (*See* A-5.B.1 at iii-iv and A-6 at 98.)

[4] The Code also required automatic sprinkler systems in numerous other instances. *See, e.g.*, Minn. R. 1305.0903; 7511.0903. Automatic sprinkler systems are an important and widely-recognized safety feature. (*See, e.g.*, A-5.B at 29 (observing sprinkler requirements for child and adult day cares, supervised living facilities, hospice and foster care facilities, assisted living and housing with services, and senior housing).)

anticipation of potential future amendment of the MRC, DLI began holding meetings with stakeholders throughout Minnesota to discuss the IRC's automatic fire sprinkler system requirement. (A-4 at 27:10; A-5.B at 1; A-6 at 97-8.) These preliminary meetings revealed that stakeholders held strong, conflicting views on the adoption of the sprinkler requirement for single-family dwellings. (A-4 at 27:10-28:7.)

DLI convened a formal Chapter 1309 Advisory Committee, of which Petitioner was a member, to advise DLI regarding the 2012 IRC and proposed amendments. (A-4 at 26, 28; A-5.B at 1, 27, 51.) Although the committee discussed many issues related to amending the MRC, only the sprinkler requirement was controversial. (A-4 at 27.) The focus of the committee's discussion was the life-safety benefits of automatic sprinkler systems as compared to their cost. (A-5.B at 27.) DLI received proposals and information from stakeholders on both sides of the issue—notably the Builders Association of Minnesota ("BAM"), which opposed the requirement, and the Minnesota State Fire Chiefs Association ("Fire Chiefs Association") and Fire Marshals Association of Minnesota, which favored the requirement. (*See* A-5.B at 27-33; A-5.B.1-B.8.)

BAM argued in the Chapter 1309 Advisory Committee that automatic sprinkler systems were unnecessary because existing smoke alarm requirements provided a sufficient protection feature. (A-5.B at 29.) BAM expressed concern about installation costs and provided a Fire Chiefs Association white paper that estimated an average cost of $1.61 per square foot and a letter that included BAM's own estimate of $2.93 to $3.95 per square foot. (A-5.B at 31-32; A-5.B.3, .B.8.) BAM proposed that all single-family dwellings be exempted from any automatic sprinkler requirement. (*Id.*)

In contrast to BAM's cost-related concerns, the fire associations argued that automatic sprinkler systems are critical to protecting occupants, firefighters, and property in the event of a fire. (A-5.B at 27-28). They submitted an Underwriters Laboratories study showing that floors and roofs in houses built to comply with modern building code requirements could collapse after only 4 minutes of burning, as compared to 18 minutes for legacy construction methods. (*Id.*; A-5.B.2.) They also submitted information pertaining to the use of fire sprinkler systems in Bucks County, Pennsylvania, which reported average property loss of $14,000 and water use of 340 gallons for fires in sprinkled homes, but average property loss of $179,896 and water use of 5,974 gallons for fires in non-sprinkled homes. (A-5.B.7 at 9.) The fire associations recommended a phased-in approach to implementing the residential fire sprinkler requirement-beginning with one- and two-family homes of at least 5,000 square feet, then 4,000-square-foot homes, and so forth until the requirement encompassed all new one- and two-family homes. (A-5.B at 31-32; A-5.B.7; A-5.B.8, Appendix B.)

In 2012, DLI Commissioner Ken Peterson personally met with the home builders and fire associations to determine if any common ground existed such that a compromise could be reached. (A-4 at 28.) During that meeting, the fire associations highlighted the hazards associated with fighting fires in larger homes. (*Id.*)

Faced with the conflicting policy positions advanced by building and fire safety groups, DLI was required to weigh "1) the life-safety concerns that are mitigated by automatic fire sprinkler systems; 2) the cost to install automatic fire sprinkler systems; and 3) how to adequately address both of these two factors in a rule." (A-5.B at 27.) DLI

reviewed the materials submitted by representatives of both groups and ultimately determined to pursue a balanced approach:

> In reaching its balance between the benefits of the life-safety/property protections offered by automatic fire sprinkler systems and the costs of installing these systems in newly constructed one-family homes, [DLI] determined that larger homes have the same challenges for occupants and first responders as other two-family and townhouse structures, but that the relative cost of installing sprinkler systems in smaller homes may be too expensive. Therefore, [DLI] is proposing to amend IRC Rule 313.2 to exclude homes under 4,500 square feet from the automatic sprinkler requirement.

(A-5.B at 32; *see also* A-5.B at 27-30.)

C. DLI Undertakes The 1309 Rulemaking.

On November 5, 2012, DLI published in the State Register a Request for Comments regarding the possible amendment of the MRC by adopting the 2012 IRC, with amendments. (A-5.C.) On September 16, 2013, DLI submitted drafts of the proposed 1309 Rule and associated Statement of Need and Reasonableness ("1309 SONAR") to Minnesota Management and Budget ("MMB") for evaluation of the potential fiscal impact and benefit to units of local government. (A-5.H.) On October 3, 2013, MMB concluded that local governments might incur some staffing and processing costs but that "there does not appear to be significant costs to local units of government that are not recoverable through local fees as a result of this proposed rule." (*Id.*)

On October 15, 2013, DLI submitted a hearing request, along with the 1309 SONAR, 1309 Rule, and proposed Notice of Hearing, to the Office of Administrative Hearings. (A-2; A-7 at 10.) DLI also requested approval of the Additional Notice Plan included in the 1309 SONAR ("1309 Notice Plan"), pursuant to

which DLI would ensure that Petitioner and other interested persons received notice. (*See* A-2; A-5.B at 7; A-7 at 10.) ALJ Eric Lipman issued an order scheduling the hearing, approving the Notice of Hearing (with minor changes not relevant here), and approving the 1309 Notice Plan. (A-3; A-7 at 10.)

On October 28, 2013, DLI published the Notice of Hearing in the State Register and mailed it to Petitioner and other persons identified in the 1309 Notice Plan or on DLI's rulemaking mailing list, including *amicus curiae* BAM. (A-5.E, F.1-.2; A-7 at 10.) DLI also emailed the Notice of Hearing to members of DLI's electronic rulemaking list, including *amicus curiae* Minnesota Association of Realtors ("Realtors Association"). (A-5.F.3.)

The public hearing on the 1309 Rule occurred on December 12, 2013, during which DLI presented testimony and exhibits supporting the need for and reasonableness of the 1309 Rule and Fire Sprinkler Standard. (A-4 at 17-34.) Although the 2012 IRC required automatic sprinkler systems in all one- and two-family dwellings, DLI indicated that it had determined as a result of the input provided by building and fire-safety groups that Minnesota should exempt existing homes and new single-family homes smaller than 4,500 square feet. (A-4 at 28-29.) DLI explained that it did not exempt single-family dwellings of 4,500 square feet and larger because these homes' size and quantity of modern, combustible materials presented a greater risk of catastrophic loss to property and life. (A-4 at 29.) DLI explained that the 4,500 square foot threshold derived from the fire associations' phase-in proposals, which would have required fire sprinklers immediately for homes of 5,000 square feet or more, and from a previously established

Code requirement for fire sprinklers in two-family homes of 9,250 square feet or more. (A-4 at 30.) The proposed size threshold was intended to fulfill DLI's charge to establish standards that safeguard the health and safety of Minnesotans while balancing the costs of meeting those standards.[5] (A-4 at 29.)

After DLI completed its presentation, ALJ Lipman heard testimony from seventeen interested persons, representing all sides of the issue. (*See* A-4 at 3.) More than forty interested persons submitted written comments and materials to ALJ Lipman for inclusion in the hearing record. (*See* A-6 at 1-781.) Approximately one-fourth of these were substantially similar form letters, dated before the hearing, from home builders opposing the Fire Sprinkler Standard. (*See* A-6 at 1-35.) On December 31, 2013, DLI responded to the concerns raised at the hearing and in post-hearing comments.

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[5] DLI explained that its research and stakeholders' input had produced cost estimates for automatic sprinkler systems ranging from $1.35 per square foot to $3.95 per square foot, and that the actual cost of a sprinkler system would depend on many factors, including

> whether or not it is served by municipal water or an on-site well, whether sprinklers are mandatory or voluntary in a particular municipality, whether the system is a stand-alone or multi-purpose, the degree to which systems are efficiently designed with current technology, whether unheated areas must be protected, and ultimately the builder's markup on the product and the installation.

(A-4 at 32.) DLI further explained that between 2008 and 2013, the national average cost had decreased from $1.61 to $1.35 per square foot as a result of improved installation methods, standardized practices, and increased competition. (*Id.*) DLI observed that, to the extent costs in Minnesota then exceeded the national average, the increased prevalence of fire sprinkler systems required by the 1309 Rule would help drive costs down toward the national average.

(A-6 at 91.) On January 9, 2014, DLI, BAM, and two others filed final memoranda with ALJ Lipman and the record officially closed. (A-6 at 782-818; A-7.)

D. ALJ Lipman Approves The 1309 Rule.

The record before ALJ Lipman comprised more than 2,500 pages of testimony, comments, and other submissions, and represented the culmination of nearly five years of research, planning, and rulemaking. (*See generally* A-4; A-5; A-6.) This voluminous record includes the following evidence:

1. 1309 SONAR

The 1309 SONAR explained that DLI proposed to amend the MRC by adopting by reference the 2012 IRC, with modifications. (A-5.B at 1.) The purpose of the proposed 1309 Rule was to provide a modern, comprehensive building code addressing all facets of residential construction in Minnesota. (*Id.*; *see also* A-5.A; A-5.B.1.) The 1309 SONAR indicated, among other things: (1) that no less costly or intrusive method of updating the MRC exists, in part because adopting the model code promotes uniformity of application and enforcement, which in turn tends to lower costs related to code interpretation and review; (2) that DLI proposed adopting the 2012 IRC because the IRC is the only model residential code generally accepted and in use in the United States; (3) that the proposed rule applies only to new construction and remodeling, the costs of which vary with building design, use, age, and condition and are not readily susceptible to determination in advance; (4) that the Code is a single set of coordinated building regulations and the sole building code that can be used in the State, and DLI therefore takes care to ensure that the various individual rules that make up the Code do not cause

cumulative effects with regard to one another or federal regulations; and (5) that DLI was in the process of adopting several 2012 ICC codes—which are interrelated—and failing to adopt the 2012 IRC could cause confusion in other parts of the Code. (A-5.B at 3-6.)

The 1309 SONAR also explained that the first-year cost of the 1309 Rule to any small business or small city would not exceed $25,000 because: (1) the rule applies only to new construction or remodeling undertaken after the rule takes effect, and the rule does not require any construction or remodeling to take place; (2) the rule places costs on the owners of residential buildings subject to the rule, not small businesses, because companies constructing or remodeling residential buildings will pass the cost of code compliance along to their customers; and (3) the costs to small cities of purchasing new code books and potentially training employees in changes to the code would not exceed $25,000. (A-5.B at 8.) Because the cost of construction on any particular project is subject to many unpredictable variables, "it [is] unlikely the specific set of provisions that apply to a specific building on a specific site will increase the cost by more than $25,000." (*Id.*). The 1309 SONAR also noted the controversy surrounding the Fire Sprinkler Standard and summarized the process by which DLI arrived at the version of the requirement in the proposed rule. (A-5.B at 4-5, 27-34.)

2. Hearing Testimony

Of the seventeen non-DLI witnesses at the December 2012 hearing, eight opposed the adoption of any fire sprinkler requirement for single-family homes, six spoke in favor of DLI's proposed modification of the fire sprinkler mandate to exempt single-family homes smaller than 4,500 feet, and three urged requiring fire sprinkler systems in *all*

single-family homes. (*See generally* A-4.) A number of the witnesses also submitted supporting exhibits. (*See generally* A-5.L through A-5.AC.) Of particular note:

- Chief Deputy State Fire Marshal Robert Dahm discussed "flashover," which occurs when a burning room reaches about 1,200 degrees Fahrenheit. (A-4 at 126.) Once flashover occurs, a fire spreads rapidly and makes escape extremely difficult or impossible. (*Id.*) Fire sprinklers typically activate between 165 and 200 degrees Fahrenheit and prevent fires from reaching flashover. (*Id.*) Chief Deputy Dahm also explained that the furnishings and contents of modern homes cause untenable conditions when burning in approximately three minutes, which "is not enough time for those unable to escape on their own, specifically young children, elderly and mobility impair[ed] individuals, and particularly in the middle of the night when they are sleeping and need to be woken up . . . and determine what is going on." (*Id.* at 128-29.) Chief Deputy Dahm unequivocally stated that "[n]o single protection scheme is enough to protect against fire" and "no other method of fire protection has been found to be as effective as fire sprinklers," which are currently required by all national model codes. (*Id.* at 125, 130.)

- Ronald Fahr, former Michigan State Fire Marshal and current Underwriters Laboratories employee, testified that 53% of all fatalities in home fires occur between 11 p.m. and 7 a.m. (A-4 at 149.) He agreed with Chief Deputy Dahm's comments regarding flashover and the new fire dangers posed by modern furnishings. (A-4 at 152-55.) Specifically, Fahr explained that even a single synthetically-upholstered chair could cause flashover, and that synthetic furnishings significantly reduce time for

escape. (*Id.*) Fahr addressed the unique problems posed by large homes, including that they pose a danger to firefighters who must enter without knowing the layout and are more difficult for occupants to evacuate in a timely manner. (*Id.* at 151, 155.) He concluded that residential fire sprinklers are the answer to "large homes, more open space, evolving fire loads, void spaces that are being built in, changing building materials and new technology that we are seeing on the roofs, which equal fast fire propagation, shorter time to flashover, rapid changes in fire dynamic, shorter escape times, shorter time to collapse." (*Id.* at 163.)

- Jeffrey Hudson, a National Fire Protection Association sprinkler specialist, testified that despite the widespread use of smoke alarms and interconnected smoke alarms, 2,500 to 3,000 people die each year in residential fires. (A-4 at 138.) Adults over the age of 65, children under 5, and the disabled are particularly at risk. (*Id.* at 136.) He explained that smoke alarms and fire sprinklers are not alternative methods of fire protection, but "work together to provide protection in the event of a fire in a home the same way that seat belts and air bags do in cars." (*Id.* at 139.) Sprinklers keep fires from growing, reduce heat and toxic gases, and provide additional time for occupants to escape and firefighters to work. (*Id.* at 138-39.)

- Fire Chiefs Tim Butler and Wayne Kewitsch, representing the Fire Chiefs Association, each testified that automatic fire sprinklers are so effective and important that they should be required in *all* residential homes. (A-4 at 223, 229, 235.) Chief Butler gave several examples of home occupants who died in residential fires in non-sprinkled buildings because of age or disability or because their escape routes were

blocked by flames, and of firefighters injured when a floor or stairwell collapsed. (*Id.* at 220-27.) He explained that no one can survive a flashover—even a firefighter in full gear can survive only two seconds—and "[s]moke alarms can't prevent a flashover or a structural collapse, but sprinkler systems can delay or prevent both." (*Id.* at 225.) As a result, the Fire Chiefs Association believes that sprinklers should be required in all newly-built homes. (*Id.* at 229.) Chief Kewitsch echoed Chief Butler's concerns and demonstrated the ongoing change in residential fire hazards by showing an Underwriters Laboratories video of two burning rooms—one filled with modern synthetic furnishings and the other with legacy furnishings. (A-4 at 231-36.) The room with modern furnishings reached flashover in just over three minutes, whereas the room with legacy furnishings took nearly twenty minutes. (*Id.* at 234.)

- Sean Flaherty, a contractor and president elect of the Minnesota chapter of the National Fire Sprinkler Association, testified in favor of a sprinkler mandate with no size exemption. (A-4 at 193.) He indicated that active systems like fire sprinklers protect home occupants, prevent flashover, and reduce toxic smoke and gases, while passive systems like smoke alarms do not. (*Id.* at 193-94.) He also testified that sprinkler systems would cost about $2 per square foot if attached to a municipal water supply or up to $3 per square foot in rural areas. (*Id.* at 194.) Based on his own experience installing rural sprinkler systems, he explained that a pump and a water tank the size of a large water heater or furnace is installed to supply the system with water. (*Id.* at 194-95.)

3. DLI's Initial Response To Testimony And Written Submissions

On December 31, 2013, DLI filed a memorandum ("Initial Response") responding to hearing testimony and written submissions filed with ALJ Lipman. (A-6 at 91.) The Initial Response detailed multiple considerations involved in its decision to propose exempting single-family homes of less than 4,500 square feet from the automatic sprinkler requirement. (A-6 at 99-101.) DLI explained that, after considering all the options,[6] it determined that an exemption for single-family homes under 4,500 square feet, when paired with existing passive fire protection requirements, was a needed and reasonable way to protect occupants, homes, property, and rescue personnel from the danger of fire in residential dwellings. (*Id.* at 101.)

The Initial Response further addressed the testimony and comments opposing the adoption of any sprinkler requirement for single-family homes. (A-6 at 101-07.) DLI also indicated that in light of the hearing testimony and written comments, it decided to strike a previously proposed requirement for automatic dry-head sprinklers in garages and porches of single-family dwellings. (A-6 at 17-20.)

4. DLI's Final Response

On January 9, 2014, DLI filed a final memorandum ("Final Response") responding to written submissions that it had not received at the time of its Initial

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[6] Alternatives DLI considered before settling on the rule it proposed included: requiring sprinklers in all single-family homes, regardless of size; not requiring sprinklers in any single-family homes; a size-based phase-in approach; permitting election of sprinkler requirements at the local-government level; and "trading off" passive safety requirements for an active sprinkler system. (A-6 at 100.)

Response.[7] (A-6 at 797.) DLI noted that it received eight substantive comments supporting sprinklers and ten opposing, and that many of these duplicated previous testimony or comments. (*Id.* at 807, 809-10.) DLI observed that three submissions presented noteworthy comments:[8]

- Minnetonka Fire Marshal Luke Berscheit submitted individual and summary data regarding the cost of fire sprinkler installations in the City of Minnetonka. (A-6 at 49-51.) For the 71 residential sprinkler installations for which complete data was available: the average residence size was 4,030 square feet; the average total system price was $5,971; and the price per square foot ranged from under $1 to $5.15, with an average of $1.51. (*Id.* at 49.)

- State Fire Marshal Bruce West took issue with sprinkler opponents' assertions that fire deaths in Minnesota had been declining for a decade. (A-6 at 57-61.) He explained that the fire deaths in Minnesota "have pretty much plateaued. While we did see an overall downward trend of fire deaths in the 1980s and 1990s, this downward trend is no longer apparent. Actually, the downward trend of fire deaths in Minnesota in

[7] In addition to addressing issues regarding the sprinkler requirement, the Final Response addressed written comments pertaining to four other provisions of the 1309 Rule. (A-6 at 798-807.) As to one of those other provisions, proposed Minn. R. 1309.0703, DLI agreed with the commenter's analysis and therefore revised the relevant section of the 1309 Rule to incorporate the suggested revisions. (*Id.* at 803-07.)

[8] DLI also addressed a fourth comment, which expressed concern about the effect on Minnesota's resorts and campgrounds of Rule 1309's "provision requiring all residences, regardless of location or circumstances, to have fire suppression sprinklers." (A-6 at 810-11.) As DLI explained, Rule 1309 does not apply to lodges, cabins, resort buildings, and the like, which are regulated under a different section of the Code. (*Id.* at 811.)

the 1980s and 1990s appears to be reversing and has been going up since 2009." (*Id.* at 57.)

- Professor James A. Milke, Ph.D., took issue with sprinkler opponents' attempt to use a report he authored to support the proposition that sprinklers are unnecessary because smoke alarms *alone* provide sufficient protection for lives and property. (A-6 at 78-79.) He iterated that "any attempt to discredit the need for residential sprinklers by placing sole protection responsibilities on smoke alarms is a misrepresentation of our research study" and opined that "both protection features are needed." (*Id.* at 78.)

5. ALJ Lipman's Order Approving the 1309 Rule

On February 7, 2014, ALJ Lipman issued a report approving the 1309 Rule in all respects. (Petitioner's Addendum ("Add.") 2.) The report concluded that DLI has statutory rulemaking authority for the 1309 Rule, that the 1309 Rulemaking complied with MAPA procedure, and that the 1309 Rule was necessary and reasonable. (Add. 3.) In the report, ALJ Lipman analyzed and specifically rejected the building industry's claims that rule is invalid because it supposedly does not:

(a) adhere to "building codes generally accepted and in use throughout the United States";
(b) follow from the application of "scientific principles, approved tests or professional judgment;"
(c) tend to lower construction costs; [or]
(d) represent the least-cost method of fire-safety protection for occupants of residential structures.

(Add. 6-10 (footnotes omitted).) ALJ Lipman also analyzed and rejected the building industry's claims regarding purported deficiencies in the 1309 SONAR and challenges to

the 4,500 square foot threshold for single-family dwellings. (Add. 16-19, 22-23.) DLI subsequently adopted ALJ Lipman's report and the 1309 Rule. (Add. 28-29.)

III. DLI AMENDS THE MINNESOTA RESIDENTIAL ENERGY CODE, MINN. R. CH. 1322, BY ADOPTING PROVISIONS OF THE 2012 INTERNATIONAL ENERGY CONSERVATION CODE.

Prior to the 1322 Rulemaking that is the subject of this case, DLI last amended the Minnesota Residential Energy Code ("MREC") in 2009. (B-4.D at 1.) In early 2012, DLI convened an advisory committee to discuss amending and updating the 2009 MREC. (B-4.D at 1.) Petitioner had two representatives on this committee, which met five times from January through March 2012. (B-4.D at 1-2, 35.)

On November 5, 2012, DLI published in the State Register a Request for Comments regarding the possible amendment of the MREC by adopting by reference the residential provisions of the 2012 International Energy Conservation Code ("IECC"),[9] with amendments. (B-4.A.) DLI also drafted a proposed rule and associated statement of need and reasonableness ("1322 SONAR"), which were submitted to MMB in January 2014. (B-4.P.2 at p. 1.) MMB's evaluation, dated February 13, 2014, noted that while local governments that enforce the MREC might incur process or staffing costs, "there does not appear to be significant costs to local units of government that are not recoverable through local fees." (B-4.P.2 at p. 2.)

On March 10, 2014, DLI submitted the 1322 SONAR and 1322 Rule, along with its proposed Dual Notice, to the Office of Administrative Hearings for scheduling of a

[9] The IECC is a national model code promulgated by the ICC. (B-4.D at 1 n.5.)

hearing and approval of the Dual Notice. (B-4.D.) DLI also requested approval of the Additional Notice Plan included in the 1322 SONAR ("1322 Notice Plan"), pursuant to which DLI would provide notice to Petitioner and other interested persons. (B-4.D at 7.) ALJ LauraSue Schlatter approved the Dual Notice (with minor changes not relevant here), and the 1322 Notice Plan. (B-4.D at Order dated March 17, 2014.)

On April 3, 2014, DLI mailed the Dual Notice to Petitioner and other persons identified in the 1322 Notice Plan and members of DLI's rulemaking mailing list, including *amici curiae* BAM and Realtors Association. (B-4.E; B-H.1-.2.) On April 7, 2014, the Dual Notice was published in the State Register and DLI emailed the Dual Notice to members of DLI's electronic rulemaking mailing list. (B-4.E, G.) The Dual Notice provided instructions for accessing or receiving electronic or hard copies of the SONAR and proposed rule, explained how persons wishing to submit comments or hearing requests may do so, indicated that the period for comments and hearing requests closed on May 8, 2014, and stated that the hearing scheduled for May 22, 2014, would be canceled if DLI did not receive at least 25 hearing requests. (B-4.E.) The hearing was ultimately canceled because DLI only received three comments and fourteen hearing requests. (B-2, B-4.J.) Notably, neither Petitioner nor its *amici* submitted any comments or requested a hearing. (*See id.*)

On June 6, 2014, DLI submitted the 1322 Rule and rulemaking record to ALJ Schlatter. *See* Minn. Stat. § 14.26; Minn. R. 1400.2310. (B-3.) The 1322 SONAR explained that the purpose of the 1322 Rule was to provide minimum standards for energy conservation. (B-4.D at 4.) DLI determined that the first-year cost of the

1322 Rule to any small business or small city would not exceed $25,000 because: (1) the rule applies only to new construction or remodeling undertaken after the rule takes effect, and the rule does not require any construction or remodeling to take place; (2) the rule places costs on the owners of residential buildings subject to the rule, not small businesses, because companies constructing or remodeling residential buildings will pass along the cost of code compliance along to their customers, the owners of those buildings; and (3) the costs to small cities of purchasing new code books and potentially training employees in changes to the code would not exceed $25,000. (B-4.D at 8-9.)

The 1322 SONAR explained that DLI did not consider alternative methods to adoption of the IECC because it is the most comprehensive code available, and—because the IECC is part of the family of ICC model codes that make up the Code—its requirements work in concert with other parts of the Code adopted by DLI. (B-4.D at 4.) Adoption by reference of the residential construction provisions of the model IECC is the least costly and intrusive method for achieving minimum energy conservation standards because it reduces confusion and enhances the uniformity of code application and consistency of enforcement. (*Id.*) The probable costs of compliance with the 1322 Rule included costs associated with updates to equipment, control devices, and materials to comply with the minimum energy efficiency requirements set forth in the rule. (*Id.* at 5.)

On June 11, 2014, ALJ Schlatter approved the 1322 Rule upon determining that (1) DLI was authorized to adopt the rule; (2) DLI adopted the rule in compliance with Minn. Stat. ch. 14 and Minn. R. ch. 1400; (3) two amendments that DLI made to the 1322 Rule in response to public comments were permissible under the law; and (4) the

rulemaking record demonstrated the need for and reasonableness of the 1322 Rule. (B-5 (citing documents B-4.L, N).)

IV. PETITIONER SOUGHT JUDICIAL REVIEW ON THE EVE OF THE RULES BECOMING EFFECTIVE.

Following more than two years of formal rulemaking, the State Register published notice of adoption of the 1309 Rule on July 28, 2014, and of the 1322 Rule on August 18, 2014. Pursuant to Minn. Stat. § 326B.13, subd. 8, the 1309 Rule became effective on January 24, 2015, and the 1322 Rule became effective on February 14, 2015.

On January 20, 2015, Petitioner filed this declaratory action under Minn. Stat. §§ 14.44-.45 asking this Court to review both rules. Thereafter, on February 10, 2015, the Court denied Petitioner's motion to stay or enjoin enforcement of the rules after concluding that Petitioner had not demonstrated that injunctive relief was warranted, particularly in light of the limited standard of review and deference afforded to State agencies.

STANDARD OF REVIEW

"A section 14.44 declaratory judgment action is a pre-enforcement challenge '[that] questions the process by which the rule was made and the rule's general validity before it is enforced against any particular party.'" *Minn. Chamber of Commerce v. MPCA*, 469 N.W.2d 100, 102 (Minn. Ct. App. 1991) (quoting *Mfg. Housing Inst. v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984)). The scope of pre-enforcement review is specifically limited to whether the rule (1) violates constitutional provisions, (2) exceeds the agency's statutory authority, or (3) was adopted without complying with statutory

rulemaking procedures. Minn. Stat. § 14.45; *Minn. Chamber of Commerce*, 469 N.W.2d at 102; *see also Save Mille Lacs Sportsfishing, Inc. v. Minn. Dep't of Natural Res.*, 859 N.W.2d 845, 850 (Minn. Ct. App. 2015) (observing that the Court has no authority to expand the scope of review in a pre-enforcement proceeding).

The Court reviews *de novo* the threshold question of whether an agency has exceeded its statutory authority. *GH Holdings, LLC v. Minn. Dep't of Commerce*, 840 N.W.2d 838, 841-42 (Minn. Ct. App. 2013). The Court then reviews the agency's rulemaking proceedings under the arbitrary and capricious standard to determine whether the rule is "rationally related to the objective sought to be achieved." *Mammenga v. State Dep't of Human Svcs.*, 442 N.W.2d 786, 789 (Minn. 1989); *see also Minn. Chamber of Commerce*, 469 N.W.2d at 103. The agency "enjoys a presumption of correctness," and "deference is to be shown to agency expertise, restricting judicial functions to a narrow area of responsibility, lest the court substitute its judgment for that of the agency." *Peterson v. Minn. Dep't of Labor & Indus.*, 591 N.W.2d 76, 79 (Minn. Ct. App. 1999); *Pettersen*, 347 N.W.2d at 244.

A person attacking a regulation on due process grounds has a "heavy burden" to prove the challenged rules are invalid: "the statute or rule need only bear some rational relation to the accomplishment of a legitimate public purpose to be sustainable." *Pettersen*, 347 N.W.2d at 243; *Rocco Altobelli, Inc. v. State, Dep't of Commerce*, 524 N.W.2d 30, 37 n.4 (Minn. Ct. App. 1994). To satisfy itself that a challenged rule is a reasonable means to a permissible objective the Court must make a searching and careful inquiry of the record. *Minn. Chamber of Commerce*, 469 N.W.2d at 103. A rule based

on "conclusions [that] were applications of agency expertise, articulated in a reasoned manner and based on evidence in the record," cannot be labeled arbitrary and capricious. *Pettersen*, 347 N.W.2d at 245.

To avoid "emasculating the rulemaking proceedings at the administrative level," the record for judicial review in a pre-enforcement challenge is expressly limited to the record made by the agency in the rulemaking proceeding. *Pettersen*, 347 N.W.2d at 241; *Minn. Chamber of Commerce*, 469 N.W.2d at 103. A challenge under section 14.44 is to the validity of the rule on its face, and not as applied to any particular party. *Pettersen*, 347 N.W.2d at 241.

ARGUMENT

Petitioner and its *amici* treat this pre-enforcement challenge as an extension of the administrative rulemaking proceedings and ask the Court to substitute its viewpoints and policy preferences for DLI's. Petitioner's arguments misunderstand the applicable law and standards of review. The Court should affirm the validity of the rules and deny Petitioner's request for declaratory judgment.

As an initial matter, Petitioner's Brief and two of the three *amicus* briefs improperly attach and reference materials outside the respective rulemaking records. These materials include, for example: the 2015 IECC in Petitioner's Addendum; the two documents in Kottschade and the National Association of Home Builders' Addendum, both of which post-date the administrative rulemaking proceedings; and documents identified in the Realtors Association's Table of Authorities, several of which post-date the administrative rulemaking proceedings. This is plainly impermissible in a

pre-enforcement challenge under section 14.44. The Court cannot consider any materials or references to materials that are outside the respective rulemaking records as a matter of law. *Pettersen*, 347 N.W.2d at 241.

I. CHAPTER 326B AUTHORIZES DLI TO ADOPT THE RULES AT ISSUE.

The Legislature enacted the Code because "a single, uniform set of building standards was necessary to lower costs and make housing more affordable." *City of Morris v. Sax Investments, Inc.*, 749 N.W.2d 1, 7 (Minn. 2008); *see also City of Minnetonka v. Mark Z. Jones Assoc., Inc.*, 306 Minn. 217, 222, 236 N.W.2d 163, 166-67 (1975) (explaining that the legislature's purpose was "to adopt a building code which will afford the public physical protection and, at the same time, abolish abuses occasioned by local ordinances which are obsolete, complex, and unnecessary, and result in exorbitant costs" (citation omitted) (internal quotation marks omitted)); *Builders Ass'n of Minn. v. City of St. Paul*, 819 N.W.2d 172, 181 (Minn. Ct. App. 2012) ("Prior to its adoption, municipalities enforced a wide range of building code requirements, resulting in confusion and increased construction costs.").

To effectuate this purpose, DLI "may . . . adopt, amend, suspend, and repeal rules relating to [DLI]'s responsibilities under [chapter 326B]." Minn. Stat. § 326B.02, subd. 5. Chapter 326B requires that DLI "shall by rule" establish a Code of standards "for the construction, reconstruction, alteration, and repair of buildings, governing matters of structural materials, design and construction, *fire protection*, health, sanitation, and safety, including design and construction standards regarding *heat loss control, illumination, and climate control.*" Minn. Stat. § 326B.106, subd. 1 (emphasis added).

The Code "must conform *insofar as practicable* to model building codes generally accepted and in use throughout the United States." *Id.* (emphasis added). It must also "be based on the application of scientific principles, approved tests, and professional judgment" and "encourage the use of new methods and new materials." *Id.* "Model codes with necessary modifications . . . may be adopted by reference."[10] *Id.* Nevertheless, as observed by ALJ Lipman and contrary to Petitioner's arguments, the law "does not require [DLI] to wait until the majority of states have approved a particular construction practice before including it in the Minnesota Building Code." (Add. 7).

A. DLI Has Statutory Authority To Adopt By Reference The 2012 IRC With Amendments.

The 1309 Rule comprised the 2012 IRC model code with Minnesota-specific amendments. (*See generally* A-2; A-5.B; A-12.) The IRC is the *only* model residential building code generally accepted and in use in the United States. (A-5.B at 1, 4.) It uses both performance and prescriptive provisions to establish minimum regulations for single- and two-family dwellings and townhouses. (*Id.* at 1; *see also generally* A-5.B.1.) It makes possible the use of new materials, methods, and building designs and is updated every three years to incorporate the most current construction code criteria and provide

[10] One of Petitioner's *amici* argues that the 1309 Rule exceeds DLI's statutory authority because DLI did not give consideration to existing statewide specialty codes—in particular, the State Fire Code. This argument is frivolous. DLI is responsible for adopting and amending the State Fire Code. Minn. Stat. § 326B.02, subd. 6. The 1309 Rule was part of a package of updates to state codes for which DLI bears some administrative responsibility—*including an update to the State Fire Code*. (A-1.) The Code takes precedence over the State Fire Code. Minn. Stat. § 299F.011; *Builders Ass'n*, 819 N.W.2d at 180.

up-to-date code provisions for use throughout the nation. (*Id.*) The IRC is, and is intended to be, a residential building code that protects public health, safety, and welfare, does not unnecessarily increase construction costs, and does not restrict the use of new materials, products, or methods. (*Id.*) The 2012 IRC requires automatic fire sprinklers in all single- and two-family dwellings, regardless of size. (A-5.B.1 at 62-63.) The Fire Sprinkler Standard includes a Minnesota-specific modification exempting some single-family dwellings, thereby making the Code *less stringent and less costly* than the model code. (*See, e.g.*, A-5.B at 1-2.)

The Code's enabling statutes authorize DLI to adopt the 2012 IRC "insofar as practicable" and to modify the 2012 IRC as necessary. Minn. Stat. § 326B.106, subd. 1. With regard to the Fire Sprinkler Standard, DLI and members of the Chapter 1309 Advisory Committee reviewed many scientific, technical, and cost reports pertaining to automatic fire sprinkler systems. (*See* Add. 8 n.26 (listing reports).) DLI explained in the 1309 SONAR, Initial Response, and Final Response how it weighed the evidence regarding the benefits and costs of fire sprinkler systems and, exercising its professional judgment, crafted the Fire Sprinkler Standard for Minnesota. (A-5.B at 27-30; A-6 at 93, 97-107, 807-10.) Although Petitioner and its *amici* obviously disagree with DLI's policy determination that the life-safety benefits of fire sprinklers outweigh installation costs, their financially-based disagreement does not render the 1309 Rule or the Fire Sprinkler Standard in excess of the broad rulemaking authority granted by the Code's enabling

statutes. DLI's adoption of the 1309 Rule is plainly authorized by the Code's enabling statutes.[11]

B. DLI Has Statutory Authority To Adopt By Reference The 2012 IECC With Amendments.

The 1322 Rule comprised the 2012 IECC model code with Minnesota-specific amendments. (*See* B-4.C.) The IECC is a model residential energy code generally accepted throughout the United States. (B-4.D at 1; B-4.J at 2.) Like the IRC, it is updated every three years to keep pace with modern materials, methods, and building designs. (*See* B-1.) At the time of the 1322 Rulemaking, the 2012 IECC was the most recent version of the most comprehensive model energy code available for purposes of adoption. (B-4.D at 4; B-4.J at 2.)

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[11] Petitioner places great significance on the Minnesota legislature's passage, in 2010 and 2011, of bills that would have prohibited the Code from requiring automatic fire sprinkler systems in single-family homes ("sprinkler bills"). (Petitioner's Br. 7, 25-26; *see also* Add. 4-5, 7.) These bills, both of which were vetoed by the Governor, are not relevant to the narrow issues before the Court in this pre-enforcement declaratory judgment action.

Under Article 4, Section 11 of the Minnesota Constitution, "a bill remains in an embryonic state and does not become law until three things occur, namely, passage by both houses of the legislature and approval by the governor." *State ex rel. Foster v. Naftalin*, 246 Minn. 181, 187, 74 N.W.2d 249, 254 (1956). The "embryonic" sprinkler *bills*, which were not approved by the governor, have no impact on DLI's authority to promulgate Code rules—which, as explained above, is provided by existing *laws*. *See* Minn. Stat. §§ 326B.02, .106. Moreover, although the sprinkler bills' passage and veto highlight the existence of differing viewpoints regarding the policy wisdom of requiring fire sprinklers in single-family homes, "[i]f there is room for two opinions on [a] matter, [an] agency's decision to accept one over another is not arbitrary and capricious." *In re Request for Issuance of SDS General Permit MNG300000*, 769 N.W.2d 312, 323 (Minn. Ct. App. 2009).

In considering the 1322 Rule, DLI convened an advisory committee, examined-along with other scientific and technical data—a research study by a University of Minnesota professor, and received and responded to comments submitted by the public. (B-4.D at 24; B-4.J; B-6.) The 1322 Rule establishes minimum requirements governing materials, design, and construction specifically related to heat loss control, illumination, climate control, and other aspects of residential construction that affect a building's efficient use of energy. (*See, e.g.*, B-4.C; B-4.J at 2-5, 8-9.) The 1322 Rule addresses, for example, residential buildings' windows and doors, duct systems, insulation specifications, and so forth. (*Id.*) It does so by adopting the 2012 IECC with Minnesota-specific amendments resulting from DLI's professional judgment, as informed by its own investigation, its consultation with the advisory committee, and its consideration of comments received in response to the Dual Notice. (B-4.C.) DLI's adoption of the 1322 Rule is plainly authorized by the Code's enabling statutes.

II. PETITIONER HAS NOT AND CANNOT CARRY ITS HEAVY BURDEN TO OVERTURN THE 1309 RULE.

The Court should decline Petitioner's improper invitation to rebalance the evidence in the 1309 Rulemaking and substitute its judgment for DLI's. Petitioner repeatedly misinterprets the applicable law, particularly when it comes to balancing public safety concerns against anticipated costs. The 1309 Rule is not arbitrary and capricious, and Petitioner cannot establish that any rulemaking procedure was violated.

A. ALJ Lipman Correctly Rejected Petitioner's Cost-Based Arguments.

Petitioner incorrectly asserts that the Code's policy and purpose provision strictly limits DLI's rulemaking authority by using the phrases "tend to lower construction costs" and "least possible cost." Minn. Stat. § 326B.101. Indeed, Petitioner incredibly suggests that *any* rule that results in a net cost increase is invalid as a matter of law.[12] (Petitioner's Br., p. 15, 26-27.) ALJ Lipman properly rejected these flawed statutory interpretations and cost-based arguments. (Add. 8-10.)

First, section 326B.101 expresses the policy and purpose of the Code to replace local-level building regulations—the proliferation of which "serve[d] to increase costs without providing correlative benefits of safety to owners, builders, tenants, and users of buildings"—with a basic and uniform building code providing for modern materials and techniques. *City of Morris*, 749 N.W.2d at 7 (quoting Act of May 26, 1971, ch. 561, § 1, 1971 Minn. Laws 1018, 1019). In other words, section 326B.101 observes that the Code "will in part tend to lower construction costs" and does not, as Petitioner claims, mandate that a building standard is invalid unless it lowers construction costs. (*See also* Add. 9 ("The Department is not barred by Minn. Stat. § 326B.101 from promulgating a building construction standard that is more costly than the one it replaces.").)

Second, section 326B.101's intimation that construction "*should* be permitted at the least possible cost" is permissive, not mandatory. *See, e.g.*, *In re Jacobs*, 802 N.W.2d 748, 754 (Minn. 2011) ("[U]se of the word 'should' indicates that the comment is not

[12] For example, under Petitioner's flawed analysis, the mandatory installation of smoke alarms in homes is unlawful because of increased construction costs.

mandatory. Where a Rule contains a permissive term, such as 'may' or 'should,' the conduct being addressed is committed to the personal and professional discretion of the [person] in question." (citation omitted) (internal quotation marks omitted)); *Meriwether Minn. Land & Timber, LLC v. State*, 818 N.W.2d 557, 566 (Minn. Ct. App. 2012) (stating that "the legislature uses 'shall' to avoid giving discretion to officials"). ALJ Lipman correctly concluded that this directive seeks to "balance health and safety benefits of future construction standards against the costs of adhering to any new practices." (Add. 9-10).

Section 326B.101 does not mandate that construction standards must lower costs in every instance and does not guarantee construction at the least possible cost. The Legislature did not intend to place any such absurd or unreasonable limitations on DLI's ability to enact reasonable safeguards to protect the health, safety, and welfare of Minnesota residents. *See* Minn. Stat. § 645.17 (2014). Petitioner's claim that increased costs automatically preclude any new health and safety standard must be rejected.

B. The 1309 Rule Is Rationally Related To The Legitimate Public Purpose Of Fire Safety.

An administrative rule violates due process when it is not rationally related to the objective sought to be achieved. *Jacka v. Coca-Cola Bottling Co.*, 580 N.W.2d 27, 35 (Minn. 1998). An agency therefore "must explain on what evidence it is relying and how that evidence connects rationally with the agency's choice of action to be taken." *Pettersen*, 347 N.W.2d at 244.

Petitioner cannot dispute that the protection of life and property in the event of a residential fire are legitimate public purposes. *See, e.g.*, *Mark Z. Jones*, 306 Minn. at 223, 236 N.W.2d at 166 ("It is difficult to conceive of any matter of public concern which should be given greater attention in the State Building Code than fire prevention."); *Builders Ass'n*, 819 N.W.2d at 180 ("[T]he purpose of the building code is, in part, to ensure reasonable safeguards for the health and safety of residents.").

The 1309 Rulemaking record more than adequately demonstrates that the 1309 Rule and the Fire Sprinkler Standard are rationally related to this purpose. Throughout the rulemaking proceeding, DLI repeatedly identified and explained the evidence on which it was relying and how that evidence rationally connected with DLI's choice to adopt the 2012 IRC with an exemption for single-family homes of 4,500 square feet or less from the fire sprinkler mandate. (*See, e.g.*, Add. 6-10, 13-20, 23-24.)

The 1309 SONAR, for example, is representative of DLI's efforts: Initially, the 1309 SONAR states that the purpose of the 1309 Rule was to provide a modern, comprehensive building code addressing all facets of residential construction. It indicates that DLI proposed adopting the 2012 IRC because the IRC is the only model residential code generally accepted and in use in the United States. It explains that adopting the 2012 IRC with amendments will help promote uniformity of code application and enforcement, which in turn tends to lower costs—one goal of the Code.

The SONAR also specifically addresses the Fire Sprinkler Standard. (A-5.B at 27-33.) It acknowledges that differences in opinion exist between proponents and opponents of requiring automatic fire sprinklers in single-family homes in Minnesota. It

identifies the competing proposals offered by fire safety groups—which suggested phasing in a sprinkler requirement for all single-family homes—and by the building industry—which outright reject any sprinkler requirement for single-family homes. The SONAR discusses both the life-safety concerns raised by the fire safety groups and the cost concerns raised by the building industry. As to the former, the SONAR cites an Underwriters Laboratories study showing that modern construction methods had resulted in faster floor and roof collapses—from approximately 18 minutes in the past to approximately 4 minutes today. It cites data from one Pennsylvania county demonstrating that the use of automatic fire sprinklers reduced average property loss due to home fires from approximately $180,000 to $14,000 and water use by firefighters from approximately 6,000 gallons to 340 gallons. It also explains the concern of firefighters that larger homes pose additional dangers because they are more difficult to deal with from a rescue and firefighting perspective and because their size results in longer escape times for residents. The SONAR acknowledges that interconnected smoke alarms enhance fire safety by alerting and enabling some occupants to escape when fires break out. The SONAR concludes, however, that fire sprinklers are active systems that provide life-safety and property protection above and beyond that provided by passive systems such as smoke alarms. This conclusion is buttressed by a great deal of evidence in the record—some of which is summarized in DLI's Initial and Final Responses and on pages 16 through 21 of this brief—establishing that fire sprinklers reduce heat and toxic gases; prevent flashover, which will kill even a firefighter in full protective gear; and actively *protect* the elderly, young children, physically disabled, chemically impaired, and others

who are unable to respond to a smoke alarm's passive alert, as well as the firefighters who come to their aid.

The SONAR next addresses the cost of sprinkler systems. It cites to a 2008 study showing the average per-square-foot cost of sprinklers systems to be $1.61, and the 2013 update of the same study showing that the average cost had decreased to $1.35 per square foot. (A-5.B at 31.) It discusses the building industry's submission of information showing a per-square foot cost of $2.93 to $3.95 when builder markup is included in the price. (A-5.B at 32.) The SONAR explains that DLI also obtained several price quotes for sprinkler installation in a representative commercial building. (A-5.B at 33 n.13.) It explains that DLI predicts that the actual cost of sprinkler installation for large single-family homes will be more similar to the existing cost for multiple-occupancy dwellings (which already require fire sprinklers) than to the costs projected by the building industry. (*Id.* at 33.) It also notes concerns regarding enhanced costs when sprinklers are installed on homes with private well systems and concerns that some potential homebuyers may be priced out of the market. (*Id.*) The SONAR provides internet links to all of the cited documents, which were later submitted into the hearing record.

The SONAR then explains how DLI analyzed the information provided and balanced the life-safety and cost concerns in arriving at its decision to modify the 2012 IRC's broad fire sprinkler requirement by exempting single-family homes smaller than 4,500 square feet. (A-5.B at 32-33.) The SONAR explains that fire safety groups indicated that homes between 4,000 and 5,000 square feet and larger provide the greatest

life-safety risk to the public and that the Minnesota Department of Public Safety indicated that most fire departments are not equipped to handle fires involving large buildings. (*Id.* at 32.)

The rulemaking record was further developed before, during, and after the hearing with testimonial and documentary evidence. *See* Minn. Stat. § 14.14, subd. 2 ("The agency may, in addition to its affirmative presentation, rely upon facts presented by others on the record during the rule proceeding to support the rule adopted"). DLI produced additional written statements on December 31, 2013 and January 9, 2014 that further responded to new evidence and arguments. On February 7, 2014, ALJ Lipman properly approved the Fire Sprinkler Standard:

> In this proceeding . . . [DLI] explained how it resolved the conflicts in the rulemaking record, detailed the cost and performance assumptions it used and articulated the policy objectives it was pursuing through the proposed rule. As [DLI] explains in the SONAR, it selected a 4,500 square foot threshold for applicability of the sprinkler requirement for new single-family homes because these homes have larger combustible materials and overall sales prices that can bear the costs associated with installing sprinklers. [DLI] wrote:
>
> > In reaching its balance between the benefits of the life-safety/property protections offered by automatic fire sprinkler systems and the costs of installing these systems in newly constructed one-family homes, [DLI] determined that larger homes have the same challenges for occupants and first responders as other two-family and townhouse structures, but that the relative cost of installing sprinkler systems in smaller homes may be too expensive. Therefore, [DLI] is proposing to amend IRC Rule 313.2 to exclude homes under 4,500 square feet from the automatic sprinkler requirement.
> >
> > [DLI] chose the threshold of 4,500 feet in response to the case made by the fire service that homes between 4,000 and 5,000 square feet and larger provide the greatest initial life-safety risk to the public.

> While it is undeniable that the proposed rule will result in real impacts on the prices of new homes, and the market conditions for those who build residential structures, [DLI] chose a compliance threshold that reflected contemporary construction practice, home prices and fire-prevention techniques. The proposed rule is needed and reasonable as those terms are used in the Administrative Procedure Act.

(Add. 24 ¶¶ 94-95.) DLI adopted ALJ Lipman's report, which catalogues evidence in the record and expressly rejects many of the same arguments raised by Petitioner in this appeal.

There is no question that DLI, in drafting and adopting the 1309 Rule, had "to make judgments and draw conclusions from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as 'fact,' and the like." *Pettersen*, 347 N.W.2d at 244 (citation omitted) (internal quotation marks omitted). But imperfect and conflicting data does not render an administrative rule invalid. Rather, it underscores the extent to which DLI was required to apply its expertise as the agency responsible for administering the Code in order to resolve the all-or-nothing standoff between fire safety officials and the building industry. DLI did not shy from this task and instead repeatedly and transparently explained how and why it arrived at its decisions to adopt the 2012 IRC and to make the sprinkler requirement less restrictive by exempting homes of 4,500 square feet and smaller.[13]

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[13] *Amici curiae* Franklin Kottschade and the National Association of Home Builders ("NAHB") now ask this Court to find that it is arbitrary and capricious to treat single-family and two-family homes differently, and to require the 4,500-square-foot (Footnote Continued on Next Page.)

Petitioner's challenge to the exemption is puzzling: DLI adopted the 2012 IRC by reference, except where explicitly superseded by amendment. The exemption is one such amendment. If the exemption is determined to be invalid, presumably *all* single-family homes will be subject to the sprinkler requirement. Nevertheless, Petitioner maintains that DLI's decision to exempt single-family homes smaller than 4,500 square feet from the 2012 IRC's sprinkler mandate is arbitrary and capricious under *Pettersen*, 347 N.W.2d 238. In *Pettersen*, the Minnesota Supreme Court considered a pre-enforcement challenge to a 0.5 parts-per-million ("ppm") maximum formaldehyde threshold established by the Minnesota Department of Health ("MDH"). *Id.* MDH initially proposed a 0.4 ppm threshold, but the hearing examiner rejected it and suggested 0.8 ppm, the Chief Hearing Examiner rejected *that* and suggested 0.5 ppm or higher, and MDH ultimately "without explanation, adopted the recommendation of the Chief Hearing

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(Footnote Continued From Previous Page.)
threshold be applied to two-family homes. First, as a threshold matter, this issue was not raised by Petitioner or Respondent and is therefore not properly before the Court. *Nat'l Council on Teacher Quality v. Minn. State Colleges & Univs.*, 837 N.W.2d 314, 320 (Minn. Ct. App. 2013). Second, as explained above, the Fire Sprinkler Standard is not arbitrary and capricious because it is rationally related to the legitimate public purpose of fire safety. Third, although NAHB participated in the 1309 Rulemaking proceeding, neither it nor anyone else raised this issue. In fact, BAM argued the exact opposite—that two-family homes present safety concerns above and beyond those present in single-family homes: "Two-family dwellings are very different than a one-family dwelling because you share a wall with someone, and you don't know if that is the guy that is drinking and smoking in bed or cooking meth or whatever or burning unattended candles. It's a different policy question when someone else can put your family at risk." (A-4 at 83-84.) The Court should reject Kottschade and NAHB's attempt to emasculate the administrative rulemaking proceeding by saving this issue for judicial review, after DLI's opportunity to address it in the rulemaking record has long passed.

Examiner to set the level at 0.5 ppm." *Id.* at 243-44. In setting the 0.5 ppm threshold, MDH determined that reasonable tests for formaldehyde exist, that the chosen threshold was achievable, and the threshold was reasonable to protect the public health. *Id.* at 245-46.

The Court held that MDH's conclusions that 0.5 ppm was achievable and subject to testing were *not* arbitrary or capricious because the conclusions were based on evidence in the record and articulated in a reasonable manner. *Id.* at 245. MDH's conclusion regarding public health, however, *was* arbitrary and capricious because "there is no explanation of how the conflicts and ambiguities in the evidence are resolved, no explanation of any assumptions made or the suppositions underlying such assumptions, and no articulation of the policy judgments." *Id.* at 246. The Court explained that "[w]e do not say 0.5 ppm is wrong; we only say we cannot tell if it is within the bounds of what is right," and remanded to MDH to for further consideration of only the portion of the rule found defective. *Id.*

This case is not *Pettersen.* Here, unlike *Pettersen*, the threshold value—4,500 square feet in size—remained constant throughout the 1309 Rulemaking and was thoroughly discussed and analyzed by DLI, interested parties, and ALJ Lipman. Petitioner's argument that DLI failed to explain itself cannot withstand even cursory scrutiny of the record. *See Minn. Chamber of Commerce*, 469 N.W.2d at 104 ("It is difficult to conclude that [the agency] arbitrarily and capriciously failed to consider [required] factors, when public hearings were held . . . and when [the agency] responded to public reaction by revising some of the proposed [provisions]."). Petitioner's

suggestion that automatic fire sprinkler systems do not make homes safer defies reason and logic: the record establishes that the 1309 Rule and Fire Sprinkler Standard are rationally related to the legitimate public purpose of preventing losses of life and property in the event of a house fire. The record also demonstrates that DLI explained how the evidence in the record connects rationally with DLI's decision to exempt single-family homes smaller than 4,500 square feet from the 2012 IRC's blanket fire sprinkler mandate. The 1309 Rule is reasonable and valid.[14] (*See, e.g.*, Add. 22-23.)

C. DLI's 1309 Rulemaking Complied With The MAPA.

ALJ Lipman correctly concluded that DLI complied with the MAPA's procedural and legal requirements upon preparing the 1309 SONAR and promulgating the 1309 Rule. (Add. 12-20; *see also* Minn. Stat. §§ 14.131, .23; Minn. R. 1400.2070.) Petitioner's arguments, while purportedly aimed at the alleged insufficiency of the 1309 SONAR, are little more than collateral attacks on the policy supporting the 1309 Rule and the Fire Sprinkler Standard with which it disagrees.

Petitioner also mistakes the Fire Sprinkler Standard for the 1309 Rule as a whole. The purpose of the 1309 Rulemaking was to update the MRC by adopting the entire 2012 IRC, which addresses every aspect of residential construction. DLI accordingly provided accurate and sufficient responses to each of the eight items required by section 14.131, performed the analysis required by section 14.127, and provided all of it to ALJ

[14] If the Court finds that the 4,500 square foot threshold value is arbitrary and capricious, the remedy is not invalidation of the 1309 Rule or the Fire Sprinkler Standard, but remand of only the threshold value to DLI for additional consideration. *Pettersen*, 347 N.W.2d at 246.

Lipman for review. To the extent completion of the SONAR is a "statutory procedural requirement" reviewable in a pre-enforcement challenge, DLI has done everything the MAPA requires by responding accurately and completely, to the satisfaction of the presiding ALJ. *Cf.* Minn. Stat. § 14.15, subd. 5 (requiring ALJ to disregard "any error or defect . . . due to the agency's failure to satisfy any procedural requirement imposed by law or rule" unless the procedural failure deprived interested persons of the opportunity to participate meaningfully in the rulemaking process).

Petitioner has not and cannot establish that any procedural errors exist, much less one that deprived any person of a meaningful opportunity to participate in the public rulemaking.

III. PETITIONER HAS NOT AND CANNOT CARRY ITS HEAVY BURDEN TO OVERTURN THE 1322 RULE.

Petitioner improperly relies on data outside the record and that was unavailable at the time of the rulemaking, and fails to articulate any specific substantive reasons why it believes the 1322 Rule is invalid. Likewise, Petitioner cannot identify any procedural errors that purportedly exist or that otherwise deprived any person's right to be heard.

A. Petitioner's Vague Arguments Are Unavailing.

Petitioner vaguely asserts that "various" requirements of the 1322 Rule are "unnecessary, provide no appreciable benefit, and go beyond recognized standards of energy efficiency." (Petitioner's Br. 38-39.) But Petitioner fails to identify what specific requirements it is challenging—much less explain why or how it believes these unidentified requirements invalidate the 1322 Rule.

Petitioner contends that its challenge to the 1322 Rule is supported by a federal appellate court's application of a provision in the Federal Mine Safety and Health Act of 1977 granting the federal Mine Safety and Health Administration authority to adopt "no-less protective" health and safety rules under the federal Administrative Procedures Act. *United Mine Workers of Am., Intern. Union v. Dole*, 870 F.2d 662 (D.C. Cir. 1989). But federal enabling statutes have no bearing on DLI's authority to make Code rules, and federal administrative rulemaking statutes have no application to the 1322 Rule's promulgation under the MAPA. *See* 21 William J. Keppel, *Minnesota Practice* § 1.08 (2d ed. 2007) (explaining that "Minnesota's rulemaking procedures are unique in the nation" and "differ significantly" from rulemaking procedures patterned on the federal Administrative Procedure Act); *see also* Minn. Stat. § 326B.02, .106 (authorizing DLI to promulgate Code rules).

Petitioner's vague assertions and citation to inapplicable case law are inadequate to raise an issue for the Court's consideration. *See Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519, 187 N.W.2d 133, 135 (1971).

B. Petitioner Improperly Cites To And Relies On The 2015 IECC.

Petitioner's arguments based on the 2015 IECC lack merit and are not properly before the Court. (Petitioner's Br., p. 21, 41-42.) At the time of the 1322 Rulemaking, which formally began in November 2012, the 2012 IECC was the most current version of the IECC available and the 2015 IECC *did not exist*. (*See* B-4.J at 1-2.) To the extent Petitioner believed that DLI should have considered an alternative model code or any other substantive data, Petitioner had every opportunity to bring it to DLI's attention. It

did not do so and it is too late to supplement the record. *See Save Mille Lacs*, 859 N.W.2d at 852 n.7 (explaining difficulty reviewing objection raised for the first time in pre-enforcement challenge to this Court when "the record indicates that petitioners had the opportunity to attend several forums and to submit comments to the [agency]" but did not raise the objection during the rulemaking process); *see also* Minn. R. 1400.2070 (SONAR need not contain rebuttal evidence or argument).

The Realtors Association likewise relies on bare allegations and information that it failed to submit into the 1322 Rulemaking record. (Realtors Association Br. 4, 5, 10.) The Realtors Association complains that DLI did not "adequately evaluate" costs and implies that DLI's analysis is faulty but cannot point to any record evidence in support of these allegations. Instead, it proposes—without citation—hypothetical "estimated" compliance costs. (*Id.* at 10.)

By saving their objections for this pre-enforcement challenge, Petitioner and the Realtors Association attempt to "emasculat[e] the rulemaking process at the administrative level" in exactly the manner the supreme court rejected in *Pettersen*. The Court should disregard their unsupported arguments and reject their attempts to circumvent the well-established rule prohibiting extra-record evidence.

C. DLI's 1322 Rulemaking Complied With The MAPA.

Petitioner vaguely challenges the 1322 Rule on the basis that DLI allegedly failed to comply with procedures required by the MAPA and that the 1322 SONAR was "insufficient." (Petitioner's Br. 41-42.) These arguments are without merit.

Petitioner was aware of DLI's preparation for the 1322 Rulemaking because it was a member of the relevant advisory committee DLI convened in early-2012. Petitioner was also specifically identified in DLI's 1322 Notice Plan and received direct notice of the proceeding and opportunity to comment or request a hearing on the 1322 Rule. Although some members of the public did comment—leading DLI to revise part of the proposed 1322 Rule—Petitioner did not request a hearing and did not comment.

It is undisputed that the 1322 SONAR addressed each of the eight items enumerated in section 14.131. It is further undisputed that before DLI submitted the 1322 Rule to ALJ Schlatter it made a determination that the cost of complying with the 1322 Rule (which applies to *residential dwellings*) would not exceed $25,000 for any small business or small city. ALJ Schlatter reviewed the rulemaking record and approved compliance with the MAPA and associated administrative rules. *Cf.* Minn. Stat. § 14.26, subd. 3(d) (requiring ALJ to disregard "any error or defect . . . due to the agency's failure to satisfy any procedural requirement imposed by law or rule" unless the procedural failure deprived interested persons of the opportunity to participate meaningfully in the rulemaking process). Petitioner's arguments that the 1322 Rule was adopted without complying with the applicable rulemaking procedures are without merit.

CONCLUSION

Fire sprinklers are active safety features that are not new to the construction industry or the State Building Code. DLI acted within its authority and appropriately balanced the competing interests when it adopted the 1309 Rule, including the Fire Sprinkler Standard that exempts single-family dwellings smaller than 4,500 square feet

from the 2012 IRC's automatic fire sprinkler requirement. Similarly, DLI followed all applicable requirements when it updated the energy code by adopting the 1322 Rule.

Petitioner's cost-based concerns are insufficient to satisfy their heavy burden of proof in this pre-enforcement challenged to the 1309 Rule and 1322 Rule. These rules are and should be declared valid.

Dated: 4/27/2015

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CERTIFICATE OF COMPLIANCE
WITH MINN. R. APP. P 132.01, Subd. 3

The undersigned certifies that the Brief submitted herein contains 12,675 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2010, the word processing system used to prepare this Brief.

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