

MEMORANDUM

DATE: March 27, 2006

TO: Robert DuPont
Bureau Director

FROM: Joseph R. Thomas
Chief Legal Counsel

SUBJECT: Proposed Rule Modification to Chapters Comm. 61-66

You have requested a legal opinion in response to the opinion rendered in the memorandum dated December 5, 2005, from Chad R. Taylor, Esquire, of the law firm of Michael, Best & Friedrich, LLP, addressed to Jerry Deschane, Deputy Executive Vice President, Wisconsin Builders Association.

The issue presented, and that which will be addressed herein, is whether the Department may promulgate and/or amend an administrative rule that requires automated fire sprinkler systems to be installed in all multifamily buildings regardless of floor area square footage or number of units.

SHORT ANSWER

Yes. Not only does Wisconsin Law authorize the Department to promulgate administrative rules for the purposes of implementing state statutes under its purview, it also charges the Department with the responsibility to "...ascertain, fix, and order such reasonable standards or rules for the construction, repair and maintenance of places of employment and public buildings, as shall make them safe."

APPLICABLE SECTIONS OF WISCONSIN STATUTES

§ 101.12^o(1), Wis. Stats., reads as follows:

(1) The department shall adopt reasonable and proper rules and regulations relative to the exercise of its powers and authorities and proper rules to govern its proceedings and regulate the mode and manner of all investigative hearings.

§ 101.02(15)(j), Wis. Stats, provides that:

(j) The department shall ascertain, fix, and order such reasonable standards or rules for the construction, repair and maintenance of places of employment and public buildings, as shall make them safe." (Emphasis added).

§ 101.14(4)(a), Wis. Stats states that:

The department shall make rules, pursuant to ch. 227, requiring owners of places of employment and public buildings to install such fire detection, prevention or suppression devices as will protect the health, welfare and safety of all employers, employees and frequenters of places of employment and public buildings. (Emphasis added).

§ 101.14(4)(c), Wis. Stats., states that:

(c) The rules of the department governing such places and buildings under 60 feet in height shall be based upon but may vary from those provisions in the Building Officials and Code Administrators International, Inc. building code which relate to fire detection, prevention and suppression in public buildings and places of employment.

[NOTE: The following statute is the only statute discussed by Mr. Taylor, but is by no means the only authorizing statute granting the department authority to promulgate rules for the construction or inspection of multifamily dwellings.]

§ 101.14(4m)(b), Wis. Stats., provides that:

(b) The department shall require an automatic sprinkler system or a 2-hour fire resistance in every multifamily dwelling that contains any of the following:

- (1) Total floor area, for all individual dwelling units, exceeding 16,000 square feet.
- (2) More than 20 dwelling units.

§ 101.973(1), Wis. Stats, provides that;

Departmental Duties. The department shall:

- (1) Promulgate rules that establish standards for the construction of multifamily dwellings and their components.

ANALYSIS

While Mr. Taylor has gone to great lengths to explain what authority the department lacks to promulgate the proposed changes to § Comm. 61-66, it is my opinion that the department should focus on the very broad authority granted by the legislature to promulgate rules to "...protect the, health, welfare and safety of all employers, employees and frequenters of places of employment and public buildings." §101.(14)(4)(a), Wis. Stats. Under §101.01(12), Wis. Stats., "public building" means any structure, including exterior parts of such building, such as a porch, exterior platform or steps providing means of ingress or egress, used in whole or in part as a place of ...lodging, or use by the public or three or more tenants."

The essence of Mr. Taylor's argument is that "The Department is prohibited from adopting an administrative rule requiring fire sprinkler systems in all multifamily buildings since the State Legislature in the underlying legislation neither expressly nor impliedly authorized such action." (Taylor Short Answer p. 1).

Since it is clear and unambiguous on its face, I agree with Mr. Taylor that §101.02(14)(4m)(b) establishes the criteria for requiring an automatic fire sprinkler system or a 2-hour fire resistance in every multifamily dwelling where: (1) Total floor area, for all individual dwelling units, exceeds 16,000 square feet and (2) there are more than 20 dwelling units. However, I do not agree with his statement that “As eventually agreed to by the state legislature and as expressed in the statutory language, buildings with 20 units or more or greater than 16,000 square feet in size would need fire sprinkler systems or two-hour fire walls, while those with fewer than 20 units or less than 16,000 square feet in size would not.” (Emphasis added).[Taylor Facts p. 2].

Mr. Taylor has stated as that the “intended effect of the rule would be to require fire sprinkler systems in all multifamily buildings except townhouses of three stories or less.” (Taylor Analysis p. 2). While it is true that the ultimate effect of the rule change would be to require fire sprinkler systems in all multifamily buildings except townhouses of three stories or less, the purpose of the rule change is for the department to comply with its responsibility as charged in §101.02(15)(j) and §101.14(4)(a) and, Wis. Stats., to §101.14(4)(c).

Mr. Taylor has interpreted, or rendered his opinion, as if the legislature’s enactment of §101.14(4m)(b), Wis. Stats., was the only statute enacted authorizing the department to require the installation of automatic sprinkler systems. I agree with his statement that “The precise language in Wis. Stats. § 101.14(4m)(b) is deliberate, clear and unambiguous...”, but only to the matters contained therein. That statute sets the criteria for the installation of automatic sprinkler systems in multifamily dwellings where: (1) Total floor area, for all individual dwelling units exceeds 16,000 square feet and (2) there are more than 20 dwelling units. However, that statute is silent on the issue of what rules the department may promulgate for multifamily dwellings that are smaller in total square footage or unit size. It does not state expressly, or otherwise, that the department is prohibited from extending the requirement of the installation of automatic sprinkler systems to other multifamily dwellings that are smaller in total square footage or unit size.

Notwithstanding Mr. Taylor’s opinion that the legislature did not authorize the department to promulgate rules for the requirement to install automatic sprinkler systems in all multifamily dwelling outside of the purview of §101.14(4m)(b), Wis. Stats., the legislature has granted the department broad authority to promulgate rules relating to the construction, safety and inspection of dwellings.

Under §101.02(6)(a)&(b), Wis. Stats., entitled “**Powers, duties and jurisdiction of department**”:

(6) (a) All orders of the department in conformity with law shall be in force, and shall be prima facie lawful; and all such orders shall be valid and in force, and prima facie reasonable and lawful until they are found otherwise upon judicial review thereof pursuant to ch. 227 or until altered or revoked by the department. (Emphasis added).

(b) All general orders shall take effect as provided in s. 227.22. Special orders shall take effect as therein ordered.

Under §101.01(9), Wis. Stats., the term “Order” means any decision, rule, regulation, direction, requirement or standard of the department, or any determination arrived at or decision made by the department. (Emphasis added).

The department has exercised its broad authority under 101.02(15)(j) to promulgate a number of rules that in content have not exactly matched the specific statutory directions. (See attached list). However, pursuant to §101.02(6)(a), those rules are presumed to be “...in conformity with law shall be in force, and shall be primea facie lawful; and all such orders shall be valid and in force, and prima facie reasonable

and lawful...”, since none have been “... found otherwise upon judicial review thereof pursuant to ch. 227 or until altered or revoked by the department. (Emphasis added).

Among those rules, the current Comm 62.0001 adopts Section 503 of the IBC that regulates automatic sprinkler systems to address construction features, including construction types and height limitations, regardless of aggregate area or number of dwelling units. The underlying authorization was § 101.02(15)(j) and 101.14(a) & (c), Wis. Stats.

The final confirmation that the department is vested with the aforementioned authority to promulgate the proposed rule in question is manifested in the extraordinary system of checks and balances the legislature has put in place to guarantee that the department does not exceed that authority.

Under § 101.02(6)(e), Wis. Stats., “Any employer or any other person interested either because of ownership in or occupation, of any property affected by any such order, or otherwise, may petition for a hearing on the reasonableness of any order of the department in the manner provided in this subchapter.”

§ 101.02(10), Wis. Stats., provides that “Orders of the department under this subchapter shall be subject to review in the manner provided in ch. 227.”

In his memorandum opinion, Mr. Taylor correctly quotes Wis. Stat. 227.10(2) by stating that “No agency may promulgate a rule which conflicts with state law.” and Wis. Stat. 227.11(2)(a), which that states:

“Each agency may promulgate rules interpreting the provision of any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if it exceeds the bounds of correct interpretation. (Emphasis added).

He also cited several cases in which various rules of certain agencies were challenged as having exceeded the underlying authorizing statutes. Most noteworthy of those cited cases was that of *Mallo v. Department of Revenue*, 253 Wis. 12d 391, 645 N. W. 2d 853. In *Mallo*, the court held that an “Administrative agency may not issue a rule that is not expressly or impliedly authorize by the legislature.” The above-referenced statutes either expressly, or by implication, grant the department the authority to promulgate rules to effectuate the purpose of the statutes. The court in *Mallo* also held that “It is not necessary for an enabling statute to spell out every detail of a rule in order to expressly authorize it; accordingly, whether the exact words used in an administrative rule appear in the statute is not the question.” As stated previously, the department has promulgated several rules in which the language in the rule has not exactly matched the specific statutory directions or the exact language of the statutes.

Finally, the department faced a similar challenge to its authority to promulgate a rule in the case of *League of Wisconsin Municipalities, et al. v. Wisconsin Department of Commerce*, No. 01-1035, dated May 2, 2002 (Ct. of App. Dist. IV). Ironically, the Wisconsin Builders Association intervened as a party defendant in that matter. In this case, the plaintiffs brought an action to obtain a declaratory judgment invalidating Wis. Admin. Code § Comm 83. The department comprehensively revised ch. Comm 83, which regulates “private onsite wastewater treatment systems,” effective July 1, 2000. Under § 227.40(4), “the court shall declare the rule invalid if it finds it violates constitutional provisions or exceeds the statutory authority of the agency or was promulgated without compliance with statutory rule-making procedures.” The court held that it was not persuaded by the plaintiff’s argument that “...the department somehow exceeded its authority in promulgating Wis. Admin. Code § Comm 83.” The court went on the say that “We agree with the department that its general authority to grant exceptions or variances from its rules and regulations derives from Wis. Stats. §101.02(60)(e)-(h). *See, e.g.*, §101.02(6)(h) ([I]f it shall be found that the order complained of is unjust or unreasonable the department shall substitute thereof such other order as shall be just and reasonable.’ §101.01(9) (‘Orders’ means any decision, rule, [or]

regulation...of the department.’) Further indication that the department’s general authority to grant variance extends to provisions of the plumbing code are found in Wis. Stat. §§145.02(2) and 145.13. The former statute directs the department to establish and enforce plumbing standards ‘which shall be uniform and of statewide concern so *far as practical*,’ 145.02(2) (emphasis added), and it grants the department ‘such powers as are reasonably necessary to carry out the provisions of this chapter.’”

Likewise, the authority of the department to promulgate rules to “...ascertain, fix, and order such reasonable standards or rules for the construction, repair and maintenance of places of employment and public buildings, as shall make them safe.”, is found in §101.02(15)(j), Wis. Stats.

CONCLUSION

The authority of the department to promulgate rules and adopt reasonable and proper standards and regulations relative to the exercise of its powers and authorities and proper rules to govern its proceedings is clearly granted in the above-referenced statute sections. The proposed rule change of § Comm 61-66 is no different from other rules previously promulgated by the department, which remain in effect and deemed to be valid. It does not conflict with § 101.02(14)(4m)(b), Wis. Stats., or any other statute section which authorizes the department to promulgate rules to protect the safety, health and welfare of the citizens of Wisconsin.

**Comparison of
Specific Statutory Direction
And
Administrative Rules Promulgated under General Statutory Authority**

Specific Statutory Directions		Administrative Rules Promulgated under "General" Statutory Authority [101.02 (15) (j), 101.63 (1), 101.973 (1)]	
Stat. Ref.	Summary of Statutory Details	Adm. Rule Ref.	Summary of Rules
101.145(4) 1977 c. 388	Requires smoke detectors in each sleeping room or elsewhere within 6 feet of each sleeping area in residential buildings. This provision was retroactive.	Comm 57.16(1)(b) 4/1/2000	Required a single station smoke alarm (smoke detector) in each sleeping room even if there is a detector directly outside of the sleeping room in residential buildings.
		Comm 62.0001 [IBC 907.2.10.1.2] 7/1/2002	Requires a single station smoke alarm (smoke detector) in each sleeping room and outside of the sleeping room but in the immediate vicinity of the bedrooms in residential buildings.
101.145(4) 1977 c. 388	Requires smoke detectors in the basement and the head of stairways in residential buildings. The law does not require the use of multi-station detectors that are interconnected.	Comm 57.16(1)(c) 4/1/2000	Required detectors in stairways, corridors and other public areas of residential buildings to be wired and interconnected to the fire alarm system.
101.14(4)(b)1. 1975 c. 39, 94	Requires sprinklers in most buildings over 60 feet in height. This provision is retroactive to July 3, 1974.	Ind 54.01, 54.02 1/1/1976 Comm 62.0001 [IBC 503, IBC 1004] 7/1/2002	Requires sprinkler protection for many buildings that are under the 60 foot height threshold of the high rise sprinkler law to address various construction features since 1914, including construction types and area/height limitations, exit travel distance.
101.14(4m)(b) 1995 a. 27	Requires sprinklers in multifamily dwelling buildings when aggregate dwelling unit area exceeds 16,000 sq. ft. or contains more than 20 dwelling units.	Comm 62.0001 [IBC 503] 7/1/2002	Requires sprinklers for multifamily buildings to address various construction features, including construction types and height limitations, regardless of aggregate area or the number of dwellings units.
101.125 1975 c. 293	Specifies specific locations where safety glazing is required to be utilized.	Ind 51.14(3) 1/1/1975 Comm 62.0001 [IBC s. 2406] 7/1/2002	Required safety glazing in some areas subject to human impact if not adequately protected by guards. Requires safety glazing in additional locations not specified within the statutes (i.e. bifold closet door assemblies and glazing in areas not that can be adequately protected by guards).
101.645 1977 c. 388	Requires smoke detectors in the basement and each floor in one- and 2-family dwellings. The law does not require the use of multi-station detectors that are interconnected.	Comm 21.09 4/1/2001	Requires smoke alarms (detectors) in each sleeping room and outside of sleeping rooms where more than one sleeping room is located on a floor level. Requires alarms to be interconnected.