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NO. A06-1188

State of Minnesota
In Supreme Court

City of Morris,

Respondent,

v.

Sax Investments, Inc. and Michael Sax,

Appellants.

BRIEF OF *AMICUS CURIAE* CITY OF ROCHESTER

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LEGAL ISSUE

Whether the state law that prohibits cities from "regulating components or systems of any residential structure that are different from any provision of the State Building Code" act to prohibit cities from regulating rental housing using ordinances that impose habitability standards that do not affect an integral part of the design or construction of buildings.

The Court of Appeals held that the State Building Code preempts cities from regulating the construction, alteration, remodeling and restoration of residential housing, but does not preempt the regulation of rental housing habitability standards.

INTRODUCTION

The City of Rochester ("Rochester") submits this brief in support of the Respondent's position in Morris v. Sax Investments, Inc., to further its governmental role in protecting the health, safety and welfare of the local population through the creation and enforcement of housing code ordinances.[1] Rochester's ability to enforce minimal habitability standards for rental properties will be severely hamstrung if the Court reverses the Court of Appeals' decision thereby restricting municipalities from exercising their authority to locally regulate the business of the use and occupancy of rental properties.

This issue is particularly relevant to Rochester in light of the recent and ongoing period of significant growth and change.[2] Rochester is the third largest city in Minnesota and it is rapidly expanding. Rochester's estimated 2006 population was 98,649.[3] For the past five years, Money Magazine has named Rochester as one of the top three U.S. cities.[4] Mayo Clinic is Rochester's largest employer with an estimated 28,000 employees.[5]

The strong local economy has brought high rates of job growth and very low unemployment. As local labor resources are tapped to their full extent, area businesses are increasingly relying on immigrants to the community to fill their business expansion needs. As a result, Rochester is becoming home to an increasingly diverse population.[6] The percentage of

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[1] Pursuant to Minn.R.Civ.App.P.129.03, Rochester certifies that this brief was not authorized in whole or in part by counsel for either party to this appeal, and that no other person or entity made a monetary contribution to its preparation or submission.

[2] Olmsted County Official Website, *General County Information> Demographics> Population Data* (visited Sept. 19, 2007)

[3] Minn. Office of the State of Demographer, *Annual Estimated of City and Township Population, Households and Persons per Household 2000-2006*

[4] RelocateAmerica.com, *Rochester, Minnesota* (visited Sept. 20, 2007)

[5] First Homes Rochester Area Foundation, *Employer Assisted Housing and the Community Land Trust* (visited Sept. 18, 2007)

[6] Olmsted County Official Website, *General County Information> Demographics> Population Data* (visited Sept. 19, 2007)

foreign born population in Rochester is 10.1%.[7] It is estimated that 87.8% of the residents speak English at home.[8] Since 1990, minority enrollment in the Olmsted County school systems has increased by 125%.[9]

Rochester is a temporary residence to a significant seasonal migrant worker population employed by the local factories, farms, and restaurants during the warmer months. This segment of the population requires short-term rental housing. They are often poorly educated, unfamiliar with Minnesota laws and cannot read or speak or write English. These tenants never enter into a meaningful lease agreement with their landlords. They do not understand their legal options and are unable to exercise their legal rights to ensure that their premises remain habitable. A portion of these rental tenants are illegal immigrants who are reluctant to complain for fear that they will be reported to law enforcement agencies and subsequently lose their employment and housing.

Rochester is also home to a growing college student population. Rochester hosts the University of Minnesota-Rochester (UMR), University of Winona-Rochester (UWR), Crossroads College (CC), the Rochester Community and Technical College (RCTC), Mayo School of Health Related Services (MSHS), Mayo Graduate School (MGS) and Mayo Medical School (MMS). UMR was formally established in Rochester in December, 2006, and provides graduate and undergraduate degrees. RCTC offers 2-4 year academic degrees and has a total enrollment of 5,852 students which is up .7 % from last year.[10] UWR serves approximately

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[7] City-Data.com, *Rochester, MN (Minnesota) Houses and Residents* (visited Sept. 19, 2007).
[8] City-Data.com, *Rochester, MN (Minnesota) Houses and Residents* (visited Sept. 19, 2007).
[9] Olmsted County Official Website, *General County Information > Demographics> Population Data (*visited Sept. 19, 2007)
[10] TMCnet.com NEWS (Post-Bulletin (Rochester, MN) (KRT) Via Thomson Dialog NewsEdge) *Enrollment Up Slightly at Area Campuses* (Sept. 14, 2007) (visited Sept. 20, 2007)

1,350 students which represent a 4.5% increase this year.[11] CC has a 184 students attending this fall semester which is up 8.9%.[12] MSHS, MGS, and MMS combined have approximately 800 enrolled students.[13]

In the late 1990's, the increasing demand for housing resulted in a "housing crisis" in Rochester. There was less than a 1% rental vacancy rate. Housing options for low to moderate income families were nearly non-existent. This situation stimulated a growth in the number of apartments and homes being rented out to meet the need for affordable transitional housing.[14] According to Phil Wheeler, Planning Director for Olmsted County, the current rental vacancy rate is estimated to be approximately 7%.

The Olmsted County Planning Department estimates the current percentage of renters in Rochester's population is 29%. In 2006, there were 12,149 registered rental properties.[15] The Rochester Building Safety Department is aware of 818 elderly rental housing units and 109 student rental housing units.

In response to the growing demand for housing and the increasing conversion of single-family occupied homes into rental properties, Rochester's Common Council expressed its concern about the health and safety of those living in these properties. The Council found that there were structures used for human habitation which were or soon would be sub-standard with respect to structure, equipment or maintenance. These conditions, coupled with inadequate provisions for light and air, insufficient protection again fire hazards, lack of proper heating, unsanitary conditions and overcrowding, constituted a danger to the public health, safety and

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[11] TMCnet.com NEWS (Post-Bulletin (Rochester, MN) (KRT) Via Thomson Dialog NewsEdge) *Enrollment Up Slightly at Area Campuses* (Sept. 14, 2007) (visited Sept. 20, 2007)
[12] TMCnet.com NEWS (Post-Bulletin (Rochester, MN) (KRT) Via Thomson Dialog NewsEdge) *Enrollment Up Slightly at Area Campuses* (Sept. 14, 2007) (visited Sept. 20, 2007)
[13] Mayo Clinic, Mayo School of Health Sciences, *Mayo Clinic Overview* (visited Sept. 20, 2007)
[14] First Homes Rochester Area Foundation, *Employer Assisted Housing and the Community Land* Trust (visited Sept. 18, 2007)
[15] City of Rochester, Building Safety Department, 2006 Annual Report of Registered Rental Properties

welfare of its citizens. As a result, the Council concluded that it was in the best interests of the public health, safety and welfare of the people of the city to establish and enforce minimum housing standards.[16]

Rochester's housing code applies to every portion of a building or premises, used or intended to be used for dwelling purposes, except hotels, motels, rooming houses, rest homes, convalescent homes, hospitals and nursing homes. The provisions of the housing code apply irrespective of when such building was constructed, altered or repaired. The code provides that any construction, alteration, or repair thereof or changes of use therein, which are required by the provisions of the housing code, shall be done in accordance with the applicable provisions of the State Building Code. Finally, the code states that any provision of the housing code which is inconsistent with a comparable and applicable provision of the State Building Code shall be governed by the building code to the extent of such inconsistency.[17]

Rochester established its Building Safety department in 1970 to administer and enforce Chapter 32 through 39 of the "Housing Code of the City of Rochester, Minnesota." Administration and enforcement of the provisions of the housing code occurs through and by the Director of Building Safety and the Department's personnel. The Department is given the additional responsibility of further developing a comprehensive and coordinated program for the improvement of present housing conditions in the city.[18]

STATEMENT OF THE CASE AND FACTS

The City of Rochester concurs with Respondent's statement of the case and facts.

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[16] ROCHESTER, MN., CODE §32.02 (2007)
[17] ROCHESTER, MN., CODE §32.02 (2007)
[18] ROCHESTER, MN., CODE §32.02 (2007)

SUMMARY OF ARGUMENT

Respondent's brief demonstrates why the Court of Appeals' decision should be affirmed. Rochester concurs with the Respondent's legal arguments and will not repeat them. Instead, Rochester will focus on the severe health, safety and welfare threat to Rochester's temporary and permanents residents as well as its visitors resulting from a ruling that the State Building Code preempts local regulation of the use and occupancy of structures.

ARGUMENT

This case will have a significant impact on Rochester's ability to create and enforce habitability standards in rental housing to ensure the health, safety and welfare of the tenant population.

I. Lack of Implied Warranty of Habitability

Chapter 1300 of the Minnesota Rules addresses the Minnesota State Building Code (SBC). Minn. R. Section 1300.0030 defines the SBC's purpose and application:

> Subpart 1. **Purpose.** The purpose of this code is to establish minimum requirements to safeguard the public health, safety, and general welfare through structural strength, means of egress facilities, stability, sanitation, adequate light and ventilation, 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.

The SBC contains no provisions for regulating building maintenance or other nuisance conditions.[19]

The traditional common law rule is that there is no implied warranty of habitability as to residential property.[20] Under that rule, absent an express contractual covenant or statute

[19] Minn. Dept. of Labor and Industry, Construction Codes and Licensing Division, Building Codes and Standards Unit, Minnesota State Building Code Adoption Guide, Common Questions and Answers at 18 (January 2006)
[20] Kitchens By and Through Kitchens v U.S., 604 F.Supp. 531 (M.D. Ala 1985)

imposing a comparable duty, a landlord is under no obligation to assure that the premises are habitable.[21]

Minnesota is one state that has stepped forward and imposed a statutory duty to ensure rental property is habitable. Minnesota Statutes Section 504B.161 imposes a duty upon the landlord to maintain and repair rental property so as to be habitable. Section 504B.161, subd. 1 states that:

"In every lease or license of residential premises, the landlord or licensor covenants with every lease:

1) that the premises and all common areas are fit for the use intended by the parties;
2) to keep the premises in reasonable repair during the term of the lease or license, except when the disrepair has been caused by the willful, malicious, or irresponsible conduct of the tenant or licensee or a person under the direction or control of the tenant or licensee; and
3) to maintain the premises in compliance with the applicable health and safety laws of the state, including the weather stripping, caulking, storm window, and storm door energy efficiency standards for renter-occupied residences prescribed by section 216C.27, subdivisions 1 and 3, and of the local units of government where the premises are located during the term of the lease or license, except when violation of the health and safety laws has been caused by the willful, malicious, or irresponsible conduct of the tenant or licensee or a person under the direction or control of the tenant or licensee."[22]

Section 504B.161 specifically contemplates the adoption by local governmental entities of ordinances regulating the health and safety of those residing within rental property in this

[21] Gamble-Robinson Co. v. Buzzard, 65F.2.950 (C.C.A. 8th Cir. 1933)
[22] Minn. Stat. 504B.161 subd. 4. (2006)

State. Obviously, the state legislature envisioned a partnership between state and local governments in the adoption and enforcement of rental property ordinances affecting the public's health, safety and welfare. Appellant would have this Court terminate that partnership and force renters across Minnesota to rely solely upon state regulations, to the extent they exist, to ensure their rental homes and apartments are habitable and safe. Yet, the entirety of state statutes providing for local regulation of rental property and its residents will not allow this argument to prevail. Rather than return to the common law days of no implied warranty of habitability, Rochester asks this Court to uphold the clearly stated legislative intent to provide for, if not encourage, the state and its local governments to work hand-in-hand in protecting the health, safety and welfare of rental property residents.

II. Local Regulation in Rochester

In 2006, Rochester's Building Safety Department handled 817 rental property complaint calls.[23] The typical complaint began as a phone call to Building Safety by a complainant frustrated with a sub-standard physical condition of the rental property the complainant resides in or lives adjacent to. Usually the complainant had attempted to contact the landlord or managing agent and either had been unsuccessful in making a connection with that authority or the complainant had expressed concern about the deficiency that impacted habitability or the fact that no repair or improvement had been made. The complainant requested information from Building Safety as to whether the rental property's condition violated any laws. If the property's substandard condition constituted a violation, the complainant requested Building Safety to exercise its power and authority in order to "make" the landlord fix the deficiencies on the property.

[23] City of Rochester, Building Safety Department, 2006 Annual Report of Registered Rental Properties

Sometimes, a tenant may do nothing about his or her living conditions. The lower income tenant often has few housing options and may therefore choose to silently reside in a substandard living environment. The tenant may be dissatisfied with the rental property's condition and the property owner's response. However, the tenant has difficulty saving sufficient funds for first month's rent and another security deposit needed for an alternative rental property. The tenant cannot afford an attorney's services or the $255 civil filing fee requisite to commence a civil action for damages.[24] Because the tenant does not want to become "homeless," he or she is a "prisoner" to the habitability standards that the landlord adopts.

A very recent example illustrates the hopeless situation facing many Rochester tenants. On August 15, 2007, Building Safety, Olmsted County Social Services and Rochester Police Department responded to a complainant about a foul odor emanating from a residence. The property was a single family rental structure occupied by a low-income extended family of seven people, some of which were children. The renters had re-located from Kentucky to Rochester and had little knowledge of Minnesota law. The home contained 20 unlicensed animals that were allowed to defecate within the living quarters. The floors, walls and ceilings of the home were filthy. There were piles of debris, heaps of household items, hazardous electrical violations and no operational smoke detectors. Applying provisions of the Rochester Housing Code, the home was vacated immediately due to the dangerous and unsanitary conditions.

Unfortunately, this potentially tragic situation is not uncommon in Rochester. The property owner in the above example owns several rental properties in the City of Rochester. He has been prosecuted several times for failing to maintain his properties in accord with Rochester's Housing Code.

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[24] Minn. Judicial Branch, Third District, Olmsted County, Olmsted County Filing Fees (eff. Jul. 1, 2005) (visited Sept. 20, 2007)

Sometimes tenants request assistance from governmental agencies to assist them to improve their living situation when it becomes precarious or dangerous. Such a situation arose on August 19, 2004, when a bedridden tenant contacted Building Safety and complained of water leaking from her ceiling onto her bed. An inspection revealed the bathroom toilet on the second floor was overflowing through the ceiling and soaking the tenant's bed. Building Safety immediately issued to the property owners a verbal emergency notice and a written corrections orders notice to stop the toilet overflow, vacuum up the water and shampoo the water soaked carpet. In conducting a rental housing inspection, the Building Safety inspector discovered other housing code violations including inoperable smoke detectors, broken windows, obstructed exits, burnt out hallway ceiling light fixtures, a faulty exterior entry door and extensive water damage. The property owners wet vacuumed the tenant's bedroom on August 19, 2004, but the toilet overflowed again on August 23, 2004. As a result, the bed-ridden tenant was evacuated by Social Services using emergency funds and the property owners were prosecuted in the criminal court system.

Rochester's Building Safety Department was able to adequately respond to these examples of rental properties that posed a threat to the residents' health, safety and welfare only because the Rochester Housing Code allowed it to do so. Without a housing code, Rochester would not be able to provide for the adequate protection of those who choose to, or must, live in rental properties. Some of the poor, disabled, illiterate and the foreign-born people residing in Rochester rental property are literally at the mercy of their landlords. They must rely on the City to enforce the SBC and local rental housing code to safeguard their health, safety and welfare in their "home". Working in conjunction with the SBC, Rochester's Housing Code serves the public by protecting the health, safety and welfare of all of those who live here.

CONCLUSION

Rochester has a strong public interest in this case. Rochester faces a difficult task in creating and maintaining safe living conditions for its permanent and temporary residents, as well as those who come to town as part of an extended medical stay. Rochester is relying upon the partnership created by the Minnesota legislature where the SBC and local housing code regulations work together to protect the health, safety and welfare of rental property residents. The erosion of that partnership will only worsen the plight of rental property residents seeking to do nothing more than live in a safe, clean and healthy place.

For all of these reasons, the City of Rochester respectfully requests that the Court of Appeals' decision be affirmed.

Respectfully submitted this 21 day of September 2007.

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