

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*
LEAGUE OF MINNESOTA CITIES

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ISSUE

State law provides that cities must not “require building code provisions regulating components or systems of any residential structure that are different from any provision of the State Building Code.” Does state law preempt cities from regulating the business of rental housing by adopting ordinances that impose standards of habitability 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 local authorities from creating and enforcing standards of habitability for rental housing.

INTRODUCTION

The League of Minnesota Cities (LMC) has a voluntary membership of 830 out of 854 cities in Minnesota. LMC represents the common interests of cities before judicial courts and other governmental bodies and provides a variety of services to its members including information, education, training, advocacy, and insurance services. LMC has a public interest in this appeal as a representative of cities throughout the state that adopt rental-housing ordinances to protect their tenant residents.¹ We have a particular interest in clarifying that the State Building Code does not preempt cities from regulating the business of rental housing by adopting ordinances that impose standards of habitability that do not affect an integral part of the design or construction of buildings.

In this case, the city of Morris sought an injunction to require Sax to bring his rental housing into compliance with the city's rental-housing ordinance by providing: (1) ground fault interruption receptacles near water sources; (2) bathroom ventilation through a window or fan; (3) smoke detectors in basement bedrooms; and (4) proper covers on egress basement windows. Sax argued he was not required to comply with these requirements because they are preempted by the State Building Code. The trial court and the court of appeals ruled in the city's favor holding that the contested ordinance provisions are not building-code provisions, but rather, are standards of habitability that lawfully regulate the business of rental housing under the city's police powers.

¹ Pursuant to Minn. R. Civ. App. P. 129.03, LMC certifies that this brief was not authored 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.

STATEMENT OF THE CASE AND FACTS

LMC concurs with the city's statement of the case and facts.

ARGUMENT

This case will have a significant, statewide impact on cities' ability to protect the health, safety and welfare of their tenant residents.

The city's brief demonstrates why the court of appeal's decision should be affirmed. LMC concurs with the city's legal arguments, which will not be repeated here. Instead, this brief will focus on the statewide significance of this appeal and the important public policies at issue.

This case will impact hundreds of cities throughout Minnesota. State law requires all metropolitan counties and cities, regardless of size, to enforce the State Building Code. Minn. Stat. §§ 16B.62; 16B.72; 16B.73. If a county outside the metropolitan area has voted to enforce the State Building Code, all cities within the county must also enforce it. *Id.* If a county outside the metropolitan area has voted not to enforce the State Building Code, it only applies to those cities that had adopted it before January 1, 1977.² And any city with a population under 2,500 that is located in whole or in part of a county that has voted not to enforce the State Building Code may choose not to enforce it. *Id.* According to the Minnesota Department of Labor and Industry, 422 of the 854 cities in Minnesota have adopted the State Building Code. Minnesota State Building Code (visited Sept. 24, 2007) http://www.doli.state.mn.us/pdf/bc_map_county_jurisdiction.pdf.

² Cities that do not enforce the State Building Code are still required to enforce the building requirements for disabled persons, bleacher safety, and elevator safety. Minn. Stat. §§ 16B.72; 16B.73.

LMC Appendix at A1. And all Minnesota cities — regardless of whether they enforce the State Building Code — are prohibited from adopting a local building code. Minn. Stat. § 16B.62.

Although this case will have a significant statewide impact, the issue involved is somewhat unique to Minnesota because our state is in a small minority of states that have framed their state building code as mandatory requirements from which localities cannot deviate. David Hattis and David Listokin, *Building Codes and Housing* at 11 (visited Sept. 24, 2007) (http://www.huduser.org/rbc/pdf/Building_Codes.pdf) (paper prepared for the U.S. Department of Housing and Urban Development's Conference on Regulatory Barriers to Affordable Housing, April 2004). According to data provided by the National Conference of States on Building Codes and Standards, 46 states had adopted a state building code as of 2003, and only 13 states (including Minnesota) prohibit local amendments to their state building code.³ *Id.* at Table 2, Building Code Categories by State.

Minnesota's State Building Code does not address the business of operating rental housing. In order to address this gap, cities throughout Minnesota of all sizes and geographic locations have adopted rental-housing ordinances, including large metropolitan cities, like Bloomington (population 84,347) and Brooklyn Park (population 71,048), and small cities outside the metropolitan area, like Foley (population 2612) and

³ In Virginia, Rhode Island, New Jersey, Kentucky, Connecticut, and Pennsylvania, the state building code is mandatory statewide and no local amendments are allowed. In West Virginia, North Dakota, Montana, Minnesota, Michigan, Idaho, and Colorado, the state building code is mandatory if adopted locally and no local amendments are allowed.

Two Harbors (population 3678). Rental-housing ordinances vary from city to city but generally require licensing of rental housing and periodic inspections to ensure compliance with some type of housing standards.

Minnesota cities adopt rental-housing ordinances under their police powers to protect their tenant residents. The city of Foley's rental-housing ordinance, for example, states that its purpose is "to protect the public health, safety and welfare of the residents of the City of Foley who have, as their place of abode a dwelling unit, manufactured home, lot or room furnished to them for the payment of a rental charge to another." Foley City Code, Section 730. There are several reasons why rental housing raises unique health, safety and welfare concerns.

First, property owners that do not live in their buildings generally do not have as strong of an incentive to maintain their property in a habitable manner as do property owners that live in their buildings. *See, e.g., Dome Realty, Inc. v. City of Paterson*, 416 A.2d 334, 351-352 (N. J. 1980) (noting that landlords who live in their buildings have greater incentive to maintain them in accord with minimum standards of habitability). Second, for a variety of reasons — including race, economic status, youth and lack of time, knowledge, and alternatives — the population occupying rental housing frequently does not have leverage to require landlords to promptly or properly address problems with habitability.

Tenants have very little leverage to enforce demands for better housing. Various impediments to competition in the rental housing market, such as racial and class discrimination and standardized form leases, mean that landlords place tenants in a take it or leave it situation. The increasingly severe shortage of adequate housing

further increases the landlord's bargaining power and escalates the need for maintaining and improving the existing stock.

Javins v. First National Realty Corp., 428 F.2d 1071, 1079 (D.C. Cir. 1970) (citations omitted) (landmark case establishing an implied warranty of habitability in residential leases measured by the standard set out in the Housing Regulations for the District of Columbia). And finally, because the operation of rental-housing is a business, the economic desire to maximize profit frequently deters landlords from spending the money necessary to provide habitable rental housing. In this case, for example, it appears that Sax's strategy is to avoid doing any significant repair work to his buildings so he can attempt to argue his property is "grandfathered in" and does not need to be updated to comply with the current version of the State Building Code or the standards of habitability in the city's ordinance. Appellant's Brief at 8, 25.

Sax argues for a bright-line test claiming rental-housing ordinances are preempted on any subject the State Building Code addresses in any way regardless of whether there is direct conflict between particular provisions of an ordinance and the State Building Code. Appellant's Brief at 17, 23. While this certainly would be an easy standard to apply (it would essentially preempt all provisions of rental-housing ordinances that address the physical structure of a building in any way), the city of Morris correctly notes that Sax's proposed standard contradicts the limited nature of the State Building Code's preemption language and Minnesota case law. Respondent's Brief at 7-16.

Indeed, the State Building Code simply does not address the business of rental housing. As a result, a city could prohibit all residential rental housing without running

afoul of the State Building Code's preemption language. Surely then, cities must have authority to take the less drastic measure of conditioning the privilege of operating the business of rental housing on a landlord's compliance with habitability standards as long as those standards do not affect an integral part of the design or construction of a building.

Consider, for example, a building that was built before the State Building Code was adopted in 1972. It is one thing to allow a property owner who occupies his or her own building to choose to live in a building that does not comply with modern-day habitability standards. It is quite another thing to allow landlords to make this choice on behalf of their tenants. If property owners voluntarily choose to engage in the business of rental housing, a city must have authority to prevent them from providing substandard housing to their tenants.

Sax's proposed standard not only contradicts state statute and case law; it also represents a troubling challenge to cities' well-established and broadly interpreted police powers. State law has long authorized cities to provide, by ordinance, for the "promotion of health, safety, order, convenience, and the general welfare." Minn. Stat. § 412.221, subd. 32. And Minnesota courts have a well-established history of interpreting this type of general-welfare clause broadly. *See, e.g., Remick v. Clousing*, 285 N.W. 711, 713 (Minn. 1939) (general-welfare clause is not limited to things enumerated, and authorizes licensing of businesses not specifically referred to in charter); *State v. Morrow*, 221 N.W. 423 (Minn. 1928) (general-welfare clause is intended to give sufficiently expansive power to the city to enable it to meet and provide for new conditions as they arise);

Mangold Midwest Co. v. Village of Richfield, 143 N.W.2d 813, 820 (Minn. 1966)

(general-welfare clause will be construed liberally to allow effective self-protection by the city).

The broad interpretation of cities' police powers has also been consistently applied in the area of licensing.

Generally speaking, pursuant to its police power a municipality may regulate by license any business or trade which may injuriously affect the public health, morals, safety, convenience, or general welfare.

City of St. Paul v. Dalsin, 71 N.W.2d 855, 858 (Minn. 1955). Indeed, cities' licensing authority in the area of rental housing is well-established in case law. *See, e.g., Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523, 534 (1967); *City of Minneapolis v. Ellis*, 441 N.W.2d 134, 137 (Minn. Ct. App. 1989); *Rozman v. City of Columbia Heights*, 268 F.3d 588 (8th Cir. 2001). And the Legislature has likewise acknowledged cities' authority to regulate rental housing. *See, e.g.,* Minn. Stat. § 504B.001, subd. 14 (defining violation in the landlord-tenant context to include a violation of "any state, county or city health, safety, housing, building, fire prevention, or housing maintenance code applicable to the building").

As with most cases this Court considers, there are competing public policies at issue. It is possible that certain property owners may need to incur some expense to comply with the housing standards in some cities' rental-housing ordinances. It is also possible that some of this expense might get passed through to tenants potentially impacting the affordability of rental rates in particular communities.

It is important to remember, however, that rental-housing ordinances do not require improvements that affect an integral part of the design or construction of buildings. As a result, the types of required changes will generally be minor improvements that are low-cost and easily installed, like the requirement in this case for additional smoke detectors in basement bedrooms. It is also important to remember that it is not in the public interest to provide affordable housing if it does not comply with minimum standards of habitability. In short, local officials are in the best position to balance these competing public policies and make a legislative determination about how best to protect the health, safety and welfare of their tenant residents.

CONCLUSION

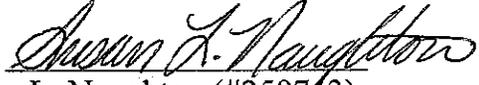
This case will have a significant, statewide impact on cities' ability to protect the health, safety and welfare of their tenant residents. Cities should be able to require property owners who voluntarily choose to engage in the business of rental housing to comply with standards of habitability that do not affect an integral part of the design or construction of buildings. The State Building Code should not be interpreted in a way that authorizes landlords to provide substandard housing to their tenants.

For all these reasons, LMC respectfully requests that the court of appeals' decision be affirmed.

Dated: September 25, 2007

Respectfully submitted,

LEAGUE OF MINNESOTA CITIES

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