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State of Minnesota
In Supreme Court

CITY OF MORRIS,

Respondent,

vs.

SAX INVESTMENTS, INC. and MICHAEL SAX,

Appellants.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

The Appellant has maintained throughout this litigation that the subject rental property is subject to building code regulations under the Minnesota State Building Code and housing code regulations pertaining to non-building code items. The City of Morris has adopted the Minnesota State Building Code and has also adopted a Residential Rental Licensing Ordinance. Both of these regulatory standards applicable to residential housing are available to the City to protect the health, safety and welfare of its residents. However, if a code provision regulates a component or system of a residential structure, a municipality must not regulate that component or system differently than the State Building Code. The City of Morris is violating that prohibition in this case.

II. ARGUMENT

The heart of the Respondent's and the Amicuses' arguments is that if the four provisions in the Morris City Code at issue herein are held to be pre-empted by the Minnesota State Building Code, municipalities will be hindered in their efforts to protect the health, safety, and welfare of their tenant residents. If this Court holds that the four provisions in the Morris City Code at issue herein are in fact pre-empted by the Minnesota State Building Code, Respondent argues that it will somehow eviscerate housing codes ensuring safe occupancy. That

argument misconstrues the Appellant's position and misrepresents the impact if the decision of the lower court is reversed. Furthermore, the Respondent and Amicuses: (1) misrepresent the safety aspects of the four cited conditions and the cost to complete the demanded changes and; (2) incorrectly interpret the 2001 language changes to the statute directing the establishment of the Minnesota State Building Code.

A. Does the subject property have existing conditions which are "dangerous to life" and are thereby not covered by the existing structures clauses in the MSBC?

All parties agree that the State Building Code prohibits existing conditions if they are "dangerous to life;" and Appellant has also pointed out that the Building Code prohibits "unsafe" structures. However, the Respondent's argument that the four cited conditions are "dangerous to life" has not been supported by the local building official via an order citing those conditions as "unsafe" or "dangerous to life" in violation of Minnesota Rules 1300.0180 or "dangerous to life" in violation of Minnesota Rules 1311.0206. In fact, the four cited conditions are not in violation of the State Building Code.[1] Given the prohibition against conditions that are unsafe or "dangerous to life" in the Building Code, the fact that the building complies with the Code also indicates that the conditions are not unsafe or "dangerous to life". For the Respondent's argument to be accepted, it is

[1] On February 23, 2006, Appellant obtained a staff opinion from the State Building Official stating this opinion. See First Affidavit of Michael Sax, dated March 28, 2006.

necessary to determine that:

(1) the Minnesota State Fire Code permits a fire hazard (a smoke detector on each floor but not in every bedroom) that is dangerous to life;

(2) the Minnesota State Building Code permits a new residence to be built with a fire hazard (no window well cover) and an electrical hazard, no Ground Fault protection on an electrical outlet dedicated to a washer and dryer that are both "dangerous to life", and;

(3) a bathroom with no exterior window or mechanical ventilation system but with no indication in the record of any condensation build-up or mold growth is "dangerous to life".

Clearly, the cited conditions can not reasonably be judged as either "unsafe" or "dangerous to life" and the Respondent is merely attempting to obfuscate the issue.

B. Does the Minnesota State Building Code regulate the maintenance of a structure or does it permit a "substandard" structure?

The Respondent and the Amicuses argue that the Minnesota State Building Code regulates only the act of building and does not regulate the maintenance of a structure. Consequently, they argue that an existing building can comply with the building code and still be reasonably judged to be "substandard". This argument is refuted by both the statute directing the establishment of the building code and the Building Code itself.

Minnesota Statute 16B.61 directs that:

> a code of standards be established by rule for the construction, reconstruction, alteration, and repair of buildings, governing matters of structural materials, design and construction, fire protection health, sanitation and safety,

and additionally directs that:

> The code must conform insofar as practicable to model building codes generally accepted and in use throughout the United States, **including a code for building conservation. In preparation of the code, consideration must be given to the existing statewide specialty codes presently in use in the state.** (emphasis added)

Following this direction, the Guidelines For Rehabilitation of Existing Buildings was incorporated into the Building Code pursuant to Minnesota Rule 1311.0010. Section 107 of the Guidelines explicitly regulates the maintenance of all existing buildings and allows for inspections to determine compliance with that regulation. Therefore, application of the Building Code to the maintenance of an existing structure by a municipality will ensure that the health, safety, sanitation and fire protection of a residence's occupants meet standards generally accepted by experts in the field to the extent that those items are impacted by the components or systems regulated by the Building Code and separate regulation of those components or systems is unnecessary.

Furthermore, the Respondent and the Amicuses state that the demanded changes are inexpensive and the League of Cities' brief (page 6) goes so far as to state (without any factual basis):

> In this case, for example, it appears that Sax's strategy is to avoid doing any significant repair work to his building 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.

Both of these assertions are refuted by the available record which indicates that

the Appellant quickly corrected four conditions (previously unknown to him) that were identified in the initial inspection (and actually reflected violations of the maintenance requirements contained in Section 107 of the Guidelines For Rehabilitation of Existing Buildings of the Minnesota State Building Code) and had prior to the initiation of this litigation begun the replacement of roofing materials, siding and trim to remain in compliance with that same Section 107. The record also indicates that the expected cost to complete the demanded changes exceeded $3,000.00 (an amount that can not reasonably be judged to be inexpensive). While a bathroom ventilation system or exterior window can be added at only a moderate expense during the construction of a new structure or addition, the expense for that modification can increase dramatically for an existing structure. This is exactly the type of case that the experts who formulated the Minnesota State Building Code considered when determining that existing structures should not be required to meet all new construction requirements because the incremental benefits frequently do not justify the added cost for those structures.

C. Does sound public policy require a regulatory environment in which local authorities can independently define what constitutes sub-standard housing?

The Respondent and the Amicuses argue that good governance demands that local authorities be permitted to formulate local housing standards unencumbered by any restrictions imposed by state authorities and that absent

that authority a city's ability to protect its tenant-residents is eviscerated. This argument is ill conceived and self-serving. In this case, the City of Morris could have inspected the Appellant's residential rental property under the provisions of the Minnesota State Building Code for all components and systems regulated by the Building Code and under the Morris City Residential Rental Licensing Ordinance for all other matters. If the inspection resulted in a determination that the conditions of components or systems regulated by Building Code were "unsafe" or "dangerous to life", the City would have recourse under the Minnesota State Building Code and would have recourse under the local ordinance for other matters. A nearly identical inspection process would have easily permitted the Cities of Rochester and St. Paul to require correction to each of the code violations that were the subject of the examples cited in their respective briefs.

In addition, the State Legislature determined that sound public policy required that the formulation of provisions regulating the components or systems of any residential structure is best accomplished by technical experts instead of legislative bodies and delegated that task to the Department of Administration (now the Department of Labor and Industry). If the State Legislature with its plethora of resources does not have adequate expertise to formulate provisions that appropriately balance cost with recognized standards for health and safety, it is illogical to assert that the many small municipalities across Minnesota will have

a higher level of such expertise. One of the provisions at issue here[2] is a perfect example of the misguided regulations that can and have resulted when inadequately informed local representatives create certain housing standards.

The existing public policy is established by Minnesota Statute 16B.62 Subd. 1 that from its initial adoption has stated that the State Building Code applies statewide and supersedes the building code of any municipality. Recent (2001) additions to the wording of that statute expressly prohibits a municipality from adopting an ordinance containing provisions that regulate a component or system of any residential structure differently than the corresponding provisions of the Minnesota State Building Code unless warranted by geological conditions and approved by the State Building Official. Other additions to the language of that statute also expressly prohibit such provisions in ordinances relating to other matters subject to permissible local regulation. Additions to Minnesota Statute 16B.61 expressly required that the Building Code include a code for building conservation (i.e. maintenance and rehabilitation of existing structures). The express purpose of these additions was to achieve uniform and consistent application of building code provisions to protect the health, safety, welfare, comfort, and security of the residents of this state and to provide housing at the

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[2]While window well covers are permitted by the Minnesota State Building Code, their use is actually discouraged for most applications by staff opinions obtained from the Construction Codes and Licensing Division since window well covers almost always present an additional obstacle to emergency egress.

least possible cost consistent with recognized standards of health and safety. Respondent argues that these additions are not part of the preemptive language of the statute and have not expanded the preempted field identified in City of Minnetonka v. Mark Z. Jones Assoc., 236 N.W.2d 163 (Minn. 1975). The argument that words in a statute expressly prohibiting local ordinances or words redefining the content of the Minnesota State Building Code by requiring that building conservation be added are not part of the preemptive language would require that the third criteria listed in the Mangold decision for determining preemption be eliminated. See Mangold Midwest Co. v. Village of Richfield, 143 N.W.2d 813 (Minn. 1966).

D. Does the Minnesota State Building Code only preempt provisions that are "integral" to the construction of a building?

Respondent argues that: (1) the language of the State Building Code limits preemption to integral "components or systems" of a residential structure; (2) the Minnetonka decision confirmed that the State Building Code preempts local regulation only on matters integral to construction; and (3) the term component is best understood as one of the main constituent parts. Each of these arguments is factually incorrect and misleading.

First, the preemptive language of the Minnesota State Building Code in regards to local ordinances occurs twice in the modifications to Minnesota Statute 16B.62, Subd. 1 enacted in 2001. Neither occurrence uses the word

"integral" or any synonym. The explicit language prohibits any provision of a local ordinance which: (1) regulates a component or system of any residential structure differently than the State Building Code; or (2) conflicts with a provision of the State building Code that regulates a component or system of any residential structure. The simplest statement is that if a component or system of any residential structure is regulated by the Minnesota State Building Code then a local ordinance can not regulate that component or system in any way different from the Minnesota State Building Code. The determination of preemption does not require an analysis of whether a component or system is "integral" to construction but merely if it is a component or system regulated by the Minnesota State Building Code.

Second, the Minnetonka decision did not confirm that the State Building Code preempts local regulation only on matters integral to construction. The Minnetonka court held "that insofar as local ordinances purport to adopt fire prevention measures which affect the design and construction of buildings, they are in conflict with the State Building Code which has preempted that field" and local regulations are permitted only to the extent that they are not "related to the design or construction". While the dispute in Minnetonka may have initiated during construction (the fact recitation does not explicitly address this), the fact recitation does clearly state that the apartment buildings had been constructed at the time of the review of the case by the Minnetonka court. If the Respondent's

argument in this case were directly applied to the Minnetonka case, the issue would have been moot at the time of the Minnesota Supreme Court hearing because the City of Minnetonka would have been applying permissible "habitability standards" to a residential structure after its construction. That is contrary to the actual outcome of the case.

Third, the primary definition of the term component is "a constituent part, element or ingredient" and is not limited to a main constituent part as stated in the Respondent's brief and as the Respondent's argument requires. The components of a residential structure are not limited to its frame, configuration of wall joists and support beams, foundation, floors, roof, heating and cooling, plumbing and electrical service. Contrary to the Respondent's assertion, the components of a residential structure also include (among other items) its doors, windows, door locks, electrical wiring, electrical outlets, lights, ventilation system parts, smoke detectors, window wells, window well covers, coverings to stud walls, stairs, exterior decks and railings. Indeed, Minnesota Statute 16B.61 Subds. 3(b) and (h) explicitly require that the promulgated building codes regulate smoke detectors and double cylinder dead bolt locks, respectively.

In addition, the primary definition of design is "the form and structure of an item". Therefore, the design of a residential structure is an enduring subject. While the verb usage of the term design implies that it terminates at the completion of construction, renovation, rehabilitation, etc., the subject usage of

the term design does not terminate at those times. A requirement to add a component to an existing structure is a requirement to change the design of that structure and clearly "affects the design" of that structure. This is true whether the component required to be added is a door, window, smoke detector, ventilation system, electrical circuit protector or a window well cover. Clearly, each of the modifications required by the City of Morris affects the design of the residential structure and both parties agree that each of the subject components are regulated by the Minnesota State Building Code.

Finally, the recent statutory requirement that the Minnesota State Building Code include provisions for building conservation (i.e. maintenance and rehabilitation of existing structures) clearly expands the preempted field to include provisions regulating building conservation even if it were previously limited to only the "act of construction".

III. CONCLUSION

The Minnesota State Building Code provides for Uniform Standards which are applicable statewide and pre-empt municipal ordinances that provide different regulation of a residential structure's components or systems also regulated by the Building Code. The Minnesota State Building Code provides for the health, safety, welfare, comfort and security of the residents of this State while at the same time providing uniform standards that will tend to lower the cost of housing.

A municipality can ensure health, safety, welfare and security through enforcement of the provisions of the Minnesota State Building Code and through enforcement of permissible County and municipal housing codes. The preemption provisions in the Minnesota State Building Code do not prevent a municipality from requiring safe habitable housing. In this case, the City of Morris could have inspected Appellant's residential rental property under the provisions of the Minnesota State Building Code (for all building code matters), and under the Morris City Residential Rental Licensing Ordinance for all non-building code matters. Under the provisions of the Minnesota State Building Code, if the inspection resulted in a determination that the conditions of the property were "dangerous to life", the City would have recourse *under the Minnesota State Building Code.* Under the provisions of Minn. Stat. § 504B, a tenant may bring an action against a landlord for a violation under the provisions of any State, County, or City health, safety, housing, building, fire prevention, or housing maintenance code applicable to the building.

If the applicable provisions in the Minnesota State Building Code do not (in the Respondent's opinion) provide for the safety of its residents, municipalities can use the procedures outlined in Minnesota Statute 16B.64 Subd. 5 to propose an amendment to the Minnesota State Building Code.

What a municipality may not do under the preemption provisions in the Minnesota State Building Code is to regulate a component or system of a

residential structure different from a provision of the Minnesota State Building Code regulating the same component or system. The four provisions under the Morris City Residential Renting Licensing Ordinance at issue herein are all provisions regulating a component or system of a residential structure that are different than the corresponding provision in the Minnesota State Building Code. Therefore, each provision is preempted by the Minnesota State Building Code.

Accordingly, the decision by the Minnesota Court of Appeals below should be reversed.

Dated: October 3, 2007

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