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CASE NO. A06-1188

State of Minnesota
In Court of Appeals

CITY OF MORRIS,

Plaintiff/Respondent,

vs.

SAX INVESTMENTS, INC. AND MICHAEL SAX,

Defendants/Appellants.

APPELLANTS' BRIEF, APPENDIX AND ADDENDUM

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STATEMENT OF LEGAL ISSUES

I. WHETHER MINNESOTA STATUTE §16B.62 PREEMPTS PROVISIONS OF THE MORRIS CITY CODE, SECTION 4.32 THAT REGULATE COMPONENTS OR SYSTEMS OF ANY RESIDENTIAL STRUCTURE THAT ARE REGULATED BY ANY PROVISION OF THE STATE BUILDING CODE, AND SPECIFICALLY THE FOUR REGULATIONS IN THE MORRIS CITY CODE UNDER WHICH THE SUBJECT PROPERTY WAS ORDERED TO BE CORRECTED?

The Trial Court ruled that the applicable regulations in the Morris City Code were not preempted by the Minnesota State Building Code.

Apposite Authorities:

Minnesota Statutes §16B.62

Morris City Code, Section 4.32

City of Minnetonka v. Mark Z. Jones Assoc., 236 N.W.2d 163 (Minn. 1975)

STATEMENT OF CASE

Defendants-Appellants appeal to the Minnesota Court of Appeals from an Order and Judgment dated April 26, 2006, Court File No. 75-C1-000165, Minnesota District Court, County of Stevens by the Honorable Gerald J. Seibel, District Court Judge, that granted summary judgment to Plaintiff on its claim for a temporary injunction and granted summary judgment to Plaintiff on its motion to dismiss Defendant's Counterclaims. That Order and Judgment was filed on April 27, 2006, and was entered on June 23, 2006.

The Plaintiff-Respondent brought an action against Defendants Michael Sax (an individual) and Sax Investments Incorporated for a temporary and permanent injunction restraining Defendants from leasing property at 608 Eighth Street East in Morris, Minnesota, to residential tenants or allowing residential tenants to occupy the premises until such time as four alleged deficiencies were remedied and all re-inspection related fees were paid. Prior to service of an Answer from either Defendant, Plaintiff served an Amended Complaint[1] to purportedly reflect the transfer of the property from Sax Investments Incorporated to Michael Sax which occurred on January 3, 2005, but was not recorded until September 27, 2005,

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[1]Both the Original and Amended Complaints cited violations of Section 4.31 of the Morris City Code which was not in effect at any time relevant to this case. This defense was used in Defendant's Answer to both the Complaint and Amended Complaint. After several pleadings had been filed in this case by both Plaintiff and Defendant, Plaintiff filed a motion for summary judgment based upon Section 4.32 of the Morris City Code without requesting or being granted leave of the Court to further amend the Amended Complaint.

shortly before service of the Summons and Original Complaint was completed. In his Answer, Defendant Michael Sax denied that Section 4.31 of the Morris City Code was in effect at any time relevant to this case and further denied that any violation of Section 4.31 of the Morris City Code existed at the subject property.

Defendant-Appellant, Michael Sax, filed a Counterclaim alleging that certain portions of Section 4.32 of the Morris City Code (the ordinance actually in effect at all times relevant to this case) were invalid since they were in violation of Minnesota Statute § 16B.62 and alleging that a special assessment on a different parcel of property exceeded the special benefit to that property. Plaintiff filed motions for an order dismissing Defendant's counterclaims and for summary judgment in favor of Plaintiff arguing by Affidavit that Section 4.32 of the Morris City Code was the basis for Plaintiff's Complaint. The Court issued an order granting summary judgment to Plaintiff on its claim for a temporary injunction under Section 4.32 of the Morris City Code and dismissing Defendant's counterclaims.[2] This appeal pertains to the Court's Order granting Plaintiff Summary Judgment enjoining the Appellant from renting the property until the alleged deficiencies are remedied and dismissing the Appellant's Counterclaims, but not any aspect of the case pertaining to the special assessment.

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[2]The Court dismissed Defendant's counterclaims in their entirety without making a determination as to 71 of the 75 inspection standards disputed by Defendant. The Memorandum attached to the Judgment of the Court explicitly limited the Court's decision to the four narrow provisions presented as violations following re-inspection and did not address the other disputed inspection standards which the Defendant-Appellant challenged in his counterclaim

STATEMENT OF FACTS

Defendant Michael Sax individually[3] owns Lot Eighteen (18), Block Three (3) in Residence Park Addition to the City of Morris, 608 East 8th Street (Appendix, hereinafter *"Appd." P. 25).* Michael Sax registered the subject property as residential rental property on January 3, 2005, as required by Section 4.32 of the Morris City Code. The Rental Licensing Ordinance requires periodic inspections of rental properties within the City of Morris. Subd. 21 of the Rental Licensing Ordinance contains approximately 95 separately stated inspection standards, of which approximately 75 regulate a component or system of a residential structure that is also regulated by the Minnesota State Building Code. See *Appd. pp. 68-69 and Add. pp. 1-5.*

An inspection by the City of Morris was conducted of the subject property on January 18, 2005, and a re-inspection was conducted on March 24, 2005. *Appd. P. 23.* The parties are in agreement that the following four conditions existed at the time of the inspections and currently exist at the subject premises.

1. The electrical outlets in the kitchen by the sink, in the first floor bathroom and in basement bathroom do not have ground fault interruption protection.

2. Neither of the two bathrooms has an exterior window or a ventilation fan.

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[3]A deed transferring the subject property from Sax Investments Incorporated to Michael Sax was executed and notarized on January 3, 2005 (the first business day of 2005). That deed was recorded by the Stevens County Recorder at 8:30 a.m. on September 27, 2005, prior to service of the Summons and Complaint on Defendants

3. Smoke detectors are present on the ceilings of the first floor and basement hallways but not in the basement bedrooms.

4. The basement egress window wells do not have covers.

Plaintiff alleges that these conditions violate four separate inspection standards contained in Subd. 21 of the City's Residential Rental Licensing Ordinance and commenced this action to force compliance.

The parties agree that sufficient smoke detectors are installed in the premises to comply with the Minnesota State Fire Code. *Appd. P. 70.* The parties also agree that no known improvements or alterations (other than replacement of shingles, siding and exterior trim currently in progress) have been made to the premises since adoption of the Minnesota State Building Code by the City of Morris. The Minnesota State Building Code was first required to be applied on a statewide basis on July 1, 1972. Minnesota Statute 16B.62 requires that all municipalities (including home rule charter and statutory cities) adopt and enforce the Minnesota State Building Code. The four conditions cited by the City of Morris as violations of the city's Residential Rental Licensing Ordinance are <u>not</u> violations of corresponding provisions in the Minnesota State Building Code and are not unsafe conditions.

ARGUMENT

Based on Minn. Stat. § 16B.62 and <u>City of Minnetonka v. Mark Z. Jones Assoc.</u>, 236 N.W.2d 163 (Minn. 1975), the trial court's decision (excluding the

special assessment matter) is contrary to law and should be reversed. In addition, the trial court, in its Order granting Plaintiff's Motion for Summary Judgment, dismissed all of the Defendants' Counterclaims, without making a determination or providing a basis for dismissal of Defendant's Counterclaims that alleged other provisions of the City's Residential Licensing Ordinance are pre-empted by the Minnesota State Building Code.

I. STANDARD OF REVIEW

On appeal from an order granting summary judgment, the Court of Appeals views the facts in the light most favorable to the party against whom judgment was granted and accepts as true the facts presented by that party. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993). When the district court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion, reviewed de novo by the appellate court. Lefto v. Hoggsbreath Enters., Inc., 581 N.W.2d 855,856 (1998). On appeal from a summary judgment, the court of appeals must ask two questions: (1) whether there are any genuine issues of material fact in dispute; and (2) whether the district court erred in applying the law. State by Cooper v. French, 460 N.W.2d 2, 4 (1990).

II. THE TRIAL COURT ERRED IN HOLDING THE FOUR ALLEGED DEFICIENCIES DO NOT INVOLVE THE "DESIGN OR CONSTRUCTION" OF THE PROPERTY AND ARE NOT STRUCTURAL.

In its Memorandum of Law attached to and incorporated by reference to the

Order granting the Plaintiff summary judgment, the trial court held that the four cited violations of the City's Rental Licensing Ordinance at the subject property were not structural, do not involve the "design or construction" of the property, and do not involve complex "components or systems" within a dwelling. *Appd. P. 4* .

The applicable Statute, Minn. Stat. §16B.62, Subd. 1, provides, in part, that: "The State Building Code applies statewide and supersedes the building code of any municipality. A municipality must not by ordinance or through development agreement require building code provisions regulating components or systems of any residential structure that are different from any provision of the State Building Code." The Minnesota Supreme Court interpreted this statutory provision in City of Minnetonka v. Mark Z. Jones Assoc., 236 N.W.2d 163 (Minn. 1975). In Minnetonka the parties had stipulated to the facts. Jones was the owner, developer and general contractor who had constructed an apartment complex in the City of Minnetonka, known as Stratford Wood. Pursuant to Minn. Stat. § 471.62, the City of Minnetonka had adopted by reference a fire prevention code as promulgated by the American Insurance Association.

In Minnetonka the Minnesota Supreme Court stated:

> The issue is whether, construing the statute and the ordinance together, Jones may be required by Minnetonka to **install an emergency electrical lighting system in hallways and exits independent of public utility power, and to install a sprinkler system in the basement garage (emphasis added).** That issue is to be resolved by determination of whether fire prevention devices which are an integral part of the construction of the building are

> governed by the State Building Code or may be dealt with by municipalities independent of the provisions of the State Building Code. We hold 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 pre-empted that field. Id. at 165.
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> In reaching his decision, the commissioner of administration emphasized the fact that the requirements in the Minnetonka fire code directly affect building construction and have as their same purpose the health, safety, and welfare of the people referred to in the statute governing the State Building Code, and consequently by the terms of the statute are superseded. Id. at 165.
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> . . .
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> The decision of the trial court hinged on the right of a municipality in the exercise of its police power to protect against the extreme hazards created by the storage of automobiles in an apartment complex. In its Memorandum the Court pointed out that the State does not have firefighting equipment and that fire fighting is a function of local government in discharging its duty to protect its residents. The Court concluded that it was not the intention of the legislature to permit such hazards to remain unattended. We are of the opinion, however, that the State Building Code has dealt with fire prevention in a comprehensive manner insofar as it affects the construction and design of buildings, and that it was the legislature's intent that the State Code pre-empt the requirements for fire prevention except as they dealt with matters other than construction. It would, undoubtedly, be within the province of local government to provide, by ordinance, fire prevention measures dealing with the use and storage of combustible materials, the number and location of portable fire extinguishers, limitations on occupancy of dwellings or commercial buildings, and similar regulations **not directly related to the design or construction.** (Emphasis added.) Id. at 165.

In Minnetonka, the City argued that the mere fact that the State does not require a sprinkler system does not foreclose the City from imposing stricter

conditions. The Minnesota Supreme Court stated in its opinion that it did not agree with the City of Minnetonka:

> The purposes of the statutes we here construe are set forth in unequivocal, unambiguous, and explicit terms in Minn. Stat. § 16.83 as follows:
>
> Laws 1971, Chapter 561 is enacted to enable the commissioner of administration to promulgate and administer a State Building Code in accordance with the provisions hereof, which Code shall govern the construction, re-construction, alteration, and repair of state-owned buildings and other structures to which the Code is applicable. It is necessary that building codes be adopted and enforced to protect the health, safety, welfare, comfort and security of the residents of this State. However, the construction of the buildings should be permitted at the least possible cost consistent with recognized standards of health and safety.
>
> Many citizens of the State are unable to secure adequate housing at prices or rentals which they can afford. Such a situation is contrary to the public interest and threatens the health, safety, welfare, comfort and security of the people of the State. Other persons in commerce and industry are also affected by the high cost of construction. Construction costs for buildings of all types have risen and are continuing to rise at unprecedented rates.
>
> A multitude of laws, ordinances, rules, regulations, and codes regulating the construction of buildings and the use of materials therein is a factor contributing to the high cost of construction. Many such requirements are obsolete, complex, and unnecessary. They serve to increase costs without providing correlative benefits of safety to owners, builders, tenants, and users of buildings.
>
> It is the purpose of Laws 1971 Chapter 561 to prescribe and provide for the administration and amendment of a State Building Code of building construction which will

> provide basic and uniform performance standards, establish reasonable safeguards for health, safety, welfare, comfort and security of the residents of this State who are occupants and users of buildings and provide for the use of modern methods, devices, materials and techniques which will in part tend to lower construction costs.

In Minnetonka the Court stated that "in concluding that the State Building Code was intended to supersede local ordinances also affecting construction and design, notwithstanding such ordinances are intended as fire-prevention measures, we are influenced, if not governed, by the fact that the State Building Code itself deals extensively with fire prevention and fire-related safety measures." "We therefore reject the argument that the legislature did not intend to pre-empt regulations dealing with fire prevention in authorizing the Code." Id. at 167. In Minnetonka , the Court included no requirement that the pre-empted measure regulate a structural component, regulate an expensive component, or regulate a complex component or system. It is sufficient that the measure directly affect the design or construction of buildings. To obtain the Court's intended meaning for the term "directly related to the design or construction", it is necessary to compare the measures listed as pre-empted and those listed as permissible. The particular components which the Court in Minnetonka determined to affect the design and

construction of a building were a garage sprinkler system and emergency lights[4] in hallways and exits. See Id. at 165. In Minnetonka, the Court listed the use and storage of combustible materials and the number and location of portable fire extinguishers as examples of permissible fire prevention measures not directly related to the design or construction.

These two categories are not obviously different on the basis of either impact on the structure of the building (since emergency lights do not affect the building's structural characteristics), complexity of the components (since emergency lights are not a complex component), cost (since emergency lights are relatively inexpensive), or the relative difficulty in adding the component to an existing building. The only obvious differentiating factor between the two lists is that the Minnesota State Building Code is silent on each of the permissible fire prevention measures but includes provisions regulating the same components that are regulated by the fire prevention measures which the Minnetonka Court determined to be pre-empted. The Court in Minnetonka noted that the Code included provisions dealing with emergency lights and sprinkler systems. Since the design, construction, renovation, repair and maintenance of a building must comply with all applicable provisions of the Code, it logically follows that each provision of the Code

[4]A battery operated light with a simple switch which is off when electrical power is provided to the switch, and on when no power is provided to the switch.

is directly related to the design or construction of a building. This is the simplest definition and, under this reading of the Minnetonka decision, the plain language of Minn. Stat. § 16B.62 is given effect.

In the present case, the four cited violations of the City's Rental Licensing Ordinance are:

1. Installing Ground Fault Interrupter electrical outlets within six feet of a water source (upgrade needed for three outlets in the residence);
2. Installing a window or fan in any bathroom for ventilation;
3. Installing a Smoke detector for the basement bedrooms; and
4. Installing proper covers for basement egress windows,

which are all regulated by provisions in the Minnesota State Building Code. The City of Morris incorrectly takes the position that the inspection standards contained in the City's Rental Licensing Ordinance are identical with the applicable provisions of the Minnesota State Building Code. *Appd. P. 60.* Appellant has applied the interpretation of the State Building Official to demonstrate that the subject property is in compliance with the Minnesota State Building Code and is not unsafe. *Appd. pp. 63-67.* The trial court's decision did not address whether or not the four cited deficiencies would also be violations of the Minnesota State Building Code. For new construction, the applicable provisions are National Electrical Code Article 210.8, Minnesota State Residential and Plumbing Code R303, Minnesota State Residential and Plumbing Code R317.1.1 and Minnesota State Residential and

Plumbing Code R310.4, respectively. For existing structures, the requirements in each of the provisions listed in the preceding sentence is replaced (via Minnesota Rules 1300.0220, Subp.2, Minnesota Building Conservation Code Section 104 and Minnesota Building Conservation Code Section 107) with the corresponding requirement imposed by the building code under which the component or system was constructed or last modified. For the house in the present case, it is undisputed that there is no known improvement to the electrical wiring or interior of the property since the adoption of the Minnesota State Building Code by the City of Morris (*Appd. P. 72*), and those requirements are as follows:

1. The requirements for ground fault interruption protection of receptacle outlets in bathrooms was incorporated into the National Electrical Code in 1971 and later for kitchens. Since no modifications have been made to the electrical circuits in the kitchen or bathrooms of the house in the present case since prior to the earliest of those dates, ground fault interruption protection of those receptacle outlets is not required by the Minnesota State Building Code and the property is in compliance with the Minnesota State Building Code.

2. The Minnesota State Building Code was first adopted on July 1, 1972. Prior to that date, there was no requirement for an exterior window or mechanical ventilation fan in the bathroom of a house constructed or modified in the City of Morris. Since no modifications

have been made to the bathrooms of the house in the present case since prior to 1972, no exterior window or mechanical ventilation is required in the bathrooms and the property is in compliance with the Minnesota State Building Code.

3. Section R317.1.1 of the Minnesota State Residential and Plumbing Code requires smoke detectors in bedrooms of a dwelling constructed before March 1, 2003, only if interior alterations, repairs or additions requiring a permit have occurred since March 1, 2003. The versions of the Minnesota State Building Code in effect prior to March 1, 2003 (such as Section 310.9.1 of the 1997 Uniform Building Code) did not require smoke detectors in an existing bedroom unless a modification was made to that bedroom. Since no modifications have been made to the bedrooms of the house in the present case since prior to 1972, smoke detectors are not required in each bedroom. The Minnesota State Fire Code does require a smoke detector on each level of every residential dwelling independent of the date of construction. The property is in compliance with that requirement.

4. Section R310.4 of the Minnesota State Residential and Plumbing Code permits covers for emergency egress window wells subject to certain restrictions but does not require them even for new

construction. Therefore, the property is in compliance with the Minnesota State Building Code.

Therefore, each of the four cited "deficiencies" under the Morris Rental Licensing Ordinance are not violations of the Minnesota State Building Code and are not unsafe conditions. Based on the Court's decision in Minnetonka, the Code preempts any provision of a local ordinance that attempts to regulate a component or system of a building which the Code also regulates. The trial court erred in holding that the four alleged "deficiencies" do not involve the "design or construction" of the property and do not principally address the structure and are, therefore, not preempted by the Minnesota State Building Code.

III. THE TRIAL COURT ERRED IN HOLDING THAT THE MINNETONKA DECISION IS LIMITED TO PROVISIONS IN LOCAL ORDINANCES THAT PERTAIN ONLY TO DESIGN OR CONSTRUCTION BUT NOT TO PROVISIONS IN LOCAL ORDINANCES THAT ALSO PERTAIN TO OTHER LEGITIMATE ISSUES.

The trial court stated in its Memorandum of Law:

> The particular provisions at issue deal with relatively inexpensive issues such as smoke detectors, ground fault interrupters, window well covers and bathroom fans. These types of conditions are not structural, do not involve the "design or construction" of the property, and do not involve complex "components or systems" within his rental property. As such, the Ordinance does not principally address the structures but rather regulates certain safety and health provisions that are part and parcel of the business of renting residential property in the City of Morris. This is a valid exercise of the City's police powers. *Appd. P. 10* .

The trial court's Memorandum of Law pointed out that:

> The Minn. St. Building Code is established by Minn. Stat. § 16B.59 et seq. The statute governs the construction, reconstruction, alterations and repair of buildings covered by the Code. Minn. Stat. § 16B.62 provides that a municipality may not require *building code provisions* regulating components or systems of any residential structure that are different from the State Building Code. The actual Code is promulgated by regulations issued by the Department of Administration.
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> . . .
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> Defendants' arguments and reliance upon the specific statutory code sections and the Supreme Court's holding in City of Minnetonka v. Mark Z. Jones Assoc., 236 N.W.2d 163 (Minn. 1975), has some persuasive basis if viewed in isolation.
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> . . .
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> The Minnetonka decision did provide that the State Building Code does pre-empt local ordinances that address the design or construction of buildings. However, the decision appears to be limited to provisions in local ordinances that pertain only to design or construction but not other legitimate issues. *Appd. pp. 7 - 8* .

In Minnetonka the Court held that (despite the fact that adoption of fire prevention measures was a legitimate issue for local regulations) certain provisions of a fire prevention ordinance were preempted by the Minnesota State Building Code. See Id. at 165. The fire prevention ordinance of the City of Minnetonka applied to all buildings in that City (including existing buildings). Indeed the subject property in Minnetonka was apparently an existing building (see Minnetonka at 164) and modifications were being imposed after construction. Clearly, the Court did not intend to limit the decision to provisions in local ordinances that pertain *only* to design or construction but not other legitimate issues, since the provisions of the fire prevention ordinance of the City of Minnetonka that were determined to be

preempted by the Code pertained to the issue of fire prevention (a legitimate issue for local regulation). However, because the subject provisions *also* affected the design or construction, the Court held that they were preempted by the Minnesota State Building Code which regulates fire prevention as it pertains to the construction and design of buildings, Id at 167. The City of Minnetonka was not permitted to apply its "police powers" to require either that a newly constructed building comply with the subject provisions of the fire prevention ordinance or that an existing building be upgraded to comply with the subject provisions. Since the Minnesota Supreme Court in Minnetonka linked fire prevention, health, safety and sanitation together as objectives of the Minnesota State Building Code (See Id. at 167), the decision must be extended to preempt provisions of local ordinances that regulate components affecting the design or construction of buildings while also addressing the otherwise legitimate issues of safety, health and sanitation.

The City of Morris Rental Licensing Ordinance (Section 4.32 of the Morris City Code, *Appd. pp. 33-53*) deals with the otherwise legitimate issues of fire prevention, health, safety and sanitation of tenant residents and licensing of residential rental property. However, most of the inspection standards contained in Subdivision 21 of that Ordinance attempt to regulate a component of a residential dwelling affecting the design or construction of that dwelling. Indeed, the subject ordinance was adopted as part of Chapter 4 of the Morris City Code entitled "Construction, Licensing, Permits and Regulation", and not as a part of Chapter 6

of the Morris City Code entitled "Other Business Regulation and Licensing." Despite the fact that the provisions of Subdivision 21 of the Rental Licensing Ordinance are labeled "inspection standards", a comparison with provisions of the Minnesota State Building Code clearly demonstrates that the majority of the provisions are in fact building code provisions. *Add. pp 1-5.*

The Minnesota State Building Code contains various "grandfather" clauses which can be found in Minnesota Rules 1300.0220, Subp.2, Minnesota Mechanical Code Section 102 and Minnesota Building Conservation Code Sections 104 and 107. The City of Morris contends that the inspection requirements for obtaining a rental license under the City's rental registration ordinance would require residential buildings built before the adoption of the Minnesota State Building Code to comply with current (new construction) building code provisions. The City of Morris's inspection requirements under their Rental Licensing Ordinance are more stringent than the Minnesota State Building Code primarily because they do not account for compliance of existing buildings with the current Minnesota State Building Code under the provisions of Minn. Rule 1300.0220, Subp. 2, Minnesota Mechanical Code Section 102, and Minnesota Building Conservation Code, Sections 104 and 107. *Add. pp. 1-5.* This construction of the City's Rental Licensing Ordinance is an attempt to eviscerate the grandfather clauses for existing buildings contained in the Minnesota State Building Code.

In Minnesota Agricultural Aircraft Assoc. v Township of Mantrap, 498 N.W.2d

40, 43 (Minn.App. 1993), the Court stated:

> While it is true, as the township argues, that municipalities have the police power to regulate in the interest of public health, safety and welfare, a township cannot invoke "police power" to accomplish what is otherwise preempted by State statute.

Application of the Minnetonka and Mantrap decisions to the instant case means that those inspection standards which regulate, even if the regulation is in the interest of public health, safety and welfare, a component of a residential dwelling that is also regulated by the Minnesota State Building Code (consequently affecting the design or construction of that building) are actually building code provisions and are preempted by the Minnesota State Building Code. The inspection standards are void even if they are not in conflict with the Code. *See* Mangold Midwest Co. v. Village of Richfield, 143 N.W.2d 813, 819 (1966). In Mangold, the Court stated that:

> It is our opinion that preemption and conflict are separate concepts and should be governed by separate doctrines. The preemption doctrine has also been known as the "occupation of the field" concept, and is familiar in drawing the line between state and federal powers. It is based on the type of reasoning expressed by a California court in People v. Commons, 148 P. 2d 724, 727, when it stated:
>
>> State law may fully occupy a particular field of legislation so that there is no room for local regulation in which case a local ordinance attempting to impose any additional regulation in that field will be regarded as conflicting with the State law and for that reason void, even though the particular regulation set forth in the ordinance does not directly duplicate or otherwise directly conflict with any express provision of the State law.

The Minnetonka decision is the only Minnesota case in which the issue of

preemption of provisions of local ordinances regulating components of buildings also regulated by the Code and also addressing other legitimate issues was argued and decided. Other cases, State v. Ellis, 441 N.W.2d 134 (Minn.App. 1989), Press v. City of Minneapolis, 553 N.W.2d 80 (Minn.App.1996), and Rozman v. City of Columbia Heights, 268 F.3d 588 (8th Cir. 2001), have also pertained to local housing maintenance and/or rental ordinances. However, the issues argued in those cases did not include preemption of the ordinances by the Minnesota State Building Code, but rather, the arguments pertained to constitutional issues of illegal searches, equal protection, vague wording, and delegation of legislative authority, and the ability of a landlord to transfer responsibility for maintenance of the building to a tenant. Therefore, those cases do not provide any precedential value in deciding the instant case, and the Minnetonka decision provides the only applicable case law pertaining to the issue of preemption of the provisions of a local ordinance by the Minnesota State Building Code.

The Appellant's Addendum at pages 1 - 5, includes a table identifying the inspection standards contained in the City's Rental Licensing Ordinance that the Appellant contends fall into the category of provisions preempted by the Minnesota State Building Code. The Appellant's table does not list all applicable provisions of the Minnesota State Building Code, but it does list at least one applicable provision for each inspection standard contained in the City's Rental Licensing Ordinance.

It is important to note that the fact that the Minnesota State Building Code preempts any provision of a local ordinance that attempts to regulate a component or system of a building which the Minnesota State Building Code also regulates, does not eviscerate a municipality's ability to safeguard the health and safety of its citizen tenants. The Minnesota State Building Code provides a municipality with the ability to insure, through inspections, that existing residential dwellings are maintained to the design standards under which they were constructed or last renovated, altered or repaired. See Minnesota Rules 1300.0110, Subp.7, and Minnesota Building Conservation Code Sections 107, 203 and 204. The Minnesota Building Code requires that the building inspector provide written correction orders if any inspection identifies a condition where a component of a building has not been maintained to the applicable design standard, or where a repair or improvement has not been completed to the requisite building code standard. See Minnesota Rules 1300.0110, Subp.4. The Minnesota State Building Code does (via Minnesota Statute 16B.62 and the Minnesota Supreme Court's decision in Minnetonka) specifically preclude a municipality from, by ordinance, forcing an owner/landlord to renovate a building to meet standards more stringent than required for existing buildings in the Minnesota State Building Code.

The Building Code and Standards Division of the Minnesota Department of Labor and Industry, under the rule making authority granted to it by the legislature, has applied its presumed expertise to determine that life, limb, health, property and

the public welfare are adequately safeguarded by those standards. Additionally, the Minnesota State Building Code does not preempt a provision of a local ordinance if that provision only regulates components or characteristics of a building about which the Minnesota State Building Code is silent. Examples of such provisions would include the use of extension cords, floor coverings, fire extinguishers, carbon monoxide detectors, requirements for kitchen appliances, house numbers, rubbish removal, rodent or insect infestations, use and storage of hazardous materials, and limitations on the number of occupants. These examples are all legitimate issues for local regulation *and* are not addressed in the Minnesota State Building Code. Therefore, these permissible provisions in local ordinances are not preempted by the Minnesota State Building Code and explain why, for example, the term "violation" is defined by Minn. Stat. § 504B.001, Subd. 14, as: "a violation of any State, County, or City health, safety, housing, building, fire prevention, or housing maintenance code applicable to the building . . . " The additional references in this definition are necessary because there are permissible provisions in local ordinances covering other legitimate issues not preempted by the Minnesota State Building Code.

Those inspection standards in the Morris Rental Licensing Ordinance that regulate a component or system of a residential dwelling which are also regulated by the Minnesota State Building Code are preempted by Minnesota Statute 16B.62. The provisions are preempted because the individual provisions affect the design

or construction of a residential dwelling even though the ordinance containing the provisions was enacted to regulate in the interest of public health, safety and welfare or some other legitimate issue. The trial court's decision is in error and should be reversed as a matter of law.

IV. THE TRIAL COURT ERRED IN DISMISSING THE DEFENDANT'S AMENDED COUNTERCLAIM WITHOUT DETERMINING IF ANY OR ALL OF THE OTHER INSPECTION STANDARDS CONTAINED IN THE CITY'S ORDINANCE WERE PREEMPTED BY MINNESOTA STATUTE § 16B.62.

The Appellant served and filed a Counterclaim and Amended Counterclaim alleging that approximately 71 other inspection standards in Subdivision 21 of Section 4.32 of the Morris City Code were preempted by Minn. Stat. § 16B.62. *Appd. P. 68.* The trial court granted the Plaintiff/Respondent's Motion for Summary Judgment dismissing this Counterclaim pled by the Appellant. In its Memorandum of Law the trial court stated that some of these other inspection standards contained in the City's Ordinance might be preempted by State statute. However, without providing its reasons, the Court dismissed Appellant's Counterclaims pertaining to the other inspection standards. The issue of whether the Petitioner has standing to challenge the other inspection standards was not raised, argued or decided below. Insofar as the inspection standards in Subd. 21 of Section 4.32 are also addressed in the Minnesota State Building Code, the standard is preempted and is invalid as a matter of law. The dismissal of Appellant's Counterclaims was clear error and should be reversed on appeal.

CONCLUSION

In summary, the City of Morris has the authority under its police powers to require licensure of residential rental properties and to regulate a wide variety of aspects related to those rental properties, but is prohibited by Minnesota Statute 16B.62 from regulating components or systems of a building also regulated by the Minnesota State Building Code other than to require that those components or systems of rental properties fully comply with the Minnesota State Building Code.

Based on the foregoing, the Appellant respectfully requests that this court reverse the trial court's decision granting the City of Morris summary judgment on its claim for a temporary injunction and dismissing the Appellant's Counterclaims pertaining to the other inspection standards. The trial court's decision that the four inspection standards under which citations were issued to the Appellant pursuant to Section 4.32 of the Morris City Code are not preempted by Minnesota Statute Section 16B.62 is contrary to law. In addition, the trial court's decision to grant the City's Motion for Summary Judgment as to Appellant's Counterclaims pertaining to the other inspection standards is contrary to law. For these reasons, and based on the entire record in this proceeding, the Appellant respectfully requests that the trial court's Judgment, except for the special assessment matter, be reversed.

Dated: August 30, 2006.

Respectfully submitted,

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).