

STATE OF MINNESOTA

IN COURT OF APPEALS

CITY OF MORRIS,

Plaintiff/Respondent,

vs.

SAX INVESTMENTS, INC. and
MICHAEL SAX,

Defendants/Appellants.

RESPONDENT'S BRIEF

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LEGAL ISSUES

- I. Are the requirements of Morris City Code §4.32 at issue here, regarding conditions in residential rental properties registered in the City of Morris, preempted by the Minnesota State Building Code?

The trial court ruled in the negative.

Apposite authorities:

Morris City Code §4.32

Minnesota Statutes §16B.62

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

STATEMENT OF FACTS

Section 4.32 of the Morris City Code regulates rental properties. (1/24/06 Affidavit of Charles Glasrud, Exhibit A; Appellant's Appendix, p. 34) By its terms, it exists "to establish and enforce minimum standards for rental units" and "to ensure that rental property is properly maintained." (Morris City Code §4.32, Subd. 1) It is patently a rental housing regulation.

The ordinance sets up a rental property registration and licensing program. (Morris City Code §4.32, Subd. 3) One, the other, or both of the Defendants/Appellants (hereinafter "Sax"), at all relevant times herein, registered the property at 608 8th Street East in Morris under the ordinance, but it failed its inspection. (Amended Complaint, pp. 1-2; Summary Judgment Order, p.3)

Plaintiff/Respondent (hereinafter "City") cited Sax for four items, which became the source of the controversy herein:

- a. Ground fault interrupters ("GFIs") were not used for outlets within six feet of a water source, the violations being found in the kitchen by the sink, in the bathroom, and in the basement;
- b. A window or fan was not present in the bathrooms for ventilation;
- c. Smoke detectors were not installed in the basement bedroom; and
- d. Egress windows in the basement did not have proper covers.

(Amended Complaint, p.2; Summary Judgment Order, p.3)

Sax neither remedied the conditions nor paid a reinspection fee. (Amended Complaint, p. 2; Summary Judgment Order, pp. 3-4) Accordingly, City brought an action

for an injunction preventing Sax from leasing the property out until he complied.

(Amended Complaint)

Sax filed an Amended Counterclaim to the Amended Complaint. (Appellant's Appendix, p. 27) He sought an order that the property be deemed to have passed its inspection; an injunction prohibiting the City from enforcing or attempting to enforce *any portion* of that part of Section 4.32 that regulates a component or system of a residential structure regulated by the Minnesota State Building Code; an injunction prohibiting the City from enforcing or attempting to enforce *any portion* of the code section which conflicts with the State Building Code and/or preempts the appeals process permitted under the Building Code; and other relief including relating to a special assessment on separate property (which aspect of the counterclaim is not on appeal herein).

(Appellant's Appendix, p. 27)

City moved for summary judgment, and in an opinion filed April 27, 2006, Stevens County District Judge Gerald J. Seibel granted the motion, issuing a temporary injunction against Sax renting the property to tenants or allowing them to occupy until the four deficiencies are resolved and appropriate reinspection fees paid. (Summary Judgment Order) In so doing, the trial court denied various responsive motions of Sax for summary judgment and other things, as untimely; this ruling is apparently not appealed herein. It also granted summary judgment to City on Sax's counterclaims.

ARGUMENT

Minnesota Rule of Civil Procedure 56.03 provides that summary judgment is mandated “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.” There is no issue of material fact as to whether or not there continue to be unremedied violations of the Morris rental ordinance in Sax’s building. In fact, Sax does not argue here there are material facts at issue that make a grant of summary judgment inappropriate. Rather, Sax’s entire argument relates to alleged preemption by the Minnesota State Building Code.

1. Sax lacks standing to challenge all but the four provisions for which he was cited.

Sax lacks standing to challenge the provisions of the ordinance except the four provisions for which he failed inspection and as to which relief was granted City by the trial court. These are the only provisions properly before this Court. *Thayer v. American Financial Advisers, Inc.*, 322 N.W.2d 599, 604 (Minn. 1982)¹(reviewing courts must consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before them); *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988)(reviewing courts generally consider only such issues). The purpose of appellate review is to determine whether the trial court made an error; where the parties fail to fully litigate an issue below, the appellate courts cannot determine it on appeal. *Fryhling v Acrometal Prod., Inc.*, 269 N.W.2d 744, 747 (Minn. 1978).

¹ This case was ruled “abrogated” in *Onvoy, Inc v SHAL, LLC*, 669 N.W.2d 344 (Minn. 2003), on other grounds.

Here, Sax attempts to contest the validity of nearly 70 provisions of the rental ordinance never at issue below and never considered by the trial court, and these cannot be taken up on appeal – if, indeed, the trial court could have considered them in the first place, because Sax was not cited for violating them.

2. The Morris regulations at issue are not preempted by the Minnesota State Building Code, as interpreted in *Minnetonka v. Jones*.

The essence of Sax’s argument is that the Minnesota State Building Code, adopted pursuant to statutory authorization found in Minn. Stat. §16B.62, preempts the rental licensing and inspection regulation – by its terms *not* a building code – attempted by City. For this proposition, Sax relies heavily upon the decision in *City of Minnetonka v. Mark Z. Jones Assoc.*, 236 N.W.2d 163 (Minn. 1975). In fact, Sax argues that decision “provides the only applicable case law pertaining to the issue of preemption of the provisions of the local ordinance by the Minnesota State Building Code.” (Appellant’s Brief, p. 18)

As the trial court pointed out, *Jones* does limit the City’s ability to regulate in this area. But while Sax would have this Court believe the *Jones* decision removes from the City the ability to do more than inspect and enforce matters covered by the State building and other codes, or to regulate things not therein addressed,² the actual language of *Jones* is not nearly so broad.

² For example, Sax contends that the requirement of landlords affixing battery-powered smoke detectors which can be bought in any hardware store in each tenant bedroom is preempted by the State Building Code, which does not require them there, but at the same time asserts City can require the placement of more recently-popularized carbon monoxide detectors – because, presumably, the State Building Code is silent about carbon monoxide detectors. Yet the two small, inexpensive appliances are essentially similar, both being designed and marketed to warn and protect

In *Jones*, a 31-year-old case decided when the State Building Code was new, the City of Minnetonka attempted to enforce its fire prevention code against a builder of apartment buildings. Specifically, Minnetonka sought to require installation of sprinkler systems in basement garages and an emergency lighting system in hallways and exits independent of public utility power. 236 N.W.2d at 165. Minnetonka lost, but not because the Supreme Court held (as Sax would have it) that the topic of fire prevention was already regulated in the State Building Code and Minnetonka was thus preempted from *any* regulation. Rather, the Court held that the issue was “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” independently. *Id.*

(emphasis supplied) The *Jones* court only 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.” *Id.*

(emphasis supplied)

The pertinent preemption language of Minn. Stat. §16B.62 is: “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.”

Thus, the narrow issue before the Court is whether the four violations cited touch upon “components or systems” of a “residential structure” which are an integral part of

people from deadly hazards in their homes That Sax notes this distinction highlights the fundamental absurdity of Sax’s position – an absurdity in no way amusing given the deadly serious public safety issues at stake

its design or construction – and whether, if so, the rental licensing ordinance can require these be upgraded on old, out-of-compliance housing prior to registering these as rental units and putting them into the hands of unsuspecting tenants.

Sax attempts to derive from *Jones* a rule that the City is powerless in enacting its rental regulation ordinance, but he cannot, for such is not the case. He argues that from the examples the *Jones* Court gave of things that could and could not be locally regulated, it must be inferred that only things as to which the Building Code is silent can be regulated. This seriously misleads this Court, for it is not what the *Jones* Court said. If the examples can be so characterized it is no more than coincidence, for the *Jones* Court quite distinctly said what it meant: matters “not directly related to the design or construction” are “undoubtedly...within the province of local...ordinance.” *Id.* The pains to which the Court went in giving these examples and in enunciating the “integral part of the construction” and “design and construction” standards also would have been for naught if Sax were correct on this analysis.

The trial court, reading the *Jones* case appropriately, looked at the only four specific items at issue in this case: the GFIs, the bathroom ventilation, the smoke detectors, and the egress windows. Comparing the four simple items with the *Jones* items – installation of an automatic sprinkler system in a parking garage and installation of an emergency lighting system for halls and exits to be triggered when the power fails – the trial court saw the real distinction based on the *Jones* Court’s language. The items in *Jones*, the Supreme Court had observed, reached a level of *design* or *construction*: the

City of Minnetonka was telling Jones it had constructed these new apartment buildings wrong, and should have designed them to include these particular components.

The trial court here correctly found that smoke detectors, GFI outlets, egress window covers and bathroom ventilation were more like portable fire extinguishers than they were like entire sprinkler *systems* and emergency lighting *systems*. (Sax would take this Court down the path of examining every portion of Morris's ordinance even though only four are at issue, but as noted *infra*, these other matters are not before the Court.) The trial court was clearly correct that there is no preemption because the four items do not rise to the level of design or construction of components or systems.

3. Sax should not, by "grandfathering" aging structures, be allowed to subvert rental regulation.

If the trial court is correct that the four specific items at issue in this case do not relate to design or construction of components or systems, then the inquiry is over and City prevails. Only if this Court disagrees with that analysis do we reach other issues, including what may best be referred to as "grandfathering." Sax's argument here is that even though the regulations adopted by the City directly mirror those contained in the State Building Code (and hence are in harmony with it), application of these requirements to aging structures that were in existence and have not been altered since 1972, when the field was preempted, conflicts with the state code because the existing unsafe conditions are "grandfathered in." The same preemption recognized in the *Jones* decision which would prevent the City from regulating design or construction of new buildings, the

argument goes, should prevent the City from applying fundamental safety-related State Building Code provisions to the aged structure in which Sax would house tenants.

Ironically, Sax hides behind the very age of his structure (already at least 34 years old if it predates the adoption of the state statute) – and the fact that apparently no serious renovation of or improvement to this structure has taken place over at least one-third of a century – to try to evade this safety regulation. It cannot be ignored that such structures are obviously the very ones that pose some of the greatest dangers to some of the neediest tenants: inexperienced students, young families, and others who lack either sophistication, nerve, or financial clout to demand better – in other words, the very people for whom rental regulations can do the most good.

But happily, the *Jones* case does not talk about grandfathering. It talks about the construction of a new structure after the enactment of the building code. *Jones* could not and did not reach the grandfathering issue. There are no grandfather provisions in either the state statute or any case law of which the undersigned is aware that prohibit a municipality from enacting a *rental* ordinance that imposes upon all properties which are in residential rental service the minimum safety provisions that have been in effect for decades for all new construction under Minnesota's *building* code. The City isn't saying private home owners cannot continue to live, if they choose, in old hazardous structures that were legal when built; but it is saying that those who would engage in the regulated business of renting their premises to residential tenants must at least live up to state standards, regardless of (and maybe even because of) the age of those structures. As

discussed in the next section, this is a business regulation, not a building regulation, and there is a long tradition of such regulation in Minnesota and the nation.

4. The ordinance in question is a business regulation which can, at least, apply current state building code guidelines to older structures to protect renters.

Justice William O. Douglas, in Berman v. Parker, 348 U.S. 26, 32 (1954), observed that

[m]iserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden.

These words remind us of the need to regulate rental housing conditions, a need recognized, it turns out, long before Justice Douglas wrote those words 52 years ago – perhaps even before Sax’s rental house was built.

In Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523 (1967), the United States Supreme Court, discussing rental inspections, recognized a long history of concern over substandard housing conditions and observed:

There is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures.

Id., at 535.

[T]he public interest demands that all dangerous conditions be prevented or abated....

* * *

The need for preventive action is great, and city after city has seen this need and granted the power of inspection to its health officials; and these inspections are apparently welcomed by all but an insignificant few.

Id., at 537.

How, then, can it be that the Minnesota State Building Code prevents Morris from addressing the well-recognized need to regulate rental housing? It turns out it does not. The instant case is not the first one in which a landlord has challenged regulation, though it may be the first appellate case in which preemption is advanced as a defense. Yet as noted by the trial court, there is a clear assumption in other Minnesota statutes that cities can regulate as Morris has here.

Minnesota Statutes Chapter 504B regulates landlord-tenant relationships which – notwithstanding Sax’s argument that the ordinance at issue happens to have been codified in a chapter entitled “Construction, Licensing, Permits and Regulation” rather than another entitled “Other Business Regulation and Licensing” – is what §4.32 is all about. Minnesota Statutes §504B.185 addresses the ability of a local authority to inspect for and give notice of code violations, and §504B.395 addresses the procedure under which an action may be brought against a landlord to remedy a building violation. “Violation,” in turn, is defined in Minn. Stat. §504B.001, Subd. 14, as including a violation of a city housing or housing maintenance code. The references in this statute, as the trial court correctly pointed out, would be meaningless if indeed the City of Morris were powerless to exercise regulation in this regard. It is through Chapter 504B, not Chapter 16B, that Minnesota regulates the landlord-tenant relationship, yet the purported preemption language is based neither in Chapter 504B nor in case law construing it.

Other statutes which recognize the existence and application of local housing or rental codes in Minnesota include Minn. Stat. §273.1319(a) (discussing Minneapolis and St. Paul’s “rental licensing requirements and housing codes”) and Minn. Stat. §394.22 (defining “official controls” to include “ordinances establishing ... sanitary codes [and] building codes”).

Case law also bears out the trial court’s observation. In *State v. Ellis*, 441 N.W.2d 134 (Minn. App. 1989) (*review denied* July 12, 1989), this Court upheld a conviction of a landlord under the City of Minneapolis’s housing code – a housing code that, under Sax’s argument, cannot exist. In *Parkin v. Fitzgerald*, 240 N.W.2d 828 (Minn. 1976), the Minnesota Supreme Court observed that tenants are “protected by local housing codes and regulations which often set down specific housing requirements and are enforced by local administrative officers....”

Press v. City of Minneapolis, 553 N.W.2d 80 (Minn. App. 1996), involved apartment buildings which in the early 1960s complied with Minneapolis’s building code. *Id.*, at 81. Subsequently, solid-core doors were required by the code. “Given the weighty public safety considerations that underlie the ordinance’s purpose, we agree that the director [of inspections] has the authority to order ‘replacement’ of doors,” the Court held, in an example not only of this Court upholding local housing codes but of public safety of residential tenants compelling application of new regulations to existing properties – a refusal to grandfather in the tenant-safety context. *Id.*, at 85.

In *Search Warrant of Columbia Heights v. Rozman*, 586 N.W.2d 273, 274 (Minn.App.1998)(*review denied*, January 21, 1999), this Court discussed Columbia

Heights's Housing Maintenance Code, enacted "to ensure that rental units are in satisfactory condition." The Court found authority to issue administrative search warrants absent a specific authorization in the local code – a pointless exercise if Columbia Heights could not regulate landlords such as Rozman.

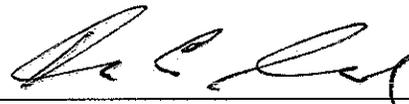
Thus, while not specifically addressing the preemption and grandfathering issues Sax raises here, both statute and case law in Minnesota recognize the ability of cities to engage in exactly the sort of regulation Morris does here. So to harmonize the *Jones* case with this statutory language and case law – and to avoid the absurd result that the older and more neglected one's building, the less a city's ability to regulate its tenants' safety – it is necessary to recognize the limited nature of the *Jones* decision.

The ultimate distinction between the instant case and *Jones* is that in *Morris* (unlike *Minnetonka*, with its fire code) we have a rental code – a housing code. It regulates the business of renting habitations to people, not the construction of buildings. It is this sort of reasonable, public safety related business regulation that the courts, the legislature, and everyone but Sax have long recognized and taken for granted.

CONCLUSION

Sax is not himself being prevented from living in an old house which met whatever building codes were in effect when it was first erected; he can do that. He is not being required to do anything. He is merely being prevented from a use – engaging in the business of renting an unsafe, aging structure to the public. The regulations City applies here are not preempted by state law as they are applied to Sax, and summary judgment was properly granted by the trial court, whose decision should be affirmed.

Respectfully submitted,



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