

NO. A11-2270

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State of Minnesota  
**In Court of Appeals**

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Builders Association of Minnesota,  
a Minnesota non-profit corporation,

*Appellant,*

vs.

City of Saint Paul, Minnesota,

*Respondent.*

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**APPELLANT'S REPLY BRIEF**

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## ARGUMENT

### **I. THE CITY OF SAINT PAUL CANNOT OVERRULE MINNESOTA STATUTES AND THE STATE BUILDING CODE THROUGH ADOPTION OF A “POLICY” INSTEAD OF AN ORDINANCE.**

The District Court held, and the City agrees, that the State Building Code “clearly preempts City of St. Paul Ordinances.” (ADD012; R. Brief, p. 9.) Moreover, the City concedes that, had it enacted an ordinance instead of the Policy, such an ordinance would be preempted by the State Building Code. (R. Brief, 9 (“If the City’s Policy was indeed an ordinance, the plain language of the MSBC would preempt the ordinance.”).) However, the City asserts that Minnesota Statutes § 326B.121, and the Minnesota appellate decisions interpreting that section and its predecessor, apply only to “ordinance[s]” and “development agreement[s].” (R. Brief, 7-12.) As a result, according to the City, it was permitted to enact a policy that directly conflicts with the State Building Code, because a “policy” is not an ordinance or development agreement. Minnesota Statutes § 326B.12 and the State Building Code, as interpreted by the Minnesota Supreme Court, are not so narrow.

Instead, the Supreme Court has explained that the State Building Code completely preempts municipal building regulations. City of Morris v. Sax Invs., Inc., 749 N.W.2d 1, 6-7 (Minn. 2008). Municipalities cannot “enact a local regulation that conflicts with state law, and state law may fully occupy a particular field of legislation so that there is no room for local regulation.” Id. at 6 (citations omitted). “In enacting a statewide building code, the legislature recognized that a single, uniform set of building standards was necessary to lower costs and make housing more affordable.” Id. at 7. Accordingly,

the Court held that “[t]he State Building Code applies statewide and supersedes the building code of any municipality.” Id. This broad pronouncement of the scope of the State Building Code demonstrates that the Code encompasses all municipal building regulations, regardless of whether the municipality names the regulation a “policy.”

Moreover, there is an inherent fallacy (and irony) in the City’s argument, and the District Court’s holding, that a municipality may adopt a “policy” that overrules the State Building Code, because the Director of the City’s Department of Safety and Inspections—who issued the Policy—derives his authority (including the authority to promulgate policies) from a City of St. Paul *ordinance*. See St. Paul, Minn., Admin. Code §§ 13.01, 13.03 (creating the Department of Safety and Inspections, giving the Department authority related to building inspection, code enforcement, and fire inspection, and providing that the “director shall have the power to prescribe such rules and regulations as deemed necessary or expedient for the proper operation of the department”). Therefore, the Policy only derives legal effect through an ordinance that would violate Minnesota Statutes § 326B.12.

Accordingly, the result of the District Court’s reasoning—were it adopted by this Court—would be that municipalities could not enact *ordinances* that differ, in any manner, from the State Building Code, but municipalities could enact ordinances that delegate authority to unelected municipal employees, and those municipal employees could issue *policies* (or rules, regulations, decrees, requirements, etc.) that directly overrule the State Building Code. See City of Morris, 749 N.W.2d at 10 (holding that any municipal provision that has “any difference from the State Building Code is

prohibited”). Such a decision would lead to the exact situation, as recognized by the Minnesota Supreme Court, that caused the Minnesota Legislature to enact a uniform state building code in the first place:

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.

City of Minnetonka v. Mark Z. Jones Assocs., Inc., 236 N.W.2d 163, 166 (Minn. 1975)

(citations omitted); see also id. at 167 (“we are of the opinion that to allow individual municipalities to impose additional burdens on builders in the name of fire prevention, sanitation, or security would totally emasculate the explicitly stated purpose of the statute authorizing the State Building Code”). There is no question that upholding the Policy would destroy the uniformity of the State Building Code because no other municipality in the state has enacted an ordinance, policy, or other regulation regarding egress windows like St. Paul’s Policy. (APP034 at ¶ 8; see also APP036 at ¶ 5.)

Because (1) the Policy is a building code provision that regulates subjects that are covered by the State Building Code, (2) the Policy regulates components or systems of a residential structure, and (3) the Policy differs from the State Building Code, the Policy is prohibited under Minnesota Statutes § 326B.121. City of Morris, 749 N.W.2d at 7-14. The District Court’s holding that the Policy is not preempted by the State Building Code must be reversed.

**II. THE MORE SPECIFIC MINIMUM EGRESS WINDOW SIZE EXCEPTION CONTAINED WITHIN THE STATE BUILDING CODE CONTROLS THE GENERAL EGRESS WINDOW SIZE PROVISION IN THE STATE FIRE CODE.**

On the same date—June 2, 2007—Minnesota adopted both the 2006 International Residential Building Code (“**IBC**”) and 2006 International Fire Code (“**IFC**”), with certain Minnesota-specific exceptions. Minn. R. 1309.0010 (2007) (ADD028-29), 32 S.R. 12 (adoption of 2006 IBC); Minn. R. 7511.0090 (2007) (ADD031), 32 S.R. 10 (adoption of 2006 IFC). As relevant here, Minnesota amended the IBC to provide a Minnesota-specific exception to the minimum size requirements for egress window replacements in single-family owner-occupied homes:

R310.1.5, exception #1. The replacement window is the manufacturer’s largest standard size window that will fit within the existing frame or existing rough opening. The replacement window shall be permitted to be of the same operating style as the existing window or a style that provides for a greater window opening area than the existing window.

Minn. R. 1309.0310 (the “**Exception**”) (ADD030.)

As the District Court recognized, the Exception directly conflicts with State Fire Code, which adopted the general IFC provision for egress window size requirements, without the Minnesota specific Exception for replacement windows in single-family owner-occupied homes. Minn. R. 7511.1026.1. (ADD014; RA 27-28.) Because the City purports that it adopted the Policy to comply with the State Fire Code, the Court is required to resolve this conflict. (ADD016-17.)

Minnesota Statutes § 645.26, subd. 1 provides that, to resolve a conflict between irreconcilable provisions in two separate laws enacted at the same time, “the special

provision shall prevail and shall be construed as an exception to the general provision.”

Here, both the State Building Code and State Fire Code contain minimum size requirements for escrow windows; however, only the State Building Code contains a special provision—a Minnesota-specific exception to the IRC minimum size requirement for replacement windows. Minn. R. 1300, 1305, 1309, 7511.1026.1. The straightforward application of Minnesota Statutes § 645.26 requires the Court to conclude that, solely for purposes of the limited circumstances identified in the Exception, the State Building Code trumps the State Fire Code. Moreover, such a construction is the only interpretation that also conforms with Minnesota Statutes § 645.17, subs. 1 & 2, because a contrary interpretation—that the more general State Fire Code provision controls—would void the Exception, rendering the Exception meaningless.

Moreover, the implementing statute for the State Fire Code suggests that the Code is not designed to be used by municipalities to do what the City did here—adopt a regulation that is contrary to the State Building Code. Minnesota Statutes § 299F.011, subd. 4 provides that municipalities may adopt ordinances or regulations that differ from the State Fire Code, but any such ordinance or regulation:

*must be directly related to the safeguarding of life and property from the hazards of fire, must be uniform for each class or kind of building covered, and may not exceed the applicable requirements of the State Building Code adopted pursuant to sections 326B.101 to 326B.151.*

(emphasis added). The Policy violates both the uniformity requirement (because of its exception provision and appeal process) and the statutory requirement that a local regulation “not exceed the applicable requirements of the State Building Code.” At a

minimum, Section 299F.011 demonstrates that the Legislature did not intend to authorize municipalities to contravene the State Building Code under the guise of fire prevention and safety. Cf. City of Minnetonka, 236 N.W.2d at 166-67 (holding that city could not require developer to install sprinkler system and other fire safety measures because they were not required by State Building Code).

Because the State Building Code contains a Minnesota-specific exception to the minimum size requirements for replacement egress windows, that Exception controls over the more general State Fire Code. Accordingly, the Policy, which is based on the State Fire Code, should be declared unenforceable.

**III. THE DISTRICT COURT ERRED IN DECLINING TO RESOLVE THE CONFLICTS BETWEEN MINN. STAT. § 326B.121, THE POLICY, THE STATE BUILDING CODE, AND THE STATE FIRE CODE.**

“It is emphatically the province and duty of the judicial department to say what the law is.” Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Despite this most fundamental responsibility of the judiciary, and the District Court’s acknowledgment that a conflict exists between the State Building Code and the State Fire Code, the District Court held that the conflict “is best left to the state legislature to resolve.” (ADD014.) The District Court’s refusal to resolve the conflict was improper, and must be reversed on appeal. See State v. Sherbrooke, 633 N.W.2d 856, 861 (Minn. Ct. App. 2001) (rejecting argument that district court had “usurped legislative power” by interpreting statute

because the district court “had the duty to interpret the . . . statute”).<sup>1</sup>

In addition, the District Court suggested that BAM “take the matter up” with the Department of Labor and Industry (“DOLI”) based on Minnesota Statutes § 326B.121, subd. 3, which authorizes the Commissioner of DOLI to “have the administration and enforcement” of the State Building Code in a municipality overtaken by a state official if the Commissioner determines that the municipality is not enforcing the Code. However, Minnesota Statutes § 326B.121, subd. 3, allows the Commissioner of DOLI to only undertake enforcement of building codes in a municipality, it does not allow the Commissioner to strike down municipal rules or regulations. Moreover, the Minnesota Supreme Court allowed a private entity to challenge a municipal regulation in the courts, rather than through lobbying the Commissioner of DOLI (or the Legislature, for that matter), in City of Morris, 749 N.W.2d at 4-14, despite the presence of a nearly identical provision in the previous version of the implementing statute for the State Building Code. See Minn. Stat. § 16B.62, subd. 2 (2006). After attempting to convince the City to voluntarily comply with the State Building Code, BAM brought this action to obtain a declaration that the Policy violated Minnesota Statutes § 326B.121 and the State Building

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<sup>1</sup> The District Court’s refusal to resolve the conflict between the two code provisions is particularly serious because it allowed a municipality—which has “no inherent powers and possess[es] only such powers as are expressly conferred by statute or implied as necessary in aid of those powers,” Minnetonka Elec. Co. v. Village of Golden Valley, 141 N.W.2d 138, 140 (Minn. 1966)—to overrule the State Building Code, which is a set of administrative rules promulgated by the Executive Department, and which has “the force and effect of law.” Minn. Stat. § 14.38, subd. 1.

Code.<sup>2</sup> The District Court erred when it stated that BAM should have instead sought relief from the Commissioner of DOLI or the Legislature.

As set forth above, the Minnesota Legislature has provided guidelines for interpreting two inconsistent laws. The straightforward application of Minnesota Statutes § 645.26, subd. 1 to the egress window size requirements in the State Building Code and State Fire Code mandates the conclusion that the more specific State Building Code Exception controls the more general State Fire Code provision. Accordingly, the Policy, even though based on the standard language in the IFC, violates the State Building Code. The District Court's Order granting the City's Motion for Summary Judgment, and Denying BAM's Motion, must be reversed.

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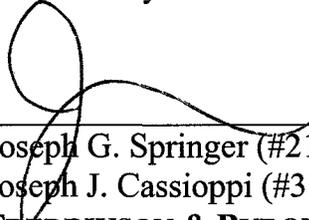
<sup>2</sup> In a footnote, the City asserts, without citation to authority, that BAM "lacks standing to bring this action." (R. Brief., p. 16, n. 4.) The City moved to dismiss BAM's Complaint based on standing, the Motion was denied, and the City did not appeal that denial. (*Id.*) The City's unsupported assertion is not properly before this Court and should be rejected. See Schaapveld v. Schaapveld, 398 N.W.2d 72, 75 n. 1 (Minn. Ct. App. 1986) (holding that issue was not before the court "[s]ince respondent did not file a cross-appeal"); see also Schoepke v. Alexander Smith & Sons Carpet Co., 187 N.W.2d 133, 135 (Minn. 1971) ("An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection.").

**CONCLUSION**

For the reasons set forth above, and those contained within BAM's initial Brief, the District Court erred when it held that the City's egress window Policy does not violate Minnesota Statutes § 326B.121 and the State Building Code. BAM respectfully requests that the Court of Appeals reverse the District Court and declare that the City's Policy violates state law.

Dated: March 2, 2012

Respectfully Submitted,



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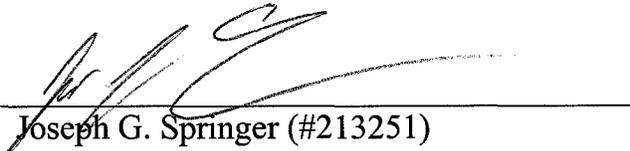
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**CERTIFICATE OF BRIEF LENGTH**

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I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P., 132.01, subd. 1 and 3, for a brief produced with proportional font. The length of this brief is 2,231 words. This brief was prepared using Microsoft Word 2003 and the word processing program has been applied specifically to include all text, including headings, footnotes, and quotations for word count purposes.

Dated: March 2, 2012



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