

NO. A11-2270

State of Minnesota
In Court of Appeals

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

Appellant,

vs.

City of St. Paul, Minnesota,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

FREDRIKSON & BYRON, P.A.
Joseph G. Springer (#213251)
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402
(612) 492-7000

Attorneys for Appellant

SARA R. GREWING
City Attorney
Judith A. Hanson (#207408)
Assistant City Attorney
750 City Hall and Court House
15 West Kellogg Boulevard
St. Paul, MN 55102
(651) 266-8727
judy.hanson@ci.stpaul.mn.us

Attorneys for Respondent

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).

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STATEMENT OF ISSUES

1. Should the District Court's Order finding that the City's egress window "Policy" does not violate the plain language of Minn. Stat. § 326B.121, subd. 2(a) of the Minnesota State Building Code ("MSBC") be affirmed?

Procedural Posture: Each party raised and argued this issue in their cross-motions for summary judgment.

District Court's Ruling: The District Court held the Policy of the City was neither an ordinance nor a development agreement under the plain language of Minn. Stat. § 326B.121, subd 2(a); therefore, it did not apply and it was not in violation of the MSBC.

Authority: Minn. Stat. § 326B.121, subds. 1 and 2
Minn. Stat. § 645.08

2. Should the District Court's Order finding that the Policy is lawful and comports with the Minnesota State Fire Code ("MSFC") be affirmed?

Procedural Posture: This issue was raised and argued in both parties' motions for summary judgment.

District Court's Ruling: The District Court held that the purpose of the City's Policy was to resolve any conflict between the administrative rules related to the MSBC and MSFC concerning egress window sizes.

Authority: Minn. R. 7511.0010
Minn. R. 7511.0101
Minn. R. 7511.0102
Minn. R. 7511.1026
Minn. Stat. § 299F.011
St. Paul, Minn., Legislative Code § 33.02
St. Paul, Minn., Legislative Code § 55.01

3. Should the District Court's finding that the Policy does not violate the plain language of either the MSBC or the MSFC be upheld? And that if a conflict does exist between the two state laws, it is not within the District Court's authority to reconcile them.

Procedural Posture: This issue was raised and argued in both parties' motions for summary judgment.

District Court's Ruling: The District Court held that the Policy does not violate the law and that the apparent conflict between the MSBC and the MSFC is best left to the legislature or the rulemaking body that interprets the legislation to resolve.

Authority: Minn. R. 7511.0102
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Minn. R. 754.0010
Minn. Stat. § 326B.121
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Minn. Stat. § 326B.02
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Minn. Stat. § 299F.011

STATEMENT OF THE CASE

Appellant Builders Association of Minnesota ("BAM") is a non-profit trade association involved in the residential construction and remodeling industry, and includes members who perform residential remodeling in the City of Saint Paul. BAM filed this action seeking a declaration that a policy of Respondent City of Saint Paul (the "City") concerning egress windows, violates the MSBC.

The City defended its Policy on the basis that it is consistent with the MSFC. Further, the Policy is neither an ordinance nor a development agreement which would make it expressly in conflict with the MSBC under Minn. Stat. § 326B.121, subd. 2(c).

The parties cross-moved for summary judgment. The District Court granted summary judgment in favor of the City and denied BAM's motion. The District Court held that the City's Policy was lawful and not a violation of Minn. Stat. § 326B.121, subd. 2(c). Judgment was entered October 19, 2011. BAM timely appealed the court's Order.

STATEMENT OF FACTS

On April 28, 2009, the Director of the City's Department of Safety and Inspections ("DSI") memorialized the City's Uniform Egress Window Policy (the "Policy") in a memorandum to Saint Paul housing owners and interested citizens. (ADD016-17.)¹ DSI, along with the City's Fire Marshal, recognized that "[A]n egress window is very important because of its life safety means of escape from smoke and/or fire and other potential hazardous conditions." (*Id.*) Because of the apparent confusion found between the various code requirements for egress windows, the Policy clarified the City's requirements for the size of egress windows in residential housing. (*Id.*)

The Policy provides as follows:

Window Policy:

Based on the Minnesota State Fire code, windows in existing structures must have a clear opening, be at least 20 inches in width, 24 inches in height **and** at least 5 square feet of entire clear glazed area, with a finished sill height of no more than 48 inches. In addition, replacement windows cannot be smaller that [sic] the originally approved windows, unless the originally approved windows exceed the current building code,

¹ References to "ADD#" are to Appellant's Addendum.

Exceptions:

The only exception to the above policy that may be granted by the Department of Safety and Inspections is for previously installed replacement windows that were installed under permit, inspected, and approved by the Department of Safety and Inspections prior to April 28, 2009.

Appeals:

Any window not meeting these specific requirements can appeal to the City Council via the City's Legislative Hearing Officer. The Council will consider the benefit to be obtained by complying with the fire marshal's orders and the effect on affordable housing, providing that the spirit of the code is complied with and public safety is secured. (Minn. Stat. § 299F.011, subd. 5b.)

(ADD017.)

Included in the Policy, was the declaration of the City's Fire Marshal that all escape windows with openings less than 20 inches in width, 24 inches in height and 5 square feet of entire glazed area with a finished sill height of no more than 48 inches constitute a "distinct hazard to life and property." (*Id.*; *see also* RA 19².)

The Policy noted that the MSFC "applies to existing buildings when: 1) identified in specific sections of the fire code; and 2) when, in the opinion of the code official, a structure, facility or condition constitutes a distinct hazard to life and property. (Minn. R. 7511.0102 (IFC 102.1)." (ADD017.) Further stated, Minn. R. 7511.0102, subp. 1 applies

²References to "RA #" are to Respondent's Appendix.

to the construction and design of existing structures, facilities and conditions that, in the opinion of the code official, constitute a distinct hazard to life and property.

An exception to the requirements of the Policy may be granted by DSI for “previously installed replacement windows that were installed under permit, inspected and approved by [DSI] prior to April 28, 2009.” (ADD017.) In the event that DSI does not grant the homeowner a variance to the window requirements, that denial may be appealed to the City Council via the Legislative Hearing Officer. (*Id.*) On appeal, “[T]he Council will consider the benefit to be obtained by complying with the fire marshal’s orders and the effect on affordable housing, provided that the spirit of the code is complied with and public safety is secured. (Minn. Stat. § 299F.011, subd.5b).” (*Id.*)

BAM alleged in their Complaint, that the MSBC contains an exception to the minimum egress window size as provided under Minn. R. 1309.0310, Section R310, which is an amendment to the International Residential Code (“IRC”). (APP001-6.)³ BAM contends that this exception allows homeowners to replace existing egress windows without being required to expand the existing frame or rough opening.

The exception under the amendment to the IRC, R310.1.5, provides:

[R]eplacement windows installed in buildings meeting the scope of the [IRC] shall be exempt from the requirements of Sections R310.1, R310.1.1, R310.1.2, and R310.1.3 if the replacement window meets the following conditions:

³ References to “APP#” are to Appellant’s Appendix.

1. The replacement window is the manufacture's largest standard size window that will fit within the existing frame or the existing rough opening. The replacement window shall be permitted to be of the same operating style as the 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.

(*Id.*)

The minimum window size requirements of R310.1.1, R310.1.2 and R310.1.3, without the exception are: a net clear opening of 5.7 square feet, (except that grade floor openings shall have a minimum net clear opening of 5 square feet); and clear opening height of 24 inches; and a net clear opening width of 20 inches. (APP010.) These are the same sizes as found in the MSFC and the Policy.

BAM asserts that because the City's Policy does not contain the same exception as provided in the Minnesota adopted IRC R310.1.5 (Minn. R. 1309.0310, incorporated by the MSBC) the City's Policy violates state law and is therefore prohibited. (APP001-6.) The City acknowledges this apparent conflict between the MSFC and the MSBC, but denies that its Policy is unlawful.

STANDARD OF REVIEW

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 Enterprises, Inc.*, 581 N.W.2d 855, 856 (Minn. 1998) (*citing Wallin v. Letourneau*, 534 N.W.2d 712, 715 (Minn. 1995)).

ARGUMENT

I. THE DISTRICT COURT PROPERLY FOUND THAT THE CITY'S EGRESS WINDOW POLICY DOES NOT VIOLATE MINN. STAT. § 326B.121, SUBD. 2(a).

BAM argued that the City's Policy is in violation of the MSBC because it regulates components or systems of a structure in a manner that is different from the MSBC. Minn. Stat. § 326B.121, subd. 1 of the MSBC provides: "(a) The State Building Code is the standard that applies statewide for the construction, reconstruction, alteration, and repair of buildings and other structures of the type governed by the code; (b) The State Building Code supersedes the building code of any municipality." Specifically BAM alleged that according to Minn. Stat. § 326B.121, subd. 2, "a municipality must not by ordinance, or through development agreement, require building code provisions regulating components or systems of any structure that are different from any provision of the State Building Code."

A. The City Policy Is Not An Ordinance.

The City's Policy is neither an ordinance, development agreement, nor municipal building code provision, therefore, it is not in violation of the MSBC. Rather, it is a policy that clarifies that the City has adopted the MSFC requirements for escape windows in existing buildings pursuant to Minn. R. 7511.1026 (IFC 1026.1). And, the Policy is based upon the City's Fire Code Official, who has declared that all escape windows with

less than 20 inches in width, 24 inches in height and 5 feet of entire glazed area with a finished sill height of no more than 48 inches to be a distinct hazard to life and property.

The Policy does not violate the plain language of either the MSBC or the MSFC. The District Court stated that the Policy is not an ordinance nor development agreement and “[i]f the legislature had intended the MSBC to preclude such a policy, it would not have limited its language to ‘ordinance, or through development agreement.’ It could have instead stated ‘including but not limited to, ordinance, development agreement, or otherwise,’ or words to that effect.” (ADD014.)

Minn. Stat. § 645.08, provides that when it comes to the canons of construction for statutory meaning, “words and phrases are construed according to . . . their common and approved usage.” When interpreting a statute, the court construes words or phrases according to their plain and ordinary meaning. *See City of Morris v. Sax Investments, Inc.*, 749 N.W.2d 1 (Minn. 2008). Chapter 326B does not define “ordinance” or “development agreement,” therefore, their plain and ordinary meaning should be applied.

B. The Policy Is Not Preempted By The MSBC Or The Holding In *City of Morris v. Sax Investments, Inc.*

BAM relies upon the Minnesota Supreme Court case *City of Morris*, 749 N.W.2d 1, to support its position that the MSBC preempts the City’s Policy. *City of Morris* does not apply here because the Policy, unlike the regulation in *City of Morris*, is not an ordinance. So too, *City of Minnetonka v. Mark Z. Jones Associates, Inc.*, 306 Minn. 217, 236 N.W.2d 163 (1975) and *Wessman v. City of Mankato*, A08-0273, 2008 WL 5058608,

at *7 n.2 (Minn. Ct. App. Dec. 2, 2008) (APP029) do not apply. A clear reading of each of the three cases cited by BAM reveals that each dispute concerned cities that passed ordinances regulating areas which were governed exclusively by the MSBC. In each case, the courts held that the ordinances were preempted by Minn. Stat. § 362B.121, subs. 1 and 2, and therefore, unlawful.

Conversely, in this matter, the City has not adopted an ordinance, development agreement, or code provision related to egress windows. DSI promulgated a policy to resolve the conflict between the administrative rules related to the MSBC and the MSFC. Therefore, BAM cannot meet the first element of *City of Morris* or the other cases it has relied upon. If the City's Policy was indeed an ordinance, the plain language of the MSBC would preempt that ordinance. *See* Minn. Stat. § 326B.121, subs. 1, 2(c) (providing that the MSBC is a statewide standard and municipalities are prohibited from adopting building code provisions that differ from the state code); *City of Morris*, 749 N.W.2d at 7, (stating that the MSBC expressly prohibits a municipal ordinance that (1) is a building code provision, (2) regulates a component or system of a residential structure, and (3) is different from a provision of the MSBC).

In addition, BAM's entire analysis of *City of Morris* as it applies to the facts of this case is faulty. The facts in *City of Morris* concern the City of Morris regulating the same matters that are exclusively covered by the MSBC by way of their municipal building code provisions and ordinances. Because their ordinances were preempted by the MSBC,

they were held to be invalid. The facts in the instant case involve the City recognizing and enforcing the requirements of the MSFC, not a City ordinance or building code provision that is preempted by the MSBC.

BAM's interpretation of *City of Minnetonka*, 236 N.W.2d 163, is likewise inaccurate. The Minnesota Supreme Court found Minnetonka's fire prevention ordinance to be preempted by the MSBC, because, it was a **local ordinance** which regulated design and construction of buildings in the name of fire prevention. *City of Minnetonka* 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." 236 N.W.2d at 165.

The crucial point made by the Minnesota Supreme Court in *City of Minnetonka*, that is relevant to the instant case, is its discussion concerning local ordinances specifically related to design and construction. The Minnesota Supreme Court determined that the MSBC provided great attention to fire prevention and fire-related safety matters, therefore, it supercedes local regulation on those issues.

Notable however, is that *City of Minnetonka* predates the adoption of the MSFC. The Minnesota Supreme Court referenced Uniform Fire Code Act, 1974 Minn. Laws, ch. 550 (RA 57-58) – the enactment of Minn. Stat. § 299F.011 which authorizes the commissioner of public safety through the fire marshal to promulgate a uniform code. The justices noted that "there is nothing in the statute to indicate either an intention to

supercede local regulations or deal with fire prevention in matters of building and construction.” *City of Minnetonka*, 236 N.W.2d at 167. “The code has not of this date been completed or released, and therefore we can draw no inferences concerning its impact on the matter before us.” *Id.*

What we know now, that the Minnesota Supreme Court did not know then, is that the MSFC precisely deals with fire-related safety matters that concern construction and design, including the very issue of this case – the size of egress windows. Specifically, Minn. R. 7511.0102, subp. 1(IFC Sec. 102.1) provides: “[T]he construction and design provisions of this code shall apply to: . . . 3. Existing structures, facilities and conditions that, in the opinion of the code official, constitute a distinct hazard to life and property.”

Accordingly, with the promulgation and adoption of the MSFC, the MSBC does not fully occupy the area of law as it concerns the size of egress windows. And, if any conflict exists, it is not a matter of the City’s Policy being preempted by state law. If there is any conflict, it concerns the differing requirements and exceptions allowed by the MSFC and the IRC which are incorporated by the MSBC.

In the same way, the Mankato City Code in *Wessman*, A08-0273, 2008 WL 5058608 is comprised of city ordinances regulating construction, housing and building codes for the City of Mankato. Relying on the holding of *City of Minnetonka*, this Court found that “[b]ecause Mankato City Code § 12.03 is a building code provision that regulates components or systems of a residential structure, and the ordinance is different

from a provision of the State Building Code, the ordinance is prohibited.” *Wessman*, A08-0273, 2008 WL 5058608 at *6 (emphasis added) (APP031.) BAM’s argument that Mankato’s City Code is not an ordinance is erroneous.

For all of the reasons set forth above, this Court should affirm the decision of the District Court and find that the City’s egress window policy is lawful and does not violate Minn. Stat. § 326B.121.

II. THE POLICY IS LAWFUL AND COMPORTS WITH THE MSFC.

The City’s Policy correctly construed the MSFC and Minn. Stat. § 299F.011 and it was lawfully patterned after both as a matter of law. The statutory authority for the MSFC is Minn. Stat. § 299F.011 *et seq.*, which provides in relevant part:

Subd. 3. Rules for code administration and enforcement. The commissioner of public safety shall adopt rules as may be necessary to administer and enforce the code, specifically including but not limited to rules for inspection of buildings and other structures covered by the code and conforming the code to the governmental organization of Minnesota state agencies, political subdivisions and local governments.

Subd. 4. Applicability; local authority. The State Fire Code shall be applicable throughout the state and in all political subdivisions and municipalities therein. However, nothing in this subdivision shall prohibit a local unit of government otherwise authorized by law from adopting or enforcing any ordinance or regulation which specifies requirements equal to, in addition to, or more stringent than the requirements of the State Fire Code. Any ordinance or regulation adopted by a local unit which differs from the State Fire Code 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.

“The legislature delegated rulemaking authority to the DOLI [Department of Labor and Industry]. The Administrative Rules promulgated pursuant to the MSFC are found at Minn. R. 7511.0010 *et seq.*” (ADD009.) The purpose of the MSFC pursuant to Minn. R. 7511.0010 is:

to adopt uniform fire safety standards consistent with nationally recognized good practice for the safeguarding to a reasonable degree of life and property from the hazards of fire and explosion arising from the storage, handling and use of hazardous substances, materials and devices, and from conditions hazardous to life or property in the use or occupancy of buildings or premises.

Additionally the District Court stated, “[t]he rules and standards of the International Fire Code have been incorporated by reference and made part of the Minnesota Administrative Rules.” (ADD009.) Minn. R. 7511.0090 provides:

[f]or purposes of this chapter, “IFC” means the 2006 edition of the International Fire Code as promulgated by the International Code Council, Inc., Falls Church, Virginia. The IFC is incorporated by reference and made a part of Minnesota Rules pursuant to statutory authority, subject to the alterations and amendments in this chapter.

And, Minn. R. 7511.0101 authorizes local governments to adopt the MSFC and to adopt rules that are necessary for the protection of property and life:

Subpart 1. IFC Section 101.1.

IFC Section 101.1 is amended to read:

101.1 Title. This code shall be known as the Minnesota State Fire Code, may be cited as such, and will be referred to herein as “Fire Code” or “this code.”

Subp. 2. IFC Section 101.

IFC Section 101 is amended by adding sections to read:

101.6 Local government amendments to Chapter 1. Any jurisdiction that adopts this code is authorized to make amendments to Chapter 1 of this code to provide a system for enforcement and administration within the jurisdiction. These amendments shall be equal to, in addition to, or more stringent than this code.

101.6.1 Local government rules. Any jurisdiction that adopts this code is authorized to adopt rules for the prevention and control of fires and fire hazards as may be necessary from time to time, to carry out the intent of this code, and that may be more restrictive than this code when the rules are necessary to protect life or property in the community. The governing body may adopt this code by ordinance.

Additionally, Minn. R. 7511.1026 governs emergency escape and rescue:

7511.1026 SECTION 1026, EMERGENCY ESCAPE AND RESCUE.

IFC Section 1026.1 is amended to read:

1026.1 Escape windows. In Group R and Group I-1 occupancies, escape windows shall be provided, installed and maintained in sleeping rooms in accordance with this section. Sleeping rooms located in basements and levels below the fourth story shall have at least one exterior emergency escape and rescue opening.

Exceptions:

1. An escape window is not required if the room has a door that leads directly to the exterior of the building.
2. Escape windows installed prior to April 11, 1983, and having a clear opening not less than 20 inches (508 mm) in width, 24 inches (610 mm) in height and 5 square feet (0.46 m²) in area with a finished sill height not more than 48 inches (1219 mm) above the floor may be allowed to continue.
3. An escape window is not required if the building is protected throughout by an approved, automatic sprinkler system.

4. Escape windows need not be installed from rooms of existing buildings having two separate means of escape, provided that the means of escape are independent of each other and they pass through only one adjacent nonlockable room or area.
5. Existing escape windows at single-story resort buildings installed prior to October 3, 1975, and having a clear opening not less than 20 inches (508 mm) in width, 20 inches (508 mm) in height and 4.5 square feet (0.41 m²) in area with a finished sill height not more than 36 inches (914 mm) above the floor may be allowed to continue.
6. Escape windows are not required in Group R hotels or motels constructed prior to April 11, 1983.

Lastly, the MSFC applies to the construction and design of structures, facilities and conditions as follows:

7511.0102 SECTION 102, APPLICABILITY.

Subpart 1. IFC Section 102.1.

IFC Section 102.1 is amended, and sections added, to read:

102.1 Construction and design provisions. The construction and design provisions of this code shall apply to:

1. Structures, facilities and conditions arising after the adoption of this code.
2. Existing structures, facilities and conditions when identified in specific sections of this code.
3. Existing structures, facilities and conditions that, in the opinion of the code official, constitute a distinct hazard to life and property.

Minn. R. 7511.0102.

The City's Policy conforms to the requirements of Minn. R. 7511.1026 concerning egress windows. It likewise conforms to the appeal and variance sections of Minn.

R. 7511.0180 and Minn. Stat. § 299F.011, subd. 5 and 5a. The Policy provides an appeal process and contains an exception “for previously installed replacement windows that were installed under permit, inspected, and approved by the Department of Safety and Inspections prior to April 28, 2009.” (ADD017.)

The Policy provides a grand-fathering exception and an appeal process that takes into consideration “the benefit to be obtained by complying with the fire marshal’s orders and the effect on affordable housing, provided that the spirit of the code is complied with and public safety is secured.” (ADD017.) This flexibility on a case by case basis takes into consideration the financial impact of complying with the fire marshal’s orders. BAM has not provided evidence of a homeowner being denied a variance by the City because of the Policy. Nor have they provided facts or evidence to show where the City has denied an appeal on the basis of the Policy.⁴ Thus, BAM’s argument that the Policy has had a detrimental impact on homeowners and BAM members is without merit.

For the reasons stated above, this Court should affirm the District Court’s ruling that the Policy is lawful and in accordance with requirements of the MSFC.

⁴ The City argued in its Motion to Dismiss, that BAM lacked standing to bring this action, however, the District Court denied the City’s motion on that basis. The City did not appeal the Court’s decision, however, to the extent that standing is jurisdictional and therefore may be raised at any time, the City renews its claim that BAM lacks standing to bring this action.

III. THE DISTRICT COURT CORRECTLY RULED THAT RESOLVING THE CONFLICT BETWEEN THE MSBC AND THE MSFC IS BEST LEFT TO THE RULE MAKING AUTHORITY OF THE DOLI OR THE LEGISLATURE.

BAM argued that the District Court erred by not concluding that the MSBC trumps the MSFC. The express purposes of the MSBC and the MSFC are to provide uniform standards. The MSBC provides:

[T]he commissioner shall administer and amend a state 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 and provide for the use of modern methods, devices, materials, and techniques which will in part tend to lower construction costs. The construction of buildings should be permitted at the least possible cost consistent with recognized standards of health and safety.

Minn. Stat. § 326B.101.

Under the MSFC the uniform standards are:

[T]o adopt uniform fire safety standards consistent with nationally recognized good practice for the safeguarding to a reasonable degree of life and property from the hazards of fire and explosion arising from the storage, handling and use of hazardous substances, materials and devices, and from conditions hazardous to life or property in the use or occupancy of buildings or premises.

Minn. R. 7511.0010.

The MSBC, like the MSFC, apply statewide. While their purposes appear to be similar in scope, the MSBC provides performance standards for the “safeguard” of “health, safety, [and] welfare”; with its focus on holding the line on construction costs. In

contrast, the MSFC's primary purpose is fire safety standards that "safeguard . . . life and property from . . . conditions hazardous to life or property."

Pursuant to Minn. Stat. § 326B.02, the commissioner of labor and industry has rulemaking authority over the MSBC and the MSFC. Minn. Stat. § 326B.02, subs. 5 and 6. However, under Minn. Stat. § 326B.106, subd. 3, the state fire marshal shall enforce the MSFC as provided in chapter 299F, under the direction of the commissioner of public safety. Minn. Stat. § 326B.106, subd. 3.

In 2007, the State Fire Marshal by Policy #INS-01 declared a "Retroactive Fire Code Application To Existing Building" which provided that means of egress for existing buildings under the MSFC Section 1026 (emergency escape and rescue section) "comprise the minimum fire and life safety features in existing buildings. Occupancies that lack these minimum fire and life safety features in existing buildings are considered to be distinct hazards and the conditions shall be abated." (RA 19.)

At that same time, the State Fire Marshal issued Policy #INS-04 (2007), with attached egress window worksheets, entitled "Emergency Escapes." The purpose of the Statement of Policy was to provide "uniform enforcement of the escape/egress window requirements throughout the state in building code and non-building code areas." (RA 23.) The Fire Marshal's policy was to provide "clarification of the requirements found in 2007 Minnesota State Fire Code [Here after referred to as MSFC (07).] Section 1026.1." (RA 23.) That Policy stated:

1.1 General.

When required, emergency escapes (second means of egress) shall be installed and maintained in Group R occupancies as specified in MSFC (07) Section 1026.1 and this policy. Emergency escapes shall be installed in sleeping rooms and basements used for sleeping. The second means of escape may be through an adjacent non-lockable space, independent of and remote from the primary exit. [MSFC (07) Section 1026.1].

Any one of the six options will satisfy the requirement for an emergency escape from a room. [MSFC (07) Section 1026.1]

1. An escape window is not required if the room has a door that leads directly to the exterior of the building.
2. Escape windows installed prior to April 11, 1983, and having a clear opening of not less than 20 inches (508 mm) in width, 24 inches (610 mm) in height and 5 square feet (0.46 m²) in area with a finished sill height not more than 48 inches (1219 mm) above the floor may be allowed to continue.
3. An escape window is not required if the building is protected throughout by an approved, automatic sprinkler system.
4. Escape windows need not be installed from rooms of existing buildings having two separate means of escape, provided that the means of escape are independent of each other and they pass through only one adjacent nonlockable room or area.
5. Existing escape windows at single-story resorts buildings installed prior to October 3, 1975 and having a clear opening not less than 20 inches in width, 20 inches in height, and 4.5 square feet in area with a finished sill height not more than 36 inches above the floor may be allowed to continue.
6. Escape windows are not required in group R hotels or motels constructed prior to April 11, 1983.

(RA 23-24.) Emphasis added.

The MSFC and the MSBC each address the authority of the fire official in determining matters of life safety. Under Minn. R. 7511.0102 Section 102 amending Section 102.1, of the IFC, it states that the MSFC shall apply to existing structures, facilities and conditions that, in the opinion of the code official, constitute a distinct hazard to life and property. And, the MSBC does not permit conditions to continue if they are “unsafe . . . a fire hazard, or otherwise dangerous to human life.” Minn. R. 1300.0180. It appears therefore, that the two state laws are consistent with each other. The inconsistency between the codes is the exception allowed under the IRC as provided in Minn. R. 1309.0310.

BAM argues that this exception is a “Minnesota-specific exception” and as such it is more “specific” than the general provisions of the MSFC. While it appears that the MSFC and the MSBC are in harmony on matters of life safety, the conflict between these two state laws is the window replacement exception that is allowed under Minn. R. 1309.0310. Because this exception is inconsistent with the requirements of the MSFC, the City developed its policy to clarify its position that a window size smaller than the requirements of the MSFC is considered to be a “distinct hazard to life and property.” The exception is no more a “Minnesota-specific” or “specific” provision, than the provisions of the MSFC.⁵

⁵ The MSFC and the IRC are both based upon Model International Codes which Minnesota has amended and adopted under the Minnesota Rules.

BAM further claims that if the MSFC controls, and all egress windows must comply with its minimum size requirements, a homeowner could never take advantage of the exception. Reconciling this apparent conflict is best left to the rulemaking authorities and the state legislature. The District Court reasoned that its role is to “interpret and apply the law, not to make new law” and if BAM “wishes to codify its preference, then it should take the matter up with either the legislature or the rulemaking body that interprets the legislation – DOLI in this case.” (ADD014-15.) This Court should hold the same.

Lastly, BAM does not have standing to challenge the City’s Policy and has not established any evidence that they have been aggrieved by the City’s Policy. If there is any challenge to be made that the City is not properly administering the MSBC, that challenge should be made administratively pursuant to Minn. Stat. § 326B.121, subd. 3, which provides:

Enforcement by state building official. If the commissioner determines that a municipality that has adopted the State Building Code is not properly administering and enforcing the code, or if the commissioner determines that any municipality that is required by subdivision 2 to enforce any provision of the State Building Code is not properly enforcing that provision, the commissioner may have the administration and enforcement in the involved municipality undertaken by the state building official or by another building official certified by the state.

The commissioner shall notify the affected municipality in writing immediately upon making the determination, and the municipality may challenge the determination as a contested case before the commissioner pursuant to the Administrative Procedure Act.

This Court should determine that any conflict between the MSBC and the MSFC are best left to be resolved administratively or by the state legislature.

CONCLUSION

The City's Policy on egress windows is lawful and in accordance with the MSFC. The Policy is not an ordinance, therefore it does not violate Minn. Stat. § 326B.121. Likewise, the Policy is not preempted by the MSBC or the holding in *City of Morris*, 749 N.W.2d 1.

For the forgoing reasons, the City respectfully requests that this Court affirm the District Court's findings and Order in favor of the City.

Respectfully submitted,

Dated: February 17, 2012.

SARA R. GREWING
City Attorney

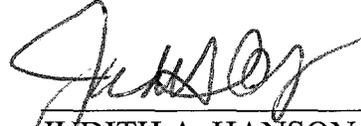


JUDITH A. HANSON, #207408
Assistant City Attorney
750 City Hall and Court House
15 West Kellogg Boulevard
St. Paul, MN 55102
judy.hanson@ci.stpaul.mn.us
(651) 266-8727
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

This brief complies with the word limitation of Minn. R. Civ. App. P. 132.01, subd. 3(a). This brief was prepared using WordPerfect Office 12, which reports that the brief contains 5534 words.

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JUDITH A. HANSON