

NO. A11-2270

State of Minnesota
In Court of Appeals

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

Appellant,

vs.

City of Saint Paul, Minnesota,

Respondent.

APPELLANT'S BRIEF, ADDENDUM AND APPENDIX

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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).

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STATEMENT OF THE CASE

Appellant Builders Association of Minnesota (“**BAM**”) is a non-profit trade association of over 3,500 members involved in the residential construction and remodeling industry, including members who perform residential remodeling in the City of St. Paul. BAM filed this action seeking a court declaration that a policy of the City of St. Paul (the “**City**”) violates the State Building Code. Under state law, the Minnesota State Building Code supersedes the building code of any municipality, and a municipality may not require building code provisions that differ (in any way) from the State Building Code. See Minn. Stat. § 326B.121, subd. 2(c). Nonetheless, the City’s Department of Safety and Inspections has adopted a “Uniform Egress Window Policy” (the “**Policy**”) that imposes a minimum size requirement on all egress windows that are being replaced or repaired. There is no exception to this requirement. Minnesota’s State Building Code, however, contains an exception to the minimum egress window size requirements that allows a contractor to replace an existing window with the manufacturer’s largest standard size window that will fit within the existing frame or rough opening. Because the City’s Policy does not contain this same exception and instead requires all replacement egress windows to meet the City’s minimum size requirements, it violates state law and is prohibited.

The City defended on the grounds that the limitations in Minn. Stat. § 326B.121 do not apply, because the City enacted a “policy” and not an ordinance. Additionally, the City argued that the Policy is consistent with the State Fire Code, and therefore, need not comply with the State Building Code.

The parties submitted cross-motions for summary judgment. The Court granted the City's motion for summary judgment and denied BAM's motion. The Court found that Minn. Stat. § 326B.121 does not apply to the Policy, reasoning that the Policy is not an "ordinance or development agreement," the terms used in the statute. It also found that the Policy was lawful because it complied with the State Fire Code. Judgment was entered on October 19, 2011.

STATEMENT OF ISSUES

1. Did the district court err in ruling that, because the City enacted its restrictions on egress windows as a “Policy” rather than as an “ordinance or development agreement,” Minn. Stat. § 326B.121 does not apply?

How raised: This issue was raised and argued in both parties’ memoranda in support of and in opposition to cross-motions for summary judgment.

Ruling: The district court held that, because the City enacted its restrictions on egress windows as a “policy,” rather than as an “ordinance or development agreement,” Minn. Stat. § 326B.121 does not apply.

Authority:

- Minn. Stat. § 326B.121;
- City of Morris v. Sax Investments, Inc., 749 N.W.2d 1 (Minn. 2008)
- City of Minnetonka v. Mark Z. Jones Assocs., Inc., 236 N.W.2d 163 (Minn. 1975)

2. Did the district court err in concluding that the Policy does not violate Minnesota state law?

How raised: This issue was raised and argued in both parties’ memoranda in support of and in opposition to cross-motions for summary judgment.

Ruling: The district court concluded that the Policy does not violate Minnesota state law because it complies with the State Fire Code.

Authority:

- Minn. Stat. § 326B.121;
- Minn. Stat. § 326B.101;
- Minn. Stat. § 645.26, subd. 1;
- Minn. Stat. § 645.17, subds. 1 & 2;
- Minn. R. 1309.0310;
- City of Minnetonka v. Mark Z. Jones Assocs., Inc., 236 N.W.2d 163 (Minn. 1975)
- City of Morris v. Sax Investments, Inc., 749 N.W.2d 1 (Minn. 2008)

- Wessman v. City of Mankato, 2008 Lexis 1393 at *7 n. 2 (Minn. Ct. App. 2008)

3. Did the district court err in holding that BAM's only recourse is to the legislature or the Department of Labor and Industry?

How raised: This issue was raised and argued in both parties' memoranda in support of and in opposition to cross-motions for summary judgment.

Ruling: The district court concluded that any conflict between the State Building Code and State Fire Code is best left to the legislature to resolve.

Authority:

- Minn. Stat. § 326B.121;
- Minn. Stat. § 326B.101;
- Minn. Stat. § 645.26, subd. 1;
- Minn. Stat. § 645.17, subds. 1 & 2;
- Minn. R. 1309.0310;
- City of Minnetonka v. Mark Z. Jones Assocs., Inc., 236 N.W.2d 163 (Minn. 1975)
- City of Morris v. Sax Investments, Inc., 749 N.W.2d 1 (Minn. 2008)

STATEMENT OF FACTS

I. ON JULY 2, 2007, MINNESOTA ADOPTED BOTH THE 2006 INTERNATIONAL BUILDING CODE (WITH AMENDMENTS) AND 2006 INTERNATIONAL FIRE CODE.

On July 2, 2007, Minnesota adopted both the 2006 International Residential Building Code (“**IBC**”) and 2006 International Fire Code (“**IFC**”), with certain state amendments. Minn. R. 1309.0010 (2007) (ADD028-29)¹, 32 S.R. 12 (adoption of 2006 IBC); Minn. R. 7511.0090 (2007) (ADD031), 32 S.R. 10 (adoption of 2006 IFC). Both the IBC and the IFC have minimum size requirements for egress windows. See IBC R310.1, et seq. (ADD035-36); IFC Section 1026.2 - 1026.3 (ADD033-34). Minnesota, however, amended the standard language of the IBC to provide a Minnesota-specific exception to the minimum size requirements for egress window replacements in single-family owner-occupied housing:

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). This Exception specifically allows the installation of a replacement egress window that will fit within the existing frame or rough opening. The purpose of the Exception is to allow a homeowner who wants to replace its egress windows to do so without having to incur the expense of having to re-frame to make the rough opening larger and to install new cladding and trim around the

¹ Citations to “ADD####” are to Appellant’s Addendum.

new opening. (See APP033 at ¶ 4.)² In a Division Opinion issued by the Minnesota Department of Labor and Industry dated August 1, 2008, the department issued the following answer to the following question:

Question: Should the building codes require an absolute minimum size for a replacement window?

Answer: No. To date, the IRC Committee has not suggested that a minimum size should be required. The replacement window provisions added by amendment in Minnesota Rule Chapter 1309, Section R310.1.5 were to encourage people to replace windows in sleeping rooms with functioning window units.

(ADD037.) The Division Opinion describes the public policy behind the Exception as follows:

Many existing dwellings have sleeping room windows that have been rendered inoperable for a variety of reasons making them unusable in the event of an emergency. Minnesota recognized a uniform enforcement concern related to replacement windows not addressed within the IRC model code language.

(ADD037.)

Minnesota's adoption of the 2006 IBC, along with any amendments, including the Exception, is referred to herein as the "**State Building Code.**" Minnesota's adoption of the 2006 IFC, along with any amendments, is referred to herein as the "**State Fire Code.**"

II. THE CITY OF SAINT PAUL HAS ADOPTED AN EGRESS WINDOW POLICY REQUIRING A MINIMUM WINDOW SIZE.

By memorandum dated April 29, 2009, the City of Saint Paul's (the "City") Department of Safety and Inspections adopted a "Uniform Egress Window Policy" (the

² Citations to "APP###" are to Appellant's Appendix.

“Policy”) that requires that all egress windows in existing homes have “a clear opening of 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.” (ADD016-17.) The Policy does not allow a homeowner or contractor to replace an existing egress window with a window smaller than the minimum size that will fit within the existing frame or rough opening. Instead, the homeowner would need to perform more extensive construction to make the rough opening larger (APP033-34 at ¶¶ 4-7; APP035-36 at ¶ 3.)

III. MINNESOTA LAW PROHIBITS A MUNICIPALITY FROM REQUIRING BUILDING CODE PROVISIONS THAT ARE DIFFERENT FROM THE STATE BUILDING CODE.

Pursuant to Minn. Stat. § 326B.121, the State Building Code supersedes the building code of any municipality, and a municipality may not impose requirements that are different from any provision of the Building Code:

Subdivision 1. Application.

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. The State Building Code supersedes the building code of any municipality....

Subd. 2. Municipal enforcement.

(c) 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. This subdivision does not prohibit a municipality from enacting or enforcing an ordinance requiring existing components or systems of any structure to be maintained in a safe and sanitary condition or in good repair, but not exceeding the standards under which the

structure was built, reconstructed, or altered, or the component or system was installed, unless specific retroactive provisions for existing buildings have been adopted as part of the State Building Code.

(emphasis added) (ADD023).

It is undisputed that the Policy differs from and, in fact, exceeds the State Building Code because it does not include the Exception to the egress window size requirements set forth in the State Building Code that allows homeowners to replace egress windows with the largest sized window that the window manufacturer produces that will fit in the existing rough opening. Instead, under the Policy, if the existing rough opening is smaller than the minimum egress window size required under the Policy, a homeowner is required to make the opening larger, which would involve removing any brick, stone, stucco, or other exterior materials surrounding the opening. (APP032-33 at ¶ 3; APP035-36.)

IV. THE POLICY HAS HAD A DETRIMENTAL IMPACT ON HOMEOWNERS AND BAM'S MEMBERS.

BAM is a non-profit trade association of over 3,500 members involved in the residential construction and remodeling industry, including members who perform residential remodeling in the City of St. Paul. (APP032 at ¶ 2.) Among many other activities, BAM is active at the state and local level in the development and interpretation of building codes. (Id.)

BAM has seen first-hand the detrimental impact that the City's Policy has had on homeowners and BAM's members. Homeowners in the City of St. Paul have decided not to replace old energy-inefficient windows because doing so would require expensive re-

framing. (APP033 at ¶ 5.) New window inserts or replacement windows will, in most if not all cases, be as easy or easier to open as the windows they replace. This improvement is especially important in the case of a fire, giving homeowners their best chance of getting fresh air and avoiding smoke inhalation before the fire service arrives without having to break an old, hard-to-open egress window. BAM's members have first hand experience with homeowners who have replaced all of their old windows, with the exception of their bedroom egress windows because of the cost and other problems with complying with St. Paul's Policy. (APP033 at ¶ 6.) Homeowners have also decided not to replace their egress windows because complying with the Policy would diminish the value and appearance of their property—for example, on a brick home with symmetrical windows, brick would need to be removed around an egress window to make it larger. Not only would the egress window now be larger than other windows and therefore not match, new headers or sills that likely would not match the rest of the windows may also need to be installed around the frame of the new, larger egress window. (APP033-34 at ¶ 7.)

The record includes an affidavit from one of BAM's members, Custom Remodelers, Inc. (“CRI”) discussing how CRI has lost revenue as a result of the City's Policy. CRI has had customers who initially wanted to hire them to replace their old, inoperable, and/or energy-inefficient egress windows with new egress windows. However, the customer decided not to go forward with the egress window replacement when they learned that the City's Policy would require them to increase the size of the rough opening of their existing egress windows. (APP035-36 at ¶ 3.) The “rough

opening” is the framed area into which a window assembly is installed. Increasing the size of the rough opening is a much larger job than just replacing a window into the existing rough opening, because increasing the size of the rough opening involves many more steps: removing some or all of the existing framing; replacing that framing with framing for a larger rough opening that is structurally sound, plumb, level and square; fixing or replacing the exterior materials, such as siding, stucco or brick (which may not match the original materials or colors); fixing or replacing the interior materials, for example by sheetrocking and painting; and replacing the finish framing that goes around the interior of the windows (again, because the new opening is larger than the old, most often you cannot reuse the old materials and the new materials likely will not match other windows in the home). (Id.) Therefore, increasing the size of the rough opening is messier, more time-consuming, and more expensive than just installing a new window into the existing rough opening. (Id.) The Policy has caused CRI direct financial harm, because CRI has lost business as a result of the Policy. Customers are price-sensitive, and if it costs more to do remodeling work, a customer often will choose not to do the work. (APP036 at ¶ 4.)

V. THE CITY IGNORED BAM’S REQUEST THAT THE POLICY BE REPEALED AS A VIOLATION OF STATE LAW.

On November 22, 2010, BAM wrote each of the members of the St. Paul City Council, setting forth numerous reasons why the Policy violated state law, and requested that the City repeal the Policy. (APP017-21.) BAM also requested that the City’s Department of Safety and Inspections immediately cease and desist from enforcement of

the Policy. BAM informed the City that if the Policy was not repealed, it would seek legal action, including commencing suit against the City to obtain a Court order prohibiting continued enforcement of the Policy. The City never responded to BAM's letter. (APP013 at ¶ 4.) As a result, BAM commenced this lawsuit on March 21, 2011.

STANDARD OF REVIEW

Review of summary judgment is *de novo*. The role of the appellate court is to “review two determinations: whether a genuine issue of material fact exists, and whether an error in the application of the law occurred.” Fairview Hosp. v. St. Paul Fire & Marine Ins. Co., 535 N.W.2d 337, 341 (Minn. 1995). “The application of statutes . . . to undisputed facts is a legal conclusion and is reviewed *de novo*.” City of Morris v. Sax Investments, Inc., 749 N.W.2d 1, 5 (Minn. 2008).

ARGUMENT

I. **THE DISTRICT COURT ERRED WHEN IT CONCLUDED THAT THE POLICY DOES NOT VIOLATE THE MINNESOTA STATE BUILDING CODE.**

A. **Minnesota Law Prohibits A Municipality From Enacting Any Regulation That Imposes Requirements That Are Different From The State Building Code.**

Minnesota Statute § 326B.121 provides that the Minnesota State Building Code supersedes the building code of any municipality and that a municipality may not impose requirements that are different from any provision of the Building Code:

Subdivision 1. **Application.**

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. The State Building Code supersedes the building code of any municipality....

Subd. 2. **Municipal enforcement.**

(c) 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. This subdivision does not prohibit a municipality from enacting or enforcing an ordinance requiring existing components or systems of any structure to be maintained in a safe and sanitary condition or in good repair, but not exceeding the standards under which the structure was built, reconstructed, or altered, or the component or system was installed, unless specific retroactive provisions for existing buildings have been adopted as part of the State Building Code.

(emphasis added). In City of Morris v. Sax Investments, Inc., 749 N.W.2d 1 (Minn. 2008), the Minnesota Supreme Court examined Minn. Stat. § 16B.62, which contained

the same operative language as Minn. Stat. § 326B.121, and discussed the legislative intent behind its adoption:

[T]he relevant language of the State Building Code expresses the legislature’s specific intent to supercede municipal building codes. 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. See Act of May 26, 1971, ch. 561, § 1, 1971 Minn. Laws 1018, 1019 (noting that multiple laws, ordinances, and rules regulating the construction of buildings “serve to increase costs without providing correlative benefits of safety to owners, builders, tenants, and users of buildings.”).

Id. at 7. Accordingly, the Supreme Court held that any municipal building regulation that has “any difference from the State Building Code is prohibited” under Minn. Stat. § 16B.62 (now Minn. Stat. § 326B.121). Id. at 10. “[E]ven a provision that is merely additional and complementary to a provision in the State Building Code is prohibited.” Id.³

B. The Supreme Court Established a Three-Part Test To Determine Whether a Municipal Building Code Violates State Law.

In City of Morris, the City of Morris enacted a rental licensing ordinance that regulated components or systems of residential structures, including requiring egress window covers. Id. at 4. The City of Morris sought a temporary injunction to prevent a building owner from renting its property until it corrected alleged violations of the city’s rental licensing ordinance, including the installation of egress window covers. Id. at 5.

³ In Wessman v. City of Mankato, 2008 Lexis 1393 at *7 n. 2 (Minn. Ct. App. 2008) (APP029), this Court held that the change from Minn. Stat. § 16B.62 to Minn. Stat. § 326B.121 did not affect the analysis or test described in City of Morris.

The building owner asserted a counterclaim for an injunction to prevent the city from enforcing any portion of the ordinance that conflicted with the State Building Code. Id. The district court granted summary judgment to the city, and the Court of Appeals affirmed. Id. at 4. The Minnesota Supreme Court, however, reversed and held that City of Morris’s rental licensing ordinance violated Minn. Stat. § 16B.62 (now Minn. Stat. § 326B.121). Id. at 14.

The Court then went on to establish and apply a three-part test to determine whether a municipal code or regulation is prohibited under the statute. The Court held that, by its express terms, the statute prohibits a municipal ordinance if:

- (1) the ordinance is a building code provision;
- (2) it regulates a component or system of a residential structure; and
- (3) it is different from a provision of the State Building Code.

Id. at 7.

In applying this test, the Supreme Court rejected the City of Morris’s argument that its “rental licensing ordinance” was not a “building code provision” within the meaning of Minn. Stat. § 16B.62. The Supreme Court found that the term “building code provision” should not be so narrowly construed, and that it would include any regulations, the subjects of which “are plainly covered by the State Building Code.” Id. at 8. The Court went on to note that, “[i]n other words, if the subject of the regulation is included within the State Building Code, it is a ‘building code’ regulation.” Id. Notably, the Supreme Court specifically addressed the regulation of egress windows, holding that “because egress window covers are regulated by the State Building Code, this provision

[in the City of Morris’s rental licensing ordinance] is a building code provision.” Id. at 12.

As to the second portion of the test, the Court found that the City of Morris’s rental licensing ordinance regulated a “component or system of residential construction,” including ground fault interrupters, bathroom ventilation, egress window covers, and smoke detectors. With regard to egress windows, the Court held that “windows are incorporated into the structure of a building and therefore are components of that structure.” Id. at 12. Furthermore, “[t]he ordinance requires the installation of an additional device on some of these components and therefore constitutes a regulation of that component.” Id.

Finally, for each component or system regulated in the rental licensing ordinance, the Court found that the ordinance differed from the State Building Code. In discussing the “different from” requirement in the three-part test, the Court noted that “‘different from’ does not mean ‘in conflict with.’” Id. at 10. Rather, “any difference from the State Building Code is prohibited. Thus, even a provision that is merely additional and complementary to a provision of the State Building Code is prohibited.” Id. With regard to the egress window covers, the Court found that the City of Morris’s rental licensing ordinance “directly requires that which the State Building Code leaves to the discretion of the building owner, and is therefore different from the State Building Code.” Id. at 12.

C. Applying The Three-Part *City of Morris* Test Establishes That The City's Policy Violates Minn. Stat. § 326B.121.

1. The Policy Is A Building Code Provision Because It Regulates Subjects That Are Covered By The State Building Code.

As noted above, a “building code provision” includes any ordinance, code or regulation that regulates subjects that “are plainly covered by the State Building Code.” City of Morris, 749 N.W.2d at 8. Here, there is no question that the City’s Policy regulates egress windows, a subject that is “plainly covered by the State Building Code.” Id. at 8; see also Minn. R. 1309.0310. Indeed, the Supreme Court has already found that a municipal regulation dealing with egress windows is a “building code provision.” City of Morris, 749 N.W.2d at 12 (“Because egress window covers are regulated by the State Building Code, this provision is a building code provision.”) Accordingly, the first prong of the three-part City of Morris test has been met.

2. The Policy Regulates Components Or Systems Of A Residential Structure.

There is also no dispute that the City’s Policy regulates components or systems of a residential structure, the second prong of the three-part City of Morris test. The Policy regulates egress windows, which are “incorporated into the structure of a building and therefore are components of that structure.” Id. at 12. The Policy imposes minimum size requirements for egress windows “and therefore constitutes a regulation of that component.” Id. Accordingly, the second prong of the three-part City of Morris test has been met.

3. The Policy Differs From The State Building Code And Is Therefore Prohibited.

Finally, there is no dispute that the Policy differs from and, in fact, exceeds the State Building Code because it does not allow exception #1 in Building Code Section R310.1.5 for single-family owner-occupied housing:

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.

This provision of the State Building Code specifically allows the installation of a replacement egress window that will fit within the existing frame or rough opening. Under the Policy, however, if the existing rough opening is smaller than the minimum egress window size required under the Policy, a homeowner is required to make the opening larger, which would involve removing any brick, stone, stucco, or other exterior materials surrounding the opening. (APP032-33 at ¶ 3.) Accordingly, the third prong of the three-part City of Morris test has been met.

In sum, the Minnesota Supreme Court has established a straight-forward test that must be applied when confronted with a challenge to a municipal ordinance as being in violation of Minn. Stat. § 326B.121. As set forth above, if the City of Morris test is applied to the facts in this case, the City's Policy is in violation of Minn. Stat. § 326B.121. The Court of Appeals should reverse.

D. The District Court Erred In Finding That The City Can Escape The Limitations In Minn. Stat. § 326B.121 By Simply Naming Its Building Code Provision A “Policy” Instead Of An “Ordinance or Development Agreement.”

The District Court correctly stated in its Order that the Minnesota State Building Code preempts the City of St. Paul Ordinances pursuant to Minn. Stat. § 326B.121. (ADD012.) The District Court, however, erroneously concluded that Minn. Stat. § 326B.121 does not apply to the Policy, because the Policy is merely a “policy” and not an “ordinance or development agreement,” the specific terms used in the statute. (*Id.*) In other words, the district court has held that a municipality can escape the limitations in Minn. Stat. § 326B.121 by simply naming its regulation affecting subjects covered by the Building Code something other than an “ordinance or development agreement.” This conclusion was clear error, and the Court of Appeals should reverse.

A similar argument was made in City of Morris and soundly rejected by the Minnesota Supreme Court. The City of Morris argued that Minn. Stat. § 16B.62, subd. 1 (now Minn. Stat. § 326B.121, subd. 4) did not apply to its rental licensing ordinances because such regulations were not “building code provisions.” City of Morris, 749 N.W.2d at 8. The Supreme Court rejected a narrow interpretation of the language in the statute and held that in prior decisions, “we did not purport to exclude from that definition [of ‘building code provisions’] subjects that are plainly covered by the State Building Code.” *Id.*

The Supreme Court also rejected a similar argument in City of Minnetonka v. Mark Z. Jones Assocs., Inc., 236 N.W.2d 163 (Minn. 1975). In that case, the City of

Minnetonka adopted a Fire Prevention Code requiring an emergency electrical lighting system and a garage sprinkler system in an apartment building. The Minnesota Supreme Court held that the State Building Code preempted Minnetonka from adopting a local regulation that affected construction of buildings:

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 preempted that field.

Id. at 165. The Minnesota Supreme Court summarized its opinion as follows:

By way of summary, 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. Accordingly, we reverse.

Id. at 167. Notably, the City of Minnetonka called its fire prevention regulations a “Fire Prevention Code,” not an “ordinance or development agreement.” Nonetheless, the Minnesota Supreme Court found it subject to Minn. Stat. § 16B.62 (the predecessor to Minn. Stat. § 326B.121) because it dealt with a subject (fire prevention) that the “State Building Code has dealt with . . . in a comprehensive manner insofar as it affects the construction and design of buildings.” Id. at 165. Therefore, “the state [building] code preempt[s] the [municipal] requirements for fire prevention except as they dealt with matters other than construction.” Id.

The Minnesota Court of Appeals has also held that the State Building Code preempts a City’s own code. In Wessman v. City of Mankato, 2008 Lexis 1393 (Minn. Ct. App. 2008), the Court of Appeals held that the Mankato City Code (not “ordinance or

development agreement”) dealing with time limits for construction permits violated Minn. Stat. § 16B.62, subd. 1, because: (1) it was a building code provision; (2) that regulated components or systems of residential construction; and (3) was different than the State Building Code. Id. at *9-17.

Here, the result should be the same. Just as the City of Morris and City of Minnetonka could not escape the statute through a strict interpretation of the term “building code provision,” the City cannot avoid the requirements of the statute by calling its regulation a “Policy” instead of an “ordinance.” If that were the case, a municipality could escape the strictures of Minn. Stat. § 326B.121 simply by calling their local regulations something other than an “ordinance” or “development agreement.” If the District Court’s decision is upheld, it would mean that a City could enact an entire municipal building code and avoid any violation of Minn. Stat. § 326B.121 by simply calling their code a “policy,” or “regulation,” or “requirement,” or any term other than “ordinance or development agreement.” Allowing this would frustrate the legislature’s intent in creating a “single, uniform set of building standards . . . necessary to lower costs and make housing more affordable.” See City of Morris, 749 N.W.2d at 7 (discussing the legislature’s intent to “supersede municipal building codes”).

In sum, the City’s Policy is (1) a building code provision that (2) regulates a component or structure of residential construction and is (3) different than the State Building Code. This is all that is necessary to establish that the Policy violates Minn. Stat. § 326B.121. The District Court erred when it accepted the City’s argument that the Policy is not subject to Minn. Stat. § 326B.121, and the Court of Appeals should reverse.

II. THE DISTRICT COURT ERRED BY NOT CONCLUDING THAT THE STATE BUILDING CODE TRUMPS THE STATE FIRE CODE.

Implicit in the District Court's decision is the conclusion that, if a City's regulation complies with the State Fire Code, it is lawful, even if the regulation conflicts with the State Building Code. The District Court concluded that this "conflict . . . is best left to the state legislature to resolve." (ADD015.) In making this conclusion, the District Court erred as a matter of law, because the Minnesota Legislature has already provided the tools necessary to conclude that the State Building Code controls.

A. Under the Canons of Statutory Construction, the "Particular Controls the General."

In Chapter 645 of the Minnesota Statutes, the Minnesota legislature has promulgated canons of construction that courts must apply when interpreting Minnesota statutes and laws. One of the most commonly-cited of these cannons is Minn. Stat. § 645.26, subd. 1, which addresses conflicting statutes and reads:

Particular controls general. When a general provision in a law is in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions be irreconcilable, the special provision shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted at a later session and it shall be the manifest intention of the legislature that such general provision shall prevail.

Here, the Court of Appeals is faced with two laws dealing with minimum egress window sizes that were adopted at the same time. Both laws first set forth the minimum egress windows size requirements. The State Building Code goes one step further by including the Minnesota-specific Exception to the minimum size requirements in limited

circumstances. Minn. R. 1309.0310. When the Exception to the minimum size requirements in the State Building Code is read in conjunction with the mandatory minimum size requirements in the State Fire Code, the two laws are irreconcilable. Therefore, the Court of Appeals should consider the canon of construction in Minn. Stat. § 645.26 and decide which regulation is more specific.⁴

The Exception is a Minnesota-specific exception to the standard International Residential Code. In a Division Opinion issued by the Minnesota Department of Labor and Industry dated August 1, 2008, the department described the public policy behind the Exception as follows:

Many existing dwellings have sleeping room windows that have been rendered inoperable for a variety of reasons making them unusable in the event of an emergency. Minnesota recognized a uniform enforcement concern related to replacement windows not addressed within the IRC model code language.

(ADD037) (emphasis added). The Exception expressly provides a limited exemption to the general size requirements for egress windows in both the State Building Code and State Fire Code for residential structures. As such, the Exception is more “specific” or “particular” than the general, across-the-board requirements in the State Fire Code (which in this instance is simply an adoption of the standard 2006 IFC). Thus, under the canons of construction, the Court of Appeals should find that the Exception is more specific and

⁴ Minnesota Statutes § 14.38, subd. 1, provides that “Every rule, regardless of whether it might be known as a substantive, procedural, or interpretive rule, which is filed in the Office of the Secretary of State as provided in sections 14.05 to 14.28 shall have the force and effect of law five working days after its notice of adoption is published in the State Register . . .” (emphasis added). Accordingly, the canons of construction set forth in § 645 apply to the interpretation of rules in same manner that they are applied to statutes.

that it therefore controls over the general size limitations. Because the Exception in the State Building Code controls, the City cannot enact local regulations that differ from the State Building Code without violating Minnesota law. See Minn. Stat. § 326B.121. The District Court erred in concluding that the Policy, which complies with the more general State Fire Code, is lawful, even though it differs from the State Building Code containing the more specific Exception. The Court of Appeals should reverse.

B. The District Court’s Conclusion Renders the Exception in the State Building Code Meaningless.

Other canons of construction in Chapter 645 should lead the Court of Appeals to the same result. Pursuant to Minn. Stat. § 645.17, the Court must consider that “(1) the legislature does not intend a result that is absurd, impossible of execution or unreasonable; [and] (2) the legislature intends the entire statute to be effective and certain.” Minn. Stat. § 645.17, subs. 1 & 2. Thus, the Court must find that, when Minnesota adopted State Building Code containing the Minnesota-specific Exception, it intended that Exception to have effect. If the State Fire Code controls, however, and all egress windows must comply with the minimum size requirements, a homeowner could never take advantage of the Exception. The Exception would have no effect. Such an interpretation runs afoul of the canons of construction in Minn. Stat. § 645.17 and cannot be the proper result. The District Court erred as a matter of law, and the Court of Appeals should reverse.

C. Interpreting the State Building Code Exception as Controlling Over the Fire Code Regulation Is Consistent With the Stated Purpose of the Building Code – Uniformity.

Pursuant to Minn. Stat. § 326B.101, the purpose of the State Building Code is to “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 legislature enacted the State Building Code, in part, as a response to the multiple laws, ordinances and rules regulating the construction of buildings on a municipal level, which, the legislature found “serve[d] to increase costs without providing correlative benefits of safety to owners, builders and users of buildings.” City of Morris, 749 N.W.2d at 7 (citing Act of May 26, 1971, Ch. 561 § 1, 1971 Minn. Laws 1018, 1019). In other words, “[i]n 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. Therefore, pursuant to Minn. Stat. § 326B.121 (previously Minn. Stat. § 16B.62), the State Building Code “applies statewide” and “supersedes the building code of any municipality.” Minn. Stat. § 326B.121, subd. 1. It also prohibits a municipality from enacting any building code regulation that is “different from any provision of the State building Code.” Minn. Stat. § 326B.121, subd. 2.

The Minnesota Supreme Court also addressed the interaction between the State Building Code and fire safety regulations in City of Minnetonka v. Mark Z. Jones Assocs., Inc., 236 N.W.2d 163 (Minn. 1975). In that case, the City of Minnetonka

enacted a Fire Prevention Code that required emergency electrical lighting and a garage sprinkler system in an apartment building, requirements that were not present in the State Building Code. The Minnesota Supreme Court held that the State Building Code preempted Minnetonka from adopting a local ordinance that affected construction of buildings:

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 preempted that field.

Id. at 165. The Minnesota Supreme Court summarized its opinion as follows:

By way of summary, 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. Accordingly, we reverse.

Id. at 167.

The State Building Code's stated purpose is to create uniform building standards and to lower costs. The evidence in the record shows that the City's Policy does neither. First, by contradicting the State Building Code, the City has defeated uniformity between the building standards applicable in St. Paul and the building standards applicable throughout the rest of the state. In fact, to BAM's knowledge, no other municipality in the State has enacted an ordinance or policy regarding egress windows like the City's Policy. (APP034 at ¶ 8; see also APP036 at ¶ 5.) Second, the Policy increases the cost to homeowners who want to replace inoperable windows. Because of this increased cost, many homeowners have decided not to replace egress windows that they otherwise would

have, if the Exception in the State Building Code controlled. (APP035-36 at ¶ 3.) Finally, the very purpose of the Exception was to encourage homeowners to replace inoperable, out-of-date, and energy-inefficient egress windows, the rationale being that a new window (albeit not as large as the minimum requirements for egress windows in new construction) was better and safer than the old inoperable one. (See ADD037 (Dept. of Labor and Industry Division Opinion setting forth public policy behind the Exception)). While the City's Policy may have been adopted in the name of fire safety, the evidence in the record shows that it has had the opposite result.

Put simply, the legislature has already provided its intention regarding the apparent conflict between the egress window size requirements in the State Building Code and State Fire Code. Under the canons of statutory construction, the State Building Code controls. If the express purpose of the State Building Code of creating uniform building standards is considered, the State Building Code controls. If Supreme Court precedent is followed, the State Building Code controls. By claiming that the conflict is best left to the legislature to resolve, the District Court committed reversible error. The Court of Appeals should, therefore, reverse the District Court and declare that the Policy violates Minnesota law.

III. THE DISTRICT COURT ERRED BY HOLDING THAT BAM WAS ASKING THE COURT "TO MAKE NEW LAW" AND THAT BAM'S ONLY RECOURSE IS TO "TAKE THE MATTER UP WITH THE . . . LEGISLATURE."

In its Order, the District Court held that it was not the court's place to "make new law" and that "[i]f BAM wishes to codify its preference [regarding whether the State

Building Code trumps the State Fire Code], then it should take the matter up with either the legislature or the rulemaking body that interprets legislation—[the Department of Labor and Industry] in this case.” (ADD014-15.) The District Court then cites to Minn. Stat. § 326B.121, subd. 3, which reads:

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.

(ADD015.) The Court’s suggestions that BAM is asking the court to “make new law” and that BAM’s only recourse for the alleged violation of Minn. Stat. § 326B.121 is through the commissioner’s authority under subd. 3 above should be rejected.

First, through this lawsuit, BAM is not asking the courts to “make new law.” BAM is asking the courts to do precisely what they are empowered and required to do—interpret state law. The court system should not abandon its obligations as the interpreter of law.

Second, it is simply not the law that only the Commissioner of the Department of Labor and Industry can challenge a municipality’s violation of the State Building Code through an administrative action. In fact, the Minnesota Supreme Court allowed precisely such a challenge in both City of Morris and City of Minnetonka, where private entities challenged municipalities’ regulations as violations of the State Building Code.

In both cases, the private challenges were brought under the statutory predecessor to Minn. Stat. § 326B.121, the very statute under which BAM brings this action. City of Morris, 749 N.W.2d at 8 (challenging city’s rental licensing ordinance as a violation of the building code); City of Minnetonka, 236 N.W.2d at 165 (challenging city’s fire prevention code as a violation of the building code); see also, Wessman, 2008 Lexis 1393 (challenging city’s code provision dealing with construction permits). This precedent establishes the fact that the District Court should have, and the Court of Appeals should now, interpret state law and find that the State Building Code trumps the Policy.

Third, Minn. Stat. 326B.121, gives the Commissioner of the Department of Labor and Industry the right to undertake all enforcement of building codes in the City of St. Paul, meaning that state officials would undertake all building code inspections and enforcement in the City of St. Paul instead of City employees. It does not give the Commissioner the power to strike down only the Policy.

Finally, if any party in this case has run afoul of administrative procedure, it is the City, which has attempted through its local Policy to effectively repeal the Exception in the Building Code. Such an amendment to the State Building Code can only be effected through formal administrative rule-making by the proper administrative authority. See, e.g., Minn. Stat. § 326B.02, subd. 5 (stating that only the “commissioner may, under the rulemaking provisions of chapter 14 and as otherwise provided by this chapter, adopt, amend, suspend, and repeal rules. . .”) (emphasis added); Minn. Stat. § 326B.13, subd. 1 (noting that amendments to the Building Code are subject to the Administrative Procedure Act); Minn. Stat. § 326B.13, subd. 5 (stating that “in no event may a state

agency . . . authorized to adopt rules involving State Building Code subject matter proceed to adopt the rules without prior consultation with the commissioner).

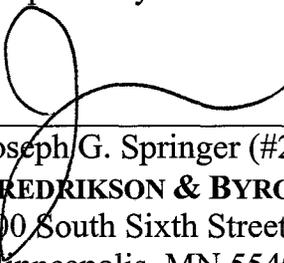
CONCLUSION

The City's egress window Policy is plainly different from the State Building Code. Applying the City of Morris test establishes that the Policy violates Minn. Stat. § 326B.121, which prohibits a municipality from adopting requirements that are different from the State Building Code. The City cannot escape the restrictions of the statute by naming its restriction a "policy" rather than an "ordinance" or "development agreement," the terms used in the statute. Allowing the City to do so would frustrate the uniformity of the State Building Code required to make housing more affordable.

For the foregoing reasons, BAM respectfully requests that the Court of Appeals reverse the District Court and declare that the City's Policy violates state law.

Respectfully Submitted,

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