**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A09-595**

William J. Cullen,
Relator,

vs.

City of Minneapolis, et al.,
Respondents.

**Filed April 20, 2010**
**Affirmed**
**Larkin, Judge**

Minneapolis Department of Regulatory Services
File No. RFS #08-0667144

Douglass E. Turner, Robert P. Schwartz, Hanbery & Carney, P.A., Minneapolis, Minnesota (for relator)

Susan L. Segal, Minneapolis City Attorney, Lee C. Wolf, Assistant City Attorney, Minneapolis, Minnesota (for respondents)

Considered and decided by Larkin, Presiding Judge; Toussaint, Chief Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

## U N P U B L I S H E D  O P I N I O N

**LARKIN**, Judge

Relator William J. Cullen, an owner of rental property in Minneapolis, challenges a determination by the Minneapolis Housing Board of Appeals (Board) that a basement bedroom in one of his rental units does not comply with a minimum ceiling-height requirement under the State Building Code. Relator argues that the bedroom is exempt from the code requirement under a grandfather clause in the code. Because there is a legal and substantial basis for the Board's determination that relator failed to establish that his property is exempt from the ceiling-height requirement, we affirm.

## D E C I S I O N

A municipal agency's action is quasi-judicial and subject to certiorari review "if it is the product or result of discretionary investigation, consideration and evaluation of evidentiary facts."[1] *See Staeheli v. City of St. Paul*, 732 N.W.2d 298, 303 (Minn. App. 2007) (explaining certiorari review applies to quasi-judicial city council action). "A quasi-judicial decision of an agency that does not have statewide jurisdiction will be reversed if the decision is fraudulent, arbitrary, unreasonable, unsupported by substantial evidence, not within its jurisdiction, or based on an error of law." *Axelson v. Minneapolis Teachers' Retirement Fund Ass'n*, 544 N.W.2d 297, 299 (Minn. 1996) (quotation omitted). As a court of review, we will not retry facts, and we will uphold the agency's

[1] The parties agree that the Board's action was quasi-judicial.

decision "if the lower tribunal furnished any legal and substantial basis for the action taken." *Staeheli*, 732 N.W.2d at 303 (quotation omitted).

Relator purchased the rental property that is the subject of this appeal, a duplex, in September 2008. When relator purchased the duplex, there was an existing bedroom in the basement of the property. Respondent City of Minneapolis inspected the property after relator purchased it. After the inspection, respondent issued relator a code-violation notice dated November 25, 2008. The notice directed relator to "[c]ease the use or renting of rooms with ceiling heights of less than seven (7) feet." The notice stated that the basement bedroom ceiling measured six feet, eight inches and that it must be emptied of sleeping furniture and not used for sleeping purposes. The notice cited Minneapolis, Minn., Code of Ordinances § 244.800 (1960), which required rooms to have a ceiling height of at least seven feet, six inches.

Relator appealed the code violation to the Board. At the appellate hearing, relator argued that the State Building Code preempts Minneapolis, Minn., Code of Ordinances § 244.800.[2] Relator also argued that the property was exempt from the minimum ceiling-height requirement under a grandfather provision in the State Building Code. The Board's minutes indicate that the Board received and considered evidence from relator; the city inspector who inspected relator's property and issued the code-violation notice;

[2] "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." Minn. Stat. § 326B.121, subd. 1 (2008). "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." Minn. Stat. § 326B.121, subd. 2(c) (2008).

the inspector's supervisor, who presented copies of truth in housing documents regarding the property; and an individual from the fire department, who presented information on fire-safety standards. The Board passed a motion denying relator's appeal at the hearing. After the hearing, the deputy director of the Housing Inspection Services Division of the Minneapolis Regulatory Services Department sent relator a letter notifying him of the decision and stating that "[t]he basement space cannot be used for a bedroom due to the lack of adequate ceiling height. The 6 foot 8 inch ceiling does not meet code requirements."

The Board did not make formal findings of fact, and the Board's minutes do not indicate that it explained the reason for its decision at the hearing. An agency's failure to make findings of fact and to explain its decision may frustrate judicial review. *See, e.g., White Bear Rod and Gun Club v. City of Hugo*, 388 N.W.2d 739, 742 (Minn. 1986) (holding that a city council's decision denying a special use permit amendment lacked findings of fact or other explanation adequate for judicial review); *Morey v. Sch. Bd. of Indep. Sch. Dist. No. 492, Austin Pub. Schs.*, 268 Minn. 110, 115-16, 128 N.W.2d 302, 307 (1964) (explaining that findings are necessary—even when not statutorily required—to guard against a court trying a matter de novo and substituting its findings for those of the agency). However, because the hearing before the Board was not recorded, the Board approved and filed a statement of the proceedings pursuant to an order of this court and Minn. R. Civ. App. P. 110.03. *See* Minn. R. Civ. App. P. 115.04, subd. 1 (stating that to the extent possible, the provisions of rule 110 apply to certiorari appeals). The statement of the proceedings explains the arguments raised by relator, the evidence considered by

the Board, the Board's findings, and the reason for the Board's decision. The information provided in the Board's statement of the proceedings is adequate for judicial review.

Relator argues and respondent concedes that the State Building Code preempts Minneapolis, Minn., Code of Ordinances § 244.800. *See* Minn. Stat. § 326B.121, subds. 1, 2(c) (providing that State Building Code is a statewide standard and municipalities are prohibited from adopting building code provisions that differ from the state code); *City of Morris v. Sax Invs., Inc.*, 749 N.W.2d 1, 7 (Minn. App. 2008) (stating that the State Building Code 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 State Building Code). Indeed, the Board's statement of the proceedings cites the state code as the governing law and notes that city officials were enforcing the ceiling height set by the state building code. *See* Minn. R. 1309.0305 § R305.1 (2009) ("Habitable rooms, hallways, corridors, bathrooms, toilet rooms, and basements shall have a ceiling height of not less than 7 feet (2134 mm).").

Because the State Building Code applies, the dispositive issue is whether relator's property is exempt from the minimum ceiling-height requirement under the following state-code provision: "The legal occupancy of any structure existing on the date of adoption of the code shall be permitted to continue without change except as specifically

required in chapter 1311."[3] Minn. R. 1300.0220, subp. 2 (2009). The State Building Code was adopted in 1972. 1971 Minn. Laws ch. 561, § 4, at 1020.

As the party seeking the benefit of the exemption, relator had the burden of proof. *See Skyline Pres. Found. v. County of Polk*, 621 N.W.2d 727, 731 (Minn. 2001) ("Because all property is presumed taxable and exemption from property tax liability is an exception to this general rule . . . parties seeking exemptions bear the burden of proof."). Thus, relator had to establish that when the state code was adopted in 1972, the "legal occupancy" of his property included the basement bedroom. *See* Minn. R. 1300.0220, subp. 2 (allowing the legal occupancy of any structure existing on the date of adoption of the code to continue without change except as otherwise provided). But relator failed to present any evidence that the bedroom existed when the state code was adopted. The Board found that relator's building "was built in 1922, however, there was no testimony or evidence presented as to whether a basement bedroom existed in the property when it was built in 1922." The Board also found that a check of the property's permit history revealed that none of the previous owners had obtained a permit to construct the basement bedroom and that the bedroom had never been approved by a city inspector. And at oral argument, relator conceded that it is not clear when the bedroom was constructed.

Relator argues that because the building was built 50 years before the adoption of the State Building Code, "the only reasonable presumption would be that the basement

[3] Chapter 1311 provides the minimum standards for change of occupancy, alteration, or repair of existing buildings and structures, and its provisions are inapplicable here. Minn. R. 1311.0103 (2009).

bedroom existed at least at the time of the adoption of the State Building Code, if not earlier." We disagree. Given the lack of any evidence regarding when the basement bedroom was constructed, it is possible that the basement bedroom was constructed *after* adoption of the state code. Relator also argues that respondent failed to submit evidence that shows that the basement bedroom did not exist when the property was built in 1922. But relator had the burden to prove that the legal occupancy of his property included the basement bedroom when the state code was adopted; respondent was not required to prove that the exemption does not apply.[4] *See Skyline Pres. Found.*, 621 N.W.2d at 731 (stating that the burden to prove application of a property-tax-liability exemption is on the party seeking the exemption).

The Board concluded that relator's property was not exempt from the minimum ceiling-height requirement under the State Building Code. The Board explained its conclusion as follows: "Relator's claim that the basement bedroom should be 'grandfathered' and allowed to remain was rejected as there was no information available as to when the basement bedroom was built." Because relator did not establish that the legal occupancy of his property included the basement bedroom when the state code was adopted, the Board's rejection of relator's exemption claim is reasonable, supported by substantial evidence, and not based on an error of law. And because there is a legal and substantial basis for the Board's decision, we affirm.

[4] Respondent cites several municipal code provisions that predate the adoption of the State Building Code in support of its argument that even if the bedroom was in existence prior to adoption of the state code, its use was not a legal occupancy. Because there is no evidence that the bedroom existed when the state code was adopted, we do not address this argument.

Relator attempts to raise estoppel and waiver issues for the first time on appeal, arguing that respondent should not be allowed to enforce the minimum ceiling-height requirement because respondent tacitly approved the use of the basement bedroom. Relator points to the 2007 and 2008 City of Minneapolis Truth in Sale of Housing Disclosure Reports, which respondent submitted at the hearing, and respondent's issuance of a permit to relator for the installation of an egress window in the basement bedroom as respondent's acknowledgment that the ceiling height in the basement bedroom was below minimum requirements. Relator also suggests that when determining whether the exemption in the grandfather clause applies, "legal occupancy" should be evaluated in the context of the property use as a whole (i.e., a rental duplex) and that we should not focus on the existence or use of the basement bedroom itself. But because these arguments were not raised below, we will not consider them on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating general rule that an appellate court will not consider matters not argued to and considered by the district court).

**Affirmed.**

Dated:

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Judge Michelle A. Larkin