STATE OF MINNESOTA

IN SUPREME COURT

Builders Association of the Twin Cities,

Respondent,

v.

Minnesota Department of Labor and Industry,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

Appellate Case No. A12-1221

Date of Filing of Court of Appeals Decision: October 13, 2015

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TO: THE SUPREME COURT OF THE STATE OF MINNESOTA.

Respondent Builders Association of the Twin Cities (BATC) requests that the Court deny the petition for review of petitioner Minnesota Department of Labor and Industry (DLI). DLI has failed to identify a valid reason for discretionary review, and the matter at issue was properly decided by the Court of Appeals pursuant to well-established law.

I. STATEMENT OF THE CASE.

BATC brought this action for declaratory judgment before the Court of Appeals pursuant to Minn. Stat. §14.44, challenging the validity of DLI's adoption of the residential sprinkler mandate (the "Sprinkler Rule")—in particular, those amendments to the Minnesota Residential Code (Minn. R. Ch. 1309)[1] mandating automatic sprinkler systems in all newly-constructed one-family homes of 4,500 square feet or larger and all two-family homes. In declaratory judgment proceedings brought under Minn. Stat. §14.44, the "court *shall* declare the rule invalid if it concludes that it violates constitutional provisions *or* exceeds the statutory authority of the agency *or* was adopted without compliance with statutory rulemaking procedures." Minn. Stat. § 14.45 (emphasis added). The Court of Appeals concluded that DLI's adoption of the Sprinkler Rule failed on all three counts—that is, the rule violated substantive due process, exceeded statutory authority and was not adopted in compliance with rulemaking procedures—and invalidated the rule.

II. THE SUPREME COURT SHOULD DENY DLI'S PETITION FOR REVIEW OF THE DECLARATORY JUDGMENT ISSUED BY THE COURT OF APPEALS.

The Court should deny discretionary review under Minn. R. Civ. App. P. 117, subd. 2, because the Court of Appeals handed down a well-reasoned ruling that applied clear and established judicial review principles to invalidate a fatally-flawed administrative decision.

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[1] The challenged Sprinkler Rule provisions included R. 313.2 ("One- and two-family dwellings automatic fire systems") and R.313.3 ("Installation Requirements").

A. The Court of Appeals Appropriately Determined that the Sprinkler Rule, as Adopted by DLI, Violates Substantive Due Process.

DLI argues that its petition should be accepted because the Court of Appeals erred in invalidating the Sprinkler Rule based on substantive due process grounds. *See* DLI Pet. at 2. DLI argues that a "rational basis" existed for the Sprinkler Rule—the same argument that the Court of Appeals soundly rejected. In determining that the Sprinkler Rule lacked a rational basis, the court below followed precedent from this Court, including *Manufactured Housing Inst. v. Pettersen,* 347 N.W.2d 238 (Minn. 1984).[2] The Court of Appeals applied the standard of review that was advocated by DLI in its own appellate brief (*see* pp. 26-27), one requiring a "searching and careful inquiry" of the evidence in the record to ensure that the rule has a rational basis (and is not arbitrary and capricious). *See* Court of Appeals Decision (Pet. Add. 5-6). As this Court recognized in *Pettersen*, the "requirement that the agency explain its determination is not some idle exercise in judicial officiousness. The purpose of 'articulated standards and reflective findings' is to ensure 'furtherance of even-handed application of law, rather than impermissible whim, improper influence, or misplaced zeal.'" *Pettersen,* 347 N.W.2d at 247, n. 4 (citations omitted).

Here, the Court of Appeals properly heeded the call of *Pettersen* to conduct a "careful and searching inquiry" of the record. Specifically with respect to the 4,500 square foot threshold, the Court of Appeals held that:

> Based on precedent from our supreme court, there must be a "reasoned determination" as to why particular standards were chosen in an administrative rule. *Pettersen,* 347 N.W.2d at 246. Because the record does not include evidence of any reasoned determination to

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[2] DLI now apparently argues, incorrectly, that "post-*Pettersen*" cases apply a different or "less exacting" evidentiary standard, citing to *Jacka v. Coca-Cola Bottling Co.*, 580 N.W.2d (Minn. 1998) and *Mammenga v. State*, 442 N.W.2d 786 (Minn. 1989). *See* DLI Pet. at 3, n. 1. That is not an accurate statement of the law. The *Petterson* standard was properly applied by the Court of Appeals to this pre-enforcement rule challenge. In contrast, *Jacka* and *Mammenga* were as-applied challenges of administrative rules.

> indefinitely exempt new one-family dwellings under 4,500 square feet, the Sprinkler Rule must be declared invalid.

Pet. Add. 6.

The Court of Appeals further properly held that the Sprinkler Rule failed the rational basis test because there is "simply no evidence or explanation to support the determination that new two-family dwellings and new one-family dwellings over 4,500 square feet present a fire safety risk that justifies the increased costs of sprinkler installations, while new one-family dwellings under 4,500 square feet do not." Pet. Add. 8. The Court of Appeals followed well-established law and "thoughtfully and unanimously" issued a declaratory judgment invalidating the Sprinkler Rule. Pet. Add. 9.

B. The Court of Appeals Did Not Disregard the SONAR in Determining that the Sprinkler Rule Lacked a Rational Basis.

DLI argues that its Statement of Need and Reasonableness (SONAR) establishes a rational basis for the Sprinkler Rule. *See* DLI Pet. at 3. The SONAR is the document that "summarizes the evidence" upon which the agency purports to rely in the rulemaking process. *See* Minn. R. 1400.2070. As the Court of Appeals discovered during its careful and searching examination of the record, however, DLI's "summary" of the evidence in the SONAR is not supported by *actual* evidence in the record. Pet. Add. 6. The SONAR itself fails to identify evidentiary sources. Nowhere in the SONAR does DLI cite to any supporting source or testimony that homes between 4,000 and 5,000 square feet pose the greatest life-safety risk to the public. DLI points to no evidence or testimony supporting the claim that fire departments are incapable of fighting fires over the 4,500 square foot threshold. DLI has merely repeated the same arguments in its petition that were already considered and rejected by the Court of Appeals—arguments amounting to nothing more than DLI's unsupported, conclusory assertions. *See* BATC Reply Br. at 7-9 (addressing DLI's misplaced reliance on the SONAR).

DLI was specifically asked at oral argument "where in the record there exists any explanation for the 4,500-square foot threshold," to which DLI directed the Court of Appeals to hearing testimony from Chief Deputy State Fire Marshal Robert Dahm. Pet. Add. 7. But, as the Court of Appeals correctly determined, this testimony provided no explanation. (*Id.*). DLI cites to this same unsupportive testimony as a basis for its petition for review. *See* DLI Pet. at 4. The Court of Appeals did not ignore or disregard the SONAR or other testimony referenced by DLI. Instead, the Court of Appeals properly rejected the same unsupported and conclusory statements that DLI now argues provide a basis for this Court to accept review. In invoking the SONAR, DLI has failed to present a valid basis for Supreme Court review.

C. DLI Misrepresents the Statutory Provision Which Circumscribes the Authority to Enact the Building Code as Directory, When It Is Clearly and Expressly Mandatory.

DLI argues that the Court of Appeals declared DLI's rule unconstitutional based in part upon DLI's general enabling legislation (citing Minn. Stat. §326B.106, subd. 1). *See* DLI Pet. at 4. DLI asserts in its petition that "the statute includes language stating that the code *should* be based on scientific principles, approved tests, and professional judgment." *See Id.* (emphasis added). This is a blatant misstatement of this statutory language. The statute does not state "should be," but rather states "must be"—the adoption of code provisions "*must* be based on the application of scientific principles, approved tests, and professional judgment." Minn. Stat. § 326B.106, subd. 1 (emphasis added). DLI, mischaracterizing the statutory language, argues that this "general policy statement did not add any additional rulemaking requirement to Chapter 14, nor did it impact the standard by which rules are reviewed in the face of a pre-enforcement constitutional challenge." *See* DLI Pet. at 4. The cited statutory provision unquestionably limits in mandatory terms DLI's rulemaking authority. DLI,

as a state agency, is a legislative creation and possesses only that authority which is granted by statute.[3] The Court of Appeals has not created a new or different standard as DLI argues.

D. The Court of Appeals' Straightforward Application of Minn. Stat. § 14.127 Provides No Basis for Review.

Finally, DLI argues that the Court of Appeals erred in concluding that DLI failed to comply with Minn. Stat. § 14.127. *See* DLI Pet. at 5. This statute requires an agency to determine whether the costs of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for a small business or small city. Minn. Stat. § 14.127, subd. 1. As the Court of Appeals recognized, rather than make such a determination, DLI argued that the cost of complying with the proposed rule will not exceed $25,000 because "the proposed rules do not *require* any construction to occur within the first year after the rules take effect." Pet. Add. 9 (emphasis added). The ALJ found this response to be "unreasonable" because it would render "assessments performed under the statute a nullity." *See Id.* DLI now claims that it gave two other "reasons" that supported its determination, but these so-called reasons are similarly conclusory and dismissive of the statutory requirement. As the Court of Appeals recognized, this Court has held that: "'[r]ules must be adopted in accordance with specific notice and comment procedures established by statute, and the failure to comply with necessary procedures results in invalidity of the rule.'" Pet. Add. 8. The Court of Appeals simply applied the long-established rule of law approved by this Court when it invalidated the Sprinkler Rule based on the statutory violation.

For all the above-stated reasons, the Court should deny the petition for review.

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[3] *See In re Hubbard*, 778 N.W.2d 313, 318 (Minn. 2010) ("Administrative agencies are creatures of statute and they have only those powers given to them by the legislature"); *see also Hirsch v. Bartley-Lindsay Co.*, 537 N.W.2d 480, 485 (Minn. 1995) ("An agency has the power to issue binding administrative rules only if, and to the extent, the legislature has authorized it to do so.").

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