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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-1468**

Gregory Frandsen, et al.,  
Appellants,

vs.

City of North Oaks,  
Respondent.

**Filed February 19, 2013  
Affirmed  
Stoneburner, Judge**

Ramsey County District Court  
File No. 62-CV-11-5775

Jeffrey D. Bores, Gary K. Luloff, Dennis B. Johnson, Chestnut Cambronne PA,  
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Considered and decided by Worke, Presiding Judge; Stoneburner, Judge; and  
Schellhas, Judge.

**UNPUBLISHED OPINION**

**STONEBURNER**, Judge

Appellants are swimming-pool-owner residents of respondent City of North Oaks  
who appeal from summary judgment dismissing their challenge to a city ordinance  
requiring fences around swimming pools. We affirm.

## FACTS

North Oaks, Minn., Code of Ordinances (NOCO) §§ 150.055-.062, enacted in 1989, require, in relevant part, permits to build swimming pools and that swimming pools be completely enclosed by safety fences of a minimum height. Appellants Michael Johnson, James Rehtiene, and Gregory Frandsen are three residents of North Oaks who own swimming pools that are not enclosed by safety fences, despite the fact that the permits to build their pools were all contingent on compliance with the safety-fence requirement. All of their pools have automatic locking pool covers.

In April 2010, the city notified appellants that they are in violation of NOCO § 150.059, which contains the fencing requirement. The city set June 15, 2010, as a deadline for compliance with the fencing requirement. Appellants, through counsel, asked the city to consider an amendment to the ordinance that would allow automatic locking pool covers as an alternative to the required fencing. The city agreed to suspend enforcement actions and to research the proposed alternative.

The city gathered information from other jurisdictions concerning options for pool safety, including powered locking pool covers. At a public hearing in August 2010, the planning commission reviewed information gathered from insurance companies, U.S. Consumer Product Safety Commission reports, and Centers for Disease Control reports, reviewed general information about pool covers, and analyzed pool ordinances from other jurisdictions. The information reviewed included a letter from the city's building official, stating that the city had been allowing buildings in lieu of safety fencing to enclose one side of pools, and noting that "[t]he main downside of covers is that they are

mechanical and therefore subject to many more possible failure scenarios than a passive deterrent such as a fence.” Three residents spoke against amending the ordinance, and counsel for appellants spoke in favor of amending the ordinance to allow alternatives, including pool covers. After the public hearing, the planning commission formed a subcommittee of commissioners to further evaluate options and scheduled another public hearing for September 2010.

The subcommittee met and reviewed the original ordinance, a copy of the International Residence Code pertaining to outdoor swimming pools, and a flyer from the U.S. Consumer Products Safety Commission entitled “Safety Barrier Guidelines for Home Pools.” The subcommittee reached a consensus to keep the fencing requirement, but to allow a wall of the residence to be one side of the enclosure.

Before the September 2010 public hearing, residents commented on the issue by e-mail, some stating that pool covers are safer than fences and others stating that pool covers, unlike fences, are subject to human error, neglect, and electronic malfunction. Only 40% of residents responding wanted a fence requirement. Many were concerned that pools predating the ordinance would not be grandfathered in.

More than 20 residents spoke at the second public hearing, reflecting the same concerns raised in the e-mails. The planning commission formed another subcommittee to answer the question: “[C]an automatic pool covers be used as an alternative to fences?” This subcommittee met in October and November 2010. It reviewed feedback from residents and advice from the city attorney regarding the grandfathering issue. The subcommittee noted that Stillwater, which had amended its ordinance to allow pool

covers as an alternative to fences, had recently reinstated a fencing requirement because pool owners were failing to close the pool covers. The subcommittee members had different views about the issue, but ultimately agreed to recommend to the planning commission that (1) fences would be required to enclose all pools built after 1989; (2) escrow accounts would be required to ensure compliance; and (3) the back of a home could be used as one side of the enclosure.

At a December 2010 meeting, the planning commission heard the subcommittee's recommendation and reviewed minutes of the subcommittee meeting and all of the research gathered by the subcommittee. That research revealed that, in addition to the recent change in the requirement in Stillwater, 19 of 22 area cities require safety fences, two require fences or a locking pool cover, and one has no requirements. The planning commission ultimately agreed to recommend the subcommittee's proposals to the city council, with the additional recommendation that "no enforcement would be made on pre-1989 pools."

At a December 2010 city council meeting, the city council noted that the issue had been thoroughly reviewed, researched, and debated for six months, and two public hearings had been held, although only one public hearing was required on a proposed ordinance amendment. The council members ultimately voted in favor of the planning commission's recommendation. The resulting amended ordinance, Ordinance 101, effective July 1, 2011, amends NOCO § 159.059 and requires, in relevant part, safety fences to completely enclose post-1989 swimming pools, but allows the principal dwelling or an accessory structure to serve as all or part of the required fence.

In April 2011, the city notified appellants that they had until July 1, 2011, to comply with the amended ordinance. Appellants responded by bringing this action against the city, seeking declaratory and injunctive relief precluding enforcement of the ordinance and requiring the city to approve the use of automatic pool covers as an alternative to fences.<sup>1</sup> Appellants alleged that the amended ordinance violates equal protection by treating them differently from homeowners with pools constructed prior to 1989 and that the amended ordinance is arbitrary and capricious. On cross motions for summary judgment, the district court denied appellants' motion and granted the city's motion. This appeal followed.

## D E C I S I O N

### **I. Standard of Review**

Summary judgment should be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. This court reviews a district court's summary judgment decision de novo, and determines “whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment.” *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010).

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<sup>1</sup> At oral argument on appeal, appellants focused on the arbitrariness of allowing pre-1989 pools to remain unfenced and allowing a wall of the house to be used for one side of the enclosure requirement. Appellants did not explain how a remand on those issues would advance their original argument that locking pool covers should be permitted in lieu of fencing.

As a threshold matter, appellants argue that the challenged ordinance is not a zoning ordinance under Minn. Stat. § 462.357 (2012), but a public-safety or building ordinance, which is relevant to their challenge to the “rationality and the selective application of the Ordinance, which resulted in the grandfathering of pre-1989 swimming pools.” The district court referred to the ordinance as one that “promote[s] the health, safety and general welfare of [the city’s] residents” as authorized by Minn. Stat. § 412.221, subd. 32 (2012), and the city has not challenged this characterization of the ordinance. For purposes of this appeal, therefore, we assume, without deciding, that the ordinance is a general safety ordinance as characterized by the district court.

## **II. Equal Protection**

Appellants argue that the city violated their right to equal protection by exempting pre-1989 pools from the pool safety-fence ordinance. Appellants contend that there is no rational reason for treating them differently when the purpose of the law is to keep children from harm. Appellants argue that whatever danger to children exists with respect to pools built after the effective date of the ordinance also exists with respect to pools built before the effective date of the ordinance.

The United States and Minnesota Constitutions guarantee citizens equal protection of the laws. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 2. This court reviews an equal-protection claim de novo. *Thul v. State*, 657 N.W.2d 611, 616 (Minn. App. 2003), *review denied* (Minn. May 28, 2003).

The constitutional guarantee of equal protection of the laws mandates that the state treat all similarly situated persons alike. *Kottschade v. City of Rochester*, 537 N.W.2d

301, 306 (Minn. App. 1995), *review denied* (Minn. Nov. 15, 1995). If a party cannot meet the similarly situated test, the party's equal-protection claim necessarily fails. *See Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 656 (Minn. 2012). "Similarly situated groups must be alike in all relevant respects." *St. Cloud Police Relief Ass'n v. City of St. Cloud*, 555 N.W.2d 318, 320 (Minn. App. 1996) (quotation omitted), *review denied* (Minn. Jan. 7, 1997). A municipality "may treat similarly situated persons differently when a distinction in treatment bears a rational relation to a legitimate government objective." *Kottschade*, 537 N.W.2d at 306 (quotation omitted).

The city's pool safety-fence ordinance became effective on May 23, 1989, long before appellants built their pools. The city granted appellants' permits to construct swimming pools with the express condition that the pools comply with all city ordinances, including the pool safety-fence ordinance. Homeowners who built pools prior to adoption of the ordinance, however, were not subject to the pool safety-fence ordinance. Permits for construction of those pools were not conditioned on enclosing the pool with a safety fence. Accordingly, appellants are not similarly situated to those homeowners who built pools prior to May 23, 1989.

Furthermore, the practice of grandfathering non-conforming properties has been upheld in the face of equal-protection challenges since at least 1914. *See City of Minneapolis v. Church Universal & Triumphant*, 339 N.W.2d 880, 882 n.1 (Minn. 1983) (noting that "grandfather clauses have been upheld in the face of constitutional attack since 1914") (citing *State v. Taubert*, 126 Minn. 371, 148 N.W. 281 (1914)). And nothing in the statutory or case law suggests that grandfathering does not apply to

ordinances enacted to protect general welfare and safety. *See, e.g., State ex rel. Berndt v. Iten*, 259 Minn. 77, 81, 106 N.W.2d 366, 368-69 (1960) (noting that safety is a legitimate purpose behind enacting a zoning ordinance). Appellants have failed to cite any authority or make any argument explaining why grandfathering, which is rational with respect to zoning ordinances, becomes irrational when applied to a general welfare ordinance. *See Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971) (“An assignment of error based on mere assertion and not supported by any argument or authorities in appellant’s brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection.”). We find no merit in appellants’ equal-protection argument based on grandfathering. It is rational and not a violation of equal protection for the city to treat residents in accordance with the law that existed at the time their pool was built. *See Kottschade*, 537 N.W.2d at 306.

### **III. Reasonableness of exercise of municipal power**

Appellants argue that the amended pool safety-fence ordinance is an arbitrary and capricious exercise of the city’s power because it allows the wall of a building or structure to comprise a portion of the fence. When reviewing municipal land use decisions, this court uses a rational-basis standard. *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 179 (Minn. 2006). An appellate court will uphold a city’s decision unless the challenging party establishes that the decision is “unsupported by any rational basis related to promoting the public health, safety, morals, or general welfare.” *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 414-15 (Minn. 1981) (quotation omitted). Amending an ordinance is a legislative function in which the

municipality is given “broad discretion . . . and even if [its] decision is debatable, so long as there is a rational basis for what it does, the courts do not interfere.” *Id.* at 415.

Appellants argue, without explanation, that allowing part of a building to comprise part of the pool safety fence is contrary to the city’s goal of safety because it increases the risk of harm to children. Under the amended ordinance, the safety fence still “shall completely enclose the pool,” even when a principal dwelling or accessory structure serves as part of the fence. NOCO § 150.059. The city’s decision is rational because it is directly related to promoting the city’s legitimate purpose of preventing trespassing children from gaining access to the pool. Appellants point out that according to studies, only two percent of deaths are from trespassing children, but the city’s decision is not arbitrary so long as one valid reason exists. *See Trisko v. City of Waite Park*, 566 N.W.2d 349, 352 (Minn. App. 1997), *review denied* (Minn. Sept. 25, 1997) (holding that the denial of a conditional-use permit “is not arbitrary when at least one of the reasons given . . . satisfies the rational basis test”).

Appellants cite to an unidentified report from the “US Public Safety Commission,” which, according to appellants, “clearly supports the conclusion that . . . a house should never be considered part of the fence.” But we have not been able to identify or verify the existence of a “US Public Safety Commission,” and if appellants are referring to the U.S. Consumer Product Safety Commission, reports from that commission do not support the conclusion that a house should never be used as part of a pool safety fence. On the contrary, a report entitled “Safety Barrier Guidelines for Home Pools,” which was considered by the first subcommittee, contemplates instances where a house will form

part of the protective barrier around the pool. In fact, the report states that, when a door opens directly onto the pool area, “the wall of the house is an important part of the pool barrier.” Another report of the U.S. Consumer Product Safety Commission, entitled “How to Plan for the Unexpected: Preventing Child Drownings,” states that effective barriers around a pool “include a fence *or wall*.” (Emphasis added.) In all instances, the barrier must completely enclose the pool, and that is what the city’s ordinance requires. NOCO § 150.059.

Appellants also contest the city’s decision not to allow automatic pool covers to serve as an alternative to the fence requirement by pointing to evidence showing that an automatic pool cover is a safe and viable alternative to a fence. But this evidence does not mandate the city to permit automatic pool covers as an alternative to fences. The city researched the issue for more than six months and considered numerous resources before reaching a decision, including information from insurance companies, reports from the U.S. Consumer Product Safety Commission, reports from the Centers for Disease Control, information regarding pool covers and how they work, and sample pool ordinances from area cities, 86% of which required safety fences. Minutes from the various meetings held on the issue show the city’s concern about the susceptibility of automatic pool covers to mechanical failures, human error such as forgetting to close the cover, and enforcement issues. The decision to require fences is a rational decision even though the record, as recognized by the city, demonstrates that “there are reasonable [and] caring people on both sides of the issue.” Courts do not interfere with municipal

decision-making so long as there is a rational basis for the decision. *Honn*, 313 N.W.2d at 414-15.

**Affirmed.**