STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0927

James A. Dolphy,
Appellant,

Michael P. Haege,
Plaintiff,

vs.

City of Minneapolis,
Respondent.

Filed December 31, 2012
Reversed and remanded
Larkin, Judge

Hennepin County District Court
File No. 27-CV-11-18314

David T. Schultz, Joseph P. Ceronsky, Maslon, Edelman, Borman & Brand, LLP, Minneapolis, Minnesota (for appellant)

Susan L. Segal, Minneapolis City Attorney, Joel M. Fussy, Gregory P. Sautter, Assistant City Attorneys, Minneapolis, Minnesota (for respondent)

Anthony B. Sanders, Katelynn K. McBride, Lee U. McGrath, Institute for Justice, Minneapolis, Minnesota (amicus curiae Institute for Justice)

Considered and decided by Stoneburner, Presiding Judge; Peterson, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant challenges the district court's dismissal of his lawsuit, which alleged that respondent's licensing ordinance requiring certification for tree servicers is unconstitutional. Because the district court converted respondent's motion to dismiss under Minn. R. Civ. P. 12.02 to one for summary judgment without allowing appellant a reasonable opportunity to present all materials made pertinent to such a motion, we reverse and remand.

FACTS

Appellant James A. Dolphy was licensed to operate a tree-trimming business in Minneapolis from 2006 to 2008. Dolphy's services included tree trimming, pruning, and removal, as well as stump grinding and removal. He did not diagnose or treat diseased trees or apply pesticides or other chemicals to trees. When he discovered a diseased tree during the course of his work, which happened in approximately five percent of his tree-trimming jobs, he referred the job to a specialist.

The Minneapolis Code of Ordinances requires licensure of persons engaged in tree servicing. Minneapolis, Minn., Code of Ordinances (MCO) § 347.20 (2012). "'Tree servicing' . . . mean[s] the felling, grinding, chipping, cutting, trimming, removal or hauling from the city of trees, limbs, branches, stumps or roots which are two (2) inches or more in diameter at the point of cutting or contact. 'Tree servicing' . . . also mean[s] the application of pesticides to a tree." MCO § 347.10 (2012). Prior to 2007, the basic requirements for a tree-servicing license in Minneapolis were insurance, registration, and

payment of a licensing fee. But in 2007, respondent City of Minneapolis, through its council, added a certification requirement to the ordinance. The ordinance now requires "[a]ll licensees [to] employ an individual who possess[es] current certification as an arborist from the International Society of Arboriculture (ISA) or post-secondary degree in urban forestry, arboriculturist, or an equivalent area of study, from an accredited institution of higher learning before a license will be issued to the applicant." MCO § 347.35 (2012). The ordinance further provides that "[t]he certified arborist or urban forester or arboriculturist shall be responsible for property and tree protection, provide supervision of tree servicing, and comply with all applicable American National Standards for Arboricultural (ANSI) standards." *Id.*

Because Dolphy does not have the necessary certification and cannot afford to employ someone who does, he was unable to maintain his Minneapolis tree-servicing license. On September 12, 2011, Dolphy commenced suit against the city challenging the constitutionality of its amended licensing requirements for tree servicers.[1] Specifically, Dolphy claimed that the certification requirement under MCO § 347.35 violates his due-process and equal-protection rights under the Minnesota Constitution, as it applies to him. He also claimed that MCO § 347.35 violates his fundamental right, under the Minnesota Constitution, to pursue his chosen livelihood.

On September 29, the city moved to dismiss Dolphy's lawsuit under Minn. R. Civ. P. 12.02 alleging, in part, that the complaint failed to state a claim upon which relief can

[1] Michael P. Haege also was a plaintiff in the underlying action. Haege appealed the district court's decision, but he subsequently dismissed his appeal.

be granted. In support of its motion to dismiss, the city submitted, via affidavit, Minneapolis City Council records of action; the Minneapolis Code of Ordinances, chapters 2 and 347; Dolphy's licensing file, including the record of a citation; the record of council action adopting the City of Minneapolis Urban Forest Policy; and Haege's citation file. Dolphy filed a memorandum in opposition to the city's motion to dismiss. In it, Dolphy opposed the district court's consideration of the city's submissions, arguing that the court must either exclude the documents, or treat the motion as one for summary judgment and postpone its consideration of the motion pending completion of discovery.

On November 14, Dolphy filed an informational statement, estimating that his proposed discovery could be completed within ten months, that five factual depositions were necessary, and that two experts would be subject to discovery. The city filed its informational statement on November 18, requesting, "STAY OF ALL DISCOVERY DURING THE PENDANCY OF THE PRESENT MOTION TO DISMISS." The district court did not issue a scheduling order, and neither party conducted discovery.

The district court held a hearing on the city's motion to dismiss on January 3, 2012. The district court subsequently issued an order that converted the city's motion to dismiss to one for summary judgment and dismissed Dolphy's complaint. This appeal follows.

D E C I S I O N

Dolphy argues that the district court erred by converting the city's motion to dismiss to one for summary judgment without first giving him a reasonable opportunity to present all material that is pertinent to a summary-judgment determination.

Specifically, Dolphy argues that the district court should have provided him an opportunity to conduct discovery before making a summary-judgment determination.

Under the rules of civil procedure,

> [i]f, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and *all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.*

Minn. R. Civ. P. 12.02 (emphasis added). We review a district court's compliance with rule 12.02 de novo. *See Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 382 (Minn. 2008) (Appellate courts "review the construction and application of the Minnesota Rules of Civil Procedure de novo").

Although the district court's order states that Dolphy's complaint was "dismissed with prejudice under Minnesota Rule of Civil Procedure 12.02(e) for failure to state a claim upon which relief can be granted," the court treated the motion to dismiss as one for summary judgment and applied the summary-judgment standard.

"A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). "[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the

nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). "[T]he party resisting summary judgment must do more than rest on mere averments." *Id.*

Dolphy raises equal-protection and due-process challenges. "When legislation is not based on a suspect class and does not infringe on a fundamental right, it need only be rationally related to a legitimate governmental purpose in order to withstand federal equal protection or substantive due process challenges." *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 288 (Minn. App. 1996), *review denied* (Minn. Oct. 29, 1996).

> Essentially the same analysis and standards apply under the Minnesota Constitution. Legislation is constitutional so long as it serves to promote a public purpose; is not an unreasonable, arbitrary, or capricious interference with a private interest; and the means chosen bear a rational relation to the public purpose sought to be served.

Id.

In granting dismissal, the district court reasoned that Dolphy failed to demonstrate "that the licensing scheme is unconstitutional beyond a reasonable doubt." The district court explained that

> [Dolphy has] asserted several conclusions of law, but [has] failed to allege sufficient facts to show the licensing scheme is not reasonably related to a legitimate public purpose. [Dolphy has] not demonstrated that the regulations are unnecessary to protect the public health and welfare. [Dolphy has] not shown that the justifications for the ordinance changes are hypothetical or theoretical. To the contrary, actual rational justifications abound for the ordinance changes.

The district court rejected Dolphy's argument that summary judgment was inappropriate because he had not had the opportunity to engage in discovery and present all material relevant to such a motion. The district court reasoned that the city's "motion to dismiss focuse[d] on the rational basis it had for amending the tree servicing ordinance, and [Dolphy] had a sufficient opportunity to respond to [the city's] motion and show evidence to the contrary."[2] The district court also reasoned that the documents considered by the court "are public records reasonably available to all parties." On appeal, the city similarly argues that the record before the district court was adequate to determine summary judgment because "the records of council action for the challenged ordinance showed the complete legislative history necessary for the Court to evaluate the rationale and meaning of the challenged ordinance."

We disagree that the record, which mainly focuses on the city's proffered rational basis for the ordinance, addresses all of the issues that are relevant to a determination of Dolphy's constitutional claim. Dolphy does not assert a facial challenge to the ordinance. He challenges the constitutionality of the ordinance as it applies to him. "A legislative act may be unconstitutional and void in its application to some persons or separable

[2] The district court appears to have primarily focused on whether there was a rational basis for the ordinance and less so on whether discovery was necessary regarding Dolphy's specific arguments that the ordinance is unconstitutional as applied to him. That approach is not surprising given the emphasis that the parties placed on the rational-basis test at the motion hearing. But Dolphy raised, and the district court addressed and determined, whether the record was adequate to determine summary judgment. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it." (quotation omitted)). Thus, the issue is properly before this court.

subject matters and constitutional as to others." *City of St. Paul v. Dalsin*, 245 Minn. 325, 330-31, 71 N.W.2d 855, 859 (1955). And, the manner in which a city applies and enforces an ordinance is relevant to a constitutional challenge. *See State v. Stewart*, 529 N.W.2d 493, 497 (Minn. App. 1995) (holding that an ordinance violated due-process and equal-protection rights, based on the city's arbitrary application and enforcement of the ordinance). Moreover, when determining whether a challenged ordinance is constitutionally justified, courts consider the factual evidence refuting the need for the regulation. *See Fairmont Foods Co. v. City of Duluth*, 260 Minn. 323, 325-26, 110 N.W.2d 155, 156-57 (1961) (holding unconstitutional an ordinance establishing the allowable maximum bacterial count of raw milk, because, in part, the record did not reveal a "justifiable reason in the interest of public health for the requirement of a lower bacterial count" when "[t]wo expert witnesses testified that the difference between a 170,000 and 200,000 standard has 'no public health significance'"). Lastly, as to Dolphy's equal-protection claim, the Minnesota rational-basis test requires "a reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals." *State v. Garcia*, 683 N.W.2d 294, 299 (Minn. 2004) (quotation omitted).

Dolphy cites these authorities and argues that he was not provided the opportunity to show a genuine issue of material fact regarding his constitutional claim because there had been no discovery. Dolphy's argument is persuasive. Although the record contains adequate evidence regarding the proffered rational basis for the ordinance, the city concedes that discovery is lacking regarding application of the ordinance and whether the

ordinance achieves its underlying purpose. When asked, at oral argument, "what does [the spread of invasive species] have to do with requiring an arborist on a tree trimmer's staff?" the city responded that the arborist is required to train the tree trimmers, ensure standards within the firm, and inspect the tree trimmers' work. But when the panel asked: "How do we know that's happening now under the current ordinance?" the city agreed that there has not been any discovery on that issue.

Moreover, related authorities indicate that summary judgment was premature. The relevant procedural rule states:

> Should it appear from the affidavits of a party opposing the [summary-judgment] motion that the party cannot for reasons stated present, by affidavit, facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Minn. R. Civ. P. 56.06. In addition, there is a "presumption in favor of granting continuances to allow sufficient time for discovery" prior to summary-judgment determinations. *Rice v. Perl*, 320 N.W.2d 407, 412 (Minn. 1982) (discussing Minn. R. Civ. P. 56.06). "When determining whether to grant a continuance [to allow discovery prior to a determination of a summary-judgment motion], the court considers first, whether the moving party has been diligent in obtaining or seeking discovery and, second, whether the moving party seeks further discovery with the good faith belief that material facts will be uncovered, or is merely engaging in a fishing expedition." *Cargill Inc. v. Jorgenson Farms*, 719 N.W.2d 226, 231 (Minn. App. 2006) (quotation omitted). Under each prong of this test, a continuance would have been justified.

First, we cannot say that Dolphy was not diligent in seeking discovery. *Cf. Dunham v. Roer*, 708 N.W.2d 552, 573 (Minn. App. 2006) (holding that the district court did not abuse its discretion by denying a continuance when appellant had ten months to complete discovery on claims that were not overly complicated), *review denied* (Minn. Mar. 28, 2006). The city filed its motion to dismiss approximately 17 days after Dolphy filed his complaint. Dolphy filed an informational statement, requesting ten months to complete discovery; the city's informational statement proposed that the district court stay all discovery pending a decision on its motion to dismiss. Dolphy informed the district court that if it was going to convert the city's motion to dismiss into one for summary judgment, he needed an opportunity to conduct discovery. But the district court did not issue a scheduling order or otherwise address whether discovery would occur pending a decision on respondent's motion to dismiss. Under the circumstances, Dolphy's failure to conduct discovery was justifiable.

Second, Dolphy's request for discovery does not appear to be a fishing expedition. Dolphy explains that he intends to obtain a copy of the arborist exam to show that only a small percentage of the test relates to tree trimming. *Cf. Dalsin*, 245 Minn. at 330, 71 N.W.2d at 859 (holding that a licensing ordinance was unconstitutional as applied to the roofing trade because it embraced "unnecessary, unreasonable, and oppressive [testing] requirements as a prerequisite to a license to install sheet metal flashing as an incidental part of the process of laying a roof"). Dolphy also plans to depose the city inspectors who monitor compliance with the certification requirement to establish the effects of the ordinance in practice and whether it serves its underlying purpose. *See Stewart*, 529

N.W.2d at 497 (considering the application and enforcement of a challenged ordinance). Lastly, Dolphy suggests that he will pursue expert opinions regarding "what tree trimmers—as opposed to arborists—need to know to protect the public." *See State v. Russell*, 477 N.W.2d 886, 891 (Minn. 1991) ("Without more evidence to support the asserted dealership levels of drug possession, the [challenged distinction between crack cocaine and powder cocaine] does not further its statutory purpose"); *Fairmont Foods Co.*, 260 Minn. at 325-26, 110 N.W.2d at 156-57 (relying on expert testimony to conclude that the challenged ordinance was not constitutionally justified). Dolphy's proposed discovery is reasonably related to a determination of the constitutional issues presented.

On this record, we agree that a reasonable opportunity to present all material made pertinent to a motion for summary judgment, as required under rule 12.02, includes an opportunity to conduct discovery. We therefore hold that the district court erred in treating the city's motion to dismiss as one for summary judgment in the absence of formal discovery, and we reverse and remand for further proceedings consistent with this opinion. Although we decide that summary judgment was premature, we express no opinion regarding whether summary judgment would be appropriate on an adequately developed record.

Reversed and remanded.