STATE OF MINNESOTA
IN COURT OF APPEALS
A24-1563

State of Minnesota,
Respondent,

vs.

B.M.W.,
Appellant.

Filed May 19, 2025
Affirmed
Cleary, Judge[*]

Dakota County District Court
File No. 19-K8-93-000496

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Kathryn M. Keena, Dakota County Attorney, Todd P. Zettler, Assistant County Attorney, Hastings, Minnesota (for respondent)

Beau D. McGraw, McGraw Law Firm, P.A., Lake Elmo, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Ross, Judge; and Cleary, Judge.

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

NONPRECEDENTIAL OPINION

CLEARY, Judge

In this appeal from an order denying appellant's petition to expunge Minnesota Bureau of Criminal Apprehension (BCA) records related to his 1993 conviction and his registration with the BCA's Predatory Offender Registry, appellant argues that the district court's failure to order expungement of these executive-branch records results in a violation of his substantive-due-process rights and an unconstitutional taking of his property. We affirm.

FACTS

Appellant B.M.W. pleaded guilty to third-degree criminal sexual conduct in 1993, in violation of Minnesota Statutes section 609.344 (1992), following his sexual encounter with a 13-year-old girl that occurred when he was 18 years old. The conviction for that offense required that B.M.W. register as a predatory offender with the BCA. *See* Minn. Stat. § 243.166, subd. 1b(1)(iii) (2024).[1] In 2011, B.M.W. successfully petitioned for expungement of his court records related to this conviction. However, the BCA denied a request from B.M.W. for early termination of his registration requirement.

[1] Subdivision 1b of section 243.166 provides the offenses for which conviction and sentencing requires predatory-offender registration. At the time of B.M.W.'s conviction for third-degree criminal sexual conduct, those offenses were listed under subdivision 1(1) of section 243.166. *See* Minn. Stat. § 243.166, subd. 1(1) (1992). In addition to the statutory basis for B.M.W.'s registration requirement being renumbered since B.M.W.'s relevant conviction, *see* 2005 Minn. Laws ch. 136, art. 3, § 8, at 937, 939 (moving the relevant list of crimes requiring registration from subd. 1 to subd. 1b, the subdivision has undergone other amendments since its enactment and the events underlying this matter, but those amendments are not relevant to this case and therefore we do not further address them.

In September 2020, B.M.W. closed on the purchase of a home in Apple Valley. That November, he notified the Apple Valley Police Department that he had moved from Burnsville to Apple Valley. Law enforcement informed B.M.W. that he could be cited for violating a city ordinance that restricts where individuals convicted of certain sexual offenses can live. *See* Apple Valley, Minn., Code of Ordinances § 130.08(C) (2023). The ordinance provides, in pertinent part:

> (1) It is unlawful for any designated offender to establish residence or otherwise reside within 1,500 feet of any of the following uses (hereinafter referred as "protected zones"):
>
> . . . .
>
> (b) Public park with playground equipment or other public facility designed or used for youth activities, including recreation centers, ice arenas, and aquatic centers, as designated in the city's official parks list . . . .

Id. A "designated offender" includes a person who has been convicted of "a designated sexual offense . . . in which the victim . . . was less than 16 years of age at the time of the offense" or "[w]ho is required to register as a predatory offender . . . in which the victim of the offense was less than 16 years of age at the time of the offense." Apple Valley, Minn., Code of Ordinances § 130.08(B) (2023). In turn, a "designated sexual offense" includes a conviction of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344—the offense of which B.M.W. was convicted. *Id.*

B.M.W.'s residence is approximately 824 feet from a public park—well within the 1,500-foot restriction imposed by the Apple Valley ordinance. Upon being notified that he could be cited for violating the ordinance, B.M.W. refused to relocate, informing law enforcement that "he just purchased the house and [didn't] want to uproot his family." The

city cited B.M.W. for violating the ordinance. The parties do not dispute that the ordinance applies to B.M.W.

B.M.W. petitioned the district court to expunge his BCA records related to his 1993 conviction and requested removal from the BCA's predatory offender registry. The district court denied B.M.W.'s petition following a hearing, determining that its inherent authority to expunge records does not extend to executive-branch records in this situation and that his constitutional arguments are unpersuasive.

B.M.W. appeals.

DECISION

In challenging the district court's denial of his expungement petition, B.M.W. argues that the district court abused its discretion by failing to use its inherent authority to expunge his records. B.M.W. appears to argue that, because the ordinance violates his substantive-due-process rights and results in an unconstitutional taking of his property, and because the BCA's registration requirement makes the ordinance apply to him, the district court must order expungement of his BCA records to prevent infringement of his rights. Because the bases that B.M.W. offers in arguing that expungement is appropriate relate to the constitutionality of the ordinance, we focus our analysis on the merits of those arguments.

Appellate courts ordinarily review a district court's decision on whether to expunge criminal records for an abuse of discretion. *State v. M.D.T.*, 831 N.W.2d 276, 279 (Minn. 2013). However, whether the district court's inherent expungement authority allows it to

expunge B.M.W.'s executive-branch record presents a question of law, which we review de novo. *State v. N.G.K.*, 770 N.W.2d 177, 181 (Minn. App. 2009).

A district court has both statutory and inherent authority to expunge criminal records. *Id.* at 179. At issue in this case is the district court's inherent expungement authority and whether this authority extends to the executive-branch records held by the BCA that B.M.W. seeks to have expunged. We assume without deciding that a district court's inherent expungement authority allows it to expunge executive-branch records to rectify the effects of an unconstitutional ordinance. A district court lacks inherent authority to expunge criminal records when expungement "is not necessary to the performance of a unique judicial function." *M.D.T.*, 831 N.W.2d at 280, 284.

Separation-of-powers principles restrict a branch of government from "intrud[ing] upon the unique constitutional functions of another branch except under limited circumstances." *State v. T.M.B.*, 590 N.W.2d 809, 812 (Minn. App. 1999), *rev. denied* (Minn. June 16, 1999). Therefore, the judiciary must "proceed cautiously in relying on inherent authority" when a petitioner seeks to expunge executive-branch records. *M.D.T.*, 831 N.W.2d at 282 (quotation omitted). Because the BCA, an executive-branch agency, holds the records that B.M.W. seeks to have expunged and "[t]he function of preparing and maintaining criminal records is a unique constitutional function of the executive branch," *T.M.B.*, 590 N.W.2d at 812, we exercise such caution here.

We have explained that the judiciary may only order expungement of executive-branch records when there is "evidence that executive agents abused their discretion in the performance of a governmental function," meaning that the petitioner's rights have been

violated by actions of the executive branch. *State v. A.S.E.*, 835 N.W.2d 513, 516 (Minn. App. 2013) (quotation omitted). When evaluating the scope of the judiciary's inherent authority to expunge executive-branch records, courts must "resolve all reasonable doubts in favor of a co-ordinate branch." *M.D.T*, 831 N.W.2d at 280 (quotation omitted).

Substantive-Due-Process Challenge

B.M.W. appears to raise an as-applied challenge to the constitutionality of the ordinance on substantive-due-process grounds, arguing that the ordinance implicates his fundamental rights and that, therefore, strict scrutiny applies and the ordinance does not survive such review.

Appellate courts review constitutional questions de novo. *State v. Holloway*, 916 N.W.2d 338, 344 (Minn. 2018). Ordinances are presumed constitutional and the power to declare an ordinance "unconstitutional must be exercised with extreme caution and only when absolutely necessary." *Cf. id.* (quotation omitted) (applying analysis to a statute rather than an ordinance).

The United States and Minnesota Constitutions "provide that the government shall not deprive any person of 'life, liberty, or property without due process of law.'" *Id.* (quoting U.S. Const. amend. XIV, § 1; Minn. Const. art. 1, § 7). If a government action that is challenged as unconstitutional implicates a fundamental right, appellate courts "apply strict-scrutiny review, and will only find a statute constitutional if it advances a compelling state interest and is narrowly tailored to further that interest." *Id.* (quotation omitted). If the challenged action does not implicate a fundamental right, appellate courts apply rational-basis review instead, which only requires "that the statute not be arbitrary or

capricious," meaning that "it must provide a reasonable means to a permissible objective." *Id.* at 344-45 (quotation omitted).

We first address whether the ordinance implicates a fundamental right. B.M.W. argues, without citing relevant authority, that the ordinance implicates two fundamental rights: the right "to use and enjoy . . . property" and the right to choose "where his family lives and how [his children] are raised." Because B.M.W. only asserts the right to decide how his children are raised by arguing that the ordinance impermissibly restricts where he can live, we address both of his fundamental-rights arguments in tandem.

A fundamental right is a right "that is objectively, deeply rooted in this Nation's history and tradition." *Id.* at 345 (quotation omitted). When determining whether a right is fundamental, courts consider "historical practice and whether the right has uniform and continuing acceptance across the nation." *Fletcher Props., Inc. v. City of Minneapolis*, 931 N.W.2d 410, 418 (Minn. App. 2019), *aff'd*, 947 N.W.2d 1, 6 (Minn. 2020).[2]

Minnesota courts have never held that the purported right to live where one chooses implicates a fundamental right. *See Gluba by Gluba v. Bitzan & Ohren Masonry*, 735

[2] On appeal at the supreme court, the parties did not contest the court of appeals' determination that no fundamental rights were at stake. *See Fletcher Props.*, 947 N.W.2d at 18 (noting that the parties agreed that rational-basis review applied). Following remand to the district court, the matter has been appealed again on separate grounds than the issues that first brought the matter before this court, and the Minnesota Supreme Court has granted review of that more recent appeal. *See Fletcher Props., Inc. v. City of Minneapolis*, 2 N.W.3d 544 (Minn. App. 2024), *rev. granted* (Minn. May 14, 2024). But because the issues for which the supreme court has granted review do not include the above-described substantive due-process issue, the forthcoming decision is unlikely to affect the point that we address here. *See* 2 N.W.3d 544.

N.W.2d 713, 720 (Minn. 2007) (declining to decide whether the right to live where one chooses is a fundamental right). Indeed, caselaw has determined that certain housing-related restrictions do not implicate fundamental rights. In *Fletcher Properties*, for example, we held that there is not a fundamental right to rent one's property and, accordingly, applied a rational-basis review to a challenged city ordinance that prohibited property owners from refusing to rent their property for reasons related to the Section 8 housing program. 931 N.W.2d at 416, 419-20. And, while not binding authority on this court, we note that the United States Court of Appeals for the Eighth Circuit held that there is not "a fundamental right to live where [one] want[s]," and accordingly applied a rational-basis review to an Iowa statute that prohibits people convicted of certain sex offenses from residing within 2,000 feet of a school or a registered child-care facility. *Doe v. Miller*, 405 F.3d 700, 704, 713-14 (8th Cir. 2005); *see also Doe v. Dean*, 699 S.W.3d 185, 190, 193-94 (Ky. Ct. App. 2024) (applying rational-basis review to statute that prohibits individuals convicted of certain offenses from residing within 1,000 feet of schools, playgrounds, or licensed daycare centers). We therefore conclude that there is no fundamental right to live where one chooses and accordingly apply a rational-basis review to the ordinance. *See Holloway*, 916 N.W.2d at 344-45.

The rational-basis test only requires that an ordinance "not be arbitrary or capricious," meaning that it only needs to "provide a reasonable means to a permissible objective." *Id.* Under this highly deferential test, a court will not strike down an ordinance if the rationality of the ordinance "is at least debatable and the government decision maker

could reasonably have conceived those facts and considerations to be true." *Fletcher Props.*, 947 N.W.2d at 11 (quotation omitted).

The ordinance that B.M.W. challenges included a section titled "findings and intent," which provides that "predatory offenders who prey on children or individuals less than 16 years of age[] are predators who present a threat to the public safety," may "commit more than one offense," and "are likely to re-offend." Apple Valley, Minn., Code of Ordinances § 130.08(A)(1) (2023). The ordinance adds that:

> It is the intent of this section to serve the city's compelling interest to promote, protect and improve the health, safety and welfare of the citizens of the city, particularly children, by creating areas around locations where children regularly congregate in which certain sexual (predatory) offenders are prohibited from establishing residence.

Apple Valley, Minn., Code of Ordinances § 130.08(A)(2) (2023). It was not irrational for the city to have concluded that individuals convicted of sex offenses involving minors pose a risk to public safety and that, as a result, it was appropriate to enact an ordinance preventing these individuals from residing near where children are regularly present. The ordinance therefore survives rational-basis review, and B.M.W.'s substantive due-process challenge fails.

Takings Challenge

B.M.W. additionally argues that the ordinance results in an unconstitutional taking of his property. In support of this argument, B.M.W. points to *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), and contends that, by preventing him from living in his home, the ordinance deprives him of

the use of his home, interferes with his investment-backed expectations, and fails to serve its intended purpose when applied to him. Again, appellate courts review constitutional questions de novo. *Holloway*, 916 N.W.2d at 344.

The federal and state constitutions prohibit takings "without just compensation." U.S. Const. Amend. V; Minn. Const. art. 1, § 13. The government need not physically invade property for a taking to occur; rather, a regulation can also result in a taking. *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 632 (Minn. 2007). Courts engage in a fact-specific inquiry in evaluating whether a taking has occurred. *Id.*

In *Penn Central*, the United States Supreme Court identified the following factors as relevant to evaluating whether a taking has occurred: "[t]he economic impact of the regulation on the claimant . . . , the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action." 438 U.S. at 124 (citation omitted). The Minnesota Supreme Court has largely adopted the *Penn Central* test. *See Wensmann Realty*, 734 N.W.2d at 632-33.

Regarding the economic impact, the inquiry "turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Id.* at 634 (quotation omitted). The method of determining economic impact depends on the circumstances. *Id.* B.M.W. argues that the ordinance creates a substantial economic impact because it deprives him of the use of his home and forces him to sell the home. B.M.W.'s argument is unpersuasive because he will presumably be able to recoup much of his investment by selling the home, and there

is no indication that, outside of a desire to see the home appreciate in value, he chose the property for a special reason as an economic investment.

Turning to the investment-backed expectations, "the existing and permitted uses of the property when the land was acquired generally constitute the primary expectation of the landowner regarding the property." *Id.* at 637 (quotation omitted). B.M.W. argues that this factor weighs in his favor because he expected to live in the home for "many years" and that the home would appreciate in value. However, the city passed the ordinance that B.M.W. challenges in 2017 and last amended it in May 2020, which is well before B.M.W. closed on the home in September 2020. *See* Apple Valley, Minn., Code of Ordinances § 130.08 (2023). B.M.W., having been convicted of the underlying sex offense in 1993, should have been aware that there may be some restrictions on where he can live. In any case, the challenged ordinance was in effect when B.M.W. purchased the home and was publicly available for his review. Any impact that the ordinance has on B.M.W.'s investment-backed expectations is largely self-inflicted.

Lastly, courts look to "the nature rather than the merit of the governmental action" when evaluating the character of the governmental action. *Wensmann Realty*, 734 N.W.2d at 639. Under this inquiry, "an important consideration involves whether the regulation is general in application or whether the burden of the regulation falls disproportionately on relatively few property owners." *Id.* Specifically targeting certain properties, for example, counsels in favor of determining that a taking has occurred. *See id.* at 639-40. Here, although the ordinance only impacts the relatively few individuals it classifies as

"designated offenders," it is broad in the sense that it does not specifically target B.M.W. or his property; rather, it applies to all individuals who qualify as designated offenders.

Considering the *Penn Central* factors, the city's ordinance does not constitute a taking, in large part because the ordinance did not significantly impact B.M.W.'s economic expectations and he does not have valid investment-backed expectations in the property.

And, because B.M.W.'s constitutional arguments present the only bases for his challenge to the district court's denial of his expungement petition, and these arguments fail, we accordingly affirm the district court.

Affirmed.