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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1284**

DiMa Corporation,
Appellant,

vs.

City of Albert Lea,
Respondent.

**Filed April 15, 2013
Reversed and remanded
Johnson, Chief Judge**

Freeborn County District Court
File No. 24-CV-12-530

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Minnesota (for appellant)

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Considered and decided by Johnson, Chief Judge; Stoneburner, Judge; and
Toussaint, Judge.*

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

UNPUBLISHED OPINION

JOHNSON, Chief Judge

DiMa Corporation owns a portable sign that it rents to customers for purposes of advertising. The city of Albert Lea adopted an ordinance that, the city contends, prohibits DiMa's customers from using the sign. DiMa commenced this action to challenge the city's interpretation of its ordinance and to assert a First Amendment right to rent the sign to customers despite the ordinance. DiMa moved for a temporary injunction to prevent the city from enforcing the ordinance while the action is pending. The district court denied the motion. We conclude that the district court erred by determining that DiMa is unlikely to succeed on the merits of its claims and would not suffer irreparable harm if the ordinance were not enjoined and, thus, erred by denying the motion for a temporary injunction. Therefore, we reverse and remand for entry of a temporary injunction.

FACTS

DiMa owns a portable sign that is approximately 8 feet tall and 20 feet long. It is mounted on a frame with two axles and four wheels so that it can be towed. DiMa rents the sign to businesses in the city of Albert Lea and elsewhere.

In November 2006, the city issued a citation to one of DiMa's customers for using the sign in violation of a city ordinance. DiMa commenced a civil action against the city in the United States District Court for the District of Minnesota, alleging that the city's ordinance was contrary to the First Amendment to the United States Constitution. In

January 2007, however, DiMa and the city entered into a settlement agreement in which the city agreed to, among other things, not enforce the ordinance against DiMa.

In October 2011, the city amended its sign ordinance by substantially rewriting it. The city's amended sign ordinance now permits portable signs only if they do not exceed 32 square feet in area and 8 feet in height. It is undisputed that DiMa's portable sign does not comply with the size limitations of the amended ordinance. But the amended ordinance also allows lawful nonconforming signs to continue to be used.

In December 2011, one of DiMa's customers, the Marion Ross Performing Arts Center, applied for a permit to place DiMa's portable sign in its parking lot. The city denied the permit application on the ground that DiMa's sign violates the size requirements of the amended ordinance. DiMa appealed that decision to the city's Board of Zoning Appeals, arguing that its sign is a lawful nonconforming sign. The board rejected DiMa's argument.

In March 2012, DiMa commenced this action in the Freeborn County District Court. DiMa pleaded two causes of action: it sought judicial review of the board's decision pursuant to state law and alleged a cause of action under 42 U.S.C. § 1983 (2006) for a violation of its First Amendment rights. DiMa prayed for relief in the form of a permanent injunction prohibiting enforcement of the city's amended ordinance against the sign and for money damages. DiMa promptly moved for a temporary injunction while the case is pending. In May 2012, the district court denied DiMa's motion for a temporary injunction. DiMa appeals.

DECISION

DiMa argues that the district court erred by denying its motion for a temporary injunction. In considering such a motion, a district court should evaluate the following factors: (1) the relationship between the parties prior to the dispute; (2) the balance of harms between the two parties; (3) the likelihood that the moving party will succeed on the merits; (4) public policy concerns; and (5) the administrative burdens associated with enforcing the injunction. *Dahlberg Bros., Inc. v. Ford Motor Co.*, 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965). On appeal from the denial of a motion for a temporary injunction, this court applies an abuse-of-discretion standard of review. *Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203, 209 (Minn. 1993). A district court may abuse its discretion if its analysis or conclusions are based on “an erroneous interpretation of the applicable law.” *Fannie Mae v. Heather Apartments Ltd. P’ship*, 811 N.W.2d 596, 599 (Minn. 2012).

The district court determined that four of the *Dahlberg* factors favored the city and that the fifth factor favored DiMa, as the city conceded. DiMa focuses its challenge on two factors: the likelihood of success on the merits and the balance of harms. DiMa essentially argues that the district court should have reached different conclusions with respect to both of those factors and, consequently, should have granted the motion instead of denying it. The city does not challenge the premise that different conclusions with respect to these two factors would require the motion to be granted instead of denied.

Before analyzing the parties’ arguments, we note that there is an unusual degree of discontinuity between DiMa’s arguments in the district court, the city’s arguments in the

district court, the district court's analysis, DiMa's arguments in this court, and the city's arguments in this court. We would be compelled to ignore some of the appellate arguments made by both parties if we were to strictly apply the caselaw concerning preservation of errors and arguments. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). But the parties themselves have not accused each other of a failure to preserve their appellate arguments. In addition, we recognize that this appeal is interlocutory in nature and that the parties and the district court will be confronting the same issues at trial. Accordingly, we will address all arguments and issues raised by the parties' briefs and oral arguments.

A. Likelihood of Success on Merits

DiMa argues that the district court erred by determining that DiMa is unlikely to succeed on the merits of its claims. Specifically, DiMa contends that it is likely to succeed on the merits because it is entitled to continue displaying its sign pursuant to the nonconforming-use provision of the 2011 amended ordinance.

The nonconforming-use provision on which DiMa relies is contained in section 74-1005 of the Albert Lea City Code, which provides, in relevant part, as follows:

Signs that were legally installed prior to the adoption of this chapter and that do not conform to the requirements of this chapter when adopted are nonconforming signs and shall comply with the following requirements:

- (1) It is recognized that signs exist within the zoning district that were lawful before this sign ordinance was enacted, which would be prohibited, regulated or restricted under the terms of this chapter or future amendments. It is the intent of this sign ordinance that nonconforming signs shall not be enlarged upon,

expanded or extended, nor be used as grounds for adding other signs or uses prohibited elsewhere in the same district. It is further the intent of this sign ordinance to permit legal nonconforming signs existing on the effective date of this sign ordinance, or amendments thereto, to continue as legal nonconforming signs provided such signs are safe, are maintained so as not to be unsightly, and have not been abandoned or removed subject to the following provisions:

.....

- c. Should such sign or sign structure be moved for any reason for any distance whatsoever, it shall thereafter conform to the regulations for the zoning district in which it is located after it is moved.

- d. No existing sign devoted to a land use not permitted by the zoning code in the zoning district in which it is located shall be enlarged, extended or moved except in changing the sign to a sign devoted to a land use permitted in the zoning district in which it is located.

Albert Lea, Minn., Code of Ordinances § 74-1005 (2011).

DiMa contends that its prior use satisfies all of the requirements of section 74-1005, including the requirement that its prior use was lawful. In response, the city contends that DiMa's prior use was not lawful because it violated the prior ordinance. The city also contends that DiMa's present use does not satisfy the particular requirements of the nonconforming-use provision. DiMa has two contentions in rebuttal. First, in the district court, DiMa contended that its prior use was lawful because it never was declared unlawful and because the settlement agreement precludes the city from arguing that the prior use was unlawful. Second, in the district court and on appeal,

DiMa contends, in the alternative, that its prior use was lawful because, even if its prior use violated the terms of the prior ordinance, the prior ordinance was unconstitutional.

1.

The parties previously disputed in federal court whether the city's prior ordinance was constitutional. The federal district court never reached the merits of the dispute because the parties settled the case and agreed to its dismissal. Thus, the federal district court never declared DiMa's prior use to be lawful and never declared it to be unlawful.

As part of the settlement agreement, the city agreed to not enforce the prior ordinance against DiMa. But the city's present argument in opposition to DiMa's nonconforming-use status depends on the validity of the prior ordinance. In essence, the city now seeks to enforce the prior ordinance by asserting it as a reason why DiMa does not satisfy the non-conforming use provision of the amended ordinance. To allow the city to proceed with that argument would effectively allow the city to enforce the prior ordinance and thereby breach the settlement agreement. Thus, the city may not attempt to show that DiMa's prior use violated the prior ordinance.

2.

Even if the city were allowed to rely on the prior ordinance in arguing that DiMa's prior use was not lawful, the city likely could not prevail on that argument because DiMa appears to have a valid argument that the prior ordinance was unconstitutional.

In the prior lawsuit, DiMa argued that the prior ordinance was unconstitutional on the ground that it imposed impermissible content-based restrictions. DiMa relied on this court's opinion in *Goward v. City of Minneapolis*, 456 N.W.2d 460 (Minn. App. 1990),

in which we held unconstitutional an ordinance prohibiting all signs except “for sale” signs, “for rent” signs, and temporary political signs. *Id.* at 463. We reasoned that the ordinance was content-based because the exceptions “permit certain signs based solely on the speech contained on them.” *Id.* at 464-65. We reasoned further that the ordinance was unnecessary to achieve a compelling state interest and, thus, was unconstitutional. *Id.* at 466; *see also Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 99, 92 S. Ct. 2286, 2292 (1972).

The city’s prior ordinance in this case is similar to the ordinance in *Goward*. The city’s prior ordinance prohibited all portable signs “unless placed by a city-licensed portable sign business.” Albert Lea, Minn. Code of Ordinances § 74-1002(4) (1997). Portable signs were defined to mean “any business or outdoor advertising sign which is not permanently attached to a building or a freestanding structure mounted or installed in the ground, *except for real estate, construction, subdivision or plat signs or political signs.*” Albert Lea, Minn. Code of Ordinances § 74-996 (1997). (Emphasis added.) Because the prior ordinance prohibited some portable signs but exempted others based on their content, DiMa appears to have had, and continues to have, a valid argument that the prior ordinance was unconstitutional. If the prior ordinance was unconstitutional, it was void *ab initio*, *Lovgren v. People’s Elec. Co., Inc.*, 380 N.W.2d 791, 795 n.6 (Minn. 1986), which would mean that the prior ordinance could not be recognized as law and “is as inoperative as if it had never been enacted,” *Fedziuk v. Comm’r of Pub. Safety*, 696 N.W.2d 340, 349 (Minn. 2005). In that event, DiMa’s prior use would be lawful.

3.

In the district court, the city also contended that DiMa's present use does not satisfy the requirements of the nonconforming-use provision of the amended ordinance for two other reasons.

A court should interpret a city ordinance according to three principles:

First, courts generally strive to construe a term according to its plain and ordinary meaning. . . .

Second, zoning ordinances should be construed strictly against the city and in favor of the property owner

[Third,] A zoning ordinance must always be considered in light of its underlying policy.

SLS P'ship v. City of Apple Valley, 511 N.W.2d 738, 741 (Minn. 1994) (alterations in original) (quoting *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608-09 (Minn. 1980)). We apply a *de novo* standard of review to a district court's interpretation of a city ordinance. See *Frank's Nursery*, 295 N.W.2d at 608.

First, the city contended in the district court that DiMa cannot satisfy the amended ordinance's requirement that its prior use was in existence on the effective date of the amended ordinance. DiMa, on the other hand, contends that the ordinance requires only that the prior use be in existence at some point before the effective date of the amended ordinance. The first paragraph of section 74-1005 of the amended ordinance refers to signs "that were legally installed *prior to* the adoption of this chapter." Albert Lea, Minn. Code of Ordinances § 74-1005 (emphasis added). Similarly, the first sentence of paragraph (1) refers to signs "that were lawful *before* this sign ordinance was enacted."

Id. (emphasis added). But the third sentence of paragraph (1) refers to signs “existing on the effective date of this sign ordinance.” *Id.* The city does not contend that DiMa’s sign was not “existing on the effective date of this sign ordinance.” *Id.* Whether DiMa’s sign satisfies the requirements of the nonconforming-use provision of the amended ordinance depends on the application of the entirety of the third sentence of paragraph (1). The city has not demonstrated that DiMa cannot satisfy the requirements of that sentence. Thus, DiMa’s claim is likely to survive this counterargument by the city.

Second, the city also contended in the district court and at oral argument on appeal that DiMa cannot satisfy the requirements of the nonconforming-use provision of the amended ordinance because, pursuant to paragraph (c), the sign loses its nonconforming-use status whenever it is moved. In response, DiMa contends that its sign would lose its nonconforming-use status only if it were moved to another zoning district in which it would be unlawful. DiMa further contends that, because its sign was lawful in all zoning districts before the 2011 amendments, the sign remains lawful in all zoning districts. The language of paragraph (c) supports DiMa’s contention to the extent that paragraph (c) provides that a nonconforming sign may be moved to a different location if the sign thereafter “conform[s] to the regulations for the zoning district in which it is located after it is moved.” The city has not demonstrated that DiMa’s sign would not conform to the regulations applicable in other districts. Thus, DiMa’s claim also is likely to survive this counterargument by the city.

For these reasons, DiMa is likely to succeed on the merits of its argument that its present use satisfies the requirements of the nonconforming-use provision of the amended ordinance.

B. Balance of Harms

DiMa also argues that the district court erred by determining that the balance of harms weighs in favor of the city. The party seeking a temporary injunction must establish that it will suffer irreparable harm if its motion is denied, while the party opposing the motion need show only substantial harm. *See Pacific Equip. & Irrigation, Inc. v. Toro Co.*, 519 N.W.2d 911, 915 (Minn. App. 1994), *review denied* (Minn. Sept. 16, 1994).

DiMa contends that the balance of harms does not favor the city for two reasons. First, DiMa contends that any restriction on its First Amendment rights would constitute irreparable harm as a matter of law. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690 (1976). The city does not respond directly to DiMa’s contention; rather, the city responds only by contending that it has not violated DiMa’s First Amendment rights because its ordinance is a valid time, place, and manner restriction. *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 3069 (1984). Although the issue has not been thoroughly briefed, DiMa appears to be correct that irreparable harm is presumed if there is a First Amendment violation.

Second, DiMa contends that, in the absence of a temporary injunction, it would suffer lost profits for which it would not be able to recover because the city would be immune from liability for damages. The city did not respond to this claim, but the city did plead immunity as an affirmative defense. At oral argument, the city's appellate counsel did not disavow the city's interest in asserting immunity from any award of damages. The common-law doctrine of vicarious official immunity would protect the city from liability for damages if DiMa's claims are based on the "quasi-judicial" actions of city officials that are "the product or result of investigation, consideration, and deliberate human judgment based upon evidentiary facts of some sort commanding the exercise of their discretionary power." *City of Shorewood v. Metropolitan Waste Control Comm'n*, 533 N.W.2d 402, 404 (Minn. 1995) (quotation omitted). Although the parties have provided only limited briefing on this issue, it appears that the city would be immune from liability for damages and, thus, that DiMa will suffer irreparable harm from the denial of its motion for a temporary injunction.

In sum, we conclude that the district court erred in its analysis of the second and third *Dahlberg* factors. Consequently, the district court erred by denying DiMa's motion for a temporary injunction. Therefore, we reverse and remand for entry of a temporary injunction.

Reversed and remanded.