IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DAVID C. PLEASANTON, MELAINE MINEAR, ALBERT PICKETT, and LETICIA PICKETT,	)	C.A. No. N10M-03-029-JAP
Petitioners,	)	
v.	)	
DAVID S. HUGG, III, Town Manager of Smyrna, Delaware	)	
Respondent.	)	

Submitted: August 18, 2010
Decided: November 29, 2010

Upon Respondent's Motion to Dismiss Petition for Writ of Mandamus
MOTION GRANTED

MEMORANDUM OPINION

David C. Pleasanton, Smyrna, Delaware, Pro Se Petitioner
Melaine Minear, Smyrna, Delaware, Pro Se Petitioner
Albert Pickett, Smyrna, Delaware, Pro Se Petitioner
Leticia Pickett, Smyrna, Delaware, Pro Se Petitioner

Thomas I. Barrows, Esquire, Dover, Delaware
Attorney for Respondent David S. Hugg, III, Town Manager of Smyrna

JUDGE JOHN A. PARKINS, JR.

Petitioners have filed a Petition for Writ of Mandamus seeking to compel future compliance with the Smryna zoning ordinance by the Town Manager. ("Hugg"). Respondent Hugg has moved to dismiss, and for the reasons that follow his motion is granted.

FACTS

Petitioners Pleasanton and Minear are members of the Smyrna Citizens Coalition who are concerned about purported mismanagement of the Town of Smyrna. Petitioners Albert and Leticia Pickett state that they have a property that shares a common border with two recently constructed dwellings that allegedly do not meet the zoning requirements—the Delaware House Condominium at 34 Main Street and a single-family dwelling at 25 East Mount Vernon Street. All of the petitioners claim that these two properties violate the town's zoning requirements because the lots upon which the buildings were constructed fail to meet the minimum size specified in the zoning code. They also complain about irregularities in the issuance (or non-issuance) of a certification of zoning compliance before issuance of a building permit.

DISCUSSION

There are at least three reasons why the court must dismiss the instant petition.[1] First, Petitioners have failed to exhaust their administrative remedies. Second, Petitioners essentially seek and "obey the law" in the future order and the court will not issue such an order under the guise of a writ of mandamus. Third, a writ of mandamus may not be predicated, as here, on an event which has yet to occur.

Mandamus is an extraordinary writ used to compel performance of a duty by and administrative agency.[2] The writ will issue only when the petitioner can demonstrate "a clear legal right to the performance of a non-discretionary duty."[3] The petitioner must also show that the agency has failed to perform its duty and that no other remedy is available.[4] The writ may therefore not be used as a substitute for an administrative remedy nor may it be used as a substitute for

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[1] Upon consideration of a motion to dismiss, the Court confines itself to the consideration of the facts provided in the allegations of the petition. *Dover Historical Soc. v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1110 (Del. 2003). The motion will not be granted if the plaintiff may recover under any conceivable set of circumstances susceptible to proof under the complaint. *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

[2] 10 *Del. C.* § 564; *Clough v. State*, 686 A.2d 158, 159 (Del. 1996).

[3] *Darby v. New Castle Gunning Bedford Ed. Ass'n*, 336 A.2d 209, 210 (Del. 1975).

[4] 10 *Del. C.* § 564; *Clough*, 686 A.2d at 159; *see Cheswold Aggregates, L.L.C. v. Town of Cheswold*, 1999 WL 743339, *1 (Del. Super. July 2, 1999) (finding that "Delaware has adopted the doctrine of exhaustion of administrative remedies, which requires that where a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will either review any action by the agency or provide an independent remedy").

an appeal from an administrative decision where such an appeal is allowed by rule or statute.[5] This principle stems from the strong presumption in favor of the exhaustion of administrative remedies.[6]

The instant petitioners have failed to avail themselves of their administrative remedies. They concede that they did not appeal from the final ruling of the Board of Adjustment which was adverse to them. They offer an explanation (albeit not a valid one) for their failure to do so, but the reasons proffered here are irrelevant in the instant matter.[7] What is relevant is that the petitioners had a clear administrative remedy of which they failed to avail themselves. The court therefore declines to grant the writ.[8]

There is a second reason why the court must deny the writ. The duty sought to be enforced is that respondent follow the law in the future.[9] The duty to be enforced by a writ of mandamus must be specific and precise such that no

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[5] The courts of this state have repeatedly held that mandamus "may not be invoked as a substitute for appellate review." *In re Herring*, 925 A.2d 503 (Del. May 3, 2007) (ORDER) (citing *Matushefske v. Herlihy*, 214 A.2d 883, 885 (1965))

[6] *See Hundley v. O'Donnell*, 1998 WL 842293, *2 (Del. Ch. Dec. 1, 1998).

[7] There is no claim that court or township personnel prevented them from appealing.

[8] *See In re Herring*, 925 A.2d 503.

[9] At times petitioners couch their argument as a request to "prevent the future issuance of building permits" where requirements of the local zoning ordinance are not met. This is the functional equivalent of commanding respondent to obey the law in the future.

In their respnse to Respondent's motion to dismiss, Petitioners mention in passing some sort of duty on behalf Respondent to remove the allegedly illegal buildings. Yet, Petitioners do not petition for such a remedy, nor do they provide any facts or offer legal grounds for the removal of the buildings. Petitioners also have not joined the owners, lien holders and any tenants of those buildings, any of whom would be a necessary party in an action seeking removal of the buildings.

discretion is involved in its performance.[10] Public officials are, of course, expected to obey the law and nothing in this opinion is intended to suggest otherwise. However a command to "obey the law" does not constitute the specific, clear cut command required in a writ of mandamus. Courts have traditionally refused to issue "obey the law" injunctions because the requirements of such an injunction are too vague to put the enjoined party on notice as to precisely what is required.[11] The same rationale applies here. Therefore the petition must be dismissed on this ground also.

Finally, a petition for writ of mandamus must be dismissed where the action complained of has yet to occur.[12] In *Cason v. State*, a petition for writ of mandamus was deemed premature and meritless and, therefore, denied where the petitioner asked the Court to compel a state agency "to act should certain . . . future events come to pass."[13] The writ cannot be predicated upon some event which has yet to occur.[14] In other words, "mandamus is not granted to take

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[10] *Darby*, 336 A.2d at 211.

[11] See *State ex rel. Hillyer v. Tuscarawas Cty. Bd. of Commrs*., 637 N.E.2d 311, 315 (Ohio 1994); *see also Belitskus v. Pizzingrilli*, 343 F.3d 632, 650 (3d Cir. 2003) (stating that language in an injunctive order that "does nothing more than order [an agency] to obey the law" may be struck from the order)

[12] *Cason v. State*, 1999 WL 743491, *2 (Del. Super. July 20, 1999).

[13] 1999 WL 743491, at *1.

[14] *State ex rel. Oxyhydrogen Co. of Del. v. Simmons*, 50 A. 213, 214 (Del. Super. 1901).

effect prospectively."[15] Since any future failure to comply with the law on the part of Respondent has not yet occurred, the petition must be dismissed as premature.

Accordingly, Respondent's motion to dismiss is hereby **GRANTED** and the petition is **DISMISSED**.

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John A. Parkins, Jr.
Judge

15. *Id*..