

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL H. KANAKRY, MARY ANN
KANAKRY and MCDONALD'S
CORPORATION,

UNPUBLISHED
May 11, 2001

Plaintiffs-Appellees,

v

CITY OF ST. CLAIR SHORES, CITY OF ST.
CLAIR SHORES CITY COUNCIL and CITY OF
ST. CLAIR SHORES PLANNING
COMMISSION,

No. 216010
Macomb Circuit Court
LC No. 97-001494-CZ

Defendants-Appellants.

Before: Hood, P.J., and Doctoroff and K.F. Kelly

PER CURIAM.

Defendants appeal as of right from an order granting plaintiffs' request for a writ of mandamus compelling defendants to approve plaintiffs' site plan for construction of a McDonald's restaurant. We reverse.

On appeal, defendants argue that the trial court abused its discretion by granting plaintiffs' writ of mandamus because defendants' denial of plaintiffs' second site plan was supported by competent, material, and substantial evidence on the record. We agree. A trial court's decision to grant a writ of mandamus will not be disturbed absent an abuse of discretion. *In re MCI Telecommunications Complaint*, 460 Mich 396, 443; 596 NW2d 164 (1999).

First we note that MCR 3.302(C) provides that "[a] superintending control order replaces . . . the writ of mandamus when directed to a lower court or tribunal." Accordingly, a municipal zoning authority is subject to the circuit court's superintending control, not its power of mandamus. *Choe v Flint Charter Twp*, 240 Mich App 662, 666; 615 NW2d 739 (2000). Therefore, the trial court erred by issuing a writ of mandamus requiring defendants to approve plaintiffs' site plan. See *Id.* at 666-667. However, to reverse at this level solely because the court issued a writ of mandamus instead of an order for superintending control "[w]ould be to elevate form over substance." *Id.* at 667. We decline to do so. Notwithstanding, we hold that reversal is warranted because mandamus was improper on other grounds.

In *Lee v Macomb Co Bd of Comm'rs*, 235 Mich App 323, 331; 597 NW2d 545 (1999), the court defined mandamus as “[a] writ issued by a court of superior jurisdiction to compel a public body or public officer to perform a clear legal duty.” Indeed, mandamus is an extraordinary remedy and properly lies where the plaintiff is otherwise without adequate legal recourse and where the following obtain: (1) the plaintiff has a clear legal right to performance of the specific duty sought to be compelled; (2) the defendant has a clear legal duty to perform such act; and (3) the act must be ministerial, “[w]here the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.” *Keaton v Village of Beverly Hills*, 202 Mich App 681, 683; 509 NW2d 544 (1993)(citations omitted). Moreover mandamus:

[w]ill not lie for the purpose of reviewing, revising, or controlling the exercise of discretion reposed in administrative bodies . . . [t]he writ will lie to require a body or an office charged with a duty to take action in the matter, notwithstanding the fact that the execution of that duty may involve some measure of discretion. . . . Stated otherwise, mandamus will lie to compel the exercise of discretion, but not to compel its exercise in a particular manner. Lee v Macomb County Bd of Com'rs, 235 Mich App 323, 332-333; 597 NW2d 545 (1999)(quoting *Teasel v Dep't of Mental Health*, 419 Mich 390, 409-411; 355 NW2d 75 (1984)[Emphasis added.]

Thus, a writ of mandamus may issue to compel the public body to make a discretionary decision but cannot issue to direct the public body to make a *specific* discretionary decision. See *Dowork v Charter Tp of Oxford*, 233 Mich App 62, 74-75; 592 NW2d 724 (1998) (holding that granting or denying a variance is a discretionary action and defendant was thus not entitled to the requested relief where defendant sought a writ of mandamus to compel the township to grant plaintiff's request for a variance).

Respecting the aforementioned principles, the first inquiry is whether defendants have discretionary authority when approving site plans and issuing building permits pursuant to defendant city's zoning ordinance. *Hessee Realty v Ann Arbor*, 61 Mich App 319, 323; 232 NW2d 695 (1975). Section 15.509(5) [35.82(5)] of defendant city's zoning ordinance states:

STANDARDS FOR SITE PLAN APPROVAL. The Planning Commission shall recommend approval and the City Council shall approve a site plan only if the site plan meets all applicable standards set forth in the Ordinance, and only upon finding that the site design will not, on the basis of facts known at the time of submission of the site plan, have an unduly harmful impact on surrounding property owners or the City as a whole. The Planning Commission or City Council may, as a basis for making such findings, require whatever site plan modifications it deems necessary, including the provision of additional site design amenities not specifically required by the Ordinance. In addition the Planning Commission and City Council shall use [enumerated criteria] in evaluating a site plan[Emphasis added].

According to the applicable zoning ordinance, defendants must approve a site plan if the plan, (1) meets ordinance standards and (2) does not pose an unduly harmful impact on

surrounding property owners or the city. Although the first prong is necessarily a ministerial act, the second prong of the standard involves discretion on the part of the planning commission and city council. Even if a site plan meets all applicable standards set forth in the ordinance, the planning commission and city council still has the discretion to reject a site plan if they determine that it will have an unduly harmful impact on surrounding property owners or the city as a whole. This inquiry involves a subjective review by council members and interjects some measure of discretion into the decision making process. See *Dowerk, supra* at 75 (granting or denying a variance is a discretionary act); *South Haven, supra* at 52 (granting or denying consent by the township for permission to extend water pipeline is discretionary); *Hessee Realty, supra*, at 323 (approval of site plans and granting of building permits is discretionary).

In the case at bar, we find that mandamus was inappropriate because defendants' decision to deny plaintiffs' site plan was a decision involving discretionary authority vested in an administrative agency. See *Tuscola Co Abstract Co supra* at 512. Because defendants' decision to deny approval of plaintiffs' site plan was partially an exercise of discretionary authority and not a purely ministerial act, the trial court improperly granted the extraordinary writ. See *Dowerk*, at 75.

However, even though defendants' decision to deny plaintiffs' site plan was an exercise of its discretionary authority, defendant's decision, is nevertheless subject to review for an abuse of discretion. *Choe supra* at 665. If defendant's decision is supported by competent, material, and substantial evidence on the whole record, that decision will survive judicial review and must be upheld. *Dowerk supra* at 72; see also, MCL 125.585(11)(c); MSA 5.2935(11)(c). "'Substantial evidence' is evidence that a reasonable person would accept as sufficient to support a conclusion." *Id.*

After a thorough review of the whole record, we find that defendant's decision to deny plaintiffs' second site plan was indeed supported by competent, material, and substantial evidence. Because the trial court ordered the writ of mandamus compelling defendants to approve the October 10, 1996, site plan, this court will review that portion of the record pertaining to that specific plan.¹

In the instant case, the record is replete with competent and substantial evidence to support defendants' decision to deny plaintiffs' second site plan. Pursuant to trial court's order of August 15, 1997, defendant planning commission reviewed plaintiffs' revised or second site plan on August 26, 1997. During that meeting, defendants raised a number of concerns and objections to plaintiffs' site plan leading to defendants' ultimate decision to reject the plan.

First, pursuant to Zoning Ordinance section 35.73(12)(3)(h), fourteen stacking spaces were required for the plaintiffs to have two drive-thru windows. Plaintiffs' site plan only provided for nine stacking spaces. This non-conformance *alone* was sufficient for defendants to

¹ The trial court stated that the October 10, 1996, site plan was improperly denied, and as a result, subsequent site plans need not have been considered. Thus, defendants' objections to any of those site plans were irrelevant.

deny the site plan because it failed to meet the standards required by the applicable ordinance. Furthermore, defendants found that the deficient number of stacking spaces would create a hazardous condition by causing the extra cars to back-up onto Little Mack Avenue. Additionally, defendants studied and determined that the lack of a sufficient number of stacking spaces would have a negative effect on the entry of cars into the site, pose a risk to pedestrians, compel patrons to pass through the line of stacked cars to gain access to the restaurant, pose a problem for those attempting to pull their cars in and out of parking spaces, make it virtually impossible for the handicapped patrons to access the handicapped parking spaces, and finally make it difficult, at best, for delivery trucks to access the loading zone. Additionally, defendants also raised concerns about the size of the loading zone itself. It appeared that a forty-foot delivery truck would be unable to make the turn necessary to pull into the loading zone. Further, to even maneuver into the loading zone, the delivery trucks would have to not only cut through the stacking lane, but also, either pull out into one-way traffic, or back out onto Little Mack Ave thereby creating a significant traffic hazard. Finally, defendants voiced concern regarding the small size of the property for the intense use requested. It appeared that the space deficiencies affected delivery trucks, their drivers, and pedestrians in the area.² And the site plan exhibited conflicting traffic patterns. Thus, defendants determined that the cumulative affect of the deficiencies inherent in plaintiffs' proposed site plan would cause an unduly harmful impact on the city as a whole.

The record reveals that defendants' concerns, objections, and ultimate decision to deny plaintiffs' second site plan were based on facts and information provided by experts in the form of a traffic study relative to the site plan, a report from defendant city's planning consultant³, and a traffic report compiled by the Traffic Improvement Association for defendant city. A review of the entire record reveals that the decision to deny approval was not an arbitrary or capricious decision, but rather, was an informed decision based on competent, material, and substantial evidence on the whole record. Accordingly, the trial court improvidently granted plaintiffs' request for a writ of mandamus.

Moreover, a writ of mandamus properly issues where the party seeking the extraordinary relief establishes a "[c]lear legal right to performance." In the case *sub judice*, plaintiffs cannot satisfy that requirement. In light of the deficiencies inherent in plaintiffs' site plan relative to the applicable ordinance, plaintiffs did not have the requisite "clear legal right" to have the city approve their site plan. The site plan did not provide for enough stacking spaces and the city determined that this deficiency would necessarily have an "unduly harmful impact" on the surrounding community. Because plaintiffs did not have a clear legal right to the performance sought, and defendants did not have the concomitant clear legal duty to perform, and because the act sought involved discretionary authority, the trial court abused its discretion by granting the writ of mandamus compelling defendants to accept plaintiffs second site plan. We cannot uphold this order.

² In addition, defendants also recognized that because of the schools in the area, the deficiencies in plaintiffs' site plan also raised safety concerns for the children attending those schools.

³ The city's planning consultant also recommended that plaintiffs' site plan be denied because of the plan's physical deficiencies.

Reversed and remanded for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood

/s/ Martin M. Doctoroff

/s/ Kirsten Frank Kelly