

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Donald L. Hamilton Jr. and :
Katherine Hamilton :
 :
v. : No. 296 C.D. 2010
 : Submitted: September 10, 2010
Borough Council of South :
Williamsport, :
Appellant :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: December 22, 2010

The Borough Council of South Williamsport (Borough) appeals a writ of mandamus issued to it by the Court of Common Pleas of Lycoming County (trial court) upon the request of Donald and Katherine Hamilton. The writ directs the Borough to enforce its Property Maintenance Code (Code)¹ with respect to two industrial properties near the Hamiltons' residence. Finding the writ to have been improvidently granted, we reverse.

The Hamiltons own a home located at 1239 West Front Street, in South Williamsport, which is located in a district zoned for industrial use. There are several businesses near the Hamiltons' home, two of which are at issue here: A-1 Oil

¹ The Borough has adopted the 2009 International Property Maintenance Code (IPMC § _____).

Company, located at 1221 West Front Street, and Peterman's Gulf, located at 124 and 127 Reynolds Street. These properties are located directly across the street and immediately adjacent to the Hamiltons' property. According to the Hamiltons, there are unlicensed and unregistered automobiles, old tires, and other debris sitting outside of Peterman's Gulf and unlicensed and unregistered vehicles, oil tanks, and old boats sitting outside of A-1 Oil Company. Believing that Borough officials have not been enforcing the Code against the owners of A-1 and Peterman's, the Hamiltons petitioned the trial court for a writ of mandamus to compel the Borough to do so.

At a trial on the Hamiltons' petition, the Borough called its former code enforcement officer, Rexford Lowmiller, to testify. Lowmiller stated that the Hamiltons complained numerous times about A-1, Peterman's and virtually every other business in the vicinity. Lowmiller testified that he did not issue a citation to A-1 or Peterman's because he did not believe they were in violation of the Code. Lowmiller noted that the Borough's enforcement policy is more relaxed for properties located in the Borough's industrially zoned districts.

Lowmiller testified that he attempted to placate the Hamiltons by asking the owners of A-1 and Peterman's to clean up their properties and remove items that were unrelated to their business or were no longer needed. Lowmiller achieved some success in this regard; the owners voluntarily removed junk cars, a boat and other debris. Lowmiller also had the Department of Environmental Protection (DEP) inspect Peterman's property. DEP, like Lowmiller, did not find any violations.²

² The Borough also had a third party inspection specialist from Codes Inspections, Incorporated inspect the properties. The specialist could not identify any Code violations.

The trial court reviewed the Code and found that it had specific provisions governing the accumulation of rubbish and garbage and the keeping of unlicensed and unregistered automobiles.³ Based upon these provisions, and the evidence introduced at trial, the trial court found that A-1 and Peterman's were in violation of the Code and that the Borough's enforcement policy lacked merit. Accordingly, the trial court issued a writ of mandamus directing the Borough to enforce the Code. Distinguishing this Court's decision in *South End Enterprises, Inc. v. City of York*, 913 A.2d 354 (Pa. Cmwlth. 2006), the trial court reasoned that the Borough lacked discretion not to enforce the Code. The Borough now appeals.

On appeal,⁴ the Borough contends that the extraordinary remedy of mandamus was inappropriate in this case. While acknowledging that it has a duty to inspect properties within its borders, the Borough argues that its code enforcement

³ The trial court cited two provisions of the Code as applicable to the Hamiltons' complaint. The first, Section 302.8, provides:

Motor Vehicles. Except as provided for in other regulations, no inoperative or unlicensed motor vehicle shall be parked, kept or stored on any premises, and no vehicle shall at any time be in a state of major disassembly, disrepair, or in the process of being stripped or dismantled. Painting of vehicles is prohibited unless conducted inside an approved spray booth.

Exception: A vehicle of any type is permitted to undergo major overhaul, including body work, provided that such work is performed inside a structure or similarly enclosed area designed and approved for such purposes.

IPMC § 302.8. The second provision, Section 308.1, states:

Accumulation of rubbish or garbage. All exterior property and premises, and the interior of every structure, shall be free from any accumulation of rubbish or garbage.

IPMC § 308.1.

⁴ Our scope of review in a mandamus action is to determine whether the trial court abused its discretion or committed an error of law and whether sufficient evidence exists to support its findings. *South End Enterprises*, 913 A.2d at 357 n.4.

officer has the discretion to determine whether a property is in violation of the Code and whether to issue a citation. As part of that discretion, the code enforcement officer may, and should, consider the zoning classification of the property. The Borough asserts that the trial court erred by treating the decision to initiate enforcement of the Code as a mandatory duty or ministerial act for purposes of a mandamus action.

A writ of mandamus is an extraordinary remedy that compels official performance of a ministerial act or mandatory duty. *South End Enterprises*, 913 A.2d at 359. A ministerial act or mandatory duty exists when a public officer is required to perform an act upon a given factual scenario, in a prescribed manner, in obedience to the mandate of legal authority *without regard to his own judgment or opinion*. *Id.* Mandamus cannot be used to compel performance of discretionary acts.⁵ *Lamar Advertising*, 939 A.2d at 999. Mandamus lies only where a clear legal right in the plaintiff and a corresponding duty in the defendant exist, and no other adequate remedy at law exists. *Id.*; *see also Council of the City of Philadelphia v. Street*, 856 A.2d 893, 896 (Pa. Cmwlth. 2004). Furthermore, when a municipal official has exercised discretionary authority, mandamus will not lie to compel a revision of his decision even though the decision may be wrong. *Anderson v. City of Philadelphia*, 348 Pa. 583, 587, 36 A.2d 442, 444 (1944).

We begin by reviewing the applicable provisions of the Borough's Property Maintenance Code. Under the Code, the code enforcement official is

⁵ In mandamus cases, a court may not compel action in a particular manner. *See Lamar Advertising Co. v. Zoning Hearing Board of the Municipality of Monroeville*, 939 A.2d 994, 999 (Pa. Cmwlth. 2007), *appeal denied*, 600 Pa. 751, 965 A.2d 246 (2008). Instead, a court may only direct the agency to do the act which is sought. *South End Enterprises*, 913 A.2d at 360.

charged with the responsibility to inspect properties; to issue notices and orders to ensure compliance with the Code; and to institute appropriate proceedings at law to restrain, correct, or abate violations which continue after appropriate notice is given.

See IPMC §§ 104.2, 104.5, 106.3. However, the Code specifically states:

The code official is hereby authorized and directed to enforce the provisions of this code. *The code official shall have the authority to render interpretations of this code ...* Such interpretations, policies and procedures shall be in compliance with the intent and purpose of [the] code ...

IPMC § 104.1 (emphasis added). Additionally, Section 105.1 provides:

Whenever there are practical difficulties involved in carrying out the provisions of this code, the code official shall have the authority to grant modifications ... provided the code official shall first find that special individual reason makes the strict letter of this code impractical and the modification is in compliance with the intent and purpose of the code and that such modification does not lessen health, life and fire safety requirements.

IPMC § 105.1 (emphasis added). Thus, Sections 104.1 and 105.1 grant the code enforcement officer the discretion to interpret the Code and even modify its application where strict adherence to its terms is “impractical.”

In this case, Lowmiller exercised the above-described discretion and concluded that A-1 and Peterman’s were not in violation of the Code and, further, that the condition of their properties did not pose a health or safety risk to the public. Lowmiller’s interpretation and application of the Code, and his decision not to issue citations to A-1 and Peterman’s, resulted from the exercise of his discretion conferred upon him by the Code. The Code’s broad grant of discretion makes the exercise of

the code enforcement officer's duties beyond the reach of a mandamus action. *South End Enterprises*, 913 A.2d at 359.

Further, it is well-established that the exercise of prosecutorial discretion cannot be compelled, nor is it subject to judicial review. *See Commonwealth v. Sanico, Inc.*, 830 A.2d 621, 629 n.14 (Pa. Cmwlth. 2003), *Lerro ex rel. Lerro v. Upper Darby Township*, 798 A.2d 817, 820-21 (Pa. Cmwlth. 2002)(citing *Commonwealth v. Malloy*, 450 A.2d 689 (Pa. Super. 1982)). The doctrine of prosecutorial discretion also applies to enforcement actions by administrative agencies. *Sanico*, 830 A.2d at 629 n.14 (citing *In re Frawley*, 364 A.2d 748) (Pa. Cmwlth. 1976)). It is the agency's sole province to assess whether a violation has occurred and whether to expend resources on one particular enforcement action as opposed to another. *Sanico*, 830 A.2d at 629 n.14 (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)).

In sum, the Borough's code enforcement officer did not shirk any mandatory duty under the Code. He interpreted and applied the Code in accordance with the discretion granted to him under Sections 104.1 and 105.1 of the Code. The trial court erred by reviewing the officer's discretionary act and substituting its interpretation of the Code for his. Accordingly, we reverse the trial court's order granting a writ of mandamus.

MARY HANNAH LEAVITT, Judge

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Williamsport,	:	
Appellant	:	

ORDER

AND NOW, this 22nd day of December, 2010, the order of the Court of Common Pleas of Lycoming County, dated February 25, 2010, in the above-captioned matter is hereby REVERSED.

MARY HANNAH LEAVITT, Judge