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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 46728-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STUART MCCOLL,

Appellant,

v.

GEOFFREY ANDERSON;
CLALLAM COUNTY DCD ADMINISTRATOR
CLALLAM COUNTY PROSECUTOR

Respondents,

BRIEF OF RESPONDENT CLALLAM COUNTY

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I. IDENTITY OF RESPONDENT

The Respondent is Clallam County (on behalf of its Administrator of the Department of Community Development and its Prosecuting Attorney).¹ Throughout this brief, this Respondent will be referred to as “Clallam County.”

II. INTRODUCTION

Clallam County respectfully asks the Court to affirm the decision of the trial court dismissing Appellant Stuart McColl’s Petition for a Writ of Mandamus. The mandamus action was properly dismissed because essential elements for a writ action were not present, i.e., a “clear duty to act,” and the absence of an “adequate remedy at law.”

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Clallam County believes that the issues pertaining to the assignments of error may best be stated as follows:

A. Whether the trial court correctly dismissed McColl’s mandamus action where (1) the County had no clear

¹ Departments of a local government are not separate legal entities. The only appropriate legal entity for the purpose of suit is the county itself. Nolan v. Snohomish County, 59 Wn. App. 876, 883, 802 P.2d 792 (1990), rev. denied, 116 Wn.2d 1020.

duty to investigate or pursue enforcement action against McColl's neighbor; (2) the alleged infraction occurred years previously, long before McColl purchased his property, and (3) there was an available remedy at law to challenge the neighbor's construction activity.

B. Whether a county planning office and prosecuting attorney have discretion as to which allegations of code infraction warrant expenditure of government time and money.

C. Whether an adequate remedy at law is present, for purposes of mandamus, even if that legal remedy proves to be unsuccessful based on limitations or other defenses.

IV. COUNTERSTATEMENT OF THE CASE

Appellant Stuart McColl purchased a lot on Lake Sutherland in 2012. (Supp. CP 196-197). Shortly thereafter, he brought suit against his neighbor Respondent Geoffrey Anderson, seeking injunctive relief arising from improvements to a dock that had been constructed many years earlier, in 2008. The lawsuit against Anderson was filed on June 10, 2013. (Supp. CP 99-107).

On or about January 10, 2014, Mr. Anderson amended his Complaint to join the Clallam County Department of Community Development (DCD) and the Prosecuting Attorney's Office as defendants. The Amended Complaint also added damages claims against Anderson. (Supp. CP 92-98). In December 2013, Mr. McColl had sent a letter to DCD, demanding that County inspectors investigate and take enforcement action against Anderson for the 2008 dock improvements. McColl's Amended Complaint was filed after Clallam County had determined that its work load and budgetary constraints did not warrant immediate investigation and enforcement action for an alleged minor infraction not jeopardizing the public health or welfare. (Supp. CP 75-76).

On or about July 23, 2014, McColl filed a motion for summary judgment, asking the trial court to enter judgment in his favor against Anderson as well as the Clallam County defendants. On or about August 7, 2014, Clallam County filed a cross-motion, seeking dismissal of McColl's mandamus action. (Supp. CP 78).

The trial court heard oral argument on September 5, 2014 on the cross-motions on McColl's claims against Clallam County. Following oral argument, the Court issued an order granting Clallam County's motion for summary judgment. (Supp. CP 65-66).

McColl filed a Motion for Reconsideration on September 9, 2014. That motion was denied by a Memorandum Opinion and Order dated September 19, 2014. (CP 13-14).

Subsequently, cross-motions for summary judgment between McColl and Geoffrey Anderson were heard and decided by the Court. The Court granted Anderson's motion for summary judgment, entering an order to that effect on October 30, 2014. (CP 9).

McColl filed a Notice of Appeal on October 2, 2014, challenging the trial court's Memorandum Decision on the Motion for Reconsideration involving the claims against the County. Although the filing was premature, the Court of Appeals accepted the Notice of Appeal after the trial court

issued a November 17, 2014 Order resolving the remaining claims between Anderson and McColl.

V. ARGUMENT

A. Mandamus is an Extraordinary Remedy.

The starting point in evaluating any claim for mandamus relief is the settled principle that mandamus is an extraordinary remedy. Walker v. Munro, 124 Wn.2d 402, 407, 879 P.2d 920 (1994). Mandamus is available only under narrow circumstances. A party seeking a writ of mandamus must satisfy three strict requirements: (1) the party subject to the writ must be under a “clear duty to act;” (2) the petitioner must be “beneficially interested”; and (3) the petitioner must not have a “plain, speedy and adequate remedy in the ordinary course of law.” RCW 7.16.170. The applicant bears the “demanding” burden of proving all three elements. Eugster v. City of Spokane, 118 Wn. App. 383, 402, 76 P.3d 741 (2003).

As the trial court properly held below, Mr. McColl could not satisfy the strict requirements for mandamus relief. Clallam County’s building enforcement ordinances give substantial discretion to enforcement officers as to what is to be done in the

case of an alleged permitting infraction from the distant past. There is no requirement that the County undertake an investigation or take any specific enforcement action when the public health and safety is not compromised. CCC 20.08.030.

Further, McColl could not satisfy the requirement that there was “no adequate remedy at law” to challenge Anderson’s dock improvements. Mr. McColl not only had a remedy at law, but he was actively pursuing that remedy in the form of a lawsuit for damages and injunctive relief against Mr. Anderson. Because McColl could not satisfy two of the three required elements for mandamus relief, his mandamus petition was properly denied, and Clallam County’s motion for summary judgment was correctly granted.

B. Clallam County Was Not Under a “Clear Duty” to Investigate and Take Action on an Alleged Minor Infraction.

The first reason why mandamus relief was properly denied was the absence of a mandatory obligation that Clallam County undertake investigation and enforcement regarding an alleged building issue which was not an imminent threat to public health and safety. An applicant for a writ of mandamus

must show that the party subject to a writ has a clear duty to act, and this duty must be ministerial rather than discretionary. Seattle Times Co. v. Serko, 170 Wn.2d 581, 588-89, 243 P.3d 919 (2010). A writ of mandamus will not issue to compel the performance of a discretionary act in the absence of arbitrary and capricious conduct. Prosecuting violations of the law is generally recognized as a “highly discretionary” act. Walker v. Munro, *supra*, 124 Wn. 2d at 411.

McColl argues that Clallam County had a mandatory duty to investigate the allegations in his complaint under Chapter 20.08 CCC. That is incorrect. Whether an ordinance creates a clear duty to act is a question of law. River Park Square, LLC v. Miggins, 143 Wn.2d 68, 76, 17 P.3d 1178 (2001). Clallam County Code Section 20.08 gives to the building official substantial discretion as to investigation of alleged infractions, and what enforcement action, if any, will be taken:

20.08.030 Enforcement Authority and Administration.

(1) All conditions determined to be civil code violation *may* be enforced pursuant to the provisions of this title. . . .

* * *

(3) If the director establishes, based on the provisions of CCC 20.08.060, that a civil violation exists, the director *may*:

(a) enter into voluntary compliance agreements . . . ;

(b) issue citations and assess civil penalties . . . ;

(c) issue notice and order re mediation and mitigation of the civil code violation . . . ;

(d) issue Stop Work Orders

(Emphasis added).

Indeed, the County may choose not to investigate or take enforcement action, particularly when its budget is limited, and there are more important matters which need to be attended to:

It is the County's policy to investigate and to attempt to resolve all potential code violations. At the discretion of the director, potential violations may be processed in any order that maximizes the efficiency of enforcement. However, at times when not all potential code violations can be investigated due to lack of resources or otherwise,

the most serious potential violations should be addressed before less serious potential violations. . . .

CCC 20.08.050. The ordinance goes on to list a number of guidelines for prioritization, including whether the alleged violation is an imminent threat to public health or safety, or presents a high risk of damage to public resources.

McColl argues that investigation and enforcement is mandatory under the County's shoreline master program. But the language of the master program relative to investigation is discretionary, and incorporates the discretionary language of CCC Title 20. Thus, CCC 35.01.100 provides as follows:

The Administrator *may* inspect properties as necessary to determine whether permittees have complied with conditions of their respective permits and, wherever there is reasonable cause to believe that development has occurred upon any premises in violation of the Shoreline Management Act of 1971 and this chapter, *may* enter upon such premises . . . to inspect the same. (Emphasis added).

CCC 35.01.130, dealing with Shoreline Master Program enforcement, provides that the Administrator shall initiate code compliance proceedings "according to the provisions of CCC

Title 20.” As noted above, the enforcement provisions of CCC 20.08 are discretionary in nature. The Shoreline Master Program thus incorporates the discretionary language of the Clallam County Code with respect to investigation and enforcement of alleged Code violations.

McColl argues that the prosecuting attorney for Clallam County had an absolute mandate to immediately investigate and undertake enforcement action against Mr. Anderson’s dock. The only authority he cites for this proposition is the Shoreline Management Act at RCW 90.58.210(1), and the companion County ordinance CCC 35.01.130(2), which authorize the Attorney General or the county prosecutor to enforce shoreline regulations. The suggestion by McColl that these provisions mandate specific and immediate action every time an angry property owner complains about a neighbor is wrong.

It should first be noted that Mr. McColl acknowledged in open court that he was not claiming that the dock improvements damaged the shoreline environment. (RP 9/26/2014, p. 15). Rather, he was complaining about the aesthetic features of the

Anderson dock, i.e., that he does not like its appearance and that it blocks his view. (RP 18-19).

Moreover, even if McColl had raised a potential minor shoreline violation, the County was not under a clear duty to immediately investigate and take action on McColl's complaint.

As is made clear in CCC 35.01.100, supra, considerable discretion is afforded to the administrator of the Shoreline Master Program as to which claims are investigated and, if potential infractions are actually found, how infractions are prioritized for enforcement. Moreover, the very use of the word "shall" in RCW 90.58.210(1) does not necessarily compel action. Where a statute is merely a guide for orderly procedure, rather than a limitation of power, it should be construed as directory, and not mandatory. Seatoma Convalescent Center v. DSHS, 82 Wn. App. 485, 513, 919 P.2d 602 (1996), rev. denied, 130 Wn.2d 1023. "Shall" is interpreted as directory when a literal reading would frustrate the legislative intent. Frank v. Department of Licensing, 94 Wn. App. 306, 311, 972 P.2d 491 (1999).

Further, the use of the term “shall” in RCW 90.58.210(1) is modified by the phrase “as . . . necessary,” evincing the discretion granted to the government to determine which alleged infractions need to be prioritized for prosecution:

. . . the attorney general or the attorney for the local government shall bring such injunctive, declaratory, or other actions *as are necessary*. . . .

RCW 90.58.210(1). A fair reading of this language together with the discretionary language of CCC 35.01.100 and CCC 20.08.030 reflects the discretionary power given to the code enforcement officer as to which complaints will be investigated and, if a violation is found after investigation, which infractions should be prioritized for enforcement. Statutory provisions should be harmonized whenever possible. Koenig v. City of Des Moines, 158 Wn.2d 173, 184, 142 P.3d 162 (2006). In view of the settled proposition that prosecuting violations of the law is highly discretionary, any potential ambiguity in the Clallam County Code should be resolved by recognizing the discretionary power of the building official and the prosecuting attorney.

Mandamus may not be used to compel the exercise of a discretionary duty:

... the action of mandamus is not proper to compel a discretionary act. “The act of mandamus compels performance of a duty, but cannot lie to control discretion.” Thus mandamus can direct an officer or body to exercise a mandatory discretionary duty, but not the manner of exercising that discretion.

Mower v. King County, 130 Wn. App. 707, 719, 125 P.3d 148 (2005).

Here, Clallam County exercised its discretion to not prioritize the claim of McColl regarding his neighbor’s 2008 dock extension, at least under the current budget constraints. The Clallam County Code provides discretion to the building official as to how enforcement will be undertaken, and whether or not a particular complaint will be prioritized, investigated and/or enforced. At the time of Clallam County’s summary judgment motion, the County had not concluded that Anderson’s dock extension was a priority for investigation or

enforcement, especially since there was no evidence of an imminent danger to public health or safety.²

The trial court properly recognized that a local government budget cannot be hijacked by an individual who wishes to pursue a vendetta against his neighbor. Moreover, the County may take into consideration mitigating circumstances in determining whether investigation and enforcement is warranted. In this case, the alleged infraction of which Mr. McColl complained was the extension of a dock by his neighbor Mr. Anderson which apparently occurred in 2008. Mr. Anderson contended that the dock extension was undertaken following a major storm event, which resulted in a washout of a culvert at the outfall of Lake Sutherland. This washout evidently had the effect of lowering the water level of the lake, so that many docks on the lake no longer extended into the water. (Supp. CP 203-204).

In deciding whether to investigate McColl's complaint, the County could take into consideration that the dock

² As time and resources permit, the County reserves the right to investigate and pursue enforcement action against permitting violations.

extension by Mr. Anderson was undertaken many years earlier, long before Mr. McColl purchased his property. Furthermore, Mr. McColl had sued Anderson, and the trial court had not ruled as to whether or not his claim had merit. Given the uncertainty as to the rights of McColl and Anderson, and the budgetary constraints of the County, it was not inappropriate for the County to take no investigation or enforcement action against Anderson at that time.

In short, Clallam County did not have a “clear duty to act” under these circumstances and therefore mandamus relief could not be ordered, as a matter of law.

C. Mandamus Relief is Unavailable Because a Legal Remedy Was Available.

A second reason supporting the trial court’s dismissal of McColl’s mandamus petition is that mandamus may not be invoked where the plaintiff had a remedy at law. The absence of a legal remedy is a mandatory element of any mandamus action. Stafne v. Snohomish County, 156 Wn. App. 667, 687, 234 P.3d 225 (2010), aff’d on related grounds, 174 Wn.2d 24 (2012).

In this case, McColl had a remedy at law, in the form of a suit against his neighbor Mr. Anderson. Indeed he not only had this remedy, but he was actively pursuing it when he joined Clallam County as a defendant. He has asserted claims of negligence and nuisance against Anderson, as well as a claim for injunctive relief. (Supp. CP 96-98). At the time of the Court's dismissal of the mandamus action, the Court had not yet heard all of the evidence and determined whether Mr. McColl's claims against Anderson had merit. But because this legal remedy was available to McColl, he could not invoke mandamus relief against Clallam County. Stafne, 156 Wn. App. at 688. Whether there is a plain, speedy and adequate remedy at law is a question left to the discretion of the court in which the proceeding is instituted. River Park Square v. Miggins, supra, 143 Wn.2d at 76. The trial court's determination will not be disturbed on appeal unless the exercise of discretion was manifestly unreasonable. Id.

McColl argues that he did not have an "adequate remedy of law," because the trial court ultimately dismissed his claims

against Mr. Anderson. But this argument reflects a misunderstanding of the contours of the “adequate remedy at law” element. The fact that McColl’s remedies against Mr. Anderson turned out to be subject to dismissal, based on the statute of limitations and other defenses, does not create standing for purposes of asserting a mandamus claim.

A party’s loss of a statutory or common law remedy through delay does not result in the absence of an “adequate remedy at law,” for the purpose of evaluating writs of mandamus and prohibition. Thus, in Bock v. Pilotage Commission, 91 Wn.2d 94, 586 P.2d 1178 (1979) a state licensing board notified Bock that it would take no further action on his request for a pilotage license. Bock did not file a timely appeal of that decision, but instead filed a petition for mandamus. The Board answered and asserted that the plaintiff had failed to state a mandamus claim upon which relief could be granted because he had failed to pursue the timely statutory appeal remedy within 30 days. The Supreme Court agreed that the courts had no jurisdiction to hear a mandamus petition, in

view of Bock's failure to timely pursue a legal appeal remedy that was available to him:

The court below thus had no jurisdiction to review the Board's action, and should have dismissed the action on that ground.

91 Wn.2d at 100.

Similarly, the fact that McColl's statutory and state law remedies against Anderson may be barred by limitations or other defenses does not satisfy the "absence of an adequate remedy of law" element for mandamus. Because other legal remedies were available to challenge the actions of Anderson in extending his dock, McColl's mandamus claim was without legal foundation, and was properly dismissed.

VI. CONCLUSION

The trial court properly dismissed McColl's mandamus action against Clallam County. This Court should affirm.

Respectfully submitted this 6th day of March,

2015.

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By: 

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Respondents

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served on the parties of record as stated below in the manner indicated:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Seattle, Washington on March 6, 2015.

Nancy Randall
Nancy Randall

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