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IN THE SUPREME COURT OF GUAM

LEE and JOAN HOLMES,)
)
 Petitioners-Appellees)
)
 vs)
)
 TERRITORIAL LAND USE)
 COMMISSION, DEPARTMENT)
 OF LAND MANAGEMENT, GIL)
 A. SHINOHARA, in his official)
 capacity as Director,)
 DEPARTMENT OF PUBLIC)
 WORKS,)
)
 Respondents-Appellants,)
)
 and)
)
 SU EUR HUANG, aka Oceanic)
 Advisory Services, Inc.,)
)
)
 Real Party in Interest.)
)

SUPREME COURT CASE NO. CVA97-010
SUPERIOR COURT CASE NO. SP0140-96

OPINION

Filed June 4, 1998
Cite as: 1998 Guam 8
Appeal from the Superior Court of Guam
Argued and Submitted on 10 December 1997
Hagåtña, Guam

Appearing for the Respondent-Appellant:
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120 West O'Brien Drive
Hagåtña, Guam 96910

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3 BEFORE: PETER C. SIGUENZA, Chief Justice; JANET HEALY WEEKS and EDUARDO A.
4 CALVO, Associate Justices.

5 WEEKS, J.:

6 [1] The Territorial Land Use Commission ("TLUC"), successor to the Territorial Planning
7 Commission ("TPC"), is appealing a judgment of the Superior Court denying a Petition for a Writ
8 of Mandate. The court, while denying the injunctive relief and finding no abuse of discretion by the
9 TLUC, ordered the TLUC to promulgate specific rules and regulations relating to procedures for
10 approving zone changes.

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12 I.

13 [2] Petitioners-Appellees Lee and Joan Holmes ("Holmes") sought a writ of mandamus
14 challenging the granting of a zoning change by the TPC. The Real Party in Interest, Su Eur Huang
15 ("Huang") had gone before the TPC on 13 December 1988 to request a zoning change of Lot Nos.
16 2152-F-5-RI, 5173-REM-PART and 5174-D, Block 1, Tract 7 from R-1 to R-2. The Governor
17 eventually approved the zoning change request on 7 February 1995.

18 [3] The lower court held a hearing on the writ on 10 and 11 October 1996, and as noted, issued
19 a ruling denying the injunctive relief sought, finding no abuse of discretion by the TLUC, the
20 Department of Land Management or Gil Shinohara. However, after determining that the respondents
21 had not abused their discretion, the court then went further and ordered:

- 22 1) that Respondent TLUC shall promulgate and implement the following rules:
- 23 a) establishing an appeal period of thirty (30) days for any party aggrieved by
24 the decisions of the Commission on any zone change application, to the
25 Superior Court of Guam, similar to what is set forth in the Administrative
26 Adjudication Act, 5 GCA § 9241; the thirty (30) day period is to be counted
27 from the date the zone change approval is submitted to the Legislature;
- 28 b) limiting the frequency of zone change applications and setting
standards providing that a subsequent application may not be filed
without a showing of a change of circumstances or condition
warranting a re-application;

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- 3 c) mandating that upon request, adjoining landowners and other interested
- 4 parties are entitled to notice of each stage of the zone change process
- 5 including when it has been acted upon by the TLUC and transmitted to the
- 6 Governor; when it is transmitted to the Legislature, and when it is acted upon
- 7 by the Legislature;
- 8 d) adopting the guidelines set forth in the Administrative Adjudication
- 9 Act, particularly the rules relating to:
- 10 i) the recording of public hearings including the testimony and evidence
- 11 submitted, objections presented, appearances therein,
- 12 ii) the preservation of the records of the Commission;
- 13 e) adopting a rule limiting the time that the Governor has to act upon a zone
- 14 change before it is deemed automatically denied. Prior to adopting such a
- 15 rule, the TLUC shall conduct public hearings pursuant to the Administrative
- 16 Adjudication Act, to solicit comments and suggestions of an appropriate time
- 17 period;
- 18 f) a sunset provision, a notice requirement for alteration, changes or revisions
- 19 of a zone change application; and that the TLUC consider contract zoning.
- 20 2) that the Office of the Attorney General assist the TLUC in drafting the rules and regulations
- 21 identified above;
- 22 3) that the draft rules and regulations be submitted to the Governor and the Legislature
- 23 at the next legislative session in February 1997, or within 120 days of this judgment,
- 24 whichever is later.

25 [4] The Judgment was filed on 24 February 1997, and a timely Notice of Appeal was filed by

26 the TLUC on 24 March 1997. Although the prayer for relief in the Petition for Writ of Mandate

27 does not seek the promulgation of rules and regulations, the record below is clear that the Holmeses

28 requested each of the specific rules and regulations that were ordered by the trial court. Further, the

Petition for Writ of Mandate details the failure of the TPC to adopt rules for the conduct of public

hearings and the absence of procedural rules governing zone changes, and requests, "Such other

relief as at law or in equity may be granted, whether or not prayed for herein." Petition Record at

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II.

[5] This court has jurisdiction to hear this appeal pursuant to 7 GCA § 3107 (1994) and 48 U.S.C. § 1424-3(d)(1987). While at times the Ninth Circuit has reviewed the issuance of mandamus applying federal precedent, *see Hauser v. Department of Law, Government of Guam*, 97 F.3d 1152, 1154 (9th Cir. 1996) (citing *Davis v. United States*, 961 F.2d 867, 878 (9th Cir. 1992)), the Ninth Circuit has, on another occasion, indicated that California case law interpreting mandamus relief is persuasive. *See Apusento Garden (Guam), Inc. v. Superior Court of Guam*, 94 F.3d 1346, 1350 (9th Cir 1996).¹ As we have stated in *Sumitomo Construction Co. v. Zhong Ye, Inc.*, 1997 Guam 8, ¶6, “[D]ecisions of the federal courts are not controlling upon our construction of the law” (citing *People of the Territory of Guam v. Dwayne S. Quenga*, 1997 Guam 6, n.4. [W]hile we will not disturb precedent that is “well supported in law and well reasoned”, we clearly are within our authority to modify those interpretations previously addressed by federal courts. *Id.* In this case, we will use our own independent analysis of the issues before us.

[6] This court concurs with the *Apusento Garden* court in its finding that since Guam’s mandamus statutes were adopted from the California Civil Code, California cases applying the mandamus standard are persuasive authority. *Id.* at 1350. We also find that California cases interpreting California’s mandamus statute are at the very least, instructional. A judgment granting mandamus relief is reviewed to determine whether the judgment is supported by substantial evidence. *Saathoff v. City of San Diego*, 35 Cal. App. 4th 697, 700, 41 Cal. Rptr.2d 352, 354 (Cal. Ct. App. 1995). However, if the facts underlying the judgment are not in dispute, this court may arrive at its own legal conclusions. *Id.* In the present appeal, the relevant facts are not in dispute, and this court will review the trial court’s issuance of mandamus *de novo*.

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¹*Apusento Garden* was filed on 6 September 1996. *Hauser* was filed over a month later on 8 October 1996.

III.

[7] Respondent-Appellant TLUC, the only party to this Appeal, contends that the trial court erred in ordering the promulgation of specific rules and regulations relating to zoning changes.

The Appellant asserts that the Petition for a Writ of Mandate should have been dismissed for failure to exhaust the administrative remedies available to the Holmeses through the Administrative Adjudication Act, which provides a procedure by which a person may petition the agency to promulgate, amend or repeal an administrative rule. The TLUC argues that the Petitioners failed to exhaust this remedy to make the proposed changes to the zoning rules and regulations. We address this as a threshold issue in determining whether the trial court properly granted mandamus.

[8] The Administrative Adjudication Law (“AAL”), 5 GCA Chapter 9, provides a uniform system of rule making procedures for all government of Guam agencies and departments. As stated in its **Legislative Intent**:

It is the intent of the Legislature to establish a uniform method of making, adopting, promulgating, filing and publishing rules by all agencies of this Territory, to permit public participation therein and provide a method of making rules readily accessible to the public. It is not intended to give to any agency any additional rule-making power or authority and no additional or new power or authority to make or adopt rules is given to any agency by this law.

5 GCA § 9300 (1994). The AAL provides detailed and specific procedures for the adoption, repeal, rescission or amendments of rules. *See* 5 GCA § 9301- 9303. Such procedures involve petitioning the agency for the adoption of rules, notice to the public, a public hearing, approval by the Attorney General, approval by the Governor where required by law, and finally, adoption or approval by the Legislature. In this case, there is no indication in the record that the Holmeses availed themselves of this remedy. There are simply requests by the Holmeses for the court to order the promulgation of specific rules and regulations.

[9] Mandamus will not be granted where the petitioner has failed to pursue the administrative remedies available to him. *Chamorro Employees Labor Union (CHELU) v. Calvo*, 2 Guam R. 30, 31 (1980). When an administrative remedy has been provided by statute, this remedy must be

exhausted before the courts will act. *Aguirre v. Lee*, 20 Cal.App.4th, 1646, 1654, 25 Cal. Rptr.2d 367, 371 (Cal. Ct. App. 1993). Because mandamus is an extraordinary remedy issued only when there is not a plain, speedy, and adequate remedy in the ordinary course of law, 7 GCA § 31203 (1993), and because the Holmeses did not avail themselves of this remedy, this court finds that mandamus was improperly granted.

[10] The Appellant further asserts that the promulgation of such rules is not a ministerial act, and therefore the TLUC does not have a duty to promulgate such rules and regulations. The TLUC argues that the writ violates the separation of powers doctrine by allowing the judiciary to step into the legislative arena by ordering the TLUC to exercise its discretion by promulgating specific rules.

[11] A writ of mandate may be issued to compel the performance of an act which the law specially enjoins. 7 GCA § 31202 (1993). As stated above, mandamus is a extraordinary remedy issued only when there is not a plain, speedy, and adequate remedy in the ordinary course of law. 7 GCA § 31203; *see also Apusento Garden*, 94 F.3d at 1346, *Guam Publications v. Superior Court v. People*, 1996 Guam 6 ¶ 10. It is ordered where the respondent has a clear, present and ministerial duty to act, and the petitioner has a clear, present and beneficial right to performance of that duty. *See State Board of Education v. Honig*, 13 Cal.App.4th 720, 741, 16 Cal. Rptr.2d 727, 741 (Cal. Ct. App. 1993). When mandamus is sought against a governmental body, the court must determine whether the act involves the exercise of discretion or a ministerial duty. *United Ass'n. of Journeymen v. City and County of San Francisco*, 32 Cal. App. 4th 751, 759, 38 Cal. Rptr.2d 280, 284 (Cal. Ct. App. 1995).

[12] Mandamus may not ordinarily issue to command a body to exercise its discretion in a particular manner. *Id.*; *Saathoff*, 35 Cal.App. 4th at 702, 41 Cal. Rptr.2d at 355; *Sklar v. Franchise Tax Board*, 185 Cal.App.3d 616, 624, 230 Cal. Rptr. 42, 48 (Cal. Ct. App. 1986). To compel a discretionary action could violate the separation of powers doctrine this Court strives to uphold. *See Taisipic v. Marion*, 1996 Guam 9. Nonetheless, where the exercise of discretion, or the failure to exercise such discretion is so fraudulent, arbitrary, or palpably unreasonable that it constitutes an

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3 abuse of discretion as a matter of law, mandamus may issue. *United Ass'n. of Journeymen*, 32
4 Cal.App.4th at 768, 38 Cal. Rptr.2d at 290; *see also Sklar*, 185 Cal.App.3d at 625, 230 Cal. Rptr.
5 at 49. This abuse of discretion standard is highly deferential. *United Ass'n. of Journeymen*, 32
6 Cal.App.4th at 768, 38 Cal. Rptr.2d at 290.

7 [13] In *Sklar*, the California appellate court conceded that the tax board had a mandatory duty to
8 prescribe rules and regulations, but that it was not an abuse of discretion for the tax board to fail to
9 enact the specific rules and regulations sought by the Petitioner. 185 Cal.App. 3d at 626, 230 Cal.
10 Rptr. at 49-50. We cannot say that the TLUC's failure to implement the specific rules and
11 regulations ordered by the trial court rose to a decision which was "fraudulent, or so palpably
12 unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law." *United Ass'n.*
13 *of Journeymen*, 32 Cal.App.4th at 768, 38 Cal. Rptr.2d at 290. Moreover, the language of 21 GCA
14 § 60405 (1995)² does not require the TLUC to promulgate rules and regulations. Such language is
15 discretionary rather than mandatory.

16 [14] In the instant case, we believe that the trial court erred by ordering the TLUC to promulgate
17 the specific rules identified in the Judgment, after determining that the TLUC had not abused its
18 discretion in granting the zone application. As noted above, when mandamus is sought against a
19 governmental body, the court must first decide if the questioned act is discretionary or ministerial.
20 *United Ass'n of Journeymen*, 32 Cal.App.4th at 759, 38 Cal. Rptr.2d at 284. Herein, the trial court
21 made a finding that the TLUC had not abused its discretionary power. It therefore found by
22 implication that the act involved in the granting of the zone application was discretionary. That
23 finding of non-abuse should have concluded the court's inquiry.

24 [15] The court's further order for the promulgation of specific rules it had formulated exceeds its
25 authority. The promulgation of particular rules and regulations is clearly an exercise of legislative
26 discretion. *See Sklar*, 185 Cal.App.3d at 623, 230 Cal. Rptr. at 47; *Tailfeather v. Board of*
27 *Supervisors of Los Angeles County*, 48 Cal.App.4th 1223, 1238, 56 Cal. Rptr.2d 255, 268 (Cal. Ct.

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²21 GCA § 60405 states: **Same: Rules.** The Commission is authorized to make reasonable rules, not inconsistent with the provisions of this Chapter for the conduct of its business.

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3 App. 1996). It is one thing for a court to order the promulgation of rules and regulations required
4 by statute; it is an entirely different thing for a court to create and then order the adoption of specific
5 rules and specific regulations.

6 [16] We conclude, therefore, that the trial judge erred in ordering the TLUC to promulgate
7 specific rules including zone change provisions, a sunset provision, an appeals period and procedure,
8 contract zoning requirement and other miscellaneous rules. These are policy decisions which are
9 best left to the discretion of the legislature or its designee, the TLUC.

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11 IV.

12 [17] The trial court improperly granted mandamus: first, because Petitioners-Appellees have failed
13 to avail themselves of administrative remedies prior to bringing the writ of mandate; and second, in
14 the absence of a finding of an abuse of discretion as a matter of law, a trial court cannot
15 compel an administrative body to promulgate specific rules and regulations left to the discretion of
16 that body. The judgment below, as it pertains to the promulgation of specific rules and regulations
17 by the TLUC, is hereby REVERSED.

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21 _____
22 EDUARDO A. CALVO, Associate Justice

JANET HEALY WEEKS, Associate Justice

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26 PETER C. SIGUENZA, Chief Justice
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