This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2006).

STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2248

Richard E. Bosse, et al.,
Appellants,

vs.

City of Ottertail, Minnesota,
Respondent,

Dennis Merchant, et al.,
Respondents,

Hexum Building Corp.,
Respondent.

Filed July 29, 2008
Affirmed
Collins, Judge[*]

Otter Tail County District Court
File No. 56-CV-07-1458

Richard E. Bosse, 303 Douglas Avenue, P.O. Box 315, Henning, MN 56551 (for appellants)

Paul A. Merwin, League of Minnesota Cities, 145 University Avenue West, St. Paul, MN 55103; and

Paul B. Hunt, Svingen, Hagstrom, Karkela, Cline, & Dirks, PLLP, 450 West Main Street, P.O. Box 160, Perham, MN 56573 (for respondent City of Ottertail)

Daniel T. Carlisle, Pemberton, Sorlie, Rufer & Kershner, PLLP, 7 Colfax Avenue Southwest, P.O. Box 406, Wadena, MN 56482 (for respondents Dennis Merchant, et al.)

---

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

Mathew A. Soberg, Krekelberg, Skonseng & Soberg, PLLP, 10 North Broadway, P.O. Box 353, Pelican Rapids, MN 56572 (for respondent Hexum Building Corp.)

Considered and decided by Toussaint, Chief Judge; Johnson, Judge; and Collins, Judge.

U N P U B L I S H E D O P I N I O N

COLLINS, Judge

In this land-use dispute, appellants challenge the district court's judgment in favor of respondents. Because the district court did not abuse its discretion by denying appellants' requests for mandamus and injunctive relief, we affirm.

FACTS

The material facts are not disputed. Appellants Richard E. and Ruth R. Bosse own certain real property in Ottertail, and respondents Dennis and Dorothy Merchant own adjacent real property. On June 21, 2007, respondent the City of Ottertail approved the Merchants' application for a zoning permit for the construction of a garage[1] on their property. The Merchants hired respondent Hexum Building Corp. to build the garage, and construction began on July 26, 2007. When the Bosses noticed the construction equipment on the Merchants' property that morning, they went to the Ottertail City Hall and reviewed a copy of the building permit. They then informed the city and the Merchants of their objection to the garage, contending that it was a nonconforming use under The Shoreland Management Ordinance of the City of Ottertail (the zoning ordinance) because there was no dwelling unit erected on the property. The Bosses

[1] The Bosses assert that the garage, which measures 30 feet wide by 48 feet long, is more appropriately referred to as a pole barn.

demanded that the city "enforce it's [sic] zoning ordinance and revoke any and all permits as being non-conforming and instruct the [Merchants] to cease and desist from further construction."

Construction was halted until the morning of August 1, 2007, when the Ottertail city attorney's office faxed the Bosses a letter declaring that it was the city's position that the garage did not violate the zoning ordinance. Construction of the garage was completed by Hexum the following afternoon. On August 6, the Bosses filed a "Petition for Writ of Mandamus and Injunctive Relief, Both Temporary and Permanent, Including Temporary Restraining Order." The city moved to dismiss the Bosses' petition, and, after a hearing on September 24, 2007, the district court denied the Bosses' requested relief and ordered judgment in favor of respondents. The Bosses appeal.

D E C I S I O N

I. The district court did not err by denying mandamus relief.

The Bosses argue, first, that the district court erred by denying their petition for a writ of mandamus ordering the city to revoke the Merchants' building permit. A writ of mandamus[2] may be issued to "any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." Minn. Stat. § 586.01 (2006). Mandamus is an extraordinary remedy based on equitable principles. *McIntosh v. Davis*, 441 N.W.2d 115, 118 (Minn. 1989). This court will affirm a district court's order denying mandamus relief unless

[2] There are two types of writs of mandamus, peremptory writs and alternative writs. *See* Minn. Stat. §§ 586.03, .04 (2006). It is unclear which writ the Bosses sought, but the type of writ is immaterial to the reasoning or result here.

"there is no evidence reasonably tending to sustain the [district] court's findings." *Popp v. County of Winona*, 430 N.W.2d 19, 22 (Minn. App. 1988), *review denied* (Minn. Nov. 23, 1988).

As an initial matter, the district court concluded that the Bosses are not entitled to the writ of mandamus they requested because such a writ would be futile. A writ of mandamus "will be denied where it is obvious that it will prove to be futile, unavailing, and ineffective." *Winnetka Partners Ltd. P'ship v. County of Hennepin*, 538 N.W.2d 912, 915 (Minn. 1995) (quotation omitted). The Bosses' specifically requested a writ ordering the city to revoke the Merchants' building permit. As the district court aptly noted, issuing a writ of mandamus ordering the city to revoke the building permit "serves no purpose" and would be ineffective because construction on the garage had already been completed by the time the Bosses filed their petition. Obviously, on these facts, a writ ordering the city to revoke the building permit would have been futile, unavailing, and ineffective. The district court, therefore, did not abuse its discretion by denying the Bosses' request for mandamus relief.

We nevertheless will address whether the elements required for a mandamus order are satisfied. Parties seeking mandamus relief must show: (1) that the city failed to perform an official duty clearly imposed by law; (2) that they were specifically injured by a "public wrong" due to this failure; and (3) that there was no other adequate legal remedy available to them. *See Breza v. City of Minnetrista*, 725 N.W.2d 106, 109-10 (Minn. 2006). On appeal from an order denying mandamus and finally determining the

action, this court reviews de novo whether these elements have been satisfied. *McIntosh*, 441 N.W.2d at 118-19.

A. Failure to perform a duty clearly imposed by law

A district court will issue a writ of mandamus "only when the petitioner has shown the existence of a legal right to the act demanded which is so clear and complete as not to admit any reasonable controversy." *Day v. Wright County*, 391 N.W.2d 32, 34 (Minn. App. 1986), *review denied* (Minn. Sept. 24, 1986). "[M]andamus will lie only to compel performance of a duty which the law clearly and positively requires." *Id.*

The Bosses contend that the city's issuance of the Merchants' building permit violated the zoning ordinance. They claim that the building permit was thus void and, therefore, the city had a duty clearly imposed by law to revoke the permit but failed to do so. But a city's decision on whether or not to issue a building permit involves an exercise of discretion in that it requires "judgment about whether submitted plans constitute[] permissible use of the property in the area involved." *Mohler v. City of St. Louis Park*, 643 N.W.2d 623, 639 (Minn. App. 2002) (citing *Anderson v. City of Minneapolis*, 287 Minn. 287, 288, 178 N.W.2d 215, 217 (1970)), *review denied* (Minn. July 16, 2002). And when the duty alleged to have been violated is one that involves discretion, mandamus is not available to control how such discretion is to be exercised or to dictate that the exercise of such discretion lead to a particular conclusion. *See, e.g.*, *State v. Davis*, 592 N.W.2d 457, 459 (Minn. 1999). Here, the Bosses' request for mandamus relief seeks to control how the city exercised its discretion in granting the Merchants' building permit and in refusing to revoke it after the Bosses demanded that it do so.

Mandamus is not available to compel the city to do that which the Bosses demand. The Bosses failed to show, therefore, that the city was under a clear legal duty to revoke the building permit. As a result of our conclusion, we need not address whether the city's issuance of the building permit violated the zoning ordinance, and we express no opinion on that issue.

B. Specifically injured by a public wrong

To be entitled to mandamus relief, the Bosses were also required to show that the city's failure to revoke the building permit constituted a "public wrong" that specifically injured them. *See Chanhassen Chiropractic Ctr., P.A. v. City of Chanhassen*, 663 N.W.2d 559, 562 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003). In their arguments before the district court, the Bosses failed to allege how they were specifically injured by the city's refusal to revoke the permit. Thus, the district court properly concluded that the Bosses "have failed to show any immediate injury to their property or themselves." *See Knudson v. Comm'r of Pub. Safety*, 438 N.W.2d 423, 425 (Minn. App. 1989) (stating that a petitioner in a mandamus proceeding must be a "beneficially interested party," which requires the showing of a public wrong especially injurious to the petitioner and that the petitioner would benefit from the issuance of the writ). Although it is apparent that the Bosses do not appreciate the placement of the Merchants' garage and perhaps find it to be annoying, they have not alleged encroachment, actionable nuisance, or any other particular injury to themselves. Nor have they claimed that the city's refusal to revoke the building permit, which they contend was issued in

violation of the zoning ordinance, constituted a "public wrong." Thus, the Bosses failed to establish a public wrong that specifically injured them.

C. No adequate alternative legal remedy

Finally, to be entitled to mandamus relief, a petitioner must establish that there is no other "plain, speedy, and adequate remedy in the ordinary course of law." Minn. Stat. § 586.02 (2006). "[T]he remedy which will preclude mandamus must be equally as convenient, complete, beneficial, and effective as would be mandamus, and be sufficiently speedy to prevent material injury." *Kramer v. Otter Tail County Bd. of Comm'rs*, 647 N.W.2d 23, 26-27 (Minn. App. 2002) (quotation omitted). Here, the Bosses have an adequate alternative legal remedy. The Minnesota Supreme Court has held that "the proper procedure for reviewing a city's decision in a zoning matter generally will be a declaratory judgment action." *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 178 (Minn. 2006). The court emphasized, "We use 'zoning' in a broad sense to encompass a municipality's land use decisions under its zoning ordinances and rules." *Id.* at n.9. A declaratory-judgment action is an adequate alternative remedy available to the Bosses to challenge the city's issuance of and refusal to revoke the building permit, and, therefore, they are not entitled to mandamus relief.

Because the Bosses failed to satisfy the elements that warrant mandamus relief, we conclude that, even had their petition been timely, the district court did not abuse its discretion by denying the Bosses a writ of mandamus.

II. The district court did not abuse its discretion by denying injunctive relief.

The Bosses next challenge the district court's denial of a permanent injunction.[3] They claim entitlement to a permanent injunction ordering that the Merchants remove the garage from their property and that the city revoke the building permit.[4] The denial of a permanent injunction rests with the sound discretion of the district court and will not be disturbed on appeal absent an abuse of such discretion. *Cherne Indus., Inc. v. Grounds & Assocs., Inc.*, 278 N.W.2d 81, 91 (Minn. 1979).

Rationalizing the denial of a permanent injunction, the district court articulated this dispositive procedural impediment: "Injunctive relief is not available unless an underlying lawsuit has been commenced." The district court recognized that, because the Bosses "failed to serve and file a Summons and Complaint commencing an action" against the Merchants, they "have no basis to request . . . injunctive relief." We agree.

"Injunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist *before* injunctive relief may be granted." *Smith v. Spitzenberger*, 363 N.W.2d 470, 472 (Minn. App. 1985) (quotation omitted) (emphasis in original). Moreover, "[a] permanent injunction will issue only after a right to such relief has been established at a trial." *Bio-Line, Inc. v. Burman*, 404 N.W.2d 318, 320 (Minn. App.

[3] In the district court, the Bosses sought a temporary restraining order, a temporary injunction, and a permanent injunction. The Bosses appear to acknowledge on appeal that since construction of the garage has been completed, the issues of a temporary restraining order and a temporary injunction are moot. Indeed, their arguments on appeal focus only on the issue of a permanent injunction.

[4] The request for an injunction ordering the removal of the garage was directed at both the Merchants and Hexum. At oral argument, it was clarified that the Bosses are no longer claiming that they are entitled to such relief against Hexum.

1987) (quotation omitted). Before permanent injunctive relief may be awarded, the merits of a dispute must be determined. *Id.* Here, the Bosses have failed to initiate, much less fully litigate, an underlying cause of action against the Merchants. Thus, there has been no merits determination on any underlying cause of action, and the Bosses are not entitled to permanent injunctive relief against the Merchants.

Despite clear legal authority holding that a determination on the merits of a cause of action is a prerequisite for permanent injunctive relief, the Bosses argue that "[t]here can be a claim solely for injunctive relief." In support, the Bosses cite *McCavic v. DeLuca*, 233 Minn. 372, 46 N.W.2d 873 (1951), *Lowry v. City of Mankato*, 231 Minn. 108, 42 N.W.2d 553 (1950), and *Newcomb v. Teske*, 225 Minn. 223, 30 N.W.2d 354 (1948). In none of these cases does the text of the opinion show that a cause of action had proceeded to a merits determination, but a review of the briefs submitted in each of those cases reveals that all arose following a trial ending in a determination of the merits of the underlying cause of action that supported the claim for injunctive relief.

With regard to their request for a permanent injunction ordering the city to revoke the building permit, the Bosses are entitled to such relief only if they have established that (1) there is no adequate legal remedy and (2) a permanent injunction is necessary to prevent great and irreparable injury. *See Jackel v. Brower*, 668 N.W.2d 685, 688 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003). As discussed above, the Bosses have available to them an adequate legal remedy—namely, a declaratory-judgment action. Such an action would have been the appropriate means to challenge the city's issuance and refusal to revoke the building permit. *See Mendota Golf*, 708 N.W.2d at 178.

Following a determination of the merits of such an action, the district court could have then considered whether permanent injunctive relief against the city was warranted. The Bosses have also failed to show that a permanent injunction is necessary to prevent great and irreparable injury. Absent such a showing, courts will not presume irreparable injury. *See Jackel*, 668 N.W.2d at 690. Here, other than the Bosses' bare assertion that they have been irreparably injured, there is nothing in the record showing that they have been injured in any way by the alleged violation of the zoning ordinance.

The Bosses maintain, however, that in the event of a determination that the garage violates the zoning ordinance, they are automatically entitled to a permanent injunction and that they need not show the absence of an adequate legal remedy or irreparable harm. In support of this argument, the Bosses again cite *McCavic*, *Lowry*, and *Mohler*. They essentially claim that these cases established, as a matter of law, that in such case there is no adequate legal remedy, and that irreparable injury has occurred whenever a building has been constructed in violation of a zoning ordinance. We disagree.

Although *McCavic*, *Lowry*, and *Mohler* resulted in injunctive relief ordering the removal or alteration of buildings that violated zoning ordinances, they do not support the contention that a violation of a zoning ordinance entitles any person who complains about the violation to injunctive relief, and this court has so held. *See Jackel*, 668 N.W.2d at 688 ("Although [*Lowry* and *Mohler*] resulted in injunctive relief to enforce a zoning ordinance, neither case stands for the proposition that injunctive relief is mandatory or automatic."). Rather, it is clear that the plaintiffs in *Lowry*, *McCavic*, and *Mohler* were in fact injured by the zoning-ordinance violation. In *McCavic*, the supreme court noted that

"[t]he houses of plaintiffs are close to the building of defendant," and "[i]t is not trivial to have a concrete-block building setting some seven feet out in front of a residence in such close proximity to it." 233 Minn. at 379, 46 N.W.2d at 877. In *Lowry*, the supreme court explained that injunctive relief was warranted because the plaintiff had been "injured by the violation." 231 Minn. at 117, 42 N.W.2d at 559-60. And in *Mohler*, this court stated that "a 'property owner *injured* by [a permit issued in violation of city ordinance] is entitled to injunctive relief.'" 643 N.W.2d at 634 (emphasis added) (alteration in original) (quoting *Lowry*, 231 Minn. at 117, 42 N.W.2d at 560). As we did in *Jackel*, we hold here that permanent injunctive relief for a zoning-ordinance violation is not automatic and, like all claims for such relief, requires a showing that there is no adequate legal remedy and that an injunction is necessary to prevent great and irreparable injury. *See* 668 N.W.2d at 688.

We conclude that the district court did not abuse its discretion by denying the Bosses' request for injunctive relief.

Lastly, the Bosses argue that a statement in the affidavit of the city's mayor claiming that the intent of the Ottertail City Council when it drafted the zoning ordinance was to allow landowners to construct a building on their property without having first constructed a residence or dwelling unit on the same lot cannot be considered in construing the zoning ordinance. *Cf. Minn. Educ. Ass'n v. Minn. State Bd. of Educ.*, 499 N.W.2d 846, 847 n.1 (Minn. App. 1993) (holding that comments by legislators about legislative intent "made after a statute has been passed are inadmissible to construe a statute"). But it does not appear from the record, and the Bosses do not contend, that the

district court relied on the objectionable statement in making its decision. And because resolution of the issues on appeal did not require that we construe the zoning ordinance, the statement had no effect on our decision.

Affirmed.