

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD BERTO G and LORNA BERTO G,

Plaintiffs-Appellants,

v

BENTON CHARTER TOWNSHIP,

Defendant-Appellee,

and

MILLBURG EQUIPMENT COMPANY, LLC, and
B&Z COMPANY,

Defendants.

UNPUBLISHED

December 16, 2021

No. 356489

Berrien Circuit Court

LC No. 2020-000129-AW

Before: GADOLA, P.J., and SWARTZLE and CAMERON, JJ.

PER CURIAM.

Plaintiffs Richard Bertog and Lorna Bertog appeal the trial court’s order denying their request for a writ of mandamus and granting defendant Benton Charter Township’s motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact).¹ We affirm.

¹ Although the trial court indicated that it was granting summary disposition under MCR 2.116(C)(8), we will analyze the trial court’s order as arising under MCR 2.116(C)(10) because the trial court considered evidence outside the pleadings when granting the motion. See *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999) (a court may not consider facts outside the pleadings when deciding a motion under MCR 2.116(C)(8)).

I. BACKGROUND

This case arises from the operation of a sand mine on Millburg Equipment Company, LLC's property (the subject property). The subject property is located adjacent to plaintiffs' property, and both are located in the Township's "Heavy Industrial Corridor."

In 1992, the Benton Charter Township Board of Trustees granted Curtis Jenkins a special use permit to mine and remove sand from the subject property. Jenkins transferred the subject property to Millburg Equipment Company in 2006, and Millburg Equipment Company permitted B&Z Company to mine and remove sand from the subject property.

Plaintiffs, who had a residential home on their property,² began submitting complaints to the Township about Millburg Equipment Company's use of the subject property. Plaintiffs also submitted requests for information concerning the subject property under the Freedom of Information Act, MCL 15.231 *et seq.* In response to these requests, plaintiffs were informed in May 2017 that the Township officials had "reviewed all pertinent information," that the Township Ordinance Officer had inspected the subject property to determine if there were any ordinance violations, and that the Township Building Department had "reviewed the current use of the property." Plaintiffs were informed that Millburg Equipment Company was not violating any Township ordinances.

Plaintiffs submitted additional FOIA requests. In June 2020, Chris Fuchs, who has served as the Township's Chief Building Official since 2017, provided plaintiffs' attorneys with the requested information. Fuchs also indicated as follows:

In March of 1992, Mr. Jenkins ran through the process of obtaining his mining permit with public hearing before the Planning Commission and ultimate approval by the Board of Trustees Mining is a permitted use as a result of that action. Mining involves heavy trucks and equipment. The property is zoned F-Heavy Industrial. The permission allows mining in conjunction with the allowed uses in that heavy industrial district. Mining of its nature is dusty. Crushing concrete is an industrial and allowed process. Mining uses heavy trucks. Perhaps because of the change in ownership there may be a greater degree of use, but it is not a different use. We have investigated complaints on Mr. Bertog's behalf on numerous occasions involving all departments of our Township.

In August 2020, plaintiffs filed a complaint. Plaintiffs alleged that the Township had failed to enforce certain ordinances, some of which were enacted after 1992, by permitting Jenkins and Millburg to "plac[e] and/or deposit[] rubble and grind[] concrete on the subject property without a license[.]"³ Plaintiffs also alleged that the Township was improperly permitting Millburg Equipment Company and B&Z Company to "remove sand and relocate gravel on an annual basis"

² In 2007, plaintiffs obtained a special use permit to build a home on their property.

³ The complaint also named Millburg Equipment Company and B&Z Company as defendants. However, they were subsequently dismissed by stipulation of the parties.

without the appropriate permits. Plaintiffs requested, in relevant part, that the trial court issue a writ of mandamus and order the Township to enforce its ordinances.

The Township moved for summary disposition. In relevant part, the Township argued that plaintiffs were not entitled to a writ of mandamus because enforcement of ordinances involves the exercise of discretion or judgment. Plaintiffs opposed the motion. The trial court heard oral argument and granted the Township's motion for summary disposition, concluding in relevant part that whether to enforce a municipal ordinance was a discretionary matter. This appeal followed.

II. STANDARDS OF REVIEW

Generally, this Court “review[s] de novo a trial court’s decision on a motion for summary disposition.” *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019).

A motion under MCR 2.116(C)(10) . . . tests the factual sufficiency of a claim. When considering such a motion, a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion. A motion under MCR 2.116(C)(10) may only be granted when there is no genuine issue of material fact. [*Id.* at 160 (quotation marks, citations, and emphasis omitted).]

“A lower court’s decision on whether to grant a writ of mandamus is reviewed for an abuse of discretion.” *Citizens Protecting Michigan’s Constitution v Secretary of State*, 503 Mich 42, 59; 921 NW2d 247 (2018). “A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes.” *Rental Props Owners Ass’n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 531; 866 NW2d 817 (2014) (quotation marks and citation omitted). “An error of law necessarily constitutes an abuse of discretion.” *Denton v Dep’t of Treasury*, 317 Mich App 303, 314; 894 NW2d 694 (2016).

III. GENERAL PRINCIPLES OF LAW

“Mandamus is an extraordinary remedy and the primary purpose of a writ of mandamus is to enforce duties required by law.” *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 618; 822 NW2d 159 (2012). The issuance of a writ of mandamus is proper where “(1) the plaintiff has a clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result.” *Rental Props Owners Ass’n*, 308 Mich App at 518.

A writ of mandamus “will not lie for the purpose of reviewing, revising, or controlling the exercise of discretion reposed in administrative bodies.” *Teasel v Dep’t of Mental Health*, 419 Mich 390, 410; 355 NW2d 75 (1984). “However, the writ will lie to require a body or an officer 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.” *Id.* “Stated otherwise, mandamus will lie to compel the exercise of discretion, but not to compel its exercise in a particular manner.” *Id.* Thus, to warrant mandamus relief, the act requested by the party seeking the writ must be ministerial, and involve no exercise of discretion or judgment. *Lickfeldt v Dep’t of Corrections*, 247 Mich App 299, 302; 636 NW2d 272 (2001).

IV. ANALYSIS

We conclude that the nature of the Township's decisions concerning Millburg Equipment Company's compliance with the relevant zoning ordinances clearly involves the exercise of discretion and judgment by the Township's Building Officials.

In 1992, the Township "approved sand mining on the subject property," and "the subject property was continuously mined" in the following years. In August 2005, Jenkins filed an application for a special use permit. The application referenced the special use permit and noted that the subject property was "said to have been mined since the early 1990s." However, Jenkins indicated that the request was "[t]o allow continued use of the property for mining purposes with [the] possibility of selling [the subject] property in the future." Thomas Baldwin, who was the Township's Chief Building Official and Zoning Administrator at the time, determined that Jenkins already possessed a special use permit for sand mining and removal, and that the special use permit ran with the land. Therefore, Baldwin determined that an additional special use permit was not required. Consequently, the application was not processed, and Jenkins's application fee was returned. Jenkins later sold the property to Millburg Equipment Company, and mining continued on the subject property. When plaintiffs complained about Millburg Equipment Company's use of the property, Fuchs investigated and determined that "the current use of the subject property . . . [did] not violate any Township ordinances."

Whether Millburg Equipment Company's use of the property violated the Township's ordinances required the Township to determine whether Millburg Equipment Company was complying with the special use permit and other existing ordinances. These matters were not ministerial in nature and instead required professional judgment, specialized knowledge and experience, and the exercise of discretion. See *Teasel*, 419 Mich at 414-415; *Lickfeldt*, 247 Mich App at 302. Additionally, contrary to plaintiffs' arguments on appeal, the undisputed record evidence establishes that the matter was investigated and that it was thereafter determined that Millburg Equipment Company was not in violation of any ordinances. Cf. *Bischoff v Wayne Co*, 320 Mich 376, 385; 31 NW2d 798 (1948) (noting that a writ of mandamus can be issued where there is evidence of "a total failure to exercise discretion") (quotation marks and citation omitted). Consequently, it was not necessary for the trial court to order the Township to require the appropriate official to exercise his or her discretion.⁴ See *Teasel*, 419 Mich at 410 (holding that a writ of mandamus can be issued "to require a body or an officer charged with a duty to take action in the matter").

⁴ The Township argued before the trial court that Fuchs, as opposed to the Township, was the proper defendant in the mandamus action.

In sum, the trial court did not err by granting the Township's motion for summary disposition and did not abuse its discretion by denying plaintiffs' request for a writ of mandamus.⁵

Affirmed.

/s/ Michael F. Gadola
/s/ Brock A. Swartzle
/s/ Thomas C. Cameron

⁵ Given this holding, it is not necessary to consider the remainder of plaintiffs' arguments on appeal. See *Garrett v Washington*, 314 Mich App 436, 449; 886 NW2d 762 (2016) ("This Court does not decide moot issues.").