

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Court File No: 62-CV-20-5188

Honorable John H. Guthmann

Case Type: Civil/Other

James Charles Winterer,
Kathryn McGuire,
Catherine M. Hunt and Howard J. Miller,
Bruce J. Faribault,
Bruce Hoppe,

Petitioners,

v.

The City of Saint Paul, a body
corporate and politic under Minnesota
law,

Respondent.

**PETITIONERS' RESPONSE
MEMORANDUM TO
RESPONDENT CITY OF
SAINT PAUL'S MOTION TO
DISMISS**

INTRODUCTION

Petitioners are respectfully submitting this Memorandum of Law in opposition to Respondent The City of Saint Paul's ("the City") Motion to Dismiss Petitioners' Petition for a Writ of Mandamus under Minn. Stat. § 586.01. The City is asking the Court to dismiss this case on the following grounds: (1) This Court lacks jurisdiction to hear this case because the Petitioners failed to appeal the Zoning Administrator's decision using the procedures inside the City's zoning code; (2) Petitioners lack standing to challenge the Zoning Administrator's decision; (3) The City does not have fair notice of Petitioners' legal claim because the Petition fails to contain a short and plain statement of that claim; and (4) Even if the Court reaches the merits, the Zoning Administrator's decision was reasonable under the deferential rational-basis test.

As will be discussed in this memorandum, the Court has jurisdiction and the Petitioners have standing to compel the City to hold the variance hearing since the City failed in its duty to enforce the City’s Municipal Code (“the Code”) and the Ford Site Zoning and Public Realm Master Plan (“the Master Plan”) (Attached as Exhibit 1 to Petition) in a manner that is consistent with the plain meaning of the words in those documents. Additionally, Petitioner’s Writ of Mandamus provides the City fair notice of their legal claim and the City’s rational-basis test defense does not entitle the City to dismissal of this case. Based upon the arguments in this memorandum along with the files, records and proceedings herein, the City’s motion to dismiss should be denied.

STATEMENT OF FACTS

In its Memorandum in Support of its Motion to Dismiss, the City provides a lengthy section of facts regarding the background of the Ford Site Development. Most of these facts are not relevant to the Petition for Writ of Mandamus. The following are the relevant facts at issue with this case.

The City is currently in the process to develop the old Ford Plant located in the Highland Park district of the City (“the Ford Site”). (Petition for Writ of Mandamus (“Petition”), ¶ 9). As part of this process, the City has adopted the Ford Master Plan and the Ford Site Open Space Guidelines (“Open Space Guidelines”) (Attached as Exhibit 2 to Petition). (Petition, ¶ 10).

The Ford Master Plan prescribes that each development parcel is to have a certain percentage of “open space” that is distinct from the percentage of the parcel that is occupied by the building. (Petition, ¶ 11). Under the Code Sec. 60.216.-O, “open space” is defined as “Land and water areas retained for use as active or passive recreation areas

or for resource protection.” (Petition, ¶ 12). Under Chapter 8: Parks and Open Space, the Ford Master Plan states “Design and performance standards for specific elements are provided in the Ford Site Open Space Guidelines Report, found on the City’s Ford web pages.” (Ex. 1 attached to Petition, p. 133). In the Open Space Guidelines, “open space” is defined as “Natural lands, athletic fields (even if managed by non-city entity), recreational lands, community gathering spaces and recreational buildings which are publicly-owned and/or publicly-accessible. The term is not intended to refer to privately-owned lands, yards, urban plazas, stormwater treatment areas or public street rights-of-way unless, through agreement, the land is designated as public space with a recreational and/or habitat function.” (Ex. 2 attached to Petition, p. 3). Under Chapter 4: Zoning – Districts & General Standards, Vegetation & Landscaping, the Ford Master Plan states “Required open space coverage for lots is addressed in ‘Zoning – Building Types’ chapter. Open space is defined as areas covered by landscape materials, gardens, walkways, patios, recreation facilities, or play areas.” (Ex. 1 attached to Petition, p. 47).

The City has a contract with Ryan Companies US, Inc. (“Ryan”) to develop the Ford Site and as part of this development, Ryan has proposed a mixed-use building to be located at 2170 Ford Parkway (the “Project”). (Petition ¶¶ 16, 17). On May 26, 2020, Ryan submitted a Zoning Variance Application to the City for the Project. (Attached as Exhibit 3 to Petition). The Zoning Variance Application includes Variance Request 4: Lot Coverage – Open Space in which Ryan requests the following:

Ryan is pursuing a variance for the minimum amount of open space of 25% as required by the City’s Masterplan. The project provides approximately 7,300 SF (6.3%) of open space around the building exterior at ground level and approximately 22,000 SF (19.1%) of rooftop amenity space above the ground floor grocery and parking deck, which

together equates to 25.4% of open space on the site. When rooftop square-footage is adjusted per the Masterplan, which limits the rooftop amenity space to count towards only half (or 12.5%) of the total open space calculation, the percentage drops to 18.8% which is short of the required 25%.

The values above also do not consider the additional open space provided by some of the resident balconies on the north and west sides of the building elevated above the ground floor. While these elevated balconies are only available to a limited number of residents, they still contribute to the open space on the site as they will have people actively using the space on a frequent basis. (Ex. 3 attached to Petition, p.11).

In June, 2020, Principal City Planner Tia Anderson informed Ryan that the City was not requiring them to seek a variance for the Project regarding the 25% open space requirement. (Attached as Exhibit 4 to Petition). Specifically, Ms. Anderson wrote:

Per the Ford Public Realm Master Plan, Open Space is defined as: *areas covered by landscape materials, gardens, walkways, patios, recreation facilities, or play areas* (MP pg 47). Based on the definition currently written within the Master Plan:

- All private property areas that meet the open space definition – ground level or above grade – apply 100% towards meeting the Open Space requirement.
- Therefore, for the Block 3, Lot 1 mixed use project the 25% Open Space requirement is met based on perimeter landscape/hardscape (including the dog run area in SW corner) as well as the above grade amenity deck and green roof area (see attached image provided by Joseph Peris on 6/12 identifying Open Space areas).

Ms. Anderson went on to note “that the Planning Administrator will likely pursue a Master Plan text amendment to clarify the Open Space definition for projects going forward, which may be more restrictive.” (Ex. 4 attached to Petition).

On July 8, 2020, Neighbors for a Livable Saint Paul sent a letter to the City expressing their concerns with the Project and that the City had determined a variance for the 25% open space requirement for the Project was not required. (Attached as Exhibit 5 to Petition). On July 16, 2020, the City responded stating that Project “meets the 25% Open Space Lot Coverage requirement with the proposed square footage perimeter landscape/hardscape and above grade amenity deck and green roof area.” (Attached as Exhibit 6 to Petition). On October 2, 2020, Neighbors for a Livable Saint Paul sent a second letter specifically asking the City to “enforce the open space requirements per the original intent of the Code and Master Plan and supporting documents and that the building permits be suspended until Ryan can submit a revised plan that is in compliance. Alternatively, Ryan can submit a variance request.” (Attached as Exhibit 7 to Petition). On October 9, 2020, the City responded again stating that a variance was not needed for the 25% open space requirement of the Project. (Attached as Exhibit 8 to Petition).

ARGUMENT

I. THE COURT DOES NOT LACK JURISDICTION TO HEAR THIS CASE.

The City argues that Petitioners failed to appeal the Zoning Administrator’s decision within 10 days and this deprives the Court of jurisdiction. This argument fails for several reasons. First, the City relies on Minn. Stat. § 462.361 in making this argument. Unlike Minn. Stat. §462.361, Minn. Stat. §586.01 does not explicitly include exhaustion of alternative remedies as a requirement for a successful Writ of Mandamus action. However, even if the doctrine of exhaustion of alternative remedies is applicable to a Writ of Mandamus action, it is not applicable to the case at hand. That doctrine usually presupposes that some legitimate action has been taken by the litigant asserting

the defense.¹ In the case at hand, the Zoning Administrator failed to fulfill his legal duty to enforce the Code and the Master Plan in a manner that is consistent with the plain meaning of the words in those documents.

Indeed, Petitioners would like the opportunity to debate the substance of whether private rooftop decks and private apartment balconies within the limits of the building lot coverage constitute “open space.” However, that question was never properly brought up to the Board of Zoning Appeals (“BZA”) or to the Saint Paul City Council (“City Council”). The general administrative procedural rule is that an administrative agency is bound by its substantive rules and its stated procedures.² Where prejudice can be demonstrated, the agency’s failure to follow its own rules is an abuse of discretion which invalidates its action.³ By analogy, the Zoning Administrator’s failure to follow the Code and the Ford Master Plan does not constitute legitimate action that would trigger the doctrine of exhaustion of alternative remedies. There are a number of policy objectives supporting that doctrine, but shielding public officials from executing legal duties is not one of them. Respondent’s assertion that Petitioners should have caught them earlier is not a position that is consistent with lawful governance and sound public policy. Respondent’s manifest error in this regard should not be allowed to be used as a basis to trigger the duty to pursue alternative remedies.

Additionally, it should be pointed out that while the City claims the clock for the 10-day appeal started ticking on June 16, 2020, this is not entirely clear. According to the Declaration of Yaya Diatta, he decided on June 16, 2020 that Ryan’s application for a

¹ State ex rel. Sholes v. University of Minnesota et al., 236 Minn. 452, 451 (Minn. 1952) citing *Davis, Administrative Law*, s 182.

² 21 Minn. Prac., Administrative Prac. & Proc § 10.14 (2d ed.)

³ *Id.*

variance from the open space coverage requirement was unnecessary based on the definition of “open space coverage” as defined by Chapter 4, page 47 of the Ford Site Master Plan (Declaration of Yaya Diatta, ¶ 7). Mr. Diatta further declared that as Zoning Administrator he decided that, based on his interpretation and administrating of both the Code and the Ford Master Plan, all private property areas that meet the open space definition – whether those areas are at ground level or above ground level – apply 100% towards meeting the definition of “open space coverage” from Chapter 4, page 47 of the Ford Site Master Plan. (*Id.* at ¶ 8). Mr. Diatta declared that he communicated his decision to Ryan through Principal City Planner Tia Anderson (*Id.* at ¶ 9). Mr. Diatta’s declaration does not include when his decision was made public. In fact, Mr. Diatta further declared that Ryan did not formally withdraw its request for a variance from the open space coverage requirement for 2170 Ford Parkway after his June 16, 2020 decision informing Ryan that a variance for the open space coverage was not necessary. (*Id.* at ¶ 10). If Ryan, the applicant, never withdrew its request for a variance Petitioners would have no way to know that any legitimate action had been taken that would trigger a duty to appeal. It is not equitable to hold the Petitioners in this case to the 10-day requirement when there is no clear evidence that any appealable action was taken or that the clock even ever started. For these reasons, this Court does not lack jurisdiction to hear this matter.

II. PETITIONERS HAVE STANDING UNDER MINN. STAT. § 586.01 TO COMPEL THE CITY TO FOLLOW THE PLAIN MEANING OF THE CODE AND THE FORD MASTER PLAN AND TO HOLD A VARIANCE HEARING WHERE THEY INTEND TO DEVIATE FROM THAT PLAIN MEANING.

The City’s argument that Petitioner does not have standing to challenge the City’s failure to follow their own laws and to hold a variance hearing because they are not “aggrieved persons” under Minn. Stat. § 462.361 is incorrect because this case does not fall under that statute. This case was filed as a Petition for Writ of Mandamus under Minn. Stat. § 586.01. The authority to issue a writ of mandamus is statutory. *State v. Wilson*, 632 N.W.2d 225, 227 (Minn. 2001); Minn. Stat. 586.01. The two primary uses of mandamus are (1) to compel the performance of an official duty clearly imposed by law and (2) to compel the exercise of discretion when that discretion is required by law. *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162 (Minn. 2006). Mandamus can be properly issued to compel the performance of a duty which the law clearly and positively requires such officer, board, or tribunal to perform. *Curry v. Young*, 173 N.W.2d 410, 414-15 (Minn. 1969).

In their response to Petitioners’ Writ of Mandamus, the City argues that all municipal land use issues are controlled by Minn. Stat. § 462.361. This assertion is incorrect. In their brief, the City cites *Mendota Golf, LLP v. City of Mendota Heights* which includes a lengthy discussion by the Minnesota Supreme Court of the proper use of the Writ of Mandamus in municipal zoning cases. The Court states, “there are municipal zoning matters for which mandamus may be appropriate, these cases typically involve

claims that a city failed to perform a clearly defined duty that is required by a statute or zoning ordinance.”⁴

In this case, Petitioner’s Writ of Mandamus seeks to compel the City to follow the plain meaning of the Code and the Ford Master Plan, which would require the City to conduct a variance hearing on the 2170 Ford Parkway Project’s Zoning Variance Request 4: Lot Coverage – Open Space. Ryan submitted a Zoning Variance Application to the City for the Project (Petition, ¶ 18.). After the Application was submitted, the Zoning Administrator decided that this part of the Application was unnecessary based on the definition of “open space coverage” as defined by Chapter 4, p. 47 of the Ford Master Plan (Declaration of Yaya Diatta, ¶ 7). The Zoning Administrator further decided that based on his interpretation and administrating of both Saint Paul’s zoning code and the Ford Site Master Plan, all private property areas that meet the open space definition of “open space coverage” from Chapter 4, page 47 of the Ford Site Master Plan. (*Id.* ¶ 8).

There are three key provisions in the Code that prescribe the Zoning Administrator’s legal duty to enforce the Code and the Master Plan, where incorporated by reference, in a manner that is consistent with the plain meaning of the words in those documents. Those provisions are:

“All words and phrases used in this Legislative Code are used in their plain and ordinary sense unless otherwise clearly indicated...except that technical words

⁴ *See also* Glen Paul Court Neighborhood Ass’n v. Paster, 437 N.W.2d 52, 57 (Minn. 1989) (concluding that a city’s failure to comply with a statutory requirement of mailed notice to property owners rendered an amendment to the city’s zoning ordinance invalid); Advantage Capital Mgmt. v. City of Northfield, 664 N.W.2d 421, 427-28 (Minn. App. 2003) (reviewing a writ of mandamus that required a city to issue a building permit where the petition was based on the claim that the city failed to grant or deny the building permit within the time limits prescribed by statute), rev. denied (Minn. Sept. 24, 2003); cf. Chanhassen Estates Residents Ass’n v. City of Chanhassen, 342 N.W.2d 335, 340-41 (Minn. 1984) (directing a city to issue a building permit where the proposed facility was a permitted use under the city’s zoning ordinance

and phrases having a peculiar and recognized meaning in law shall be understood according to their technical import.”⁵

“The zoning administrator shall enforce the provisions of this zoning code and any amendment thereto...”⁶

“The zoning administrator shall have no authority to change or to grant variances from the terms of this code in carrying out the duties of zoning administrator.”⁷

It is clear that the Zoning Administrator has an undeniable ministerial duty under the law to apply the plain meaning of the Code and the Ford Master Plan. It is also clear that the Zoning Administrator does not have the power to change, or grant variances from, the terms of the Code or the Ford Master Plan. It should be noted that an experienced developer such as Ryan who assisted in the development of the Master Plan believed that it needed a variance and applied for the variance.

The Code and the Ford Master Plan are clear that for mixed residential and commercial properties like the building proposed for 2170 Ford Parkway, *lot coverage by buildings is a maximum of 75%* and that *lot coverage for open space is a minimum of 25%*. The plain meaning here is that *lot coverage by buildings* and *lot coverage for open space* are mutually exclusive. At the very least, those terms are distinct.

All available codified definitions of “open space” which are listed in the Statement of Facts are summarized in the table below:

and the permit application complied with the specific requirements, regulations, and standards prescribed by the ordinance).

⁵ See Saint Paul Leg. Code Ch. 2, §2.01 Construction generally and §2.02 General rule.

⁶ See Saint Paul Leg. Code Ch. 61 §61.201(d).

Location of Definition	Definition
The Code	“Land and water areas retained for use as active or passive recreation areas or for resource protection.” ⁸
Ford Site Open Space Guidelines Report	“Natural lands, athletic fields (even if managed by a non-city entity), recreational lands, community gathering spaces and recreational buildings which are publicly-owned and publicly accessible. The term is not intended to refer to privately-owned lands, yards, urban plazas, stormwater treatment areas or public street rights-of-way unless, through agreement, the land is designated as public space with a recreational and/or habitat function.”
The Master Plan	“Open space is defined as areas covered by landscape materials, gardens, walkways, patios, recreation facilities or play areas.”

By interpreting “open space” to include private roof top decks and private apartment balconies, the Zoning Administrator applied the Code and the Ford Master Plan in a manner that is opposite from the plain meaning as prescribed by any of the potentially applicable definitions of “open space” shown above. Depending on which definition is applied, the Zoning Administrator may have the authority to interpret “open space” to mean, for example, “patios.” However, by interpreting “open space” to mean private patios within the limits of the building lot coverage, the Zoning Administrator has swallowed up the entire codified distinction between *lot coverage by buildings* and *lot coverage for open space*.

By not fulfilling the duty to apply the Code and the Ford Master Plan in a manner that is consistent with the plain meaning, and by not requiring a hearing for Ryan’s proposed variance, the Zoning Administrator effectively changed the Code and the Ford Master Plan, or granted a variance from the terms in those documents.

⁷ See Saint Paul Leg. Code Ch. 61 §61.201(d).

⁸ Definition of Open Space Saint Paul, MN Code of Ordinances, Part II – Legislative Code, Title VIII – Zoning Code, Chapter 60. – Zoning Code – General Provisions and Definitions; Zoning Districts and Maps General, Article II. – 60.200. GENERAL DEFINITIONS, Sec. 60.216. – O.

The Code and the Ford Master Plan can be amended, or varied from, by way of proper amendment and variance procedures⁹ However, the Zoning Administrator has no power to effectively change, or grant a variance from, the Code or the Ford Master Plan by applying the words in those documents in a manner that is the antithesis of the plain meaning.

The Zoning Administrator and by extension the City had an official duty to interpret the Code and the Ford Master Plan in accordance with its plain meaning. If they would have fulfilled this duty, Ryan would have had to have a variance to deviate from the open space requirement and the City would have had to conduct the variance hearing on 2170 Ford Parkway Project's Zoning Variance Request 4: Lot Coverage – Open Space as requested by Ryan. By failing to apply the plain meaning of the Code and the Master Plan, and by failing to conduct the hearing, the City failed at this duty. The City has not properly applied their own laws and Petitioners have no recourse. Therefore, Petitioners' have no other plain, speedy, and adequate remedy in the ordinary case of the law except for a Writ of Mandamus. For these reasons, Petitioners have standing to compel the City to conduct the variance hearing.

III. PETITIONERS' WRIT OF MANDAMUS PROVIDES THE CITY FAIR NOTICE OF PETITIONERS' LEGAL CLAIM.

The City also argues that Petitioners' Writ of Mandamus fails to adhere to basic pleadings rules in that it is not "a short and plain statement of the claim showing that the pleader is entitled to relief." Minn. R. Civ. P. 801. The Petition for Writ of Mandamus and Alternative Writ of Mandamus signed by the Court provide the City notice of what Petitioners are seeking. Petitioners are seeking to compel the City to carry out their legal

⁹ See Saint Paul Leg. Code Ch. 66 §66.951.

duty to follow the plain meaning of the Code and the Master Plan and to conduct a variance hearing on the 2170 Ford Parkway Project's Zoning Variance Request 4: Lot Coverage – Open Space if Ryan intends to deviate from that plain meaning.

The City acknowledges that the Petitioners want the City to hold a variance hearing on the 2170 Ford Parkway Project's Zoning Variance Request 4: Lot Coverage – Open Space. (City's Memorandum, p. 29). However, the City wants to know why Petitioners are seeking to compel the City to conduct a variance hearing and asks what legal claim would force the City to do this. (*Id.* at p. 30). Even though asking why a Petitioner would file a claim does not appear to be a legal defense, the answer to what legal claim compels the City to hold a variance hearing is Minn. Stat. § 586.01. As laid out in the Petition and further discussed in this Memorandum, a Writ of Mandamus compels the City to perform a clearly defined legal duty which in this case is to follow the plain meaning of the Code and the Master Plan and to hold a variance hearing if Ryan intends to deviate from the plain meaning. Petitioner's Petition for Writ of Mandamus provides the City with fair notice of Petitioners' legal claim and therefore, the City's motion to dismiss on this ground should be denied.

IV. CITY'S RATIONAL-BASIS TEST DEFENSE DOES NOT ENTITLE THE CITY TO DISMISSAL OF THIS CASE.

The City's final argument for dismissal of this case is that its decision not to hold a variance hearing was reasonable under the rational-basis test. While the City may be able to use this defense in showing cause why it believes a variance hearing is not necessary, it does not entitle the City to dismissal of this action. This case was filed under Minn. Stat. § 586.01 as an Alternative Writ of Mandamus. The Alternative Writ of Mandamus states that the Petition demonstrates a prima facie case that petitioners are

entitled to the requested relief. The Writ further states that Respondent shall show cause in a written Answer filed with this court not later than 21 days following the completion of service of the Alternative Writ of Mandamus upon it, why the relief set forth in paragraph 1 should not be ordered. The City appears to be filing an answer using the rational-basis test in its motion to dismiss.

In its argument that the Petition should be dismissed under the rational-basis test, the City argues that the Petitioners' dispute comes from their confusion of two similar-sounding terms. (City's Memorandum at p. 30). The City then goes on to discuss why its decision not to hold a variance hearing was reasonable based on the Zoning Administrator's interpretation of "*Amenity Space*." (*Id.* at p. 31). The term "*Amenity Space*" is completely made up by the City in its Memorandum and it is nowhere to be found in the Code or the Ford Master Plan. The City admits that it makes up this term stating "Recall this term *Amenity Space* is being used by the City to avoid confusion between the actual term used in Chapter 4 of the Master Plan – "Open Space Coverage" – and a different term in Chapter 8 of the Master Plan called *Parks and Open Space*." (*Id.* at p. 31, footnote 12). In order to justify why the City did not hold a variance hearing, it relies on a made-up term. While the Petitioners look forward to debating with the City why this would justify not holding a variance hearing, using this term and arguing that it supports a rational basis for not having a hearing does not entitle the City to dismissal of this action at this point. If the City believes that this is a defense, it should be filed in an Answer to show cause as to why a variance hearing should not be conducted and then the parties can proceed with their arguments as in any

other civil action. However, this argument should not be relied upon to dismiss this case at this point the proceedings.

CONCLUSION

Based on the foregoing, the City’s Motion to Dismiss should be denied. The Court has jurisdiction and standing to compel the City to hold the variance hearing since the City failed in its duty to fulfill their legal duty to enforce the Code and the Master Plan. Additionally, Petitioner’s Writ of Mandamus provides the City fair notice of their legal claim and the City’s rational-basis test defense does not entitle the City to dismissal of this case. For these reasons, the City’s Motion to Dismiss should be denied in its entirety.

Respectfully submitted,

KELLY & LEMMONS, P.A.

Dated: January 15, 2021

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ACKNOWLEDGEMENT REQUIRED BY
MINNESOTA STATUTE, SECTION 549.211, SUBDIVISION 2

The undersigned hereby acknowledges that pursuant to Minnesota Statute, section 549.21, subdivision 2, costs, disbursements and reasonable attorney and witness fees may be awarded to the opposing party or parties in this litigation if the Court should find that the undersigned acted in bad faith, asserted a claim or defense that is frivolous and that is costly to the other party, asserted an unfounded position solely to delay the ordinary course of the proceedings or to harass or committed a fraud upon the Court.

Date: January 15, 2021

/s/ Martin H.R. Norder
Martin H.R. Norder