

**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. SP0I40-96

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

**WEEKS, J.:**

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

**I.**

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

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

- 1) that Respondent TLUC shall promulgate and implement the following rules:
  - a) establishing an appeal period of thirty (30) days for any party aggrieved by the decisions of the Commission on any zone change application, to the Superior Court of Guam, similar to what is set forth in the Administrative Adjudication Act, 5 GCA § 9241; the thirty (30) day period is to be counted from the date the zone change approval is submitted to the Legislature;
  - 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;
  - c) mandating that upon request, adjoining landowners and other interested parties are entitled to notice of each stage of the zone change process including when it has been acted upon by the TLUC and transmitted to the Governor; when it is transmitted to the Legislature, and when it is acted upon by the Legislature;
  - d) adopting the guidelines set forth in the Administrative Adjudication Act, particularly the rules relating to:

- i) the recording of public hearings including the testimony and evidence submitted, objections presented, appearances therein,
  - ii) the preservation of the records of the Commission;
  - e) adopting a rule limiting the time that the Governor has to act upon a zone change before it is deemed automatically denied. Prior to adopting such a rule, the TLUC shall conduct public hearings pursuant to the Administrative Adjudication Act, to solicit comments and suggestions of an appropriate time period;
  - f) a sunset provision, a notice requirement for alteration, changes or revisions of a zone change application; and that the TLUC consider contract zoning.
- 2) that the Office of the Attorney General assist the TLUC in drafting the rules and regulations identified above;
  - 3) that the draft rules and regulations be submitted to the Governor and the Legislature at the next legislative session in February 1997, or within 120 days of this judgment, whichever is later.

[4] The Judgment was filed on 24 February 1997, and a timely Notice of Appeal was filed by the TLUC on 24 March 1997. Although the prayer for relief in the Petition for Writ of Mandate does not seek the promulgation of rules and regulations, the record below is clear that the Holmeses 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 11.

## 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 Haeuser 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).<sup>1</sup> 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.

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

[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*.

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

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

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

[15] The court's further order for the promulgation of specific rules it had formulated exceeds its authority. The promulgation of particular rules and regulations is clearly an exercise of legislative discretion. *See Sklar*, 185 Cal. App. 3d at 623, 230 Cal. Rptr. at 47; *Tailfeather v. Board of Supervisors*

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<sup>2</sup> 21 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.

of *Los Angeles County*, 48 Cal. App. 4th 1223, 1238, 56 Cal. Rptr. 2d 255, 268 (Cal. Ct. App. 1996). It is one thing for a court to order the promulgation of rules and regulations required by statute; it is an entirely different thing for a court to create and then order the adoption of specific rules and specific regulations.

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

#### IV.

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