

STATE OF MICHIGAN
COURT OF APPEALS

SNOW SNAKE MOUNTAIN, INC.,

Plaintiff-Appellee,

v

HATTON TOWNSHIP,

Defendant-Appellant.

UNPUBLISHED
October 18, 1996

No. 187657
LC No. 95-900148-AW

Before: Neff, P.J., and Hoekstra and G. D. Lostracco,* JJ.

PER CURIAM.

Defendant appeals as of right from a writ of mandamus ordering its board to approve plaintiff's application for a liquor license. We vacate the order and remand to the trial court with instructions to order defendant's board to either approve the application or provide reasons for the denial.

I

Plaintiff, a golf and ski resort corporation, was required under MCL 436.17; MSA 19.988 to obtain local approval before a resort tavern liquor license could be issued by the Liquor Control Commission. Defendant's board unanimously denied plaintiff's request for approval without specifying a reason for the denial. Plaintiff filed a complaint in which it sought a writ of mandamus to compel the board to approve its application. The day after the complaint was filed, defendant enacted a liquor license ordinance that required an applicant to show a "demonstrated need" for the on-premises consumption of alcoholic beverages in the township. Following a show cause hearing, the trial court issued the writ, finding defendant's denial of plaintiff's request for approval to be arbitrary and capricious. The court refused to consider the ordinance as providing reasons for the denial.

II

Defendant's first claim of error is that the trial court abused its discretion when it refused to consider the liquor license ordinance.

* Circuit judge, sitting on the Court of Appeals by assignment.

A

While it is true that a trial court should apply the law in existence at the time of its decision, a court need not consider an ordinance if it concludes that the ordinance was enacted in an attempt to manufacture a defense to the suit. *Lockwood v City of Southfield*, 93 Mich App 206, 211; 286 NW2d 87 (1979). Defendant claims that it had a long-standing policy of denying liquor licenses and that the ordinance was merely a formality. However, defendant has provided no evidence of publication of the minutes of the meetings at which it claims the “no liquor license approval” policy was adopted. Moreover, a liquor license was approved in 1982, so if any policy was in existence, at least one exception was made. Therefore, the trial court could have reasonably concluded that the ordinance was enacted in an attempt to manufacture a defense to the suit.

B

In addition, case law demonstrates the pivotal importance of notice in determining whether an ordinance should be applied retroactively. In *Willingham v City of Dearborn*, 359 Mich 7, 8; 101 NW2d 294 (1960), the plaintiff’s application for a building permit was denied on the basis of a nonexistent zoning requirement. The plaintiff brought an action for mandamus to compel issuance of the permit, but at the opening of the hearing the defendant city filed a pleading entitled “Notice to court of amendment of city ordinance.” *Id.* The city sought to inform the court that it had amended its ordinance and rezoned the plaintiff’s property to prohibit the proposed use five months after the initiation of plaintiff’s suit. *Id.* at 8-9. Affirming the trial court’s grant of mandamus, the Michigan Supreme Court held that “injustice to plaintiff might have resulted from any such last-minute order providing a defense which did not exist when the petition was filed.” *Id.* at 10. Unlike *Willingham*, in this case the ordinance was enacted very early in the proceedings and was included as a defense in defendant’s answer to plaintiff’s complaint. However, the Michigan Supreme Court emphasized in *Franchise Realty Corp v City of Detroit*, 368 Mich 276, 279; 118 NW2d 258 (1962), that a trial court’s decision whether to consider changes in the law is discretionary and will be affirmed in the absence of evidence demonstrating an abuse of that discretion. We can find no such abuse of discretion here.

C

In support of its argument, defendant relies in part on *Klyman v City of Troy*, 40 Mich App 273, 281; 198 NW2d 822 (1972), in which this Court overturned a trial court’s refusal to allow the city to amend its pleadings to include an amended version of an existing but ambiguous ordinance.

Klyman, however, does not control the outcome here. Not only was there an existing ordinance in that case, but this Court found it significant that the defendant city had “long pursued a policy of excluding” the plaintiff’s proposed use of his property. *Id.* at 279-280. Thus, the plaintiff in *Klyman* had notice prior to filing suit that his use of his property could arguably have been precluded by an existing ordinance; in contrast, defendant made no comparable attempt to publish its policy before plaintiff requested approval of its liquor license application. In addition, evidence of the *Klyman*

defendant's long-standing policy existed in the form of a previously enacted, but procedurally flawed, ordinance. No such evidence existed here.

The importance of notice is also illustrated by *Roseland Inn v McClain*, 118 Mich App 724, 731; 325 NW2d 551 (1982), in which this Court noted that "an applicant for a liquor license is entitled to some kind of notice of standards which guide a local body's decision-making." See also *Stafford's Restaurant, Inc v City of Oak Park*, 129 Mich App 84, 86-87, 93; 341 NW2d 235 (1983) (upholding the denial of a request for approval of a liquor license where the city had published a resolution providing that it would refrain from any consideration of requests for approval of liquor licenses and had consistently acted in accordance with the resolution). Consequently, we cannot find that the trial court abused its discretion in refusing to consider the ordinance.

III

Defendant also argues on appeal that the trial court erred in granting the writ of mandamus because defendant had discretion to deny plaintiff's application even though it failed to provide reasons for the denial or follow any guidelines. On the facts of this case, we disagree.

In *Wong v City of Riverview*, 126 Mich App 589, 595; 337 NW2d 589 (1983), this Court stated that it would not require preexisting guidelines in every case. However, in that case, in addition to considering issues such as parking and competing licensees, the city's denial of the application for a liquor license was justified by the statutory prohibition against granting a liquor license to an establishment located within five hundred feet of a church or school. *Id.*, at 591, 595-596. No such justifications exist in this case.

IV

Although we conclude that the trial court properly granted the request for mandamus, we find that the trial court abused its discretion in requiring defendant to approve the license.

The trial court relied on *Pease v St Clair Shores City Council*, 85 Mich App 371; 271 NW2d 236 (1978), in reaching its decision that the license must be approved. In that case the circuit court found the city council's denial of the plaintiff's request for liquor license approval arbitrary and capricious only *after* remanding the matter to the council "for an informal written statement indicating the reasons for the denial." *Id.* at 372-373. This Court held in *Pease* that in the absence of previously-enacted standards, the following factors can support the denial of an application for a liquor license: (1) the bad moral character of the applicant; (2) a lack of sufficient assets for the successful operation of the business; (3) the location of the business in an area zoned as one within which no liquor may be sold; (4) the unfitness of the building or violation of health, safety or fire codes; or (5) the potential aggravation of existing problems in the area. *Id.* at 373-375.

Although it appears from the record that none of these factors exist, proper deference to defendant's authority requires that it be given the opportunity to articulate some reason for the denial prior to a judicial determination of arbitrariness. *Id.* at 375 n 3. Indeed, a writ of mandamus may not

be used to compel the exercise of a discretionary act in a particular case – such as requiring the approval of a liquor license – but may only be used to compel the exercise of that discretion. *Teasel v Dep't of Mental Health*, 419 Mich 390, 410; 355 NW2d 75 (1984). Consequently, remand is required in order to enable defendant board to provide reasons for the denial.

The writ of mandamus is vacated and the matter remanded to the trial court with instructions to order defendant's board to either approve or provide reasons for the denial of plaintiff's application. It should be clear that having affirmed the trial court's refusal to consider the ordinance, the remand to the township board is to allow it to provide the reasons for denial as they existed before adoption of the ordinance or to approve the application. This Court does not retain jurisdiction.

/s/ Janet T. Neff

/s/ Joel P. Hoekstra

/s/ Gerald D. Lostracco