

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

**CHICKASAW BLUFFS CONSERVANCY,
ROBERT W. DEININGER, MARGARET
DEININGER, TANDY GILLILAND,
MARY ROSE MCCORMICK, PATRICIA
MERRILL, MARJORIE RAINES,
SAMMY S. RICH, ANNE W. SHAFER,
and JOHN W. SPENCE,**

Petitioners-Appellees,

Vs.

**THE CITY OF MEMPHIS, TENNESSEE,
DR. W. W. HERENTON, THE OFFICE
OF CONSTRUCTION CODE
ENFORCEMENT OF THE CITY OF
MEMPHIS, TENNESSEE, and SOUTH
BLUFFS DEVELOPMENT ASSOCIATES,
a Tennessee Partnership,**

Defendants-Appellants.

FROM THE SHELBY COUNTY CHANCERY COURT
THE HONORABLE NEAL SMALL, CHANCELLOR

Edward M. Bearman; Branson and Bearman, PLLC, of Memphis
Reva M. Kriegel of Memphis
For Petitioners-Appellees

Russell J. Hensley of Memphis
Monice Moore Hagler of Memphis
Robert Beckmann of Memphis
For Defendants-Appellants

Allan J. Wade; Baker, Donelson, Bearman & Caldwell of Memphis
Amicus Curiae, Memphis City Council

VACATED IN PART, AFFIRMED IN PART AND REMANDED

Opinion filed:

**W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.**

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE

This case involves a dispute concerning the construction of a portion of a “riverwalk” on what is known as the South Bluff located on the east side of the Mississippi River in downtown

Memphis. On March 25, 1996, plaintiffs, Chickasaw Bluffs Conservancy, Robert W. Deininger, Margaret Deininger, Tandy Gilliland, Mary Rose McCormick, Patricia Merrill, Marjorie Raines, Sammy S. Rich, Anne W. Shafer, and John W. Spence, filed a complaint in chancery court titled “Petition for Writ of Mandamus and Complaint for Breach of Contract, Temporary Restraining Order, Temporary and Permanent Injunctions and Declaratory Judgment.” The complaint avers that Chickasaw Bluffs Conservancy (Conservancy) is a non-profit corporation organized in 1990 to maintain and protect the public’s rights in the historic Fourth Chickasaw Bluff overlooking the Mississippi River and to continue efforts on behalf of the citizens of Memphis to maintain a continuous walkway along the river, including the portion that would be on the bluff. The other named plaintiffs are citizens and taxpayers of the City of Memphis and are also members and supporters of the Conservancy.

The defendants named in the pleading are the City of Memphis, Tennessee, Dr. W. W. Herenton, The Office of Construction Code Enforcement of the City of Memphis, Tennessee, and South Bluffs Development Associates. Dr. W. W. Herenton is the Mayor of the City of Memphis (Mayor or Mayor Herenton), and the South Bluffs Development Associates (Developer)¹ is a Tennessee partnership and is the owner and developer of the South Bluffs Planned Development.

The complaint avers that, historically, the citizens of the City of Memphis (City) and various groups of citizens of the City used a walking trail along the banks of the Mississippi River and particularly along the South Bluff involved in this controversy and that various plans for construction of a more formal walk way were advanced through the years preceding 1989, when in July of that year, the Developer sought approval of a planned development on the bluff known as the South Bluffs Planned Development (Development). The development proposed was a 34-acre commercial and residential development on the former Frisco Railroad Yard site overlooking the Mississippi River and was designated as PD-89-319. At public hearings concerning the application, large numbers of citizens attended, and the City Council was urged to require a public easement along the crest of the bluff to preserve the public access. The Developer objected on the grounds that the public walkway along the crest of the bluff would impair the marketability of the project. However, through negotiations involving the Memphis

¹ References herein to Developer will include the present Developer and the entities that preceded it in ownership.

Office of Planning and Development, the Developer and various proponents of the bluff walk, including some of the plaintiffs, the City Council adopted an outline plan that included a compromise for the proposed walkway leading to a proposed pedestrian bridge over Riverside Drive from the Development to Ashburn-Coppock Park. Specific terms and conditions were included in the outline plan, together with various incentives of public assistance for the Developer.

The complaint further avers that after the Development was approved, the Conservancy was organized “in order to consolidate public support for a bluff walk/river walk, to protect the public interest in continuous public access to the bluff, to monitor compliance with the resolution approving the planned development, and to assist in obtaining funding for the construction costs.” The complaint alleges that in August 1991, the Henry Turley Company, a predecessor of the Developer, submitted an application for a second, smaller planned development between Huling and Nettleton Streets in which the Henry Turley Company recognized a Chester Street right of way that exists on the edge of the bluff in front of the lots involved in its planned development. Although the Conservancy was involved in meetings concerning the proposed construction of the bluff walk in this development, no agreement was reached on the location of the bluff walk between Huling and Nettleton Streets. The complaint further alleges that in October of 1991, another developer, the Founder’s Pointe Developer, was granted an application for a planned residential development along the top of the bluff, south of the Rivermark Hotel/Apartments on Riverside Drive. The Conservancy was invited to comment and did comment, recommending approval because the Founder’s Pointe development made provisions for the bluff walk.

The complaint avers that in August 1992, the City submitted an application to the Tennessee Department of Transportation to obtain 1.7 million dollars under the federally funded Intermodal Surface Transportation Efficiency Act (ISTEA) program for construction of the bluff walk. An application for the funds was made by Mayor Herenton in which he noted that the proposed bluff trail was the city’s “highest priority project due to its feasibility for use as an alternative transportation mode and because of its impact on the city’s urban environment.”

The complaint avers that in the spring of 1992, the Developer submitted an application to amend PD-89-319 and its outline plan. The Developer requested a change in land use for one

of the areas from commercial to mixed residential and commercial use, and the proposal provided for nine single family residential lots along the crest of the bluff that would eliminate the segment of the bluff walk that the Developer was required to construct in accordance with the terms of the resolution, the outline plan for PD-89-319. The Conservancy was notified of the proposed amendment and was invited to comment. It did so by voicing no objection to the change in the land use but did object to the elimination of the bluff walk along the crest of the bluff. The land use control board approved the change in the use, but reserved the question of the location of the bluff walk for the legislative body of the City, the City Council. The complaint avers that subsequently, in June and July of 1992, meetings were held by the representatives of the Developer and the representatives of the Conservancy in an effort to obtain an agreement concerning the location of the proposed bluff walk. An agreement was reached by which the Developer agreed to build an eight-foot wide pedestrian walk eight feet below the crest of the bluff, from Calhoun Street to Butler Avenue, and in return the Conservancy promised not to oppose before the City Council the amendment to the Development. This agreement was adopted by the resolution of the City Council, but a short time later, Henry Turley, on behalf of the Developer, objected because he did not want to bear the expense of construction of the walk in this manner. The complaint avers that in December 1992, Mayor Herenton, through his chief administrative officer, notified the Conservancy and the Developer that all plans for a bluff walk would be abandoned unless the parties could agree on a compromise. The complaint further avers that on December 8, 1992, City Councilman Tom Marshall, Chairman of the council's zoning and land use committee, called a meeting between representatives of the Conservancy and the Developer to attempt to reach an agreement prior to the City Council's scheduled meeting that day to consider the proposed amendments to the Development.

The complaint alleges that the parties were able to reach an agreement and that the agreement was incorporated in the City Council's resolution of December 8, 1992, approving the amendment conditioned upon the construction of a bluff walk as described. The complaint further alleges that on December 15, 1992, the City Council approved a motion to reconsider the December 8, 1992 resolution amending the Development, and the reconsideration motion was placed on the City Council's agenda for January 5, 1993. At the January 5, 1993 meeting,

testimony was adduced concerning the feasibility of the notched walkway², whereupon the City Council again passed the amendment. The amended planned development was designated as PD-91-330. The resolution approving the amendments incorporated provisions of the compromise that was negotiated between the Conservancy and the Developer and, among other things, specifically required the Developer to construct adequate access to the bluff walk at the southern and northern ends of one section of the walk. The Developer was required to post bond of \$110,000.00 for three years, to be adjusted upward annually in the amount of \$5,000.00 to a maximum of \$125,000.00 at the end of three years, to cover the difference between the cost of building the bluff walk at eight feet below the crest of the bluff and the cost for building it on the top of the bluff. The terms and conditions specifically provided:

Council approval is specifically contingent upon Turley and/or his successors posting a bond in the amount of \$110,000.00 for a three (3) year period adjusted upward annually in the amount of \$5,000.00 to a maximum of \$125,000.00 at the end of three years or pay the difference with monies posted in the required bond between the cost of building the riverwalk at 8 feet below the bluff and building the riverwalk on the bluff not to exceed \$125,000.00.

If Federal or State funds are made available for the construction of the entire Bluffwalk within three (3) years of the date of the bond, the bond will be released and returned to the Henry Turley Company. If Federal or State funds are not made available for this purpose within the stated time period, the City will execute the bond and apply it toward the construction of the entire length of the Bluffwalk; provided, however, that the City commits to substantial completion of the project as defined by the American Institute of Architects, Standard Form of Agreement, at the end of the said three (3) year period. If the City fails to make such commitment, the bond will be released to the Henry Turley Company. For purposes of this agreement, commitment shall mean appropriation of construction funds in the CIP budget to 1996-97 for the Bluffwalk segment extending from Riverside Drive to Beale Street.

In addition to the foregoing, Turley agrees to continue his best efforts to influence State Officials to approve the City's ISTEA proposal for construction and funding of the Bluffwalk including the section east and north of Ashburn-Coppock Park.

On April 6, 1993, the Memphis City Council passed the following resolution:

WHEREAS, SOUTH BLUFF DEVELOPMENT ASSOCIATES is the Owner and Developer of certain property within the present limits of the City of Memphis, located along Calhoun Avenue east of Riverside Drive, as indicated on the attached final plat entitled SOUTH BLUFFS P.D., PHASE III, AREA A (PD-91-

² The walk was to be cut or notched into the face of the bluff, eight feet below the crest of the bluff.

330) (formerly PD-89-319), the outline plan for which was approved by the Memphis City Council on January 05, 1993, and is also the Developer of the Calhoun Avenue closure (SAC 89-28), conditionally approved as amended by the City Council on August 13, 1991; and

WHEREAS, the Developer desires to develop the property reflected on the final plat and construct the physical closure of Calhoun Avenue at Tennessee Street as required by the conditions approved by the City Council; and

WHEREAS, attached hereto is a standard improvement contract entered into by and between SOUTH BLUFFS DEVELOPMENT ASSOCIATES and the City of Memphis covering the public improvements to be constructed as a part of developing the property and the closure of Calhoun Avenue; and

WHEREAS, the City Council required a special Bluffwalk bond in the initial amount of \$110,000.00 be posted by the Developer as a part of this phase of development of South Bluffs P.D.; and

WHEREAS, the terms and conditions of the contract are in accordance with the policies of the City of Memphis for developing such a project.

NOW, THEREFORE, BE IT RESOLVED by the Council of the City of Memphis that the final plat for SOUTH BLUFFS P.D., PHASE III, AREA A (PD-91-330) (formerly PD-89-319) and CALHOUN AVENUE CLOSURE (SAC 89-28), be and is hereby approved.

BE IT FURTHER RESOLVED that the proper officials be and are hereby authorized to execute the attached standard improvement contract including the special Bluffwalk bond on behalf of the City of Memphis.

Pursuant to the April 6, 1993 resolution, a standard improvement contract was executed by the Developer and the Mayor on behalf of the City. The contract incorporated the terms and conditions concerning the construction of the bluff walk in the area indicated and, subsequently thereto, the bond required from the Developer was executed and approved by the Mayor. The complaint avers that in November 1993, the City was informed that ISTEA funds were awarded to the City in the amount of \$1,088,000.00 for construction of the walk, and in June 1994, the City contracted with Ritchie Smith Associates to prepare a design and feasibility study for the bluff walk. The complaint further avers that Mayor Herenton appointed a Riverbluff Walkway Review Committee in August 1994, which included City Council members, the chief administrative officer of the City, division directors of the City, presidents of the Conservancy, the Downtown Neighborhood Association, the director of the Center City Commission, and also City Council member, Tom Marshall.

The complaint avers that by resolution of February 21, 1995, the City Council appropriated \$1,088,000.00 in ISTEA funds and \$512.00 in local matching funds for the design and construction of the bluff walk from Union Avenue to Calhoun Avenue. The design and specifications were as previously provided by the City Council's resolutions. In the summer of 1995, a pedestrian bridge over Riverside Drive connecting Ashburn-Coppock Park with the South Bluff was completed, and in August of 1995, the Mayor's Riverbluff Walkway Review Committee unanimously approved the design and construction plan prepared by the consultants and engineers. The complaint avers that in October of 1995, the bluff walk construction was put out for public bid, and a low bid was submitted by the Chris-Hill Construction Company in November. The complaint avers that Mayor Herenton in January of 1996 voiced some "second thoughts" about the bluff walk and in February 1996, met with members of the Conservancy and other supporters and voiced his concerns about the aesthetics and stability of the bluff. On February 20, 1996, Mayor Herenton advised the City Council that he would not sign the construction contract with Chris-Hill Construction Company and that he would not approve construction of the bluff walk notched into the bluff as called for in the plan. The complaint alleges that the failure to construct the bluff walk in accordance with the conditions set out in the Standard Improvement Contract for PD-91-330 violates the condition for the Development.

Plaintiffs allege that they are third party beneficiaries to the contract between the City and the Developer executed pursuant to the City Council's resolution authorizing the Development. They aver that they have no adequate remedy at law and seek injunctive relief to require the City to proceed in accordance with the Standard Improvement Contract. Plaintiffs assert that they are intended beneficiaries of the contract and will suffer injury by foreclosure of their access to the bluff. They aver that as intended beneficiaries they are entitled to proceed to enforce the contract. The complaint avers that plaintiffs are entitled to an injunction enjoining the issuance of building permits and occupancy permits for the property in the Development and are entitled to a permanent injunction enjoining further building by the Developer until the Development is in compliance with the PD-91-330 resolution and the Standard Improvement Contract.

Plaintiffs further allege that they are entitled to a writ of mandamus to the Mayor and that he has a non-discretionary duty to proceed with the construction and has refused to do so.

The complaint also seeks in the alternative a declaratory judgment of plaintiffs' rights

under the charter of the City, the City Council resolutions, and the Standard Improvement Contract. Plaintiffs also seek, as third party beneficiaries, specific performance of the Standard Improvement Contract between the City and the Developer.

Upon the filing of the complaint on March 25, 1996, the chancellor issued a fiat, or a temporary restraining order, restraining all defendants from releasing, altering, or amending the Developer's bond, and further instructing the clerk and master to set a hearing on the first day of April on the question of the extension of the bond and mandamus. On April 1, 1996, defendants, the City, Mayor Herenton, and the Office of Construction Code Enforcement of the City of Memphis, Tennessee, filed a motion to dismiss the complaint pursuant to Tenn. R. Civ. P. 12.02 (6), for failure to state a claim upon which relief can be granted. An alternative writ of mandamus, as provided for in T.C.A. § 29-25-102 (1)(1980) was not issued nor has any defendant filed an answer to the complaint. The averments of the petition are therefore admitted. Tenn. R. Civ. P. 8.04; *Harris v. State*, 96 Tenn. 496 (1896) (holding that allegations in a petition for mandamus not denied or confessed and avoided are taken to be true). Although no alternative writ of mandamus had been issued and the only response to the complaint was a motion to dismiss for failure to state a claim, an evidentiary hearing was conducted on April 1, 1996.

We also note that the complaint seeks to enjoin the City from issuing any building permits or occupancy for the Development and prohibiting any further construction until compliance with the terms and conditions of the ordinance. The trial court made no disposition of this claim, and therefore, the order appealed from is technically not a final order. However, the record discloses that counsel for the plaintiffs stated to the court during the evidentiary hearing that plaintiffs were abandoning this claim. Under these circumstances, we will consider the appealed order final and dispose of the appeal.

Plaintiffs presented the testimony of several witnesses, including members of the City Council then in office, that corroborated the allegations of the complaint. Plaintiffs also introduced into evidence, without objection from the defendants, the affidavit of Tom Marshall, the City Councilman who took a very active part in the consideration of the proposed bluff walk. Councilman Marshall's testimony corroborates the allegations of the complaint and fairly summarizes the major part of the uncontroverted proof. To amplify the summary of the

complaint and proof, a copy of the affidavit is attached as an addendum to this Opinion. In short, the proof discloses that the City Council at all times recognized the immense public interest in and the rights of the public to the unmatched natural resource existing on the riverfront. It is also established that for the protection of the public's rights, the City Council recognized the Conservancy as the entity to properly represent the public at large. The proof also established that the City Council demanded that the Conservancy, in its role as the public protector, must be satisfied as to the terms and conditions of the Development under the ordinance to be activated by the City Council's resolution. At the conclusion of the hearing, the trial court ruled that plaintiffs were entitled to the relief sought, and on April 15, 1996, the trial court entered an order that provides in pertinent part:

1. The Plaintiffs have standing to bring this action;
2. The Motion to Dismiss of the Defendants, the City of Memphis, Dr. W. W. Herenton, and the Office of Construction Code Enforcement for the City of Memphis, Tennessee, is denied;
3. The Plaintiffs are entitled to a Writ of Mandamus requiring Dr. W. W. Herenton to proceed with the construction of the Bluffwalk as set forth in City Council's Resolutions and P.D. 91-330, and to Temporary and Permanent Injunctions requiring the City of Memphis to proceed with the construction of the Bluffwalk as set forth in City Council's Resolutions and P. D. 91-330.
4. The bond and/or letter of credit posted by the Defendant, South Bluffs Development Associates, shall be extended and/or renewed in order to ensure completion of the Bluffwalk as set forth herein;
5. That the Plaintiffs are required to post an injunction bond in the amount of \$500.00.

Defendants, the City of Memphis, Dr. W. W. Herenton, and the Office of Construction Code Enforcement for the City of Memphis, have appealed and present two issues for review:

1. Whether petitioners were entitled to the relief of mandamus in this action?
2. Whether petitioners were third party beneficiaries to the Standard Improvement Contract present in this action?

Subsequently, by leave of this Court, the Memphis City Council was allowed to file an amicus curiae brief. In essence, the amicus brief asserts that the Mayor's refusal to act is outside the powers and authority granted to him under the City's charter and ordinances and that a writ

of mandamus to the Mayor is a proper remedy to compel him to perform his duties.

As to the first issue, which by its nature can apply only to Mayor Herenton, it is asserted that the mandamus proceeding must be prosecuted in the name of the state and that the construction of the bluff walk was discretionary with the Mayor because it was authorized by a resolution that is not binding on the Mayor. The defendants also assert that the Standard Improvement Contract was contingent because it specifically provided that it is subject to the approval of the Mayor and the City attorney. As to the last assertion, it is undisputed that the Mayor signed the Standard Improvement Contract and certainly should be considered to have approved it.

As to the prosecution of the complaint in the name of the state and not in the name of an individual citizen, we cannot disagree with defendant concerning the holding of *Whitesides v. Stuart*, 91 Tenn. 710, 20 S.W. 245 (1892) (holding that mandamus proceedings must be prosecuted in the name of the state). However, we note that the statutes pertaining to mandamus, T.C.A. §§ 29-25-101 to 29-25-109 (1980), have no requirement that the complaint be prosecuted in the name of the state. We also note that the record does not reflect that the defendants raised this question in the trial court. In *Brown v. Crystal Ice Co.*, 122 Tenn. 239 (1909), the Court said:

A question has been made as to whether it is necessary to present the bill in the name of the State. It was so held in *Whitesides v. Stuart*, 91 Tenn., 710, 20 S.W., 245. This seems the more logical rule, since the writ is in the nature of a prerogative writ (*State, ex rel., Weinberg, v. Pacific Brewing & Malting Co.*, 21 Wash., 451, 58 Pac., 584, 47 L. R. A., 208-212, and authorities cited); but in most of our cases, prior to *Whitesides v. Stuart*, the name of the State was not used, and the same is true of some of the subsequent cases. No doubt the court would lend an easy ear to an application for amendment, so as to insert the name of the State in any case where objection is made on that ground.

122 Tenn. at 246-47; *see also* 2 *Gibson's Suits in Chancery* § 1133 at 469 n.18 (5th ed. 1956).

Under the state of this record, we do not find this assertion well taken.

We recognize the general rule that a citizen cannot maintain a suit to restrain or to compel an action of municipal authorities unless they are acting illegally and the effect of their illegal action will be to occasion the citizen some specific injury, not merely an injury in common with the body of citizens. *See State ex rel. Allen v. American Glanzstoff Corp.*, 167 Tenn. 597, 72

S.W.2d 775 (1934). However, in this case, without deciding the question of whether the Conservancy is a third party beneficiary of the Standard Improvement Contract, we are of the opinion that the Conservancy will sustain a special injury not common to the citizenry at large by the failure of the Mayor to act. The Conservancy was organized and incorporated for the express purpose of protecting the property involved and the public's historical use of the property. The Mayor and the City Council recognized the desirability and, in fact, the necessity for an entity to speak and act in furtherance of the public good. A failure to enforce the terms and conditions of the Development would thwart the very essence of the Conservancy's purpose. The proof establishes that but for the Conservancy's agreement and the terms of the Development outlined by the City Council, the City Council would not have approved the Development. In *Metropolitan Air Research Testing Authority, Inc. v. Metro. Government of Nashville and Davidson County*, 842 S.W.2d 611 (Tenn. App. 1992), the Court said:

Standing is a judge-made doctrine used to determine whether a party is entitled to judicial relief. *Knierim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn.1976). It requires the court to decide whether the party has a sufficiently personal stake in the outcome of the controversy to warrant the exercise of the court's power on its behalf. *Browning-Ferris Indus., Inc. v. City of Oak Ridge*, 644 S.W.2d 400, 402 (Tenn.Ct.App.1982). To establish standing, a party must demonstrate (1) that it sustained a distinct and palpable injury, (2) that the injury was caused by the challenged conduct, and (3) that the injury is apt to be redressed by a remedy that the court is prepared to give.

842 S.W.2d at 615.

Mayor Herenton also asserts that mandamus will not lie because he did not have a mandatory duty to perform. It is the universally recognized rule that mandamus will only lie to enforce a ministerial act or duty and will not lie to control a legislative or discretionary duty. *State ex rel. Weaver v. Ayers*, 756 S.W.2d 217, 221 (Tenn. 1988) (quoting *Lamb v. State ex rel. Kisabeth*, 207 Tenn. 159, 162, 338 S.W.2d 584, 586 (1960)). In *Ayers*, the Court said,

In short, “[t]he writ of mandamus will not lie to control official judgment or discretion, but it is the proper remedy where the proven facts show a clear and specific legal right to be enforced, or a duty which ought to be and can be performed, and relator has no other specific or adequate remedy.”

756 S.W.2d at 221 (quoting *State ex rel. Ragsdale v. Sandefur*, 215 Tenn. 690, 696, 389 S.W.2d 266, 269 (1965)).

The Mayor argues that since the action of the City Council was by resolution, he is not

obligated. We must respectfully disagree. The facts of this controversy are not in dispute, and from our review of the record, it appears that all matters pertaining to the construction of that part of the bluff walk in question were done pursuant to a zoning ordinance for a planned development. A planned development is authorized by Section 14 of the Zoning Ordinance - Regulation of the City of Memphis and Shelby County, City of Memphis Code of Ordinances, Appendix A (1985). The use of a planned development allows a planning authority a great deal of flexibility to obtain the best and most compatible use of the property, and the ordinance specifically provides that “[d]eviation from the rigid uniformity characteristics of such earlier zoning regulations and the use of new and innovative techniques are henceforth to be encouraged as a matter of public policy.” Section 14A, Zoning Ordinance. The ordinance requires that the outline plan be approved by resolution. Section 14B, 2 (a) and (b), Zoning Ordinance. Thus, the ordinance or planned development becomes operative only upon the passage of a resolution by the City Council. The action of the City Council in activating a planned development zoning ordinance is an administrative act executing an ordinance already in existence. *See McCallen v. City of Memphis*, 786 S.W.2d 633, 639 (Tenn. 1990).

The defendants rely upon *Joe Cooper’s Cafe, Inc. v. City of Memphis*, No. 02A01-9209-CH-00269, 1993 WL 54606 (Tenn. App. W.S. Mar. 3, 1993), wherein this Court said:

A resolution is a mere expression of the opinion of the mind of the City Council concerning some matter of administration coming within its official cognizance. See 56 Am. Jur.2d Municipal Corporations § 344 (1971). A resolution of a city council is of a temporary nature, while an ordinance is of a permanent nature. See 19 Tenn. Jur. Municipal Corporations § 46 (1985).

Joe Cooper’s Cafe, 1993 WL 54606, at *3.

We do not believe *Joe Cooper’s Cafe* is controlling in this case. First, because the Court in *Cooper’s* specifically noted that its decision was based on the facts of that case. *Id.* at *4. Moreover, the resolution in *Cooper’s* was a mere resolution of the Council, whereas in the case at bar, the resolution of the City Council was made pursuant to an ordinance providing for the resolution in order to activate the provisions of the ordinance. We consider the resolution in the present case an essential part of the planned development ordinance and an extension thereof. We also note that the Mayor himself recognized and accepted the resolution activating the ordinance and approved and signed the Standard Improvement Contract in furtherance of the

resolution.

The Mayor's duties under the Home Rule Charter of the City are specified in pertinent part as follows:

Ordinance No. 1852 (Home Rule Charter)

The Mayor shall be shall be responsible to the Council for the administration of all units of the City government under his jurisdiction and for carrying out policies adopted by Council.

Memphis, Tenn., Ordinance No. 1852 § 1 at HRA-19.

The Mayor shall see that the ordinances and provisions of the Charter are observed.

Memphis, Tenn., Ordinance No. 1852 § 4 at HRA-25.

Section 2-56 of the City of Memphis Code of Ordinances provides:

The mayor shall make all contracts authorized by the city council, unless otherwise ordered, and shall supervise their execution. He shall make known to the city council the wants and necessities of the city, from time to time, recommending such action and the adoption of such measures as the welfare of the city may demand. He shall supervise all the officers of the city, and shall see that all laws and ordinances are enforced.

From the above authorities, we conclude that the Mayor is mandated to enforce the ordinances of the City, which include the zoning ordinance establishing the Development at issue in the case before us. The Mayor has a non-discretionary duty to proceed for the enforcement of the ordinance and the completion of the improvements as provided for therein. This is not to say, however, that the Mayor does not have some discretion in the manner of performance of this non-discretionary duty. Where the law prescribes a specific duty or an act to be performed, the court may, by mandamus, compel a public official to perform the duty, leaving to the public official judgment and discretion in the manner of performance. *State ex rel. Harned v. Meador*, 153 Tenn. 634, 640 (1925).

Accordingly, we find that the trial court properly held that the plaintiffs are entitled to a writ of mandamus to require the Mayor to proceed with the construction of the bluff walk pursuant to the provisions of PD-91-330 and its incident resolutions.

Under the terms and conditions of the planned development ordinance, PD-91-330, the Developer is obligated to construct access to the notched bluff walk. By the same token, the Developer agreed to this obligation only on the condition that the City complete the remainder of the subject bluff walk. The City's commitment to do so became a part of the terms and

conditions of the planning ordinance. The Mayor is obligated to perform as necessary to carry out the complete terms of the ordinance, and, therefore, is obligated to proceed with the construction of the walk and to require the Developer to provide the access to the walk.

The trial court's order also provided for a mandatory injunction to the City to proceed with the construction of the bluff walk. However, the proof in this case is that the only barrier to proceeding with the construction is the failure of the Mayor to sign the necessary contract for the construction. The legislative body of the City, the City Council, has authorized and directed the construction of the walk.

In view of our decision concerning the writ of mandamus, there is no need for an injunction.

Accordingly, the order of the trial court granting injunctive relief against the City is vacated, and the order is in all other respects affirmed. The case is remanded to the trial court with instructions to issue a writ of peremptory mandamus to the defendant, Mayor W. W. Herenton of the City of Memphis, demanding that he forthwith proceed to provide for the construction of the bluff walk according to the specifications and planned development ordinance 91-330 and to otherwise enforce all terms and conditions of that ordinance. Costs of the appeal are assessed against the appellant, Mayor W. W. Herenton. The remaining issue presented for review is pretermitted.

**W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.**

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE