STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		**SUPERIOR COURT**
MIKE'S PROFESSIONAL TREE SERVICES, INC.	:	
v.	:	**C.A. No. PC 13-0775**
CITY OF PROVIDENCE ZONING BOARD OF REVIEW	:	

DECISION

HURST, J. This case is before the court on an appeal from a decision of the Providence Zoning Board of Review (Board). Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the reasons set forth below, this Court reverses the Board's decision.

I

Facts and Travel

On January 24, 2013 the Providence Zoning Board of Review, acting as a board of appeals pursuant to § 45-24-63, upheld a decision of the Director of the Department of Inspection and Standards to issue a Notice of Violation of § 425.6 of the City of Providence Zoning Ordinance for removal of a significant tree without obtaining approval from the City Forester. The Board also upheld the Director's imposition of a penalty in the amount of $32,500 against Appellant. The penalty amount was equal to the value of the tree as calculated pursuant to § 425.6 of the City of Providence Zoning Ordinance which states:

> "Penalties – any person who removes a significant tree without prior permission from the City Forester, or causes the death of a significant tree though negligent construction practices or other means as determined by the City Forester, shall be subject to a one-time fine equivalent to the value of the tree. The tree value shall be established using the Trunk Formula Method set forth in the latest edition of Guide for Plant Appraisal authored by the Council of Tree and Landscape Appraisers. Fines shall be held by the Parks Department for forestry-related uses as determined by the City Forester."

The Board held a three day public hearing during which it received exhibits, heard testimony and arguments of counsel and received memoranda from the Appellant and the Director of Inspections and Standards. The facts are largely undisputed.

On or about April 24, 2011, a limb fell from a very large tree located at 281 Williams Street in Providence, causing damage to a parked car on the property. The property owner solicited bids for the removal of the tree limb. The Appellant, Mike's Professional Tree Service Inc., was hired to remove the tree because of to its ability to remove it in the least amount of time.

According to the Appellant, its owner and principal, Michael Baird, inspected the tree and found it to be in an unhealthy condition and a danger to the surrounding area. Mr. Baird removed the fallen limb and returned with a crane four days later to remove the entire tree. He left a one foot tall stump that measure over six feet in diameter. The photographic images of the stump show that the interior of the tree was hollow and significantly damaged by disease and decay. Mr. Baird was aware that the tree was a "significant tree" within the meaning of the Ordinance and that the Ordinance required that he obtain approval from the City Forester before removing it. According to Mr. Baird, he did not contact the City Forester before removing the tree. Mr. Baird testified that it was a matter of emergency and that there was not enough time to comply with the Ordinance by contacting the Forester. However, there was evidence that five

days had lapsed between the time when the branch fell and the day the tree was removed without any effort to contact the City Forester. Mr. Baird admitted that he did not contact the City Forester because he does not get along with him. There was evidence that, in the six previous years, Appellant had been cited for four previous violations of the same nature but never before fined.

The City Forester became aware of the tree's removal after observing the Appellant's truck traveling down the road with large chunks of tree trunk in its bed. The City Forester followed the trail of sawdust and found the freshly cut tree stump. Although the stump provided imperfect information about the tree, the City Forester did evaluate and estimate the size, health, and condition of the tree for purposes of determining the various components of the trunk formula method of a valuation. He made a comparative analysis of other existing trees. He made findings and estimated the condition of the tree. According to his testimony, he erred on the side of caution and estimated conservatively. He detailed his methodology.

About four months later, on August 31, 2011, the Director of the Department of Building and Standards issued a Notice of Violation to the Appellant. Because the tree appraisal had not been completed, the Notice of Violation did not provide a penalty amount to be imposed. On August 16, 2012, the Director supplemented and reissued the Notice of Violation to include information regarding the $32,500 penalty and the manner in which the penalty was calculated. The Appellant appealed to the Board.

During the hearing before the Board, Appellant argued that the $32,500 penalty was excessive and violated three sections of the Rhode Island General Laws: G.L. 1956 §§ 2-14-11, 45-6-2, and 45-24-60. It also argued that the penalty violated the Eighth Amendment to the United States Constitution and Article 1, Section 8 of the Rhode Island Constitution because

there is no rational relationship between the fine and the act. Finally, it argued that the Ordinance was defective because there was no provision for an exception for emergency conditions and that the tree met the standards of § 425.6 for removal in that it was diseased and posed a danger to life and property.

Appellant also filed a written memorandum with the Board in which it argued the affirmative defense that the tree should have been removed pursuant to Municipal Code § 425.6 (B) which states:

> "Required findings for approval. In order to grant permission to remove a significant tree the city forester must make one (1) or more of the following findings within thirty (30) days of receipt of the application:
>
> (1) The tree is in poor health or diseased with an expected life span less than two (2) years.
>
> (2) The removal of the tree is unavoidable because the tree poses a danger to human safety, health and welfare.

The Board issued a written decision on January 24, 2013. In that decision, the Board concluded it lacked the authority to rule upon the various legal challenges Appellant had made to the validity or enforceability of the Ordinance and the amount of the fine. It also noted that the Appellant's constitutional arguments were not developed or briefed. It made factual findings, ultimately finding that the Appellant had violated the Ordinance. Finally, in a 3-2 vote, it affirmed the Director's findings and decision regarding the penalty.

II

Standard of Review

The standard of review for this Court's appellate consideration of the Board's Decision is set forth in § 45-24-69(D). When reviewing a zoning board decision, this Court must examine the entire certified record to determine whether substantial evidence exists to support the finding of the board. Lloyd v. Zoning Bd. of Review of Newport, 62 A.3d 1078, 1083 (R.I. 2013);

Apostolou v. Genovesi, 120 R.I. 501, 507, 388 A.2d 821, 824 (1978). Substantial evidence as used in this context means such relevant evidence that a reasonable mind might accept as adequate to support a conclusion and means an amount more than a scintilla. Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008). It is the essential function of the zoning board, not this Court, to weigh evidence and, with discretion, accept or reject the evidence presented. Bernuth v. Zoning Bd. of Review of Town of New Shoreham, 770 A.2d 396, 399-400 (R.I. 2001). Moreover, this Court should exercise restraint in substituting its judgment for that of the zoning board. Kaveny v. Town of Cumberland Zoning Bd. of Review, 875 A.2d 1, 7 (R.I. 2005). This Court is compelled to uphold the board's decision if the Court conscientiously finds that the decision is supported by substantial evidence contained in the record. Salve Regina Coll. v. Zoning Bd. of Review of City of Newport, 594 A.2d 878, 880 (R.I. 1991). It is only if the record is

> "completely bereft of competent evidentiary support" that a board of appeal's decision may be reversed. If the Board's decision is supported by substantial evidence contained in the record, the Court may reverse the Board only upon a finding that substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions or decisions which are:
> "(1) In violation of constitutional, statutory or ordinance provisions;
> "(2) In excess of the authority granted to the zoning board of review by statute or ordinance;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error of law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Sec. 45-24-69(D); Lloyd, 62 A.3d at 1083 (R.I. 2013); Town of Coventry Zoning Bd. of Review v. Omni Dev. Corp., 814 A.2d 889, 898 (R.I. 2003).

III

Analysis

The question of whether or not the Zoning Board exceeded its authority or abused its discretion when it assessed a penalty against Appellant in an amount in excess of $500 requires discussion of the Rhode Island legislature's delegation of power to municipalities to (1) regulate land use, (2) protect and care for trees, and (3) impose penalties for violations of municipal ordinances.

a. Delegation: Legislative History

As early as the late 1700s, the Rhode Island legislature delegated to municipalities the power to enact ordinances and regulations. See Pub. L. 1798 § 2 at 326 (entitled "An act declaring Towns to be Bodies Corporate, establishing Town-Councils, regulating Town-Meetings, and prescribing the manner of recovering debts due from towns"); see also § 45-6-1 (entitled "Scope of Ordinances Permissible"). It also permitted municipalities to impose penalties for ordinance violations but placed a $500 limitation on them—such as is now found in § 45-6-2.[1]

In 1907, the Rhode Island legislature adopted Chapter 1479 of the Public Laws. See "An act providing for the care and preservation of shade trees, and for other purposes, in the city of Providence," Pub. L. 1907 ch. 1479 ("Shade Tree Act"). Although the Shade Tree Act was amended in 1925, it is substantially unchanged. See R.I. Acts and Resolves 1925 ch. 693. The Shade Tree Act provided for the care and preservation of shade trees and other plants in the City of Providence streets and public ways. Pub. L. 1907 ch. 1479 § 2. The Shade Tree Act empowered the City to appoint a forester who was charged with the duty of monitoring,

[1] In cases stemming from breaches of the peace causing harm to third parties, the legislature also permitted municipalities to impose thirty day jail terms and/or require restitution in an amount up to $2500. See § 45-6-2.

supervising and caring for all trees, shrubs and plants that are in any public way or which stand on private property but overhang or project into any public way. Id. The Shade Tree Act also prohibited anyone from planting, removing, destroying or trimming trees and shrubs in any part of a public way without first having obtained permission from the forester. Id. at § 12. Destruction and mutilation of trees, shrubs and plants in any public street also was prohibited. Id. at § 15. Notably, persons who violated the provisions of the Shade Tree Act or obstructed the forester were to be fined not less than $5 nor more than $100 for each offense. Id. at § 16.

Later, in the 1930s, the legislature sought to protect trees and plants on public roads and in public places in towns and cities in addition to Providence. It adopted what has evolved into Title 2, Chapter 14 of the Rhode Island General Laws. The legislature required all municipalities to appoint a tree warden but subject to the approval of the Rhode Island Department of Environmental Management (DEM). Secs. 2-14-2, 2-14-3. Generally, the tree warden was given care and control over all trees and shrubs existing in whole or in part within the limits of any public roads or grounds and of forest areas. Sec. 2-14-5. Pursuant to § 2-14-7, wardens have the authority to enforce all provisions of law for the preservation of trees and shrubs and may make suitable regulations governing the care and preservation of those trees, subject to the approval of the town or city council.

Although both Title 2 Chapter 14 and public law 1479, the Shade Tree Act, are helpful in understanding legislative history and intent, neither have direct bearing on the issues presented by the instant case. Section 2-14-11 specifically provides that Chapter 14 would not apply to the City of Providence and specifically states that the 1907 public law 1479 and the 1925 amendment thereto shall not be affected. Just as importantly, the Shade Tree Act applies only to

trees located upon public roads, grounds and forest areas. See Pub. L. 1907 ch. 1479 §§ 4-7. It is undisputed that the tree at issue in this case was located on private property. See id.

Beginning in 1921, the legislature began to delegate the power to regulate private land use. See Pub. L. 1921, ch. 2069 (entitled "An act authorizing cities to enact zoning ordinances"); Chase, R.I. Zoning Handbook 3 (1993) (explaining that "[p]rior to the adoption of the Zoning Enabling Act of 1991, zoning law in Rhode Island was controlled by a much-amended general enabling act originally adopted in 1921 and a series of special enabling acts for various cities and towns). The current iteration of Rhode Island's original zoning statute is the Rhode Island Zoning Enabling Act of 1991, that is, §§ 45-24-27 to -72 ("Zoning Enabling Act"). According to the legislative intent set forth in § 45-24-29(b)(3), the zoning enabling authority contained in Title 45, Chapter 24 empowers cities and towns to "establish and enforce standards and procedures for the proper management and protection of land, air, and water as natural resources, and to employ contemporary concepts, methods, and criteria in regulating the type, intensity, and arrangement of land uses, and provides authority to employ new concepts as they may become available and feasible." Sec. 45-24-29(b)(3). Section 45-24-60 of the Zoning Enabling Act, authorized civil fine and penalties for violations of the Zoning Enabling Act but, consistent with § 45-6-1 and § 45-6-2, it imposed limitations. Section 45-24-60 states: "The penalty for the violation must reasonably relate to the seriousness of the offense, and not exceed five hundred dollars ($500) for each violation, and each day of the existence of any violation is deemed to be a separate offense."

Thus, regardless of its immediate objective, it is plain that the Rhode Island legislature remained guarded when delegating to municipalities the authority to impose fines and penalties

for violation of municipal ordinances and for crimes against shrubs, trees and other vegetation. See §§ 45-24-29(b)(3), 45-24-60.

b. Section 425 of the Providence Zoning Ordinance

Section 425 of the Providence Zoning Ordinance, entitled "Trees and Landscaping," regulates trees on private property.[2] The section regulates the location of trees and landscaping or parking areas; vegetated buffers along water bodies and coastlines; and the quantity of trees required on a given lot to ensure a certain percentage of vegetative canopy. Sec. 425. As noted at the outset, it is subsection 425.6 that regulates removal of significant trees in all zoning districts and which attempts to authorize penalties equivalent to the value of the tree as calculated by the Tree Trunk Formula.

Among other things, the Board points to § 45-24-60 of the Zoning Enabling Act of 1991. It argues that a penalty of $500 per day could have been assessed for every day that the tree was no longer in place and Appellant therefore could have been penalized in an amount far exceeding the $32,500 called for by the Tree Trunk Formula. It argues that the size of the penalty is therefore reasonably related to the offense as required by § 45-24-60. Implicit in the Board's argument is that separate violation occurred every day that the tree was no longer in place. However, it is plain that in cases involving a discrete act which results in the permanent destruction of a tangible object or property, it is not always appropriate to treat subsequent days as separate violations. See McQuillan, Municipal Corporations § 25:402 (explaining that courts have invalidated imposition of cumulative fines for single but continuing zoning violations).

[2] For present purposes, the Court assumes that § 425 of the Providence Zoning Ordinance falls within the general purposes of zoning ordinances as set forth in § 45-24-30 and can properly be considered to be a zoning regulation adopted pursuant to the City's authority to regulate and to impose penalties for violations. See §§ 45-24-30, 45-24-60.

In land use regulation, daily penalties for ongoing violations most commonly are brought to bear in connection with structures and uses that are illegal and can be removed or discontinued by the individual in control of the property. See generally Town of Barrington v. Gadd, 569 A.2d 231, 236 (N.H. 1990) (holding that the master could impose a $50 per day fine on the defendants for continuing its mining operation beyond the designated boundary); City of Erie v. Freitus, 681 A.2d 840, 841-43 (Pa. Commw. Ct. 1996) (holding that the court of common pleas did not abuse its discretion by imposing a $100 a day fine for operating an unlawful scrap yard); In re Wood NOV & Permit Applications, 75 A.3d 568, 575, 581 (Vt. 2013) (holding that the trial court did not abuse its discretion by imposing a $100 fine per day where the landowner continued construction of a nonconforming retaining wall despite receiving notices of violation from the city). Generally, in cases of continuing violations and daily penalties, the mounting penalties provide incentive for the violator to cure the violation. See generally Aminoil, Inc. v. U.S. E.P.A., 599 F. Supp. 69, 76 (C.D. Cal. 1984) (explaining that the threat of daily penalties provide incentives to responsible parties to comply with the law); Kraft, Inc. v. Edgar, 661 (1990) (penalties serve as incentives to comply with the law). Daily penalties are also effective in cases where a landowner has failed to maintain, for example, landscaping, a buffer zone of plantings or a fence or a drainage sluice required by a zoning ordinance or as a condition of a grant of zoning relief. In most cases, the offending structure or use can be removed or discontinued, or the buffer zone restored, within a reasonable period of time. However, there are situations in which, as a practical matter, the effects of the act comprising the violation cannot be cured. For example, in the instant case and taken to its logical extreme, the destruction of the tree could not be cured absent planting a new tree and waiting a decade or two for it to grow to maturity. Therefore, under the circumstances of this case, it would have been arbitrary,

capricious, or an abuse of discretion if the Board had treated each day the tree was no longer in place as a separate violation. See § 45-24-69(D); Salve Regina Coll., 594 A.2d at 880 (R.I. 1991). Thus the Board's argument in this regard is unavailing.

Indeed, it would seem that the authors of § 425.6 recognized the difficulty in applying a § 45-24-60 continuing violation framework to the destruction of trees. See § 425.6. A single $500 penalty for the act of cutting down a significant tree would not seem to be enough of a disincentive given the nature of the offense and the important role of trees and plants. See § 426. On the other hand, using a "continuing violation" approach could invite excessive penalties. Therefore, treating the discrete act of removing a significant tree as a one-time offense and tying the penalty to the value of the tree would have been attractive: plainly the value of the tree would seem to bear a reasonable relationship to the offense of destroying it. However, as sensible as that may be, it overlooks the $500 cap the legislature imposed on a municipality's authority to impose on one-time offenses. See McCain, 41 A.3d at 243.

IV

Conclusion

This Court discerns no error on the part of the Board in finding that a violation had occurred. There was substantial evidence to support that conclusion. See Lloyd, 62 A.3d at 1083. Similarly, this Court also discerns no error on the part of the Board when it accepted the City Forester's findings, assumptions and calculations for purposes of applying the Trunk Formula Method and calculating the tree's value at $32,500. See Envtl. Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993) ("[T]he further away . . . that an administrative official is when he or she evaluates the adjudicative process, the more deference should be owed to the factfinder.") Nor has the Appellant demonstrated that the Tree Trunk Formula is an unreasonable method of

establishing the value of a tree for the purposes of assessing the seriousness of an offense or relating the seriousness of that offense to the size of the penalty to the extent authorized by the legislature. See Lloyd, 62 A.3d at 1083.

This Court also discerns no error when the Board refused to issue declarations concerning the validity or enforceability of § 425.6 or the unconstitutionality of the considerable fine that resulted from its application. The Rhode Island Supreme Court has made it abundantly clear that Zoning Boards do not have the authority to determine the validity or enforceability of an ordinance provision and that such questions are for the courts. MBT Construction v. Edwards, 528 A2d 336, 338 (R.I. 1987) (explaining that a zoning board could not consider the validity or enforceability of a city's zoning code).[3]

However, it is clear that the Board erred when it imposed a penalty amount that exceeded the maximum permitted by the legislature for a single-event or one-time offense. Section 45-24-60 is clear and unambiguous. See McCain v. Town of N. Providence ex rel. Lombardi, 41 A.3d 239, 243 (R.I. 2012) (quoting State v. Gordon, 30 A.3d 636, 638 (R.I. 2011) (stating that when the "statutory language is 'clear and unambiguous, [courts] must interpret the statute literally and must give the words of the statute their plain and ordinary meanings'"). The Rhode Island legislature delegated to the cities and towns only limited power to impose penalties for violation

[3] In addition, the Appellant has failed to prove beyond a reasonable doubt that § 425.6 is unconstitutional. See State ex rel. Town of Westerly v. Bradley, 877 A.2d 601, 605 (R.I. 2005) (citing Gem Plumbing & Heating Co. v. Rossi, 867 A.2d 796, 808 (R.I. 2005)) "The challenger bears the burden of proving beyond a reasonable doubt that the challenged enactment is unconstitutional." Id. There could be circumstances in which the value of the tree, when calculated by the Tree Trunk Formula, would result in a fine proportional to the offense and is within the maximum allowable penalty of $500. Moreover, the Appellant's constitutional arguments remain wholly undeveloped—as they were before the Zoning Board—and therefore waived. Courts have routinely held that parties have a duty to "'spell out [their] arguments squarely and distinctly . . .'" McCoy v. Mass Inst. Of Tech., 950 F.2d 13, 22 (1st Cir. 1991). Judges will not entertain arguments raised in a perfunctory and underdeveloped manner. See id. An argument will be considered waived if it is presented without providing any analysis. See id.

local zoning ordinances. See § 45-24-60. That power is limited to $500 per violation. Id. For this reason, the Board's decision was in violation of statutory provisions and was in excess of the authority granted to it by state law when it imposed a penalty in excess of $500. See § 45-24-69(D); Lloyd, 62 A.3d at 1083.

Accordingly, the Decision of the Zoning Board of Review is reversed and the penalty assessed for the violation is vacated.